Tort Law

Cases and Commentaries

2024 Edition

2021 CanLIIDocs 1859

Samuel Beswick

May 2024

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Preface

The law of obligations concerns the legal rights and duties owed between people. Three primary categories make up the common law of obligations: tort, contract, and unjust enrichment. This casebook provides an introduction to tort law: the law that recognises and responds to civil wrongdoing. The material is arranged in two main parts. Following a brief introduction (§1), the first main part addresses intentional, dignitary and dishonesty torts as well as corresponding defences and remedies (§2-§10). The focus pivots with a consideration of the overarching theories and goals of tort law (§11) and no-fault compensation schemes as an alternative to tort liability (§12). The second main part addresses negligence, nuisance, strict liability, and further defences and remedial doctrines (§13-§23). The casebook concludes with two chapters that explore the place of common law tort within our broader legal systems (§24-§25).

This casebook was compiled and edited by Assistant Professor Samuel Beswick of the University of British Columbia Peter A. Allard School of Law. Maddison Zapach (J.D. 2023) assisted on the first edition published in July 2021. We gratefully acknowledge the influence on our approach to this subject of Professor Joost Blom QC of the Allard School of Law, Professor John C.P. Goldberg of Harvard Law School, and Associate Professor Rosemary Tobin of the University of Auckland Faculty of Law. The support of Open UBC and the UBC Teaching and Learning Enhancement Fund is also gratefully acknowledged.

Gabriella Pasolli (J.D. expected 2025), Lillian Callender (J.D. expected 2025), Joey He (J.D. expected 2026) and Malik Dhami (J.D. expected 2026) assisted on the 2024 edition.

Themes

Themes explored within this casebook include:

- Tort law is grounded in community standards and values.
- Rights of action in private law afford plaintiffs the *right* to sue.
- Our common law constitution assumes equality of all (including public officials) under law.
- The common law develops incrementally: precedent upon precedent.
- The common law is a dialogue taking place over time within and between jurisdictions.

Notable illustrations of these themes include the High Court of Australia's judgment in *Binsaris v. Northern Territory* (§2.2.4) recognising incarcerated indigenous youths' claims of unlawful battery by prison officers; the Supreme Court of Canada's judgment in *R v. Le* (§2.4.5) addressing police racial profiling, trespass, and wrongful detention; the opinion dissenting from the Supreme Court of the United States' denial of *certiorari* in *Baxter v. Bracey* (§6.6.8.2) concerning the US doctrine of qualified immunity from constitutional tort liability for government officers; and the Ontario Court of Appeal's judgment in *Cloud v. Canada* (§19.7.1) certifying a class action of First Nations residential school survivors' claims in negligence, battery, and assault.

While primarily focussing on Canadian case law, this casebook incorporates judgments from comparative common law jurisdictions, including Hong Kong, India, Kenya, New Zealand, and Singapore, as well as excerpts of and links to commentaries from the world's leading tort law scholars.

Teaching and learning from this casebook

This casebook is designed to complement the teaching of tort law in common law Canadian law schools. Rather than presenting an exhaustive treatment of the subject, the content focusses on the central doctrines and topics.

The cases have been selected and curated to help build up understanding of concepts and material over a course. One way this is achieved is by returning to different portions of judgments across topics. For example, the case of *Gokey v. Usher & Parsons* appears across twelve cross-referenced sections addressing the topics of battery (§2.2.1), assault (§2.3.3), statutory invasion of privacy (§4.2.3), harassment (§5.2.6), trespass to land (§7.1.2), non-pecuniary damages (§9.3.4), aggravated damages (§9.4.3), punitive damages (§9.5.4), permanent injunctions (§9.8.2.1), intimidation (§10.2.1), private nuisance (§21.1.3), and legal costs (§20.8.1). The case of *Lu v. Shen* appears in the sections on intentional infliction of mental suffering (§3.2.5), invasion of privacy (§4.2.4), defamation (§5.1.1), harassment (§5.2.3), non-pecuniary damages (§9.3.8), and permanent injunctions (§9.8.2.4). *Hill v. Hamilton-Wentworth Police Services Board* appears in the sections on duty of care (§13.4.2.2), standard of care (§14.1.3.3), breach of duty (§14.2.5.3), damage (§15.2.1), and but-for causation (§16.1.3).

The casebook is designed with flexibility in mind. Each chapter is largely self-contained so that instructors can assign sections to suit their syllabi. The edited cases link back to original judgment transcripts on open-access platforms. Extracts of relevant Federal and British Columbia statutes are accompanied by lists of other provinces' equivalent statutes.

Dinkuses ("***") indicate where content has been edited out. To aid classroom discussion, paragraph numbering has been added to case excerpts where it was not already included in the original transcript.

To aid comprehension, each reading is followed by the editor's *Reflection* questions. Students may find it helpful to review these questions before reading the case or material that they reflect on. Students can find past exams, multiple-choice quizzes and guided exam answer exercises based on the casebook content by visiting https://blogs.ubc.ca/beswick/torts/.

Readers who wish to delve deeper can follow the links to podcasts 🎧, videos 📺, blogs, news, articles, and books on relevant topics that are cited and hyperlinked in the *Further material* sections.

Instructors may subscribe to a mailing list for edition updates.

Recommended reference reading on Canadian tort law

- E. Chamberlain, S. Pitel, A. Botterell, M. McInnes, J. Neyers & Z. Sinel, *Introduction to the Canadian Law of Torts* (4th ed, Toronto: LexisNexis, 2020).
- E. Chamberlain, S. Pitel, A. Botterell, M. McInnes, J. Neyers & Z. Sinel, *Fridman's The Law of Torts in Canada* (4th ed, Toronto: Thomson Reuters, 2020).
- G.H.L. Fridman, *Torts: A Guide for the Perplexed* (Toronto: LexisNexis, 2017).
- L. Klar & C. Jefferies, *Tort Law* (7th ed, Toronto: Thomson Reuters, 2023).
- A. Linden, B. Feldthusen, M. Hall, E. Knutsen & H. Young, *Canadian Tort Law* (12th ed, Toronto: LexisNexis, 2022).
- M.H. Kerr, J. Kurtz & L.M. Olivo, *Canadian Tort Law in a Nutshell* (5th ed, Toronto: Thomson Reuters, 2019).
- P.H. Osborne, *The Law of Torts* (6th ed, Toronto: Irwin Law, 2020).
- S. Shields, *Is That Legal? Torts*, http://www.isthatlegal.ca/index.php?name=Torts.

Recommended reading on succeeding as a first-year law student

- B. Friedman & J.C.P. Goldberg, *Open Book: The Inside Track to Law School Success* (2nd ed, New York: Wolters Kluwer, 2016).
- JD Advising, "A Case Brief Template" (2020) and "An In-Depth Guide to Outlining" (2020).

1 INTRODUCTION

1.1 The rule of law

1.1.1 Equality under ordinary law and the common law right of redress

A.V. Dicey, Introduction to the Study of the Law of the Constitution (8th ed., 1915), Roger E. Michener ed. (Indianapolis: Liberty Fund, reprint 1982), 110, 113-114, 120-121, 125-127

Three meanings of rule of law

When we say that the supremacy or the rule of law is a characteristic of the English constitution, we generally include under one expression at least three distinct though kindred conceptions.

We mean, in the *first* place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint. ***

We mean in the *second* place, when we speak of the "rule of law" as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary Courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the Courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor,[1] a secretary of state,[2] a military officer,[3] and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorise as is any private and unofficial person. ***

It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals ***. ***

The "rule of law," *lastly*, may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts; that, in short, the principles of private law have with us been by the action of the Courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land. ***

Redress for arrest

If we use the term redress in a wide sense, we may say that a person who has suffered a wrong obtains redress either when he gets the wrongdoer punished or when he obtains compensation for the damage inflicted upon him by the wrong.

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[1] *Mostyn v. Fabregas*, (1774) 1 Cowp. 161; *Musgrave v. Pulido*, (1879) 5 App. Cas. 102; *Governor Wall's Case*, (1802) 28 St. Tr. 51.
[2] *Entick v. Carrington*, (1765) 19 St. Tr. 2030 [§7.1.1].
[3] *Phillips v. Eyre*, (1867) L.R. 4 Q.B. 225.

Each of these forms of redress is in England open to every one whose personal freedom has been in any way unlawfully interfered with. Suppose, for example, that X without legal justification assaults *A*, by knocking him down, or deprives *A* of his freedom—as the technical expression goes, "imprisons" him—whether it be for a length of time, or only for five minutes; *A* has two courses open to him. He can have X convicted of an assault and thus cause him to be punished for his crime, or he can bring an action of trespass against X [§2] and obtain from X such compensation for the damage which *A* has sustained from X's conduct as a jury think that *A* deserves [§9]. ***

Before quitting the subject of the redress afforded by the Courts for the damage caused by illegal interference with any one's personal freedom, we shall do well to notice the strict adherence of the judges in this as in other cases to two maxims or principles which underlie the whole law of the constitution, and the maintenance of which has gone a great way both to ensure the supremacy of the law of the land and ultimately to curb the arbitrariness of the Crown. The *first* of these maxims or principles is that every wrongdoer is individually responsible for every unlawful or wrongful act in which he takes part, and, what is really the same thing looked at from another point of view, cannot, if the act be unlawful, plead in his defence that he did it under the orders of a master or superior. *** Now this doctrine of individual responsibility is the real foundation of the legal dogma that the orders of the King himself are no justification for the commission of a wrongful or illegal act. *** The *second* of these noteworthy maxims is, that the Courts give a remedy for the infringement of a right whether the injury done be great or small. *** Ninety-nine hundred actions for assault or false imprisonment have reference to injuries which in themselves are trifling. If one ruffian gives another a blow, if a policeman makes an arrest without lawful authority [§6.6], if a schoolmaster keeps a scholar locked up at school for half an hour after he ought to have let the child go home,[4] if in short X interferes unlawfully to however slight a degree with the personal liberty of *A*, the offender exposes himself to proceedings in a Court of law, and the sufferer, if he can enlist the sympathies of a jury, may recover heavy damages for the injury which he has or is supposed to have suffered. The law of England protects the right of personal liberty, as also every other legal right, against every kind of infringement, and gives the same kind of redress (I do not mean, of course, inflicts the same degree of punishment or penalty) for the pettiest as for the gravest invasions of personal freedom. *** […continue reading]

REFLECTION:

- *What is Prof. Dicey's second conception of the rule of law? How does it relate to the common law of torts?*
- *Should public officials, whose job is to serve the public interest, be presumptively subject to the same common law rules and standards as apply to ordinary people? What defences to tort liability should they have?*
- *Why should plaintiffs have a right of redress for trivial wrongs, rather than only for grave violations of rights?*

1.1.2 Further material

- S. Beswick, "Equality Under Ordinary Law" (2024) 2 Supreme Court L Rev (3d) (*forthcoming*).
- M.D. Walters, *A.V. Dicey and the Common Law Constitutional Tradition: A Legal Turn of Mind* (Cambridge: Cambridge University Press, 2020), ch 9; Runnymede Radio (Sep 30, 2020) 🎧.
- J. Gardner, "Criminals in Uniform" in R.A. Duff *et al* (eds), *The Constitution of the Criminal Law* (Oxford: Oxford University Press, 2013).
- J. Beatson, *Key Ideas in Law: The Rule of Law and the Separation of Powers* (Oxford: Hart Publishing, 2021), ch 3; Oxford Public Law Book Festival (Dec 17, 2021) 📺.
- Law Society of British Columbia: Rule of Law Matters Podcast, "Introduction to the Rule of Law" (Sep 16, 2020) 🎧.
- D.M. Beatty, *Faith, Force, and Reason: An Armchair History of the Rule of Law* (Toronto: U Toronto Press, 2022), ch 6.

[4] *Hunter v. Johnson*, (1884) 13 Q.B.D. 225.

1.2 Overview of tort law

1.2.1 Sources, reasoning and interpretation

S. Beaulac & J.F. Gaudreault-DesBiens, Common Law and Civil Law: A Comparative Primer (Federation of Law Societies of Canada, 2017), 5-7

As was noted by Stephan Vogenauer, "[l]aw does not just happen. Every rule of law has an origin. It can be said to 'flow', 'emerge', or 'descend' from this 'source'."[5] From this perspective, reflecting on the sources of positive law in a given jurisdiction presupposes a genealogical inquiry, the results of which ground the validity of legal claims. One of the problems that may arise while performing such an inquiry is to assume the uniformity of the 'theories of sources' across jurisdictions, an obstacle upon which lawyers may easily stumble given the anchoring of most of their legal education in a single system of law and the still relatively marginal space occupied by comparative law in most law school curricula. The fact is that given the variety of expressions used by the Common Law and Civil Law traditions, theories of sources sometimes differ significantly within a single legal tradition. ***

Let us begin with the easiest topic of this section, i.e. the theory of sources within the Common Law tradition or, if one prefers, the absence thereof. Indeed, contrary to the Civil Law tradition, it is hard to speak of a formal 'theory' of sources in the Common Law tradition. As Poirier observes, questions pertaining to the sources of the Common Law have historically been envisaged from the perspective of the institutions empowered to give law, primarily courts of various types, but also Parliament.[6] Yet, the primary source of law is deemed to be found in judicial precedents, which form the *jus commune* and which hold together through *stare decisis*, that all Canadian lawyers, wherever they come from, know about. Statutes are also—and perhaps more than ever—an important source of law, but the type of relation they entertain with the precedents-based *jus commune* is markedly different from the interaction that exists between legislation and case law in the Civil Law tradition. ***

Another important source of law in the Common Law tradition is equity, which began as a system parallel to the common law, precisely because it sought to remedy some injustices created by the formalism that characterized the early centuries of common law adjudication. *** Although conflicts between common law and equity have by and large been abolished, Canadian jurists must be aware of the potential impacts of this genealogical distinction on the concepts on which they ground their arguments. ***

Theoretically, custom can also be a source of law in the Common Law tradition provided it meets a certain number of conditions, but in most accounts, it is when it is adopted and iterated in a precedent that it actually becomes law; for instance, the origins of many foundational common law concepts or rules can be traced back to ancient customs transposed into positive law by common law courts. Custom's significant influence on the evolution of the common law, if less visible than in the past, highlights the particular importance of social practices in that tradition.[7] Last, legal scholarship was not historically considered to be a source of law; for a long time, English courts were even reluctant to cite an author who was not dead. However, the emergence in the past half-century or so of a class of academic jurists in most Common Law jurisdictions has led to a rise in judicial citations of legal scholarship, be they doctrinally or critically inclined.[8] In the Canadian context, it is far from unusual to see courts of law, including the Supreme Court of Canada, referring to scholarship to decide cases to which a Common Law legal framework applies. It is thus fair to say that not unlike the role it plays in the Civil Law tradition, legal scholarship has become a kind of secondary, not determinative, source of law in the Common Law tradition, at least in its Canadian iteration.

[5] S. Vogenauer, "Sources of Law and Legal Method in Comparative Law", in M. Reinmann & R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law,* (Oxford: Oxford University Press, 2006), p. 869, 877.
[6] D. Poirier, "Droit et common laws: de sources multiples à une common law à l'image de chaque culture", in L. Castonguay & N. Kasirer (eds.), *Étudier et enseigner le droit: hier, aujourd'hui et demain*. *Études offertes à Jacques Vanderlinden* (Cowansville: Éditions Yvon Blais, 2006), p. 81, 88.
[7] See: C.K. Allen, *Law in the Making*, 7th ed., (Oxford: Clarendon Press, 1964), p. 127.
[8] Y-M Morissette, "Les caractéristiques classiquement attribuées à la common law," [2013] *Revue internationale de droit comparé* 613, pp. 634-636.

In Canada as in several other Common Law jurisdictions, the interplay between the two main primary sources of law, i.e. judicial precedents and legislation, must be envisaged in light of the principle of Parliamentary supremacy, even if its impact has been mitigated since the advent of constitutionalism. Indeed, Parliament may decide, through legislation, to confirm, to modify or even to abrogate a common law rule, even if there is a *juris tantum* presumption of conformity of the legislation with the common law. In grasping that interplay, interpreters thus have to rely on rules of statutory construction.

[Common law] reasoning is generally characterized as "inductive", that is, as stemming from the facts. Even though this image is a bit simplistic, it remains true that a close interaction between law and facts exemplifies the eminently casuistic Common Law reasoning. An eloquent and accessible illustration of such reasoning can be found in the torts case of *Cooper v. Hobart*,[9] which dealt with the question of whether a statutory regulator can be found negligent for having failed to properly oversee the conduct of a licensed investment company.[10] In *Cooper*, the court begins its analysis by reconciling three important precedents in order to assess whether pre-existing legal categories applicable to the case at bar are closed. It further examines whether legislative evolutions that took place after the common law was settled, had affected the scope of the tort of negligence in that case. Last, the court carefully narrows down its ruling to the facts of the case, refusing to close the door to a future recognition of a "private law duty of care to members of the investing public giving rise to liability in negligence for economic losses that the investors sustained."[11] In good common law fashion, it simply concludes: "we find that this is not a proper case in which to recognize a new duty of care."[12] The evolution of the law is thus linked to the appropriate factual matrix. *** […continue reading]

REFLECTION:

- *What sources of common law do Prof. Beaulac and Prof. Gaudreault-DesBiens identify? How might these sources be ordered in a hierarchy of authority for judicial decision-making?*
- *What are the merits of distilling common law principles from the facts of cases? What are the challenges?*
- *What is the doctrine of stare decisis? In what way does stare decisis hold the common law together?*

1.2.2 Basic features

J. Coleman, S. Hershovitz and G. Mendlow, "Theories of the Common Law of Torts" in E.N. Zalta (ed), The Stanford Encyclopedia of Philosophy (Stanford University, 2015), [1.1]

A tort suit enables the victim of a wrong to seek a remedy from the person who injured her. Unlike a criminal case, which is initiated and managed by the state, a tort suit is prosecuted by the victim or the victim's estate (or survivors). Moreover, a successful tort suit results in a judgment of liability, rather than a sentence of punishment. Such a judgment normally requires the defendant to compensate the plaintiff financially. In principle, an award of *compensatory* damages [§9.2] shifts all of the plaintiff's legally cognizable costs to the defendant. (It is controversial whether tort really lives up to this principle in practice.) On rare occasions, a plaintiff may also be awarded *punitive* damages [§9.5], which go beyond what it necessary for compensation. In other cases, a plaintiff may obtain an *injunction* [§9.8]: a court order preventing the defendant from injuring her or from invading her rights (perhaps harmlessly). An example of the former would be awarding a plaintiff (or a class of plaintiffs) an injunction against a polluting manufacturer. An example of the latter would be awarding a plaintiff an injunction against a harmless trespass.

"Tort" means "wrong" and it is natural to think that wrongs are the domain of tort law. But tort law does not

[9] *Cooper v. Hobart* [2001] 3 S.C.R. 537 [§13.4.1.2].

[10] In this case, the investment company had allegedly used its investors' funds for unauthorized purposes, as a result of which they had suffered economic losses. The plaintiff was arguing that at some point, the regulator became aware of illegalities committed by the investment company but had failed to suspend its license and to notify the investors that an investigation had been launched. This omission was at the source of the alleged breach by the regulator of its duty of care towards the plaintiff. Absent a precedent finding that the law of negligence could be extended to encompass such a factual situation, the Supreme Court had to decide whether or not to make that determination. In the circumstances of the case, the court found that it could not, because "there was insufficient proximity between the regulator and the investors to ground a *prima facie* duty of care." (*Id.*, p. 559, para. 50.)

[11] *Cooper*, *supra*, p. 541, para. 1.

[12] *Ibid*.

concern itself with all the wrongs that people do. Some wrongs are addressed by the criminal law, not private law (some are addressed by both). And not every wrong that falls within the province of private law falls within tort law. A breach of contract, for example, is not traditionally regarded as a tort. More generally, tort law does not provide a remedy for every wrong that a victim might suffer. Rather, tort law offers relief for a canonical set of wrongs, or torts. These include assault [§2.3], battery [§2.2], defamation [§5.1], and trespass [§7.1], among many others.

Rather than focusing on categories of torts, it is more fruitful to begin by conceptualizing torts in terms of the elements that a plaintiff must prove in order to obtain a remedy. For example, a defendant commits battery if she acts, intending to cause harmful or offensive contact with the plaintiff, and such contact in fact results from her act. If a plaintiff meets the burden of establishing these elements, then he or she has established a prima facie case for battery. A defendant who commits a battery so defined might nevertheless escape liability by asserting a defense. For example, a defendant in a battery action might avoid liability by showing that she acted in self-defense [§6.4] or that the plaintiff consented to the otherwise unlawful touching [§6.3]. *** […continue reading]

REFLECTION:

- *Is there any core conception of 'wrong' that unifies the plethora and diversity of torts that common law courts recognise? In what sense is the wrong of carelessly injuring another related to the wrong of intending to harm?*

1.2.3 Further material

- L. Solum, "Legal Theory Lexicon: Common Law" Legal Theory Blog (Jan 23, 2021).
- M. Dyson, "Fault Doctrines in Tort Law" in *Explaining Tort & Crime* (Cambridge University Press, 2022).
- K.F. Graham, *Tort Law for Children* (Jeofail.com, 2023).
- The Law Academy (UK), *The Law of Tort: Lectures* (2023) 📺.

1.3 Pleading in tort

1.3.1 The modern law of tort

C.J. Donahue, "The Modern Laws of Both Tort and Contract: Fourteenth Century Beginnings?" (2017) 40 Manitoba LJ 9, 9-12, 17, 25-26

Introduction—The Action on the Case

The title of my talk has a question mark at the end of it, but I hope that when you read it you thought that I must be mad. After all, surely the modern laws of both tort and contract go back further than that. How about the Code of Hammurabi? Or Cain's slaying of his brother Abel (Genesis 4)? Or Abraham's purchase of the field in Machpelah from Ephron the Hittite (Genesis 23)? Even if we confine ourselves to England after the departure of the Romans, I can hear arguments that both tort and contract are to be found in Aethelbert's Code in the early seventh century.[13] On the other side, I can hear someone say: 'You are quite wrong, Donahue. The modern law of tort and contract in the Anglo-American legal system goes back no further than the nineteenth century in the case of tort, perhaps to the mid-eighteenth century in the case of contract.' ***

The Origins of Trespass

To begin with the action of trespass: are the origins of this action to be found in Anglo-Saxon times or in the mid-thirteenth century or in the eighteenth century? It depends on what you are looking for. If it is the notion of a legal wrong or the notion of the king's peace then look to Anglo-Saxon times. If it is the notion

[13] See L Oliver, The Beginnings of English Law (Toronto: University of Toronto Press, 2002) at 60–81, for the text and translation, from which the relevance to 'tort' is obvious enough. For contract, see R L Henry, "Forms of Anglo-Saxon Contracts and Their Sanctions" (1917) 15:7 Michigan L R, (1917) 552–65, 639–56.

that trespass is a direct forcible injury to the person [§2.2], or property in the possession, of the plaintiff (like assault or trespass to land), then look to the eighteenth century.[14] If it is a writ called 'trespass' that will be heard in the central royal courts, then look to the mid-thirteenth century.

The origins of the trespass writ in the central royal courts are obscure. At the beginning of the thirteenth century we find in the plea rolls actions like the following: 'Walter de Grancurt brings a plea against Hugh de Polestead about why (*ostensurus quare*) he made his granddaughter a nun'.[15] What writ is this? It does not identify itself, and there was no writ in regular use in this period that contained the *ostensurus quare* formula. Obviously, however, someone had thought of the possibility of calling someone into the central royal courts to explain why he had done something.

The earliest examples of trespass writs in the registers of writs come from late in the reign of Henry III, between 1261 and 1272.[16] The classic form of the writ is as follows:[17]

> The king to the sheriff, greeting. If A. shall give you security for pursuing his claim, then put by gage and safe pledges B. that he be before our justices at Westminster on the octave of St. Michael to show wherefore (*ostensurus quare*) with force and arms (*vi et armis*) he made an assault upon the same A. at N. and beat wounded and ill-treated him so that his life was despaired of, and other outrages there did to him, to the grave damage of the same A. and against our peace (*contra pacem*).

Other examples make clear that this writ was also available for trespass to land [§7.1] and trespass for taking or damaging personal property [§8.2]. ***

The Rise of the Action on the Case—Tort

By mid-century it seems that the jurisdictional distinction between actions done with force and arms and against the peace and those that are not is breaking down. ***

Not all the features of the later action are here (which is probably why this case is reported),[18] but it soon becomes clear that in the action on the case there will be no capias or outlawry. The action is an action on the special case with a 'whereas' (*cum*) clause, the essential purpose of which is to lay out some duty. We still have a way to go but the course is set. ***

By Way of a Conclusion

The distinction between trespass and case remained until the abolition of the forms of action beginning in the 1830s. Whatever sense can be made out of that distinction—and much effort was spent trying to make sense out of it—it clearly did not, in the minds of most lawyers, correspond to the distinction between intentional and negligent wrongs. Further, there was a variety of other actions, spin-offs of the action on the case, that acquired a life of their own: libel and slander, nuisance, trover, and, somewhat later, various actions for tortious interference with economic relations. All of these prevented the development of a unified theory of the law of wrongs.

And yet most of the elements that the nineteenth century put together in its unified theory of torts were there from a quite early period. We hear of a distinction between intentional actions and accidents. The word 'negligence' is in quite frequent use. The idea of strict liability also seems to be there. The concept of forseeability is certainly there by the end of the 17th century, perhaps earlier. We must be careful. Words

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[14] It is frequently said that this definition was not settled until *Scott v. Shepherd*, 2 Wm Bl 892 (CP 1773), 96 Eng Rep 525 (KB 1773) [§2.1.2].

[15] D M Stenton, ed, *Pleas before the King or his Justices*, (London: Selden Society 1953) 187, no 2148 (Michaelmas 1199): 'Hugo de Polstede [essoniavit se] uersus Galterum de Grancurt de placito quare fecit neptem eius monialem per Robertum filium Ade'. I have imagined what was in the writ on the basis of the essoin roll. For the plea itself, see F Palgrave, ed, *Rotuli curiae regis* (London: Record Comm'n, 1835) 1:126–7.

[16] See G D G Hall, "Some Early Writs of 'Trespass'", (1957) 73 L Q Rev, at 67–73; G D G Hall, ed, *Early Registers of Writs* (London: Selden Society 87, 1970) at cix–cx.

[17] *Registrum brevium* (London 1687) fol 93 (the text dates from the 14th century).

[18] Palmer's explanation (at 226) that this case involves a change in the form of writs for such cases is plausible.

do not always mean the same thing in the past as they do today. We are likely to get into a lot of trouble if we think that 'negligence' always means the breach of some objective standard of care. Nonetheless we must ask the question why a world that had quite sophisticated moral theories and was certainly capable of speculative reasoning never put together the elements that seem to us to be fundamental to a coherent law of wrongs in a package that looks anything like what the nineteenth century created and which we still, to some extent, have today. […continue reading]

REFLECTION:

- *Why do courts today still ground common law doctrines in precedents that were determined under the former writ system? Does that make sense?*
- *What does the system of precedent tell us about the nature of common law development?*

1.3.2 From forms of action to statements of claim

Law Reform Commission of British Columbia, Wrongful Interference with Goods (Rep. 127, 1992), 32-34

To obtain relief today a claimant must establish that a wrong recognized at law has been committed. The claimant commences the proceedings with a general document, either a writ or a petition, and sets out the facts to support the claim.

The former practice was not so simple. The law recognized particular kinds of action and each had its special writ. Without a writ for the wrong complained of, there was no way to bring the action.[19] A person who commenced an action using the wrong writ would be told by the court to start again. The differences in philosophy between today and a hundred and fifty years ago are striking.

The system of formal writs for discrete claims was called the "forms of action." For 40 years (from 1832 until 1875) Parliament tried to rid the law of the forms of action,[20] but their shadows remain. The ideas underlying the forms of action are still part of the law, a point that becomes clear by an examination of the torts dealing with wrongful interference with property [§8].

Each form of action developed its own set of precedents. While various writs might deal with related causes of action, the law viewed each action individually.[21] In this way different, sometimes inconsistent, principles developed in actions supported by separate writs. The process can be seen in the conflicting policy choices made in detinue, conversion and trespass to chattels. Each of these, until the nineteenth century, were supported by different writs and each was a separate form of action.

The importance of selecting the correct writ continued until 1832, when legislation introduced an important reform: a single writ was created for all actions. It was no longer possible to use the wrong writ, but a plaintiff was still at risk if the wrong *form of action* was pleaded. *** Further reforms, introduced in 1852 and 1873, also tried to break down the artificial boundaries between the actions. The last of these had the most success, but remnants of the forms of action are still patched to the law. *** […continue reading]

REFLECTION:

- *What was the main problem with the system of forms of action? Does civil pleading today avoid the problem?*

---

[19] One kind of generic writ was recognized, for the action on the case. Speculation concerning the origins of case caused something of an academic furor in the 1930's—see T.F.T. Plucknett, "Case and the Statute of Westminister II" (1931) 31 Col. L. Rev. 778; W.S. Holdsworth, (1931) 47 Law. Q. Rev. 334; P.A. Landon, "The Action on the Case and the Statute of Westminster II" (1936) 52 Law. Q. Rev. 68; T.F.T. Plucknett, "Case and Westminster II" (1936) 52 L. Q. Rev. 220—with the result that much that was generally accepted has been called into question. Even so, this much is clear: while other writs were based on the wrong committed, the action on the case was based on the injury. The plaintiff would set out the court in this way. An action on the case allowed the courts some latitude in fashioning new causes of action. Trover [§8.2] began as an action on the case, as did elements of the law of negligence [§13.1.6].

[20] The reforms attempted to correct a malfunctioning system of procedure by simplifying the process of bringing an action before the appropriate court. ***

[21] It is important to stress just how fundamental this idea was in the nineteenth century. In *Reynolds v. Clarke*, (1725) 1 Str. 634, 636, 93 E.R. 747, 748, *e.g.*, dealing with the distinction between trespass and case, it is said "We must keep up the boundaries of the actions; otherwise, we shall introduce the utmost confusion."

1.3.3 Letang v. Cooper [1964] EWCA Civ 5

England and Wales Court of Appeal – [1964] EWCA Civ 5

MASTER OF THE ROLLS:

1. On the 10th July, 1957, Mrs Letang was on holiday in Cornwall. She was staying at a hotel and thought she would sunbathe on a piece of grass where cars were parked. While she was lying there, Mr Cooper came into the car park driving his Jaguar motor-car. He did not see her. The car went over her legs and she was injured.

2. On the 2nd February, 1961, more than three years after the accident, Mrs Letang brought this action against Mr Cooper for damages for loss and injury caused by (1) the negligence of the Defendant in driving a motor-car and (2) the commission by the Defendant of a trespass to the person.

3. The sole question is whether the action is statute-barred [§6.8]. The Plaintiff admits that the action for negligence is barred after three years, but she claims that the action for trespass to the person is not barred until six years have elapsed. The Judge has so held and awarded her £575 damages for trespass to the person.

4. Under the *Limitation Act, 1939*, the period of limitation was six years in all actions founded "on tort"; but in 1954 Parliament reduced it to three years in actions for damages for personal injuries, provided that the actions come within these words of section 2(1) of the *Law Reform (Limitation of Actions) Act, 1954*:

> "Actions for damages for negligence *** where the damages claimed by the plaintiff for the negligence *** consist of or include damages in respect of personal injuries to any person".

5. The Plaintiff says that these words do not cover an action for trespass to the person and that therefore the time bar is not the new period of three years, but the old period of six years.

6. The argument, as it was developed before us, became a direct invitation to this Court to go back to the old forms of action and to decide this case by reference to them. The statute bars an *action on* the case, it is said, after three years, whereas *trespass to the person* is not barred for six years. *** I must say that if we are, at this distance of time, to revive the distinction between trespass and case, we should get into the most utter confusion. The old common lawyers tied themselves in knots over it, and we should do the same. Let me tell you some of their contortions. Under the old law, whenever one man injured another by the *direct* and immediate application of force, the plaintiff could sue the defendant in *trespass* to the person, without alleging negligence (see *Leame v. Bray* (1803) 3 East 593), whereas if the injury was only *consequential*, he had to sue in *case*. You will remember the illustration given by Mr Justice Fortescue in *Reynolds v. Clarke* (1795) 1 Str. 634, 635:

> "If a man throws a log into the highway and in that act it hits me, I may maintain trespass because it is an immediate wrong; but if, as it lies there, I tumble over it and receive an injury, I must bring an action upon the case because it is only prejudicial in consequence".

7. Nowadays, if a man carelessly throws a piece of wood from a house into a roadway, then whether it hits the plaintiff or he tumbles over it the next moment, the action would not be *trespass* or *case*, but simply negligence. ***

10. The truth is that the distinction between trespass and case is obsolete. We have a different sub-division altogether. Instead of dividing actions for personal injuries into *trespass* (direct damage) or *case* (consequential damage), we divide the causes of action now according as the defendant did the injury intentionally or unintentionally. If one man intentionally applies force directly to another, the plaintiff has a cause of action in assault and battery, or, if you so please to describe it, in trespass to the person [§2]. "The least touching of another in anger is a battery". If he does not inflict injury intentionally, but only unintentionally, the plaintiff has no cause of action today in trespass. His only cause of action is in negligence [§13], and then only on proof of want of reasonable care [§14]. If the plaintiff cannot prove want of reasonable care, he may have no cause of action at all. Thus, it is not enough nowadays for the plaintiff

to plead that "the defendant shot the plaintiff". He must also allege that he did it intentionally or negligently. If intentional, it is the tort of assault and battery. If negligent and causing damage, it is the tort of negligence.

11. The modern law on this subject was well expounded by my brother Diplock in *Fowler v. Lanning* [1959] 1 Q.B. 426, with which I fully agree. But I would go this one step further: When the injury is not inflicted intentionally, but negligently, I would say that the only cause of action is negligence and not trespass. If it were trespass, it would be actionable without proof of damage; and that is not the law today.

12. In my judgment, therefore, the only cause of action in the present case (where the injury was unintentional) is negligence and is barred by reason of the express provision of the statute. ***

LORD JUSTICE DIPLOCK:

26. A cause of action is simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person. Historically the means by which the remedy was obtained varied with the nature of the factual situation and causes of action were divided into categories according to the "form of action" by which the remedy was obtained in the particular kind of factual situation which constituted the cause of action. But that is legal history, not current law. If A., by failing to exercise reasonable care, inflicts direct personal injury upon B., those facts constitute a cause of action on the part of B. against A. for damages in respect of such personal injuries. The remedy for this cause of action could before 1873 have been obtained by alternative forms of action, namely, originally either trespass *vi et armis* or trespass on the case, later either trespass to the person or negligence. (See Bullen & Leake, 3rd Edition). Certain procedural consequences, the importance of which diminished considerably after the *Common Law Procedure Act of 1852*, flowed from the plaintiff's pleader's choice of the form of action used. The *Judicature Act of 1873* abolished forms of action. It did not affect causes of action; so it was convenient for lawyers and legislators to continue to use, to describe the various categories of factual situations which entitled one person to obtain from the Court a remedy against another, the names of the various "forms of action" by which formerly the remedy appropriate to the particular category of factual situation was obtained. But it is essential to realise that when, since 1873, the name of a form of action is used to identify a cause of action, it is used as a convenient and succinct description of a particular category of factual situation which entitles one person to obtain from the Court a remedy against another person. To forget this will indeed encourage the old forms of action to rule us from their graves.

27. If A., by failing to exercise reasonable care, inflicts direct personal injuries upon B., it is permissible today to describe this factual situation indifferently, either as a cause of action in negligence or as a cause of action in trespass, and the action brought to obtain a remedy for this factual situation as an action for negligence or an action for trespass to the person—though I agree with the Master of the Rolls that today "negligence" is the expression to be preferred. But no procedural consequences flow from the choice of description by the pleader: (see *Fowler v. Lanning*). They are simply alternative ways of describing the same factual situation.

28. In the Judgment under appeal, Mr Justice Elwes has held that the *Law Reform (Limitation of Actions) Act 1954* has, by Section 2(1) created an important difference in the remedy to which B. is entitled in the factual situation postulated according to whether he chooses to describe it as negligence or as trespass to the person. If he selects the former description, the limitation period is three years; if he selects the latter, the limitation period is six years. ***

29. The factual situation upon which the Plaintiff's action was founded is set out in the Statement of Claim. It was that the Defendant, by failing to exercise reasonable care (of which failure particulars were given), drove his motor-car over the Plaintiff's legs and so inflicted upon her direct personal injuries in respect of which the Plaintiff claimed damages. That factual situation was the Plaintiff's cause of action. It was the cause of action "for" which the Plaintiff claimed damages in respect of the personal injuries which she sustained. That cause of action or factual situation falls within the description of the tort of "negligence" and an action founded on it, that is, brought to obtain the remedy to which the existence of that factual situation entitles the Plaintiff, falls within the description of an "action for negligence". The description "negligence" was in fact used by the Plaintiff's pleader; but this cannot be decisive, for we are concerned not with the description applied by the pleader to the factual situation and the action founded on it, but with the

description applied to it by Parliament in the enactment to be construed. It is true that that factual situation also falls within the description of the tort of "trespass to the person". But that, as I have endeavoured to show, does not mean that there are two causes of action. It merely means that there are two apt descriptions of the same cause of action. It does not cease to be the tort of "negligence" because it can also be called by another name. An action founded upon it is none the less an "action for negligence" because it can also be called an "action for trespass to the person".

30. It is not, I think, necessary to consider whether there is today any respect in which a cause of action for unintentional as distinct from intentional "trespass to the person" is not equally aptly described as a cause of action for "negligence". The difference stressed by Mr Justice Elwes that actual damage caused by failure to exercise reasonable care forms an essential element in the cause of action for "negligence", but does not in the cause of action in "trespass to the person", is, I think, more apparent than real when the trespass is unintentional; for, since the duty of care, whether in negligence or in unintentional trespass to the person, is to take reasonable care to avoid causing actual damage to one's neighbour, there is no breach of the duty unless actual damage is caused. Actual damage is thus a necessary ingredient in unintentional as distinct from intentional trespass to the person. But whether this be so or not, the sub-section which falls to be construed is concerned only with actions in which actual damage in the form of personal injuries has in fact been sustained by the plaintiff. Where this factor is present, every factual situation which falls within the description "trespass to the person" is, where the trespass is unintentional, equally aptly described as negligence. ***

LORD JUSTICE DANCKWERTS concurred with LORD DENNING M.R.

REFLECTION:

- *Was Cooper's crushing of Letang's legs with his car battery, negligence or both? Why did it matter in this case?*
- *Consider A. R. Robertson Q.C.'s observation: "It is often said that a plaintiff must plead facts, not law, which … mean[s] that the plaintiff must plead sufficient facts so as to demonstrate a cause of action and that a statement of claim is not the place for legal argument. Although it is common (and helpful) to identify claims by way of recognized causes of action, it is not necessary to do so."[22] Why not?*
- *What is a cause of action?[23] What distinguishes causes of action from the old forms of action?*

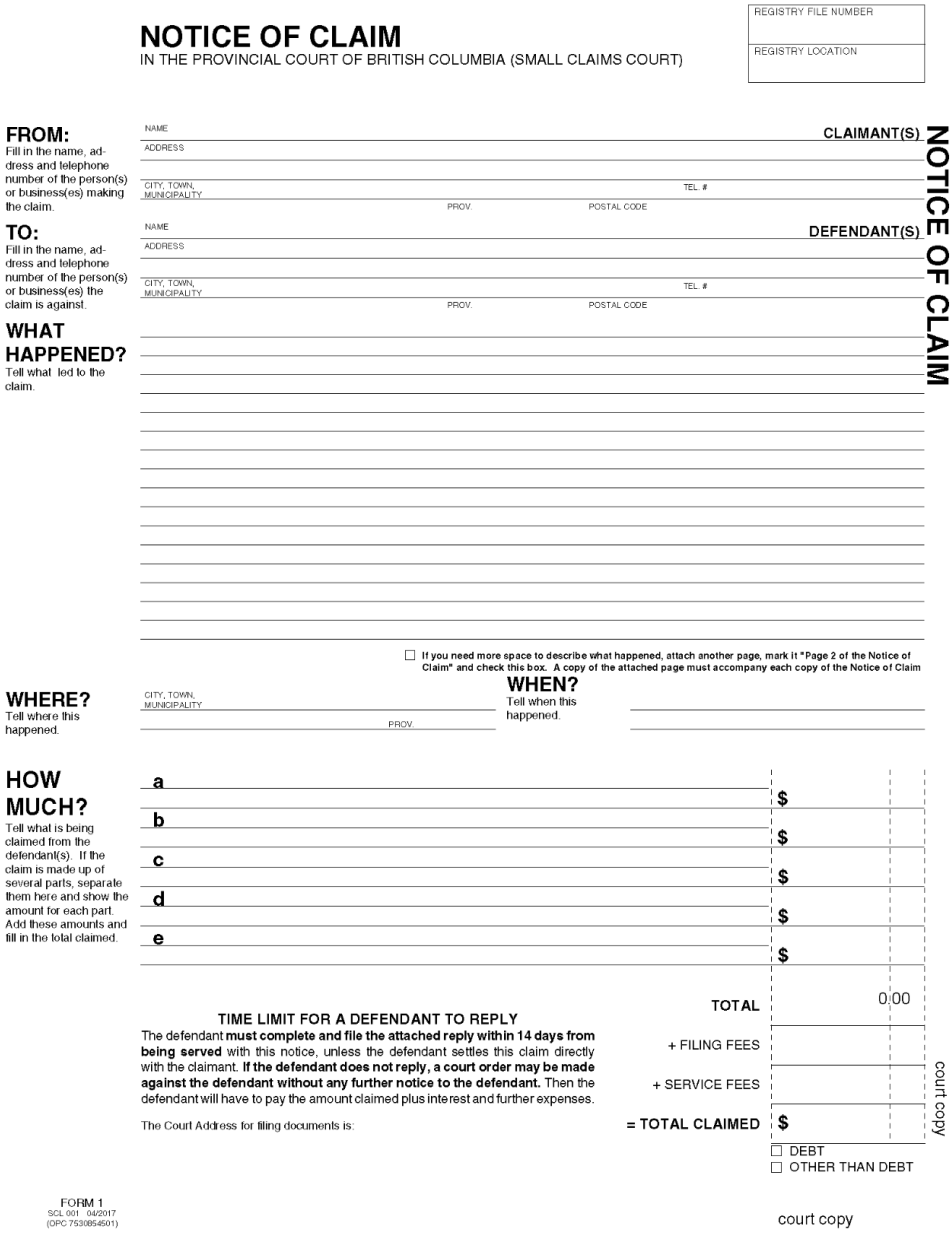
[22] *McMorran v. Hockett*, 2016 ABQB 279, [35].

[23] See *Markevich v. Canada*, 2003 SCC 9, [27]; *Do Carmo v. Ford Excavations Pty Ltd* [1984] HCA 17, [13]. See also *Paragon Finance v. Thakerar* [1998] EWCA Civ 1249, [1999] 1 All ER 400, 405 *per* Millett LJ:

> "The classic definition of a cause of action was given by Brett J in *Cooke v. Gill* (1873) LR 8 CP 107, 116:
>
> > '"Cause of action" has been held from the earliest times to mean every fact *which is material to be proved* to entitle the plaintiff to succeed—every fact which the defendant would have a right to traverse' (my emphasis).
>
> In the *Thakerar* case Chadwick J cited the more recent definition offered by Diplock LJ in *Letang v. Cooper* [1965] 1 QB 232 (CA), 242-3 ***. I do not think that Diplock LJ was intending a different definition from that of Brett J. However it is formulated, only those facts which are material to be proved are to be taken into account. The pleading of unnecessary allegations or the addition of further instances or better particulars do not amount to a distinct cause of action. The selection of the material facts to define the cause of action must be made at the highest level of abstraction.
>
> The question in *Letang v. Cooper* was whether a claim for damages for personal injuries sustained as a result of the defendant's negligence was a claim for "damages for negligence" within the meaning of Section 2(1) of the *Limitation Act 1939* ("the 1939 Act") as amended by Section 2 of the *Law Reform (Limitation of Actions Act) 1954* even though the claim was expressly pleaded in trespass. Diplock LJ held that where actual damage in the form of personal injuries has been sustained by the plaintiff:
>
> > '… every factual situation which falls within the description "trespass to the person" is, *where the trespass is unintentional*, equally aptly described as negligence' (my emphasis).
>
> His reasoning was: (i) trespass to the person may be intentional or unintentional; (ii) intent is therefore not one of the facts which is material to be proved to constitute the cause of action; (iii) accordingly unintentional trespass may be equally aptly described as negligence.
>
> But it is important to observe what Diplock LJ was *not* saying. He was *not* saying that trespass and negligence are the same cause of action, or that intentional trespass could equally aptly be described as negligence, or that a cause of action in which it was material to prove intent could equally well be described by the name of a cause of action in which it was not. This would make any distinction between different causes of action illusory and destroy the practical utility of the concept."

1.3.4 Notice of claim form

British Columbia Courthouse Services – SCR Form 1, SCL001



NOTICE OF CLAIM
IN THE PROVINCIAL COURT OF BRITISH COLUMBIA (SMALL CLAIMS COURT)

REGISTRY FILE NUMBER
REGISTRY LOCATION

FROM: Fill in the name, address and telephone number of the person(s) or business(es) making the claim.
NAME — CLAIMANT(S)
ADDRESS
CITY, TOWN, MUNICIPALITY — TEL. #
PROV. — POSTAL CODE

TO: Fill in the name, address and telephone number of the person(s) or business(es) the claim is against.
NAME — DEFENDANT(S)
ADDRESS
CITY, TOWN, MUNICIPALITY — TEL. #
PROV. — POSTAL CODE

NOTICE OF CLAIM

WHAT HAPPENED? Tell what led to the claim.

☐ If you need more space to describe what happened, attach another page, mark it "Page 2 of the Notice of Claim" and check this box. A copy of the attached page must accompany each copy of the Notice of Claim

WHERE? Tell where this happened.
CITY, TOWN, MUNICIPALITY
PROV.

WHEN? Tell when this happened.

HOW MUCH? Tell what is being claimed from the defendant(s). If the claim is made up of several parts, separate them here and show the amount for each part. Add these amounts and fill in the total claimed.

a $
b $
c $
d $
e $

TOTAL 0.00
+ FILING FEES
+ SERVICE FEES
= TOTAL CLAIMED $
☐ DEBT
☐ OTHER THAN DEBT

TIME LIMIT FOR A DEFENDANT TO REPLY
The defendant **must complete and file the attached reply within 14 days from being served** with this notice, unless the defendant settles this claim directly with the claimant. **If the defendant does not reply, a court order may be made against the defendant without any further notice to the defendant.** Then the defendant will have to pay the amount claimed plus interest and further expenses.

The Court Address for filing documents is:

court copy

FORM 1
SCL 001 04/2017
(OPC 753085-4501)

court copy

REFLECTION:

- *What differentiates this claim form from the writs described by Prof. Donahue (§1.3.1)?*

1.3.5 Further material

- "Going to Court" Dial A Law (Mar 2018).
- J. Fiddick & C. Wardell (eds), *The CanLII Manual to British Columbia Civil Litigation* (Ottawa: Canadian Legal Information Institute, 2020), [3.4].
- "The Castle" (Working Dog & Village Roadshow, 1997) 📺.

2 TRESPASS TO THE PERSON

Holder v. State of South Australia [2018] SADC 83, aff'd [2019] SASCFC 135

12. The three torts of trespass to the person (assault, battery and false imprisonment) are actionable *per se*, that is they are actionable without proof of any actual damage or injury being suffered by the plaintiff. The fundamental distinction between these three torts was explained in *Collins v. Wilcock*[24] by Robert Goff LJ:

> An *assault* is an act which causes another person to apprehend the infliction of immediate, unlawful force on his person; a *battery* is the actual infliction of unlawful force on another person. Both assault and battery are forms of trespass to the person. Another form of trespass to the person is *false imprisonment*, which is the unlawful imposition of constraint upon another's freedom of movement from a particular place. ***

2.1 Foundational concepts: volition, directness, intention, capacity

2.1.1 Smith v. Stone (1647) Style 65, 82 ER 533 (KB)

England Court of King's Bench – (1647) Style 65, 82 ER 533

Smith brought an action of trespasse against Stone *pedibus ambulando* [walking by his feet], the defendant pleads this speciall plea in justification, *viz.* that he was carryed upon the land of the plaintiff by force, and violence of others, and was not there voluntarily, which is the same trespasse, for which the plaintiff brings his action. The plaintiff demurs to this plea.

In this case Roll Justice said, that it is the trespasse of the party that carryed the defendant upon the land, and not the trespasse of the defendant: as he that drives my cattel into another mans land is the trespassor against him, and not I who am owner of the cattell.

REFLECTION:

- *Why was the alleged trespass not undertaken with volition? Who was the true tortfeasor in this case?*

2.1.2 Scott v. Shepherd [1773] All ER Rep 295 (KB)

BACKGROUND: Quimbee (2021), https://youtu.be/m-8oLq0ggZQ

England Court of King's Bench – (1773) 96 E.R. 525

On the evening of the fair day at Milborne Port, 28 October 1770, the defendant threw a lighted squib made of gunpowder, etc, from the street into the markethouse which was a covered building supported by arches and enclosed at one end, but open at the other and both the sides, where a large concourse of people were assembled. The lighted squib fell in the stall of one William Yates, who sold gingerbread, etc. One James Willis instantly, and to prevent injury to himself and the wares of Yates, took up the lighted squib from off the stall and then threw it across the market-house where it fell on another stall there of one Ryal, who sold the same sort of wares. He instantly and to save his own goods from being injured took up the lighted squib from off the stall and then threw it to another part of the market-house and, in so throwing it, struck the plaintiff then in the markethouse in the face therewith, and the combustible matter then bursting, put out one of the plaintiff's eyes. The question for the opinion of the court was whether this action was maintainable?

NARES J.:

1. I am of opinion that trespass would well lie in the present case. The natural and probable consequence of the act done by the defendant was injury to somebody, and, therefore, the act was illegal at common

[24] (1984) 79 Cr App R 229, [1984] 3 All ER 374, [1984] 1 WLR 1172 at 1177-8 [§2.2.3].

law. *** Being, therefore, unlawful, the defendant was liable to answer for the consequences, be the injury mediate or immediate. ***

BLACKSTONE J. (dissenting): ***

2. The solid distinction is between direct or immediate injuries on the one hand and mediate or consequential on the other, and trespass never lay for the latter. If this be so, the only question will be whether the injury which the plaintiff suffered was immediate, or consequential only; and I hold it to be the latter. The original act was, as against Yates, a trespass; not as against Ryal or the plaintiff. The tortious act was complete when the squib lay at rest on Yates's stall. ***

3. *** [T]he defendant, I think, is not answerable in an action of trespass and assault for the mischief done by the squib in the new motion impressed on it, and the new direction given it, by either Willis or Ryal, who both were free agents and acted on their own judgment. ***

6. As I *** think no immediate injury passed from the defendant to the plaintiff (and without such immediate injury no action of trespass can be maintained) I am of opinion that in this action judgment ought to be for the defendant.

GOULD J.:

7. *** I think that the defendant may be considered in the same view as if he himself had personally thrown the squib in the plaintiff's face. The terror impressed on Willis and Ryal excited self-defence and deprived them of the power of recollection. What they did was, therefore, the inevitable consequence of the defendant's unlawful act. ***

DE GREY C.J.:

8. This case is one of those wherein the line drawn by the law between actions on the case and actions of trespass is very nice and delicate. Trespass is an injury accompanied with force, for which an action of trespass *vi et armis* lies against the person from whom it is received. The question here is whether the injury received by the plaintiff arises from the force of the original act of the defendant, or from a new force by a third person. I agree with Blackstone, J, as to the principles he has laid down but not in his application of those principles to the present case. *** The throwing the squib was an act unlawful and tending to affright the bystanders. So far, mischief was originally intended; not any particular mischief, but mischief indiscriminate and wanton. Whatever mischief, therefore, follows he is the author of it; ***. *** Everyone who does [with a deliberate intent] an unlawful act is considered as the doer of all that follows; ***. I look on all that was done subsequent to the original throwing as a continuation of the first force and first act which will continue until the squib was spent by bursting. I think that any innocent person removing the danger from himself to another is justifiable; the blame lights on the first thrower. The new direction and new force flow out of the first force, and are not a new trespass. *** On these reasons I concur with Gould and Nares, JJ, that the present action is maintainable.

REFLECTION:

- *What is the distinction between direct and indirect harms? Why was it important? Is it still important?*
- *How does the reasoning of De Grey C.J. and Blackstone J. align or differ?*

2.1.3 Non-Marine Underwriters, Lloyd's of London v. Scalera [2000] SCC 24

Supreme Court of Canada – 2000 SCC 24

✗**REF: §6.3.1.1**

MCLACHLIN J. (L'HEUREUX-DUBÉ, GONTHIER, BINNIE JJ. concurring): ***

7. The question *** is whether we should in this case depart from the settled rule that requires the plaintiff in a battery case to show only contact through a direct, intentional act of the defendant and places the onus on the defendant of showing consent or lawful excuse, including actual or constructive consent. For the

reasons that follow, I am not convinced that we should alter the established rule.

A. The Traditional Approach to Trespass is Justified as a Rights-Based Tort

8. The traditional rule *** is that the plaintiff in an action for trespass to the person (which includes battery) succeeds if she can prove direct interference with her person. Interference is direct if it is the immediate consequence of a force set in motion by an act of the defendant: see *Scott v. Shepherd* (1773) 96 E.R. 525 (Eng. K.B.); *Leame v. Bray* (1803), 102 E.R. 724, 3 East 593 (Eng. K.B.). The burden is then on the defendant to allege and prove his defence. Consent is one such defence.

9. Some critics have suggested that this rule should be altered. They suggest that tort must always be fault-based. This means the plaintiff must prove fault as part of her case, by showing either: (1) that the defendant intended to harm; (2) that the defendant failed to take reasonable care or was "negligent"; or (3) that the tort is one of strict liability, i.e. legally presumed fault. On a practical level, some *** argue that the traditional approach confers an unfair advantage on the plaintiff by easing her burden of proof: ***. *** In the spirit of these comments, my colleague Iacobucci J. proposes to alter the traditional rule, at least for sexual battery, to require the plaintiff to prove fault, i.e. that the defendant either knew or ought to have known that she was not consenting.

10. I do not agree with these criticisms of the traditional rule. In my view the law of battery is based on protecting individuals' right to personal autonomy. To base the law of battery purely on the principle of fault is to subordinate the plaintiff's right to protection from invasions of her physical integrity to the defendant's freedom to act: see R. Sullivan, "Trespass to the Person in Canada: A Defence of the Traditional Approach" (1987), 19 *Ottawa L. Rev.* 533, at p. 546. Although I do not necessarily accept all of Sullivan's contentions, I agree with her characterization, at p. 551, of trespass to the person as a "violation of the plaintiff's right to exclusive control of his person." This right is not absolute, because a defendant who violates this right can nevertheless exonerate himself by proving a lack of intention or negligence: *Cook* [*v. Lewis* [1951] S.C.R. 830 (S.C.C.)], at p. 839, *per* Cartwright J. Although liability in battery is based not on the defendant's fault, but on the violation of the plaintiff's right, the traditional approach will not impose liability without fault because the violation of another person's right can be considered a form of fault. Basing the law of battery on protecting the plaintiff's physical autonomy helps explain why the plaintiff in an action for battery need prove only a direct interference, at which point the onus shifts to the person who is alleged to have violated the right to justify the intrusion, excuse it or raise some other defence. ***

15. *** [W]e should not lightly set aside the traditional rights-based approach to the law of battery that is now the law of Canada. The tort of battery is aimed at protecting the personal autonomy of the individual. Its purpose is to recognize the right of each person to control his or her body and who touches it, and to permit damages where this right is violated. The compensation stems from violation of the right to autonomy, not fault. When a person interferes with the body of another, a *prima facie* case of violation of the plaintiff's autonomy is made out. The law may then fairly call upon the person thus implicated to explain, if he can. If he can show that he acted with consent, the *prima facie* violation is negated and the plaintiff's claim will fail. But it is not up to the plaintiff to prove that, in addition to directly interfering with her body, the defendant was also at fault. ***

REFLECTION:

- *What degree of intention does an action in trespass entail—is it intention to do an act that interferes with the plaintiff, intention to harm the plaintiff, or is intent irrelevant? Who bears the burden of proof?*
- *According to McLachlin J., what principle lies at the heart of the trespass torts—autonomy or fault? Why?*

2.1.4 Olsen v. Olsen [2006] BCSC 560

British Columbia Supreme Court – 2006 BCSC 560

STROMBERG-STEIN J.:

(i) Civil liability of children

20. Unlike the criminal law, which absolves children under the age of twelve from criminal liability, there is

no age limit under which children are automatically excused from civil liability for intentional torts. A child's age may be a factor in determining liability, but age is only relevant if it demonstrates that the child was not capable of forming the intent required to commit an intentional tort: *Pollock v. Lipkowitz* (1970), 17 D.L.R. (3d) 766, [1970] M.J. No. 171 (Man. Q.B.). A.M. Linden explained in his text, *Canadian Tort Law*, 7th ed. (Markham: Butterworths Canada Ltd., 2001) at p. 38:

> Youth in itself is not the significant factor, but rather how it affects the defendant's capacity to form the requisite intention for liability. Children may be excused from liability for intentional torts if they are incapable of forming the specific intent required to commit the tort in question, but they will be held liable if they are capable.

21. There are cases where children have been excused from civil liability, where the courts have found that the children were too young to have acted with intention: *Walmsley v. Humenick*, [1954] 2 D.L.R. 232 (B.C. S.C.); *Tillander v. Gosselin* (1966), [1967] 1 O.R. 203, 60 D.L.R. (2d) 18 (Ont. H.C.).

22. Thus, the real issue in this case is whether the defendant was capable of forming the intent required for an action in battery. ***

(ii) The level of intent required for the tort of battery ***

24. The courts have struggled with the question of what level of intent ought to be required for the contact to be considered "intentional". Very early common law cases dealing with trespass to the person applied a strict rule that conduct was intentional if it was the act of a conscious mind, acting under its own volition: *Scott v. Shepherd* (1772), 2 Black. W. 892, 96 E.R. 525 (Eng. K.B.).

25. In later years, some courts moved away from this strict definition of "intention", and excused defendants who, because of their age or mental capacity, were incapable of appreciating the nature and quality of their actions: see *Tillander*, a case involving a three-year-old defendant; and *Canada (Attorney General) v. Connolly* (1989), 41 B.C.L.R. (2d) 162, 64 D.L.R. (4th) 84 (B.C. S.C.) and *Lawson v. Wellesley Hospital* (1975), 9 O.R. (2d) 677, 61 D.L.R. (3d) 445 (Ont. C.A.), cases involving defendants who suffered from mental illness.

26. The Supreme Court of Canada in *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 SCR 551 favoured the stricter, traditional rule. In finding that this rule remains appropriate in the modern law of Canada, the court emphasized that the purpose of the tort of battery is to protect an individual's right to personal autonomy and physical inviolability. The court held that liability is based on proof of a violation of those rights; it is not based on the defendant's level of culpability. ***

27. This analysis is consistent with the many cases of medical battery where a doctor who performs a medical procedure without the patient's valid consent may be found liable despite having no intention to cause injury or harm. Plaintiffs are entitled to compensation for the harm they suffer when their right to personal autonomy is violated whether or not the defendant intended to cause them any harm.

28. Based on this traditional approach, the plaintiff need only prove direct physical interference with his body to establish a *prima facie* case of battery. He is not obligated to prove that the defendant was also at fault: *Scalera* at [15]. ***

REFLECTION:

- *Why does tort law only hold liable those who have capacity to appreciate the nature and quality of their actions? Is it fair that a plaintiff is not compensated for harms inflicted by a defendant who lacks capacity?*

2.1.5 Cross-references

- *Letang v. Cooper* [1964] EWCA Civ 5, [10]-[11], [29]-[30]: §1.3.3.
- *Peter Ballantyne Cree Nation v. Canada* [2016] SKCA 124, [132]: §7.1.4.
- *Fiala v. MacDonald* [2001] ABCA 169, [29]-[53]: §14.1.4.2.

2.1.6 Further material

- A. Mogyoros, "Deconstructing Directness in Canada: A Critical Evaluation of the Role of Directness in the Tort of Battery" (2013) 21 Tort L Rev 24.
- M.I. Hall, "Beyond the King's Peace: Direct Interferences with the Person as Tortious Interferences with Autonomy" (2024) 3 Supreme Court L Rev (3d) (*forthcoming*).

2.2 Battery

Holder v. State of South Australia [2018] SADC 83, aff'd [2019] SASCFC 135

17. Battery may be defined as a direct act of the defendant which has the effect of causing contact with the body of the plaintiff without the latter's consent. Battery is usually brought only for intentional acts, though actions for reckless or even careless threats are not precluded.[25]

18. Any physical contact, however slight, is capable of constituting a battery, but the contact must be offensive in the sense that it goes beyond that which is part of the 'ordinary incidents of social intercourse' or that which is 'generally acceptable in the ordinary conduct of daily life'.[26] It is not a requirement that the defendant intended the plaintiff any harm or *** that the plaintiff suffered harm in fact.[27] ***

2.2.1 Gokey v. Usher & Parsons [2023] BCSC 1312

British Columbia Supreme Court – 2023 BCSC 1312

✗**REF: §2.3.3, §4.2.3, §5.2.6, §7.1.2, §9.3.4, §9.4.3, §9.5.4, §9.8.2.1, §10.2.1, §20.8.1, §21.1.3**

PUNNETT J.:

1. The plaintiffs and defendants became neighbours in Sandspit, British Columbia on Haida Gwaii in July 1997. ***

2. Initially, the parties were neighbourly but after a few years that neighbourly relationship ended. Matters significantly deteriorated over the issue of a shared well for which the defendants agreed to grant an easement to the plaintiffs. The easement documents were never signed by the plaintiffs. Litigation ensued in Provincial Court. Matters then deteriorated further, leading to the present litigation.

3. In this action, the plaintiffs claim assault, invasion of privacy, harassment and/or infliction of mental suffering, intimidation, nuisance and trespass. The plaintiffs seek injunctive relief and damages. ***

5. *** [The defendants by counterclaim] seek an order respecting removal of structures placed on the easement area, as well as general, punitive and aggravated damages against the plaintiffs for nuisance, trespass, assault and battery and costs. ***

7. Mr. Gokey was the sole witness for the plaintiffs. The defendants were both witnesses. In addition, they called two other residents of Sandspit: Carol Wagner, the neighbour of the defendants on the other side of their property from Mr. and Mrs. Gokey, and Lori Wilson, who testified to a conversation she heard Mr. Gokey have at a local restaurant where she was a server. ***

Assault and Battery ***

162. The defendants refer to *Mittenen v. Dudley*, 2015 BCSC 2247, where Justice Verhoeven described

[25] F. Trindade and P. Cane, *The Law of Torts in Australia*, Oxford University Press 3rd ed. at 27. [See in Canada, E. Veitch, "The Many Facets of *Cook v. Lewis*" (2010) 34 Manitoba LJ 287.]
[26] *Slaveski v. State of Victoria* [2010] VSC 441 at [223] (Kyrou J).
[27] *Carter v. Walker* (2010) 32 VR 1 (Victoria Court of Appeal) at [215]. See also *Cowell v. Corrective Services Commission of NSW* (1988) 13 NSWLR 714 at 743 (Clarke JA); *Wilson v. Pringle* [1987] QB 237 at 249.

the tort of assault and battery:

> 76. I described the tort of assault and battery in a decision I rendered in 2009, *McBeth-Kearns v. Marples*, 2009 BCSC 802, at para. 67:
>
> > Assault is the intentional creation of the apprehension of imminent harmful or offensive contact. Battery consists of intentionally causing a harmful or offensive contact with another person. Assault should be distinguished from battery, although the two are often blurred together and called "assault": Allen M. Linden and Bruce Feldthusen, *Canadian Tort Law*, 8th ed. (LexisNexis Butterworths, 2006) at 46. ***

163. Mr. Gokey alleges Mr. Usher assaulted him on April 14, 2015, when Mr. Usher attended his property to complain about the noise of their ["excessively loud" outside] phone ringer and low water alarm and serve documents in the Provincial Court proceeding.

164. Mr. Gokey testified that Mr. Usher entered his property and started circling him rapidly "like a rooster" so he put his arm on his shoulder and asked him to leave. He alleges Mr. Usher then struck him with a backhanded blow, breaking his glasses and bloodying his nose. He stated that Mr. Usher was preparing to take another punch so he responded to this threat by taking Mr. Usher to the ground, then laying across him and putting his arm across his neck, choking him until he was blue in the face; he only let him up once Mr. Usher agreed to leave his property. Mr. Gokey denies the alarm was sounding by then.

165. Mr. Usher stated he entered the plaintiff's property as the alarm had been going off all day and at the suggestion of the RCMP he went over to ask Mr. Gokey to turn down the alarm. He also had documents to serve on Mr. Gokey. A summary prepared by Mr. Usher shortly after the incident noted that Mr. Gokey told Mr. Usher he would turn the alarm off after the system finished being flushed. Mr. Usher then noted that he reached into his pocket to serve Mr. Gokey with some Court papers being his application to a judge in the Provincial Court, and that Mr. Gokey told him he could not serve him. When he told Mr. Gokey he could and took out his cell phone to take a photo to confirm service, Mr. Gokey ordered Mr. Usher off his property, bumped him with his chest and stated he did not want to hurt him. Mr. Gokey then pushed him, struck him twice, hit him again and pushed him down. Mr. Usher stated he grabbed for Mr. Gokey's glasses and pulled them off as he was on his back on the ground. He then got up and left the property.

166. The evidence of Mr. Usher is to be preferred over that of Mr. Gokey because firstly I have found Mr. Usher credible and Mr. Gokey not credible. Mr. Gokey initiated physical contact. In addition, Mr. Usher minimized the assault by Mr. Gokey whereas Mr. Gokey described his actions as more serious. He also described the whole incident as "a blur" to him. He did admit that he placed his arm on Mr. Usher initially. Mr. Gokey being the aggressor is more consistent with his behavior and his evidence regarding aggressive actions such as the January 8, 2022 incident where he stated he stood his ground and that he was "asserting the Irish" in him when he stood in front of Mr. Usher's snow plow truck. The plaintiff clearly likes to be perceived as a "tough guy". Indeed, he appears to enjoy confrontations ***.

167. I am satisfied Mr. Gokey did not strike Mr. Usher in self-defence. Mr. Gokey pushed and struck him because he did not like Mr. Usher being on his property nor did he like being served. ***

169. I am satisfied the tort of assault and battery by Mr. Gokey of Mr. Usher has been established on a balance of probabilities. ***

REFLECTION:

- *What standard of proof applies in civil cases? How does it differ from the criminal standard?*
- *In his counterclaim against Gokey, should Usher have pleaded his cause of action as an assault, a battery, or both? Having regard to the discussion in Letang v. Cooper (§1.3.3), does it matter?*
- *On what basis did Punnett J. determine that the defendants' evidence was more credible than Gokey's?*[28]
- *Suppose the judge had accepted Gokey's version of events. On his account, would putting his arm on Usher's shoulder to ask him to leave have been a battery? Would putting Usher in a chokehold in response to Usher's*

[28] See S. Foward, "Bitter Sandspit neighbour case ends in court after years of feuding" The Northern View (Aug 4, 2023).

alleged attack on him have satisfied the elements of self-defence (§6.4)?

2.2.2 Kohli v. Manchanda [2008] INSC 42

Supreme Court of India – [2008] INSC 42

✗**REF: §6.7.3.1, §18.1.1.1**

RAVEENDRAN J. (FOR THE COURT): ***

2. On May 9, 1995, the appellant [Samira Kohli], an unmarried woman aged 44 years, visited the clinic of the first respondent [Dr. Prabha Manchanda] (for short "the respondent") complaining of prolonged menstrual bleeding for nine days. The respondent examined and advised her to undergo an ultrasound test on the same day. After examining the report, the respondent had a discussion with appellant and advised her to come on the next day (May 10, 1995) for a laparoscopy test under general anesthesia, for making an affirmative diagnosis.

3. Accordingly, on May 10, 1995, the appellant went to the respondent's clinic with her mother. On admission, the appellant's signatures were taken on (i) admission and discharge card; (ii) consent form for hospital admission and medical treatment; and (iii) consent form for surgery. The Admission Card showed that admission was "for diagnostic and operative laparoscopy on May 10, 1995." The consent form for surgery filled by Dr. Lata Rangan (respondent's assistant) described the procedure to be undergone by the appellant as "diagnostic and operative laparoscopy. Laparotomy may be needed". Thereafter, appellant was put under general anesthesia and subjected to a laparoscopic examination. When the appellant was still unconscious, Dr. Lata Rengen, who was assisting the respondent, came out of the Operation Theatre and took the consent of appellants mother, who was waiting outside, for performing hysterectomy under general anesthesia. Thereafter, the Respondent performed a abdominal hystecrectomy (removal of uterus) and bilateral salpingo-oopherectomy (removal of ovaries and fallopian tubes).

4. *** The appellant alleged that respondent was negligent in treating her; that the radical surgery by which her uterus, ovaries and fallopian tubes were removed without her consent, when she was under general anesthesia for a Laparascopic test, was unlawful, unauthorized and unwarranted; that on account of the removal of her reproductive organs, she had suffered premature menopause necessitating a prolonged medical treatment and a Hormone Replacement Therapy (HRT) course, apart from making her vulnerable to health problems by way of side effects. The compensation claimed was for the loss of reproductive organs and consequential loss of opportunity to become a mother, for diminished matrimonial prospects, for physical injury resulting in the loss of vital body organs and irreversible permanent damage, for pain, suffering emotional stress and trauma, and for decline in the health and increasing vulnerability to health hazards. ***

6. *** As she was intending to marry within a month and start a family, she would have refused consent for removal of her reproductive organs and would have opted for conservative treatment, had she been informed about any proposed surgery for removal of her reproductive organs.

7. When the appellant was under general anaesthesia, respondent rushed out of the operation theatre and told appellant's mother that she had started bleeding profusely and gave an impression that the only way to save her life was by performing an extensive surgery. Appellant's aged mother was made to believe that there was a life threatening situation, and her signature was taken to some paper. Respondent did not choose to wait till appellant regained consciousness, to discuss about the findings of the laparoscopic test and take her consent for treatment. The appellant was kept in the dark about the radical surgery performed on her. She came to know about it, only on May 14, 1995 when respondent's son casually informed her about the removal of her reproductive organs. When she asked the respondent as to why there should be profuse bleeding during a Laparoscopic test (as informed to appellant's mother) and why her reproductive organs were removed in such haste without informing her, without her consent, and without affording her an opportunity to consider other options or seek other opinion, the respondent answered rudely that due to her age, conception was not possible, and therefore, the removal of her reproductive organs did not make any difference. ***

Questions for consideration

13. On the contentions raised, the following questions arise for our consideration: (i) Whether informed consent of a patient is necessary for surgical procedure involving removal of reproductive organs? If so what is the nature of such consent? (ii) When a patient consults a medical practitioner, whether consent given for diagnostic surgery, can be construed as consent for performing additional or further surgical procedure—either as conservative treatment or as radical treatment—without the specific consent for such additional or further surgery. (iii) Whether there was consent by the appellant, for the abdominal hysterectomy and Bilateral Salpingo-oopherectomy (for short AH-BSO) performed by the respondent? *** (vi) Whether the Respondent is guilty of the tortious act of negligence/battery amounting to deficiency in service, and consequently liable to pay damages to the appellant.

Re: Question No.(i) and (ii) ***

15. The basic principle in regard to patient's consent may be traced to the following classic statement by Justice Cardozo in *Schoendorff v. Society of New York Hospital* (1914) 211 NY 125:

> "Every human being of adult years and sound mind has a right to determine what should be done with his body; and a surgeon who performs the operation without his patient's consent, commits an assault for which he is liable in damages."

This principle has been accepted by English court also. In *Re: F* 1989 (2) All ER 545 [§6.7.3], the House of Lords while dealing with a case of sterilization of a mental patient reiterated the fundamental principle that every person's body is inviolate and performance of a medical operation on a person without his or her consent is unlawful. The English law on this aspect is summarised thus in *Principles of Medical Law* (published by Oxford University Press, Second Edition, edited by Andrew Grubb, Para 3.04, Page 133):

> "Any intentional touching of a person is unlawful and amounts to the tort of battery unless it is justified by consent or other lawful authority. In medical law, this means that a doctor may only carry out a medical treatment or procedure which involves contact with a patient if there exists a valid consent by the patient (or another person authorized by law to consent on his behalf) or if the touching is permitted notwithstanding the absence of consent."

16. The next question is whether in an action for negligence/battery for performance of an unauthorized surgical procedure, the Doctor can put forth as defence the consent given for a particular operative procedure, as consent for any additional or further operative procedures performed in the interests of the patient. ***

17. It is quite possible that if the patient been conscious, and informed about the need for the additional procedure, the patient might have agreed to it. It may be that the additional procedure is beneficial and in the interests of the patient. It may be that postponement of the additional procedure (say removal of an organ) may require another surgery, whereas removal of the affected organ during the initial diagnostic or exploratory surgery, would save the patient from the pain and cost of a second operation. Howsoever practical or convenient the reasons may be, they are not relevant. What is relevant and of importance is the inviolable nature of the patient's right in regard to his body and his right to decide whether he should undergo the particular treatment or surgery or not. Therefore at the risk of repetition, we may add that unless the unauthorized additional or further procedure is necessary in order to save the life or preserve the health of the patient and it would be unreasonable (as contrasted from being merely inconvenient) to delay the further procedure until the patient regains consciousness and takes a decision, a doctor cannot perform such procedure without the consent of the patient. ***

37. The summery of the surgical procedure (dictated by respondent and handwritten by her assistant Dr. Lata Rangan) furnished to the appellant also confirms that no emergency or life threatening situation developed during laparoscopy. ***

40. The admission card makes it clear that the appellant was admitted only for diagnostic and operative laparoscopy. *** The consent form shows that the appellant gave consent only for diagnostic operative laparoscopy, and laparotomy if needed. ***

44. When the oral and documentary evidence is considered in the light of the legal position discussed above while answering questions (i) and (ii), it is clear that there was no consent by the appellant for conducting hysterectomy and bilateral salpingo-oopherectomy.

45. The Respondent next contended that the consent given by the appellant's mother for performing hysterectomy should be considered as valid consent for performing hysterectomy and salpingo-oopherectomy. The appellant was neither a minor, nor mentally challenged, nor incapacitated. When a patient is a competent adult, there is no question of someone else giving consent on her behalf. There was no medical emergency during surgery. The appellant was only temporarily unconscious, undergoing only a diagnostic procedure by way of laparoscopy. The respondent ought to have waited till the appellant regained consciousness, discussed the result of the laparoscopic examination and then taken her consent for the removal of her uterus and ovaries. In the absence of an emergency and as the matter was still at the stage of diagnosis, the question of taking her mother's consent for radical surgery did not arise. Therefore, such consent by mother cannot be treated as valid or real consent. Further a consent for hysterectomy, is not a consent for bilateral salpingo-ooperectomy. ***

Re: Question No.(vi)

54. In view of our finding that there was no consent by the appellant for performing hysterectomy and salpingo-oopherectomy, performance of such surgery was an unauthorized invasion and interference with appellant's body which amounted to a tortious act of assault and battery and therefore a deficiency in service. But as noticed above, there are several mitigating circumstances. The respondent did it in the interest of the appellant. As the appellant was already 44 years old and was having serious menstrual problems, the respondent thought that by surgical removal of uterus and ovaries she was providing permanent relief. It is also possible that the respondent thought that the appellant may approve the additional surgical procedure when she regained consciousness and the consent by appellant's mother gave her authority. This is a case of respondent acting in excess of consent but in good faith and for the benefit of the appellant. ***

55. We accordingly allow this appeal *** and allow the appellant's claim in part.

REFLECTION:

- *How were the elements of battery established in this case? What arguable defences were available to Dr. Manchanda? Why did the defences not succeed on the facts?*
- *Should it matter that Dr. Manchanda thought she was acting in her patient's best interests and didn't mean to harm her? Of what relevance were the "mitigating circumstances" the Court identified? Is the Court's characterisation of those circumstances compelling?*

2.2.3 Walker v. Metropolitan Police Comm'r [2014] EWCA Civ 897

England and Wales Court of Appeal – [2014] EWCA Civ 897

✗**REF: §2.4.4, §9.1.1**

RIX L.J. (RIMER AND TOMLINSON L.JJ. concurring):

1. On 12 July 2008 at shortly before 4pm, the claimant, Mr Alexander Walker, got into a fight with the police in Rita Road, London SW8. The incident arose out of a complaint that he had hit his partner, Ms Cadice Lecky. On arrival of the police, Ms Lecky shouted: "Fucking arrest him. He punched me. Get him the fuck out of here." Less than two and a half minutes later, the incident was over, with Mr Walker taken off to the police station in handcuffs. There he was detained for 7 hours before being released on bail. The custody record stated that he had been arrested for "affray, assault police officer". On 23 September 2008 Mr Walker was charged with assault of a police officer in the execution of his duty. He stood trial in Camberwell Green Magistrates' Court on 20-21 April 2009 and was acquitted following the close of the prosecution case, on the ground that his initial detention had been unlawful. It followed that the charge that he had assaulted a police officer in the execution of his duty failed on an essential ingredient of the offence. The district judge found that the police officer concerned, PC Adams, had restricted Mr Walker's movements in a doorway,

without intending or purporting to arrest him, thereby detaining him unlawfully, and that Mr Walker's reactions were reasonable.

2. It was almost two years later that Mr Walker's solicitors wrote a letter of claim, dated 11 February 2011. His claim form was issued on 2 July 2011. In it he claimed damages for false imprisonment, assault, and malicious prosecution. The trial of that civil claim took place before a judge alone, His Honour Judge Freeland QC, in the Central London County Court, between 1 and 5 July 2013. The judge's reserved and detailed judgment was given on 1 August 2013. Mr Walker's claim failed totally. He rejected Mr Walker's evidence and accepted the police evidence. Mr Walker now appeals with the limited leave of Vos LJ. He was refused permission to challenge the judge's general findings, but his appeal is concerned with three comparatively narrow points arising out of his initial detention and arrest, which, as found by the judge, had preceded the major part of the fight. I should explain that his arrest, although completely secured only after he had been overpowered and handcuffed, had been initiated before the fight and was the catalyst of the violence which then ensued. ***

8. The judge's critical findings were *** in favour of the police, and I set them out below:

> "***120. … I have concluded in the end without doubt that the claimant was aggressive and abusive towards Constable Adams. The claimant was told twice in a measured way to calm down, but he did not. He was and remained in an agitated state and in a state of temper. He threatened to assault and bang PC Adams. He pushed him quite violently in the chest …
>
> 121. I am fully satisfied that very shortly after PC Adams arrested the claimant for a public order offence [**§6.6**] and I am quite sure that he had section 5 [of the *Public Order Act 1986*] in mind, but matters escalated very quickly because of the claimant's violence and his temper …
>
> 122. They fell over the large wall … I am fully satisfied, having considered this issue with great care, that he bit Constable Adams twice, as the officer alleges … to the forearm and ring finger as described by the officer.
>
> 123. I am also and equally satisfied by a wide margin that Constable Adams struck the claimant only a single blow to the face and he did not strike him two or three blows. I am fully satisfied that the blow was in all the circumstances proportionate, reasonable and not excessive. In my judgment, it was justified and not unreasonable. ***" ***

11. Moreover it was at trial and is again on this appeal submitted on Mr Walker's behalf, that *** PC Adams [failed] to effect a lawful arrest at the time when, on PC Adams's evidence, he did purport to arrest Mr Walker, namely immediately before the fight broke out. As to that submission, two points survive to this appeal, which are raised pursuant to section 28(3) of the *Police and Criminal Evidence Act 1984* ("*PACE*"). That provides that "no arrest is lawful unless the person arrested is informed of the ground for the arrest at the time of, or as soon as practicable after, the arrest".[29] It is said that the judge was wrong to have accepted that PC Adams gave any reason at all for his arrest; alternatively, it is said that the reason which PC Adams said he gave ("public order") was an insufficient statement of the ground for arrest. ***

The jurisprudence

17. The leading case is recognised as being *Collins v. Wilcock* [1984] 1 WLR 1172, (1984) 79 Cr App R 229, [1984] 3 All ER 374, and Robert Goff LJ's judgment there considered in detail the jurisprudence up to that time. The case concerned a woman who was suspected of soliciting in the street for the purposes of prostitution. The police asked her to get into their car for the purpose of being questioned, but she walked away. A policewoman followed her, but the woman continued to ignore her. The policewoman then took hold of the woman's arm to detain her: the woman swore at her and scratched her. The woman was convicted of assaulting a police officer in the execution of her duty. Her appeal succeeded on the ground that, save when exercising a power of arrest, a police constable had no greater powers than a member of the public to detain another: therefore anything that went beyond generally accepted physical contact was

[29] Compare in Canada: "Section 10(a)—Right to be informed of reasons for detention or arrest" in *Charterpedia* (Government of Canada, 2018); *R. v. Boliver*, 2014 NSCA 99, [15].

a battery, the detention was unlawful, and the officer was not acting in the execution of her duty. That was what had happened in the instant case.

18. Robert Goff LJ considered the matter as rooted in principle as follows (at 1177A-D):

> "*** The fundamental principle, plain and incontestable, is that every person's body is inviolate. It has long been established that any touching of another person, however slight, may amount to a battery … as Blackstone wrote in his *Commentaries*, 17th ed. (1830), vol. 3, p. 120:
>
> > "the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every person's body being sacred, and no other having the right to meddle with it, in any the slightest manner."
>
> The effect is that everybody is protected not only against physical injury but against any form of physical molestation."

19. Robert Goff LJ then went on to show how the law nevertheless in a pragmatic way created exceptions implied from the consent of people to the everyday interaction of physical contact, such as jostling in a busy place, or a hand gripped in friendship, or a friendly slap on the back. Such cases were now regarded as "falling within a general exception embracing all physical contact which is generally acceptable in the ordinary contact of daily life" (at 1177G). But—

> "a distinction is drawn between a touch to draw a man's attention, which is generally acceptable, and a physical restraint, which is not. So we find Parke B observing in *Rawlings v. Till* (1837) 3 M. & W. 28, 29, with reference to *Wiffin v. Kincard*, that "There the touch was merely to engage [a man's] attention, not to put a restraint on his person." Furthermore, persistent touching to gain attention in the face of obvious disregard may transcend the norms of acceptable behaviour, and so be outside the exception …" (at 1178B).

20. Robert Goff LJ then turned to the application of the principle to the case of police officers going about their duties. He said:

> "The distinction drawn by Parke B. in *Rawlings v. Till* is of importance in the case of police officers. Of course, a police officer may subject another to restraint when he lawfully exercises his power of arrest: and he has other statutory powers, for example, his power to stop, search and detain persons under section 66 of the *Metropolitan Police Act 1839* (2 & 3 Vict. C. 47), with which we are not concerned. But, putting such cases aside, police officers have for present purposes no greater rights than ordinary citizens. It follows that, subject to such cases, physical contact by a police officer with another person may be unlawful as a battery, just as it might be if he was an ordinary member of the public. But a police officer has his rights as a citizen, as well as his duties as a policeman. A police officer may wish to engage a man's attention, for example if he wishes to question him. If he lays his hand on the man's sleeve or taps his shoulder for that purpose, he commits no wrong. He may even do so more than once; for he is under a duty to prevent and investigate crime, and so his seeking further, in the exercise of that duty, to engage a man's attention in order to speak to him may in the circumstances be regarded as acceptable (see *Donnelly v. Jackman* [1970] 1 W.L.R. 562). But if, taking into account the nature of his duty, his use of physical contact in the face of non-co-operation persists beyond generally acceptable standards of conduct, his action will become unlawful; and if a police officer restrains a man, for example by gripping his arm or his shoulder, then his action will also be unlawful, unless he is lawfully exercising his power of arrest. A police officer has no power to require a man to answer him, though he has the advantage of authority, enhanced as it is by the uniform which the state provides and requires him to wear, in seeking a response to his inquiry. What is not permitted, however, is the unlawful use of force or the unlawful threat (actual or implicit) to use force; and, excepting the lawful exercise of his power of arrest, the lawfulness of a police officer's conduct is judged by the same criteria as are applied to the conduct of any ordinary citizen of this country" (at 1178D-H).

21. Robert Goff LJ considered some previous jurisprudence in the following passage (at 1179A-F):

> "In *Kenlin v. Gardner* [1967] 2 Q.B. 510 it was held that the action by police officers in catching hold of two schoolboys was performed not in the course of arresting them but for the purpose of detaining them for questioning and so was unlawful (see *per* Winn LJ at p. 519). Similarly, in *Ludlow v. Burgess* (1971) 75 Cr.App.R. 227, 228 it was held that "this was not a mere case of putting a hand on [the defendant's] shoulder, but it resulted in the detention of [the defendant] against his will", so that the police officer's act was "unlawful and a serious interference with the citizen's liberty" and could not be an act performed by him in the execution of his duty. ***" ***

Was the purported arrest for "public order" a valid arrest within section 28(3) of *PACE*?

36. Mr Metzer's first point under this issue was that the arrest was unlawful because PC Adams should not have been believed when he said that he had given as his reason "public order" and was thinking of section 5 when he arrested Mr Walker just prior to the outbreak of the fight. ***

38. *** I do not feel in any way able to go behind the judge's finding that "PC Adams arrested the claimant for a public order offence and I am quite sure that he had section 5 in mind" (at para [121]). ***

39. Mr Metzer's second point was that, even so, what was found to have been said did not amount to an adequate performance of the requirements of section 28(3) of *PACE*. ***

43. My mind has wavered on this, because "public order" can denote a wide variety of offences, some much more serious than others: see the 1986 Act. Section 5, let us say "disorderly conduct", is a merely summary offence, unlike other offences in the Act. However, as Clarke LJ said in *Taylor* [*v. Chief Constable of Thames Valley Police* [2004] EWCA Civ 858] at para [35]:

> "Each case depends upon its own facts. It has never been the law that the arrested person must be given detailed particulars of the case against him. He must be told why he is being arrested."

In the particular circumstances of this case Mr Walker must have been fully aware that he was being arrested for his conduct in the face of PC Adams and that this was regarded as being a public order offence. It seems to me that that is here a legally and factually adequate explanation of the reason for his arrest. Although in some situations legal labels may matter more than in others, I do not think that the particular legal label of a particular offence matters so much if the arrested person knows that he is being arrested for the conduct he has immediately carried out, a fortiori in the face of the arresting officer, and after warnings that such conduct may lead to his arrest.

Conclusion

44. In sum, I would *** dismiss [Mr Walker's appeal on the issue of whether the purported arrest for "public order" was a valid arrest]. ***

REFLECTION:

- *What is the ratio decidendi of Collins v. Wilcock? Where is the line between acceptable physical contact and battery? Was Goff L.J.'s judgment applied or distinguished in this case?*
- *Was Officer Adams' punching of Walker in the face prima facie a battery?*
- *Why was Officer Adams not liable for the tort of battery? What defence(s) did Officer Adams have?*[30]

2.2.4 Binsaris v. Northern Territory [2020] HCA 22

High Court of Australia – [2020] HCA 22

✗**REF: §6.6.4, §6.7.1.2**

KIEFEL C.J. AND KEANE J.:

[30] Compare *Elmardy v. Toronto Police Services Board*, 2017 ONSC 2074; G. Giroday, "Damages awarded in racial profiling case" Law Times (Sep 11, 2017).

1. The Don Dale Youth Detention Centre is located in the Northern Territory. It was at the relevant time approved as a youth detention centre under s 148 of the *Youth Justice Act* (NT). On 21 August 2014 the appellants and others were detained in the Behavioural Management Unit of the detention centre when another detainee, Jake Roper, escaped from his cell, damaged property and caused a serious disturbance. The appellants Josiah Binsaris and Ethan Austral participated to the extent of damaging property in their cells. ***

2. The superintendent of the detention centre contacted the Director of Correctional Services, who mobilised members of the Immediate Action Team, which included three prison officers from Berrimah Correctional Centre. Sometime after their arrival at the detention centre it became apparent that the situation, particularly as regards Jake Roper, could not be resolved. The Director of Correctional Services gave a direction to the prison officers that CS gas, a type of tear gas, could be deployed. A warning was read out to Jake Roper. It was not complied with. One of the prison officers deployed CS gas in bursts until Jake Roper ceased the offending conduct. The appellants were also exposed to the CS gas.

3. CS gas is deployed using a CS fogger. A CS fogger is a prohibited weapon under the *Weapons Control Act* (NT).[31] ***

11. The appellants brought proceedings in the Supreme Court of the Northern Territory against the Territory in which they claimed damages for assault and for battery. The primary judge, Kelly J, found the appellants' cases for battery to have been made out with respect to a later incident for the application of spit hoods and leg shackles to all four appellants, and another later incident for the application of spit hoods, leg shackles and handcuffs to three of the appellants.[32] Her Honour dismissed their other claims for assault and battery, including their claims for battery constituted by the use of the CS gas.

12. The principal question in those proceedings so far as concerned those claims was whether the use of CS gas was lawful, in the sense that it was authorised by statute. ***

20. The provisions of the *Weapons Control Act* and the *Prisons Act* did not authorise the use of a CS fogger in the detention centre. Its deployment was unlawful.

21. We agree with the orders proposed by Gordon and Edelman JJ. ***

GAGELER J. (concurring): ***

23. Deployment of the CS gas to subdue Jake Roper led to a common law action in battery being brought against the Northern Territory of Australia in the Supreme Court of the Northern Territory. The action was brought not by Jake Roper but by four other detainees who were exposed to the CS gas in their cells in the Behaviour Management Unit of the Detention Centre. The Northern Territory did not dispute that it was vicariously liable [**§23**] if the exposure of the other detainees to the CS gas constituted battery and did not dispute that their exposure to the CS gas constituted battery in the absence of lawful authority for the deployment of the CS gas. ***

31. The Northern Territory, in my opinion, is also correct in its contention that the findings of the primary judge establish that the deployment of the CS gas was reasonably necessary to restrain conduct by Jake Roper which constituted a breach of the peace. In her careful and comprehensive reasons for judgment, her Honour found that the CS gas "was not used *on* the detainees in their cells" but "for the purpose of temporarily incapacitating Jake Roper so he could be taken back into safe custody … in a way that avoided the risk of serious … injury to Jake Roper and/or the prison officers".[33] She agreed with the contemporaneously formed opinions of the Director and of the prison officers who comprised the Immediate Action Team that "use of the CS gas was the least hazardous option available, constituted the least degree of force which could be used in the circumstances, and carried the least risk of serious injury to Jake Roper

[31] *Weapons Control Act* (NT), s 3 "prohibited weapon"; *Weapons Control Regulations* (NT), reg 3, Sch 2, item 18.
[32] *LO v. Northern Territory* [2017] NTSC 22; (2017) 317 FLR 324.
[33] (2017) 317 FLR 324 at 347-348 [139] (original emphasis). See also at 353 [166].

and to staff".[34] The effect of the deployment of the CS gas on the other detainees was not ignored in that calculus but was, rather, reasonably assessed by the Director and the members of the Immediate Action Team to be outweighed by the risks of serious injury to Jake Roper and to staff. "Despite the fact that the inevitable consequence of using the gas was that detainees who were restrained in their cells would also be exposed to the gas", her Honour found, "it was both reasonable and necessary in the circumstances to use the gas to temporarily incapacitate Jake Roper and so bring the crisis to a close".[35]

32. The upshot is that I accept that the deployment of the CS gas by a member of the Immediate Action Team for the purpose of temporarily incapacitating Jake Roper was within the power of a police officer which the member had under the *Prisons (Correctional Services) Act* when performing his duty as a prison officer of assisting in the emergency situation to which he had been called at the Detention Centre. Being within the power which he had when performing his duty as a prison officer, the deployment was exempt from criminal liability under the *Weapons Control Act* (NT).[36]

33. It follows that I would accept that the power of a police officer which the member of the Immediate Action Team who deployed the CS gas had under the *Prisons (Correctional Services) Act* would provide the Northern Territory with a defence of lawful justification to such common law action in battery as might have been brought against it by Jake Roper. The question is whether that power provides the Northern Territory with a defence of lawful justification to the common law action in battery that has in fact been brought against it by the other detainees who were exposed to the CS gas.

34. Exposure of the other detainees to the CS gas could not be said to have been unintentional. Their exposure was understood by the Director and the members of the Immediate Action Team to be the inevitable consequence of the decision to deploy the CS gas for the purpose of incapacitating Jake Roper and was carefully weighed by the Director in making that decision.

35. Nor could it be said that deployment of the CS gas for the purpose of incapacitating Jake Roper was reasonably necessary to prevent greater harm to the other detainees themselves. Although the primary judge referred to expert evidence concerning the deployment of CS gas in a "hostage situation" ("where gas is deployed to temporarily incapacitate the hostage taker and rescue the hostage or hostages who will also, inevitably, be affected by the gas"),[37] she did not suggest that the emergency situation in the Behaviour Management Unit of the Detention Centre met that description. Her Honour made no finding that Jake Roper presented any risk of harm to any other detainee.

36. Two of the other detainees in the Behaviour Management Unit of the Detention Centre had played no part in creating the emergency situation to which the Immediate Action Team had been called. The other two had themselves engaged in violent and erratic behaviour. By the time the decision was made to deploy the CS gas for the purpose of incapacitating Jake Roper, however, all four of the other detainees were locked in their cells. There they were bystanders to the confrontation between Jake Roper and staff of the Detention Centre playing out in the adjacent exercise yard.

37. Conscious of the proximity of the other four detainees, the Director faced a choice between two evils in making the decision to deploy CS gas for the purpose of incapacitating Jake Roper to bring the emergency situation to an end. On the one hand was the risk of serious harm to Jake Roper and staff of the Detention Centre if CS gas were not deployed. On the other hand was the inevitability of the other detainees being exposed if CS gas were deployed. The Director chose the lesser evil, and the choice he made must be accepted on the findings of the primary judge not only to have been reasonable but also to have been necessary.

38. Mr Walker SC, who appears with Ms Foley and Mr McComish for the other detainees, submits that the common law power of a police officer to use such force as is reasonably necessary to restrain or prevent a breach of the peace confers no common law immunity from liability in battery to a bystander who is injured through the application of that force. He submits that police have no privilege to make "instrumental use" of

[34] (2017) 317 FLR 324 at 349 [152]. See also at 338-340 [86]-[91], 352-353 [165].
[35] (2017) 317 FLR 324 at 352-353 [165].
[36] Section 12(2).
[37] (2017) 317 FLR 324 at 348 [140].

a bystander so as to cause "collateral damage" to the bystander with impunity. Despite a surprising dearth of modern authority on the topic, I believe the submission to be correct. ***

41. The slightest intentional non-consensual interference with the physical integrity of a person can, of course, constitute a battery. Tortious liability for battery is nevertheless adapted to the reality that the price of living in a civil society is that some measure of physical contact must be taken to be "generally acceptable in the ordinary conduct of everyday life".[38] Minor intentional physical contact between bystanders and police engaged in quelling breaches of the peace might sometimes, perhaps often, escape tortious liability on that basis. Examples in the case law include a passenger being bumped on public transport in the course of the conductor removing another drunk and disorderly passenger[39] and members of the public being moved aside in a crowded public place in order to create a corridor for police or emergency services to gain access to an incident.[40]

42. There is, however, a difference between a police officer taking intentional action which involves minor and incidental physical contact with a bystander and a police officer taking intentional action which involves a calculated choice to do an act which it is known will cause harm to a bystander in order to avoid a risk of greater harm to the police officer or to someone else.

49. *** The bystander is entitled to damages at common law to compensate for the harm for the simple reason that the use of force has interfered with the bystander's bodily integrity. The interference is tortious in the absence of a defence. The tortious liability and concomitant entitlement to an award of compensatory damages by a court administering the common law is unaffected by the circumstance that a court administering equity would decline to restrain the tortious but necessitous use of force by pre-emptive injunction.

50. Therefore rejecting the notices of contention, I would allow the appeals and make the consequential orders proposed by Gordon and Edelman JJ. ***

GORDON AND EDELMAN JJ: ***

109. *** The issue here is whether the prison officers committed a battery, which directs attention to whether they acted with positive authority and the possible sources of that authority. Even if the prison officers attending the Detention Centre were within the exemption in s 12(2) of the *Weapons Control Act* (and they were not), any exemption from the prohibition in s 6 would not grant them positive authority to engage in what was a battery. It remains the case that, without any positive authority, such as that conferred in the context of prisons or police prisons by s 62(2) of the *Prisons (Correctional Services) Act*, the use of CS gas on the appellants was a battery and therefore unlawful.

110. For those reasons, the Court of Appeal erred in holding that the deployment of CS gas by a prison officer at the Detention Centre on 21 August 2014 was not an unlawful battery of the appellants. ***

REFLECTION:

- *All of the judges agreed that there had been a battery of the appellants. In what way did Gageler J.'s reasons differ from those of his colleagues? Is Gageler J.'s judgment obiter dicta?*
- *How were the elements of battery established in this case? What arguable defences were available to the prison officers? Why did the defences not succeed on the facts?*
- *Watch the ABC News interview with Jake Roper.[41] Was the rule of law vindicated in this case? Or does this case illustrate systemic problems in the justice system?[42]*

[38] *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at 73 [§6.7.3]. See also *Secretary, Department of Health and Community Services v. JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 233, 265-266, citing *Collins v. Wilcock* [1984] 1 WLR 1172 at 1177; [1984] 3 All ER 374 at 378 [§2.2.3].

[39] See *Spade v. Lynn* (1899) 52 NE 747 at 748.

[40] See *R (Laporte) v. Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105 at 141-142 [83].

[41] "Don Dale Detainee Trying to Turn His Life Around" ABC News (Nov 16, 2017) 📺. See also Law Council of Australia, "Statement on High Court Ruling of Unlawful Use of Force in Don Dale" MediaNet (Jun 3, 2020).

[42] Compare *Richards v. Canada*, 2022 FC 1763; C. Nardi, "Judge awards inmate nearly $200K for abuses and unlawful time in solitary confinement" National Post (Jan 18, 2023).

2.2.5 Cross-references

- *Non-Marine Underwriters, Lloyd's of London v. Scalera* [2000] SCC 24, [8]-[15]: §2.1.3.
- *Wainwright v. Home Office* [2003] UKHL 53, [9], [13]: §3.1.2.
- *PP v. DD* [2017] ONCA 180, [71]: §6.3.2.2.
- *Toews v. Weisner* [2001] BCSC 15, [16]-[25]: §6.3.1.3.
- *Norberg v. Wynrib* [1992] CanLII 65 (SCC), [26]: §6.3.2.1.
- *Crampton v. Walton* [2005] ABCA 81, [1]-[3]: §6.6.1.
- *Slater v. Attorney-General* (No. 1) [2006] NZHC 308, [41]: §8.5.1.

2.2.6 Further material

- R. Sullivan, "Trespass to the Person in Canada: A Defence of the Traditional Approach" (1987) 19 Ottawa L Rev 533.
- B.C. Zipursky, "Moore on Intent and Battery" JOTWELL (Apr 19, 2013).
- N. Moore, "Intent and Consent in the Tort of Battery: Confusion and Controversy" (2012) 61 American U L Rev 1585 (2012).
- The Decibel Podcast, "Why police are rarely charged after killing or injuring someone" (Mar 2, 2023) 🎧.

2.3 Assault

Holder v. State of South Australia [2018] SADC 83, aff'd [2019] SASCFC 135

13. Assault is any direct threat by the defendant that places the plaintiff in reasonable apprehension of an imminent contact with the plaintiff's person either by the defendant or by some person or thing within the defendant's control. Assault is usually brought for intentional threats, although actions for reckless or even careless threats are not precluded.[43]

14. The threat must create in the mind of the plaintiff reasonable apprehension that the threat will be carried out forthwith. However, it is not necessary for the plaintiff to fear the threat, in the sense of being frightened by it. It is enough if the plaintiff apprehends that the threat will be carried out without his or her consent.[44]

15. Physical contact is not an element of assault, however, there must be at least the possibility of physical contact for a threat to constitute an assault. In other words there must be the means of carrying the threat into effect.[45] However, it is not necessary to prove that the defendant in fact intends to carry out the threat.[46] In *White v. South Australia*[47] Anderson J explained the mental element of assault as follows:[48]

> The intention element of assault requires an intention to cause apprehension in *that* plaintiff, putting in them the fear or knowledge and expectation that physical contact will occur. No intention to commit the actual battery is required. A defendant who lacks the requisite intent will still be liable if the plaintiff's apprehension was foreseeable, and recklessness as to causing that apprehension can make the defendant liable.[49]

[43] F. Trindade and P. Cane, *The Law of Torts in Australia*, Oxford University Press 3rd ed. at 42.
[44] *ACN 087 528 774 Pty Ltd v. Chetcuti* (2008) 21 VR 559 at [16] (Hargrave AJA, Ashley and Dodds-Streeton JJA agreeing).
[45] *Stephens v. Myers* (1830) 4 Car. & P 349; 172 ER 735.
[46] *ACN 087 528 774 Pty Ltd v. Chetcuti* (2008) 21 VR 559 at [16] (Hargrave AJA, Ashley and Dodds-Streeton JJA agreeing).
[47] (2010) 106 SASR 521.
[48] (2010) 106 SASR 521 at [365]. (emphasis added)
[49] See also *Rixon v. Star City Pty Ltd* (2001) 53 NSWLR 9 at 114.

16. Words alone may constitute assault if they directly cause the apprehension of imminent physical contact.[50] A conditional threat to use force if something is not done may also amount to an assault. As Balkin and Davis state:[51]

> On the other hand, words accompanying an act may explain away what might otherwise be an assault, as when the defendant in *Tuberville v. Savage*,[52] with hand on sword said: 'if it were not assize time, I would not take such language from you'.
>
> *Tuberville*'s case is not to be taken as establishing a rule that a conditional threat may never amount to assault—it all depends on the circumstances in which it is made and the nature of the condition imposed. In that case the declaration of the intent to kill was made subject to an extraneous condition ('if it were not assize time'), which was known to the other party not to be fulfilled. The unfulfilled condition therefore nullified the threat.[53] If, by comparison, the condition relates to the plaintiff's future conduct and the defendant has no right to impose the condition as, for instance, where victims are told that they will be hit if they move,[54] the defendant will be liable in assault. There is also authority[55] that an assault is committed where the defendant demands, by way of a threat, something to which he or she has a legal right, if the threat is an improper way of enforcing that right. ***

2.3.1 Tuberville v. Savage [1669] EWHC KB J25

BACKGROUND: Quimbee (2022), https://youtu.be/6yhkqA4XjLI

England Court of King's Bench – [1669] EWHC KB J25

The evidence to prove a provocation was, that the plaintiff put his hand upon his sword and said, "If it were not assize-time, I would not take such language from you." The question was if that were an assault.

The Court agreed that it was not; for the declaration of the plaintiff was, that he would not assault him, the Judges being in town; and the intention as well as the act makes an assault. Therefore if one strike another upon the hand, or arm, or breast in discourse, it is no assault, there being no intention to assault; but if one, intending to assault, strike at another and miss him, this is an assault: so if he hold up his hand against another in a threatening manner and say nothing, it is an assault. In the principal case the plaintiff had judgment.

REFLECTION:

- *Tuberville was suing Savage for attacking him, which Savage sought to defend by arguing that he was simply retaliating to Tuberville's provocation. Why was Tuberville's threat found not to be an assault of Savage?*

2.3.2 Stephens v. Myers [1830] EWHC KB J37 (CP)

England Court of Common Pleas – [1830] EWHC KB J37

It appeared, that the plaintiff was acting as chairman, at a parish meeting, and sat at the head of a table, at which table the defendant also sat, there being about six or seven persons between him and the plaintiff. The defendant having, in the course of some angry discussion, which took place, been very vociferous, and interrupted the proceedings of the meeting, a motion was made, that he should be turned out, which was carried by a very large majority. Upon this, the defendant said, he would rather pull the chairman out of the chair, than be turned out of the room; and immediately advanced with his fist clenched toward the chairman, but was stopt by the churchwarden, who sat next but one to the chairman, at a time when he was not near

[50] *Read v. Coker* (1853) 13 CB 850; 138 ER 1437; *R v. Wilson* [1955] 1 All ER 744 at 745.
[51] RP Balkin and JLR Davis, *Law of Torts*, LexisNexis, 5th ed. at [3.19].
[52] (1669) 2 NSWR 451.
[53] Williams, 'Assault and Words' (1957) *Crim LR* 219 at 221.
[54] *Blake v. Barnard* (1840) 9 C & P 626; *Police v. Greaves* (1964) NZLR 295.
[55] *Read v. Coker* (1853) 13 CB 850; Handford 'Tort Liability for Threatening or Insulting Words' (1976) 54 Can. Bar Rev 563 at 567.

enough for any blow he might have meditated to have reached the chairman; but the witnesses said, that it seemed to them that he was advancing with an intention to strike the chairman.

Spankie, Serjt., for the defendant, upon this evidence, contended, that no assault had been committed, as there was no power in the defendant, from the situation of the parties, to execute his threat—there was not a present ability—he had not the means of executing his intention at the time he was stopt.

TINDAL C.J., in his summing up, said: It is not every threat, when there is no actual personal violence, that constitutes an assault, there must, in all cases, be the means of carrying the threat into effect. The question I shall leave to you will be, whether the defendant was advancing at the time, in a threatening attitude, to strike the chairman, so that his blow would almost immediately have reached the chairman, if he had not been stopt; then, though he was not near enough at the time to have struck him, yet if he was advancing with that intent, I think it amounts to an assault in law. If he was so advancing, that, within a second or two of time, he would have reached the plaintiff, it seems to me it is an assault in law. If you think he was not advancing to strike the plaintiff, then only can you find your verdict for the defendant; otherwise you must find it for the plaintiff, and give him such damages as you think the nature of the case requires.

Verdict for the plaintiff. Damages 1s.

REFLECTION:

- *Can there be an assault if the defendant has no practical means of striking the plaintiff? Why?*

2.3.3 Gokey v. Usher & Parsons [2023] BCSC 1312

✗**REF: §2.2.1, §4.2.3, §5.2.6, §7.1.2, §9.3.4, §9.4.3, §9.5.4, §9.8.2.1, §10.2.1, §20.8.1, §21.1.3**

PUNNETT J.: ***

14. In April 2004 the parties [neighbours in Sandspit, British Columbia] agreed to share a well and water system. They entered into a community water use agreement under which they were to share equally in the construction, connection, maintenance and operational costs of the well. It was intended to be shared 50/50 and could be used by the plaintiffs and the defendants for one residential dwelling each. ***

20. In April 2009, Mr. Gokey installed a plywood wall down the centre of the well house despite the defendants asking that he not do so. The wall denied the defendants access to the well controls. They were left without water. ***

Assault Alleged by Ms. Parsons with Chainsaw

170. Mr. Gokey alleges that in April 2009, Ms. Parsons used an electric chainsaw to cut through a plywood wall he had built down the centre of the well house knowing he was on the other side. He alleges when she did so he was behind the wall and fell backwards and that she knew he was there. He also testified the valves controlling water to the defendants were open.

171. Ms. Parsons testified that she had asked him several times during his building of the wall not to put the wall up or she would call the RCMP. She did so but testified the RCMP would not take any action. The wall prevented the defendants from accessing the controls to the water supply from the well. Their water supply had been cut off by Mr. Gokey.

172. She testified she did not know Mr. Gokey was on the other side of the wall when she used an electric chainsaw to cut through the wall so she could turn on the defendants' water supply. ***

174. I accept the evidence of Ms. Parsons that she did not know Mr. Gokey was present. It is not clear why if he was close to the plywood, he would not have been aware of the saw. There is no evidence Ms. Parsons was threatening him. Upon being made aware he was on the other side of the wall, she ceased using the chainsaw. ***

187. I conclude the plaintiff Mr. Gokey has failed to establish on a balance of probabilities that he has been

assaulted in any of the circumstances alleged by him. *** His claims of assault and battery are dismissed. ***

Assault on Ms. Parsons by Mr. Gokey

247. Ms. Parsons testified that on June 10, 2013, she had gone onto the public beach area to rake moss that Mr. Gokey had blown from in front of their properties across Beach Road onto the public beach area, and to put the moss around the trees in the beach area for mulch. Mr. Gokey had then come across onto the beach area and advanced towards her with his leaf blower running. He told her to stop what she was doing and started waving the leaf blower up and down very close to her with mulch getting blown onto her. She says the end of the leaf blower was six inches from her face.

248. She said that he then started making a number of comments about her daughter such as asking whether her daughter had enjoyed having sex with her then-husband and asking questions such as whether Ms. Parsons was a "crack junkie" and making observations about the effects of the supposed use of crack upon her skin and teeth, and about Ms. Parsons and her family being "losers". Her evidence is that Mr. Gokey also commented that "Gord can't get it up". ***

250. Ms. Parsons stated Mr. Gokey's behavior terrified her. Mr. Usher was away at the time. After the incident Ms. Wanger stayed with her for the rest of the day. She was hesitant to the call the RCMP because she feared Mr. Gokey's reaction if she did so, but eventually did so because she considered it was the right thing to do.

251. Mr. Gokey's evidence at trial was that he had made the comment about Ms. Parsons' teeth and her supposed crack usage, but not the other comments. The evidence of Ms. Parsons and Ms. Wagner was credible and reliable with respect to this incident. The comments about Ms. Parsons, her daughter and Mr. Usher were consistent with his pattern of making offensive comments to Ms. Parsons. ***

253. I am satisfied that Mr. Gokey's actions with the leaf blower amounted to an assault as they were threatening, and Ms. Parsons experienced an apprehension of imminent harm. ***

REFLECTION:

- *Having regard to the elements of assault, why did Gokey's claim of assault fail while Parsons' succeeded?*

2.3.4 Tam v. Chan [2014] HKCFI 1480

*Hong Kong Court of First Instance – [2014] HKCFI 1480, **aff'd** [2015] HKCA 126*

✗**REF: §5.2.1, §9.8.2.2, §21.1.2**

DEPUTY JUDGE LINDA CHAN SC: ***

3. The 1st plaintiff (Mrs Tam) and the 2nd plaintiff (Mr Tam) in the Harassment Action are a married couple residing at G/F of 34G [Braga Circuit, Kadoorie Hill, Kowloon, Hong Kong]. The 3rd plaintiff (Ms Tam) is their daughter, who is married to a Mr Chai. Ms Tam and Mr Chai reside at 2/F of 34F. The defendant in both actions (Mr Chan) and his mother (Mrs Chan), who is the 2nd defendant in the Nuisance Action, reside at 1/F of 34F. Although the parties are neighbours, they are not acquainted with each other.

4. Braga Circuit is a residential development with over 50 years' history. It has six adjoining buildings with 34F and 34G forming one block and sharing the same entrance, lobby and stairwell. The other two blocks are 34H/34J and 34K/34L. Each building comprises G/F, 1/F, 2/F, 3/F, penthouse and the basement floor (B/F), with 2/F at the street level while 1/F, G/F and B/F are below street level. ***

6. Each building is separately incorporated. Mrs Tam is the chairman of the incorporated owners (the IO) of 34G. All the IO engage the same management company, which employ watchmen for day and night shifts who are based at the management office located at 34L (the Office).

7. There is no dispute that there are unauthorised building works (the UBWs) and unauthorised structures

at 34F and 34G. Since at least 2005, Mr Chan has been making complaints to the Buildings Department, which led to the issue of statutory orders against various owners including Mr Tam and Mrs Tam.

8. On 16 December 2008, Mr Chan brought two officers of the Buildings Department to inspect certain UBWs and unauthorised structures at 34F and 34G. At the main entrance, Mr Kwok Shek Chun (Mr Kwok), a day-shift watchman, recognised the two officers are from the Buildings Department and requested them to produce their identity cards for registration. However, Mr Chan claimed that the two officers are his friends and refused to let Mr Kwok register their identities. An argument ensued and police were called in to deal with their dispute. As will be seen below, this was one of the many occasions when the parties called the police to deal with disputes involving Mr Chan.

9. While the police officers were making enquiries near the main gate where the dispute took place, Mrs Tam walked passed and asked one of the police officers, Sergeant Wong, what was going on. Shortly afterwards, an argument arose between Mr Chan and Mrs Tam. This event was described by the plaintiffs as "the First Encounter" in the Statement of Claim filed in the Harassment Action (the SOC), and marked the beginning of a series of disputes involving the plaintiffs and Mr Chan and later, Mrs Chan, which are the subject matters of the two actions.

Issues: ***

15. It is the plaintiffs' case that during the First Encounter, without provocation and for reasons unknown to Mrs Tam, Mr Chan shouted obscenities and use vile language loudly towards her. Mr Chan threatened that he would shout and swear at Mrs Tam every time he saw her from then onwards.

16. From the First Encounter up to about 11 March 2010, on each of the five occasions when Mr Chan saw Mr Tam, Mrs Tam and/or Ms Tam, he shouted obscenities and vile language loudly whilst pointing and gesturing towards them in a progressively angry, hostile, and aggressive manner. These occasions are described as the "Further Encounters" in the SOC. On one of these occasions, Mr Chan used a camera to take pictures of Mr Tam and Mrs Tam without their consent.

17. This was followed by two "spray painting incidents" (as defined in the SOC). It is the plaintiffs' case that on 12 March 2010, Mr Chan unlawfully spray-painted on the wall immediately outside the entrance to the premises of Mr Tam and Mrs Tam at G/F of 34G and the adjacent stairwell area with black paint with words "COMMON AREA", "NOT A STORAGE SPACE", "UNAUTHORISED BUILDING WORKS" and "NO BEGGING FOR MONEY". The other incident took place on 11 April 2010 when Mr Chan sprayed-painted the same words (except the last set of words) on the same areas with red paint.

18. The plaintiffs say that the cumulative acts of Mr Chan have caused them to feel distress, to fear for their personal safety, and to feel apprehension of imminent unlawful bodily contact. Such conduct, the plaintiffs contend, constitutes the tort of assault and the tort of harassment against the plaintiffs. The conduct only came to an end when Mr Chan gave the undertaking to the Court to abide by the terms of the injunction sought by the plaintiffs. ***

62. There is no dispute that the elements of the tort of assault are accurately set out in *Clerk & Lindsell on Torts* (20th ed., 2010), at para.15-12 as follows:

> An assault is an act which causes another person to apprehend the infliction of immediate, unlawful, force on his person. The defendant's act must also be coupled with the capacity of carrying the intention to commit a battery into effect. Although in popular language an assault includes a battery, a person may be liable for an assault without being liable for a battery. Thus, '[i]f you direct a weapon, or if you raise your fist, within those limits which given you the means of striking, that may be an assault. … Threats and vile abuse *per se* do not constitute a tortious assault even though conduct designed to cause psychiatric harm constitutes a criminal assault.

63. Threatening conduct may constitute assault. As stated in *Clerk & Lindsell on Torts*, (20th ed., 2010) at para.15-13:

> It is an assault to aim a gun in a hostile manner within shooting distance, although it may be at half

> cock, because the cocking is a momentary operation. Similarly, if a man makes a rush at the claimant so that a blow would almost immediately have reached him, but is stopped before he is near enough to deal a blow, this is an assault. … By contrast, a mere gesture, however menacing, is not actionable if it appears at the time that there is no intention to put the menace into immediate effect. … Similarly, mere threatening words do not constitute an assault.

64. Mr Chain [for the plaintiff] submits that what constitutes assault is determined on an objective basis, so that apprehension of infliction of force must be reasonable in all the circumstances of the case, relying on *Clerk & Lindsell on Torts*, at para.15-12. However, in appropriate circumstances and taking all factors of the case into account, even merely making phone calls and keeping silent can constitute assault (*Wong Wai Hing v. Hui Wei Lee* (unrep., HCA 2901/1998, [2000] HKEC 329) (29 March 2000)[56], at [41] per Sakhrani J). Mr Fong [for the defendant] on the other hand submits that mere threatening words do not constitute an assault and the act alleged to constitute assault must be an act threatening direct physical contact with the plaintiff ***.

65. I do not think there is any real difference in the submissions. Whether the act complained of by the plaintiff constitutes an assault must depend on all the circumstances including the nature of the act and the manner in which it was made and the Court would decide whether such act would put a reasonable person in fear of physical violence. This approach was described by Taylor J in *Barton v. Armstrong* [1969] 2 NSWR 451 at 455:

> I am not persuaded that threats uttered over the telephone are to be properly categorised as mere words. I think it is a matter of the circumstances. To telephone a person in the early hours of the morning, not once but on many occasions, and to threaten him, not in a conversational tone but in an atmosphere of drama and suspense, is a matter that a jury could say was well calculated to not only instill fear into his mind but to constitute threatening acts, as distinct from mere words. If, when threats in this manner are conveyed over the telephone, the recipient has been led to believe that he is being followed, kept under surveillance by persons hired to do him physical harm to the extent of killing him, then why is this not something to put him in fear or apprehension of immediate violence? In the age in which we live threats may be made and communicated by persons remote from the person threatened. Physical violence and death can be produced by acts done at a distance by people who are out of sight and by agents hired for that purpose. I do not think that these, if they result in apprehension of physical violence in the mind of a reasonable person, are outside the protection afforded by the civil and criminal law as to assault. How immediate does the fear of physical violence have to be? In my opinion the answer is it depends on the circumstances. Some threats are not capable of arousing apprehension of violence in the mind of a reasonable person unless there is an immediate prospect of the threat being carried out. Others, I believe, can create the apprehension even if it is made clear that the violence may occur in the future, at times unspecified and uncertain. Being able to immediately carry out the threat is but one way of creating the fear of apprehension, but not the only way. There are other ways, more subtle and perhaps more effective.
>
> Threats which put a reasonable person in fear of physical violence have always been abhorrent to the law as an interference with personal freedom and integrity, and the right of a person to be free from the fear of insult. If the threat produces the fear or apprehension of physical violence then I am of opinion that the law is breached, although the victim does not know when that physical violence may be effected. ***

69. *** [D]uring the First Encounter, without any provocation, Mr Chan shouted and yelled obscenities and used vile language towards Mrs Tam in an aggressive and hostile manner. Mrs Tam shouted back at him whereupon Mr Chan said he would swear and shout at Mrs Tam every time he sees her in future. The Further Encounters were incidents when Mr Chan shouted obscenities and yelled loudly at the plaintiffs using vile language whilst pointing and gesturing towards them in a progressively angry, hostile and aggressive manner. ***

[56] Overturned partially on appeal in [2001] 1 HKLRD 736 on issue of vicarious liability [§23.1].

71. As for the Further Encounters, *** during each of the five occasions, Mr Chan without provocation shouted vile language loudly at the plaintiffs whilst gesturing aggressively and angrily at them and with increasing intensity. ***

72. Both Mrs Tam and Ms Tam describe in their evidence how the conduct of Mr Chan, in particular his aggressive gesture towards them, caused them to feel distress, and fear for their personal safety and physical injury. Having seen how Mr Chan behaved in the video, which was only one of the five occasions complained of by the plaintiffs, I consider that a reasonable person in the circumstances faced by the plaintiffs would be put in fear of physical violence or injury. ***

75. Mrs Tam describes how shocked and scared she and her husband were when they saw the words sprayed outside her premises the next morning after the first spray incident. They became even more scared when they found the same words sprayed outside her premises a month later. In my view, any reasonable person faced with the First Encounter, the Further Encounters and the spray paint incidents would feel very threatened and would be put in fear of physical violence or injury, which is sufficient to constitute the tort of assault. ***

REFLECTION:

- *Having regard to the reasoning in Ahluwalia v. Ahluwalia, did the evidence show that the Tams feared imminent contact, or did they merely have a fear of future harm? Can a clear line be drawn?*

2.3.5 Ahluwalia v. Ahluwalia [2023] ONCA 476

Ontario Court of Appeal – 2023 ONCA 476, leave granted: 2024 CanLII 43115 (SCC)

✗**REF: §3.2.2, §5.2.5, §9.4.4, §9.5.5**

BENOTTO J.A. (TROTTER J.A. AND ZARNETT J.A. concurring):

1. Intimate partner violence is a pervasive social problem. It takes many forms, including physical violence, psychological abuse, financial abuse and intimidation. In Canada, nearly half of women and a third of men have experienced intimate partner violence and rates are on the rise.[57] What was once thought to be a private matter is now properly recognized for its widespread and intergenerational effects.

2. The issue before the court is not whether intimate partner violence exists. It does. It is not about whether societal steps should be taken to ameliorate the problem. They should be. The issue is whether, in the context of family law court proceedings—where numerous and varied remedies already exist—a tort specific to "family violence" should be created.

3. The trial judge found that the marriage here was characterized by a pattern of emotional and physical abuse and financial control. She created a new tort of "family violence" and awarded $150,000 in damages. As I will explain, it was unnecessary to create a novel tort. The law is clear that new torts should only be introduced where the existing remedies are inadequate. In the circumstances of this case, existing torts, properly applied, address the harm suffered.

Facts

4. The parties were married in 1999 in India. Eighteen months later, their first child was born.[58] The husband immigrated to Canada in September 2001. The wife and the child followed in March 2002. ***

7. The couple separated in July 2016. The children have, apart from a few visits, essentially refused to see their father post-separation.

8. The trial judge found that the husband was abusive during the marriage. This is not disputed on appeal.

9. The trial judge accepted the wife's evidence that the parties' relationship was characterized by a pattern

[57] Statistics Canada, *Victims of police-reported family and intimate partner violence*, 2021.
[58] I refer to the appellant as husband and the respondent as wife, except when discussing legal submissions.

of emotional and physical abuse and financial control. The wife testified to three specific incidents of physical violence: in 2000, 2008, and 2013. ***

Decision below

16. The wife brought an action for statutory relief—divorce, child support, spousal support, and property equalization—and also claimed damages for the husband's conduct during the marriage.

17. The trial judge held that the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), did not create a complete statutory scheme for addressing all the legal issues arising in a situation of alleged family violence. Spousal support awards remained narrowly focused on compensation and economic fallout of the marriage rather than fault and misconduct. Accordingly, she held that an award in tort was proper. ***

19. The trial judge then recognized a new tort of "family violence". She concluded that there were interests worthy of protection and that development in the law was necessary to stay abreast of social change. She considered case law from the United States which recognized a tort of "battered women's syndrome". While that tort overlapped significantly with existing American torts, it was "fundamentally different in terms of the assessment of liability, causation, and damages".

20. The trial judge was concerned that focusing on narrow methods of liability did not adequately address the day-to-day reality of family violence. For example, "one hard beating at the beginning of a marriage" could create a constant imminent threat of violence and focusing liability on the one incident risked obscuring that fact. She considered the paucity of damage awards for inter-spousal violence as evidence of the problems associated with addressing family violence through existing torts and noted that earlier cases were "out-of-step with the evolving social understanding about the true harms associated with family violence". She approvingly cited to the case of *Schuetze v. Pyper*, 2021 BCSC 2209, where a trial judge awarded damages of $795,029 for an incident of physical violence in an intimate relationship. ***

23. The trial judge defined the elements of this new tort. She considered the proper starting point to be the statutory definition of "family violence" in s. 2 of the *Divorce Act*. Based on that definition, she held that a plaintiff could establish a defendant's liability through any of three modes: (1) intentional conduct that was violent or threatening; (2) behaviour calculated to be coercive and controlling to the plaintiff; or (3) conduct the defendant would have known with substantial certainty would cause the plaintiff to subjectively fear for their own safety or that of another person. While these modes of liability overlapped with existing torts, she considered that the existing torts "do not fully capture the cumulative harm associated with the pattern of coercion and control that lays at the heart of family violence". While intentional infliction of emotional distress, for instance, requires showing that a specific interaction or behaviour was "flagrant and outrageous" and resulted in injury, family violence would allow consideration of, and compensation for, the pattern of violence, not just the individual incidents. ***

25. Having accepted the wife's evidence that the husband used physical violence at the beginning of the marriage to condition her to his control, that the violence continued when they moved to Canada, and that she did not leave the relationship because of family expectations, the parties' children, and her social and financial dependence on him, she found the appellant liable on all three potential modes of liability under the new tort of family violence. In the alternative, she also found him liable under the torts of assault, battery, and intentional infliction of emotional distress. ***

Analysis ***

56. In *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, [2020] 1 S.C.R. 166, Abella J. said, at para. 118, that the common law develops to "keep law aligned with the evolution of society". At paras. 237 *et seq.*, Brown and Rowe JJ. summarized Canadian jurisprudence and set out a test for the recognition of new torts. While their reasons were dissenting, they deal with an issue not addressed by the majority and so do not conflict with the binding holding in any way. The direction is helpful:

> Three clear rules for when the courts will not recognize a new nominate tort have emerged: (1) The courts will not recognize a new tort where there are adequate alternative remedies; (2) the courts will not recognize a new tort that does not reflect and address a wrong visited by one person upon

> another; and (3) the courts will not recognize a new tort where the change wrought upon the legal system would be indeterminate or substantial. Put another way, for a proposed nominate tort to be recognized by the courts, at a minimum it must reflect a wrong, be necessary to address that wrong, and be an appropriate subject of judicial consideration. [Citations omitted.]

57. There is no doubt that a tort of family violence or coercive control would "reflect and address a wrong visited by one person on another". The issue here is whether there are adequate alternative remedies and whether the change wrought upon the legal system would be indeterminate or substantial.

58. The trial judge determined that a new tort was necessary because in her view the assessment of liability and causation as well as of damages under existing torts were insufficient.

59. With respect to liability and causation, the trial judge emphasized the focus in the existing torts of assault and intentional infliction of emotional distress on individual instances rather than on a *pattern* of behaviour. The essence of her reasoning on this point is set out in para. 54 of the reasons:

> While the tort of family violence will overlap with existing torts, there are unique elements that justify recognition of a unique cause of action. I agree with the [respondent] that the existing torts do not fully capture the cumulative harm associated with the *pattern* of coercion and control that lays at the heart of family violence cases and which creates the conditions of fear and helplessness. These patterns can be cyclical and subtle, and often go beyond assault and battery to include complicated and prolonged psychological and financial abuse. These uniquely harmful aspects of family violence are not adequately captured in the existing torts. In general, the existing torts are focused on specific, harmful *incidents*, while the proposed tort of family violence is focused on long-term, harmful *patterns* of conduct that are designed to control or terrorize. For example, the tort of intentional infliction of emotional distress requires showing that a specific interaction or behaviour was "flagrant and outrageous" and resulted in injury. In the context of damage assessment for family violence, it is the pattern of violence that must be compensated, not the individual incidents. [Emphasis in original.]

60. With respect, this statement reflects a misunderstanding of the law of existing torts. Existing torts already address patterns of behaviour, for both liability and damages.

61. In *Barker v. Barker*, 2022 ONCA 567, 162 O.R. (3d) 337, this court recently provided a summary of the torts of battery and assault. Although the terms are often used interchangeably, there is a distinction. At para. 138:

> … battery and assault are distinct concepts in tort law, both being examples of trespass to the person … a battery involves actual physical contact by the tortfeasor or bringing about harmful or offensive contact with another person, whereas a tortious assault involves intentionally causing another to fear imminent contact of a harmful or offensive nature. [Citations omitted.]

62. The tort of battery requires direct interference with one's person. Interference is direct if it is the immediate consequence of a force set in motion by an act of the defendant. The interference must be "harmful or offensive" or contact that is "non-trivial": *Scalera*, at para. 16 [§2.1.3].

63. The trial judge's findings here that the appellant physically assaulted the respondent on three separate occasions satisfy the requirements for the tort of battery.

64. Assault is conceptually different. It involves creating the apprehension of imminent harmful or offensive contact. In *Barker*, at para. 170, this court approved the following statement of law from the Hon. Allen M. Linden, et al., *Canadian Tort Law*, 10th ed. (Toronto: LexisNexis, 2015), at §2.42:

> Assault is the intentional creation of the apprehension of imminent harmful or offensive contact. The tort of assault furnishes protection for the interest in freedom from fear of being physically interfered with. Damages are recoverable by *someone who is made apprehensive of immediate physical contact*, even though that contact never actually occurs. [Emphasis added.]

65. *Barker* involved a claim brought by 28 persons admitted to a mental health facility. They sought (among other things) damages against physicians who worked at that facility for assault, battery and intentional infliction of emotional distress. The claim for assault related to a program in the facility where patients could be sent to an extremely harsh form of solitary confinement known as MAPP. The trial judge wrote that the patients "lived under the shadow of the MAPP threat": *Barker v. Barker*, 2020 ONSC 3746, at para. 1202.

66. This court concluded that the trial judge had failed to apply the imminence requirement for assault, instead relying on a fear of future harm, which itself was "conduct-dependent". A fear of future harm is not an apprehension of imminent harm: see *Barker* ONCA at para. 182.

67. Here, however, the imminence requirement is met. The wife suffered constant threats of imminent harm, solidified by actual harm—both physical and emotional. The pattern of abuse caused her to live in a near-constant fear of imminent harm. The three violent incidents described above show that this fear, unlike that of the plaintiffs in *Barker*, was not conduct-dependent: simple acts such as asking a friend for help fixing a computer or receiving a compliment from a tour guide would be enough to provoke the husband's wrath.

68. The trial judge's findings of fact satisfy the requirements for assault. ***

76. In *MacKay v. Buelow* (1995), 11 R.F.L. (4th) 403 (Ont. Gen. Div.), the defendant "harassed and intimidated the plaintiff on numerous occasions", including threats of violence, throwing a cupboard door at her, stalking, videotaping her through her bathroom window from a tree, and threatening to kidnap her daughter. The plaintiff was diagnosed with post-traumatic stress disorder. Binks J., without limiting his analysis to any particular incident, found liability for trespass to the person (i.e., assault), intentional infliction of emotional distress, and invasion of privacy. For general, aggravated and punitive damages altogether, the plaintiff was awarded $55,000. ***

78. Much like in the present case, in *Dhaliwal v. Dhaliwa*, [1997] O.J. No. 5964 (Gen. Div.), the wife provided evidence of three discrete violent incidents that formed part of a pattern of physical and emotional abuse. This abuse caused her to suffer depression, sleep disturbances, and other forms of emotional distress. Métivier J. noted (at para. 10) that verbal abuse "leaves scars as real and as deep as physical abuse." She accepted the wife's evidence as to the pattern of abusive conduct and awarded damages of $10,000. ***

82. In *Jane Doe 72511 v. Morgan*, 2018 ONSC 6607, the physical and emotional abuse was described as extending over the entire period of 6 months during which the parties lived together. Gomery J. found liability in assault and battery for several incidents of violent abuse and threats by the defendant toward his then-girlfriend. She held that the damages award should reflect the "entire history" of abuse, and concluded, at para. 120, that despite the lack of lingering physical injury, a damages award on the high end of the scale was "appropriate due to the repeated, ongoing nature of Nicholas' physical and verbal abuse and Jane's vivid evidence on the terrifying nature of the incidents in September 2013 and March 2014." The plaintiff was awarded a total of $100,000 in damages ***. ***

91. In summary the trial judge's concern that "long-term, harmful *patterns* of conduct that are designed to control or terrorize" are not captured by existing torts is misplaced. She found that the appellant had subjected the respondent to years of physical, psychological, emotional and financial abuse constituting behaviour calculated to be coercive and controlling. These facts fall squarely within the existing jurisprudence on battery, assault and intentional infliction of emotional distress. The jurisprudence cited above demonstrate that *patterns* of recurring behaviour are addressed. ***

142. I would allow the appeal in part ***. I would not recognize the new torts of domestic violence or coercive control as defined in this case. ***

REFLECTION:

- *What was the trial judge's rationale for recognising a new nominate tort of family violence?*[59] *What was the*

[59] See J. Koshan & D. Sowter, "Torts and Family Violence: *Ahluwalia v. Ahluwalia*" ABlawg (Sep 15, 2023); "New causes of action and *Ahluwalia v. Ahluwalia*" Tort Law and Social Equality (Jun 3, 2022).

Court of Appeal's rationale for resolving this case under the frameworks of established common law torts?[60]
- *The Supreme Court has granted leave to appeal this decision. How is the Court likely to rule?*
- *Why might a victim of family violence seek recourse through the common law of tort, instead of or in addition to laying a complaint with the police?*[61]

2.3.6 Further material

- P.R. Handford, "Tort Liability for Threatening or Insulting Words" (1976) 54 Canadian Bar Rev 563.
- W.D. Rollison, "Torts: Assault; Battery" (1941) 17 Notre Dame Lawyer 1.
- Law School Toolbox Podcast, "Assault and Battery (Torts)" (Apr 6, 2021) 🎧.

2.4 False imprisonment

Holder v. State of South Australia [2018] SADC 83, aff'd [2019] SASCFC 135

19. A false imprisonment is a wrongful total restraint on the liberty of the plaintiff that is directly brought about by the defendant. The action is usually brought for an intentional restriction on the freedom of movement of the plaintiff, though actions for reckless and negligent false imprisonments are not precluded.[62] An unlawful arrest can amount to false imprisonment.[63]

20. As the essence of the action of false imprisonment is the compelling of a person to stay at a particular place against his or her will, it is not sufficient that the conduct of the defendant contributed to or influenced the plaintiff's decision. It must be shown that, but for the defendant's conduct, the plaintiff would not have yielded to the total restraint; that the plaintiff's determination to remain was a coercive consequence of the defendant's acts.[64]

21. Furthermore, there must be no reasonable means of egress available to the plaintiff. Put another way, restraint will still be total if the plaintiff's only alternative means of movement or escape is unreasonable. In *McFadzean v. Construction, Forestry, Mining and Energy Union*[65] the Court of Appeal of Victoria said:[66]

> [A]lthough the idea of false imprisonment is sometimes expressed in terms of a restriction on liberty which must be total, that does not mean that a restriction short of lock and key may not be actionable. In each case, it is a question of fact as to whether a restriction is so severe as to be characterised as false imprisonment. For example, if a victim is confined to an island, and the only means of egress is by swimming through dangerous waters to the mainland, there is no reasonable means of egress and the victim's confinement to the island is likely to amount to false imprisonment. If, however, there is a reasonable means of egress or escape from detention, the restriction may not be enough. So, if a victim is confined to a room, and there is a reasonable means of egress through a door, the victim is in effect free to leave the room and there is no false imprisonment.

22. False imprisonment for any period of time, no matter how short is actionable. However, the duration of the false imprisonment is a consideration relevant to damages.[67] ***

[60] See K. Sun & S. Sérafin, "Law Over Labels: A Comment on *Ahluwalia v. Ahluwalia*" CanLII Connects (Jan 19, 2024).
[61] See M. Gollom, "'Her Voice is Heard': Why Some Accusers Pursue Civil rather than Criminal Justice in Harassment Cases" CBC News (Jan 5, 2018) 📺; E. Uguen-Csenge, "Woman Assaulted by Husband Awarded $800K in Civil Lawsuit. He Received an Absolute Discharge in Criminal Case" CBC News (Jan 28, 2022).
[62] F. Trindade and P. Cane, *The Law of Torts in Australia*, Oxford University Press 3rd ed. at 50.
[63] *Slaveski v. State of Victoria* [2010] VSC 441 at [252].
[64] *McFadzean v. Construction, Forestry, Mining and Energy Union* (2007) 20 VR 250 at [41]
[65] (2007) 20 VR 250.
[66] (2007) 20 VR 250 at [41]-[45].
[67] *White v. South Australia* (2010) 106 SASR 521 at [420] (Anderson J).

2.4.1 Bird v. Jones [1845] EWHC QB J64

England Court of Queen's Bench – [1845] EWHC QB J64

This action was tried before Lord Denman C.J., at the Middlesex sittings after Michaelmas term, 1843, when a verdict was found for the plaintiff. In Hilary term, 1844, Thesiger obtained a rule nisi for a new trial, on the ground of misdirection. *** In this vacation (9th July), there being a difference of opinion on the Bench, the learned Judges who heard the argument delivered judgment seriatim.

COLERIDGE J.: ***

3. A part of a public highway was inclosed, and appropriated for spectators of a boat race, paying a price for their seats. The plaintiff was desirous of entering this part, and was opposed by the defendant: but, after a struggle, during which no momentary detention of his person took place, he succeeded in climbing over the inclosure. Two policemen were then stationed by the defendant to prevent, and they did prevent, him from passing onwards in the direction in which he declared his wish to go: but he was allowed to remain unmolested where he was, and was at liberty to go, and was told that he was so, in the only other direction by which he could pass. This he refused for some time, and, during that time, remained where he had thus placed himself.

4. These are the facts: and, setting aside those which do not properly bear on the question now at issue, there will remain these: that the plaintiff, being in a public highway and desirous of passing along it, in a particular direction, is prevented from doing so by the orders of the defendant, and that the defendant's agents for the purpose are policemen, from whom, indeed, no unnecessary violence was to be anticipated, or such as they believed unlawful, yet who might be expected to execute such commands as they deemed lawful with all necessary force, however resisted. But, although thus obstructed, the plaintiff was at liberty to move his person and go in any other direction, at his free will and pleasure: and no actual force or restraint on his person was used, unless the obstruction before mentioned amounts to so much. ***

6. And I am of opinion that there was no imprisonment. To call it so appears to me to confound partial obstruction and disturbance with total obstruction and detention. A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only; it may itself be moveable or fixed: but a boundary it must have; and that boundary the party imprisoned must be prevented from passing; he must be prevented from leaving that place, within the ambit of which the party imprisoning would confine him, except by prison-breach. Some confusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom: it is one part of the definition of freedom to be able to go whithersoever one pleases; but imprisonment is something more than the mere loss of this power; it includes the notion of restraint within some limits defined by a will or power exterior to our own. ***

8. If it be said that to hold the present case to amount to an imprisonment would turn every obstruction of the exercise of a right of way into an imprisonment, the answer is, that there must be something like personal menace or force accompanying the act of obstruction, and that, with this, it will amount to imprisonment. I apprehend that is not so. If, in the course of a night, both ends of a street were walled up, and there was no egress from the house but into the street, I should have no difficulty in saying that the inhabitants were thereby imprisoned; but, if only one end were walled up, and an armed force stationed outside to prevent any sealing of the wall or passage that way, I should feel equally clear that there was no imprisonment. If there were, the street would obviously be the prison; and yet, as obviously, none would be confined to it. ***

13. "Every confinement of the person" (according to Blackstone (3 Bl. C. 127)), "is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public street," which, perhaps, may seem to imply the application of force more than is really necessary to make an imprisonment. Lord Coke, in his Second Institute (2 Inst. 589), speaks of "a prison in law" and "a prison in deed:" so that there may be a constructive, as well as an actual, imprisonment: and, therefore, it may be admitted that personal violence need not be used in order to amount to it. "If the bailiff" (as the case is put in Bull. N. P. 62) "who has a process against one, says to him," "'You are my prisoner, I have a writ against you,' upon which he submits, turns back or goes with him, though the bailiff never touched him, yet

it is an arrest, because he submitted to the process." So, if a person should direct a constable to take another in custody, and that person should be told by the constable to go with him, and the orders are obeyed, and they walk together in the direction pointed out by the constable, that is, constructively, an imprisonment, though no actual violence be used. In such cases, however, though little may be said, much is meant and perfectly understood. ***

14. *** I am aware of no case, nor of any definition, which warrants the supposition of a man being imprisoned during the time that an escape is open to him if he chooses to avail himself of it.

PATTESON J.: ***

18. I have no doubt that, in general, if one man compels another to stay in any given place against his will, he imprisons that other just as much as if he locked him up in a room: and I agree that it is not necessary, in order to constitute an imprisonment, that a man's person should be touched. *** But imprisonment is, as I apprehend, a total restraint of the liberty of the person, for however short a time, and not a partial obstruction of his will, whatever inconvenience it may bring on him. ***

LORD DENMAN C.J. (dissenting):

21. I have not drawn up a formal judgment in this case, because I hoped to the last that the arguments which my learned brothers would produce in support of their opinion might alter mine. We have freely discussed the matter both orally and in written communications; but, after hearing what they have advanced, I am compelled to say that my first impression remains. If, as I must believe, it is a wrong one, it may be in some measure accounted for by the circumstances attending the case. A company unlawfully obstructed a public way for their own profit, extorting money from passengers, and hiring policemen to effect this purpose. The plaintiff, wishing to exercise his right of way, is stopped by force, and ordered to move in a direction which he wished not to take. He is told at the same time that a force is at hand ready to compel his submission. That proceeding appears to me equivalent to being pulled by the collar out of the one line and into the other. ***

24. It is said that the party here was at liberty to go in another direction. *** But this liberty to do something else does not appear to me to affect the question of imprisonment. As long as I am prevented from doing what I have a right to do, of what importance is it that I am permitted to do something else? How does the imposition of an unlawful condition shew that I am not restrained? If I am locked in a room, am I not imprisoned because I might effect my escape through a window, or because I might find an exit dangerous or inconvenient to myself, as by wading through water or by taking a route so circuitous that my necessary affairs would suffer by delay?

25. It appears to me that this is a total deprivation of liberty with reference to the purpose for which he lawfully wished to employ his liberty: and, being effected by force, it is not the mere obstruction of a way, but a restraint of the person. ***

REFLECTION:

- *Why did the majority find there was no false imprisonment in this case? Why did Lord Denman C.J. disagree? Whose reasons are more compelling?*

2.4.2 Robertson v. Balmain New Ferry Co. Ltd [1909] UKPC 1

Privy Council (on appeal from Australia) – [1909] UKPC 1

THE LORD CHANCELLOR: ***

2. The Plaintiff paid a penny on entering the wharf to stay there till the boat should start and then be taken by the boat to the other side. The Defendants were admittedly always ready and willing to carry out their part of this contract. Then the Plaintiff changed his mind, and wished to go back. The rules as to the exit from the wharf by the turnstile required a penny for any person who went though. This the Plaintiff refused to pay, and he was by force prevented from going through the turnstile. He then claimed damages for assault and false imprisonment.

3. There was no complaint *** of any excessive violence, and in the circumstances admitted it is clear to their Lordships that there was no false imprisonment at all. The Plaintiff was merely called upon to leave the wharf in the way in which he contracted to leave it. There is no law requiring the Defendants to make the exit from their premises gratuitous to people who come there upon a definite contract which involves their leaving the wharf by another way. And the Defendants were entitled to resist a forcible passage through their turnstile.

4. The question whether the notice which was affixed to these premises was brought home to the knowledge of the Plaintiff is immaterial, because the notice itself is immaterial.

5. When the Plaintiff entered the Defendant's premises there was nothing agreed as to the terms on which he might go back, because neither party contemplated his going back. When he desired to do so the Defendants were entitled to impose a reasonable condition before allowing him to pass through their turnstile from a place to which he had gone of his own free will. The payment of 1d. was a quite fair condition, and if he did not choose to comply with it the Defendants were not bound to let him through. He could proceed on the journey he had contracted for.

6. Under these circumstances, their Lordships consider that, when the Defendants at the end of the case submitted that there ought to be a non-suit, the learned Judge ought to have non-suited the Plaintiff. Their Lordships are glad that they can thus arrive, in accordance with law, at this decision, because they regard the Plaintiff's conduct as thoroughly unreasonable in this case. ***

REFLECTION:

- *What does this case tell us about the relationship between private rights under contract and tort?*
- *Would this case have been decided differently if the plaintiff had sought to charge £1,000 as a condition for leaving through the turnstile?*

2.4.3 Jeeves v. Swanson [1995] CanLII 520 (BC SC)

British Columbia Supreme Court – 1995 CanLII 520

LOW J.: ***

3. Joanne Jeeves took a child's silver bracelet to Swanson's Jewellery for engraving on July 4, 1992, leaving a second, bracelet with them for comparison. Subsequently, the defendants' engraver became unavailable and they obtained permission from Mrs. Jeeves by telephone to sub-contract the engraving job to another business. Mrs. Jeeves returned to pick up the bracelet on July 24, 1992. She had her eleven-month old daughter with her.

4. Mrs. Jeeves became upset when Mr. Swanson showed her the engraving work. It was very unworkmanlike. It was uneven and in a larger script than that contracted for. Although both the bracelet and the engraving were inexpensive, both were important to Mrs. Jeeves and she was justifiably annoyed with the finished product.

5. Mr. Swanson agreed that the engraving was poor. Mrs. Jeeves refused to pay for it. Mrs. Swanson apparently heard this refusal and got into the discussion, insisting that Mrs. Jeeves pay the defendants' bill and take her complaint to the engravers. I have no doubt that Mrs. Swanson's abruptness and aggressiveness were the main cause of the ensuing problems. Her manner was probably more upsetting to Mrs. Jeeves than was the unsatisfactory engraving.

6. It is not possible to reconstruct accurately what was said about the transaction after Mrs. Swanson's intervention. It would appear that both she and Mrs. Jeeves repeated themselves. I find that at all times Mrs. Jeeves was businesslike and only insisting that the damage done to her property be made right.

7. Then Mr. Swanson, who had initially been sympathetic with Mrs. Jeeves' concerns but had remained quiet once his wife intervened, seemed to lose his temper. He slammed the bracelets on the counter and told Mrs. Jeeves to take them and leave. She put them in her purse. Mrs. Swanson said that Mrs. Jeeves was not leaving with the bracelets unless she paid for the engraving. I accept the evidence of Mrs. Jeeves

that at this point Mrs. Swanson was quite angry. The argument continued, but now the Swansons were in disagreement with each other as to whether Mrs. Jeeves should be permitted to leave with the bracelets.

8. During this standoff, another customer, a man, came into the store. While Mr. Swanson sold a watch battery to him and installed it, Mrs. Swanson continued to tell Mrs. Jeeves that she could not leave with the bracelets unless she paid for the engraving. Then Mrs. Swanson went to the front of the store where there are two recessed doors leading into it. The doors are separated by a short wall to which each sits at a 45 degree angle. Each gives entrance to a separate part of the store, the two parts being separated by a wall with a large gap in it before it extends to the entrance area. The two doors are only a few feet apart.

9. Mrs. Swanson locked both doors and told her husband to telephone the police. He refused, she persisted and he eventually telephoned the police, although Mrs. Jeeves did not see or hear him do so.

10. Mrs. Jeeves remarked to the other customer that they were locked in and Mrs. Swanson said she would let the other customer out when he was ready to leave. Mrs. Jeeves told Mrs. Swanson that it was not legal to lock people in, that it was unlawful confinement. Mrs. Swanson let the other customer out a short time later. Mrs. Jeeves says that Mrs. Swanson continued to badger her about how much trouble they had taken to get the engraving done. Mrs. Jeeves retreated to the other side of the store, near one of the exit doors, to await the arrival of the police.

11. Each door had a deadbolt locking system operated from the outside by a key and from the inside by a flat knob without a key. Mrs. Jeeves easily could have left the store by turning the deadbolt knob and the doorknob of either door. Neither Mr. nor Mrs. Swanson was standing guard so as to physically prevent her from leaving. However, Mrs. Jeeves thought Mrs. Swanson had locked the doors with a key, she didn't check the doors and she thought she was obliged to wait for the police whom she assumed had been called. She reasonably believed that she was being physically detained by the defendants until the police arrived. That belief was strengthened by Mrs. Swanson telling her she would let the other customer out and then doing so. Mrs. Jeeves was not aware of any other exit from the store. It is not suggested that she should have sought a rear exit.

12. It is not clear from the evidence how long it took for the police to arrive. Mrs. Swanson did become impatient and told her husband to call the police a second time, which he says he did. The police record shows only one call, at 12:35 p.m., the dispatch of an officer two minutes later and the arrival of Cst. Lynn Rosvold two minutes after that. The police station was across the street. The wait certainly was more than four minutes and I conclude that Mr. Swanson delayed making the call or he called twice and the first call was not acted upon. *** I conclude that the doors probably were locked for more than half an hour prior to the arrival of Cst. Rosvold.

13. Constable Rosvold found the door she tried to be locked and Mrs. Swanson admitted her. The constable found Mrs. Jeeves upset and angry. The Swansons were angry about Mrs. Jeeves' unwillingness to pay their bill. The constable saw the bracelet and was of the opinion that the engraving was unsatisfactory. She suggested to each side that they contact the engraver separately. She told them it was entirely a civil matter and the police need not have been involved. Mrs. Jeeves left the store with the bracelets just ahead of the constable. The police officer was in the store about twenty minutes. ***

17. I find that the purpose of the defendants in latching the doors was to confine Mrs. Jeeves until the police arrived. They were trying to enforce payment of their $20 account for the engraving ***. In addition, they knew from Mrs. Jeeves' comments to them that she understood that she was locked in. Contrary to their evidence, I find that it was their intention to foster and maintain that belief. ***

False imprisonment

19. I think that in describing this tort the word "imprisonment" simply means "confinement". It need not be the equivalent of placement in a gaol cell. The word "false" does not mean there must be some deception or misrepresentation of the facts. It simply means that the confinement must be unauthorized or legally wrong.

20. I rely upon the following statement of the law in Linden, *Canadian Tort Law*, 5th ed., pp. 46-47:

> Anyone who intentionally confines another person within fixed boundaries is liable for the tort of false imprisonment. …
>
> There can be no false imprisonment without a total confinement. The restraint must be complete within definite boundaries. It is insufficient to block another person's way if another route can be taken. One can be imprisoned in a room, in an automobile, or in a boat set adrift on the water. …
>
> Restraint may be accomplished by direct force or by the threat of force to which the plaintiff submits. A plaintiff, who reasonably perceives that force may be employed is imprisoned if deciding to submit and not to risk violence. It will also be imprisonment if the plaintiff goes along with another, in a suspected shoplifting case for example, in order to avoid a "scene which would be embarrassing". This has been described as a type of psychological imprisonment, but it is as real as if one were physically overpowered. It is also possible to confine someone by retaining control of that person's valuable property, or perhaps even by holding hostage someone's child or a beloved pet. *If, as a result of the defendant's intentional conduct, a person reasonably feels totally restrained, however that result is obtained, it amounts to an imprisonment and is actionable unless it is justifiable.*

21. The sentence I have underlined is particularly applicable to the present case. Mrs. Jeeves reasonably felt that the defendants were preventing her from leaving of her own free will and that the defendants had called the police to deal with her. The defendants treated her as an offender of some law, not as the justifiably aggrieved customer they knew her to be. It appears from Cst. Rosvold's evidence that Mrs. Swanson emphasized the refusal of Mrs. Jeeves to pay for the engraving. That is a further indication that the purpose of the defendants was to detain Mrs. Jeeves so the police could deal with that issue. The tort of false imprisonment is proven.

22. While it can be said as a matter of law that false imprisonment can be found even when the plaintiff, in this case the infant plaintiff, is not aware of the confinement at the time, I think that is not an appropriate result in this case. The only possible effect this incident had on the child was that she became upset. It is not possible to determine whether that was because of the tension around her or for some other reason. When she is old enough to appreciate that nature of the incident, she will have no recollection of it. I think the tort is not complete for that reason. At most, the infant plaintiff would be entitled to nominal damages. ***

28. I assess general damages at $3,500. The conduct of the defendants was somewhat high-handed and attracts aggravated or punitive damages which I fix at an additional $1,000. ***

REFLECTION:

- *Was Jeeves's confinement physical or psychological? Is the distinction important?*
- *Given false imprisonment is a per se tort, was the Court right to reject the claim brought by Jeeves's baby?*
- *Is Robertson v. Balmain New Ferry Co Ltd applicable or distinguishable on the facts of this case?*
- *In Mann v. Canadian Tire Corp. Ltd., 2016 ONSC 4926, [39], Akhtar J. considered that "there is a strong need for Canadian shopkeepers to be protected by a limited right to detain those that they have reasonable and probable grounds to believe are or have stolen their merchandise," and outlined the parameters of a common law shopkeeper's privilege.[68] Would such a privilege have provided the Swansons a defence in this case?*

[68] At [45]: "Turning to the limits of the privilege, I find that the following conditions must be met before a defendant can successfully mount the defence of the shopkeeper's privilege:

1. There must be reasonable and probable grounds to believe that property is being stolen or has been stolen from the shopkeeper's place of business. A security alarm triggered when a person is in the process of leaving the store would be sufficient to provide such grounds.
2. The sole purpose of the detention must be to investigate whether any item is being stolen or has been stolen from the store.
3. The detention must be reasonable and involves inviting the suspect to participate in a search to resolve the issue. The privilege does not bestow a power upon the store owner to search the detainee without consent.
4. The period of detention should be as brief as possible and reasonable attempts to determine whether an item of property is being stolen or has been stolen should proceed expeditiously.
5. If the detained suspect refuses co-operation, the store owner is entitled to detain them using reasonable force whilst summoning the police and until they arrive."

2.4.4 Walker v. Metropolitan Police Comm'r [2014] EWCA Civ 897

✗**REF: §2.2.3, §9.1.1**

RIX L.J. (RIMER AND TOMLINSON L.JJ. concurring): ***

5. *** PC Adams *** said that on arrival at the scene he heard Ms Lecky say that Mr Walker had punched her. He considered that he had reasonable grounds to suspect Mr Walker of an arrestable offence, but he decided to make some enquiries first in the hope of avoiding making an arrest. Mr Walker was in a doorway and he positioned himself to prevent him getting past. His first words were "Calm down mate or you will end up getting arrested". His witness statement said, "I did not touch the claimant but I made it very clear to him that he was not free to move." Mr Walker was trying to get past, and was shouting and swearing in an aggressive manner, agitated, irate and on his toes. Mr Walker threatened to "bang" him. The officer again told him to calm down or he would be arrested. Mr Walker's reaction was to say "who are you, you're just men in suits, just fuck off" and to push him firmly in the chest. It was at that point that PC Adams decided enough was enough and said that he was under arrest for "public order". He did not have time to add "section 5" or words to that effect (that is the section of the *Public Order Act 1986* which is headed "Intentional harassment, alarm or distress" and speaks of the use of "threatening, abusive or insulting words or behaviour, or disorderly behaviour" with "intent to cause a person harassment, alarm or distress"), because at that moment Mr Walker began a fight ("All hell broke loose") by swinging the handcuffs, which PC Adams was attempting to deploy, towards the officer's face. Nevertheless, it was section 5 which PC Adams had in mind. PC Cracknell came to help, because PC Adams also had Mr Walker's mother and girlfriend to contend with, who were seeking to help Mr Walker. PC Adams was bitten by Mr Walker on his left forearm and his left wedding finger. He was kicked and bloody. Mr Walker's mother and girlfriend were also arrested and taken to the police station. ***

9. In the circumstances, the claim [by Mr Walker against the police] for malicious prosecution got nowhere, and has not resurfaced on this appeal.

10. Nevertheless, there was a legal weakness in the Commissioner's defence to Mr Walker's claim with respect to the claims for false imprisonment and assault in that it was always accepted by the police that Mr Walker's initial detention in the doorway in Rita Road was not for the purpose of arrest, but only for the purpose of pursuing enquiries. It was accepted by defence counsel that this amounted to a detention. Indeed the Commissioner's defence had pleaded that "PC Adams lawfully prevented the claimant from moving away (and attempted to get control of him) by backing him into a doorway." This enabled Mr Walker to argue, at trial as he does again on this appeal, that that initial detention was unlawful and justified Mr Walker to use reasonable force to extricate himself from what was an unlawful, if brief, imprisonment. It was therefore the police who acted unlawfully in the fight which then broke out and which led to Mr Walker being taken off to the police station. ***

15. It would seem therefore that the judge accepted that there was, as had been admitted, a detention, but he characterised it as brief, trivial and technical, amounting to a few seconds. It restricted Mr Walker's movements while it lasted, but it did not amount to a deprivation of liberty or to unlawful false imprisonment. *** Even if the brief detention had been unlawful, Mr Walker's reactions had been unreasonable and disproportionate in both threatening violence and carrying out an act of actual violence. The still more serious violence which later ensued was in the course of resisting a lawful arrest. ***

The jurisprudence ***

22. *** Robert Goff LJ [in *Collins v. Wilcock* [1984] 1 WLR 1172, (1984) 79 Cr App R 229, [1984] 3 All ER 374] turned to the question posed by the magistrate for that court's consideration, which was in terms whether a constable was within her duty "when detaining a woman against her will for the purpose of questioning her …". He said (at 1180F-H):

> "Furthermore, the word "detaining" can be used in more than one sense. For example, it is a commonplace of ordinary life that one person may request another to stop and speak to him; if the latter complies with the request, he may be said to do so willingly or unwillingly, and in either event

> the first person may be said to be "stopping and detaining" the latter. There is nothing unlawful in such an act. If a police officer so "stops and detains" another person, he in our opinion commits no unlawful act, despite the fact that his uniform may give his request a certain authority and so render it more likely to be complied with. But if a police officer, not exercising his power of arrest, nevertheless reinforces his request with the actual use of force, or with the threat (actual or implied) to use force if the other person does not comply, then his act in thereby detaining the other person will be unlawful. In the former event his action will constitute a battery; in the latter event, detention of the other person will amount to false imprisonment. Whether the action of a police officer in any particular case is to be regarded as lawful or unlawful must be a question to be decided on the facts of the case."

23. In most of those cases, the "detention" of the suspected person was exercised by physical contact (see for instance *Kenlin v. Gardiner*, *Ludlow v. Burgess*, *Collins v. Wilcock* itself, and, more recently, *Wood v. DPP* [2008] EWHC 1056 (Admin) (a taking by the arm). The detention was effected in circumstances where the officer was not at the time exercising a power of arrest, but was seeking to investigate or question a suspected person. In the present case, as the judge emphasised, there was no physical contact as such. However, the logic of the cases and of Robert Goff LJ's judgment demonstrates that if a police officer, not exercising the power of arrest, detains a person in a way that goes beyond the acceptable conduct of an ordinary member of the public, then that will be false imprisonment, as where he uses the threat, actual or implied, to use force if the other person does not comply.

24. So, Halsbury's *Laws of England*, 5th ed, 2010, vol 97 at para 542, headed "Restraint of persons", states:

> "Any total restraint of the liberty of the person, for however short a time, by the use or threat of force or by confinement, is an imprisonment. It is not necessary that the person detained is aware of the detention at the time. To compel a person to remain in a given place is an imprisonment, but merely to obstruct a person attempting to pass in a given direction or to prevent him moving in any direction but one is not."

25. Among the cases cited by *Halsbury* in its footnotes to this passage is *Glynn v. Houston* (1841) 2 Man & G 337, where a guard was placed at the door of a house and it was inferred that that was done so that anyone leaving should be stopped. Reference can also be made to *Austin v. Commissioner of the Police of the Metropolis* [2007] EWCA Civ 989, [2008] QB 660 [**§6.7.1.1**], where a crowd of people were "kettled" at Oxford Circus in order to control a demonstration, and this court held that there would have been an unlawful imprisonment had the circumstances not created a rare exception where it was proved that the kettling was necessary to prevent an imminent breach of the peace by others.[69]

26. The contrast with such confinement is a mere obstruction, where a person is obstructed in only one direction, but can pass in another, even if it is not the way the person would choose to go. Thus in *Bird v. Jones* (1845) 7 QB 742, another of the cases cited by *Halsbury*, the claimant gatecrashed an enclosure appropriated for spectators of a boat race who had paid for entry: his way was then blocked in one direction, but he could pass in another. There was a division of opinion on the court, with Lord Denman CJ dissenting ***. However, the majority of the court (Coleridge, Williams, and Patteson JJ) held that there was no imprisonment. ***

Was Mr Walker's initial detention in the doorway unlawful, thus amounting to false imprisonment?

28. In the present case, it was common ground both that PC Adams was not in the course of arresting Mr Walker at the relevant time ***, and that he was detaining him by confining him within the narrow area of the doorway. *** On behalf of the respondent Commissioner, Mr Mark Ley Morgan, accepted that in this case there was both a detention and an intention to detain on the part of PC Adams.

29. Why then did the judge find that there had been no unlawful detention? The judge stressed the following factors. He said "not every trivial interference with a citizen's liberty amounts to a course of conduct sufficient to take an officer outside the course of his duties" and "an officer can lawfully detain a person (even by

[69] The court of appeal judgment was appealed to the House of Lords, but only on the separate point under article 5 of the European Convention of Human Rights: [2009] UKHL 5, [2009] 1 AC 564. The appeal was dismissed.

force if necessary and appropriate) prior to arresting him or her" (at para [131]'s (a) and (b)). He appears to have regarded the *Collins v. Wilcock* qualification that the officer must nevertheless not go beyond generally accepted standards of conduct as essentially concerned with physical contact ***. And he regarded the detention as brief and trivial, and that Mr Walker was not "in the true sense deprived of his liberty" ***. He also said that PC Adams was "fully justified in postponing the formal completion of the arrest … until the facts were fully investigated and elicited" ***.

30. In my judgment, these are not good reasons for holding that Mr Walker's detention and confinement were within generally acceptable standards of the conduct of ordinary citizens and thus lawful. It is not acceptable for an ordinary citizen to interfere with a person's liberty by confining him or her in a doorway. Although the confinement was for only a few seconds, the principle in question is framed in terms of "for however short a time" (*Bird v. Jones*, *Halsbury's Laws*). It is understandable that where liberty is in question, as in the case of assault (the context in which Robert Goff LJ made the point in *Collins v. Wilcock*), there is no room for complaisance. Moreover, the confinement would have been longer if the situation had not developed into an arrest and fight. ***

32. Mr Ley Morgan urged the court to say that only the judge's decision could be adequate to protect the police in the difficult duties they have to perform; and that a successful appeal on this point would encourage the police to exercise their power of arrest from the outset. However, the rationale of *Collins v. Wilcock* has been influential in our law for thirty years, and is underpinned by the still older jurisprudence which Robert Goff LJ there considered. ***

33. In sum, I would hold that Mr Walker was unlawfully imprisoned in the doorway by PC Adams for that brief period, even if such detention might in the circumstances be called "technical", an expression used in *Kenlin v. Gardiner* where Winn LJ and Lord Parker CJ spoke of a "technical assault" (at 519D and 520D). ***

44. In sum, I would allow Mr Walker's appeal on the [false imprisonment] issue ***. It follows that Mr Walker is entitled to damages for only the brief and "technical" imprisonment immediately before his own unlawful violence and initial arrest. The judge said that he would have awarded a nominal £5 for such false imprisonment were he wrong on the first point. ***

45. Mr Walker is therefore entitled to judgment for £5 on his first ground, but otherwise his appeal is dismissed. ***

REFLECTION:

- *Why did Walker's claim of false imprisonment succeed, when his claim of battery suffered in the course of his subsequent arrest by Officer Adams failed?*
- *If the false imprisonment of Walker was so trivial, why should he be entitled to any damages at all?*
- *During the summer 2020 George Floyd protests, New York City police officers kettled protesters on a bridge, arresting them after a curfew went into effect. Might such practices amount to false imprisonment?*[70] *When might such tactics be justified?*[71]

2.4.5 R v. Le [2019] SCC 34

Supreme Court of Canada – 2019 SCC 34

✗**REF: §6.6.5, §7.1.6**

BROWN AND MARTIN JJ. (KARAKATSANIS J. concurring):

1. One evening, three police officers noticed four Black men and one Asian man in the backyard of a townhouse at a Toronto housing co-operative. The young men appeared to be doing nothing wrong. They were just talking. The backyard was small and was enclosed by a waist-high fence. Without a warrant, or

[70] See M. Sainato, "'They Set Us Up': US Police Arrested Over 10,000 Protesters, Many Non-violent" The Guardian (Jun 8, 2020); "NYC to pay millions over police 'kettling' at Floyd protest" AP News (Mar 1, 2023);
[71] See *Austin v. Metropolitan Police Commissioner* [2007] EWCA Civ 989, [12], [49], [119] [**§6.7.1.1**].

consent, or any warning to the young men, two officers entered the backyard and immediately questioned the young men about "what was going on, who they were, and whether any of them lived there" (2014 ONSC 2033 (Ont. S.C.J.), at para. 17 ("TJR")). They also required the young men to produce documentary proof of their identities. Meanwhile, the third officer patrolled the perimeter of the property, stepped over the fence and yelled at one young man to keep his hands where the officer could see them. Another officer issued the same order.

2. The officer questioning the appellant, Tom Le, demanded that he produce identification. Mr. Le responded that he did not have any with him. The officer then asked him what was in the satchel he was carrying. At that point, Mr. Le fled, was pursued and arrested, and found to be in possession of a firearm, drugs and cash. At trial, he sought the exclusion of this evidence under s. 24(2) of the *Canadian Charter of Rights and Freedoms* ("*Charter*") on the basis that the police had infringed his constitutional rights to be free from unreasonable search and seizure and from arbitrary detention, contrary to ss. 8 and 9 of the *Charter*. ***

25. *** [I]n [*R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353 (S.C.C.)], this Court held that a *psychological* detention by the police, such as the one claimed in this case, can arise in two ways: (1) the claimant is "legally required to comply with a direction or demand" (para. 30) by the police (i.e. by due process of law); *or* (2) a claimant is not under a legal obligation to comply with a direction or demand, "but a reasonable person in the subject's position would feel so obligated" (para. 30) and would "conclude that he or she was not free to go" (para. 31).

26. Even, therefore, absent a legal obligation to comply with a police demand or direction, and even absent physical restraint by the state, a detention exists in situations where a reasonable person in the accused's shoes would feel obligated to comply with a police direction or demand and that they are not free to leave. Most citizens, after all, will not precisely know the limits of police authority and may, depending on the circumstances, perceive even a routine interaction with the police as demanding a sense of obligation to comply with every request ***.

27. Having said that, not every police-citizen interaction is a detention within the meaning of s. 9 of the *Charter*. A detention requires "significant physical or psychological restraint" ***. ***

28. In this case, it is common ground that the young men were *not* "legally required to comply with a direction or demand" by the police. This is important because it underscores that these young men were not legally required to answer the questions posed by the police, produce their identification, or follow directions about where they could place their hands. The officers had no legal authority to force them to do these things. Therefore, our analysis in this case will focus on the second way a psychological detention arises: whether a reasonable person, who stood in the appellant's shoes, would have felt obligated to comply and would not have felt free to leave as the police entered the backyard and made contact with the men. ***

30. In our respectful view, the trial judge and the majority of the Court of Appeal for Ontario erred *** by concluding that the detention crystallized only when Mr. Le was asked what was in his satchel. Rather, he was detained when the police entered the backyard and made contact. Since no statutory or common law power authorized his detention at that point, it was an arbitrary detention. ***

65. As to the duration of the encounter, although the interaction lasted less than a minute, the impact of the police conduct in that short space of time would lead any reasonable person to conclude that it was necessary to comply with police directions and commands, and that it was impossible to leave or walk away without the permission of the police once they entered the backyard. The duration of the encounter is simply one consideration among many.

66. In some cases, the overall duration of an encounter may contribute to the conclusion that a detention has occurred (i.e. the simple passage of time demonstrates how the person came to believe they could not leave). In other cases, however, a detention, even a psychological one, can occur within a matter of seconds, depending on the circumstances. ***

67. *** Although this interaction lasted less than a minute, things can and do happen very quickly. The primary focus remains on the perception of a reasonable person in the circumstances. The impact of the

police conduct in that short space of time would lead any reasonable person to conclude that it was necessary to comply with police directions and commands and that it was impossible to leave or walk away without the permission of the police.

68. In sum, the nature of the police conduct here was, in one word, and our word, aggressive. This is an accurate and appropriate adjective to capture how a reasonable person would perceive the police conduct, conduct which it is accepted may be experienced as more forceful, coercive, and threatening because it occurs on private property like a residence. Considered individually and in combination, these aspects of their conduct support the conclusion that a detention arose as soon as the police officers entered the backyard and started asking questions. ***

72. An important consideration when assessing when a detention occurred is that Mr. Le is a member of a racialized community in Canada. Binnie J. in *Grant* found that "visible minorities who may, because of their background and experience, feel especially unable to disregard police directions, and feel that assertion of their right to walk away will itself be taken as evasive" (paras. 154-55 and 169 (per Binnie J., concurring); see also, *Therens*, at p. 644 (per Le Dain J, dissenting) on whether citizens truly have a "choice" to obey the police's commands). ***

82. A reasonable person in the shoes of the accused is deemed to know about how relevant race relations would affect an interaction between police officers and four Black men and one Asian man in the backyard of a townhouse at a Toronto housing co-operative. ***

86. The context of race relations *** is neither dispositive of when Mr. Le was detained, nor mere background information. The race relations context is one consideration, among many, aiding in the analysis and interpretation of events that are crucial to this appeal. ***

94. More recently, after the appeal was heard, Justice Michael H. Tulloch, of the Court of Appeal for Ontario, issued the Tulloch Report. The report focuses on the historical practice of carding in Ontario and the regulation entitled *Collection of Identifying Information in Certain Circumstances—Prohibition and Duties*, O. Reg. 58/16. It documents how, over time, the practice of carding evolved to no longer solely target persons of interest to detectives, but rather anyone the police deemed "of interest" during the course of their duties (pp. 38-39). The Tulloch Report is relevant because it focuses on the *perceptions* of those subject to police encounters similar to the kind that occurred here. Justice Tulloch notes that "[h]istorically, Indigenous, Black and other racialized communities have different perspectives and experiences with practices such as street checks and carding" (p. 37). Not only do these communities have fundamentally different perceptions and experiences with carding, the impact of carding on minority youth, especially those who live in less affluent communities, is acute. As Justice Tulloch notes (at pp. 41-42):

> Youth, especially Indigenous, Black and other racialized youth, and youth in low-income housing, are disproportionately impacted by street checks. "[W]hile the 'street' constitutes a meaningful part of everyday life for many marginalized youth, their presence and visibility in that space makes them ready targets for heightened police surveillance and intervention". A street check is often a young person's first contact with the police. [Footnote omitted.]

95. The impact of the over-policing of racial minorities and the carding of individuals within those communities without any reasonable suspicion of criminal activity is more than an inconvenience. Carding takes a toll on a person's physical and mental health. It impacts their ability to pursue employment and education opportunities (Tulloch Report, at p. 42). Such a practice contributes to the continuing social exclusion of racial minorities, encourages a loss of trust in the fairness of our criminal justice system, and perpetuates criminalization (see N. Nichols, "The Social Organization of Access to Justice for Youth in 'Unsafe' Urban Neighbourhoods" (2018), 27 Soc. & Legal Stud. 79, at p. 86; see also Ontario Human Rights Commission, *Under Suspicion: Research and Consultation Report on Racial Profiling in Ontario* (2017), at pp. 31-40). ***

165. Requiring the police to comply with the *Charter* in *all* neighbourhoods and to respect the rights of *all* people upholds the rule of law, promotes public confidence in the police, and provides safer communities. The police will not be demoralized by this decision: they, better than anyone, understand that with extensive powers come great responsibilities. We share the view of the House of Lords, when rejecting the idea that

imposing liability on the police would have similar consequences, that "Her Majesty's servants are made of sterner stuff" (*Dorset Yacht Co. v. Home Office*, [1970] 2 All E.R. 294 (U.K. H.L.), at p. 1033, per Lord Reid [§13.2.3]).

166. We would, therefore, allow the appeal, exclude the evidence seized from Mr. Le, set aside his convictions, and enter acquittals. ***

MOLDAVER J. AND WAGNER C.J.C. dissented.

REFLECTION:

- *What was it about the circumstances here that gave rise to Le's detention?*[72] *At what point was he detained?*
- *Does a psychological detention that violates the Charter necessarily equate to the tort of false imprisonment?*
- *Do police officers have the same, greater or more restrictive powers and freedoms than ordinary people?*
- *Why is it important that courts consider a person's racial background and the context of race relations in cases such as this? How should judges give due regard to systemic social issues in their analysis?*

2.4.6 Cross-references

- *Slater v. Attorney-General (No. 1)* [2006] NZHC 308, [41]: §8.5.1.
- *Taylor v. Roper & Attorney-General of New Zealand* [2023] NZSC 49, [57]-[70]: §12.1.4.

2.4.7 Further material

- S. Beswick, "'The Liability of Judges for Wrongful Imprisonment" New Private Law Blog (Oct 24, 2023).
- E. Arbel, "Devalued Liberty and Undue Deference: The Tort of False Imprisonment and the Law of Solitary Confinement" (2018) 84 (2d) Supreme Court L Rev 43.
- M. McInnes & A. Simpson, "The Shopkeeper's Privilege and Canadian Tort Law" (2018) 56 Alberta L Rev 29.
- C. Bildfell, "Shopkeeper's Privilege: Coming to Store Near You?" (2019) 97 Canadian Bar Rev 558.

[72] See M. Friedl, "Supreme Court of Canada Finally Addresses Racial Profiling by Police" ABlawg (Jun 26, 2020).

3 INTENTIONAL INFLICTION OF MENTAL SUFFERING

3.1 The tort in *Wilkinson v. Downton*

3.1.1 Wilkinson v. Downton [1897] EWHC 1 (QB)

England and Wales High Court (Queen's Bench Division) – [1897] EWHC 1 (QB)

WRIGHT J.:

1. In this case the defendant, in the execution of what he seems to have regarded as a practical joke, represented to the plaintiff that he was charged by her husband with a message to her to the effect that her husband was smashed up in an accident, and was lying at The Elms at Leytonstone with both legs broken, and that she was to go at once in a cab with two pillows to fetch him home. All this was false. The effect of the statement on the plaintiff was a violent shock to her nervous system, producing vomiting and other more serious and permanent physical consequences at one time threatening her reason, and entailing weeks of suffering and incapacity to her as well as expense to her husband for medical attendance. These consequences were not in any way the result of previous ill-health or weakness of constitution; nor was there any evidence of predisposition to nervous shock or any other idiosyncrasy.

2. In addition to these matters of substance there is a small claim for 1s. 10½d. for the cost of railway fares of persons sent by the plaintiff to Leytonstone in obedience to the pretended message. As to this 1s. 10½d. expended in railway fares on the faith of the defendant's statement, I think the case is clearly within the decision in *Pasley v. Freeman* (1789) 3 TR 51. The statement was a misrepresentation intended to be acted on to the damage of the plaintiff.

3. The real question is as to the 100l., the greatest part of which is given as compensation for the female plaintiff's illness and suffering. It was argued for her that she is entitled to recover this as being damage caused by fraud, and therefore within the doctrine established by *Pasley v. Freeman* (1789) 3 TR 51 and *Langridge v. Levy* (1837) 2 M & W 519 [§10.1.1]. I am not sure that this would not be an extension of that doctrine, the real ground of which appears to be that a person who makes a false statement intended to be acted on must make good the damage naturally resulting from its being acted on. Here there is no injuria of that kind. I think, however, that the verdict may be supported upon another ground. The defendant has, as I assume for the moment, wilfully done an act calculated to cause physical harm to the plaintiff—that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act. This wilful injuria is in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant.

4. It remains to consider whether the assumptions involved in the proposition are made out. One question is whether the defendant's act was so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the defendant, regard being had to the fact that the effect was produced on a person proved to be in an ordinary state of health and mind. I think that it was. It is difficult to imagine that such a statement, made suddenly and with apparent seriousness, could fail to produce grave effects under the circumstances upon any but an exceptionally indifferent person, and therefore an intention to produce such an effect must be imputed, and it is no answer in law to say that more harm was done than was anticipated, for that is commonly the case with all wrongs. The other question is whether the effect was, to use the ordinary phrase, too remote to be in law regarded as a consequence for which the defendant is answerable. Apart from authority, I should give the same answer and on the same ground as the last question, and say that it was not too remote. Whether, as the majority of the House of Lords thought in *Lynch v. Knight* (1861) 9 HL C 577, at pp 592, 596, the criterion is in asking what would be the natural effect on reasonable persons, or whether, as Lord Wensleydale thought 9 HL C 577, at p 600, the possible infirmities of human nature ought to be recognised, it seems to me that the connection between the cause and the effect is sufficiently close and complete. It is, however, necessary to consider two authorities which are supposed to have laid down that illness through mental shock is a too remote or unnatural consequence of an injuria to entitle the plaintiff to recover in a case where damage is

a necessary part of the cause of action. One is the case of *Victorian Railways Commissioners v. Coultas* 13 App Cas 222 [§19.2.1.1], where it was held in the Privy Council that illness which was the effect of shock caused by fright was too remote a consequence of a negligent act which caused the fright, there being no physical harm immediately caused. That decision was treated in the Court of Appeal in *Pugh v. London, Brighton and South Coast Ry. Co.* [1896] 2 QB 248 as open to question. It is inconsistent with a decision in the Court of Appeal in Ireland: see *Bell v. Great Northern Ry. Co. of Ireland* (1890) 26 LR Ir 428, where the Irish Exchequer Division refused to follow it; and it has been disapproved in the Supreme Court of New York: see *Pollock on Torts*, 4th ed. p. 47 (n). [This decision has since been reversed on appeal: *Mitchell v. RR Co*, 151 NY 107—FP]. Nor is it altogether in point, for there was not in that case any element of wilful wrong; nor perhaps was the illness so direct and natural a consequence of the defendant's conduct as in this case. On these grounds it seems to me that the case of *Victorian Railways Commissioners v. Coultas* 13 App Cas 222 is not an authority on which this case ought to be decided.

5. A more serious difficulty is the decision in *Allsop v. Allsop* 5 H & N 534, which was approved by the House of Lords in *Lynch v. Knight* 9 HL C 577. In that case it was held by Pollock C.B., Martin, Bramwell, and Wilde BB., that illness caused by a slanderous imputation of unchastity in the case of a married woman did not constitute such special damage as would sustain an action for such a slander. That case, however, appears to have been decided on the ground that in all the innumerable actions for slander there were no precedents for alleging illness to be sufficient special damage, and that it would be of evil consequence to treat it as sufficient, because such a rule might lead to an infinity of trumpery or groundless actions. Neither of these reasons is applicable to the present case. Nor could such a rule be adopted as of general application without results which it would be difficult or impossible to defend. Suppose that a person is in a precarious and dangerous condition, and another person tells him that his physician has said that he has but a day to live. In such a case, if death ensued from the shock caused by the false statement, I cannot doubt that at this day the case might be one of criminal homicide, or that if a serious aggravation of illness ensued damages might be recovered. I think, however, that it must be admitted that the present case is without precedent. Some English decisions—such as *Jones v. Boyce* (1816) 1 Stark 493; *Wilkins v. Day* (1883) 12 QB D 110; *Harris v. Mobbs* (1878) 3 Ex D 268—are cited in *Beven on Negligence* as inconsistent with the decision in *Victorian Railways Commissioners v. Coultas* 13 App Cas 222. But I think that those cases are to be explained on a different ground, namely, that the damage which immediately resulted from the act of the passenger or of the horse was really the result, not of that act, but of a fright which rendered that act involuntary, and which therefore ought to be regarded as itself the direct and immediate cause of the damage. In *Smith v. Johnson & Co.* unreported, decided in January last, Bruce J. and I held that where a man was killed in the sight of the plaintiff by the defendant's negligence, and the plaintiff became ill, not from the shock from fear of harm to himself, but from the shock of seeing another person killed, this harm was too remote a consequence of the negligence. But that was a very different case from the present.

6. There must be judgment for the plaintiff for 100l. 1s. 10½.

REFLECTION:

- *What differentiates the tort in Wilkinson v. Downton from the trespass-to-the-person torts?*
- *Was the development of this tort an illustration of judicial law-making?*

3.1.2 Wainwright v. Home Office [2003] UKHL 53

House of Lords – [2003] UKHL 53

✗REF: §4.1.1.1

LORD HOFFMANN (LORD BINGHAM, LORD HOPE, LORD HUTTON AND LORD SCOTT concurring):

2. On 15 August 1996 Patrick O'Neill was taken into custody on a charge of murder and held at Armley Prison, Leeds. The prison authorities suspected that while awaiting trial he was dealing in drugs. They did not know how he obtained his supplies but people who visit prisoners are a common source of drugs and other contraband. So the governor gave instructions that anyone who wanted an open visit with Patrick O'Neill had first to allow himself (or herself) to be strip searched. Rule 86(1) of the Prison Rules 1964 (consolidated 1998) confers a power in general terms to search any person entering a prison.

3. Strip searching is controversial because having to take off your clothes in front of a couple of prison officers is not to everyone's taste. Leeds Prison has internal rules designed to reduce the embarrassment as far as possible. They are modelled on the code of practice issued to the police. The search must take place in a completely private room in the presence of two officers of the same sex as the visitor. The visitor is required to expose first the upper half of his body and then the lower but not to stand completely naked. His body (apart from hair, ears and mouth) is not to be touched. Before the search begins, the visitor is asked to sign a consent form which outlines the procedure to be followed.

4. On 2 January 1997 Patrick O'Neill's mother Mrs Wainwright, together with her son Alan (Patrick's half-brother) went to visit him. A prison officer told them that they would have to be strip searched. They reluctantly agreed and prison officers took them to separate rooms where they were asked to undress. They did as they were asked but both found the experience upsetting. Some time afterwards (it is unclear when) they went to a solicitor who had them examined by a psychiatrist. He concluded that Alan (who had physical and learning difficulties) had been so severely affected by his experience as to suffer post-traumatic stress disorder. Mrs Wainwright had suffered emotional distress but no recognised psychiatric illness.

5. Mrs Wainwright and Alan commenced an action against the Home Office on 23 December 1999, just before the expiry of the limitation period. By the time the case came to trial in April 2001, none of the prison officers could remember searching the Wainwrights. They, on the other hand, gave evidence, which the judge accepted, that the search had not been conducted in accordance with the rules. Both had been asked to uncover all or virtually all of their bodies at the same time, both were not given the consent form until after the search had been completed, the room used to search Mrs Wainwright was not private because it had an uncurtained window from which someone across the street could have seen her and one prison officer had touched Alan's penis to lift his foreskin. ***

7. The conclusion of both the judge and the Court of Appeal was *** that the searches were not protected by statutory authority. But that is not enough to give the Wainwrights a claim to compensation. The acts of the prison officers needed statutory authority only if they would otherwise have been wrongful, that is to say, tortious or in breach of a statutory duty. People do all kinds of things without statutory authority. So the question is whether the searches themselves or the manner in which they were conducted gave the Wainwrights a cause of action.

8. The judge found two causes of action, both of which he derived from the action for trespass. As Diplock LJ pointed out in *Letang v. Cooper* [1965] 1 QB 232, 243 [§1.3.3], trespass is strictly speaking not a cause of action but a form of action. It was the form anciently used for a variety of different kinds of claim which had as their common element the fact that the damage was caused directly rather than indirectly; if the damage was indirect, the appropriate form of action was the action on the case. After the abolition of the forms of action trespass is no more than a convenient label for certain causes of action which derive historically from the old action for *trespass vi et armis*. One group of such causes of action is trespass to the person, which includes the torts of assault, battery and false imprisonment, each with their own conditions of liability.

9. Battery involves a touching of the person with what is sometimes called hostile intent (as opposed to a friendly pat on the back) but which Robert Goff LJ in *Collins v. Wilcock* [1984] 1 WLR 1172, 1178 [§2.2.3] redefined as meaning any intentional physical contact which was not "generally acceptable in the ordinary conduct of daily life": see also *Wilson v. Pringle* [1987] QB 237. Counsel for the Home Office conceded that touching Alan's penis was not acceptable and was therefore a battery.

10. That, however, was the only physical contact which had occurred. The judge nevertheless held that requiring the Wainwrights to take off their clothes was also a form of trespass to the person. He arrived at this conclusion by the use of two strands of reasoning. First, he said that a line of authority starting with *Wilkinson v. Downton* [1897] 2 QB 57, *** had extended the conduct which could constitute trespass to the utterance of words which were "calculated" to cause physical (including psychiatric) harm. There was in his view little distinction between words which directly caused such harm and words which induced someone to act in a way which caused himself harm, like taking his own clothes off. So inducing Alan to take off his clothes and thereby suffer post-traumatic stress disorder was actionable. ***

13. The Court of Appeal did not agree with the judge's extensions of the notion of trespass to the person and did not consider that (apart from the battery, which was unchallenged) the prison officers had committed any other wrongful act. So they set aside the judgments against the Wainwrights with the exception of the damages for battery, to which they attributed £3,750 of the £4,500 awarded by the judge. ***

40. By the time of *Janvier v. Sweeney* [1919] 2 KB 316, *** the law was able comfortably to accommodate the facts of *Wilkinson v. Downton* [1897] 2 QB 57 in the law of nervous shock caused by negligence. It was unnecessary to fashion a tort of intention or to discuss what the requisite intention, actual or imputed, should be. Indeed, the remark of Duke LJ to which I have referred suggests that he did not take seriously the idea that Downton had in any sense intended to cause injury.

41. Commentators and counsel have nevertheless been unwilling to allow *Wilkinson v. Downton* to disappear beneath the surface of the law of negligence. ***

44. I do not resile from the proposition that the policy considerations which limit the heads of recoverable damage in negligence do not apply equally to torts of intention. If someone actually intends to cause harm by a wrongful act and does so, there is ordinarily no reason why he should not have to pay compensation. But I think that if you adopt such a principle, you have to be very careful about what you mean by intend. In *Wilkinson v. Downton* RS Wright J wanted to water down the concept of intention as much as possible. He clearly thought, as the Court of Appeal did afterwards in *Janvier v. Sweeney* [1919] 2 KB 316, that the plaintiff should succeed whether the conduct of the defendant was intentional or negligent. But the *Victorian Railway Comrs* case 13 App Cas 222 prevented him from saying so. So he devised a concept of imputed intention which sailed as close to negligence as he felt he could go.

45. If, on the other hand, one is going to draw a principled distinction which justifies abandoning the rule that damages for mere distress are not recoverable, imputed intention will not do. The defendant must actually have acted in a way which he knew to be unjustifiable and intended to cause harm or at least acted without caring whether he caused harm or not. Lord Woolf CJ, as I read his judgment, at [2002] QB 1334, 1350, paras 50-51, might have been inclined to accept such a principle. But the facts did not support a claim on this basis. The judge made no finding that the prison officers intended to cause distress or realized that they were acting without justification in asking the Wainwrights to strip. He said, at para. 83, that they had acted in good faith and, at para. 121, that:

> "The deviations from the procedure laid down for strip-searches were, in my judgment, not intended to increase the humiliation necessarily involved but merely sloppiness." ***

47. In my opinion, therefore, the claimants can build nothing on *Wilkinson v. Downton* [1897] 2 QB 57. It does not provide a remedy for distress which does not amount to recognized psychiatric injury and so far as there may be a tort of intention under which such damage is recoverable, the necessary intention was not established. I am also in complete agreement with Buxton LJ, at [2002] QB 1334, 1355-1356, paras 67-72, that *Wilkinson v. Downton* has nothing to do with trespass to the person. ***

50. In the present case, the judge found that the prison officers acted in good faith and that there had been no more than "sloppiness" in the failures to comply with the rules. The prison officers did not wish to humiliate the claimants; the evidence of Mrs Wainwright was that they carried out the search in a matter-of-fact way and were speaking to each other about unrelated matters. The Wainwrights were upset about having to be searched but made no complaint about the manner of the search; Mrs Wainwright did not ask for the blind to be drawn over the window or to be allowed to take off her clothes in any particular order and both of them afterwards signed the consent form without reading it but also without protest. The only inexplicable act was the search of Alan's penis, which the prison officers were unable to explain because they could not remember having done it. But this has been fully compensated. ***

53. I would therefore dismiss the appeal.

REFLECTION:

- *In what way did Lord Hoffmann reconceptualise the tort in Wilkinson v. Downton?*

3.2 The modern tort of intentional infliction of mental suffering

3.2.1 Rhodes v. OPO [2015] UKSC 32

United Kingdom Supreme Court – [2015] UKSC 32

✗REF: §9.8.1.1

LADY HALE AND LORD TOULSON (LORD CLARKE AND LORD WILSON concurring):

1. By these proceedings, a mother seeks to prevent a father from publishing a book about his life containing certain passages which she considers risk causing psychological harm to their son who is now aged 12. Mother and son now live in the United States of America and so the family court in England and Wales has no jurisdiction to grant orders protecting the child's welfare. Instead, these proceedings have been brought in his name, originally by his mother and now by his godfather as his litigation friend, alleging that publication would constitute a tort against him. The tort in question is that recognised in the case of *Wilkinson v. Downton* [1897] 2 QB 57 and generally known as intentionally causing physical or psychological harm. What, then, is the proper scope of the tort in the modern law? In particular, can it ever be used to prevent a person from publishing true information about himself? ***

4. *** [T]he author's life has been a shocking one. And this is because, as he explains in the first of the passages to which exception is taken, "I was used, fucked, broken, toyed with and violated from the age of six. Over and over for years and years". In the second of those passages, he explains how he was groomed and abused by Mr Lee, the boxing coach at his first prep school … ***

90. We conclude that there is no arguable case that the publication of the book would constitute the requisite conduct element of the tort or that the appellant has the requisite mental element. On both grounds the appeal must be allowed and the order of Bean J restored. ***

LORD NEUBERGER (LORD WILSON concurring): ***

94. The claimant's claim had no prospects of success because publication of the defendant's book would plainly not have given rise to a cause of action in his favour. ***

102. The tort [in *Wilkinson v. Downton*] has been identified as "terror wrongfully induced and inducing physical mischief" (see *Dulieu v. White & Sons* [1901] 2 KB 669, 683 and *Janvier v. Sweeney* [1919] 2 KB 316, 322). However, I am not happy with that characterisation, as it lumps together physical actions and statements, it begs the question by the use of the word "wrongful", and it is limited to "terror", and, as explained below, I would leave open whether "physical mischief" is a necessary ingredient.

103. While I would certainly accept that an action not otherwise tortious which causes a claimant distress could give rise to a cause of action, I would be reluctant to decide definitively that liability for distressing actions and distressing words should be subject to the same rules, at this stage at any rate. There is of course a substantial overlap between words and actions: after all, words can threaten or promise actions, and freedom of expression can in some respects extend to actions as well as words. And, in the light of what I say below, it might be the case that the tort of making distressing statements is to be limited to statements which are the verbal equivalent of physical assaults. However, there are relevant differences between words and actions. ***

105. *** [T]he tort exists, and should be defined narrowly and as clearly as possible, but it would be dangerous to say categorically that each ingredient of the tort must always be present. Nonetheless, it seems to me that it is worth identifying what are, at least normally, and hopefully almost always, the essential ingredients of the tort.

106. *Wilkinson* and *Janvier* were cases where the statement made by the defendant was untrue, gratuitous, intended to distress the plaintiff, directed at the plaintiff, and caused the plaintiff serious distress amounting to psychiatric illness. Clearly, where all these ingredients are present, the tort would be established, but the question is whether they are all strictly required.

107. First, if it is possible at all, it will be a very rare case where a statement which is not untrue could give rise to a claim, save, perhaps where the statement was a threat or (possibly) an insult. ***

110. This does not, of course, mean that every untruthful statement, threat or insult could give rise to a claim. Because of the importance of freedom of expression and of the law not impeding ordinary discourse, there must be a second and demanding requirement which has to be satisfied before liability can attach to an untruth, an insult or a threat which was intended to, and did, cause distress, but would not otherwise be civilly actionable. Lady Hale and Lord Toulson have suggested a test of "justification or reasonable excuse" in paras 74-76 above, and I have used the adjective "gratuitous" in para 106 above. Neither description is ideal as it can be said to be question-begging (virtually every threat, untruth or insult can be said to be unjustified, inexcusable and gratuitous), and it involves a subjective assessment. There may be something to be said for the adjectives "outrageous", "flagrant" or "extreme", which seem to have been applied by the US and Canadian courts (discussed in paras 69-71 above). Of course, even with a test of outrageousness a subjective judgment will be involved to some extent, but that cannot be avoided.

111. As mentioned, it seems to me to be vital that the tort does not interfere with the give and take of ordinary human discourse (including unpleasant, heated arguments, whether in domestic, social, business or other contexts, sometimes involving the trading of insults or threats), or with normal, including trenchant, journalism and other writing. Inevitably, whether a particular statement is gratuitous must depend on the context. An unprompted statement made simply because the defendant wanted to say it or because he was inspired by malice, as in *Janvier*, or something very close to malice, as in *Wilkinson*, may be different from the same statement made in the course of a heated argument, especially if provoked by a series of wounding statements by the defendant. Similarly, it would be wrong for this tort to be invoked to justify relief against a polemic op-ed newspaper article or a strongly worded and antipathetic biography, save in the most unusual circumstances. The tort should not somehow be used to extend or supplement the law of defamation.

112. Thirdly, I consider that there must be an intention on the part of the defendant to cause the claimant distress. This requirement might seem at first sight to be too narrow, not least because it might appear that it would not have caught the defendant in *Wilkinson*: he merely intended his cruel statement as a joke. However, the fact that a statement is intended to be a joke is not inconsistent with the notion that it was intended to upset. ***

113. Intentionality may seem to be a fairly strict requirement, as it excludes not merely negligently harmful statements, but also recklessly harmful statements. However, in agreement with Lady Hale and Lord Toulson, I consider that recklessness is not enough. In truth, I doubt it would add much. Further, in practice, recklessness is a somewhat tricky concept. Quite apart from this, bearing in mind the importance of freedom of expression and of the law not sticking its nose into human discourse except where necessary, it appears to me that the line should be drawn at intentionality.

114. I am inclined to think that distressing the claimant has to be the primary purpose, but I do not consider that it need be the sole purpose. The degree of distress which is actually intended must be significant, and not trivial, and it can amount to feelings such as despair, misery, terror, fear or even serious worry. ***

115. Fourthly, the statement must, I think, be directed at the claimant in order to be tortious. In most cases this will add nothing to the requirements already mentioned. However, I would have thought that a statement which is aimed at upsetting a large group of addressees, without any particular individual (or relatively small group of individuals) in mind, should not be caught.

116. Then there is the question as to whether a claimant can only bring an action if he suffers distress to a sufficient degree to amount to a recognised illness or condition (whether psychological or physiological—assuming that the distinction is a valid one). Like Lord Hoffmann in *Wainwright v. Home Office* [2003] UKHL 53, [2004] 2 AC 406 [§3.1.2], I consider that there is much to be said for the view that the class of potential claimants should not be limited to those who can establish that they suffered from a recognised psychiatric illness as a result of the actionable statement of the defendant. ***

119. As I see it, *** there is plainly a powerful case for saying that, in relation to the instant tort, liability for distressing statements, where intent to cause distress is an essential ingredient, it should be enough for

the claimant to establish that he suffered significant distress as a result of the defendant's statement. It is not entirely easy to see why, if an intention to cause the claimant significant distress is an ingredient of the tort and is enough to establish the tort in principle, the claimant should have to establish that he suffered something more serious than significant distress before he can recover any compensation. Further, the narrow restrictions on the tort should ensure that it is rarely invoked anyway. ***

122. In all these circumstances, it seems to me clear, even at this interlocutory stage, that the claimant's case plainly fails all but one of the requirements of the tort on which it is said to be based. While there is some (disputed) evidence that they could cause the claimant serious distress, the contents of the defendant's book are not untrue, threatening or insulting, they are not gratuitous or unjustified, let alone outrageous, they are not directed at the claimant, and they are not intended to distress the claimant. Accordingly, I have no hesitation in agreeing that the appeal should be allowed, and the order of Bean J striking out the claim restored.

REFLECTION:

- *How does Lord Neuberger's conception of the tort of intentionally inflicting nervous shock differ from the elements first laid down in Wilkinson v. Downton?*
- *Why was Lord Neuberger concerned to define this tort "narrowly and as clearly as possible"? Do you disagree with any aspects of his reasoning?*

3.2.2 Ahluwalia v. Ahluwalia [2023] ONCA 476

✗**REF: §2.3.5, §5.2.5, §9.4.4, §9.5.5**

BENOTTO J.A. (TROTTER J.A. AND ZARNETT J.A. concurring): ***

69. There is also the tort of intentional infliction of emotional distress. It has three elements: (i) the defendant's conduct was flagrant and outrageous; (ii) the conduct was calculated to harm; and (iii) the conduct caused the plaintiff to suffer a visible and provable illness. See *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 60 O. R. (3d) 474 (C.A.).

70. The requirement that the conduct be calculated to produce harm is met where the actor desires to produce the consequences that follow from the act, or if the consequences are known to be substantially certain to follow: Allen M. Linden, *Canadian Tort Law*, 7th ed. (Markham, Ont.: Butterworths, 2001) at p. 34, Prof. G.H.L. Fridman, *The Law of Torts in Canada* (Toronto: Carswell, 1989) at p. 53. The "visible and provable illness" does not require expert medical evidence. It is satisfied when depression or physical illness result from the conduct: see *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543 [**§19.2.1.3**].

71. The trial judge's findings satisfy these requirements. ***

REFLECTION:

- *How does the Ontario Court of Appeal's conception of the intentional infliction of mental suffering tort differ from the elements first laid down in Wilkinson v. Downton? How does its elements compare to Rhodes?*

3.2.3 Fitzpatrick v. Orwin, Squires & Squires [2012] ONSC 3492

Ontario Superior Court – 2012 ONSC 3492, aff'd 2014 ONCA 124

✗**REF: §7.1.3, §9.1.3, §9.2.3, §9.3.5, §9.5.6, §9.8.2.3, §10.11.2**

STINSON J.:

1. As was their standard practice, at approximately 5:20 a.m. on Monday, November 12, 2007, sixty year old William Squires kissed his seventy-five year old wife, Anna, goodbye at the front door of their suburban Pickering bungalow. As he descended the front steps to begin his early morning commute to his job in downtown Toronto, Mr. Squires was shocked to discover that someone had placed a large dead coyote on the hood of his pickup truck. Blood was dripping from its mouth. The Squires called 911 and the Durham

Regional Police came to investigate. By the end of the day, the police had arrested and taken into custody the Squires' thirty-nine year old next door neighbour, David Fitzpatrick, and charged him with criminal harassment.

2. The charge against Mr. Fitzpatrick never proceeded to trial. Instead, Assistant Crown Attorney Roberto Corbella concluded that there was no reasonable prospect of conviction and the charge against Mr. Fitzpatrick was withdrawn.

3. Mr. Fitzpatrick now sues the Squires for malicious prosecution. He joins as a co-defendant his estranged sister, Shelley Orwin. *** The Squires counterclaim for intentional infliction of mental distress. ***

95. Based upon the evidence at trial and my assessment of the testimony of the witnesses, I make the following findings of fact:

> 1. I find that Mr. Fitzpatrick acted in an increasingly hostile and abusive fashion towards the Squires subsequent to his mother's death. He did so based on his erroneous perception that they were allies of his sister Shelley in relation to the estate dispute. His hostility was manifested in insults, abusive language and failure to respect the property line between the driveways at the front of their house when he was cutting the grass. On occasion, Mr. Squires responded by speaking in a like fashion, but only when provoked by Mr. Fitzpatrick.
>
> 2. I find that, on repeated occasions, Mr. Fitzpatrick shouted at and used profane and abusive language in reference to Mrs. Squires, to the point where she felt uncomfortable leaving her house. ***
>
> 6. [The Squires] felt genuinely threatened by the outburst by Mr. Fitzpatrick. I accept their testimony that they had previously observed Mr. Fitzpatrick engaged in a physical confrontation and they believed he had violent tendencies. Their decision to contact the police on November 11, 2007 was made in good faith, and was based on genuine and well-founded concerns regarding their personal safety.
>
> 7. In relation to the detachment of the security camera on the night of November 11—12, 2007, I infer and find as a fact that this was carried out by Mr. Fitzpatrick or someone acting on his instructions so that the placement of the coyote on the hood of the Squires' vehicle would not be recorded. I also infer and find as a fact that the dead coyote was placed on the hood of the Squires' vehicle either by Mr. Fitzpatrick personally or by someone acting on his instructions. ***

Intentional infliction of mental distress ***

115. In *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 60 O.R. (3d) 474 (Ont. C.A.), Weiler J.A adopted the test for intentional infliction of mental distress, as set out by McLachlin J. in *Rahemtulla v. Vanfed Credit Union* (1984), 51 B.C.L.R. 200 (B.C. S.C.). This test requires:

> (a) conduct that is flagrant and outrageous;
>
> (b) calculated to produce harm; and,
>
> (c) resulting in a visible and provable injury.

116. A malicious purpose is not required in order to establish this tort: see *Prinzo*, *supra*, at para. 44.

(a) Flagrant and outrageous conduct

117. I am satisfied that Mr. Fitzpatrick's conduct was flagrant and outrageous. First, it was completely unreasonable for him to act in a hostile and insulting fashion to the Squires, simply because he (inaccurately) perceived them as supporters of his sister during his estate dispute with her. His ongoing disparaging comments were wholly inappropriate and misguided. As well, Mr. Fitzpatrick's threatening actions towards Mr. O'Carroll were unwarranted since the postholes he dug for the fence were on the property of the Squires. As such, Mr. Fitzpatrick had no reason to act in a threatening and belligerent

manner. In my opinion, Mr. Fitzpatrick's decision to detach the Squires' security camera and place a dead coyote on the hood of their truck is the epitome of flagrant and outrageous conduct.

118. As explained below, it matters not whether Mr. Fitzpatrick placed the coyote carcass on Mr. Squires' truck himself or instructed or encouraged someone else to do so; in either situation, he is personally liable for the torts of trespass and intentional infliction of mental suffering. If he instructed someone to carry out this action, Mr. Fitzpatrick acted in concert with the other individual as a joint tortfeasor. Such tortfeasors are jointly liable for the damage they cause. Because Mr. Fitzpatrick is the only joint tortfeasor known to this court with regards to the coyote incident, he bears full responsible for all the damages suffered by the Squires as a consequence of this incident. ***

(b) Calculated to produce harm

126. Turning to the next element of tort, I find that Mr. Fitzpatrick's above actions were calculated to produce harm. This requirement is met where it is clearly foreseeable that the actions of the tortfeasor would cause harm to the victim: see *Prinzo*, *supra*, at para. 45 adopting the reasons in *Rahemtulla*.

127. It is entirely foreseeable that hurling insults at the Squires, threatening their friend Mr. O'Carroll into abandoning the construction of the fence, and of course, placing the carcass of a dead animal on the hood of their vehicle would produce upset and alarm. They were an older couple who would naturally feel fearful and unsafe due to this conduct.

128. The Court of Appeal for Ontario stressed in *Piresferreira v. Ayotte*, 2010 ONCA 384 (Ont. C.A.) at paras.78-79 that although the extent of the harm need not be anticipated, the kind of harm must have been intended or known to be substantially certain to follow. Thus, Mr. Fitzpatrick must have either desired to produce the mental distress suffered by the Squires, or know that this type of harm was substantially certain to follow.

(c) Visible and provable injury

129. The final element of the test is visible and probable injury. Mr. Fitzpatrick's ongoing hostile conduct directed at the Squires, culminating in the placement of the animal carcass on the truck did not cause physical harm to the Squires. It is evident, however, that this conduct on his part would likely produce psychological harm. Mr. Squires believed the final incident to be a death threat, akin to one portrayed in a mafia movie. While I make no finding as to whether an actual death threat was the intended purpose of the dead coyote incident. Mr. Fitzpatrick had to know that psychological harm was substantially certain to follow the placement of an animal carcass on the hood of a vehicle owned by an older couple in the Squires' circumstances.

130. The actual psychological harm in this case is evidenced by the uncontradicted medical reports of Dr. Eisen who is the family physician of the Squires. He reported that Mr. Squires suffered severe depression, suicidal ideation, insomnia, agitation, irritability and anxiety as a result of the harassment. Mr. Squires was diagnosed with adjustment reaction with depressed mood. He required prescription medication in high doses as well as counseling to help him cope with his situation.

131. According to Dr. Eisen, Mrs. Squires was depressed, tearful and anxious. She suffered from panic attacks, with shortness of breath, palpitations and extreme fearfulness, as well as high blood pressure. She required Clonazapen to manage her panic symptoms. ***

133. In addition to (and as a direct consequence of) the emotional impact caused by Mr. Fitzpatrick's conduct, the Squires concluded that they could no longer live in the house they had enjoyed and improved for more than 20 years. They were forced to sell and relocate, leaving established relationships with their other, long-time neighbours.

134. Based on the medical reports provided by Dr. Eisen and the testimony of the Squires, I conclude that Mr. Fitzpatrick's actions caused in each of them a visible and provable illness. It follows that the Squires have made out their claim for intentional infliction of mental distress. ***

REFLECTION:

- *What facts were crucial to satisfying the elements of the Prinzo test in this case?*[73]

3.2.4 Boucher v. Wal-Mart Canada Corp. [2014] ONCA 419

Ontario Court of Appeal – 2014 ONCA 419

✗**REF: §9.3.7, §9.4.5, §9.5.7**

LASKIN J.A.:

1. The respondent Meredith Boucher began working for the appellant Wal-Mart in 1999. She was a good employee. In November 2008 she was promoted to the position of assistant manager at the Wal-Mart store in Windsor. Her immediate supervisor was the store manager, the appellant Jason Pinnock.

2. At first Boucher and Pinnock worked well together. Their relationship turned sour, however, after an incident in May 2009 in which Boucher refused to falsify a temperature log. Pinnock then became abusive towards her. He belittled, humiliated and demeaned her, continuously, often in front of co-workers. Boucher complained about Pinnock's misconduct to Wal-Mart's senior management. They undertook to investigate her complaints. But in mid-November 2009 they told her that her complaints were "unsubstantiated" and that she would be held accountable for making them. A few days later, after Pinnock again humiliated Boucher in front of other employees, she quit. A few weeks later she sued Wal-Mart and Pinnock for "constructive" dismissal and for damages.

3. The action was tried before a judge and a jury. The jury found that Boucher had been constructively dismissed and awarded her damages equivalent to 20 weeks salary, as specified in her employment contract. The jury also awarded her damages of $1,200,000 against Wal-Mart, made up of $200,000 in aggravated damages for the manner in which she was dismissed, and $1,000,000 in punitive damages. And the jury awarded Boucher damages of $250,000 against Pinnock, made up of $100,000 for intentional infliction of mental suffering, and $150,000 in punitive damages (awards for which Wal-Mart is vicariously liable as Pinnock's employer).

4. On appeal, Pinnock and Wal-Mart challenge both their liability for and the amount of damages for intentional infliction of mental suffering, aggravated damages and punitive damages. ***

B. Background ***

(c) The working relationship between Pinnock and Boucher ***

24. Boucher testified that from the day Pinnock found out about her meeting with the District People Manager, he subjected her to an unrelenting and increasing torrent of abuse. He regularly used profane language when he spoke to her. He belittled her. He demeaned her in front of other employees. He even called in other employees so he had an audience when he berated her and showed his disdain for her.

25. Boucher gave many specific examples of Pinnock's abuse. A sampling is as follows:

> • Pinnock pulled employees who reported to Boucher into morning store tours and in front of them told Boucher how stupid she was, and that her career was blowing away;
>
> • When Pinnock criticized Boucher, he pounded his chest and said "let me know when you can't fucking handle it anymore";
>
> • Pinnock berated Boucher in front of other managers, and even store customers: "he would say this is a fucking shit show, look at this fucking mess".

[73] See A. Humphreys, "Like a 'Mafia movie': Neighbourly dispute leads to a gruesome 'death threat' against couple" National Post (Dec 5, 2012).

26. Other Wal-Mart employees testified about Pinnock's conduct towards Boucher. For example:

> • One assistant manager testified that after the May 2009 temperature log incident, Pinnock turned "ferocious" towards Boucher. His treatment of her was "humiliating". She said, "we were constantly called idiots like we were so stupid";
>
> • Another assistant manager testified that after the May 2009 incident, Pinnock's treatment of Boucher was "terrible, horrific".

(d) Boucher's complaints to Wal-Mart and Wal-Mart's investigation ***

31. Wal-Mart's management team told Boucher that they had investigated her complaints and found them to be "unsubstantiated". They also told her that she would be held accountable for making these unsubstantiated complaints, but they had not yet decided what discipline she would face. They concluded that Boucher was trying to undermine Pinnock's authority. Boucher left the meeting in tears.

32. Pinnock, on the other hand, was not disciplined for his conduct or even cautioned about it. He was spoken to only about his and his team's use of inappropriate language.

33. In reaching their findings, Wal-Mart's management team appeared to ignore the numerous incidents in which Pinnock berated Boucher in front of co-workers. And little evidence was led at trial that Wal-Mart's investigators sought information from the other assistant managers who had witnessed Pinnock's abusive conduct.

(e) The Final Incident: November 18, 2009

34. At the end of Boucher's shift on November 18, Pinnock again berated her because ten extra skids of products delivered to the store overnight had not been unloaded. Pinnock grabbed Boucher by the elbow in front of a group of co-workers. He told her to prove to him that she could count to ten. He prompted her by initiating the count, then told her to count out loud along with him. Boucher was so humiliated she left the store.

35. Four days later, Boucher sent Wal-Mart an email that she did not intend to return to work until her complaints about Pinnock were resolved to her satisfaction. They never were. And she never returned to work. In early December she started this lawsuit for constructive dismissal and damages.

(f) Pinnock's Motives: the Evidence of Samantha Russell

36. Samantha Russell was the Store People Manager. She had observed how Pinnock treated Boucher. At one point she cautioned Pinnock about going after Boucher so hard because Boucher was beginning to look ill. Pinnock replied: "Not until she fucking quits." When Pinnock found out that Boucher had quit he was overjoyed. He had achieved his goal.

(g) The Effect of Pinnock's and Wal-Mart's Conduct

37. Boucher testified about the effect of Pinnock's conduct toward her, and of Wal-Mart's failure to do anything about it, or even acknowledge it. She said that she was stressed out. She could not eat or sleep. She had abdominal pain, constipation and bloating. She lost weight and began vomiting blood. Co-workers testified that Boucher went from a fun-loving, lively, positive leader to a defeated and broken person.

38. Boucher went to see her family doctor, Dr. Avril MacDonald, three times between September and November 2009. In Dr. MacDonald's opinion, Boucher's physical symptoms were stress-related. Dr. MacDonald prescribed a sedative and referred Boucher to a psychiatrist. Boucher saw a therapist in December, but by then she was already feeling better. She testified that by late December she felt she had nearly fully recovered and was actively looking for another job. ***

C. Pinnock's Appeal

(a) The Elements of the Tort and the Trial Judge's Charge

41. The tort of intentional infliction of mental suffering has three elements. The plaintiff must prove:

- The defendant's conduct was flagrant and outrageous;
- The defendant's conduct was calculated to harm the plaintiff;
- The defendant's conduct caused the plaintiff to suffer a visible and provable illness.

See *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 60 O.R. (3d) 474 (Ont. C.A.).

42. The trial judge instructed the jury several times on the three elements of the tort. Pinnock submits that the trial judge misstated the second element. She told the jury:

> In determining whether the conduct was calculated to produce harm, you must be satisfied that Mr. Pinnock either intended to produce the consequences or *alternatively, ought to have known that the consequences were substantially certain to occur*. Has it been established that Mr. Pinnock intended to cause mental suffering on the part of Ms. Boucher, or engaged in conduct that was substantially certain to cause such suffering? [Emphasis added.]

43. The alternative, that Pinnock could be liable if he "ought to have known" the consequences were substantially certain to occur, is wrong, he contends, because it imports an objective test into the tort. I am inclined to agree that the trial judge misstated the second element. The test is purely subjective as Weiler J.A. said in *Prinzo*, at para. 61:

> [F]or the conduct to be calculated to produce harm, either the actor must desire to produce the consequences that follow, or the consequences must be known by the actor to be substantially certain to follow. ***

44. The plaintiff cannot establish intentional infliction of mental suffering by showing only that the defendant ought to have known that harm would occur. The defendant must have intended to produce the kind of harm that occurred or have known that it was almost certain to occur: see *Piresferreira*, at para. 78.

45. However, I would not give effect to this error on appeal because Pinnock's trial counsel did not object to the charge at trial, and the error did not result in an injustice.[74] ***

48. The error here was inconsequential; it caused no injustice. The evidence of Samantha Russell, which I reviewed earlier and which the jury almost certainly accepted, shows that Pinnock intended by his conduct to cause the very harm that occurred; he wished to cause Boucher so much stress or mental anguish that she would resign. I would therefore not give effect to Pinnock's submission on the charge.

(b) Liability

49. Pinnock submits that no jury acting reasonably could have found him liable for this tort. I do not agree with this submission. Appellate review of a civil jury award is limited. The standard is "unreasonableness" and this standard applies to liability as well as to amount. A civil jury verdict should be set aside only where it is so plainly unreasonable and unjust that no jury, reviewing the evidence as a whole and acting judicially, could have arrived at the verdict: see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.), at para. 30. In this case the evidence led at trial reasonably supported each of the three elements of the tort of intentional infliction of mental suffering.

50. Pinnock's conduct was flagrant and outrageous. He belittled, humiliated and demeaned Boucher continuously and unrelentingly, often in front of co-workers, for nearly six months.

51. Pinnock intended to produce the harm that eventually occurred. He wanted to get Boucher to resign. To do so, he wanted to cause her so much emotional distress or mental anguish that she would have no alternative but to quit her job. The evidence of Samantha Russell, which was not challenged in cross-examination, and was reviewed by the trial judge for the jury, supports this element of the tort. Ms. Russell

[74] Counsel for Pinnock and Wal-Mart on appeal were not counsel at trial.

testified that Pinnock was "overjoyed" when Boucher resigned because he had achieved his goal.

52. Because of Pinnock's conduct, Boucher suffered a visible and provable illness. The stress of Pinnock's conduct caused physical symptoms: Boucher suffered abdominal pain, constipation and weight loss. She vomited blood and could not eat or sleep. Her appearance became grey and haggard. *** Although Boucher's symptoms did not last long, that is not surprising. They cleared up once the person who caused them—Pinnock—was no longer part of her life.

53. The jury's finding of liability was reasonable. Appellate intervention is not justified. ***

REFLECTION:

- *How does this case clarify the second element of the Prinzo test? What was the significance of the judge's misinterpretation of the second element to the outcome of this appeal?*
- *How did the legal system facilitate (or frustrate) Boucher's pursuit of civil redress? What was Boucher's likely aim in pursuing a tort suit?*[75]

3.2.5 Lu v. Shen [2020] BCSC 490

British Columbia Supreme Court – 2020 BCSC 490, aff'd 2021 BCCA 95

✗**REF: §4.2.4, §5.1.1, §5.2.3, §9.3.8, §9.8.2.4**

ADAIR J.:

1. In this action, two women who barely know one another, and who have rarely met one another in person, sue one another for defamation, breach of privacy and intentional infliction of emotional distress. Their claims against one another are the product of a verbal war they have waged against one another in social media for over a decade. After this action was filed, the war intensified, and was played out mostly (but not exclusively) in court filings and very lengthy affidavits. ***

60. As of trial, Ms. Lu and Ms. Shen were representing themselves. However, Ms. Lu's notice of civil claim was drafted by a lawyer. Ms. Shen's Second Amended response to civil claim was also (on its face) drafted and signed by a lawyer, as was her original counterclaim. ***

62. *** Ms. Lu alleges:

> 3. The parties first met on an Internet forum called Canadameet.com ("Canadameet") in the year 2005. At that time both parties were preparing to immigrate to Canada from China.
>
> 4. Canadameet is an online forum popular with the Chinese community in Canada, wherein users interact and have discussions about various issues having to do with their lives and the Chinese community.
>
> 5. In 2006, both parties stopped using Canadameet and started using a new Internet forum called Ourdream.ca ("Ourdream"). Ourdream is also an online forum in which members of the Canadian Chinese community have discussions about various issues.

Ms. Shen admits the allegations in paras. 3-5.

63. Ms. Lu continues:

> 6. Both Canadameet and Ourdream are very popular forums accessible by hundreds of thousands of people in the Chinese community.
>
> 7. In or around 2005, the Defendant became increasingly dismissive and insulting toward the

[75] See I. Roumeliotis, "Workplace bullying a major concern in Canada, says woman who sued Wal-Mart" CBC News (Jun 12, 2014) 📺.

Plaintiff, including by stating the Plaintiff's family would not be able to have a good life in Canada.

8. The Plaintiff immigrated to Canada with her family under the Federal Skilled Worker Program in or around July, 2005.

9. The Defendant moved to Canada in or around September, 2005.

10. After moving to Canada, the Defendant continued making various unprovoked insulting forum comments about the Plaintiff, including stating that the Plaintiff and her family were poor and that the Plaintiff was a liar.

11. In or around 2007, due to the continuing online harassment by the Defendant, the Plaintiff stopped frequenting either Canadameet or Ourdream. ***

14. In or around 2009, the Plaintiff checked the forum postings on Ourdream and found that despite the Plaintiff's lack of participation in the forum, the Defendant continued making derogatory comments about the Plaintiff between the years 2007 and 2009.

15. In or around 2009, the Plaintiff once again began participating in forum discussions on Canadameet, under the user name "Snowbear888".

16. In or around 2009, the Plaintiff advertised that she was looking to rent out the basement of the Home.

17. The Defendant asked a friend to contact the Plaintiff pretending to be interested in renting, in order to see the Home and find out the Home's address. The Defendant subsequently proceeded to disclose the Plaintiff's address without the Plaintiff's permission on Canadameet.

18. In or around 2010, the Defendant followed the Plaintiff's son, who was 16 years old at the time, home from school.

19. In or around 2010, the Defendant made various derogatory remarks regarding the Plaintiff's son, including that he was a bad student, that his high school dropped in ranking due to him attending there, and that he could never get into a good school in the United States.

20. In or around April, 2010, the Plaintiff's son was admitted to Harvard, Yale, Princeton, Columbia and other post-secondary institutions. The Defendant contacted the high school and a tutoring centre attended by the Plaintiff's son in order to verify this fact. In the process, the Defendant found out that the Plaintiff's son had a different last name than the Plaintiff's husband. Shen used this information to post defamatory forum comments about how the Plaintiff had been divorced and abandoned by a prior husband.

21. Between the years 2010 to 2012 the Defendant persisted in making defamatory statements about the Plaintiff and her family. ***

254. Both Ms. Lu and Ms. Shen assert that the other is liable for damages for intentional infliction of emotional distress or mental suffering, and for breach of privacy under the *Privacy Act*.

255. In my opinion, and although (as I noted above) neither Ms. Lu nor Ms. Shen pleaded any limitation defences, the conduct each described from the previous decade cannot provide the foundation for a valid cause of action in the context of this action. However, I have considered it as part of the overall history of the relationship between these two women in the context of their claims against each other for intentional infliction of emotional distress and under the *Privacy Act*.

256. Moreover, and for the reasons I set out above, I have not considered the very large volume of exhibits and pages attached to the parties' affidavits as part of their defamation claims. However, I have considered that material in the context of Ms. Lu's and Ms. Shen's mutual claims for intentional infliction of emotional distress and under the *Privacy Act*.

257. To make out a cause of action for intentional infliction of emotional distress, a plaintiff must demonstrate conduct that is (1) flagrant and extreme, (2) plainly calculated to produce harm, and which (3) results in visible and provable illness. See *Rahemtulla v. Vanfed Credit Union*, 1984 CanLII 689 (BCSC), at paras. 52-56; and also *Merrifield v. Canada (Attorney General)*, 2019 ONCA 205, at para. 45 [§5.2.2].

258. In their social media communications, both of these women, for reasons that remain largely a mystery, have demonstrated conduct that is flagrant and extreme. Indeed, much of it could be described as obsessive and bordering on the irrational. Each of them claims that the behaviour of the other has inflicted serious harm on her. However, neither recognizes that they are, in many respects, mirror images of one another, and that each of them engages in the very conduct she finds so distressing coming from the other person. Instead, each of them seeks to justify her own conduct as an appropriate response to being attacked and harassed by the other.

259. I will provide a few examples.

260. In a post dated November 2, 2015 *** that Ms. Lu admits she made (although in her evidence, she indicated that not all of her post had been translated), she said (as translated):

> Taking a knife and down it goes, [name of Ms. Shen's son redacted] is chopped, and put oil on him, ha. ***

262. Also in 2015, Ms. Lu admits she posted the following message (*** as translated):

> Ok, I will spend another 10 years, my next goal is to let the epilepsy [a reference to Ms. Shen's son] child never get married.

263. Ms. Lu also posted this message (*** as translated):

> In short, loose woman, Qin Qin Shen you listen carefully. If you are too curious about other people's way of living, you will pay [with] your life. Whether you understand of not, after all, you won't have many more years to live.

264. According to Ms. Shen, she took this last message as a threat to her life.

265. On the other hand, according to Ms. Lu, in 2015 Ms. Shen stalked her and documented details about her daily schedule, which Ms. Shen then posted (together with photographs) on Canadameet. In the post, Ms. Shen described Ms. Lu as having (as translated) "the look of a shrew and bitch." In addition to the 61 posts in October and November 2015, Ms. Shen began another series of posts about Ms. Lu on March 3, 2016, under the ID "Windgone." It began (in translation):

> This thread will be completed in 3 days. Around 15 [posts] each day. Take the spot first, all the information is in the computer. For the sake of security, I don't want to post any article online from my computer at home. Tomorrow morning, I'll carry around my computer and go outside to post my article. Originally I wrote 50 posts in this thread, but ended at 40 something, because BEAR called the police on me to prevent me from posting more ….

266. In many posts in 2015 and into 2016, Ms. Shen persistently targeted Ms. Lu's son. Based on the contents of her posts, Ms. Shen felt driven to communicate with his high school and Harvard concerning him, in an attempt to justify her views about Ms. Lu. This is extreme and alarming conduct. In my opinion, it can only have been done to hurt Ms. Lu.

267. Most regrettably, Ms. Lu also targeted Ms. Shen's son. A couple of Ms. Lu's posts in that respect are set out above. Ms. Lu posted photographs of Ms. Shen's son next to images of a cartoon pig. She referred to him as the "epilepsy child," something that Ms. Shen says is false. Ms. Lu's conduct can only have been done to hurt Ms. Shen. ***

269. In their affidavit evidence, each of Ms. Lu and Ms. Shen describe the stress and emotional toll the conduct of the other has taken on her. For example, Ms. Lu described herself as not feeling safe and suffering great mental stress. Ms. Shen described the fear she felt for her son, and that she herself felt

deeply depressed and that she could not have a normal life.

270. There is no social utility in the communications Ms. Lu and Ms. Shen have posted. It is difficult to imagine that anyone, apart from Ms. Lu and Ms. Shen themselves, cares whether Ms. Lu is right or Ms. Shen is right, or cares about Ms. Lu's and Ms. Shen's opinions about one another. However, based on the evidence I have before me, I find that each woman feels bullied, abused and harassed by the other. Their posted communications are, in my view, plainly calculated to harm the other person, and cause that person mental and emotional distress.

271. I turn then to the third element that must be proved: that the conduct results in visible and provable illness.

272. In my opinion, neither Ms. Lu nor Ms. Shen has satisfied her evidentiary burden on this element. Although medical evidence is not essential (see, for example, *Rahemtulla*, at para. 53), I have no independent or objective evidence from anyone. The evidence from each of Ms. Lu and Ms. Shen is, for the most part, conclusory and self-interested. I accept that Ms. Lu's and Ms. Shen's interactions with one another, spanning more than a decade, have been unpleasant and very upsetting to both of them. However, to make out a claim for intentional infliction of emotional suffering, a plaintiff must demonstrate "visible and provable illness". Neither Ms. Lu nor Mr. Shen have done that, in my opinion.

273. The result is that both Ms. Lu's and Ms. Shen's claims for intentional infliction of emotional distress must fail. ***

REFLECTION:

- *The parties in this case were both self-represented, an increasing phenomenon given Canada's access to justice crisis.*[76] *What legal errors did the parties make that affected the outcome of their claims?*
- *Was it worth it for this case to have gone to trial? Should it have been mediated or settled?*
- *As reported by CTV News Vancouver, during subsequent proceedings in this case the parties' feud tragically escalated.*[77] *If the parties had had comprehensive legal representation, what advice or assistance could lawyers have provided their clients aside from representing their strict legal interests?*

3.2.6 Cross-references

- *Merrifield v. Canada* [2019] ONCA 205, [44]-[49]: §5.2.2.
- *Caplan v. Atas* [2021] ONSC 670, [176]: §5.2.4.

3.2.7 Further material

- C. Hunt, "*Wilkinson v. Downton* Revisited" (2015) 74:3 Cambridge LJ 392.
- Y.K. Liew, "The Rule in *Wilkinson v. Downton*: Conduct, Intention, and Justifiability" (2015) 78 Modern L Rev 349.
- P. Roycroft, "*Wilkinson v. Downton* after *Rhodes* and its Future Viability in New Zealand" (2017) 48 Victoria U Wellington L Rev 107.
- D. Réaume, "The Role of Intention in the Tort in *Wilkinson v. Downton*" in J.W. Neyers, E. Chamberlain & S.G.A. Pitel (eds), *Emerging Issues in Tort Law* (Oxford: Hart Publishing, 2007).

[76] T.C.W. Farrow *et al.*, *Everyday Legal Problems and the Cost of Justice in Canada* (Toronto: Canadian Forum on Civil Justice, 2016).
[77] "Woman sentenced to 12 years in prison for Vancouver courtroom stabbing" CTV News Vancouver (Nov 30, 2023) 📺.

4 INVASION OF PRIVACY

4.1 Common law invasion of privacy torts

4.1.1 Intrusion upon seclusion

4.1.1.1 Wainwright v. Home Office [2003] UKHL 53

✗REF: §3.1.2

LORD HOFFMANN: ***

15. My Lords, let us first consider the proposed tort of invasion of privacy. Since the famous article by Warren and Brandeis (*The Right to Privacy* (1890) 4 Harvard LR 193) the question of whether such a tort exists, or should exist, has been much debated in common law jurisdictions. Warren and Brandeis suggested that one could generalise certain cases on defamation, breach of copyright in unpublished letters, trade secrets and breach of confidence as all based upon the protection of a common value which they called privacy or, following Judge Cooley (*Cooley on Torts*, 2nd ed (1888), p 29) "the right to be let alone". They said that identifying this common element should enable the courts to declare the existence of a general principle which protected a person's appearance, sayings, acts and personal relations from being exposed in public.

16. Courts in the United States were receptive to this proposal and a jurisprudence of privacy began to develop. It became apparent, however, that the developments could not be contained within a single principle; not, at any rate, one with greater explanatory power than the proposition that it was based upon the protection of a value which could be described as privacy. Dean Prosser, in his work on *The Law of Torts*, 4th ed (1971), p 804, said that:

> "What has emerged is no very simple matter … it is not one tort, but a complex of four. To date the law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff 'to be let alone'."

17. Dean Prosser's taxonomy divided the subject into (1) intrusion upon the plaintiff's physical solitude or seclusion (including unlawful searches, telephone tapping, long-distance photography and telephone harassment) (2) public disclosure of private facts and (3) publicity putting the plaintiff in a false light and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness. These, he said, at p 814, had different elements and were subject to different defences. ***

19. What the courts have so far refused to do is to formulate a general principle of "invasion of privacy" (I use the quotation marks to signify doubt about what in such a context the expression would mean) from which the conditions of liability in the particular case can be deduced. The reasons were discussed by Sir Robert Megarry V-C in *Malone v. Metropolitan Police Comr* [1979] Ch 344, 372-381. I shall be sparing in citation but the whole of Sir Robert's treatment of the subject deserves careful reading. The question was whether the plaintiff had a cause of action for having his telephone tapped by the police without any trespass upon his land. This was (as the European Court of Justice subsequently held in *Malone v. United Kingdom* (1984) 7 EHRR 14) an infringement by a public authority of his right to privacy under article 8 of the Convention, but because there had been no trespass, it gave rise to no identifiable cause of action in English law. Sir Robert was invited to declare that invasion of privacy, at any rate in respect of telephone conversations, was in itself a cause of action. He said, at p 372:

> "I am not unduly troubled by the absence of English authority: there has to be a first time for everything, and if the principles of English law, and not least analogies from the existing rules, together with the requirements of justice and common sense, pointed firmly to such a right existing, then I think the court should not be deterred from recognising the right. On the other hand, it is no function of the courts to legislate in a new field. The extension of the existing laws and principles is

one thing, the creation of an altogether new right is another." ***

23. The absence of any general cause of action for invasion of privacy was again acknowledged by the Court of Appeal in *Kaye v. Robertson* [1991] FSR 62, in which a newspaper reporter and photographer invaded the plaintiff's hospital bedroom, purported to interview him and took photographs. The law of trespass provided no remedy because the plaintiff was not owner or occupier of the room and his body had not been touched. Publication of the interview was restrained by interlocutory injunction on the ground that it was arguably a malicious falsehood to represent that the plaintiff had consented to it. But no other remedy was available. ***

26. All three judgments are flat against a judicial power to declare the existence of a high-level right to privacy and I do not think that they suggest that the courts should do so. The members of the Court of Appeal certainly thought that it would be desirable if there was legislation to confer a right to protect the privacy of a person in the position of Mr Kaye against the kind of intrusion which he suffered, but they did not advocate any wider principle. ***

35. For these reasons I would reject the invitation to declare that since at the latest 1950 there has been a previously unknown tort of invasion of privacy. ***

REFLECTION:

- *Despite Lord Hoffmann's dismissal of a tort of invasion of privacy in English common law, only seven months later the House of Lords in Campbell v. MGN Ltd [2004] UKHL 22 recognised a new tort of misuse of private information, which "involves a two-stage test: whether there is a reasonable expectation of privacy in relation to information, and then a balancing of competing Article 8 and Article 10 rights [the right to respect for private and family life and the right to freedom of expression under the European Convention on Human Rights]. This was recently confirmed by the Supreme Court in ZXC v. Bloomberg LP [2022] UKSC 5."[78] In contrast to the trend of Canadian common law, the UK courts have not embraced Prof. Prosser's taxonomy of four distinct privacy-invasion torts. What are the implications of grounding a civil right to privacy in rights enumerated in a bill of rights as opposed to rights elucidated from the common law?*

4.1.1.2 Jones v. Tsige [2012] ONCA 32

Ontario Court of Appeal – 2012 ONCA 32

✗**REF: §9.3.6, §20.8.2, §24.1.2**

SHARPE J.A. (WINKLER C.J.O. AND CUNNINGHAM A.C.J. concurring): ***

2. In July 2009, the appellant, Sandra Jones, discovered that the respondent, Winnie Tsige, had been surreptitiously looking at Jones' banking records. Tsige and Jones did not know each other despite the fact that they both worked for the same bank and Tsige had formed a common-law relationship with Jones' former husband. As a bank employee, Tsige had full access to Jones' banking information and, contrary to the bank's policy, looked into Jones' banking records at least 174 times over a period of four years.

3. The central issue on this appeal is whether the motion judge erred by granting summary judgment and dismissing Jones' claim for damages on the ground that Ontario law does not recognize the tort of breach of privacy. ***

6. Tsige has apologized for her actions and insists that she has ceased looking at Jones' banking information. Tsige is contrite and embarrassed by her actions. BMO disciplined Tsige by suspending her for one week without pay and denying her a bonus.

7. In her statement of claim, Jones asserts that her privacy interest in her confidential banking information has been "irreversibly destroyed" and claims damages of $70,000 for invasion of privacy and breach of fiduciary duty, and punitive and exemplary damages of $20,000. ***

[78] *Various Claimants v. MGN Ltd* [2022] EWHC 1222 (Ch), [46].

Issue 1. Does Ontario law recognize a cause of action for invasion of privacy?

15. The question of whether the common law should recognize a cause of action in tort for invasion of privacy has been debated for the past one hundred and twenty years. Aspects of privacy have long been protected by causes of action such as breach of confidence [§10.5], defamation [§5.1], breach of copyright, nuisance [§21.1], and various property rights [§7.1]. Although the individual's privacy interest is a fundamental value underlying such claims, the recognition of a distinct right of action for breach of privacy remains uncertain. As Adams J. stated in *Ontario (Attorney General) v. Dieleman* (1994), 117 D.L.R. (4th) 449 (Ont. Gen. Div.) at p. 688, after a comprehensive review of the case law, "invasion of privacy in Canadian common law continues to be an inceptive, if not ephemeral, legal concept, primarily operating to extend the margins of existing tort doctrine."

16. Canadian, English and American courts and commentators almost invariably take the seminal articles of S.D. Warren & L.D. Brandeis, "The Right to Privacy" (1890) 4 Harv. L. R. 193 and William L. Prosser, "Privacy" (1960), 48 Cal. L. R. 383 as their starting point. ***

18. Professor Prosser's article picked up the threads of the American jurisprudence that had developed in the seventy years following the influential Warren and Brandeis article. Prosser argued that what had emerged from the hundreds of cases he canvassed was not one tort, but four, tied together by a common theme and name, but comprising different elements and protecting different interests. Prosser delineated a four-tort catalogue, summarized as follows, at p. 389:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.

2. Public disclosure of embarrassing private facts about the plaintiff.

3. Publicity which places the plaintiff in a false light in the public eye.

4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

19. Most American jurisdictions now accept Prosser's classification and it has also been adopted by the *Restatement (Second) of Torts* (2010). ***

Case law ***

25. In Canada, there has been no definitive statement from an appellate court on the issue of whether there is a common law right of action corresponding to the intrusion on seclusion category. Ontario trial judges have, however, often refused to dismiss such claims at the pleading stage as disclosing no cause of action and some have awarded damages for claims based on violations of the right to be free of intrusion upon seclusion. The clear trend in the case law is, at the very least, to leave open the possibility that such a cause of action does exist. ***

Legislation ***

52. Four common law provinces currently have a statutorily created tort of invasion of privacy: British Columbia, *Privacy Act*, R.S.B.C. 1996 c. 373; Manitoba, *Privacy Act*, R.S.M. 1987 c.P125; Saskatchewan, *Privacy Act*, R.S.S. 1978, c. P-24; and Newfoundland, *Privacy Act*, R.S.N. 1990, c.P-22. All four Privacy Acts are similar. They establish a limited right of action, whereby liability will only be found if the defendant acts wilfully (not a requirement in Manitoba) and without a claim of right. Moreover, the nature and degree of the plaintiff's privacy entitlement is circumscribed by what is "reasonable in the circumstances". ***

54. Significantly, however, no provincial legislation provides a precise definition of what constitutes an invasion of privacy. The courts in provinces with a statutory tort are left with more or less the same task as courts in provinces without such statutes. The nature of these acts does not indicate that we are faced with a situation where sensitive policy choices and decisions are best left to the legislature. To the contrary, existing provincial legislation indicates that when the legislatures have acted, they have simply proclaimed a sweeping right to privacy and left it to the courts to define the contours of that right. ***

Other Jurisdictions ***

55. As already indicated, most American states have recognized a right of action for invasion of privacy rights as defined by the four categories identified by Prosser and now adopted by the Restatement. ***

58. *** [F]actors to be considered in determining whether a particular action is highly offensive include the degree of intrusion, the context, conduct and circumstances of the intrusion, the tortfeasor's motives and objectives and the expectations of those whose privacy is invaded ***. ***

61. In England, privacy is expressly protected by art. 8 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 at 223, incorporated by the *Human Rights Act 1998* (UK), c. 42: "Everyone has the right to respect for his private and family life, his home and his correspondence." However, the House of Lords held in *Wainwright v. Home Office*, [2003] UKHL 53, [2003] 4 All E.R. 969 (U.K. H.L.) at para. 31, that while privacy may be "a value which underlies the existence of a rule of law (and may point the direction in which the law should develop)", privacy is not "a principle of law in itself" capable of supporting a private law right if action for damages. Yet the next year, in *Campbell v. Mirror Group Newspaper Ltd.*, [2004] UKHL 22, [2004] 2 A.C. 457 (U.K. H.L.), the House of Lords granted an injunction to restrain on grounds of breach of confidence publication of newspaper stories and photographs of a supermodel leaving a drug addiction treatment facility. Lord Hoffman held, in *Campbell* at para. 51, that the tort of breach of confidence had evolved into a form of privacy protection, described by the court as a tort of misuse of private information:

> [T]he new approach takes a different view of the underlying value which the law protects. Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity—the right to control the dissemination of information about one's private life and the right to the esteem and respect of people. ***

64. In *Hosking v. Runting*, [2004] NZCA 34 (New Zealand C.A.), the New Zealand Court of Appeal recognized a common law tort of breach of privacy that is separate and distinct from the tort of breach of confidence. Although the court dismissed the claim on the merits, the majority judgment confirmed the existence of a privacy tort in New Zealand dealing with wrongful publication of private facts to address publicity that is (at para. 26) "truly humiliating and distressful or otherwise harmful". The elements of the tort were described at para. 109:

> 1. the existence of facts in respect of which there is a reasonable expectation of privacy; and
>
> 2. the publicity given to those private facts must be considered highly offensive to an objective reasonable person.

2. Defining the tort of intrusion upon seclusion

65. In my view, it is appropriate for this court to confirm the existence of a right of action for intrusion upon seclusion. Recognition of such a cause of action would amount to an incremental step that is consistent with the role of this court to develop the common law in a manner consistent with the changing needs of society.

Rationale

66. The case law, while certainly far from conclusive, supports the existence of such a cause of action. Privacy has long been recognized as an important underlying and animating value of various traditional causes of action to protect personal and territorial privacy. *Charter* jurisprudence recognizes privacy as a fundamental value in our law and specifically identifies, as worthy of protection, a right to informational privacy that is distinct from personal and territorial privacy. The right to informational privacy closely tracks the same interest that would be protected by a cause of action for intrusion upon seclusion. ***

68. It is within the capacity of the common law to evolve to respond to the problem posed by the routine collection and aggregation of highly personal information that is readily accessible in electronic form. Technological change poses a novel threat to a right of privacy that has been protected for hundreds of years by the common law under various guises and that, since 1982 and the *Charter*, has been recognized

as a right that is integral to our social and political order.

69. Finally, and most importantly, we are presented in this case with facts that cry out for a remedy. While Tsige is apologetic and contrite, her actions were deliberate, prolonged and shocking. Any person in Jones' position would be profoundly disturbed by the significant intrusion into her highly personal information. The discipline administered by Tsige's employer was governed by the principles of employment law and the interests of the employer and did not respond directly to the wrong that had been done to Jones. In my view, the law of this province would be sadly deficient if we were required to send Jones away without a legal remedy.

Elements

70. I would essentially adopt as the elements of the action for intrusion upon seclusion the *Restatement (Second) of Torts* (2010) formulation which, for the sake of convenience, I repeat here:

> One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person.

71. The key features of this cause of action are, first, that the defendant's conduct must be intentional, within which I would include reckless; second that the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. However, proof of harm to a recognized economic interest is not an element of the cause of action. I return below to the question of damages, but state here that I believe it important to emphasize that given the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum.

Limitations

72. These elements make it clear that recognizing this cause of action will not open the floodgates. A claim for intrusion upon seclusion will arise only for deliberate and significant invasions of personal privacy. Claims from individuals who are sensitive or unusually concerned about their privacy are excluded: it is only intrusions into matters such as one's financial or health records, sexual practices and orientation, employment, diary or private correspondence that, viewed objectively on the reasonable person standard, can be described as highly offensive.

73. Finally, claims for the protection of privacy may give rise to competing claims. Foremost are claims for the protection of freedom of expression and freedom of the press. As we are not confronted with such a competing claim here, I need not consider the issue in detail. Suffice it to say, no right to privacy can be absolute and many claims for the protection of privacy will have to be reconciled with, and even yield to, such competing claims. A useful analogy may be found in the Supreme Court of Canada's elaboration of the common law of defamation in *Grant v. Torstar Corp.* [§5.1.4] where the court held, at para. 65, that "[w]hen proper weight is given to the constitutional value of free expression on matters of public interest, the balance tips in favour of broadening the defences available to those who communicate facts it is in the public's interest to know." ***

3. Application to this case

89. It is my view that in this case, Tsige committed the tort of intrusion upon seclusion when she repeatedly examined the private bank records of Jones. These acts satisfy the elements laid out above: the intrusion was intentional, it amounted to an unlawful invasion of Jones' private affairs, it would be viewed as highly offensive to the reasonable person and caused distress, humiliation or anguish. ***

Disposition

92. Accordingly, I would allow the appeal, set aside the summary judgment dismissing the action and in its place substitute an order granting summary judgment in Jones' favour for damages in the amount of

$10,000. ***

REFLECTION:

- *Did Sharpe J.A. make new law for Ontario in this judgment? Should he have?*
- *Was it fair to apply the newly declared tort of intrusion upon seclusion retrospectively to Tsige's conduct? Or should Sharpe J.A. have held that the new tort only applies prospectively from the date of his judgment?*[79]
- *When, if at all, should Canadian judges treat foreign case law as persuasive in elucidating principles of provincial tort law?*
- *Were the damages awarded adequate? Given Jones incurred $127,607 in legal fees pursuing her claim, how might the relatively modest damages award in this case dissuade future invasion of privacy claims?*[80]

4.1.1.3 Cross-references

- *Caplan v. Atas* [2021] ONSC 670, [176]: §5.2.4.
- *Fearn v. Board of Trustees of the Tate Gallery* [2023] UKSC 4, [111]-[112]: §21.1.6.

4.1.1.4 Further material

- S. Todd, "Tortious Intrusions upon Solitude and Seclusion" (2015) 27 Singapore Academy LJ 731.
- T.L. McKenzie, "The New Intrusion Tort: The News Media Exposed?" (2014) 45 Victoria U Wellington L Rev 79.
- C. Hunt, "Reasonable Expectations of Privacy in Canadian Tort Law" (2018) 84 (2d) Supreme Court L Rev 269.
- S.K. Mizrahi, "Ontario's New Invasion of Privacy Torts: Do They Offer Monetary Redress for Violations Suffered via the Internet of Things?" (2018) 8 Western J Legal Studies 1.
- A. Lerch, "The Judicial Law-Making Function and a Tort of Invasion of Personal Privacy" (2021) 43 Sydney L Rev 133.
- Just Torts Podcast (U Sydney), "Invasion of Privacy" (Oct 20, 2017) 🎧.
- Rule of Law Matters Podcast, "Privacy and the Rule of Law" (Jan 28, 2021) 🎧.

4.1.2 Public disclosure of private facts

4.1.2.1 ES v. Shillington [2021] ABQB 739

Alberta Court of Queen's Bench – 2021 ABQB 739

✗**REF: §9.2.4, §9.3.9, §9.4.6, §9.5.8, §9.8.2.5, §10.5.2**

INGLIS J.: ***

8. Between 2005 and 2016 the Plaintiff and the Defendant were partnered in a romantic relationship and they have two children together. The parties moved to New Brunswick in 2015 when the Defendant, an officer in the Canadian Armed Forces, was transferred there.

9. This relationship was marred by the Defendant committing multiple acts of physical and sexual assault against the Plaintiff. In August 2016, the Plaintiff left the Defendant to live in a shelter for women at risk. Attempts at reconciliation failed and the relationship ended in November 2016.

10. The Plaintiff testified that prior to this relationship she was a happy person, and was loving and appreciated her sexuality. As part of her relationship with the Defendant she shared with him photographs of her in which she was in various states of undress and engaging in sexual activity. These were shared with her partner as a private gift to him. One of the reasons she provided him these images was due to their

[79] See S. Beswick, "Prospective Overruling Unravelled" (2022) 41 Civil Justice Quarterly 29.
[80] See Y. Taddese, "Plaintiff in landmark privacy case sued for not paying legal bills" Law Times News (Mar 11, 2013); *DuVernet v. Jones*, 2013 ONSC 928 [§20.8.3].

separation caused by his military deployment. It was understood between them that he would not distribute these images in any way.

11. While he was deployed, near the end of their relationship, the Defendant confessed to the Plaintiff that he had posted her images online. Through accessing the Defendant's social media accounts the Plaintiff was able to track some of these postings and was disturbed to find many of those private, explicit images available on the internet at pornography sites. At no time did the Defendant have the Plaintiff's consent to publish these images. The Defendant admitted that he had posted photos as early as 2006, and the Plaintiff has located images posted as late as 2018. As recently as early 2021 the Plaintiff was able to find some of these images online.

12. The availability of these photos, including the fact that the Plaintiff is identifiable in some images, resulted in the Plaintiff being recognized in them by a neighbour that spoke to her sexually, having seen her likeness on a website. She has experienced significant mental distress and embarrassment as a result of the postings. She suffers nervous shock, psychological and emotional suffering, depression, anxiety, sleep disturbances, embarrassment, humiliation, and other impacts to her wellbeing.

13. The relationship was also marred by abuse. The final instances occurred on November 11, 2016, when the Defendant violently sexually assaulted the Plaintiff in a public Legion in front of bystanders. ***

16. The Plaintiff's psychologist provided affidavit evidence describing the extensive treatment schedule the Plaintiff required following these incidents described. She described the Plaintiff's anxiety, inability to emotionally engage with a romantic relationship, and other significant ongoing symptoms that negatively affected the Plaintiff's life. ***

18. The Plaintiff argues that the tort of Public Disclosure of Private Information ("Public Disclosure") should exist as a separate cause of action in Alberta. ***

Recognition of new tort of Public Disclosure of Private Facts ***

24. The Supreme Court held in *Nevsun Resources Ltd v. Araya*, 2020 SCC 5 at para 237 (*Nevsun*) that there are three required elements in order for a court to recognize a new tort:

> Three clear rules for when the courts will not recognize a new nominate tort have emerged: (1) The courts will not recognize a new tort where there are adequate alternative remedies ***; (2) the courts will not recognize a new tort that does not reflect and address a wrong visited by one person upon another (*Saskatchewan Wheat Pool*, at pp 224-25 [§14.1.2.1]); and (3) the courts will not recognize a new tort where the change wrought upon the legal system would be indeterminate or substantial (*Wallace v. United Grain Growers Ltd*, [1997] 3 SCR 701 (SCC), at paras 76-77). Put another way, for a proposed nominate tort to be recognized by the courts, at a minimum it must reflect a wrong, be necessary to address that wrong, and be an appropriate subject of judicial consideration.

25. The Supreme Court cited *Jones v. Tsige*, 2012 ONCA 32 (*Jones*) as an example of the correct application of these principles when the court determined that a new tort should be declared for the action of intrusion upon seclusion. ***

26. The Plaintiff argues that she has met these criteria, citing one case in Canada that has declared this cause of action to exist. In *Jane Doe 72511 v. Morgan*, 2018 ONSC 6607 (*Jane Doe #2*) the defendant also posted sexually explicit content of the plaintiff on a pornographic website without her knowledge or consent; he also committed acts of assault and battery. The court recognized that there was no law in Ontario establishing the right of action for the posting of intimate images without consent. ***

29. In *Jane Doe #2* Justice Gomery held that the cause of action sought here [public disclosure of embarrassing private facts about the plaintiff] was made out on the facts before that court ***.

30. The facts in that case are similar to the facts before this court. The motivation of the defendant in that matter was one of revenge and there are more discrete posts in this matter, however neither of those

differences matter when considering the determination of the cause of action. That case is not binding upon this court, but very persuasive. ***

Rule one: Necessity

34. *Nevsun* states that there can be "at least three alternative remedies: another tort, an independent statutory scheme, and judicial review. If any of these alternatives address the wrong targeted by the proposed nominate tort, then the court will decline to recognize it": at para 238. ***

41. In Alberta the relevant civil statute, *Protecting Victims of Non-Consensual Distribution of Intimate Images Act*, SA 2017, c P-26.9, has been in force since August 4, 2017 (the Act) (see discussion under "rule three", below). The rule against retrospective application of statutes prohibits this Plaintiff from relying on this cause of action. Without recognition of this tort in common law, the Plaintiff has no civil remedy given the date of the conduct complained of, even though it is now recognized as conduct requiring a legal response.

42. Further, the Act only protects distribution of intimate images, and the term "intimate image" is narrowly defined, limiting the availability of this remedy to those images defined as where the victim is nude, exposing their genital or anal regions or breasts, or is engaged in sexual activity: Act, section 1(b). While that definition would apply to the Plaintiff in this matter, the proposed tort could protect information not contemplated by this legislation even if the distribution occurred after it came into force ***. The Plaintiff correctly points out that the Act does not protect privately sharing such images, which is also a potential gap in the statutory framework.

43. The Province of Alberta has recognized that other existing torts do not offer a remedy to the particular conduct complained of. ***

50. Given the timing of the wrongdoing in this case, there are no fulsome alternative remedies for this plaintiff to the proposed tort.

Rule two: Response to a wrongdoing ***

53. In *Jones*, the court observed that the Charter "recognizes privacy as a fundamental value in our law and specifically identifies, as worthy of protection, a right to informational privacy that is distinct from person and territorial privacy": at para 66.

54. Finally, the Defendant's actions here, which are similar to *Jane Doe #2*, are acts of deliberate wrongdoing with significant foreseeable harm as a consequence.

Rule three: Appropriate for judicial adjudication

55. Right to privacy is recognized internationally and within Canada; it is enshrined in the *Charter*, the *Criminal Code*, statute, and tort law. Further, the increased use of new technologies has created rapid societal change that has created new possibilities for privacy breaches that require adequate legal protection. ***

62. The conduct complained of by the Plaintiff clearly meets this third test; it is appropriate for judicial adjudication. The change sought of this court is a determinate and substantial change that recognizes the inherent harm done by dissemination of private content. When conduct attracts legislative and parliamentary attention, its wrongfulness is apparent. From *Jane Doe #2* at para 88:

> "… Failing to develop the legal tools to guard against the intentional, unauthorized distribution of intimate images and recordings on the internet would have a profound negative significance for public order as well as the personal wellbeing and freedom of individuals."

Conclusion re cause of action for Public Disclosure of Private Facts

63. The existence of a right of action for Public Disclosure of Private Facts is thus confirmed in Alberta. ***

Elements of Public Disclosure tort ***

67. In *Campbell* [*v. Mirror Group Newspaper Ltd*, [2004] UKHL 22], the House of Lords noted that the "reasonable person" to be considered in these circumstances is not the viewer of the publication, but rather the person affected by the publication. As such, that part of the test should read "the matter publicized or its publication would be highly offensive to the reasonable person *in the same position as the plaintiff*." That is an appropriate distinction.

68. Therefore, in Alberta, to establish liability for the tort of Public Disclosure of Private Facts, the Plaintiff must prove that:

> (a) the defendant publicized an aspect of the plaintiff's private life;
>
> (b) the plaintiff did not consent to the publication;
>
> (c) the matter publicized or its publication would be highly offensive to a reasonable person in the position of the plaintiff; and,
>
> (d) the publication was not of legitimate concern to the public.

69. *** *Jones* *** and *Jane Doe #2* *** recognize the privacy interests inherent in financial and sexual matters. Relationships and health records also fit into the category of "private life" matters. If publicized information does not match one of these groups, the test from *Campbell* (at paras 94-96) is an appropriate starting point to determine the issue of whether or not the information in question is private arises: "What would a reasonable person feel if they were place in the same position as the claimant faced with the same publicity?": at para 99.

Assessment of Defendant's liability for Public Disclosure ***

72. In the matter before this court, the application of the tortious principles is *** straightforward. By uploading the Plaintiff's explicitly sexual images to accessible websites the Defendant publicized an aspect of her private life; the Plaintiff did not consent to this action; the publication of the images is highly offensive to a reasonable person in the position of the Plaintiff; and, there is no legitimate concern to the public that warranted the publication.

73. The Defendant is liable for this tort against the Plaintiff. ***

REFLECTION:

- *Did Inglis J. make new law for Alberta in this judgment? Should she have?*
- *Was it fair to apply the newly declared tort of public disclosure of private facts retrospectively to Shillington's conduct?*

4.1.2.2 Further material

- Lawson Insight, "Protecting Private Information in Alberta" (Dec 20, 2021) 🎧.
- McGill Law Journal Podcast, "Revenge Porn, Tort Law and the Protection of Privacy in Canada: Parts I, II, III" (May 11, May 25, July 27, 2016) 🎧.
- I. Wilson, "In Defence of Privacy and the Judiciary: The Fall-out from *HRH the Duchess of Sussex v. Associated Newspapers*" Inforrm's Blog (Feb 8, 2022).
- E. Laidlaw & H. Young, "Creating a Revenge Porn Tort for Canada" (2020) 96 (2d) Supreme Court L Rev 147.
- Y. Stevens, "'Revenge Porn', Tort Law, and Changing Socio-Technological Realities: A Commentary on *Doe 464533 v. ND*" (2017) 15 Canadian J L & Technology 365.
- E. Rankin, "Assessing Damages for the Public Disclosure of Private Facts: The Case of *Jane Doe 464533 v. ND*" (2017) 42 Queen's LJ 135.
- S. Dunn & A. Petricone-Westwood, "More than 'Revenge Porn': Civil Remedies for the Nonconsensual Distribution of Intimate Images" (38th Annual Civil Litigation Conference, 2018).

- S. Beswick & W. Fotherby, "The Divergent Paths of Commonwealth Privacy Torts" (2018) 84 (2d) Supreme Court L Rev 225.
- N. Henry *et al*, "'Devastating, like It Broke Me': Responding to Image-Based Sexual Abuse in Aotearoa New Zealand" (2022) 23 Criminology & Criminal Justice 861.

4.1.3 Publicity in a false light

4.1.3.1 Yenovkian v. Gulian [2019] ONSC 7279

Ontario Superior Court – 2019 ONSC 7279

✗**REF: §9.3.10, §9.5.9, §9.8.2.6**

KRISTJANSON J.:

1. This case is mainly about two children, twelve-year old A.B. and C.D., almost nine. And it is about the best interests of the children, the invasion of their privacy, and the effects of cyberbullying.

2. It is also about a father, Mr. Vem Yenovkian, who has engaged in years of cyberbullying of the mother, Ms. Sonia Gulian on websites, YouTube videos, online petitions and emails. It is about a father who videotapes court-ordered access visits with the children—both in-person and on Skype—and edits and posts those access visits and photographs of the children on the internet, with commentary. It is about a father who publicly posts on YouTube a video of his son cowering under a table while the father harangues him over Skype on a court-ordered access visit. It is about a father who posts videos of him describing his daughter, who suffers from a neurological disorder, as looking drugged, when she used to be "normal," and posting that his daughter has a "broken" mind.

3. Despite court orders prohibiting posting, the father continues his cyberbullying campaign abusing Ms. Gulian and her parents. He seeks to undermine the administration of justice through an online campaign to "unseat" a judge of this Honourable Court for rulings made, internet attacks on trial witnesses and the wife's lawyer, and by flouting court orders and family law disclosure obligations.

4. It is within this context that the court must determine parenting issues in the best interests of the children, a restraining order, child and spousal support, equalization and property issues, and a civil claim for intrusion on seclusion, intentional infliction of mental suffering, invasion of privacy, and punitive damages. ***

5. The parents married in October 2000 and separated in September 2016. They have two children. Their daughter, A.B., is almost twelve. A.B. has an unspecified neurological disorder and is on the autism spectrum. She requires special needs supports, including significant educational supports. Their son, C.D., is almost nine years old. ***

19. Mr. Yenovkian has created two main websites which contain embedded links to many videos involving the children. One website is focused on Ms. Gulian, her parents and their family business. *** The court viewed the content on both websites, which contain links to other content created by Mr. Yenovkian. On top of the websites, the court viewed ten videos posted on Mr. Yenovkian's YouTube channel, his Facebook page, his Go Fund Me page to "save an abducted autistic girl from captivity", and two online petitions to remove the Named Justice from the bench. ***

21. The material posted online by Mr. Yenovkian contains photographs and videos of the children, personal identifying information, and comments about the children. Both main websites include links to YouTube videos of Mr. Yenovkian's court-ordered parenting time with children, both in-person and Skype access. Ms. Gulian testified that the children do not know that they are being recorded. Mr. Yenovkian did not tell Ms. Gulian that he intended to post the videos. Ms. Gulian never consented to Mr. Yenovkian's posting of the children's images and videos, which was done contrary to a court order of June 26, 2018. Mr. Yenovkian has refused to remove the videos and images contrary to an order of this court of April 18, 2019.

22. The court spent hours viewing the videos, websites, petitions and internet posts during the trial. A few examples will suffice. In one video, he states that his daughter is "stuttering" because her violent and abusive grandmother "kidnapped" and "drugged" his daughter. He specifically contrasts pictures of his daughter "before" and "after", with the clear inference that his daughter has declined. He calls his daughter "autistic" on the internet postings, even though Ms. Gulian testifies that they try to avoid labelling. He writes that his "autistic daughter" has been drugged with "opiates and other tranquilizers." In his posts he states he has documented the "mental degradation" of his child; the "before and afters" which show A.B.'s "broken" mind, that A.B.'s mental health is "incredibly damaged." Another online video depicts C.D. cowering under a table during a court-ordered access Skype call with Mr. Yenovkian and his mother, Sylvia Yenovkian, with Mr. Yenovkian loudly haranguing his son for not getting out from under the table.

23. Mr. Yenovkian has posted images and videos of Ms. Gulian and her parents with written and oral commentary accusing them of various illegal acts including kidnapping, child abuse, stealing money from the UK government, multiple "felonies" *** One of his online petitions, entitled "Demand an End to Corruption in Family Law—Investigate the Gulian Family for Kidnapping, Fraud, and Child Abuse" has several online supporters who have signed the petition, many from the UK, one of whom posted that a young man gave her a flyer at the Armenian Church in the UK, others of whom said they knew the family personally.

24. The children live with their mother and their maternal grandparents, the focus of the online campaign. The online materials pose specific issues for A.B. At some level, A.B. must appreciate that she differs from her friends. The evidence establishes that she excels in areas despite her neurological disorder. She is entering puberty and is almost twelve. Mr. Yenovkian narrates his videos with commentary such as "she used to be age appropriate," posting "before" and "after" pictures stating that she used to be "normal" and now, she is "three years behind", and "look at how she slurs her words, cannot say "Happy New Years."

25. Mr. Yenovkian must be aware of the consequences for the children if they or their peers view the online content that he has posted. He has chosen to place his interests first. Remarkably, on the final day of the trial Mr. Yenovkian emailed Ms. Gulian threatening to release additional videos.

26. Ms. Gulian has sought the removal of the rest of the online material, but to date YouTube has only blocked the channel to Canadians (however, Canadians can still view the individual videos). A single petition was removed, but Mr. Yenovkian replaced it. ***

Should the court award Ms. Gulian damages for * invasion of privacy ***?** ***

166. The Ontario Court of Appeal recognized one aspect of tortious invasion of privacy in the form of intrusion upon seclusion in *Jones v. Tsige* [§4.1.1.2], 2012 ONCA 32, (2012), 108 O.R. (3d) 241. Sharpe, J.A. also referred to other forms of invasion of privacy described in the seminal article of William L. Prosser, "Privacy" (1960), 48 *Cal. L. Rev.* 383, and adopted by the American Law Society in the *Restatement (Second) of Torts* (2010). Prosser's "four-tort catalogue", as Sharpe, J.A. called it, is as follows:

> 1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
>
> 2. Public disclosure of embarrassing private facts about the plaintiff.
>
> 3. Publicity which places the plaintiff in a false light in the public eye.
>
> 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness. (*Jones v. Tsige* at para. 18)

167. The Court of Appeal held that the first was the tort most relevant to the facts before it and went on, as I have mentioned, to recognize the tort of intrusion on seclusion as part of Ontario law. The Court also noted that the fourth form of invasion of privacy, that is, appropriation of the plaintiff's name or likeness, was already actionable in Ontario: *Jones v. Tsige* at paras. 24, 27, citing *Athans v. Canadian Adventure Camps Ltd.*, [1977] O.J. No. 2417 (Ont. H.C.).

168. Since *Jones v. Tsige*, this Court has recognized the second form of invasion of privacy, that is, public

disclosure of private facts. The two principal cases that have dealt with this are *Jane Doe 464533 v. D. (N.)* [2016 CarswellOnt 911 (ON SC)] ("*Jane Doe 2016*") and *Jane Doe 72511 v. Morgan*, 2018 ONSC 6607, [2018] O.J. No. 5741 ("*Jane Doe 2018*"). *** In each of these cases, the defendant had published intimate videos of his partner on internet pornography sites. ***

170. With these three torts all recognized in Ontario law, the remaining item in the "four-tort catalogue" of causes of action for invasion of privacy is the third, that is, publicity placing the plaintiff in a false light. I hold that this is the case in which this cause of action should be recognized. It is described in § 652E of the *Restatement* as follows:

> **Publicity Placing Person in False Light**
>
> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
>
> > (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
> >
> > (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

171. I adopt this statement of the elements of the tort. I also note the clarification in the *Restatement*'s commentary on this passage to the effect that, while the publicity giving rise to this cause of action will often be defamatory, defamation is not required. It is enough for the plaintiff to show that a reasonable person would find it highly offensive to be publicly misrepresented as they have been. The wrong is in publicly representing someone, not as worse than they are, but as other than they are. The value at stake is respect for a person's privacy right to control the way they present themselves to the world.

172. It also bears noting this cause of action has much in common with the tort of public disclosure of private facts. They share the common elements of 1) publicity, which is 2) highly offensive to a reasonable person. The principal difference between the two is that public disclosure of private facts involves true statements, while "false light" publicity involves false or misleading claims. (Two further elements also distinguish the two causes of action: "false light" invasion of privacy requires that the defendant know or be reckless to the falsity of the information, while public disclosure of private facts involves a requirement that there be no legitimate public concern justifying the disclosure.)

173. It follows that one who subjects another to highly offensive publicity can be held responsible whether the publicity is true or false. This indeed, is precisely why the tort of publicity placing a person a false light should be recognized. It would be absurd if a defendant could escape liability for invasion of privacy simply because the statements they have made about another person are false.

174. Moreover, it is likely that in the course of creating publicity placing a person in a false light, the wrongdoer will happen to include true, but private, facts about the person whose privacy is invaded. In this case, for instance, the defendant has publicized falsehoods about the plaintiff, but he has also publicly aired private facts about her present living situation with the children and her parents (including videos of their home) and details of access visits which is a true, but private matter.

175. I find that the false light in which Mr. Yenovkian has placed Ms. Gulian would be highly offensive to a reasonable person. I have set out detailed findings of the false light publicity throughout this decision. Mr. Yenovkian has and continues to make serious allegations online about Ms. Gulian and her family, including that she is a kidnapper, abuses the children, drugs the children, forges documents, and defrauds governments. I find these statements to be false on the evidence before me.

176. Mr. Yenovkian has posted a video online of a person displaying posters of Ms. Gulian and her parents and the allegations at various locations in London, England. He established an online petition to persecute Ms. Gulian and her parents and enlisted the help of members of the public. He has spread his allegations on the internet and distributed them and links to the sites to friends, family members and business relations of Ms. Gulian and her parents, members of the Armenian community and her church in London, England,

as well as to Ms. Gulian's fellow employees. ***

182. Mr. Yenovkian has actively sought an audience for a website that portrays Ms. Gulian as criminally abusive of A.B. and C.D. In his vindictive pursuit of his own perceived interest, he has been, at the very least, reckless of the false light in which his campaign would place her.

183. I also find that, to the extent that Mr. Yenovkian happens to have included true statements about Ms. Gulian in the publicity he has created around their dispute, he is liable to her for public disclosure of private facts. The parties' parenting dispute is not a matter of legitimate concern to the public (save, of course, to the extent that it is the subject of a public judicial proceeding) and a reasonable person would find it highly offensive that the dispute has become the subject of a website and an online petition. ***

185. Ms. Gulian has met the burden of proving Mr. Yenovkian's tortious conduct in respect of the tort of invasion of privacy (both public disclosure of private facts, and publicity placing a person before the public in a false light) on the facts as I have set out in this decision. ***

REFLECTION:

- *How does this tort of publicity placing a person in a false light differ from the tort of public disclosure of private facts (§4.1.2) and the tort of defamation (§5.1)? How is it similar to these torts?*
- *What sources did Kristjanson J. consider when recognising this new common law tort? Was it necessary in this case to recognise such a tort?*

4.1.3.2 Further material

- F. Duncan, "Illuminating False Light: Assessing the Case for the False Light Tort in Canada" (2020) 43 Dalhousie LJ 605.
- B.C. Zipursky & J. C. P. Goldberg, "A Tort for the Digital Age: False Light Invasion of Privacy Reconsidered" (2023) 73 DePaul L Rev 1.

4.1.4 Misappropriation of personality

4.1.4.1 Hategan v. Moore & Farber [2021] ONSC 874

Ontario Superior Court – 2021 ONSC 874, aff'd 2022 ONCA 715

✗**REF: §10.4.2, §10.7.1, §10.8.2**

FERGUSON J.: ***

31. Ms. Moore and Ms. Hategan's life stories have many similarities. They both had a troubled family life growing up and both felt that they were white minorities. They were both introduced to the Heritage Front [an extremist white supremist group] when they were teenagers and became female members of an otherwise male-dominated extremist group. They both left the group, fearful of repercussions, and started new lives for themselves. They now speak out about hate and anti-fascism.

32. Ms. Moore's position is that both women are entitled to speak about their lived experiences. Unfortunately, Ms. Hategan disagrees. In late 2018, Ms. Hategan commenced a claim against Ms. Moore seeking to prohibit Ms. Moore from discussing her own life story. Ms. Hategan's claims centre around a belief that Ms. Moore has appropriated elements of her life, and that Ms. Moore is part of a conspiracy to profit from such appropriations. Since developing this belief, Ms. Hategan has engaged in a vicious campaign against Ms. Moore that has included publicly revealing intimate details about Ms. Moore's life; buying up online domains in Ms. Moore's name; and publishing dozens of derogatory statements about Ms. Moore online and elsewhere. As such, Ms. Moore has brought a counterclaim against Ms. Hategan in defamation. ***

33. Essentially Ms. Hategan's position is that these motions cannot be dealt with on summary judgment. *** I do not agree. These are appropriate summary judgment motions. ***

Wrongful appropriation of personality

43. The tort of wrongful appropriation of personality involves the wrongful exploitation of the name and likeness of someone else for commercial purposes, such as when an athlete's name or image is used to endorse a product without the athlete's knowledge or consent. The elements of the tort are:

(a) use of another's personality;

(b) without consent;

(c) for commercial gain.[81] ***

47. The claim under discussion is and has always been focused on the right to control publication.

48. There is nothing novel about that element of the claim; its novelty is and has always been in attempting to extend it beyond the right to control publication of one's name and likeness into a nebulous and insupportable claim to control how someone else markets experiences similar to one's own. ***

68. Ms. Moore submits that Ms. Hategan's main claim is that Ms. Moore appropriated aspects of her life and identity for Ms. Moore's own benefit and financial gain.

69. To be held liable for the tort of wrongful appropriation of personality, Ms. Moore must "be taking advantage of the name, reputation, likeness or some other component of Ms. Hategan's individuality or personality which the viewer associates or identifies with Ms. Hategan."[82] Courts have limited this tort to cases in which the likeness of a public figure has been used, without permission, for advertising or other commercial purposes.[83] Indeed, the Ontario Court of Appeal has specifically expressed caution at extending this tort beyond situations in which a person's name or likeness is falsely used as endorsement, stating that the danger is "obvious."[84]

70. Ms. Moore further submits that Ms. Hategan has provided no evidence that Ms. Moore has used her name, face, reputation or likeness, which the public associates or identifies with Ms. Hategan, for commercial purposes. Ms. Hategan is not a public figure with whom Ms. Moore is trying to associate in an attempt to take advantage of Ms. Hategan's reputation or good will. At best, Ms. Hategan submits that Ms. Moore has used aspects of Ms. Hategan's life story and passed them off as her own, including joining the Heritage Front while still in high school; becoming a prominent female spokesperson; contributing to the downfall of the Heritage Front; and being in danger following the defection from the group.

71. Ms. Moore submits that she is not "passing off" or "appropriating" these facts. These are facts based on her own life experiences. The lives of Ms. Hategan and Ms. Moore share many similarities. Ms. Hategan may believe that the statements equally apply to her, or perhaps that she has more of a "right" to make these statements, but that does not amount to a claim for wrongful appropriation of personality, or any legal claim for that matter.

72. Ms. Hategan may believe that she, (a) was more immersed in the white supremacist movement than Ms. Moore; (b) was the "female face" of the Heritage Front; (c) deserves exclusive recognition for being "the only young woman who was involved in shutting down" the Heritage Front; and (d) is better qualified to speak about the fascist movement, but this does not amount to an actionable wrong to be remedied. Ms. Moore is entitled to draw on her lived experiences and share those experiences with others.

73. In her supplementary factum Ms. Hategan submits that her claim for appropriation of personality ought

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[81] *Krouse v. Chrysler Canada Ltd.* (1973), 1 O.R. (2d) 225 (Ont. C.A.) [*Krouse*]; *Gould Estate v. Stoddart Publishing Co.* (1996), 30 O.R. (3d) 520 (Ont. Gen. Div.) [*Gould*].
[82] *Joseph v. Daniels* (1986), 4 B.C.L.R. (2d) 239 (B.C. S.C.) [*Joseph*] at para. 14.
[83] *Athans v. Canadian Adventure Camps Ltd.* (1977), 17 O.R. (2d) 425 (Ont. H.C.) [*Athans*]; C.D.L. Hunt, "The Common law's Hodgepodge Protection of Privacy" (2015) *66 UNB LJ 161*, p 8.
[84] *Gould supra*, at paras 14 to 17, citing *Krouse*, *supra*.

to survive summary judgment. Ms. Moore submits that this argument must fail for the following reasons:

> (i) First, the tort of appropriation of personality is well settled. This tort is not a new or novel tort. It has been the subject of judicial rulings since 1977, when the tort was first recognized in Canada in *Athans v. Canadian Adventure Camps Ltd.*.[85] Its test has since been firmly established in the jurisprudence. It protects against the "unauthorized use of a name or likeness of a person as a symbol of [her] identity".[86] Ms. Hategan does not meet the test. Ms. Hategan has asserted that Ms. Moore has "copied" details of her life. This assertion, even if true, would not meet the test as Ms. Moore is not using Ms. Hategan's name or likeness in any unauthorized way.
>
> (ii) Second, *** Ms. Hategan cannot bend existing law to concoct a possible "novel" claim just so she can survive a motion for summary judgment.
>
> (iii) Third, courts in Canada have specifically held that this tort should not be expanded, due in particular to concerns about how such an expansion could affect the public interest and freedom of expression.[87]
>
> (iv) Finally, even if Ms. Hategan had a legitimate argument that the facts of this case are appropriate for expansion of the tort, and even if this court was willing to entertain the argument, Ms. Hategan has not adduced any evidence to support her argument that a "new" or "expanded" tort of misappropriation of personality is appropriate. Ms. Hategan has not offered any case law or policy considerations to support the expansion of this tort. This is not a case that "cries out" for a new or expanded tort.[88] ***

75. I agree with these submissions. *** This tort is well settled and protects against the unauthorized use of a name or likeness of a person as a symbol of her identity. Ms. Hategan does not meet the test. Ms. Moore is not using Ms. Hategan's name or likeness in any unauthorized way. This tort claim fails against Ms. Moore. ***

109. Ms. Hategan submits that this court should protect her reputation and unique life story from commercial exploitation by Ms. Moore by accepting that Ms. Moore has committed tort of wrongful appropriation of personality. ***

110. Ms. Moore generates profits as a public speaker and expert on extremism. Ms. Hategan testified that she has lost business opportunities as a result (paid speaking engagements, etc.). ***

112. Ms. Hategan submits that this is precisely what this tort is designed to protect, lying in the gap not covered by copyright and trademark infringement. The tort allows an individual to control the commercial use of their name, image, likeness, voice, reputation, or other aspects of their identity.

113. I do not agree with these submissions. Yes there is a tort of wrongful appropriation of personality. This tort is not made out. It is not even a "close call". ***

Counterclaim ***

141. Ms. Moore submits that Ms. Hategan appropriated Ms. Moore's likeness by registering multiple websites and social media handles (the "domains") in Ms. Moore's name. Ms. Hategan linked many of the domains directly to her own website, so that when a person searched for Ms. Moore, they were redirected to Ms. Hategan's information. In doing so, Ms. Hategan took advantage of the name, reputation and likeness of Ms. Moore's personality. Ms. Hategan did this for commercial purposes and to boost her own professional reputation. As a direct result, Ms. Moore cannot register many of the domains that would naturally be used for her business—including variations of her name. Instead of using her own name, Ms. Moore has to use a fictional phrase—"one moore liz"—to promote herself online.

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[85] *Athans supra*, cited in *Joseph supra*.
[86] *Joseph supra* at para 14.
[87] *Wiseau Studio, LLC et al. v. Harper et al.*, 2020 ONSC 2504 (Ont. S.C.J.), at paras. 210-217, citing *Gould supra*.
[88] *Merrifield v. Canada (Attorney General)*, 2019 ONCA 205, 145 O.R. (3d) 494 (Ont. C.A.), at para. 41 [§5.2.2].

142. I agree with the defendant that these actions constitute an appropriation of Ms. Moore's personality and likeness. ***

REFLECTION:

- *What is the essence of the tort of misappropriation of personality? Is Hategan's description of the tort as a gap-filler where intellectual property law fails to provide adequate protection to claimants compelling?*
- *Is the Court's approach to the scope of the tort of misappropriation of personality here similar to the cautious approach to the tort of intentional infliction of mental suffering discussed in Rhodes v. OPO (§3.2.1)?*

4.1.4.2 Audi v. Standard Group Plc [2022] eKLR, Const. Pet. E008 of 2021

Kenya High Court – [2022] eKLR, Const. Pet. E008 of 2021

ABURILI J.: ***

3. It is the petitioners' case that being persons of good standing in the society and very hardworking individuals, the respondents used their image/likeness and persona without express consent to advertise their product specifically the digital newspaper which infringed on the fundamental rights and freedoms of the Petitioners.

4. The petitioners averred that on the 1st June 2021, the respondent [a Kenyan newspaper] published on its website the image/likeness of the petitioners showing one of them yawning. They further averred that on the 3rd June 2021, the respondent via its twitter handle, The Standard Digital, published a story with the intention of attracting wide readership and boost its sales titled *"TAKE YOUR LEAVE, CLOCK OUT AT FIVE, WORK WILL STILL BE THERE TOMORROW"* with the petitioners' image/likeness and persona. They stated that the post stated:

> "You need to appreciate that just like any other machine, *your body needs some rest and it undergoes wear and tear*. And with the work daily life stresses your body goes through every single day, you can't afford not to find an outlet."

5. The petitioners averred that the actions of the respondent cited above were an infringement on their fundamental freedoms and rights as the petitioners ought to have consented to:

> a) Being models for the respondent's products;
>
> b) Being retained by the respondent to offer modelling services in a bid to advertise their products and boost their sales;
>
> c) Be sufficiently paid by the respondent to enable him waive his privacy and dignity at the expense of their commercial gain and in the eyes of the society;
>
> d) Work for the respondent having been contracted or on salary to offer modelling services.

6. The petitioners averred that the respondent exploited their images to gain commercially thus violating their right to control and make money from the commercial use of their identity ***.

7. It is further averred by the petitioners that the actions of the respondent in utilising the petitioners' image/likeness clawed back their right to inherent dignity as it was done without their consent and further that it was an invasion of the petitioners' privacy. ***

21. It was further averred by the petitioners that the publication of their images was intrusive and defamatory and that working in a public space as they did [did] not in any way interfere with the petitioners' expectation to privacy and further that the opinion carried out by the respondent was not related to the key functions of the County Assembly.

22. The petitioners further denied misrepresenting any facts and stated that they are Committee Clerks at Siaya County Assembly, normally referred to as Clerks. ***

Petitioners' Submissions

29. Relying on the cases of *Kenyan Human Rights Commission v. Communications Authority of Kenya* [2018] eKLR and that of *MWK v. Attorney General* [2017] eKLR it was submitted that the right to privacy extends to more than possessions of a person and is concerned with their identity and conduct of their private affairs and thus by using their images, the respondent intruded into the petitioners' personal sanctum and distorted their identity and gained commercially from the said act. It was further submitted that a person's image was a fundamental feature of their identity deserving legal protection. ***

33. It was submitted that the test to determine whether the right to publicity had been breached was enunciated in the case of *Krouse v. Chrysler Canada* [1974] 1 O.R. (2d) 225 (ON CA) as whether there was, i) Use of a protected attribute, ii) For an exploitative purpose and ii) No consent.

34. It was submitted that the image of the petitioners was published in the respondent's website which was a paid subscription service and further that the contents of the article did not relate in any way to the petitioners conduct of work nor did it mention their names.

35. It was further submitted that the petitioners' consent was not obtained by the respondent and as such their right to privacy was violated as there was no evidence adduced by the respondent that the petitioners' consent was obtained as was held in the case of *Mutuku Ndambuki Matingi v. Rafiki Microfinance Bank Limited* [2021] eKLR.

36. As to whether the article published by the respondent was newsworthy in the sense that it was educational, the petitioners relied on the case of *Lahiri v. Daily Mirror Inc* 295 N.Y.S. 382, 386 (1937) where the Supreme Court of New York defined non-commercial use in cases where it involved the current news or immediate public interest. Further it was submitted that a news item will not be considered newsworthy if the images in use are not reasonably connected with the contents of the publication. ***

38. The petitioners submitted that the publication made by the respondent was read by the general public and everyone who knew them which occasioned acute personal embarrassment, forcing the petitioners to hide and seek court intervention. It was further submitted that the publication of the advert was reached by many people and no amends were made by the respondent by way of apology or pulling down the post. ***

41. It was further submitted that being in a public building/space did not waive the petitioners' reasonable expectation to privacy and that the publication by the respondent of the petitioners' image amounted to an intrusion of their private life. Reliance was placed on the case of *Aubry v. Editions Vice Versa Inc* [1998] 2 SCR 591 where the Supreme Court of Canada held that there had been a violation of a young woman's rights of privacy notwithstanding the fact that she had been sitting on the steps of a public building. ***

Respondent's Submissions ***

51. It was submitted that the petitioners' right to privacy was not violated. The respondent refuted allegations by the petitioners that the use of their image was for an exploitative purpose or qualify as commercial as the wording of the article did not allude to any product other than discussing the need of balancing between the amount of time persons dedicate to work, social, family and personal time. Reliance was placed on the case of *Dworkin v. Hustler*, 867 F.2d 1188 (9th Cir. 1989) where the United States Court of Appeals found that *even where a photo is used to express a newspaper's opinion [it] is not exploitative and the fact that Hustler Magazine is operated for profit does not extend a commercial purpose to every article within it* ***. ***

52. It was submitted that while the Respondent is a media house, the article in which the Petitioners' image was used was not geared towards making profits and further that there was no single statement in the article inviting subscription or imploring the readers to subscribe to the digital newspaper and that paid subscription to the news website does not apply to all articles. ***

54. The respondent submitted that in so far as the publication addressed the topic of work and life balance, illustratively using an image of a person yawning, this established the relationship between the contents of the article and the image used and as such a reasonable person juxtaposing the contents therein with the

image would definitely note the connection between the two. Therefore, it was submitted that there was reasonable connection between the image and the contents of the article hence no violation of the Petitioners right to privacy.

55. The respondent submitted that the court ought to balance between the petitioners' right to privacy and the respondent's freedom of expression as was held by the European Court of Human Rights in the case of *Von Hannover v. Germany (No. 2)* (Applications nos. 40660/08 and 60641/08), [2012] ECHR 228 where the Court faced a similar question and proceeded to hold that there was no violation of the right to privacy as the photo was published in furtherance of a public debate.

56. It was submitted by the respondent that the subject of work life balance resonated with many as this court appreciated in the case of *Republic v. Public Procurement Administrative Review Board* [2017] eKLR.

57. The respondent submitted that that the Petitioners did not reasonably expect privacy in the surroundings where their image was taken as the image was not taken in an intrusive manner but in public space during a County assembly session where there was all expectation by the Petitioners that photos were likely to be taken in coverage of the proceedings and debates and further that the image did not contain any intimate details of the Petitioners. ***

Analysis & Determination ***

80. It was submitted by the petitioners that use of their image without their consent violated their right to privacy [under Article 31 of the *Constitution of Kenya*, 2010]. ***

82. The Consultative Assembly of the Council of Europe [Resolution 428, 1970] has defined Article 8(2) of the *European Convention on Human Rights*, which provides for the right to privacy of an individual as follows:

> "The right to privacy consists essentially in the right to live one's own life with a minimum interference. It concerns private family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorized publication of private photographs, protection from disclosure of information given or received by the individual confidentially." ***

86. The respondent denied infringing on the petitioners' right to privacy or that the use of their image was for an exploitative purpose.

87. In the instant suit it is clear that the petitioners' consent was not sought prior to use of their images in the respondent's publication. Indeed, in *Aubry (supra)*, the Canadian Supreme Court held that publication of the photograph of an individual without her consent was actionable as a breach of privacy.

88. In the end, I find and hold that there was breach of privacy of the petitioners' image.

89. The question is whether there was unlawful use of the image of the petitioners.

90. As was held in the case of *Jessica Clarise Wanjiru* [*v. Davinci Aesthetics & Reconstruction Centre* [2017] eKLR, Const. Pet. 410 of 2016], 'Privacy', 'dignity', 'identity' and 'reputation' are facets of personality and that the tort of misappropriation of personality can be invoked when all of the following four elements are met:

> i. There is an element of commercial exploitation of a person's personality. There must be a sufficient link between the individual and the exploiting medium to establish that the plaintiff's personality was "used" for the defendant's commercial gain.
>
> ii. The person is clearly identifiable in the medium used and to their respective community or communities.
>
> iii. The person does not consent to the use of their personality.

iv. Damages, either emotional or financial losses, are proven (although recent judicial rulings would indicate the right of privacy is recognized even in the absence of damages).

91. In the case of *Jessica Clarise Wanjiru* (*supra*), the court stated, and I am in agreement with it that the key elements of a Claim for unlawful use of Name or image which a petitioner must establish to succeed in a case of this nature are:

a. Use of a Protected Attribute: The plaintiff must show that the defendant used an aspect of his or her identity that is protected by the law. This ordinarily means a plaintiff's name or likeness, but the law protects certain other personal attributes as well.

b. For an Exploitative Purpose: The plaintiff must show that the defendant used his name, likeness, or other personal attributes for commercial or other exploitative purposes. Use of someone's name or likeness for news reporting and other expressive purposes is not exploitative, so long as there is a reasonable relationship between the use of the plaintiff's identity and a matter of legitimate public interest.

c. No Consent: The plaintiff must establish that he or she did not give permission for the offending use.

92. This first and third test are not in contention in this case. Indeed, the petitioners' image was used by the respondent and such use was without their consent. The question is whether the use of the petitioners' image was for an exploitative purpose.

93. The petitioners submit that the use of their image was for an exploitative purpose as the site on which the same was posted is for subscription at Kshs. 10 and further that the respondent's daily retails at Kshs. 60 and thus the respondent gained from views on its sites and from purchase of its newspaper.

94. On their part the respondent avers that the Petitioners' image was use was not geared towards making profits and further that there was no single statement in the article inviting subscription or imploring the readers to subscribe to the digital newspaper and that paid subscription to the news website does not apply to all articles and that the Petitioners failed to place any evidence before Court to prove that the Respondents subscription increased as a result of the publication.

95. The respondent submitted that in so far as the publication addressed the topic of work and life balance, illustratively using an image of a person yawning, this established the relationship between the contents of the article and the image used and as such a reasonable person juxtaposing the contents therein with the image would definitely note the connection between the two. Therefore, it was submitted that there was reasonable connection between the image and the contents of the article hence no violation of the Petitioners right to privacy.

96. The question is whether the use of the petitioners' image showing them yawning created a reasonable relationship with a matter of legitimate public interest. The picture itself was captured in the Siaya County Assembly.

97. According to a study published by the World Health Organization on the 17th May 2021, long working hours led to 745 000 deaths from stroke and ischemic heart disease in 2016, a 29 per cent increase since 2000, leading the Organization to come up with actions that governments and companies can take to minimize the same. In my view this was a matter of public interest and which was addressed by the respondent's publication. A prima facie look at the image published by the respondent, in my view, resonates with the contents of the article published.

98. In the *Mistry* case [*Mistry v. Interim National Medical and Dental Council of South Africa* (1998) (4) SA 1127 (CC), [51]] the Constitutional Court of South Africa considered the factors to be considered when determining whether right to privacy was violated in line with the information in question. The Court stated that one ought to consider: whether the information was obtained in an intrusive manner; whether it was about intimate aspects of the applicants' personal life; whether it involved data provided by the applicant for one purpose which was then used for another; whether it was disseminated to the press or the general

public or persons from whom the applicant could reasonably expect such private information would be withheld.

99. In the instant case, it is my view that the petitioners' image was not captured in an intrusive manner as the same was captured during a public hearing of the Siaya County Assembly in which the press had been allowed and was thus not an intimate aspect of the petitioners' life.

100. Taking all the above into consideration, I am not convinced that the petitioners claim for unlawful use of image is merited. ***

REFLECTION:

- *Is the High Court of Kenya's reasoning compelling that the newspaper had not posted the petitioners' photo on Twitter for commercial gain? In what different circumstances might the defendant have been liable in tort?*
- *The Court awarded the petitioners Kshs 80,000 plus costs for the newspaper's infringement of Article 31 of the Constitution of Kenya, 2010, which, like the European Convention on Human Rights, affords a constitutional right to privacy. Yet, the petitioners' tort claim was rejected. Are these holdings consistent? What differentiates rights secured by the common law from rights secured by a constitutional bill of rights (§24.2)?*
- *Is the common law tort of misappropriation of personality equivalent to the statutory tort of unauthorised use of name or portrait of another, found in some province's privacy statutes?[89] Was Facebook's ill-fated "Sponsored Stories" feature a tortious invasion of privacy?[90]*

4.1.4.3 Further material

- J. Buchanan, "In the Future, Everyone Will Have Their Personality Misappropriated for 15 Minutes" McCarthy Tétrault (Dec 2, 2017).
- N. Chamberlain, "Misappropriation of Personality: A Case for Common Law Identity Protection" (2021) 26 Tort LJ 195.
- M.S. Henderson, "Applying Tort Law to Fabricated Digital Content" (2018) 2018 Utah L Rev 1145.
- A.M. Conroy, "Protecting Your Personality Rights in Canada: A Matter of Property or Privacy?" (2012) 1 Western J of Legal Studies 1.

4.2 Statutory invasion of privacy torts

4.2.1 Privacy Act, RSBC 1996

Privacy Act, RSBC 1996, c 373, ss 1-2

1. Violation of privacy actionable

(1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.

(2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.

(3) In determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.

(4) Without limiting subsections (1) to (3), privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass.

[89] E.g. *Privacy Act*, RSBC 1996, c 373, s 3.
[90] See *Facebook, Inc. v. Douez*, 2023 BCCA 40; B. Fox, "Click and Consent: *Douez v. Facebook*" The Court (Jan 28, 2018); "Facebook Sponsored Stories Settlement" Branch MacMaster (Jan 11, 2024).

2. Exceptions

(1) In this section:

> "**court**" includes a person authorized by law to administer an oath for taking evidence when acting for the purpose for which the person is authorized to take evidence;
>
> "**crime**" includes an offence against a law of British Columbia.

(2) An act or conduct is not a violation of privacy if any of the following applies:

> (a) it is consented to by some person entitled to consent;
>
> (b) the act or conduct was incidental to the exercise of a lawful right of defence of person or property;
>
> (c) the act or conduct was authorized or required under a law in force in British Columbia, by a court or by any process of a court;
>
> (d) the act or conduct was that of
>
> > (i) a peace officer acting in the course of his or her duty to prevent, discover or investigate crime or to discover or apprehend the perpetrators of a crime, or
> >
> > (ii) a public officer engaged in an investigation in the course of his or her duty under a law in force in British Columbia,
>
> and was neither disproportionate to the gravity of the crime or matter subject to investigation nor committed in the course of a trespass.

(3) A publication of a matter is not a violation of privacy if

> (a) the matter published was of public interest or was fair comment on a matter of public interest, or
>
> (b) the publication was privileged in accordance with the rules of law relating to defamation.

(4) Subsection (3) does not extend to any other act or conduct by which the matter published was obtained if that other act or conduct was itself a violation of privacy.

4.2.1.1 Other provincial privacy tort statutes

- Manitoba: Privacy Act, RSM 1987, c P125.
- Newfoundland: Privacy Act, RSNL, 1990, c P-22.
- Québec: Civil Code of Québec, CQLR c CCQ-1991, arts 35-41.
- Saskatchewan: Privacy Act, RSS 1978, c P-24.

REFLECTION:

- *How do the elements of British Columbia's statutory privacy-invasion tort compare to the common law privacy-invasion torts? What are the similarities? What are the differences?*

4.2.2 Milner v. Manufacturers Life Insurance Co. [2005] BCSC 1661

British Columbia Supreme Court – 2005 BCSC 1661

MELNICK J.:

1. Cynthia Louise Milner ("Ms. Milner") claims to be entitled to long-term disability benefits pursuant to a policy of insurance with Manulife Financial Insurance Company ("Manulife"). Manulife claims that Ms. Milner

is not totally disabled within the meaning of the policy and thus is not entitled to benefits. The principal issue is the credibility of Ms. Milner with respect to her subjective complaints that have led to a diagnosis of her suffering from chronic fatigue syndrome.

2. Ms. Milner also claims for aggravated damages for the manner in which Manulife has dealt with her as well as for damages for the loss she claims she and her husband suffered on the sale of their home consequent on being denied benefits by Manulife. She further claims damages for the breach of her privacy and that of her family as a result of video surveillance carried out at the request of Manulife. ***

70. In this case, on the instructions of Manulife, four different private investigators on various days observed and took surveillance videos of Ms. Milner. Ms. Milner does not dispute that they had the right to do so provided that those photographs were taken in a public place. However, she claims that Manulife did not instruct its investigators not to take photographs of her in her home nor did they instruct Manulife not to take photographs of members of her family (unless, presumably, the members of her family were necessarily in the same scene with her a public venue).

71. Nathan Helm ("Mr. Helm") of Shadow Investigations Ltd. took the most contentious video on October 26, 2003. He sat in a parked vehicle across the road from the Milner residence and, using a video camera with a zoom lens, as noted above, photographed Ms. Milner, Andrea Milner and a friend of Andrea Milner in the process of making a Halloween costume for Andrea. It was dark outside, the interior of the home well lit so that Mr. Helm (or any passer-by for that matter) could see the individuals through the window of the home. As stated earlier in these reasons, at one point Andrea Milner removed her upper outer garment for a brief period of time. At that time, Mr. Helm had the camera trained on the individuals, not to capture Andrea Milner but rather to record the activities of Ms. Milner who could be seen to be sewing and moving into an adjoining room.

72. On October 27, 2003, Nathan Helm's father, Raymond Helm, conducted video surveillance of Ms. Milner's two sons playing soccer outside their home. When asked why he did so, he responded that it was just to show whatever activity was going on. It was clear that Ms. Milner was not in the area and that had to be known to Raymond Helm.

73. Ms. Milner indicated that she was upset that her children had been photographed playing when there was no reason for them to be photographed. Ms. Milner's youngest son wasn't called to give evidence and her oldest son, Bryan Milner, made no comment on the incident.

74. Whether a person's privacy has been violated is dependent upon the particular facts of each case (see *Davis v. McArthur* (1970), [1971] 2 W.W.R. 142 (B.C. S.C.)). I adopt the approach of Madam Justice Dorgan in *Getejanc v. Brentwood College Assn.* (2001), 6 C.C.L.T. (3d) 261 (B.C. S.C. [In Chambers]) at para. 16, namely that the analysis requires two questions to be answered: was the plaintiff entitled to privacy and, if so, did the defendant breach the plaintiff's privacy?

75. Therefore, in this case I ask:

1. Were the Milners entitled to privacy?

2. If the Milners were entitled to privacy, did the videotape surveillance breach the Milners' privacy?

Section 1(2) of the Act provides the only guidance as to when a person is entitled to privacy. The Act provides that a person's privacy interest must be reasonable in the circumstances, with due regard being given to the lawful interests of others.

76. The location of the subject of the surveillance is the key to determining whether a person's expectation of privacy is reasonable. Therefore, a person's expectation of privacy would be highest in one's home. As stated in *Brentwood College* at para. 18, "[a] person's entitlement to privacy is highest where the expectation of privacy would be greatest" ***.

77. Conversely, there is no reasonable expectation of privacy for actions taking place in public. In *Druken v. R.G. Fewer & Associates Inc.* (1998), 171 Nfld. & P.E.I.R. 312, 58 C.R.R. (2d) 106 (Nfld. T.D.), the

Newfoundland court considered legislation very similar to British Columbia's when determining whether the videotape surveillance of the plaintiff in public constituted a violation of her privacy. The court held that there is no reasonable expectation to privacy in public.

78. Even if actions take place on private property, the circumstances may suggest that there is not a reasonable expectation of privacy. The authors of *Privacy Law in Canada* observe that it is generally permitted to videotape a plaintiff in a public place or a place visible to the public such as a parking lot or the front yard of one's house (Colin H.H. McNairn & Alexander K. Scott, *Privacy Law in Canada*, (Markham and Vancouver: Butterworths, 2001) at 78). This is what happened in *Silber v. British Columbia Television Broadcasting System Ltd.* (1985), 69 B.C.L.R. 34, 25 D.L.R. (4th) 345 (B.C. S.C.). In that case, a news crew taped an altercation between the plaintiff and the reporter on the private parking lot of the plaintiff. Although the plaintiff was on private property, it was in full view of any passersby and therefore there was no reasonable expectation of privacy.

79. These principles are just general guidelines; there remains a high degree of discretion for a trial judge to determine what is a reasonable expectation of privacy in the circumstances. However, it should be noted that section 1(2) requires a person's entitlement to privacy be weighed against the lawful interest of others.

80. Section 1(1) requires that the breach of a person's privacy, to be actionable, must have been done willfully and without claim of right. In *Brentwood College* at para. 22, Madam Justice Dorgan refers to the meaning given to these words by the jurisprudence:

> In *Hollinsworth v. BCTV* (1998), 59 B.C.L.R. (3d) 121 (B.C. C.A.), Lambert J.A. said the following at p. 127:
>
> I turn first to the word "wilfully". In my opinion the word "wilfully" does not apply broadly to any intentional act that has the effect of violating privacy but more narrowly to an intention to do an act which the person doing the act knew or should have known would violate the privacy of another person.
>
> I move now to the phrase, "without a claim of right". I adopt the meaning given by Mr. Justice Seaton to that very phrase, "without a claim of right" in *Davis v. McArthur* (1969), 10 D.L.R. (3d) 250 (B.C. S.C.):
>
> > … an honest belief in a state of facts which, if it existed, would be a legal justification or excuse …

81. Also relevant to determining if privacy was violated is section 1(3) which requires the trial judge to consider the "nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties."

82. A final consideration is to do with surveillance itself. Section 1(4) provides that privacy may be violated by surveillance whether or not the surveillance is accomplished by trespass.

a) Was Ms. Milner's privacy violated?

83. Although her expectation of privacy may legitimately be higher while in her house, on the night in question the blinds were open and the lights were on. Therefore, anyone could have seen her helping her daughter while just passing by the house. Further, Ms. Milner ought to have reasonably known that Manulife was investigating her claim and that it was possible that video surveillance would be used. Thus, her entitlement to privacy on the evening in question was low.

84. I also consider that Manulife had a lawful interest in conducting surveillance of Ms. Milner considering the nature of her claim and the credibility issues her conduct raised. Weighing this lawful interest against what in my opinion is Ms. Milner's reasonable expectation of privacy, I conclude that Ms. Milner was not entitled to an expectation of privacy in the circumstances.

85. If I am in error and Ms. Milner did have a reasonable expectation of privacy, in my opinion, having regard to the nature, incidence and occasion of the investigator's conduct with respect to Ms. Milner only, I

would not find that her privacy was violated.

b) Was the privacy of Ms. Milner's sons violated?

86. The videotape of Ms. Milner's sons playing soccer was not a violation of their privacy. They were in a public place at the time and based on the authorities above, particularly *Silber* and *Druken*, they had no reasonable expectation of privacy in the circumstances.

87. Because I have found that the Milner boys were not entitled to an expectation of privacy when they were playing in the street, it is not necessary to determine if their privacy was violated.

c) Was the privacy of Andrea Milner violated?

88. With respect to Andrea's entitlement to an expectation of privacy, it is my view that it is reasonable in the circumstances that she had a higher expectation than that of her mother. I say this because, although she was in full view of any passer-by, she was nonetheless inside her home while the video was being taken. *Brentwood College* suggests that the entitlement to privacy is highest when the expectation is greatest. The cases referenced above that have held there is no expectation to privacy in a public place or while on private property outside a person's home, implicitly suggest that the expectation is greater while inside the home.

89. I recognize that I concluded that Ms. Milner had no reasonable expectation of privacy on the same occasion but the circumstances surrounding Andrea herself are different. Unlike with regards to Ms. Milner, Manulife had no lawful interest in videotaping Andrea. Andrea was not the subject of the insurance investigation and therefore it is reasonable for her to expect that she would not be videotaped while in her home, particularly while in a state of partial undress.

90. It may be said that it was careless for Andrea to partially undress in front of the window considering that it was dark outside, the blinds were open and the lights were on inside the room. There is one case that suggests that such carelessness might negate a person's reasonable expectation to privacy in the circumstances. In *Milton v. Savinkoff* (1993), 18 C.C.L.T. (2d) 288 (B.C. S.C.), the plaintiff left some nude photographs of herself in the jacket pocket of a friend who later circulated the photos to other people. Apparently, her carelessness in leaving the photos in her friend's jacket and her indifference to having the photos developed and viewed by the technician in the first place, negated her expectation that the photos would be kept private. This case has been criticized for its finding. In a case comment appearing at (1993), 18 C.C.L.T. (2d) 288 (B.C. S.C.), at 297, Professor P.H. Osborne questions how a breach of privacy can be authorized by one's carelessness:

> To some degree the plaintiff was the author of her own misfortune. However, it is submitted that carelessness does not authorize a breach of privacy. *A person may leave a blind open in a bedroom window or may leave a personal diary in an easily accessible place. The peeping tom and the surreptitious diary reader are not however justified in their actions.* It is reasonable to expect that others will not seize on our lack of vigilance to pry into our personal affairs. We are certainly not authorizing, consenting or waiving our right to privacy. [Emphasis added.]

91. Having concluded that Andrea was entitled to a higher degree of privacy than her mother, it must then be determined whether the actions of the private investigator violated her privacy.

92. Section 1(1) requires the violation of privacy to be wilful and without a claim of right. The actions of Mr. Helm, the private investigator, were certainly wilful as defined by Lambert J.A. in *Hollinsworth v. BCTV* (1998), 59 B.C.L.R. (3d) 121, [1999] 6 W.W.R. 54 (B.C. C.A.) as quoted in *Brentwood College*, above. Mr. Helm should have known that continuing to videotape Andrea once she had removed her shirt was a violation of her privacy. This is particularly so considering that Ms. Milner left the room while Andrea was in a partial state of undress. In my opinion, the private investigator had no claim of right in the meaning adopted by Lambert J.A. in *Hollinsworth*; there are no facts that exist which would give rise to an honest belief in Mr. Helm that he had a legal justification to continue filming Andrea.

93. The final consideration in determining if Andrea's privacy was violated is the nature, incidence and

occasion of the investigator's conduct and the relationship between the parties. The nature of the surveillance in this case was clandestine and utilized a zoom lens. Mr. Helm continued to film even after Andrea removed her upper garment and Ms. Milner had left the room. There is no relationship between Mr. Helm and Andrea; the only relationship the investigator had in the circumstances was with Ms. Milner. Taking this into consideration, I conclude that Andrea Milner's privacy was violated by the videotape surveillance.

94. Although I have found that Andrea Milner's privacy was violated, I cannot award damages directly to her because she is not a party to the action. I was not referred to, nor have I found, any authority for awarding Ms. Milner damages on behalf of Andrea. If I am in error in that regard, in these circumstances I would have awarded damages of $500 for the breach of Andrea Milner's privacy.

95. I conclude that Ms. Milner suffers from chronic fatigue syndrome and has been totally disabled from performing her former normal occupation as a resident care manager or any other occupation, job or work since November 26, 2001. She is entitled to long term disability benefits under the Manulife policy. I dismiss her claims for aggravated damages and damages for breach of her and her children's privacy. ***

REFLECTION:

- *What is privacy? What considerations guide whether a plaintiff had a reasonable expectation of privacy?*
- *Why did the Court consider that Ms. Milner's privacy had not been violated when in the same circumstances Andrea's had? Why did the defendant not have a claim of right vis-à-vis Andrea? What is a claim of right?*
- *Suppose that as part of its insurance fraud investigation the defendant had mounted a pole camera on public property outside of Ms. Milner's home, which captured 24/7 visual (but not audio) surveillance of the movement of people and vehicles in and out of her home and any activities taking place in front of the home. Would Ms. Milner then have had a reasonable expectation of privacy? Would a court find her privacy to be violated by such surveillance? Should it?*[91]

4.2.3 Gokey v. Usher & Parsons [2023] BCSC 1312

✗**REF: §2.2.1, §2.3.3, §5.2.6, §7.1.2, §9.3.4, §9.4.3, §9.5.4, §9.8.2.1, §10.2.1, §20.8.1, §21.1.3**

PUNNETT J.: ***

189. Mr. Gokey alleges the defendants [his neighbours] have violated his privacy by their surveillance of his property and activities, the recording of videos and the taking of photographs contrary to the *Privacy Act*, R.S.B.C. 1996, c. 373 ***. ***

190. Mr. Gokey complains the defendants have breached his privacy by "stalking" him, watching his activities on his property and making videos and taking pictures of his activities effectively placing him under "continual surveillance". He says that such is not restricted to only matters that they complain about, but rather includes normal day-to-day activities.

191. In *Wasserman* [*v. Hall*, 2009 BCSC 1318], Macaulay J. considered when "the installation of security cameras on one's own property can result in an invasion of a neighbour's privacy or a private nuisance": para. 72. He stated:

> 75. There has been relatively little judicial consideration of the legislative intent underlying s. 1(2) of the *Act.* Nonetheless, it seems obvious that a person's reasonable expectation of privacy in his or her own home is ordinarily very high whereas surveillance in a public place would be substantially less so. ***

192. Mr. Gokey states he is being watched "all the time". Mr. Gokey submits this shows that everything he does bothers them.

193. That is an inaccurate description of the defendants' complaints. The activities that affect them include

[91] See *R. v. Hoang*, 2024 ONCA 361; A. Macnab, "Camera pointed at suspect's home not intrusion on reasonable expectation of privacy: Ont. CA" Law Times (May 8, 2024).

excessive smoke, offensive smells, the feeding of their dogs, water issues relating to the well, trespasses on their property, harassing behavior, noise such as the telephone ringer and low water pressure alarm and verbal and physical abuse.

194. Ms. Parsons testified that she started taking and kept keeping records of Mr. Gokey's conduct partly because RCMP officers and conservation officers had informed her that such records were necessary in order for them to act on any complaints about Mr. Gokey's conduct. ***

198. The defendants submit they only observe and record Mr. Gokey when he is engaged in activities that affect their property and other rights. Given my credibility findings, I accept the evidence of the defendants. Mr. Gokey exaggerates the alleged privacy violations and has failed to produce evidence supportive of his allegation of constantly being watched. The defendants on the other hand maintained a detailed logbook and calendar of relevant events. ***

200. Under s. 2(2)(b) of the *Privacy Act* an act or conduct is not a violation of the act if "the act or conduct was incidental to the exercise of a lawful right of defence of person or property".

201. In *Minicucci v. Liu*, 2021 BCSC 1640, the plaintiff's neighbour topped trees on the plaintiff's property after being told not to. The defendants did so to improve their view. The plaintiffs subsequently installed two outdoor surveillance cameras in order to detect and deter further interference with the cedar trees. The defendants argued one of the cameras had a view of their back yard and swimming pool and in doing so violated their right of privacy.

202. Justice E. McDonald stated: ***

> 67. It must be kept in mind that after Mr. Liu topped the trees, he stated to Mr. Minicucci in his September 17, 2018 email that, "… I will report to the by-law about the exhaust, and trim the trees over the fence and send you the bill". In my view, Mr. Minicucci and the plaintiff's fear that Mr. Liu might "trim" more of their cedar trees was not unreasonable in the circumstances. Mr. Liu topped the trees when the plaintiff was away from her home and I do not find it unreasonable that she and Mr. Minicucci would resort to surveillance cameras to help protect their trees from further damage. ***

205. In *Fouad* [*v. Wijayanayagam*, 2015 BCCA 272], the Court stated:

> 125. There is a two-step analysis for determining a breach of privacy under the *Act*—was the plaintiff entitled to privacy? And if so, did the defendant breach that right? (*Gatejanc v. Brentwood College Association*, 2001 BCSC 822at para. 16). Once proven, damages are presumed.

206. The plaintiffs' claim fails at the first step. Given Mr. Gokey's conduct, his confrontational acts and his deliberate refusal to cease activities that were actionable in tort, it was not unreasonable for the defendants to monitor his activities when he was engaged in them. The monitoring was not done 24 hours a day but occurred when he was, for example, operating his Bobcat or burning various substances in various devices and creating unreasonable levels of smoke. The defendants were therefore entitled under s. 2(2)(b) of the *Privacy Act* to record the plaintiff incidental to their "lawful right of defence of person or property". Any alleged tracking of Mr. Gokey's movements were incidental to that lawful right.

207. The plaintiffs' claim for breach of privacy is dismissed. ***

REFLECTION:

- *What are examples of factors that courts have considered in determining a plaintiff's reasonable expectation of privacy?*
- *Why did Gokey not have a reasonable expectation of privacy in the activities the defendants recorded?*

4.2.4 Lu v. Shen [2020] BCSC 490

✗**REF: §3.2.5, §5.1.1, §5.2.3, §9.3.8, §9.8.2.4**

ADAIR J.: ***

276. In *St. Pierre v. Pacific Newspaper Group Inc.*, 2006 BCSC 241 (B.C. S.C.), Rice J. discussed what is meant by "privacy," at paras. 40-42:

> 40. As to what is meant by "privacy", in *Davis v. McArthur* (1969), 10 D.L.R. (3d) 250, 72 W.W.R. 69 (B.C.S.C.), Seaton J. cited definitions from American case law and the Shorter Oxford English Dictionary, at p. 1586, which defined privacy as "[t]he state or condition of being withdrawn from the society of others, or from public interest; seclusion."
>
> 41. Although the judgment was reversed in the result at the Court of Appeal [(1970) 17 D.L.R. (3d) 760, [1971] 2 W.W.R. 142 (B.C.C.A.)], Seaton J.'s approach to this issue was approved. The Court of Appeal found that the definition of the "Right of Privacy" in Black's Law Dictionary, 4th ed., (St. Paul: West Pub Co., 1951), was "useful" and "largely consonant" with the provisions of the *Privacy Act*. Black's provides as follows:
>
> > The right to be let alone, the right of a person to be free from unwarranted publicity. *Holloman v. Life Ins. Co. of Virginia*, 192 S.C. 454, 7 S.E. 2d 169, 171, 127 A.L.R. 110. The right of an individual (or corporation) to withhold himself and his property from public scrutiny, if he so chooses. It is said to exist only as far as its assertion is consistent with law or public policy, and in a proper case equity will interfere, if there is no remedy at law, to prevent an injury threatened by the invasion of, or infringement upon, this right from motives of curiosity, gain or malice. ***
>
> 42. The *Privacy Act* does not grant an absolute right to privacy. The right is restricted to "that which is reasonable" as indicated in § 1 set out above.

277. What is "private," is not open to or shared with or known to the public.

278. Ms. Lu and Ms. Shen each claim that the other violated her privacy in a variety of ways.

279. For example, Ms. Lu says that Ms. Shen has violated her privacy by (among other things): stalking Ms. Lu and posting details on Canadameet concerning Ms. Lu's daily schedule; posting photographs of Ms. Lu taken without Ms. Lu's authorization; repeatedly threatening in 2015 to reveal personal information about Ms. Lu; and publishing the 61 posts in October and November 2015.

280. On the other hand, Ms. Shen asserts that Ms. Lu has violated her privacy by (among other things): publishing in November 2015 private information about Ms. Shen's job history taken from her resume (which Ms. Shen asserts Ms. Lu obtained as a result of fraud); and by stalking Ms. Shen.

281. I have concluded that, in the unique context of this case, the right to privacy includes the right to be left alone and to be shielded from unwanted contact by or from another person. In that context, in my opinion, the conduct that I have described above in the discussion of the parties' mutual claims for intentional infliction of emotional distress, which is but a small sampling of the conduct detailed in the evidence, is sufficient to justify the conclusion that each of Ms. Lu and Ms. Shen has, over a period of years, breached the other's privacy. While the evidence was insufficient to show "visible and provable illness" for the purposes of the claim of intentional infliction of emotional distress, the tort of breach of privacy is actionable without proof of damage.

282. Of course, the relationship between Ms. Lu and Ms. Shen began, and has persisted, as a result of their participation in social media, and specifically the Canadameet forum. Individuals who participate in social media are making information public, and, as both Ms. Lu and Ms. Shen have learned to their regret, inviting interaction with others, whether they want it or not. The interaction can be pleasant and benign, or it can be very unpleasant and hurtful.

283. There are costs to wanting to be left alone and maintain one's privacy. One of the costs is refraining from participation in social media.

284. Both Ms. Lu and Ms. Shen seek privacy, especially from the other. To maintain privacy, their behaviour

has to change. Ms. Shen, for example, complained that, in this litigation, she was being forced to "seal" her mouth, implying that she should be able to say whatever she wants whenever she wants and however she wants, without consequences. For Ms. Shen to say that she was forced to "seal" her mouth was a gross exaggeration. There were simply court-ordered limits on what she could say on social media, and the same limits applied to Ms. Lu. More importantly, Ms. Shen cannot expect to be shielded from unwanted behaviour or from breaches of her privacy—relief she is asking the court to grant for her—without at the same time modifying her own behaviour. The same is true for Ms. Lu.

285. I conclude, therefore, that, in the unique circumstances of this case, each of Ms. Lu and Ms. Shen has shown that the other has violated and breached her privacy. ***

REFLECTION:

- *How was the nature of the privacy interest in this case conceptualised differently from the privacy interest in Milner and Gokey?*
- *Why did Lu and Shen's respective invasion of privacy claims against each other succeed when their claims for intentional infliction of mental suffering did not? Would they have succeeded under the tort in Jones v. Tsige (§4.1.1.2)?*

4.2.5 Insurance Corp. of British Columbia v. Ari [2023] BCCA 331

British Columbia Court of Appeal – 2023 BCCA 331

✗**REF: §23.1.1**

GRIFFIN J.A. (BUTLER AND GRAUER JJ.A. concurring):

1. An employee of the appellant, the Insurance Corporation of British Columbia ("ICBC"), wrongfully accessed the personal information of a number of its customers, linking their motor vehicle license plates to their names and home addresses, and sold that information to persons who then targeted several of the same customers in arson and shooting attacks.

2. ICBC was found vicariously liable for its employee's statutory tort of violation of privacy under the *Privacy Act*, R.S.B.C. 1996, c. 373 [*Privacy Act*]. ***

4. The action is a class action [§20.6]. The judge concluded that class-wide general damages were appropriate, but these non-pecuniary damages were not quantified at the liability trial: see reasons for judgment at 2022 BCSC 1475.

5. ICBC appeals from the finding of liability. It advances two key premises on appeal: the information accessed was not private, but mere contact information that people regularly provide to others; and vicarious liability was wrongfully imposed because all that ICBC provided was the mere opportunity for the employee to access the information. ICBC says that it did everything right in terms of having workplace privacy policies, and imposition of liability on it is inappropriate. ***

Background ***

9. ICBC is a Crown corporation, pursuant to the *Insurance Corporation Act*, R.S.B.C. 1996, c. 228, which provides a universal, compulsory insurance plan for vehicles in British Columbia and exercises other powers under its originating statute: ss. 7–9. ICBC is authorized to acquire and retain personal information about almost everyone who owns or drives a vehicle in British Columbia. This information includes names of drivers, addresses, driver's license numbers, vehicle descriptions and identification numbers, license plate numbers, and claims histories. ***

12. ICBC employed Candy Rheaume as a claims adjuster. She had a record of agreeing to ICBC's information and security policies and, in 2010, she completed an online information and privacy tutorial. In 2011, she accessed the personal information of 78 customers for no apparent business reason. She searched for the customers' personal information by running license plate numbers provided to her by Aldorino Moretti, which information she then sold to him for $25 or more per license plate number. There

was no monitoring of staff access to personal information in the database during the time Ms. Rheaume was carrying out these activities.

13. Between April 2011 and January 2012, the homes and vehicles of 13 of the 78 customers were targeted in arson, shootings, and vandalism. All the customers' vehicles had been parked at the Justice Institute of British Columbia's parking lot at some point. Vincent Eric Gia-Hwa Cheung, Thurman Ronley Taffe and others carried out the attacks using the information obtained from Ms. Rheaume through Mr. Moretti. At Mr. Cheung's criminal trial, there was evidence establishing that he was engaging in substance use, held a delusion that he was being targeted and controlled by the Justice Institute, and had paid to obtain information about the vehicles in the parking lot that he believed were owned by police officers.

14. In August 2011, in the course of a police investigation, the police approached ICBC and informed the agency about Ms. Rheaume's activities. As a result, ICBC terminated her employment on September 1. Later, she pleaded guilty to fraudulently obtaining a computer service and received a suspended sentence with nine months' probation. The others involved were also charged and sentenced for various associated criminal offences.

15. In June 2012, the plaintiff commenced this action as a class proceeding. ***

Did the Judge Err in His Determination of the Reasonable Expectation of Privacy Under the *Privacy Act*? ***

39. In my view, despite ICBC's able arguments, it has not established that the judge erred in finding that customers had a reasonable expectation of privacy in the information they gave ICBC, which expectation was that the information would only be used for ICBC's legitimate purposes. ***

42. The judge started his analysis of the privacy issue by referring to s. 1 of the *Privacy Act*. He correctly observed the context-specific nature of the analysis:

> 31. The determination of liability for breach of privacy under the [*Privacy Act*] depends on the particular facts of each case. The court must decide whether the plaintiff was entitled to privacy in the circumstances and, if so, whether the defendant breached the plaintiff's privacy. The trial judge has "a high degree of discretion" to determine what is a reasonable expectation of privacy in the circumstances: *Milner v. Manufacturers Life Insurance Company*, 2005 BCSC 1661 [*Milner*] at paras. 74 and 79. [Emphasis added.]

43. The judge then considered ICBC's argument that "simple contact information" was not private information: para. 34. This led the judge to properly consider ICBC's own policies and evidence, some of the jurisprudence under s. 8 of the *Charter*, and jurisprudence dealing with the common law tort of intrusion upon seclusion.

ICBC's Policies, Pleadings and Evidence

44. ICBC submits that the type of privacy protected by the *Privacy Act* is particularly intimate information that is at the biographical core of who we are as people. It describes this as "highly sensitive" information.

45. ICBC says that the information at issue in this case was simple contact information, which is publicly available and readily provided by persons in our society, and in which there is no privacy interest. It says that, by treating contact information as private for the purpose of the *Privacy Act*, the judge conflated the statute that protects personal information, *FOIPPA* [*the Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165] [§4.3.1], with the *Privacy Act*.

46. I disagree with the various propositions wrapped up in this submission. There is no authority concluding that the statutory tort is limited to "highly sensitive" information at the biographical core of individuals. The language of the *Privacy Act* is not so narrow. The statutory tort expressly requires consideration of the entire context to determine what is a reasonable expectation of privacy in the circumstances. Nor was the information at issue "simple contact information" that is publicly available. Further, the judge did not conflate *FOIPPA* obligations with the analysis required under the *Privacy Act*. ***

48. *** The judge found that ICBC's own documents and code of ethics acknowledged that this type of contact information including residential addresses, was "personal information" and entitled to "privacy" protection, in contrast to business contact information. I agree with the judge's observations in this regard. ***

52. Contrary to ICBC's argument on appeal, the judge was not finding that ICBC committed a breach of statutory duty by reason of its failure to comply with *FOIPPA*. When the judge concluded that it was "not open to ICBC to now argue for purposes of this case that there is no privacy interest in the contact information it obtained about its customers" at para. 43, the judge was not equating ICBC's *FOIPPA* obligations with privacy interests under the *Privacy Act*. ***

58. ICBC's argument on appeal seeks to turn its attempted compliance with *FOIPPA* as a defence and shield to liability under the *Privacy Act*. This is not a persuasive argument. Had the legislature considered compliance with *FOIPPA* to be a defence to the statutory tort under the *Privacy Act*, the legislature could have enacted language making this a statutory defence, but it did not do so.

59. Furthermore, I do not accept ICBC's argument that the personal information was simple contact information for which there is no privacy interest. Ms. Rheaume's misconduct was in using the ICBC database to link motor vehicle license plate numbers to the vehicle owner's names and addresses, and this was "personal information" ***. She disclosed some of this "personal information" for a fee per license plate, which allowed others to engage in arsons, shootings, and other illegal activity targeting some of the individuals whose "personal information" was disclosed ***.

60. ICBC's argument that there is no privacy interest in the personal information given to it by ICBC's customers is simply not aligned within the modern world and ICBC's relationship with its customers. In today's world, the Internet can spread information rapidly and widely, opinions on social media can incite irrational mob behaviour against individuals, and identity fraud can impact a person's financial security on multiple levels. The result is that a reasonable person has a desire to control and protect the use of their personal information, including in the way it is digitally disseminated. This is in part the reason for the proliferation of statutes around the world to protect personal information contained in electronic data.

61. Contrary to ICBC's argument, the existence of a statute protecting against the misuse of data is concurrent privacy protection that does not subtract from the privacy statutory tort regime.

Privacy Protections Under the *Charter*

62. ICBC also argues that the judge erred in referring to *Charter* jurisprudence on the right to privacy.

63. The judge referred to a case involving s. 8 of the *Charter* for its discussion of "informational privacy": *R. v. Spencer*, 2014 SCC 43. The judge held:

> 33. This case involves what the Supreme Court of Canada described in *R. v. Spencer*, 2014 SCC 43 [*Spencer*], as "informational privacy," including the right to control use of private information. The Court said at paras. 38 to 40:
>
> > 38. To return to informational privacy, it seems to me that privacy in relation to information includes at least three conceptually distinct although overlapping understandings of what privacy is. These are privacy as secrecy, privacy as control and privacy as anonymity.
> >
> > 39. Informational privacy is often equated with secrecy or confidentiality. For example, a patient has a reasonable expectation that his or her medical information will be held in trust and confidence by the patient's physician ….
> >
> > 40. Privacy also includes the related but wider notion of control over, access to and use of information, that is, "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others" … The understanding of informational privacy as control "derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain

> for himself as he sees fit" … Even though the information will be communicated and cannot be thought of as secret or confidential, "situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected" …. [Emphasis added; citations omitted.]

64. The discussion of privacy in *Spencer* counters the implication in ICBC's argument that the right to privacy does not apply once information is in the public domain. ICBC's very limited vision of privacy equates privacy to secrecy, and it is inconsistent with the modern concept of privacy rights.

65. The judge found the discussion in *Spencer* helpful, stating the present case deals with the right of individuals to control the use of their personal information by those to whom it is provided for a specific purpose: para. 44.

66. It was not an error for the judge to consider the reasoning in *Spencer*. That reasoning is no less useful because the present case deals with the statutory tort of breach of privacy as opposed to an argument under s. 8 of the *Charter* that there has been a breach of privacy by reason of an unlawful search and seizure. The protection of privacy in other circumstances in society, by analogy, can be helpful to a judge when determining the question of what is an objectively "reasonable" expectation of privacy in the particular circumstances, as the judge in this case properly recognized.

67. That the entire privacy landscape may be relevant when considering the reasonable expectation of privacy under the *Privacy Act* is also consistent with the approach to the common law tort of invasion of privacy developed in Ontario.

68. This is illustrated by the analysis in *Jones v. Tsige*, 2012 ONCA 32 [**§4.1.1.2**], a case relied upon by ICBC. In that case, the Ontario Court of Appeal recognized a distinctive common law tort of intrusion upon seclusion; one of four categories of invasion of privacy posited by William L. Prosser in his article "Privacy" (1960), 48 Cal. L. Rev. 383.

69. The question of whether the common law breach of privacy tort exists in BC is unsettled but does not arise on this appeal, see discussion in *Tucci v. Peoples Trust Company*, 2020 BCCA 246 at paras. 53-68.[92]

70. Nevertheless, the facts and conclusions in *Jones* are of interest. ***

71. In *Jones*, the Ontario Court of Appeal expressly addressed *Charter* jurisprudence and the s. 8 protection of privacy, particularly the right to "informational privacy", to support the conclusion that Ms. Jones had a privacy interest in the information in her banking records: paras. 39-42. ***

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[92] *Tucci v. Peoples Trust Company*, 2020 BCCA 246 at paras. 53-68:

> "53. As I have indicated, the judge found that under the law of British Columbia, there is no cause of action for breach of privacy or intrusion upon seclusion beyond the limited statutory claim provided for in the *Privacy Act*, R.S.B.C. 1996, c. 373. That statutory claim has no application to this case.
>
> 54. No appeal has been taken from the judge's ruling, and the notice of civil claim no longer alleges breach of privacy or intrusion upon seclusion, except as matters of federal common law.
>
> 55. It is, in some ways, unfortunate that no appeal has been taken. In my view, the time may well have come for this Court to revisit its jurisprudence on the tort of breach of privacy. ***
>
> 64. The thread of cases in this Court that hold that there is no tort of breach of privacy, in short, is a very thin one. There has been little analysis in the cases, and, in all of them, the appellants failed for multiple reasons. ***
>
> 66. It may be that in a bygone era, a legal claim to privacy could be seen as an unnecessary concession to those who were reclusive or overly sensitive to publicity, though I doubt that that was ever an accurate reflection of reality. Today, personal data has assumed a critical role in people's lives, and a failure to recognize at least some limited tort of breach of privacy may be seen by some to be anachronistic.
>
> 67. For that reason, this Court may well wish to reconsider (to the extent that its existing jurisprudence has already ruled upon) the issue of whether a common law tort of breach of privacy exists in British Columbia.
>
> 68. As this appeal does not directly address the question of whether the torts of breach of privacy or intrusion upon seclusion exist in the law of British Columbia, the interesting question of whether the law needs to be rethought will have to await a different appeal."

84. In focusing solely on the *type* of information at issue in this case, ICBC overlooks that the reasonable expectation of privacy is concerned also with the *use of the information* in the circumstances of the case. One use of personal information might not be an invasion of privacy; another use of the same information might be. Further, an accused might succeed in showing that the accused's s. 8 *Charter* right to privacy was violated, but might not succeed in a civil claim for breach of privacy under the *Privacy Act*, and *vice versa*. It all depends on the circumstances including the use of the information.

85. As an example, it might be unreasonable for a condominium owner to expect that security cameras in common areas of a condominium would not be shared with police during an investigation: see *R. v. Nguyen*, 2023 ONCA 367. However, it might be reasonable for a condominium owner to expect that a security guard will not broadcast images from the security camera for entertainment or news media purposes, by analogy to *Peck*.

86. The legislature's choice of language in s. 1(2) of the *Privacy Act* expressly adopted a contextual approach to privacy, since the "nature and degree of privacy to which a person is entitled" is that which is "reasonable in the circumstances", giving due regard to the lawful interests of others, and the "nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties" (s. 1(3)).

87. It can be seen then, that the concept of the right to privacy as including an individual's right to control the use of their personal information, and the degree to which it is disclosed and to whom it is disclosed, is a longstanding and widely held concept that properly informs the analysis of what is a reasonable expectation of privacy in the circumstances. It is correct to conclude from the language of the statute, the academic discourse regarding privacy rights, and other case law regarding privacy interests, that the disclosure of personal information to some persons does not mean there is no remaining privacy interest in controlling who else has access to the information.

88. Thus, contrary to the thrust of ICBC's submissions, it is not just the nature of the personal information that is relevant, but also the context of the nature and degree of disclosure of the information. ***

Common Law Tort of Intrusion Upon Seclusion

95. Consistent with the judge's approach to consider a wide variety of approaches to privacy interests, the judge also considered the common law tort of intrusion upon seclusion dealt with in a number of Ontario cases. However, contrary to the thrust of ICBC's submission on appeal, the judge was not required to find those cases determinative. ***

103. The *Privacy Act* expressly does not require the plaintiff to show that the privacy breach caused damage in the sense of actual harm: s. 1(1); *Davis v. McArthur*, 17 D.L.R. (3d) 760, 1970 CanLII 813 (B.C.C.A.) at pp. 764-765 [*Davis*].

104. The analysis of whether a person's entitlement to privacy has been violated under the *Privacy Act* imports a reasonableness standard and does not require that the consequences be "highly offensive". The threshold of consequences giving rise to the statutory tort is highly contextual: the "nature and degree of privacy to which a person is entitled is that which is reasonable in the circumstances", giving due regard to the lawful interest of others, the nature, incidence and occasion of the act or conduct, and the relationship of the parties: ss. 1(2), (3).

105. Thus the "consequence requirement", to use the Ontario Court of Appeal's words in *Owsianik* [*v. Equifax Canada Co.*, 2022 ONCA 813], has a lower threshold in respect of the BC statutory tort of breach of privacy than it does in respect of the common law tort of intrusion upon seclusion developed in Ontario.

106. The English courts interpreting the right of privacy pursuant to Article 8 of the European Convention on Human Rights consider the applicable standard to be the "reasonable expectation of privacy", and recognize this as a less stringent test than the "highly offensive" standard for privacy violations found in some other jurisdictions: *Murray v. Express Newspapers plc* [2008] EWCA Civ. 446, [2009] Ch. 481 at paras. 25, 35, 48. The test incorporates an objective-subjective standard taking into account the particular characteristics of the claimant and all the circumstances. It is described as the expectation of a reasonable

person of ordinary sensibilities placed in the same position as the claimant and faced with the same disclosure or publicity, as applied to all of the circumstances of the case: *Murray* at paras. 35, 36.

107. In my view, the facts of the present case illustrate the value of the statutory tort regime in BC. An examination of the "nature, incidence and occasion(s)" of the ICBC's employee's conduct reveals that the privacy breach was serious, consistent with ICBC's own description of it. She deliberately searched out the private information of Class Members, linking their license plates of their vehicles to their personal residences for an improper purpose of selling that information to persons who she knew had a criminal intention, and did sell some of that information, risking the property and personal safety of the Class Members. This led to some Class Members being targeted with extremely violent attacks at their homes. ***

109. While malice is not a requirement under the *Privacy Act*, the motive or purpose of the party breaching the privacy can be a relevant contextual factor in determining if there is a breach of a reasonable expectation of privacy.

110. In *Jones*, the employee who merely looked at another employee's banking records, without using that information, was found liable for the tort of intrusion upon seclusion. It was relevant in that case that Ms. Jones did have an improper purpose as she was seeking to gather information to inform her in her dispute with her ex-partner, even if she did not actually misuse the information.

111. In *Davis*, the private investigator alleged to have breached privacy was found to be acting for the plaintiff's wife, who the Court found had a legitimate interest in her husband's conduct. The investigator was not acting with malice or mere curiosity but rather, was said to have acted with circumspection and inoffensively and so was found not to go beyond "reasonable bounds": at p. 765.

112. In *Peck*, the municipal government's purpose in pursuing crime prevention might have justified having CCTV film footage of the public street but did not justify its disclosure of the footage to television networks without masking the claimant's identity or obtaining his consent.

113. It was open to the judge to consider that Ms. Rheaume's conduct in selling some of the information to third parties for a criminal purpose tainted all of her actions and affected all of the Class Members. Her improper motive in accessing all of the files she accessed without a legitimate business purpose was fairly inferred. ***

114. Ms. Rheaume's invasion of files that she had no business reason for accessing, combined with her improper motives, all go to the "nature, incidence and occasion" of her conduct. To paraphrase *Davis*, what she did goes beyond reasonable bounds. To paraphrase *Jones*, Ms. Rheaume's actions were deliberate, repeated, and shocking, and the law would be deficient if there was no legal remedy.

115. I therefore do not accept ICBC's core argument that regardless of the circumstances, a person can never have any reasonable expectation of privacy in the information concerning where they live, their driver's license, and linking their vehicle license plate to their name and home address. Context is everything.

116. For the purpose of considering ICBC's argument, I accept the theory that, in a hypothetical case where an employee innocently looked at files containing personal contact information without a business reason and an improper motive, the analysis of whether there was a violation of privacy might well result in a different conclusion than was reached in this case.

117. It is important to remember that it is a defence to a claim under s. 1 of the *Privacy Act* that the breach of privacy was not wilful or without claim of right. This limits the scope of liability under the *Privacy Act*. Further, s. 2 of the *Privacy Act* provides additional defences ***. ***

Conclusion on Breach of *Privacy Act*

119. What is a reasonable expectation of privacy is a question of fact: *Davis*. ICBC has not established that the judge made a palpable and overriding error in his finding that the Class Members had a reasonable

expectation of privacy in the personal information they gave ICBC; an expectation that the information would not be used except for ICBC's legitimate operational purposes. ICBC's employee, Ms. Rheaume, accessed this information for a purpose that was not a legitimate ICBC purpose, and in circumstances where she sold some of the information to third parties who had a criminal purpose. ICBC has not established that the judge made any extricable error of law in finding that ICBC's employee wilfully violated the Class Members' privacy, within the meaning of s. 1 of the *Privacy Act*. ***

REFLECTION:

- *How did the Court characterise the concept of the right to privacy in this case?*
- *Is the statutory privacy-invasion tort equivalent to the common law tort of intrusion upon seclusion? Should the courts of British Columbia recognise common law invasion of privacy torts alongside the statutory tort?*
- *Why did the plaintiffs only sue ICBC and not also Rheaume? What were the consequences for Rheaume?*[93]

4.2.6 Bracken v. Vancouver Police Board [2006] BCSC 189

British Columbia Supreme Court – 2006 BCSC 189

HOLMES J.:

1. Ms. Bracken seeks damages and injunctive relief in her action against numerous defendants that, at its core, alleges that an officer of the Vancouver Police Department unlawfully obtained her address from a Ministry of Human Resources official and thus violated her statutory and constitutional rights of privacy. ***

Background

5. Ms. Bracken's allegations in her statement of claim and in her submissions are far-reaching and discursive; however, her essential complaint is, as she agrees, straightforward and as follows.

6. In November 2003, Ms. Bracken witnessed the arrest by officers of the Vancouver Police Department of a woman Ms. Bracken describes as mentally ill. Ms. Bracken described the arrest as very upsetting and brutal.

7. In May 2004, Ms. Bracken filed a Third Party Complaint about the arrest with the Office of the Police Complaint Commissioner. That complaint was referred to the defendant Sergeant Ross Jackson of the Vancouver Police Department for investigation. Within about two weeks, Sergeant Jackson completed his investigation of that complaint, as well as another complaint filed by Ms. Bracken. By that time, Ms. Bracken had moved her residence from the address indicated, as required, on the two forms by which she had made the two complaints.

8. Sergeant Jackson deposes that he took steps to find Ms. Bracken's new address because he was required by s. 57.1 of the *Police Act*, R.S.B.C. 1996, c. 367 to send her a letter concluding the investigation within ten business days of reaching the conclusion. He deposes that ultimately, he obtained her address from an official (now agreed to be Robert Barrett) of the British Columbia Ministry of Human Resources (now the Ministry of Employment and Income Assistance).

9. Sergeant Jackson prepared the concluding letter to Ms. Bracken. The defendant Inspector Rick McKenna signed the letter, which was then sent by mail to the address provided by the Ministry.

10. Not long after receiving the concluding letter, Ms. Bracken filed a formal Form 1 Record of Complaint under the *Police Act* against Sergeant Jackson, the defendant Inspector McKenna, and the defendant Chief Constable Jamie Graham, alleging that the obtaining of her address from the Ministry amounted to criminal harassment. The defendant Sergeant Dan Bezanson investigated that complaint and found it to be unsubstantiated.

[93] See K. Slepian, "Former ICBC employee pleads guilty to role in arsons and shootings" The Abbotsford News (May 8, 2017).

The Positions of the Parties

11. At the heart of Ms. Bracken's claim are the allegations that:

> 1. the Ministry and its officials violated constitutional, statutory, and common law protections of her privacy by providing the police with confidential information stored in their database for a limited statutory purpose; and
>
> 2. Sergeant Jackson, and those of the City of Vancouver defendants who endorsed his conduct or, by virtue of their position, are responsible for it, grossly invaded her privacy in a similar fashion by asking Mr. Barrett for confidential information from Ministry records. ***

15. In brief overview (which I will discuss in more detail later), the City of Vancouver defendants and the Province acknowledge that Ministry records should, in general, be kept confidential, but argue that the disclosure here was either authorized by law or, if improper, done in good faith and subject to statutory protections against civil liability. ***

Was the Disclosure Authorized by Law?

37. I am satisfied that it was. The circumstances of the disclosure fell within the scope of s. 33(n)(i) of the *FOIPPA* [*Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165] [§4.3.1] because the disclosure assisted a law enforcement agency in an investigation undertaken with a view to a law enforcement proceeding. ***

43. *** Sergeant Jackson's duty to investigate Ms. Bracken's complaint involved not only reaching a conclusion, but also drafting a letter to Ms. Bracken, arranging for a superior officer to sign it, and, as required by statute, directing the letter to her within ten business days.

44. I find therefore that s. 33(n)(i) authorized the disclosure of Ms. Bracken's address in the circumstances outlined in the evidence, and the disclosure was therefore authorized by law.

Was the Disclosure Otherwise Protected?

45. Even if the disclosure was not authorized by law, other statutory provisions protect the defendants from civil action.

46. The *Privacy Act* s. 2(2)(d), as quoted above, expressly states that certain acts or conduct do not give rise to a violation of privacy recognized as actionable by s. 1.

47. In my view, Sergeant Jackson was a "public officer engaged in an investigation in the course of his … duty" under the *Police Act* for the same reasons that (in relation to the application of s. 33(n)(i) of the *FOIPPA* discussed above) he was assisted in his investigation by the disclosure of Ms. Bracken's address.

48. In addition, s. 2(2)(d) stipulates that in order for a disclosure to amount to a violation of privacy, the disclosure must be disproportionate to the gravity of the matter subject to investigation. Sergeant Jackson asked for Ms. Bracken's address and no more. That inquiry (and intrusion) was not disproportionate to his responsibility to report to Ms. Bracken the result of his investigation. The disclosed information was neither intended to be, nor actually used, to her prejudice or disadvantage. ***

Is the Disclosure Actionable under s. 1(1) of the *Privacy Act*?

52. Given these conclusions, it is unnecessary for me to address the threshold issue raised by Mr. Jordan and Ms. Davies that Sergeant Jackson's and Mr. Barrett's actions are not actionable, as described in s. 1(1) of the *Privacy Act*, because they were not wilful and without a claim of right. However, I will make some brief remarks.

53. Mr. Jordan submits essentially that Sergeant Jackson's request for and receipt of the confidential information were neither wilful nor without a claim of right because Sergeant Jackson was not aware of any legal impediment applying to his request. The difficulty with this position is as follows.

54. If I am correct in my conclusion that the disclosure fell within s. 33(n)(i), then the request was authorized by law and, by s. 2(2)(c) of the *Privacy Act*, was not actionable as a tort. If, however, I am incorrect in that conclusion, then Sergeant Jackson's "claim of right" is also in doubt.

55. In *Hollinsworth v. BCTV* (1998), 59 B.C.L.R. (3d) 121 (B.C. C.A.), Lambert J.A. for the court considered the terms "wilfully" and "without a claim of right" in the context of s. 1 of the *Privacy Act* and said the following at [29]-[30]:

> … In my opinion the word "wilfully" does not apply broadly to any intentional act that has the effect of violating privacy but more narrowly to an intention to do an act which the person doing the act knew or should have known would violate the privacy of another person. That was not established in this case.
>
> I move now to the phrase, "without a claim of right". I adopt the meaning given by Mr. Justice Seaton to that very phrase, "without a claim of right" in *Davis v. McArthur* (1969), 10 D.L.R. (3d) 250:
>
> > … an honest belief in a state of facts which, if it existed, would be a legal justification or excuse…

56. If I am incorrect in my conclusion that the disclosure was authorized by law, then Sergeant Jackson's belief was in a state of facts which did not provide a legal justification or excuse. His honest mistake would be as to the application of the law, and not as to the state of facts.

57. For similar reasons, his request would also have been "wilful", in the sense that he acted intentionally, knowing that Ms. Bracken's privacy would be violated. That he would have mistakenly believed he was legally entitled to make the request would, in the circumstances I posit, be a mistake of law, incapable by its character of removing the "wilful" character of his conduct. ***

70. The claim is dismissed against all the City of Vancouver defendants and the Province.

REFLECTION:

- *Why did the judge begin her analysis by considering whether any statutory defences applied, before first establishing whether a prima facie right to privacy had been invaded? Why might it have been conceptually difficult to begin the judicial analysis with s. 1(1) of the Privacy Act in this case?*

4.2.7 Further material

- British Columbia Law Institute, *Report on the Privacy Act of British Columbia* (Report No 49, 2008), 15-19.
- C. Hunt, "Reasonable Expectations of Privacy under Canada's Statutory Privacy Torts" (2018) 84 (2d) Supreme Court L Rev 269.
- C. Hunt & N. Shirazian, "Canada's Statutory Privacy Torts in Commonwealth Perspective" (2016) Oxford U Comparative L Forum 3.

4.3 Data privacy statutes

4.3.1 Freedom of Information and Protection of Privacy Act, RSBC 1996

Freedom of Information and Protection of Privacy Act, RSBC 1996, c 165, s 2

2. Purposes of this Act

(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by

(a) giving the public a right of access to records,

(b) giving individuals a right of access to, and a right to request correction of, personal information

about themselves,

(c) specifying limited exceptions to the rights of access,

(d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and

(e) providing for an independent review of decisions made under this Act.

(2) This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public.

4.3.1.1 Other freedom of information statutes

- Federal: Personal Information Protection and Electronic Documents Act, SC 2000, c 5.
- Alberta: Freedom of Information and Protection of Privacy Act, RSA 2000, c F-25.
- Manitoba: The Freedom of Information and Protection of Privacy Act, SM 1977 c 50.
- New Brunswick: Right to Information and Protection of Privacy Act, SNB 2009, c R-10.6.
- Newfoundland & Labrador: Access to Information and Protection of Privacy Act, 2015, SN 2015, c A-1.2.
- Nova Scotia: Freedom of Information and Protection of Privacy Act, SNS 1993, c 5.
- Ontario: Freedom of Information and Protection of Privacy Act, RSO 1990, c F.31.
- Prince Edward Island: Freedom of Information and Protection of Privacy Act, SPEI 2001, c 37.
- Québec: Act respecting Access to documents held by public bodies and the Protection of personal information, CQLR c A-2.1.
- Saskatchewan: The Freedom of Information and Protection of Privacy Act, SS 1990-91, c F-22.01.

REFLECTION:

- *How might freedom of information legislation influence the incremental development of invasion of privacy torts in Canada? In British Columbia?*

4.3.2 Personal Information Protection Act, SBC 2003

Personal Information Protection Act, SBC 2003, c 63, s 2

2. Purpose

The purpose of this Act is to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of individuals to protect their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.

4.3.2.1 Other data protection statutes

- Federal: Personal Information Protection and Electronic Documents Act, SC 2000 c 5.
- Alberta: Personal Information Protection Act, SA 2003, c P-6.5.
- Manitoba: The Personal Information Protection and Identity Theft Prevention Act, SM 2013, c 17.
- Québec: Act respecting the protection of personal information in the private sector, CQLR c P-39.1.

REFLECTION:

- *While every province in Canada has enacted legislation regulating information privacy in relation to public bodies, not every province has enacted legislation regulating information privacy in relation to private actors, such as businesses.[94] Is information privacy more important in the context of an individual's interactions with the state as compared to private enterprises?*

[94] W. Wagner, "Guide to Doing Business in Canada: Privacy Law" Gowling WLG (Oct 20, 2023).

4.3.3 Cross-references

- *Insurance Corp. of British Columbia v. Ari* [2023] BCCA 331, [45]-[61]: §4.2.5.

4.3.4 Further material

- The Decibel Podcast, "The information laws governments keep breaking" (Jun 9, 2023) 🎧.
- Lawson Insight, "The New Changes to FOIPPA: Part One" (Feb 14, 2022) .
- Lawson Insight, "The New Changes to FOIPPA: Part Two" (Feb 28, 2022) .
- Lawson Insight, "Protecting Your Privacy: The Tim Hortons Data Tracking Controversy" (Oct 27, 2022) .
- A. Levin & P. Abril, "Two Notions of Privacy Online" (2009) 11 Vanderbilt J Entertainment & Technology L 1001.
- M. Ryan, "*Persona Non Data*: How Courts in the EU, UK, and Canada are Addressing the Issue of Communications Data Surveillance vs. Privacy Rights" (44th Research Conference on Communications, Information and Internet Policy, 2016).
- "Privacy, Identity, and Control: Emerging Issues in Data Protection" (2018) 4 Canadian J Comparative & Contemporary L i.
- A. Solow-Niderman, "Beyond the Privacy Torts: Reinvigorating a Common Law Approach for Data Breaches" (2018) 127 Yale LJ Forum 614.
- S. O'Byrne & A. Levin, "It Shouldn't Be Small Potatoes: The Future of Civil Damage Awards Under Canada's Personal Information Protection Legislation" (2022) 52 Advocates' Quarterly 427.

5 DEFAMATION AND HARASSMENT

5.1 Defamation

L.N. Klar, "Defamation in Canada" in The Canadian Encyclopedia (Feb 6, 2012)

Defamation law protects an individual's reputation and good name. It also restricts freedom of speech. Therefore, courts must carefully balance these two important values in deciding defamation actions. Although the principles of defamation law stem mainly from the common law (judicial decisions), there are also statutory laws that affect defamation actions. ***

Traditionally, *libel* included defamatory written words, pictures, statues and films. *Slander* was a defamatory spoken word. Since the law regarded defamatory material which could be seen, and was in a "permanent" form, as more serious than the spoken word—which, by its nature, is "transient"—libel was a more serious tort than slander. For example, one could not succeed in most actions for slander unless actual damages were caused. This was not true for libel, where damages were always presumed.

With the advent of the electronic mass media, such as radio, television, and especially the internet, the difference between the written and spoken word has become less important. Widely disseminated speech can cause as much harm as something which is written down. As a result, some provinces have even eliminated any practical distinctions between libel and slander. *** […continue reading]

REFLECTION:

- *Who is better placed to assess whether a defendant has brought a plaintiff's reputation into disrepute—a judge or a jury?*

5.1.1 Lu v. Shen [2020] BCSC 490

✗**REF: §3.2.5, §4.2.4, §5.2.3, §9.3.8, §9.8.2.4**

ADAIR J.: ***

1. In this action, two women who barely know one another, and who have rarely met one another in person, sue one another for defamation, breach of privacy and intentional infliction of emotional distress. Their claims against one another are the product of a verbal war they have waged against one another in social media for over a decade. After this action was filed, the war intensified, and was played out mostly (but not exclusively) in court filings and very lengthy affidavits. Each represented herself at the trial. ***

(a) Basic legal principles

173. The basic legal principles concerning defamation claims have been conveniently summarized by Dickson J.A. in *Weaver v. Corcoran*, 2017 BCCA 160.

174. To obtain judgment in a defamation action, the plaintiff must prove three things: (i) that the impugned words were defamatory; (ii) that they referred to the plaintiff; and (iii) that they were published, meaning that they were communicated to at least one other person. Where the plaintiff establishes these elements, falsity and damage are presumed and the onus shifts to the defendant to advance a defence in order to escape liability. Defamation is a tort of strict liability, so it is unnecessary to prove that the defendant was careless or intended to cause harm. ***

175. Words that tend to lower the plaintiff's reputation in the eyes of a reasonable person are defamatory. The central question is whether the meaning conveyed by the impugned words genuinely threatened the plaintiff's actual reputation. See *Weaver v. Corcoran*, at para. 68. A plaintiff must show that the alleged defamatory words lowered her reputation in the estimation of right-thinking members of society generally, or exposed her to hatred, contempt or ridicule: see *Hee Creations Group Ltd. v. Chow*, 2018 BCSC 260 (B.C. S.C.), at para. 64.

176. As Madam Justice Dickson explained in *Weaver v. Corcoran*, para. 69:

> 69. … The same words used in a particular context may lead different minds to reach different conclusions for different reasons. In determining whether impugned words, fairly construed, are defamatory, courts adopt an objective, common sense approach and avoid seizing upon the worst possible meaning. As Madam Justice Abella, then of the Ontario Court of Appeal, explained in *Color Your World Corp. v. Canadian Broadcasting Corp.* (1998), 156 D.L.R. (4th) 27 at para. 15 (Ont. C.A.), the words must be assessed, in context, from the perspective of a reasonable, right-thinking person, "that is, a person who is reasonably thoughtful and informed, rather than someone with an overly fragile sensibility".

177. The intention of the author and publisher of a statement alleged to be defamatory is not relevant on the issue of meaning. The subjective opinion of a plaintiff concerning the meaning of the expression is also not relevant. See *Lawson v. Baines*, 2011 BCSC 326 (B.C. S.C.), at para. 39, aff'd 2012 BCCA 117 (B.C. C.A.).

178. With respect to proof of defamatory meaning, Madam Justice Dickson explained in *Weaver v. Corcoran*, at paras. 71 and 72:

> 71. Words may convey a defamatory meaning literally, inferentially or by legal innuendo. Literal meaning is conveyed directly; inferential meaning, indirectly; and legal innuendo, by extension based on extrinsic facts. These alternate means of proof were summarised by Hinkson J.A., as he then was, in *Lawson*:
>
> > 13. There are three alternate means by which defamation can be proven:
> >
> > a) If the literal meaning of the words complained of are defamatory;
> >
> > b) If the words complained of are not defamatory in their natural and ordinary meaning, but their meaning based upon extrinsic circumstances unique to certain readers (the "legal" or "true" innuendo meaning) is defamatory; or
> >
> > c) If the inferential meaning or impression left by the words complained of is defamatory (the "false" or "popular" innuendo meaning).
>
> 72. Where the literal meaning of words is in issue, it is unnecessary to go beyond the words themselves to prove that they are defamatory. Where a claim is based on the inferential meaning of words, the question is one of impression: what would the ordinary person infer from the words in the context in which they were used? Both literal and inferential defamatory meaning reside within the words, as part of their natural and ordinary meaning ….

179. It is for the trier of fact (in a non-jury trial such as this one, the trial judge) to decide what natural and ordinary meaning the words bear, including what innuendos can be reasonably inferred, and whether any are defamatory. Thus, I am not bound by either Ms. Lu's interpretations or Ms. Shen's interpretations. See *Casses v. Canadian Broadcasting Corp.*, 2015 BCSC 2150 (B.C. S.C.), at para. 326.

180. Ms. Lu has not pleaded either inferential meanings or any legal innuendo meanings. Based on Ms. Lu's pleadings, she asserts only that the *literal* meanings of the words are defamatory. Ms. Shen, on the other hand, in her amended counterclaim, pleads inferential meanings of statements she claims were published by Ms. Lu and asserts that those are defamatory.

181. Once defamatory meaning is established, the plaintiff must go on to prove that the impugned words are of or concerning him or her. This is a factual question. Where the plaintiff is not specifically named, the question is: would the statements lead reasonable people who know the plaintiff to conclude that they refer to the plaintiff? An immediate suspicion on a recipient's part is insufficient. The test is whether the recipient would, in light of the surrounding circumstances, reasonably believe that the person referred to in the defamatory statements is the plaintiff. A series of defamatory statements may be considered together when determining whether a particular defamatory statement refers to the plaintiff without naming him or her.

Moreover, where more than one defamatory article is published by the same person, the court may look at all related articles in considering whether the impugned words in a particular article refer to the plaintiff. See *Weaver v. Corcoran*, at paras. 84-85 and 98.

182. Finally, the plaintiff must prove publication. It must be established that the defendant has, by any act, conveyed the defamatory meaning concerning the plaintiff to a third party, who has received it. See *Weaver v. Corcoran*, at para. 86. Whereas defamatory words contained in a newspaper or a broadcast are deemed to be published pursuant to *Libel and Slander Act*, R.S.B.C. 1996, c. 263 [§5.1.6], there is no such presumption in relation to allegedly defamatory material published on the internet: see *Crookes v. Wikimedia Foundation Inc.*, 2011 SCC 47 (S.C.C.), at para. 14; and *Hee Creations*, at para. 76. Thus, while the court cannot presume that allegedly defamatory material was "published" in the required sense, it is open to the court to draw an inference from the other available evidence that it was: see *Hee Creations*, at para. 78.

183. Where there are multiple publications, generally, each publication is a separate cause of action for which an action lies: see *Rook v. Halcrow*, 2019 BCSC 2253 (B.C. S.C.), at para. 24. However, as Madam Justice Dickson pointed out in *Weaver v. Corcoran*, at para. 83:

> [T]he circumstances in which multiple publications may be read together to determine allegedly defamatory meaning of impugned words are limited by logic, case law and the pleadings. In my view, where separate publications are pleaded as independent causes of action, absent referability or other inextricable linkage, the meaning of each should be determined independently, in the immediate context in which the words are used.

184. For the most part, based on the [notice of civil claim] and the particulars in Ms. Lu's Affidavit No. 3, Ms. Lu did not plead separate publications as individual defamatory expressions and separate causes of action. Rather, posts alleged to have been made by Ms. Shen tended to be treated globally. Ms. Shen, on the other hand, pleaded separate publications as independent causes of action.

185. Once a plaintiff proves the required elements in a defamation claim, the onus then shifts to the defendant to advance a defence in order to escape liability: see *Grant* [*v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640], at para. 29 [§5.1.4]. Examples of defences are fair comment, justification and responsible communication. Any defence must be properly pleaded.

186. A defendant claiming a defence of fair comment must satisfy the following test: (a) the comment must be on a matter of public interest; (b) the comment must be based on fact; (c) the comment, although it can include inferences of fact, must be recognisable as comment; (d) the comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts? See *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 (S.C.C.) [hereinafter *WIC*], at para. 28. Even though the comment satisfies the objective test, the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice, and that this was the defendant's primary or predominant motive in publishing the comment: see *WIC*, at paras. 28 and 63.

187. Fair comment is a defence that protects defamatory criticisms or expressions of opinion. It does not protect defamatory statements of fact. In order to determine whether a defamatory imputation can be protected as fair comment, it must be initially determined whether it is comment upon given facts, or a statement of facts. The distinction is fundamental and must absolutely be made because an assertion of facts can never be defended as fair comment: see *Ross v. N.B.T.A.*, 2001 NBCA 62 (N.B. C.A.), at para. 55.

188. Justification is an absolute defence to defamation. It applies to statements of fact. It will succeed if the defendant proves, on a balance of probabilities, the substantial truth of what is alleged to be defamatory. See *Casses*, at para. 550.

189. *Grant* is the leading case on the defence of responsible communication. For the defence to apply, the publication must be on a matter of public interest. Second, the defendant must show that publication was responsible, in that he or she was diligent in trying to verify the allegation(s), having regard to all the relevant circumstances. See *Grant*, at para. 98. ***

191. Whether a publication is on a matter of public interest is for the trial judge to decide. The judge must determine whether the nature of the statement is such that protection may be warranted in the public interest. The judge's role at the gatekeeping stage is to determine whether the subject matter of the communication as a whole is one of public interest. The "public interest" is not synonymous with what interests the public. However, it is enough if some segment of the community would have a genuine interest in receiving information on the subject. See *Grant*, at paras. 100-102.

192. Where liability has been established, and a defendant has not succeeded in making out a defence, the court must then consider remedies.

193. With respect to damages, Frankel J. A. explained in *Best v. Weatherall*, 2010 BCCA 202 (B.C. C.A.), beginning at para. 45:

> 45. Defamation is a strict liability tort and damages are presumed (except for slander that is not actionable per se): *Grant v. Torstar Corp.* at para. 28; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 164; R.E. Brown, *The Law of Defamation in Canada*, 2nd ed., looseleaf (Toronto: Carswell, 1999), vol. 3 at 25-2, 25-3. Compensatory damages, both general and special, and punitive damages are available in a defamation action.
>
> 46. There are many different statements intended to capture the difficulty of assessing the quantum of damages in defamation cases. It has been said that the calculation of damages for defamation is speculative and an inexact science, that there is no objective measure, and that damages need not be calculated mathematically. Further, although damages for defamation are difficult to assess, courts should sensibly and rationally attempt to arrive at a monetary sum that will compensate the plaintiff appropriately, i.e., achieve *restitutio in integrum*. Such an award should provide "solatium, vindication and compensation": see Brown, *The Law of Defamation*, vol. 3 at 25-7 – 25-11.
>
> 47. In *Hill v. Church of Scientology of Toronto*, Mr. Justice Cory (at para. 182), referring to *Gatley on Libel and Slander*, 8th ed. (London: Sweet & Maxwell, 1981), endorsed the following factors as being relevant to the assessment of general damages for defamation: the conduct of the plaintiff, his position and standing; the nature of the libel; the mode and extent of publication; the absence or refusal of any retraction or apology; the conduct of the defendant from the time of publication to the time of verdict; the conduct of the defendant before and after the action, and in court (including conduct of defendant's counsel); and evidence of aggravation or mitigation of damages.

194. The damages should allow for the reality that no apology, retraction or withdrawal can ever be guaranteed to completely undo the harm the defamation has done. However, regardless of the amount awarded, the mere grant of judgment in a defamation action will likely go some distance in restoring the reputation of the defamed individual. See *Hee Creations*, at para. 113.

195. Although damages are presumed once a cause of action for defamation is established, there is no corresponding presumption that damages must be substantial, nor is there a minimum floor for damages in defamation: see *Chase v. Anfinson*, 2018 BCSC 856 (B.C. S.C.) at para. 140.

196. Injunctive relief may be appropriate, although, generally, it is not easy to obtain an injunction in response to a defamation claim, given the concern to protect free speech rights. However, the remedy is not impossible to obtain. Permanent injunctions have been ordered after findings of defamation where either: (1) there is a likelihood that the defendant will continue to publish defamatory statements despite the finding that she is liable to the plaintiff for defamation; or (2) there is a real possibility that the plaintiff will not receive any compensation, given that enforcement against the defendant of any damage award may not be possible. See, for example, *Hunter Dickinson Inc. v. Butler*, 2010 BCSC 939 (B.C. S.C.) at paras. 75-79; *Griffin v. Sullivan*, 2008 BCSC 827 (B.C. S.C.), at paras. 119-127; and *Newman v. Halstead*, 2006 BCSC 65 (B.C. S.C.) at paras. 297-301.

(b) General comments

197. Based on the admissible evidence, I find that publication has been established by both Ms. Lu and Ms. Shen, and that the posts in issue (which I describe in detail below) were published on the Canadameet

forum. With some exceptions, neither Ms. Lu nor Ms. Shen seriously disputed that the posts in issue made by one of them was "of or concerning" the other, so I will discuss that issue relatively briefly below.

198. The main areas of dispute are: whether the statements were defamatory; whether any defences were made out; and, if liability for defamation is established, what is the appropriate remedy? I will deal with remedies in the section titled *Remedies* below.

(c) Ms. Lu's defamation claims

199. Although Ms. Shen did not plead a limitation defence, I am treating all publications prior to April 13, 2014 (i.e., two years before the [notice of civil claim] was filed) as statute-barred under the *Limitation Act* [§6.8.2]. Despite what Ms. Lu asserts in her Affidavit No. 3 at para. 41, there is no satisfactory or reliable evidence that publications earlier than that date continued to be available on either of the forums (or elsewhere on the Internet) after that date. Accordingly, I am not persuaded that, as of April 13, 2014, the publications of either Ms. Shen or Ms. Lu prior to April 2014 continued to be available either on Canadameet or elsewhere on the Internet. In addition, there is some evidence from both Ms. Shen and Ms. Lu that earlier posts were deleted by forum administrators.

200. This ruling concerning the application of the limitation period is made in the unique circumstances of this case.

201. Ms. Shen has admitted using several different on-line IDs and making posts under those IDs. I find that, in posting on the two social media sites that are in issue in this action (Canadameet and Ourdream), Ms. Shen used the following IDs (in translation): NiuMang, GenGen, Windgone and implacablefoe38.

202. Based on my discussion above (at paras. 80-84), the only defamation claims by Ms. Lu that are properly before me are those particularized in her Affidavit No. 3, Exhibits "D" and "E." Both Exhibit "D" and parts of Exhibit "E" are part of a series of 61 numbered posts that I find were made by Ms. Shen in late October and early November 2015, using the "implacablefor38" ID, and were published in November 2015 to Canadameet forum users. ***

204. The certified English translation of Post no. 5 in the series *** reads as follows (I have omitted some of the "pseudonyms" and redacted the name of Ms. Lu's son below) [all sic]:

> 5) forward: This Bear38 has a real name of Lu Jing, Becky Lu was an English name (she) once used. Born in Henan province, (she) made a living in Shenzhen early on and once frequented the forum on tianya.com. (She) moved to Coquitlam of the Vancouver area from Shenzhen in 2005. (Her) first cyber name at iask.com was TU-BA-GE. As (she) bragged a lot on the immigrants' forum after landing here and was subsequently exposed to the very core by others. Then (she) had a big argument with me, so after that (she) did not dare to get on the forum in a fair and square way for a period of 4 years and had to use a pseudonym to harass me on this forum. SNOWBEAR888 is one of the hidden pseudonyms used to harass me. After the pseudonym SNOWBEAR888 was exposed in 2009, it [she] used a series of pseudonyms [pseudonyms omitted] and currently uses 'Chui-Niu-Pi' to smear me and my family and son. I'll call it [her] Bear38 as it comes from SNOWBEAR888, so SB38 for short. It [she] has a substitute husband of the second marriage Hongyun Ke, Henry Ke, son [name redacted]. Below is a photo taken after SB38 just landed at age 38, now almost 50; ….

205. Post No. 37 in this series is marked as Exhibit "D" to Ms. Lu's Affidavit No. 3. Ms. Lu says that, here, Ms. Shen posted defamatory comments about her, concerning how she had been divorced and abandoned by a prior husband. The certified English translation of this reads as follows (I have redacted the name of Ms. Lu's son below) [all sic]:

> 37) In 2010, its [her] son was admitted into an elite school. Bear38 was elated by that, and started to brag again It [she] thought it [she] could tell whatever tall tales it [she] wanted to because others wouldn't be able to find out. Fortunately I, Niu, is quite family with Pinetree Secondary School in Coquitlam. I got to know its [her] son's classmates. When I arrived at Pinetree Secondary, (as it [her] husband's last name is Ke), I tried to get information of a student whose last name is Ke, but

> nobody knew any student Ke who had been admitted into an elite school. Then I said, is there any student from Shenzhen? Someone told me the student from Shenzhen had a last name [name redacted]. When I confirmed that [name redacted] was indeed its [her] son, I almost fainted. This despicable shrew, when it [she] cursed me online over the past few years regarding the divorce, and being jilted by husband and mother-in-law, it was all reflections of her own life. It [she] loves to curse me saying I should be jilted by comparison, but actually it [she] is a slut who is jilted by [name redacted], a man who knew good from bad. Have you guys ever seen anyone who's more shameless than this bitch!!

206. I find that Ms. Shen's words in these posts were defamatory of Ms. Lu. Saying that someone is a liar, a slut and a bitch, and someone who deceives and swindles others, would tend to lower that person's reputation in the eyes of a reasonable person. I find that Ms. Lu has proved the impugned words are of or concerning her. Indeed, in post no. 5, Ms. Shen identified Ms. Lu by name, and described one of the nicknames, "Bear38," she would use to refer to Ms. Lu.

207. Accordingly, I find that Ms. Lu has proved the required elements of her defamation claim in relation to these posts by Ms. Shen.

208. I turn then to Ms. Shen's defences: justification, fair comment and responsible communication. In my view, none of these defences can succeed.

209. Ms. Shen has failed to prove, by admissible evidence, that the gist or sting of her defamatory statements concerning Ms. Lu was substantially true. That Ms. Shen fervently believes in the truth of what she states in her posts is insufficient. Her recital in her posts of investigative steps she says she has taken to arrive at her conclusions is not admissible evidence to prove any of the facts or the truth of what Ms. Shen asserts.

210. In my opinion, neither Ms. Shen's fair comment defence nor her defence of responsible communication has been properly pleaded.

211. However, even if that was not a problem, in my opinion, both Ms. Shen's defences of fair comment and responsible communication must fail based on the complete absence of any public interest in Ms. Shen's comments and communications concerning Ms. Lu. This is a personal feud between Ms. Lu and Ms. Shen that, regrettably, is being aired on social media. There is nothing that affects the public at large.

212. Accordingly, I find that Ms. Lu is entitled to a remedy.

(d) Ms. Shen's defamation claims

213. As was the case with Ms. Shen, no limitation defence was pleaded by Ms. Lu. However, and for the reasons set out above in relation to Ms. Lu's defamation claims, I consider that any defamation claims by Ms. Shen based on publications alleged to have been made more than two years prior to April 13, 2016 to be statute-barred under the *Limitation Act*. Again, this ruling concerning application of the limitation period is made in the unique circumstances of this case.

214. Ms. Lu has admitted using several different on-line IDs and making posts under those IDs. I find that, in posting to Canadameet and Ourdream, Ms. Lu used the following IDs (in translation): Snowbear888; Chui Niu pi (sometimes ChuiNiuPi); Tubage and lubecky.

215. I turn then to Ms. Shen's claims that Ms. Lu made defamatory statements about her. I will use the amended counterclaim as a basic guide. ***

Ms. Lu stated that she wanted to make Ms. Shen "the most famous cheap woman"

222. In para. 12 of the amended counterclaim and para. 31 of her Affidavit No. 4, Ms. Shen asserts that on July 2, 2015, Ms. Lu, under the ID "I am GENGEN," stated that she wanted to make Ms. Shen the most famous cheap woman.

223. The post is found at p. 52 of Exhibit 1 to Ms. Shen's Affidavit No. 4. Although this post was not put to

her on cross-examination, Ms. Lu admitted making the post on the following page, which has the same ID, and I find that Ms. Lu made the post found at p. 52. The post at p. 52 has been translated as follows [all sic]:

> Somebody is born with low status. (I) cannot make (her/him) awake by curses. For example, this woman from Shanghai, a poor cheap person, is looking for being cursed and beat. If someone knows her, just tells her. I keep cursing her on forum until she becomes the most famous cheap woman of Shanghai.

224. The screen-shot at the top of p. 52 has 4 photographs that appear to be of Ms. Shen, although Ms. Shen does not say that in her Affidavit.

225. I conclude that, in context, readers of Ms. Lu's post would understand that it is of or concerning Ms. Shen.

226. I find further that the natural and ordinary meaning of the words "most famous cheap woman" were defamatory of Ms. Shen and implied that Ms. Shen was famous for selling herself cheaply for sex.

227. Accordingly, Ms. Shen has established that she was defamed in this post by Ms. Lu. Ms. Lu has not raised any affirmative defences. Ms. Shen is therefore entitled to a remedy. ***

Ms. Lu published a post stating that Ms. Shen was the "worst scum" and her family was "garbage"

236. In para. 16 of the amended counterclaim and para. 41 of her Affidavit No. 4, Ms. Shen says that on December 26, 2015, Ms. Lu published a post stating that Ms. Shen was "the worst scum and her whole family was garbage."

237. The post is found at p. 94 of Exhibit 1 to Ms. Shen's Affidavit No. 4. The ID is translated as "ChuiNiuPi," one of Ms. Lu's IDs. The translation of the post reads [all sic]:

> Ten years ago I discriminated you. The fact is all the people in your family are garbage. The man is useless, cannot take care of the wife. The son is an underachiever. You are the worst scum.

238. In my view, Ms. Lu's words, namely, "garbage" and "the worst scum" are defamatory.

239. However, there is nothing in this post that identifies Ms. Shen, or that indicates that it is referring to her. Context, if available, might do that. However, Ms. Shen does not provide such context either in the facts alleged in her amended counterclaim or in her affidavit evidence. I am unable to conclude that a reasonable person, who knew Ms. Shen, would conclude that the post refers to her. I am not in a position to conclude that the feud between Ms. Lu and Ms. Shen was so notorious on Canadameet that a reasonable person would conclude that whenever Ms. Lu said something about someone that tended to lower the reputation of Ms. Lu's target in the eyes of a reasonable person, she was speaking of Ms. Shen. In my opinion, the facts that the post comes from an ID used by Ms. Lu, that Ms. Lu and Ms. Shen are feuding with one another, and that Ms. Shen believes she is the target are not enough to establish this part of Ms. Shen's claim.

240. I conclude that Ms. Shen has failed to make out her claim with respect to this post. ***

Ms. Lu stated that Ms. Shen sleeps around and does odd jobs

249. In para. 18 of the amended counterclaim, Ms. Shen asserts that in a post dated January 2, 2018, Ms. Lu stated that "the defendant sleeps around and does odd job, no house, no car, no husband, which is false and defamatory" [all sic]. The post is found at p. 126 of Ms. Shen's Affidavit No. 4. The English translation reads [all sic]:

> Only this so called office clerk QinQinShen worked in a joint venture company, now still working for odd job. Living alone, no house, no car, no husband. Today leaves, tomorrow find another one—can sleep with anybody—

250. The post is shown as being made by the ID ChuiNiuPi, which Ms. Lu has admitted is one of her online IDs. I conclude on the basis of the ID that the post was published by her.

251. I find that the words "can sleep with anybody" bears the inferential meaning pleaded by Ms. Shen ("sleeps around") and is defamatory. As Ms. Shen is referred to by name, there is no doubt that the words are about her.

252. Accordingly, I find that Ms. Shen has established that she was defamed in this post by Ms. Lu. Ms. Lu has not pleaded any affirmative defences.

253. Ms. Shen has, therefore, established her defamation claim with respect to these words, and is entitled to a remedy. ***

REFLECTION:

- *What are the elements of the tort of defamation?*
- *What is the defence of fair comment (honest opinion)? What are its elements and features?*
- *What is the defence of justification (truth)? What are its elements and features?*[95]
- *Why were Lu and Shen both entitled to receive remedies for defamation but not for intentional infliction of mental suffering?*

5.1.2 Caplan v. Atas [2021] ONSC 670

Ontario Superior Court of Justice – 2021 ONSC 670

✗**REF: §5.2.4, §6.8.4, §9.8.2.7, §20.7.3**

CORBETT J.: ***

92. Atas has engaged in a vile campaign of cyber-stalking against the plaintiffs ***, the goal of which has been retribution for longstanding grievances. ***

116. There can be no doubt that the content of many of the thousands of postings allegedly posted on the internet by Atas are defamatory of the plaintiffs, their families and associates. The affidavits sworn by the plaintiffs contain many thousands of examples.

117. On their face, the impugned postings are "of and about" the plaintiffs (identifying the plaintiffs by name, often also by reference to a photograph and other identifying information such as addresses or business associations).

118. On their face, most of the impugned posting are defamatory of the plaintiffs, alleging that plaintiffs are (variously) dishonest, incompetent, have acted in violation of professional standards, have committed fraud, and, in some cases, are prostitutes, "sluts", sexual predators, pedophiles (including, in some cases, pedophiles who take a public role in educating the public about the challenges and possibilities of persons suffering from pedophilia of rising above their desires and living constructive and law-abiding lives),

[95] See *Bent v. Platnick*, 2020 SCC 23 per Côté J:
"107. Once a *prima facie* showing of defamation has been made, the words complained of are presumed to be false: [*Grant v. Torstar Corp.*, [2009] 3 S.C.R. 640], at para. 28 [§5.1.4]. To succeed on the defence of justification, "a defendant must adduce evidence showing that the statement was substantially true": para. 33. The burden on the defendant is to prove the substantial truth of the "'sting', or main thrust, of the defamation": Downard, [*The Law of Libel in Canada* (4th ed. 2018)] at §1.6 (footnote omitted). In other words, "[t]he defence of justification will fail if the publication in issue is shown to have contained only accurate facts but the sting of the libel is not shown to be true": Downard, at §6.4.
108. Of particular importance here is the fact that partial truth is not a defence. If a material part of the justification defence fails, the defence fails altogether: R. E. Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States* (2nd ed. (loose-leaf)), at pp. 10-88 to 10-90. However, a defendant may justify only part of a libel "if that part is severable and distinct from the rest": p. 10-89 (footnote omitted). This depends on the allegation being separate and self-contained rather than an "ingredient or part of a connected whole": p. 10-90 (footnote omitted). ***"

members of organizations advocating sexual exploitation of children, such as NAMBLA ("North American Man-Boy Love Association").

119. A minority of the postings are not defamatory of the plaintiffs because the substance of these postings are abusive comments rather than factual allegations. Calling someone a "twit" or "stupid", in the context in which the postings are presented, communicates no more than disapprobation and does not communicate a statement of fact that is either true or false: the plain meaning of this minority of postings is that the poster dislikes and/or disapproves of the target of the posting. These publications may be considered as part of a pattern of harassment but cannot ground liability in defamation. The vast majority of postings include serious defamatory statements, and the "merely abusive" comments are a form of rhetorical seasoning. There is no need to undertake a close analysis to separate defamatory words from the "merely abusive" words in the context of the overall mass of defamatory publications.

120. The postings have been disseminated on the internet anonymously, pseudonymously, or by using false names. This has been done by placing the postings on internet sites that do not monitor or control the content of postings ***. *** On the record before me, these sites may be viewed almost anywhere in the world by anyone with access to the internet. On these facts, by posting the impugned words, the person who posted them "published" the words within the meaning of the law of defamation. ***

(1) Atas wrote, published and/or caused to be published the impugned words ***

123. While Atas has attempted to publish her statements anonymously or pseudonymously in the other Defamation Proceedings, she is not sophisticated enough in respect to internet technology to entirely cover her tracks successfully. Further, she has, from time to time come forward and self-identified in efforts to prevent hosting sites from releasing information about the person who posted the impugned content. ***

139. *** [I]t is clear that Atas' online attacks have continued in the face of injunction orders against her, attacks brought against an ever-widening group of people.

140. Mr Groleau *** has been an information technology specialist employed at IBM for nearly three decades. Mr Groleau has continued to keep track of Atas' internet harassment as the actions have moved forward. In his most recent internet searches, Mr Groleau has identified more than 80,000 unique search results attributable to Atas, related to some 3,747 online posts, on 77 different web sites, directed against 150 different victims. Since April 9, 2018, the date on which this court ordered Atas not to make further posts to the internet of any kind, Mr Groleau found 1,072 posts for which dates of posting can be verified.

141. This information points to two conclusions. First, despite a broad order from this court to stop Atas from posting online, she has ignored the order and continued to do so. This conduct continued, and appeared to escalate, right up to the time that these motions were heard. ***

> (a) Atas has admitted to some of the publications;
>
> (b) Atas has motive to engage in the impugned conduct;
>
> (c) Atas has engaged in extensive other harassing behaviour against plaintiffs, behaviour that itself exhibits obsessive fixation on old grievances, out of all proportion to the underlying grievances;
>
> (d) many of the publications are linked to online accounts for which there is evidence that they belong to Atas, and no evidence to the contrary;
>
> (e) there is evidence, which I accept, that Atas paid another person to post some of the impugned publications from internet sites in northern Ontario, to create the impression that not all publications originate from the Toronto area;
>
> (f) most of the publications originate from the Toronto area, including publications about relatives who live outside Ontario (Quebec, Arizona and the United Kingdom);
>
> (g) where identifying information has been obtained by plaintiffs, computers used to publish the impugned publications were located in public libraries, a university, and internet cafes in Toronto,

consistent with evidence that Atas has no fixed address and no access to a computer at a residence;

(h) the style, format, use of language, structure and content of the impugned publications, including the defamatory words used (including unusual word choices ["twit", "skank"] consistent errors of punctuation, spelling and diction, all tend to establish common authorship;

(i) the escalation of campaigns are consistent among the Dale & Lessman, Caplan and Babcock Actions, and can be correlated to significant milestones in Atas' other litigation (for example, a wave of publications followed the completion of final argument in the s.140 application);

(j) the accounts from which the publications originated are pseuodonymous, and use dozens of different names or nicknames, but bear a striking resemblance in other respects;

(k) the victims, as a group, have only one thing in common: they or someone close to them is in conflict with Atas. These are a disparate group, from a cardiologist in Arizona, an IT specialist in Quebec, a retired realtor in the UK, a bank employee in Toronto, realtors in Hamilton, trust company personnel in Toronto, and, of course, the many victims in the Toronto area with direct connections to Atas' underlying litigation;

(l) where the publications are focused on Atas' grievances ***, the subject matter of the posts, themselves are matters that only Atas would care about, and things that very few people other than Atas would even know about ***.

143. *** Taken altogether, there is a clear pattern and *modus operandi* here: this is a coordinated effort from a single source. I have no hesitation in finding that Atas posted or caused to be posted all of the impugned publications. ***

(2) There is No Defence Established for the Impugned Publications

144. In argument, Atas asserted the following defences:

(a) The defamation claims are barred by the notice requirements of s.5(1) of the *Libel and Slander Act*, R.S.O. 1990, c L. 12, ss. 5(1).

(b) The impugned statements made of professional plaintiffs that they are dishonest, incompetent, have breached their professional duties, and that they have engaged in fraud, are true and therefore the defence of justification applies.[96] ***

146. Section 5(1) of the *LSA* requires notice of any action for libel in a "newspaper" or in a "broadcast" to be delivered within 6 weeks ***. ***

154. There is no evidence from Atas, let alone expert evidence, that the impugned publications constitute "broadcasts" under the *LSA* or that the online publications were broadcasts from a "station in Ontario." ***

159. I am satisfied that this defence is not available to Atas. ***

161. In *Magno v. Balita*, 2018 ONSC 3230 (Ont. S.C.J.), at paras. 41-44, the court stated that justification is a complete defence which requires the defendant to prove the truth of all the defamatory statements. However, there can be no defence of justification if the pleading is completely devoid of particulars. Failure to plead particulars results in no evidence of truth being admitted and the defence fails. Here, Atas pleaded no particulars, filed no responding evidence on the motions for summary judgment, and hence her defence of justification/truth must fail. ***

[96] Atas has pleaded other defences such as fair comment and qualified privilege. I do not address these defences separately since there is no evidence before the court in support of these defences.

REFLECTION:

- *What facts showed that Atas's statements satisfied the elements of the tort of defamation?*[97]
- *Why did Atas's defences fail? Would she have had more success had she been represented by a lawyer?*

5.1.3 Hill v. Church of Scientology of Toronto [1995] CanLII 59 (SCC)

Supreme Court of Canada – 1995 CanLII 59 (SCC)

✗**REF: §9.3.2, §9.4.2, §9.5.3, §18.2.3.2, §24.1.1**

CORY J. (LA FOREST, GONTHIER, MCLACHLIN, IACOBUCCI, MAJOR JJ. concurring): ***

1. On September 17, 1984, the appellant Morris Manning, accompanied by representatives of the appellant Church of Scientology of Toronto ("Scientology"), held a press conference on the steps of Osgoode Hall in Toronto. Manning, who was wearing his barrister's gown, read from and commented upon allegations contained in a notice of motion by which Scientology intended to commence criminal contempt proceedings against the respondent Casey Hill, a Crown attorney. The notice of motion alleged that Casey Hill had misled a judge of the Supreme Court of Ontario and had breached orders sealing certain documents belonging to Scientology. The remedy sought was the imposition of a fine or the imprisonment of Casey Hill.

2. At the contempt proceedings, the allegations against Casey Hill were found to be untrue and without foundation. Casey Hill thereupon commenced this action for damages in libel against both Morris Manning and Scientology. On October 3, 1991, following a trial before Carruthers J. and a jury, Morris Manning and Scientology were found jointly liable for general damages in the amount of $300,000 and Scientology alone was found liable for aggravated damages of $500,000 and punitive damages of $800,000. Their appeal from this judgment was dismissed by a unanimous Court of Appeal: 1994 CanLII 10572 (ON CA). ***

Analysis ***

63. *** The appellants contend that the common law of defamation has failed to keep step with the evolution of Canadian society. They argue that the guiding principles upon which defamation is based place too much emphasis on the need to protect the reputation of plaintiffs at the expense of the freedom of expression of defendants. This, they say, is an unwarranted restriction which is imposed in a manner that cannot be justified in a free and democratic society. The appellants add that if the element of government action in the present case is insufficient to attract *Charter* scrutiny under s. 32, the principles of the common law ought, nevertheless, to be interpreted, even in a purely private action, in a manner consistent with the *Charter*. This, the appellants say, can only be achieved by the adoption of the "actual malice" standard of liability articulated by the Supreme Court of the United States in the case of *New York Times v. Sullivan*, [376 U.S. 254 (1964)].

64. In addition, the appellant Morris Manning submits that the common law should be interpreted so as to afford the defence of qualified privilege to a lawyer who, acting on behalf of a client, reads and comments in public upon a notice of motion which he believes, in good faith, has been filed in court, and which subsequently is filed. ***

(a) Interpreting the Common Law in Light of the Values Underlying the Charter ***

91. It is clear from [*RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573], that the common law must be interpreted in a manner which is consistent with *Charter* principles. This obligation is simply a manifestation of the inherent jurisdiction of the courts to modify or extend the common law in order to comply with prevailing social conditions and values. ***

(b) The Nature of Actions for Defamation: The Values to Be Balanced

100. There can be no doubt that in libel cases the twin values of reputation and freedom of expression will

[97] See K. Hill, "A Vast Web of Vengeance" The New York Times (Jan 30, 2021) 🎧.

clash. As Edgerton J. stated in *Sweeney v. Patterson*, 128 F.2d 457 (D.C. Cir. 1942), at p. 458, cert. denied 317 U.S. 678 (1942), whatever is "added to the field of libel is taken from the field of free debate". The real question, however, is whether the common law strikes an appropriate balance between the two. ***

(i) Freedom of Expression

101. Much has been written of the great importance of free speech. Without this freedom to express ideas and to criticize the operation of institutions and the conduct of individual members of government agencies, democratic forms of government would wither and die. See, for example, *Reference re Alberta Statutes,* [1938] S.C.R. 100, at p. 133; *Switzman v. Elbling*, [1957] S.C.R. 285, at p. 306; and *Boucher v. The King*, [1951] S.C.R. 265, at p. 326. More recently, in *Edmonton Journal* [*v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326], at p. 1336, it was said:

> It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized.

102. However, freedom of expression has never been recognized as an absolute right. Duff C.J. emphasized this point in *Reference re Alberta Statutes*, *supra*, at p. 133:

> The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means … "freedom governed by law." [Emphasis added.] ***

103. Similar reasoning has been applied in cases argued under the *Charter*. ***

106. Certainly, defamatory statements are very tenuously related to the core values which underlie s. 2(b). They are inimical to the search for truth. False and injurious statements cannot enhance self-development. Nor can it ever be said that they lead to healthy participation in the affairs of the community. Indeed, they are detrimental to the advancement of these values and harmful to the interests of a free and democratic society. This concept was accepted in *Globe and Mail Ltd. v. Boland*, [1960] S.C.R. 203, at pp. 208-9, where it was held that an extension of the qualified privilege to the publication of defamatory statements concerning the fitness for office of a candidate for election would be "harmful to that 'common convenience and welfare of society'". ***

(ii) The Reputation of the Individual

107. The other value to be balanced in a defamation action is the protection of the reputation of the individual. Although much has very properly been said and written about the importance of freedom of expression, little has been written of the importance of reputation. Yet, to most people, their good reputation is to be cherished above all. A good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must, just as much as freedom of expression, be protected by society's laws. In order to undertake the balancing required by this case, something must be said about the value of reputation.

108. Democracy has always recognized and cherished the fundamental importance of an individual. That importance must, in turn, be based upon the good repute of a person. It is that good repute which enhances an individual's sense of worth and value. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited.

109. From the earliest times, society has recognized the potential for tragic damage that can be occasioned by a false statement made about a person. This is evident in the Bible, the Mosaic Code and the Talmud.

As the author Carter-Ruck, in *Carter-Ruck on Libel and Slander* (4th ed. 1992), explains at p. 17:

> The earliest evidence in recorded history of any sanction for defamatory statements is in the Mosaic code. In *Exodus* XXII 28 we find 'Thou shalt not revile the gods nor curse the ruler of thy people' and in *Exodus* XXIII 1 'Thou shalt not raise a false report: put not thine hand with the wicked to be an unrighteous witness'. There is also a condemnation of rumourmongers in *Leviticus* XIX 16 'Thou shalt not go up and down as a talebearer among thy people'. ***

118. In the present case, consideration must be given to the particular significance reputation has for a lawyer. The reputation of a lawyer is of paramount importance to clients, to other members of the profession and to the judiciary. A lawyer's practice is founded and maintained upon the basis of a good reputation for professional integrity and trustworthiness. It is the cornerstone of a lawyer's professional life. Even if endowed with outstanding talent and indefatigable diligence, a lawyer cannot survive without a good reputation. ***

120. Although it is not specifically mentioned in the *Charter*, the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the *Charter* rights. It follows that the protection of the good reputation of an individual is of fundamental importance to our democratic society. ***

(c) The Proposed Remedy: Adopting the *New York Times v. Sullivan* "Actual Malice" Rule

122. In *New York Times v. Sullivan*, *supra*, the United States Supreme Court ruled that the existing common law of defamation violated the guarantee of free speech under the First Amendment of the Constitution. It held that the citizen's right to criticize government officials is of such tremendous importance in a democratic society that it can only be accommodated through the tolerance of speech which may eventually be determined to contain falsehoods. The solution adopted was to do away with the common law presumptions of falsity and malice and place the onus on the plaintiff to prove that, at the time the defamatory statements were made, the defendant either knew them to be false or was reckless as to whether they were or not. ***

(d) Critiques of the "Actual Malice" Rule ***

127. The "actual malice" rule has been severely criticized by American judges and academic writers. *** Commentators have pointed out that, far from being deterred by the decision, libel actions have, in the post-*Sullivan* era, increased in both number and size of awards. *** It has been said that the *New York Times v. Sullivan*, decision has put great pressure on the fact-finding process since courts are now required to make subjective determinations as to who is a public figure and what is a matter of legitimate public concern. ***

(e) Conclusion: Should the Law of Defamation be Modified by Incorporating the *Sullivan* Principle?

137. The *New York Times v. Sullivan* decision *** has not been followed in the United Kingdom or Australia. I can see no reason for adopting it in Canada in an action between private litigants. The law of defamation is essentially aimed at the prohibition of the publication of injurious false statements. It is the means by which the individual may protect his or her reputation which may well be the most distinguishing feature of his or her character, personality and, perhaps, identity. I simply cannot see that the law of defamation is unduly restrictive or inhibiting. Surely it is not requiring too much of individuals that they ascertain the truth of the allegations they publish. The law of defamation provides for the defences of fair comment and of qualified privilege in appropriate cases. Those who publish statements should assume a reasonable level of responsibility. ***

141. In conclusion, in its application to the parties in this action, the common law of defamation complies with the underlying values of the *Charter* and there is no need to amend or alter it. ***

(f) Should the Common Law Defence of Qualified Privilege be Expanded to Comply with Charter Values?

143. Qualified privilege attaches to the occasion upon which the communication is made, and not to the

communication itself. As Lord Atkinson explained in *Adam v. Ward*, [1917] A.C. 309 (H.L.), at p. 334:

> … a privileged occasion is … an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential. ***

144. The legal effect of the defence of qualified privilege is to rebut the inference, which normally arises from the publication of defamatory words, that they were spoken with malice. Where the occasion is shown to be privileged, the *bona fides* of the defendant is presumed and the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff. However, the privilege is not absolute and can be defeated if the dominant motive for publishing the statement is actual or express malice. See *Horrocks v. Lowe*, [1975] A.C. 135 (H.L.), at p. 149.

145. Malice is commonly understood, in the popular sense, as spite or ill-will. However, it also includes, as Dickson J. (as he then was) pointed out in dissent in *Cherneskey* [*v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067], at p. 1099, "any indirect motive or ulterior purpose" that conflicts with the sense of duty or the mutual interest which the occasion created. *** Malice may also be established by showing that the defendant spoke dishonestly, or in knowing or reckless disregard for the truth. ***

146. Qualified privilege may also be defeated when the limits of the duty or interest have been exceeded. ***

147. In other words, the information communicated must be reasonably appropriate in the context of the circumstances existing on the occasion when that information was given. ***

149. The principal question to be answered in this appeal is whether the recitation of the contents of the notice of motion by Morris Manning took place on an occasion of qualified privilege. If so, it remains to be determined whether or not that privilege was exceeded and thereby defeated.

150. The traditional common law rule with respect to reports on documents relating to judicial proceedings is set out in *Gatley on Libel and Slander* (8th ed. 1981), at p. 252, in these words:

> The rule of law is that, where there are judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open court, then the publication without malice of a fair and accurate report of what takes place before that tribunal is privileged. ***

155. This said, it is my conclusion that Morris Manning's conduct far exceeded the legitimate purposes of the occasion. The circumstances of this case called for great restraint in the communication of information concerning the proceedings launched against Casey Hill. As an experienced lawyer, Manning ought to have taken steps to confirm the allegations that were being made. This is particularly true since he should have been aware of the Scientology investigation pertaining to access to the sealed documents. In those circumstances he was duty bound to wait until the investigation was completed before launching such a serious attack on Hill's professional integrity. Manning failed to take either of these reasonable steps. As a result of this failure, the permissible scope of his comments was limited and the qualified privilege which attached to his remarks was defeated.

156. The press conference was held on the steps of Osgoode Hall in the presence of representatives from several media organizations. This constituted the widest possible dissemination of grievous allegations of professional misconduct that were yet to be tested in a court of law. His comments were made in language that portrayed Hill in the worst possible light. This was neither necessary nor appropriate in the existing circumstances. While it is not necessary to characterize Manning's conduct as amounting to actual malice, it was certainly high-handed and careless. It exceeded any legitimate purpose the press conference may have served. His conduct, therefore, defeated the qualified privilege that attached to the occasion. ***

Disposition

204. The appeal is dismissed with costs. ***

L'HEUREUX-DUBÉ J. concurred separately.

REFLECTION:

- *What is the defence of qualified privilege? What are its elements and features?*[98] *How is it different from the defence of absolute privilege.*[99]
- *What are "Charter values" and how are they distinct from Charter rights (§24.1)? How might the common law of defamation conflict with or be reconciled with Charter values?*

5.1.4 Grant v. Torstar Corp. [2009] SCC 61

Supreme Court of Canada – 2009 SCC 61

MCLACHLIN C.J.C. (BINNIE, LEBEL, DESCHAMPS, FISH, CHARRON, ROTHSTEIN, CROMWELL JJ. concurring):

1. Freedom of expression is guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*. It is essential to the functioning of our democracy, to seeking the truth in diverse fields of inquiry, and to our capacity for self-expression and individual realization.

2. But freedom of expression is not absolute. One limitation on free expression is the law of defamation, which protects a person's reputation from unjustified assault. The law of defamation does not forbid people from expressing themselves. It merely provides that if a person defames another, that person may be required to pay damages to the other for the harm caused to the other's reputation. However, if the defences available to a publisher are too narrowly defined, the result may be "libel chill", undermining freedom of expression and of the press.

3. Two conflicting values are at stake—on the one hand freedom of expression and on the other the protection of reputation. While freedom of expression is a fundamental freedom protected by s. 2(b) of the *Charter*, courts have long recognized that protection of reputation is also worthy of legal recognition. The challenge of courts has been to strike an appropriate balance between them in articulating the common law of defamation. In this case, we are asked to consider, once again, whether this balance requires further adjustment.

4. Peter Grant and his company Grant Forest Products Inc. ("GFP") sued the *Toronto Star* in defamation for an article the newspaper published on June 23, 2001, concerning a proposed private golf course development on Grant's lakefront estate. The story aired the views of local residents who were critical of

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[98] See *Bent v. Platnick*, 2020 SCC 23 *per* Côté J:

"121. An occasion of qualified privilege exists if a person making a communication has "an interest or duty, legal, social, moral or personal, to publish the information in issue to the person to whom it is published" *and* the recipient has "a corresponding interest or duty to receive it": Downard, [*The Law of Libel in Canada* (4th ed. 2018)] at §9.6 (footnote omitted). Importantly, "[q]ualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself": *Hill* [*v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130], at para. 143 [§5.1.3]; *Botiuk* [*v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3], at para. 78. Where the occasion is shown to be privileged, "the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff": *Hill*, at para. 144; *Botiuk*, at para. 79. However, the privilege is *qualified* in the sense that it can be defeated. This can occur particularly in two situations: where the dominant motive behind the words was malice, such as where the speaker was reckless as to the truth of the words spoken; or where the scope of the occasion of privilege was exceeded (Downard, at §1.9; see also *Hill*, at paras. 145-47; *Botiuk*, at paras. 79-80).

122. For this reason, a precise characterization of the "occasion" is essential, as it becomes impressed with the limited, qualified privilege, which in turn becomes the benchmark against which to measure whether the occasion was exceeded or abused. ***"

[99] See *Caron v. A.*, 2015 BCCA 47 *per* Garson J.A.:

"16. Absolute privilege, on the other hand, provides a complete defence in cases of alleged defamatory publications, even if the defendant published the statement with actual malice. Traditionally, absolute privilege was granted to any "communications which take place during, incidental to, and the processing and furtherance of, judicial or quasi-judicial proceedings": *Elliott v. Insurance Crime Prevention Bureau*, 2005 NSCA 115 (N.S. C.A.) at para. 112, citing Raymond E. Brown, *The Law of Defamation in Canada*, (Toronto: Carswell, 1999) at para. 12.4(1). ***"

the development's environmental impact and suspicious that Grant was exercising political influence behind the scenes to secure government approval for the new golf course. The reporter, an experienced journalist named Bill Schiller, attempted to verify the allegations in the article, including asking Grant for comment, which Grant chose not to provide. The article was published, and Grant brought this libel action.

5. The trial proceeded with judge and jury. The jury found the respondents (the "Star defendants") liable and awarded general, aggravated and punitive damages totalling $1.475 million.

6. The Star defendants argue that what happened in this trial shows that something is wrong with the traditional law of libel: a journalist or publisher who diligently tries to verify a story on a matter of public interest before publishing it can still be held liable in defamation for massive damages, simply because the journalist cannot prove to the court that all of the story was true or bring it within one of the "privileged" categories exempted from the need to prove truth. This state of the law, they argue, unduly curbs free expression and chills reporting on matters of public interest, depriving the public of information it should have. The Star defendants ask this Court to revise the defences available to journalists to address these criticisms, following the lead of courts in the United States and England. Mr. Grant and his corporation, for their part, argue that the common law now strikes the proper balance and should not be changed. ***

A. Should the Common Law Provide a Defence Based on Responsible Communication in the Public Interest? ***

(1) The Current Law

28. A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff. If these elements are established on a balance of probabilities, falsity and damage are presumed, though this rule has been subject to strong criticism ***. (The only exception is that slander requires proof of special damages, unless the impugned words were slanderous *per se*: R. E. Brown, *The Law of Defamation in Canada* (2nd ed. (loose-leaf)), vol. 3, at pp. 25-2 and 25-3.) The plaintiff is not required to show that the defendant intended to do harm, or even that the defendant was careless. The tort is thus one of strict liability.

29. If the plaintiff proves the required elements, the onus then shifts to the defendant to advance a defence in order to escape liability.

30. Both statements of opinion and statements of fact may attract the defence of privilege, depending on the occasion on which they were made. Some "occasions", like Parliamentary and legal proceedings, are absolutely privileged. Others, like reference letters or credit reports, enjoy "qualified" privilege, meaning that the privilege can be defeated by proof that the defendant acted with malice: see *Horrocks v. Lowe* (1974), [1975] A.C. 135 (U.K. H.L.). The defences of absolute and qualified privilege reflect the fact that "common convenience and welfare of society" sometimes requires untrammelled communications: *Toogood v. Spyring* (1834), 1 Cr. M & R. 181, 149 E.R. 1044 (Eng. Exch.), at p. 1050, *per* Parke B. The law acknowledges through recognition of privileged occasions that false and defamatory expression may sometimes contribute to desirable social ends.

31. In addition to privilege, statements of opinion, a category which includes any "deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof" (*Ross v. N.B.T.A.*, 2001 NBCA 62, 201 D.L.R. (4th) 75 (N.B. C.A.), at para. 56 ***), may attract the defence of **fair comment**. As reformulated in [*WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420], at para. 28, a defendant claiming fair comment must satisfy the following test: (a) the comment must be on a matter of public interest; (b) the comment must be based on fact; (c) the comment, though it can include inferences of fact, must be recognisable as comment; (d) the comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts?; and (e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice. *Simpson* expanded the fair comment defence by changing the traditional requirement that the opinion be one that a "fair-minded" person could honestly hold, to a requirement that it be one that

"anyone could honestly have expressed" (paras. 49-51), which allows for robust debate. As Binnie J. put it, "[w]e live in a free country where people have as much right to express outrageous and ridiculous opinions as moderate ones" (para. 4).

32. Where statements of fact are at issue, usually only two defences are available: the defence that the statement was substantially true (justification); and the defence that the statement was made in a protected context (privilege). The issue in this case is whether the defences to actions for defamatory statements of fact should be expanded, as has been done for statements of opinion, in recognition of the importance of freedom of expression in a free society.

33. To succeed on the defence of justification, a defendant must adduce evidence showing that the statement was substantially true. This may be difficult to do. A journalist who has checked sources and is satisfied that a statement is substantially true may nevertheless have difficulty proving this in court, perhaps years after the event. The practical result of the gap between responsible verification and the ability to prove truth in a court of law on some date far in the future, is that the defence of justification is often of little utility to journalists and those who publish their stories.

34. If the defence of justification fails, generally the only way a publisher can escape liability for an untrue defamatory statement of fact is by establishing that the statement was made on a privileged occasion. However, the defence of qualified privilege has seldom assisted media organizations. One reason is that qualified privilege has traditionally been grounded in special relationships characterized by a "duty" to communicate the information and a reciprocal "interest" in receiving it. The press communicates information not to identified individuals with whom it has a personal relationship, but to the public at large. Another reason is the conservative stance of early decisions, which struck a balance that preferred reputation over freedom of expression. ***

35. In recent decades courts have begun to moderate the strictures of qualified privilege, albeit in an *ad hoc* and incremental way. When a strong duty and interest seemed to warrant it, they have on occasion applied the privilege to publications to the world at large. For example, in suits against politicians expressing concerns to the electorate about the conduct of other public figures, courts have sometimes recognized that a politician's "duty to ventilate" matters of concern to the public could give rise to qualified privilege: *Parlett v. Robinson* (1986), 5 B.C.L.R. (2d) 26 (B.C. C.A.), at p. 39.

36. In the last decade, this recognition has sometimes been extended to media defendants. For example, in *Grenier v. Southam Inc.*, [1997] O.J. No. 2193 (Ont. C.A.), the Ontario Court of Appeal *** upheld a trial judge's finding that the defendant media corporation had a "social and moral duty" to publish the article in question. Other cases have adopted the view that qualified privilege is available to media defendants, provided that they can show a social or moral duty to publish the information and a corresponding public interest in receiving it ***.

37. Despite these tentative forays, the threshold for privilege remains high and the criteria for reciprocal duty and interest required to establish it unclear. It remains uncertain when, if ever, a media outlet can avail itself of the defence of qualified privilege.

(2) The Case for Changing the Law

38. Two related arguments are presented in support of broadening the defences available to public communicators, such as the press, in reporting matters of fact.

39. The first argument is grounded in principle. It asserts that the existing law is inconsistent with the principle of freedom of expression as guaranteed by s. 2(b) of the *Charter.* In the modern context, it is argued, the traditional rule has a chilling effect that unjustifiably limits reporting facts, and strikes a balance too heavily weighted in favour of protection of reputation. While the law should provide redress for baseless attacks on reputation, defamation lawsuits, real or threatened, should not be a weapon by which the wealthy and privileged stifle the information and debate essential to a free society.

40. The second argument is grounded in jurisprudence. This argument points out that many foreign common law jurisdictions have modified the law of defamation to give more protection to the press, in

recognition of the fact that the traditional rules inappropriately chill free speech. While different countries have taken different approaches, the trend is clear. Recent Canadian cases *** have affirmed this trend. The time has arrived, it is argued, for this Court to follow suit. ***

85. A number of countries with common law traditions comparable to those of Canada have moved in recent years to modify the law of defamation to provide greater protection for communications on matters of public interest. These developments confront us with a range of possibilities. The traditional common law defence of qualified privilege, which offered no protection in respect of publications to the world at large, situates itself at one end of the spectrum of possible alternatives. At the other end is the American approach of protecting all statements about public figures, unless the plaintiff can show malice. Between these two extremes lies the option of a defence that would allow publishers to escape liability if they can establish that they acted responsibly in attempting to verify the information on a matter of public interest. This middle road is the path chosen by courts in Australia, New Zealand, South Africa and the United Kingdom.

86. In my view, the third option, buttressed by the argument from *Charter* principles advanced earlier, represents a reasonable and proportionate response to the need to protect reputation while sustaining the public exchange of information that is vital to modern Canadian society.

87. What remains to be decided is how, consistent with *Charter* values, the new defence should be formulated.

B. The Elements of the Defence of Responsible Communication

(1) Preliminary Issues ***

95. *** [T]he proposed change to the law should be viewed as a new defence, leaving the traditional defence of qualified privilege intact. ***

97. A review of recent defamation case law suggests that many actions now concern blog postings and other online media which are potentially both more ephemeral and more ubiquitous than traditional print media. While established journalistic standards provide a useful guide by which to evaluate the conduct of journalists and non-journalists alike, the applicable standards will necessarily evolve to keep pace with the norms of new communications media. For this reason, it is more accurate to refer to the new defence as responsible communication on matters of public interest.

(2) Formulating the Defence of Responsible Communication on Matters of Public Interest

98. *** I *** would formulate the test as follows. First, the publication must be on a matter of public interest. Second, the defendant must show that publication was responsible, in that he or she was diligent in trying to verify the allegation(s), having regard to all the relevant circumstances.

a) Was the Publication on a Matter of Public Interest? ***

100. This is a matter for the judge to decide. To be sure, whether a statement's publication is in the public interest involves factual issues. But it is primarily a question of law; the judge is asked to determine whether the nature of the statement is such that protection may be warranted in the public interest. The judge acts as a gatekeeper analogous to the traditional function of the judge in determining whether an "occasion" is subject to privilege. Unlike privilege, however, the determination of whether a statement relates to a matter of public interest focuses on the substance of the publication itself and not the "occasion". ***

101. In determining whether a publication is on a matter of public interest, the judge must consider the subject matter of the publication as a whole. The defamatory statement should not be scrutinized in isolation. The judge's role at this point is to determine whether the subject matter of the communication as a whole is one of public interest. If it is, and if the evidence is legally capable of supporting the defence, as I will explain below, the judge should put the case to the jury for the ultimate determination of responsibility.

102. How is "public interest" in the subject matter established? First, and most fundamentally, the public interest is not synonymous with what interests the public. The public's appetite for information on a given subject—say, the private lives of well-known people—is not on its own sufficient to render an essentially

private matter public for the purposes of defamation law. An individual's reasonable expectation of privacy must be respected in this determination. Conversely, the fact that much of the public would be less than riveted by a given subject matter does not remove the subject from the public interest. It is enough that some segment of the community would have a genuine interest in receiving information on the subject.

103. The authorities offer no single "test" for public interest, nor a static list of topics falling within the public interest (see, e.g. *Gatley on Libel and Slander* (11th ed. 2008), at p. 530). Guidance, however, may be found in the cases on fair comment and s. 2(b) of the *Charter*. ***

105. To be of public interest, the subject matter "must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached": Brown, vol. 2, at pp. 15-137 and 15-138. The case law on fair comment "is replete with successful fair comment defences on matters ranging from politics to restaurant and book reviews": *Simpson v. Mair*, 2004 BCSC 754, 31 B.C.L.R. (4th) 285 (B.C. S.C.), at para. 63, *per* Koenigsberg J. Public interest may be a function of the prominence of the person referred to in the communication, but mere curiosity or prurient interest is not enough. Some segment of the public must have a genuine stake in knowing about the matter published.

106. Public interest is not confined to publications on government and political matters, as it is in Australia and New Zealand. Nor is it necessary that the plaintiff be a "public figure", as in the American jurisprudence since *Sullivan*. Both qualifications cast the public interest too narrowly. The public has a genuine stake in knowing about many matters, ranging from science and the arts to the environment, religion, and morality. The democratic interest in such wide-ranging public debate must be reflected in the jurisprudence. ***

108. The question then arises whether the judge or the jury should decide whether the inclusion of a particular defamatory statement in a publication was necessary to communicating on the matter of public interest. ***

109. In my view, if the publication read broadly and as a whole relates to a matter of public interest, the judge should leave the defence to the jury on the publication as a whole, and not editorially excise particular statements from the defence on the ground that they were not necessary to communicating on the matter of public interest. Deciding whether the inclusion of the impugned statement was justifiable involves a highly fact-based assessment of the context and details of the publication itself. Whereas a given subject matter either is or is not in law a matter of public interest, the justifiability of including a defamatory statement may admit of many shades of gray. It is intimately bound up in the overall determination of responsibility and should be left to the jury. ***

b) Was Publication of the Defamatory Communication Responsible? ***

(i) The Seriousness of the Allegation

111. The logic of proportionality dictates that the degree of diligence required in verifying the allegation should increase in proportion to the seriousness of its potential effects on the person defamed. This factor recognizes that not all defamatory imputations carry equal weight. *** Publication of the kinds of allegations traditionally considered the most serious—for example, corruption or other criminality on the part of a public official—demand more thorough efforts at verification than will suggestions of lesser mischief. So too will those which impinge substantially on the plaintiff's reasonable expectation of privacy.

(ii) The Public Importance of the Matter

112. Inherent in the logic of proportionality is the degree of the public importance of the communication's subject matter. *** Where the public importance in a subject matter is especially high, the jury may conclude that this factor tends to show that publication was responsible in the circumstances. ***

(iii) The Urgency of the Matter

113. As Lord Nicholls observed in *Reynolds*, news is often a perishable commodity. The legal requirement to verify accuracy should not unduly hamstring the timely reporting of important news. But nor should a

journalist's (or blogger's) desire to get a "scoop" provide an excuse for irresponsible reporting of defamatory allegations. The question is whether the public's need to know required the defendant to publish when it did. As with the other factors, this is considered in light of what the defendant knew or ought to have known at the time of publication. If a reasonable delay could have assisted the defendant in finding out the truth and correcting any defamatory falsity without compromising the story's timeliness, this factor will weigh in the plaintiff's favour.

(iv) The Status and Reliability of the Source

114. Some sources of information are more worthy of belief than others. The less trustworthy the source, the greater the need to use other sources to verify the allegations. ***

(v) Whether the Plaintiff's Side of the Story Was Sought and Accurately Reported

116. *** In most cases, it is inherently unfair to publish defamatory allegations of fact without giving the target an opportunity to respond: see, e.g. *Galloway v. Telegraph Group Ltd.*, [2004] EWHC 2786 (Eng. Q.B.), *per* Eady J., at paras. 166-67. Failure to do so also heightens the risk of inaccuracy, since the target of the allegations may well be able to offer relevant information beyond a bare denial.

117. The importance of this factor varies with the degree to which fulfilling its dictates would actually have bolstered the fairness and accuracy of the report. ***

(vi) Whether Inclusion of the Defamatory Statement was Justifiable

118. *** In applying this factor, the jury should take into account that the decision to include a particular statement may involve a variety of considerations and engage editorial choice, which should be granted generous scope.

(vii) Whether the Defamatory Statement's Public Interest Lay in the Fact That it Was Made Rather Than its Truth ("Reportage")

119. The "repetition rule" holds that repeating a libel has the same legal consequences as originating it. This rule reflects the law's concern that one should not be able to freely publish a scurrilous libel simply by purporting to attribute the allegation to someone else. *** Maintaining the repetition rule is particularly important in the age of the internet, when defamatory material can spread from one website to another at great speed.

120. However, the repetition rule does not apply to fairly reported statements whose public interest lies in the fact that they were made rather than in their truth or falsity. This exception to the repetition rule is known as reportage. If a dispute is itself a matter of public interest and the allegations are fairly reported, the publisher should incur no liability even if some of the statements made may be defamatory and untrue, provided: (1) the report attributes the statement to a person, preferably identified, thereby avoiding total unaccountability; (2) the report indicates, expressly or implicitly, that its truth has not been verified; (3) the report sets out both sides of the dispute fairly; and (4) the report provides the context in which the statements were made. ***

(viii) Other Considerations ***

123. Not all factors are of equal value in assessing responsibility in a given case. ***

124. If the defamatory statement is capable of conveying more than one meaning, the jury should take into account the defendant's intended meaning, if reasonable, in determining whether the defence of responsible communication has been established. *** Under the defence of responsible communication, it is no longer necessary that the jury settle on a single meaning as a preliminary matter. Rather, it assesses the responsibility of the communication with a view to the range of meanings the words are reasonably capable of bearing.

125. Similarly, the defence of responsible communication obviates the need for a separate inquiry into malice. (Malice may still be relevant where other defences are raised.) A defendant who has acted with

malice in publishing defamatory allegations has by definition not acted responsibly.

(3) Summary of the Required Elements

126. The defence of public interest responsible communication is assessed with reference to the broad thrust of the publication in question. It will apply where:

> A. The publication is on a matter of public interest and:
>
> B. The publisher was diligent in trying to verify the allegation, having regard to: (a) the seriousness of the allegation; (b) the public importance of the matter; (c) the urgency of the matter; (d) the status and reliability of the source; (e) whether the plaintiff's side of the story was sought and accurately reported; (f) whether the inclusion of the defamatory statement was justifiable; (g) whether the defamatory statement's public interest lay in the fact that it was made rather than its truth ("reportage"); and (h) any other relevant circumstances.

C. Procedural Issues: Judge and Jury ***

128. The judge decides whether the statement relates to a matter of public interest. If public interest is shown, the jury decides whether on the evidence the defence is established, having regard to all the relevant factors, including the justification for including defamatory statements in the article. ***

VI. Application to the Facts of this Case

136. The evidence revealed a basis for three defences: (1) justification; (2) fair comment; and (3) responsible communication on a matter of public interest. All three defences should have been left to the jury. ***

VII. Conclusion

141. I would dismiss the appeal and the cross-appeal, and affirm the order for a new trial. ***

ABELLA J.:

142. I am in complete agreement with the Chief Justice's reasons for adding the "responsible communication" defence to Canadian defamation law. I also share her view that determining the availability of this defence entails a two-step analysis: the first to determine whether a publication is on a matter of public interest; and the second to determine whether the standard of responsibility is met. Yet while I agree that the first question is a matter of law for the judge to decide, I do not, with great respect, share her view that the jury should decide the second step. *** [I]n my view the legal character of deciding whether the applicable standard of responsibility has been met in a given case is, like the public interest analysis, a matter for the judge. ***

REFLECTION:

- *What is the defence of responsible communication in the public interest? What are its elements and features?*
- *Why did the Court recognise this defence? What are the respective roles of the judge and jury in applying it?*

5.1.5 Hansman v. Neufeld [2023] SCC 14

Supreme Court of Canada – 2023 SCC 14

KARAKATSANIS J. (WAGNER C.J., ROWE, MARTIN, JAMAL, O'BONSAWIN JJ. concurring):

1. At the core of defamation law are two competing values: freedom of expression and the protection of reputation. Each is essential to maintaining a functional democracy. This appeal presents an opportunity to clarify the proper equilibrium between these two values where the expression at issue relates to a matter of public interest.

2. Defamation suits are a way to vindicate an individual's personal or professional reputation in the face of

attack, but can have the undesirable effect of suppressing the open debate that is the cornerstone of a free and democratic society. For this reason, certain provincial legislatures have targeted strategic lawsuits against public participation (SLAPPs), or actions that disproportionately suppress free expression on matters of public interest. This case concerns the application of s. 4 of British Columbia's anti-SLAPP statute, the *Protection of Public Participation Act*, S.B.C. 2019, c. 3 (PPPA).

3. The defamation suit at the heart of this proceeding arises out of a high-profile public debate—spanning traditional print media, the internet, rallies, protests, and a local election—on British Columbia's efforts to combat discrimination against transgender and other 2SLGBTQ+ youth.

4. The parties are both local public figures. Barry Neufeld, a public school board trustee in Chilliwack, British Columbia, made online posts criticizing a provincial government initiative designed to equip educators to instruct students about gender identity and sexual orientation. Mr. Neufeld's posts triggered significant local controversy, spurring protests and calls for Mr. Neufeld to resign. Many considered his comments to be derogatory of transgender and other 2SLGBTQ+ individuals. Glen Hansman, a gay man, teacher, and former president of the British Columbia Teachers' Federation (BCTF), a large teachers' union in the province, was prominent among the dissenting voices and made statements to media. Mr. Hansman called Mr. Neufeld's views bigoted, transphobic, and hateful; accused him of undermining safety and inclusivity for transgender and other 2SLGBTQ+ students in schools; and questioned whether he was suitable to hold elected office.

5. Mr. Neufeld sued for defamation. Mr. Hansman then applied to have Mr. Neufeld's defamation action dismissed as a SLAPP under s. 4 of the PPPA. The core feature of the *PPPA* is that it instructs courts to dismiss even meritorious claims where the public interest in protecting the defendant's freedom of expression outweighs the public interest in remedying the harm done to the plaintiff. It also requires the plaintiff to meet a merits threshold by demonstrating grounds to believe that the underlying proceeding has substantial merit and that the defendant has no valid defence in the proceeding.

6. The chambers judge found that Mr. Neufeld's defamation action had the effect of unduly suppressing debate on matters of public interest and dismissed the suit (2019 BCSC 2028). The chambers judge held both that Mr. Hansman had a valid fair comment defence and that the value in protecting his expression outweighed the resulting harm done to Mr. Neufeld. The Court of Appeal disagreed on both counts and reinstated the action (2021 BCCA 222).

7. I agree with the chambers judge. Mr. Neufeld argued in the courts below and in this Court that he only criticized a policy; he never expressed hatred towards the transgender community, nor did his words create an unsafe school environment for transgender students. But his submissions miss the mark. Mr. Neufeld's right to criticize a government initiative is not in dispute. Rather, the central issue is whether Mr. Hansman had a right to respond to Mr. Neufeld in the way he chose without the threat of civil liability. In my view, he did.

8. The fair comment defence asks whether a person could honestly hold the views Mr. Hansman expressed and whether Mr. Hansman's statements related to a matter of public interest and were recognizable as comments based on facts. The chambers judge found that Mr. Neufeld did not adequately challenge any of these elements and he was entitled to dismiss the proceeding on this basis.

9. Even if Mr. Neufeld had discharged his burden as to the fair comment defence, however, the chambers judge was entitled to dismiss the defamation claim because the public interest in protecting Mr. Hansman's expression is not outweighed by the limited harm to Mr. Neufeld. Mr. Hansman's words were not a disproportionate or gratuitous response to Mr. Neufeld's statements, and there is a substantial public interest in protecting his counter-speech. Mr. Hansman spoke out to counter expression that he and others perceived to be discriminatory and harmful towards transgender and other 2SLGBTQ+ youth—groups especially vulnerable to expression that reduces their worth and dignity in the eyes of society and questions their very identity. Not only does protecting Mr. Hansman's expression preserve free debate on matters of public interest, it also promotes equality, another fundamental democratic value.

10. I would restore the order of the chambers judge dismissing the defamation action.

Analysis

44. This appeal presents two issues:

> (i) Did the chambers judge err in the weighing exercise set out in s. 4(2)(b) of the PPPA by concluding that the public interest in protecting Mr. Hansman's expression mandates dismissal of the underlying action?
>
> (ii) Did the chambers judge err in finding that Mr. Neufeld did not show, under s. 4(2)(a)(ii) of the PPPA, grounds to believe Mr. Hansman had no valid fair comment defence?

45. Answering either of these questions in the negative would result in the dismissal of the action. I would answer "no" to both. The Court of Appeal should not have overturned the chambers judge's findings on the fair comment defence. More significantly, even if Mr. Neufeld had disproved the validity of Mr. Hansman's fair comment defence, the public interest in protecting Mr. Hansman's expression mandates dismissal of the underlying action. Before turning to the two questions before the Court, I summarize the applicable statutory framework.

Section 4 of the PPPA

46. A SLAPP is a tactical action that seeks to suppress expression on matters of public interest. The goal of a SLAPP is not necessarily a legal victory, but a political one: to intimidate and suppress criticism with the threat of costly litigation (V. Pelletier, *Strategic Lawsuits against Public Participation (SLAPPs) (and other abusive lawsuits)*, August 2008 (online), at para. 4). A key feature of a SLAPP is thus the strategic use of the legal system to silence contrary viewpoints. Binnie J. aptly described the problem posed by such litigious tactics in *WIC Radio* [*v. Simpson*, 2008 SCC 40, para. 15]:

> The function of the tort of defamation is to vindicate reputation, but many courts have concluded that the traditional elements of that tort may require modification to provide broader accommodation to the value of freedom of expression. There is concern that matters of public interest go unreported because publishers fear the ballooning cost and disruption of defending a defamation action …. When controversies erupt, statements of claim often follow as night follows day, not only in serious claims (as here) but in actions launched simply for the purpose of intimidation. Of course "chilling" false and defamatory speech is not a bad thing in itself, but chilling debate on matters of *legitimate* public interest raises issues of inappropriate censorship and self-censorship. Public controversy can be a rough trade, and the law needs to accommodate its requirements. ***

47. SLAPPs first emerged in the United States as a tendency of some powerful businesses to use the threat of litigation to frustrate public mobilization efforts against them (R. A. Macdonald, P. Noreau and D. Jutras, *Les poursuites stratégiques contre la mobilisation publique—les poursuites-bâillons (SLAPP)* (2007), at p. 2). Because of these origins, the archetypal SLAPP is generally described as a powerful or wealthy plaintiff, who has suffered only nominal damage, using litigation against a comparatively under-resourced defendant to silence criticism (see *Platnick v. Bent*, 2018 ONCA 687, at para. 99).

48. But SLAPPs do not always embody the hallmarks of the archetype. A SLAPP may be initiated by the rich and powerful, but not always. Similarly, the plaintiff may not have a history of using litigation or the threat of litigation to silence critics. In any case, however, the consistent defining feature of a SLAPP is that the proceeding acts to silence the defendant, and more broadly, to suppress debate on matters of public interest, rather than to remedy serious harm suffered by the plaintiff.

49. Anti-SLAPP legislation, such as the *PPPA*, creates a procedure for screening proceedings arising from expression on matters of public interest at an early stage. Legislative anti-SLAPP solutions have now been passed into law in British Columbia, Ontario, and Quebec. In Ontario, the *Protection of Public Participation Act*, 2015, S.O. 2015, c. 23, s. 3, amends the province's *Courts of Justice Act*, R.S.O. 1990, c. C.43, by adding s. 137.1, which introduces a pretrial screening mechanism designed to weed out SLAPPs. This Court recently analyzed s. 137.1 in two decisions released concurrently: *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, and *Platnick v. Bent*, 2020 SCC 23.

50. British Columbia's *PPPA* was modelled after the *Uniform Protection of Public Participation Act* (2017), May 1, 2017 (online), adopted by the Uniform Law Conference of Canada, which, in turn, is based on Ontario's statute. Like s. 137.1 of *Ontario's Courts of Justice Act*, s. 4 of the *PPPA* creates a pretrial screening procedure that enables a defendant to apply to the court to dismiss a proceeding against them, provided certain criteria are satisfied. Section 4 reads:

> **4. Application to court**
>
> (1) In a proceeding, a person against whom the proceeding has been brought may apply for a dismissal order under subsection (2) on the basis that
>
> > (a) the proceeding arises from an expression made by the applicant, and
> >
> > (b) the expression relates to a matter of public interest.
>
> (2) If the applicant satisfies the court that the proceeding arises from an expression referred to in subsection (1), the court must make a dismissal order unless the respondent satisfies the court that
>
> > (a) there are grounds to believe that
> >
> > > (i) the proceeding has substantial merit, and
> > >
> > > (ii) the applicant has no valid defence in the proceeding, and
> >
> > (b) the harm likely to have been or to be suffered by the respondent as a result of the applicant's expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression. ***

56. Absent reviewable error, an application judge's determination on a s. 4 motion is entitled to deference (*Bent*, at para. 77, citing *Housen v. Nikolaisen*, 2002 SCC 33, at paras. 8 and 36).

Issue 1: Public Interest Weighing ***

62. As I explain below, I disagree with the Court of Appeal both as to the extent of the harm to Mr. Neufeld and as to the public interest in protecting Mr. Hansman's expression. First, Mr. Neufeld failed to identify any specific harm flowing from the statements serious enough to outweigh the public interest in protecting Mr. Hansman's expression. Second, the Court of Appeal's consideration of the "chilling effect" factor was divorced from a proper interpretation of s. 4(2)(b) and runs contrary to how a chilling effect has been conceived of in freedom of expression jurisprudence. Third, Mr. Hansman's expression is counter-speech motivated by a desire to promote tolerance and respect for a marginalized group in society. His expression is deserving of significant protection. I would affirm the chambers judge's conclusion that the public interest in protecting Mr. Hansman's expression outweighed the public interest in remedying the harm to Mr. Neufeld.

(1) Harm Likely to Have Been or to Be Suffered by the Plaintiff as a Result of the Defendant's Expression

63. Under s. 4(2)(b), the factor to be considered in favour of the public interest in continuing the proceeding is the likely harm to the plaintiff as a result of the defendant's expression. ***

64. Mr. Neufeld pleaded generally that he suffered reputational harm and associated emotional distress due to Mr. Hansman's statements. He contended that these assertions were corroborated by a few examples of steps taken against him by other entities: the Chilliwack School Board sought his resignation and directed him to stay away from schools (he refused and continued to serve as a trustee); he was uninvited from an annual trustee meeting; and he was uninvited from delivering high school commencement addresses. Mr. Neufeld also argued that harm could be inferred based on circumstantial factors, including the identity of the accuser, the breadth, and distribution of the statements, and the republication of the statements ***.

65. The chambers judge recognized that Mr. Neufeld was not expected to present a fully developed

damages brief on a s. 4 application (para. 157). Still, he found that Mr. Neufeld had presented only "bare assertions" of harm, leaving him with "precious little evidence" to weigh on Mr. Neufeld's side of the equation under s. 4(2)(b) (paras. 147 and 152). ***

69. *** Even considering the circumstantial factors that Mr. Neufeld alleged, there is no basis to disturb the judge's assessment of the harm to Mr. Neufeld. And as the judge recognized, other circumstantial factors clearly pointed to a conclusion that Mr. Neufeld had suffered limited reputational harm: Mr. Neufeld continued to express the same contentious views despite the public reaction and won re-election a year later. ***

78. Mr. Hansman undoubtedly used words with the potential to inflict serious reputational harm. But the consideration of the public interest in continuing the proceeding must be grounded in harm to Mr. Neufeld, reputational or otherwise, caused by Mr. Hansman's expression, and not in the consideration of a "chilling effect" on others if Mr. Neufeld could not proceed with his defamation suit.

(2) Public Interest in Protecting the Defendant's Expression

79. The other side of the weighing exercise evaluates the public interest in protecting the defendant's expression. In making this assessment, s. 2(b) Canadian Charter of Rights and Freedoms jurisprudence "grounds the level of protection afforded to [the defendant's] expression in the nature of the expression" (*Pointes*, at para. 77). *** As our Constitution recognizes, not all expression is created equal, and the level of protection to be afforded to any particular expression can vary widely according to the quality of the expression, its subject matter, the motivation behind it, or the form through which it was expressed (see *Pointes*, at paras. 74, 76 and 120). The closer the expression lies to the core values of s. 2(b), including truth-seeking, participation in political decision-making and diversity in the forms of self-fulfillment and human flourishing, "the greater the public interest in protecting it" (para. 77). ***

90. Mr. Neufeld's right to express himself is not in doubt, nor is it for this Court to assess the value of his expression. But Mr. Neufeld's statements are critical context in characterizing Mr. Hansman's expression, which is at issue. Despite Mr. Neufeld's submissions, it is evident that his expression went beyond a critique of a government program. For instance, in his original post, Mr. Neufeld criticized the fact that SOGI 123 materials instruct children "that gender is not biologically determined, but is a social construct" and stated that permitting children to "choose to change gender is nothing short of child abuse" ***. In the same post, Mr. Neufeld expressed concern that children were "being taught that heterosexual marriage is no longer the norm" and that "[i]ncreasing numbers of children are growing up in homes with same sex parents" (p. 16). And in his speech at the Culture Guard event about a month following his original post, Mr. Neufeld claimed that SOGI 123 "enabl[es] dysfunctional behavior and thinking patterns" and "coddl[es] and encourag[es] what [he] regard[s] as the sexual addiction of gender confusion". Mr. Hansman was responding to these and other statements.

91. Mr. Hansman's counter-speech fell close to the core of s. 2(b). His expression served a truth-seeking function, as he was contacted by the media to present an alternative perspective within a debate on a matter of public importance. In speaking out, he sought to counter expression that he and others perceived to undermine the equal worth and dignity of marginalized groups. Finally, his speech commenting on the fitness of an electoral candidate was political expression, which is "the single most important and protected type of expression" (*Harper v. Canada (Attorney General)*, 2004 SCC 33, at para. 11, per McLachlin C.J. and Major J., dissenting in part, but not on this point; see also *Able Translations Ltd. v. Express International Translations Inc.*, 2018 ONCA 690, at paras. 41-44 (affording expression about a person's suitability for elected office significant protection under s. 137.1 of the Ontario Courts of Justice Act)).

92. Although one's engagement in counter-speech does not amount to "open season" on reputation (*Grant* [*v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640], at para. 58) and speakers must always choose their words carefully (*Pointes*, at para. 75), on the whole, Mr. Hansman's words were not a disproportionate or gratuitous response to Mr. Neufeld's statements. When confronted with views a person believes to be discriminatory, individuals often use words such as "bigoted", "intolerant", or even sometimes "hateful". I note that Mr. Hansman's expression generally focused on the views that Mr. Neufeld expressed, and not who he is as a person.

93. I agree with the chambers judge that there is a great public interest in protecting Mr. Hansman's freedom of speech on such matters. The subject matter of Mr. Hansman's speech (commenting on the value of a government initiative, the need for safe and inclusive schools, and the fitness of a candidate for public office), the form in which it was expressed (solicited by the media to present a counter-perspective within an ongoing debate), and the motivation behind it (to combat discriminatory and harmful expression and to protect transgender youth in schools) are all deserving of significant protection. Given Mr. Neufeld's failure to establish harm serious enough to outweigh that substantial public interest, the chambers judge did not err in concluding that the weighing exercise under s. 4(2)(b) mandates dismissal of the underlying action.

Issue 2: No Valid Defence ***

95. In support of his s. 4 application, Mr. Hansman advanced the defence of fair comment. The right of fair comment is "a basic safeguard against irresponsible political power" (C. Sappideen and P. Vines, eds., *Fleming's The Law of Torts* (10th ed. 2011), at p. 668). The fair comment defence is premised on the idea that citizens must be able to openly declare their real opinions on matters of public interest without fear of reprisal in the form of actions for defamation (*Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067, at p. 1086, quoting *Slim v. Daily Telegraph Ltd.*, [1968] 1 All E.R. 497, at p. 503 (C.A.)). This democratic discourse is a defining feature of a free and open society. Thus, the defence aims to keep the equilibrium in defamation law between two competing values: the protection of individual reputation from unwarranted attack, on one side, and the free debate "that is said to be the 'very life blood of our freedom and free institutions'" on the other (*WIC Radio*, at para. 1, quoting *Price v. Chicoutimi Pulp Co*, (1915), 51 S.C.R. 179, at p. 194). The task of courts in interpreting the defence is to reconcile these two values, not to prefer one over the other (*WIC Radio*, at para. 2).

96. The fair comment defence has five elements. First, the "comment must be on a matter of public interest" (*Grant*, at para. 31). Second, it must be "based on fact" (para. 31). Third, "though it can include inferences of fact, [it] must be recognisable as comment" (para. 31). Fourth, it must satisfy an objective test: "could any person honestly express that opinion on the proved facts?" (para. 31). Finally, even if the above elements are met, "the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice" (para. 31). Consideration of the elements of the fair comment defence requires an assessment of the defamatory words used in the full context surrounding their use (*WIC Radio*, at paras. 55-56). In this appeal, the only elements at issue are the second and third elements of the defence, along with the question of malice.

97. When invoked at trial, the defendant must prove the elements of the fair comment defence before the onus switches to the plaintiff to defeat the defence by establishing malice by the defendant (para. 52). On a s. 4 application, however, the onus is on the plaintiff to show grounds to believe that the defendant cannot establish one or more of its elements and thus the defence has no real prospect of success. ***

(a) Was the Expression Based on Fact? ***

102. *** The relevant inquiry is not whether the underlying facts supported the truth of the statements. At trial, Mr. Hansman need not demonstrate that Mr. Neufeld is bigoted, transphobic, promoted hatred, or created an unsafe environment for students. The question is merely whether the statement can be tethered to an adequate factual basis so the reader can be an informed judge. I agree with the chambers judge that Mr. Neufeld's original Facebook post could provide the requisite factual basis for most statements at issue. The post reads:

> Okay, so I can no longer sit on my hands. I have to stand up and be counted. A few years ago, the Liberal minister of education instigated a new curriculum supposedly to combat bullying. But it quickly morphed into a weapon of propaganda to infuse every subject matter from K-12 with the latest fad: Gender theory. The Sexual Orientation and Gender Identity (SOGI) program instructs children that gender is not biologically determined, but is a social construct. At the risk of being labelled a bigoted homophobe, I have to say that I support traditional family values and I agree with the College of paediatricians that allowing little children [to] choose to change gender is nothing short of child abuse. But now the BC Ministry of Education has embraced the LGBTQ lobby and is forcing this biologically absurd theory on children in our schools. Children are being taught that

> heterosexual marriage is no longer the norm. Teachers must not refer to "boys and girls" they are merely students. They cannot refer to mothers and fathers either. (Increasing numbers of children are growing up in homes with same sex parents) If this represents the values of Canadian society, count me out! I belong in a country like Russia, or Paraguay, which recently had the guts to stand up to these radical cultural nihilists. [A link to a news article entitled "Parents Defeat Gender Ideology in Paraguay".] ***

103. All of the challenged publications either reproduced, linked to, quoted from, or otherwise described Mr. Neufeld's original Facebook ***. Most articles also describe Mr. Neufeld's anti-SOGI 123 views and views on gender dysphoria, in general. *** Mr. Neufeld's views were therefore available to readers within the four corners of the publications, either within the text itself or via hyperlinks to further articles and explanations. Those views grounded Mr. Hansman's statements that Mr. Neufeld should resign; expressed views that are bigoted, intolerant, transphobic, misogynist, or hateful; "tip toed" into hate speech; spread or promoted hatred against 2SLGBTQ+ students; and created or contributed to an unsafe or discriminatory environment.

104. As the chambers judge noted, Mr. Neufeld can hardly argue that his Facebook post did not provide a factual basis for Mr. Hansman's statements when he himself wrote that he posted at the risk of "being labelled a bigoted homophobe". ***

(b) Was the Expression Recognizable as Comment, Rather Than an Imputation of Fact?

108. For expression to constitute fair comment, the statement must be one that would be understood by a reasonable reader as a comment rather than a statement of fact (*WIC Radio*, at para. 27). A comment includes a "deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof" (para. 26, quoting *Ross v. New Brunswick Teachers' Association*, 2001 NBCA 62, at para. 56). This is a low threshold; "the notion of 'comment' is generously interpreted" (*WIC Radio*, at para. 30). ***

114. Considered as a whole, the chambers judge was entitled to find under s. 4(2)(a)(ii) that the "sting" of Mr. Hansman's statements was "comment and it would have been understood as such" by readers (*WIC Radio*, at para. 27).

(c) Was the Fair Comment Defence Defeated by Malice?

115. A showing of malice defeats a valid fair comment defence. This can be done by demonstrating the defendant made the statement knowing it was false, with reckless indifference as to its truth, to injure the plaintiff out of spite or animosity, or for some other improper purpose (*WIC Radio*, at paras. 100-101 and 104; see also *Bent*, at para. 136; *Smith v. Cross*, 2009 BCCA 529, at para. 34). ***

119. *** The defence was Mr. Neufeld's to disprove, yet Mr. Neufeld adduced no "evidence … that would form the basis of an argument against the validity of the fair comment defence" (para. 126). The judge was therefore entitled to dismiss the proceeding on this basis. ***

Conclusion

122. I would allow the appeal, set aside the order of the Court of Appeal for British Columbia, and restore the order of the chambers judge dismissing the defamation action. ***

CÔTÉ J. (dissenting):

123. In a famous concurring opinion, U.S. Supreme Court Justice Louis Brandeis posited that the remedy for objectionable speech "is more speech, not enforced silence" (*Whitney v. California*, 274 U.S. 357 (1927), at p. 377). The argument that counter-speech is to be preferred to the censorship or silencing of ideas perceived to be wrong or offensive is connected to the concept of a "marketplace of ideas" encouraging competition between conflicting viewpoints. However, counter-speech does not enjoy absolute constitutional protection, nor is it inherently more valuable than the speech to which it responds. ***

129. Defamation lawsuits like the one in the present case call upon courts to cautiously strike the

appropriate balance between freedom of expression and the protection of one's reputation ***. In determining whether Barry Neufeld's action in defamation against Glen Hansman should be dismissed at an early stage, our Court must remain mindful of this balance and take great care in not upsetting it (*Bent v. Platnick*, 2020 SCC 23, at para. 168). Unfortunately, and I say this with respect, by dismissing Mr. Neufeld's claim, my colleague fails to do so. ***

Fair Comment Defence ***

150. In my opinion, there are grounds to believe that the fair comment defence is not available for two of Mr. Hansman's statements because they were made as statements of fact.

151. In January 2018, news articles regarding Mr. Neufeld were published in the *Fraser Valley News* and the *Agassiz Harrison Observer*. Both articles, available online, reproduced a press release from the Chilliwack Teachers' Association. The press release announced the passing of a motion of non-confidence in the Chilliwack Board of Education due to its perceived inaction in connection with Mr. Neufeld's statements concerning the Sexual Orientation and Gender Identity 123 ("SOGI 123") initiative. Mr. Hansman was quoted as saying the following:

> Sometimes our beliefs, values, and responsibilities as professional educators are challenged by those who promote hatred. This is often the case when it comes to sexual health curriculum in schools and our efforts to ensure safe, inclusive schools for all students—including LGBTQ students …. ***

152. Read plainly and in the context of the press release, this statement implies that Mr. Neufeld promoted hatred against an identifiable group, i.e. LGBTQ students.

153. Then, in April 2018, a news article was published on CityNews 1130's website. The article pertained to the human rights complaint filed against Mr. Neufeld by the BCTF. In the article, Mr. Hansman was quoted as saying that Mr. Neufeld had "tip toed quite far into hate speech" ***. This statement is at the core of Mr. Neufeld's action in defamation ***.

154. Both of these statements carry the defamatory sting that Mr. Neufeld engaged in hate speech. Our law requires an onerous and objective standard to be met for speech to constitute hate speech (*Keegstra*, [[1990] 3 S.C.R. 697] at pp. 777-78, per Dickson C.J.; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, at para. 56). Understandably, allowing subjective sensibilities to play a role in the analysis would endanger the constitutionality of anti-hate speech laws. Therefore, what is considered hate speech is not speech that evokes a wide range of emotions, but speech that elicits deep feelings of detestation and vilification ***. Such speech sits at a distance from offensive or hurtful expression that "does not incite the level of abhorrence, delegitimization and rejection that risks causing discrimination or other harmful effects" (*Whatcott*, at para. 57; see also para. 46).

155. In my respectful view, affirming that Mr. Neufeld engaged in hate speech is quite different from expressing a judgment or making a remark incapable of proof. Read in their context, the aforementioned hate speech allegations appear similar to allegations of fraud, theft or other criminal conduct that have been found to be statements of fact for which a fair comment defence is not available ***. ***

157. For this reason, I conclude that there are grounds to believe that the two impugned statements were made as statements of fact and not as comments and, consequently, that the fair comment defence is not available to Mr. Hansman. I turn now to the public interest hurdle.

Public Interest Hurdle

(1) The Harm Likely to Have Been or to Be Suffered by Mr. Neufeld Is Very Serious

158. *** In my opinion, and as I demonstrate below, the chambers judge erroneously ignored factors aggravating the harm likely to have been or to be suffered by Mr. Neufeld, despite the fact that they were specifically argued by him (para. 155).

159. First, the chambers judge failed to consider that the seriousness of the harm can be inferred from the

gravity of the impugned statements. Indeed, the "nature of the defamatory comment is the most important element in assessing the amount of damages" (*Brown on Defamation*, at § 25:19; see also P. A. Downard, *The Law of Libel in Canada* (5th ed. 2022), at §14.01[2][b]). ***

161. Second, the chambers judge did not consider the absence of an apology from Mr. Hansman, which is another aggravating factor increasing Mr. Neufeld's harm (*Barrick Gold Corp. v. Lopehandia*, (2004), 71 O.R. (3d) 416 (C.A.), at para. 51).

162. Third, the chambers judge did not take into account the stature of Mr. Hansman, who, at all relevant times, was acting as the president of the BCTF. This is likely to have magnified Mr. Neufeld's harm. ***

163. Finally, the chambers judge failed to consider the context of the publication and the platform on which the impugned statements were published (Downard, at §14.01[2][c]). The statements accusing Mr. Neufeld of hate speech were published by news organizations in articles available on the Internet ***. The anonymity offered by the Internet, combined with increased accessibility and information sharing, can result in greater harm to a person's reputation ***. ***

166. In my opinion, given the aggravating factors discussed above, the seriousness of Mr. Neufeld's harm should have been situated somewhere between the middle and the high end of the scale.

(2) The Public Interest in Allowing Mr. Neufeld's Claim to Proceed to Trial Outweighs the Public Interest in Protecting Mr. Hansman's Expression ***

172. Ultimately, both Mr. Hansman and Mr. Neufeld had the right to express themselves on SOGI 123. It may be that Mr. Neufeld's statements crossed the line and that he breached the *Human Rights Code*, R.S.B.C. 1996, c. 210, but that is for the British Columbia Human Rights Tribunal to decide following a hearing on the merits of the complaints filed against Mr. Neufeld.

173. It is undeniable that Mr. Hansman's counter-speech concerned the importance of ensuring inclusive schools for LGBTQ students through the implementation of SOGI 123. But Mr. Hansman did not limit himself to criticizing Mr. Neufeld's views on SOGI 123 or to affirming his support for inclusive schools. He made personal attacks and serious hate speech accusations that were likely to cause or that did cause significant harm to Mr. Neufeld. This lowers the public interest in protecting his speech, as "defamatory statements and personal attacks are 'very tenuously' related to the core values which underlie s. 2(b) of the Charter" (*Thorman v. McGraw*, 2022 ONCA 851, at para. 15; see also *Hill*, at para. 106; *Pointes*, at paras. 74-75; *Bent*, at para. 163).

174. What is really going on in the present case is not an attempt to suppress Mr. Hansman's expression. Rather, this is "a case in which one party is attempting to remedy seemingly legitimate harm suffered as a result of a defamatory communication" (*Bent*, at para. 172). In other words, the harm likely to have been or to be suffered by Mr. Neufeld strongly militates in favour of allowing the proceeding to continue (para. 159). ***

179. For these reasons, I would dismiss the appeal ***. ***

REFLECTION:

- *What is a SLAPP suit?[100] Why did the majority of the Court consider Neufeld's defamation claim against Hansman to be a SLAPP suit? What were the implications of the Court's holding?*
- *Were Hansman's statements about Neufeld defamatory? If so, did Hansman have a valid defence? Should these issues have gone to trial?*

[100] See H. Young, "Canadian Anti-SLAPP Laws in Action" (2022) 100 Can Bar Rev 186.

5.1.6 Libel and Slander Act, RSBC 1996

Libel and Slander Act, RSBC 1996, c 263, ss 3, 4, 6, 6.1, 10

3. Newspaper reports of proceedings in court privileged

(1) A fair and accurate report in a public newspaper or other periodical publication or in a broadcast of proceedings publicly heard before a court exercising judicial authority if published contemporaneously with the proceedings, is privileged. ***

4. Newspaper reports of public meetings, etc., privileged

(1) A fair and accurate report published in a public newspaper or other periodical publication or in a broadcast of the proceedings of a public meeting, *** is privileged, unless it is proved that the report or publication was published or made maliciously. ***

6. Special pleas in mitigation of damages for libel

(1) In an action for libel in a newspaper or other periodical publication the defendant may plead in mitigation of damages that the libel was inserted in the newspaper or other periodical publication without actual malice and without gross negligence, and

(a) that before the commencement of the action, or at the earliest opportunity afterwards, the defendant inserted in the newspaper or other periodical publication a full apology for the libel, or

(b) if the newspaper or periodical publication in which the libel appeared is one ordinarily published at intervals exceeding one week, that the defendant offered to publish the apology in a newspaper or periodical publication to be selected by the plaintiff in the action.

(2) In an action for a libel in a broadcast, the defendant may plead in mitigation of damages that the libel was broadcast without actual malice and without gross negligence and that before the commencement of the action, or at the earliest opportunity afterwards, the defendant broadcast a full apology for the libel. ***

6.1 Fair comment

(1) If a defendant published alleged defamatory matter that is an opinion expressed by another person, a defence of fair comment must not fail merely because the defendant did not hold the opinion if

(a) the defendant did not know that the person expressing the opinion did not hold the opinion, and

(b) a person could honestly hold the opinion.

(2) For the purposes of this section, a defendant referred to in subsection (1) has no duty, before or after publication of an opinion referred to in that subsection, to inquire into whether the person expressing the opinion does or does not hold the opinion. ***

10. Proving offer of written apology in mitigation of damages

In an action for defamation if the defendant has pleaded not guilty, if judgment has been given against the defendant with damages to be assessed, or the defendant admits the defamation, the defendant may give in evidence in mitigation of damages, that the defendant made or offered a written or printed apology to the plaintiff for the defamation before the commencement of the action, or if the action was commenced before there was an opportunity of making or offering the apology, that the defendant did so as soon afterwards as the defendant had opportunity. ***

5.1.6.1 Other provincial defamation statutes

- Alberta: Defamation Act, RSA 2000, c D-7.
- Manitoba: The Defamation Act, RSM 1987, c D20.

- New Brunswick: Defamation Act, RSNB 2011, c 139.
- Newfoundland & Labrador: Defamation Act, RSN 1990, c D-3.
- Northwest Territories: Defamation Act, RSNWT 1988, c D-1.
- Nova Scotia: Defamation Act, RSNS 1989, c 122.
- Nunavut: Defamation Act, RSNWT 1988, c D-1.
- Ontario: Libel and Slander Act, RSO 1990, c L.12.
- Prince Edward Island: Defamation Act, RSPEI 1988.
- Québec: Press Act, RSQ, c P-19.
- Saskatchewan: Libel and Slander Act, RSS 1978, c L-14.
- Yukon Territory: Defamation Act, RSY 2002, c 52.

REFLECTION:

- *In what ways do defamation statutes amend or clarify the common law of defamation?*

5.1.7 Cross-references

- *Yenovkian v. Gulian* [2019] ONSC 7279, [171]: §4.1.3.1.

5.1.8 Further material

- People's Law School, "Defamation in British Columbia" (Mar 29, 2022) 📺.
- Gertie's Law Podcast, "Defamation" (May 17, 2021) 🎧.
- Lawson Insight, "Considerations of Social Media Defamation" (Oct 2, 2020) ⍰.
- "Justice", *QI*, series J, episode 12 (BBC, Dec 7, 2012) 📺.
- Runnymede Radio, "Asher Honickman: What Defamation Law Tells Us About Free Expression" (Dec 14, 2023) 🎧.
- M. Douglas, "Suing Google, Facebook or Twitter for Defamation" (2021) 40 Communications L Bulletin 53.
- H. Young, "The Scope of Canadian Defamation Injunctions" (2021) 44 Dalhousie LJ 285.
- E.B. Laidlaw & H. Young, "Internet Intermediary Liability in Defamation" (2019) 56 Osgoode Hall LJ 112.
- J. Cameron (ed), "Special Issue: Reforming Defamation Law in the Age of the Internet" (2018) 56 Osgoode Hall LJ i.
- B.C. Zipursky, "Presumed Damages and Reputational Injury" (SSRN, 2023).
- Law Commission of Ontario, *Defamation Law in the Internet Age* (March 2020).
- D. Mangan, "Canadian Defamation and Privacy Law in Comparative Context" in A. Koltay & P. Wragg (eds), *Comparative Privacy and Defamation* (Cheltenham: Edward Elgar Publishing, 2020).
- R.E. Brown, *Defamation Law: A Primer* (2nd ed, Toronto: Carswell, 2013).
- D. Rolph (ed), *Landmark Cases in Defamation Law* (Oxford: Hart Publishing, 2019).
- A.T. Kenyon, *Comparative Defamation and Privacy Law* (Cambridge: Cambridge University Press, 2016).
- "McLibel: The Story of Two People Who Wouldn't Say McSorry" (Spanner Films, 2005) 📺.

5.2 Harassment

5.2.1 Tam v. Chan [2014] HKCFI 1480

✗**REF: §2.3.4, §9.8.2.2, §21.1.2**

DEPUTY JUDGE LINDA CHAN SC: ***

49. Mr Chain submits that the tort of harassment exists at common law. He relies on the recent judgment in *Lau Tat Wai* [*v. Yip Lai Kuen Joey* [2013] 2 HKLRD 1197] where Anthony Chan J held (at 1206-1211) that there is a tort of harassment in Hong Kong for the following reasons:

(1) The current state of law in Hong Kong has been accurately summarised in *Tort Law in Hong Kong*, (3rd ed., 2012), pp.717-719, where the learned author referred to *** the observations of Andrew Cheung J (as he then was) in *Wong Tai Wai David v. HKSAR* (unrep., CACV 19/2003, [2004] HKEC 1093) (7 September 2004), that "it is arguable that a tort of harassment *per se*, or as part of a tort of intentional (or reckless) infliction of injury (physical or mental), exists at common law" (at [36]).

(2) The learned Judge is "unable to see any reason why there should not be a tort of harassment to protect the people of Hong Kong who live in a small place and in a world where technological advances occur in leaps and bounds. It means that, eg, intrusion on privacy is difficult to prevent and it is hard for the victim to escape the harassment" (at [59]). ***

51. On the other hand, Mr Fong submits that the tort of harassment does not exist at common law, relying on the following cases:

(1) In *Patel v. Patel* [1988] 2 FLR 179, the defendant harassed the plaintiff by telephone calls and visits to the plaintiff's home, but did not commit any trespass to either the person or property of the plaintiff. The Court of Appeal held that as harassment is not a tort at common law, the court has no power to grant an injunction to restrain a defendant from entering an "exclusion zone" outside the plaintiff's premises unless the defendant has committed or is likely to commit trespass against the person or property of the plaintiff. At p.182, Waterhouse J observed that "in the present state of the law there is no tort of harassment".

(2) In *Wong v. Parkside Health NHS Trust* [2003] 3 All ER 932 the Court of Appeal, after considering the views expressed by the Courts in *Khorasandjian v. Bush* [1993] QB 727, *Burris v. Azadani* [1995] 1 WLR 1372 and *Hunter v. Canary Wharf Ltd* [1997] AC 655 on the tort of harassment, held that before the enactment of the *Protection from Harassment Act 1997*, there was no common law tort of harassment. As the claim made by the claimant against the 2nd defendant was based on the "tort of intentional harassment" and could not amount to tort of intentional infliction of harm, it was right for the Court below to strike out such claim.

(3) In *Wong Wai Hing v. Hui Wei Lee* (unrep., HCA 2901/1998, [2000] HKEC 329) (29 March 2000), the plaintiffs sought injunctive relief against the defendant based on the tort of assault and intimidation and Sakhrani J observed, at [42], that "[t]here is as yet no tort of harassment in our law".

(4) In *朱祖永 訴 香港警務處* (unrep., HCMP 1676/2002, 27 September 2002), *** Yuen JA observed that under common law, there was no tort of harassment, citing *Patel* (at 182, *per* Waterhouse J) and *Khorasandjian* (at 744, *per* Peter Gibson J). ***

57. *** Mr Fong submits that I should follow the latest decision of the Court of Appeal in *朱祖永*. There is no answer from Mr Chain on the point or why this Court is not bound by *朱祖永*. In any event, it does not seems to me the judgments of the Court of Appeal in *朱祖永* and *Wong Tai Wai David* are in conflict, as the Court of Appeal did not in *Wong Tai Wai David* hold that there is a tort of harassment at common law. ***

59. In light of the judgment of the Court of Appeal in *朱祖永*, I am bound to hold that there is no tort of harassment at common law and it is not necessary for me to express any concluded view on the issue. ***

REFLECTION:

- *Which authorities were binding on the Hong Kong Court of First Instance? Which authorities were persuasive? Why did the Court decline to recognise a tort of harassment in this case?*
- *On appeal, the Hong Kong Court of Appeal noted that the case raised "the interesting issue whether the tort of harassment exists in the common law of Hong Kong," but concluded "that it would not be appropriate to set*

out our views on this important and possibly far-reaching issue in an obiter decision."[101] In a more recent judgment of the Hong Kong Court of First Instance, it was "undisputed between the parties that tort of harassment exists in Hong Kong and that it is rooted in the common law."[102] Following a detailed canvas of the authorities, Judge H. Au-Yeung affirmed the harassment tort in Hong Kong but held that "a corporate entity has no standing to make a claim under the common law tort of harassment in its own capacity."[103] What explains the differing holdings of these two judges of the Court of First Instance?

5.2.2 Merrifield v. Canada [2019] ONCA 205

Ontario Court of Appeal – 2019 ONCA 205, leave denied: 2019 CanLII 86846 (SCC)

JURIANSZ, D. BROWN AND HUSCROFT JJ.A.:

1. This appeal relates to claims of harassment and bullying by Royal Canadian Mounted Police (RCMP) managerial members of the respondent Peter Merrifield from 2005 to 2012. Merrifield was a junior RCMP Constable in 2005. He was promoted to Corporal in 2009 and Sergeant in 2014.

2. The litigation has been protracted; Merrifield issued his notice of action in May 2007 and a 40-day trial was held over a period of 17 months, from November 2014-April 2016. A lengthy decision was released in February 2017.

3. The trial judge's decision reviewed in considerable detail more than seven years of strained relations between Merrifield and several of his superiors in the RCMP. In allowing the action, the trial judge recognized a new freestanding tort of harassment and found that many of the managerial decisions made in relation to Merrifield constituted harassment. ***

15. The trial judge found that the tort of harassment exists in Ontario. Her analysis concerning the existence of the tort is quite brief in the context of an otherwise lengthy decision—a mere 8 paragraphs of her 896-paragraph judgment. She set out four questions (as submitted by the plaintiff) that must be answered in order to establish entitlement to damages for harassment:

> 1. Was the conduct of the defendants toward Merrifield outrageous?
>
> 2. Did the defendants intend to cause emotional distress or did they have a reckless disregard for causing Merrifield to suffer from emotional distress?
>
> 3. Did Merrifield suffer from severe or extreme emotional distress?
>
> 4. Was the outrageous conduct of the defendants the actual and proximate cause of the emotional distress?

16. The trial judge found that the elements of the tort were satisfied. ***

The Tort of Harassment

19. The decision under appeal is the first case in which a Canadian appellate court has been required to determine whether a common law tort of harassment exists. What is required in order for a new tort to be recognized or established? Neither party canvassed this issue, yet it is key to the resolution of this appeal. ***

The nature of common law change

20. Common law change is evolutionary in nature: it proceeds slowly and incrementally rather than quickly and dramatically, as McLachlin J. explained in *Watkins v. Olafson*, [1989] 2 S.C.R. 750 (S.C.C.), at p. 760:

[101] *Tam v. Chan* [2015] HKCA 126, [30].
[102] *Sir Elly Kadoorie & Sons Ltd v. Bradley* [2023] HKCFI 1478, [54].
[103] *Sir Elly Kadoorie & Sons Ltd v. Bradley* [2023] HKCFI 1478, [91].

> Generally speaking, the judiciary is bound to apply the rules of law found in the legislation and in the precedents. Over time, the law in any given area may change; but the process of change is a slow and incremental one, based largely on the mechanism of extending an existing principle to new circumstances. While it may be that some judges are more activist than others, the courts have generally declined to introduce major and far-reaching changes in the rules hitherto accepted as governing the situation before them.

21. As she went on to explain at pp. 760-761, courts may not be in the best position to address problems in the law; significant change may best be left to the legislature:

> There are sound reasons supporting this judicial reluctance to dramatically recast established rules of law. The court may not be in the best position to assess the deficiencies of the existing law, much less problems which may be associated with the changes it might make. The court has before it a single case; major changes in the law should be predicated on a wider view of how the rule will operate in the broad generality of cases. Moreover, the court may not be in a position to appreciate fully the economic and policy issues underlying the choice it is asked to make. Major changes to the law often involve devising subsidiary rules and procedures relevant to their implementation, a task which is better accomplished through consultation between courts and practitioners than by judicial decree. Finally, and perhaps most importantly, there is the long-established principle that in a constitutional democracy it is the legislature, as the elected branch of government, which should assume the major responsibility for law reform. ***

Common law change in Ontario

24. The importance of incremental development of the common law was discussed in *Jones v. Tsige*, 2012 ONCA 32, 108 O.R. (3d) 241 (Ont. C.A.) [**§4.1.1.2**], in which this court recognized the existence of a tort of intrusion upon seclusion.

25. Far from being created from whole cloth, the intrusion upon seclusion tort was grounded in what Sharpe J.A. identified as an emerging acceptance of claims for breach of privacy. He carefully reviewed Ontario and Canadian case law, in which he discerned both supportive dicta and a refusal to reject the existence of the tort, and provincial legislation that established a right to privacy while not foreclosing common law development. He also considered academic scholarship, much of which supported the existence of a right to privacy. He drew upon American tort law, which recognizes a right to privacy, as well as the law of the United Kingdom, Australia, and New Zealand. He also noted societal change—in particular, technological developments that pose a threat to personal privacy—and the impetus for reform that it created. "[M]ost importantly," he said, "we are presented in this case with facts that cry out for a remedy": at para. 69.

26. Ultimately, Sharpe J.A.'s conclusion was couched in terms of confirming the existence of the tort rather than simply creating it. ***

Authority does not support the recognition of a tort of harassment

27. The trial judge in this case relied on four trial-level decisions proffered by Merrifield as supporting the existence of the tort and establishing its elements: *Mainland Sawmills Ltd. v. IWA-Canada, Local 1-3567 Society*, 2006 BCSC 1195, 41 C.C.L.T. (3d) 52 (B.C. S.C.); *Savino v. Shelestowsky*, 2013 ONSC 4394, 4 C.C.L.T. (4th) 94 (Ont. S.C.J.); *McHale v. Ontario*, 2014 ONSC 5179 (Ont. S.C.J.); and *McIntomney v. Evangelista Estate*, 2015 ONSC 1419 (Ont. S.C.J.).

28. She erred in doing so. Taken as a whole, these cases confirm neither the existence of the tort nor its elements.

29. *Mainland Sawmills Ltd.* is the key case in the analysis. It underlies all of the subsequent Ontario trial decisions—this, despite the fact that it is a British Columbia trial level authority in which the court did no more than *assume*, for purposes of dealing with an application seeking to have particular claims dismissed, that the tort exists. Far from confirming the existence of the tort, the application judge in *Mainland Sawmills Ltd.* specifically concluded that the law is unclear.

30. As for the elements of the tort, these too were assumed by the application judge in *Mainland Sawmills Ltd.* based on the plaintiffs' submission—a submission that was based on American caselaw arising out of the tort of intentional infliction of emotional distress. In short, *Mainland Sawmills Ltd.* is not authority for either the existence of the tort of harassment or the elements of such a tort.

31. Nevertheless, *Mainland Sawmills Ltd.* has been cited and relied on in several subsequent cases in Ontario in which the tort of harassment has been asserted.

32. In *Savino*, the motion judge does no more than find that although a tort of harassment is "not largely accepted, the door does not appear to be entirely closed on the possibility of this tort's existence": at para. 15. The court cites *Mainland Sawmills Ltd.* as one of the few cases in which the elements of the tort are set out.

33. *McHale* appears to assume the existence of the tort and cites two cases, *Lynch v. Westario Power Inc.*, [2009] O.J. No. 2927 (Ont. S.C.J.), and *Mainland Sawmills*, for the elements of the tort, only to conclude that the tort was not pleaded with sufficient particularity. *Lynch* specifically states that the existence of the tort of harassment is unclear and, like *McHale*, finds that the tort was not pleaded with sufficient particularity in accordance with *Mainland Sawmills* in any event.

34. *P.M.* describes harassment as a "still-developing tort" and cites *Savino* and *Lynch* for the elements of the tort. *P.M.* is the only case cited by the respondent in which damages were awarded for harassment ($5,000), but the defendant in that case was the administrator of the estate of the tortfeasor and did not lead evidence.

35. The trial judge concluded that the law of harassment has evolved since 2011, citing *McHale*, *P.M.*, and *John v. Cusack*, 2015 ONSC 5004 (Ont. S.C.J.), in support. The motion judge in *John* acknowledges that the existence of the tort is a "live legal issue", but assumes its existence for purposes of a summary judgment motion, ultimately dismissing the claim as frivolous and vexatious.

36. This is the extent of the authority cited in support of the existence of the tort. In sum, these cases assume rather than establish the existence of the tort. They are not authority for recognizing the existence of a tort of harassment in Ontario, still less for establishing either a new tort or its requisite elements.

There is no other basis to recognize a new tort

37. Given that authority does not support the existence of a tort of harassment, should this court nevertheless recognize such a new tort?

38. To pose the question in this way is to suggest that the recognition of new torts is, in essence, a matter of judicial discretion—that the court can create a new tort anytime it considers it appropriate to do so. But that is not how the common law works, nor is it the way the common law should work.

39. At the outset, it is important to recognize that this is not a case like *Tsige*, which, as we have said, is best understood as a culmination of a number of related legal developments. As we have explained, current Canadian legal authority does not support the recognition of a tort of harassment.

40. We were not provided with any foreign judicial authority that would support the recognition of a new tort. Nor were we provided with any academic authority or compelling policy rationale for recognizing a new tort and its requisite elements.

41. This is not a case whose facts cry out for the creation of a novel legal remedy, as in *Tsige*. ***

42. *** In this case, there are legal remedies available to redress conduct that is alleged to constitute harassment. The tort of IIMS is one of these remedies ***.

43. In summary, the case for recognizing the proposed tort of harassment has not been made. On the contrary, *** there are good reasons opposing the recognition of the proposed tort at this time.

The Intentional Infliction of Mental Suffering (IIMS)

44. The tort of IIMS [§3.2] is well established in Ontario and may be asserted as a basis for claiming damages for mental suffering in the employment context. ***

48. Plainly, the elements of the tort of harassment recognized by the trial judge are similar to, but less onerous than, the elements of IIMS. Put another way, it is more difficult to establish the tort of IIMS than the proposed tort of harassment, not least because IIMS is an intentional tort, whereas harassment would operate as a negligence-based tort.

49. Given the similarities between IIMS and the proposed tort of harassment, and the availability of IIMS in employment law contexts, what is the rationale for creating the new tort?

50. Merrifield submits that the new tort must be created because there is an increased societal recognition that harassment is wrongful conduct. *** He asserts that the decision of the Supreme Court in *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543 (S.C.C.) [§19.2.1.3], supports the creation of the tort of harassment, and that the test the trial judge recognized for the tort is sufficiently stringent to limit the reach of the tort.

51. We disagree.

52. *Saadati* is concerned with proof of mental injury in the context of a known cause of action. Although it may make damages for mental injury more readily available in negligence actions, it does not require the recognition of a new tort. ***

53. In summary, while we do not foreclose the development of a properly conceived tort of harassment that might apply in appropriate contexts, we conclude that Merrifield has presented no compelling reason to recognize a new tort of harassment in this case. ***

REFLECTION:

- *In what sense did the trial judge err in recognising a common law tort of harassment in this case?*
- *What is distinctive about the proposed elements of a tort of harassment? What might be problematic about the proposed tort elucidated by the trial judge?*
- *When is it legitimate for a court to recognise a new tort at common law?*

5.2.3 Lu v. Shen [2020] BCSC 490

✗**REF: §3.2.5, §4.2.4, §5.1.1, §9.3.8, §9.8.2.4**

ADAIR J.: ***

96. *** [T]he "tort of harassment" is doubtful on the authorities. ***

REFLECTION:

- *Should Adair J. nevertheless have analysed the relevant authorities to determine whether the common law of British Columbia ought to be developed in the direction of recognising a distinctive tort of harassment?*

5.2.4 Caplan v. Atas [2021] ONSC 670

✗**REF: §5.1.2, §6.8.4, §9.8.2.7, §20.7.3**

CORBETT J.:

1. These cases concern extraordinary campaigns of malicious harassment and defamation carried out unchecked, for many years, as unlawful acts of reprisal. Nadire Atas, has used the internet to disseminate vicious falsehoods against those towards to whom she bears grudges, and towards family members and associates of those against whom she bears grudges. Atas is destitute and apparently content to revel in ancient grievances, delighting in legal process and unending conflict because of the misery and expense it causes for her opponents.

2. Cyber-stalking is the perfect pastime for Atas. She can shield her identity. She can disseminate vile messages globally, across multiple unpoliced platforms, forcing her victims to litigate in multiple jurisdictions to amass evidence to implicate her, driving their costs up and delaying the process of justice. Unrestrained by basic tenets of decency, when she is enjoined from attacking named plaintiffs, she moves her focus to their siblings, their children, their other family members and associates, in a widening web of vexatious and harassing behaviour.

3. Serious mental illness must underlie this conduct: what person of sound mental health would throw away more than a decade of her life, her material prosperity, and risk her liberty, for such paltry visceral satisfaction: the obsession seems clear. When this conduct is placed alongside the apparent grievances that have spurred Atas on, the disproportionality—even as apparently apprehended by Atas herself—is so unbalanced as to impugn her grasp on reality: what mentally sound person would devote so much time and energy to such negative unproductive activities? And then one must consider some of the persons Atas has been willing to attack to cause harm to her primary victims: persons unknown to her, used by her as ammunition to hurt others. Her lack of empathy is sociopathic.

4. Freedom of speech and the law of defamation have developed over centuries to balance the importance of preserving open public discourse, advancing the search for truth (which must allow for unpopular and even incorrect speech), protecting personal reputations, promoting free democratic debate, and enforcing personal responsibility for statements made about others. The value of freedom of speech, and the need for some limits on that freedom, have long been recognised as central to a vibrant and healthy democracy and, frankly, any decent society.

5. The internet has cast that balance into disarray.

6. This case illustrates some of the inadequacies in current legal responses to internet defamation and harassment. This court's response is a solution tailored for these cases and addresses only the immediate problem of a lone publisher, driven by hatred and profound mental illness, immune from financial constraints and (dis)incentives, apparently ungovernable except through the sledgehammer response of incarceration. It remains to be seen whether there is any way to control Atas' unacceptable conduct other than by locking her up and/or compelling her to obtain treatment. Whatever the solution may be that brings an end to her malicious unlawful attacks on other people, it is clear that the law needs better tools, greater inter-jurisdictional cooperation, and greater regulation of the electronic "marketplace" of "ideas" in a world with near universal access to the means of mass communication. Regulation of speech carries with it the risk of over-regulation, even tyranny. Absence of regulation carries with it the risk of anarchy and the disintegration of order. As should be clear from the discussion that follows, a situation that allows someone like Atas to carry on as she has, effectively unchecked for years, shows a lack of effective regulation that imperils order and the marketplace of ideas because of the anarchy that can arise from ineffective regulation. ***

7. *** As of the time that these motions were argued, there have been as many as 150 victims of Atas' attacks. ***

92. *** As argued by the plaintiffs, the conduct falls in the area where the civil and criminal law intersect. The law should respond to this conduct to compensate victims, to express the law's disgust and firm rejection of the conduct, to punish for wrongful conduct, to deter Atas and others from this sort of conduct in future, and to bring Atas' wrongful conduct to an end.

93. The law's response, thus far, has failed to respond adequately to Atas' conduct. It is evident that Atas enjoys the ongoing conflict. *** [I]t is still not clear what Atas conceives as the benefit she obtains from her conduct. At one point she was a qualified real estate professional and owned two income properties. Now she is destitute, lives in shelters, owns no property other than the clothes on her back and a cellphone, and is an undischarged bankrupt. She has already spent 74 days in jail for contempt of court unrelated to her alleged violations of the injunctions, and plaintiffs are seeking substantial jail sentences for Atas alleged breaches of the injunctions.

94. In sum, there have been severe consequences for Atas for her conduct. These consequences address the court's concerns about general deterrence. Although Atas herself has not been deterred, the

consequences she has suffered and may yet suffer would deter most people from doing what she has done. ***

95. Compensation, though usually a primary goal of the civil justice system, is not available from a person such as Atas. On the record, Atas has been insolvent for years. ***

96. Expressions of the law's disapprobation in a civil proceeding are usually limited to awards of punitive and exemplary damages—claims that have been abandoned in this proceeding because of their futility and to avoid delay as a result of Atas' assignment in bankruptcy. Again, Atas' poverty leaves her judgment-proof.

97. This leaves two closely related goals: specific deterrence and preventing Atas from continuing or repeating this conduct. The first aspect addresses Atas' motive force. The second addresses creating practical impediments to Atas repeating or continuing this conduct, whatever she may wish to do. ***

99. Online harassment, bullying, hate speech, and cyber stalking straddle criminal and civil law. Harmful internet communication has prompted many jurisdictions to amend or pass legislation to deal with the issue. The courts too have been challenged to recognize new torts or expand old ones to face the challenges of the internet age of communication. ***

163. The prevalence of online harassment is shocking. In Canada, as of October 2016, about 31% of social media users were harassed. Studies on the effects of cyber harassment show the potentially devastating impact of these attacks ***. ***

164. *** The Court of Appeal's decision [in *Merrifield v. Canada (Attorney General)*, 2019 ONCA 205 (Ont. C.A.)] not to recognize the new tort [of harassment] was based on two critical conclusions. First, the Court concluded that the tort of intentional infliction of mental suffering was a sufficient remedy in the circumstances of *Merrifield*. Second, the court held that: "(w)e were not provided with any foreign judicial authority that would support the recognition of a new tort. Nor were we provided with any academic authority or compelling policy rationale for recognizing a new tort and its requisite elements" (at para. 40).

165. In the end, the Court of Appeal "[did] not foreclose the development of a properly conceived tort of harassment that might apply in appropriate contexts, we conclude that Merrifield has presented no compelling reason to recognize a new tort of harassment in this case."

166. Except for the US, no other common law court has recognized the common law tort of harassment. Ontario does not have a comprehensive statute akin to the English, Manitoba and Nova Scotia legislation. There have been some developments, including recognition of the tort of intrusion upon seclusion. ***

168. In my view, the tort of internet harassment should be recognized in these cases because Atas' online conduct and publications seek not so much to defame the victims but to harass them. Put another way, the intent is to go beyond character assassination: it is intended to harass, harry and molest by repeated and serial publications of defamatory material, not only of primary victims, but to cause those victims further distress by targeting persons they care about, so as to cause fear, anxiety and misery. The social science literature *** makes it clear that real harm is caused by serial stalkers such as Atas.

169. The tort of intentional infliction of mental suffering [§3.2] is simply inadequate in these circumstances: it is designed to address different situations. *** It is not part of the test that the conduct be persistent and repetitive.

170. I do not have evidence that the plaintiffs have suffered visible and provable illnesses as a result of Atas' conduct. One would hope that a defendant's harassment could be brought to an end before it brought about such consequences. To coin a phrase from Sharpe J.A., quoted by the Court of Appeal in *Merrifield*, "[T]he law of this province would be sadly deficient if we were required to send [the plaintiff] away without a legal remedy." The law would be similarly deficient if it did not provide an efficient remedy until the consequences of this wrongful conduct caused visible and provable illness.

171. The plaintiffs propose, drawn from American case law[104] the following test for the tort of harassment in internet communications: where the defendant maliciously or recklessly engages in communications conduct so outrageous in character, duration, and extreme in degree, so as to go beyond all possible bounds of decency and tolerance, with the intent to cause fear, anxiety, emotional upset or to impugn the dignity of the plaintiff, and the plaintiff suffers such harm.

172. The facts of these cases clearly meet this stringent test.

173. I am mindful that *Merrifield* is a recent case and strongly cautions against quick and dramatic development of the common law (para. 20). Often courts are not in the best position to address complex new legal problems (para. 21). As my brief review of legal developments in this area shows, this is a developing area of the law, legislatures have tried to fashion responses, and the issue has been under active recent consideration by the Law Commission of Ontario. It would be better if changes in this area of the law came from the legislature rather than a trial judge.

174. However, the facts of the case before me are very different from the facts in *Merrifield*. They are much closer to the situation in which the Court of Appeal recognized the tort of intrusion on seclusion, *Jones v. Tsige*, 2012 ONCA 32 (Ont. C.A.), in which Sharpe J.A. stated: "we are presented in this case with facts that cry out for a remedy". As I said at the outset, the law's response to Atas' conduct has not been sufficient, and traditional remedies available in defamation law are not sufficient to address all aspects of Atas' conduct. Harassment, as a concept, is recognized in the criminal law (*Criminal Code of Canada*, RSC 1985, c. C-46, as am., s.264). It is well understood in the context of family law. *** The concern, of course, on the other side of the question, is that people are not always on their best behaviour, and not all, or perhaps even most, conduct intended to annoy another person should be of concern to the law. It is only the most serious and persistent of harassing conduct that rises to a level where the law should respond to it.

175. The facts of these cases fit within that description. ***

176. In my view these cases do not fit within the tort of invasion of privacy or "intrusion upon seclusion" [§4.1.1]. Atas has not invaded the plaintiffs' private affairs or concerns (the second branch of the test) (*Jones v. Tsige*, 2012 ONCA 32 (Ont. C.A.), para. 71 [§4.1.1.2]). She has persistently published false statements about a broad range of people to cause harm to her primary victims. ***

REFLECTION:

- *Did Corbett J. set out a compelling basis for distinguishing Merrifield in this case?*
- *Can a principled distinction be drawn between "harassment" and "internet harassment"?*

5.2.5 Ahluwalia v. Ahluwalia [2023] ONCA 476

✗**REF: §2.3.5, §3.2.2, §9.4.4, §9.5.5**

BENOTTO J.A. (TROTTER J.A. AND ZARNETT J.A. concurring): ***

50. The principles for the creation of a new tort were discussed by this court in *Merrifield v. Canada (Attorney General)*, 2019 ONCA 205, 145 O.R. (3d) 494. There, the trial judge had recognized the new tort of harassment. This court cautioned that common law change is evolutionary. It happens slowly and significant change is best left to the legislature. ***

51. When remedies already exist, a new tort is not required. ***

52. A new tort is not required when the only difference from established torts is the quantum of damages. In *Non-Marine Underwriters Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551 [§6.3.1.1], the court explained, at para. 27, that the tort of sexual battery was not necessary because the harms suffered by the plaintiff were addressed by the established tort of battery and the sexual component only

[104] See Marnie Shiels, 'Civil Causes of Action for Stalking Victims', *Victim Advocate*, Fall 2000, found at www.victimsofcrime.org.

went to damages.

53. *Merrifield* left open the possibility that there could be a situation arising where existing torts do not address the impugned conduct. This is what occurred in *Caplan v. Atas*, 2021 ONSC 670, where the tort of internet harassment was recognized. Corbett J. concluded that existing torts did not adequately respond to the extraordinary behaviour before him. The conduct spanned over 20 years and went beyond the bounds of decency and tolerance. Yet, the plaintiff had not established injury, so intentional infliction of emotional distress was not available. ***

54. Corbett J. defined the test for internet harassment as "communications conduct so outrageous in character, duration, and extreme in degree, so as to go beyond all possible bounds of decency and tolerance, with the intent to cause fear, anxiety, emotional upset or to impugn the dignity of the plaintiff, and the plaintiff suffers such harm" (para. 171). ***

55. Similarly, in *Alberta Health Services v. Johnston*, 2023 ABKB 209, Feasby J. found that existing torts left a gap in the law with respect to the misinformation, conspiracy theories and hate that had been promulgated by the defendant. He therefore recognized a tort of harassment, though defined slightly differently from the tort recognized in *Caplan*.

56. In *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, [2020] 1 S.C.R. 166, Abella J. said, at para. 118, that the common law develops to "keep law aligned with the evolution of society". At paras. 237 *et seq.*, Brown and Rowe JJ. summarized Canadian jurisprudence and set out a test for the recognition of new torts. While their reasons were dissenting, they deal with an issue not addressed by the majority and so do not conflict with the binding holding in any way. The direction is helpful:

> Three clear rules for when the courts will not recognize a new nominate tort have emerged: (1) The courts will not recognize a new tort where there are adequate alternative remedies (see, for example, *Scalera*); (2) the courts will not recognize a new tort that does not reflect and address a wrong visited by one person upon another (*Saskatchewan Wheat Pool*, at pp. 224-25 [§14.1.2.1]); and (3) the courts will not recognize a new tort where the change wrought upon the legal system would be indeterminate or substantial (*Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (SCC), at paras. 76-77). Put another way, for a proposed nominate tort to be recognized by the courts, at a minimum it must reflect a wrong, be necessary to address that wrong, and be an appropriate subject of judicial consideration. ***

92. As set out in *Merrifield*, this desirable gradual evolution, with significant change best left to the legislature, means that new torts should not be created where existing torts suffice. The existing torts are flexible enough to address the fact that abuse has many forms. Recurring and ongoing abuse, intimidation, domination and financial abuse exist can be patterned into daily life. Trial judges should be alive to these dynamics. The trial judge here recognized the ability of existing torts to address the harm when she found that liability under the existing torts had in fact been established.

93. The trial judge erred by creating a new tort which was not required here. ***

REFLECTION:

- *What is distinctive about harassment as a civil wrong? Does a tort of harassment fill a gap in the law between the torts of assault, intentional infliction of mental suffering, invasion of privacy and defamation?*
- *Having regard to the Supreme Court of Canada's guidance in Nevsun, should Canadian courts recognise a tort of harassment?*
- *Did Caplan v. Atas really entail a situation "where existing torts do not address the impugned conduct"?*

5.2.6 Gokey v. Usher & Parsons [2023] BCSC 1312

✗**REF: §2.2.1, §2.3.3, §4.2.3, §7.1.2, §9.3.4, §9.4.3, §9.5.4, §9.8.2.1, §10.2.1, §20.8.1, §21.1.3**

PUNNETT J.: ***

7. Mr. Gokey was the sole witness for the plaintiffs. The defendants were both witnesses. In addition, they

called *** Carol Wagner, the neighbour of the defendants on the other side of their property from Mr. and Mrs. Gokey ***. ***

81. The plaintiffs allege the defendants have harassed and inflicted mental suffering upon them by subjecting them to "a continuous bombardment of constant hatred and intrusions into their lives as to put especially Mr. Gokey in a constant and escalating state of fear for his personal safety and life every moment he spent in Sandspit at the Gokeys' residence" consisting of "[c]onstant surveillance, trespass on the Gokeys' property, multiple complaints made to governmental authorities … the chainsaw incident ***, and continuing assaults on Mr. Gokey's person … with the obvious intent of driving the Gokeys out of Canada …". ***

208. The plaintiff Mr. Gokey submits: *** These cumulative actions by Defendants, and those acting in concert with them, are the underpinnings of an actionable tort of harassment. … ***

210. On the assumption the tort exists in Canada, the plaintiffs must prove that they suffered severe or extreme emotional distress caused by the defendants. As noted in *Mainland* [*Sawmills Ltd. et al v. IWA – Canada et al*, 2006 BCSC 1195]:

> 19. Though this tort does not require proof of a visible and provable illness, it does require proof of "severe or extreme emotional distress". As described in *Graves* [*v. City of Stockton*, LEXIS 13116 (District Court 2006)] quoting, with approval from *Girard v. Ball* 125 Cal. App. (3d) 772 (1981), "[s]evere emotional distress means … emotional distress of such substantial quantity or enduring quality that no reasonable person in a civilized society should be expected to endure it". ***

211. The Court in *Mainland* assumed for the purpose of its decision that the tort of harassment existed in British Columbia without finding that it actually existed: *Christison v. Parr*, 2022 BCSC 656 at para. 33, citing *Mainland* at paras. 12-16. Given the conclusion I have reached on the plaintiffs' harassment claim I need not determine if the tort of harassment exists in British Columbia.

212. The plaintiff Mr. Gokey alleges that Mr. Usher held an anti-American animus against him and his wife. He made similar assertions regarding Ms. Wagner. He was of the view they sought to "drive" them out of Canada. That assertion firstly ignores the fact that for many years they were friends and in fact the defendants had visited them in Washington State. Secondly, he produced no evidence that the defendants expressed such a view and when Ms. Wagner told him to go home, according to her that was reference to his home in Sandspit. The assertion is without merit. What is clear is that the differences between the plaintiff Mr. Gokey and the defendants are due to his conduct, not because he is an American. ***

214. It is not in issue that the defendants have made many reports to the RCMP and regulatory authorities about Mr. Gokey's conduct, including the smoke and smell he was creating, the signs about Ms. Parsons' daughter and the June 2013 incident at the beach. They are not alone in doing so. Ms. Wagner testified she had made approximately five complaints to the RCMP and conservation officers about Mr. Gokey's conduct. ***

217. The plaintiffs rely as well on phone messages left on their Washington phone answering machine from Mr. Usher as well as the alleged poisoning of their trees, the hosing of Mr. Gokey while welding, trespass on their property, the sign with bullet holes being a veiled threat, the screws in the retaining railroad ties and the incidents involving the three trucks. Mr. Gokey testified these matters caused him and his wife great anxiety, emotional distress and fear for their personal well-being and safety when in Sandspit. ***

221. Mr. Usher testified he did not mean to threaten Mr. Gokey or Mrs. Gokey. He was however desperate to try and get Mr. Gokey to cease his conduct because his wife found it physically threatening and emotionally abusive. The evidence does not support Mr. Gokey's claim that the messages were intended to be threatening. Rather, they were those of a justifiably concerned husband about the effect Mr. Gokey's actions were having on his wife. ***

223. The evidence does not support a finding that the defendants harassed the plaintiffs. The defendants did not engage in any "outrageous" conduct. I do not accept that Mr. Gokey experienced a "constant and escalating fear for his personal safety and life every moment he spent in Sandspit at the Gokeys' residence".

The evidence is to the contrary. Mr. Gokey has engaged in a pattern of overt provocation of the defendants and appears to enjoy doing so. He is deliberately confrontational in his interactions with the defendants. For example, he forced Mr. Usher to drive around him during the "second pass" on January 8, 2022 by standing out in the public roadway along Beach Road while Mr. Usher was engaged in snow clearing. The only harassment in this matter arises from the conduct of Mr. Gokey, who clearly has sought and continues to seek to cause distress to the defendants.

224. The plaintiffs' claim of harassment is dismissed. ***

REFLECTION:

- *Punnett J. refrained in this case from determining whether a tort of harassment exists in British Columbia. In light of developments in other Canadian provinces, would it be an incremental evolution of the common law of British Columbia for its courts to recognise a tort of harassment? Or would such a step be inappropriate judicial law-making?*

5.2.7 Cross-references

- *Fitzpatrick v. Orwin, Squires & Squires* [2012] ONSC 3492, [169]: §9.5.6.

5.2.8 Further material

- McGill Law Journal Podcast, "An End to Cyberstalking? *Caplan v. Atas* and the New Tort of Online Harassment" (Feb 9, 2022) 🎧.
- Stereo Decisis Podcast, "The New Tort Trend?" (Mar 31, 2022) 🎧.
- D. Priel, "'That Is Not How the Common Law Works': Paths to Tort Liability for Harassment" (2021) 52 Ottawa L Rev 87.
- K. Sun & S. Sérafin, "The Nominalism of the New Nominate Torts" (2024) 2 Supreme Court L Rev (3d) (*forthcoming*).

6 DEFENCES (I)

✗REF: §18

6.1 Foundational concepts

J.C.P. Goldberg, "Inexcusable Wrongs" (2015) 103 California L Rev 467, 470-473

*** [I]t is important to distinguish excuses from denials, claims of general incapacity, and justifications.[105] ***

A *denial* maintains that an actor has not committed the wrong(s) she is alleged to have committed. *** [A] tort defendant who is sued for battery and who argues that she acted without any intent to touch another person denies having committed that tort.[106] A valid denial obviates the need for any further plea: there is no need to justify or excuse one's conduct because it does not meet the definition of the legal wrong one is alleged to have committed.

Unlike a denial, a claim of *general incapacity* is an effort to establish that the alleged wrongdoer is not an appropriate candidate for legal accountability even though her behavior meets the definition of the alleged wrong. To the extent that infancy precludes punishment or liability, it constitutes a general incapacity defense.[107] ***

To plead a *justification* is to claim that one's conduct was permissible, all things considered, even though it meets the definition of a wrong. For example, in both tort and criminal law, the self-defense privilege permits a person to strike another as a proportionate response to an imminent threat of bodily harm posed by that other.[108] In such a case, conduct that is in the first instance proscribed—that meets the definition of criminal assault or tortious battery—is deemed permissible once the full circumstances are taken into account.[109]

Unlike a justification, an *excuse* not only concedes that the actor's conduct meets the definition of the alleged wrong, but also that the conduct was wrongful when all things are considered.[110] *** A person who offers an excuse points to some "cause" that distracted her, misled her, clouded her judgment, weakened her resolve, or otherwise made it too difficult for her to refrain from doing what she ought not to have done. By invoking impediments such as these, an excuse renders the commission of a wrong more understandable and thereby generates a claim to leniency.[111] *** […continue reading]

REFLECTION:

- *Denials, claims of general incapacity, and justifications all negate tortious liability where they are proven on the facts. Why might Prof. Goldberg nevertheless maintain that it is important to understand these categories as conceptually distinct?*

[105] This taxonomy generally follows the taxonomy developed by Paul Robinson and recently applied to tort law by James Goudkamp. *See* JAMES GOUDKAMP, TORT LAW DEFENCES 82 n.42 (2013) (listing various taxonomies); Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199 (1982). ***

[106] RESTATEMENT (SECOND) OF TORTS § 13 (1965) (defining battery to require an intentional or knowing touching of another).

[107] 4 WILLIAM BLACKSTONE, COMMENTARIES *22 ("Infants, under the age of discretion, ought not to be punished by any criminal prosecution whatever."). ***

[108] MODEL PENAL CODE § 3.04 (describing the conditions under which use of force against another is justifiable to protect oneself from harm); RESTATEMENT (SECOND) OF TORTS §§ 63, 65 (1965) (same).

[109] There is a scholarly debate as to whether a justification renders the relevant conduct not only permissible but something that ought to be done. Marcia Baron, *Justifications and Excuses*, 2 OHIO ST. J. CRIM. L. 387, 396 (2005) (noting the debate). ***

[110] GEORGE FLETCHER, RETHINKING CRIMINAL LAW § 10.3.4, at 811 (Oxford Univ. Press 2000) (1978). ***

[111] *See* FLETCHER, *supra*, § 10.3.2, at 804 ***. ***

6.1.1 Further material

- Just Torts Podcast (U Sydney), "Defences to Intentional Torts" (Oct 27, 2017) 🎧.
- A. Botterell, "A Primer on the Distinction between Justification and Excuse" (2009) 4 Philosophy Compass 172.
- J.C.P. Goldberg, "Inexcusable Wrongs," Harvard Law School Eli Goldston Chair Lecture (Dec 13, 2013) 📺.

6.2 Non-defences (excuses)

J.C.P. Goldberg, "Inexcusable Wrongs" (2015) 103 California L Rev 467, 468

Like a stern parent, tort law has little patience for excuses.[112] It instructs us to refrain from attacking others even when we are provoked or under duress. It requires us to avoid trespassing on or converting others' property even out of necessity. It insists that we be careful even in the face of pressures that would induce carelessness in a cautious and resilient person. And excuses carry little or no weight when courts determine the compensation that tortfeasors owe their victims. *** […continue reading]

REFLECTION:
- *Criminal law tends to recognise excuses such as duress and provocation. Why is tort law different?*
- *Should tort law be more forgiving when a defendant has an understandable excuse for their actions?*

6.2.1 Duress

6.2.1.1 Gilbert v. Stone (1648) Style 72, 82 E.R. 539 (KB)

England Court of King's Bench – (1648) Style 72, 82 E.R. 539

Gilbert brought an action of trespasse *quare clausum fregit* [unlawful entry upon land], and taking of a gelding, against Stone. The defendant pleads that he for fear of his life, and wounding of twelve armed men, who threatened to kill him if he did not the fact, went into the house of the plaintiff, and took the gelding. The plaintiff demurred to this plea.

Roll Justice: This is no plea to justifie the defendant; for I may not do a trespasse to one for fear of threatnings of another, for by this means the party injured shall have no satisfaction, for he cannot have it of the party that threatned. Therefore let the plaintiff have his judgement.

REFLECTION:
- *Was it just to hold Stone liable when he was acting under the duress of death-threats?*
- *How is this case distinguishable from Smith v. Stone (§2.1.1)?*

6.2.2 Provocation

6.2.2.1 Lane v. Holloway [1967] EWCA Civ 1

England and Wales Court of Appeal – [1967] EWCA Civ 1

✗**REF: §18.3.4**

MASTER OF THE ROLLS:

1. On July 21st 1966, the peace of the Ancient Borough of Dorchester was disturbed. Mr. Lane, the plaintiff, was a retired gardener aged 64. He was living in a quiet court just off High East Street. Backing onto that

[112] JAMES GOUDKAMP, TORT LAW DEFENCES 82–83 (2013) (arguing that Anglo-American tort doctrine does not recognize excuses defeating liability and citing other scholars who make the same claim).

court there was a café which was run by a young man, Mr. Holloway, the defendant, aged 23. The people in the court did not like the sound of a juke-box from the café. They also objected because the customers relieved themselves at night in the courtyard. To meet their objection Mr. Holloway began to build some lavatories. But relations were strained. On July 21st 1966, at about 11 o'clock at night Mr. Lane, the 64-year-old, came back from the public-house. He stopped outside his door and started talking to his neighbour, Mrs. Brake. Mr. Holloway was in bed drinking a cup of coffee. His wife, hearing Mr. Lane and Mrs. Brake talking, called out to them: "You bloody lot." Mr. Lane replied: "Shut up, you monkey-faced tart." Mr. Holloway sprang up and said: "What did you say to my wife?" He said it twice. Mr. Lane said: "I want to see you on your own," implying a challenge to fight. Whereupon Mr. Holloway came out in his pyjamas and dressing-gown. He walked up the courtyard to the place where Mr. Lane was standing at his door. He moved up close to Mr. Lane in a manner which made Mr. Lane think that he might himself be struck by Mr. Holloway. Whereupon Mr. Lane threw a punch at Mr. Holloway's shoulder. Then Mr. Holloway drew his right hand out of his pocket and punched Mr. Lane in the eye, a very severe blow. *** It was indeed a very severe wound. It needed 19 stitches. ***

3. The first question is: Was there an assault by Mr. Holloway for which damages are recoverable in a civil court? I am quite clearly of opinion that there was. ***

9. *** The defendant has done a civil wrong and should pay compensation for the physical damage done by it. Provocation by the plaintiff can properly be used to take away any element of aggravation. But not to reduce the real damages. I ought to say in fairness to the Judge that he did not have the benefit of the case in the High Court of Australia [of *Fontin v. Katapodis* (1962) 108 C.L.R. 177]. We have had the benefit of it.

10. On the evidence this young man went much too far in striking a blow out of all proportion to the occasion. It must have been a savage blow to produce these consequences. I think the damages ought to be increased from £75 to £300 and I would allow the appeal accordingly. ***

LORD JUSTICE SALMON AND LORD JUSTICE WINN concurred.

REFLECTION:

- *What is provocation? Why is it not an excuse? Does provocation have any relevance to tort liability?*
- *The Canadian law as to the effect of provocation on the doctrine of mitigation (§20.2) has been described as "muddled."[113] Should provocation operate to mitigate compensatory damages (§9.3), or merely to take away a plaintiff's claim to aggravated damages (§9.4) or punitive damages (§9.5)?*

6.2.3 Mistake of fact

6.2.3.1 Wilson v. New Brighton Panelbeaters Ltd [1989] 1 NZLR 74 (NZ HC)

New Zealand High Court – [1989] 1 NZLR 74

✗**REF: §8.1.1, §8.2.1, §9.2.2**

TIPPING J.:

1. On 14 September 1985 an unexpected misfortune befell the appellant. He had gone out with his family to the beach leaving his 1969 Hillman parked in a carport up the drive of his home. On his return the

[113] *Wang v. Niu*, 2023 BCCA 153, [33] *per* Groberman J.A., continuing:
"33. *** There are at least three different approaches: Newfoundland, Nova Scotia and Alberta all purport to treat provocation as a factor "mitigating" damages, but none have explained the mechanism by which compensatory damages are mitigated, nor have they explained the process for assessment of the "mitigation". Ontario and Manitoba accept that provocation is a "mitigating factor", but only to the extent of reducing the punitive and aggravated damages that are awarded against a defendant. Thus, the reduction in damages will be in accordance with an assessment of the degree of aggravation of damages, or the degree to which punishment is required.
34. British Columbia, while purporting to accept the proposition that provocation "mitigates" damages, has not only failed to explain the concept, but also further muddied the waters by applying a comparative fault approach to the issue, seemingly treating the issue as a matter of liability rather than quantum of damages. ***"

appellant noticed that the vehicle was missing. Later inquiry revealed that it had been towed away by an employee of the respondent which operates a tow truck business. Further inquiry revealed that both the appellant and the respondent had been the subject of a cruel and probably fraudulent hoax. ***

21. *** The fact that I may take away someone else's goods honestly and without negligence does not make my conduct vis-a-vis the owner lawful or amount to lawful justification. That this is so is made quite clear in Fleming, *The Law of Torts* (6th ed, 1983) at p 47 where the learned author says:

> "Trespass to chattels is primarily a wrong of *intentional* [author's emphasis] interference, now that inadvertent damage has long ago become the exclusive concern of negligence. The requisite intent, however, does not necessarily presuppose moral fault. It is present whenever the actor deliberately uses or otherwise interferes with a chattel, without so much as an inkling that this happens to be violating someone else's possessory rights."

22. Further support for this proposition can be found in *Salmond and Heuston on Torts* (19th ed, 1987) at p 118 where under a section headed "Ineffectual Defences" the learned authors discuss what they describe as Mistake. They say:

> "Although a conversion is necessarily an international wrong in the sense already explained, it need not be knowingly wrongful. A mistake of law or fact is no defence to anyone who intentionally interferes with a chattel in a manner inconsistent with the right of another. *** He does so *suo periculo* and takes the risk of the existence of a sufficient lawful justification for the act; and if it turns out that there is no justification, he is just as responsible in an action of conversion as if he had fraudulently misappropriated the property."

23. Reference is then made to the dictum as regards auctioneers of Lord Goddard CJ in *Sachs v. Miklos* [1948] 2 KB 23, 37: "That is one of the risk of their profession."

24. I think the same may be said of tow truck operators who have the misfortune to be taken in by the sort of fraudulent hoax which appears to have been perpetrated in the present case. I am unable to accept Miss O'Connor's proposition that absence of fault or an honest belief that one's actions are lawful amounts to a general defence either to trespass or conversion. ***

REFLECTION:

- *Was it just to hold the defendant liable for making an honest mistake?*
- *Is there anything the defendant could have done to protect himself from the consequences of tort liability?*

6.2.3.2 Cross-references

- *Gambriell v. Caparelli* [1974] CanLII 679 (ON CC), [18]-[22]: §6.5.1.
- *Slater v. Pedigree Poultry Ltd* [2022] SKCA 113, [107]-[109]: §10.12.1.

6.2.4 Mistake of law

6.2.4.1 R. v. Tim [2022] SCC 12

Supreme Court of Canada – 2022 SCC 12

✗**REF: §6.6.2, §6.6.8.1**

JAMAL J. (WAGNER C.J., MOLDAVER, CÔTÉ, ROWE, KASIRER JJ. concurring): ***

2. The police investigated the appellant, Mr. Sokha Tim, for a traffic collision after he hit a roadside sign on a busy road in Calgary and kept driving until his car stopped. An officer found the appellant standing on the roadside by his damaged car and asked him for his driver's licence, vehicle registration, and proof of insurance. When the appellant returned to his car to get these documents, the officer saw him try to hide a yellow pill that the officer correctly identified as gabapentin, a prescription drug that the officer mistakenly

believed was a controlled substance under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ("*CDSA*"). The officer then arrested him for possession of a controlled substance. The police conducted a pat-down search of the appellant and searched his car incident to arrest, finding fentanyl, other illegal drugs, and ammunition. Because the police saw bullets falling from the appellant's pants and believed that he was hiding something, they conducted a second pat-down search, this time finding a loaded handgun. A strip search at the police station found no further contraband. ***

7. *** [G]abapentin *** is not a controlled substance but rather a prescription painkiller and anti-seizure medication. ***

(c) Precedent

27. This Court first ruled that a lawful arrest cannot be based on a mistake of law in *Frey v. Fedoruk*, [1950] S.C.R. 517. *Frey* involved a civil action for false imprisonment brought by a "peeping tom" against a police officer and another person after the officer arrested the voyeur for breach of the peace. The Court held that the conduct for which the plaintiff was arrested was not a criminal offence and should not be recognized as a new offence at common law (voyeurism is now contrary to s. 162(1) of the *Criminal Code*). *** [T]he Court in *Frey* also held that an officer's mistake of law in believing that certain conduct was a criminal offence could not provide "reasonable and probable grounds" for a warrantless arrest under what was then s. 30 of the *Criminal Code* (p. 531). *** As Cartwright J. (as he then was) explained in *Frey*, at p. 531: ***

> [The statutory power of warrantless arrest] *cannot, I think, mean that a Peace Officer is justified in arresting a person when the true facts are known to the Officer and he erroneously concludes that they amount to an offence, when, as a matter of law, they do not amount to an offence at all.* "*Ignorantia legis non excusat*" ["Ignorance of the law is no excuse"]. [Emphasis added.]

28. *Frey* was recently affirmed on this point in *Kosoian v. Société de transport de Montréal*, 2019 SCC 59, [2019] 4 S.C.R. 335. In *Kosoian*, a subway passenger sued the police when she was arrested and searched for refusing to comply with a subway pictogram warning passengers to hold an escalator handrail. The Court ruled that the pictogram was simply a warning and did not create an offence, and the police officer's error of law in believing otherwise did not provide reasonable and probable grounds to arrest the passenger without a warrant under Quebec's *Code of Penal Procedure*, CQLR, c. C-25.1 ("*C.P.P.*")[114] *** See, to similar effect, *** *R. v. Douglas*, 2021 ONCJ 562, at paras. 47-48, per Rose J. ("A lawful arrest must have lawful grounds, which excludes the possibility of a mistake of law."). See also *** E. G. Ewaschuk, *Criminal Pleadings & Practice in Canada* (2nd ed. (loose-leaf)), at § 5:59 ("[A]n officer who arrests someone on the basis of a 'non-existent offence' may be civilly liable".). ***

REFLECTION:

- *Does it make sense to impugn a police officer's honest mistake about the legality of their actions? Why shouldn't the law only impugn actions undertaken in bad faith?*

6.2.4.2 Cross-references

- *Bracken v. Vancouver Police Board* [2006] BCSC 189, [54]-[57]: §4.2.6.
- *R v. Le* [2019] SCC 34, [44]: §7.1.6.

[114] See further *Kosoian v. Société de transport de Montréal*, 2019 SCC 59, [2019] 4 S.C.R. 335, [56]:
56. In *Chartier* [*v. Attorney General of Quebec*, [1979] 2 S.C.R. 474 (SCC)], Pratte J. *** stated ***: "*The authority of a police officer is not of course unlimited; he must know its limits*, and if he disregards or ignores them, he commits a fault: ignorance of what a person is supposed to know is not an excuse …" (p. 513 ***). This Court also discussed this duty in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353: "While police are not expected to engage in judicial reflection on conflicting precedents, they are rightly expected to *know what the law is*" (para. 133 (emphasis added); see also *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, at para. 149 [§6.6.5]). The Court also emphasized this point in *R. v. Genest*, [1989] 1 S.C.R. 59 (SCC), at p. 87: "While it is not to be expected that police officers be versed in the *minutiae* of the law concerning search warrants, they should be aware of those requirements that the courts have held to be essential for the validity of a warrant" (see also *R. v. Kokesch*, [1990] 3 S.C.R. 3 (SCC), at pp. 32-33; *Gounis v. Ville de Laval*, 2019 QCCS 479, at para. 112; *Simard v. Amyot*, 2009 QCCS 5509, at para. 41).

6.2.5 Further material

- J.C.P. Goldberg, "Tort Law's Missing Excuses" in A. Dyson, J. Goudkamp and F. Wilmot-Smith (eds), *Defences in Tort* (Oxford: Hart Publishing, 2015).
- J. Murphy, "Duress as a Tort Law Defence?" (2018) 38 Legal Studies 571.
- N. Sussman, "The Reasonable Person's Ignorance of Tort Law in New Zealand" [2021] New Zealand L Rev 277.
- N. Tamblyn, *The Law of Duress and Necessity: Crime, Tort, Contract* (London: Routledge, 2017).

6.3 Consent

6.3.1 Indicia of consent

6.3.1.1 Non-Marine Underwriters, Lloyd's of London v. Scalera [2000] SCC 24

✗REF: §2.1.3

IACOBUCCI J. (MAJOR and BASTARACHE JJ. concurring):

46. This appeal raises the novel question of whether an insurance company has a duty to defend the holder of a homeowner's insurance policy against a civil sexual assault suit. In answering this question, we must also address the role of consent in an action for sexual assault. ***

49. An insurance company's duty to defend is related to its duty to indemnify. A homeowner's insurance policy entitles the holder to have the insurer indemnify any liability falling within the policy's terms. Since the insurance company will be paying these costs, it has also developed the right—now a duty—to conduct the defence of such claims. However, the duty to defend is not so great that it is presumed to be independent of the duty to indemnify. Absent express language to the contrary, the duty to defend extends only to claims that could potentially trigger indemnity under the policy. Therefore if an insurance policy, like the one in this case, excludes liability arising from intentionally caused injuries, there will be no duty to defend intentional torts. ***

53. To prove a claim for sexual battery, the plaintiff will have to establish that the defendant intentionally inflicted a harmful or offensive touching on her. In the context of sexual battery, "harmful or offensive" is equivalent to non-consensual. This test is objective: to establish sexual battery, the plaintiff must demonstrate that a reasonable person would have known that the plaintiff did not validly consent to sexual relations. To put it another way, the plaintiff will have to prove that the defendant should have known that she did not validly consent. It is important to note that, absent any evidence from the defendant, a simple allegation of non-consensual sex will suffice to meet this initial burden. If the plaintiff succeeds, then the defendant must also be presumed to have intended to injure the plaintiff, given the inherently harmful nature of non-consensual sexual activity. The same facts that prove the sexual battery also necessarily prove an intent to injure, and therefore the exclusion clause should apply. If, on the other hand, the plaintiff cannot establish non-consent, then the plaintiff's action would have no chance of success, there would be no possibility of a claim for indemnity, and the duty to defend would not arise. ***

55. As there are no properly pleaded claims that, even if successful, could potentially trigger indemnity, the respondent has no duty to defend, and I would therefore dismiss the appeal. ***

MCLACHLIN J. (L'HEUREUX-DUBÉ, GONTHIER, BINNIE JJ. concurring):

1. I have read the reasons of Iacobucci J. and agree with the result he reaches and with much of his reasoning. I would respectfully disagree, however, from the view that in the tort of sexual battery, the onus rests on the plaintiff to prove that the defendant either knew that she was not consenting or that a reasonable person in the defendant's position would have known that she was not consenting.

2. As Goff L.J. (as he then was) stated in *Collins v. Wilcock*, [1984] 3 All E.R. 374 (Eng. Q.B.) [§2.2.3], at

p. 378, “The fundamental principle, plain and incontestable, is that every person’s body is inviolate.” The law of battery protects this inviolability, and it is for those who violate the physical integrity of others to justify their actions. Accordingly, in my respectful view, the plaintiff who alleges sexual battery makes her case by tendering evidence of force applied directly to her. “Force,” in the context of an allegation of sexual battery, simply refers to physical contact of a sexual nature, and is neutral in the sense of not necessarily connoting a lack of consent. If the defendant does not dispute that the contact took place, he bears the burden of proving that the plaintiff consented or that a reasonable person in his position would have thought that she consented. ***

3. As Iacobucci J. states (at para. 103) “for traditional batteries, consent is conceived of as an affirmative defence that must be raised by the defendant.”

4. This Court has long affirmed this proposition. In *Lewis v. Cook*, [1951] S.C.R. 830 (S.C.C.), at p. 839, Cartwright J. stated that “where a plaintiff is injured by force applied directly to him by the defendant his case is made by proving this fact and the onus falls upon the defendant to prove ‘that such trespass was utterly without his fault’.” ***

6. This proposition holds for particular forms of battery like medical battery and sexual battery. *** [I]n *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 (S.C.C.) [§6.3.2.1], dealing with sexual battery, La Forest J., for the plurality, stated, at p. 246, that “[a] battery is the intentional infliction of unlawful force on another person. Consent, express or implied, is a defence to battery.” None of the members of the Court participating in the decision dissented from the view that the burden lies on the defendant to prove consent.

7. The question, then, is whether we should in this case depart from the settled rule that requires the plaintiff in a battery case to show only contact through a direct, intentional act of the defendant and places the onus on the defendant of showing consent or lawful excuse, including actual or constructive consent. For the reasons that follow, I am not convinced that we should alter the established rule. ***

C. The Argument that the Contact Must Be “Harmful or Offensive” Does Not Support Placing the Onus of Proving Non-Consent on the Plaintiff

17. The proposition that the law should require a plaintiff in an action for sexual battery to prove that she did not consent, is supported, it is suggested, by a requirement that the contact involved in battery must be harmful or offensive. The argument may be summarized as follows. The plaintiff must prove all the essential elements of the tort of battery. One of these is that the contact complained of was inherently harmful or offensive on an objective standard. Consensual sexual contact is neither harmful nor offensive. Therefore the plaintiff, in order to make out her case, must prove that she did not consent or that a reasonable person in the defendant’s position would not have thought she consented.

18. I do not dispute that a plaintiff generally must prove all elements of the tort she alleges. Nor do I dispute that contact must be “harmful or offensive” to constitute battery. However, I am not persuaded that plaintiffs in cases of sexual battery must prove that contact was “non-consensual” in order to prove that it was “harmful or offensive.” If one accepts that the foundation of the tort of battery is a violation of personal autonomy, it follows that all contact outside the exceptional category of contact that is generally accepted or expected in the course of ordinary life, is *prima facie* offensive. Sexual contact does not fall into the category of contact generally accepted or expected in the course of ordinary activities. Hence the plaintiff may establish an action for sexual battery without negativing actual or constructive consent. ***

22. *** The law of battery protects the inviolability of the person. It starts from the presumption that apart from the usual and inevitable contacts of ordinary life, each person is entitled not to be touched, and not to have her person violated. The sexual touching itself, absent the defendant showing lawful excuse, constitutes the violation and is “offensive.” Sex is not an ordinary casual contact which must be accepted in everyday life, nor is it the sort of contact to which consent can be implied. To require a plaintiff in an action for sexual battery to prove that she did not consent or that a reasonable person in the defendant’s position would not have thought she consented, would be to deny the protection the law has traditionally afforded to the inviolability of the body in the situation where it is perhaps most needed and appropriate. ***

D. There Is Nothing Particular About Sexual Assault that Makes it Necessary to Have a Special Rule

of Battery for Sexual Assaults for What the Plaintiff Must Prove

27. If there were something special about sexual battery that justified requiring the plaintiff to prove that the defendant either knew she was not consenting or ought to have known that she was not consenting, a case might be made for so doing. The result would be a special rule for sexual battery inconsistent with the law of battery generally, and the creation of a new tort of sexual battery. Thus far the courts have declined to do this. *** The sexual aspects of the claim go only to damages. ***

F. Requiring the Plaintiff to Prove that the Defendant Knew or Ought to Have Known that She Did Not Consent is Neither Necessary nor Sufficient to Permit the Conclusion that the Insurers in this Case Are Not Obligated to Defend the Defendant

37. The question at issue on this appeal is whether the insurer may avoid the obligation to defend the defendant to the battery action under the policy exclusion for "any intentional … act." I agree with Iacobucci J. that this clause must be interpreted as requiring an intent to injure. It follows that for the tort of sexual battery to be excluded from policy coverage, it must always involve intent to injure. ***

38. *** In other words, where there is an allegation of sexual battery, courts will conclude as a matter of legal inference that the defendant intended harm for the purpose of construing exemptions of insurance coverage for intentional injury. ***

39. *** The logic is simply that either the act must have been consensual or not consensual. If it was not consensual, the policy does not apply because neither the insured nor the insurer contemplated coverage for non-consensual sexual activities. If it was consensual, then there is no battery and no claim for recovery. In either case, the policy does not apply. ***

Conclusion

43. I conclude that there is no justification in cases of battery of a sexual nature for departing from the traditional rule that the plaintiff in a battery action must prove direct contact, at which point the onus shifts to the defendant to prove consent. To do so would be to place a burden upon plaintiffs in battery actions of a sexual nature which plaintiffs in other battery actions do not bear. I see neither the need nor the justification for doing this on the material before us in this case.

44. This said, I agree fully with Iacobucci J. that the law will not permit a defendant in an action for sexual battery to say that though he might be found to have committed the battery, he did not intend any harm. This leaves the defendant with two alternatives ***. Either the plaintiff consented, in which case no action lies, or she did not consent and the defendant is deemed to have intended to injure her. In neither case does the policy provide coverage.

45. Like Iacobucci J., I would dismiss the appeal with costs.

REFLECTION:

- *What is express consent to a prima facie battery? What is implied consent? How can consent be proven?*
- *What is the disagreement in the approach to the issue of consent as between Iacobucci J. and McLachlin J.? Which is the more principled approach?*

6.3.1.2 Johnson v. Webb [2001] MBQB 290

Manitoba Court of Queen's Bench – 2001 MBQB 290, aff'd 2002 MBCA 159

GLOWACKI J.: ***

2. The plaintiff was a school teacher at Fisher Branch Collegiate ("Collegiate") located in Lakeshore School Division No. 23 ("School Division"). For a number of years the Collegiate had been holding Spirit Week and one of the events was a hockey game between students and staff. ***

3. The game was played under recreational hockey rules and although there was no formal written

document to this effect it appears that everyone concerned with the game understood that this was the rule. Most of the witnesses indicated that recreational hockey rules meant no slap shots and no body checking although it was readily admitted by the plaintiff that there was a certain amount of body contact. Towards the end of the third period the defendant Garrette Webb ("Webb") and the plaintiff were in contact with each other and a serious injury resulted to the plaintiff. There is, however, a wide discrepancy as to how the injury occurred.

4. In the case of *Agar v. Canning* (1965), 54 W.W.R. 302 (Man. Q.B.), (affd. (1966), 55 W.W.R. 384 (Man. C.A.)), Bastin J. stated, at p. 304, as follows:

> … Since it is common knowledge that such injuries are not infrequent, this supports the conclusion that in the past those engaged in this sport have accepted the risk of injury as a condition of participating. Hockey necessarily involves violent bodily contact and blows from the puck and hockey sticks. A person who engages in this sport must be assumed to accept the risk of accidental harm and to waive any claim he would have apart from the game for trespass to his person in return for enjoying a corresponding immunity with respect to other players. It would be inconsistent with this implied consent to impose a duty on a player to take care for the safety of other players corresponding to the duty which, in a normal situation, gives rise to a claim for negligence. Similarly, the leave and licence will include an unintentional injury resulting from one of the frequent infractions of the rules of the game.
>
> The conduct of a player in the heat of the game is instinctive and unpremeditated and should not be judged by standards suited to polite social intercourse.
>
> But a little reflection will establish that some limit must be placed on a player's immunity from liability. Each case must be decided on its own facts so it is difficult, if not impossible, to decide how the line is to be drawn in every circumstance. But injuries inflicted in circumstances which show a definite resolve to cause serious injury to another, even when there is provocation and in the heat of the game, should not fall within the scope of the implied consent.

5. In *Temple v. Hallem*, [1989] 5 W.W.R. 669 (Man. C.A.), the Manitoba Court of Appeal dealt with an injury to a female catcher in a baseball game which arose as she blocked the plate while a male runner was attempting to reach home plate. The court concluded that the league rules allowed the runner to slide into home plate and as there was no breach of the rules there was no liability. In obiter, Huband J.A. (writing for the court) stated, at p. 672, as follows:

> Even if a league rule was violated, it would not necessarily give rise to liability. The case of *Agar v. Canning* (1965), 54 W.W.R. 302 (Man. Q.B.), suggests that only a deliberate violation of the rules calculated to do injury will give rise to civil liability. Otherwise people who engage in sport are assumed to accept the risk of accidental harm. …

6. In the case of *St. Laurent v. Bartley*, [1998] M.J. No. 159 (Man. Q.B.), a player was injured when the defendant's stick struck the plaintiff's eye. Kennedy J. found that although the teams played what they described as a no contact hockey league, the description was misleading and the evidence revealed the players were, during the course of the season, often involved in aggressive bodily contact. In that case, the defendant was pursuing the puck and the plaintiff was behind him hooking him with his stick while they were skating. The defendant moved either his glove or his stick to swat away the plaintiff's stick and in the course of doing so, he accidentally hit the plaintiff in the eye, causing the loss of the eye. Kennedy J. held that the incidents of being hit with the defendant's glove or the end of the stick was incidental only to knocking the plaintiff off-stride and unintentional in respect to inflicting the kind of injury which accidentally occurred, as serious as it was. In the circumstances of the game, while the defendant's actions justified the roughing call made by the linesman, it was nevertheless a course of conduct which Kennedy J. found did not fall below the standard of a reasonable competitor in his place. Kennedy J. took into account the nature of the match itself and the level of aggressiveness within the league.

7. The circumstances in the case before me differ somewhat from those in *St. Laurent v. Bartley*. In that case although it was described as a no contact hockey league, the judge found that this was misleading as there often was aggressive bodily contact play. In the case before me, there is no indication that aggressive

bodily contact was allowed. It was, however, admitted by the plaintiff that even though it was a no contact game, there was contact between the players on occasions such as when both were chasing the puck. However, I believe that the principles enunciated in the *St. Laurent v. Bartley* case are equally applicable here. ***

12. Webb testified that he was 16 years of age at the time of the incident and that the plaintiff was a favourite teacher of his. Webb testified that the plaintiff had the puck near the students' blue line, Webb poke checked the puck away and it travelled southwest towards the area of the timekeeper's cubicle. Both he and the plaintiff raced towards the puck. Webb placed his right foot around the front of the plaintiff in an attempt to get the puck first. As he did this, they became entangled so neither could turn and they proceeded towards the teachers' penalty box. The plaintiff hit the boards with his side and twisted backwards. Webb's right side and shoulder were over the plaintiff's as they proceeded into the boards. Webb testified that he had no intention of body checking the plaintiff. ***

15. It is obvious that there is quite a difference in how the various witnesses described the incident. This is not unusual in view of the incident occurring approximately four and a half years ago and it happening very quickly. ***

17. The plaintiff speculates that the defendant Webb intended to body check him. This is confirmed somewhat by Vandersteen who testified that in his opinion Webb was not going for the puck and could have avoided the hit. Pona and Plett confirmed the evidence of Webb that he and the plaintiff were both going for the puck at the time of the collision. There is nothing in any physical evidence which would substantiate the testimony of the plaintiff as opposed to that of Webb.

18. Under the circumstances, I am unable to conclude that the plaintiff has proven that the injuries which he suffered in the hockey game were as a result of the intentional act of Webb to body check him. The contact between the plaintiff and Webb was not intentionally administered nor in the circumstances did Webb's actions fall into the category of recklessness or carelessness. Webb's conduct did not fall below the standard of a reasonable competitor. The plaintiff has not discharged the onus that his version of what occurred was correct on a balance of probabilities.

19. The plaintiff was seriously injured in the accident but its occurrence, absent any intention to deliberately injure the opposing player, is one that the participants in the game undertook. ***

REFLECTION:

- *What risks of injury are impliedly consented to when playing a contact sport?*
- *Does it matter who bears the burden of proof?*

6.3.1.3 Toews v. Weisner [2001] BCSC 15

British Columbia Supreme Court – 2001 BCSC 15

✗**REF: §9.3.11, §9.5.10**

L. SMITH J.:

1. On November 12, 1997, the plaintiff Georgia Toews, then 11 years old and in Grade Six, was vaccinated against the Hepatitis B virus by Nel Weisner, a community health nurse. Although the plaintiff's father Isaac Towes as her guardian ad litem does not seek to show that the vaccination caused her any physical damage, he claims that it was without her consent and seeks exemplary damages and compensation for emotional injury from Ms. Weisner and from Ms. Weisner's employer, the South Fraser Health Region. ***

6. The Province of British Columbia Ministry of Health manual setting policy, standards and guidelines for public health nursing states: ***

> • Parental/guardian consent should be sought prior to providing services to school-age children.
>
> • For immunizations, the appropriate consent forms as well as written information should be sent

> out to parents/guardians and returned to the Public Health Nurse prior to immunizations taking place. ***
>
> • When a child refuses service although the parent/guardian has given consent, the service should be deferred and alternate arrangements made with the parent/guardian. ***

15. *** Georgia Toews's parents both appeared to be careful and honest witnesses. I conclude that neither of them gave consent to the Hepatitis B vaccination. It is not necessary to determine how a mistake was made ***, but I conclude that there was an error in that regard which led to Georgia Toews receiving the immunization without parental consent. ***

16. Battery is the intentional infliction of unlawful force on another person [§2.2]. Consent is a defence to battery and consent may be either express or implied. The defendant carries the onus of proving that there was consent. In this case, because of the plaintiff's age, it was common ground that consent had to be obtained from a parent or legal guardian rather than from the child herself.

17. In *Malette v. Shulman* (1990) 2 C.C.L.T. (2d) 1 (Ont. C.A.) Robins J.A. for the court stated at 10:

> The right of self-determination, which underlies the doctrine of informed consent, also obviously encompasses the right to refuse medical treatment. … The doctrine of informed consent is plainly intended to ensure the freedom of individuals to make choices concerning their medical care. For this freedom to be meaningful, people must have the right to make choices that accord with their own values, regardless of how unwise or foolish those choices may appear to others.

18. Counsel for the defendants argued that an actual, subjective consent is not always necessary if the defendant reasonably believes that the plaintiff has consented, relying on *Allan v. New Mount Sinai Hospital* (1980) 109 D.L.R. (3d) 634 (Ont. H.C.) (appeal allowed on a different point (1981) 125 D.L.R. (3d) 276 (Ont. C.A.)). In the *Allan* case, Linden J. wrote at 641:

> The administration of an anaesthetic is a surgical operation. To do so would constitute a battery, unless the anaesthetist is able to establish that his patient has consented to it. It is not up to the patient to prove that he refused; it is up to the doctor to demonstrate that a consent was given. An actual, subjective consent, however, is not always necessary if the doctor reasonably believes that the patient has consented. Thus, if a patient holds up an arm for a vaccination, and the doctor does one, reasonably believing that the patient is consenting to it, the patient cannot complain afterwards that there was no consent: *O'Brien v. Cunard S.S. Co., Ltd.* (1891) 28 N.E. 266. Silence by a patient, however, is not necessarily a consent. Whether a doctor can reasonably infer that a consent was given by a patient, or whether he cannot infer such consent, and must respect the wishes of the patient, as foolish as they may be, always depends on the circumstances.

In the *Malette* case a physician continued to provide blood transfusions to a patient who had specifically indicated by way of a written card that she did not wish such transfusions. At 19, Robins J.A. wrote:

> In short, the card, on its face, set forth unqualified instructions applicable to the circumstances presented by this emergency. In the absence of any evidence to the contrary, those instructions should be taken as validly representing the patient's wish not to be transfused. *** Accordingly, I am of the view that the card had the effect of validly restricting the treatment that could be provided to Mrs. Malette and constituted the doctor's administration of the transfusions a battery.

19. These authorities suggest that the question is whether a health care provider can reasonably infer consent, for example, from a patient saying nothing but rolling up his sleeve and baring his arm for an injection. Whether a defendant can reasonably infer that a consent was given will always depend on the circumstances.

20. The defendants' position was that here there was no battery because, even if I found (as I have) that there was no parental consent, Ms. Weisner had an actual and reasonable belief when she administered the vaccination that there was such consent. In other words, counsel submitted, it was reasonable for Ms. Weisner to infer that she had the requisite parental consent. I reject that position. Although I accept that

Ms. Weisner honestly believed that there had been parental consent on October 27, 1997, I find that it was not reasonable for her to infer that there was consent for the vaccination on November 12, 1997. ***

24. *** [H]ealth care providers must always respect the fundamental principle that all individuals control access to their own bodies. Individuals may give but then withdraw consent. When the individual is a child, it is the parent who gives or withholds consent. *** Inconvenient though it may have been, Ms. Weisner should have checked with a parent before going ahead with the immunization.

25. I find that the vaccination in these circumstances constituted a battery on the plaintiff Georgia Toews. ***

REFLECTION:

- *Why did it not matter that the nurse honestly thought that Georgia's parents had signed a consent form?*
- *Does this judgment vindicate the principle of individual autonomy? Whose autonomy?*

6.3.1.4 Pile v. Chief Constable of Merseyside [2020] EWHC 2472 (QB)

England and Wales High Court (Queen's Bench Division) – [2020] EWHC 2472 (QB)

✗REF: §6.7.3.2

TURNER J.:

1. Cheryl Pile brings this appeal to establish the liberty of inebriated English subjects to be allowed to lie undisturbed overnight in their own vomit soaked clothing. Of course, such a right, although perhaps of dubious practical utility, will generally extend to all adults of sound mind who are intoxicated at home. Ms Pile, however, was not at home. She was at a police station in Liverpool having been arrested for the offence of being drunk and disorderly. She had emptied the contents of her stomach all over herself and was too insensible with drink to have much idea of either where she was or what she was doing there. Rather than leave the vulnerable claimant to marinade overnight in her own bodily fluids, four female police officers removed her outer clothing and provided her with a clean dry outfit to wear. The claimant was so drunk that she later had no recollection of these events.

2. It is against this colourful background that she brought a claim against the police in trespass to the person and assault alleging that they should have left her squalidly and unhygienically soaking in vomit. Fortunately, because this appeal will be dismissed, the challenge of assessing damages for this lost opportunity will remain unmet. ***

4. Her claims came before Recorder Hudson in Chester last November. The hearing lasted three days at the conclusion of which the Recorder found for the defendant Chief Constable on all issues.

5. Ms Pile now appeals against the Recorder's decision to this Court with the permission of the single judge. ***

15. During the course of oral argument, Mr Gow on behalf of the claimant made several good-humoured attempts to smuggle into the appeal a number of points which had either not made below or had not been included in his grounds of appeal or skeleton argument. It is to his credit that he rapidly abandoned these points when challenged by the Court but less so that they he had made them in the first place. ***

35. *** If, after his detention at a police station, a prisoner asks an officer to take his hat and coat then that officer is not to be rendered potentially liable to the prisoner in tort ***.

36. In this case, the Recorder observed that it was no part of the claimant's case that she had made a conscious choice not to have a change of clothing.

37. Where someone is so intoxicated that she is unable to make an informed choice then circumstances will arise in which a police officer can readily assume that consent to the removal of clothing can be implied. Normally, someone in custody who has vomited all over themselves, but lacks the ability to articulate their

preference, may be safely taken to have given implied consent to the removal of their outer clothing and its replacement by clean clothing so long as all reasonable considerations of safety and the preservation of dignity have been taken into account.

38. I note, although it forms no part of my reasoning, that some members of the public may well have found it to have been a grotesque result if a woman who: has rendered herself insensible through drink; abused an innocent taxi driver; behaved aggressively to police officers trying to do their job and vomited all over herself should then be found to be entitled to compensation because those same officers, as an act of decency, had then changed her into clean and dry clothing at a time when she was too drunk to know or care. ***

49. The observations of the Court of Appeal in *Yousif v. Commissioner of Police for the Metropolis* [2016] EWCA Civ 364 apply with equal force to the circumstances of this case. All that happened to the claimant was a consequence of what was clearly her own failure to engage and flowed from "… the legitimate and good faith concerns of the police to ensure that she was safe while in custody."

50. This appeal is dismissed.

REFLECTION:

- *Did the incapacitated Pile really impliedly consent to the removal of her vomit-sodden clothes? Is the judge's reasoning consistent with Kohli (§2.2.2), Scalera (§6.3.1.1), Toews (§6.3.1.3) or Norberg (§6.3.2.1)? What are the possible implications of applying this judgment as a precedent in future cases?*
- *Was there another defence available on the facts that would have led to the same conclusion regardless of whether Pile gave consent?*[115]

6.3.2 Vitiation of apparent consent: mistake, fraud, duress, public policy

"Consent" in Wex (Cornell Law School Legal Information Institute, 2022)

Consent means that a person voluntarily and willfully agrees in response to another person's proposition. The person who consents must possess sufficient mental capacity. Consent also requires the absence of coercion, fraud or error. *** […continue reading]

6.3.2.1 Norberg v. Wynrib [1992] CanLII 65 (SCC)

Supreme Court of Canada – 1992 CanLII 65

✗REF: §9.4.1, §9.5.2, §18.3.2

LA FOREST J. (GONTHIER AND CORY JJ. concurring):

1. This case concerns the civil liability of a doctor who gave drugs to a chemically dependent woman patient in exchange for sexual contact. The central issue is whether the defence of consent can be raised against the intentional tort of battery in such circumstances. The case also raises the issue whether the action is barred by reason of illegality or immorality. ***

11. The trial judge, Oppal J., rejected the appellant's claim of sexual assault holding that she had consented to it. ***

16. The majority of the Court of Appeal, McEachern C.J.B.C. and Gibbs J.A., accepted the trial judge's finding that the appellant "gave her implied consent to the sexual contact that constitutes the alleged battery" and that there was no evidence that her addiction to Fiorinal interfered with her capacity to consent to the sexual activity. It further agreed that the appellant was not at any time deprived of her ability to reason. In the majority's view, Oppal J. was correct in dismissing the appellant's sexual assault claim on the basis of consent. ***

[115] See *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [41]-[42].

Assault—The Nature of Consent

26. The alleged sexual assault in this case falls under the tort of battery. A battery is the intentional infliction of unlawful force on another person. Consent, express or implied, is a defence to battery. Failure to resist or protest is an indication of consent "if a reasonable person who is aware of the consequences and capable of protest or resistance would voice his objection"; see Fleming, *The Law of Torts* (7th ed., 1987), at pp. 72-73. However, the consent must be genuine; it must not be obtained by force or threat of force or be given under the influence of drugs. Consent may also be vitiated by fraud or deceit as to the nature of the defendant's conduct. The courts below considered these to be the only factors that would vitiate consent.

27. In my view, this approach to consent in this kind of case is too limited. As Heuston and Buckley, *Salmond and Heuston on the Law of Torts* (19th ed., 1987), at pp. 564-65, put it: "A man cannot be said to be 'willing' unless he is in a position to choose freely; and freedom of choice predicates the absence from his mind of any feeling of constraint interfering with the freedom of his will." A "feeling of constraint" so as to "interfere with the freedom of a person's will" can arise in a number of situations not involving force, threats of force, fraud or incapacity. The concept of consent as it operates in tort law is based on a presumption of individual autonomy and free will. It is presumed that the individual has freedom to consent or not to consent. This presumption, however, is untenable in certain circumstances. A position of relative weakness can, in some circumstances, interfere with the freedom of a person's will. Our notion of consent must, therefore, be modified to appreciate the power relationship between the parties.

28. An assumption of individual autonomy and free will is not confined to tort law. It is also the underlying premise of contract law. The supposition of contract law is that two parties agree or consent to a particular course of action. However, contract law has evolved in such a way that it recognizes that contracting parties do not always have equality in their bargaining strength. The doctrines of duress, undue influence, and unconscionability have arisen to protect the vulnerable when they are in a relationship of unequal power. For reasons of public policy, the law will not always hold weaker parties to the bargains they make. Professor Klippert in his book *Unjust Enrichment* (1983) refers to the doctrines of duress, undue influence, and unconscionability as "justice factors." He lumps these together under the general term "coercion" and states, at p. 156, that, "In essence the common thread is an illegitimate use of power or unlawful pressure which vitiates a person's freedom of choice." In a situation where a plaintiff is induced to enter into an unconscionable transaction because of an inequitable disparity in bargaining strength, it cannot be said that the plaintiff's act is voluntary: see Klippert, at p. 170.

29. If the "justice factor" of unconscionability is used to address the issue of voluntariness in the law of contract, it seems reasonable that it be examined to address the issue of voluntariness in the law of tort. This provides insight into the issue of consent: for consent to be genuine, it must be voluntary. The factual context of each case must, of course, be evaluated to determine if there has been genuine consent. However, the principles that have been developed in the area of unconscionable transactions to negate the legal effectiveness of certain contracts provide a useful framework for this evaluation. ***

Application to this Case

42. The trial judge held that the appellant's implied consent to the sexual activity was voluntary. Dr. Wynrib, he stated, exercised neither force nor threats of force and the appellant's capacity to consent was not impaired by her drug use. The Court of Appeal agreed that the appellant voluntarily engaged in the sexual encounters. However, it must be asked if the appellant was truly in a position to make a free choice. It seems clear to me that there was a marked inequality in the respective powers of the parties. The appellant was a young woman with limited education. More important, she was addicted to the heavy use of tranquilizers and painkillers. On this ground alone it can be said that there was an inequality in the position of the parties arising out of the appellant's need. The appellant's drug dependence diminished her ability to make a real choice. Although she did not wish to engage in sexual activity with Dr. Wynrib, her reluctance was overwhelmed by the driving force of her addiction and the unsettling prospect of a painful, unsupervised chemical withdrawal. ***

44. On the other side of the equation was an elderly, male professional—the appellant's doctor. An unequal distribution of power is frequently a part of the doctor-patient relationship. As it is stated in *The Final Report*

of the Task Force on Sexual Abuse of Patients, An Independent Task Force Commissioned by the College of Physicians and Surgeons of Ontario (November 25, 1991) (Chair: Marilou McPhedran), at p. 11:

> Patients seek the help of doctors when they are in a vulnerable state—when they are sick, when they are needy, when they are uncertain about what needs to be done.
>
> The unequal distribution of power in the physician-patient relationship makes opportunities for sexual exploitation more possible than in other relationships. This vulnerability gives physicians the power to exact sexual compliance. Physical force or weapons are not necessary because the physician's power comes from having the knowledge and being trusted by patients.

In this case, Dr. Wynrib knew that the appellant was vulnerable and driven by her compulsion for drugs. *** As a doctor, the respondent knew how to assist the appellant medically and he knew (or should have known) that she could not "just quit" taking drugs without treatment. ***

49. *** [I]n my view, the defence of consent cannot succeed in the circumstances of this case. The appellant had a medical problem—an addiction to Fiorinal. Dr. Wynrib had knowledge of the problem. As a doctor, he had knowledge of the proper medical treatment, and knew she was motivated by her craving for drugs. Instead of fulfilling his professional responsibility to treat the appellant, he used his power and expertise to his own advantage and to her detriment. In my opinion, the unequal power between the parties and the exploitative nature of the relationship removed the possibility of the appellant's providing meaningful consent to the sexual contact. ***

SOPINKA J.: ***

127. *** [C]onsent, either express or implied by conduct, is a defence to a claim of battery. However, that consent must be genuine. Courts and scholars have identified circumstances in which an apparent consent will not be considered valid. Consent is not genuine if it is obtained by force, duress, or fraud or deceit as to the nature of the defendant's conduct, or if it is given under the influence of drugs: see Fleming, *The Law of Torts*, 7th ed. (1987), at pp. 72-74; Linden, *Canadian Tort Law*, 4th ed. (1988), at pp. 62-63. ***

145. *** [I]n my view, the facts of this case are more accurately reflected by acknowledging that the appellant consented to the sexual contact and by considering the respondent's conduct in light of his professional duty towards the appellant. ***

156. *** While the appellant consented to the sexual encounters, she did not consent to the breach of duty that resulted in the continuation of her addiction and the sexual encounters. The fact that a patient acquiesces or agrees to a form of treatment does not absolve a physician from his or her duty if the treatment is not in accordance with medical standards. Otherwise, the patient would be required to know what the prescribed standard is. In the absence of a clear statement by the respondent to the appellant that he was no longer treating her as her physician and an unequivocal consent to the cessation of treatment, I conclude that the duty to treat the appellant continued until she attended at the rehabilitation centre on her own initiative and was treated. ***

MCLACHLIN J. (L'HEUREUX-DUBÉ J. concurring): ***

61. I have had the advantage of reading the reasons of my colleagues Justice La Forest and Justice Sopinka. With respect, I do not find that the doctrines of tort or contract capture the essential nature of the wrong done to the plaintiff. Unquestionably, they do catch aspects of that wrong. But to look at the events which occurred over the course of the relationship between Dr. Wynrib and Ms. Norberg from the perspective of tort or contract is to view that relationship through lenses which distort more than they bring into focus. Only the principles applicable to fiduciary relationships and their breach encompass it in its totality. In my view, that doctrine is clearly applicable to the facts of this case on principles articulated by this court in earlier cases. It alone encompasses the true relationship between the parties and the gravity of the wrong done by the defendant; accordingly, it should be applied.

62. The facts *** need not detain me at length. The plaintiff was a young woman, who began under prescription to take painkillers to alleviate the pain associated with an abscessed tooth. By the time her

dental problem was diagnosed and properly treated, she was addicted. Her physicians at that time did nothing to assist her in making a gradual withdrawal from the painkillers. She no longer had any medical condition which would indicate the continued ingestion of analgesics, but her craving for the drugs continued. Her drug of choice was Fiorinal, a pharmaceutical legally obtainable only on prescription, whose active ingredients include both codeine, an opiate, and butalbital, a barbiturate. Her life became one long search for the drug. It was illegal; it was hard to get. At first she was able to get it from her sister, but the best way to get it was through doctors. So the plaintiff consulted doctors, many doctors. The doctor who had been supplying her sister with prescriptions proved a fertile source, but then he retired. His replacement refused to give her more pills. She went to Dr. Wynrib with a tale of a painful ankle and asked for Fiorinal. He gave her the prescription. She kept going back for more, on the pretext of this and other illnesses. Dr. Wynrib quickly realized that she was addicted to Fiorinal and confronted her with the addiction. But he coupled the confrontation with a request: "if you're good to me I will be good to you," a request whose meaning was made clear by his pointing upstairs where he lived. The plaintiff refused and left. He continued to make similar suggestions to her and she stopped seeing him. For a while she got Fiorinal from other doctors and off the street. As the other doctors reduced both her supply and the strength of the medication prescribed, she became, as she put it, desperate. She went back to Dr. Wynrib. She gave him what he wanted—sexual favours. He gave her Fiorinal. At one point she begged Dr. Wynrib for help. He did not advise treatment. He merely told her "to quit." The medical evidence establishes that it is virtually impossible "to quit" without the aid of a professional anti-addiction program. After being charged with the offence of "double-doctoring," the plaintiff of her own initiative went to a rehabilitation centre for drug addicts. She left the centre after one month and has not taken any drugs for non-medical reasons since.

63. It is not disputed that Dr. Wynrib abused his duty to the plaintiff. He provided her with drugs he knew she should not have. He failed to advise her to enroll in an anti-addiction program, thereby prolonging her addiction. Instead, he took advantage of her addiction to obtain sexual favours from her over a period of more than two years.

64. The relationship of physician and patient can be conceptualized in a variety of ways. It can be viewed as a creature of contract, with the physician's failure to fulfil his or her obligations giving rise to an action for breach of contract. It undoubtedly gives rise to a duty of care, the breach of which constitutes the tort of negligence. In common with all members of society, the doctor owes the patient a duty not to touch him or her without his or her consent; if the doctor breaches this duty, he or she will have committed the tort of battery. But perhaps the most fundamental characteristic of the doctor-patient relationship is its *fiduciary* nature. All the authorities agree that the relationship of physician to patient also falls into that special category of relationships which the law calls fiduciary. ***

65. *** I think it is readily apparent that the doctor-patient relationship shares the peculiar hallmark of the fiduciary relationship—trust, the trust of a person with inferior power that another person who has assumed superior power and responsibility will exercise that power for his or her good and only for his or her good and in his or her best interests. Recognizing the fiduciary nature of the doctor-patient relationship provides the law with an analytic model by which physicians can be held to the high standards of dealing with their patients which the trust accorded them requires. ***

66. The foundation and ambit of the fiduciary obligation are conceptually distinct from the foundation and ambit of contract and tort. Sometimes the doctrines may overlap in their application, but that does not destroy their conceptual and functional uniqueness. In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest. Consequently, the law seeks a balance between enforcing obligations by awarding compensation when those obligations are breached, and preserving optimum freedom for those involved in the relationship in question. The essence of a fiduciary relationship, by contrast, is that one party exercises power on behalf of another and pledges himself or herself to act in the best interests of the other. ***

83. I would summarize the situation as follows: the trial judge appears to have found a duty of trust and confidence and abuse thereof. None of the appellate judges who have written on the case offers a convincing demonstration of why it is wrong to characterize the relationship between Dr. Wynrib and Ms. Norberg as a fiduciary relationship; ***. ***

96. *** [T]he most significant consequence of applying the doctrine of fiduciary obligation to a person in the position of Dr. Wynrib is this. Tort and contract can provide a remedy for a physician's failure to provide adequate treatment. But only with considerable difficulty can they be bent to accommodate the wrong of a physician's abusing his or her position to obtain sexual favours from his or her patient. The law has never recognized consensual sexual relations as capable of giving rise to an obligation in tort or in contract. My colleagues, with respect, strain to conclude the contrary. La Forest J. does so by using the contractual doctrine of relief from unconscionable transactions to negate the consent which the plaintiff, as found by the trial judge, undoubtedly gave. ***

100. I conclude that the wrong suffered by the plaintiff falls to be considered under the rubric of breach of fiduciary duty. The duty is established, as is the breach. The plaintiff is entitled to succeed against Dr. Wynrib and to recover the appropriate damages at equity. ***

STEVENSON J. took no part in the judgment.

REFLECTION:

- *What was the basis of civil liability adopted by La Forest J., Sopinka J. and McLachlin J. respectively?*
- *What (six) types of circumstances did the Court identify that will tend to vitiate an apparently given consent?*
- *Which judicial approach adopted a narrower, perhaps more paternalistic, conception of consent? Which approach adopted a broader, perhaps more autonomy-enhancing, conception? Which is more persuasive?*

6.3.2.2 PP v. DD [2017] ONCA 180

Ontario Court of Appeal – 2017 ONCA 180

✗**REF: §10.1.2, §19.10.1.2**

ROULEAU J.A.:

1. In 2014, PP and DD met through a mutual friend and enjoyed a short romantic relationship that lasted for less than two months. They went out on a number of dates and engaged in ostensibly consensual sexual intercourse on several occasions. Based on his conversations with DD, PP understood that DD was taking the birth control pill and that she did not intend to conceive a child.

2. Several weeks after their sexual relationship ended, PP was surprised to learn from DD that she was 10 weeks pregnant. In early 2015, DD gave birth to a healthy child. According to DD, paternity testing confirmed that PP is the father.

3. PP brought a civil action for fraud, deceit, and fraudulent misrepresentation against DD, claiming as damages that the deception deprived him of the benefit of choosing when and with whom he would assume the responsibility of fatherhood. In his words, "he wanted to meet a woman, fall in love, get married, enjoy his life as husband with his wife and then, when he and his wife thought the time was 'right', to have a baby." He pleaded that he consented to sexual intercourse with DD on the understanding that she was using effective contraception. In his view, this was an express or implied misrepresentation and his consent was vitiated, having been obtained through deception and dishonesty.

4. This is an appeal from a decision granting DD's motion to strike PP's statement of claim without leave to amend: *P. (P.) v. D. (D.)*, 2016 ONSC 258, 129 O.R. (3d) 175 (Ont. S.C.J.).

Background ***

12. In the early evening of August 10, 2014, PP received a text message from DD that shocked him, in which DD informed him that she was 10 weeks pregnant with his child. PP stated that he would call DD on his way to work. During that telephone conversation, DD told PP that she intended to deliver and keep the baby. PP stated that he thought she was "on the pill", to which DD simply responded, "yah". PP told DD he did not intend to have a child at that point in his life and, in shock, he suggested that DD have an abortion. She insisted that she would not do so, to which PP responded in anger: "I don't want to have a baby with some random girl. I waited my whole life to decide who I have a baby with."

13. After ending the telephone conversation, they exchanged several text messages in which DD expressed confidence that she could raise the child on her own and stated that she did not want to force PP's involvement in the child's upbringing. She told PP that "this random girl is fine doing it on her own." ***

45. The relevant facts drawn from the pleading, which for the purpose of this motion are assumed to be true, can be summarized as follows:

> (1) The parties developed an amorous relationship that included repeated vaginal sexual intercourse;
>
> (2) The appellant agreed to have unprotected sex with the respondent and, although he accepted the risk of pregnancy that exists when a sexual partner is taking contraceptive pills, he was not prepared to accept the risk of pregnancy if the respondent was not taking any contraceptives;
>
> (3) The appellant has not suffered any physical injury or any emotional harm that is pathological in nature;
>
> (4) The appellant was not exposed to any known risk of bodily harm because of the sexual intercourse;
>
> (5) The respondent became pregnant and a healthy child was born of their relationship;
>
> (6) There was no alleged misrepresentation by the respondent other than with respect to the use of contraceptives and, implicitly, that she intended to avoid getting pregnant; and
>
> (7) The appellant is male and, as father of the child, has legal as well as moral responsibilities toward that child. ***

The potential claim in battery

69. I turn now to the appellant's submission that, for the purpose of advancing a claim in battery, the misrepresentation of the respondent vitiated the appellant's consent to sexual intercourse. ***

71. The constituent elements of the tort of "sexual battery" are the same as those of the tort of battery. That is, the plaintiff must prove on a balance of probabilities that the defendant intentionally touched the plaintiff in a sexual manner. To prove a battery, the plaintiff must also demonstrate that the interference with his or her body was "harmful" or "offensive", but this element is implied (assuming a lack of consent) in the context of a sexual battery: *Non-Marine Underwriters, Lloyd's London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551 [**§6.3.1.1**], at para. 22.

72. An apparent consent to sexual touching will be invalid if it has been obtained by duress, force or threat of force, given under the influence of drugs, secured through deceit or fraud as to the nature of the defendant's conduct, or obtained from someone who was legally incapable of consenting or where an unequal power relationship is being exploited: *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 (S.C.C.) at pp. 246-47. For the purpose of this appeal, I will focus only on fraud.

73. In Linden and Feldthusen, *Canadian Tort Law* (10th ed.) (Toronto: LexisNexis, October 2015), the authors explain that not all forms of fraud will undermine consent to sexual touching. As they state at p. 82, the key question is whether the deceit goes to the "nature and quality of the act". Consent to sexual touching will normally remain operative if the deceit relates not to the "nature and quality of the act", but instead to some collateral matter.

74. Reported cases involving fraud pertaining to "the nature or quality of the act" are frequently cases of criminal sexual assault. Criminal sexual assault and tortious sexual battery typically involve the same wrongful act, namely non-consensual sexual touching, and in such cases the difference lies in the *mens rea* and standard of proof that must be established: see *Scalera*, at para. 111.[116] For the purpose of

[116] Although it is not relevant to this case, I note that the offence of assault (including sexual assault), unlike the tort of battery, need not necessarily include physical touching: *Criminal Code*, R.S.C. 1985, c. C-46, s. 265.

determining whether consent to sexual touching is operative in the face of fraud or deceit, such criminal cases are therefore instructive. Cases of fraud as to "the nature or quality of the act" have included circumstances where, for example, a choir-master had sexual intercourse with a young student under the pretense that it would improve her singing (*R. v. Williams* (1922), [1923] 1 K.B. 340 (Eng. Ct. of Crim. App.)) and where a woman consented to sexual intercourse under the belief that it would cure certain physical disorders (*R. v. Harms* (1943), [1944] 2 D.L.R. 61 (Sask. C.A.)).

75. Likewise, fraud pertaining to the identity of the sexual partner will undermine consent. This court has upheld a criminal conviction for sexual assault where the complainant mistakenly believed her sexual partner was her boyfriend when it was in fact his identical twin brother and where the twin was reckless or wilfully blind as to whether his identity was clear to the complainant (*R. v. Crangle*, 2010 ONCA 451, 256 C.C.C. (3d) 234 (Ont. C.A.), leave to appeal refused, [2010] 3 S.C.R. v. (note) (S.C.C.)).

76. The appellant relies on *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346 (S.C.C.), a case wherein the court—in interpreting the *Criminal Code* provisions relating to sexual assault—took the opportunity to both summarize and clarify the law as to when fraud vitiates a complainant's consent to sexual touching. In *Hutchinson*, the majority made clear that the analysis of whether consent to sexual touching is operative involves two questions. First, the court must determine whether the complainant validly consented to the sexual activity in question. Second, if so, the court must consider whether there are any circumstances that may vitiate the complainant's apparent consent: *Hutchinson*, at para. 4.

77. With respect to the first question, the Supreme Court confirmed the earlier case law and the above-noted view of Linden and Feldthusen, insofar as fraud going to the "nature and quality of the act" will undermine consent. Where there is a deception or mistaken belief with respect to either the identity of the sexual partner or the sexual nature of the act itself, no consent to sexual touching will have been obtained: see *Hutchinson*, at para. 57.

78. In the present case there is no issue as to whether there was deception concerning the identity of the sexual partner or the sexual nature of the act itself. The appellant concedes that he consented to sexual intercourse with the respondent. His precise allegation is that his otherwise valid consent was vitiated in the circumstances by fraud.

79. This takes me to the second question in *Hutchinson*, namely what types of fraud will vitiate consent to sexual activity. Here the court confirmed the approach it took in the cases of *R. v. Cuerrier*, [1998] 2 S.C.R. 371 (S.C.C.) and *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584 (S.C.C.). That is, for consent to be vitiated by fraud there must be: (1) dishonesty, which can include the non-disclosure of important facts; and (2) a deprivation or risk of deprivation in the form of serious bodily harm that results from the dishonesty: *Hutchinson*, at para. 67.

80. In *Hutchinson*, the accused punctured holes in a condom that he then used to have intercourse with the complainant. As a result, unbeknownst to the complainant the sex was unprotected and the intercourse gave rise to a significant risk of serious bodily harm, namely becoming pregnant with all of its attendant risks.

81.The majority in *Hutchinson* considered that the presence or absence of a condom during sexual intercourse does not affect the "specific physical sex act" to which the complainant consented, namely sexual intercourse, but is rather a "collateral condition" to that sexual activity. In the majority's view, so long as there is consent to "sexual intercourse", this general consent is not vitiated by dishonesty about condom use unless it exposes the individual to a "deprivation or risk of deprivation in the form of serious bodily harm which results from the dishonesty" (para. 67). On the facts of *Hutchinson*, the deprivation consisted of denying the woman the benefit of choosing not to become pregnant "by making her pregnant, or exposing her to an increased risk of becoming pregnant" and thereby exposing her to a significant risk of serious bodily harm. This was based on the majority's understanding that "harm" includes at least the sorts of profound changes in a woman's body resulting from pregnancy (paras. 69-72).

82. In *Hutchinson*, therefore, the Supreme Court clarified that deception with respect to contraceptive practice does not go to the "nature and quality of the act"—or, in the words of the *Criminal Code*, to the "sexual activity in question"—but that it may, nevertheless, vitiate consent to sexual touching where the

fraud gives rise to a significant risk of serious bodily harm, which includes the risk of pregnancy. The majority also made it clear, however, that:

> [t]o establish fraud, the dishonest act must result in a deprivation that is equally serious as the deprivation recognized in *Cuerrier* and in this case [namely, a significant risk of serious bodily harm]. For example, financial deprivations or mere sadness or stress from being lied to will not be sufficient (para. 72).

83. In summary, therefore, absent any concerns about bodily harm, the test for invalid or vitiated consent has not changed from that set out by the authors in *Canadian Tort Law*. With the one exception of deceit giving rise to a significant risk of serious bodily harm, in which case consent may be vitiated, the question continues to be whether the alleged deception relates to the specific sexual act undertaken and/or to the identity of the sexual partner.

84. As a result, I do not view *Hutchinson* as being of any assistance to the appellant. In the present case, the intercourse between the two known partners occurred consensually on many occasions. The appellant's consent to sexual activity was meaningful, voluntary, and genuine. As the appellant concedes, he consented to unprotected sex and was fully informed as to the respondent's identity and as to the nature of the sexual act in which the parties voluntarily participated. The touching involved was wanted and would have occurred in the same way except that, but for the alleged misrepresentation, the appellant would have used a condom. Not wearing a condom did not increase the appellant's risk of serious physical injury.

85. As the motion judge found, the appellant's alleged damage is principally emotional harm or, in other words, hurt feelings and lost aspirations and/or career opportunities flowing from the birth of his child. His situation, as a man, is quite different from that of the woman. Clearly, there are profound physical and psychological effects on a mother undergoing a pregnancy that do not apply to the father of the child. The appellant was not exposed to any serious transmissible disease or other significant risk of serious bodily harm flowing from the intercourse. Moreover, it is noteworthy that the appellant was willing to assume some risk, albeit small, that pregnancy would result from the several instances of sexual intercourse, a risk present even where the woman is taking contraceptive pills.

86. The alleged deception in this case was not with respect to the nature of the act, but only as to the likely consequences flowing therefrom. The sexual contact in this case was consented to and there were no physically injurious consequences. There was therefore no violation of the appellant's right to physical or sexual autonomy that would give rise to a claim in battery. This is not to minimize the significance of fathering a child and the legal and moral responsibilities that ensue therefrom, nor to condone the alleged conduct of the respondent. The issue is only whether the alleged misrepresentation is actionable and whether, if proven, it would constitute the tort of battery. In my view, it would not. *** Appeal dismissed.

REFLECTION:

- *To what did PP consent when he had intercourse with DD? Why was DD not liable in tort?*
- *Was the outcome in this case fair in your view? Is fairness a relevant question?*
- *Is the Court's reasoning that the alleged deception in this case was not with respect to the nature of the act PP consented to sound, having regard to the Supreme Court of Canada's judgment in Kirkpatrick v. R?*

6.3.2.3 Kirkpatrick v. R [2022] SCC 33

Supreme Court of Canada – 2022 SCC 33

MARTIN J. (MOLDAVER, KARAKATSANIS, KASIRER, JAMAL JJ. concurring):

1. This appeal raises an important legal question about consent and condom use in the context of an allegation of sexual assault. What analytical framework applies when the complainant agrees to vaginal sexual intercourse only if the accused wears a condom, and he instead chooses not to wear one? All parties and members of this Court agree that his negation of her express limits on how she can be touched engages the criminal law. The question is: should condom use form part of the "sexual activity in question" to which a person may provide voluntary agreement under s. 273.1(1) of the *Criminal Code*, R.S.C. 1985, c. C-46?

Or alternatively, is condom use always irrelevant to the presence or absence of consent under s. 273.1(1), meaning that there is consent but it may be vitiated if it rises to the level of fraud under s. 265(3)(c) of the *Criminal Code*?

2. I conclude that when consent to intercourse is conditioned on condom use, the only analytical framework consistent with the text, context and purpose of the prohibition against sexual assault is that there is no agreement to the physical act of intercourse without a condom. Sex with and without a condom are fundamentally and qualitatively distinct forms of physical touching. A complainant who consents to sex on the condition that their partner wear a condom does not consent to sex without a condom. This approach respects the provisions of the *Criminal Code*, this Court's consistent jurisprudence on consent and sexual assault and Parliament's intent to protect the sexual autonomy and human dignity of all persons in Canada. Since only yes means yes and no means no, it cannot be that "no, not without a condom" means "yes, without a condom". If a complainant's partner ignores their stipulation, the sexual intercourse is non-consensual and their sexual autonomy and equal sexual agency have been violated.

3. Here, the complainant gave evidence that she had communicated to the appellant that her consent to sex was contingent on condom use. Despite the clear establishment of her physical boundaries, the appellant disregarded her wishes and did not wear a condom. This was evidence of a lack of subjective consent by the complainant—an element of the *actus reus* of sexual assault. As a result, the trial judge erred in granting the appellant's no evidence motion. ***

31. Section 273.1 is a key provision and operates as the gateway to consent. It is specific to sexual offences ***. *** Subsection 273.1(1) requires "the voluntary agreement of the complainant to engage in the sexual activity in question". Subsection 273.1(2) provides a non-exhaustive list of circumstances in which no consent is obtained in law. ***

33. Section 265(3) applies to all forms of assault (including sexual assault). It lists four situations where consent is not obtained as a matter of law, including where consent is obtained by fraud. In these cases, there is subjective consent under s. 273.1, but the law intervenes to vitiate that consent. Section 265(3) provides:

> (3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
>
> > (a) the application of force to the complainant or to a person other than the complainant;
> >
> > (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
> >
> > (c) fraud; or
> >
> > (d) the exercise of authority.

34. At the heart of this case is consent at the *actus reus* stage. When vitiation under s. 265(3) is argued, *Hutchinson* sets out a two-step process for analyzing consent, even though it does not impose a strict order-of-operations ***. At the first step, the question is whether the complainant consented to engage in the sexual activity in question under s. 273.1(1) (*Hutchinson*, at para. 4). If the complainant consented, or their conduct raises a reasonable doubt about the lack of voluntary agreement to the sexual activity in question, the second step is to consider whether there are any circumstances under s. 265(3) or s. 273.1(2)(c)—including fraud—that vitiate the complainant's "apparent consent" (*Hutchinson*, at para. 4). If the complainant has not consented in the first place, there is no consent to be vitiated under s. 265(3) or s. 273.1(2)(c). ***

45. All principles of statutory interpretation compel the conclusion that sex with a condom is a different physical activity than sex without a condom. It is the only meaning of the "sexual activity in question" that reads s. 273.1 as a whole and harmoniously with this Court's jurisprudence on subjective and affirmative consent. In addition, it fulfills Parliament's objective of giving effect to the equality and dignity-affirming aims underlying the sexual assault prohibitions; responds to the context and harms of non-consensual condom

refusal or removal; and respects the restraint principle in criminal law. While vitiation by fraud may still arise in other cases, it does not apply when condom use is a condition of consent. ***

100. The question of whether condom use forms part of the sexual activity in question depends on the facts and whether it is a condition of the complainant's consent in those particular circumstances. *** [T]his will require the trier of fact to consider the complainant's testimony and assess their credibility in light of all the evidence.

101. Recognizing that condom use may form part of the sexual activity in question not only brings clarity and consistency to the law, it leaves intact the careful limits set out in [*R. v. Cuerrier*, [1998] 2 S.C.R. 371] and [*R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584] in relation to the non-disclosure of HIV. Nothing in this approach impacts the criminalization of people living with HIV, unless they fail to respect their partner's condition of condom use. ***

103. In cases involving condoms, [*R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346] applies where the complainant finds out *after* the sexual act that the accused was wearing a knowingly sabotaged condom. *Hutchinson* remains good law and applies only to cases of deception, for example where a condom is used, but rendered ineffective through an act of sabotage and deception. If the complainant finds out *during* the sexual act that the condom was sabotaged, then they can revoke their subjective consent, the *actus reus* of sexual assault is made out, and there is no need to consider the fraud analysis. ***

106. The complainant's evidence in this case was clear: she would not consent to having sex with the appellant without a condom, but the appellant nevertheless chose to engage in sexual intercourse without one. Therefore, there was some evidence that the complainant did not subjectively consent to the sexual activity in question. The trial judge erred in concluding otherwise. ***

108. For these reasons, I would dismiss the appeal and uphold the order of the Court of Appeal for British Columbia setting aside the acquittal and ordering a new trial.

CÔTÉ, BROWN AND ROWE JJ. (WAGNER C.J. concurring):

109. We agree with our colleague Martin J. on the proper disposition of this appeal. We, too, would dismiss Mr. Kirkpatrick's appeal and uphold the order of the Court of Appeal for British Columbia for a new trial.

110. We also broadly and emphatically agree with our colleague's summary, at paras. 26-35, of Canadian sexual assault law. No means *only* no; and *only* yes means yes. Consent to sexual activity requires nothing less than positive affirmation. In this way, our law strives to safeguard bodily integrity and sexual autonomy for all. ***

112. At stake here, however, is not only the coherence of our jurisprudence on this issue, but the methodology by which judicial authority is exercised at this Court.

113. *** When a person agrees to have sex on the condition that their partner wear a condom, but that condition is circumvented *in any way*, the sole pathway to criminal liability is the fraud vitiating consent analysis under s. 265(3)(c).

114. This is precisely what occurred between Mr. Kirkpatrick and the complainant in this case. ***

169. *** [O]ur colleague's description of *Hutchinson*'s jurisprudential role leaves *Hutchinson* with virtually no precedential value. *** [O]n her interpretation, *Hutchinson* would apply *only* where an accused poked holes in a condom, or perhaps (but we do not know) damaged the condom in some other unidentified way. We do not accept that a 4-3 split panel of this Court intended its decision to be confined to a single bizarre set of factual circumstances. As we have indicated, this unduly narrow reading is manifestly inconsistent with this Court's long-standing jurisprudence on the proper flexible and broad approach to interpreting the *ratio* of its decisions. ***

289. We are bound—as is our colleague—to apply the two-step analytical framework set out in *Hutchinson* to determine whether valid consent existed at the time of the impugned sexual activity between Mr. Kirkpatrick and the complainant. ***

294. *** *Hutchinson* categorically eliminates condom use from the definition of "the sexual activity in question" under s. 273.1(1). *Hutchinson* thus precludes us from assessing Mr. Kirkpatrick's admitted failure to wear a condom in determining whether there was voluntary agreement to the sexual activity in question. ***

295. *** At trial, the complainant's evidence was that she consented to all physical sex acts in which the parties engaged on the night in question. Accordingly, we agree with the trial judge and Bennett J.A. of the Court of Appeal that there is some evidence of consent to "the sexual activity in question" at the first step of the *Hutchinson* framework under s. 273.1. ***

297. *Hutchinson* confirmed that fraud capable of vitiating consent to sexual activity has two elements: (1) dishonesty by the accused; and (2) deprivation or a risk of deprivation in the form of serious bodily harm to the complainant flowing from the accused's dishonesty (para. 67; see also *Mabior*, at para. 104). ***

300. We conclude that Mr. Kirkpatrick's failure to disclose he was not wearing a condom constituted at least "some evidence" of dishonesty sufficient to preclude a directed acquittal. *** If we accept—as we must at this preliminary stage—the complainant's evidence, Mr. Kirkpatrick would have been well aware that her consent was conditional on condom use. Nevertheless, when they had sex for the second time, mere hours later, Mr. Kirkpatrick failed to disclose that he was not wearing a condom. ***

303. In our view, Bennett J.A. was correct to find some evidence of a risk of deprivation to the complainant in this case, namely, a risk of pregnancy ***. ***

308. Accordingly, a new trial is required to determine whether the complainant's consent was in fact vitiated through fraud and, consequently, whether Mr. Kirkpatrick committed sexual assault within the meaning of s. 265(3)(c). ***

REFLECTION:

- *What is the disagreement between the majority and the minority concerning the R. v. Hutchinson precedent?*

6.3.3 Cross-references

- *Kohli v. Manchanda* [2008] INSC 42, [13]-[46]: §2.2.2.
- *Walker v. Metropolitan Police Comm'r* [2014] EWCA Civ 897, [19]: §2.2.3.
- *Wainwright v. Home Office* [2003] UKHL 53, [50]: §3.1.2.
- *Babiuk v. Trann* [2005] SKCA 5, [14], [26]: §6.5.2.
- *Robertson v. Stang* [1997] CanLII 2122 (BC SC), [47]-[51]: §8.2.3.

6.3.4 Further material

- L. Solum, "Legal Theory Lexicon: Consent" Legal Theory Blog (Jan 19, 2020).
- I. Grant & J. Benedet, "The Meaning of Capacity and Consent in Sexual Assault: *R. v. G.F.*" (2022) 70 Criminal L Quarterly 78.
- M. Dsouza, "False Beliefs and Consent to Sex" (2022) 85 Modern L Rev 1191.
- J. Wiener, "Deceptive Design and Ongoing Consent in Privacy Law" (2021) 53 Ottawa L Rev 133.
- M. Jones, A. Dugdale & M. Simpson (eds), *Clerk & Lindsell on Torts* (23rd ed, London: Sweet & Maxwell, 2020), ch 3, s 4.

6.4 Self-defence

Reddemann v. McEachnie, 2005 BCSC 915[117]

31. Self-defence is an answer to a claim for assault [§2.3] but only when the force used was not unreasonable in the circumstances. In dealing with the right to strike back in self-defence, Ferguson J. in

[117] Aff'd *Habib v. Wilson*, 2023 BCSC 585, [81]-[85].

Bruce v. Dyer, [1966] 2 O.R. 705 (Ont. H.C.J.) stated:

> The defendant was then justified in defending himself from the assault thus imposed upon him: *Re Lewis* (1874), 6 P.R. (Ont.) 236, where Gwynne, J., illustrates when the action is one for assault or on the case. When a person is assaulted he may do more than ward off a blow, he may strike back: *R. v. Morse* (1910), 4 Cr. App. R. 50.
>
> The right to strike back in self-defence proceeds from necessity. A person assaulted has a right to hit back in defence of himself, in defence of his property or in defence of his way. He has, of course, no right to use excessive force and so cannot strike back in defence of his way if there is a way around. (at p. 712) ***

6.4.1 Cockcroft v. Smith (1705) 11 Mod 43 (KB)

England Court of King's Bench – (1705) 11 Mod 43

Cockcroft in a scuffle ran his finger towards Smith's eyes, who bit a joint off from the plaintiff's finger. The question was, whether this was a proper defence for the defendant to justify in an action of *mayhem*?

HOLT, Chief Justice, said, if a man strike another, who does not immediately after resent it, but takes his opportunity, and then some time after falls upon him and beats him, in this case, *son assault* is no good plea; neither ought a man, in case of a small assault, give a violent or an unsuitable return; but in such case plead what is necessary for a man's defence, and not who struck first; though this, he said, has been the common practice, but this he wished was altered; for hitting a man a little blow with a little stick on the shoulder, is not a reason for him to draw a sword and cut and hew the other, &c.

REFLECTION:

- *What principle does Holt C.J. draw upon to limit the scope of self-defence?*

6.4.2 Buchy v. Villars [2009] BCCA 519

British Columbia Court of Appeal – 2009 BCCA 519

K. SMITH J.A. (FINCH C.J. AND LEVINE J.A. concurring):

1. The appellant, Dennis Wayne Buchy, suffered a catastrophic brain injury when he was punched by the respondent, Kevin Villars, in an altercation outside a pub where Mr. Villars worked as a bartender and in which Mr. Buchy had been a patron. He brought action for damages against Mr. Villars for assault and battery and against Mr. Villars' employer for negligence. Following a 23-day trial in the Supreme Court, Mr. Justice Bauman (now C.J.S.C.) concluded that Mr. Villars was acting in self-defence when he struck Mr. Buchy and dismissed the action. Mr. Buchy now appeals the dismissal of his action against Mr. Villars. He seeks a new trial. ***

3. On the evening of April 11, 1999, Mr. Buchy, his friend Mr. Sereda, and Mr. Laviolette, an acquaintance of both, had been drinking beer and playing pool together in the pub. Shortly before closing time, Mr. Buchy and Mr. Sereda got into a scuffle and Mr. Villars told all three they would have to leave. He escorted Mr. Buchy out of the pub. Mr. Sereda and Mr. Laviolette followed shortly thereafter.

4. Mr. Laviolette was not conspicuously affected by his drinking, but Mr. Buchy and Mr. Sereda were extremely intoxicated. ***

5. [Mr. Laviolette and Mr. Villars] both testified that Mr. Villars was initially standing by the door of the pub and that Mr. Buchy was a few feet away in the parking lot; that Mr. Buchy was shouting verbal abuse and racial insults at Mr. Villars, who is of African-American descent; that Mr. Buchy suddenly and without warning charged Mr. Villars, swinging wildly at him; and that Mr. Villars did not raise his hands or swing at Mr. Buchy or otherwise attempt to repel the attack. ***

7. *** [Mr. Villars] said Mr. Buchy punched him on the left side of his jaw and in the chest. He said Mr. Buchy

pushed him away from the door and off balance and that he spun into the parking lot and stopped himself from falling by placing his right hand on the pavement. He said he looked up at that instant and Mr. Buchy, who was now between him and the pub, was charging him again and was "right there on top of me". He continued:

> And at this point I don't know what he was going to do. He's coming at me, so I just was able to push myself up and just take—and hit him once, and he just would have—it wasn't thought about it. It was just a reaction, just so he could—he wouldn't be on me, because I know if he got on me, I'm off balance, I don't know what he would have did, kicked me, whatever, so I just wanted to get him off me. ***

10. The trial judge then set out the applicable law *** [2008 BCSC 385:

> 111. The tort [of battery] was discussed by the Supreme Court of Canada in *Mann v. Balaban* (1969), [1970] S.C.R. 74 (S.C.C.) and, in particular, the onus on the defendant pleading self-defence was noted by Justice Spence for the majority (at p. 87):
>
> > In an action for assault, it has been, in my view, established that it is for the plaintiff to prove that he was assaulted and that he sustained an injury thereby. The onus is upon the plaintiff to establish those facts before the jury. Then it is upon the defendant to establish the defences, firstly, that the assault was justified and, secondly, that the assault even if justified was not made with any unreasonable force and on those issues the onus is on the defence.
>
> 112. *** I believe an accurate summary of the law is contained in Linda D. Rinaldi, ed., *Remedies in Tort*, looseleaf (Toronto: Carswell, 1987) vol. 1 at 2-30 to 2-31 (footnotes omitted):
>
> > §19 The law gives every one the right to defend himself against either a threatened or an actual attack from another. The right of self-defence proceeds from and is limited by the necessity to ward off the danger of such an attack. Therefore the right of self-defence commences when the necessity for such defence begins and it terminates when the necessity for such self-defence comes to an end. The law, however, requires that the force used in defending oneself must not he out of proportion to the severity of the attack. An attack by fists may be answered by fists but not with deadly weapons such as knives and guns. In exercising the right of self-defence one must use only such force as on reasonable grounds the person attacked believes to be necessary for his own defence. In short, self-defence means defence, not counter-attack.
> >
> > §20 Self-defence is usually pleaded as a defence to a battery action where the defendant has struck the plaintiff in response to an attack or perceived attack by the plaintiff. It is a complete defence. If the defendant reasonably perceives an attack to be imminent, he may still be entitled to rely on self-defence although he has struck the first blow. However, force may only be used to repel or prevent an attack, not to punish an aggressor for past actions or as a guise for a counter-attack.]
> >
> > §21 In preventing or repelling an attack, no more than reasonable force may he used. What is reasonable depends on the facts and circumstances of the case, including the nature and seriousness of the attack or threatened attack, the relative size and strength of the combatants, and whether the acts complained of took place after the threat was averted. The seriousness of the resulting injury is not necessarily indicative of the use of unreasonable force, as even acts which cause serious injury may be justified as self-defence: "it has long been held that an attacked person defending himself and confronted with a provoking situation is not held down to measure with exactitude or nicety the weight or power of his blows." Where a person uses more than reasonable force, he himself may be liable for battery.

11. Then, he concluded:

> 114. In considering the defence in the context of the scenario described by Mr. Villars, which I have accepted in its critical aspects, Mr. Villars struck Mr. Buchy in response to Mr. Buchy's attack on

him.

115. Mr. Villars did so in an effort to repel the attack of Mr. Buchy and not to punish Mr. Buchy as "an aggressor for past actions or as a guise for a counterattack".

116. While the blow by Mr. Villars had devastating consequences, I find it to be reasonable force in the context of Mr. Buchy's attack(s) and the relative size and strength of the combatants.

117. While Mr. Villars was previously a professional athlete, his uncontroverted evidence was that he has no training in boxing or martial arts and, in the circumstances, I accept that he would not have known the force with which he struck Mr. Buchy, let alone have the ability to measure with a nicety that force.

118. Finally, in all the circumstances I find that Mr. Villars did not act unreasonably in not immediately retreating into the pub. He stayed outside to watch the men leave in an orderly fashion. He felt that he could calm Mr. Buchy down. The suddenness of Mr. Buchy's attack precluded retreat. ***

33. *** We may not interfere with that conclusion in the absence of some error of law or principle or a palpable and overriding error of fact. None has been shown.

34. For those reasons, I would dismiss the appeal.

REFLECTION:

- *What are the elements of the defence of self-defence? What are its limits?*
- *Would Villars have been able to avail himself of this defence had he been trained in boxing or martial arts?*

6.4.3 R v. Bird [1985] EWCA Crim 2

England and Wales Court of Appeal – [1985] EWCA Crim 2

THE LORD CHIEF JUSTICE (FOR THE COURT):

1. On 24th January this year in the Crown Court at Chelmsford, this appellant, as she now is this Court having given her leave to appeal against conviction, was convicted after a retrial of unlawful wounding under section 20 of the *Offences Against the Person Act 1861*, and she was sentenced to nine months' youth custody.

2. The facts of the case are these. On 10th March 1984 the appellant, Debbie Bird, was celebrating her seventeenth birthday. There was a party at a house in Harlow. Unhappily it was at that party that the events occurred which ended with her being sent to youth custody.

3. There was a guest at the party called Darren Marder, who was to be the victim of the events which occurred thereafter. He and the appellant had been friendly and had been going out together between about January and the middle of 1983. That close friendship had come to an end, but Marder arrived at the party with his new girl friend and, for reasons which it is not necessary to explore, an argument broke out. After a great deal of bad language and shouting, the appellant told Marder to leave, and leave he did.

4. A little later he unwisely came back and a second argument took place together with a second exchange of obscenities between the two of them. What happened thereafter was the subject of dispute between the parties, though not so much dispute as often arises in these sudden events. The appellant poured a glassful of Pernod over Marder, and he retaliated by slapping her around the face. Further incidents of physical force took place between them. The appellant said that the time came when she was being held and held up against a wall, at which point she lunged at Marder with her hand, which was the hand, unhappily, which held the Pernod glass. The glass hit him in the face, broke, and his eye as a result was lost. It was a horrible event in the upshot, but of course she would not realise the extent to which she was going to cause injury to this young man. ***

7. The appellant gave evidence. She insisted that she had been acting in self-defence. She was being pushed. Marder had said to her that he would hit her if she did not shut up. He slapped her in the face, she was being held by him and thought the only thing for her to do was to strike back to defend herself. In the agony of the moment, so to speak, she did not realise that she was holding the glass. ***

9. The grounds of appeal are these. First of all, the Judge was in error in directing the jury that before the appellant could rely upon a plea of self-defence, it was necessary that she should have demonstrated by her action that she did not want to fight. That really is the essence of the appellant's case put forward by Mr. Pavry to this Court in what, if we may say so, was a most helpful argument. ***

17. The matter is dealt with accurately and helpfully in the 5th edition of Smith and Hogan, *Criminal Law*, p.327 as follows:

> "There were formerly technical rules about the duty to retreat before using force, or at least fatal force. This is now simply a factor to be taken into account in deciding whether it was necessary to use force, and whether the force was reasonable. If the only reasonable course is to retreat, then it would appear that to stand and fight must be to use unreasonable force. There is, however, no rule of law that a person attacked is bound to run away if he can; but it has been said that—'… what is necessary is that he should demonstrate by his actions that he does not want to fight. He must demonstrate that he is prepared to temporise and disengage and perhaps to make some physical withdrawal.'
>
> It is submitted that it goes too far to say that action of this kind is *necessary*.
>
> It is scarcely consistent with the rule that it is permissible to use force, not merely to counter an actual attack, but to ward off an attack honestly and reasonably believed to be imminent. A demonstration by D [defendant] at the time that he did not want to fight is, no doubt, the best evidence that he was acting reasonably and in good faith in self-defence; but it is no more than that. A person may in some circumstances so act without temporising, disengaging or withdrawing; and he should have a good defence."

18. We respectfully agree with that passage. If the defendant is proved to have been attacking or retaliating or revenging himself, then he was not truly acting in self-defence. Evidence that the defendant tried to retreat or tried to call off the fight may be a cast-iron method of casting doubt on the suggestion that he was the attacker or retaliator or the person trying to revenge himself. But it is not by any means the only method of doing that.

19. It seems to us therefore that in this case the learned Judge—we hasten to add through no fault of his own—by using the word "necessary" as he did in the passages in the summing up to which we have referred, put too high an obligation upon the appellant. ***

24. *** This was a material misdirection and consequently this appeal must be allowed and the conviction quashed.

REFLECTION:

- *Why shouldn't the law require a person to walk away or to demonstrate they don't want to fight before permitting them to use force in self-defence?*
- *Was the force used here unreasonable or disproportionate?*[118]

[118] See *R. v. Khill*, 2021 SCC 37 *per* Martin J.:

"1. The law of self-defence plays an important part in the criminal law and in society. At the core of the defence is the sanctity of human life and physical inviolability of the person. Preserving life and limb operates to explain both why the law allows individuals to resist external threats and why the law imposes limits on the responsive action taken against others in its name. Life is precious. Any legal basis for taking it must be defined with care and circumspection (*R. v. McIntosh*, [1995] 1 S.C.R. 686 (SCC), at para. 82).

2. The contours of our law of self-defence are tied to our notions of culpability, moral blameworthiness and acceptable human behaviour. To the extent self-defence morally justifies or excuses an accused's otherwise criminal conduct and renders it non-culpable, it cannot rest exclusively on the accused's perception of the need to

6.4.4 Cross-references

- *Scott v. Shepherd* [1773] All ER Rep 295 (KB), [7]-[8]: §2.1.2.
- *Walker v. Metropolitan Police Comm'r* [2014] EWCA Civ 897, [8]: §2.2.3.

6.4.5 Further material

- H. Frowe & J. Parry, "Self-Defense" in E.N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Stanford University, 2021).
- T. Funk, "Cracking Self-Defense's Intractable 'Difficult Cases'" (2021) 100 Nebraska L Rev 1.
- J. Randolph, "How to Get Away with Murder: Criminal and Civil Immunity Provisions in 'Stand Your Ground' Legislation" (2014) 44 Seton Hall L Rev 599.
- W. Simons, "Self-Defense, Necessity, and the Duty to Compensate, in Law and Morality" (2018) 55 San Diego L Rev 357.
- N. Weisbord, "Who's Afraid of the Lucky Moose? Canada's Dangerous Self-Defence Innovation" (2018) 64 McGill LJ 349.
- J. Dawkins, "Defences—Self-Defence" in B. Anderson, J. Narwal & T. Paisana (eds), *The Criminal Law Ebook* (Canadian Legal Information Institute, 2022).

6.5 Defence of another

6.5.1 Gambriell v. Caparelli [1974] CanLII 679 (ON CC)

Ontario County Court, Judicial District of York – 1974 CanLII 679

✗REF: §9.1.2

CARTER CO.CT.J.:

1. This is an action for damages for assault tried before me without a jury at the Toronto nonjury sittings. The plaintiff alleges that he was assaulted by the defendant on a laneway at the rear of his residence which is on the west side of Concord Ave., Toronto, on July 17, 1970, as a result of which he suffered severe injury. ***

3. At about 5:30 in the afternoon of July 17, 1970, Fred Caparelli, then 21 years of age, and the son of the defendant, decided to wash his automobile which he had parked in the said laneway at the rear of the backyard of his residence. While he was getting the garden hose, the plaintiff (then aged 50), whose car was parked at the rear of his lot, decided to go shopping. In backing out of his lot onto the laneway, the rear of his vehicle came into contact with the rear of young Caparelli's vehicle.

4. Attracted by the noise of the impact, the Caparelli lad came running out and saw a little dent in the bumper of his car. He and the plaintiff began screaming at each other. Caparelli said he was going to call the police, there was further argument, the plaintiff started to get back in his car, Caparelli grabbed the plaintiff, who then hit Caparelli on the face with his fist. The blow was returned, other blows exchanged. The Caparelli boy, in the course of the fight, was backing up towards the rear of the plaintiff's car and fell back against the car. The plaintiff says that the Caparelli boy kicked him in the chest, leaving a heel mark on the skin, but this is not concurred in by the plaintiff's wife, nor did the plaintiff show this alleged mark to the police.

5. The Caparelli boy states that the plaintiff then put both hands around his neck and held him down and was choking him and that he was having trouble breathing. The plaintiff said that he never touched the

act. Put another way, killing or injuring another cannot be lawful simply because the accused believed it was necessary. Self-defence demands a broader societal perspective. Consequently, one of the important conditions limiting the availability of self-defence is that the act committed must be reasonable in the circumstances. A fact finder is obliged to consider a wide range of factors to determine what a reasonable person would have done in a comparable situation. ***"

boy's throat.

6. At this juncture, the defendant, a woman of 57 years at the time, the mother of young Caparelli, appeared on the scene, attracted by the screaming. She said she saw the plaintiff holding her son by the neck, that her son was under the plaintiff and that she thought her son was being choked. She said that she yelled—"stop! stop! stop!". She then ran into her garden and got a metal three-pronged garden cultivator tool with a five-foot-long wooden handle. She said she struck the plaintiff with this three times on the shoulder and then on the head. The plaintiff recalls only the blow on the head. As soon as the plaintiff saw the blood flowing from his head he released the defendant's son. ***

11. In England, common law makes a distinction between the tort of assault and the tort of battery. Assault is the act of a person whereby another person is put in immediate fear of violence, whereas battery is the intentional application of force to another without justification. ***

13. It would appear, however, that in Canada, the distinction between assault and battery has been blurred, and that when we now speak of an assault, it may include a battery. Certainly the *Criminal Code* encompasses in its definition of the offence of assault both assault and battery as it was understood at common law (R.S.C. 1970, c. C-34, s. 244).

14. Even in civil matters, such as I am dealing with here, the distinction would appear to be eliminated, and it would therefore not appear to be necessary to decide the matter on this narrow ground. In *Bruce v. Dyer*, [1966] 2 O.R. 705, 58 D.L.R. (2d) 211 (H.C.), for example, which was an action for damages for assault, Ferguson, J., at p. 710 O.R., p. 216 D.L.R., said:

> The law concerning assault goes back to earliest times. The striking of a person against his will has been, broadly speaking always regarded as an assault.

15. I shall therefore accept the definition of Ferguson, J., and this will necessitate a finding that the defendant assaulted the plaintiff, unless (a) she was justified in using force against the plaintiff, and (b) the amount of force she used was not unreasonable in all the circumstances. ***

17. In *R. v. Duffy*, [1967] 1 Q.B. 63, one Kathleen Duffy hit a man named Mohammed Akbar in a tavern. Elizabeth Duffy, sister of Kathleen, appeared from the wash-room and saw Kathleen on her knees on the floor fighting with Akbar, who was holding her by the hair. Elizabeth pulled Akbar's hair to pull him off her sister but did not succeed, and when he kicked her on the leg she hit him on the head with a bottle, as a result of which Akbar received severe lacerations to his face, forehead and head. Elizabeth was convicted of unlawful wounding. On appeal to the Court of Criminal Appeal, the Court quashed her conviction, and at p. 67, Edmund Davies, J. (as he then was), reading the judgment of the Court, said:

> Quite apart from any special relations between the person attacked and his rescuer, there is a general liberty even as between strangers to prevent a felony.

The Court further held that the necessity of intervention and the reasonableness or otherwise of the manner of intervention were questions of fact.

18. In *R. v. Chisam* (1963), 47 Cr. App. R. 130, it was held that where a person charged with the death of another says that the death of that other came about in defence of a relative or friend, the defence of self-defence would be available if the accused believed on reasonable grounds that the relative or friend was in imminent danger, even though those reasonable grounds are founded on a genuine mistake of fact. ***

21. While the cases I have cited all deal with criminal matters, the principles outlined therein are of equal weight in a civil case of this nature.

22. It would appear therefore that, where a person in intervening to rescue another holds an honest (though mistaken) belief that the other person is in imminent danger of injury, he is justified in using force, provided that such force is reasonable; and the necessity for intervention and the reasonableness of the force employed are questions to be decided by the trier of fact.

23. Having regard, therefore, to the facts as I have found them and to the law as I understand it, in my

opinion, when the defendant appeared on the scene and saw her son at the mercy of the plaintiff, and being of the belief that her son was in imminent danger of injury, she was justified in using force to prevent that injury from occurring. ***

25. The next question is—Was the force she used reasonable in the circumstances? In the witness-box, the defendant impressed me as a woman who, under normal circumstances, would be quite cool and collected. She is a woman of average build, and as I have indicated, of mature years. As her knowledge of English was slight, her evidence was given in Italian and translated by an interpreter. When she saw her son with the plaintiff's hand about his neck, she shouted for the plaintiff to stop, to no avail. Then she ran and seized the nearest implement she could find, which happened to be a cultivator fork. She struck the plaintiff three times on the shoulder, again to no avail, and finally struck him on the head. I think the fact that the plaintiff sustained only lacerations to his head rather than a fractured skull is indicative of the fact that the force she used in striking the plaintiff was not, in the circumstances, excessive.

26. In my opinion she had little other choice. If the plaintiff could overpower her son, the empty-handed aid of a woman some seven years older than the plaintiff would have availed little. On the evidence, she was alone in the laneway with the exception of the combatants and Mrs. Gambriell, who did nothing to assist. Had she run for aid, her son might well have been beyond recovery before she returned, especially as, speaking Italian, she may have encountered difficulty in summoning aid. While I am loath to excuse violence, there are times, and I think this is one of them, when the violence inflicted by the defendant on the plaintiff and the degree of such violence was justified and not unreasonable in the circumstances. I would therefore dismiss the plaintiff's case. ***

REFLECTION:

- *Is the rule that justifies the use of force in response to a mistaken belief that another is in danger consistent with the principle that ordinarily in tort mistake is no excuse (§6.2.3)? Which principle should prevail in a case such as this?*

6.5.2 Babiuk v. Trann [2005] SKCA 5

Saskatchewan Court of Appeal – 2005 SKCA 5

SHERSTOBITOFF J.A. (LANE J.A. AND JACKSON J.A. concurring):

1. This appeal is from a judgment which dismissed an action for damages for injuries incurred as a result of an alleged assault by one player against another during a rugby game. The trial judge found that the respondent Trann was justified in punching the appellant Babiuk in the jaw, as he did so to protect a teammate, Soulodre, upon whose face Babiuk had stepped. Babiuk's jaw was broken in two places as a result of the blow to his jaw.

2. The appeal raises these issues:

> 1. Was the defence of another (a teammate) a defence available at law in an action for damages for assault?
>
> 2. If so, was the force used by Trann in defending Soulodre reasonable in the circumstances? ***

3. Babiuk and Trann were members of opposing teams playing in the North Saskatchewan Rugby Union, a member of the Saskatchewan Rugby Union. Some years earlier the two teams had been one, but had split so as to make two teams. Since then there has been a great deal of animosity between the members of the two teams. ***

26. If the sport is a contact sport such as rugby and hockey, a greater degree of application of force is consented to and tolerated than in ordinary circumstances. The extent of the consent is a question of fact to be determined by the trial judge. In this case the trial judge specifically found that the degree of force used did not fall within the scope of that consent (or within the rules of the game.) No appeal has been taken from that determination and consent by the plaintiff to the conduct of the defendant is not an issue. But in any event, consent by the plaintiff to the conduct of the defendant, if it exists, is relevant in any civil

action for assault, not just to actions arising out of organized sport. ***

29. Accordingly, the trial judge was correct in finding that the defence was available to Trann in this case. While the judge made no specific findings of fact as to what actually happened, she did say that she accepted the version of events as presented by Trann and his teammates. That being so, it was open to her to find, as she implicitly did, that Babiuk, in stepping on and raking the face of Soulodre, was acting unlawfully by committing an assault, and that Trann had established that he was justified in using force to protect his teammate Soulodre from injury to his face and head arising from the assault.

30. There remains the question of whether the force used by Trann was reasonable. The trial judge made no explicit finding that it was, but implicitly did so when she said in para. [16] that Trann reacted instinctively and struck Babiuk to prevent further injury. She also noted that he only struck once. ***

32. Given that the facts as found by the trial judge were that Babiuk, who weighed at least 255 pounds, was stepping on or raking the face of a teammate of Trann's with his metal-cleated shoes, and that Trann had to quickly get up from the ground and act to protect the teammate, it is obvious that the events occurred within a very few seconds and in the heat of a very rough game. One can argue in retrospect that a push or shove would have been just as effective as the blow in fact delivered to get Babiuk's foot off of Soulodre's face. However, the urgency of the need to act to protect the teammate from harm gave Trann little or no time to consider the exact kind of force to be used and to measure with any nicety the degree of force to be used. The evidence by the referee that Trann was known as a player who followed the rules, and the fact that Trann struck only once, tend to show that Trann acted to protect his teammate rather than to retaliate or to get revenge. It must also be noted that a single blow to the jaw does not usually cause the degree of injury that occurred here. In all of these circumstances, the decision of the trial judge that the force used by Trann was reasonable was open to her, and was a reasonable decision. Accordingly, there is no basis upon which this Court can interfere with her judgment. ***

REFLECTION:

- *Why was a punch hard enough to break Babiuk's jaw not an unreasonable use of force in the circumstances?*

6.5.3 Further material

- J. Goudkamp, *Tort Law Defences* (London: Bloomsbury Publishing, 2013), [5.2.2.2].

6.6 Lawful authority

S. Beswick, "Equality Under Ordinary Law" (2024) 2 Supreme Court L Rev (3d) (forthcoming)

In jurisdictions such as Canada that hew to the English common law tradition, the idea that government entities and officers may be liable for intentional torts is quite unremarkable. Our courts have long accepted—affirmed in the great case of *Entick v. Carrington*[119]—that a public official who wilfully interferes with another's person or property commits trespass and will be liable at common law in the same way as a private person in the absence of lawful justification. The liability of public authorities in negligence is a more fraught enquiry, but even in that context equality is the starting point: careless acts[120] and omissions[121] will lead to civil liability when a private person would be liable in the same circumstances.[122] A.V. Dicey elevated

[119] (1765) 2 Wils. K.B. 275 [§7.1.1]. ***

[120] See e.g. *Robinson v. Chief Constable of West Yorkshire* [2018] A.C. 736, [2018] UKSC 4 at paras. 32-36 [§19.5.1.2]; *Attorney General v. Hartwell* [2004] 1 W.L.R. 1273, [2004] UKPC 12 at paras. 20-21 [§19.5.1.3]; *British Columbia v. Insurance Corporation of British Columbia*, [2008] 1 SCR 21, 2008 SCC 3 [§18.2.3.1].

[121] See e.g. *Hill v. Hamilton-Wentworth Regional Police Services Board,* [2007] 3 SCR 129, 2007 SCC 41 at para. 20 [§13.4.2.2]; *Rennalls v. Tettey*, [2021] AJ No. 6, 2021 ABQB 1 at para. 23-81; *Michael v. Chief Constable of South Wales Police* [2015] A.C. 1732, [2015] UKSC 2 at para. 116; *Tindall v. Chief Constable of Thames Valley Police* [2022] 4 W.L.R. 104, [2022] EWCA Civ 25 at para. 24.

[122] The equality principle thus represents a *floor* for public authority liability. More controversial (and beyond the scope of this paper) is whether the equality principle is also a *ceiling* on public authority liability; i.e. whether or not public authorities bear civil liability for the performance of public functions that private persons do not perform. See Stelios

this "idea of legal equality" to a foundational principle of the rule of law ***.[123]

The principle of equality under ordinary law eschews any presumptive immunity of public officials from civil liability when they go about their duties. The special powers of law enforcement—to search, to arrest, to keep order—do not exempt officers from civil proceedings. Rather, in response to a civil claim, their powers of lawful authority must "be pleaded as a defence in the ordinary way in an ordinary court in the face of an ordinary … claim for an ordinary … tort."[124] *** […continue reading]

REFLECTION:

- *What is the principle of equality under ordinary law?[125] Is it an ideal that the common law should strive toward? Or should those who exercise public power be regulated solely by public law and not by private law?[126]*
- *Prof. Gardner makes the argument that public officials in Commonwealth common law systems are "citizens in uniform"?[127] What does this mean? Is this a sound principle for the common law to adopt?*

6.6.1 Crampton v. Walton [2005] ABCA 81

Alberta Court of Appeal – 2005 ABCA 81

FRUMAN J.A. (PAPERNY J.A. AND ROWBOTHAM J. concurring):

1. Darryl Crampton stood in his kitchen making a sandwich for lunch. As he retrieved a pickle from a jar with a plastic-handled steak knife, members of the Calgary Police Service tactical unit burst through his unlocked screen door. Constable Anthony Manning approached Mr. Crampton, pointing an M-16 assault rifle and wearing 30 pounds of body armour. He announced the police had a search warrant, and ordered Mr. Crampton to drop the steak knife and get to the floor. Stunned, Mr. Crampton hesitated for a short period before complying. He dropped the knife and, as he began to kneel on the ground, Cst. Manning assisted him in his descent. The impact with the floor was sufficient to knock the wind out of Mr. Crampton. Cst. Manning then pinned Mr. Crampton to the floor by kneeling on his back. Cst. Manning maintained physical control of Mr. Crampton for approximately 10 minutes while the police searched the residence for a marijuana grow operation. Neither drugs nor weapons were found. Mr. Crampton, who was lying face down on the kitchen floor with his hands handcuffed behind his back, was then asked to identify himself. He was not the individual named in the warrant as the occupant of the residence. The police had faulty intelligence and the wrong suspect. They departed, leaving Mr. Crampton with a partially-constructed pickle sandwich stuck to the front of his shirt, wet pants in which he had relieved himself, a bruised jaw, a rotator-

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Tofaris and Sandy Steel, "Negligence Liability for Omissions and the Police" (2016) 75 Cambridge L.J. 128 at 136-137; Erika Chamberlain, "To Serve and Protect Whom? Proximity in Cases of Police Failure to Protect" (2016) 53:4 Alta. L. Rev. 977; Benjamin Goold, *Exercising Judgment: Understanding Police Discretion in Canada* (Joint Federal/Provincial Commission into the April 2020 Nova Scotia Mass Casualty, 2022) at 19-24; Erika Chamberlain, "Diceyan Equality and Public Authority Liability: Floor or Ceiling?" in Andrew Robertson and Jason Neyers eds, *Private Law and the State* (*forthcoming* Oxford: Hart Publishing, 2024).

[123] A.V. Dicey, *Introduction to the Study of the Law of the Constitution,* 8th ed (London: Macmillan: 1915), Roger E. Michener, ed. (Indianapolis: Liberty Fund, reprint 1982) at 120 [§1.1.1]. Aff'd in Canada in *Roncarelli v. Duplessis*, [1959] SCR 121 at 142 (SCC); *R. v. Campbell*, [1999] 1 SCR 565 at para. 18 (SCC). See Mark D. Walters, "Legality as Reason: Dicey, Rand, and the Rule of Law" (2010) 55:3 McGill LJ 563; Peter W. Hogg, Patrick Monahan and Wade K. Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011) at 4; Mark D. Walters, *A.V. Dicey and the Common Law Constitutional Tradition: A Legal Turn of Mind* (Cambridge: Cambridge University Press, 2020) at ch. 9.

[124] John Gardner, "Criminals in Uniform" in R.A. Duff *et al.*, eds, *The Constitution of the Criminal Law* (Oxford: Oxford University Press, 2013) at 2.

[125] See *Holder v. State of South Australia* [2018] SADC 83, [193], aff'd [2019] SASCFC 135: "Any person, including a police officer, who enters the land of another must justify that entry by proving that it was made with the consent of the occupier or in accordance with lawful authority. Unless authorised by common law or statute, police have no special entitlement to enter land. As Brennan J said in *Halliday v. Nevill* (1984) 155 CLR 1 at 10: 'A police officer who enters or remains on private property without the leave and licence of the person in possession or entitled to possession commits a trespass and acts outside the course of his duty unless his entering or remaining on the premises is authorized by law.'" [Internal citations omitted.]

[126] See *Nelson (City) v. Marchi*, 2021 SCC 41, [40]-[41] [§19.5.2.2].

[127] J. Gardner, "Criminals in Uniform" in R.A. Duff *et al* (eds), *The Constitution of the Criminal Law* (Oxford: Oxford University Press, 2013).

cuff injury and five cracked ribs.

2. Mr. Crampton sued the chief of police and individual members of the Calgary Police Service drug and tactical units for assault. His claim was successful and he was awarded $20,000 in damages. The police appeal. They acknowledge that Mr. Crampton was assaulted, but argue the assault was justified under s. 25(1) of the *Criminal Code*, R.S.C. 1985, c. C-46.

Assault and *Criminal Code* s. 25(1)

3. The law relating to the tort of assault is well settled in Canada. The onus is on the plaintiff to establish he was assaulted and sustained an injury. The plaintiff will then succeed unless the defendant proves the assault was justified and was not made with unreasonable force: *Mann v. Balaban* (1969), [1970] S.C.R. 74 (S.C.C.), at 87.

4. In the case of police conduct, this defence has been codified under s. 25(1) of the *Criminal Code* ***:

> [**25. Protection of persons acting under authority**
>
> (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law
>
> > (a) as a private person,
> >
> > (b) as a peace officer or public officer,
> >
> > (c) in aid of a peace officer or public officer, or
> >
> > (d) by virtue of his office,
>
> is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.] ***

5. This section protects police officers, among others, from criminal liability for actions committed in the course of enforcing or administering the law. Although the section is contained in the *Criminal Code*, it also provides a defence to civil liability: *Bolianatz v. Edmonton Police Service*, 313 A.R. 73, 2002 ABQB 284 (Alta. Q.B.) at para. 21, citing *Shynall v. Priestman*, [1959] S.C.R. 615 (S.C.C.), at 623. Section 25 does not confer extra powers on the police, but serves as a shield from criminal or civil liability: *R. v. Asante-Mensah* (2001), 204 D.L.R. (4th) 51 (Ont. C.A.) at para. 51, aff'd [2003] 2 S.C.R. 3 (S.C.C.). See also *Eccles v. Bourque* (1974), [1975] 2 S.C.R. 739 (S.C.C.), at 742.

6. Section 25(1) contains three branches. In order to access the protection of the section, a police officer must prove that he or she:

> (i) was required or authorized by law to perform an action in the administration or enforcement of the law;
>
> (ii) acted on reasonable grounds in performing that action; and
>
> (iii) did not use unnecessary force.

See *Chartier v. Greaves*, [2001] O.J. No. 634 (Ont. S.C.J.) at para. 54.

7. As is the case with other defences to assault, those seeking exemption from liability under s. 25(1) bear the burden of demonstrating the section applies: *Bolianatz*, *supra*, at para. 21. Therefore, to succeed in defending a civil suit for assault, the police must prove each of these three elements on a balance of probabilities.

8. Mr. Crampton established the assault and resulting injury at trial, and these findings are not challenged on appeal. The police relied on s. 25(1) as a defence, but the trial judge concluded the requirements of the section had not been met and the assault could not be justified. Specifically, he found there was insufficient

evidence to prove the police officers had reasonable grounds for their aggressive actions in executing the warrant. He also found Cst. Manning used unnecessary force in securing and restraining Mr. Crampton. On appeal, the police challenge the judge's interpretation and application of s. 25(1). ***

Section 25(1)—the three branches

14. As Mr. Crampton established the assault and the resulting injury, the police had to prove the assault was justified under s. 25(1). I now turn to an analysis and application of its three branches.

(i) The police officer is required or authorized by law to perform an action in the administration or enforcement of the law

15. The first element is relatively straightforward. It requires the court to review the type of action undertaken by the police officer (rather than the manner in which the action was carried out) to determine whether it was something the police officer was required or authorized by law to perform in the administration or enforcement of the law. Essentially, the court decides whether the type of action was within the scope of the police officer's law enforcement duties.

16. In this case, the police obtained a warrant that authorized them to enter the residence to search for drugs. The warrant did not authorize the police to detain, restrain or arrest the occupants. Generally, peace officers have no authority over individuals they encounter in the premises when executing a search warrant: Scott C. Hutchison, James C. Morton & Michael P. Bury, *Search and Seizure Law in Canada*, looseleaf (Toronto Carswell, 1993) at 17-8. However, in *Levitz v. Ryan* (1972), 9 C.C.C. (2d) 182 (Ont. C.A.), at 191, the court recognized that reasonable restraint may be necessary to allow officers to conduct a search, for example, to prevent occupants from secreting or destroying evidence, or, in the case of violent or dangerous individuals, to protect the officers conducting the search. See also *R. v. Gogol* (1994), 27 C.R. (4th) 357 (Ont. Prov. Div.) at paras. 41-42.

17. Mr. Crampton was present in the residence being searched by the police pursuant to a search warrant. Arguably, the police would be authorized to restrain him for some purpose related to the proper execution of the search warrant, meeting the first branch of s. 25(1).

18. The trial judge did not comment on the first part of the defence. He stated that the issues in the trial were whether the police acted on reasonable grounds in executing the search warrant and used no more force than was necessary, which are the second and third branches of the s. 25(1) defence. Therefore, he must have decided the first branch was satisfied, which is the proper conclusion.

(ii) The police officer acts on reasonable grounds in performing the action he or she is required or authorized by law to perform

19. The second element of the s. 25(1) defence requires the court, having determined that the type of action falls within the scope of the police officer's law enforcement duties, to examine the basis for the action and manner in which the action was carried out. The police officer must act on "reasonable grounds". Until a 1985 *Criminal Code* amendment, s. 25(1) required a police officer to act on "reasonable and probable grounds": R.S.C. 1985, c. C-46. Cases that refer to reasonable and probable grounds must be read in this light.

20. The phrase "reasonable grounds" also appears in s. 32(1) of the *Criminal Code*, which justifies the use of force to suppress a riot. In evaluating the conduct of a police officer, the court is to place itself in the shoes of the officer and assess whether reasonable grounds existed for the actions taken: *Berntt v. Vancouver (City)*, 1999 BCCA 345 (B.C. C.A.) at paras. 35-37. See also *R. v. Storrey*, [1990] 1 S.C.R. 241 (S.C.C.).

21. The modified objective test used in relation to s. 32(1) is equally applicable in determining reasonable grounds under s. 25(1). See, for example, *Chartier*, *supra*, at para. 59. In order to satisfy the second element of s. 25(1), namely that the police officer acted on reasonable grounds, the court must determine whether there was an objectively reasonable basis, given the circumstances faced by the police officer, for the actions undertaken by the officer.

22. Essentially, s. 25(1) is a safe harbour from liability for those who are required to enforce the law. The police are often placed in situations in which they must make difficult decisions quickly, and are to be afforded some latitude for the choices they make. See *R. v. Asante-Mensah*, [2003] 2 S.C.R. 3 (S.C.C.) at para. 73. Courts recognize that law enforcement is dangerous; no one wants police officers to compromise their safety. On the other hand, s. 25(1) is not an absolute waiver of liability, permitting officers to act in any manner they see fit: *Chartier* at para. 64. The police are entitled to be wrong, but they must act reasonably.

23. For the purposes of this case, the law enforcement action to be considered is the manner in which the search warrant was executed. ***

The search warrant and the sufficiency of the evidence

24. The police's first argument is that the issuance of the search warrant confirms the existence of reasonable grounds for their actions in executing the warrant. This argument fails to recognize the fundamental distinction between being authorized to perform an action and the manner in which the action is carried out.

25. A search warrant indicates there are reasonable grounds to believe evidence in respect of an alleged criminal offence can be found in a residence and authorizes a search of the premises for that evidence. In this case, the alleged offence is the cultivation of marijuana and the warrant authorizes a search for drugs. Neither the specific terms of the search warrant nor any provision of the *Criminal Code* deems the issuance of a search warrant to be a *carte blanche* to the police to execute the warrant in any manner, with any level of aggression and with any type of restraint or detention they see fit. Section 25(1), which plainly calls for a police officer to act on reasonable grounds, confirms this interpretation. ***

27. In this case, to satisfy the second branch of s. 25(1), the police must establish there were reasonable grounds for the actions taken in executing the warrant. More specifically, they must prove on a balance of probabilities that it was reasonable, in the circumstances, to deploy the tac team, to execute the warrant in an aggressive manner and to restrain Mr. Crampton.

28. The police submit their actions were reasonable because they were concerned the occupants of the residence were armed. They argue that this possibility required the involvement of the tac team and obligated the tac team to execute its duties in an aggressive manner, including physically restraining Mr. Crampton, to ensure the safety of the officers and the general public. This explanation might well have carried the day had there been evidence to support it. However, none of the police witnesses disclosed the source or strength of the concern that the occupants of the residence might be armed.

29. The best evidence came from Cst. Forsen, the officer who obtained the warrant and the only officer who conducted the investigation. He testified he had "a belief that there was a possibility of weapons at the residence". Because the information to obtain a search warrant was sealed, Cst. Forsen declined to state the basis of his belief, and even refused to state whether his concern originated from a confidential informant, his own investigation or both. Without this important context, it was impossible for the trial judge to evaluate the objective reasonableness of the police's actions. Accordingly, the police could not prove they acted on reasonable grounds, to meet the second branch of s. 25(1). ***

(iii) The police officer does not use unnecessary force

42. The final element of the s. 25(1) defence requires the court to determine whether unnecessary force was used. In making this assessment, the court is to determine whether the use of force was objectively reasonable in light of the circumstances faced by the police officer: *Bolianatz* at para. 36; *Vlad v. Edmonton City Police Service*, 319 A.R. 1, 2002 ABQB 518 (Alta. Q.B.) at para. 133.

43. Because both the second and third branches of the s. 25(1) defence use the modified objective standard to review police conduct, the demarcation between the two elements is sometimes blurred. To clarify, the second branch requires the court to determine whether the police acted on reasonable grounds in carrying out the action. The police could, for example, establish reasonable grounds for using force. The third branch focusses exclusively on the amount of force used. Even if the police acted on reasonable grounds in executing the warrant in an aggressive manner, they will be denied the protection of s. 25(1) if they used

excessive force.

44. Police officers act in dangerous and unpredictable circumstances. No doubt a trained police officer will have instructions and a game plan to follow when entering premises to execute a search warrant. But the officer will have to react to the circumstances that present themselves. Accordingly, police officers will be exempt from liability "if they use no more force than is necessary having regard to their reasonably held assessment of the circumstances and dangers in which they find themselves": *Levesque v. Zanibbi*, 1992 CarswellOnt 2832 (Ont. Gen. Div.) at para. 17.

45. Police officers are not expected to measure the precise amount of force the situation requires: *Bolianatz* at para. 36 citing *Bottrell v. R.* (1981), 60 C.C.C. (2d) 211 (B.C. C.A.), at 218. *** Nor will they be denied the protection of s. 25(1) if they fail to use the least amount of force that would achieve the desired result. Allowance must be made for an officer, in the exigency of the moment, misjudging the degree of necessary force: *Klyne v. Rae*, 218 Sask. R. 141, 2002 SKQB 139 (Sask. Q.B.); *Anderson v. Smith*, 2000 BCSC 1194 (B.C. S.C.); *Breen v. Saunders* (1986), 71 N.B.R. (2d) 404 (N.B. Q.B.). Accordingly, the immediate decisions a police officer makes in the course of duty are not assessed through the "lens of hindsight": *Robinow v. Vancouver (City)*, 37 M.P.L.R. (3d) 265, 2003 BCSC 661 (B.C. S.C.) at para.71 ***.

46. In this case, Cst. Manning entered the premises with the belief its occupants would be armed and dangerous. According to his training, four seconds was the optimum time for subduing any residents. As soon as he saw Mr. Crampton, he ordered him to drop the steak knife and get on the floor. Mr. Crampton complied, although, understandably, he was startled and it took a short while for the command to register. According to Cst. Manning's cross-examination, Mr. Crampton did not resist or attempt to flee, but obediently dropped the steak knife and began to get down. Mr. Crampton was not difficult to subdue, nor was he combative. Moreover, other police officers were present to provide backup to Cst. Manning. Cst. Manning also testified that he only used force if he needed to control an individual. There was no evidence here that force was required to control Mr. Crampton; the only reason for applying force was because Mr. Crampton was not getting down on the floor quickly enough.

47. Cst. Manning admitted that he pushed Mr. Crampton to the floor and kneeled on his back to restrain him. Mr. Crampton testified that the push knocked the wind out of him, considerable force was applied in restraining him and he had difficulty breathing. He was in a great deal of pain and, soon after the police left, he called an ambulance and went to the hospital. In addition to bruising and a rotator cuff injury, x-rays eventually showed Mr. Crampton had five cracked ribs and, as a result, a partially-collapsed lung. It took six weeks for the injuries to heal.

48. The trial judge concluded that five cracked ribs denoted a considerable degree of force that was unnecessary in the circumstances disclosed in Cst. Manning's cross-examination. On appeal, there is no suggestion the trial judge applied the wrong test in making this determination. The question whether unnecessary force was used is a factual one to be determined based on the particular circumstances of each case: *Bolianatz* at para. 35 citing *Chartier* at para. 64. Accordingly, this determination is subject to review for palpable and overriding error: *Housen*, *supra*, at para. 10. No such error has been shown.

Decision to absolve Cst. Manning of personal liability

49. One remaining issue must be addressed. Notwithstanding his earlier findings that the police had not demonstrated reasonable grounds for their actions, and Cst. Manning used unnecessary force, the trial judge found s. 25(1) was available to absolve Cst. Manning from personal liability for Mr. Crampton's injuries. ***

53. *** There is no residual discretion to grant protection under s. 25(1) when its elements have not been satisfied. ***

55. Although the judge did not have the discretion to exempt Cst. Manning from personal liability, neither party seeks to make him personally liable and this Court has not been asked to interfere. ***

56. The judge properly concluded the police had not established a defence under s. 25(1). The appeal is therefore dismissed.

REFLECTION:

- *Which of the three elements that make up the s. 25(1) Criminal Code defence did the police fail to prove in this case? Would the outcome have been different if the burden of proof was on the plaintiff?*
- *Should Cst. Manning have been absolved of personal liability in this case?*

6.6.2 R. v. Tim [2022] SCC 12

✗**REF: §6.2.4.1, §6.6.8.1**

JAMAL J. (WAGNER C.J., MOLDAVER, CÔTÉ, ROWE, KASIRER JJ. concurring): ***

3. At trial, the appellant applied to exclude the evidence of the gun, ammunition, and drugs on the basis that the police had breached his rights under ss. 8 and 9 of the *Charter*. ***

(a) Section 9 of the *Charter*

21. Section 9 of the *Charter* provides that "[e]veryone has the right not to be arbitrarily detained or imprisoned." ***

22. *** [A]n unlawful arrest or detention is necessarily arbitrary and infringes s. 9 of the *Charter* ***.

(b) The Power of a Peace Officer to Arrest Without a Warrant

23. Sections 495(1)(a) and (b) of the *Criminal Code*, RSC 1985, c C-46 provide ***:

> [**495. Arrest without warrant by peace officer**
>
> (1) A peace officer may arrest without warrant
>
> > (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;
> >
> > (b) a person whom he finds committing a criminal offence; or
> >
> > (c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.] ***

24. The applicable framework for a warrantless arrest was set out in *R. v. Storrey*, [1990] 1 S.C.R. 241, at pp. 250-51. A warrantless arrest requires both subjective and objective grounds. The arresting officer must subjectively have reasonable and probable grounds for the arrest, and those grounds must be justifiable from an objective viewpoint. The objective assessment is based on the totality of the circumstances known to the officer at the time of the arrest, including the dynamics of the situation, as seen from the perspective of a reasonable person with comparable knowledge, training, and experience as the arresting officer. The police are not required to have a *prima facie* case for conviction before making the arrest ***. ***

(c) Precedent

27. This Court first ruled that a lawful arrest cannot be based on a mistake of law in *Frey v. Fedoruk*, [1950] S.C.R. 517. *** A warrantless arrest is lawful only if the arresting officer's reasonable belief in the facts, if true, traces a pathway to a criminal offence known to the law. As Cartwright J. (as he then was) explained in *Frey*, at p. 531:

> I think that [the statutory power of warrantless arrest] contemplates the situation where a Peace Officer, on reasonable and probable grounds, believes in the existence of a state of facts which, if it did exist would have the legal result that the person whom he was arresting had commit[t]ed an offence for which such person could be arrested without a warrant. ***

28. *Frey* was recently affirmed on this point in *Kosoian v. Société de transport de Montréal*, 2019 SCC 59,

[2019] 4 S.C.R. 335. In *Kosoian*, a subway passenger sued the police when she was arrested and searched for refusing to comply with a subway pictogram warning passengers to hold an escalator handrail. The Court ruled that the pictogram was simply a warning and did not create an offence, and the police officer's error of law in believing otherwise did not provide reasonable and probable grounds to arrest the passenger without a warrant under Quebec's *Code of Penal Procedure*, CQLR, c. C-25.1 ("*C.P.P.*"). In *Kosoian*, at para. 78, citing *Frey*, Côté J. stated that the reasonable grounds concept relates to the facts, not the existence of an offence in law—and thus an arrest based on a mistake of law is unlawful, even if the arresting officer believes in good faith that the offence exists:

> The exercise of these powers presupposes that there are reasonable grounds to believe an offence has been committed. *The "reasonable grounds" concept relates to the facts, not to the existence in law of the offence in question* (*Frey v. Fedoruk*, [1950] S.C.R. 517, at p. 531). If the offence that the police officer believes has been committed simply does not exist, neither the [*Code of Penal Procedure*, CQLR, c. C-25.1] nor, for that matter, any other statute or common law rule gives the officer the power to require a person to identify himself or herself and to arrest the person if he or she refuses to comply ***. *An officer who makes an arrest on this basis is acting unlawfully, even if he or she believes in good faith that the offence exists* ***. *** [Emphasis added.][128]

See, to similar effect, *Hudson v. Brantford Police Services Board* (2001), 158 C.C.C. (3d) 390 (Ont. C.A.), at para. 24, per Rosenberg J.A. (s. 25(1) of the *Criminal Code*, which protects a peace officer from civil liability when acting on "reasonable grounds", encompasses mistakes of fact, but "[i]t does not protect against reasonable mistakes of law") ***. See also R. J. Marin, *Admissibility of Statements* (9th ed. (loose-leaf)), at § 9:51 ("[B]ecause the risk of abuse is undeniable, it is important there must be a legal basis for police actions. In the absence of justification their actions and conduct cannot be tolerated".) ***.

29. Although *Frey* and *Kosoian* were civil cases, this Court's conclusion that a lawful arrest cannot be based on a mistake of law applies equally in the criminal context. *** See *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, at para. 68, per McLachlin C.J. [**§14.1.3.3**] (The reasonable officer standard in civil cases "entails no conflict between criminal standards" but rather "incorporates them".) ***.

(d) Principle and Legal Policy

30. *** Côté J. helpfully encapsulated the relevant considerations of principle and legal policy in *Kosoian*, at para. 6:

> In a free and democratic society, police officers may interfere with the exercise of individual freedoms only to the extent provided for by law. Every person can therefore legitimately expect that police officers who deal with him or her will comply with the law in force, which necessarily requires them to know the statutes, regulations and by-laws they are called upon to enforce. Police officers

[128] See further *Kosoian v. Société de transport de Montréal*, 2019 SCC 59, [2019] 4 S.C.R. 335, [38]-[40]:
38. In carrying out their mission, police officers are required to limit *** rights and freedoms using the coercive power of the state, including by detaining or arresting individuals and by conducting searches or seizures. The risk of abuse is undeniable. That is why, in a society founded on the rule of law, it is important that there always be a legal basis for the actions taken by police officers (*Dedman v. The Queen*, 1985 CanLII 41 (SCC), [1985] 2 S.C.R. 2, at pp. 28-29; *R. v. Sharma*, 1993 CanLII 165 (SCC), [1993] 1 S.C.R. 650, at pp. 672-73). In the absence of such justification, their conduct is unlawful and cannot be tolerated.
39. In exercising these powers, police officers are therefore bound by strict rules of conduct that are meant to prevent arbitrariness and unjustified restrictions on rights and freedoms (*Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, at para. 71 [**§14.1.3.3**]; *Jauvin v. Québec (Procureur général)*, 2003 CanLII 32249 (QC CA), [2004] R.R.A. 37 (C.A.), at para. 46). Police officers who deviate from these rules may be civilly liable. They have no public law immunity in this regard (*Jauvin*, at para. 42; *Régie intermunicipale de police des Seigneuries v. Michaelson*, [2005] R.R.A. 7 (Que. C.A.), at para. 22; *Popovic v. Montréal (Ville de)*, 2008 QCCA 2371, [2009] R.R.A. 1, at para. 63).
40. Under Quebec law, a police officer, like any other person, is held civilly liable for the injury caused to another by his or her fault, in accordance with art. 1457 of the *Civil Code of Québec* ("*C.C.Q.*"). The officer's employer is bound to make reparation for the injury if the fault was committed in the performance of the officer's duties, pursuant to arts. 1463 and 1464 *C.C.Q.* In short, there are no exceptional rules applicable to the police ***.

are thus obliged to have an adequate knowledge and understanding of the statutes, regulations and by-laws they have to enforce.

31. It is thus unlawful for the police to arrest someone based on a mistake of law. ***

(f) Conclusion

36. Canadian law has long held that an arrest based on a mistake of law is unlawful, even if the mistake is made in good faith. The concept of "reasonable and probable grounds" for arrest relates to the facts, not the existence of an offence in law. A police officer makes a mistake of law when the officer knows the facts and erroneously concludes that they amount to an offence, when, as a matter of law, they do not.

Application ***

39. The arresting officer's subjective belief that he had reasonable and probable grounds to arrest the appellant was based on a mistake of law, and thus was not—and could not be—objectively reasonable. ***

41. *** The officer knew the facts—he correctly identified the pill as gabapentin—but mistakenly concluded that possession of gabapentin was an offence, when, in law, it was not. That brings this case squarely within *Frey* and *Kosoian*. It makes no difference whether the mistake of law involves a non-existent offence, or an existing offence that could not be engaged on the facts, even if true, relied on by the officer. In both instances, the mistake of law precludes a lawful arrest. The courts below erred in concluding otherwise. ***

43. I conclude that the arrest was unlawful and infringed s. 9 of the *Charter*. ***

BROWN J. (dissenting in part):

102. I endorse my colleague's conclusions, and his reasons therefor, that (1) an arrest based on a mistake of law is unlawful, (2) in this case, it resulted in a breach of the appellant's rights under s. 8 and s. 9 of the *Charter* ***. ***

REFLECTION:

- *What criteria must be established in order for an officer to make a lawful warrantless arrest?*
- *This was a Charter criminal procedure appeal. Would Tim have had a private law right of action against the arresting officer? Should he have sued?*
- *In Kosoian v. Société de transport de Montréal, the plaintiff received $20,000 damages for her wrongful arrest over her poor escalator etiquette. Was it worth it to bring this case?*[129] *Could the officer have been criminally prosecuted?*[130]

6.6.3 R v. Singer [2023] SKCA 123

Saskatchewan Court of Appeal – 2023 SKCA 123

✗**REF: §7.1.5**

SCHWANN J.A., BARRINGTON-FOOTE J.A., MCCREARY J.A.:

1. On March 20, 2019, RCMP Constables Sandra Lapointe and Morgan Fisher found the appellant, Wayne Singer, asleep in the driver's seat of a truck that was parked in the driveway of his residence at Big Island Lake. Having failed to wake him by knocking on the windows, they opened the doors of the truck and roused him from his sleep. As Mr. Singer exhibited signs of having consumed alcohol, he was asked to take a roadside breath test, which he failed. Thereafter, Cst. Lapointe advised Mr. Singer that he was charged with having care and control of a motor vehicle with an excessive blood alcohol level and demanded that

[129] See The Canadian Press, "Police overstepped when arresting woman for not holding escalator handrail, Supreme Court rules" Global News (Nov 29, 2019) 📺.
[130] Compare S. Rkaina, "Met officer who 'manhandled' mother wrongly arrested for bus fare evasion guilty of assault" The Independent (May 17, 2024) 📺.

he provide a breath sample. Mr. Singer was transported to the local RCMP detachment, where he refused to provide a sample.

2. Mr. Singer was charged with failing or refusing to comply with a demand made by a peace officer under s. 320.27 or 320.28 of the *Criminal Code* and with operating a motor vehicle while his ability to do so was impaired by alcohol. At his trial in the Provincial Court of Saskatchewan, he argued that his s. 8 *Charter* rights had been breached when the officers walked up the private driveway of his residence to his vehicle for the purpose of investigating a complaint of impaired driving. The trial judge concluded that there was no *Charter* violation and found Mr. Singer guilty of failing to provide a breath sample. The impaired driving charge was stayed.

3. Mr. Singer has appealed his conviction, arguing that the trial judge erred by failing to find that his s. 8 *Charter* right to be secure against unreasonable search and seizure had been violated. ***

Analysis ***

***A. The legal framework:* *** *ancillary police powers* ***

51. In *R v. McColman*, 2021 ONCA 382, 407 CCC (3d) 341 [*McColman CA*], the majority held that the police did not have the authority to conduct a stop on private property where they had no reason to suspect that the person had been drinking. They found that the authority to conduct random stops pursuant to s. 48(1) of the *HTA* [*Highway Traffic Act*, RSO 1990, c H.8] did not authorize a stop on private property, as it applied only to stops on a "highway" by a "driver" as defined in the *HTA* (see *McColman CA* at paras 27-28). The majority also addressed the question of whether the police conduct was authorized by the common law, which arises in Mr. Singer's case. More specifically, Tulloch J.A. (as he then was) posed this question:

> 48. The question at issue in this appeal is whether the common law authorizes the police to conduct a random sobriety check on a private driveway, in circumstances not authorized by the *HTA*, where the person exited the highway after the officer decided to conduct the stop but before the officer initiated the stop, and there are no grounds to suspect that an offence has been or is about to be committed.

52. In answering this question, Tulloch J.A. relied on the reasoning in *Fleming v. Ontario*, 2019 SCC 45, [2009] 3 SCR 45, where the Supreme Court of Canada reiterated the test to be applied where the question is whether the common law authorizes police action that interferes with individual liberty. In *Fleming*, Côté J. began her analysis with the following general observation relating to ancillary police powers:

> 38. The police, in fulfilling the important duties they are tasked with in a free and democratic society, are sometimes required to interfere with the liberty of individuals. This is a fact that legislatures and courts in common law jurisdictions have long recognized. However, the rule of law requires that strict limits be placed on police powers in this regard in order to safeguard individual liberties. …

53. As Côté J. explained, "[t]o determine whether a particular police action that interferes with individual liberty is authorized at common law, this Court applies the framework that was originally set out in *Waterfield*" (at para 43, citing *R v. Waterfield* (1963), [1964] 1 QB 164). She summarized this framework as follows:

> 45. The basis of the doctrine is that police actions that interfere with individual liberty are permitted at common law if they are ancillary to the fulfillment of recognized police duties. Intrusions on liberty are accepted if they are reasonably necessary—in accordance with the test set out below—in order for the police to fulfill their duties.
>
> 46. At the preliminary step of the analysis, the court must clearly define the police power that is being asserted and the liberty interests that are at stake (*Figueiras v. Toronto Police Services Board*, 2015 ONCA 208, 124 O.R. (3d) 641, at paras. 55-66). The ancillary powers doctrine comes into play where the power in issue involves prima facie interference with liberty. The term "liberty" here encompasses both constitutional rights and freedoms and traditional common law civil liberties (see [*R v. Clayton*, 2007 SCC 32, [2007] 2 SCR 725], at para. 59; [*Figueiras v. Toronto Police*

Services Board, 2015 ONCA 208, 124 OR (3d) 641], at para. 49). Once the police power and the liberty interests have been defined, the analysis proceeds in two stages:

> (1) Does the police action at issue fall within the general scope of a statutory or common law police duty?
>
> (2) Does the action involve a justifiable exercise of police powers associated with that duty? (*R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37, at paras. 35-36; *R. v. Reeves*, 2018 SCC 56, [2018] 3 SCR 531, at para. 78)

47. At the second stage of the analysis, the court must ask whether the police action is reasonably necessary for the fulfillment of the duty (*MacDonald*, at para. 36). As this Court stated in [*R v. Dedman*, [1985] 2 SCR 2]: The interference with liberty must be necessary for the carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference. [p. 35] In *MacDonald*, the majority of the Court set out three factors to be weighed in answering this question:

> 1. the importance of the performance of the duty to the public good;
>
> 2. the necessity of the interference with individual liberty for the performance of the duty; and
>
> 3. the extent of the interference with individual liberty. [para. 37; citations omitted.]

48. Throughout the analysis, the onus is always on the state to justify the existence of common law police powers that involve interference with liberty.

54. The majority applied the ancillary powers doctrine test in *McColman CA*. Justice Tulloch held that while "[d]riving on highways is a highly regulated activity, and drivers expect that the rules of the road will be enforced [but that] at home, the individual has no expectation that the police, without any suspicion of wrongdoing or any particular safety concerns, may enter onto their driveway and arbitrarily detain them" (at para 62). On that basis, he concluded that the asserted police power represented a *prima facie* interference with the liberty interest in individual autonomy, including the power to walk away from the police. He noted that the context of this liberty interest was particularly significant in the circumstances of Mr. McColman's case, as it involved "limiting the freedom of individuals to move about freely on their own driveways" (at para 60). As he observed:

> 61. … I am satisfied that an individual has greater liberty to do as they wish at home than they do on a public highway. This liberty must be considered against the backdrop of one's reasonable expectation of privacy on their own private property. This privacy interest has long been considered paramount, with roots tracing back to the provenance of the common law: see *Semayne's Case* (1604), 77 E.R. 194, and *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at paras. 13-16, 22.

55. Justice Tulloch acknowledged that pursuing impaired drivers from the highway onto private property to conduct random sobriety checks was related to the police power to prevent crime and protect life and property. However, he found that, while it is clearly important to the public good to pursue innovative strategies to address the serious problem of impaired driving, "the Crown has not met its onus of demonstrating that pursuing and detaining an individual on their own private property without any suspicion of wrongdoing is reasonable or necessary to pursue this objective" (at para 66). As he explained:

> 68. Considered in light of the powers the police already have at their disposal to combat impaired driving, and the greater intrusion on liberty posed by stops on private property, I cannot conclude that the power to conduct a groundless stop on private property is reasonably necessary. The police have extensive powers to combat impaired driving, and it is difficult to see the need for the courts to fill a legislative gap in this respect. The police can conduct a random stop under s. 48(1) [of the *HTA*] as soon as the vehicle enters the highway. They also have the option to observe the driver without detaining them, and based on those observations, develop a reasonable suspicion that would give them a basis to detain.

56. Having found that the police lacked the authority to conduct the random stop pursuant to statute or the ancillary powers doctrine, Tulloch J.A. held that they had breached Mr. McColman's *Charter* rights. ***

57. *McColman CA* is also of interest in that Tulloch J.A. observed that in *R v. Lotozky* (2006), 210 CCC (3d) 509 (WL) (Ont CA), Rosenberg J.A. "held that police officers *who have reasonable grounds to suspect that a motorist is impaired* are entitled to walk up a driveway to further their investigation" (at para 41, emphasis in original). This statement was made in response to the Crown's argument in that case that *Lotozky* supported its assertion that the court should interpret the *HTA* to permit a random stop on private land. We note, by analogy, the Crown's suggestion in this case that *Lotozky* confirms the common law authority of police to do exactly what the police did here—that is, to enter to investigate in the manner the officer did, despite there being no suggestion that the police had reasonable grounds. Put another way, the police did not have reasonable grounds to suspect that Mr. Singer was impaired *until* they opened the door of his truck. ***

B. The trial judge erred in finding that Mr. Singer had no reasonable expectation of privacy and that his s. 8 Charter rights were not breached ***

68. The Crown suggests that this intrusion was justified because the police were faced with exigent circumstances, as there was a potential threat to public safety, and that they accordingly did the only thing they could to protect the community. On a similar note, the trial judge commented that, in this case, the police officers, in discharging their obligation to investigate, had a corollary obligation to protect the public and public safety from impaired drivers.

69. This argument by the Crown is based on the ancillary police powers doctrine, and accordingly engages the analytical framework described in *Fleming*. However, the Crown cannot rely on police ancillary powers here. As we have noted, there was no evidence that the police were concerned with public safety or that they thought these were exigent circumstances when they entered the driveway, or, for that matter, when they opened the door of the truck. ***

Conclusion

100. For the foregoing reasons, we would allow Mr. Singer's appeal, exclude the evidence obtained as a result of the breach of his *Charter* rights, quash his conviction, and enter an acquittal on the charge of refusing to provide a breath sample.

REFLECTION:

- *An officer has a defence to tort liability when lawfully acting within the scope of their ancillary powers.*[131] *Is the police ancillary powers doctrine reconcilable with the principle of equality under ordinary law (§1.1.1)?*

6.6.4 Binsaris v. Northern Territory [2020] HCA 22

✗**REF: §2.2.4, §6.7.1.2**

GAGELER J. (concurring): ***

43. For much of the history of the common law, police officers and other "peace officers" were subject to the general doctrine that "any public officer whom the law charges with a discretion and responsibility in the execution of an independent legal duty is alone responsible for tortious acts which he may commit in the course of his office and that for such acts the government or body which he serves or which appointed him incurs no vicarious liability".[132] Over time, the practice in relation to a public officer appointed by the Crown came to be that "in a proper case, the Crown [would] defend its officer and become responsible for any

[131] *R v. Dedman*, [1985] 2 SCR 2 (SCC), at paras 58-59.
[132] *Little v. The Commonwealth* (1947) 75 CLR 94 at 114. See also *Enever v. The King* (1906) 3 CLR 969 at 975-978; *Attorney-General for New South Wales v. Perpetual Trustee Co Ltd* (1952) 85 CLR 237 at 252, 283-284, 303-304.

damages awarded".[133] ***

44. Beginning in the latter part of the twentieth century, however, legislation applicable in each State and Territory has come to impose liability on the Crown for torts committed in the performance of independent functions of office by officers of the Crown [§23.2.2], and by police officers in particular [§23.2.4].[134] In some legislative schemes the liability of the Crown for those torts is vicarious; in others it is in substitution for that of a police officer. The policy informing that widespread legislative development has been "the acceptance of responsibility by the State for harm done to citizens by State officials in carrying out the will of the State".[135] The legislative development, and the underlying legislative acceptance of public responsibility for torts committed by police officers, are appropriate to be factored into the contemporary expression of the common law of Australia.[136] ***

49. Doctrinally, my preferred analysis is to focus on the scope of the common law "privilege" or "immunity" attendant on the common law "power", or "right" and "duty", of a police officer to use force reasonably necessary to restrain or prevent a breach of the peace. The attendant common law immunity is unquestionably such as to provide a defence to a claim in battery by the wrongdoer who is the target of the force. The attendant common law immunity, in my opinion, is not such as to provide a defence to a claim in battery by a bystander who suffers collateral harm by reason of the necessitous use of force. ***

GORDON AND EDELMAN JJ: ***

105. The powers and privileges of a police officer are limited. At common law, police have the power to use reasonable force to prevent the commission of an offence or to apprehend a person suspected of having committed an offence.[137] There were no findings in the courts below, nor was it contended in this Court, that when the CS gas was used the appellants or Jake Roper were committing an offence that justified its use. Nor was there any finding that the appellants, as distinct from Jake Roper, were participating in a breach of the peace at the time of the use of the CS gas. There was, therefore, no evidence that a police officer could have lawfully used CS gas in the circumstances. ***

REFLECTION:

- *Where a government officer batters someone without justification, who should be subject to civil suit—the officer, the public authority, or both? Why?*

6.6.5 R v. Le [2019] SCC 34

✗**REF: §2.4.5, §7.1.6**

BROWN AND MARTIN JJ. (KARAKATSANIS J. concurring): ***

36. The trial judge found (at para. 23) that the police officers had two specific investigative purposes: (1) the officers were investigating whether any of the young men were J.J. (or knew the whereabouts of N.D.-J.) and (2) the officers were investigating whether any of the young men were trespassers. The trial judge would later note (at para. 70) that the police were pursuing a third investigative purpose as well: the L.D. townhouse was a "problem address" in relation to suspected drug trafficking. ***

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[133] *The Commonwealth v. Mewett* (1997) 191 CLR 471 at 543, quoting Robertson, *The Law and Practice of Civil Proceedings By and Against the Crown and Departments of the Government* (1908) at 351. See also *New South Wales v. Ibbett* (2006) 229 CLR 638 at 650 [41].

[134] Section 64B of the *Australian Federal Police Act 1979* (Cth); s 6, Pt 3 and Pt 4 of the *Law Reform (Vicarious Liability) Act 1983* (NSW), and s 213 of the *Police Act 1990* (NSW); s 10.5 of the *Police Service Administration Act 1990* (Qld); s 65 of the *Police Act 1998* (SA); s 84 of the *Police Service Act 2003* (Tas); ss 74 and 75 of the *Victoria Police Act 2013* (Vic); s 137 of the *Police Act 1892* (WA); Pt VIIA of the *Police Administration Act* (NT).

[135] New South Wales, Law Reform Commission, *Outline Report of the Law Reform Commission on Proceedings By and Against the Crown*, LRC 24 (1975) at 14.

[136] cf *Esso Australia Resources Ltd v. Federal Commissioner of Taxation* (1999) 201 CLR 49 at 59-60 [18]-[20], 61-63 [23]-[27].

[137] *R v. Turner* [1962] VicRp 2; [1962] VR 30 at 36; *Woodley v. Boyd* [2001] NSWCA 35 at [37]; *Dowse v. New South Wales* [2012] NSWCA 337; (2012) 226 A Crim R 36 at 51 [52]. See also *Criminal Code*, s 27.

124. *** In our view, the detention of Mr. Le was not authorized by law, and was, therefore, arbitrary. None of the investigative purposes found by the trial judge authorized the officers' actions, and they were themselves trespassers. ***

129. The trial judge found that the police had three purposes in coming to the backyard: checking to see if the young men were trespassing; looking for persons of interest; and checking an area they were told was a problem area for drugs. None of these purposes provide legal authority for the detention.

130. No statute authorized these police officers to detain anyone in the backyard. At trial, the police invoked the *Trespass to Property Act*, R.S.O. 1990, c. T.21 [§7.1.7], as a source of authorization to enter to assess whether the young men were trespassing. However, as a matter of law, the Act does not authorize the police to engage in investigative detentions on private property. Rather, it provides authorization only for the police to arrest individuals where there are reasonable and probable grounds to believe that they are trespassing (s. 9). No such grounds existed.

131. Similarly, the common law power to detain for investigative purposes could not have been invoked. This power allows the police to detain an individual for investigative purposes where, in the totality of circumstances, there are reasonable grounds to suspect a clear nexus between the individual and a recent or still unfolding crime (*Mann*, at paras. 34 and 45). Here, no such grounds existed. Any questions about persons of interest did not require entry into the property or detention and there was no nexus between the address and any recent or ongoing complaint about trespassing.

132. The trial judge concluded that the police were "duty-bound" to attend at the backyard based on the reports of the security guards that J.J. "frequents" the area and that the backyard was a "problem address" (para. 67). Even if these generalized concerns were to provide a reason for the police to approach the backyard, they fall far short of the threshold for justifying an investigative detention. As this Court said in *Mann*, a suspect's presence in a "so-called high crime area" is not by itself a basis for detention (para. 47). Similarly, the mere presence of *non*-suspects such as Mr. Le in an area frequented "days or weeks" earlier by a person of interest cannot furnish such a basis. As the Court of Appeal of Alberta said in *R. v. O. (N.)*, 2009 ABCA 75, 2 Alta. L.R. (5th) 72 (Alta. C.A.) (at para. 40):

> The officer's evidence about the location and type of building where such events occurred was too vague to contribute to reasonable grounds to detain. He did not specify the size of the "area" or the types or numbers of apartment blocks in it. With such specificity, there may be other facts when a detention could be justified. But on these facts, such a general approach gives rise to a grave risk of police interference with lawful activities. As Iacobucci J. stated in *Mann*, the high crime nature of a neighbourhood, alone, is not enough. *Even though some apartment buildings in a neighbourhood may be known to the police as havens of drug activity, that does not mean that anyone who enters any apartment building in an ill-defined area or neighbourhood can objectively be suspected of criminal activity.* [Emphasis added.]

Similarly, the receipt of general information about contraband in relation to an address does not, without more specificity, give rise to reasonable suspicion in relation to recent or ongoing criminal activity.

133. It follows from the foregoing discussion that Mr. Le's detention was arbitrary because, at the time of detention (when the police entered the backyard), the police had no reasonable suspicion of recent or ongoing criminal activity. Investigative objectives that are not grounded in reasonable suspicion do not support the lawfulness of a detention, and cannot therefore be viewed as legitimate in the context of a s. 9 claim. This detention, therefore, infringed Mr. Le's s. 9 *Charter* right. ***

REFLECTION:

- *Why were the police officers not permitted to enter the backyard to question the young men? Why did the common law power to detain for investigative purposes not apply here?*
- *In what different circumstances could the officers have had lawful authority to detain Le?*

6.6.6 Cross-references

- *Walker v. Metropolitan Police Comm'r* [2014] EWCA Civ 897, [43]: §2.2.3.
- *Wainwright v. Home Office* [2003] UKHL 53, [50]: §3.1.2.
- *Bracken v. Vancouver Police Board* [2006] BCSC 189, [37], [52]: §4.2.6.
- *Austin v. Metropolitan Police Comm'r* [2007] EWCA Civ 989, [17]-[35]: §6.7.1.1.
- *Pile v. Chief Constable of Merseyside* [2020] EWHC 2472 (QB), [30]-[37]: §6.7.3.2.
- *Entick v. Carrington* (1765) 19 State Tr 1029 (KB), [41]-[43]: §7.1.1.
- *Neill v. Vancouver Police Dept.* [2005] BCSC 277, [11]-[23]: §8.4.2.
- *Slater v. Attorney-General (No. 1)* [2006] NZHC 308, [32]-[39]: §8.5.1.
- *Robinson v. Chief Constable of West Yorkshire* [2018] UKSC 4, [32]-[70]: §19.5.1.2.

6.6.7 Further material

- Stereo Decisis Podcast, "Pictorgrams and Pipelines" (Dec 6, 2019) 🎧.
- J. Gardner, "Criminals in Uniform" in R.A. Duff *et al* (eds), *The Constitution of the Criminal Law* (Oxford: Oxford University Press, 2013).
- M. Thorburn, "Policing and Public Office" (2020) 70 U Toronto LJ 248.
- V. Clifford, "The Ancillary Powers Doctrine: The Desire for Safety v. The Need for Freedom" (28th Annual Criminal Law Conference, 2016).
- J.L. Mascott & R.T. McCotter, "Federal Officer Suits by Common Law" (2022) Cato Supreme Court Rev 111.
- UBC Law Students' Legal Advice Program, "Complaints against the Police" in *Law Students' Legal Advice Manual* (47th ed, Vancouver: The University of British Columbia, 2023), ch 5.

6.6.8 A comparison: United States public officer immunities

S. Beswick, "Equality Under Ordinary Law" (2024) 2 Supreme Court L Rev (3d) (forthcoming)

The principle of equality under ordinary law stands in contrast to a presumption that looms large within United States jurisprudence: that of governmental immunity from ordinary law. In the United States, *Entick v. Carrington* [§7.1.1] is also considered a foundational case, but not for the *ratio* that subjected state officers to the common law of trespass. Rather, Lord Camden's speech is celebrated for constraining misuse of state power. It represents "the true and ultimate expression of constitutional law" that forbids unreasonable searches and seizures by the state.[138] The principle is entrenched in the Fourth Amendment of the United States Constitution, enforceable in civil suit not through common law but by way of civil rights statutes and precedents.[139] Within this constitutionalised framework, it is the (un)reasonableness of public officials' conduct—not the violation of others' rights *per se*—that determines whether such officials must face civil suit. Thus, in the leading case of *Anderson v. Creighton*, federal officers who conducted a warrantless search of a home in violation of the owners' rights to be free from unreasonable search and seizure were afforded qualified immunity from civil suit on the basis that "a reasonable officer could have believed" their conduct to be lawful—despite the apparent unlawfulness of the invasion of private property by government agents.[140] *** *Anderson v. Creighton* illustrates a prominent theme of US federal and state jurisprudence:

[138] *Boyd v. United States*, 116 U.S. 616 at 626 (1886), aff'd in *Brower v. County. of Inyo*, 489 U.S. 593 at 596 (1989) (describing the case: "the general warrants issued by Lord Halifax in the 1760's … produced 'the first and only major litigation in the English courts in the field of search and seizure'…"); *Carpenter v. United States*, 138 S. Ct. 2206 at 2239 (2018) (*Entick* was among the materials that "inspired the Fourth Amendment"). *C.f.* Denis Baranger, "Law, Liberty and *Entick v. Carrington*" in Adam Tomkins and Paul Scott, ed, *Entick v. Carrington: 250 Years of the Rule of Law* (London: Hart Publishing, 2015) 185 at 205 ("[i]f there is a theory of the state in *Entick v. Carrington*, it is one which revolves around the common law and the common law courts").

[139] Refer to Part II.C below. But see John C.P. Goldberg and Benjamin C. Zipursky, *Recognizing Wrongs* (Cambridge: Harvard University Press, 2020) at 37-43.

[140] 483 U.S. 635 (1987). The Court of Appeals summarised the facts in *Creighton v. City of St. Paul*, 766 F.2d 1269 at 1270 (8th Cir. 1985): "On the night of November 11, 1983, Sarisse and Robert Creighton and their three young

that civil liability should not hobble law enforcement from the discharge of their public functions. Although historically and traditionally such officers have been subject to liability at common law,[141] expansive exceptions have increasingly swallowed that formal presumption. In the United States today, constitutional civil rights claims have overtaken ordinary tort as the dominant avenue for suing law enforcement.[142] Yet, coupled with this special avenue of recourse against public authorities are extensive immunities that specially shield government and its officers from civil suit. The doctrine of qualified immunity has become particularly notorious and was a focal point of the summer 2020 George Floyd protests.[143] Justice Alito for the Supreme Court summarised the breadth of the qualified immunity shield, and its rationale, in *Pearson v. Callahan*:

> The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." … Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. The protection of qualified immunity applies regardless of whether the government official's error is "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." … Qualified immunity is "an immunity from suit rather than a mere defense to liability."[144]

This doctrine has been criticized by judges and scholars from across the political spectrum.[145] Unlike defences to liability, immunities from suit shield the government and its officials from answering to claims of civil wrongdoing at all. By averting the discovery and trial processes, government defendants in the United States receive significant procedural advantages as compared to ordinary litigants. The substantive elements of immunity doctrines are also uniquely protective of governmental interests and incomparable to the defences available to ordinary defendants at common law, for whom ignorance of the law and carelessness in fact are no excuse [**§6.2.4**]. *** […continue reading]

REFLECTION:

- *In what ways does the precedent of Entick v. Carrington (**§7.1.1**) tend to be conceptualised differently in the United States as compared to Commonwealth jurisdictions? What explains this jurisprudential difference?*[146]

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daughters were spending a quiet evening at their home when a spotlight suddenly flashed through their front window. Mr. Creighton opened the door and was confronted by several uniformed and plain clothes officers, many of them brandishing shotguns. All of the officers were white; the Creightons are black. Mr. Creighton claims that none of the officers responded when he asked what they wanted. Instead, … one of the officers told him to "keep his hands in sight" while the other officers rushed through the door. When Mr. Creighton asked if they had a search warrant, one of the officers told him, 'We don't have a search warrant [and] don't need [one]; you watch too much TV.'"

[141] Thomas M. Cooley and D. Avery Haggard, *Treatise on the Law of Torts, or the Wrongs Which Arise Independently of Contract*, 4th ed, vol 2 (1932) at § 300 and § 307; American Law Institute, *Restatement of the Law (Second) of Torts* (1979) at § 895D(1); James E. Pfander, *Constitutional Torts and the War on Terror* (Oxford: Oxford University Press, 2017) at ch. 1; William Baude, "Is Qualified Immunity Unlawful?" (2018) 106 Calif. L. Rev. 45 at 56-57; James E. Pfander, "Zones of Discretion at Common Law" (2021) 116 NW. U. L. Rev. Online 148 at 150–51; Jennifer L. Mascott and R. Trent McCotter, "Federal Officer Suits by Common Law" (2022) Cato Supreme Court Rev. 111 at 112, 128-134.

[142] Refer to Part II.C below. See Joanna Schwartz, *Shielded: How the Police Became Untouchable* (New York: Viking, 2023) 93-116; Cristina C. Tilley, "A New Private Law of Policing" (2024) 89 Brooklyn L. Rev. 367.

[143] Hailey Fuchs, "Qualified Immunity Protection for Police Emerges as Flash Point Amid Protests" The New York Times (23 June 2020). The doctrine had fallen into disrepute well before that summer. Marcus R. Nemeth, "How Was *That* Reasonable? The Misguided Development of Qualified Immunity and Excessive Force by Law Enforcement Officers" (2019) 60 Boston College L. Rev. 989 at 989-991. The US doctrine should not be confused with the narrower Canadian doctrines of qualified immunity of prosecutors and Crown ministers. See *Ernst v. Alberta Energy Regulator*, [2017] 1 SCR 3, 2017 SCC 1 at 173-176.

[144] 555 U.S. 223 at 231 (2009) [citations omitted].

[145] See *Hoggard v. Rhodes*, 141 S. Ct. 2421 (2021) (Thomas, J.); *Kisela v. Hughes*, 138 S. Ct. 1148 at 1162 (2018) (Sotomayor, J.); Jay Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, Cato Institute (Policy Analysis No. 901, 2020); Amir H. Ali and Emily Clark, "Qualified Immunity: Explained" The Appeal (Jun 20, 2019); Teressa E. Ravenell and Riley H. Ross III, "Qualified Immunity and Unqualified Assumptions" (2022) 112 J. Crim. L. & Criminology 1 at 1-3.

[146] See J.E. Pfander, "Ordinary Law, Constitutional Torts, and Governmental Accountability" JOTWELL (Feb 5, 2024).

6.6.8.1 R. v. Tim [2022] SCC 12

✗**REF: §6.2.4.1, §6.6.2**

JAMAL J. (WAGNER C.J., MOLDAVER, CÔTÉ, ROWE, KASIRER JJ. concurring): ***

(e) American Jurisprudence

32. *** The majority of the Court of Appeal of Alberta, *** found persuasive the reasoning of the majority of the Supreme Court of the United States in *Heien v. North Carolina*, 574 U.S. 54 (2014), which held that a traffic stop based on a reasonable mistake of law does not infringe the right to be secure against unreasonable search and seizure protected by the Fourth Amendment to the United States Constitution.

33. In *Heien*, the police stopped a car because one of its two brake lights was out, even though the state law, while ambiguous, was later held to require only one working light. The police became suspicious during the stop, secured consent to search the car, and found cocaine. Under the Fourth Amendment, a traffic stop for a suspected offence is considered "a 'seizure' of the occupants of the vehicle" (p. 60).

34. Writing for the majority, Chief Justice Roberts ruled that the traffic stop did not infringe the Fourth Amendment, as the officer made a reasonable mistake of law (pp. 66-68). Justice Sotomayor, dissenting, concluded that "an officer's mistake of law, no matter how reasonable, cannot support the individualized suspicion necessary to justify a seizure under the Fourth Amendment" (p. 80).

35. With respect, I do not find *Heien* to be helpful in deciding on the legality of an arrest based on a mistake of law under Canadian law. This Court has noted that the greatest caution must be exercised before transplanting American decisions under the Fourth Amendment to the Canadian context under s. 8 of the *Charter* (see *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 161). *** This note of caution, coupled with this Court's own precedents on point, provide good reasons not to import American precedent in this case. ***

REFLECTION:

- *What might explain the jurisprudential difference with the United States when it comes to mistakes of law by police officers? Should the courts excuse a defendant's reasonable mistake of law?*

6.6.8.2 Baxter v. Bracey (2020) 140 S Ct 1862 (Mem)

Supreme Court of the United States – (2020) 140 S Ct 1862

Petition for a Writ of Certiorari: Questions Presented

1. Does binding authority holding that a police officer violates the Fourth Amendment when he uses a police dog to apprehend a suspect who has surrendered by lying down on the ground "clearly establish" that it is likewise unconstitutional to use a police dog on a suspect who has surrendered by sitting on the ground with his hands up?

2. Should the judge-made doctrine of qualified immunity, which cannot be justified by reference to the text of 42 U.S.C. § 1983 or the relevant common law background, and which has been shown not to serve its intended policy goals, be narrowed or abolished?

OPINION:

The petition for a writ of certiorari is denied.

THOMAS J. (dissenting from the denial of certiorari):

1. Petitioner Alexander Baxter was caught in the act of burgling a house. It is undisputed that police officers released a dog to apprehend him and that the dog bit him. Petitioner alleged that he had already surrendered when the dog was released. He sought damages from two officers under Rev. Stat. § 1979, 42 U.S.C. § 1983, alleging excessive force and failure to intervene, in violation of the Fourth Amendment.

Applying our qualified immunity precedents, the Sixth Circuit held that even if the officers' conduct violated the Constitution, they were not liable because their conduct did not violate a clearly established right. Petitioner asked this Court to reconsider the precedents that the Sixth Circuit applied.

2. I have previously expressed my doubts about our qualified immunity jurisprudence. See *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1869–1872 (2017) (THOMAS, J., concurring in part and concurring in judgment). Because our § 1983 qualified immunity doctrine appears to stray from the statutory text, I would grant this petition.

I.A.

3. In the wake of the Civil War, Republicans set out to secure certain individual rights against abuse by the States. Between 1865 and 1870, Congress proposed, and the States ratified, the Thirteenth, Fourteenth, and Fifteenth Amendments. These Amendments protect certain rights and gave Congress the power to enforce those rights against the States.

4. Armed with its new enforcement powers, Congress sought to respond to "the reign of terror imposed by the Klan upon black citizens and their white sympathizers in the Southern States." *Briscoe v. LaHue*, 460 U.S. 325, 337 (1983). Congress passed a statute variously known as the *Ku Klux Act of 1871*, the *Civil Rights Act of 1871*, and the *Enforcement Act of 1871*. Section 1, now codified, as amended, at 42 U.S.C. § 1983, provided that

> "any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall … be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress …." Act of Apr. 20, 1871, § 1, 17 Stat. 13.

Put in simpler terms, § 1 gave individuals a right to sue state officers for damages to remedy certain violations of their constitutional rights.

B.

5. The text of § 1983 "ma[kes] no mention of defenses or immunities." *** Instead, it applies categorically to the deprivation of constitutional rights under color of state law.

6. For the first century of the law's existence, the Court did not recognize an immunity under § 1983 for good-faith official conduct. Although the Court did not squarely deny the availability of a good-faith defense, it did reject an argument that plaintiffs must prove malice to recover. *Myers v. Anderson*, 238 U.S. 368, 378–379 (1915) (imposing liability); *id.,* at 371, 35 S.Ct. 932 (argument by counsel that malice was an essential element). No other case appears to have established a good-faith immunity.

7. In the 1950s, this Court began to "as[k] whether the common law in 1871 would have accorded immunity to an officer for a tort analogous to the plaintiff's claim under § 1983." *Ziglar*, 137 S.Ct., at 1871 (opinion of THOMAS, J.). The Court, for example, recognized absolute immunity for legislators because it concluded Congress had not "impinge[d] on a tradition [of legislative immunity] so well grounded in history and reason by covert inclusion in the general language" of § 1983. *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). The Court also extended a qualified defense of good faith and probable cause to police officers sued for unconstitutional arrest and detention. *Pierson v. Ray*, 386 U.S. 547, 557 (1967). The Court derived this defense from "the background of tort liabilit[y] in the case of police officers making an arrest." *Id.,* at 556–557. These decisions were confined to certain circumstances based on specific analogies to the common law.

8. Almost immediately, the Court abandoned this approach. In *Scheuer v. Rhodes*, 416 U.S. 232 (1974), without considering the common law, the Court remanded for the application of qualified immunity doctrine to state executive officials, National Guard members, and a university president, *id.,* at 234–235. It based the availability of immunity on practical considerations about "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based," *id.,* at 247, 94 S.Ct. 1683, rather than the liability of officers for analogous common-

law torts in 1871. The Court soon dispensed entirely with context-specific analysis, extending qualified immunity to a hospital superintendent sued for deprivation of the right to liberty. *O'Connor v. Donaldson*, 422 U.S. 563, 577 (1975); see also *Procunier v. Navarette*, 434 U.S. 555, 561 (1978) (prison officials and officers).

9. Then, in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court eliminated from the qualified immunity inquiry any subjective analysis of good faith to facilitate summary judgment and avoid the "substantial costs [that] attend the litigation of" subjective intent, *id.,* at 816, 102 S.Ct. 2727. Although *Harlow* involved an implied constitutional cause of action against federal officials, not a § 1983 action, the Court extended its holding to § 1983 without pausing to consider the statute's text because "it would be 'untenable to draw a distinction for purposes of immunity law.'" *Id.,* at 818, n. 30 (quoting *Butz v. Economou*, 438 U.S. 478, 504 (1978)). The Court has subsequently applied this objective test in § 1983 cases. See, *e.g., Ziglar*, 137 S.Ct., at 1866–1867 (majority opinion).[147]

II.

10. In several different respects, it appears that "our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act." ***

11. There likely is no basis for the objective inquiry into clearly established law that our modern cases prescribe. Leading treatises from the second half of the 19th century and case law until the 1980s contain no support for this "clearly established law" test. Indeed, the Court adopted the test not because of "'general principles of tort immunities and defenses,'" *Malley v. Briggs*, 475 U.S. 335, 339 (1986), but because of a "balancing of competing values" about litigation costs and efficiency, *Harlow*, *supra*, at 816, 102 S.Ct. 2727.

12. There also may be no justification for a one-size-fits-all, subjective immunity based on good faith. Nineteenth-century officials sometimes avoided liability because they exercised their discretion in good faith. ***

13. Although I express no definitive view on this question, the defense for good-faith official conduct appears to have been limited to authorized actions within the officer's jurisdiction. See, *e.g., Wilkes*, *supra*, at 130; T. Cooley, *Law of Torts* 688–689 (1880); J. Bishop, *Commentaries on Non-Contract Law* § 773, p. 360 (1889). An officer who acts unconstitutionally might therefore fall within the exception to a common-law good-faith defense.

14. Regardless of what the outcome would be, we at least ought to return to the approach of asking whether immunity "was 'historically accorded the relevant official' in an analogous situation 'at common law.'" *Ziglar*, 137 S.Ct., at 1870 (opinion of THOMAS, J.) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976)). The Court has continued to conduct this inquiry in absolute immunity cases, even after the sea change in qualified immunity doctrine. See *Burns v. Reed*, 500 U.S. 478, 489–492 (1991). We should do so in qualified immunity cases as well.[148]

15. I continue to have strong doubts about our § 1983 qualified immunity doctrine. Given the importance of this question, I would grant the petition for certiorari.

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[147] I express no opinion on qualified immunity in the context of implied constitutional causes of action against federal officials. See, *e.g., Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

[148] Qualified immunity is not the only doctrine that affects the scope of relief under § 1983. In *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), the Court held that an officer acts "'under color of any statute, ordinance, regulation, custom, or usage of any State'" even when state law did not authorize his action, *id.*, at 183, 81 S.Ct. 473. Scholars have debated whether this holding is correct. Compare Zagrans, *"Under Color of" What Law: A Reconstructed Model of Section 1983 Liability*, 71 Va. L. Rev. 499, 559 (1985), with Winter, *The Meaning of "Under Color of" Law*, 91 Mich. L. Rev. 323, 341–361 (1992), and Achtenberg, *A "Milder Measure of Villainy": The Unknown History of 42 U.S.C. § 1983 and the Meaning of "Under Color of" Law*, 1999 Utah L. Rev. 1, 56–60. Although concern about revisiting one doctrine but not the other is understandable, see *Crawford-El v. Britton*, 523 U.S. 574, 611, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998) (Scalia, J., joined by THOMAS, J., dissenting), respondents—like many defendants in § 1983 actions—have not challenged *Monroe*.

REFLECTION:

- *What is the rationale for the US doctrine of qualified immunity from constitutional tort liability? Is it compelling?*[149] *Should Canadian courts look to adopt a similar doctrine in police civil liability cases?*

6.6.8.3 Further material

- A.H. Ali & E. Clark, "Qualified Immunity: Explained" The Appeal (Jun 19, 2019).
- Reuters Investigation, "Shielded: How an Obscure Legal Doctrine Called Qualified Immunity Protects Police Accused of Excessive Force" Reuters (2020).
- J.E. Pfander, "Dicey's Nightmare: An Essay on The Rule of Law" (2019) 107 California L Rev 737.
- The Lawfare Podcast, "Alex Reinert on Qualified Immunity" (Mar 26, 2021) 🎧.
- Dissed Podcast, "The King Can Do No Wrong" (May 5, 2021) 🎧.
- Federalist Society Luncheon Debate, "Resolved: The Supreme Court Should Overrule Qualified Immunity" (Jan 3, 2019) 📺.
- R.J. Peltz-Steele, "Chapter 17: Government Liability and Civil Rights" in *Tortz: A Study of American Tort Law* (vol 2, Dartmouth: UMass Law School, 2024 rev. ed.).

6.7 Necessity

6.7.1 Public necessity

"Public necessity" in Wex (Cornell Law School Legal Information Institute, 2012)

In tort law, [public necessity is] a defense that can be used against charges of trespass where a defendant interferes with a plaintiff's property in an emergency situation to protect the community or society as a whole from a greater harm that would have occurred if the defendant had not committed trespass. *** […continue reading]

6.7.1.1 Austin v. Metropolitan Police Comm'r [2007] EWCA Civ 989

England and Wales Court of Appeal – [2007] EWCA Civ 989, aff'd [2009] UKHL 5

SIR ANTHONY CLARKE M.R. (FOR THE COURT):

1. This is an appeal from an order made by Tugendhat J on 23 March 2005 dismissing an action brought by the appellants, Ms Austin and Mr Saxby, against the Commissioner of the Metropolitan Police arising out of events in Oxford Circus on May Day 2001. The claims were principally for damages at common law for false imprisonment ***. ***

3. The judge's judgment, [2005] EWHC 480 (QB), which was produced with commendable speed, is a *tour de force*. It runs to nearly 150 closely typed pages and to 608 paragraphs. It analyses the events of 1 May 2001 in very considerable detail. It would be quite impossible for us to do the same in this judgment. What we say here should therefore be considered in the light of the judge's judgment as a whole, to which the reader is referred for the details of what occurred. ***

The judge's brief summary of events

5. *** At about 2 pm on May Day 2001, which was not a Bank Holiday, a crowd of demonstrators marched into Oxford Circus from Regent Street South. Later others entered or tried to enter from all points of the compass so that by the end of the day there were about 3000 people in Oxford Circus. In addition there were crowds of thousands to the north of Oxford Street and on the west side of Oxford Street itself. The police had information that a demonstration was planned but the organisers had deliberately given no notice of what would happen at 2 pm. They had refused to co-operate with the police at all. Their publicity material led the police to expect a gathering in Oxford Circus at 4 pm. No warning had been given of any march or

[149] See J.H. Alder, "Justice Thomas Takes Another Shot at Qualified Immunity" The Volokh Conspiracy (Jul 2, 2021).

procession or of the route which demonstrators might take. It was this deliberate lack of co-operation by the organisers, which was unlawful, that led to the police responding as they did, and to everything that happened from 2 pm onwards. The appellants were not organisers but they and many others suffered the consequences.

6. The crowd who entered the Circus at 2 pm were, for the most part, prevented from leaving. Others entered Oxford Circus during the afternoon. From about 2.20 pm no-one was allowed to leave except with the permission of the police. Many were prevented from leaving for a period of over seven hours. A number of people who were not demonstrators were caught up within the police cordon, although some were allowed through.

7. The disruption to shops, shoppers and traffic by the events on that day was enormous. It was a wet and chilly afternoon. Oxford Circus has a diameter of about 50 metres, all of which is taken up by roads, pavements, and the four entrances to the Underground. There is no free space for people to congregate. The physical conditions in Oxford Circus were for a short period quite acceptable but as time passed the conditions became increasingly unacceptable. In particular, in the absence of toilets, people had to relieve themselves in the street in public. This and other problems bore particularly hard on some of the women. Fortunately no-one was seriously hurt but some of those attending came very close to sustaining injury and some policemen were injured.

8. Neither appellant alleged that he or she was injured. Ms Austin had an 11 month old baby whom she needed to collect from the child minder at 4.40 pm. It is likely that in such a large crowd there will have been other women with commitments such as hers. Such a situation is a serious interference with human dignity. As the judge put it at [7], the point the appellants made was that the place was so unsuitable for holding a crowd that they should have been released before the problems became intolerable. The judge recognised at [8] that the fact that such events should take place in London, involving thousands of people unable to leave the police cordons, was a matter of public concern. At [11] the judge described the facts of this case as being quite exceptional. Never before, or since, 1 May 2001 have the police in England formed cordons enclosing a crowd of thousands before a substantial breakdown of law and order has occurred, with the result that the crowd were prevented from leaving for many hours.

The claims

9. The judge summarised the claims in [12-17]. The appellants are two of some 150 people who have given notice of or commenced claims arising out of the events on 1 May 2001. The appellants claim damages for distress and also both aggravated and exemplary damages. Ms Austin had come to London to take part in the demonstration. Until about 3.30 pm she made speeches through a megaphone on political topics and thereafter, while she was unable to leave Oxford Circus, she made speeches through her megaphone giving advice and comfort to the crowd around her: [13]. By contrast, Mr Saxby came to London on his employer's business, not to demonstrate, and found himself caught up in the events of the day: [12]. Both were detained within the cordons for many hours. They do not now complain so much about the initial cordon and consequent detention but complain that they were unlawfully deprived of their liberty, detained and unlawfully imprisoned by not being released much earlier than they were. Mr Starmer submits in particular that when each presented himself or herself to a police officer on the cordon and asked to leave, each should have been allowed to do so.

10. It is important to note that, although the judge did not find either Ms Austin or Mr Saxby to be an entirely satisfactory witness, there is no suggestion that either of them acted other than lawfully throughout. The respondent accepted that neither of them was violent or threatened violence or breached the peace or threatened to do so. Ms Austin was exercising her right to demonstrate peacefully and Mr Saxby was innocently caught up in the events. Each wanted to leave the cordon but was not permitted to do so for a long period. After their requests to leave had been refused by individual police officers, neither made any attempt to break through the police cordon. ***

Common law—false imprisonment

12. It is not, and could not be, in dispute that there was an interference with the liberty of the appellants which amounted to the tort of false imprisonment unless it was lawful. The respondent's case is that the

interference was lawful on one or more of three bases: by reason of what Mr Pannick calls breach of the peace powers, pursuant to powers conferred by the *Public Order Act 1986* ('the 1986 Act') or pursuant to the doctrine of necessity. It is convenient to consider first breach of the peace and secondly the defence of necessity to the tort of false imprisonment. ***

Breach of the peace ***

17. In *Laporte* [*R (Laporte) v. Chief Constable of Gloucester Constabulary* [2006] UKHL 55, [2007] 2 AC 105] at [29] Lord Bingham identified three situations of possible relevance as follows:

> "Every constable, and also every citizen, enjoys the power and is subject to a duty to seek to prevent, by arrest or other action short of arrest, any breach of the peace occurring in his presence, or any breach of the peace which (having occurred) is likely to be renewed, or any breach of the peace which is about to occur. This appeal is only concerned with the third of these situations." ***

27. *** Lord Rodger expressed the view that preventive action may be taken against innocent third parties on two bases. First, at [82] he cited *O'Kelly* [*v. Harvey* (1883) 14 LR 105] as authority for the proposition that:

> "… where it is necessary in order to prevent a breach of the peace, at common law police officers can take action … which affects people who are not themselves going to be actively involved in the breach."

28. Support for the proposition that it is necessity which forms the basis of the justification to take such steps, and therefore brings those steps within the ambit of what it is reasonable for the police to do in the face of an imminent breach of the peace, can be found in *Beatty v. Gillbanks* (1882) 9 QBD 308, which Lord Rodger cited in these terms at [80], without referring to the case by name:

> "What does need to be stressed, however, is that, as Dicey, *An Introduction to the Study of the Law of the Constitution* (10th ed by E C S Wade, 1959), pp 278-279, emphasised, using the familiar example of the Salvationists and the Skeleton Army:
>
> > 'the only justification for preventing the Salvationists from exercising their legal rights is the *necessity of the case*. If the peace can be preserved, not by breaking up an otherwise lawful meeting, but by arresting the wrongdoers—in this case the Skeleton Army—the magistrates or constables are bound, it is submitted, to arrest the wrongdoers and to protect the Salvationists in the exercise of their lawful rights.'"

The inference from that passage is that, if the peace cannot be preserved by arresting the wrongdoers (or presumably those imminently about to be wrongdoers), it is or may be the duty of a constable to break up a lawful meeting. ***

35. As we read the speeches of Lord Rodger and Lord Brown they give some support for the following propositions:

> i) where a breach of the peace is taking place, or is reasonably thought to be imminent, before the police can take any steps which interfere with or curtail in any way the lawful exercise of rights by innocent third parties they must ensure that they have taken all other possible steps to ensure that the breach, or imminent breach, is obviated and that the rights of innocent third parties are protected;
>
> ii) the taking of all other possible steps includes (where practicable), but is not limited to, ensuring that proper and advance preparations have been made to deal with such a breach, since failure to take such steps will render interference with the rights of innocent third parties unjustified or unjustifiable; but
>
> iii) where (and only where) there is a reasonable belief that there are no other means whatsoever whereby a breach or imminent breach of the peace can be obviated, the lawful exercise by third parties of their rights may be curtailed by the police;

iv) this is a test of necessity which it is to be expected can only be justified in truly extreme and exceptional circumstances; and

v) the action taken must be both reasonably necessary and proportionate. ***

49. We accept that necessity can provide a defence to the tort of false imprisonment: see eg *R v. Bournewood Mental Health Trust ex parte L* ('*Re L*') [1999] 1 AC 458, per Lord Goff at 488H and 490B-F. The test of necessity is undoubtedly a high one but, as we see it, the problem faced by the respondent here is this. If the police's breach of the peace powers are sufficient to afford the respondent a defence, he does not need this separate point. Given the part played by necessity in connection with those powers, we cannot at present see how the respondent could fail in the context of those powers but nevertheless succeed on the basis that he has a separate defence of necessity. It seems to us that the respondent can only succeed if he can show that it was necessary to take action to prevent a breach of the peace in the context of his breach of the peace powers. Put another way, as we see it, the relevant tests of necessity in this context are to be found in the five propositions summarised in [35] above. ***

Did the appellants appear to be about to commit a breach of the peace? ***

58. *** It is clear from that evidence that the police were aware that there were those in the crowd who were not demonstrators. ***

62. *** [W]e reject Mr Pannick's submissions under this head and answer the question whether these appellants appeared to be about to commit a breach of the peace in the negative. As we see it, the key to this case lies in the answer to the next question.

If the appellants did not appear to be about to commit a breach of the peace, was their containment lawful?

63. The judge held that the answer to this question was 'No'. He did so on the basis to which we have already referred, namely that, unless the question whether a particular appellant was about to commit a breach of the peace was answered in the affirmative, the case against that appellant based on powers to prevent a breach of the peace must fail: [520].

64. Mr Pannick nevertheless invites an affirmative answer to this question. He does so on the basis of the *obiter* reasoning in *Laporte* discussed above, which was not of course available to the judge. He submits that on the judge's findings of fact a breach of the peace was reasonably thought by the police to be imminent, that the police had taken all the steps which they possibly could to avoid a breach of the peace by those likely to cause it by arrest or other action directed at them and that, in all the circumstances, if a breach of the peace was to be avoided, there was no alternative but to contain everyone within a police cordon. As to release, no alternative strategy was possible, or indeed suggested, other than that adopted by the police and, in these circumstances, the containment of some innocent people such as the appellants was inevitable and lawful in accordance with the principles discussed earlier and summarised at [35] above. In short, Mr Pannick submits that, on the findings of fact made by the judge, the situation was wholly exceptional and that the police had no alternative but to do what they did in order to avoid the imminent risk of serious violence, with its consequent risk of serious injury and perhaps death, quite apart from damage to property. ***

66. In response Mr Starmer submits that the majority of people were neither committing a breach of the peace nor threatening to do so and were peaceful throughout. He further submits that the length of the containment of over seven hours was excessive and that the appellants could and should have been released much earlier than they were. As we see it, the difficulty with this submission is that the judge held that containment was necessary because there was no means by which the serious risk of serious injury could have been avoided, other than by the imposition of the cordon and the release policy subsequently adopted by the police. As to the latter, the judge found that it was not practicable for the police to release the crowd collectively earlier than they did and there was no release policy which could and should have been adopted other than that described above, especially given the lack of opportunity which the police had had to formulate a plan: [543] and [552], read with [521-8] and [347]-[351]. As already stated, none was formulated or put to the officers at the trial: [344].

67. While we see the force of the points made by Mr Starmer, especially his point that the containment of the crowd for hours without any or any sufficient toilet facilities and in many cases without food or drink was intolerable, with consequent risk to the health and safety of innocent members of the public, and we can well understand that being in Oxford Circus for so long without any idea when one would be released would have been very unpleasant, we see no realistic alternative but to accept Mr Pannick's submission in response. It is that the judge properly held that the police could not reasonably have foreseen what happened or that it would have been necessary to have contained people for so long. The judge held that the police took action to avoid or minimise the risk of crushing: [371] and [376].

68. For these reasons, we conclude that in this very exceptional case, on the basis of the judge's finding that what the police did in containing the crowd was necessary in order to avoid an imminent breach of the peace, the actions of the police were lawful at common law in accordance with the principles discussed above. On that basis, we answer the question whether the containment was lawful in the affirmative, even though the police did not reasonably suspect that the individual appellants were about to commit a breach of the peace. In our judgment that was the case, both when the cordon was imposed at about 2.20 pm and throughout the time the cordon was maintained. On the judge's findings of fact, the conditions of necessity remained throughout because no-one had or has suggested an alternative release policy. ***

72. *** Based on the reasoning in *Laporte*, we answer the question posed in this section by holding that, on the facts found, although the appellants themselves did not appear to be about to commit a breach of the peace, their containment was lawful because it was necessary to prevent an imminent breach of the peace by others. ***

Conclusions

119. For these reasons we dismiss the appeal. Our conclusions may briefly be summarised as follows:

> i) the appellants were 'imprisoned' for the purposes of the tort of false imprisonment but their 'imprisonment' was lawful because, although the appellants did not themselves appear to be about to commit a breach of the peace, on the judge's findings of fact the police had no alternative but to ask all those in Oxford Circus to remain inside the police cordon in order to avoid an imminent breach of the peace by others;
>
> ii) the correct approach is summarised in the propositions set out in [35] above ***.

REFLECTION:

- *Did the exceptional circumstances of the May Day 2001 protest justify an exceptional response by the police?*[150]
- *The appellant protesters had not done anything to warrant a deprivation of their liberty, yet the Court held that their forced detainment by police was not false imprisonment. Is the defence of public necessity consistent with the view in Scalera (§2.1.3) that the trespass torts vindicate individual autonomy?*

6.7.1.2 Binsaris v. Northern Territory [2020] HCA 22

✗**REF: §2.2.4, §6.6.4**

GAGELER J. (concurring): ***

43. For much of the history of the common law, police officers and other "peace officers" were subject to the general doctrine that "any public officer whom the law charges with a discretion and responsibility in the execution of an independent legal duty is alone responsible for tortious acts which he may commit in the course of his office and that for such acts the government or body which he serves or which appointed him incurs no vicarious liability".[151] Over time, the practice in relation to a public officer appointed by the Crown

[150] See "Violence Erupts in Central London" The Guardian (May 1, 2001); "'Kettling' campaigners lose legal battle" ITV News (Mar 15, 2012) 📺.

[151] *Little v. The Commonwealth* (1947) 75 CLR 94 at 114. See also *Enever v. The King* (1906) 3 CLR 969 at 975-978; *Attorney-General for New South Wales v. Perpetual Trustee Co Ltd* (1952) 85 CLR 237 at 252, 283-284, 303-304.

came to be that "in a proper case, the Crown [would] defend its officer and become responsible for any damages awarded".[152] But persistence of the common law doctrine did much to explain the reluctance of the common law to visit tortious liability on public officers whose conscientious discharge of official duties to safeguard the interests of the public on occasions required them to make the hard choice of sacrificing the interests of some in order to preserve the greater interests of others. History had thrown up memorable instances where catastrophes had ensued because necessary hard choices had not been made by public officers for fear of incurring personal liability.[153] Hence, the provision to a "public champion" of a defence of public necessity.[154] ***

45. The decision of the House of Lords in *Burmah Oil Co Ltd v. Lord Advocate*[155] illustrates that an act constituting an interference with a common law right of property undertaken lawfully by the Crown as a matter of public necessity can still give rise to a common law entitlement to compensation. There private property was destroyed in the exercise of prerogative power in a time of war in order to prevent it from falling into enemy hands. The utilitarian notion that "the property of a few" could be destroyed so that "the property of many and the lives of many more could be saved" was not wholly rejected in that it was accepted to justify the existence and exercise of the prerogative power.[156] But it was moderated by the principle of distributive justice that "the loss to the individual must be made good at the public expense".[157]

46. In my opinion, application of similar reasoning should result in an entitlement to compensation against the Crown for physical harm inflicted on a bystander through action of a police officer undertaken to avoid a risk of greater harm to the police officer or to someone else. If the bystander is not contributing to the risk avoided through the action of the police officer and is not personally at risk of greater harm, the harm caused to the bystander through the police officer's interference with the bystander's bodily integrity ought in principle be compensable at public expense.

47. In working my way to that result, I have benefited from recent academic writing exploring the general topic of "necessity" as a defence to an action in tort in the United Kingdom[158] and the United States.[159] Although I have found them to have no direct utility, I have also considered the concepts of "incomplete privilege"[160] and "conditional fault"[161] developed in academic and professional writing in the United States by reference to *Vincent v. Lake Erie Transportation Co*.[162]

48. To my mind, the informing principle is that the burden of the necessitous infliction of harm on an individual by a public officer in the performance of a public function in the public interest should in fairness be borne by the public. That principle is implicit in the common law reasoning in *Burmah Oil* and is embraced within the legislative imposition of liability for the tortious conduct of a police officer on the Crown.

49. Doctrinally, my preferred analysis is to focus on the scope of the common law "privilege" or "immunity" attendant on the common law "power", or "right" and "duty", of a police officer to use force reasonably necessary to restrain or prevent a breach of the peace. The attendant common law immunity is unquestionably such as to provide a defence to a claim in battery by the wrongdoer who is the target of the force. The attendant common law immunity, in my opinion, is not such as to provide a defence to a claim

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[152] *The Commonwealth v. Mewett* (1997) 191 CLR 471 at 543, quoting Robertson, *The Law and Practice of Civil Proceedings By and Against the Crown and Departments of the Government* (1908) at 351. See also *New South Wales v. Ibbett* (2006) 229 CLR 638 at 650 [41].
[153] eg *Respublica v. Sparhawk* (1788) 1 US 357 at 363.
[154] Fleming, *The Law of Torts*, 9th ed (1998) at 103-104.
[155] [1965] AC 75.
[156] [1965] AC 75 at 112, quoting *United States v. Caltex (Philippines) Inc* (1952) 344 US 149 at 154.
[157] [1965] AC 75 at 107, quoting *Burmah Oil Co (Burma Trading) Ltd v. Lord Advocate* 1963 SC 410 at 475.
[158] Virgo, "Justifying Necessity as a Defence in Tort Law", in Dyson, Goudkamp and Wilmot-Smith (eds), *Defences in Tort* (2015) 135, esp at 146-147.
[159] Simons, "Self-Defense, Necessity, and the Duty to Compensate, in Law and Morality" (2018) 55 *San Diego Law Review* 357, esp at 373.
[160] See Bohlen, "Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality" (1926) 39 *Harvard Law Review* 307.
[161] See Keeton, "Conditional Fault in the Law of Torts" (1959) 72 *Harvard Law Review* 401.
[162] (1910) 124 NW 221. See *Restatement (Third) of Torts: Intentional Torts to Persons, Tentative Draft No 5* (2020), §26 and §44.

in battery by a bystander who suffers collateral harm by reason of the necessitous use of force. The bystander is entitled to damages at common law to compensate for the harm for the simple reason that the use of force has interfered with the bystander's bodily integrity. The interference is tortious in the absence of a defence. The tortious liability and concomitant entitlement to an award of compensatory damages by a court administering the common law is unaffected by the circumstance that a court administering equity would decline to restrain the tortious but necessitous use of force by pre-emptive injunction. ***

REFLECTION:

- *Is Gageler J.'s judgment in Binsaris consistent with the holding in the English case of Austin?*
- *In Rigby v. Chief Constable of Northamptonshire [1985] 1 WLR 1242, a dangerous intruder broke into a gun shop. In order to force him out, the police fired a canister of CS gas into the shop, which started a fire that caused serious damage to the shop and its contents. The owners sued the police for trespass seeking compensation for the damage caused. Taylor J. held, at 1254, that "a defence of necessity is available in the absence of negligence on the part of the defendant creating or contributing to the necessity. In this case there was a dangerous armed psychopath whom it was urgently necessary to arrest. … It is conceded that the only alternative was to fire in a CS gas canister, which was done. I therefore find that the defence of necessity prevails and that the cause of action in trespass fails."[163] Is Rigby distinguishable from Binsaris?*
- *In response to the House of Lords' judgment in Burmah Oil, the UK Parliament enacted the War Damage Act 1965, which abolished common law rights of action against the Crown for property destroyed in times of war. Who should ultimately bear the costs of necessitous intervention that entails trespass to person or property?*

6.7.1.3 Further material

- J. Goudkamp & D. Nolan (eds), *Winfield & Jolowicz on Tort* (20th ed, London: Sweet & Maxwell, 2020), ch 26, s 3(B)(i).

6.7.2 Private necessity

"Private necessity" in Wex (Cornell Law School Legal Information Institute, 2011)

In tort law, [private necessity is] a defense that can be used against charges of trespass where a defendant interferes with a plaintiff's property in an emergency to protect an interest of his own. *** […continue reading]

6.7.2.1 Vincent v. Lake Erie Transport Co. (1910) 109 Minn 456 (MN SC)

BACKGROUND: Quimbee (2020), https://youtu.be/3wX-IH3Qzqw

Supreme Court of Minnesota – 109 Minn. 456

O'BRIEN J.:

1. The steamship Reynolds, owned by the defendant, was for the purpose of discharging her cargo on November 27, 1905, moored to plaintiff's dock in Duluth. While the unloading of the boat was taking place a storm from the northeast developed, which at about 10 o'clock p. m., when the unloading was completed, had so grown in violence that the wind was then moving at 50 miles per hour and continued to increase during the night. There is some evidence that one, and perhaps two, boats were able to enter the harbor that night, but it is plain that navigation was practically suspended from the hour mentioned until the morning of the 29th, when the storm abated, and during that time no master would have been justified in attempting to navigate his vessel, if he could avoid doing so. After the discharge of the cargo the Reynolds signaled for a tug to tow her from the dock, but none could be obtained because of the severity of the storm. If the lines holding the ship to the dock had been cast off, she would doubtless have drifted away; but, instead, the lines were kept fast, and as soon as one parted or chafed it was replaced, sometimes with a larger one. The vessel lay upon the outside of the dock, her bow to the east, the wind and waves striking her starboard quarter with such force that she was constantly being lifted and thrown against the dock, resulting in its

[163] An alternative claim in negligence prevailed on the basis the police should have had fire-fighting equipment on hand.

damage, as found by the jury, to the amount of $500.

2. We are satisfied that the character of the storm was such that it would have been highly imprudent for the master of the Reynolds to have attempted to leave the dock or to have permitted his vessel to drift a way from it. One witness testified upon the trial that the vessel could have been warped into a slip, and that, if the attempt to bring the ship into the slip had failed, the worst that could have happened would be that the vessel would have been blown ashore upon a soft and muddy bank. The witness was not present in Duluth at the time of the storm, and, while he may have been right in his conclusions, those in charge of the dock and the vessel at the time of the storm were not required to use the highest human intelligence, nor were they required to resort to every possible experiment which could be suggested for the preservation of their property. Nothing more was demanded of them than ordinary prudence and care, and the record in this case fully sustains the contention of the appellant that, in holding the vessel fast to the dock, those in charge of her exercised good judgment and prudent seamanship.

3. It is claimed by the respondent that it was negligence to moor the boat at an exposed part of the wharf, and to continue in that position after it became apparent that the storm was to be more than usually severe. We do not agree with this position. The part of the wharf where the vessel was moored appears to have been commonly used for that purpose. It was situated within the harbor at Duluth, and must, we think, be considered a proper and safe place, and would undoubtedly have been such during what would be considered a very severe storm. The storm which made it unsafe was one which surpassed in violence any which might have reasonably been anticipated.

4. The appellant contends by ample assignments of error that, because its conduct during the storm was rendered necessary by prudence and good seamanship under conditions over which it had no control, it cannot be held liable for any injury resulting to the property of others, and claims that the jury should have been so instructed. An analysis of the charge given by the trial court is not necessary, as in our opinion the only question for the jury was the amount of damages which the plaintiffs were entitled to recover, and no complaint is made upon that score.

5. The situation was one in which the ordinary rules regulating properly rights were suspended by forces beyond human control, and if, without the direct intervention of some act by the one sought to be held liable, the property of another was injured, such injury must be attributed to the act of God, and not to the wrongful act of the person sought to be charged. If during the storm the Reynolds had entered the harbor, and while there had become disabled and been thrown against the plaintiffs' dock, the plaintiffs could not have recovered. Again, if which attempting to hold fast to the dock the lines had parted, without any negligence, and the vessel carried against some other boat or dock in the harbor, there would be no liability upon her owner. But here those in charge of the vessel deliberately and by their direct efforts held her in such a position that the damage to the dock resulted, and, having thus preserved the ship at the expense of the dock, it seems to us that her owners are responsible to the dock owners to the extent of the injury inflicted.

6. In *Depue v. Flatau*, 100 Minn. 299, 111 N.W. 1, 8 L.R.A. (N.S.) 485, this court held that where the plaintiff, while lawfully in the defendants' house, became so ill that he was incapable of traveling with safety, the defendants were responsible to him in damages for compelling him to leave the premises. If, however, the owner of the premises had furnished the traveler with proper accommodations and medical attendance, would he have been able to defeat an action brought against him for their reasonable worth?

7. In *Ploof v. Putnam*, 71 Atl. 188, 20 L.R.A. (N.S.) 152, the Supreme Court of Vermont held that where, under stress of weather, a vessel was without permission moored to a private dock at an island in Lake Champlain owned by the defendant, the plaintiff was not guilty of trespass, and that the defendant was responsible in damages because his representative upon the island unmoored the vessel, permitting it to drift upon the shore, with resultant injuries to it. If, in that case, the vessel had been permitted to remain, and the dock had suffered an injury, we believe the shipowner would have been held liable for the injury done.

8. Theologians hold that a starving man may, without moral guilt, take what is necessary to sustain life; but it could hardly be said that the obligation would not be upon such person to pay the value of the property so taken when he became able to do so. And so public necessity, in times of war or peace, may require the

taking of private property for public purposes; but under our system of jurisprudence compensation must be made.

9. Let us imagine in this case that for the better mooring of the vessel those in charge of her had appropriated a valuable cable lying upon the dock. No matter how justifiable such appropriation might have been, it would not be claimed that, because of the overwhelming necessity of the situation, the owner of the cable could not recover its value.

10. This is not a case where life or property was menaced by any object or thing belonging to the plaintiff, the destruction of which became necessary to prevent the threatened disaster. Nor is it a case where, because of the act of God, or unavoidable accident, the infliction of the injury was beyond the control of the defendant, but is one where the defendant prudently and advisedly availed itself of the plaintiffs' property for the purpose of preserving its own more valuable property, and the plaintiffs are entitled to compensation for the injury done.

11. Order affirmed.

LEWIS J. (dissenting):

12. I dissent. It was assumed on the trial before the lower court that appellant's liability depended on whether the master of the ship might, in the exercise of reasonable care, have sought a place of safety before the storm made it impossible to leave the dock. The majority opinion assumes that the evidence is conclusive that appellant moored its boat at respondent's dock pursuant to contract, and that the vessel was lawfully in position at the time the additional cables were fastened to the dock, and the reasoning of the opinion is that, because appellant made use of the stronger cables to hold the boat in position, it became liable under the rule that it had voluntarily made use of the property of another for the purpose of saving its own.

13. In my judgment, if the boat was lawfully in position at the time the storm broke, and the master could not, in the exercise of due care, have left that position without subjecting his vessel to the hazards of the storm, then the damage to the dock, caused by the pounding of the boat, was the result of an inevitable accident. If the master was in the exercise of due care, he was not at fault. The reasoning of the opinion admits that if the ropes, or cables, first attached to the dock had not parted, or if, in the first instance, the master had used the stronger cables, there would be no liability. If the master could not, in the exercise of reasonable care, have anticipated the severity of the storm and sought a place of safety before it became impossible, why should he be required to anticipate the severity of the storm, and, in the first instance, use the stronger cables?

14. I am of the opinion that one who constructs a dock to the navigable line of waters, and enters into contractual relations with the owner of a vessel to moor at the same, takes the risk of damage to his dock by a boat caught there by a storm, which event could not have been avoided in the exercise of due care, and further, that the legal status of the parties in such a case is not changed by renewal of cables to keep the boat from being cast adrift at the mercy of the tempest.

JAGGARD J. concurs herein.

REFLECTION:

- *Vincent characterises private necessity as an incomplete defence. Whether private necessity is a complete or only a partial defence in Canada and other Commonwealth jurisdictions remains unclear. In what sense is private necessity a defence to tort liability in the United States, if it does not shield a defendant from liability to pay the plaintiff compensatory damages? What does the defence shield the defendant from?*
- *In Monsanto Plc v. Tilly [1999] EWCA Civ 3044, [33], Stuart-Smith L.J. affirmed the dicta of Edmund Davies L.J. in Southwark Borough Council v. Williams [1971] Ch 734, 745, that "the law regards with the deepest suspicion any remedies of self-help, and permits those remedies to be resorted to only in very special circumstances. The reason for such circumspection is clear—necessity can very easily become simply a mask for anarchy." Mummery L.J., concurring, stated that the defence of necessity "is only available to the individual in cases of emergency where it is necessary for the private citizen to act in the face of immediate and serious danger to life or property and the citizen acts reasonably in all the circumstances." Would a broad conception*

of the defence of necessity lead to anarchy?

6.7.2.2 Further material

- G. Virgo, "Justifying Necessity as a Defence in Tort Law" in A. Dyson, J. Goudkamp and F. Wilmot-Smith (eds), *Defences in Tort* (Oxford: Hart Publishing, 2015).
- N. Tamblyn, "Private Necessity in English and American Tort Law" (2012) 1 Global J Comparative L 38.
- "*Vincent v. Lake Erie Transportation Co.* and the Doctrine of Necessity" (2005) 5 Issues in Legal Scholarship i.

6.7.3 Necessity in assisting another

Re: F [1990] 2 AC 1, 74 (HL)

LORD GOFF OF CHIEVELEY: *** There is *** a third group of cases, which is also properly described as founded upon the principle of necessity ***. These cases are concerned with action taken as a matter of necessity to assist another person without his consent. To give a simple example, a man who seizes another and forcibly drags him from the path of an oncoming vehicle, thereby saving him from injury or even death, commits no wrong. But there are many emanations of this principle, to be found scattered through the books. These are concerned not only with the preservation of the life or health of the assisted person, but also with the preservation of his property (sometimes an animal, sometimes an ordinary chattel) and even to certain conduct on his behalf in the administration of his affairs. Where there is a pre-existing relationship between the parties, the intervenor is usually said to act as an agent of necessity on behalf of the principal in whose interests he acts, and his action can often, with not too much artificiality, be referred to the pre-existing relationship between them. Whether the intervenor may be entitled either to reimbursement or to remuneration raises separate questions ***.

6.7.3.1 Kohli v. Manchanda [2008] INSC 42

✗REF: §2.2.2, §18.1.1.1

RAVEENDRAN J. (FOR THE COURT): ***

16. The next question is whether in an action for negligence/battery for performance of an unauthorized surgical procedure, the Doctor can put forth as defence the consent given for a particular operative procedure, as consent for any additional or further operative procedures performed in the interests of the patient. In *Murray v. McMurchy* [1949] 2 DLR 442, the Supreme Court of BC, Canada, was considering a claim for battery by a patient who underwent a caesarian section. During the course of caesarian section, the doctor found fibroid tumors in the patient's uterus. Being of the view that such tumours would be a danger in case of future pregnancy, he performed a sterilization operation. The court upheld the claim for damages for battery. It held that sterilization could not be justified under the principle of necessity, as there was no immediate threat or danger to the patient's health or life and it would not have been unreasonable to postpone the operation to secure the patient's consent. The fact that the doctor found it convenient to perform the sterilization operation without consent as the patient was already under general anaesthetic, was held to be not a valid defence. A somewhat similar view was expressed by Courts of Appeal in England in *Re: F.* (*supra*) [§6.7.3]. It was held that the additional or further treatment which can be given (outside the consented procedure) should be confined to only such treatment as is necessary to meet the emergency, and as such needs to be carried out at once and before the patient is likely to be in a position to make a decision for himself. Lord Goff observed:

> "Where, for example, a surgeon performs an operation without his consent on a patient temporarily rendered unconscious in an accident, he should do no more than is reasonably required, in the best interests of the patient, before he recovers consciousness. I can see no practical difficulty arising from this requirement, which derives from the fact that the patient is expected before long to regain consciousness and can then be consulted about longer term measures."

The decision in *Marshall v. Curry* [1933] 3 DLR 260 decided by the Supreme Court of Nova Scotia, Canada, illustrates the exception to the rule, that an unauthorized procedure may be justified if the patient's medical condition brooks no delay and warrants immediate action without waiting for the patient to regain consciousness and take a decision for himself. In that case the doctor discovered a grossly diseased testicle while performing a hernia operation. As the doctor considered it to be gangrenous, posing a threat to patient's life and health, the doctor removed it without consent, as a part of the hernia operation. An action for battery was brought on the ground that the consent was for a hernia operation and removal of testicle was not consent. The claim was dismissed. The court was of the view that the doctor can act without the consent of the patient where it is necessary to save the life or preserve the health of the patient. Thus, the principle of necessity by which the doctor is permitted to perform further or additional procedure (unauthorized) is restricted to cases where the patient is temporarily incompetent (being unconscious), to permit the procedure delaying of which would be unreasonable because of the imminent danger to the life or health of the patient. ***

REFLECTION:

- *How should a court determine whether an unconsented medical procedure is justified as necessary?*
- *Is the common law justification for interfering with another to preserve their life or property consistent with the refusal in Gilbert v. Stone (§6.2.1.1) to excuse such interferences when necessary to preserve one's own life?*

6.7.3.2 Pile v. Chief Constable of Merseyside [2020] EWHC 2472 (QB)

✗**REF: §6.3.1.4**

TURNER J.: ***

16. The claimant contends that the police have no power to change the clothing of a detainee incapacitated by drink however contaminated such clothing may be by bodily fluids. This prohibition, it is said, applies: (i) even in circumstances in which to leave the detainee in her own clothes would give rise to a hygiene risk both to her and to those required to come into contact with her; and (ii) notwithstanding the degrading condition in which she would otherwise be left to spend the rest of the night wallowing in her own vomit or worse. Accordingly, it is argued, despite the fact that the claimant raised no objection to the removal of her clothes and that the officers were acting her own best interests using no more force then necessary, she was the victim of a trespass to her person.

17. In support of this brave proposition, the claimant relies upon section 54 of the *Police and Criminal Evidence Act 1984* ("*PACE*") which provides [a police power to search detained persons]. ***

26. In this case, it is clear that the removal of the claimant's clothes had nothing whatsoever to do with a search "in order to ascertain whether [she] has with [her] anything which [she] could use for any of the purposes specified in subsection (4)(a)" [namely, causing physical injury, damaging property, interferring with evidence, or assisting escape]. Accordingly, subsection 6C [which provides that "[a] constable may only seize clothes and personal effects in the circumstances specified in subsection (4) above"] has no application to the circumstances of this case.

27. It follows that ground one of this appeal must fail. ***

29. Nevertheless, I would make some brief additional observations.

30. Section 39 of *PACE* *** provides:

> "**Responsibilities in relation to persons detained**
>
> (1) Subject to subsections (2) and (4) below, it shall be the duty of the custody officer at a police station to ensure—

> (a) that all persons in police detention at that station are treated in accordance with this Act and any code of practice issued under it and relating to the treatment of persons in police detention; …"

31. Paragraph 8.5 of the Code of Practice provides:

> "If it is necessary to remove a detainee's clothes for the purposes of investigation, for hygiene, health reasons or cleaning, removal shall be conducted with proper regard to the dignity, sensitivity and vulnerability of the detainee and replacement clothing of a reasonable standard of comfort and cleanliness shall be provided."

32. I am satisfied, in the circumstances of this case, that it was necessary to remove the claimant's clothing for hygiene and health reasons and that a failure to have done so would have amounted to a breach of the Code and of the duty under section 39 of *PACE*. ***

34. In addition to the fact that the interpretation which I have preferred arises out of the natural meaning of the words used in their statutory context, any other approach would give rise to absurdities. On the claimant's interpretation, for example, a constable would be acting unlawfully by removing the coat of a detainee rendered unconscious by heat exhaustion. ***

REFLECTION:

- *Is the defence of necessity a more satisfactory basis for denying Pile's claim of battery as compared to the defence of implied consent?*

6.7.3.3 Further material

- K Chandler, B. White & L. Willmott, "The Doctrine of Necessity and the Detention and Restraint of People with Intellectual Impairment: Is there Any Justification?" (2016) 23 Psychiatry, Psychology & L 361.

6.8 Limitation period

Brisbane South Regional Health Authority v. Taylor [1996] HCA 25

MCHUGH J.: ***

4. *** For nearly 400 years, the policy of the law has been to fix definite time limits (usually six but often three years) for prosecuting civil claims. The enactment of time limitations has been driven by the general perception that "[w]here there is delay the whole quality of justice deteriorates."[164] ***

5. Even before the passing of the *Limitation Act 1623* (Imp), many civil actions were the subject of time limitations[165]. Moreover, the right of the citizen to a speedy hearing of an action that had been commenced was acknowledged by Magna Carta itself[166]. Thus for many centuries the law has recognised the need to commence actions promptly and to prosecute them promptly once commenced. As a result, courts exercising supervisory jurisdiction over other courts and tribunals in their jurisdictions have power to stay proceedings as abuses of process if they are satisfied that, by reason of delay or other matter, the commencement or continuation of the proceedings would involve injustice or unfairness to one of the parties[167].

6. The effect of delay on the quality of justice is no doubt one of the most important influences motivating a legislature to enact limitation periods for commencing actions. But it is not the only one. Courts and commentators have perceived four broad rationales for the enactment of limitation periods. First, as time

[164] *R v. Lawrence* [1982] AC 510 at 517 per Lord Hailsham of St Marylebone LC.
[165] Bacon, *New Abridgment of the Law*, 5th ed (1798), vol 4 at 461 et seq.
[166] cap 40, Magna Carta.
[167] *Walton v. Gardiner* (1993) 177 CLR 378.

goes by, relevant evidence is likely to be lost[168]. Second, it is oppressive, even "cruel", to a defendant to allow an action to be brought long after the circumstances which gave rise to it have passed[169]. Third, people should be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them[170]. Insurers, public institutions and businesses, particularly limited liability companies, have a significant interest in knowing that they have no liabilities beyond a definite period[171]. *** Even where the cause of action relates to personal injuries[172], it will be often just as unfair to make the shareholders, ratepayers or taxpayers of today ultimately liable for a wrong of the distant past, as it is to refuse a plaintiff the right to reinstate a spent action arising from that wrong. The final rationale for limitation periods is that the public interest requires that disputes be settled as quickly as possible[173].

7. In enacting limitation periods, legislatures have regard to all these rationales. A limitation period should not be seen therefore as an arbitrary cut off point unrelated to the demands of justice or the general welfare of society. It represents the legislature's judgment that the welfare of society is best served by causes of action being litigated within the limitation period, notwithstanding that the enactment of that period may often result in a good cause of action being defeated. Against this background, I do not see any warrant for treating provisions that provide for an extension of time for commencing an action as having a standing equal to or greater than those provisions that enact limitation periods. A limitation provision is the general rule; an extension provision is the exception to it. *** The discretion to extend should therefore be seen as requiring the applicant to show that his or her case is a justifiable exception to the rule that the welfare of the State is best served by the limitation period in question. Accordingly, when an applicant seeks an extension of time to commence an action after a limitation period has expired, he or she has the positive burden of demonstrating that the justice of the case requires that extension. ***

REFLECTION:

- *What are the policy justifications for statutes of limitation?*
- *Should legislatures or courts be primarily responsible for determining when civil rights of action expire?*

6.8.1 The interpretative principle of discoverability

S. Beswick, "Error of Law: An Exception to the Discoverability Principle?" (2020) 57 Osgoode Hall LJ 295, 298-306

In broad terms, Canada's provinces have experienced three waves of statutory limitation reform.[174]

[168] *Jones v. Bellgrove Properties Ltd* [1949] 2 KB 700 at 704.
[169] *RB Policies at Lloyd's v. Butler* [1950] 1 KB 76 at 81-82.
[170] New South Wales Law Reform Commission, *Limitation of Actions for Personal Injury Claims*, (1986) LRC 50 at 3; The Law Reform Commission of Western Australia, *Limitation and Notice of Actions*, Discussion Paper, (1992) Project No 36, Part II at 11.
[171] In *Limitation of Actions for Latent Personal Injuries*, (1992) Report No 69 at 10, the Law Reform Commissioner of Tasmania said: "The need for certainty can be justified in many cases. For example, manufacturers need to be able to 'close their books' and calculate the potential liability of their business enterprise with some degree of certainty before embarking on future development. Under modern circumstances, an award of damages compensation may be so large as to jeopardise the financial viability of a business. The threat of open-ended liability from unforeseen claims may be an unreasonable burden on business. Limitation periods may allow for more accurate and certain assessment of potential liability."
[172] The vast majority of defendants in personal injury actions are insured. Consequently, the amount of the verdict will not be met by the defendant. Nevertheless, it is a charge on the revenue of the insurer for the relevant year and is ultimately met by the shareholders of the insurer or the individual proprietors of the insurance business if the insurer is not incorporated. Although the burden of the plaintiff's claim is spread in such cases, the consequences for the proprietors of the insurance business can be significant. When a large number of claims are allowed to be brought out of time, as has been the case in respect of some types of injuries or in some industries in recent years, the financial consequences for an insurer can be drastic.
[173] New South Wales Law Reform Commission, *Limitation of Actions for Personal Injury Claims*, (1986) LRC 50 at 3; The Law Reform Commission of Western Australia, *Limitation and Notice of Actions*, Discussion Paper, (1992) Project No 36, Part II at 11.
[174] See Mew, *Limitations*, *supra* at paras 1.12-1.47.

A. Consolidation of Limitation Laws

Consolidation was the focus of the first wave of reform. In the 1930s, provinces undertook to amalgamate their diffused limitation provisions into single limitation statutes.[175] This first wave of provincial limitation legislation largely inherited its drafting language and principles from England.[176] The ordinary limitation period was six years.[177] It commenced from when "the cause of action arose."[178] The *Uniform Limitations Act 1931*, which precipitated these reforms, [179] provided exceptions in cases of fraudulent misrepresentation,[180] concealed fraud,[181] and for "actions grounded on accident, mistake or other equitable ground of relief."[182] In such cases, the ordinary period of limitation ran not from when the cause of action occurred, but from "discovery" of the action. Ontario[183] and British Columbia[184] did not adopt the *Uniform Act*. Although both provinces recognized equitable rules that postponed the running of time in some circumstances of "mistake," their scope and application came to be considered as "neither clear nor sufficient."[185]

B. Discoverability of Cause of Action

The problem of latent or concealed causes of action becoming statute-barred before a plaintiff could reasonably discover them spurred a second wave of limitation reform in the latter half of the last century.[186] As in England, [187] provincial legislatures enacted more expansive discoverability provisions. [188] These

[175] See John D Falconbridge, "The Disorder of the Statutes of Limitation" (1943) 21 Can Bar Rev 669 at 670.
[176] Everett Lane Weaver, *Limitations: Being a Treatise on the Time Limit on Actions in Canada*, ed by AE Laverty (Canadian Law List, 1939) at 1; Jeremy S Williams, *Limitation of Actions in Canada*, 2nd ed (Butterworth & Co, 1980) at 26; Alberta, Institute of Law Research and Reform, *Limitations*, Report for Discussion No 4 (1986) at 12.
[177] See e.g. *The Limitations of Actions Act*, ULCC 1931, cl 3(1)(j) [*Uniform Limitations Act* 1931] in Ontario Law Reform Commission, *Report on Limitation of Actions* (1969), Appendix C. The *Uniform Limitations Act* 1931 provided a two-year limit for personal injury, defamation, and certain other actions. See also Weaver, *supra*, citing *Limitations Act*, RSO 1937, c 118 [Ontario, *Limitations Act* 1937]. The Ontario, *Limitations Act* 1937 prescribed several different limitation periods depending on the cause of action.
[178] *Uniform Limitations Act* 1931, *supra* at cl 3 (defining an "action" as "any civil proceeding" at cl 2(a)); Limitations Act, RSO 1960, c 214, s 45; *Limitation Act 1939* (E&W), 2 & 3 Geo 6, c 21 (defining an "action" as "any proceeding in a court of law" at s 31(1)) [*Limitation Act 1939* E&W]. See Daniel Zacks, "Claims, Not Causes of Action: The Misapprehension of Basic Limitations Principles" (2018) 48 Adv Q 165 at 171-72 ("[d]epending on one's preference, a cause of action completes, accrues, arises, or ripens. This language all means the same thing: the date on which the cause of action first becomes viable" at 169, n 12); *Nykredit Mortgage Bank Plc v. Edward Erdman Group Ltd (No 2)*, [1997] 1 WLR 1627 at 1638 (HL Eng), Lord Hoffmann [*Nykredit Mortgage Bank Plc*]; *Costello v. Calgary (City)* (1989), 60 DLR (4th) 732 at 741 (Alta CA) [*Costello* 1989 Alta CA].
[179] Mew, *Limitations*, *supra* at para 1.11. The *Uniform Limitations Act* 1931 was the basis for the limitation statutes acts enacted in Manitoba (1931), Saskatchewan (1932), Alberta (1935), Prince Edward Island (1939), the Northwest Territories (1948), New Brunswick (1952), and Yukon (1954) (*ibid*).
[180] *Uniform Limitations Act* 1931, *supra* at cl 3(1)(g).
[181] *Ibid*, cl 4.
[182] *Ibid*, cl 3(1)(h).
[183] Ontario, *Limitations Act* 1937, *supra*; *Limitations Act*, SO 1966, c 214.
[184] *Statute of Limitations*, RSBC 1897, c 123; *Statute of Limitations*, RSBC 1960, c 370.
[185] Ontario Law Reform Commission, *Report on Limitation of Action* (1969) at 109; Law Reform Commission of British Columbia, *Report on Limitations: Project No 6*, Report 15 (1974) at 95, citing Law Revision Committee of England and Wales, *Fifth Interim Report: Statutes of Limitation* (1936) at 29-32.
[186] Mew, Limitations, *supra* at paras 1.12-1.50; New Brunswick, Office of the Attorney General Law Reform Branch, *Limitations Act*, Discussion Paper (1988) at 4. ***
[187] See *Limitation Act 1963* (E&W), c 47 [*Limitations Act 1963* E&W] (replaced *by Limitation Act 1980*, c 58, ss 11, 14); UK, Edmund Davies Committee, *Limitation of Actions in Cases of Personal Injury* (Cmnd 1829, 1962) (recommending the enactment of the *Limitations Act 1963*). See also *Latent Damage Act 1986* (E&W), c 37 [*Latent Damage Act 1986*]; UK, Law Reform Committee, *24th Report on Latent Damage* (Cmnd 9390, 1984) at para 4.4 (recommending the enactment of the *Latent Damage Act 1986* and inserting *Limitation Act 1980*, ss 14A, 14B); *Limitation Act 1980* (E&W), c 58, ss 14A-14B.
[188] For the most comprehensive early reform, see *Limitation Act*, SBC 1975, c 37 [*Limitation Act* 1975 BC]. The *Limitation Act* 1975 BC was the first Canadian statute to codify a general principle of discoverability. Actions governed by these provisions tended also to be accompanied by shorter headline limitation periods. ***

reforms largely maintained the principal drafting technique of tethering the running of the limitation period to the cause of action, but redefined the point at which the affected action "arises." For example, Manitoba introduced a discoverability standard for personal injury claims into its limitation statute in 1967,[189] modelled after the 1963 English legislation,[190] and expanded the statutory principle in 1980[191] following the English Court of Appeal's watershed judgment five years earlier in *Sparham-Souter v. Town & Country (Essex) Ltd*.[192] Judges, too, came to reconsider their understanding of limitation provisions. In *Sparham-Souter*, a decision concerning latent building defects, the Court of Appeal of England and Wales set new precedent in holding that a negligence action "does not accrue, and time does not begin to run, until such time as the plaintiff discovers" that it has suffered "damage, or ought, with reasonable diligence, to have discovered it."[193] Courts across the Commonwealth took up then-Master of the Rolls Lord Denning's novel interpretation of the accrual of negligence actions[194] even after the House of Lords repudiated it less than seven years later.[195]

Sparham-Souter was assumed to be good law in Canada when the Court of Appeal for British Columbia ruled in *Kamloops v. Nielsen* that defective building owners were not time-barred from bringing negligence claims for latent damage against the City outside of the ordinary limitation period.[196] Before a decision on appeal was rendered,[197] *Sparham-Souter* was overruled in England, and the SCC was (in the majority's view) called to resolve an interpretative choice in *Nielsen*:[198] Did the plaintiffs' cause of action "arise"[199] when their building was damaged (in which case their action would be time-barred) or when the plaintiffs were able to discover the defects (in which case their action would be timely)? Justice Wilson, writing for the majority of the Court, endorsed *Sparham-Souter*: The plaintiffs' cause of action did not arise, and the limitation period did not commence, until the defects became reasonably discoverable.[200] Whereas the House of Lords in *Pirelli General Cable Works Ltd v. Oscar Faber & Partners* had found that "the necessary implication" from the express inclusion of a discoverability standard in section 26 of the *Limitation Act 1939* was that discoverability was *not* to be implied into the statute's other provisions,[201] Justice Wilson in *Nielsen* disagreed that the equivalent statutory schemes before her necessarily confined discoverability to cases of fraud, concealment, and mistake.[202] Discoverability could aid the interpretation of a cause of action's accrual generally. Justice Wilson acknowledged the problem of discoverability potentially extending the time for

[189] *An Act to Amend the Limitation of Actions Act and to amend Certain Provisions of other Acts relating to Limitations of Actions*, SM 1966-67, c 32.
[190] *Limitation Act 1963* E&W, *supra*. See *AB v. Ministry of Defence*, [2012] UKSC 9 at para 165, Lady Hale SCJ.
[191] *An Act to Amend the Limitation of Actions Act*, SM 1980, c 28.
[192] [1976] QB 858 (CA) [*Sparham-Souter*]. See Manitoba Law Reform Commission, *Limitations*, (Cameron Harvey, QC) Report 123 (2010) at 15, citing *Sparham-Souter* [Manitoba Law Reform, Limitations]. See Harris Wineberg, "British Columbia's Statutory Discoverability Rule" (1994) 16 Adv Q 490 at 504-505 (expressing preference for the common law formulation over British Columbia's codification).
[193] *Sparham-Souter*, *supra* at 868. See Andrew McGee & Gary Scanlan, "Imputation of Facts—Aspects of s 32(1)(b) of the Limitation Act 1980" (2001) 20 CJQ 17 at 25; James C Morton, *Limitation of Civil Actions* (Carswell, 1988) at 17-18; Janet O'Sullivan, "Limitation, Latent Damage and Solicitors' Negligence" (2004) 20 Professional Negligence 218 at 229; Zacks, *supra* at 171-72. See also *Forster v. Outred & Co* (1981), [1982] 1 WLR 86 (CA).
[194] See e.g. *Invercargill City Council v. Hamlin*, [1994] 3 NZLR 513 (NZCA), aff'd [1996] 1 NZLR 513 (PC).
[195] The House of Lords held that a principle of reasonable discoverability was not to be inferred into the interpretation of English limitation provisions that did not explicitly incorporate it. *Pirelli General Cable Works Ltd v. Oscar Faber & Partners*, [1983] 2 AC 1 (HL Eng) [*Pirelli*]. Parliament responded by enacting the *Latent Damage Act 1986*, *supra*. See also *Anns v. Merton London Borough Council*, [1978] AC 728, Lord Salmon (expressing the view that the cause of action arose "when the building began to sink and the cracks appeared" at 770) [§13.4.1.1].
[196] (1981), 129 DLR (3d) 111 at 122-23 (BCCA).
[197] *Rafuse*, *supra* at 221; *Pirelli*, *supra*. *Pirelli* was decided after oral submission in *Nielsen*, so the SCC called for written submissions on the question. See *Nielsen*, *supra*.
[198] *Nielsen*, *supra* at 40.
[199] *Municipal Act*, RSBC 1960, c 255, s 738 [*Municipal Act* 1960 BC]. The one-year limitation provision in issue was the *Municipal Act* 1960 BC.
[200] *Nielsen*, *supra* at 39-40.
[201] *Pirelli*, *supra* at 14-15, citing *Cartledge v. E Jopling & Sons Ltd*, [1963] AC 758 (HL Eng) [*Cartledge*]. See also *Pirelli*, *supra*, Lord Fraser (noting that after the post-Cartledge statutory amendment, "Parliament deliberately left the law unchanged so far as actions for damages of other sorts was concerned" at 14).
[202] *Nielsen*, *supra* at 40.

bringing an action many years after its occurrence.[203] But weighed against "the injustice of a law which statute-bars a claim before the plaintiff is even aware of its existence," the interpretative discoverability principle was seen "to be much the lesser of two evils."[204] Two years later, a unanimous SCC in *Central Trust Co v. Rafuse* reaffirmed the judgment of the majority in *Nielsen* as laying down a "general rule" that "a cause of action arises for purposes of a limitation period when the material facts on which it is based *have been discovered* or *ought to have been discovered* by the plaintiff *by the exercise of reasonable diligence*."[205]

Over the next decade, despite some resistance,[206] discoverability came to be adopted as a principle of general application to the interpretation of when a cause of action accrues or arises[207] under Canadian limitation statutes.[208] The SCC in *Peixeiro v. Haberman* described the principle as "an interpretive tool … which ought to be considered each time a limitations provision is in issue."[209] It has, accordingly, been broadly employed. Discoverability applies where a statute provides that no action shall be brought beyond X years "after the cause of any such action arose"[210] or "shall have first arisen,"[211] or "from the discovery of the cause of action."[212] Thus, even statutory language that incorporates a knowledge-based inquiry is construed as complementary with common law discoverability.[213] Discoverability also applies when limitation is triggered by an element of an underlying cause of action, such as where an action must be brought within X years from when prohibited "conduct was engaged in,"[214] or where an action for the recovery of damages must be brought within X years "from the time when the damages were sustained,"[215] or where an action arising by reason of a deprivation of land must be brought within X years "from the date when the deprivation took place."[216] In each case, the interpretation converges on the same construction: That time does not begin to run until the date of the plaintiff's discovery or *discoverability* of their action.

C. Discoverability of Claim

The interpretive discoverability principle did not settle discontent with Canada's limitation laws.[217] Three problems persisted. First, discoverability exacerbated inconsistencies in the running of limitation between different causes of action.[218] Second, it gave rise to the possibility that "undiscovered" actions could

[203] *Ibid*.
[204] *Ibid*.
[205] *Rafuse*, *supra* at 224 [emphasis added]. See Joost Blom, "Concurrent Liability in Tort and Contract—Start of Limitation Period" (1987) 21 UBC L Rev 429; Nicholas J Mullany, "Limitations of Actions: Where Are We Now?" [1993] LMCLQ 34 at 39.
[206] See Alberta Law Reform Institute, *Limitations*, Report 55 (1989) at 26-27 [ALRI Limitations]; Richard W Bauman, "The Discoverability Principle: A Time Bomb in Alberta Limitations Law" (1993) 1 Health LJ 65 at 79.
[207] Zacks, *supra* at 169. See *Nykredit Mortgage Bank Plc*, *supra* at 1638, Hoffmann LJ; *Costello* 1989 Alta CA, *supra* at 741.
[208] See *M(K) v. M(H)*, [1992] 3 SCR 6; *Canada (AG) v. Lameman*, 2008 SCC 14 [*Lameman*]. See also Graeme Mew, "When Does Time Start to Run? When Does Time Run Out? When Does the Clock Stop Running?" (2004) 28 Adv Q 448 at 452-53 [Mew, "When Does Time Start to Run"].
[209] [1997] 3 SCR 549 at para 37 [*Peixeiro*]. For the Supreme Court's most recent review of the principle, see *Pioneer Corp*, *supra* at paras 31-42.
[210] *Rafuse*, *supra* at 217, citing Statute of Limitations, RSNS 1967, c 168, s 2(1)(e) [Statute of Limitations 1967]; *Costello* 1989 Alta CA, *supra* at 735, citing *Limitation of Actions Act*, RSA 1980, c L-15, s 51(f) [*Limitation of Actions Act* 1980].
[211] *Nielsen*, *supra* at 40, citing *Municipal Act* 1960 BC, *supra*, s 738.
[212] *Lameman*, *supra* at para 14, citing *Limitation of Actions Act* 1980, *supra*, s 4(1)(e)). See *Uniform Limitations Act* 1931, cl 3(1)(h).
[213] *Nielsen*, *supra* at 42; *Novak*, *supra* at para 10.
[214] *Pioneer Corp*, *supra* at paras 43-44, citing *Competition Act*, RSC 1985, c C-34, s 36(4)(a)(i).
[215] *Hope v. RM of Parkdale #498*, 2013 SKPC 176 at para 59, citing *The Municipalities Act*, SS 2005, c M36.1, s 344(1)); *Peixeiro*, *supra* at para 11, citing *Highway Traffic Act*, RSO 1990, c H-8, s 206(1).
[216] *Hill v. South Alberta Land Registration District* (1993), 100 DLR (4th) 331 at 337 (Alta CA) [*Hill v. Alberta* Alta CA]; *McWhorter v. Alberta (North Alberta Land Registration District)*, [1988] 3 WWR 132 at para 18 (Alta QB) [*McWhorter* Alta QB], aff'd on other grounds [1989] 5 WWR 183 (Alta CA) [*McWhorter* CA]. ***
[217] Zacks, *supra* at 170; Roach, *supra* at 40. See Guttel & Novick, *supra* at 179 (providing an economic analysis and critique of contemporary limitation law).
[218] See Blom, *supra* at 438-439, 443-448; Zacks, *supra* at 182.

potentially be indefinitely postponed until such point as a claimant's cause of action became reasonably discoverable.[219] Except where longstop provisions[220] or the equitable doctrine of laches applied,[221] courts would not infer an outer limit on when a claim could be brought. The potential for claims to lie dormant for decades undermined core principles of certainty and finality.[222] Third, discoverability could also, counterintuitively, lead to actions expiring before a claim could feasibly be brought. It has, for instance, been a "primary stumbling block" to litigating claims concerning historic sexual abuse.[223]

In response, a third wave of limitation reform has spread to supersede the old law. The modern *Limitation of Actions Acts* abandon the framework of cause-of-action accrual.[224] In these *Acts*, it is the "claim,"[225] not the particular "cause of action," that determines the running of limitation. Cause of action and claim are not synonymous. The former is a precondition of the latter,[226] but one only has a claim once one can plead a right to a remedy. Under the modern drafting, limitation commences once it is *discoverable* both that a claimant had a claim and that civil proceedings over it were "warrant[ed]" or "appropriate."[227] The right to sue is further constrained by default ultimate limitation periods that apply across the board, subject to prescribed exceptions and extensions.[228] For provinces that have modernized their limitation statutes, this third wave of limitation reform marks a break from English limitation law. It also hails a departure from Canada's traditional understanding of the judge-made discoverability principle,[229] since the statutory discoverability provisions take precedence. Courts nevertheless frequently refer back to the interpretive principle in construing modern limitation statutes.[230]

D. Discoverability Today

Despite the contemporary trend in Canada's provinces toward the statutory "claim"-based framework, common law discoverability remains an important interpretive rule for several reasons. First, the third-wave reforms are best understood as an improvement on, not a clean break with, what came before. Second, not all provinces have abandoned the "cause of action" framework.[231] Second-wave reform drafting also

[219] Bauman, *supra* at 79; Mullany, *supra* at 48.
[220] See Roach, *supra* at 26, 42, 44-46.
[221] See Bauman, *supra* at 80-82; Francis A Anglin, Limitations of Actions Against Trustees (Canada Law Book Company, 1900) at 9-10.
[222] See generally Jeremy Waldron, "Superseding Historic Injustice" (1992) 103 Ethics 4; Arthur Ripstein, "The Rule of Law and Time's Arrow" in Lisa M Austin & Dennis Klimchuk, eds, *Private Law and the Rule of Law* (Oxford University Press, 2014) 306.
[223] Graeme Mew & Adrian Lomaga, "Abusive Limits: M(K) v. M(H) and a Comparison of the Limitation for Sexual Assault" (2009) 35 Adv Q 133 at 134. See Elizabeth Adjin-Tettey & Freya Kodar, "Improving the Potential of Tort Law for Redressing Historical Abuse Claims: The Need for a Contextualized Approach to the Limitation Defence" (2010) 42 Ottawa L Rev 95 at 117.
[224] Such statutes have been enacted in Alberta (1996), Ontario (2002), Saskatchewan (2004), New Brunswick (2009), British Columbia (2012), and Nova Scotia (2014). The Manitoba Law Reform Commission proposed reforms, which have not been enacted. See The Manitoba Law Reform, *Limitations*, *supra* ***.
[225] Uniform Law Conference of Canada, *Uniform Limitations Act* (2005) (establishing that "'claim' means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission," cl 1).
[226] Zacks, *supra* at 182.
[227] See *Limitations Act*, RSA 2000, c L-12, s 3(1)(a)(iii) [Alberta *Limitations Act*]; *Uniform Limitations Act* (2005), s 5(a)(iv); *Limitations Act*, SO 2002, c 24, s 5(1)(a)(iv). See also Manitoba Law Reform, *Limitations*, *supra* at 21 ("This provision, in its different forms, is intended to recognize that the nature or extent of the injury or damage suffered may not be immediately apparent, and to avoid forcing plaintiffs into litigating unnecessarily over minor damage in order to preserve their rights.").
[228] Zacks, *supra* at 183-84. See *Apotex Inc v. Nordion (Canada) Inc*, 2019 ONCA 23 at para 86.
[229] Zacks, *supra* at 165. See *Rooplal v. Fodor*, 2019 ONSC 7211 at para 5 (holding that the discoverability provisions in the *Limitations Act*, SO 2002, c 24, oust common law discoverability in Ontario).
[230] Mew does not draw as sharp a distinction with past limitation regimes as Zacks does. See Mew, *Limitations*, *supra* at paras 3.66, 3.121; Mew, "When Does Time Start to Run," *supra*. *** For a summary of the legal principles guiding the interpretation of limitation periods, see *Condominium Plan No 0625385 v. Oxford Grande Ltd*, 2017 ABQB 316 at para 20 [*Condominium Plan No 0625385*]. See also Mew, *Limitations*, *supra* at paras 3.48-3.53.
[231] The limitation statutes of Manitoba, Newfoundland and Labrador, Prince Edward Island, Yukon, and the Northwest Territories are still largely influenced by the traditional English drafting and the *Uniform Limitations Act* 1931.

subsists in key federal limitation statutes,[232] as well as hundreds of particular provincial and federal limitation provisions.[233] Those statutes remain subject to common law discoverability, as do actions that arose prior to the modern reforms.[234]

Canada's common law understanding of discoverability may also usefully inform the interpretation of limitation provisions in other jurisdictions.[235] Most pertinently, it can aid judicial understanding of the English statutory developments that Canada's second-wave reforms mirrored. When the House of Lords in *Pirelli* declined to infer a general principle of discoverability into the interpretation of the English *Limitation Act 1939*, it constrained considerations of discoverability to those provisions in which Parliament specifically provided for it.[236] This conservative approach to statutory interpretation has seemingly dissuaded English judges from looking to the interpretive understandings of analogous provisions abroad. Yet, the statutory provision in the *Limitation Act 1980* E&W—that limitation on an action based on fraud, concealment, or mistake "shall not begin to run until the plaintiff *has discovered* the fraud, concealment or mistake (as the case may be) *or could with reasonable diligence have discovered it*"[237]—is clearly paralleled in Canadian limitation statutes and in the interpretative principle of discoverability.[238] Indeed, it was English legislation and cases that provided "the source for the development of the Canadian rule."[239] Canada's understanding of discoverability can, in the relevant contexts, usefully inform the adjudicative approach in England and elsewhere.[240] *** […continue reading]

REFLECTION:

- *Of the three waves of statutory limitation reform seen in Canada, which limitation scheme provides the most certainty as to one's rights to sue? What policy other than certainty might reformers have sought to balance?*

6.8.2 Limitation Act, SBC 2012

Limitation Act, SBC 2012, c 13, ss 3, 6(1), 8, 21(1)

3. Exempted claims

(1) This Act does not apply to the following: ***

(b) a claim for possession of land if the person entitled to possession has been dispossessed in circumstances amounting to trespass; ***

(i) a claim relating to misconduct of a sexual nature, including, without limitation, sexual assault,

(i) if the misconduct occurred while the claimant was a minor, and

(ii) whether or not the claimant's right to bring the court proceeding was at any time governed by a limitation period;

[232] A fallback limitation period that requires proceedings to be brought "within six years after the cause of action arose" is prescribed by two federal acts. See *Federal Courts Act*, RSC 1985, c F-7, s 39(2); *Crown Liability and Proceedings Act*, RSC 1985, c C-50, s 32.
[233] See e.g. *Marine Liability Act*, SC 2001, c 6, s 14(1); *Bank Act*, SC 1991, c 46, s 272(3); *Competition Act*, RSC 1985, c C-34, s 36(4)(a)(i). See Mew, *Limitations*, *supra* at Appendix B, C.
[234] See Mew, *Limitations*, *supra* at paras 1.73-1.86.
[235] Christine French, "Time and the Blamelessly Ignorant Plaintiff: A Review of the Reasonable Discoverability Doctrine and Section 4 of the Limitation Act 1950" (1998) 9 Otago L Rev 255 at 262-63.
[236] See *Pirelli*, *supra* at 10, 14.
[237] *Limitation Act 1980* (E&W), s 32(1) [*Limitation Act 1980* E&W] [emphasis added].
[238] *Rafuse*, *supra* at 224. See Erik S Knutsen, "Limitation Periods and the Symbiosis of Capacity and Discoverability" (2003) 237 Ann Rev Civ Litig 237 at 241.
[239] See Mew, *Limitations*, *supra* at para 3.29.
[240] Andrews, *supra* at 593, citing *Limitation Act 1980* E&W, *supra* (noting that s 32(1) of the *Limitation Act 1980* E&W is "important if 'discoverability' does not become the general 'starting-date' test" in England (*ibid* at 593, n 18)); Law Reform Commission of Ireland, *Limitation of Actions*, Report 104 (2011) (noting that modern limitation regimes "owe much to the pioneering work in the 1980s in Canada of the Alberta Institute of Law Research and Reform" (at 28)).

(j) a claim relating to sexual assault, whether or not the claimant's right to bring the court proceeding was at any time governed by a limitation period;

(k) a claim relating to assault or battery, whether or not the claimant's right to bring the court proceeding was at any time governed by a limitation period, if the assault or battery occurred while the claimant

(i) was a minor, or

(ii) was living in an intimate and personal relationship with, or was in a relationship of financial, emotional, physical or other dependency with, a person who performed, contributed to, consented to or acquiesced in the assault or battery; ***

(2) This Act does not apply to a claim or court proceeding for which a limitation period has been established under another enactment, except to the extent provided for in the other enactment.

6. Basic limitation period

(1) Subject to this Act, a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered. ***

8. General discovery rules

Except for those special situations referred to in sections 9 to 11, a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:

(a) that injury, loss or damage had occurred;

(b) that the injury, loss or damage was caused by or contributed to by an act or omission;

(c) that the act or omission was that of the person against whom the claim is or may be made;

(d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

21. Ultimate limitation period

(1) Subject to Parts 4 and 5, even if the limitation period established by any other section of this Act in respect of a claim has not expired, a court proceeding must not be commenced with respect to the claim more than 15 years after the day on which the act or omission on which the claim is based took place. ***

6.8.2.1 Other limitation statutes

- Federal: Federal Courts Act, RSC 1985, c F-7, s 39; Crown Liability and Proceedings Act, RSC 1985, c C-50, s 32.
- Alberta: Limitations Act, RSA 2000, c L-12.
- Manitoba: The Limitation of Actions Act, CCSM c L150.
- New Brunswick: Limitation of Actions Act, SNB 2009, c L-8.5.
- Newfoundland & Labrador: Limitations Act, SNL 1995, c L-16.1.
- Nova Scotia: Limitation of Actions Act, SNS 2014, c 35; Real Property Limitations Act, RSNS 1989, c 258.
- Ontario: Limitations Act, 2002, SO 2002, c 24.
- Prince Edward Island: Statute of Limitations, RSPEI 1988, c S-7.
- Québec: Civil Code of Québec, CQLR c CCQ-1991, arts 3131 and 2922.
- Saskatchewan: The Limitations Act, SS 2004, c L-16.1.

REFLECTION:

- *When does the basic limitation period typically commence on a tort claim? When does the right to sue expire?*

- *What sorts of claims are exempted from limitation? Why might the statute exempt these sorts of claims?*

6.8.3 Grant Thornton LLP v. New Brunswick [2021] SCC 31

Supreme Court of Canada – 2021 SCC 31

MOLDAVER J. (KARAKATSANIS, CÔTÉ, BROWN, ROWE, MARTIN, KASIRER JJ. concurring):

1. On June 23, 2014, the Province of New Brunswick ("Province") filed a statement of claim against Grant Thornton ***, seeking damages for negligence. In response, Grant Thornton brought summary judgment motions to have the Province's claim dismissed as statute-barred by virtue of the two-year limitation period under s. 5(1)(a) of the *Limitation of Actions Act*, S.N.B. 2009, c. L-8.5 ("*LAA*").

2. The motions judge granted summary judgment in favour of Grant Thornton. He found that s. 5(1)(a) barred the claim because the Province knew or ought to have known that it had *prima facie* grounds to infer that it had a potential claim against Grant Thornton more than two years before commencing its claim. The Court of Appeal overturned that decision. It rejected the "*prima facie* grounds" standard used by the motions judge and held instead that the governing standard is whether a plaintiff knows or ought reasonably to have known facts that confer a legally enforceable right to a remedy. That right, the court explained, only exists if the plaintiff has knowledge of each constituent element of the claim. Applying this standard, the court held that the two-year limitation period in s. 5(1)(a) had not been triggered because the Province had not yet discovered its claim (even though the Province had issued a 106-paragraph statement of claim almost six years before receiving the reasons of the Court of Appeal). Grant Thornton now appeals to this Court.

3. This case turns on the standard to be applied in determining whether a plaintiff has the requisite degree of knowledge to discover a claim under s. 5(2), thereby triggering the two-year limitation period in s. 5(1)(a). Respectfully, the Court of Appeal adopted too high a standard. In my view, a claim is discovered when the plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn. It follows from this standard that a plaintiff does not need knowledge of all the constituent elements of a claim to discover that claim.

4. In the present case, I am satisfied that the Province discovered its claim against Grant Thornton on February 4, 2011. By then, the Province knew or ought to have known that a loss occurred and that the loss was caused in whole or in part by conduct which Grant Thornton had been retained to detect. This was sufficient to draw a plausible inference that Grant Thornton had been negligent. Although the Province had this knowledge by February 4, 2011, it did not bring its claim until June 23, 2014, more than two years later. The claim is therefore statute-barred by s. 5(1)(a) of the *LAA*. ***

27. Section 5(1)(a) of the *LAA* sets out the limitation period that controls this case: a claim must be commenced two years from the day on which the claim is discovered. As the text of s. 5(2) makes plain, a claim is discovered when a plaintiff knows or ought reasonably to have known that an injury, loss or damage occurred, which was caused or contributed to by an act or omission of the defendant. ***

40. *** I am satisfied that s. 5(1)(a) and (2) codifies the common law rule of discoverability. As established by that rule and the *LAA*, the limitation period is triggered when the plaintiff discovers or ought to have discovered through the exercise of reasonable diligence the material facts on which the claim is based. ***

42. *** I propose the following approach *** [to the degree of knowledge required under s. 5(2) to discover a claim and trigger the limitation period]: a claim is discovered when a plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn. ***

46. The plausible inference of liability requirement ensures that the degree of knowledge needed to discover a claim is more than mere suspicion or speculation. This accords with the principles underlying the discoverability rule, which recognize that it is unfair to deprive a plaintiff from bringing a claim before it can reasonably be expected to know the claim exists. At the same time, requiring a plausible inference of liability ensures the standard does not rise so high as to require certainty of liability *** or "perfect knowledge" ***. Indeed, it is well established that a plaintiff does not need to know the exact extent or type of harm it has

suffered, or the precise cause of its injury, in order for a limitation period to run ***. ***

REFLECTION:

- *Is it fair that a limitation period might start to run before a plaintiff knows the extent of their harm or is certain that the defendant is liable? At what point in litigation does a plaintiff gain such certainty?*

6.8.4 Caplan v. Atas [2021] ONSC 670

✗**REF: §5.1.2, §5.2.4, §9.8.2.7, §20.7.3**

CORBETT J.: ***

180. Atas has adduced no evidence respecting the limitation defences. In argument, she relied on dates on which publications are said to have been uploaded to the internet. Under the law of limitations, this information, which can be seen in the plaintiffs' evidence, may establish a date of original posting, but does not assist in establishing the "date of discoverability" for the purposes of a limitations period.

181. Third, the publications are continuing. Atas has refused to facilitate removal of these postings and has taken steps to delay or prevent removal of these publications from the sites that still display them. There is no evidence that any of the impugned publications were removed from the internet before the Defamation Proceedings were commenced. On the record before me, the publication is ongoing, and the statements continue to be actionable. ***

REFLECTION:

- *What is the significance of a tort continuing when it comes to applying a limitation period?*

6.8.5 Cross-references

- *Letang v. Cooper* [1964] EWCA Civ 5: **§1.3.3**.
- *Lu v. Shen* [2020] BCSC 490, [199]-[200], [255]: **§3.2.5**, **§5.1.1**.
- *Hill v. Hamilton-Wentworth Police Services Board* [2007] SCC 41, [95]-[98]: **§15.2.1**.
- *Jarbeau v. McLean* [2017] ONCA 115, [2]-[3]: **§16.3.2**.
- *Cloud v. Canada* [2004] CanLII 45444 (ON CA), [61], [81]-[82]: **§19.7.1**.
- *Blackwater v. Plint* [2005] SCC 58, [82], [85]: **§19.7.2**.

6.8.6 Further material

- S. Beswick, "Discoverability Demystified" (2022) 81 Cambridge LJ 242.
- A. Burrows, "Some Recurring Issues in Relation to Limitation of Actions" in A. Dyson, J. Goudkamp and F. Wilmot-Smith (eds), *Defences in Tort* (Oxford: Hart Publishing, 2015).
- K.T. Di Tomaso, "Limitations Act" in N. Semple (ed), *Civil Procedure and Practice in Ontario* (Ottawa: Canadian Legal Information Institute, 2021).
- J. Fiddick & C. Wardell (eds), *The CanLII Manual to British Columbia Civil Litigation* (Ottawa: Canadian Legal Information Institute, 2020), [3.3.3].
- D. Zacks, *Under the Limit* blog: http://limitations.ca/.

7 INTENTIONAL INTERFERENCE WITH LAND

7.1 Trespass to land

7.1.1 Entick v. Carrington (1765) 19 State Tr 1029 (KB)

England Court of King's Bench – (1765) 19 State Tr 1029

The plaintiff declares that the defendants on the 11th day of November in the year of our lord 1762, at Westminster in Middlesex, with force and arms broke and entered the dwelling-house of the plaintiff in St. Dunstan, Stepney, and continued there four hours without his consent and against his peaceable possession thereof, and broke open the doors to the rooms, the locks, iron bars, etc. thereto affixed, and broke open the boxes, chests, drawers, etc. of the plaintiff in his house, and broke the locks thereto affixed, and searched and examined all the rooms, etc., in his dwelling house, and all the boxes, etc., so broke open, and read over, pried into and examined all the private papers, books, etc. of the plaintiff there found, whereby the secret affairs, etc., of the plaintiff became wrongfully discovered and made public and took and carried away 100 printed charts, 100 printed in pamphlets, etc. etc. of the plaintiff there found, and other 100 charts etc took and carried away, to the damage of the plaintiff 2000*l*. ***

[T]he defendants say, the plaintiff ought not to have his action against them, because they say, that before the supposed trespass … because the Earl of Halifax was, and yet is one of the lords of the King's Privy Council, and one of his principal secretaries of state, and that the earl before the trespass … made his warrant under this hand and seal directed to the defendants, by which the earl did in the King's name authorize and require the defendants, taking a constable to their assistance, to make strict and diligent search for the plaintiff, mentioned in the said warrant to be the author, or one concerned in the writing of several weekly very seditious papers intitled, "*the Monitor* or *British Freeholder* … printed to J. Wilson and J. Fell in Paternoster Row," containing gross and scandalous reflections and invectives upon his majesty's government, and upon both Houses of Parliament, and him the plaintiff having found, to seize and apprehend an bring together with his books and papers in safe custody before the Earl of Halifax to be examined concerning the premisses, and further dealt with according to law; …. ***

LORD CHIEF JUSTICE CAMDEN: ***

24. … The defendants … are under a necessity to maintain the legality of the warrants, under which they have acted, and to show that the secretary of state in the instance now before us, had a jurisdiction to seize the defendants' papers. If he had no such jurisdiction, the law is clear, that the officers are as much responsible for the trespass as their superior.

25. This, though it is not the most difficult, is the most interesting question in the cause; because if this point should be determined in favor of the jurisdiction, the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel.

26. The messenger, under this warrant, is commanded to seize the person described, and to bring him with his papers to be examined before the secretary of state. In consequence of this, the house must be searched; the lock and doors of every room, box, or trunk must be broken open; all the papers and books without exception, if the warrant be executed according to its tenor, must be seized and carried away; for it is observable, that nothing is left either to the discretion or to the humanity of the officer. ***

28. This power, so claimed by the secretary of state, is not supported by one single citation from any law book extant. It is claimed by no other magistrate in this kingdom but himself; the great executive hand of criminal justice, the lord chief justice of the court of King's Bench, Chief Justice Scroggs excepted, never having assumed this authority. ***

35. Before I state the question, it will be necessary to describe the power claimed by this warrant in its full

extent. If honestly exerted, it is a power to seize that man's papers, who is charged upon oath to be the author or publisher of a seditious libel; if oppressively, it acts against every man, who is so described in the warrant, though he be innocent. It is executed against the party, before he is heard or even summoned; and the information, as well as the informers, is unknown. ***

38. It must not be here forgot that no subject whatsoever is privileged from this search; because both Houses of Parliament have resolved, that there is no privilege in the case of a seditious libel. ***

41. Such is the power, and therefore one should naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant.

42. If it is law, it will be found in our books. If it is not to be found there, it is not law.

43. The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by private law, are various. Distresses, executions, forfeitures, taxes etc are all of this description; wherein every man by common consent gives up that right, for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment.

44. According to this reasoning, it is now incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is a trespass.

45. Papers are the owner's goods and chattels. They are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and therefore it is too much for us without such authority to pronounce a practice legal, which would be subversive of all the comforts of society. ***

56. The Revolution restored this constitution to its first principles. It did no more. It did not enlarge the liberty of the subject; but gave it a better security. It neither widened nor contracted the foundation, but repaired, and perhaps added a buttress or two to the fabric; and if any minister of state has since deviated from the principles at that time recognized, all that I can say is, that, so far from being sanctified, they are condemned by the Revolution. ***

84. I have now taken notice of every thing that has been urged upon the present point; and upon the whole we are all of opinion, that the warrant to seize and carry away the party's papers in the case of a seditious, is illegal and void.

85. Before I conclude, I desire not to be understood as an advocate for libels. All civilized governments have punished calumny with severity; and with reason; for these compositions debauch the manners of the people; they excite a spirit of disobedience, and enervate the authority of government; they provoke and excite the passions of the people against their rulers, and the rulers oftentimes against his people.

86. After this description, I shall hardly be considered a favorer of these pernicious productions. I will always set my face against them, when they come before me; and shall recommend it most warmly to the jury always to convict when the proof is clear. The will do well to consider, that unjust acquittals bring an odium upon the press itself, the consequences whereof may be fatal to liberty; for if kings and great men cannot obtain justice at their hands by the ordinary course of law, they may at last be provoked to restrain that

press, which the juries of their country refuse to regulate. When licentiousness is tolerated, liberty is in the utmost danger; because tyranny, bad as it is, is better than anarchy, and the worst of governments is more tolerable than no government at all.

REFLECTION:

- *What was Entick's legal basis for suit? What was the defence of the King's messengers? Why did Entick prevail?*
- *What rule of law principle does Entick v. Carrington seem to vindicate?*

7.1.2 Gokey v. Usher & Parsons [2023] BCSC 1312

✗**REF: §2.2.1, §2.3.3, §4.2.3, §5.2.6, §9.3.4, §9.4.3, §9.5.4, §9.8.2.1, §10.2.1, §20.8.1, §21.1.3**

PUNNETT J.:

1. The plaintiffs and defendants became neighbours in Sandspit, British Columbia on Haida Gwaii in July 1997. The plaintiffs, Edward C. and Diane Gokey, purchased the property at 495 Beach Road. It is the property immediately east of the defendants' property at 497 Beach Road. In June 1998, the plaintiffs also purchased the property to their east at 493 Beach Road. To the north across Beach Road is a public beach area on the Pacific Ocean. Properties to the south of the parties' properties are vacant.

2. Initially, the parties were neighbourly but after a few years that neighbourly relationship ended. Matters significantly deteriorated over the issue of a shared well for which the defendants agreed to grant an easement to the plaintiffs. The easement documents were never signed by the plaintiffs. Litigation ensued in Provincial Court. Matters then deteriorated further, leading to the present litigation. ***

Law of Trespass

125. In *City of Burnaby v. Thandi et al*, 2005 BCSC 1478, Justice Bennett (then of this Court) stated:

> 113. Trespass to land is defined in G.H.L. Fridman, *The Law of Torts in Canada*, 2nd ed., (Toronto: Carswell, 2002), at p. 37-38:
>
> > Trespass to land consists of entering upon the land of another without lawful justification, or placing, throwing or erecting some material object thereon without the legal right to do so. Such interference must be direct rather than consequential. To constitute trespass the defendant must in some direct way interfere with the land possessed by the plaintiff. ***

126. In *Gibson v. Sun,* 2018 BCSC 1277, Justice Abrioux (then of this Court) addressed trespass:

> 109. The tort of trespass to land was discussed in *Watson v. Charlton*, 2016 BCSC 664 at para. 224, where the court endorsed the following summary from *Glashutter v. Bell*, 2001 BCSC 1581 at para. 26, "Trespass to land occurs when one enters onto land in the possession of another without lawful justification. Trespass is actionable *per se*; there is no requirement to prove actual damage to the property".

127. In addition, as noted by Justice Metzger in *Aschenbrenner v. Yahemech*, 2010 BCSC 905:

> 34. … The law of trespass is summarized by Fleming in *The Law of Torts*, 6th Ed. (1983), at p. 39, as follows: "If a structure or other object is placed on another's land, not only the initial intrusion but also the failure to remove it constitute an actionable wrong." ***

Water Down Sauna Steam Pipe and Water Filling Composter

130. Mr. Gokey alleges the defendants used a hose to pour water down the chimney of his sauna and that they broke into his composter and filled it with water. He did not see either of the defendants do so. He provided no evidence of water entering the sauna or the composter. Instead, he relied on a photograph taken by Ms. Parsons showing a step ladder on her property with a hose spraying into the air filled with smoke from burning devices of the plaintiff.

131. Ms. Parsons testified there had been smoke coming into her yard that had a sickening smell. She noted that Mr. Gokey had connected a pipe from the tank into which he put fish carcasses to rot for fertilizer to the burning sauna, which was the apparent source of the smell. She had placed a hose on the ladder spraying water into the air in an effort to dampen down the smoke. There is no evidence the spray was entering any of Mr. Gokey's devices.

132. Mr. Gokey has failed to establish that these alleged acts occurred. ***

Trespass Claims of the Defendants

147. The defendants allege two instances of trespass by Mr. Gokey, the first by entry into their home and the second by building the structure in the easement area in January 2022.

Trespass into Defendants' Home

148. On December 19, 2017, Mr. Gokey attended at the defendants' home at 497 Beach Road. Ms. Parsons testified it was early in the morning after Mr. Usher had left for work. She was upstairs when there was a loud banging on the front door on the main floor of the house and she heard Mr. Gokey speaking to one of their dogs. She did not answer the door nor respond saying she was too terrified. Mr. Gokey opened the door and left an envelope on the floor in the defendant's home. When put to him that Ms. Parsons did not give him permission to open the door he responded: "I swear I heard a window open, and she said put it on the floor". ***

151. By December 17, 2017, any civil relationship between the plaintiffs and the defendants had long passed. Given Mr. Gokey's treatment of Ms. Parsons including the signs, the taunting of her regarding her daughter who had been sexually assaulted, his comments about her teeth, her looks and her supposed use of crack, the unwanted and uninvited sexist remarks and his aggressive behavior towards her on June 10, 2013 on the beach, I do not accept his evidence that Ms. Parsons invited him to open the front door.

152. Mr. Gokey was well aware of the effect of his behavior on Ms. Parsons. He knew she had called the police after the beach incident. He also knew Mr. Usher had tried to contact Mrs. Gokey in the U.S. by phone to try and get her to persuade him to stop his threatening and abusive behavior towards Ms. Parsons.

153. It is not credible that Ms. Parsons would invite him into the home even if just to deliver documents. Nor is it credible that Mr. Gokey would expect her to do so. ***

155. On a balance of probabilities, I find that Mr. Gokey trespassed by opening the door of the defendant's home on December 17, 2017, in order to deliver documents to the defendants.

Trespass on the Easement Area in January 2022

156. In January 2022, Mr. Gokey built a large structure in the easement area. As the easement area is the defendants' property his structure and its construction are a clear trespass. In addition, such acts were in breach of two Court judgments. He essentially treated the easement area as his own property so that the defendants could not monitor his activity on their property. His view was that they had no reason to monitor the easement area and if they needed to, they could use a ladder to climb up and look over the top of what he had constructed. In addition, also in January 2022 he used his Bobcat on January 6 and 8 on part of the front of the defendants' property which was also a trespass. ***

157. In *Wasserman v. Hall*, 2009 BCSC 1318, Justice Macaulay addressed trespass to land involving the placement of a structure on another's land, in that case a fence:

> 68. There is no doubt, as I set out at the beginning of my reasons that the fence encroaches on the Wasserman property although the degree of encroachment is minor. This engages the law of trespass that Fleming summarizes in *The Law of Torts*, 6th Ed. (1983), at p. 39, as follows: "If a structure or other object is placed on another's land, not only the initial intrusion but also the failure to remove it constitute an actionable wrong. There is a "continuing trespass" as long as the object remains …."

> 69. As a result, any encroachment, even if minute, is a trespass. It is not necessary for Mr. Wasserman to prove actual damages and here there are none: see *Boyle v. Rogers*, [1921] 2 W.W.R. 704, at para. 8, affd [1922] 1 W.W.R. 206 (Man. C.A.).

159. It is clear [Mr. Gokey's] construction of an excessively large bore sleeve and the building in the easement area was a trespass. ***

REFLECTION:

- *Why is proof of actual damage not a necessary element for recognising a cause of action in trespass?*

7.1.3 Fitzpatrick v. Orwin, Squires & Squires [2012] ONSC 3492

✗REF: §3.2.3, §9.1.3, §9.2.3, §9.3.5, §9.5.6, §9.8.2.3, §10.11.2

STINSON J.: ***

135. The tort of trespass to land occurs when a person directly and unlawfully applies force to the land of another. The requirements for this tort are simple and solely require that a person enters another person's land without permission: see the seminal English case of *Entick v. Carrington* (1765), 19 State Tr. 1029 (Eng. K.B.). Moreover, this tort does not require proof of damage in order to be actionable, but does require that the intrusion on land be intentional or negligent.

136. I find that Mr. Fitzpatrick committed the tort of trespass on multiple occasions. In the first instance he intentionally intruded on the property of the Squires by cutting the lawn on their side of the property line. He also wrongfully removed the survey stakes placed by Mr. Comery on the Squires' side of the boundary line. In *Arnold v. Mercer*, 2007 NLTD 118 (N.L. T.D.); aff'd *Arnold v. Mercer*, 2008 NLCA 41 (N.L. T.D.) the removal of fence stakes by a neighbour was held to constitute a trespass.

137. Further acts of trespass occurred in connection with the placement of the dead coyote on the hood of Mr. Squires' truck and the events leading up to this. I have found that either Mr. Fitzpatrick or someone acting on his instructions entered onto the Squires' property to detach the security camera and to deposit the coyote carcass where Mr. Squires found it. Both activities involved the intentional intrusion onto the Squires' property without permission. Moreover, as Mr. Fitzpatrick, or someone acting on his instructions left the coyote on the vehicle, they also committed a continuing trespass, until the carcass was removed.

138. By intentionally entering onto the property of the Squires without permission in the above instances, Mr. Fitzpatrick committed the tort of trespass. ***

REFLECTION:

- *Is the tort of trespass to land comparable to the torts of trespass to the person (§2)?*

7.1.4 Peter Ballantyne Cree Nation v. Canada [2016] SKCA 124

Saskatchewan Court of Appeal – 2016 SKCA 124,[241] leave denied: 2017 CanLII 38581 (SCC)

HERAUF J.A. (OTTENBREIT J.A. AND WHITMORE J.A. concurring):

1. The Peter Ballantyne Cree Nation (Cree Nation) commenced an action against the respondents for flooding of Indian Reserve 200 (Southend Reserve), caused by the construction of dams on the Reindeer River. The Cree Nation sought declarations and damages for breach of the honour of the Crown, breach of fiduciary duty and trespass, including continuing trespass.

2. The respondents applied for summary judgment and succeeded primarily on the basis that the claims were statute barred. As a result, all claims were dismissed against the respondents.

3. The Cree Nation has appealed. It asserts that the actions revealed a genuine issue for trial and should

[241] Aff'd *Michel v. Saskatchewan*, 2021 SKCA 126, [10].

not have been subject to summary dismissal.

4. For the most part, I would dismiss the appeal. The decision of the Chambers judge reveals no legal errors. As well, there is no palpable and overriding error of fact.

5. However, there is one issue where I part company with the Chambers judge, namely, his finding that there is no continuing trespass. In my view, for the reasons set out below, the evidence supports the claim of the Cree Nation that there is a continuing trespass by Saskatchewan and SaskPower. ***

Facts

6. This case involves the flooding of the Southend Reserve, a reserve set apart for use and benefit of the Cree Nation in 1929 under Treaty 6 of 1876. This reserve is located on islands and the south-eastern shore of Reindeer Lake, at or near its outlet to the Reindeer River. The treaty provided certain hunting, fishing and trapping rights:

> [T]he said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.

7. Since or before 1928, members of the Cree Nation have used these lands and waters to hunt, fish, and trap, and travel to other destinations for similar purposes. The Cree Nation has made no surrender, absolute or otherwise, of the Southend Reserve land or of any interest to such lands to Her Majesty the Queen in Right of Canada pursuant to ss. 37 and 38 of the *Indian Act*, RSC 1985, c I-5. Nor has there been any taking of the Southend Reserve land for a public purpose.

8. In 1938, plans were put in place for the construction of a second permanent hydroelectric facility on the Reindeer River. Reports commissioned by the Churchill River Power Company (Churchill River Power) were provided to the federal Department of Mines and Resources, the Provinces of Saskatchewan and Manitoba and the local Indian agent of the Southend Reservation, Samuel Lovell. In June 1939, a letter was sent from Churchill River Power to the Secretary of Indian Affairs seeking approval to proceed with the project. This letter also stated that Saskatchewan, Manitoba, and the Indian agent had already approved the project. In July 1939, the Secretary of Indian Affairs sent his reply stating that, "[i]n so far as the Indian interest is concerned, this department does not anticipate any unfavourable results from the water conservation plan in Reindeer Lake and will not oppose the construction works as outlined by Mr. Davis in his report dated December 20, 1938."

9. In early 1942, the Province of Saskatchewan authorized the construction of the Whitesand Dam on the Reindeer River. In August 1943, the final licence for the operation of the dam was granted under *The Water Power Act*, RSS 1940, c 42. The site selected for the Whitesand Dam is approximately 11 kilometres downstream from the Southend Reserve. The construction of the dam was completed in 1943 and it has operated continuously since that time. A known consequence of the construction of the Whitesand Dam was the flooding of the Southend Reserve. At any given time, at least 240 acres of the 10,425.5 acres that make up the Reserve land is under water. As much as 600 acres of the land may be flooded depending on how much water is allowed to pass through the Whitesand Dam. This is controlled through the addition or removal of "stop logs." The number of stop logs in place is changed by SaskPower anywhere from 3 to 19 times per year. The addition or removal of the stop logs is required for operational purposes and to ensure that the water level of Reindeer Lake is within the dam's operating parameters. ***

15. In late 1980 or early 1981, the Cree Nation obtained a legal opinion by Professor Richard Bartlett in relation to the flooding of the Southend Reserve and its alleged effects on the activities of the Cree Nation. The opinion suggested that a clear cause of action arose with respect to the flooding of the Southend Reserve lands and injunctive relief may be sought. Throughout 1981, the Cree Nation communicated its view that the Southend Reserve was being unlawfully flooded to Churchill River Power and the Minister Responsible for SaskPower via letters first sent by Chief Joe Custer and then John Beckman of the law

firm McKercher, McKercher, Stack, Korchin & Laing.

16. The statement of claim to commence the matter at hand was filed on December 20, 2004. No further action was taken until September 24, 2013, when the plaintiffs filed an amended statement of claim with the court and the defendants brought the application for summary judgment. As against Canada, the plaintiffs alleged a breach of fiduciary duty, breach of the honour of the Crown and a breach of the duty to consult. As against Saskatchewan and SaskPower, the plaintiffs alleged that a trespass has been committed and that such trespass is continuing, so it is not statute barred. ***

Review of the Case Law ***

126. There are several decisions in which it is found that the intentional discharge of water onto the property of another constitutes a trespass. In *Qualley v. Day* (1928), [1929] 2 D.L.R. 928 (Sask. C.A.), the defendant opened a ditch or a drain which allowed surface water to run on the land of the plaintiff. Over 25 acres of land could not be farmed by the plaintiff due to the water. The defendant was liable for trespass as the court held that one cannot lawfully prevent injury to one's own property by transferring the cause of injury to the property of a neighbour. Another example is *Jennings v. Redmond*, 2000 34 R.P.R. (3d) 91 (Ont. S.C.J.), where the plaintiff commenced an action in trespass against the defendant for damages caused by water runoff from a drain that sent water from the defendant's property to the plaintiff's property. The court found that the flow of water met the test for nuisance and trespass and that the acts of the defendant were intentional in that they were done knowingly and purposefully (at para 75). Finally in *Manhas v. Michael Landon Homes Ltd.*, 1998 CarswellBC 1511 (B.C. Prov. Ct.) (WL), the court said that "[f]or an action in trespass, involving flooding, to succeed the claimant must prove that the defendant intentionally flooded the land by directly diverting water to it" (at para 2).

127. It appears that there are no decisions in which the facts match those of this case. Neither has the concept of "continuing trespass" been adequately addressed by this case law. One significant issue has been determining the boundaries between trespass and nuisance. In G.H.L. Fridman *et al*, *The Law of Torts in Canada*, 3d ed (Toronto: Carswell, 2010) at 32, states that, "the common law has long known the concept of continuous trespass." However, the decision cited, *Hole v. Chard Union* (1893), [1894] 1 Ch. 293 (Eng. C.A.) at 295-296, deals exclusively with nuisance and does not explain what would constitute a continuing action for trespass. Similarly, in *Chaudière* [*Machine & Foundry Co. v. Canada Atlantic Railway* (1902), 33 S.C.R. 11 (S.C.C.)] the Court simply finds that trespass or nuisance had occurred without providing any helpful guidance. Therefore, examining the core ingredients of trespass will hopefully provide clarity and guide the analysis further.

Core Ingredients of Trespass

128. The mischief that trespass is directed at remedying is "unjustifiable interference with possession": *Didow v. Alberta Power Ltd.*, 1988 ABCA 257, [1988] 5 W.W.R. 606 (Alta. C.A.). It is "the act of entering upon land, in the possession of another, or placing or throwing or erecting some material object thereon without the legal right to do so": *Mann v. Saulnier* (1959), 19 D.L.R. (2d) 130 (N.B. C.A.) at 132 [*Mann*]. As can be gleaned from the above, the discharge of some substance such as water or oil onto another's property may similarly interfere with possession: *Fleming's The Law of Torts* at 50; *Esso*.

129. As explained by Fleming at 49, the historical origins of trespass can explain its core ingredients:

> From earliest times the common law protected the possessory rights of landlords against unauthorised entry by an action of trespass, known as *quare clausum fregit* …
>
> In the course of its history, this action of trespass came to be used for a number of different purposes which have left their mark on its conditions of liability. In origin, trespass was a remedy of forcible breach of the King's peace, aimed against acts of intentional aggression. This early association with the maintenance of public order explains why the action lies only for interference with an occupier's *actual* possession. Its proprietary aspect became more dominant when it was later used for the purpose of settling boundary disputes, quieting title and preventing the acquisition of easements by prescriptive user. These latter functions account for the rules that the plaintiff is not required to prove material loss, and that a mistaken belief by the defendant that the land was

> his affords no excuse. The temptation for the occupier to resort to violence in defence of his boundary and privacy was not lessened by the absence of pecuniary loss, while in less serious cases nominal damages were justified to vindicate his rights against adverse claims. Likewise, if mistake as to title had been admitted as a defence, trespass would have been a less suitable remedy for settling claims to disputed land. [Footnotes omitted]

130. The modern function of trespass to land was described by Philip H. Osborne in *The Law of Torts*, 4th ed (Toronto: Irwin Law, 2011) at 295-296:

> … In modern tort law, trespass to land plays a much more sophisticated role. First, it protects the possessor's interest in freedom of land use. The power to control entry onto land facilitates the use and development in accordance with the possessor's desires and interests. A possessor of land is not required to accommodate others who may have a reasonable need or desire to enter his land. Second, trespass to land plays a conventional compensatory and deterrent role when an intruder damages land or destroys premises. Third, trespass to land plays an important role in the protection of privacy interests. The slightest intrusion into a person's home or apartment gives rise to trespassory remedies. … Finally, trespass to land is an adjunct of the law of real property. It plays a role in the determination of competing land claims and the settlement of boundary disputes. It also provides protection to the possessor against the acquisition of prescriptive easements over his property as a result of twenty years of continuous trespassing in derogation of the possessor's rights. The trespassory conduct may be trivial and harmless, such as a technical but permanent invasion of airspace and the use of land as a pedestrian right of way. Nevertheless, the tort of trespass to land allows the possessor to assert his proprietary rights and prevent the establishment of a prescriptive easement. The capacity of the tort to trespass to complement property law is enhanced by the fact that trespass is actionable without proof of damage and also by the fact that mistake is no defence. [Footnotes omitted]

131. Osborne in *The Law of Torts* describes the elements of trespass as follows (at 296-298):

> (a) the intrusion onto the land must be direct;
>
> (b) the interference with land must be intentional or negligent; and
>
> (c) the defendant's interference with the land must be physical.

132. In practice, the requirement that the interference must be intentional or negligent, is limited to intentional interference as negligent interference is normally pleaded in the tort of negligence. It is generally viewed that "intentional" does not mean that the defendant intended to do a wrongful act against the plaintiff, but that the defendant completed a voluntary and affirmative act. Trespass will occur, regardless of consciousness of wrongdoing, if the defendant intends to conduct itself in a certain manner and exercises its volition to do so (*Costello v. Calgary (City)* 1997 ABCA 281 at para 33, 152 D.L.R. (4th) 453 (Alta. C.A.) [*Costello*]). In *R. v. East Crest Oil Co.*, [1945] S.C.R. 191 (S.C.C.) at 195, Rand J. stated that "[t]respass does not depend upon intention. If I walk upon my neighbour's land, I am a trespasser even though I believe it to be my own". Furthermore, if person A is carried against his will by person B onto the plaintiff's land, A is not liable for trespass as his act was not voluntary (see *Smith v. Stone* (1647), 82 E.R. 533 (Eng. K.B.) [§2.1.1]). The requirement that the interference must be physical simply means that the defendant themselves must have physically interfered with the property or caused some physical object to be placed on the property. Objects such as fumes, smoke, noise, or odour do not fall within trespass.

133. These elements that the interference must be direct, intentional and physical are significant. For example, if time and weathering caused a fence to marginally lean over a boundary line, there is no direct intrusion: see *Mann*. Relatedly, an explosion off the plaintiff's property that causes damage to his or her property by the resulting vibration is not a physical intrusion nor is it sufficiently direct to constitute a trespass: see *Phillips v. California Standard Co.* (1960), 31 W.W.R. 331 (Alta. S.C.). In the classic case of *Rylands v. Fletcher* (1865), 159 E.R. 737 (Eng. Exch.) at 792 [§22.1.1], it was found that the building of a reservoir on one's own land but having an escape through an old shaft and damaging a neighbour's property was not sufficiently direct to be trespassing.

134. The parties in this application have agreed that a trespass has occurred and they were correct for so concluding. It may be observed that, like many of the nuisance cases described above, the water originated off the Southend Reserve and the flooding was caused by the building of a dam off the reserve land. However, in those cases the consequences were unintended, inadvertent, and were not a necessary result of the defendant's construction. In the immediate case, however, the invasion of the Southend Reserve was an intended and necessary consequence of the dam's construction. In my view, an intentional action such as this is sufficiently direct and immediate to be a trespass. Indeed, if there is trespass in situations where the defendant "directly causes rubbish, stones, or other projectiles to be cast on or over another's property" (Fleming at 51-52), then surely intentionally and knowingly directing water onto another property would similarly qualify.

135. Next, trespass is actionable *per se* in that it does not require proof of actual damage to render a wrong actionable: *Wordsworth v. Harley* (1830), 109 E.R. 833 (Eng. K.B.); *Pelletier v. Collins*, 2014 SKCA 130 at para 13. Trespass is concerned primarily with interference of possessory rights. As a tort of strict liability, it acts as a remedy against dispossession, vindicating a propriety interest rather than a tort obligation: see Fleming at 50; *Costello*. A classic example of this aspect of trespass is illustrated by the old case of *Basely v. Clarkson* (1681), 83 E.R. 565 (Eng. K.B.) [*Basely*]. In *Basely*, the defendant was liable in trespass to land for innocently mowing the plaintiff's grass in belief it was his own. However, he intentionally (perhaps should be read as "voluntarily") acted which interfered with the property right of another: see Osborne at 296-97.

136. An aspect of trespass that is of particular importance in this case is that the tort may "continue" if the interference is not dealt with by the defendant. This characteristic is explained in Fleming's, *The Law of Torts*, 10th ed at 53 (portions of this passage is quoted by the Chambers judge, and in *Johnson* and *Williams*):

> *If a structure or other object is placed on another's land, not only the initial intrusion but also failure to remove it constitute an actionable wrong. There is a "continuing trespass" as long as the object remains*; and on account of it both a subsequent transferee of the land may sue and a purchaser of the offending chattel or structure be liable, because *the wrong gives rise to actions de die in diem until the condition is abated* … In all these cases, the plaintiff may maintain successive actions, but, in each, damages are assessed only as accrued up to the date of the action. This solution has the advantage to the injured party that the statute of limitations does not run from the initial trespass, but entails the inconvenience of forcing him to institute repeated actions for continuing loss. [Emphasis added; footnotes omitted]

137. A similar passage is found in *Salmond on the Law of Torts* (R.F.V. Heuston, 17th ed (London: Sweet & Maxwell, 1977)) at 42:

> That trespass by way of personal entry is a continuing injury, lasting as long as the personal presence of the wrongdoer, and giving rise to actions *de die in diem* so long as it lasts, is sufficiently obvious. *It is well settled, however, that the same characteristic belongs in law even to those trespasses which consist in placing things upon the plaintiff's land. Such a trespass continues until it has been abated by the removal of the thing which is thus trespassing*; successive actions will lie from day to day until it is so removed; and in each action damages (unless awarded in lieu of an injunction) are assessed only up to the date of the action. … [Emphasis added; footnotes omitted]

138. When one examines the origins and characteristics of trespass, one ascertains the immediate logic behind the concept of continuing trespass. Trespass is different from most other torts, notably from nuisance, in that the offending action is in and of itself the damage that gives rise to liability. As identified by Fleming at 50, "[i]ntentional invasions are actionable whether resulting in harm or not." A trespass is occurring as long as the possessory rights of the plaintiff are being interfered with. As affirmed in *Roberts v. Portage la Prairie (City)*, [1971] S.C.R. 481 (S.C.C.), "a trespass continues so long as the defendant remains present upon the plaintiff's land".

139. However, as recognized by the Chambers judge, this is not the same where a plaintiff fails to restore land to the same condition as he found it: see paras 88-89 of Chambers judgment. Citing Fleming, the Chambers judge stated it is not a continuing trespass for a neighbour to dig a pit in a neighbour's garden

and then leave. The trespass occurs when the neighbour enters and continues until he leaves. There is nothing that is brought onto the land which remains after the neighbour leaves. Similarly, *Salmond on the Law of Torts* distinguishes continuing trespass from cases where there are continuing consequences from an initial trespass: at p. 42.

140. The Chambers judge reasoned that, because there was no structure erected or chattel left on the reserve, the facts of the immediate case were rather analogous to the pit in the neighbour's garden scenario. With respect, I do not agree with this conclusion. The case of the pit is distinguishable from the case at bar because nothing foreign is left on the land after the initial entry. Here, something (in the form of water) was brought to the Cree Nation's land and left there. If, for example, the dam had caused a single instance of flooding which resulted in the water damaging the land and displacing rocks and trees before rushing away, then the trial judge would be correct in saying that no new harm had since arisen. In that situation the flood would be the reference point for the purpose of limitations. Yet, the question at hand is whether there is continued interference because "the defendant remains present on the plaintiff's land" or, "something … has been brought on land and wrongfully left there."

141. I believe the Chambers judge placed too much emphasis on the word "chattel" as used by Fleming in *The Law of Torts*. There are many cases in which water was the subject matter that was tortiously interfering with the plaintiff's land in the form of a trespass (see above discussion under "Review of the Case Law" heading). Furthermore, the parties, for the purpose of the summary judgment application, agreed that a trespass had occurred when the land was flooded. If this initial intrusion constitutes a trespass, should not the failure to remove the water constitute a continued trespass? I conclude that it would. The fact that water is not a "chattel" makes no difference. The flooding was a direct, physical, and intended consequence of the construction of the dam. The water was wrongfully left there, and the respondents continue to omit to remove it. The mere existence of the water is the continuing harm that forms the basis of the continuing trespass, and no "fresh" or "new" damage need arise. In this sense, the injury is still in the course of being committed and is not wholly past.

142. The respondents argue that *Chaudiére*, which deals with a permanent structure not erected on the plaintiff's land but that adversely affected the land due to the nature of the structure itself, is the governing authority from the Supreme Court of Canada with respect to the circumstances at hand. However, it seems to me that the situation before us is different. Here, we are dealing with flood water that was an intentional consequence of the dam. Although the structure was built off the reserve land, its purpose was to control and raise the water level on the reserve land. As such, the ruling in *Chaudiére* does not govern this case.

143. Therefore, as agreed by the parties as discussed above, the flooding of the Southend Reserve, by directing the water from Reindeer Lake onto the land, interfered with possession. This interference with possession continues to this day. A wrongful omission is committed every day the water is allowed to interfere with possession. In this light, it is the omission that is "the continuance of the act which caused the damage" (*P. (F.)* [*v. Saskatchewan)* 2004 SKCA 59] at paras 38 and 48) falling within the meaning of s. 2(1)(a) of POPA. Therefore, I would find that the Chambers judge erred by not finding a continuing trespass. ***

145. *** [I]t might be suggested that my interpretation regarding continuing trespass cannot stand in the face of the legislative purpose of limitation periods. The Cree Nation could have sued for trespass when the flooding first occurred more than 50 years prior. Further, *** other than the potential for a continuing trespass there is nothing since then that can constitute anything "new or fresh" so as to defeat limitation periods. The case law and legal commentary agree that when an object interferes with another person's land, a new cause of action arises each day.

146. *** Trespass is actionable *per se*, and a new cause of action arises each day regardless whether actual harm was suffered or not until the time the plaintiff's possessory rights are restored. Unmistakably, this proposition has long been accepted by the courts and legal commentators. This distinctive nature of trespass justifies the effective extension of the limitation period when a wrong is not rectified and the trespass continues.

147. Finally, SaskPower's submission that the Cree Nation gave irrevocable consent to the construction of

the dam is a question that will have to be considered at trial. SaskPower relies on ***Bartlett*** [***v. Corner Brook (City)***, 2003 NLCA 10], where the defendant city constructed a road and obtained the plaintiff's consent to place fill on his property. The plaintiff withdrew his consent, but the city refused to remove the fill from the property. When discussing the claim, Welsh J.A. stated that while an owner may pursue a continuing trespass claim in most situations where consent is withdrawn and the defendant does not remove himself or the interfering object, it is not available "where the material placed on the property essentially becomes part of the property, having been put there with the property owners consent" (at para 37). Therefore, once the plaintiff consented to having the fill placed on his property with the anticipation that it will become part of the property, he cannot reasonably expect to withdraw that consent and require the city to remove it (at para 38).

148. In my view, it would not be appropriate to comment on the applicability of this potential defence to the continuing trespass tort. Since the Chambers judge found there has been no continuing tort of trespass, he did not have to comment on the submission of SaskPower relating to the potential for a ***Bartlett*** type defence. As noted above, this is best left for the trial judge to determine. ***

Conclusion ***

265. The appeal with respect to the claim for the continuing tort of trespass against Saskatchewan and SaskPower is allowed. Having determined that the Cree Nation has a claim in continuing trespass against Saskatchewan and SaskPower, the matter is returned to the Court of Queen's Bench to determine the following issues: (i) the merits of SaskPower's arguments relating to the consent issue as identified in paras 147 to 148 of this judgment; and (ii) damages.

REFLECTION:

- *Who can bring a claim in trespass—an owner of land, a lawful occupier or both?*
- *What is a continuing trespass? What is its significance in terms of civil procedure and defences?*

7.1.5 R v. Singer [2023] SKCA 123

✗**REF: §6.6.3**

SCHWANN J.A., BARRINGTON-FOOTE J.A., MCCREARY J.A.:

5. At approximately 11:00 p.m. on March 20, 2019, the RCMP received a call from a person who reported that Mr. Singer was speeding while driving on Big Island Lake Cree Territory, and that she believed he might be driving while impaired because he sped off when she saw him. The complainant described Mr. Singer's vehicle as a white single cab Ford truck.

6. Constables Lapointe and Fisher were dispatched to investigate, each in their own vehicles. Something more than an hour after the call was made to the police, Cst. Lapointe identified a vehicle matching the description provided by the caller, parked on the driveway of a private residence at the Big Island Lake Cree Nation townsite. She contacted Cst. Fisher, who joined her at the residence. The officers could readily see the vehicle from the public road and observed that it was running with its lights on. They could not see anyone in the vehicle from the road. They did not know that Mr. Singer lived at the residence, but they knew that the driveway was private property. Constable Lapointe testified that she did not think of obtaining a tele-warrant because she was investigating an impaired driver.

7. The police approached the vehicle, which was parked a short distance from the road, by walking up the driveway. Constable Lapointe testified that her purpose for entering the driveway was to investigate the impaired driving complaint. As they approached the vehicle, the police officers observed a man in the front seat on the driver's side of the vehicle, lying down with his head toward the passenger door. He appeared to be asleep. Constable Lapointe knocked on the driver's side window, but the man did not respond. She then opened the driver's side door and immediately smelled a strong odour of liquor. Constable Fisher opened the passenger side door, but the man still did not wake up, so Cst. Fisher shook him until he awoke.

8. Constable Lapointe testified that the man appeared sleepy, had red, bloodshot eyes, and had a strong

odour of alcohol on his breath. She recognized him as Mr. Singer, whom she had met before. Mr. Singer's speech was not slurred nor were there any observable issues with his fine motor skills. He did not ask the police officers to leave the property.

9. Constable Lapointe advised Mr. Singer that she suspected he was in the care and control of a vehicle with alcohol in his body and that he would be required to provide a sample of his breath into an approved screening device [ASD]. Mr. Singer provided a roadside breath sample on the ASD and registered a fail. As a result, Cst. Lapointe arrested Mr. Singer at 12:24 a.m. for having care or control of a motor vehicle with an excessive blood alcohol level. ***

13. At trial, Mr. Singer argued that the police had no implied licence to enter onto the driveway and that they should not have entered his property without permission. It was his position that having failed to obtain permission, they were trespassers, their entry was unlawful, and his *Charter* rights were violated.

14. The trial judge found that Mr. Singer had a subjective expectation of privacy. He noted that the police had walked onto the entrance of a driveway, which was open to public view, that their intrusion was brief, and that they did not know it was Mr. Singer's residence when they entered. He held that "[m]erely walking onto [a private driveway] with intent to conduct an investigation regarding the vehicle and its driver, as opposed to the occupant of the residence … does not constitute a sufficient intrusion to be considered a search".

15. The trial judge also relied on the common law "implied licence" doctrine to enter private property on legitimate business, which he found extended to both the investigation and the "corollary" obligation "to protect the general public and their safety from potential impaired drivers". ***

Analysis ***

***A. The legal framework:* *** *the implied licence to enter private property* ***

23. This appeal is concerned with whether the trial judge erred in determining that Mr. Singer's s. 8 *Charter* right to be free from unreasonable search and seizure had not been violated. ***

25. In this case, the application of the implied licence to enter private property is also at issue. Justice Sopinka explained the nature and scope of that licence in his majority reasons in *R v. Evans*, [1996] 1 SCR 8 (S.C.C.), as follows:

> 13. I agree with Major J. [in his concurring reasons in this case] that the common law has long recognized an implied licence for all members of the public, including police, to approach the door of a residence and knock. As the Ontario Court of Appeal recently stated in *R. v. Tricker* (1995), 21 O.R. (3d) 575, at p. 579:
>
> > The law is clear that the occupier of a dwelling gives implied licence to any member of the public, including a police officer, on legitimate business to come on to the property. The implied licence ends at the door of the dwelling. This proposition was laid down by the English Court of Appeal in *Robson v. Hallett*, [1967] 2 All E.R. 407, [1967] 2 Q.B. 939.
>
> As a result, the occupier of a residential dwelling is deemed to grant the public permission to approach the door and knock. Where the police act in accordance with this implied invitation, they cannot be said to intrude upon the privacy of the occupant. The implied invitation, unless rebutted by a clear expression of intent, effectively waives the privacy interest that an individual might otherwise have in the approach to the door of his or her dwelling. (Emphasis added)

26. Here, the key issue that arises is as to the terms of the implied licence, and in particular, the scope of the police activities that are authorized by the invitation. In *Evans*, Sopinka J. answered this question in the context of the implied licence to knock:

> 14. If one views the invitation to knock as a *waiver* of the occupier's expectation of privacy in the approach to his or her home, it becomes necessary to determine the terms of that waiver. Clearly, under the "implied licence to knock", the occupier of a home may be taken to authorize certain

persons to approach his or her home for certain purposes. However, this does not imply that all persons are welcome to approach the home regardless of the purpose of their visit. For example, it would be ludicrous to argue that the invitation to knock invites a burglar to approach the door in order to "case" the house. The waiver of privacy interests that is entailed by the invitation to knock cannot be taken to go that far.

15. In determining the scope of activities that are authorized by the implied invitation to knock, it is important to bear in mind the *purpose* of the implied invitation. According to the British Columbia Court of Appeal in *R. v. Bushman* (1968), 4 C.R.N.S. 13, the purpose of the implied invitation is to facilitate communication between the public and the occupant. As the Court in *Bushman* stated, at p. 19:

> The purpose of the implied leave and licence to proceed from the street to the door of a house possessed by a police officer who has lawful business with the occupant of the house is to enable the police officer to reach a point in relation to the house where he can conveniently and in a normal manner communicate with the occupant.

I agree with this statement of the law. In my view, the implied invitation to knock extends no further than is required to permit convenient communication with the occupant of the dwelling. The "waiver" of privacy rights embodied in the implied invitation extends no further than is required to effect this purpose. As a result, only those activities that are reasonably associated with the purpose of communicating with the occupant are authorized by the "implied licence to knock". *Where the conduct of the police (or any member of the public) goes beyond that which is permitted by the implied licence to knock, the implied "conditions" of that licence have effectively been breached, and the person carrying out the unauthorized activity approaches the dwelling as an intruder.* (Italicized emphasis in original; underlined emphasis added)

27. This passage makes several points that bear emphasis in the context of this case. The implied licence to knock is a subset of the implied licence to enter private property *on legitimate business*. It authorizes the person who has entered the property only to approach the door and knock. A person approaching the door to "case" the residence, whether by looking for useful information or by asking the occupant questions, is not there on legitimate business. They are a trespasser. The same is true of a police officer who approaches the door for the purpose of gathering evidence against the occupant. As Sopinka J. explained:

> 16. … Clearly, occupiers of a dwelling cannot be presumed to invite the police (or anyone else) to approach their home for the purpose of substantiating a criminal charge against them. Any "waiver" of privacy rights that can be implied through the "invitation to knock" simply fails to extend that far. As a result, where the agents of the state approach a dwelling with the intention of gathering evidence against the occupant, the police have exceeded any authority that is implied by the invitation to knock.

28. In *Evans*, the police had approached the door for two reasons—to communicate with the occupants, but also with the subsidiary and improper purpose of attempting to collect evidence against the occupant by attempting to smell marijuana. For that reason, they were found to have exceeded the implied licence.

29. This principle—that the purpose of the entry onto property in the context of a criminal investigation determines whether it is within the scope of the implied invitation—was affirmed in *R v. Rogers*, 2016 SKCA 105, 341 CCC (3d) 502. In that case, the police had received a complaint regarding a potentially intoxicated driver who had hit a vehicle and fled the scene. A licence plate number was provided, and the police attended to the address shown on the registration for the vehicle, which was Mr. Rogers' apartment. The investigating officer knocked on the apartment door and when Mr. Rogers opened the door, the officer formed the opinion—through observing Mr. Rogers—that he was impaired, thereby obtaining grounds for the impaired driving arrest.

30. This Court rejected the Crown's argument that the officer was permitted to rely on the implied invitation to knock to justify accessing Mr. Rogers' private residence. This was because the trial judge had made a factual finding that the officer had knocked on Mr. Rogers' door with the intention of gathering evidence against him. Justice Jackson agreed with the Crown "that the police do not exceed the implied licence to

knock simply because they are intent on investigating a potential criminal offence" and that "a police officer who is looking for information or evidence about a suspected offence, or even about an actual offence, which the police officer has reasonable grounds to believe has been committed, is not conducting a 'search' for s. 8 purposes for that reason alone" (at para 27). However, she did not agree that this meant they could knock for the purpose of gathering evidence about the occupant's sobriety, finding as follows:

> 29. The investigation of the crime of drinking and driving, or a similar offence, necessarily entails the potential to obtain evidence from conversing with or observing the person answering the door. Nonetheless, based on my review of the authorities, I have concluded that *if a trial judge finds on all of the evidence* a police officer knocked on the door to a residence *for the purpose* of securing evidence against the occupant, the officer is conducting a search within the meaning of s. 8 of the *Charter*. This principle applies equally to drinking and driving offences as well as to other offences where observing the person opening the door will give visual, auditory and olfactory clues about the person's participation in the crime under investigation. *Evans* remains the leading authority on point, and nothing in the jurisprudence extends the principles articulated by the majority in that decision as far as Crown counsel suggests. (Emphasis in original)

31. This reasoning was applied in *R v. Moyles*, 2019 SKCA 72. There, a police officer posing as a delivery driver had delivered a box containing a monitoring device and a controlled substance to a house, in the hopes that it would be opened by Mr. Moyles, who they believed was living there, or by another occupant of the residence. The purpose was to gather evidence as to the identity of the person that ordered the substance. Justice Barrington-Foote noted that, in *Rogers* at paragraph 29, Jackson J.A. had confirmed that "if a police officer knocks on the door of a residence for the purpose of securing evidence against the occupant, they are conducting a search within the meaning of s. 8 of the Charter" and that this principle "was affirmed by Moldaver J. in his dissenting opinion (but not on this point) in *R v. Le*, 2019 SCC 34 at para 212" [**§7.1.6**] (at para 50). He then found as follows:

> 53. … [T]he police were delivering the very boxes that contained the imported GBL [gamma-butyrolactone] to the address listed on the packing slips, one of the direct purposes of the transaction at the doorstep was to gather evidence as to the identity of the person who ordered the GBL. The undercover officer asked for identification and a signature. As instructed, he promptly handed that evidence to his liaison officer after he delivered the boxes. All of that was a step in investigating an occupant of the house.
>
> 54. The Crown bears the burden of demonstrating a warrantless search is authorized by a reasonable law and carried out in a reasonable manner: *R v. Mann*, 2004 SCC 52 at para 36, [2004] 3 SCR 59. In this case, that reasonable law was the implied licence to knock, which did not apply. That being so, the controlled delivery was an unreasonable search which breached Mr. Moyles's s. 8 *Charter* right to be secure against unreasonable search or seizure. ***

36. These cases confirm the significance of the purpose of the police entry onto private property where the issue is the implied licence doctrine. As Sopinka J. explained in *Evans*, a police officer who is approaching the door of a residence for the purpose of gathering evidence against the occupant is an intruder. That is so because an unlawful search is not lawful police business. The fact that they have entered to investigate a crime does not save the day if they intend to investigate in that prohibited manner.

37. Further, if the implied licence did not authorize the police entry—absent any justification based on statutory authority or police ancillary powers—the police are trespassers as soon as they enter the private property: *Le* at paras 124-126 and 211. As Brown and Martin JJ. commented in *Le*, which dealt with a warrantless police entry into a backyard, "[t]he conclusion that the police officers were trespassing is clearly relevant under s. 8, as it nullifies any 'consent' to the police entry" (at para 128). Put differently, while a police officer who is a trespasser is not necessarily conducting a search within the meaning of s. 8, the fact they are a trespasser is relevant when determining whether there is a reasonable expectation of privacy.

38. In Mr. Singer's case, there was no evidence that the police entered for the purpose of approaching the residence to knock. However, the implied licence is not limited to the licence to knock. In *Evans*, Sopinka J. adopted the following statement of the law from *R v. Tricker* (1995), 96 CCC (3d) 198 at 203 (Ont CA)

[*Tricker*]: "The law is clear that the occupier of a dwelling gives implied licence to any member of the public, including a police officer, on legitimate business to come on to the property. The implied licence ends at the door of the dwelling" (*Evans* at 6; see also para 30). There is, in particular, an implied licence to enter an uncontrolled driveway on private property in certain circumstances. It is clear, for example, that a person who parks in a driveway for the purpose of conducting legitimate business on the property—such as a meter reader or a courier—would have an implied licence to do so. A police officer would also have an implied licence in some situations. ***

43. Other courts have also found that there is an implied licence to enter a driveway to investigate in certain circumstances: see, for example, *Tricker* and *R v. Johnson* (1994), 4 MVR (3d) 283 (BCCA). However, that does not mean that there is an invitation to enter a driveway—any more than that there is an invitation to enter a sidewalk leading to a residence—for the purpose of conversing with and observing the occupant to gather evidence that they are impaired. There is no principled basis to conclude otherwise. Why would an occupant of private property be presumed to have invited the police to enter the driveway for that purpose? ***

49. The Ontario Court of Appeal's decision in *R v. McColman*, 2021 ONCA 382, is also of interest. That decision was concerned with a police stop of Mr. McColman, who had just exited the street and stopped in his parents' driveway, to check for signs of impairment. The police observed signs of intoxication and proceeded to arrest and subsequently charge Mr. McColman with impaired operation of a motor vehicle and operating a motor vehicle while "over 80" pursuant to ss. 253(1)(a) and 253(1)(b) (since repealed) of the *Criminal Code* (at para 2). He was convicted on both counts.

50. On appeal, the summary conviction appeal judge overturned the s. 253(1)(b) conviction. They found that the trial judge erred in law by concluding that the stop was authorized under s. 48(1) of the *Highway Traffic Act*, RSO 1990, c H.8 [HTA]. They held that the stop was unlawful, breaching Mr. McColman's right not to be arbitrarily detained under s. 9 of the *Charter*. On that basis, the summary conviction appeal judge excluded the evidence under s. 24(2) of the *Charter* and entered an acquittal. The Crown appealed that acquittal and the remedy to the Ontario Court of Appeal. ***

B. The trial judge erred in finding that Mr. Singer had no reasonable expectation of privacy and that his s. 8 Charter rights were not breached

59. Turning now to the application of these principles to Mr. Singer's case, we do not agree with Mr. Singer that the fact he was in a vehicle rather than a dwelling house is a red herring, if by that he means it is not relevant. In general, a person has a lesser expectation of privacy in a motor vehicle than in their residence. That point was made by Cory J. in *R v. Wise*, [1992] 1 SCR 527 at 534:

> Society then requires and expects protection from drunken drivers, speeding drivers and dangerous drivers. A reasonable level of surveillance of each and every motor vehicle is readily accepted, indeed demanded, by society to obtain this protection. All this is set out to emphasize that, although there remains an expectation of privacy in automobile travel, it is markedly decreased relative to the expectation of privacy in one's home or office.

60. This reasoning is consistent with the principle that there is a hierarchy in relation to territorial privacy, a concept that was explained by Binnie J. in *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432. ***

61. Here, however, Mr. Singer was not simply in a vehicle. He was in his vehicle, parked in the driveway of his residence. The decreased expectation of privacy associated with automobile *travel* referred to in *Wise* was not in play. The doors of the truck were closed and while his vehicle was in public view, he was not. Although it is possible that he might have been observed by a person walking past the truck who had accessed the driveway for a legitimate purpose, that does not mean he could not have a reasonable expectation of privacy. ***

62. The Crown argues that the invitation to knock is engaged. We do not agree. There was no evidence that the police entered the property for the purpose of knocking on the door of the residence or, for that matter, on the window of the vehicle. If there was an implied licence to enter the driveway, it had to be for some other legitimate purpose.

63. Further, the police could not see that Mr. Singer was in the truck, and there was, accordingly, no evidence that they entered the driveway to conduct an investigation by communicating with him in the truck or in the driveway. Constable Lapointe said only that they entered to investigate the impaired driving that had been reported more than an hour before. She did not explain what that investigation might entail. Her testimony was unhelpful. She was not asked to do so by the Crown, which had the onus to demonstrate that this warrantless search was authorized by law.

64. For the reasons explained above, we do not agree with the Crown that there is an invitation to enter a driveway to investigate writ large, regardless of how that investigation is to be carried out. Just as the implied licence to knock does not extend an invitation to the police to approach the door for the purpose of gathering evidence against the occupant, by conversing with and using their senses to determine if the occupant exhibits signs of intoxication, there is no implied invitation to enter the driveway to investigate the owner by gathering such evidence. The question, accordingly, is whether Cst. Lapointe and her partner entered for that improper purpose in this case. ***

66. *** [I]t is clear that the police intended to investigate by gathering evidence against Mr. Singer from the moment they set foot in the driveway. That being so, they did not have an implied licence to enter at all. To paraphrase *Evans*, Mr. Singer cannot be presumed to have invited the police to enter the driveway for the purpose of collecting evidence to enable them to substantiate a criminal charge against him. Constable Lapointe was a trespasser from the moment she set foot in the driveway. In our view, the fact that she did not know this was Mr. Singer's residence is irrelevant in the circumstances of this case. ***

70. For these reasons, it is our opinion that the trial judge erred in finding that Mr. Singer's s. 8 *Charter* rights were not infringed. *** The police infringed upon Mr. Singer's right to be free from unreasonable search by entering the driveway, opening the door of his truck and rousing him. ***

REFLECTION:

- *What is the scope of the common law implied licence to enter private property? Should the police have more or less leeway to invoke the implied license as compared to an ordinary person?*
- *While the police trespassed in this case, Singer was also found to have breached the Criminal Code. Should tort law afford someone like Singer a damages action against the police in a case such as this? Why?*

7.1.6 R v. Le [2019] SCC 34

✗**REF: §2.4.5, §6.6.5**

BROWN AND MARTIN JJ. (KARAKATSANIS J. concurring): ***

40. *** [A] reasonable person would know only that three police officers entered a private residence without a warrant, consent, or warning. The police immediately started questioning the young men about who they were and what they were doing—pointed and precise questions, which would have made it clear to any reasonable observer that the men themselves were the objects of police attention ***. Further, the police demanded their identification and issued instructions, which would have made it clear to a reasonable observer that the police were taking control over the individuals in the backyard.

41. Even if such conduct is seen as consistent with a concern over trespassing, the reasonable observer would understand that if the police simply wanted to make inquiries, the height of the fence allowed full interaction without entry. The officers could have simply asked their questions from the other side of the fence with an undiminished ability to see and hear any responses. Instead, they entered the backyard without any consent, without an apparent or communicated purpose, and immediately engaged with the occupants in a manner that demonstrated they were not in fact free to leave. ***

44. The police entered the property as trespassers. Our colleague accepts this conclusion. The judicially constructed reasonable person must be taken to know the law and, as such, must be taken to know that the police were trespassing when they entered the backyard (Moldaver J.'s reasons, at para. 257). While not determinative, when the police enter a private residence as trespassers, it both colours what happens subsequently and strongly supports a finding of detention at that point in time. ***

59. Placing the mode of entry aside, we agree with Lauwers J.A.'s observation that it was unlikely that the police officers would have "brazenly entered a private backyard and demanded to know what its occupants were up to in a more affluent and less racialized community" (para. 162). Living in a less affluent neighbourhood in no way detracts from the fact that a person's residence, regardless of its appearance or its location, is a private and protected place. This is no novel insight and has long been understood as fundamental to the relationship between citizen and state. Over 250 years ago, William Pitt (the Elder), speaking in the House of Commons, described how "[t]he poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter!—all his force dares not cross the threshold of the ruined tenement" (House of Commons, *Speech on the Excise Bill* (March 1763), quoted in Lord Brougham, *Historical Sketches of Statesmen Who Flourished in the Time of George III* (1855), vol. I, at p. 42). ***

125. The trial judge was of the view that the police entry into the backyard was authorized by the implied licence doctrine. Where it applies, this doctrine allows the police, or any member of the public, on legitimate business to proceed from the street to the door of a house so as "to permit convenient communication with the occupant of the dwelling" (*R. v. Evans*, [1996] 1 S.C.R. 8 (S.C.C.), at para. 15, per Sopinka J.).

126. We agree with Lauwers J.A. at the Court of Appeal for Ontario, as does our colleague, that the doctrine does not apply in this case and that it was the police officers themselves who were the trespassers. Simply put, the implied licence doctrine does not apply to excuse the police presence in the backyard because even if "communication" was the officers' purpose, it did not necessitate their entry onto private property—they could easily have spoken with the young men over the "little two-foot fence".

127. More fundamentally, in entering the backyard, the police also had what Sopinka J. in *Evans* referred to as a "subsidiary purpose", which exceeds the authorizing limits of the implied licence doctrine (para. 16). In *Evans*, the subsidiary purpose that vitiated any "implied licence" was the hope of securing evidence against the home's occupants (by sniffing for marijuana). Here, the subsidiary purpose was, in our view, correctly identified by Lauwers J.A. (at para. 107): "the police entry was no better than a speculative criminal investigation, or a 'fishing expedition'". It has to be recalled here that the police had no information linking any of the backyard's occupants whose identities were unknown to them to any criminal conduct or suspected criminal conduct. The doctrine of implied licence was never intended to protect this sort of intrusive police conduct. ***

REFLECTION:

- *Why were the police officers considered to be trespassers? Why did they have no implied license to enter?*
- *Does this judgment demonstrate the Diceyan principle of equality under ordinary law (§1.1.1)?*

7.1.7 Criminal trespass statutes

- Federal: Criminal Code, RSC 1985, c C-46, s 177.
- Alberta: Petty Trespass Act, RSA 2000, c P-11; Trespass to Premises Act, RSA 2000, c T-7.
- British Columbia: Trespass Act, RSBC 2018, c 3.
- Manitoba: The Petty Trespasses Act, CCSM c P50.
- New Brunswick: Trespass Act, RSNB 2012, c 117.
- Newfoundland & Labrador: Petty Trespass Act, RSNL 1990, c P-11.
- Nova Scotia: Protection of Property Act, RSNS 1989, c 363.
- Ontario: Trespass to Property Act, RSO 1990, c T.21; Security from Trespass and Protecting Food Safety Act, 2020, SO 2020, c 9.
- Prince Edward Island: Trespass to Property Act, RSPEI 1988, c T-6.
- Saskatchewan: The Trespass to Property Act, SS 2009, c T-20.2.

REFLECTION:

- *Independent of the common law of tort, certain trespasses can also be prosecuted as crimes. What are the*

differences in procedure and outcome when pursuing trespass under tort law as compared to criminal law?[242]

7.1.8 Cross-references

- *Miller v. Jackson* [1977] EWCA Civ 6, [8]: §21.1.1.

7.1.9 Further material

- History Hub, "What Limits the Power of the State? *Entick v. Carrington*" (Nov 1, 2020) 📺.
- T.T. Arvind & C.R. Burset, "A New Report of *Entick v. Carrington* (1765)" (2022) 110 Kentucky LJ 265.
- A. Tomkins & P. Scott (eds), *Entick v. Carrington: 250 Years of the Rule of Law* (Oxford: Hart Publishing, 2015).
- A. Dorfman & A. Jacob, "The Fault of Trespass" (2015) 65 U Toronto LJ 48.
- J. Oberdiek, "The Trouble with Trespass" in L. Green & B. Leiter (eds), *Oxford Studies in Philosophy of Law* vol 5 (Oxford: Oxford University Press, 2024).

7.2 Defence of real property

J. Goudkamp, Tort Law Defences (Oxford: Hart Publishing, 2013), 108

The plea of defence of one's property is a variation on the same theme as that of self-defence[243] [§6.4] and is, therefore, also a private justification.[244] Like self-defence, it can defeat liability from arising in all of the varieties of trespass to the person, and it is available only when it was reasonable to use force and the force used was proportionate.[245] However, the defence of property defence differs from self-defence in several ways. Most importantly, the maximum amount of force that it permits a defendant to use without incurring liability is lower. Because the law regards interests in property as less valuable than interests in bodily security, all things being equal,[246] a defendant is not permitted to use as much force merely to defend his land or chattels as he may to defend his person. Consequently, whereas it is permissible to kill in self-defence where one is threatened with harm that is sufficiently serious,[247] a person cannot apply lethal force merely to protect his property.[248] Indeed, it is probably the case that the defence of one's property does not even authorise one to subject a trespasser to a significant risk of serious physical injury.[249] *** […continue reading]

REFLECTION:

- *The Ontario Court of Appeal has recognised that "the ancient common law 'castle doctrine' gives 'rise to the principle that a person has the right to defend him or herself in his or her own home without the duty to retreat*

[242] See P. Dostal, "Trespassing at Night" in *The Criminal Law Notebook* (2016).
[243] 'The privilege to defend the possession of property rests upon the same considerations of policy as that of self-defense. The limitations upon the privilege are much the same as in the case of self-defense': Keeton *et al* (n 6) 131 (footnote omitted).
[244] There are several other defences that are closely related to, or are specific applications of, that of defence of property, such as the defence afforded to those who destroy dogs that worry their livestock: *Animals Act 1971* (UK), s 9. For discussion of this provision, see R Bagshaw, 'The Animals Act 1971' in TT Arvind and J Steele (eds), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Oxford, Hart Publishing, 2012) 213, 223–24.
[245] *Attorney-General's Reference (No 2 of 1983)* [1984] QB 456 (CA).
[246] 'The safety of human lives belongs to a different scale of values from the safety of property. The two are beyond comparison': *Southport Corporation v. Esso Petroleum Co Ltd* [1953] 2 All ER 1204, 1209; [1953] 3 WLR 773, 779 (QBD) (Devlin J).
[247] Eg, *Brown v. Wilson* (1975) 66 DLR (3d) 295 (BCSC).
[248] Restatement (Second) of Torts, § 77; *Civil Liability Act 2002* (NSW), s 52(3); cf *Hackshaw v. Shaw* (1984) 155 CLR 614 (HCA).
[249] *Kline v. The Central Pacific Railroad Company of California* 37 Cal 400 (1869); *Jordan House Ltd v. Menow* [1974] SCR 239.

from the home in the face of an attack.'"[250] *Should people have more leeway to protect themselves or their property at home as compared to public places?*

7.2.1 Bird v. Holbrook (1825) 130 ER 911 (CP)

England Court of Common Pleas – (1825) 130 ER 911

[T]he Defendant rented and occupied a walled garden in the parish of St. Phillip and Jacob, in the county of Gloucester, in which the Defendant grew valuable flower-roots, and particularly tulips, of the choicest and most expensive description. *** The Defendant had been, shortly before the accident, robbed of flowers and roots from his garden to the value of 20*l*. and upwards: in consequence of which, for the protection of his property, with the assistance of another man, he placed in the garden a spring gun, the wires connected with which were made to pass from the doorway of the summer-house to some tulip beds ***.

A witness to whom the Defendant mentioned the fact of his having been robbed, and of having set a spring gun, proved that he had asked the Defendant if he had put up a notice of such gun being set, to which the Defendant answered, that "he did not conceive that there was any law to oblige him to do so," and the Defendant desired such person not to mention to any one that the gun was set, "lest the villain should not be detected." ***

On the 21st March 1825, between the hours of six and seven in the afternoon, it being then light, a pea-hen belonging to the occupier of a house in the neighbourhood had escaped, and, after flying across the field above mentioned, alighted in the Defendant's garden. A female servant of the owner of the bird was in pursuit of it, and the Plaintiff (a youth of the age of nineteen years), seeing her in distress from the fear of losing the bird, said he would go after it for her: he accordingly got upon the wall at the back of the garden, next to the field, and having called out two or three times to ascertain whether any person was in the garden, and waiting a short space of time without receiving any answer, jumped down into the garden.

The bird took shelter near the summer-house, and the boy's foot coming in contact with one of the wires, close to the spot where the gun was set, it was thereby discharged, and a great part of its contents, consisting of large swan shot, were lodged in and about his knee-joint, and caused a severe wound. ***

BEST C.J.: ***

2. It has been argued that the law does not compel every line of conduct which humanity or religion may require; but there is no act which Christianity forbids, that the law will not reach: if it were otherwise, Christianity would not be, as it has always been held to be, part of the law of England. I am, therefore, clearly of opinion that he who sets spring guns, without giving notice, is guilty of an inhuman act, and that, if injurious consequences ensue, he is liable to yield redress to the sufferer. But this case stands on grounds distinct from any that have preceded it. In general, spring guns have been set for the purpose of deterring; the Defendant placed his for the express purpose of doing injury; for, when called on to give notice, he said, "If I give notice, I shall not catch him." He intended, therefore, that the gun should be discharged, and that the contents should be lodged in the body of his victim, for he could not be caught in any other way. On these principles the action is clearly maintainable, and particularly on the latter ground. ***

3. *** *Ilott v. Wilks* is an authority in point. But we want no authority in a case like the present; we put it on the principle that it is inhuman to catch a man by means which may maim him or endanger his life, and, as far as human means can go, it is the object of English law to uphold humanity, and the sanctions of religion. It would be, indeed, a subject of regret, if a party were not liable in damages, who, instead of giving notice of the employment of a destructive engine, or removing it, at least, during the day, expressed a resolution to withhold notice, lest, by affording it, he should fail to entrap his victim.

[250] *R. v. Docherty*, 2012 ONCA 784, [38], continuing: "The 'castle doctrine' rests on the idea that the home provides protection for a person, his family and his possessions and that mandating a duty to retreat would force people to leave the security of their home, leaving their family members exposed to danger and their belongings vulnerable to theft. The castle doctrine also involves the idea that one's home is the last refuge, the last line of self-defence."

PARK J.:

4. *** I found my decision on the circumstance of the Defendant having omitted to give notice of what he had done, and his even expressing a desire to conceal it. *** One case precisely in point *** is that of *Jay v. Whitfield* [3 B. & A. 308]. There the plaintiff, a boy, having entered the defendant's premises for the purpose of cutting a stick, was shot by a spring gun, for which injury he recovered 120*l.* damages at the Warwick Summer Assizes 1807, before Richards C. B., and no attempt was made to disturb the verdict.

BURROUGH J.:

5. The common understanding of mankind shews, that notice ought to be given when these means of protection are resorted to; and it was formerly the practice upon such occasions to give public notice in market towns. But the present case is of a worse complexion than those which have preceded it; for if the Defendant had proposed merely to protect his property from thieves, he would have set the spring guns only by night. The Plaintiff was only a trespasser: if the Defendant had been present, he would not have been authorised even in taking him into custody, and no man can do indirectly that which he is forbidden to do directly. ***

6. Here, no notice whatever was given, but the Defendant artfully abstained from giving it, and he must take the consequence.

GASELEE J.:

7. After the decision in *Ilott v. Wilks*, it is impossible to say that this action is not maintainable.

REFLECTION:

- *Why are spring guns and harmful traps a disproportionate response to trespass?*
- *Why could the spring gun not be justified as a thief-deterrent in this case?*
- *Consider Matthew 5:38-40 (ESV): "[38] "You have heard that it was said, 'An eye for an eye and a tooth for a tooth.' [39] But I say to you, Do not resist the one who is evil. But if anyone slaps you on the right cheek, turn to him the other also. [40] And if anyone would sue you and take your tunic, let him have your cloak as well." Was Best C.J. right to assert that the common law is founded on Christian Biblical precepts?*[251]

7.2.2 Further material

- A. Flynn & E. Van Wagner, "A Colonial Castle: Defence of Property in *R v. Stanley*" (2020) 98 Canadian Bar Rev 358.

[251] See M.P. Moreland, "Christianity and Torts" in J. Witte Jr. & R. Domingo (eds), *Oxford Handbook on Christianity and Law* (Oxford: Oxford University Press, 2023); see also *R. v. Big M Drug Mart Ltd.*, 1983 CanLII 3630 (AB CJ), [47] *per* Stevenson Prov. J.: "But *was* Christianity a part of the law of the realm? Riley J. in the *Boardwalk Merchandise Mart* case, [1972] 6 W.W.R. 1, states, at pp. 19-20:

> 'The case law errs because until 1917 there was a large body of judicial opinion that accepted that Christianity was part of the law of the realm. In *Bowman v. Secular Soc. Ltd.* [1917] A.C. 406, this judicial error or rhetoric was corrected by the House of Lords: see Lord Sumner at p. 464:
>
> > "My Lords, with all respect for the great names of the lawyers who have used it, the phrase 'Christianity is part of the law of England' is really not law; it is rhetoric, as truly so as was Erskine's peroration when prosecuting Williams: 'No man can be expected to be faithful to the authority of man, who revolts against the Government of God.' One asks what part of our law may Christianity be, and what part of Christianity may it be that is part of our law? Best C.J. once said in *Bird v. Holbrook* (1828), 4 Bing. 628, 130 E.R. 911 (a case of injury by setting a spring-gun): 'There is no act which Christianity forbids, that the law will not reach: if it were otherwise, Christianity would not be, as it has always been held to be, part of the law of England'; but this was rhetoric too. Spring-guns, indeed, were got rid of, not by Christianity, but by Act of Parliament. 'Thou shalt not steal', is part of our law. 'Thou shalt not commit adultery' is part of our law, but another part. 'Thou shalt love thy neighbour as thyself' is not part of our law at all. Christianity has tolerated chattel slavery; not so the present law of England. Ours is, and always has been, a Christian state. The English family is built on Christian ideas, and if the national religion is not Christian there is none. English law may well be called a Christian law, but we apply many of its rules and most of its principles, with equal justice and equally good government, in heathen communities, and its sanctions, even in Courts of conscience, are material and not spiritual." ***"

8 INTENTIONAL INTERFERENCE WITH GOODS

8.1 Trespass to chattels

Law Reform Commission of British Columbia, Wrongful Interference with Goods (Rep. 127, 1992), 10, 17

Trespass to chattels is analogous to trespass to land. It provides a remedy where a person wrongfully takes or damages another's property. ***

1. Who may sue for trespass to chattels? A person in possession of the property (not necessarily the owner of the goods).

2. Who is liable? A person who wrongfully damages or interferes with goods in the possession of another.

3. What is the wrong? Interference with possession or causing damage to the goods (but not interference with ownership).

4. What is the remedy? At common law, the wrongdoer had to pay damages measured by the possessor's loss.[252] *** […continue reading]

8.1.1 Wilson v. New Brighton Panelbeaters Ltd [1989] 1 NZLR 74 (NZ HC)

✗**REF: §6.2.3.1, §8.2.1, §9.2.2**

TIPPING J.: ***

2. A man calling himself Walters had rung a telephone answering service which answers calls for the respondent professing that he had bought the vehicle. He asked the respondent to go to the appellant's home at 449 Durham St in Christchurch and tow the vehicle that would be found there to an address at 615 Worcester St, Christchurch. An employee of the respondent was duly despatched to perform this mission. He found the appellant's vehicle, hitched it up to the tow truck and took it round to 615 Worcester St. There the man calling himself Walters handed over $40 in cash, being the price of the job, and the tow truck operator left the vehicle there and departed. Nothing more has been heard of either Walters or the vehicle.

3. The appellant on ascertaining this sequence of events commenced proceedings in the District Court against the respondent for damages. The sum of $2000 plus interest was claimed as representing the value of the vehicle at the time it was towed away. The appellant's amended statement of claim pleaded three causes of action: negligence, trespass to goods and conversion. ***

4. The learned Judge heard quite substantial evidence as to the circumstances in which the telephone call from Walters was received and the steps which the respondent either took or might have taken to verify the bona fides of the transaction. In the event he held that the respondent had not been negligent. Mr Brodie for the appellant mounted an attack on that conclusion but as will appear I find it unnecessary to consider that part of the appeal. I proceed, as regards the respondent, on the premise that it demonstrated that it acted both honestly (there was no question about that) and without negligence. ***

7. The law as to trespass to goods is succinctly stated in *Salmond and Heuston on Torts* (19th Ed, 1987) at p 104 as follows:

> "The tort of trespass consists in committing without lawful justification any act of direct physical interference with goods in the possession of another person. Thus it is a trespass to take away goods or to do wilful damage to them."

Reference is made by the learned authors to Lord Diplock's speech in *R v. Inland Revenue Commissioners, ex parte Rossminster Ltd* [1980] AC 952 where his Lordship said at p 1011:

[252] Now legislation also allows the courts to compel the return of property still held by the wrongdoer.

> "I would also accept that since the act of handling a man's goods without his permission is prima facie tortious …." ***

10. *** [T]respass has to do primarily with possession and interference with rights to possession rather than with title. Thus as early as 1791 Lord Kenyon CJ in *Ward v. McAuley* (1791) 4 Term Rep 489 at p 490 was able to say:

> "The distinction between the actions of trespass and trover is well settled: the former is founded on possession; the latter on property."

11. *Winfield and Jolowicz on Tort* (12th ed, 1984) puts the matter very succinctly at p 476 as follows:

> "Trespass to goods is a wrongful physical interference with them."

12. It is not necessary for me in this case to discuss the more difficult questions of whether or not an unintentional interference with goods is actionable without proof of damage, and indeed whether damage or asportation is necessary to constitute the tort: see *Everitt v. Martin* [1953] NZLR 29. ***

REFLECTION:

- *In light of Tipping J.'s holding that the defendant, although not negligent, had committed trespass to Wilson's vehicle, what core principle seems to be vindicated by the tort of trespass to chattels?*

8.1.2 Further material

- Law School Toolbox Podcast, "Property-Based Intentional Torts" (Apr 9, 2024) 🎧.
- R.C.C. Cuming, "Secured Creditors' Non-Statutory Remedies: Unfinished Business" (2012) 91 Canadian Bar Rev 243.
- S. Balganesh, "Property Along the Tort Spectrum: Trespass to Chattels and the Anglo-American Doctrinal Divergence" (2006) 35 Common L World Rev 1.

8.2 Conversion (trover)

Law Reform Commission of British Columbia, Wrongful Interference with Goods (Rep. 127, 1992), 10, 24

Conversion (also known as "**trover**")[253] deals with more serious kinds of interference with property, although it overlaps [with trespass and detinue]. Conversion provides a remedy where property is destroyed, or wrongfully "converted," to the use of another. ***

1. Who may sue in conversion? A person entitled to the possession of the property (not necessarily the owner of the goods).

2. Who is liable? A person who wrongfully damages or interferes with goods in the possession of another where the damage or interference is substantial.

3. What is the wrong? Interference with a person's dominion over the goods.

4. What is the remedy? At common law, the wrongdoer was liable to pay damages measured as the value of the goods at the date of conversion. The law, however, acknowledges many exceptions to the general principle. *** […continue reading]

[253] Trover is the original name for the action. It is also derived from Old French and means "to find." The law initially adopted the fiction that the wrongdoer had found the property—to distinguish this action from detinue or trespass to chattels. Nineteenth century legislation removed that pretense from legal pleadings. The name "trover" is no longer appropriate although it is still used occasionally.

8.2.1 Wilson v. New Brighton Panelbeaters Ltd [1989] 1 NZLR 74 (NZ HC)

✗**REF: §6.2.3.1, §8.1.1, §9.2.2**

TIPPING J.: ***

13. The tort of conversion cannot be so simply defined. *Salmond and Heuston on Torts* (19th ed, 1987) says this at p 108:

> "A conversion is an act, or complex series of acts, of wilful interference, without lawful justification, with any chattel in a manner inconsistent with the right of another, whereby that other is deprived of the use and possession of it."

14. The learned authors go on to discuss various different forms of dealing with chattels which may, depending upon the circumstances, constitute conversions. They speak of conversion by taking, conversion by detention, conversion by wrongful delivery, conversion by wrongful disposition and conversion by wrongful destruction. As to conversion by taking *Salmond and Heuston* has this to say at p 110:

> "Every person is guilty of a conversion who, without lawful justification, takes a chattel out of the possession of anyone else with the intention of exercising a permanent or temporary dominion over it, because the owner is entitled to the use of it at all times. It is no defence that restoration has become impossible, even though no permanent taking was intended and the impossibility has resulted from no act or default of the defendant but solely through the loss or destruction of the property by some inevitable accident or the wrongful act of some third person. For he who wrongfully takes possession of another's goods has them at his own risk and must in all events either return them or pay for them.
>
> But a mere taking unaccompanied by an intention to exercise such a dominion is no conversion, though it is actionable as a trespass. So the mere act of wrongfully removing a chattel from one place to another, without intent to assume possession of it or to deprive the owner of possession, is not in itself a conversion, but is a mere trespass."

Thus the respondent's original taking in the present case, while arguably not a conversion at the outset, unarguably became a conversion when the respondent so acted as to lose the power to restore the vehicle to the appellant. ***

24. *** As Diplock LJ said in *Marfani & Co Ltd v. Midland Bank Ltd* [1968] 1 WLR 956, 970-971:

> "At common law, one's duty to one's neighbour who is the owner … of any goods is to refrain from doing any voluntary act in relation to his goods which is an usurpation of his proprietary or possessory rights in them. Subject to some exceptions … it matters not that the doer of the act of usurpation did not know, and could not be the exercise of any reasonable care have known, of his neighbour's interests in the goods. The duty is absolute; he acts at his peril."

It cannot be said, nor was it contended, that any of the exceptions to this proposition apply in the present case.

25. A review of the foregoing authorities *** leads me to the following conclusions. The essence of trespass is an unlawful interference with possession of goods. The essence of conversion is an unlawful denial of the plaintiff's rights to his goods or an unlawful dealing with the plaintiff's goods by asserting a temporary or permanent dominion over them in a manner inconsistent with the plaintiff's rights thereto. By unlawful I mean without lawful justification.

26. Thus the initial act of taking possession of the goods of another while it will be a trespass if performed without lawful justification, will not be conversion unless the person taking possession knows that he is thereby infringing the plaintiff's rights in the goods. But any dealing with the plaintiff's goods after coming into possession of them, is a conversion if it amounts to an assertion of temporary or permanent dominion in a manner constituting an infringement of the plaintiff's rights in relation to the goods. This is so whether

or not there is knowledge of such infringement and even if the person dealing with the goods is acting honestly and without negligence. That is why the respondent in the present case, by taking possession of the appellant's goods without lawful justification albeit innocently and without negligence, committed a trespass to those goods.

27. A person who comes into possession of another's goods innocently and without being the original taker does not commit trespass to those goods because there is no direct interference. Nor is he guilty of conversion unless and until he asserts some temporary or permanent dominion over the goods in a manner inconsistent with the plaintiff's rights; but on so dealing with the goods he is guilty of conversion even if he is honestly and reasonably in ignorance of the plaintiff's rights. This is why a mere custodian from the original taker or a carrier of the goods on behalf of the original taker, if acting in ignorance of the plaintiff's rights, commits no conversion by his temporary possession unless and until he does something with or to the goods which amounts to an assertion of permanent or temporary dominion inconsistent with the plaintiff's rights. Examples of such inconsistent conduct are the delivery of possession to a third person or changing the character of the goods. Simple retention in these circumstances or redelivery to the person who handed the goods to the custodian or carrier in the first place is not per se a conversion.

28. Against that legal background it is clear that the respondent committed trespass to the goods of the appellant by transporting his vehicle from Durham St to Worcester St. Whether it also committed conversion by that operation need not be finally determined because it undoubtedly committed conversion by handing the car to Walters in return for the towing fee of $40, thereby transferring possession to Walters and in the event rendering it impossible to return the car to the appellant. Thus on either cause of action the respondent is liable to pay damages to the appellant. ***

REFLECTION:

- *In what sense is conversion a tort of strict liability?*[254]
- *What advantage might there be to a plaintiff in a case like this to sue both in trespass and conversion?*

8.2.2 Armory v. Delamirie [1722] EWHC KB J94

BACKGROUND: Quimbee (2020), https://youtu.be/PNK737XXicw

England Court of King's Bench – [1722] EWHC KB J94

The plaintiff being a chimney sweeper's boy found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who under pretence of weighing it, took out the stones, and calling to the master to let him know it came to three halfpence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones.

And now in trover against the master these points were ruled:

1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.

2. That the action well lay against the master, who gives a credit to his apprentice, and is answerable for his neglect.[255] [§23.1]

3. As to the value of the jewel several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and shew it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages: which they accordingly did.

[254] See *Zwaan v. Laframboise*, 2024 ONSC 23, [49]-[54].
[255] *Jones v. Hart*, Salk. 441. Cor. Holt C.J. *Mead v. Hamond*, *supra*. *Grammer v. Nixon*, *post*, 653.

REFLECTION:

- *The chimney sweeper's boy did not own the jewel he had found. Did he commit trespass or conversion in taking it in the first place?*
- *Why did the common law afford the boy a right to sue the goldsmith to get the jewel back?*

8.2.3 Robertson v. Stang [1997] CanLII 2122 (BC SC)

British Columbia Supreme Court – 1997 CanLII 2122

✗REF: §9.2.1

PARRETT J.:

1. The plaintiff in this action seeks damages for the loss of an enormous number of personal items which she had stored in her apartment unit in a cooperative housing project. The defendants are: Cedarbrooke Apartments Ltd. ("Cedarbrooke"), which was, at the material times, a form of cooperative responsible for the building in which the plaintiff resided; and its managers, Paul Stang and Jacqueline Stang.

2. The plaintiff claims that the defendants forced her to move the goods stored in her apartment to storage areas elsewhere in the complex, from which areas most of the goods were later stolen. She grounds her claim in conversion, bailment, and negligence. ***

Background ***

5. The plaintiff is a compulsive shopper. During the 1970s and 1980s, she accumulated an enormous quantity of goods which she stored in her apartment unit. The plaintiff's obsessive-compulsive behaviour involved a search for bargains: if an item was on sale, she would buy it, regardless of whether or not she needed it or had any use for it. Many of the items in her apartment were purchased on sale, with discounts ranging from 25-75% off the regular price. The vast majority of the items purchased by the plaintiff were never removed from their packages. ***

7. Up until February 4, 1989, the plaintiff was largely able to hide her obsession from other tenants in the cooperative. However, on that date a pipe burst in the plaintiff's apartment, flooding it and the unit below. Paul Stang, the manager of the complex and a defendant in this action, attended at the plaintiff's apartment. When he received no response from knocking on her door, he collected three of the cooperative's board members to act as witnesses and proceeded to break down her door.

8. Mr. Stang testified that he was shocked by what he saw when he entered the apartment. The apartment was filled with packages. He was forced to turn sideways and walk crab-like along the hallway in order to enter the apartment. He eventually located a burst pipe in the master bedroom, turned off the water (which could only be turned off inside the apartment), repaired the door, wrote a note for the plaintiff, and left.

9. By the time Mr. Stang had turned off the water in the plaintiff's apartment, a group of tenants had gathered outside the apartment, including the board members present as witnesses and other tenants attracted by what Mr. Stang described as the "commotion". A discussion ensued between the board members and Mr. Stang about what should be done about the piles of boxes and packages in the plaintiff's apartment. Concern was expressed that the goods might constitute a fire hazard. ***

11. *** The plaintiff agreed to move the goods, because, she asserts, she felt that she had no other choice. Mr. Stang agreed, on cross-examination, that the plaintiff was not entirely happy about having to move the goods, but in the end acquiesced.

12. Beginning February 11, Paul and Jacqueline Stang moved the plaintiff's goods from her apartment into storage rooms in the 300 and 600 blocks of the complex. The plaintiff did not assist in carrying the goods to the storage areas, and testified she was unsure where exactly the goods were being taken. By March 22 all the goods had been moved into storage.

13. The plaintiff testified that at the time she was told the goods had to be moved to storage, and again

when the goods were actually moved, Mr. Stang assured her that the storage areas were safe and secure. She also testified that he told her only he and the hydro man had keys to the 300 block hydro rooms, where much of her goods were stored. Mr. Stang testified that he did not tell her that no one else had keys, but his recollection appears to be vague and I prefer the plaintiff's evidence on this point.

14. As it turned out, the area was not particularly secure. The evidence disclosed that the door to the 300 block storage area could be opened using a screwdriver. In addition, Gordon Everingham testified that there were a number of master keys unaccounted for. Each member of the board, in addition to Mr. Stang and the hydro man, had their own key.

15. On February 22 or 23, and again on February 27, break-ins occurred in the 300 block storage rooms …. ***

Issues

22. The plaintiff has alleged three causes of action: conversion, bailment and negligence. Determination of the plaintiff's claim in conversion requires the resolution of two issues. The first is whether the defendants committed a wrongful act vis-a-vis the plaintiff's property. This depends on whether the plaintiff consented to the removal of her goods by the Stangs. The second issue is whether or not removal of the goods by the defendants was done with the intention or effect of interfering with the plaintiff's title. ***

The Tort of Conversion

36. The tort of conversion was defined by Martin J.A. of the Saskatchewan Court of Appeal in *Driedger v. Schmidt*, [1931] 3 W.W.R. 514 (Sask. C.A.) at 519:

> Conversion consists of any act of wilful interference with a chattel, done without lawful justification, whereby any person entitled thereto is deprived of the use and possession of it. ***

38. Other definitions are summarized by G.H.L. Fridman in the following passage from *The Law of Torts in Canada*, vol 1 (Toronto: Carswell, 1990) at 95:

> Conversion consists in a wrongful taking, using or destroying of goods or the exercise of dominion over them that is inconsistent with the title of the owner. It is an intentional exercise of control over a chattel which seriously interferes with the right of another to control it. There must be a voluntary act in respect of another's goods amounting to a usurpation of the owner's proprietary or possessory rights in them … Succinctly put, conversion is "a positive wrongful act or dealing with the goods in a manner, and with an intention, inconsistent with the owner's rights".

39. Fridman goes on to summarize the essential features of the tort of conversion as including: (i) a wrongful act; (ii) involving a chattel; (iii) consisting of handling, disposing or destruction of the chattel; (iv) with the intention or effect of denying or negating the title of another person to such chattel. ***

47. Turning to the present case, the first issue is whether or not the defendants committed a wrongful act in moving the plaintiff's belongings into storage; in other words, whether or not the plaintiff consented to the removal of her goods. At trial, the plaintiff testified that she did not want the goods moved into storage, but felt, as a result of statements made by Mr. Stang, that she had no choice in the matter. She testified that her impression was that she would be evicted if she did not move the goods and that Mr. Stang stated: "it would be worse for you if I do what the board wants me to."

48. This latter statement is hotly contested by Mr. Stang, who testified that he at no time said this to the plaintiff. Mr. Stang tried to characterize the movement of the plaintiff's goods as being a favour that he did for her. However, he agreed that the plaintiff was told that she had to move her belongings, and could not deny that he had told the plaintiff that the board had issued an edict that the goods had to be moved.

49. Regardless of whether or not Mr. Stang made the alleged statement, it is clear on all the evidence that the plaintiff felt she had no choice but to move her belongings. The issue then is whether this lack of "choice" vitiated the consent which the plaintiff appears to have given.

50. In my view a proper assessment of the evidence in this case requires a recognition of the plaintiff's condition which resulted in the compulsive shopping, her mortification over the discovery by others in the complex and the way in which her "decision" was made. There is such a relationship of power-dependency between the parties in the unusual circumstances of this case as to vitiate the consent of the plaintiff. The evidence from both sides is that the Stangs were polite and friendly when they moved the plaintiff's goods. The plaintiff was genuinely grateful for their help and understanding. Even though the plaintiff did not really want to move the goods, she was in a position where she was given little option but to comply. The Stangs friendly assistance, in all the circumstances, simply increased the very real pressure to comply and gave her no real option.

51. The plaintiff also argues that misrepresentations by Mr. Stang vitiated any consent she might have given to having her goods moved to storage. These misrepresentations include that she had no choice about moving her goods, that the storage areas were secure; that only he and the hydro man had a key, and that she need not obtain extra insurance. These misrepresentations may not be sufficient on their own to vitiate the plaintiff's consent. To some extent they are all peripheral to the main decision which faced the plaintiff: whether or not to move her goods. In the unusual circumstances of this case, however, it was the totality of the circumstances which led to the compelling nature of the pressure brought to bear on the plaintiff. The overall effect of those circumstances, and the defendants' actions as well meaning as they were, was to force the plaintiff to comply with their directions; directions they had no right to give.

52. Despite my conclusions as to consent, there is no evidence suggesting that the defendants moved the plaintiff's goods with the intention of claiming title to them, or of depriving her of title. There can therefore be no conversion. The defendants' purpose in moving the goods out of the apartment was not to claim them for their own; it was to eliminate a fire hazard and to enable them to measure the plaintiff's apartment for the purposes of converting the building to a strata corporation. This is clear from the testimony of Messrs. Stang and Everingham, which I accept on this point.

53. Mr. Stang testified that the plaintiff could have access to her goods any time she wanted, simply by coming to him and asking for a key. This evidence is uncontradicted, and in fact the plaintiff had done just this when she discovered that some of her goods were missing. The notices sent to Ms. Robertson and to her mother requesting removal of the goods from the storage areas are also inconsistent with an intention on the part of the defendants to interfere with the plaintiff's title. Finally, the plaintiff testified that on May 30 Paul Stang left her a note asking her to remove her goods from the storage areas; she told him that she could not move the items into mini-storage until they were inventoried.

54. *** I conclude that the tort of conversion has not been made out by the plaintiff. ***

REFLECTION:

- *Why did the claim in conversion fail in this case? Would a claim in trespass have succeeded?*

8.2.4 Driving Force Inc. v. I Spy-Eagle Eyes Safety Inc. [2022] ABCA 25

Alberta Court of Appeal – 2022 ABCA 25

✗**REF: §17.5.1**

WATSON, SLATTER AND SCHUTZ JJ.A.: ***

3. The Driving Force leased nine trucks to I Spy. It alleged that I Spy had stopped making payments on six of those trucks in August 2017 and had failed to return the trucks. It sued for the outstanding balances owed under the leases and for conversion of its trucks. ***

5. The trial judge found that I Spy was in breach of the six disputed lease agreements by failing to make the monthly payments after about August 2017, and by failing to return the trucks as required by the lease agreements. *** When I Spy failed to return the trucks at the end of the terms of the leases, The Driving Force continued to send monthly invoices, and the trial judge concluded that the leases had been extended on a month-to-month basis ***.

6. The trial judge concluded that I Spy was liable to The Driving Force in contract, but that it was also liable for the tort of conversion:

> 64. Driving Force also sues the Defendants for the tort of conversion.
>
> 65. The tort of conversion involves a wrongful interference with the goods of another, such as taking, using, or destroying the goods in a manner inconsistent with the owner's right of possession. The tort is one of strict liability, and although the dispossession must arise as a result of the defendant's intentional act, it is no defence that the wrongful act was committed in all innocence (*Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727at para. 31; *373409 Alberta Ltd. (Receiver of) v. Bank of Montreal*, 2002 SCC 81at para. 8). In Fleming's *The Law of Torts* (10th ed., 2011) at pp. 66-67, the following definition of conversion is found:
>
> > Conversion may be defined as an intentional exercise of control over a chattel which so seriously interferes with the right of another to control it that the intermeddler may justly be required to pay its full value.
>
> 66. In *Clow v. Gershman Transport International Ltd*, 2000 ABQB 360 at para 13, Paperny J. (as she then was), adopted the following four essential features of conversion from G.H.L. Fridman, *The Law of Torts in Canada*, 3rd ed., (Toronto: Carswell, 1989) at p. 95: (1) a wrongful act; (2) involving a chattel; (3) consisting of handling, disposing or destruction of the chattel; (4) with the intention or effect of denying or negating the title of another person to such chattel.
>
> 67. I find that I Spy is liable to Driving Force in conversion. The conduct which constitutes the conversion is the *same conduct which constitutes the breach of contract*. By refusing to return the trucks beyond the cessation of its monthly rental payments, I Spy took and used the trucks in a manner inconsistent with Driving Force's right of possession. This exercise of control over the trucks has so seriously interfered with Driving Force's right to control the trucks that I Spy may justly be required to pay the trucks' full value. (Emphasis added)

The trial judge did not examine whether I Spy's right to have possession of the trucks under the leases constituted a defence to the claim in conversion. ***

30. In *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 SCR 727 at para. 31, the tort of conversion was described as "a wrongful interference with the goods of another, such as taking, using or destroying these goods in a manner inconsistent with the owner's right of possession". *Kuwait Airways Corporation v. Iraqi Airways Co (Nos 4 and 5)*, [2002] UKHL 19 at para. 39, [2002] 2 AC 883 stated:

> … Conversion of goods can occur in so many different circumstances that framing a precise definition of universal application is well nigh impossible. In general, the basic features of the tort are threefold. First, the defendant's conduct was inconsistent with the rights of the owner (or other person entitled to possession). Second, the conduct was deliberate, not accidental. Third, the conduct was so extensive an encroachment on the rights of the owner as to exclude him from use and possession of the goods …

All the leading cases confirm that there is no universal test for the tort.

31. One way of summarizing the test for conversion is found in *Clow v. Gershman Transport International Ltd*, 2000 ABQB 360 at para. 13, 82 Alta LR (3d) 196, 265 AR 181:

> (a) a wrongful act;
>
> (b) involving a chattel;
>
> (c) consisting of handling, disposing or destruction of the chattel;
>
> (d) with the intention or effect of denying or negating the title of another person to such chattel.

Although the liability of I Spy in conversion was not directly confronted by the parties, on this record the first

and fourth components of this formulation of the test are not met.

32. It is admitted that I Spy had possession of and exercised control over the trucks. However, finding that possession and control to be a "wrongful act" depends on finding that I Spy had no right to do so. The tort of conversion cannot be made out where the alleged tortfeasor is holding or dealing with the property with the consent of the owner: *Raza Kayani LLP v. Toronto-Dominion Bank*, 2014 ONCA 862 at paras. 27–28, 378 DLR (4th) 729.

33. The need for a wrongful act to make the conduct tortious was confirmed in *373409 Alberta Ltd. (Receiver of) v. Bank of Montreal*, 2002 SCC 81 at para. 9, [2002] 4 SCR 312:

> 9 An owner's right of possession includes the right to authorize others to deal with his or her chattel in any manner specified. As a result, dealing with another's chattel in a manner authorized by the rightful owner is consistent with the owner's right of possession, and does not qualify as wrongful interference. The principle is aptly stated in R. D. Bowers, *A Treatise on the Law of Conversion* (1917), at s. 10:
>
> > It will be noted that the deprivation must be wrongful, for without the element of wrong no tort can be committed and conversion cannot occur; and to be wrongful, it must be wholly without the owner's sanction or assent, either express or implied. So, where the owner has given to another, or permitted him to have control of the property, no one can be held responsible in tort for its conversion who merely makes such use of the property or exercises such dominion over it as is warranted by the authority thus given. Otherwise expressed, it has been said that a rightful interference with the chattels of another cannot constitute a conversion. [Footnotes omitted.]
>
> The principle is reiterated in A. Grubb, ed., The Law of Tort (2002), at para. 11.170:
>
> > No action lies in conversion or trespass to chattels for consensual interferences with goods: the nature of these torts involves *wrongful* interference with goods and an interference that is consented to cannot be wrongful. Consent may be express, as in a contract or agreement for bailment or lease, or it may be implied from the circumstances. [Emphasis in original.]
>
> While *Boma Manufacturing* at para. 31 described conversion as a tort of "strict liability", that only means that it is no defence that the deliberate wrongful act constituting the conversion was committed in all innocence as to the consequences of the act: L. Klar and C Jefferies, *Tort Law*, 6th ed, (Toronto: Thomson Reuters, 2017) at p. 118, fn 404. However, without a wrongful interference with the owner's rights, there is no tort.

34. In this case, under the leases the respondents had the consent of the owner (The Driving Force) to possess the trucks. When the leases expired, The Driving Force treated them as month-to-month leases; implicitly the respondents had continuing consent to possess the trucks on a month-to-month basis. ***

35. To be sufficient to constitute the tort of conversion, any "unlawful act" must somehow deny or negate the possession of the owner, The Driving Force. Merely breaching the lease agreements is not an "unlawful act" for the purpose of the tort of conversion, as the mere failure to make the rental payments does not terminate lawful possession. In this case, the respondents have done nothing with respect to the trucks other than to be in default of their obligations to make payments under the leases. This, the trial judge found, was as a result of their misunderstanding of their rights under those leases.

36. The failure to make lease payments, however, does not render continuing possession of the chattel unlawful for the purposes of the tort of conversion, although it may entitle the lessor to a number of remedies. Nor does the mere possession of the trucks after the expiry of the leases itself make out a sufficient "wrongful act" to constitute the tort of conversion. The failure to return the trucks at the end of the lease, and at the end of the month-to-month arrangement, was ultimately found to be a breach of contract but did not amount to a "wrongful act" for the tort of conversion. The trial reasons err in the analysis at para. 67 that "The conduct which constitutes the conversion is the same conduct which constitutes the breach of contract". ***

41. Defendants have been found liable in conversion in so many and varied fact situations that, as observed in *Kuwait Airways* at para. 39, "framing a precise definition of universal application is well nigh impossible". Despite that, there does not appear to be another reported case where a lessee in default of the covenants in a chattel lease has been found liable in conversion, as well as for breach of the lease. The absence of such a prior case is meaningful. The appellant relies on a number of decisions which recite the basic principles of the law of conversion, but they are all distinguishable on their facts.

42. *Clow v. Gershman Transport*, for example, involved a wrongful seizure. Even the seizure of Clow's truck, however, was not an act of conversion:

> 19. Interference on the basis of wrongful seizure has traditionally been viewed by the common law as an act of trespass for which the defendant may be answerable in damages (*384238*, *supra*, at p 685). Fridman [The Law of Torts in Canada, 3rd ed., (Toronto: Carswell, 1989)], at 96, states:
>
> > "An unlawful distraint, or other wrongful seizure of goods, that deprives the plaintiff of possession without questioning the plaintiff's rights to such goods, may be trespass; it is not conversion."
>
> Later, at the same page, he explains that the distinction between the two is that trespass involves a simple interference with the plaintiff's possession whereas conversion requires the defendant to exercise rights of ownership over the goods.

Wrongful seizures have always been found to be answerable in tort but not necessarily conversion. Not every exercise of control over property, even if it is subsequently held to be unjustified, amounts to a denial of the title of the owner. ***

46. In summary, the reasons under appeal incorrectly concluded that I Spy had converted the trucks owned by The Driving Force. As a general rule, the law of conversion should not be converted into a remedy for breaches of chattel leases, unless the lessee engages in some conduct with respect to the leased chattels that is completely inconsistent with any honest or legitimate assertion of the lessee's rights. In this case, I Spy was liable in contract, but liability in tort was not made out. ***

REFLECTION:

- *Why might there be no universal test for the tort of conversion? What are the tort's essential elements?*
- *Was I Spy's possession and control of Driving Force's trucks at the end of their lease term a legal wrong? Why did it not amount to conversion? Did it amount to trespass to goods?*

8.2.5 Cross-references

- *Miller v. Jackson* [1977] EWCA Civ 6, [8]: §21.1.1.

8.2.6 Further material

- H. Yang, "The Law of Wheel Clamping in New Zealand" (2020) New Zealand L Rev 71.
- J. Goudkamp & Lorenz Mayr, "The Doctrine of Illegality and Interference with Chattels" in A. Dyson, J. Goudkamp and F. Wilmot-Smith (eds), *Defences in Tort* (Oxford: Hart Publishing, 2015).
- S. Shaw, "Conversion of Intangible Property: A Modest, but Principled Extension? A Historical Perspective" (2009) 40 Victoria U Wellington L Rev 419.
- J.D. Fischer, "Misappropriation of Human Eggs and Embryos and the Tort of Conversion: A Relational View" (1998) 32 Loyola of LA L Rev 381.

8.3 Detinue

Law Reform Commission of British Columbia, Wrongful Interference with Goods (Rep. 127, 1992), 10, 16

Detinue (derived from an Old French word[256] meaning "to detain") provides a remedy where a person wrongfully refuses a request to return property. ***

1. Who may sue? A person entitled to the possession of the property (not necessarily the owner of the goods).

2. Who is liable? A person with possession of goods who refuses without qualification a request to return them to the person entitled to possession.

3. What is the wrong? Interference with possession (not damage to the goods, or interference with ownership).

4. What is the remedy? An order for the return of the goods, or an award of damages. *** […continue reading]

8.3.1 Schentag v. Gauthier [1972] CanLII 1205 (SK QB)

Saskatchewan District Court – 1972 CanLII 1205

GEATROS D.C.J.:

1. In this action the plaintiff seeks the return of an electric typewriter which he alleges has been wrongfully detained by the defendant, and damages for detaining the same. The prayer includes an alternative claim for damages for conversion.

2. The material facts are as follows. The plaintiff formerly carried on a plumbing and heating and a construction business out of Esterhazy. These enterprises the plaintiff incorporated into several companies. He personally owned various office equipment and this equipment was made available for the use of the companies.

3. The defendant was employed as a stenographer and typist by one of the plaintiff's companies, Schenco Industries Ltd. In 1968 this company ceased operations. After that the defendant continued in the plaintiff's employ for some three weeks. A short time later Schenco Industries Ltd. filed an assignment in bankruptcy. Donald A. Robinson, a chartered accountant from Regina, was made the trustee in bankruptcy of the estate of Schenco Industries Ltd.

4. When Schenco Industries Ltd. ceased operations the plaintiff allowed the defendant to take to her home the electric typewriter in this action. She had agreed, at the plaintiff's request, to do some typing for him. The defendant had informed the plaintiff that it would be more convenient for her to perform the work at home. ***

6. By letter dated March 24, 1970, forwarded to the defendant by the plaintiff's solicitors, a demand was made for delivery of the typewriter to the plaintiff. Up to the time of the trial of this action such demand has not been complied with.

7. It is of some importance to determine whether this action is in conversion or in detinue so that it can be ascertained what remedies are available to the plaintiff. A concise statement dealing with conversion and detinue is found in the judgment of Diplock, L.J., in *General & Finance Facilities, Ltd. v. Cooks Cars (Romford), Ltd.*, [1963] 2 All E.R. 314. At p. 317 of the report he says:

> There are important distinctions between a cause of action in conversion and a cause of action in detinue. The former is a single wrongful act and the cause of action accrues at the date of the

[256] After the Conquest in 1066 Norman French became the language of the upper classes, government and the administration of justice. Many words introduced then remain part of our legal language.

> conversion; the latter is a continuing cause of action which accrues at the date of the wrongful refusal to deliver up the goods' and continues until delivery up of the goods or judgment in the action for detinue. It is important to keep this distinction clear, for confusion sometimes arises from the historical derivation of the action of conversion from detinue sur bailment and detinue sur trover; of which one result is that the same facts may constitute both detinue and conversion. Demand for delivery up of the chattel was an essential requirement of an action in detinue and detinue lay only when at the time of the demand for delivery up of the chattel made by the person entitled to possession the defendant was either in actual possession of it or was estopped from denying that he was still in possession.

8. and later at p. 318:

> But even where, as in the present case, the chattel is in the actual possession of the defendant at the time of the demand to deliver up possession, so that the plaintiff has alternative causes of action in detinue or conversion based on the refusal to comply with that demand, he has a right to elect which cause of action he will pursue (see *Rosenthal v. Alderton & Sons, Ltd.*, [1946] 1 All E.R. 683 at p. 585; [1946] 1 K.B. 374 at p. 379) and the remedies available to him will differ according to his election.

9. Now, in the instant case it is clear that the plaintiff has elected to pursue his action in detinue as it, in the words of Diplock, L.J., in the *General & Finance Facilities Ltd.* case, "partakes of the nature of an action in rem in which the plaintiff seeks specific restitution of his chattel". Detinue is the proper action to bring if the plaintiff wishes to recover possession of his goods, and not merely their value: *Rosenthal v. Alderton & Sons, Ltd.*, [1946] 1 All E.R. 583, referred to by Diplock, L.J., above.

10. I am satisfied that in the present case there has been a demand and refusal for "a demand and refusal are necessary in order to constitute a cause in action in detinue": *per* Martin, J.A., in *Ball et al. v. Sawyer-Massey Co. Ltd.*, [1929] 4 D.L.R. 323 at p. 326. ***

21. As a consequence, I am of the opinion that the plaintiff had the right of property in the typewriter at the time of the detention. Further, the circumstances under which the plaintiff delivered the typewriter to the defendant entitled him to the immediate possession of it when the demand was made. He had the right to demand the return of the machine at anytime. "… detention is based on a wrongful withholding of the plaintiff's goods": *Beaman v. A.R.T.S., Ltd.*, [1948] 2 All E.R. 89 at p. 92, *per* Denning, J. Accordingly, the plaintiff in my view has a claim in detinue. He is entitled to succeed.

22. The plaintiff seeks the return of the typewriter, damages for its detention and damages for its conversion. Plaintiff's counsel says that the claim of $600 damages for its conversion is intended as a claim in the alternative and that such damages are claimed in the event that the typewriter is not returned. It is alleged for the plaintiff that $600 is the value of the typewriter.

23. In *Mayne v. Kidd*, [1951] 2 D.L.R. 652 at p. 654, an action in detinue, Gordon, J.A., states: "There is always a discretion in the Court as to whether it will order restitution or give damages in lieu thereof. Restitution is never given if the articles or goods detained are ordinary goods in commerce." In *Mayne v. Kidd* the subject-matter was wheat.

24. At p. 319 of *General & Finance Facilities, Ltd. v. Cooks Cars (Romford), Ltd.*, [1963] 2 All E.R. 314, already referred to, Diplock, L.J., says:

> In the result an action in detinue today may result in a judgment in one of three different forms: **(i)** for the value of the chattel as assessed and damages for its detention; or **(ii)** for return of the chattel or recovery of its value as assessed and damages for its detention; or **(iii)** for return of the chattel and damages for its detention. A judgment in the first form is appropriate where the chattel is an ordinary article in commerce, for the court will not normally order specific restitution in such a case, where damages are an adequate remedy.

25. I am of the opinion that the electric typewriter in the present case is not an ordinary article of commerce in the sense contemplated by both Gordon, J.A., and Diplock, L.J., in the two cases cited. It is a personal

possession of the plaintiff and not in its present state an article subject to commerce. It is simply an article that can be sold privately as any other personal possession.

26. As a result I am of the view that I can exercise the discretion stated by Gordon, J.A., in *Mayne v. Kidd*. The plaintiff in effect seeks judgment in the second form stated by Diplock, L.J., above. In the result, there shall be judgment for the plaintiff that the defendant return the I.B.M. electric typewriter in this action to the plaintiff within 15 days from the date judgment is formally entered. In the event the said typewriter is not returned within such time the plaintiff shall recover against the defendant its value. Plaintiff's counsel alleges that such value is $600. However, this was not proven at the trial. Accordingly, should it be required to determine the value of the typewriter the plaintiff shall have leave to apply to have its value assessed. There is also a claim for damages for the detention of the typewriter. No damages have been proven and accordingly none are awarded. ***

REFLECTION:

- *What is the advantage to a plaintiff of making a claim in detinue as opposed to conversion?*

8.3.2 Cross-references

- *Neill v. Vancouver Police Dept.* [2005] BCSC 277, [28]-[30]: §8.4.2.

8.3.3 Further material

- R.N. Nwabueze & P.C. Okorie, "Flexibility of Damages for Conversion and Detinue" (2009) 17 African J International & Comparative L 102.
- N. Querée, "Detinue: Gone but Not Forgotten? *Schwarzschild v. Harrods Ltd*" (2008) 13(2) Art Antiquity & L 203.

8.4 Replevin

Law Reform Commission of British Columbia, The Replevin Act (Rep. 38, 1978), 2, 3

Replevin is a remedy which permits the speedy recovery of personal property that is wrongfully withheld from a person entitled to possession. *** Through a proceeding known as "replevin" a person who claims personal property that is in the possession of another may, in a summary way, obtain possession for himself without a formal adjudication of his right thereto. *** […continue reading]

8.4.1 Law and Equity Act, RSBC 1996

Law and Equity Act, RSBC 1996, c 253, s 57

57. Recovery of property

(1) In an action for the recovery of specific property, other than land, the court may, if it considers it just and on any terms as to security or otherwise it considers just, order the person from whom recovery of the property is claimed to surrender it to the claimant pending the outcome of the action.

(2) If an order is made under subsection (1) and the action is dismissed,

(a) the claimant must

(i) return the property to the person who surrendered it, and

(ii) compensate that person for any loss suffered or damage sustained by that person because of that person's surrender of the property or compliance with another order respecting the property, and

(b) the court may order that any security provided by or on behalf of the claimant under subsection

(1) be applied in payment of the compensation for loss or damage.

8.4.1.1 Other provincial replevin statutes

- Alberta: Alberta Rules of Court, Alta Reg 124/2010 ss 6.48-6.53 (enabling statute: Judicature Act, RSA 2000, c J-2).
- Manitoba: The Court of Queen's Bench Act, CCSM c C280, s 59.
- New Brunswick: Rules of Court, NB Reg 82-73, s 44 (enabling statute: Judicature Act, RSNB 1973, c J-2).
- Newfoundland & Labrador: Rules of the Supreme Court, 1986, SNL 1986, c 42, Sch D, s 27 (enabling statute: Judicature Act, RSNL 1990, c J-4).
- Nova Scotia: Nova Scotia Civil Procedure Rules, Royal Gaz Nov 19, 2008, s 43 (enabling statute: Judicature Act, RSNS 1989, c 240).
- Ontario: Courts of Justice Act, RSO 1990, c C.43, s 104.
- Prince Edward Island: Judicature Act, RSPEI 1988, c J-2.1, s 47.
- Saskatchewan: The Queen's Bench Rules, Sask Gaz December 27, 2013, 2684 ss 6.68-6.73 (enabling statute: The Queen's Bench Act, 1998, SS c Q-1.01).

REFLECTION:

- *In British Columbia, replevin is an interim order for the recovery of property. Why might it be advantageous for a plaintiff to seek such an order prior to the resolution of their legal action?*

8.4.2 Neill v. Vancouver Police Dept. [2005] BCSC 277

British Columbia Supreme Court – 2005 BCSC 277

DILLON J.: ***

3. In the afternoon of January 11, 2004, a Vancouver Police Department officer stopped a SUV vehicle driven by the applicant for having tinted windows contrary to the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318. When he approached the vehicle, he noticed that three of the four occupants of the vehicle did not have their seatbelts fastened. He requested identification from all of the occupants including the passenger wearing a seatbelt. He obtained identification from three of the four occupants, including a valid driver's licence from the applicant. The fourth occupant, a back seat passenger, did not have identification. According to the officer, that passenger gave conflicting information about whether he lived with the applicant, whether his apartment number was 2602 or 3602, and whether he spelt his surname with a "s" or a "z". He said that he was from Mexico. The officer inquired from immigration Canada and was told that there was no record of his entry into Canada. The officer then arrested the passenger for obstruction of justice. The officer ordered all of the occupants out of the vehicle, did a personal search of the arrested passenger, and handcuffed him.

4. The officer then searched the vehicle "in the hopes of finding some identification inside the vehicle". He did not seek the consent of the applicant. He did not obtain a warrant for the search. The officer said that the search was "for identification pursuant to arrest under the *Criminal Code*".

5. When the officer opened the rear centre console of the vehicle, the only console in the vehicle, he observed an open cognac box containing American currency, bundled with elastic bands. He removed the money and approached each occupant and asked whether the money "belonged" to them or if they had any knowledge as to "who the money belonged" to. All, including the applicant, denied that the money belonged to them or that they had knowledge of whom the money belonged to. There had been no *Charter* warning prior to asking these questions.

6. The officer seized the money. He testified that he did so "as found property given that the money did not belong to anyone in the vehicle" and because he was "concerned that it may be…proceeds of crime". He impounded the vehicle and brought the arrested individual to the police station. He was later released without charge upon production of a valid passport. No criminal charges were pursued against anyone. Subsequently, forensic examination established that the fingerprint of the applicant was on the top of the

cognac box that contained the money. The owner of the vehicle was ascertained and was not the applicant/driver. Attempts to locate the owner were unsuccessful.

7. The officer did not immediately complete a report under section 489.1(1) of the *Criminal Code* because he had not charged anyone and did not intend to carry out any further investigation. He did, however, complete such a report on February 10, 2004 after he learned that the applicant wanted the funds returned to him. In that report to a Justice of the Peace, the officer advised that the property was required for purposes of an investigation or preliminary inquiry, trial, or other proceeding. He applied for and obtained a detention order under section 490(1)(b) of the *Criminal Code* on February 17, 2004. No other applicants have laid claim to the funds.

8. The applicant applied for the return of $26,520 in seized funds pursuant to section 490(7) of the *Criminal Code* on May 12, 2004. The applicant alleged that he was in lawful possession of the funds seized on January 11, 2004, that no criminal charges had been laid, that the detention period had expired, and that attempts to obtain return of the funds from police had been unsuccessful. Although the applicant made reference to the validity of the seizure in argument, it was not pursued.

9. Following hearing of the application in the provincial court on July 7, 2004, the judge concluded that the applicant was not in possession of the money when it was seized and that the lawful owner of the money could not be ascertained. He ordered the money forfeited to the Crown pursuant to section 490(9) of the *Criminal Code*. The reasons for judgment concerned whether the applicant had possession of the money. The lawfulness of the seizure was not considered.

Issues

10. The questions before this court are:

> 1. Did the provincial court have jurisdiction under section 490 of the *Criminal Code*?
>
> 2. If the provincial court did not have jurisdiction, should this court exercise its inherent jurisdiction to make the order sought by the applicant?
>
> 3. If the provincial court did not have jurisdiction, how should the applicant proceed aside from a request to exercise the inherent jurisdiction of the court? Should relief be granted in the nature of replevin or detinue? ***

1. Jurisdiction of the provincial court under section 490 of the *Criminal Code* ***

21. There was a seizure in this case. The police officer could not seize beyond the scope of a search for identification related to an arrest for obstruction of justice without reasonable and probable grounds to believe that another offence had been committed. There was no such belief here. The officer had not completed an inquiry concerning the ownership of the money as the statements of the driver and passengers were conclusive neither of ownership nor possession, especially when the owner of the vehicle was not the driver or passenger. There was an aura of privacy within the vehicle such that any seizure by a police officer in such circumstances would constitute a seizure within both the *Charter* and common law meaning of that term. It was obvious that the money belonged to someone other than the police department. There was no legal requirement for anyone to give up the money. The officer took it without consent. It matters not that he could not obtain consent at that moment.

22. The police officer cannot be said to have “found” the money. This would suggest that the officer could be in a better position relying on a common law right to hold that money than he would be when he has seized money without a warrant and beyond the scope of seizure authorized by his own conduct. He is also not a true finder in the lawful sense of that word. A true finder locates some thing in a place where the public has leave or licence or where there is some basis to believe that the thing was lost in the true sense (*Bird v. Fort Frances (Town)*, [1949] O.R. 292, [1949] 2 D.L.R. 791 (Ont. H.C.)). Some thing carefully hidden in a glove box or even abandoned is not lost in the sense of a wallet dropped in the street. The person who put the money in the cognac box in this case put it there deliberately and it was never lost in that sense. The police officer could never have “found” it. He seized the money.

23. The officer put forward the "found" theory to explain his delay in preparing a report under section 489.1 of the *Criminal Code*. However, this position is inconsistent with the section 489.1 report in which the officer stated that the money was required for evidence or investigation. In fact, he never believed that the money was required as material evidence for any crime or continuing investigation. His statement in his report to the justice of the peace to that effect was without foundation and could only have been intended to frustrate the claim of the applicant.

24. The provincial court did not have jurisdiction under section 490 of the *Criminal Code* or at common law to deal with this matter. Accordingly, the order of the judge for forfeiture is vacated.

2. Should this court exercise its inherent jurisdiction to order return of the monies? ***

26. The money should be returned to its "rightful possessor" (*Lal v. Vancouver (City)*, [1997] B.C.J. No. 1677 (B.C. S.C.) at para. 19). The applicant must prove that he was in possession at the time the money was seized (*R. v. Mac* (1995), 97 C.C.C. (3d) 115, 80 O.A.C. 26 (Ont. C.A.) at para. 17). As against the respondent, the applicant has a superior right of possession. The police department does not have a common law right to take a private citizen's property (*R. v. MacLeod*, 2005 MBQB 15 (Man. Q.B.) at para. 39). The attempted claim as a "finder" is fiction. The police department had no statutory authority for forfeiture.

27. The applicant, the driver of the vehicle, had an expectation of privacy within the vehicle. The money was found in a container that had his fingerprint on the cover. The container was located in a console that was within the reach of the driver and there was no other console in the vehicle. From these facts, control to the driver/applicant can be inferred (see *R. v. Lepage* (1995), 95 C.C.C. (3d) 385 (S.C.C.) at para. 31-32). The applicant's statement that he did not know who the money belonged to does not alter the fact of possession (*R. v. Mac*, *supra*, at para. 18). None of the others in the vehicle have laid claim to the money. In these circumstances, the applicant is the rightful possessor and is entitled to the return of the money.

3. Should relief be granted in replevin or detinue?

28. In addition to the inherent jurisdiction of the court to deal with seized property, McLaughlin J. stated in *Raponi* at para. 36, that the proper procedure to obtain an order for the return of monies was to bring an application for replevin or any other viable remedy. *Raponi* came from Alberta where final orders for return of property based upon an application in replevin are still available (*Alberta Rules of Court*, Alta. Reg. 390/68, Rules 427, 428, 429, and 436).

29. In British Columbia, replevin is an interim order only for the recovery of property, the *Replevin Act*, R.S.B.C. 1960, c. 339 having been repealed in 1979 (*Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 57; *Rules of Court*, R.46(4); see also Law Reform Commission of British Columbia, *Report on the Replevin Act*, LRC 38, 1978). A final order for the return of specific property must be framed in detinue in this province. Any improper retention of goods is actionable in detinue. The elements of detinue are: the property is specific personal property, the plaintiff has a possessory interest in the property, and the defendant has refused to return the property (Lewis and Klar, *Remedies in Tort*, (Toronto: Carswell) 1987 at para. 46).

30. All elements are present in this case. While the application did not conform to the Rules of Court for final orders, the respondents did not take issue with this and I am inclined to relieve from any non-compliance with the Rules pursuant to Rule 1(11). ***

32. The police department is ordered to return the monies seized, $U.S. 26,520, to the applicant forthwith. ***

REFLECTION:

- *Why was Neill entitled to claim back from the police the seized bundled cash despite having disclaimed ownership of it? Was this case a modern application of the principle in Armory v. Delamirie (§8.2.2)?*

8.4.3 Further material

- M.B. Frank, "Exploring the Writ of Replevin as a Pre-Judgement Remedy for Protecting Exotic Animals"

(2021) 32 Duke Environmental L & Policy Forum 167.

- C. Leonetti, "Detinue and Replevin: Arresting Children to Enforce Private Parenting Orders in New Zealand Family Court" (2023) 30 U Miami International & Comparative L Rev 74.

8.5 Recaption

8.5.1 Slater v. Attorney-General (No. 1) [2006] NZHC 308

New Zealand High Court – [2006] NZHC 308

✗REF: §9.3.3, §24.2.3

KEANE J.:

1. On 16 May 2002 police officers assisted a car rental company, Matthew Rentals Limited, the owner of a Nissan Bluebird car, to repossess it after it was found immobile, partly over a driveway, in Dawson Road, Otara. The car was damaged and under the hire agreement MRL was entitled to immediate possession.

2. The car was then occupied by Mr Slater, asleep in the front passenger's seat, and by Mr Wirehana, asleep in the back, as it had been in excess of an hour earlier when the police first inspected it. When wakened and asked to leave the car so that MRL could resume possession they did not respond. They were passively, if not actively, resistant. When Mr Slater's leg was pulled he kicked out. To abstract them without having to enter the car one of the officers sprayed between them, as he said, a short burst of OC spray.

3. Mr Slater, in contrast to Mr Wirehana, responded, as the police contend, aggressively. Outside the car Mr Slater was subdued, handcuffed, and arrested for disorderly behaviour, but held for a breach of the peace. At the Papakura Police Station he was first detained in a detoxification cell, his arms and legs tied together with plastic ties. He was then moved to a cell with a bed for the night. In the early morning he was released without charge.

4. In June 2005 Mr Slater's claim in the District Court for damages for battery, false imprisonment and related breaches of ss 21 and 22 of the Bill of Rights, relying either on his own version of events or that conceded by the police, was dismissed outright. The Judge concluded that the police, as agents for MRL, and possessing all its rights as owner, were entitled at common law to use reasonable force to repossess the car, and in the exercise of their usual powers to respond to Mr Slater's response; and that the force they used was no more than was reasonable. Mr Slater was afforded his rights and he was not unlawfully detained.

5. On this appeal there is no challenge to the Judge's acceptance of the police account. But even on that account, it is contended, Mr Slater ought to have succeeded in his action. The police, acting as MRL's agent, and not in the ordinary exercise of their duty, had no right to use force, let alone pepper spray. Nor, once Mr Slater reacted, even overreacted, were they entitled to invoke their usual powers. In subduing him they subjected him to battery and he was arrested and detained unlawfully. ***

Scope of common law defence

26. The right of recaption, as *Blades v. Higgs* expresses it, may well deserve to be revisited in New Zealand. In *De Lambert v. Ongley* Sim J applied the principle it pronounces but, as he said, it was controversial even when first pronounced. He saw it as clear authority, because he thought it tacitly approved on appeal by the House of Lords. It may have been adhered to since, but the cases have been infrequent and are all, Toyota apart, expressions of a different age.

27. In *Toyota* a strong majority of the New South Wales Court of Appeal, Sheller JA with whom Meagher JA agreed, preferred instead to restrict *Blades v. Higgs* to the case of outright trespass. It may be, as Handley JA said in minority, in his exhaustive review, and as the Attorney General says on this appeal, that this restriction rests only uncertainly on such authorities as there are. But the more pertinent question is, I

think, whether the explicit policy underpinning *Blades v. Higgs* enjoys, or ought to enjoy, currency any longer.

28. In *Blades v. Higgs* the Court of Common Pleas held that the right of forcible recaption, even where the one in possession had come by it without trespass, was a sensible and commensurate resort to self help. It held, at 637:

> If the owner was compellable by law to seek redress by action for a violation of his right of property, the remedy would be often worse than the mischief, and the law would aggravate the injury instead of redressing it.

29. In *Toyota*, by contrast, Sheller JA, with whom Meagher JA agreed, preferred instead, at 131-133, relying on Professor Fleming's analysis, to categorise forcible recaption as a privilege and not a right. He described *Blades v. Higgs* as unconvincing, as unsupported by precedent, and at 133 as encouraging resort to force in any dispute as to possession:

> It … for no satisfactory reason encourages forcible, perhaps violent redress where none is required … It is quite different in kind from the case where a person takes from its owner by a trespass a chattel that that person knows he or she is not entitled to.

30. Sheller JA and Meagher JA considered that in such a case there should be resort to law; and in that echoed what Nolan LJ had to say in *Lloyd v. DPP* [1992] 1 All ER 984, a car clamping case in which the English Court of Appeal concluded that, even if the clamping were unlawful, that did not entitle the car's owner to remove the clamp. Nolan LJ said at 922:

> In my judgment the suggestion that there was a lawful excuse for (the defendant's) action is wholly untenable. At worst what he had suffered was a small wrong. The remedy for such wrong is available in the civil courts. That is what they are there for. Self help involving the use of force can only be contemplated where there is no reasonable alternative.

31. If this issue had arisen in an action begun in this Court that is the policy I would apply: I would prefer the *Toyota* principle to that in *Blades v. Higgs*. But this is an appeal and the issue is whether the Judge in this respect made any error. He did not. His decision was founded on *De Lambert v. Ongley*, which will continue to state the law in New Zealand until revisited by a Court exercising equal or higher jurisdiction. On this appeal it is not for me to reorder the terrain.

Unjustifiable force

32. The Judge's conclusion that the police acted reasonably throughout rests mostly on inferences from his findings of credibility. But on the first and critical issue, whether the police used reasonable force to abstract Mr Slater from the car, even on the Judge's own finding, there is a severable issue of law as well as fact, raised squarely by the agreed documentary evidence, which is capable of being resolved on this appeal.

33. That issue is whether, when the police used OC spray, they were within the scope of their MRL agency or their usual authority. For, as Donaldson LJ said in *Lindley v. Rutter* [1981] QB 128 at 132:

> Police constables of all ranks derive their authority from the law and only from the law. If they exceed that authority, however slightly, technically they cease to be acting in the execution of their duty and have no more rights than any other citizen.

34. OC spray, as the *Police General Instructions* (para A269(1)), produced in the District Court confirm, is a restricted weapon: para 8, *Arms (Restricted Weapons and Specially Dangerous Airguns) Order 1984*. Possession of it can be illegal: s 202A of the *Crimes Act 1961*. And these strictures are scarcely surprising. OC spray, according to the Instruction, para A268(1):

> is a tactical tool for use by frontline officers for the resolution of violent incidents with minimum risk of harm to police, the public and the person involved.

The effect on the person sprayed is palpable and can last for 10 to 45 minutes. OC spray, as para A268(3)

says, causes:

> blood vessels to dilate rapidly, bronchial passages to constrict, mucus membranes to secrete freely and eyes to burn and close tightly. ***

37. Typically, it is envisaged in para A269(3), OC spray will be used in the exercise of statutory powers, ranging from arrest (ss 31, 32, 39 and 40), to preventing escape or rescue (s 41), or in self defence. Nor is the fact that the power exercised is statutory of itself enough. OC spray may only be deployed, under para A270(1), most typically when those powers are being exercised, to enable officers to:

> • defend themselves or others if they fear physical injury to themselves or others, and they cannot reasonably protect themselves, or others less forcefully, or
>
> • arrest an offender if they believe on reasonable grounds that the offender poses a threat of physical injury and the arrest cannot be effected less forcefully,

38. When the police were intent on taking possession of the car for MRL neither applied. Mr Slater and Mr Wirehana, in the car, presented no immediate threat. The spray was used pre-emptively, because the officers wished to enter the car. Nor at that point were they intent on arresting Mr Slater. He was arrested only after he reacted to the use of the spray. Instead, at the time the spray was deployed, it was in a context expressly prohibited by para A272(2): 'against people offering passive resistance'.

39. The result must be, even on the facts the Attorney-General concedes and the Judge found, that the police in abstracting Mr Slater from the car by use of spray, acted beyond their authority, however it is understood, and beyond the scope of the common law defence even on its widest reading.

Conclusions

40. The police may well have been right, when Mr Matthew confirmed at the roadside that MRL wished to exercise its right to repossess the car, to ensure that this happened without a breach of the peace. What right Mr Slater and Mr Wirehana had to be in the car, or to remain there, was unclear and both were intoxicated and uncooperative. The police were also right to be concerned about their own safety.

41. In repossessing the car for MRL the police had still to act within the confines of their authority, whether as MRL's agent or in the execution of their duty, and by using the spray they used force beyond the scope of both. They failed to adhere to their own General Instructions. That use of force was battery. And, in reacting, Mr Slater cannot then be understood to have been disorderly or to have caused a breach of the peace. His arrest must then have been unlawful and any subsequent restraint equally so.

42. The judgment in the District Court must therefore be set aside. Counsel are to confer as to damages, and I am to be advised by joint memorandum within ten days of the issue of this decision whether they can be agreed. If they cannot I will fix them. ***

REFLECTION:

- *Is this judgment consistent with Binsaris v. Northern Territory (§2.2.4) and Walker v. Metropolitan Police Comm'r (§2.4.4)? Does it demonstrate the Diceyan principle of equality under ordinary law (§1.1.1)?*
- *Prof. Sinel observes that "The fundamental question raised by self-help behaviour like reception is what justifies the self-authored and apparently self-authorized exercise of force against another."[257] When, if ever, should the law permit people to use physical force or threats in order to effect the return of their property?*

8.5.2 Further material

- W. Blackburn, "The Right of Reception of Chattels by Force" (1945) 34 Kentucky LJ 65.

[257] Z. Sinel, "De-Ciphering Self-Help" (2017) 67 U Toronto LJ 31, 47, continuing at 65: "We are left with the following definition of self-help: self-help remedies are privileges borne of wrongs that allow the wronged party to act against the wrongdoer in ways that, absent the fact of the wrong, would be legally impermissible and, moreover, are actions that are not generally available for private actors to undertake. …"

9 REMEDIES: DAMAGES AND INJUNCTIONS

✗**REF: §20**

9.1 Nominal damages

OAG Glossary of Terms: Token (i.e. small) damages awarded to redress a violation of a legal right that the law deems necessary to protect, even in the absence of actual harm.

REFLECTION:
- *Why might a plaintiff sue when the only damages likely to be awarded are nominal?*
- *In what circumstances might a nominal damages award be, nor not be, a trivial amount?*

9.1.1 Walker v. Metropolitan Police Comm'r [2014] EWCA Civ 897

✗**REF: §2.2.3, §2.4.4**

TOMLINSON L.J. (RIMER AND RIX L.JJ. concurring):

46. *** Mr Walker's conduct attracts no sympathy but that is of course often the way when a fundamental constitutional principle is at stake. The detention was indeed trivial, but that can and should be reflected in the measure of damages and does not render lawful that which was unlawful. The judge's assessment of £5.00 as the appropriate figure was I think generous to Mr Walker, but there is no appeal against that assessment. ***

9.1.2 Gambriell v. Caparelli [1974] CanLII 679 (ON CC)

✗**REF: §6.5.1**

CARTER CO.CT.J.: ***

28. I am of the opinion that the plaintiff was the author of his own misfortune. On the evidence, the plaintiff struck the first blow, and in the course of the fight, the Caparelli boy was backing away from the plaintiff, and the plaintiff could well have desisted. Under all these circumstances, even had I found for the plaintiff, I would not have awarded damages in excess of $1.

9.1.3 Fitzpatrick v. Orwin, Squires & Squires [2012] ONSC 3492

✗**REF: §3.2.3, §7.1.3, §9.2.3, §9.3.5, §9.5.6, §9.8.2.3, §10.11.2**

STINSON J.: ***

159. In *Hudson's Bay Co. v. White*, [1997] O.J. No. 307 (Ont. Gen. Div.), rev'd on other grounds [1998] O.J. No. 2383 (Ont. Div. Ct.) (QL), at para. 15, Lederman J. held that general damages for trespass may only be awarded where there is evidence that a loss was suffered. In contrast, nominal or punitive damages for this tort may be awarded without proof of loss, since this tort is actionable *per se*. These reasons were adopted by Harvison-Young J. of the Ontario Superior Court in *Cantera v. Eller*, [2007] O.J. No. 1899 (Ont. S.C.J.), aff'd 2008 ONCA 876 (Ont. C.A.), at para.63.

160. I also adopt Lederman J.'s reasoning and note that the Squires have not provided any evidence of actual losses suffered as a result of Mr. Fitzpatrick's trespass, apart from those for which they have been compensated for the tort of intentional infliction of mental distress. As such, they can only be awarded nominal damages. *** In *Freitas v. Defraga*, [2006] O.J. No. 2152 (S.C.), Perell J. awarded $2,500 in damages for trespass where a neighbour continuously trespassed onto the abutting driveway of another neighbour. The facts in *Freitas* also demonstrate several acts of neighbourly misconduct and animosity as occurred in the current case. ***

161. In both *Freitas*, *supra*, and the current case, the trespass occurred to facilitate further acts of neighbourly misconduct. It did not, in itself, amount to any provable damage, save for the damage to the security camera, for which they have adequately recompensed in para. 158, above. Taking the $2,500 awarded in *Freitas* as a baseline and accounting for inflation, I award the Squires jointly the sum of $2,800 in damages for the trespass committed by Mr. Fitzpatrick. ***

9.1.4 Cross-references

- *Rees v. Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [8]: §19.10.1.1.

9.1.5 Further material

- M. Douglas, "What Is the Value of Freedom? Nominal Damages for False Imprisonment" (2013) 21 Tort L Rev 117.
- S. Blanchard, "Nominal Damages as Vindication" (2022) 30 George Mason L Rev 228.

9.2 Compensatory damages—pecuniary (special)

OAG Glossary of Terms: Damages intended to compensate a plaintiff for a quantifiable monetary loss. Examples of such losses include: lost earnings, medical bills, and repair costs.

REFLECTION:

- *How does the doctrine of mitigation (§20.2) constrain the scope of special damages recoverable in tort?*

9.2.1 Robertson v. Stang [1997] CanLII 2122 (BC SC)

✗**REF: §8.2.3**

PARRETT J.: ***

98. The general rule is that damages are assessed as of the time of loss: S.M. Waddams, *The Law of Damages*, 2nd ed. (Toronto: Canada Law Book Inc., 1995) at 1-76.1-1-78. The measure of damages is determined according to the rule that the plaintiff is entitled to damages in an amount that will put her in the position she would have been in had her goods not been stolen: *Buchanan v. Cook* (Sask. C.A.) at 639; *Nan v. Black Pine Manufacturing Ltd.* (B.C. C.A.); *Tremear v. Park Town Motor Hotels Ltd.* (Sask. Q.B.).

99. In determining the appropriate amount for a damage award where property has been damaged, destroyed or lost, the courts have considered various values which could be assigned to the property, for instance, market value, replacement value or actual value. The plaintiff here submits that damages should be determined according to the "actual value" test, citing *Bendera v. C.E. & V. Holdings* (B.C. C.A.), *Buchanen*, *supra*, and various American authorities. ***

103. The plaintiff also argued that where replacement value exceeds the price paid, the court may take into account the reasonableness of the plaintiff's desire to replace the property lost, citing *Nan v. Black Pine Manufacturing Ltd.*, *supra*. This decision would appear to weigh against the plaintiff, as any desire to replace the property lost, for which she had no use, would not be reasonable. Moreover, I do not understand the plaintiff to have testified that she wants to replace the lost property.

104. In my opinion, the following factors are relevant to a determination of the actual value of the plaintiff's goods stolen from the storage areas:

> (a) The amount paid for the goods by the plaintiff at the time of purchase. The evidence, including diary entries, credit card statements, the accountant's summary provided by the plaintiff, and receipts, establishes that the plaintiff paid $150,335.42 for the goods in the storage areas. From this must be subtracted $10,733.37, the amount paid for goods remaining in the storage rooms after the theft. This leaves a total value of $139,603.05. In addition, the plaintiff has already recovered $40,000 pursuant to her insurance policy.

(b) The retail value of the goods at the time they were purchased by the plaintiff. This amounts to $205,946.60, less the amounts deducted in (a) (adjusting the amount for the value of items remaining to reflect retail value), which equals approximately $142,000.

(c) The cost of replacing the goods. Included in this factor is an amount to compensate for inflation and an additional amount which would have to be paid on account of the Goods and Services Tax, which was not in effect at the time the plaintiff purchased the goods. The amounts of GST payable on the amounts calculated in (a) and (b) are $6,972.21 and $9,940,00 respectively.

(d) The estimated market value of the items at the time of loss. This factor includes an allowance for:

(i) The increase in value of some items, notably jewelry and similar goods. Approximately 15-25% of the items purchased by the plaintiff were jewelry or other items which might appreciate. Another 5-15% of miscellaneous items may have appreciated, or on average at least held their value.

(ii) Depreciation in the value of many items, such as clothing, which, although they may never have been used, could not be resold for anywhere near the price originally paid. ***

105. Having considered each of the above factors, and doing the best I can to reach reasonable conclusions based on those factors, I find that an appropriate value for the goods taken from the storage areas is $75,000. While I recognize that this is at best an approximate estimate of the value of the goods, the court must do the best it can with the available evidence. ***

9.2.2 Wilson v. New Brighton Panelbeaters Ltd [1989] 1 NZLR 74 (NZ HC)

✗**REF: §6.2.3.1, §8.1.1, §8.2.1**

TIPPING J.: ***

30. *** It is sometimes said that in conversion the plaintiff is entitled to call on the defendant to “purchase” the chattel converted, that is to say the plaintiff is entitled by way of damages in conversion to the value of the chattel at the time it was converted. It is not necessary to discuss this aspect any further because on any view of the case, whether in trespass or in conversion the chattel has been lost to the appellant and he is entitled to recover from the respondent as damages the value of his property as at the time of the tort. ***

34. The object of damages is to give fair compensation to the appellant for the loss of the vehicle. The damages must be fair to both parties. It is impossible to be precise but in all the circumstances I consider that the sum of $1000 will do justice. The appellant’s witness was prepared to put a specific figure on the car. The respondent’s witness, while disputing the plaintiff’s figure, did not suggest any specific figure in evidence but implicitly acknowledged that the vehicle did have some value, albeit as a wreck. It is clear enough that the vehicle was not in a roadworthy condition at the time it was towed away. The appellant’s evidence suggested that he was going to take steps to put it into a roadworthy condition. It may accordingly have had some potential value to him greater than the cost of repairs. Mr Brodie invited me, in the light of the circumstances and the respondent’s conduct, to lean, if at all, towards the plaintiff in my assessment of quantum. I do not think that the Court should lean either way. All in all I am satisfied that the sum of $1000 will do justice to both parties. ***

36. The appeal is accordingly allowed. I order that judgment be entered in the District Court for the appellant (plaintiff below) for the sum of $1000, together with interest ***. ***

9.2.3 Fitzpatrick v. Orwin, Squires & Squires [2012] ONSC 3492

✗**REF: §3.2.3, §7.1.3, §9.1.3, §9.3.5, §9.5.6, §9.8.2.3, §10.11.2**

STINSON J.: ***

157. *** [T]he Squires are entitled to recover special damages relating to expenses they incurred as a consequence of [Mr. Fitzpatrick's] conduct. Their documented costs included the following:

(a) Bill for abortive 2006 survey: $265.00

(b) Cost for materials for new fence: $821.47

(c) Bill for April 2008 survey: $1,509.38

(d) Bill from movers: $1,575.00

(e) Real estate commission on sale of 685 Victory: $17,587.50 (5% of $335,000 = $16,750 +5% GST of $837.50 = $17,587.50)

Total documented special damages: $21,758.35

158. In addition, Mr. Squires testified that they paid $5,000 in cash for additional security cameras and lights for the house at 685 Victory due to the impact of Mr. Fitzpatrick's conduct, in an effort to feel safe there. I therefore quantify the Squires' special damages at $26,758.35. That sum shall be payable to them jointly. ***

9.2.4 ES v. Shillington [2021] ABQB 739

✗**REF: §4.1.2.1, §9.3.9, §9.4.6, §9.5.8, §9.8.2.5, §10.5.2**

INGLIS J.: ***

114. The Plaintiff also made a special damages claim, largely related to her journey from New Brunswick to Alberta and the ongoing medical expenses she incurs. She provided receipts for medical costs, childcare expenses (limited to the time period where she transitioned back to Alberta), necessities of life, having left her home urgently. She has made a claim for her schooling costs to support a claim for loss of future opportunity, given that she is only able to attend school part time due to her treatment schedule and ongoing mental illnesses. While these costs were well-outlined by the Plaintiff, the direct causation link to the torts was not fully developed, particularly related to the delays in her schooling and potential future loss of income. As such, only a portion of the special damages claimed will be ordered: $30,000. ***

9.2.5 Further material

- N. Sullivan & W. Perera, "High Court Rules on Hire Car Claims: *Arsalan v. Rixon; Nguyen v. Cassim*" Moray & Agnew (Dec 2021).

9.3 Compensatory damages—non-pecuniary (general)

OAG Glossary of Terms: Damages for non-monetary losses suffered by a plaintiff. These damages are not capable of exact quantification. Examples of such losses suffered include pain, suffering, and disfigurement.

REFLECTION:

- *What weight should courts give to precedent, the plaintiff's evidence, expert evidence, actuarial tables, and judgement in quantifying general damages in cases that come before them?*
- *Are the Stapley factors comprehensive? What else should influence the assessment of general damages?*
- *Who is better placed to quantify an award of general damages: a judge or a jury?*
- *Is the inflation-adjusted cap on general damages adopted by the Supreme Court of Canada in the 1978 "trilogy" of cases justified in your view?[258] Who is likely to benefit from this cap? What sorts of cases should be exempted from this cap?*

[258] See L. Bau, "The History and Treatment of Damages in Canada" Lindsay LLP (Sep 18, 2014).

9.3.1 McCliggot v. Elliott [2022] BCCA 315

British Columbia Court of Appeal – 2022 BCCA 315

✗REF: §20.1.1

DICKSON J.A. (MARCHAND J.A. concurring):

43. The purpose of non-pecuniary damages is to provide solace and to make life more endurable for an injured plaintiff. To the extent possible, non-pecuniary damages are intended to compensate the plaintiff for pain and suffering caused by their injuries and the consequences of those injuries, direct and indirect, including the loss of amenities and enjoyment of life: *Moskaleva* [*v. Laurie*, 2009 BCCA 260] at para. 95; *Boyd v. Harris*, 2004 BCCA 146 at para. 29. That said, it has long been recognized that "there is no medium of exchange for happiness" and putting a money value on pain and suffering is impossible: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 31. It has also been recognized that "[t]he monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one": *Dilello* at para. 32, citing *Andrews v. Grand & Toy* Alberta, Ltd., [1978] 2 S.C.R. 229 (SCC).

44. As Justice Dickson (as he then was) explained in *Lindal v. Lindal*, [1981] 2 S.C.R. 629, the amount of an award for non-pecuniary damages is determined by a functional approach that does not depend exclusively on the gravity of the injury. Rather, it depends additionally on the ability of the award "to ameliorate the condition of the victim considering his or her particular situation". It follows that the need for solace does not necessarily correlate with the seriousness of an injury. When assessing non-pecuniary damages, the role of the trier of fact is to gain a full appreciation of the plaintiff's overall loss and determine an amount of compensation appropriate to the circumstances of that particular plaintiff: *Lindal*, at 637.

45. In the trilogy of cases decided in 1978, the Supreme Court of Canada imposed a rough upper limit of $100,000 as the amount to be awarded for non-pecuniary damages in cases involving catastrophic injuries: *Andrews*; *Arnold v. Teno*, [1978] 2 S.C.R. 287 (SCC); *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267 (SCC). A rule of law and policy, the legal ceiling acts as a "governor on an engine" and, adjusted for inflation, to limit what could otherwise be an unlimited sum without influencing the assessment of non-pecuniary damages before the limit is reached. ***

46. Because the specific circumstances of each case govern, non-pecuniary damage awards are by their nature highly variable and not amenable to a tariff: *Lindal*, at 637. However, as Chief Justice Finch observed in *Dilello*, the effect of the upper limit has filtered down to non-pecuniary damage awards generally, which has resulted in a rough tariff system in cases involving judge-alone awards. ***

47. In *Stapley* [*v. Hejslet*, 2006 BCCA 34], Justice Kirkpatrick provided a list of common factors that influence an award of non-pecuniary damages. Now commonly referred to as the "*Stapley* factors", she described those factors in this way:

> 46. The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life; ***
>
> (g) impairment of family, marital and social relationships;

(h) impairment of physical and mental abilities;

(i) loss of lifestyle; and

(j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, 2005 BCCA 54). ***

GROBERMAN J.A. (dissenting):

123. I have had the opportunity to read the majority reasons of my colleague, Justice Dickson. Those reasons set out the law applicable to the review of jury awards of non-pecuniary damages with admirable clarity. *** For the most part, I agree with my colleague's analysis. ***

9.3.2 Hill v. Church of Scientology of Toronto [1995] CanLII 59 (SCC)

✗**REF: §5.1.3, §9.4.2, §9.5.3, §18.2.3.2, §24.1.1**

CORY J. (LA FOREST, GONTHIER, MCLACHLIN, IACOBUCCI, MAJOR JJ. concurring): ***

164. It has long been held that general damages in defamation cases are presumed from the very publication of the false statement and are awarded at large. See *Ley v. Hamilton* (1935), 153 L.T. 384 (H.L.), at p. 386. They are, as stated, peculiarly within the province of the jury. These are sound principles that should be followed.

165. The consequences which flow from the publication of an injurious false statement are invidious. The television report of the news conference on the steps of Osgoode Hall must have had a lasting and significant effect on all who saw it. They witnessed a prominent lawyer accusing another lawyer of criminal contempt in a setting synonymous with legal affairs and the courts of the province. It will be extremely difficult to correct the impression left with viewers that Casey Hill must have been guilty of unethical and illegal conduct.

166. The written words emanating from the news conference must have had an equally devastating impact. *** The jury as representative of that community should be free to make an assessment of damages which will provide the plaintiff with a sum of money that clearly demonstrates to the community the vindication of the plaintiff's reputation.

(a) Should a Cap be Imposed on Damages in Defamation Cases?

167. The appellants contend that there should be a cap placed on general damages in defamation cases just as was done in the personal injury context. In the so-called "trilogy" of *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, *Arnold v. Teno*, [1978] 2 S.C.R. 287, and *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267, it was held that a plaintiff claiming non-pecuniary damages for personal injuries should not recover more than $100,000.

168. In my view, there should not be a cap placed on damages for defamation. First, the injury suffered by a plaintiff as a result of injurious false statements is entirely different from the non-pecuniary damages suffered by a plaintiff in a personal injury case. In the latter case, the plaintiff is compensated for every aspect of the injury suffered: past loss of income and estimated future loss of income, past medical care and estimated cost of future medical care, as well as non-pecuniary damages. Second, at the time the cap was placed on non-pecuniary damages, their assessment had become a very real problem for the courts and for society as a whole. The damages awarded were varying tremendously not only between the provinces but also between different districts of a province. Perhaps as a result of motor vehicle accidents, the problem arose in the courts every day of every week. The size and disparity of assessments was affecting insurance rates and, thus, the cost of operating motor vehicles and, indeed, businesses of all kinds throughout the land. In those circumstances, for that one aspect of recovery, it was appropriate to set a cap.

169. A very different situation is presented with respect to libel actions. In these cases, special damages

for pecuniary loss are rarely claimed and often exceedingly difficult to prove. Rather, the whole basis for recovery for loss of reputation usually lies in the general damages award. Further, a review of the damage awards over the past nine years reveals no pressing social concern similar to that which confronted the courts at the time the trilogy was decided. ***

(c) Application of Principles to the Facts Established in this Case

177. *** Our whole system of administration of justice depends upon counsel's reputation for integrity. Anything that leads to the tarnishing of a professional reputation can be disastrous for a lawyer. It matters not that subsequent to the publication of the libel, Casey Hill received promotions, was elected a bencher and eventually appointed a trial judge in the General Division of the Court of Ontario. As a lawyer, Hill would have no way of knowing what members of the public, colleagues, other lawyers and judges may have been affected by the dramatic presentation of the allegation that he had been instrumental in breaching an order of the court and that he was guilty of criminal contempt. ***

184. In considering and applying the factors pertaining to general damages in this case it will be remembered that the reports in the press were widely circulated and the television broadcast had a wide coverage. The setting and the persons involved gave the coverage an aura of credibility and significance that must have influenced all who saw and read the accounts. The insidious harm of the orchestrated libel was indeed spread widely throughout the community.

185. The misconduct of the appellants continued after the first publication. ***

186. When all these facts are taken into account there is no question that the award of $300,000 by way of general damages was justified in this case. ***

9.3.3 Slater v. Attorney-General (No. 2) [2006] NZHC 979

New Zealand High Court – [2006] NZHC 979

✗**REF: §8.5.1, §24.2.3**

KEANE J.: ***

5. The purpose of an award of damages for unlawful arrest and false imprisonment, and any related use of force, is to vindicate the right infringed; as Scott LJ said in 1944 'to give reality to the protection afforded by the law': *Dumbell v. Roberts* [1944] 1 All ER 326; *Blundell v. Attorney General* [1968] NZLR 341, CA, 341, McCarthy J. And what Scott LJ then said bears repeating:

> Personal freedom depends upon the enforcement of personal rights; and the primary personal right, apart from habeas corpus, is the common law right of action for damages for trespass to the person, which is called 'false imprisonment' … a trespass which has involved interference with personal freedom. By the common law there is no fixed measure of damages … the more high handed and less reasonable the detention is, the larger may be the damages; and, conversely, the more nearly reasonable the defendant may have acted … the smaller will be the proper assessment.

6. That assessment embraces the extent to which the one whose rights were infringed contributed. If he or she acted unreasonably, provocatively or aggressively and the police, on the instant, made an error of judgment, that can result in any award of damages being reduced even to a nominal award. ***

9. But everything depends on the case. Even a short detention can found a much higher award when aggravated. In *Niao* Randerson J awarded $17,500 damages, where the time detained was one—two hours, but aggravated by police conduct afterwards. ***

14. Mr Slater was held for in excess of seven hours, and that is primary. Counterbalancing that, the police acted in good faith. Their want of authority, though critical, was momentary. Mr Slater, by overreacting aggressively in contrast to Mr Wirehana, contributed to his own arrest and detention. He was subjected, as

the Judge found, to no more than reasonable restraint. Mr Slater can only then, I consider, be entitled to damages in tort, compensating him for the time he was held in custody. ***

15. Mr Slater's claim for damages as high as $20,000 is overstated; as overstated as the Attorney General's response, $3,000, relying on a *Thompson* calculation without starting or end points, is understated. Mr Slater will have a compensatory award of $5,000 damages; an award that would serve also, if public law damages were awarded, to vindicate his s 22 right. ***

9.3.4 Gokey v. Usher & Parsons [2023] BCSC 1312

✗**REF: §2.2.1, §2.3.3, §4.2.3, §5.2.6, §7.1.2, §9.4.3, §9.5.4, §9.8.2.1, §10.2.1, §20.8.1, §21.1.3**

PUNNETT J.: *

Damages for Assault and Battery

275. The defendants submit the damages suffered by Mr. Usher from the August 15, 2015 assault were minor. They seek general damages of $10,000. ***

276. In *Mittenen* [*v. Dudley*, 2015 BCSC 2247], Verhoeven J. awarded damages of $17,500 for a violent attack with some "significant persistent injuries, mainly in the psychological realm": para. 79.

277. Mr. Usher stated he had a small mark behind his ear but was not aware of any other bruising. He did not testify to any further injuries.

278. In my view, general damages of $2,500 for the assault and battery are appropriate. ***

Damages for Trespass on December 19, 2017 and January 2022

280. The defendants seek damages of $20,000 for the December 19, 2017 trespass into their home. ***

282. As noted, I am satisfied that Mr. Gokey trespassed by entering the home of the defendants without permission.

283. As for damages, in *Gibson* [*v. Sun*, 2018 BCSC 1277], the defendant had entered onto the outside land of the plaintiffs at various times to either move a fireplace and barbeque and/or to place boxwood hedges, and to remove fence posts or landscaping material. Nominal damages of $500 for each of those acts of trespass were awarded. Justice Abrioux stated:

> 112. Damages in trespass and nuisance are, by their nature, contextually driven. Where a technical trespass is committed, such as an unintentional encroachment, damages may be nominal only: *Wasserman v. Hall*, 2009 BCSC 1318 at para. 90. ***

284. Here, the trespass involved opening the door to their home and depositing an envelope on the floor inside the home. It appears that Mr. Gokey's entry was limited to that brief act. I do not accept the Mr. Gokey had permission to enter. It was not inadvertent or simply a technical entry. It was entry to the defendants' home at a time when the plaintiff Mr. Gokey was well aware they were not communicating and that their relationship was hostile and difficult. His act of entry was not bona fides (*Webb v. Attewell*, [1994] 4 W.W.R. 404 at para.17) hence more than nominal damages are warranted. In addition, past delivery by leaving on the chair by the door was sufficient. There was no need for Mr. Gokey to open the door and deliver the envelope into the house.

285. In my view, general damages of $2,500 are appropriate. ***

General Damages [for Nuisance]

286. The defendants' claim for general damages relates primarily to the smoke and its interference with their enjoyment of their property. ***

293. The defendants seek damages of $400,000 to $500,000 for nuisance due to the smoke. They concede they have not located an award for nuisance in that range. They justify such an award because of the ongoing actions of the plaintiff Mr. Gokey which have now continued for over 15 years and eight years since the limitation date. The damages are for the period from May 4, 2014 to now given the applicable limitation period.

294. In *Deumo v. Fitzpatrick*, [2008] O.J. No. 3015 (S.C.), the plaintiffs were neighbours of the defendants. The defendants' burning of wood in a wood stove caused excessive smoke to invade the plaintiff's home and yard. As a result, they had to keep their windows closed and were unable to use their yards. ***

298. General damages of $80,000 were awarded and punitive damages of $20,000: para. 24. ***

300. In *Pyke v. Tri Gro Enterprises Ltd*, [1999] O.J. No. 5025 (S.C.), aff'd 55 O.R. (3d) 257 (C.A.), leave to appeal to SCC ref'd, 28789 (13 June 2002), the Court assessed damages for injuries to the individual plaintiffs as of the last date of trial when evidence was heard given the nuisance was continuing. Justice Ferguson said this:

> 20. The caselaw indicates that in assessing damages the courts consider these factors: the frequency, degree and length of the interference; its effect on the health and comfort of the plaintiffs while on the land; the effect on the plaintiff's enjoyment of the land; the effect on the plaintiff's activities on the land. ***
>
> 50. There are a number of factors which distinguish the damage to each plaintiff. Some of the more significant are these: the frequency and degree of intensity of the odour on their property, the frequency and time of day they spent on the property, the extent to which their activities were disrupted, my assessment of the extent to which each was personally affected taking into account their physical and psychological persona. ***

301. Damages were then assessed for various parties at amounts between $10,000 and $30,000. ***

303. In *Willis v. Halifax (Regional Municipality)*, 2009 NSSC 244, rev'd in part, *Halifax (Regional Municipality) v. Willis*, 2010 NSCA 76, on the issue of prejudgment interest, the plaintiff successfully established nuisance caused by odours from a sewage treatment plant next to his property. He was awarded damages of $55,000. The headnote summarizes the nuisance as follows:

> Between 1990 and 2008 the sewage treatment plant at North Preston emitted odours frequently. Sometimes they were wretched. Mr. Willis' home and farm neighboured the plant, and he was frequently disturbed, as were his family and guests, by the odours.

305. The *Deumo* decision is closest factually to this matter.

306. A higher amount is justified in this instance by Mr. Gokey's concerted effort to torment his neighbours through a relentless course of conduct to interfere with their property rights and inflict as much misery on them as possible, primarily through his production of smoke, sometimes from multiple burn sources, although his use of an excessively loud telephone ringer and failing to silence a low-pressure water alarm contributed as well.

307. Taking into account the rural nature of the defendants' property and the significance of the nuisance of smoke and its effect on the defendants, as well as its prevalence when Mr. Gokey is in Sandspit and his deliberate placement of burn locations on the property line in addition to other acts of nuisance, I am satisfied a fair award for general damages for nuisance is $150,000. ***

9.3.5 Fitzpatrick v. Orwin, Squires & Squires [2012] ONSC 3492

✗**REF: §3.2.3, §7.1.3, §9.1.3, §9.2.3, §9.5.6, §9.8.2.3, §10.11.2**

STINSON J.: ***

148. In relation to the Squires' counterclaim, I found that Mr. Fitzpatrick intentionally inflicted mental distress by engaging in flagrant and outrageous conduct, calculated to produce harm, which resulted in a visible and provable injury. ***

155. The following factors warrant a higher award of compensation:

(a) the severe level of harm suffered by Mrs. Squires, and its ongoing nature;

(b) the significant harm experienced by Mr. Squires and the fact that the quality of his life continues to be diminished, too;

(c) the fact that the harm disturbed the sense of safety and tranquility that the Squires were entitled to enjoy in their home;

(d) the material adverse impact on the Squires' relationship with one another arising from Mr. Fitzpatrick's conduct;

(e) the dislocation, disruption and isolation suffered by the Squires as a result of being forced to sell and move;

(f) the ongoing, overall negative impact on the Squires' lives.

156. Taking the foregoing factors into account, I assess Mrs. Squires' general damages at $75,000, and those of Mr. Squires at $40,000. These amounts reflect the differing levels of mental distress experienced by the couple. ***

9.3.6 Jones v. Tsige [2012] ONCA 32

✗**REF: §4.1.1.2, §20.8.2, §24.1.2**

SHARPE J.A. (WINKLER C.J.O. AND CUNNINGHAM A.C.J. concurring): ***

87. In my view, damages for intrusion upon seclusion in cases where the plaintiff has suffered no pecuniary loss should be modest but sufficient to mark the wrong that has been done. I would fix the range at up to $20,000. The factors identified in the Manitoba *Privacy Act*, which, for convenience, I summarize again here, have also emerged from the decided cases and provide a useful guide to assist in determining where in the range the case falls:

1. the nature, incidence and occasion of the defendant's wrongful act;

2. the effect of the wrong on the plaintiff's health, welfare, social, business or financial position;

3. any relationship, whether domestic or otherwise, between the parties;

4. any distress, annoyance or embarrassment suffered by the plaintiff arising from the wrong; and

5. the conduct of the parties, both before and after the wrong, including any apology or offer of amends made by the defendant. ***

90. In determining damages, there are a number of factors to consider. Favouring a higher award is the fact that Tsige's actions were deliberate and repeated and arose from a complex web of domestic arrangements likely to provoke strong feelings and animosity. Jones was understandably very upset by the intrusion into her private financial affairs. On the other hand, Jones suffered no public embarrassment or harm to her health, welfare, social, business or financial position and Tsige has apologized for her conduct and made genuine attempts to make amends. On balance, I would place this case at the mid-point of the range I have identified and award damages in the amount of $10,000. Tsige's intrusion upon Jones' seclusion, this case does not, in my view, exhibit any exceptional quality calling for an award of aggravated or punitive damages. ***

9.3.7 Boucher v. Wal-Mart Canada Corp. [2014] ONCA 419

✗**REF: §3.2.4, §9.4.5, §9.5.7**

LASKIN J.A.: ***

C. Pinnock's Appeal ***

54. The jury's award of $100,000 is undoubtedly high—according to counsel for Pinnock, substantially higher than any other award against an individual employee in a breach of employment contract case. That it is so high does not mean that it is so plainly unreasonable it should be set aside. To state the obvious, there is no precedent until it is done for the first time. The jury's awards of $800,000 for punitive damages in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 (S.C.C.) and later of $1,000,000 for punitive damages in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 (S.C.C.) were unprecedented at the time. Yet both awards were upheld by the Supreme Court of Canada, even though appellate courts have greater latitude to intervene in punitive damage awards than they do in ordinary tort awards.

55. Though very high, I am not persuaded that the $100,000 award against Pinnock is unreasonable. The harm Boucher incurred because of Pinnock's conduct was severe. She suffered serious physical symptoms. She went from a cheerful, productive worker to a broken and defeated employee, left with no reasonable alternative but to resign. Her symptoms eased only when Pinnock no longer controlled her employment.

56. The jury represents the collective conscience of the community. The magnitude of their award shows that they were deeply offended by Pinnock's mistreatment of Boucher. We are not justified in substituting our own award unless we are satisfied the jury's award is so inordinately high to be plainly unreasonable. On this record I am not so satisfied.

57. I therefore conclude that the jury's award of $100,000 for intentional infliction of mental suffering was not unreasonable. I would therefore uphold this award. ***

9.3.8 Lu v. Shen [2020] BCSC 490

✗**REF: §3.2.5, §4.2.4, §5.1.1, §5.2.3, §9.8.2.4**

ADAIR J.: ***

293. Damages for breach of privacy can be very modest, or quite substantial, depending on the circumstances and the evidence presented. Some breaches, for example, unauthorized and malicious disclosure on the Internet of private and sensitive medical information, can result in great harm and merit a substantial award to denounce and deter such misconduct. However, other breaches, for example, unauthorized reading of a letter about a business matter, may justify only nominal damages.

294. In my view the most significant factors here are: the effect of the breach on each of Ms. Lu and Ms. Shen, in particular the mental and emotional distress each says she has suffered as a result of the conduct of the other; the lack of any apology from either of them; and Ms. Shen's persistent posting on the forum after she was served with the [notice of civil claim].

295. For breach of privacy, I award Ms. Lu additional damages in the sum of $4,000 and Ms. Shen additional damages in the sum of $3,500. ***

9.3.9 ES v. Shillington [2021] ABQB 739

✗**REF: §4.1.2.1, §9.2.4, §9.4.6, §9.5.8, §9.8.2.5, §10.5.2**

INGLIS J.: ***

84. The Plaintiff has judgment for assault, battery, sexual assault, intentional infliction of mental distress,

breach of confidence, and public disclosure of private facts. The Plaintiff agrees that there is overlap of damages between the last three causes of action.

85. These torts are intentional torts; the Defendant's liability is not restricted to foreseeable consequences: *Norberg v. Wynrib*, [1992] 2 SCR 226 at para 54 [§9.4.1]. ***

Public Disclosure of Private Facts, Breach of Confidence, Mental Distress ***

95. The Plaintiff argues that the following facts must be considered to assess damages here: a significant number of images were disclosed and published extensively; the images were explicit; the Plaintiff is identifiable in many of the images; the Defendant abused a position of trust (of course, the confidentiality issue is a required element for liability); the distribution and identifiable aspects of the photos led to a direct interaction with someone who had seen the images, recognized, and approached the Plaintiff; and, the significant psychological impact on the Plaintiff. ***

97. I award the Plaintiff $80,000 in general damages. The pain and suffering she has experienced are significant. The continued availability of her images publicly has extended that suffering more than either plaintiff in the *Jane Doe* [*72511 v. Morgan*, 2018 ONSC 6607] and *Racki* [*v. Racki*, 2021 NSSC 46] cases. Further, the nature of the embarrassment is much higher than contemplated by *Racki*. The number of images posted is much higher than in either Jane Doe and the breach of a position of trust is similar to that as in *L(TK)* [*v. P(TM)*, 2016 BCSC 789]. ***

Assault and Battery, Sexual Assault ***

113. *** For the violence perpetrated against her by the Defendant, the Plaintiff is owed non-pecuniary damages of $175,000; aggravated damages of $50,000; and punitive damages of $50,000. ***

9.3.10 Yenovkian v. Gulian [2019] ONSC 7279

✗**REF: §4.1.3.1, §9.5.9, §9.8.2.6**

KRISTJANSON J.: ***

185. Ms. Gulian has met the burden of proving Mr. Yenovkian's tortious conduct in respect of the tort of invasion of privacy (both public disclosure of private facts, and publicity placing a person before the public in a false light) on the facts as I have set out in this decision. ***

187. On damages for intrusion on seclusion, the Court of Appeal in *Jones v. Tsige* [§9.3.6] held at paragraphs 87-88 that damages for intrusion upon seclusion in cases where the plaintiff has suffered no pecuniary loss should be modest, in a range up to $20,000. The important distinction with the two invasion of privacy torts in issue here, however, is that intrusion on seclusion does not involve publicity to the outside world: they are damages meant to represent an invasion of the plaintiff's privacy by the defendant, not the separate and significant harm occasioned by publicity.

188. The two *Jane Doe* cases have recognized that the cap on damages for intrusion upon seclusion may not apply to the other forms of invasion of privacy: *Jane Doe 2016* at para. 58; *Jane Doe 2018* at paras. 127-132. In this case, as is in those, the "modest conventional sum" that might vindicate the "intangible" interest at stake in *Jones v. Tsige*, para. 71, would not do justice to the harm the plaintiff has suffered.

189. In *Jane Doe 2016*, at para. 52, Stinson J. turned to sexual battery cases for guidance in arriving at an award, and Gomery J. in *Jane Doe 2018*, at paras. 127-128 followed the same approach. In support of this approach, Stinson, J. pointed to the similarly of the psychological and emotional harm the plaintiff had suffered to that experienced by victims of sexual assault.

190. I likewise adopt the method of looking to the factors applied to decide damage awards for a tort causing harms analogous to those the present plaintiff has suffered for invasion of privacy. The harm arising from the invasion of privacy in the present case is akin to defamation. Accordingly, in arriving at an award of non-pecuniary damages, I am guided by the factors described by Cory J. in *Hill v. Church of Scientology of*

Toronto [[1995] 2 SCR 1130 (S.C.C.), at para. 187, which I am adapting to the tort of publicity placing a person a false light:

> a) the nature of the false publicity and the circumstances in which it was made,
>
> b) the nature and position of the victim of the false publicity,
>
> c) the possible effects of the false publicity statement upon the life of the plaintiff, and
>
> d) the actions and motivations of the defendant.

191. In this case, the false publicity is egregious, involving alleged criminal acts including by Ms. Gulian against her children. The false publicity is widely disseminated on the internet, as well as through targeted dissemination to church friends and business associates. Ms. Gulian has suffered damage as a mother, as an employee, in the Armenian community, and in her church community. She is peculiarly vulnerable as the spouse of the disseminator of false publicity. The false publicity has had a detrimental effect on Ms. Gulian's health and welfare, humiliation, caused her fear, and could be expected as well to affect her social standing and position. Mr. Yenovkian has not apologized, nor has he retracted the outrageous comments despite court orders.

192. The damages for intentional infliction of mental suffering are intended to be compensatory. I award $50,000 compensatory damages for intentional infliction of mental suffering, relying on *Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419 [§9.3.7].

193. On the tort of invasion of privacy (false light and public disclosure of private facts), I award damages of $100,000, considering the conduct here and the range in the cases identified in *Rutman v. Rabinowitz*, 2018 ONCA 80 (Ont. C.A.) and *Mina Mar Group Inc. v. Divine*, 2011 ONSC 1172 (Ont. S.C.J.), and the increased potential for harm given that the publicity is by way of the internet, which is "instantaneous, seamless, interactive, blunt, borderless and far-reaching": *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416 (Ont. C.A.) at para. 31. I find that third parties have commented on the websites and signed the petitions in both the UK and the US, and that Mr. Yenovkian has sent targeting e-mails and caused the distribution of flyers in the UK driving people to the websites in addition to the mere fact of publication. ***

9.3.11 Toews v. Weisner [2001] BCSC 15

✗**REF: §6.3.1.3, §9.5.10**

L. SMITH J.: ***

30. I have concluded that the defendants are liable to the plaintiff and that she will receive $1,000 in general damages. This is an amount which takes into account both the lack of evidence of any actual harm caused to the plaintiff by the vaccination, and the circumstances in which this battery took place. ***

9.3.12 Further material

- J. Der & D. Wotherspoon, "Emerging Trends in Awarding Damages in Defamation and Privacy Law" in *Damages 2022* (Vancouver: CLEBC, 2022) 📺.
- P. Lord, "Popping the Cap" (2021) 42 Health Law in Canada 14.
- J. Berryman, "Non-Pecuniary Damages—In Search of a Purpose" (SSRN, 2021).
- A.I. Ogus, "Damages for Lost Amenities: For a Foot, a Feeling or a Function" (1972) 35 Modern L Rev 1.
- A.S. Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th ed, Oxford: Oxford University Press, 2019).
- J. Cassels & E.A. Adjin-Tettey, *Remedies: The Law of Damages* (3rd ed, Toronto: Irwin Law, 2014).
- 39 Essex Chambers Podcast, "General Damages: An Overview" (Feb 4, 2021) 🎧.

9.4 Aggravated damages

OAG Glossary of Terms: Damages designed to compensate a plaintiff for suffering intangible damages such as humiliation and distress, as a result of the defendant's actions.

REFLECTION:

- *What distinguishes aggravated damages from general damages? Can a clear distinction be drawn?*

9.4.1 Norberg v. Wynrib [1992] CanLII 65 (SCC)

✗**REF: §6.3.2.1, §9.5.2, §18.3.2**

LA FOREST J. (GONTHIER AND CORY JJ. concurring): ***

54. I begin by noting that the battery is actionable without proof of damage. Moreover, liability is not confined to foreseeable consequences. Aggravated damages may be awarded if the battery has occurred in humiliating or undignified circumstances. These damages are not awarded in addition to general damages. Rather, general damages are assessed "taking into account any aggravating features of the case and to that extent increasing the amount awarded": see *J.L.N. v. A.M.L.*, [1989] 1 W.W.R. 438, 47 C.C.L.T. 65 (Q.B.), at p. 71 [C.C.L.T.], per Lockwood J. ***

9.4.2 Hill v. Church of Scientology of Toronto [1995] CanLII 59 (SCC)

✗**REF: §5.1.3, §9.3.2, §9.5.3, §18.2.3.2, §24.1.1**

CORY J. (LA FOREST, GONTHIER, MCLACHLIN, IACOBUCCI, MAJOR JJ. concurring): ***

(a) General Principles

188. Aggravated damages may be awarded in circumstances where the defendants' conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety arising from the libellous statement. ***

189. These damages take into account the additional harm caused to the plaintiff's feelings by the defendant's outrageous and malicious conduct. Like general or special damages, they are compensatory in nature. Their assessment requires consideration by the jury of the entire conduct of the defendant prior to the publication of the libel and continuing through to the conclusion of the trial. They represent the expression of natural indignation of right-thinking people arising from the malicious conduct of the defendant.

190. If aggravated damages are to be awarded, there must be a finding that the defendant was motivated by actual malice, which increased the injury to the plaintiff, either by spreading further afield the damage to the reputation of the plaintiff, or by increasing the mental distress and humiliation of the plaintiff. ***

(b) The Application to the Facts of this Case

192. In this case, there was ample evidence upon which the jury could properly base their finding of aggravated damages [of $500,000]. The existence of the file on Casey Hill under the designation "Enemy Canada" was evidence of the malicious intention of Scientology to "neutralize" him. The press conference was organized in such a manner as to ensure the widest possible dissemination of the libel. Scientology continued with the contempt proceedings although it knew its allegations were false. ***

193. It is, as well, appropriate for an appellate court to consider the post-trial actions of the defendant. It will be recalled that Scientology, immediately after the verdict of the jury, repeated the libel, thus forcing the plaintiff to seek and obtain an injunction restraining Scientology from repeating the libel. ***

194. In summary, every aspect of this case demonstrates the very real and persistent malice of Scientology. Their actions preceding the publication of the libel, the circumstances of its publication and their subsequent

actions in relation to both the search warrant proceedings and this action amply confirm and emphasize the insidious malice of Scientology. ***

9.4.3 Gokey v. Usher & Parsons [2023] BCSC 1312

✗REF: §2.2.1, §2.3.3, §4.2.3, §5.2.6, §7.1.2, §9.3.4, §9.5.4, §9.8.2.1, §10.2.1, §20.8.1, §21.1.3

PUNNETT J.: ***

326. The defendants seek aggravated damages. They submit the fear instilled in them by Mr. Gokey, which is reinforced every time he burns, and the intentional placement of smoke-producing units as well as the level of smoke deliberately generated justify aggravated damages. They seek an additional $200,000 each.

327. Aggravated damages address intangible losses suffered by a party. They are a form of non-pecuniary damages that compensate a party for the effect of a defendant's conduct on them: *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085 at 1099.

328. In *Weingerl v. Seo*, 256 D.L.R. (4th) 1 (Ont. C.A.), the Ontario Court of Appeal stated:

> 69. … The purpose of aggravated damages, in cases of intentional torts, is to compensate the plaintiff for humiliating, oppressive, and malicious aspects of the defendant's conduct which aggravate the plaintiff's suffering.

329. In *Allison*, Ker J. discussed the nature of aggravated damages:

> 195. In *Thomson v. Friedmann*, 2008 BCSC 703, aff'd 2010 BCCA 277 [*Thomson*], the Court discussed the nature of aggravated damages at para. 29:
>
> > Aggravated damages are a compensatory award that takes account of the intangible injuries such as distress and humiliation caused by a defendant's insulting behaviour. Aggravated damages are often claimed as compensation for mental distress caused by a defendant's behaviour. Aggravated damages will frequently cover conduct which would also be subject to punitive damages, but their role is compensatory. They are designed to compensate a plaintiff and are measured by the plaintiff's suffering such as pain, anguish, grief, humiliation, wounded pride, damaged self-confidence or self-esteem, and similar matters caused by the conduct of a defendant: *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085.
>
> 196. In *Fouad v. Longman*, 2014 BCSC 785, the Court summarized the nature of aggravated damages in the following terms, relying on the Supreme Court of Canada's decision in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130:
>
> > 328. Aggravated damages may be awarded where the defendant has acted in a high handed or oppressive manner thereby increasing the humiliation and anxiety of the plaintiff from the libel. The key consideration in a finding of aggravating damages is the extent to which the defendant was motivated by actual malice which increased the injury to the plaintiff either by spreading further afield the damage to his reputation, or by increasing his mental distress or humiliation: *Hill* at para. 190. ***

333. It is clear Mr. Gokey has engaged in seriously offensive conduct. He has done so despite being aware of the effect his activities were having on the defendants. His conduct throughout has been high-handed, placing his perception of his rights ahead of those of the defendants. The parties are entitled to be compensated for that conduct and its resulting effects on them.

334. Regarding the appropriate damages to be awarded for aggravated damages the defendants rely on *Boucher v. Wal-Mart Canada Corp*, 2014 ONCA 419 [§9.4.5], where an award of $200,000 made by a jury for aggravated damages was upheld on appeal. The plaintiff in *Boucher* had been constructively dismissed. The award of aggravated damages was for the manner in which she was dismissed which involved flagrant and outrageous contact by her supervisor and the employer's misconduct as well, causing the plaintiff

mental anguish.

335. In *Pellegrin v. Wheeldon,* 2020 BCPC 143, a factually similar case, also a dispute between neighbours, the actions of the defendant were found to be "harsh, vindictive, reprehensible and malicious" (para. 102). An award for aggravated damages was made in the amount of $1,000. ***

337. In *Campbell v. Blainey*, 2005 BCSC 250 a less severe case than the case at bar, arising from a neighbour interfering with a shared easement the court awarded compensatory and aggravated damages in the amount of $7,400.

338. As is apparent, there is a wide range in the sums awarded for aggravated damages depending on the behavior of a party and its context.

339. The malicious actions of the plaintiff Mr. Gokey over an eight-year period has had a significant impact on the defendants. A sum in addition to the general damages for aggravated damages is appropriate. I award the sum of $15,000 to Ms. Parsons and $10,000 to Mr. Usher. ***

9.4.4 Ahluwalia v. Ahluwalia [2023] ONCA 476

✗**REF: §2.3.5, §3.2.2, §5.2.5, §9.5.5**

BENOTTO J.A. (TROTTER J.A. AND ZARNETT J.A. concurring): ***

125. The trial judge assessed damages at $150,000: $50,000 for each of compensatory, aggravated, and punitive damages.

126. The compensatory damages were based the fact that the respondent suffered from depression and anxiety because of the appellant's abuse. The $50,000 in aggravated damages related to the "overall pattern of coercion and control and the clear breach of trust". The appellant "preyed on the [respondent's] vulnerability" as a new, racialized immigrant to Canada. Moreover, his post- separation conduct was egregious and left the respondent unable to meet the children's daily needs, which itself affected the children's long-term mental health.

127. The appellant submits that the award is excessive and not in line with prior jurisprudence. While I agree that the damage assessment is higher than in many previous cases, I would not interfere with the trial judge's award for compensatory and aggravated damages.

128. First, the trial judge's assessment of damages attracts a high level of deference. Second, while the quantum is higher than has been typical in previous jurisprudence, the higher damage award reflects an emerging understanding of the evils of intimate partner violence and its harms. Just as sentencing in a criminal context is not in a "straitjacket", so too damage awards should reflect society's abhorrence towards the conduct.[3] Indeed, the quantum of damages historically awarded may need to evolve to better reflect the current societal understanding of the extent of these harms. This is entirely consistent with Abella J.'s comment in *Nevsun* [*Resources Ltd. v. Araya*, 2020 SCC 5, [2020] 1 S.C.R. 166], at para. 118, that the common law develops to "keep law aligned with the evolution of society".

129. I would not interfere with the trial judge's assessment for compensatory and aggravated damages. ***

9.4.5 Boucher v. Wal-Mart Canada Corp. [2014] ONCA 419

✗**REF: §3.2.4, §9.3.7, §9.5.7**

LASKIN J.A.: ***

D. Wal-Mart's Appeal ***

65. The jury awarded Boucher $200,000 for aggravated damages. Wal-Mart submits that the award should be set aside or reduced for two reasons: first, the trial judge failed to caution the jury against double

recovery, thus compensating Boucher twice for Pinnock's conduct; and second, $200,000 is excessive. ***

69. I do not accept Wal-Mart's contention. The caution requested on appeal was not requested by Wal-Mart's counsel at trial. Quite the contrary. Wal-Mart's counsel approved of the trial judge's instructions. *** And in my opinion, the absence of a caution did not cause an injustice. I say that for three reasons.

70. First, the tort award against Pinnock and the aggravated damages award against Wal-Mart vindicate different interests in law.

71. Second, I do not view the jury's aggravated damages awarded to have resulted in double recovery for Boucher. Pinnock's misconduct brought about Boucher's mental anguish. But the unfair way Walmart dealt with Pinnock's misconduct and Boucher's complaints about it brought about Boucher's constructive dismissal. ***

73. Third, although the trial judge's charge on aggravated damages is not as clear as it might have been, I do not think that it would have led the jury to compensate Boucher twice for the same wrong, Pinnock's misconduct. ***

75. I therefore conclude that an award of aggravated damages against Wal-Mart was justified, and that the trial judge's charge did not cause an injustice.

76. In the alternative, Wal-Mart argues that an award of $200,000 is excessive—unprecedented in Canadian employment law. As was the tort award against Pinnock, this award against Wal-Mart is very high, reflecting the jury's strong disapproval of its conduct. For the reasons that I have just discussed, I do not consider that the award gives Boucher "double recovery" for Pinnock's misconduct.

77. Thus, the remaining question is whether the amount of the award is so high this court ought to scale it back. In the light of Wal-Mart's conduct, I am not persuaded that the jury's view of the amount is so plainly unreasonable that it ought to be reduced. Accordingly, I would not interfere with the award of $200,000. ***

9.4.6 ES v. Shillington [2021] ABQB 739

✗**REF: §4.1.2.1, §9.2.4, §9.3.9, §9.5.8, §9.8.2.5, §10.5.2**

INGLIS J.: ***

100. With respect to aggravated damages, courts often require the existence of malice or malicious behaviour or conduct before awarding aggravated damages. ***

101. Like the court in *Jane Doe* [*72511 v. Morgan*, 2018 ONSC 6607], I similarly find that the Defendant here was motivated by malice. His conduct was intended to, and did increase the Plaintiff's humiliation and anxiety. The publication of her private images is another form of the domestic abuse she otherwise experienced. His conduct exhibits malice.

102. For these privacy torts, the punitive and general damage awards do not fully reflect the Defendant's liability to the Plaintiff. *** [T]he images where shared by the subject on the explicit basis that they would be kept private. The nature of the relationship between the parties is also aggravating to the torts committed. *** $25,000 for aggravated damages, is appropriate here. ***

9.4.7 Further material

- A. Beever, "The Structure of Aggravated and Exemplary Damages" (2003) 23 Oxford J Legal Studies 87.
- J. Berryman, "Reconceptualizing Aggravated Damages: Recognizing the Dignitary Interest and Referential Loss" (2004) 41 San Diego L Rev 1521.
- J. Murphy, "The Nature and Domain of Aggravated Damages" (2010) 69 Cambridge LJ 353.
- Law Commission of England and Wales, *Aggravated, Exemplary and Restitutionary Damages* (LC247, 1997).

9.5 Punitive (exemplary) damages

OAG Glossary of Terms: Damages awarded to punish a defendant for their purposely harsh, vindictive or malicious behaviour.

REFLECTION:

- *If punitive damages are not about compensating loss, why should they be paid to the plaintiff as opposed to the government or a charity? Are punitive damages a windfall for plaintiffs?*
- *Should punitive damages be available in all cases where the defendant's conduct has been outrageous? Or should punitive damages only be available in limited and predefined circumstances?*[259]

9.5.1 Atlantic Lottery Corp. Inc. v. Babstock [2020] SCC 19

✗**REF: §9.7.1, §15.1.1**

KARAKATSANIS J. (dissenting in part with WAGNER C.J., MARTIN, KASIRER JJ.): ***

130. The objective of punitive damages is to punish the defendant rather than compensate a plaintiff (*Whiten*, at para. 36). They are to be awarded where the defendant's conduct is "so malicious, oppressive and high-handed that it offends the court's sense of decency" (*Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 (SCC), at para. 196). Critically, the focus of punitive damages is on the defendant's misconduct, not the plaintiff's loss (*Whiten*, at para. 73), and injury to the plaintiff is not a condition precedent to an award of punitive damages (H. D. Pitch and R. M. Snyder, *Damages for Breach of Contract* (loose-leaf), at pp. 4-1 to 4-2). ***

9.5.2 Norberg v. Wynrib [1992] CanLII 65 (SCC)

✗**REF: §6.3.2.1, §9.4.1, §18.3.2**

LA FOREST J. (GONTHIER AND CORY JJ. concurring): ***

54. *** [P]unitive or exemplary damages *** are awarded to punish the defendant and to make an example of him or her in order to deter others from committing the same tort; see Linden, *Canadian Tort Law* (4th ed. 1988), at pp. 54-55. In *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085, at pp. 1107-8, McIntyre J. thus set forth the circumstances where the defendant's conduct would merit punishment:

> … punitive damages may only be awarded in respect of conduct which is of such nature as to be deserving of punishment because of its harsh, vindictive, reprehensible and malicious nature. I do not suggest that I have exhausted the adjectives which could describe the conduct capable of characterizing a punitive award, but in any case where such an award is made the conduct must be extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment. ***

59. The question that must be asked is whether the conduct of Dr. Wynrib was such as to merit condemnation by the court. It was not harsh, vindictive or malicious to use the terms cited in *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085. However, it was reprehensible and it was of a type to offend the ordinary standards of decent conduct in the community. Further, the exchange of drugs for sex by a doctor in a position of power is conduct that cries out for deterrence. *** An award of punitive damages is of importance to make it clear that this trend of underestimation cannot continue. Dr. Wynrib's use of power to gain sexual favours in the context of a doctor-patient relationship is conduct that is offensive and reprehensible. In all the circumstances, I would award an additional $10,000 in punitive damages. ***

MCLACHLIN J. (L'HEUREUX-DUBÉ J. concurring): ***

111. Quite apart from analogies with tort, punitive (or exemplary) damages are available with respect to

[259] See *ACB v. Thomson Medical Pte Ltd* [2017] SGCA 20, [153]-[206] [**§19.10.5.1**].

breaches of fiduciary duty, and in particular for breaches of the sort exemplified by this case. ***

120. *** Dr. Wynrib is not alone in breaching the trust of his patient through sexually exploiting her; physicians, and all those in positions of trust, must be warned that society will not condone abuse of the trust placed in them. I would award punitive damages against Dr. Wynrib in the amount of $25,000. ***

SOPINKA J.: ***

159. The breach of duty found was that in lieu of striving to cure the appellant of her addiction, the respondent promoted it in return for sexual favours. The result was that the addiction was prolonged in lieu of treatment and the appellant was subjected to the respondent's sexual advances. The sexual acts were causally connected to the failure to treat and must form part of the damage suffered by the appellant. I would assess the damages for both these components in the amount awarded by my colleague, La Forest J. I would not, however, award punitive damages. These are inappropriate in this case inasmuch as the basis of liability is the breach of professional duty. While the sexual episodes are an element of damage, they are not the basis of liability. These sexual episodes are the basis of liability in the reasons of La Forest J. who found the respondent liable for acts of sexual assault deserving of punishment. In the view that I have taken, they are rather an element of damage for breach of duty, and an award that includes as a component aggravated damages is adequate compensation to the appellant. ***

9.5.3 Hill v. Church of Scientology of Toronto [1995] CanLII 59 (SCC)

✗**REF: §5.1.3, §9.3.2, §9.4.2, §18.2.3.2, §24.1.1**

CORY J. (LA FOREST, GONTHIER, MCLACHLIN, IACOBUCCI, MAJOR JJ. concurring): ***

(a) General Principles

196. Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence. ***

199. Punitive damages can and do serve a useful purpose. But for them, it would be all too easy for the large, wealthy and powerful to persist in libelling vulnerable victims. Awards of general and aggravated damages alone might simply be regarded as a licence fee for continuing a character assassination. The protection of a person's reputation arising from the publication of false and injurious statements must be effective. The most effective means of protection will be supplied by the knowledge that fines in the form of punitive damages may be awarded in cases where the defendant's conduct is truly outrageous.

(b) The Application to the Facts of this Case

200. There can be no doubt that the conduct of Scientology in the publication of the injurious false statement pertaining to its "enemy" was malicious. Its publication was carefully planned and carried out in a manner which ensured its widest possible dissemination in the most damaging manner imaginable. The allegation made against Hill was devastating. It was said that he had been guilty of breach of trust, breach of a court order and that his conduct and behaviour was criminal. Scientology's actions from the time of publication, throughout the trial, and after the trial decision was rendered constituted a continuing attempt at character assassination by means of a statement which it knew to be false. It was such outrageous conduct that it cried out for the imposition of punitive damages.

201. There might have been some concern that, in light of the award of general and aggravated damages totalling $800,000, there might not be a rational basis for punitive damages [of $800,000]. However any lingering doubt on that score is resolved when Scientology's persistent misconduct subsequent to the trial

is considered. ***

203. The award of punitive damages *** served a rational purpose in this case. Further, the circumstances presented in this exceptional case demonstrate that there was such insidious, pernicious and persistent malice that the award for punitive damages cannot be said to be excessive. ***

9.5.4 Gokey v. Usher & Parsons [2023] BCSC 1312

✗**REF: §2.2.1, §2.3.3, §4.2.3, §5.2.6, §7.1.2, §9.3.4, §9.4.3, §9.8.2.1, §10.2.1, §20.8.1, §21.1.3**

PUNNETT J.: ***

313. The defendants submit Mr. Gokey's production of smoke has been prolonged, persistent, vindictive and reprehensible, done without any rational justification. Rather, he has "weaponized" it to pursue his claims against the defendants arising from the well and easement. They seek an award of $500,000.

314. Punitive damages are intended to punish for conduct that is malicious, high-handed and oppressive and that offends the Court's sense of decency. In doing so they serve the purposes of retribution, deterrence and denunciation. ***

315. There is no question that this is an exceptional case. As is apparent from the plaintiff Mr. Gokey's actions, particularly his placement of various devices for burning and his excessive production of smoke whilst knowing its effect on the defendants and their property, he has engaged in conduct that supports an award of punitive damages. His behavior was high-handed, arrogant, malicious and a deliberate course of conduct directed at the defendants. Well aware of his actions' effects on the defendants, he deliberately continued them over a period of years. His justifications that he has to burn because he is clearing his land, that the smoke is steam, that it is no worse than any other resident's burning in the area and that it is the wind's fault ring hollow. The defendants are entitled to an award of punitive damages.

316. The assessment of the amount of such damages was addressed by Justice Gomery in *Baring v. Farm Credit Corporation*, 2019 BCSC 1965, rev'd in part on other grounds, *Baring v. Grewal*, 2022 BCCA 42, leave to appeal to SCC ref'd, 40173 (2 February 2023): ***

> 101. Because punitive damages are awarded to punish and not to compensate, there is no obvious starting point for the determination of an amount. *** A structured framework, building on *Whiten* [*v. Pilot Insurance Co*, 2002 SCC 18], was identified by Hunt and Costigan JJ.A. in *Elgert v. Home Hardware Stores Limited*, 2011 ABCA 112 at para. 82, leave to appeal ref'd, [2011] S.C.C.A. No. 294 and applied by Fenlon J. in *Kelly* at paras. 130-146. Fenlon J. stated:
>
> > 130. The governing rule in determining the appropriate quantum of punitive damages is *proportionality*. The overall award, i.e. compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objectives for which the punitive damages are awarded (retribution, deterrence and denunciation): *Whiten* at para. 74. [Emphasis in original.]
>
> 102 Proportionality requires that an award of punitive damages must be:
>
> > i. Proportionate to the blameworthiness of the defendant's conduct—the more reprehensible the conduct, the higher the rational limits of the potential award. Factors include outrageous conduct for a lengthy period of time without any rational justification, the defendant's awareness of the hardship it knew it was inflicting, whether the misconduct was planned and deliberate, the intent and motive of the defendant, whether the defendant concealed or attempted to cover up its misconduct, whether the defendant profited from its misconduct, and whether the interest violated by the misconduct was known to be deeply personal to the plaintiff.
> >
> > ii. Proportionate to the degree of vulnerability of the plaintiff—the financial or other vulnerability of the plaintiff, and the consequent abuse of power by a defendant, is highly relevant where

there is a power imbalance.

iii. Proportionate to the harm or potential harm directed specifically at the plaintiff.

iv. Proportionate to the need for deterrence—a defendant's financial power may become relevant if the defendant chooses to argue financial hardship, or it is directly relevant to the defendant's misconduct, or other circumstances where it may rationally be concluded that a lesser award against a moneyed defendant would fail to achieve deterrence.

v. Proportionate, even after taking into account the other penalties, both civil and criminal, which have been or are likely to be inflicted on the defendant for the same misconduct—compensatory damages also punish and may be all the "punishment" required.

vi. Proportionate to the advantage wrongfully gained by a defendant from the misconduct. ***

318. The defendants submit the production of smoke by Mr. Gokey from various sources placed along his property line with the defendants was motivated by malice and displayed utter contempt, hostility and disregard towards the defendants and for their health and property rights.

319. Regarding the first part of the six-part test noted above, Mr. Gokey's blameworthiness in producing the smoke is high as it was prolonged and persistent. It was deliberate, vindictive and reprehensible. It was not the product of any rational justification. He clearly was deliberately punishing the defendants, likely for his dissatisfaction in failing to gain control of the well for his own purposes.

320. The second part of the test, the vulnerability of the defendants, is met. The defendants were both seniors when his conduct started. Ms. Parsons was afraid of him. Mr. Usher was suffering from different types of cancer and the effects of treatments for them.

321. The third matter, the harm or potential harm, is clear. The smoke significantly affected the defendants' use of their property and effectively denied its outdoor use when Mr. Gokey was creating the smoke.

322. With respect to the fourth and fifth elements of the test (deterrence and proportionality), Mr. Gokey has over the years shown a pattern to ignore and circumvent court orders that he disagrees with. As noted earlier in these reasons he does what he wants and does not consider whether legally or morally he should not. He has shown a complete disregard for the emotional and physical health of the defendants and their property rights. Any award of punitive damage must be sufficient to deter his conduct.

323. Regarding the six element of the test, Mr. Gokey has used his property as he wishes, to the detriment of the rights of the defendants.

324. Mr. Gokey is a unique individual. His motives for his production of smoke and his persistence and determination in producing the smoke are also unique. A significant punitive damages award against him is not only appropriate but necessary.

325. Taking into account the conduct of Mr. Gokey, his high level of blameworthiness, the vulnerability of the defendants, the harm directed at them, the significant need for deterrence and the other factors noted above while at the same time awarding a proportionate amount, I award the defendants punitive damages of $50,000. ***

9.5.5 Ahluwalia v. Ahluwalia [2023] ONCA 476

✗REF: §2.3.5, §3.2.2, §5.2.5, §9.4.4

BENOTTO J.A. (TROTTER J.A. AND ZARNETT J.A. concurring): ***

129. I would not interfere with the trial judge's assessment for compensatory and aggravated damages.

130. The punitive damage award is different.

131. Although the respondent sought $100,000 in total damages; the trial judge ordered $150,000. The additional $50,000 for punitive damages reflected, in the trial judge's words, the "strong condemnation" required.

132. I agree with the trial judge that the appellant's conduct called for condemnation. But the trial judge failed to take a required step in the analysis of whether an award of punitive damages was warranted. She did not address, and made no finding that the award of general and aggravated damages was insufficient to achieve the goals of denunciation and deterrence. This was an error. In *Whiten v. Pilot Insurance*, 2002 SCC 18, [2002] 1 S.C.R. 595, at para. 94, the court set out the following principles for an award of punitive damages:

> (1) *Punitive damages are very much the exception rather than the rule*, (2) imposed *only* if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages. (11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient. [Emphasis added.]

133. A proper consideration of the *Whiten* requirements in the context of this case does not justify an award of punitive damages because the compensatory and aggravated damages (in the amount sought by the respondent) are sufficient to accomplish the objectives of condemnation. It was unreasonable and disproportionate to add punitive damages in the amount of an additional 50% of the total claimed, without any explanation. I would allow the appeal with respect to the punitive damage award, thereby reducing the total damages to $100,000. This is not to say that where a tort is made out in circumstances such as these punitive damages are never justified. They may very well be, where the trial judge is satisfied that the deterrent and denunciatory effect of the other heads of damages is insufficient to accomplish the objective of condemnation. ***

142. I would allow the appeal in part and reduce the damage award by $50,000. ***

9.5.6 Fitzpatrick v. Orwin, Squires & Squires [2012] ONSC 3492

✗**REF: §3.2.3, §7.1.3, §9.1.3, §9.2.3, §9.3.5, §9.8.2.3, §10.11.2**

STINSON J.: ***

163. The availability of punitive damages was summarized by Binnie J. in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 (S.C.C.) at para.94. He commented that punitive damages are exceptional, and should only be imposed if "there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour." This is because punitive damages are not compensatory, but provide for retribution, deterrence, and denunciation. ***

167. Given the above jurisprudence, punitive damages are available to the Squires to address the intentional infliction of mental harm they suffered.

168. Justice Binnie also stated in *Whiten* that punitive damages should take into account any other fines or penalties imposed on the defendant. This is because punitive damages may only be granted where the misconduct would otherwise go unpunished, or where the penalty is seen to be inadequate to achieving the goals of retribution, deterrence and denunciation. For this reason, punitive damages are rarely awarded where a defendant has already been convicted of a criminal offence and punished for it. A criminal conviction is not a complete bar to punitive damages, however. ***

169. In the present case, a charge of criminal harassment was laid against Mr. Fitzpatrick, but ultimately withdrawn. Because the charge was withdrawn, Mr. Fitzpatrick did not receive any punishment for the acts of harassment that I have found he committed against the Squires. As such, I do not have to consider the adequacy of his punishment, because he has so far been able to avoid any. Since Mr. Fitzpatrick's misconduct will otherwise remain unpunished, I find this an appropriate circumstance in which to award punitive damages. ***

172. Damages were awarded for neighbourly misconduct in *Desjardins v. Blick*, [2009] O.J. No. 1234 (Ont. S.C.J.), where Kane J. granted $5,000 in punitive damages, at para.31. In *Desjardins*, the defendant neighbours mistakenly believed that their property had been encroached upon by their neighbour's garage. In response, they deliberately removed lateral support for this structure, causing damage. This behaviour escalated to taunts, fights, and the imbedding of devices to cause personal injury. Such belligerent behaviour is reminiscent of Mr. Fitzpatrick's threatening and distasteful actions. ***

174. In *Desjardins*, *supra*, the neighbours believed that they were the victims of an encroachment on their property. This belief was unfounded, however it stands in stark contrast to Mr. Fitzpatrick's explicit knowledge that he was trespassing onto the property of the Squires when he removed the survey markers and when he caused the video camera to be detached and the dead coyote to be placed on the truck. In *Cantera*, the defendants chose to remove the fence when the plaintiffs were away from home. In contrast. Mr. Fitzpatrick took advantage of the opportunities he had to encounter the Squires in person, so that he could insult them. He also waited for Mr. Squires to emerge from his house so that he could relish in the shock and fear of seeing Mr. Squires discover the carcass. For these distinguishing reasons, I find that Mr. Fitzpatrick's conduct was considerably more egregious than in *Desjardins* and *Cantera*. I therefore award punitive damages of $20,000 against him. This sum shall be payable to the Squires jointly. ***

9.5.7 Boucher v. Wal-Mart Canada Corp. [2014] ONCA 419

✗**REF: §3.2.4, §9.3.7, §9.4.5**

LASKIN J.A.: ***

C. Pinnock's Appeal ***

58. The jury also awarded Boucher $150,000 in punitive damages against Pinnock. On appeal, Pinnock seeks to set aside this award on the ground it was not rationally required to punish his misconduct. ***

64. The award of tort damages against Pinnock is very high. The magnitude of this compensatory award carried a strong punitive component. The compensatory award alone provided retribution to Boucher, substantially denounced Pinnock for his conduct, and in the Windsor community would likely deter Pinnock and other senior employees from engaging in similar conduct. An additional award of $150,000 against an individual employee is not rationally required to achieve these purposes or to punish Pinnock. To give modest effect to the jury's view of Pinnock's misconduct, an award of $10,000 in punitive damages would be appropriate. Accordingly, I would allow Pinnock's appeal on punitive damages and reduce the jury's award from $150,000 to $10,000. ***

D. Wal-Mart's Appeal ***

78. The jury awarded Boucher $1,000,000 in punitive damages against Wal-Mart. ***

79. To obtain an award of punitive damages, a plaintiff must meet two basic requirements. First, the plaintiff must show that the defendant's conduct is reprehensible: in the words of Binnie J. in *Whiten*, "malicious,

oppressive and high-handed" and "a marked departure from ordinary standards of decent behaviour": see *Whiten*, at para. 36. Second, the plaintiff must show that a punitive damages award, when added to any compensatory award, is rationally required to punish the defendant and to meet the objectives of retribution, deterrence and denunciation. ***

82. *** McLachlin C.J.C. said in *Blackwater v. Plint*, [2005] 3 S.C.R. 3 (S.C.C.), at para. 91 [§19.7.2], "punitive damages cannot be awarded in the absence of reprehensible conduct specifically referable to the employer." And, it seems to me, the employer's reprehensible conduct must go beyond mere negligent conduct. Its conduct must itself be harsh, offensive or high-handed. ***

83. *** The jury's award of aggravated damages shows that they found the manner of Wal-Mart's dismissal most unfair. In substance, they found that Wal-Mart breached its duty of good faith and fair dealing towards Boucher. It committed an actionable wrong that would support an award of punitive damages. ***

86. Wal-Mart submits that its conduct was not so reprehensible to attract an award of punitive damages. I disagree. From the evidence I have just outlined, the jury could reasonably conclude that Wal-Mart's conduct toward Boucher was sufficiently reprehensible to merit an award of punitive damages.

87. The jury found Wal-Mart liable for aggravated damages of $200,000. In addition, Wal-Mart is vicariously liable for the $100,000 tort award against Pinnock. And Wal-Mart is liable for damages for constructive dismissal and for $140,000 in trial costs. In the light of these compensatory awards, Wal-Mart submits that an additional punitive damages award of $1,000,000 is not rationally required to punish it or to give effect to denunciation and deterrence. I accept Wal-Mart's submission.

92. *** Wal-Mart is already liable for significant compensatory damages. Its misconduct lasted less than six months. It did not profit from its wrong. And while it obviously maintained a power imbalance over Boucher, it did not set out to force her resignation. In the light of these considerations, a punitive damages award of $100,000 on top of the compensatory damages it must pay is all that is rationally needed to punish Wal-Mart and denounce and deter its conduct. Accordingly, I would allow Wal-Mart's appeal on punitive damages and reduce the award from $1,000,000 to $100,000.

9.5.8 ES v. Shillington [2021] ABQB 739

✗REF: §4.1.2.1, §9.2.4, §9.3.9, §9.4.6, §9.8.2.5, §10.5.2

INGLIS J.: ***

96. Punitive damages are also appropriate ***. *** The Defendant's prolific publication of these images is "highly reprehensible misconduct that falls outside the standards of decent behavior": *Jane Doe* [*72511 v. Morgan*, 2018 ONSC 6607] at para 140. ***

98. The Defendant's conduct is worthy of significant condemnation. His actions were intentional and appear to have been done repeatedly. His confession made to his partner when he was deployed to a high-risk situation after acting secretly shows that he was aware of the distress his choices would cause the Plaintiff, and he attempted to clear his conscience. He abused a position of trust for unknown reasons. The conduct is notably now criminal in nature in Canada, and regardless of when the actions occurred, they are worthy of punitive measures from this court.

99. The Defendant is liable for $50,000 in punitive damages. Compared to the single act by the defendant in *Jane Doe*, this Defendant is significantly more blameworthy and punitive damages shall reflect the same. ***

9.5.9 Yenovkian v. Gulian [2019] ONSC 7279

✗REF: §4.1.3.1, §9.3.10, §9.8.2.6

KRISTJANSON J.: ***

195. The following guiding principles governing punitive damages are drawn from *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595:

> (1) The court must rationally determine circumstances that warrant adding punishment to compensation in a civil action, and it is in the nature of the remedy that punitive damages will largely be restricted to intentional torts and breach of fiduciary duty (para. 67). In promoting rationality, the court should relate the facts of the particular case to the purposes of punitive damages and ask itself how, in particular, an award would further one or other of the objectives of the law, and what is the lowest award that would serve the purpose, i.e., because any higher award would be irrational (para. 71)
>
> (2) the general objectives of punitive damages are punishment (in the sense of retribution), deterrence of the wrongdoer and others, and denunciation (or, as Cory J. put it … they are "the means by which the jury or judge expresses its outrage at the egregious conduct") (para. 68)
>
> (3) punitive damages should be resorted to only in exceptional cases and with restraint, particularly when there has been a prior penalty imposed in a criminal or regulatory proceeding (para. 69)
>
> (4) the governing rule for quantum is proportionality. The overall award, that is to say compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objectives for which the punitive damages are awarded (retribution, deterrence and denunciation) (para. 74)

196. In considering proportionality, the court must consider:

> (1) proportionality in accordance with the blameworthiness of the defendant's conduct, including whether the misconduct was planned and deliberate; the intent and motive of the defendant; whether the defendant persisted in the outrageous conduct over a long period; whether the defendant concealed or tried to cover up its misconduct; the defendant's awareness that what they were doing was wrong: whether the defendant profited from its misconduct; whether the interest violated by the misconduct was known to be deeply personal to the plaintiff (paras. 112-113);
>
> (2) proportionality to the degree of vulnerability of the plaintiff (para. 114);
>
> (3) proportionality to the harm or potential harm directed specifically at the plaintiff (para. 117);
>
> (4) proportionality to the need for deterrence (para. 118).
>
> (5) proportionality after taking into account the other penalties, civil and criminal, which have been or are likely to be inflicted on the defendant for the same conduct. Punitive damages are awarded "if, but only if" all other penalties have been considered and found to be inadequate to accomplish the objectives of retribution, deterrence and denunciation.
>
> (6) proportionality to the advantage wrongfully gained by a defendant.

197. I have no hesitation in finding that the long campaign of cyberbullying of Ms. Gulian is outrageous and egregious conduct at the extreme of reprehensibility, including:

> • attacks on Ms. Gulian, including posting Ms. Gulian's image and those of her parents and children online. He has accused her of abusing the children, drugging the children, slapping the children, of defrauding the government, of forging documents, and other criminal offences,
>
> • publicizing these attacks to members of her church, friends, her parents and their business associates, and the general public on the internet,
>
> • attacks on the administration of justice in this case involving Ms. Gulian, including on a judge, her lawyer and her witnesses at this trial,
>
> • public attacks on her parents, whom she loves,

• publicly exposing her children to harm and ridicule on the internet,

• reporting unfounded allegations to the police, the school, government authorities and Children's Aid Societies, in Canada, the U.S. and the UK, and

• the continued flouting of court orders directed at stopping the conduct.

198. As a spouse and parent of their children, a stay-at-home mother dependent on Mr. Yenovkian until the attacks began, Ms. Gulian was and remains a vulnerable plaintiff. There are no other penalties Mr. Yenovkian is likely to face for this conduct. Mr. Yenovkian knew the conduct was wrong; had been informed by the court that it was wrong; but he persisted in the conduct. The harm of such publicly distributed invective to Ms. Gulian and to the system of administration of justice, through attacks on a judge, a lawyer and witnesses in litigation, is severe.

199. This is the exceptional case. Mr. Yenovkian's conduct is reprehensible. The damage that he has inflicted upon Ms. Gulian is purposeful and premediated. On December 27, 2015, he threatened that if Ms. Gulian attempted to "take the children from [him]" or limit the time that he spends with the children he would "ensure that the damage done is irreparable" to Ms. Gulian and her family. Mr. Yenovkian has been undeterred by court orders regarding online content that is abusive of Ms. Gulian.

200. Mr. Yenovkian's conduct must not only be punished but it should be denounced, and it should be deterred. A significant award of punitive damages may serve to deter Mr. Yenovkian, since the court orders have had no effect in deterring his conduct. It will also serve to warn other litigants, both represented and self-represented, that cyberbullying another party online, in family law proceedings where the interests of children are in issue, will not be tolerated.

201. I have considered the range of punitive damages and conduct in *Pate Estate v. Galway-Cavendish and Harvey (Township)*, 2013 ONCA 669 (Ont. C.A.), and in *Rutman v. Rabinowitz*, 2018 ONCA 80 (Ont. C.A.), and cases cited therein.

202. I consider the damages of $50,000 and $100,000 already awarded. As a result, I set the punitive damages at $150,000.00, having considered all the applicable factors, and having determined that an additional punitive damages award is required in this case to express the court's denunciation, deterrence, and punishment, and finding that this punitive damages award is proportional in light of the total award and the conduct in issue. ***

9.5.10 Toews v. Weisner [2001] BCSC 15

✗REF: §6.3.1.3, §9.3.11

L. SMITH J.: ***

31. I have further concluded that this is not an appropriate case for exemplary or punitive damages. Although the defendant Nel Weisner did commit the intentional tort of battery, there was no conduct warranting the description "harsh, vindictive, reprehensible or extreme." Ms. Weisner wrongfully over-rode a child's communication of non-consent but on the strength of a good faith belief that a valid parental consent had been obtained. The award of general damages is sufficient and appropriate vindication of the plaintiff's rights in these circumstances. ***

9.5.11 Cross-references

- *A v. Bottrill* [2002] UKPC 44, [11], [21]-[51]: §12.1.3.
- *Blackwater v. Plint* [2005] SCC 58, [90]-[92]: §19.7.2.
- *Midwest Properties Ltd v. Thordarson* [2015] ONCA 819, [122]-[124]: §19.11.1.
- *Vancouver (City) v. Ward* [2010] SCC 27, [20]-[22]: §24.2.1.

9.5.12 Further material

- B. McGill, "Pine Tree Justice: Punitive Damage Reform in Canada" (2012) 36 Manitoba LJ 287.
- J. Goudkamp & E. Katsampouka, "Punitive Damages: Ten Misconceptions" in E. Bant *et al* (eds), *Punishment and Private Law* (Oxford: Hart Publishing, 2021).
- H. Koziol & V. Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Vienna: Springer, 2009).

9.6 Restitutionary damages

M.S. Clapton, "Gain-Based Remedies for Knowing Assistance: Ensuring Assistants do not Profit From Their Wrongs" (2008) 45 Alberta L Rev 989, 990-992

[T]he law's normal response to a wrong[260] is to create for the victim a personal right to the payment of money, usually in the form of monetary damages,[261] and a correlating obligation on the wrongdoer to pay those damages. The usual measure of damages is compensatory, which is measured by the victim's loss, subject to limiting principles, such as remoteness. ***

In some circumstances, the plaintiff may receive an award measured by the defendant's gain. There may be several reasons for pursuing a gain-based remedy, including the possibility that the plaintiff cannot establish a loss, but she can nevertheless prove that a wrong has been committed against her for which the defendant acquired a benefit. ***

Restitutionary damages operate to reverse a wrongful transfer of value from the plaintiff's assets.[262] In other words, this form of damages requires the defendant to give back the value of the benefit he subtracted from the plaintiff in the course of committing a wrong against her. The rationale for reversing such a transfer is that it was obtained by a wrongful act and, as such, it is not a transfer that should be recognized in law. As a matter of corrective justice, the law must respond in this way—that is, reverse a transfer of value acquired through wrongful conduct—because to do otherwise would be to condone such behaviour.[263]

This form of gain-based damages is often conflated with the monetary award of restitution that is awarded to the successful plaintiff of an unjust enrichment action.[264] The confusion comes as no surprise since both restitution for unjust enrichment and restitutionary damages operate the same way insofar as they force the defendant to give back the value of the benefit he received from the plaintiff.[265] In other words, each measure of damages *responds* in the same way, but what they *respond to* is quite different. Restitution and restitutionary damages are awarded in response to different causative events. The former award may be granted if the plaintiff can prove the three elements of the autonomous action in unjust enrichment. The latter may be awarded if the plaintiff can prove that the defendant perpetrated a civil wrong against her and, in doing so, subtracted or transferred a benefit from her. *** […continue reading]

[260] A wrong *** is an act or omission on the part of the defendant that is characterised as the breach of a primary duty. The primary duty may originate from the common law, such as statutory breach, the commission of a tort or a breach of contract, or from equity, such as the breach of a fiduciary duty. ***

[261] Although the point is not without some controversy, it is the position in this article that the term "damages" encompasses all monetary forms of relief for wrongdoing (including punitive and nominal damages) and is not confined to compensatory damages measured by the victim's loss. ***

[262] To refer to restitutionary damages as "gain-based" is somewhat of a misnomer. Restitutionary damages arc not strictly gain-based; like restitution for unjust enrichment, they arc loss-based as well, insofar as the transfer of value to the defendant causes the plaintiff a loss.

[263] Edelman, [*Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Oxford: Hart, 2002)] at 80-81.

[264] The three part cause of the autonomous action in unjust enrichment is set out in *Pettkus v. Becker*, [1980] 2 S.C.R. 834 at 848 [*Pettkus*]. It requires (1) an enrichment to the defendant, (2) a corresponding deprivation to the plaintiff, and (3) the absence of any juristic reason for the enrichment. [See S. Beswick, "Restitution—Unjust Enrichment", https://blogs.ubc.ca/beswick/restitution/.]

[265] According to Edelman's account, restitution and restitutionary damages arc virtually identical concepts that respond to different underlying causes of action. Both reverse a transfer between the parties. The former responds to an action in unjust enrichment, whereas the latter responds to any civil wrong that entails a transfer.

REFLECTION:
- *Are restitutionary damages compensatory in nature? If not, what justifies awarding restitutionary damages?*

9.6.1 Cross-references

- *Schentag v. Gauthier* [1972] CanLII 1205 (SK QB), [23]-[24]: §8.3.1.

9.6.2 Further material

- J. Berryman, "The Case for Restitutionary Damages Over Punitive Damages: Teaching the Wrongdoer that Tort Does Not Pay" (1994) 73 Canadian Bar Rev 320.
- E.J. Weinrib, "Restitutionary Damages as Corrective Justice" (2000) 1 Theoretical Inquiries L 1.
- D. Wright & S. Doyle, "Restitutionary Damages: The Unnecessary Remedy?" (2001) 25 Melbourne University L Rev 1.
- M. Gilboa, "Linking Gains to Wrongs" (2022) 35 Canadian Journal L & Jurisprudence 365.
- K. Barnett, "Restitution, Compensation and Disgorgement" in E. Bant, K. Barker & S. Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (Cheltenham: Edward Elgar Publishing, 2020).

9.7 Disgorgement damages

M.S. Clapton, "Gain-Based Remedies for Knowing Assistance: Ensuring Assistants do not Profit From Their Wrongs" (2008) 45 Alberta L Rev 989, 993

Disgorgement damages operate to strip or disgorge gains that the defendant acquired through wrongdoing. The distinguishing feature of disgorgement damages is that they ignore whether the gain has been transferred from the plaintiff's assets and, instead, measure the actual profit accruing to the defendant from his wrongful behaviour regardless of the source.[266] *** […continue reading]

REFLECTION:
- *What distinguishes disgorgement damages from restitutionary damages?*
- *When should disgorgement damages be awarded?*

9.7.1 Atlantic Lottery Corp. Inc. v. Babstock [2020] SCC 19

✗**REF: §9.5.1, §15.1.1**

BROWN J. (ABELLA, MOLDAVER, CÔTÉ, ROWE JJ. concurring): ***

24. *** [R]estitution for unjust enrichment and disgorgement for wrongdoing are two types of gain-based remedies (McInnes (2014), at pp. 144-49; L. D. Smith, "Disgorgement of the Profits of Breach of Contract: Property, Contract, and 'Efficient Breach'" (1995), 24 *Can. Bus. L. J.* 121, at pp. 121-23; G. Virgo, *The Principles of the Law of Restitution* (3rd ed. 2015), at pp. 415-17; Burrows, at pp. 9-12). Each is distinct from the other: *disgorgement* requires only that the defendant gained a benefit (with no proof of deprivation to the plaintiff required), while *restitution* is awarded in response to the causative event of unjust enrichment (most recently discussed by this Court in *Moore v. Sweet*, 2018 SCC 52, [2018] 3 S.C.R. 303 (S.C.C.)), where there is correspondence between the defendant's gain and the plaintiff's deprivation (Edelman, at pp. 80-86). ***

32. I acknowledge that disgorgement is available for some forms of wrongdoing without proof of damage (for example, breach of fiduciary duty). But it is a far leap to find that disgorgement without proof of damage is available as a general proposition in response to a defendant's negligent conduct. Determining the appropriate remedy for negligence, where liability for negligence has not already been established, is futile and even nonsensical since doing so allows "the remedy tail [to] wag the liability dog" (*Haida Nation v.*

[266] Edelman, [*Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Oxford: Hart, 2002)] at 72.

British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 S.C.R. 511 (S.C.C.), at para. 55). This observation applies with no less force to the plaintiff who seeks disgorgement, since the availability of gain-based relief lies in "aligning the remedy with *the injustice* it corrects" (E. J. Weinrib, "Restitutionary Damages as Corrective Justice" (2000), 1 *Theor. Inq. L.* 1, at p. 23 (emphasis added)).

33. *** Granting disgorgement for negligence without proof of damage would result in a remedy "arising out of legal nothingness" (Weber, at p. 424). It would be a radical and uncharted development, "[giving] birth to a new tort over night" (Barton, Hines and Therien, at p. 147). ***

9.7.2 Further material

- M. McInnes, "Waiver of Tort, Contract, Disgorgement, and Unjust Enrichment: Clarity in the Supreme Court of Canada" (2022) 66 Canadian Business LJ 157.
- K. Maharaj, "Alternatives to Expectation: When Can You Get Disgorgement, Gain-Based, or Restitutionary Damages for Breach of Contract?" (2022) 48 Queen's LJ 4558.
- R.D. Cooter & A. Porat, "Disgorgement Damages for Accidents." (2015) 44 J of Legal Studies 249.

9.8 Injunctions

C. Heer, S. Di Giandomenico, A. Latoszewska, D. Kutsyna, "How to Use Court Injunctions in Intellectual Property Disputes" Heer Law (Nov 23, 2021)

An injunction is an equitable remedy, which means that the court has discretion to grant it or not depending on the circumstances of each case. ***

The three most common types of injunctions granted in Canada are interlocutory injunctions, interim injunctions, and permanent injunctions. They differ in four main ways: (1) the length of time for which they are valid; (2) how they can be obtained; (3) when they can be obtained; and (4) the level of difficulty in obtaining them.

An **interlocutory injunction** is an injunction that is obtained after legal proceedings have been commenced but before trial. The party who wishes to obtain an interlocutory injunction (generally the plaintiff) must bring a motion to ask for this relief. Notice to the defendant must be given so they can present their arguments in court and both sides can have a proper hearing. If granted, an interlocutory injunction usually lasts until the trial judgment is rendered by the court. ***

An **interim injunction** is the shortest type of injunction ordered by the courts. *** Unlike interlocutory injunctions, interim injunctions are for situations that need to be urgently addressed to prevent immediate harm to the plaintiff. The injunction can be granted on an *ex parte* basis, meaning in the absence of the defendant, where the matter is so urgent that no notice is possible or where giving notice to the other party would defeat the purpose of the motion. It is typically granted for a very short period of time. ***

A **permanent injunction**, unlike interim and interlocutory injunctions, is granted after trial. Most plaintiffs ask for a permanent injunction in their pleading to stop the defendant from carrying on its infringing activities. *** […continue reading]

REFLECTION:

- *Why do courts have discretion over whether to award injunctive relief in a tort action, but no discretion to withhold damages?*

9.8.1 Interim and interlocutory injunctions

526901 B.C. Ltd. v. Dairy Queen Canada Inc., 2018 BCSC 1092

10. In Canada, the test for an interlocutory injunction is drawn from a decision of the U.K. House of Lords, *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (U.K. H.L.). This three-part test is referred to as the "*RJR-MacDonald* test" since its endorsement in *RJR-MacDonald Inc. v. Canada (Attorney General)*,

[1994] 1 S.C.R. 311 (S.C.C.).

11. The *RJR-MacDonald* test requires an applicant to establish three elements in order to obtain an interlocutory injunction:

> 1. there is a serious issue to be tried;
>
> 2. the applicant will suffer irreparable harm absent the injunction; and
>
> 3. the balance of convenience favours the granting of the injunction.

12. In *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 (S.C.C.) at para. 12 ("*R. v. C.B.C.* 2018"), the Court summarized the history and content of the *RJR-MacDonald* test:

> In *Manitoba (Attorney General) v. Metropolitan Stores Ltd.* and then again in *RJR-MacDonald*, this Court has said that applications for an interlocutory injunction must satisfy each of the three elements of a test which finds its origins in the judgment of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd*. At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a "serious question to be tried", in the sense that the application is neither frivolous nor vexatious. The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused. Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.

13. Although the *RJR-MacDonald* test comprises three elements, injunctions are equitable remedies and the fundamental question in each case is whether the granting of the injunction is just and equitable in all the circumstances. ***

What is a serious issue to be tried?

17. As noted above, the Court in *R. v. C.B.C.* 2018, confirmed that the first element of the three-part test for an interlocutory injunction requires a preliminary investigation of the merits to decide whether the applicant demonstrates a serious question to be tried, in the sense that the application is neither frivolous nor vexatious. Once satisfied that the application is neither vexatious nor frivolous, the court should proceed to the second and third elements even if it is of the opinion that the applicant is unlikely to succeed at trial. At this first stage, the court should not embark on a prolonged or extensive examination of the merits: *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 at paras. 39-40 ***.

18. There are, however, some exceptional situations where an applicant for an interlocutory injunction confronts an elevated threshold at the first stage of the *RJR-MacDonald* test and where the applicant must instead demonstrate that it has a strong *prima facie* case. In *R. v. C.B.C.* 2018, at para. 17, the Court considered various descriptions of this strong *prima facie* case threshold and clarified the standard:

> … Common to all these formulations is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge must be satisfied that there is a *strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful* in proving the allegations set out in the originating notice. [Emphasis added.]

19. In *RJR-MacDonald* at pp. 401-404, the Court identified three possible exceptions where the "serious question to be tried" test is discarded in favour of the strong *prima facie* case threshold:

> 1. where the result of the interlocutory motion will in effect amount to a final determination of the action, *i.e.* when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial;
>
> 2. where the factual record is largely settled before the application and the facts in issue are not

substantially in dispute; and

3. where a question respecting the constitutional validity of legislation presents itself as a simple question of law alone, which can be finally settled by the motions judge.

20. The Court in *RJR-MacDonald* offered some examples that might fall within the first exception: restraining picketing, granting a mandatory injunction allowing a politician to participate in a televised debate, and enjoining a woman in an advanced stage of pregnancy from having an abortion. Subsequent cases have also included the summary enforcement of restrictive covenants in employment or commercial agreements and *quia timet* injunctions sought before the threatened harm has actually occurred ***.

21. As well, the Court in *R. v. C.B.C.* 2018 concluded that applicants seeking mandatory interlocutory injunctions as opposed to prohibitory interlocutory injunctions must also demonstrate a strong *prima facie* case, rather than simply showing there is a serious issue to be tried. In that case the Court commented on the difficulty of distinguishing between mandatory and prohibitory injunctions and noted the essential question is whether the overall effect of the injunction would be to require a party to do something (mandatory) or to refrain from doing something (prohibitory).

What is irreparable harm?

22. The Court in *RJR-MacDonald* described the second factor for granting an interlocutory injunction as "deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm". It stated:

> 63. At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
>
> 64. "Irreparable" refers to the nature of the harm suffered rather than its magnitude. *It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.* Examples of the former include instances where one party will be put out of business by the court's decision …; where one party will suffer permanent market loss or irrevocable damage to its business reputation …; or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined …. The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration …. [Emphasis added; citations omitted.]

23. When considering the nature of irreparable harm sufficient to sustain an injunction, the court will bear in mind that unquantifiable loss is not necessarily the same as loss that is difficult to assess. The court regularly conducts complicated and challenging assessments of financial loss in a variety of commercial, breach of contract and tort cases, including losses based on uncertain future events, fluctuating market conditions, and various other contingencies. This includes situations where the aggrieved party has been put out of business or rendered unemployable as a result of catastrophic events such as wrongful receiverships, destruction of property or serious personal injury.

24. In *Belron Canada*, after referring to the *RJR-MacDonald* excerpts set out above, the Court stated, at para. 91:

> It follows that if the ordinary legal remedy of damages will provide appropriate or adequate compensation and the defendant is able to pay them, the extraordinary step of restraining a defendant's conduct pending a determination on the merits, is not usually justified.

25. Some debate exists about the appropriate evidentiary burden placed on the injunction applicant to establish irreparable harm. In *Vancouver Aquarium* the Court concluded, at para. 60:

> [T]here surely must be a *foundation, beyond mere speculation*, that irreparable harm will result. Interlocutory injunctive relief pending the trial of the issues is a significant remedy, and should be

> invoked only when the test in *RJR-MacDonald* is satisfied on a *sound evidentiary foundation*. [Emphasis added.]

26. In *RJR-MacDonald* the Court emphasized that this second stage of irreparable harm analysis only applies to the harm that might be suffered by the injunction applicant and *not* any harm that might be suffered by the respondent should the relief sought be granted. This latter factor "is more appropriately dealt with in the third part of the analysis [and] any alleged harm to the public interest should also be considered at that [third] stage" (para. 62).

When does the balance of convenience favour the granting of an interlocutory injunction?

27. The third factor to be applied in an application for interlocutory injunction relief is "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits": *RJR-MacDonald*, para. 67. The Court observed that in light of the relatively low threshold of the "serious issue" requirement and the difficulty in applying the test of irreparable harm in some cases, many interlocutory proceedings will be determined at this third stage of analysis.

28. The Court in *RJR-MacDonald* noted that the factors to be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. It cautioned that it would be unwise to attempt even to list all of the various matters that may need to be taken into consideration, let alone to suggest the relative weight that should be attached to them.

29. One case frequently referred to in injunction applications, which does list a number of factors that "should" be considered in assessing the balance of convenience, is *Canadian Broadcasting Corp. v. CKPG Television Ltd.* (1992), 64 B.C.L.R. (2d) 96 (B.C. C.A.) at p. 102. The list is:

> • the adequacy of damages as a remedy for the applicant if the injunction is not granted and for the respondent if an injunction is granted;
>
> • the likelihood that if damages are finally awarded they will be paid;
>
> • the preservation of contested property;
>
> • other factors affecting whether harm from granting or refusal of the injunction would be irreparable;
>
> • which of the parties has acted to alter the balance of their relationship and so affect the *status quo*;
>
> • the strength of the applicant's case;
>
> • any factors affecting the public interest; and
>
> • any other factors affecting the balance of justice and convenience.

30. While it is sometimes said that when everything else is equal, it is prudent to preserve the *status quo* in interlocutory injunction applications (an observation by Lord Diplock in *American Cyanamide*), the Court in *RJR-MacDonald* stated, at para. 80, "This approach would seem to be of limited value in private law cases …". ***

REFLECTION:

- *Why should courts exercise particular caution before making an award of an interlocutory injunction?*
- *What are the consequences of breaching a court-ordered injunction?*

9.8.1.1 Rhodes v. OPO [2015] UKSC 32

✗**REF: §3.2.1**

LADY HALE AND LORD TOULSON (LORD CLARKE AND LORD WILSON concurring): ***

21. The application for an interim injunction came before Bean J in private in July 2014. *** He dismissed the application and struck the proceedings out on the basis that the child had no cause of action in tort against the father or the publishers. He said that there was no precedent for an order preventing a person from publishing their life story for fear of its causing psychiatric harm to a vulnerable person, nor should there be. He held that a cause of action under *Wilkinson v. Downton* [§3.1.1] did not extend beyond false or threatening words. ***

78. The Court of Appeal recognised that the appellant had a right to tell his story, but they held for the purposes of an interlocutory injunction that it was arguably unjustifiable for him to do so in graphic language. The injunction permits publication of the book only in a bowdlerised version. This presents problems both as a matter of principle and in the form of the injunction. As to the former, the book's revelation of what it meant to the appellant to undergo his experience of abuse as a child, and how it has continued to affect him throughout his life, is communicated through the brutal language which he uses. His writing contains dark descriptions of emotional hell, self-hatred and rage, as can be seen in the extracts which we have set out. The reader gains an insight into his pain but also his resilience and achievements. To lighten the darkness would reduce its effect. The court has taken editorial control over the manner in which the appellant's story is expressed. A right to convey information to the public carries with it a right to choose the language in which it is expressed in order to convey the information most effectively. (See *Campbell v. MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, para 59, and *In re Guardian News and Media Ltd* [2010] UKSC 1, [2010] 2 AC 697, para 63.)

79. The problem with the form of the injunction is that Schedule 2 defines the information which it is forbidden to publish not only by reference to its substantive content, but also by the descriptive quality of being "graphic". What is sufficiently "graphic" to fall within the ban is a matter of impression. The amplification of "graphic" in the court's supplementary judgment as meaning "seriously liable to being understood by a child as vividly descriptive so as to be disturbing" similarly lacks the clarity and certainty which an injunction properly requires. Any injunction must be framed in terms sufficiently specific to leave no uncertainty about what the affected person is or is not allowed to do. The principle has been stated in many cases and nowhere more clearly than by Lord Nicholls in *Attorney General v. Punch Ltd* [2002] UKHL 50, [2003] 1 AC 1046 at para 35:

> "An interlocutory injunction, like any other injunction, must be expressed in terms which are clear and certain. The injunction must define precisely what acts are prohibited. The court must ensure that the language of its order makes plain what is permitted and what is prohibited. This is a well established, soundly-based principle. A person should not be put at risk of being in contempt of court by an ambiguous prohibition, or a prohibition the scope of which is obviously open to dispute." ***

LORD NEUBERGER (LORD WILSON concurring): ***

97. *** [I]t would, I think, be an inappropriate restriction on freedom of expression, an unacceptable form of judicial censorship, if a court could restrain publication of a book written by a defendant, whose contents could otherwise be freely promulgated, only refer in general and unobjectionable terms to the claimant, and are neither intended nor expected by the defendant to harm the claimant, simply because the claimant might suffer psychological harm if he got to read it (or extracts from it). Whatever the nature and ingredients of the tort whose origin can be traced to *Wilkinson v. Downton*, it therefore cannot possibly apply in this case. And that, at least in a narrow sense, is in my view the beginning and the end of this case.

98. As to the terms of the injunction, the Court of Appeal accepted that the defendant should be entitled to describe the ordeals which he had undergone. However, they decided that he could not publish certain specified passages in his book or any other accounts of his ordeals in so far as those accounts were "graphic", a description which was explained by Arden LJ as meaning "seriously liable to being understood by a child as vividly descriptive so as to be disturbing".

99. There are two problems with such a form of injunction. First, it treats the terms in which events are described in the book as detachable from the inclusion of the events themselves. Freedom of expression extends not merely to what is said but also to how it is said. Whether a communication is made orally or in

writing, the manner or style in which it is expressed can have a very substantial effect on what is actually conveyed to the listener or reader. One cannot realistically detach style from content in law any more than one can do so in literature or linguistic philosophy. I agree with what is said in para 78 above in this connection.

100. The second problem with the form of injunction granted by the Court of Appeal is that it is insufficiently specific, and in that connection there is nothing which I wish to add to what is said in para 79 above. ***

9.8.1.2 Li v. Barber [2022] ONSC 1513

Ontario Superior Court – 2022 ONSC 1513

MR. CHAMP (counsel for the applicant): ***

Your Honour, we have this motion before you for an injunction, we'll leave it at that, prohibiting the air horns and rail horns around Ottawa, applying to some people for some time. ***

Your Honour, the evidence you have from the moving party is three affidavits: from the plaintiff, Ms. Li, from *** another resident of Ottawa, Mr. Barr, and from a doctor, Dr. Scherer, an otolaryngologist or ENT specialist, who's a specialist in hearing damage.

The affidavit of Ms. Li sets out that *** [there are] loud horns on trucks being deafening in her neighbourhood. *** [It] is basically all day and all night, including the latest that she can recall, 1:30 a.m. *** [S]he has measured the level of sound in her apartment. So, this isn't on the street, this is in her apartment with the windows closed, at 84 decibels. She talks at paragraph 8 about how this has been impacting her. The 84 decibels almost non-stop, at that point, for over a week, her nerves are frayed, she can't sleep, she's suffering anxiety, and even when the sound stops she's seized with anxiety because she's unsure of when it will start again. *** [S]he talks about what it's like when she goes outside, right outside her door, that the sound is so loud, even when she wears sound cancelling earphones, it's physically vibrating in her head. *** [S]he's made complaints to the Ottawa Police Service 14 times and they've indicated they can't assist her. ***

Barr *** is an individual citizen from Ottawa who walked around using an app on his phone from the CDC for Occupational Health and Safety, to measure the decibel levels. *** [H]e has measured and has recordings of those measures of sound levels, constant sound levels, of 100 decibels at the corners of Laurier and Kent, 105 decibels at Parliament Hill and at Bank and Slater. And he testifies *** that he could only tolerate that sound, that level of sound, for a few minutes. At paragraph 7, he speaks to at one point going by a truck, which then uses *** the train horn. The sound level spiked, which he measured at over 121 decibels. He described the sound as very painful. ***

The third affidavit, from the moving party, is from Dr. Scherer, as I'd indicated, an ENT—ear, nose and throat specialist and otolaryngologist, who treats patients for hearing loss and hearing damage. *** [S]he advises that the sound of a lawnmower is between 88 to 94 decibels. *** [T]hat's very close to decibel level that Ms. Li indicates is in her apartment with the windows closed. So, essentially, Ms. Li has a lawnmower running in her living room none stop, all day and all night. *** [T]he doctor sets out that prolonged exposure can cause permanent damage to the ear and can cause psychological distress. *** [S]he indicates that residents living in downtown Ottawa, exposed to this level of noise, may face hearing loss and tinnitus. *** [P]articularly important for the irreparable harm test, she says that tinnitus can be permanent for downtown residents due to exposure of these sound levels over several days. ***

The only other evidence, if I can call it that, *** [is] yesterday *** the mayor of Ottawa has declared a state of emergency.

With respect to the responding party's affidavits, *** in the *** Bufford affidavit ***, he speaks of the freedom convoy leadership, in his words, agreeing on a schedule of the honking between 8:00 a.m. to 8:00 p.m. *** Now, that evidence, Your Honour, is important because it indicates that, as part of the claim, we're pleading, or alleging, that the leaders of this freedom convoy protest are directing and encouraging, and controlling to some extent, the truckers who are using this horn tactic. *** That, Your Honour, I would suggest, *** fits

the serious issue to be tried test. That that would be relevant to the tort of nuisance [§21.1] and individuals working collectively for a common design or purpose. ***

MR. WILSON (counsel for the respondents): ***

I think when we look at this action and this motion, I feel as though we're trying to fit a round peg in a square hole in that *** the effort before the court is to use a private civil remedy, including a class action, as a means of effectively achieving municipal noise by-law and police compliance. And I think …

> **MCLEAN J.:** Just on that point, but can't they do that?

Well, I'm not sure that—well, perhaps they can, but … ***

The protests that have been occurring have been peaceful; that's the affidavit evidence before you. The residents haven't been impeded in their ability to move freely and *** the issue, we acknowledge, is really the noise from the honking. ***

With respect to the *** irreparable harm, *** there must be detailed, concrete, real, definite, unavoidable [harm]. Vague assumptions and bald assertions are *** not sufficient. ***

Interestingly, Ms. Li alleges that she's had difficulty sleeping, but then testifies that she can fall asleep with earplugs. I note that my friend had indicated that *** it is not uncommon in the City of Ottawa, he's represented to you, sir, for there to be protests and for them to be loud and prolonged. That that is sort of a flavour and the complexion of the neighbourhood. And when you're *** engaged in a nuisance assessment you look at the *** context in which the nuisance is occurring. A loud noise in a *** quiet place is different than a loud noise in a busy place.

With respect to the balance of convenience, this is where the *Charter* starts to come in, and as you know, the balancing of rights with respect to free speech. And *** this is not some spontaneous protest in response to a government announcement of today. This is a *** spontaneous grassroots phenomenon that started in Canada, is now spreading around the world, in response to what we all have had to endure for over the last two years. And *** it's an effort to end that *** harm and that hardship. And I think that *** it's important to contextualize *** why it is that people came here. That they're *** seeking to lift themselves and their families from what they believe are hardships that are affecting them and their families, and their communities, and their economies, with respect to the COVID restrictions and the vaccine mandate. ***

[A]nd so, the rights of Mr. Champ's clients are being weighed against my clients' *Charter* rights and their common law rights of freedom of expression, their *Charter* rights of peaceful assembly. *** I believe that that really mitigates and weighs in favour of finding that the balance of convenience test isn't met, and in part, because it's weighing the balance of convenience in the context of an order that will enjoin. ***

MCLEAN J. (orally): ***

The only issue before the court is whether an injunction should be granted in some terms with respect to the use of vehicle horns as described in the *Highway Traffic Act* [RSO 1990, c H.8] for the Province of Ontario. That is how the motion is set forward. And whether, on that basis, I should grant an interim injunction.

With respect to the injunction, it is this Court's view that the injunction, if it's granted, will only be for 10 days. It is—because there are certainly a plethora of people that have not been served, or have not attorned to the jurisdiction of the court. ***

The test, of course, for obtaining an interlocutory injunction is articulated [by] the Supreme Court of Canada in *RJR-MacDonald Inc. v. Attorney General* [1994 CanLII 117 (SCC)]:

> The moving party [must be satisfied] must demonstrate [that] a serious question [is] to be tried. ***

Clearly, on these merits, the court has not much difficulty in finding that the test has been met. This is a serious issue that *** should be tried on the effect of the air horns on particular people, who is responsible

for that, et cetera.

The *** second part of the test is ***:

> The moving party must convince the court that it will suffer irreparable harm if relief is not granted. 'Irreparable' refers to the nature of the harm rather than the magnitude [of it]. ***

[T]he court accepts the evidence of the doctor. And therefore, it is the Court's view that *** the irreparable nature of the harm has been made out.

That leaves us the third branch, which requires an assessment of the balance of inconvenience. Clearly, what we are dealing with here is, we are dealing with the right for security of person vis-à-vis the right of expression and protest. Both these rights exist. There is no debate on that. People have a right to protest various things in various ways. That is enshrined at common law for many eons, and also in the *Charter*.

However, in the Court's view, there's really no difference between the rights given by the *Charter* and the rights that already existed in common law [§24.1]. Certainly, people have a right to protest things, particularly governmental things, that they don't like. And the nature of that protest is really not something that can be accurately assessed because it, in large degree, is a subjective matter within the sole interest of those people demonstrating.

However, in these particular circumstances, we have the issue of the fact of the manner of self-expression, that is the continual honking of—or using horns on vehicles, trucks in particular, which are having an effect on the people in the particular area of this protest. That is clear from the evidence of the plaintiff, it is clear from the other evidence, and it is also clear from the evidence put forward in the affidavit of Mr. Bufford, who apparently is a volunteer security official with the group, wherein he suggests that the honking of the air horns would be restricted from 8:00 p.m. to 8:00 in the morning. Clearly, the inference that the Court draws from that is, quite frankly, that the defendants, or at least the evidence on behalf of the potential defendants, comprehends the fact that there is a deleterious nature to the use of these horns. When we consider this as a whole, we are of the opinion that the balance of—balance of inconvenience has been made out, in that the rights of the citizens for quiet, if we can use that term, and I know it's not a legal one, but a right to quiet, has been made out as the overcoming or being the overriding right here. And for those reasons, an interim injunction will be granted. ***

MCLEAN J.: ***

ORDER: *** UPON READING the motion records of the parties and UPON HEARING the oral arguments made by counsel for the parties by Zoom, ***

> 1. THIS COURT ORDERS that an interlocutory injunction is granted, pursuant to section 101 of the *Courts of Justice Act,* Rule 40.01 of the *Rules of Civil Procedure*, and section 12 of the *Class Proceedings Act* [§20.6.1].
>
> 2. THIS COURT ORDERS that any persons having notice of this Order are hereby restrained and enjoined from using air horns or train horns, other than those on a motor vehicle of a municipal fire department, in the geographic location anywhere in the City of Ottawa, in the vicinity of downtown Ottawa, being any streets north of Highway 417, otherwise known as the Queensway, for 10 days from the date of this Order. ***
>
> 4. THIS COURT ORDERS that any police officer with the Ottawa Police Service, and/or the appropriate police authority in the jurisdiction in question (the "Police"), shall have authorization to arrest and remove any person who has knowledge of this Order and who the Police have reasonable and probable grounds to believe is contravening or has contravened any provision of this Order. ***
>
> 7. THIS COURT ORDERS that, provided the terms of this Order are complied with, the Defendants and other persons remain at liberty to engage in a peaceful, lawful and safe protest. ***
>
> 11. THIS COURT ORDERS that the parties shall appear before the Court in Ottawa by

videoconference on February 16, 2022 at 10:00am for the hearing of a motion to continue this Order.

9.8.1.3 Cross-references

- *Binsaris v. Northern Territory* [2020] HCA 22, [49]: **§6.6.4**.
- *XY LLC v. Zhu* [2013] BCCA 352, [14]: **§10.1.4**.

9.8.1.4 Further material

- The Decibel Podcast, "Court Orders Honking Halted in Ottawa" (Feb 8, 2022) 🎧.
- D.V. Wright & M. Olszynski, "Rigs in a Parlour: The Freedom Convoy and the Law of Private Nuisance" ABlawg (Feb 9, 2022).
- S. Thiele, "Understanding the Ambassador Bridge Injunction Against the Freedom Convoy Protestors" Mondaq (Feb 17, 2022).
- R. Williams, D. Rossi, C. Jacobson & T. Pritchard, "The New Normal? Natural Resource Development, Civil Disobedience, and Injunctive Relief" (2017) 55 Alberta L Rev 285.
- S. Wood, Reconsidering the Test for Interlocutory Injunctions Affecting Homeless Encampments: A critical assessment of BC case law (2024) 61 Osgoode Hall LJ (*forthcoming*).

9.8.2 Permanent (perpetual) injunctions

Labourers' International Union of North America, Local 183 v. Castellano, 2020 ONCA 71

18. *** As this court stated in *St. Lewis v. Rancourt*, 2015 ONCA 513, at para. 16: "A broad ongoing injunction is an extraordinary remedy which should be used sparingly. ***" The injunctive relief must be broad enough to be effective but no broader than reasonably necessary to effect compliance: *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2010 BCCA 396, at para. 39.

24. We reiterate that permanent injunctions constitute extraordinary relief that must be granted sparingly. A different test applies for a permanent injunction than for an interlocutory injunction. A different test is required because, in considering an application for a permanent injunction, the court has the ability to finally determine the merits of the case and fully evaluate the legal rights of the parties. See *1711811 Ontario Ltd. v. Buckley Insurance Brokers Ltd.*, 2014 ONCA 125, at paras. 76-80; *Schooff v. British Columbia (Medical Services Commission)*, 2010 BCCA 396, at paras. 27-28.

25. As referenced in Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf, (Toronto: Canada Law Book, 2019), at para. 1.45, in *Nalcor Energy v. NunatuKavut Community Council Inc.*, 2014 NLCA 46, at para. 72, the Court of Appeal of Newfoundland and Labrador summarized the approach to be applied in deciding whether to grant a permanent injunction:

> (i) *Has the claimant proven that all the elements of a cause of action have been established or threatened?* (If not, the claimant's suit should be dismissed);
>
> (ii) *Has the claimant established to the satisfaction of the court that the wrong(s) that have been proven are sufficiently likely to occur or recur in the future that it is appropriate for the court to exercise the equitable jurisdiction of the court to grant an injunction?* (If not, the injunction claim should be dismissed);
>
> (iii) *Is there an adequate alternate remedy, other than an injunction, that will provide reasonably sufficient protection against the threat of the continued occurrence of the wrong?* (If yes, the claimant should be left to reliance on that alternate remedy);
>
> (iv) If not, are there any applicable equitable discretionary considerations (such as clean hands, laches, acquiescence or hardship) affecting the claimant's *prima facie* entitlement to an injunction that would justify nevertheless denying that remedy? (If yes, those considerations, if more than one, should be weighed against one another to inform the court's discretion as to whether to deny

the injunctive remedy.);

(v) If not (or the identified discretionary considerations are not sufficient to justify denial of the remedy), are there any terms that should be imposed on the claimant as a condition of being granted the injunction?

(vi) In any event, where an injunction has been determined to be justified, *what should the scope of the terms of the injunction be so as to ensure that only actions or persons are enjoined that are necessary to provide an adequate remedy for the wrong that has been proven or threatened* or to effect compliance with its intent? [Emphasis added.]

26. Given their potentially broad and restrictive scope, permanent injunctions must be particularly tailored to the specific circumstances of the case in which they are ordered. It is therefore incumbent on the court asked to consider such relief to conduct a careful analysis and to limit the breadth of any permanent injunction to only what is reasonably necessary to remedy the specific wrong committed and prevent further harm to the claimant. ***

31. Recall that a permanent injunction is a remedy that may be granted once a legal right or a cause of action has been finally adjudicated and proven on a balance of probabilities. ***

REFLECTION:

- *Why are permanent injunctions an exceptional, rather than the ordinary, remedy for tortious action?*
- *Why is it important that permanent injunctions are particularly tailored to the specific circumstances of the case in which they are ordered?*

9.8.2.1 Gokey v. Usher & Parsons [2023] BCSC 1312

✗**REF: §2.2.1, §2.3.3, §4.2.3, §5.2.6, §7.1.2, §9.3.4, §9.4.3, §9.5.4, §10.2.1, §20.8.1, §21.1.3**

PUNNETT J.: ***

345. The defendants seek a permanent injunction restraining the plaintiffs, and each of them, by themselves, their servants or agents or otherwise from entering the defendants' property, contacting the defendants directly or indirectly, any burning by the plaintiffs except within their home for heating purposes provided it does not produce excessive smoke, the use of any sound-emitting devices and placing garbage, debris or waste on the defendants property, including food scraps and the like. In addition, they seek prohibition of composting and other material within 100 feet of the well, the erecting of any signs about the defendants or their family members on the plaintiffs' property and any work on the north edge of their property including the municipal lands in front of their property.

346. The defendants submit that damages alone are inadequate to prevent the future continuation of the private nuisance, noting that Mr. Gokey is almost certain to continue to produce smoke and will only be prevented by a permanent injunction.

347. While damages may be sufficient compensation to a party, that would be tantamount to granting Mr. Gokey a licence to continue his conduct, hence injunctive relief can be granted: *Ward v. Cariboo Regional District*, 2021 BCSC 1495 at para. 312, order partially stayed on appeal, 2021 BCCA 423; *469238 B.C. Ltd. v. Okanagan Aggregates Ltd*, aff'd 2017 BCCA 127.

348. In this case, I am satisfied that both damages and a permanent injunction are appropriate. ***

351. The defendants and each of them are hereby granted a permanent injunction restraining the plaintiffs, and each of them, by themselves, their servants or agents or otherwise from:

a) Entering any part of the property owned by the defendants and legally described as PID 009-561-838, Lot 16, District Lot 165, Queen Charlotte District, Plan 3734 (the "Defendants' Property") without the prior written permission of the defendants, except for the Easement Area;

b) In the case of the plaintiff Edward Gokey, from initiating any in-person physical or verbal contact or communications with the defendants or either of them on or from the Defendants' Property, in the vicinity of the Defendants' Property, or from the Plaintiffs' Property, except for in-person contact or communications that occur on property owned by the plaintiffs if the defendants or either of them have first entered such property or by written communications from the plaintiff Edward Gokey to the defendants or either of them delivered through Canada Post or third party courier to the Defendants' Property, subject to the defendants having liberty to apply for further restrictions on the type of communications that the plaintiff Edward Gokey is permitted to have with them.

c) The burning of any material including without limitation yard waste, branches, leaves, entire trees or parts of trees, roots, construction debris, garbage, fish offal, crab shells, food scraps on any location on the Plaintiffs' Property, or in any device, shack, building or other structure located anywhere on the Plaintiffs' Property, except for burning done within the main residence on the Plaintiffs' Property for heating purposes and only to the extent such burning in the main residence does not produce smoke that interferes with the defendants or their use of their property and only if the smoke from such burning is vented in a chimney extending above the highest point of the roof of the main residence;

d) The use of a sound emitting device or devices on the Plaintiffs' Property, the Easement Area or Lot 18, District Lot 165, Queen Charlotte District, Plan 12314, PID 013-665-34, including but not limited to telephone bell ringers and to alarm systems, that produce(s) a level or type of noise that disturbs or is liable to disturb the defendants' reasonable enjoyment of the Defendants' Property; ***

j) The orders set out in paragraphs a. to i. inclusive above shall be enforceable by the Royal Canadian Mounted Police and the orders set out in paragraphs c. to g. inclusive above also shall be enforceable by the British Columbia Conservation Service Office.

k) The defendants shall have liberty to apply to vary the restrictions in paragraphs a. to i. above in the future if deemed necessary because of the conduct of the plaintiffs or either of them; ***

9.8.2.2 Tam v. Chan [2014] HKCFI 1480

✗**REF: §2.3.4, §5.2.1, §21.1.2**

DEPUTY JUDGE LINDA CHAN SC: ***

10. The Harassment Action was commenced by the plaintiffs on 4 May 2010 and, on the same day, the plaintiffs applied for an interlocutory injunction to restrain Mr Chan from, *inter alia*:

(1) "assaulting, harassing, threatening, or pestering the 1st, 2nd and/or 3rd plaintiffs" including shouting or speaking obscenities or foul language towards the plaintiffs and taking photographs of the plaintiffs without their consent and coming or remaining within 10 meters of the person of the plaintiffs with the intent to do any of the restrained acts; and

(2) causing damage to the residence of the plaintiffs, spraying or applying paint to the residence or the immediate stairwell area outside the residence of the plaintiffs and coming to or remaining in without reasonable excuse the immediate stairwell area outside the entrance of the plaintiffs' residence. ***

83. I am satisfied that in the circumstances of this case, it is just and convenient to grant the injunctions sought by the plaintiffs in both actions as it is clear that without such injunctions, it is likely that the defendants in particular Mr Chan, will commit the acts complained of by the plaintiffs or other acts for the purpose of harassing, assaulting or causing disturbance or nuisance to them.

84. Although I have held that there is no tort of harassment at common law, this does not mean that the Court cannot grant an injunction on terms which have the effect of restraining the defendant from harassing the plaintiffs as the jurisdiction to grant an injunction is not limited to restraining acts which is in itself tortious

or unlawful. In *Burris v. Azadani* [1995] 1 WLR 1372, the plaintiff claimed against the defendant for nuisance as a result of a number of uninvited visits made by the defendant to her premises, which caused the plaintiff to become very worried about the safety of her children and herself. The Court below granted an interlocutory injunction restraining the defendant from "assaulting, molesting, harassing, threatening, pestering or otherwise interfering with the plaintiff", her children or her friend or remaining within 250 yards of her home. The Court of Appeal rejected the defendant's contention that the Court had no jurisdiction to grant the "exclusion zone" order. The principle was explained by Bingham MR, at 1377A-G, in this way:

> If an injunction may only properly be granted to restrain conduct which is in itself tortious or otherwise unlawful, that would be a conclusive objection to term (c) … I do not, however, think that the court's power is so limited. A *Mareva* injunction granted in the familiar form restrains a defendant from acting in a way which is not, in itself, tortious or otherwise unlawful. The order is made to try and ensure that the procedures of the court are in practice effective to achieve their ends. The court recognises a need to protect the legitimate interests of those who have invoked its jurisdiction …
>
> It would not seem to me to be a valid objection to the making of an 'exclusion zone' order that the *conduct to be restrained is not in itself tortious or otherwise unlawful if such an order is reasonably regarded as necessary for protection of a plaintiff's legitimate interest*. (my emphasis)

85. As for the terms of the injunctions, I have some reservations on the width of the orders sought by the plaintiffs which, if granted, may have the effect of restricting the rights of the defendants beyond what is necessary in the circumstances. Mr Chain very sensibly does not insist on seeking the injunctions on the terms claimed in the SOC and, instead, seeks the injunctions on a much more restricted term.

86. In the Harassment Action, I grant an injunction that the defendant whether by himself, his servants or agents or any of them, or otherwise howsoever be restrained from assaulting, harassing, threatening, or pestering the 1st, 2nd and 3rd plaintiffs including:

> (1) communicating with the 1st, 2nd and 3rd plaintiffs with the intent to do any act restrained of, whether in writing or orally;
>
> (2) shouting or speaking obscenities or foul language towards the 1st, 2nd and 3rd plaintiffs;
>
> (3) taking photographs of the plaintiffs without their consent;
>
> (4) causing damage to the 1st and 2nd plaintiffs' residence at G/F of 34G, Braga Circuit, Kadoorie Hill, Kowloon or the 3rd plaintiff's residence at 2/F of 34F, Braga Circuit, Kadoorie Hill, Kowloon (together "Plaintiffs' Residence"); and
>
> (5) spraying or applying any paint to the Plaintiffs' Residence or to the immediate stairwell area outside the entrance of the Plaintiffs' Residence. ***

9.8.2.3 Fitzpatrick v. Orwin, Squires & Squires [2012] ONSC 3492

✗**REF: §3.2.3, §7.1.3, §9.1.3, §9.2.3, §9.3.5, §9.5.6, §10.11.2**

STINSON J.: ***

175. I have found that Mr. Fitzpatrick violated the Squires' legal rights when he harassed them and inflicted mental distress upon them. They should not have to be concerned that he might continue or resume that behavior. A permanent order will therefore issue restraining Mr. Fitzpatrick from having any contact with them, directly or indirectly. He is also ordered, permanently, from communicating with them, directly or indirectly. Lastly, he is ordered, permanently, to remain at least 500 metres from their residence or any other location where he knows them to be. ***

9.8.2.4 Lu v. Shen [2020] BCSC 490

✗**REF: §3.2.5, §4.2.4, §5.1.1, §5.2.3, §9.3.8**

ADAIR J.: ***

297. I note that both Ms. Lu and Ms. Shen sought injunctions against the other, prohibiting either of them from publishing any defamatory words, in any public forum or social media, against the other or members of her family. The terms of the order that I pronounced at the end of trial were broader, and prohibited the publication of any words in any public forum or social media against or of or concerning the other or any of her family members.

298. In my opinion, given the history between the parties, and the conclusions I have reached on the merits of the claims, an injunction in substantially the terms of the order I pronounced on October 4, 2019 is both appropriate and necessary to bring an end to this lengthy war, and as a means to modify the behaviour of both Ms. Lu and Ms. Shen toward each other, as well as to protect the privacy of each of them from unwanted intrusions from the other.

299. I therefore order that:

> (a) subject to paras. (b) and (c):
>
> > (i) the plaintiff, Jing Lu, shall refrain from directly or indirectly making, publishing, disseminating or broadcasting any words in any public forum or social media, including Canadameet.com and Ourdream.com, either against or of and concerning the defendant, Catherine Shen, or any family member of Catherine Shen;
> >
> > (ii) the defendant, Catherine Shen, shall refrain from directly or indirectly making, publishing, disseminating or broadcasting any words in any public forum or social media, including Canadameet.com and Ourdream.com, either against or of and concerning the plaintiff, Jing Lu, or any family member of Jing Lu; ***
>
> (c) the order in para. (a) expires one year after the date it is pronounced, that is, the date of these Reasons, unless extended by further court order.

300. I order further that, by August 31, 2020 ***:

> (a) Ms. Lu take reasonable steps to remove from any public forum or social media, including Canadameet.com and Ourdream.com, all posts she has made or published either against or of and concerning Ms. Shen or any members of Ms. Shen's family; and
>
> (b) Ms. Shen take reasonable steps to remove from any public forum or social media, including Canadameet.com and Ourdream.com, all posts she has made or published either against or of and concerning Ms. Lu or any members of Ms. Lu's family. ***

9.8.2.5 ES v. Shillington [2021] ABQB 739

✗**REF: §4.1.2.1, §9.2.4, §9.3.9, §9.4.6, §9.5.8, §10.5.2**

INGLIS J.: ***

75. A permanent injunction is relief that is only to be granted after a final adjudication of the parties' legal rights. While there is not an established test for permanent injunctions (compared to interlocutory injunctions, for example) one dissent from the Supreme Court of Canada held that the test requires a party to establish: (1) its legal rights; and (2) that damages are an inadequate remedy; and 3) that an injunction is an appropriate remedy: see *Google Inc v. Equustek Solutions Inc*, 2017 SCC 34 at para 66. However, an injunction is an equitable remedy and therefore discretionary, subject to the considerations that govern the exercise of that discretion. ***

77. Here, the Plaintiff has established that her legal rights to privacy and confidence have been violated and likely continue to be violated. When she last conducted a search, she located some of the images complained of still publicly available.

78. The test for a mandatory injunction is found in *Poole v. City Wide Towing and Recovery Service Ltd*, 2020 ABCA 102 at paras 14-17. The Plaintiff must show a strong *prima facie* case; the Plaintiff will suffer irreparable harm if the injunction is refused; and on a balance of convenience it must be determined which party would suffer greater harm from the granting or refusal of the remedy.

79. Given the findings of this decision, the first step is established. The irreparable harm to the Plaintiff is clear: given the ongoing impact to her privacy rights as well as her overall well-being, the ongoing presence of these images in the public arena, or the control of these private images in the hands of the Defendant, are significantly damaging. There is no apparent inconvenience to the Defendant to take the steps sought from the Plaintiff to attempt to undo what he has done.

80. The Defendant is required to make all of his best efforts to return all images of the Plaintiff in his possession and to make all of his best efforts to remove any images of the Plaintiff that he posted wherever the images are found.

81. *** [T]he Defendant is prohibited by this court from sharing *any* private images of the Plaintiff publicly in the future. This is a permanent injunction that binds the Defendant beyond the statutory restrictions. ***

9.8.2.6 Yenovkian v. Gulian [2019] ONSC 7279

✗**REF: §4.1.3.1, §9.3.10, §9.5.9**

KRISTJANSON J.: ***

44. Section 46(1) of the *Family Law Act*, R.S.O. 1990, c. F.3 ("*FLA*") permits the court to make an interim or final restraining order against a spouse or former spouse if the applicant has reasonable grounds to fear for his or her own safety or for the safety of any child in his or her lawful custody. By final order dated June 7, 2019, I granted a final restraining order under section 46 of the *Family Law Act*. These are my reasons.

45. Key elements in determining whether a restraining order should issue as summarized by Paulseth, J. in *Children's Aid Society of Toronto v. L.S.*, 2017 ONCJ 506 (Ont. C.J.) at para. 44 include:

> • Restraining orders are serious and should not be ordered unless a clear case has been made out. See: *Ciffolillo v. Niewelglowski*, 2007 ONCJ 469.
>
> • A restraining order is serious, with criminal consequences if there is a breach. It will also likely appear if prospective employers conduct a criminal record (CPIC) search. This could adversely affect a person's ability to work. It may affect a person's immigration status. See: *F.K. v. M.C.*, 2017 ONCJ 181.
>
> • It is not sufficient to argue that there would be no harm in granting the order. See: *Edwards v. Tronick-Wehring*, 2004 ONCJ 195.
>
> • Before the court can grant a restraining order, it must be satisfied that there are "reasonable grounds for the person to fear for his or her own safety or for the safety of their child". See: *McCall v. Res*, 2013 ONCJ 254.
>
> • The person's fear may be entirely subjective so long as it is legitimate. See: *Fuda v. Fuda*, 2011 ONSC 154, 2011 CarswellOnt 146 (Ont. S.C.J.); *McCall v. Res*, *supra*.
>
> • A person's subjective fear can extend to both the person's physical safety and psychological safety. See: *Azimi v. Mirzaei*, 2010 CarswellOnt 4464 (Ont. S.C.J.).
>
> • It is not necessary for a respondent to have actually committed an act, gesture or words of harassment, to justify a restraining order. It is enough if an applicant has a legitimate fear of such acts being committed. An applicant does not have to have an overwhelming fear that could be understood by almost everyone; the standard for granting an order is not that elevated. See: *Fuda v. Fuda*, *supra*.

> • A restraining order will be made where a person has demonstrated a lengthy period of harassment or irresponsible, impulsive behaviour with the objective of harassing or distressing a party. There should be some persistence to the conduct complained of and a reasonable expectation that it will continue without court involvement. See: *Purewal v. Purewal*, 2004 ONCJ 195.

46. Based on all the evidence, I find that a clear case has been made out for a permanent restraining order. I am satisfied that there are reasonable grounds for Ms. Gulian to fear for her own safety and for the safety of her children. This encompasses both physical safety and psychological safety, based on a long period of egregious and continuing threats and menace to Ms. Gulian and those whom Mr. Yenovkian perceives support Ms. Gulian. These include Ms. Gulian's parents, her lawyer, her witnesses and a judge who issued orders with which Mr. Yenovkian disagrees. I find that there has been persistence to the conduct complained of and there is a reasonable expectation that it will continue without court involvement because it has persisted despite the court orders of June 26, 2018 and April 19, 2019: *Purewal v. Prewal*, 2004 ONCJ 195 (Ont. C.J.), para. 40.***

48. I grant a permanent restraining order on the terms set out in the Order below. ***

206. The final Order in this matter is set out below as edited for publication by removing the specific URLs for websites and the names of the websites and videos, the names and birthdates of the children, and the name of the family business:

> 1. Vem Yenovkian shall immediately remove [the URLs for seven listed websites] from the internet.
>
> 2. Vem Yenovkian shall immediately remove from the internet all videos and/or images referable to either or both of the children, A.B. and C.D.; to Ms. Gulian; to her family (in particular, her mother and father); and/or to the [family business] under his control, power and/or possession.
>
> 3. Vem Yenovkian shall immediately remove from the internet all posts in writing referring to either or both of the children, A.B. and C.D. Elijah Yenovkian; to Ms. Gulian; to her family (in particular, her parents); and/or to the [family business] under his control, power and/or possession.
>
> 4. Vem Yenovkian shall not post (directly or indirectly) to the internet any videos and/or images referable to either or both of the children, A.B. and C.D.); to Ms. Gulian, to her family (in particular, her parents); and/or to the [family business].
>
> 5. Vem Yenovkian shall not post (directly or indirectly) to the internet any writing referring to either or both of the children, A.B. and C.D.); to Ms. Gulian; to her family (in particular, her parents); and/or to the [family business].
>
> 6. Vem Yenovkian shall not record his access via videoconferencing or telephone with either or both of the children, A.B. and C.D.). ***
>
> 12. A permanent restraining order pursuant to section 46 of the *Family Law Act* shall issue providing that except during scheduled access times, Vem Yenovkian shall be restrained from directly or indirectly contacting, threatening, intimidating, molesting, harassing, annoying or causing a third party to contact, threaten, intimidate, molest, harass or annoy Ms. Gulian, her daughter or her son as follows:
>
> > (a) Vem Yenovkian shall not telephone, text, email or communicate with Ms. Gulian directly or indirectly for any purpose, except through her lawyers for the purpose of arranging access or to communicate about the children, or through her lawyers for litigation-related purposes.
> >
> > (b) Vem Yenovkian shall not come within 500 metres of Ms. Gulian's home or anywhere that Ms. Gulian or A.B. or C.D. happen to be, save and except for such access with A.B. and C.D. as is ordered by the court or agreed between the parties.
> >
> > (c) Vem Yenovkian shall not come within 500 metres of or make contact with any official at A.B. or C.D.'s school, day care facilities, or anyone providing the children with extracurricular activities; ***

9.8.2.7 Caplan v. Atas [2021] ONSC 670

✗**REF: §5.1.2, §5.2.4, §6.8.4, §20.7.3**

CORBETT J.: ***

216. In *Astley v. Verdun*, 2011 ONSC 3651 (Ont. S.C.J.), para. 21, Chapnik J. stated as follows:

> Permanent injunctions have consistently been ordered after findings of defamation where either: (1) there is a likelihood that the defendant will continue to publish defamatory statements despite the finding that he is liable to the plaintiff for defamation; or (2) there is a real possibility that the plaintiff will not receive any compensation, given that enforcement against the defendant of any damage award may not be possible…. ***

218. The record establishes that Atas has continued to publish, and to cause to be published, defamatory and harassing publications on the internet after having been ordered not to do so. She has not adduced evidence to defend the Defamation Proceedings and has a long history of procedural misconduct in litigation: given the chance she will seek to re-open these proceedings and to continue with them indefinitely while continuing her wrongful conduct. As a result of Atas' bankruptcy and the resulting withdrawal of the plaintiffs' monetary claims in these proceedings, even as to costs, it is certain that plaintiffs will not receive any monetary compensation. This is a case where a permanent injunction should be ordered. ***

234. The overall history makes it clear that Atas must be ordered to leave the plaintiffs alone, and that the order must be framed broadly to ensure that she does not do indirectly that which she has been restrained from doing directly. ***

9.8.2.8 Cross-references

- *XY LLC v. Zhu* [2013] BCCA 352, [98]-[110]: **§10.5.1**.
- *Miller v. Jackson* [1977] EWCA Civ 6, [12]-[18], [40]-[41], [47]-[48]: **§21.1.1**.
- *Fearn v. Board of Trustees of the Tate Gallery* [2023] UKSC 4, [126]: **§21.1.6**.
- *Smith v. Fonterra Co-op. Group Ltd* [2024] NZSC 5, [4]: **§21.2.3**.

9.8.2.9 Further material

- J. Murphy, "Rethinking Injunctions in Tort Law" (2007) 27 Oxford J Legal Studies 509.
- P.S. Davies, "Injunctions in Tort and Contract" in G. Virgo & S. Worthington (eds), *Commercial Remedies: Resolving Controversies* (Cambridge: Cambridge University Press, 2017).
- H. Young, "Permanent Injunctions in Defamation Actions" (2023) 46 Dalhousie LJ 781.

10 DISHONESTY AND ABUSE OF POSITION

10.1 Fraud (deceit)

10.1.1 Langridge v. Levy (1837) 4 M&W 337 (ExP)

England Exchequer of Pleas – (1837) 4 M&W 337

The declaration stated, that whereas one George Langridge the father of the plaintiff, on the 1st of June, 1833, at the request of the defendant, bargained with him to buy of him a certain gun, to wit, for the use of himself and his sons, at and for a certain price, to wit, the sum of 24l., and the defendant then, by falsely and fraudulently warranting the said gun to have been made by Nock, and to be a good, safe, and secure gun, then sold the said gun to the said George Langridge, for the use of himself and his sons, for the said sum of 24l., then paid by the said George Langridge to the defendant for the same: whereas in truth and in fact the defendant was guilty of great breach of duty, and of wilful deceit, negligence, and improper conduct, in this, that the said gun, at the time of the said warranty and sale, was not made by Nock, nor was it a good, safe, and secure gun, but, on the contrary thereof, was made and constructed by a maker very inferior as a gun-maker to Nock, and was then and at all times a very bad, unsafe, ill-manufactured, and dangerous gun, and wholly unsound and of very inferior materials; of all which premises the defendant, at the time of the making of the said warranty, and of the said sale, had full knowledge and notice. And the plaintiff in fact says, that he, knowing and confiding in the said warranty, did use and employ the said gun, which but for the said warranty he would not have done: and that afterwards, to wit, on the 10th December, 1835, the said gun being then in the hands and use of the plaintiff, by reason and wholly in consequence of the weak, dangerous, and insufficient and unworkmanlike manufacture, construction, and materials thereof, then and whilst the said gun was so in use by the plaintiff, burst and exploded, became shattered, and went to pieces; whereby and by reason whereof the plaintiff was greatly cut, wounded, maimed, &c. &c., and wholly by means of the premises, breach of duty, and improper conduct of the defendant, lost, and is for ever deprived of the use of his hand, &c. &c. ***

PARKE B:

1. It is clear that this action cannot be supported upon the warranty as a contract, for there is no privity in that respect between the plaintiff and the defendant. The father was the contracting party with the defendant, and can alone sue upon that contract for the breach of it.

2. The question then is, whether enough is stated on this record to entitle the plaintiff to sue, though not on the contract; and we are of opinion that there is, and that the present action may be supported.

3. We are not prepared to rest the case upon one of the grounds on which the learned counsel for the plaintiff sought to support his right of action, namely, that wherever a duty is imposed on a person by contract or otherwise, and that duty is violated, any one who is injured by the violation of it may have a remedy against the wrongdoer: we think this action may be supported without laying down a principle which would lead to that indefinite extent of liability, so strongly put in the course of the argument on the part of the defendant; and should pause before we made a precedent by our decision which would be an authority for an action against the vendors, even of such instruments and articles as are dangerous in themselves, at the suit of any persons whomsoever into whose hands they might happen to pass, and who should be injured thereby. We do not feel it necessary to go to that length, and our judgment proceeds upon another ground. If the instrument in question, which is not of itself dangerous, but which requires an act to be done that is, to be loaded, in order to make it so, had been simply delivered by the defendant, without any contract or representation on his part, to the plaintiff, no action would have been maintainable for any subsequent damage which the plaintiff might have sustained by the use of it. But if it had been delivered by the defendant to the plaintiff, for the purpose of being so used by him, with an accompanying representation to him that he might safely so use it, and that representation had been false to the defendant's knowledge, and the plaintiff had acted upon the faith of its being true, and had received damage thereby, then there is no question but that an action would have lain, upon the principle of a numerous class of cases, of which the leading one is that of *Pasley v. Freeman*, 3 T.R. 51; which principle is, that a mere naked falsehood is

not enough to save a right of action: but if it be a falsehood told with an intention that it should be acted upon by the party injured, and that act must produce damage to him; if, instead of being delivered to the plaintiff immediately, the instrument had been placed in the hands of a third person, for the purpose of being delivered to and then used by the plaintiff, the like false representation being knowingly made to the intermediate person to be communicated to the plaintiff, and the plaintiff having acted upon it, there can be no doubt but that the principle would equally apply, and the plaintiff would have had his remedy for the deceit; nor could it make any difference that the third person also was intended by the defendant to be deceived; nor does there seem to be any substantial distinction if the instrument be delivered, in order to be so used by the plaintiff, though it does not appear that the defendant intended the false representation itself to be communicated to him. There is a false representation made by the defendant, with a view that the plaintiff should use the instrument in a dangerous way, and, unless the representation had been made, the dangerous act would never have been done.

4. If this view of the law be correct, there is no doubt but that the facts which upon this record must be taken to have been found by the jury bring this case within the principle of those referred to. The defendant has knowingly sold the gun to the father, for the purpose of being used by the plaintiff by loading and discharging it, and has knowingly made a false warranty that it might be safely done, in order to effect the sale: and the plaintiff, on the faith of that warranty, and believing it to be true (for this is the meaning of the term confiding), used the gun, and thereby sustained the damage which is the subject of this complaint. The warranty between these parties has not the effect of a contract; it is no more than a representation; but it is no less. The delivery of the gun to the father is not, indeed, averred, but it is stated that, by the act of the defendant, the property was transferred to the father, in order that the son might use it; and we must intend that the plaintiff took the gun with the father's consent, either from his possession or the defendant's for we are to presume that the plaintiff acted lawfully, and was not a trespasser, unless the contrary appear.

5. We therefore think, that as there is fraud, and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured.

6. We do not decide whether this action would have been maintainable if the plaintiff had not known of and acted upon the false representation; nor whether the defendant would have been responsible to a person not within the defendant's contemplation at the time of the sale, to whom the gun might have been sold or handed over. We decide that he is responsible in this case for the consequences of his fraud whilst the instrument was in the possession of any person to whom his representation was either directly or indirectly communicated, and for whose use he knew it was purchased.

7. Rule discharged.

REFLECTION:

- *Why could the plaintiff not sue Levy for breach of the firearm sale and purchase contract?*
- *What was Parke B's concern that caused him to "pause before we made a precedent by our decision"?*
- *What distinguishes the tort of fraud from the tort of negligence elucidated in Donoghue v. Stevenson (§13.1.1)?*

10.1.2 PP v. DD [2017] ONCA 180

✗**REF: §6.3.2.2, §19.10.1.2**

ROULEAU J.A.: ***

1. In 2014, PP and DD met through a mutual friend and enjoyed a short romantic relationship that lasted for less than two months. They went out on a number of dates and engaged in ostensibly consensual sexual intercourse on several occasions. Based on his conversations with DD, PP understood that DD was taking the birth control pill and that she did not intend to conceive a child.

2. Several weeks after their sexual relationship ended, PP was surprised to learn from DD that she was 10 weeks pregnant. In early 2015, DD gave birth to a healthy child. According to DD, paternity testing confirmed

that PP is the father.

3. PP brought a civil action for fraud, deceit, and fraudulent misrepresentation against DD, claiming as damages that the deception deprived him of the benefit of choosing when and with whom he would assume the responsibility of fatherhood. In his words, "he wanted to meet a woman, fall in love, get married, enjoy his life as husband with his wife and then, when he and his wife thought the time was 'right', to have a baby." He pleaded that he consented to sexual intercourse with DD on the understanding that she was using effective contraception. In his view, this was an express or implied misrepresentation and his consent was vitiated, having been obtained through deception and dishonesty.

4. This is an appeal from a decision granting DD's motion to strike PP's statement of claim without leave to amend: *P. (P.) v. D. (D.)*, 2016 ONSC 258, 129 O.R. (3d) 175 (Ont. S.C.J.). ***

The Decision Below ***

25. The motion judge held that the claim of fraudulent misrepresentation could not be made out. He determined that "PP is only suing in fraudulent misrepresentation because he had a non-pathological emotional shock from becoming a parent" (para. 74). In the motion judge's view, fraudulent misrepresentation is an economic or pecuniary loss tort, for which damages are meant to restore a party to the financial circumstances he or she was in prior to relying on the misrepresentation. As a result, it was plain and obvious that a fraudulent misrepresentation claim for damages for what the motion judge labelled as "non-pathological emotional harm resulting from an unplanned parenthood" could not succeed. ***

Can the appellant recover damages arising from the child's birth?

37. Central to the motion judge's dismissal of the appellant's claim for fraudulent misrepresentation is his conclusion that there were no recoverable damages. The appellant argues that the motion judge erred in several respects on the issue of damages.

38. First, the appellant argues that a simple plea that he has suffered damages is sufficient. Second, notwithstanding his submission that the motion judge erred in characterizing the claim as one for damages for "non-pathological emotional harm from unplanned parenthood", the motion judge described the claim for damages as "novel" and as such, the appellant argues, it ought to be allowed to proceed to trial. Third, he argues that he ought to have been permitted to amend his pleading to allege other potential loses he has suffered or will suffer such as, he submits, the negative impact on his career and income earning capacity resulting from his having to spend time with his unwanted child.

39. I agree with the motion judge's conclusion that the appellant has not made out a viable claim for fraudulent misrepresentation. Such a claim cannot succeed in the absence of recoverable damages. It is not sufficient to simply allege that damages were suffered; there must be a basis for the claim that a loss has been suffered for which the law allows recovery of damages.

40. The appellant places particular reliance on the *obiter* comment of Cory J. in *R. v. Cuerrier*, [1998] 2 S.C.R. 371 (S.C.C.), at para. 135, that "[f]raud which leads to consent to a sexual act but which does not have [a significant risk of serious bodily harm] might ground a civil action." In the motion judge's view, while this may be true, "that civil action would not be fraudulent misrepresentation for damages for non-pathological emotional harm." I agree with that conclusion and, as I will explain, none of the damages allegedly suffered by the appellant—be they the damages set out in the claim or those argued in the course of submissions by counsel—are properly recoverable in a tort claim.

41. To succeed on a civil claim for fraudulent misrepresentation, the appellant must establish the following: (1) the representation was made by the respondent; (2) the respondent knew that the representation was false or was recklessly indifferent to its truth or falsity; (3) the false statement was material and by it the appellant was induced to act; and (4) the appellant suffered damages: *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 8, [2014] 1 S.C.R. 126 (S.C.C.), at para. 21; see also *Parna v. G. & S. Properties*

Ltd. (1970), 15 D.L.R. (3d) 336 (S.C.C.) at p. 344.[267] The Supreme Court of Canada has consistently recognized that "fraud without damage gives … no cause of action": *Hryniak* at para. 20.

42. The appellant maintains that the pleading has made out all of the required elements for fraudulent misrepresentation including damages. In his submission, the damages claimed—be they for non-pathological emotional harm or for disruption of his career and finances—while perhaps novel, should be left to be determined after a trial.

43. I have concluded that the appellant has not made out a viable claim for recoverable damages. As I will explain, I regard it as plain and obvious that those damages are not and, as a matter of legal policy, ought not to be recoverable by way of a fraudulent misrepresentation action. ***

45. The relevant facts drawn from the pleading, which for the purpose of this motion are assumed to be true, can be summarized as follows:

> (1) The parties developed an amorous relationship that included repeated vaginal sexual intercourse;
>
> (2) The appellant agreed to have unprotected sex with the respondent and, although he accepted the risk of pregnancy that exists when a sexual partner is taking contraceptive pills, he was not prepared to accept the risk of pregnancy if the respondent was not taking any contraceptives;
>
> (3) The appellant has not suffered any physical injury or any emotional harm that is pathological in nature;
>
> (4) The appellant was not exposed to any known risk of bodily harm because of the sexual intercourse;
>
> (5) The respondent became pregnant and a healthy child was born of their relationship;
>
> (6) There was no alleged misrepresentation by the respondent other than with respect to the use of contraceptives and, implicitly, that she intended to avoid getting pregnant; and
>
> (7) The appellant is male and, as father of the child, has legal as well as moral responsibilities toward that child.

46. Although it was not presented in this way, the claim can be viewed as a tort claim for involuntary parenthood made by one parent against the other. It is clear that the alleged damages do not relate to a physical or recognized psychiatric illness. In essence, the damages consist of the appellant's emotional upset, broken dreams, possible disruption to his lifestyle and career, and a potential reduction in future earnings, all of which are said to flow from the birth of a child he did not want. Although the claim is not for the direct costs associated with raising the child, all of the damages claimed by the appellant are the result of consequences flowing from the unwanted birth of a child, albeit unwanted only by the father. ***

The irrelevance of fault in Ontario's custody and child support regime

55. As I have noted above, this is not a claim being advanced by unwilling parents as against a third party. Rather, it is a claim being advanced by the unwilling father against the mother, who does not claim to be an involuntary parent and who has willingly taken on the responsibility of raising the child. ***

57. To allow the appellant to recover damages as against the respondent for the unwanted birth in the circumstances of this case would, in my view, run against the clear trend in the law moving away from fault based claims in the family law context.

58. Since the 1970s, Canadian jurisdictions have moved away from a fault based divorce and child support

[267] As this court noted in *Singh v. Trump*, 2016 ONCA 747, [2016] O.J. No. 5285, at para. 141, it is not entirely clear from the recent case law that an intention that the false representation be acted upon is a necessary element of a fraudulent misrepresentation claim, but that is immaterial to the present appeal.

regime. The 1976 Law Reform Commission of Canada's *Report on Family Law* (Ottawa: Information Canada, 1976) put it as follows, at p. 18:

> [There should be] a process that offers no legal confirmation of a spouse's contention that he was right and she was wrong, that she is innocent and he is guilty, that one is good and the other is bad. No legal results should be allowed to follow from such claims or accusations—not dissolution, not financial advantage, not a privileged position vis-à-vis the children.

59. In *Frame v. Smith*, at para. 9, La Forest J. similarly emphasized the "undesirability of provoking suits within the family circle." As he explained, such claims brought by one parent against another should not often be allowed since they are in most cases detrimental to the parties involved—especially to the welfare of the child—and will invite a flood of cases. See also *Louie v. Lastman*, (2001), 54 O.R. (3d) 301 (Ont. S.C.J.), at para. 31, affirmed (2002), 61 O.R. (3d) 459 (Ont. C.A.), and *Saul v. Himel*, (1994), 9 R.F.L. (4th) 419 (Ont. Gen. Div.), at para. 20, affirmed (1996), 22 R.F.L. (4th) 226 (Ont. C.A.). ***

61. When a couple's dispute involves costs related to their child, the imposition of civil liability raises similar concerns. It is well established that child support is the right of the child: see, e.g., *S. (D.B.) v. G. (S.R.)*, 2006 SCC 37, [2006] 2 S.C.R. 231 (S.C.C.), at para. 38. There is a corresponding obligation "placed equally upon both parents" to financially support the child: *Paras v. Paras*, (1970), [1971] 1 O.R. 130 (Ont. C.A.). The Supreme Court of Canada has confirmed that:

> the obligation of both parents to support the child arises at birth. In that sense, the entitlement to child support is "automatic" and both parents must put their child's interests ahead of their own in negotiating and litigating child support (*Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269 (S.C.C.), at para. 208).

62. The child support obligation of a parent in Ontario is legislated in s. 31(1) of the *Family Law Act*, which clearly states that every parent has an obligation to provide support for his or her child to the extent that the parent is capable of doing so. The legislative scheme for child support is broad, and does not take blame into account in relation to the manner of conception.[268] The statutory remedies available to ensure support for the child flow from the simple fact of being a parent as defined by statute.

63. It would be contrary to the spirit, purpose and policy reflected in Ontario's no-fault child support regime to view parents as equally responsible for maintaining a child but, at the same time, to allow recovery by the appellant against the mother for the loss purportedly suffered by him as a result of that responsibility, which loss would presumably increase as he devotes more of his time and resources to the child's upbringing.

64. The appellant asserts that he accepts and has complied with his statutory duty to pay child support. Nevertheless, the appellant seeks to recover in excess of $4 million in damages from the child's mother in compensation for losses flowing from the child's birth and his responsibilities toward that child. In the circumstances of this case, to allow the appellant's claim would, in effect, be to allow the appellant to circumvent the equal obligations to the child imposed on parents by law—obligations that are imposed without regard to fault or intention.

65. Little would distinguish this proposed claim from claims other parents may decide to bring against their former spouses or sexual partners seeking compensation for the burdens imposed on them by the birth of an unwanted child, where it is claimed that the child's conception was the result of a misrepresentation, duress, or even the negligence of the former spouse or sexual partner with respect to matters such as fertility or contraceptive use or misuse. Such actions would engender disharmony between mothers and fathers and would be contrary to the spirit of this province's family law legislation. ***

66. With the above in mind, I would observe that appellate courts in the United States have decided a

[268] As reflected in recent amendments to the *Children's Law Reform Act*, R.S.O. 1990, c. C.12, the manner of conception may well be relevant, in itself, to the presumption of parentage for the purposes of determining child support obligations under the *Family Law Act*, for example in the case of insemination by a sperm donor. PP's parentage is not disputed here and those issues are distinct from the case at bar.

number of cases highly analogous in their facts to the present one. ***

67. In *Henson v. Sorrell*, 1999 WL 5630 (U.S. Tenn. Ct. App. 1999), the Court of Appeals of Tennessee referred to a number of other cases from a variety of American jurisdictions in which the father of a child has attempted to recover damages from the mother because of false representations concerning birth control use.[269] The court noted that such claims have been "universally rejected". Again, in *Wallis v. Smith*, 130 N.M. 214 (U.S. N.M. C.A. 2001), the Court of Appeals for New Mexico dismissed precisely such a claim on the express basis that it would effectively allow the plaintiff to circumvent the legislative policy reflected in that state's statutory child support obligations. Although there are differences between the family law regimes in these United States jurisdictions and their equivalent in Ontario, the underlying principle is the same.

68. For these reasons, as a matter of legal policy the alleged damages should not be recoverable in tort. Therefore, this is not the kind of novel claim that ought to be allowed to proceed to a protracted and expensive trial: see *Arora v. Whirlpool Canada LP*, 2013 ONCA 657, 118 O.R. (3d) 113 (Ont. C.A.), at para. 94. ***

Conclusion

88. In conclusion, therefore, I would dismiss *** the appeal ***.

REFLECTION:

- *The Court dismissed PP's fraud claim on the basis that PP could not use his child to satisfy the damage element of the tort alleged against DD. Had the other elements of the tort been established?*
- *How did provincial family law influence the Court's reasoning? Was the Court's judgment grounded in principle, policy or a combination of both?*

10.1.3 Ultracuts v. Magicuts [2023] MBCA 71

Manitoba Court of Appeal – 2023 MBCA 71, leave denied: 2024 CanLII 40766 (SCC)

✗**REF: §10.4.1**

BEARD J.A. (STEEL and MAINELLA J.A. concurring):

1. The defendants Magicuts Inc. (Magicuts), Christopher R. Cawston (Mr. Cawston) and Brian A. Luborsky (Mr. Luborsky) (together, the defendants) are appealing a judgment from the Court of Queen's Bench (as it then was) in which the trial judge found that they had intentionally harmed the plaintiff, Ultracuts Franchises Incorporated (Ultracuts), by means of an unlawful act (civil fraud) against a third party, Wal-Mart Canada Inc. (Wal-Mart), by deceiving Wal-Mart regarding assurances that Wal-Mart had given to Magicuts, thereby committing the tort of unlawful interference with economic interests (unlawful means) (see para 37 herein). ***

2. The defendants argue that the trial judge committed a number of errors: ***

> (ii) regarding the tort of civil fraud, by failing to consider whether the impugned statements were statements of fact, as opposed to statements of position, opinion or future intentions of a third party;
>
> (iii) regarding the tort of civil fraud, by failing to consider whether Wal-Mart relied on the alleged misrepresentations; ***

3. In my view, the trial judge erred as set out in grounds (ii) and (iii), and it is not necessary to determine the other grounds. I would grant the appeal and dismiss Ultracuts' claim against the defendants. ***

Background ***

[269] See also A. M. Payne, "Sexual Partner's Tort Liability to other Partner for Fraudulent Misrepresentation Regarding Sterility or Use of Birth Control Resulting in Pregnancy", (1992) 2 *A.L.R.* 5th 301.

4. Ultracuts and Magicuts are competitors in the hair salon business. Each operated a chain of hair salons in Canada in 1994 and continues to do so.

5. Mr. Cawston and Mr. Luborsky were officers of Magicuts at the relevant times, Mr. Cawston being the president and in charge of Canadian operations and Mr. Luborsky being the chief executive officer (CEO) and in charge of operations in the United States. Further, each was a director of Magicuts and indirectly held shares in it. Meril Rivard (Mr. Rivard) was, throughout the relevant period, the owner of Ultracuts.

6. This claim is one in a series of claims that began in 1994, when Wal-Mart announced its agreement with Woolworth Canada Inc. to buy out 120 of the Woolco department stores throughout Canada (the Woolco stores), with plans to convert them to Wal-Mart stores. At that time, Magicuts operated 170 hair salons across Canada, 59 of which were located in Woolco stores. ***

7. Wal-Mart was of the view that it did not have enough space for the hair salons in the Woolco stores, so on March 22, 1994, Woolco notified Magicuts that it was terminating the licence agreements for the hair salons, and most hair salons were given a notice to vacate the Woolco stores within 30 days, that is, by April 21, 1994. The franchisees threatened legal action against Woolco, Wal-Mart and Magicuts.

8. Mr. Cawston eventually arranged a meeting with Melvin Redman (Mr. Redman), Wal-Mart's senior vice president in charge of the Woolco transition, to discuss the effect of the sale on the hair salons and the threatened legal action by the franchisees. ***

10. During those meetings, Mr. Redman maintained that the Magicuts hair salons would have to be closed, but he gave Mr. Cawston certain assurances regarding future opportunities to open Magicuts hair salons in existing or new stores, should there be any opportunities (the Redman agreement). It is uncontested that Mr. Redman refused to put any assurances in writing, but he said that "Wal-Mart's words [were] its bond" and he shook hands with Mr. Cawston. ***

13. In August 1995, Ultracuts *** began discussions with Brad Messer (Mr. Messer), the international property manager with Wal-Mart, to open hair salons in some of Wal-Mart's stores in Western Canada, which led to it opening hair salons in Wal-Mart stores in Winnipeg and Calgary in late 1995. Some of these locations were former Woolco stores in which there had been franchise Magicuts hair salons.

14. In October 1995, Magicuts became aware that Ultracuts was negotiating with Wal-Mart, and Mr. Cawston called Mr. Redman (who was then no longer with Wal-Mart) to voice his concerns about Wal-Mart not upholding its part of their bargain. ***

15. Despite those discussions, Wal-Mart continued to offer further locations to Ultracuts, with the result that Ultracuts would have had 10 hair salons in Wal-Mart stores. ***

17. In March 1996, Scott Robertson (Mr. Robertson) replaced Mr. Messer. *** In response, Mr. Cawston sent a letter to Mr. Robertson dated May 14, 1996 (the letter). It is this letter that Ultracuts argues contains the false representations that form the basis of its claim against the defendants.

18. Mr. Robertson's evidence was that Wal-Mart's senior management reviewed the letter with Mr. Wasserman, and he and Mr. Wasserman undertook an investigation. Following this investigation, Wal-Mart concluded that, while an agreement had been reached in 1994, it was not a legally binding agreement, and that there was a potential that Wal-Mart might get sued by Magicuts franchisees, should Ultracuts open further hair salons in former Woolco stores.

19. In late June 1996, Mr. Robertson told Mr. Rivard that Wal-Mart could not offer any new locations to Ultracuts due to its agreement with Magicuts.

20. Wal-Mart then entered into separate discussions with both Magicuts and Ultracuts to find a solution to the competing requests for additional hair salons. ***

22. The result, as found by the trial judge, was that Wal-Mart agreed to honour an offer to Ultracuts that would give it seven locations in Wal-Mart stores in Western Canada, with an agreement not to put a competitor in a market where it was operating a hair salon. Ultracuts rejected this offer.

23. *** On November 13, 1996, Ultracuts advised Wal-Mart that it would proceed with the remaining hair salons in the written agreements only if Wal-Mart would agree that it was without prejudice to its rights in the litigation. Wal-Mart refused, so Ultracuts chose not to proceed with any further hair salons, and none were constructed. ***

The Law ***

36. This appeal relates to Ultracuts' claim that the defendants unlawfully interfered with its economic relations with Wal-Mart. As I will explain, this tort is premised on the commission by the defendants of an unlawful act in relation to a third party, which Ultracuts alleges was civil fraud. I will begin with a review of the elements of these two torts. ***

Civil Fraud

48. In this case, Ultracuts alleges that the unlawful act that was committed by the defendants against Wal-Mart was the tort of civil fraud. The elements of civil fraud, also known as deceit and fraudulent misrepresentation (see *Dhillon v. Dhillon*, 2006 BCCA 524 at para 77), are settled and have been explained in a number of legal texts and decisions from all levels of court, albeit in somewhat different language. It would be fair to say that all rely, at least to some extent, on the principles set out in Herschell LJ's decision in *Derry v. Peek* (1889), [1886-90] All ER Rep 1; [1889] UKHL 1 at 374 (HL (Eng)). I am going to list the elements and then explain the principles of each.

(a) The Elements of Civil Fraud

49. The elements of civil fraud can best be described as follows:

> (i) a representation or statement of fact made by the representor that was false;
>
> (ii) the representor knew that the representation was false or was reckless as to its truth or falsity;
>
> (iii) the false representation was made with the intention that the representee would act upon it;
>
> (iv) the representee relied on the false representation, sometimes stated as the misrepresentation caused (i.e., induced) the representee to act; and
>
> (v) the representee's reliance on the representation caused/resulted in a loss.

(i) There Must Be a False Representation or Statement of Fact

50. This element requires proof of both a representation of fact and the falsity of that representation.

51. A representation includes verbal and written statements, but it can also include conduct, such as a nod or active concealment, silence or half-truths, depending on the circumstances (see *Alevizos v. Nirula*, 2003 MBCA 148 at paras 19-27). As this case involves written statements (the representations), I will not consider other types of representations.

52. First, any statement purported to be a false representation for the purpose of civil fraud must be one of fact, which must relate to something in the past or present. (See, for example, *Parna v. G & S Properties Ltd*, [1971] SCR 306 at 316; *Bruno Appliance and Furniture, Inc v. Hryniak*, 2014 SCC 8 at para 19; and *York University v. Markicevic*, 2018 ONCA 893 at para 21, leave to appeal to SCC refused, 38607 (18 July 2019); *Youyi Group Holdings (Canada) Ltd v. Brentwood Lanes Canada Ltd*, 2020 BCCA 130 at para 83, leave to appeal to SCC refused, 39246 (21 January 2021); Chamberlain [& Pitel, eds, *Fridman's The Law of Torts in Canada*, 4th ed (Toronto: Thomson Reuters, 2020)] at p 860; and Burns [& Blom, *Economic Torts in Canada*, 2nd ed (LexisNexis, 2016)] at section 7.17.)

53. Generally speaking, "[o]pinions, predictions as to future events and promises are all statements that, as far as their explicit content is concerned, are neither true nor false" (Burns at section 7.18).

54. Second, an opinion, estimate, prediction or promise that "may convey factual information by implication, which [could open] up the possibility of liability in civil fraud" (Burns at section 7.18). That is, such a

statement may constitute a representation if it implies that facts exist that are consistent with it, in which case, it would be treated as a representation of implied fact. (See, for example, *KRM Construction Ltd v. British Columbia Railway*, 1982 CarswellBC 257 (CA); and Burns at section 7.19.)

55. That said, an "opinion about facts that both parties know equally well will not usually be a statement of fact" (MacDougall [*Misrepresentation and (Dis)Honest Performance in Contracts*, 2nd ed (Toronto: LexisNexis, 2021)] at section 2.148). That is, if two parties are privy to the same facts underlying the opinion, that opinion will not be based on implied facts known only to the party giving the opinion, so there will be no representation of implied facts. (See also *Williams v. Saanich School District No 63*, 1986 CarswellBC 699 (SC), aff'd on other grounds, 1987 CarswellBC 146 (CA).)

56. Third, the existence and meaning of a representation should be construed objectively from the perspective of a reasonable recipient of that communication in all of the circumstances of the actual representee. (See *Primus Telecommunications Plc v. MCI Worldcom International Inc*, [2004] EWCA Civ 957 at para 30; and MacDougall at section 2.32.)

57. Fourth, as previously noted, the representation must be false. The onus to prove that falsity is on the plaintiff; there is no onus on the representor to prove that the representation is true. (See MacDougall at section 2.65, relying on *Melbourne Banking Corporation v. Brougham* (1882), [1881-82] 7 AC 307 (HL (Eng)), as implied in *Queen v. Cognos Inc*, [1993] 1 SCR 87 at 109-10.)

58. Further, the test when determining whether a representation is false is an objective one, by considering the effect of the words on a reasonable person in the circumstances of the representee. (See *2249659 Ontario Ltd v. Sparkasse Siegen*, 2018 ONCA 371 at para 35; see also *Toronto-Dominion Bank v. Leigh Instruments Ltd (Trustee of)*(1999), 178 DLR (4th) 634 at para 9 (ON CA), leave to appeal to SCC refused (2000), 188 DLR (4th) vi (note) (SCC); and Burns at section 7.32.)

(ii) The Representor Knew That the Representation Was False or Was Reckless as to Its Truth or Falsity

59. It was established in *Derry* that the tort of deceit (and civil fraud) requires proof that the representor made the representation knowing that it was false, or with reckless disregard for its truth or falsity. In neither case would there be "an honest belief in [the] truth" of the statement (at p 374). Stated otherwise, if the representor had an honest belief in the truthfulness of the statement, then it would not be fraudulent, even if the statement was, in fact, false (see p 370).

60. *Derry* also established that the representor's honest belief in the truthfulness of the statement should not be judged objectively, on the basis of whether it was reasonable, but subjectively, from the representor's point of view (see pp 358, 363, 370).

61. However, a belief is a state of mind and direct evidence of a person's beliefs is not often available, which raises the question of how to determine whether a belief was honestly held. A person's belief, like knowledge or intention, can be determined by inference from the surrounding circumstances. A court should consider the context and surrounding circumstances in which the representation was made. The more unreasonable the belief, when considered in the context and circumstances, the less likely it may be for a court to find that it was honestly held. (See *Derry* at pp 369, 375-76; Burns at section 7.24.) However, the absence of reasonable grounds for a belief does not establish that there was, at law, no honest belief.

62. Further, if a representation is capable of different meanings, a court must determine whether the representor honestly believed that the representation was true in the sense in which he or she understood it when making it, even if that understanding was objectively wrong. (See Burns at section 7.24; and Hoyano ["Lies, Recklessness and Deception: Disentangling Dishonesty in Civil Fraud" (1996) 75:3 Can Bar Rev 474] at p 481.)

63. Finally, while the representor has to know that the representation is false, the motive for making the false statement is irrelevant. As stated in *Derry*, "if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the [representee]" (at p 374).

(iii) The False Representation Was Made with the Intention That the Representee Would Act Upon It

64. It has generally been agreed that an element of civil fraud/fraudulent misrepresentation is that the representor made the representation with the intention that the representee would act/rely on it. This was one of the elements set out in the early case of *Pasley v. Freeman*, (1789), 100 ER 450 (KB UK), as cited in Halsbury's Laws of Canada (online), *Misrepresentation and Fraud*, "Fraudulent Misrepresentation Founded in Tort: The Tort of Fraudulent Misrepresentation: Requisite Elements of the Tort" (IV.1(2)) at HMF-28 "Requisite Elements of the Tort of Fraudulent Misrepresentation" (2019 Reissue), and was recognized as an element by the Supreme Court of Canada in *Redican v. Nesbitt*, [1924] SCR 135 at 147; and *Parna*, at p 316.

65. Likewise, it has been recognized as an element of civil fraud in other Canadian secondary sources. See MacDougall at section 5.10; Osborne [*The Law of Torts*, 6th ed (Toronto: Irwin Law, 2020)] at p 336; Klar [& Jefferies, *Tort Law*, 6th ed (Toronto: Thompson Reuters, 2017)] at p 803; and Burns at section 7.1. ***

67. In my view, the weight of the jurisprudence and the academic commentary supports a finding that the elements of civil fraud include the requirement that the representor must have made the false representation *with the intention that the representee would act/rely on it*, and I would so find.

68. Proving intention, like proving knowledge or belief, can be difficult because it is a state of mind, and, unless the representor admits to having a particular state of mind, it can only be proven by inference from the surrounding circumstances. This starts with the basic legal premise that the law infers that a person intends the natural consequences of his actions, often called a common sense inference (the common sense inference). (See Burns at section 7.34; Hoyano at p 485; *Jago v. Virden Credit Union Ltd*, 1990 CarswellMan 392 (QB) at para 30, aff'd 1993 CarswellMan 411 at para 13 (CA).)

69. Once it is proven that a representor knowingly made a false representation to the representee about a material fact, it would be open to the court to infer that the representor intended the natural consequences of making that statement, that is, to draw the common sense inference. Here, the common sense inference would be that the representor intended that the representee would rely on the representation.

70. However, as with any inference, before drawing the common sense inference, it is important to consider the specific circumstances in which the representation was made and the relationship between the parties. Considered in context, a judge may conclude that reliance on the representation, although a common sense inference, was not, in fact, intended.

71. For example, circumstances that have been found to negate the common sense inference include where a representation related to matters of law or the construction of a contract and was made when the parties were in an adversarial legal situation, as those are circumstances where a representee would be expected to rely on advice from his or her own lawyer, not on legal advice from an adversarial party. (See *Dorsch et al v. City of Weyburn et al*, (1985), 23 DLR (4th) 379 at 389 (SK CA); and *Apotex Inc v. Sanofi-Aventis*, 2010 FC 182 at para 61.)

72. Regarding opinions in general, MacDougall stated that "[s]ome opinions do not constitute representations because they are clearly not intended to be relied on by the other party" (at section 2.142). In *The Law of Torts*, Osborne stated that "[s]tatements of opinion, law and prediction, and vague and boastful sales commendations ('puffs') are not normally sufficient [to be a misrepresentation] because the representation must be of a kind on which a reasonable person would rely" (at p 336).

(iv) The Representee Relied in the False Representation, Sometimes Stated as the False Representation Caused (i.e., Induced) the Representee to Act

73. Reliance by the representee on the false representation, that is, that the representation caused/induced the representee to act, is a required element of civil fraud and requires proof that the representee, in fact, relied on the representation (see *Parna*, at pp 316-17; *Kelemen v. El-Homeira*, 1999 ABCA 315 at paras 9-10, leave to appeal to SCC refused, 2000 CarswellAlta 1156; *Bruno* at para 19; *York* at para 21; and Chamberlain at pp 851, 874-75).

74. Whether the representee relied on the representation is "a question of fact to be inferred from all the circumstances of the case and [the] evidence at the trial" (Fridman at p 291, as quoted in *York* at para 21; see *LK Oil & Gas Ltd v. Canalands Energy Corporation*, 1989 ABCA 153 at paras 31, 36, 38, leave to appeal to SCC refused, [1989] SCCA No 383 (QL). Although this statement was made in the contractual context, it applies equally to tortious misrepresentation.

75. The jurisprudence has established that an outwardly positive act by the representee, such as entering into a contract, is not required to prove reliance; all that is required is an alteration of position, which can include acts such as forbearance. (See, generally, *XY, LLC v. Zhu*, 2013 BCCA 352 at paras 24-27 [§10.1.4], leave to appeal to SCC refused, 35557 (20 February 2014).)

76. There is divergent jurisprudence on two aspects of this element of the tort: materiality and the onus of proof. For reasons that will become clear, these issues do not have to be resolved in this case; however, I will provide a brief explanation of each.

77. One issue that sometimes arises when considering causation relates to the materiality of the representation, in the sense of being a positive inducement for the representee's actions (see Burns at section 7.36; *Derry* at p 361; *LK Oil* at para 24; *Genesis Tower Ltd v. Cheung and Chiu*, 2002 BCCA 582 at paras 16, 21-22; see also Klar at p 811; Burns at section 7.38; MacDougall at sections 2.338, 2.343, 2.345). While the representation must be material to the representee's decision, it does not need to be the sole inducing factor (see *Sidhu Estate v. Bains*, 1996 CarswellBC 1262 at para 36 (CA); and *Midland* at para 137).

78. The first divergence relates to the test to determine materiality—that is, whether it should be determined on a subjective or objective basis. If determined on a subjective basis, the question is whether the representation was material to the representee (see *Kelemen* at paras 9-10). If determined on an objective basis, the question would be whether the representation would be likely to induce a person to act (see *LK Oil* at paras 24-25; *Wang v. Shao*, 2019 BCCA 130 at para 48, leave to appeal to SCC refused, 38704 (14 November 2019)).

79. Some jurisprudence holds that the plaintiff must prove that the representation was objectively material as an element of the tort, with the result that a finding that it was not would dispose of the claim, even if all of the other elements were proven. (See Chamberlain at pp 877-78).

80. The second divergence relates to a shifting of the onus of proof of reliance. This arises where a court finds that the defendant made an objectively material false representation that was intended to induce the plaintiff to act to his or her detriment, that the plaintiff acted to his detriment and there was a loss. One line of authorities holds that these findings would shift the legal onus to the defendant to prove that the plaintiff (in this case, Wal-Mart) did not rely on the representation, while another line of authorities holds that these findings would lead to an inference of fact that there was reliance and put an evidentiary onus on the defendant to rebut the inference, but there would be no shift of the legal onus (see Chamberlain at p 878).

81. On these two issues, the conclusion in Chamberlain, is that "[g]iven these confusions and divergences, it cannot be authoritatively determined how materiality interacts with the tort of deceit" (at p 878).

82. Reliance is an inference that relates to the representee's state of mind, which must be determined by taking into account the context in which the representation was made and all of the surrounding circumstances (see *Sidhu Estate* at para 41). Aside from whether it is an element of the tort, the objective materiality of the representation is one factor to consider in determining actual reliance, as a finding that the representation was objectively trivial or irrelevant would weigh against a finding that the representee actually relied on it, i.e., that it was an inducement. This was the finding in *Genesis Tower*; see also *Parna*, at p 319.

83. There are a number of circumstances that may indicate that it is unlikely that the representee acted on the false representation, such as:

> • where the representee made his own investigations or inquiries into the matter (see *Amertek Inc et al v. Canadian Commercial Corp et al*, (2005), 256 DLR (4th) 287 (ON CA), leave to appeal to

SCC refused, 31141 (16 February 2006); *Abdossamadi v. TD Insurance Direct Agency Inc*, 2016 ONSC 1363; and *1348623 Alberta Ltd v. Choubal*, 2016 SKQB 129);

• where it can be shown that the misrepresentation played no role in the representee's decision to act (see *Seaver v. Winnipeg Regional Health Authority Inc et al*, 2014 MBCA 55 at paras 5, 13-14; and *Patten v. Hants Realty Ltd*, 2015 NSSC 349);

• where it can be shown that the representee knew that the misrepresentation was false, or it did not believe the truth of the representation (see *Parna*; and *Brent v. Slegg Construction Materials Ltd*, 2007 BCSC 661);

• where the representee, after initially believing the misrepresentation, learns the truth before actually relying on it (see *Sorensen v. Kaye Holdings Ltd*, 1979 CarswellBC 242 (CA)).

(v) The Representee's Actions Resulted in a Loss

84. *** [P]roof that a representee suffered a loss due to relying on a misrepresentation is an element of the tort of civil fraud ***. ***

Analysis—Civil Fraud ***

(a) The Trial Judge's Decision ***

90. The trial judge set out the elements of the tort of unlawful means, including the requirement to prove that the interference was by way of an unlawful act (see paras 132, 136), which he found to be civil fraud in relation to the defendants' representations to Wal-Mart (see para 138).

91. The trial judge's analysis regarding civil fraud was brief (at paras 136-39):

> *** In this case, *** the question is whether Wal-Mart had a right of action against the defendants.
>
> With respect to this issue, the evidence establishes the following key points:
>
> a) The defendants alleged that they had a verbal agreement with Wal-Mart for Magicuts to be its exclusive haircare provider in Canada;
>
> b) The defendants advised Wal-Mart that if the plaintiff opened additional salons, in breach of the alleged exclusivity agreement, both Magicuts and Wal-Mart would be sued by Magicuts' franchisees;
>
> c) The [defendants'] allegations caused Wal-Mart to change its position relative to its ongoing business relationship with the plaintiff; and
>
> d) The defendants were aware that Wal-Mart did not grant exclusive rights and they did not actually believe that Magicuts had a binding agreement with Wal-Mart to be its exclusive haircare provider in Canada, but made that allegation to "posture for legal reasons".
>
> [Ultracuts] argued on the basis of these points that the defendants made an allegation that was not factually correct, something which they were aware of at the material time, in an attempt to gain an advantage. ***
>
> I find on a balance of probabilities that the defendants made false statements to Wal-Mart, which led to Wal-Mart's refusal to expand the scope of its business with [Ultracuts] and caused a loss. I also accept that the defendants' conduct was actionable by Wal-Mart.

(b) Grounds of Appeal Regarding Civil Fraud ***

There Must Be a False Representation or Statement of Fact

92. This element of the tort requires Ultracuts to prove on a balance of probabilities both that the defendants

made a representation of fact and that it was false.

93. The trial judge did not clearly identify the allegedly false representations; however, he seemed to conclude that the letter contained the following two misrepresentations (at para 137):

> … a) the defendants alleged that they had a verbal agreement with Wal-Mart for Magicuts to be its exclusive haircare provider in Canada; [and]
>
> b) the defendants advised Wal-Mart that if [Ultracuts] opened additional salons, in breach of the alleged exclusivity agreement, both Magicuts and Wal-Mart would be sued by Magicuts' franchisees. …

94. He may also have considered the following statement from the letter to be a misrepresentation (at para 60):

> … Our real difficulty is that [the franchisees] would, in the opinion of our counsel, easily win the action, as the factual evidence is clearly on their side; a deal was made, and now Wal-Mart has simply decided to change their minds.

95. The defendants argue that the trial judge erred by failing to set out and apply the correct legal test because he failed to identify the requirement that the representation must be one of fact, and he carried out no analysis and made no finding that any of these statements was one of fact. ***

96. Their position is that none of these statements is a representation of fact, so the tort of civil fraud has not been proven. ***

Analysis

102. I will now consider the three representations that are alleged to have been false.

(i) The Defendants Alleged That They Had a Verbal Agreement with Wal-Mart to Be Its Exclusive Haircare Provider in Canada

103. While the trial judge found that the defendants represented that there was an agreement that Magicuts would be the "exclusive haircare provider" (at paras 137(a)-137(b)), these are not the words in the letter, which refers to a guarantee that Magicuts would be the "sole haircare operator" (at para 127).

104. The distinction is important because, as the trial judge noted, both Messrs Cawston and Luborsky testified that Mr. Redman said that Wal-Mart does not give exclusive rights (see paras 27, 61, 114). A finding that the defendants represented that there was an agreement to be the "exclusive haircare provider" amounts to a finding that they knew that the representation was false and that they intended to make a false representation. ***

109. The trial judge did not raise or address the question of whether this was a representation of fact or opinion. Reviewing the statement in context, and taking an objective view of the contents of the letter, it is difficult to understand how this could be considered a representation of fact, rather than a representation of opinion. ***

111. The letter set out background details, starting from the 1994 sale of the Woolco stores to Wal-Mart and the effect on Magicuts' franchisees. It explained the discussions with Mr. Redman, the agreements that were concluded on the part of both Magicuts and Wal-Mart, the fact that Mr. Redman assured Mr. Cawston that Wal-Mart's "word [was] its bond", that Wal-Mart could be relied upon to keep its promises and that Mr. Redman and Wal-Mart frequently did business on the basis of trust and a handshake.

112. The "sole haircare operator" representation in the letter must also be considered in light of the fact that it is found in the same letter where it is opined that the franchisees will sue and easily win if Wal-Mart continues to disregard the agreement. This suggests that the representations in the letter are tied together and should be read together. This results in the letter being objectively seen as a single opinion in which Magicuts is opining that it reached an agreement with Mr. Redman, which was shared with the franchisees,

and that the franchisees will sue and easily win if Wal-Mart continues to disregard the agreement. ***

114. In my view, a reasonable person in Wal-Mart's circumstances, reading the details in the letter in the above context, would not objectively conclude that the representation that there was an agreement for Magicuts to be Wal-Mart's "sole haircare operator" was one of fact. A reasonable person would be much more likely to judge that representation as an opinion, rather than a fact.

115. Further, the representations in the letter were all known to Wal-Mart, as explained above. First, they were either made by, or explained to, several members of Wal-Mart's senior management in 1994. Second, they were all based on the facts shared with Wal-Mart in the letter, so Wal-Mart was made aware of the facts underlying these representations in the letter. As a result, Wal-Mart could come to its own conclusion as to whether there had been a legally binding agreement, i.e., a contract, or an agreement that was not legally binding.

116. In my view, this representation was an expression of opinion, not one of fact.

(ii) The Defendants Advised Wal-Mart That if Ultracuts Opened Additional Salons, in Breach of the Alleged Exclusivity Agreement, Both Magicuts and Wal-Mart Would Be Sued by Magicuts' Franchisees

117. The words "if [Ultracuts] opened additional salons … both Magicuts and Wal-Mart would be sued by Magicuts' franchisees" (at para 137(b)), in the context of the letter, strongly suggest that Mr. Cawston was providing an opinion or advice about the future acts of third parties. As noted earlier, the law generally does not treat opinions and predictions about future acts as factual representations unless they imply underlying factual information that is otherwise unknown.

118. In this case, the opinion that some of the franchisees "will sue" was supplemented with the factual information that some of the franchisees had been threatening to sue and that one of them had already done so, so the factual implication in the statement and the factual statement, itself, were one and the same—there are no unknown implied facts.

119. Further, Ultracuts had the burden of proving that the representation was false, that is, that the franchisees were not threatening to sue; the defendants did not have to prove that it was true. ***

120. In my view, this representation was an expression of opinion, not one of fact, and, further, Ultracuts has not proven that the representation was false.

(iii) Our Real Difficulty Is That the Franchisees Would, in the Opinion of Our Counsel, Easily Win the Action, as the Factual Evidence Is Clearly on Their Side; A Deal Was Made and Now Wal-Mart Has Simply Decided to Change Their Minds

121. This statement was clearly an expression forecasting the outcome of future litigation, which the law does not treat as a factual representation (see *Williams* at para 32). ***

126. In my view, this representation was an expression of opinion, not one of fact, and, further, Ultracuts has not proven that the representation was false in the manner argued by Ultracuts.

Conclusion—Representations of Fact

127. Taking an objective view of the letter in its entirety, as well as the background and context, in my view, it is clear that the three representations were merely opinions, incapable of being judged as true or false. They were not representations of fact. Therefore, Ultracuts has not proven an essential element of civil fraud, being that the defendants' impugned representations were representations of fact. ***

The Representee Must Have Relied on the Representation ***

131. The trial judge simply concluded that "[t]he defendants' allegations caused Wal-Mart to change its position relative to its ongoing business relationship with [Ultracuts]" (at para 137(c)) and that "the defendants made false statements to Wal-Mart, which led to Wal-Mart's refusal to expand the scope of its business with [Ultracuts] and caused a loss" (at para 139). ***

134. The trial judge *** made no mention, here or elsewhere, that causation requires proof that the representee relied on the representation. Further, he carried out no analysis and made no findings regarding reliance; he appears to have jumped to an inference of causation from the finding of a false representation to Wal-Mart without considering key evidence relevant to reliance.

135. In my view, in failing to turn his mind to the legal requirements for causation, the trial judge failed to consider the correct legal principles related to this element of civil fraud ***. ***

Analysis ***

146. Mr. Robertson's evidence was key evidence on the element of reliance and causation, but the trial judge failed to either refer to it or to resolve the inconsistency between Mr. Robertson's evidence and his own factual finding of causation.

147. There is other evidence that supports that of Mr. Robertson. There is evidence that Wal-Mart's management team did not act in a manner consistent with a belief that Wal-Mart had a binding exclusivity agreement with Magicuts. Mr. Redman testified that he refused to enter into a binding agreement with Magicuts. He was clear that Mr. Messer was aware of the terms of the Redman agreement in May 1994, yet, just over a year later, Mr. Messer was discussing leasing space for hair salons with Ultracuts. When the real estate broker advised him that Magicuts was asserting an exclusivity agreement in Canada, Mr. Messer replied that he would be meeting with Magicuts and if they did not like it, he would "cut them off totally" (at para 54).

148. Further, after the management team had received the letter, it still offered Ultracuts the locations that had been discussed with it, together with exclusivity in those markets, which would have breached an exclusivity contract with Magicuts.

149. As well, Mr. Rivard's letters to Wal-Mart do not indicate that Wal-Mart expressed the view that it had a binding agreement with Magicuts. In a letter to Mr. Robertson dated June 27, 1996, Mr. Rivard refers to "Wal-Mart's concern that it *may have* some liability" to Magicuts (emphasis added). In his letter to Mr. Ferguson of July 10, 1996, Mr. Rivard refers to being told at a meeting the day before that senior management had just recently been told of an "*alleged agreement*" with Magicuts (emphasis added).

150. All of this evidence is relevant to the issue of reliance, as it goes to establish the subjective views of Wal-Mart's senior management team regarding the letter. ***

156. The bottom line is that the senior management team made up their own minds regarding the nature of the agreement between Magicuts and Wal-Mart, relying on their own legal counsel to advise them whether the Redman agreement was a contract. They came to the conclusion that it was not. Their decision to limit their relationship with Ultracuts to the four salons in the written agreements was a business decision, made for business reasons, and not because they were relying on the defendants' representations of an exclusivity contract. ***

Conclusion—Reliance ***

159. Thus, in my view, Ultracuts has not proven on a balance of probabilities that Wal-Mart relied on the representation or that the representation caused Wal-Mart to act. Thus, Ultracuts has not proven this element of civil fraud. ***

Decision ***

167. Applying the facts to the correct legal principles, I would find, for the reasons set out above, that Ultracuts has not proven either of the two elements at issue in grounds (ii) and (iii) on a balance of probabilities. I would find that the representations at issue were opinions, not facts, and that the representee, Wal-Mart, was not proven to have relied on the representations in determining whether to act. ***

169. In the result, I would allow the defendants' appeal ***. ***

REFLECTION:

- *Why does civil liability for fraud generally not attach to statements of opinion? When might an expressed opinion give rise to tort liability?*
- *When will a court infer a party's reliance on the defendant's false representation or statement of fact?*
- *Which party bears the burden of (dis)proving reliance?*

10.1.4 XY LLC v. Zhu [2013] BCCA 352

British Columbia Court of Appeal – 2013 BCCA 352, leave denied: 2014 CanLII 7156, 7160, 7165 (SCC)

✗REF: §10.5.1, §10.8.1

NEWBURY J.A. (CHIASSON AND SMITH J.A. concurring):

1. This matter consists of three appeals and a cross appeal. They arise in the context of a technology licensing agreement between the plaintiff XY, LLC ("XY") as licensor and one of the defendants, JingJing Genetic Inc. ("JingJing"), as licensee. The technology makes it possible to separate X and Y chromosomes in (*inter alia*) bovine spermatozoa, thus permitting the production of calves of a desired sex. The trial judge, Mr. Justice Kelleher, found that JingJing had provided XY with false reports concerning revenues it received from its use of the technology, underpaid the royalties it owed to XY, concealed documents from XY, and violated in several ways the confidentiality provisions in the agreement. JingJing was found liable for breach of contract and the tort of deceit. The award of damages of some $8.6 million against JingJing is not challenged by the plaintiffs; but since the corporation is now bankrupt, the judgment is presumably a dry one.

2. Three of the appeals are brought by individual defendants (the "Personal Defendants") who were employed by JingJing (and by other members of its corporate "group"). The trial judge found that these defendants had committed the torts of deceit and civil conspiracy and awarded the damages jointly and severally against them as well as against their employer. ***

12. The relationship between the contracting parties was marred by dishonesty on the part of JingJing from the very beginning. The trial judge described at paras. 75-7 and 250, for example, an attempt by JingJing to amend the royalty provisions in the Agreement without XY's consent and in full knowledge that it had not agreed to the amendment. Dr. Jacobsen noticed the change and warned Dr. Remillard that he did not "do business that way". (Para. 76.)

13. Evidently, JingJing was not deterred. It proceeded to violate various terms of the CLA [Commercial Licensing Agreement], beginning with its entering into contract-sorting agreements with certain parties in August 2006, conduct that was prohibited by the CLA. (Para. 80.) XY expressed its objections, but JingJing proceeded to breach the Agreement in other ways—by selling sexed semen (not permitted by the terms of the CLA) and representing to XY that it was not doing so; by materially underreporting its embryo production (carried out partly through a veterinary clinic in Abbotsford, British Columbia and partly through other IND subsidiaries in Quebec and the United States) and selling in China; by taking steps to challenge XY's patents in China (prohibited under the CLA); and by attempting to sell SX cytometers to unauthorized parties in China. JingJing lied about or covered up these breaches through the production of false reports to XY which Ms. Zhou and Ms. Tang helped to prepare.

14. Finally, on October 12, 2007, XY commenced its action in British Columbia against JingJing. It obtained an *ex parte* interim injunction [§9.8.1] restraining JingJing from transferring, selling, licensing, disclosing or in any way disposing of the cytometers or the confidential information that was the subject of the CLA. (See 2007 BCSC 1666 (B.C. S.C.).) Later, other claims and counterclaims were filed by and against other parties, and in August 2008, XY filed its consolidated statement of claim, alleging breach of contract, breach of confidence, deceit, conspiracy, inducing breach of contract, unlawful interference with economic relations, and unjust enrichment against the defendants herein. ***

Material Findings

16. The trial judge made the following findings that are material to these appeals: ***

> • JingJing was in an "obvious and substantial breach of contract". Its breaches took the following forms:
>
> > • failure to keep accurate records in accordance with article 3.3 of the CLA;
> >
> > • failure to produce accurate records in accordance with article 3.4;
> >
> > • failure to report production to XY on a monthly basis in accordance with article 3.1.4;
> >
> > • failure to pay royalties monthly in accordance with articles 3.1.1 and 3.1.4;
> >
> > • failure to not sub-license the use of XY's technology in accordance with article 2.6;
> >
> > • failure to disclose and assign developments made with third parties using XY's technology in accordance with articles 6.2.2 and 6.2.3;
> >
> > • failure to maintain the confidentiality of XY's confidential information in accordance with article 3.10. (Paras. 187-8.) ***

The Tort of Deceit ***

20. The judge referred to certain textbook discussions of deceit which had been cited by this court in *Catalyst Pulp & Paper Sales Inc. v. Universal Paper Export Co.*, 2009 BCCA 307 (B.C. C.A.). He noted in particular a passage from Professor G.H.L. Fridman's text, *The Law of Torts in Canada* (2nd ed., 2002):

> Before a defendant can be liable for deceit it must be established, as a matter of fact, that the plaintiff relied on the defendant's misrepresentation. Such reliance was proved to have occurred in *Dixon v. Deacon Morgan McEwan Easson* [(1993) 102 D.L.R. (4th) 1 (B.C.C.A.)] where the plaintiff purchased the shares as a result of reading the press release containing the inaccurate financial statements about the company.
>
> Although in general it is for the plaintiff to prove the requisite reliance, it would seem that once the plaintiff establishes that the defendant made a misrepresentation calculated to induce the plaintiff to act to his detriment and loss consistent with the plaintiff's having acted on the misrepresentation, the onus then shifts to the defendant to prove that the plaintiff did not in fact rely on the misrepresentation in issue. [At 750-1.]

21. The judge then considered each of the elements of the tort he had listed in his para. 237 ["(1) a false representation of fact by the defendant; (2) made with knowledge of its falsity or recklessly, ie. not caring whether it is true or not; (3) made with the intention that the plaintiff would act on it; (4) with the intention that the plaintiff would act on it; and (5) the plaintiff suffered damages"], finding that the defendants JingJing, Mr. Zhu, Ms. Zhou and Ms. Tang had knowingly made false representations to XY at least until 2008; and that they had intended for XY to rely on those representations. Then, with respect to the last two elements he stated:

> **The plaintiff's Reliance**
>
> Finally, the plaintiff did act on it. Until the true facts were discovered, the plaintiff had no way of knowing it was receiving less than what it was owed, and that it was therefore entitled to recover damages.
>
> **Damages**
>
> There is no serious issue about the fifth element of the tort of deceit: the plaintiff undoubtedly suffered damages. [Paras. 260-61; emphasis added.]

Analysis

22. Both Mr. Hunter on behalf of Ms. Zhou and Mr. McFee on behalf of Mr. Zhu took issue with the trial judge's statement of the elements of the tort of deceit, and with his conclusion that the tort was proven in this case. First, counsel submitted that *** the final element did not capture the requirement of causation—i.e., that the plaintiff must have suffered damages as a result of its reliance on the false statement. ***

24. In Spencer Bower, Turner and Handley, *Actionable Misrepresentation* (4th ed., 2000), the authors break down the four requirements into eight in the following passage:

> An action for damages for fraudulent misrepresentation at common law was an action for deceit. The Court of Chancery exercised a concurrent jurisdiction with the Courts of Law in cases of actual fraud, and could award equitable compensation on similar, but not identical, principles, and also specific relief. In either case a representee must allege and prove:
>
> 1) a representation;
>
> 2) that the defendant was the representor;
>
> 3) that the plaintiff was a representee;
>
> 4) inducement;
>
> 5) falsity;
>
> 6) alteration of position;
>
> 7) fraud;
>
> 8) damage. ***
>
> The authors also state that the representee must establish that "he was induced not just to believe [the misrepresentation] but to *alter his position* in a manner affecting his interests" (at §138).

25. Similarly, the editors of *Halsbury's Laws of England* (4th ed.) state that the representee must "establish that he was induced by [the misrepresentation], not merely to alter his mind, but to alter his position, that is to say, to effect a change in his material or temporal interests or situation." (Vol. 31 at §778; my emphasis.) ***

26. The Personal Defendants rely on these textbook formulations of the tort of deceit, arguing that XY did not change its position in reliance on the false statements made to it by JingJing or any other defendant. Instead, XY simply carried on with the performance of its obligations under the contract, as it would have if JingJing's statements had been true. Thus while the plaintiff suffered damages in contract, these defendants contend it did not prove damages flowing from an act of the plaintiff carried out in reliance on JingJing's false statements.

27. Mr. Wilson on behalf of XY emphasized that the texts uniformly cite "forbearance" as a type of alteration of position. ***

29. There appear to be only a few modern Canadian cases that address situations in which the parties entered into a contract prior to the making of the false statements. One is *Catalyst Paper*, *supra*. Like this case, *Catalyst Paper* involved an ongoing contract that called for regular reports and invoices, although in this instance, the payments were to be made by the plaintiff "Catalyst" to the defendant "UPE". UPE had been engaged by Catalyst to facilitate the delivery and distribution of telephone directory paper to an Australian customer. Under the contract, UPE regularly invoiced Catalyst for certain costs, but the parties were not *ad idem* as to whether UPE was entitled by the terms of the contract to "mark up" certain distribution costs it incurred in Australia. Catalyst assumed that UPE was passing on only its actual costs and paid UPE's invoices from time to time. When it discovered the costs had been marked up, it sued in contract, breach of fiduciary duty, unjust enrichment, and fraudulent misrepresentation. ***

31. Catalyst succeeded *** in its claim for deceit, both at the trial level and on appeal. ***

32. In *Catalyst Paper*, the trial judge found that the defendant had intended that the plaintiff "act on the representation by not focusing on, inquiring into, or assessing the appropriateness of the amount paid to Chase [a facilitator for UPE in Australia]." (My emphasis.) The Court of Appeal's treatment of reliance was more equivocal:

> It is implicit, if not express, that the trial judge found that the false representations began with the cost information forwarded by UPE from the beginning of its relationship with Catalyst in July 1999, September 1999, November 1999, February 2000, and regularly throughout the currency of the PSA. If an actual inducement to enter into the contract is required, the false representations in the Fall of 1999, and in February 2000, so induced Catalyst. And it is beyond doubt, as the trial judge found, that the false representations continued to induce Catalyst to alter its position to its detriment throughout the course of the arrangement with UPE. I note particularly the costing information sent to Catalyst at regular intervals during the PSA "for its approval"; an approval obtained, again, on the basis of the false representation that UPE passed along only actual costs and that those of Chase were subsumed in the 3% commission paid to UPE.
>
> In my view, the case against UPE for fraudulent misrepresentation was overwhelming. *** [At paras. 62-3; emphasis added.] ***

37. Returning to the case at bar, counsel for the Personal Defendants argued that the trial judge had "conflated" tort and contract by awarding damages without proof that the plaintiff had relied on the misrepresentations. XY submitted in response that the defendants' position was "too categorical." In XY's submission: ***

> [W]here the misrepresentation operates during the performance of an *existing* contractual relationship, the reliance measure may be less apposite to the assessment of damages than when the misrepresentation induces the making of the contract in the first place. This court's decision in *Catalyst Pulp and Paper Sales Inc. v. Universal Paper Export Co.* … illustrates the distinction.
>
> [Emphasis added.]

38. In addition to *Catalyst Paper*, Mr. Wilson referred us *Karas v. Rowlett* (1943), [1944] S.C.R. 1 (S.C.C.), where the Court stated:

> The *injuria* here was intended to and did bring about a fraudulent termination of the lease and loss of the business. The damages from the deceit are, therefore, the same as the consequences of a breach of the obligations from which the rights and interests of the plaintiff arose; and they are to be determined on the rules applicable to contractual defaults.
>
> It is well settled that the person who has suffered from such a wrong is entitled, so far as money can do it, to be placed in as good a position as if the contract had been performed. [At 7; emphasis added.]
>
> See also *V.K. Mason Construction Ltd. v. Bank of Nova Scotia*, [1985] 1 S.C.R. 271 (S.C.C.), and this court's decision in *Wiebe v. Gunderson*, [2004 BCCA 456, 243 D.L.R. (4th) 1]. In the latter, we noted that in cases of fraud inducing a plaintiff to enter into a contract, the trend in Canada and elsewhere is to de-emphasize one particular "measure" of damages and to:
>
> > … strive for an award that in broad and practical terms compensates the plaintiff for all aspects of his or her loss flowing from the fraud, without being overly restricted by the nature of the cause of action. The overarching question is what amount of money represents the financial loss suffered by the plaintiff as a direct result of the altercation of his or her position under the inducement of the defendant's fraudulent representations. [At para. 40.]
>
> (See also *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12 (S.C.C.), at 37-42.)

39. It is not the measure of damages with which we are concerned at this stage, however. Rather it is the

question of whether the final element of the tort of deceit was proven against the Personal Defendants—assuming for the moment they were not shielded from liability by their employment relationship with JingJing. Here, it cannot be said that as in *Catalyst Paper*, the parties' agreement was entered into in reliance on JingJing's false representations (which obviously followed the CLA in time). Nor did XY, like the plaintiffs in *Catalyst Paper* and *3Com* [*Corp. v. Zorin International Corp.* (2006), 211 O.A.C. 222 (Ont. C.A.)], make payments on the strength of the false statements. It made no conscious decision, as the plaintiff did in *Firbank's* [*Executors v. Humphreys* (1886), 18 Q.B.D. 54 (Eng. C.A.)], to forebear from enforcing its rights or to delay taking legal action. In short, it conducted itself in the same way it would have if JingJing's reports had been true. Of course, had it realized the reports were false, the plaintiff might have sued immediately, and succeeded in obtaining its judgment before JingJing declared bankruptcy. But can it be said that XY's carrying on under the contract until it discovered the fraud constituted an act of reliance on its part?

40. To answer this question in the affirmative would be a significant step in the law of deceit. I am reluctant to take such a step on the basis of authorities in which the point was not clearly raised, expressly considered or satisfactorily analyzed. At the same time, I recognize that the law of private obligations in Canada is moving away from a stringent view of causation in tort and from a "categorical" approach to civil causes of action generally: see *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, *supra*, at 348 and 41; *Rainbow Industrial Caterers Ltd. v. Canadian National Railway* (1990), 67 D.L.R. (4th) 348 (B.C. C.A.), at paras. 184-5; *Morrison v. Pankratz* (1995), 122 D.L.R. (4th) 352 (B.C. C.A.) at para. 45. See also the discussion by M.J. Tilbury in "Two Models of Concurrent Tort/Contract Liability & Their Application to Remoteness and the Measure of Damages" in J. Berryman, ed., *Remedies: Issues & Perspectives* (1991) at 423 *et seq.*

41. The Supreme Court of Canada may well wish to provide guidance in this area. On balance, however, I propose to adopt the less stringent view of reliance exemplified by this court's decision in *Catalyst Paper*, by which I am bound, and to accept that in the final analysis, the object is to compensate XY for the losses it suffered by reason of JingJing's fraudulent conduct. I will therefore proceed on the basis that XY's "acceptance" of the payments made by JingJing on the basis of the false reports constituted "reliance" for purposes of the tort of deceit. At the same time, I will consider the defendants' challenges to the trial judge's findings of liability independent of deceit so that if I am wrong regarding that tort, the parties will have a complete case for purposes of any further appeal. ***

52. The trial judge was not persuaded by *** evidence from either Ms. Zhou or Ms. Tang. In connection with the tort of deceit, he found that all three Personal Defendants "knew the information they provided to XY was false and [that] the circumstances warrant an inference that they intended for XY to be deceived by it." (Para. 247.) ***

55. Mr. Wilson referred us to various other references in the Court's reasons to evidence that fully supports the conclusions that the Personal Defendants were part of the "management team" of JingJing who not only acted in concert to carry out unlawful acts that would injure the plaintiff, but who assisted in planning how best to go about it. In my view, the evidence makes it impossible to say the judge erred in reaching these conclusions.

Employment Status ***

57. Surprisingly, the case law concerning the liability of employees who on the orders of or at the request of their employer commit torts or other wrongful acts that injure a third party, is not fully developed. ***

74. In any event it is clear that fraud or fraudulent conduct has historically fallen into an established category in which personal liability has been imposed on agents and employees. ***

75. In the result, it cannot in my view be said that the claims of deceit or civil conspiracy were not available to XY against the Personal Defendants as a matter of law merely because they were employees of JingJing and acting in the course of their duties to further the objectives of JingJing. ***

79. There is no doubt that the implications of holding an employee responsible for 'supporting' or 'assisting' her employer in what turns out to be fraudulent conduct, must be carefully considered. As Southin J. (as she then was) stated in *United Services Funds v. Lazzell* (1988), 28 B.C.L.R. (2d) 26 (B.C. S.C.):

> One must, I think, be wary of postulating so wide a theory of assistance as to make liable, for instance, a secretary or bookkeeper who, discovering that her employer is engaged in chicanery, simply goes on doing the duties, not tortious in themselves, he or she did before. [At 89.]

I agree that the employee who simply carries on doing the job she has always done, notwithstanding that her typing or bookkeeping may assist in a fraud, should not without more be regarded as a fraudster (or conspirator) herself. (As noted by the Law Reform Commission of British Columbia in its *Report on Shared Liability* (1986) at 25-6, a person in this situation who "acts innocently or is unaware of the tortious act of another" would be entitled to indemnification from the employer.)

80. Here, however, the trial judge found that Ms. Zhou and Ms. Tang went beyond mere bookkeeping or 'typing' lab reports at Mr. Zhu's instructions. Both defendants *actively* assisted in devising how best to deceive XY. Their acts were, then, "tortious in themselves" and were not part of their regular duties. As stated by Burns and Blom, *supra*, it appears the law has historically held fraudulent employees liable with their employers "irrespective of whether the fraud was done at the behest and for the benefit of the latter." ***

81. In the result, I would reject the "following orders" defence asserted on behalf of Ms. Tang and Ms. Zhou. ***

REFLECTION:

- *What was the difficulty in determining whether XY had relied on the false representations in this case?*
- *Given reliance is traditionally marked by a change in position, was the Court right to find reliance in this case?*
- *When should an employee whose actions facilitate fraud be relieved of civil liability? When should an employee be indemnified by their employer for costs or losses arising from litigation?*

10.1.5 Cross-references

- *Wilkinson v. Downton* [1897] EWHC 1 (QB), [3]: §3.1.1.
- *Donoghue v. Stevenson* [1932] UKHL 100, [38]: §13.1.1.
- *Bang v. Kim* [2024] BCCA 88, [29]: §18.3.1.
- *Ultramares Corp. v. Touche* (1931) 255 NY 170 (NY CA), [22]-[26]: §19.3.1.1.
- *Deloitte & Touche v. Livent Inc.* [2017] SCC 63, [123]-[124]: §19.3.1.3.
- *Salomon v. Matte-Thompson* [2019] SCC 14, [83]: §19.4.1.2.

10.1.6 Further material

- J.C.P. Goldberg, A.J. Sebok, & B.C. Zipursky, "The Place of Reliance in Fraud" (2006) 48 Arizona L Rev 1001.
- L.C.H. Hoyano, "Lies, Recklessness and Deception: Disentangling Dishonesty in Civil Fraud" (1996) 75 Canadian Bar Rev 474.
- M.A. Matus, "Civil Fraud Requires Proof of Inducement, Supreme Court Rules" The Litigator (Mar 10, 2014).

10.2 Intimidation

10.2.1 Gokey v. Usher & Parsons [2023] BCSC 1312

✗**REF: §2.2.1, §2.3.3, §4.2.3, §5.2.6, §7.1.2, §9.3.4, §9.4.3, §9.5.4, §9.8.2.1, §20.8.1, §21.1.3**

PUNNETT J.: ***

183. Mr. [Edward C.] Gokey alleges that in January 2016 the defendants [his neighbours] put up a sign facing his property with the words "DEAD ED" on it and a drawing of a human head. That along with the bullet holes in the sign was viewed by him as a threat. ***

185. Mr. Usher denies placing the "Dead Ed" wording on the plastic sheet but agrees the sheet had bullet holes on it as it was used by him for target practice out of town at a range when he was a fishery officer. ***

194. Ms. Parsons testified that she started taking and kept keeping records of Mr. Gokey's conduct partly because RCMP officers and conservation officers had informed her that such records were necessary in order for them to act on any complaints about Mr. Gokey's conduct. ***

198. The defendants submit they only observe and record Mr. Gokey when he is engaged in activities that affect their property and other rights. Given my credibility findings, I accept the evidence of the defendants. ***

225. Mr. Gokey alleges the defendants have sought to intimidate him by tracking and documenting his activities on his property. Mr. Gokey submits they have done so by enlisting friends of theirs in the RCMP and the B.C. Conservation Officer Service to intimidate them. He also submits the target sign was done to both harass and intimidate him because it had bullet holes in it. ***

226. In *Central Canada Potash Co. Ltd. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42 (SCC) at 81, the elements of intimidation are described:

> The tort of intimidation is defined in *Clerk & Lindsell on Torts* (14th ed.) para. 802, p. 414, 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. The tort is one of intention and the plaintiff, whether it be B or C, must be a person whom A intended to injure.

227. The tort of intimidation then requires that plaintiffs satisfy a two-part test. In *Gidda v. Hirsch*, 2014 BCSC 1286, Associate Chief Justice Cullen stated:

> 76. It is clear from the decision of the Supreme Court of Canada in *Central Potash Company v. Saskatchewan*, [[1979] 1 S.C.R. 42], that the tort of intimidation requires both an unlawful act or unlawful means against the plaintiffs by the defendants and the consequence that the plaintiffs do some act or refrain from doing an act they were entitled to do thereby causing damage to the plaintiffs. ***

228. The plaintiffs are alleging an ongoing conspiracy between the defendants and various RCMP officers and conservation officers against the plaintiffs over many years. The plaintiffs appear to rely on alleged close relationships between the defendants and those officers. While the defendants knew some of the officers, that is not surprising in a small community. There is however no evidence to support the allegations of the plaintiffs. It is of note as well that despite the defendants complaining to such officers, no formal steps were taken by them in support of the defendants.

229. Regarding the target back sheet of plastic, the evidence is that it was stored along the property line by the defendants. It has not been established that it was "put up" in particular locations to threaten anyone.

230. There is no evidence from Mrs. Gokey of any anxiety or emotional stress. As for Mr. Gokey, contrary to these assertions, his demeanor when giving evidence, the evidence of his behavior over the years and his overall behavior on the trial reveal the opposite of the alleged stress, anxiety or distress. Rather, he is revealed as an individual who thrives on confrontation.

231. The plaintiffs have failed to prove their claims of harassment and intimidation on a balance of probabilities. The evidence of the plaintiffs fails to establish any unlawful act or means being used by the defendants against the plaintiffs. ***

REFLECTION:

- *What might be the rationale for the tort of intimidation entailing an unlawful act or means? How does this requirement set intimidation apart from other torts?*

10.2.2 Pollock v. The Government of Manitoba [2005] MBCA 31

Manitoba Court of Appeal – 2005 MBCA 31

STEEL J.A:

1. The issue on this appeal is whether the statement of claim should be struck for failing to disclose a reasonable cause of action. ***

2. Mr. Pollock filed a statement of claim against the Government of Manitoba (Manitoba) alleging a variety of torts and breaches of his rights under the *Canadian Charter of Rights and Freedoms* (the *Charter*) committed by Crown attorneys during the course of legal proceedings in the Provincial Court. Some of the claim, as amended, was struck out as not disclosing a reasonable cause of action.

3. However, those portions of the amended statement of claim relating to the tort of intimidation and the requests for declaratory relief in relation to s. 4(6) of *The Proceedings Against the Crown Act*, R.S.M. 1987, c. P140 [§23.2.2.1], and s. 20(2) of *The Legal Profession Act*, S.M. 2002, c. 44—Cap. L107, were not struck out.

4. The issue on this appeal was whether the remaining paragraphs of the amended statement of claim disclose a reasonable cause of action against Manitoba. ***

5. *** Those remaining were: (1) allegations that two Crown attorneys intentionally attempted to intimidate the plaintiff during the legal proceedings and that Manitoba was vicariously liable for their actions ***. ***

Tort of Intimidation

7. The plaintiff, who is not a lawyer, was acting as a summary conviction agent for an accused respecting a summary conviction matter before the Provincial Court. During the course of an appearance on this matter, the Crown attorney stated that there was an issue with respect to *The Legal Profession Act* and the plaintiff's ability to represent the accused. The Crown attorney represented to the court that since the accused was unrepresented, any further disclosure would be given to the accused directly.

8. However, the presiding judge held that he did not challenge the plaintiff being an agent pursuant to s. 800(2) of the *Criminal Code*. The Crown attorney again stated that there was an issue with respect to *The Legal Profession Act*, but the judge told the Crown that he expected her to follow his ruling. The plaintiff was allowed to proceed and act as an agent for the accused.

9. A week later, the presiding judge at that time made statements about the potential to run afoul of the Law Society and indicated he was unsure of the position of the Law Society regarding paralegals who appear as agents in *Criminal Code* matters. The Crown attorney in question remained silent and did not respond to the judge's comments. The plaintiff was allowed to act as agent for the accused for that appearance.

10. The plaintiff alleged in his statement of claim that these two Crown attorneys knew that the Law Society had no jurisdiction over summary conviction agents and, in particular, had no issue with the plaintiff and therefore the actions of the Crown attorneys on those two occasions amounted to the tort of intimidation.

11. In order to proceed with an action based on the tort of intimidation, the plaintiff must establish in the pleadings that:

> (1) the Crown attorneys had delivered a threat of an unlawful act;
>
> (2) the Crown attorneys intended to injure or cause damage to the plaintiff;
>
> (3) the plaintiff complied with the threat or demand; and
>
> (4) the plaintiff must have suffered loss due to complying with the threat.
>
> See Lewis N. Klar *et al.*, *Remedies in Tort*, looseleaf (Toronto: Carswell, 1987) vol. 1 at c. 13, paras. 14-25, and *Gershman v. Manitoba (Vegetable Producers' Marketing Board)* (1976), 69 D.L.R. (3d)

114 (Man. C.A.).

12. There must be a threat, and it must be a threat of an unlawful act. As Professor Philip H. Osborne explains in *The Law of Torts*, 2d ed. (Toronto: Irwin Law Inc., 2003) at c. 4(F)(2)(b):

> Intimidation was recognized as a discrete and independent tort in 1964 in the House of Lords decision of *Rookes v. Barnard* [[1964] A.C. 1129]. It is now well established that intimidation arises where the defendant either threatens to use unlawful means to coerce a third person to damage the plaintiff or threatens unlawful acts that directly compel the plaintiff to act to his detriment. … The gravamen of each is the threat of an unlawful act.

13. In this claim, on one occasion, the Crown attorney said nothing at all in the face of the judge's musings. On the other occasion, the Crown attorney stated that there was "an issue with respect to [*The Legal Profession Act*] and the plaintiff's ability to represent the accused." Further, she made a statement that because the accused was unrepresented, if there was any further disclosure, she would be giving it to the accused directly.

14. While every individual in a court of law, whether unrepresented or acting as an agent or counsel, is entitled to be treated with courtesy and respect, the elements necessary to establish the tort of intimidation are not alleged in the pleading. There is no threat of an unlawful act. There may or may not be an issue here of the interpretation of s. 800(2) of the *Criminal Code* and its interrelationship with s. 20(2) of *The Legal Profession Act*. There may or may not be an issue here of whether an agent can receive disclosure or whether it should be given directly to the accused. Raising the issue is not a threat. Raising the issue is not an unlawful act. Rather, they were simply expressions of opinion. Whether the concerns of the Crown attorneys were right or wrong, they were not unlawful.

15. In any case, the judges indicated they were satisfied that the plaintiff could act as agent, which Mr. Pollock proceeded to do. Consequently, there was certainly no compliance with any alleged threat or demand. Nor, as far as I can tell, was there any loss or damage, since the plaintiff continued to act. As the plaintiff admits in the amended statement of claim, the judge did not challenge the plaintiff's right to appear as an agent. As a result, neither the plaintiff nor the accused was required to do anything, nor did they suffer any loss based on the facts as pled.

16. The motions judge erred when he failed to consider whether the elements of the tort of intimidation were contained in the facts set out in the statement of claim. ***

27. The appeal is allowed, with costs payable to Manitoba in this court.

REFLECTION:

- *What distinguishes the tort of intimidation from the tort of assault or the tort of harassment?*

10.2.3 McIlvenna v. 1887401 Ontario Ltd [2015] ONCA 830

Ontario Court of Appeal – 2015 ONCA 830

VAN RENSBURG J.A. (WEILER AND ROBERTS J.A. concurring):

1. The appellants commenced an action seeking damages for their treatment by the respondents during the evening of July 26, 2014 into the early morning hours of July 27, 2014, when they were ejected from a bar in Sudbury because they smelled of marijuana. According to their claim, the appellants are authorized users of medical marijuana.

2. The respondents brought a motion under rule 21 of the *Rules of Civil Procedure* to dismiss the action for failure to disclose any reasonable cause of action and on the basis that the claim is frivolous, vexatious or otherwise an abuse of the process of the court. In the alternative, the respondents asked that certain paragraphs of the statement of claim be struck under rule 25. ***

4. The motion judge *** dismissed the action for failure to disclose a cause of action, without leave to amend.

He also observed that the action was an abuse of process and frivolous. He awarded costs against Mr. McIlvenna on a substantial indemnity basis in the sum of $5,905.90. ***

Did the motion judge err in striking out the entirety of the appellants' claim? ***

13. The appellants are authorized users of medical marijuana as treatment for their medical conditions ***. Mr. McIlvenna uses medical marijuana pursuant to a federal exemption "that allows him to use cannabis for medical purposes anywhere at any time" ***. The appellants frequented two bars located next door to one another that were owned and operated by the respondent 1887401 Ontario Ltd., whose principals are the individual respondents ***. They had previously been permitted to smoke their marijuana in the smoking area in an alleyway between the bars, after showing their medical exemptions.

14. On the night in question, the appellants were not permitted to smoke in the alleyway ***. They were told to smoke outside on the sidewalk, and they began to do so. The doorman of the second bar told the appellants to move across the street because of the smell of the marijuana ***. They refused to do so (para. 24). When they entered the second bar, Mr. McIlvenna was tapped on the shoulder by the respondent Khalil and confronted by all three owners of the bar ***. Mr. Khalil was acting in a furious and out of control manner, took up a fighting stance, and told Mr. McIlvenna they had stunk up his whole bar with the smell of marijuana ***. After Mr. McIlvenna tried to explain their rights, Mr. Khalil pointed at the door and yelled at them to leave ***. The appellants left the premises ***. ***

17. The appellants assert that the amended statement of claim also pleads the torts of intimidation and intentional infliction of mental suffering. The relevant key paragraphs to support these pleadings are as follows. The appellants were asked to go to the opposing sidewalk to smoke their medical marijuana, which was a deliberate attack against their worth and dignity ***. When the appellants returned inside the bar, Mr. Khalil was acting furious and took up a fighting stance ***. Mr. Khalil yelled at the appellants to leave and pointed at the door ***. Further, when Mr. Khalil demanded that the appellants leave the nightclub due to the smell of their medicine, he intended to inflict mental pain and suffering on them ***. After this altercation, the appellants left without being physically removed ***. ***

The Tort of Intimidation ***

23. The tort of intimidation consists of the following elements: (a) a threat; (b) an intent to injure; (c) some act taken or forgone by the plaintiff as a result of the threat; (d) as a result of which the plaintiff suffered damages: *Score Television Network Ltd. v. Winner International Inc.*, 2007 ONCA 424, [2007] O.J. No. 2246 (Ont. C.A.), at para. 1; see also *Central Canada Potash Co. v. Saskatchewan (Attorney General)* (1978), [1979] 1 S.C.R. 42 (S.C.C.). Although the pleading of intimidation is most frequently seen in the context of economic torts, the business context is not an essential element of the tort.

24. The motion judge concluded that none of the requirements for the tort of intimidation were present, and that it was plain and obvious that this claim could not succeed.

25. I disagree. Contrary to the motion judge's conclusion, all elements of the tort of intimidation are pleaded in the amended statement of claim. The claim is that the appellants were prevented from doing something they claim they had a legal right to do—to remain in a bar, although they smelled of marijuana after smoking marijuana as a medication, in accordance with a license that permitted them to do so. The appellants claim that the respondents were wrong to tell them to leave because they had refused to smoke on the other side of the street, and further that they were threatened with violence. They plead that the conduct of the respondents "was a deliberate attack against [their] worth and dignity". As a result of the conduct of the respondents, they left the bar.

26. The question is not whether the allegations, if true, would give rise to substantial damages, or whether the respondents would have a defence to the claim. In *Hunt* [*v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.)], at p. 975, the Supreme Court referred with approval to an English decision, *Drummond-Jackson v. British Medical Assn.*, [1970] 1 All E.R. 1094 (Eng. C.A.), which stated that "it is not permissible to anticipate the defence or defences—possibly some very strong ones—which the defendants may plead and be able to prove at the trial, nor anything which the plaintiff may plead in reply and seek to rely on at the trial." ***

28. For these reasons, I would not strike the action, which discloses a cause of action in intimidation. ***

REFLECTION:

- *A claimant must prove that they suffered damage to succeed in a claim of intimidation. What was the alleged damage to McIlvenna here?*

10.2.4 Cross-references

- *Canada v. Greenwood* [2021] FCA 186, [5]: §20.6.2.

10.2.5 Further material

- J. Murphy, "Understanding Intimidation" (2014) 77 Modern L Rev 33.

10.3 Inducing breach of contract

10.3.1 Potash Corp. of Saskatchewan Inc. v. HB Constr. Co. Ltd [2022] NBCA 39

New Brunswick Court of Appeal – 2022 NBCA 39

LEBLOND J.A.:

1. The underlying actions to the two appeals filed in these matters relate to the construction of a compaction plant at the potash mine of Potash Corporation of Saskatchewan Inc. (PCS) located in Penobsquis/Picadilly, New Brunswick. The project is sometimes referred to, both in the decision below and in these reasons, as "CP-15." The construction contract was awarded to Comstock Canada Ltd. (the "Comstock Contract"). Following PCS' termination of the Comstock Contract, and prior to the underlying trial, *** HB Construction Company Ltd. acquired certain assets of Comstock, including the rights to the action it commenced below ***. ***

2. PCS had a separate contract with AMEC Americas Limited to receive the engineering, procurement, design and construction management for the project. Of particular interest for these appeals, AMEC was responsible for assessing Comstock's claims for additional compensation by way of the contractual change order process. It was also responsible for assessing any claim by Comstock for additional time to complete the work. Comstock was aware of AMEC's role from the tendering stage. ***

3. *** Comstock claimed damages against both PCS and AMEC. As against PCS, it claimed: (1) damages for breach of contract in the amount of $4,581,195; (2) additional damages of $13,500,613 for breach of contract, breaches of collateral warranties, breach of the duty to act in good faith, misrepresentation and negligent misrepresentation; (3) in the alternative, compensation in the amount of $18,081,808 on the basis of *quantum meruit* for wrongful repudiation of the Comstock Contract or independent of it; and (4) in the further alternative, compensation and/or restitution in the amount of $18,081,808.

4. As against AMEC, Comstock claimed damages in the same amount of $18,081,808 for: (1) tortious interference with contractual relations and economic interests; (2) in the alternative, inducing breach of contract; (3) in the further alternative, misrepresentation or negligent misrepresentation; and (4) further still, breach of the duty to act in good faith. ***

The decision

10. The trial judge awarded Comstock damages in the amount of $6,731,289 ***. ***

11. The judge dismissed *** the Comstock action against AMEC in their entirety. ***

The trial judge's findings

139. In her decision, the trial judge made the following findings that are relevant to this appeal: ***

> 3. AMEC breached its contractual duties by acting arbitrarily and unfairly in not granting Comstock an extension for completion (at para. 736);
>
> 4. The evidence did not establish AMEC ever advised Comstock it was failing to perform the work diligently (at para. 747);
>
> 5. AMEC was in breach of its duty of good faith toward Comstock in not providing it with its contractually mandated independent evaluation of Comstock's compliance with the contract thus constituting another basis for setting aside the Notice of Default [of Contractual Obligations that AMEC had sent Comstock] (at para. 933); ***

Should AMEC have been found liable in damages to Comstock? ***

148. The trial judge specifically found that AMEC breached its "duty of good faith as contract administrator" by failing to conduct an independent evaluation of Comstock's compliance with the Contract before issuing the Notice of Default (at para. 933). The trial judge also found that AMEC had "breached its duties under the contract by acting arbitrarily and unfairly in not granting Comstock an extension to the overall completion date" (at para. 736). The trial judge did not, however, hold AMEC liable in damages for this breach of duty. Comstock argues that, where a legal duty is breached, the law should provide a framework to hold the wrongdoer accountable. It asserts AMEC should have been found liable for inducing breach of contract and for breaching its obligation to act in good faith. ***

161. In *Walsh* [*v. Nicholls and CGU Insurance Company of Canada*, 2004 NBCA 59, 273 N.B.R. (2d) 203], Drapeau C.J.N.B. determined the claim for inducing breach of contract satisfied the need to impose liability for wrongdoing by insurance adjusters. He noted, however, that if the doctrine of inducing breach of contract was not up to the task, then this Court could revisit whether the duty of good faith and fair dealing ought to be extended to insurance adjusters. In the end, the Court denied the request to extend the tort of bad faith and unfair dealings. Instead, it held that intentional torts (inducing breach of contract in *Walsh*) are broad enough to capture bad faith actions by an adjuster.

162. Comstock, however, argues that AMEC, like the insurance adjuster in *Walsh*, should not be insulated from liability for its failure to act in good faith by asserting that this Court should recognize a new category of contractual duty of care, although there is no contract between Comstock and AMEC. Comstock's submission on the contractual duty of good faith is essentially the same as the argument submitted in *Walsh*. I would reject it for the same reasons given in *Walsh*.

163. There is no juristic reason to extend the contractual duty of good faith. The duty's animating principle is focused on good faith performance of contracts, not the creation of a generalized duty of good behaviour. As is discussed below, unless Comstock can tie a duty of good faith obligation to another cause of action against AMEC, that claim cannot stand. ***

Did AMEC commit the tort of inducing breach of contract? ***

190. The trial judge stated [at paras. 935-936]:

> In summary, Comstock argues that AMEC induced PCS to breach the contract in two respects:
>
> > i) By refusing to fairly evaluate Comstock's claims for additional compensation and additional time to complete the work, it induced PCS to breach the contractual obligation to compensate Comstock for additional work and delays and changed conditions, and
> >
> > ii) By urging PCS to terminate Comstock for cause when it knew no breach had occurred.
>
> The elements of the tort of inducing breach of contract were set out by the New Brunswick Court of Appeal in *Sar Petroleum et al. v. Peace Hills Trust Company*, 2010 NBCA 22 at paragraph 40:
>
> > On reflection and out of an abundance of caution, I have settled on eight elements: (1) there must have been a valid and subsisting contract between the plaintiff and a third party; (2) the third party must have breached its contract with the plaintiff; (3) the defendant's acts must have

> caused that breach; (4) the defendant must have been aware of the contract; (5) the defendant must have known it was inducing a breach of contract; (6) the defendant must have intended to procure a breach of contract in the sense that the breach was a desired end in itself or a means to an end; (7) the plaintiff must establish it suffered damage as a result of the breach; and (8) if these elements are satisfied, the defendant is entitled to raise the defence of "justification".

191. The trial judge applied the correct test, in particular with respect to step six of the *SAR Petroleum* analysis set out above. Unless a defendant acts maliciously, inducing breach of contract necessarily requires evidence of a benefit or advantage resulting to the defendant to ground such an intention. Evidence of conduct alone is not enough.

192. The trial judge was correct to rely on *SAR Petroleum et al. v. Peace Hills Trust Company*, 2010 NBCA 22, 357 N.B.R. (2d) 202, given the factual matrix of this action and the fact that *SAR Petroleum* explicitly canvassed the *Walsh* decision and built upon it.

193. This Court explained the analysis of intention to be conducted at step six of the analysis in *SAR Petroleum*, where Robertson J.A. wrote [paras. 55-56]:

> In brief, if the breach of contract were neither an end in itself nor a means to an end, one must conclude that it was unintended. Hence, if the defendant did not act out of malice or obtain an economic advantage as a result of the breach, it should follow that the requisite intention is absent and the tort action must fail. Lord Hoffman cites one case which illustrates clearly the proper application of the test for intention. The case is *Millar v. Bassey*, [1993] E.W.J. No. 5409 (QL), [1994] E.M.L.R. 44 (C.A.). No doubt Shirley Bassey's breach of her contract with the recording company had the foreseeable consequence that the recording company would breach its contracts with the accompanying musicians. In short, she knew or was deemed to have known of the contracts with the accompanying musicians. But as Lord Hoffman observed, breaches of those contracts was neither an end desired by Ms. Bassey nor a means of achieving that end. More pointedly, Ms. Bassey did not seek to achieve a benefit or advantage that would have otherwise accrued to the musicians but for her breach. She simply decided to withdraw from her contract and suffer the legal fate of any contract breaker: to pay damages.
>
> Applying the above framework to the undisputed facts of the present case, there can be no doubt that Peace Hills lacked the requisite intention to induce a breach of the construction contract. First, SAR Petroleum properly concedes that Peace Hills did not act out of malice. In other words, breach of the construction contract was not an end in itself. This leads us to ask whether the breach was a means to an end. But it is equally clear: no distinct economic benefit or advantage accrued to Peace Hills because of the breach of the construction contract between Eel River and SAR Petroleum. In other words, Peace Hills did not gain an advantage over and above that to which it was entitled under its loan agreement with Eel River. Most certainly, Peace Hills did not profit from the breach in the way that Mr. Gye would have profited from Ms. Wagner's breach of contract with Mr. Lumley, but for the court injunction. Nothing that Peace Hills did qualifies as improper or opportunistic conduct. Thus, the element of intention has not been satisfied and the tort action must fail.

See also the Trial Decision, at para. 947.

194. The trial judge found unequivocally that AMEC had not acted maliciously. Therefore, the question before her was whether AMEC induced the breach of contract as a "means" of achieving some other "end." In other words, she had to determine whether there was evidence of a benefit or advantage sought by AMEC to allow her to infer that AMEC induced PCS to breach the Comstock Contract as a means of achieving that end (that economic benefit or advantage).

195. The test for intent, as it relates to the tort of inducing breach of contract, necessarily requires an assessment of whether the defendant sought an economic benefit or advantage. This is confirmed in *SAR Petroleum*:

> It has not escaped my attention that Lord Hoffman's formulation of the intention test may be recast as a test to determine whether the defendant acted for an improper purpose (maliciously or opportunistically). The flip side of the coin is to ask whether the defendant acted for a proper purpose. As stated earlier, it should follow that if the defendant did not act for improper purpose it must have acted for a proper one. If we take the test of intention to be whether the desired breach was a means to an end or an end in itself, and we leave aside cases of malice, we are left with deciding whether the defendant sought a commercial or economic advantage that crossed the Rubicon from acceptable commercial behaviour to unacceptable or opportunistic behaviour. If the defendant did not cross the Rubicon, it is because he or she acted for what the law considers a proper purpose. Of course, the more difficult task is to reach an accord with respect to what qualifies as a proper, as opposed to an improper, purpose. Fortunately, for purposes of deciding this appeal, it can be safely assumed that it is proper for a defendant to pursue a course of action consonant with protecting its legitimate and existing contractual or proprietary rights with the third party. In short, once the intention test is framed in terms of the defendant not acting for an improper purpose (means to an end), it is only logical that the defendant would want to show that it acted for a proper purpose: the pursuit and preservation of existing contractual rights with the third party. [para. 57]

196. In order to decide whether AMEC sought a benefit or advantage, the trial judge was required to determine whether AMEC would actually obtain a benefit or advantage from the breach. On this, the trial judge was very clear that AMEC would not obtain a benefit or advantage as a result of PCS breaching the Contract but would actually be exposed to liability. As previously noted, she held [at paras. 951-952]:

> I accept that the contract between PCS and AMEC provides for liability on the part of AMEC for damages, losses, costs or expenses suffered by PCS arising from or caused by the wrongdoing, negligence (including negligent errors or omissions) of the AMEC. However, if AMEC wrongfully refused to properly adjudicate Comstock's claims and this led to damages being awarded against PCS for breach of contract, that did little to minimize AMEC's liability to PCS, and it is more likely it would have created liability to PCS.
>
> I fail to see how AMEC obtained any specific economic or commercial benefit from inducing a breach of the contract between PCS and Comstock.

197. Inducing breach of contract is an intentional tort. It requires a plaintiff to prove that the defendant intended the outcome (the breach of contract) as opposed to the tort of negligence, which requires only that the plaintiff prove that the outcome was reasonably foreseeable. Improper purpose alone is not enough to establish intention for the purposes of the tort of inducing breach of contract. ***

198. AMEC's entire role as it related to Comstock is outlined in the Comstock Contract. AMEC was to be specifically called upon as a decision maker at first instance. Accordingly, such a test would not ground any finding of intention to induce PCS to breach the Comstock Contract.

199. The decision to terminate the Contract was that of PCS. In the event of default by Comstock, PCS had the choice to either suspend Comstock's right to continue with work or terminate the Contract.

200. Termination is a contractual mechanism, and the discretion to exercise it was PCS' alone. Its witnesses at trial gave uncontroverted evidence that, in fact, PCS did exercise that discretion of its own volition. For example, Clark Bailey (PCS) confirmed he terminated the Contract despite the recommendations of Mark Neis (AMEC) ***.

202. Mr. Bailey's evidence confirmed the reality that the contract was between PCS and Comstock and that only PCS could decide to terminate it ***.

203. If Comstock did not agree with the decisions made by AMEC, it had the contractual right to dispute those decisions under the terms of the Comstock Contract, and it chose not to do so.

204. The tort of inducing breach of contract is one of "secondary" or "accessory" liability: primary liability lies with the party who breached the contract. The alleged tortfeasor merely assumes secondary liability for its role as an accessory to this breach. The tort was created to step in when recourse against the contracting

party is unavailable or impractical, which is not the case in this action. As explained in *SAR Petroleum* [para. 33]:

> It is worth identifying the policy reason underscoring the right of a party to a contract, which has been breached, to sue a non-party for inducing the breach. In contract law, the general right or ability of one party to refuse to perform is accepted subject, of course, to the obligation to compensate the innocent party (e.g. anticipatory breach). Hence, Ms. Wagner had the option of breaching her performance contract whether or not she was induced to do so by a third party. Why should it make any difference whether the decision to breach the contract was encouraged or informed by the views of others? *Lumley v. Gye* [[1853] EWHC QB J73] provides a ready answer. The remedy on the contract may be inadequate as where the person breaching the contract (Ms. Wagner) might be unable to pay the damages actually suffered by the plaintiff. While "primary" liability rested with Ms. Wagner, Mr. Gye assumed "secondary" liability for the loss suffered as a consequence of his acts of inducing breach of contract. Not only may the remedy on the contract be inadequate, but also the damages available in tort may be broader than those available in contract (see reasons of Erle J.). Curiously, the law of inducing breach of contract has never focused on this point. Instead, the law simply holds that for the defendant to be liable to the plaintiff, so too must the third party be liable to the plaintiff. Hence, the distinction between primary and secondary liability. […]

205. In sum, the rationale for the tort is to provide a remedy in circumstances in which: a) the contracting party (in this case, PCS) is unable to pay the damages suffered; or b) the measure of damages differs in contract and tort. It is not meant to be invoked in circumstances such as the present where the contracting party is already being pursued to recover the exact same damages. Comstock did not plead that its claims in tort against AMEC were in any way broader than its claims against PCS in contract—in fact Comstock pled that the damages are identical. The purpose of the tort claim in such circumstances is unsustainable because either it is redundant or it creates concerns of double recovery. ***

206. Ultimately, the breach of contract from which all of Comstock's damages flow was the trial judge's finding that PCS wrongfully terminated the Contract. This was a decision that PCS made for itself and for which Comstock sued PCS, in contract, and was awarded damages, thereby negating the very loss for which Comstock pursued AMEC in tort, and for which it may only recover once. ***

Disposition

376. For these reasons, I would dismiss both appeals. ***

REFLECTION:

- *Why does the tort of inducing breach of contract entail proof of a defendant's intentionality or malice? What is problematic about recognising a standard whereby the breach of contract was reasonably foreseeable?*
- *What rationale for the tort of inducing breach of contract does LeBlond J.A. identify? Is this rationale consistent with the rationales underlying the doctrines of joint and several liability (§18.2.3) or concurrency of actions in tort and contract against a primary defendant (§17.5)?*

10.3.2 Further material

- S. Sérafin & K. Sun, "Corrective Justice and *In Personam* Rights: Reconsidering the Tort of Inducing Breach of Contract" (2024) Supreme Court L Rev (3d) (*forthcoming*).
- B. MacKenzie, "Shifting Blame? Reassessing the Tort of Inducing Breach of Contract Following *A.I. Enterprises v. Bram*" [2016] Annual Rev Civil Litigation 245.
- I. Christie, "Inducing Breach of Contract in Trade Disputes: Development of the Law in England and Canada" (1967) 13 McGill LJ 101.

10.4 Unlawful interference with economic interests (unlawful means)

10.4.1 Ultracuts v. Magicuts [2023] MBCA 71

✗REF: §10.1.3

BEARD J.A. (STEEL and MAINELLA J.A. concurring):

1. The defendants Magicuts Inc. (Magicuts), Christopher R. Cawston (Mr. Cawston) and Brian A. Luborsky (Mr. Luborsky) (together, the defendants) are appealing a judgment from the Court of Queen's Bench (as it then was) in which the trial judge found that they had intentionally harmed the plaintiff, Ultracuts Franchises Incorporated (Ultracuts), by means of an unlawful act (civil fraud) against a third party, Wal-Mart Canada Inc. (Wal-Mart), by deceiving Wal-Mart regarding assurances that Wal-Mart had given to Magicuts, thereby committing the tort of unlawful interference with economic interests (unlawful means) (see para 37 herein). ***

2. The defendants argue that the trial judge committed a number of errors:

> (i) regarding the tort of unlawful means, by failing to find, or even consider, whether Magicuts intended to harm Ultracuts; ***

25. In the current action, Ultracuts' claim alleging unlawful interference with economic relations was dismissed on summary judgment against all defendants except for Magicuts, Mr. Cawston and Mr. Luborsky (see *Ultracuts Franchises Incorporated v. Magicuts Inc et al*, 2005 MBQB 294, aff'd 2010 MBCA 34). ***

The Law ***

36. This appeal relates to Ultracuts' claim that the defendants unlawfully interfered with its economic relations with Wal-Mart. As I will explain, this tort is premised on the commission by the defendants of an unlawful act in relation to a third party, which Ultracuts alleges was civil fraud. I will begin with a review of the elements of these two torts.

Unlawful Means (Unlawful Interference with Economic Interests)

37. The leading Canadian decision on the tort of unlawful means is *AI Enterprises Ltd v. Bram Enterprises Ltd* 2014 SCC 12 (*Bram SCC*). In that case, Cromwell J, speaking for the Court, noted that the tort was "unsettled and need[ed] clarification" (at para 2), including that it has been referred to in a number of ways: "unlawful interference with economic relations", "interference with a trade or business by unlawful means", "intentional interference with economic relations" and "causing loss by unlawful means" (*ibid*). He adopted but did not mandate the name "causing loss by unlawful means", shortened to "unlawful means", and he undertook an extensive review of the jurisprudence to clarify its scope and the applicable legal principles (*ibid*).

38. Cromwell J described the tort as one that applies in a three-party situation "in which the defendant commits an unlawful act against a third party and that act intentionally causes economic harm to the plaintiff" (at para 5). He explained that it "creates a type of 'parasitic' liability in a three-party situation" (at para 23) because the defendant's liability to the plaintiff is based not on any direct unlawful act against the plaintiff, but its unlawful act against a third party. He also emphasized that "this is an intentional tort; the focus of the dispute … is on the unlawful means element" (*ibid*; see also para 28). He concluded that the rationale for the tort is "liability stretching" (at para 37), in that it does not create a new tort but, rather, "expand[s] the range of persons who may sue for harm intentionally caused by existing actionable wrongs to a third party" (at para 45).

39. An early example of this tort is found in *Tarleton v. M'Gawley*, (1794), 170 ER 153 (UK). In that case, the master of a trading ship (the defendant) fired its cannons at a canoe (the third party) that was attempting to trade with the trading ship's competitor (the plaintiff) to prevent the trade. The plaintiff recovered damages for economic loss from the defendant, based on the defendant's wrongful conduct towards the occupants of the canoe, which conduct had been committed with the intention of inflicting economic injury on the

plaintiff.

40. In *Bram SCC*, Cromwell J also clarified several aspects of the tort. The first issue that he addressed was the type of unlawful means or act that was required. He rejected a wide interpretation that would include any unlawful means that was forbidden by law whatever its source and regardless of whether it was actionable, including criminal offences and breach of a statute (see paras 40, 42, 45). He also pointed out that the common law has traditionally been reluctant to develop rules about fair competition (see para 31). He opted, instead, for a narrow interpretation that would limit the unlawful act or means to "conduct [that would] give rise to a civil cause of action by the third party or would do so if the third party [had] suffered loss as a result of that conduct" (at para 76; see also paras 5A(1), 26, 75, 86) (unlawful act).

41. Cromwell J concluded that there is no requirement that the unlawful acts be limited to those where the plaintiff has no cause of action against the defendant (see paras 82, 85) and that there is no principled exception that gives a judge discretion to address unanticipated situations (see paras 83-86).

42. The second issue that Cromwell J addressed was that of the relationship between the plaintiff and the third party, and the defendant's knowledge of that relationship. The Court of Appeal in *Bram* (see *AI Enterprises Ltd and Schelew v. Bram Enterprises and Jamb Enterprises*, 2012 NBCA 33) had found that essential elements of the tort included the requirement of a valid business relationship between the plaintiff and the third party and that the defendant had knowledge of that relationship (see para 21). Cromwell J rejected both as elements of the tort. He found that the focus was unlawful conduct that intentionally harmed the plaintiff's economic interests, but that there did not need to have been either a contract or other formal dealings between the plaintiff and the third party, so long as the defendant's conduct was unlawful and it intentionally harmed the plaintiff's economic interests. He stated that, in *Bram SCC*, it was sufficient to show that the defendant knew that "various persons were negotiating with the majority of investors" (at para 93) and that the allegedly wrongful acts were committed with the intention of causing economic harm to the plaintiff.

43. The third issue that Cromwell J addressed was that of the required intention on the part of the defendant. He noted, in reference to *Douglas v. Hello! Ltd (No 3)*, [2005] EWCA Civ 595 at para 159, aff'd on other grounds *OBG Ltd v. Allan*, [2007] UKHL 21, that five types of intention have been identified (at para 95): (a) an intention to cause economic harm to the plaintiff as an end in itself; (b) an intention to cause economic harm to the plaintiff because it is a necessary means of achieving an end that serves some ulterior motive; (c) knowledge that the course of conduct undertaken will have the inevitable consequence of causing the plaintiff economic harm; (d) knowledge that the course of conduct will probably cause the plaintiff economic harm; and (e) knowledge that the course of conduct undertaken may cause the plaintiff economic harm, coupled with reckless indifference as to whether it does or does not.

44. Cromwell J concluded that only the first two types of intention "represent the core intention required for the unlawful means tort" (at para 95). He explained (*ibid*):

> … It is the intentional targeting of the plaintiff by the defendant that justifies stretching the defendant's liability so as to afford the plaintiff a cause of action. It is not sufficient that the harm to the plaintiff be an incidental consequence of the defendant's conduct, even where the defendant realizes that it is extremely likely that harm to the plaintiff may result. Such incidental economic harm is an accepted part of market competition.

45. While Cromwell J appears to have rejected the third type of intention, being "knowledge that the course of conduct undertaken will have the inevitable consequence of causing the [plaintiff] economic harm" (at para 95), he does not comment on how that differs from the second type of intention. This may be problematic in practice, because direct evidence of an intention to bring about a result is often not available and resort must be had to inferences that arise where that result is the natural/inevitable consequence of what a person knew would flow from his deliberate actions. (See, for example, *Grand Financial Management Inc v. Solemio Transportation Inc*, 2016 ONCA 175, at para 63, leave to appeal to SCC refused, 36982 (8 September 2016); see also *Douglas* at paras 159-60, 223-24. This issue has also been the subject of academic comment. (See Chamberlain [& Pitel, eds, *Fridman's The Law of Torts in Canada*, 4th ed (Toronto: Thomson Reuters, 2020)] at p 1003 n 127, pp 1004, 1006-7; Burns [& Blom, *Economic*

Torts in Canada, 2nd ed (LexisNexis, 2016)] at sections 4.45-4.50; and Carty [*An Analysis of the Economic Torts*, 2nd ed (Oxford: Oxford University Press, 2010)] at pp 83-84.)

46. In my view, for reasons that will become clear, it is not necessary for this Court to resolve this issue. That said, Cromwell J was careful in his decision to clarify that the law does not accept that the intentional harming of someone else's economic interests is a tort, *unless* that harm was the result of an unlawful act.

47. In conclusion, the basic elements of this tort can best be described as follows:

> (i) the defendant committed an unlawful act against a third party;
>
> (ii) the unlawful act caused economic harm to the plaintiff; and
>
> (iii) the defendant intended to cause economic harm to the plaintiff when committing the unlawful act. ***

84. *** The relevant loss for the tort of unlawful interference in economic relations is that suffered by the plaintiff due to the unlawful interference. ***

Analysis—Civil Fraud ***

90. The trial judge set out the elements of the tort of unlawful means, including the requirement to prove that the interference was by way of an unlawful act (see paras 132, 136), which he found to be civil fraud in relation to the defendants' representations to Wal-Mart (see para 138).

91. The trial judge's analysis regarding civil fraud was brief (at paras 136-39):

> The only component of the cause of action [of causing loss by unlawful means] that warrants further discussion is whether the interference by the defendants was by way of unlawful means. In this case, *** the question is whether Wal-Mart had a right of action against the defendants. ***

95. The defendants argue that the trial judge erred by failing to set out and apply the correct legal test because he failed to identify the requirement that the representation must be one of fact, and he carried out no analysis and made no finding that any of these statements was one of fact. ***

127. *** Ultracuts has not proven an essential element of civil fraud, being that the defendants' impugned representations were representations of fact.

128. This also means that an essential element of the unlawful means tort, being proof of an unlawful act (civil fraud), has not been proven. ***

159. *** Ultracuts has not proven on a balance of probabilities that Wal-Mart relied on the representation or that the representation caused Wal-Mart to act. Thus, Ultracuts has not proven this element of civil fraud.

160. This also means that an essential element of the unlawful means tort, being proof of an unlawful act (civil fraud), has not been proven. ***

Decision ***

168. *** I would find that Ultracuts has failed to prove that the representations constituted the unlawful act of civil fraud and, therefore, it has failed to prove that the defendants committed the tort of unlawful means (unlawful interference with economic interests).

169. In the result, I would allow the defendants' appeal and dismiss Ultracuts' claim of unlawful means against these defendants. ***

REFLECTION:

- *Why should courts be reluctant to impose liability for intentionally harming someone's economic interests when the underlying conduct is not unlawful?*
- *Should a plaintiff be able to sue a defendant for committing an unlawful act against a third party that*

economically harms the plaintiff, in circumstances where the defendant's conduct towards the third party is not actionable by that party?

10.4.2 Hategan v. Moore & Farber [2021] ONSC 874

✗REF: §4.1.4.1, §10.7.1, §10.8.2

FERGUSON J.:

14. On September 19, 2017, Mr. Farber appeared on the television program *The Agenda* along with Ms. Moore. On that program, Mr. Farber described Ms. Moore and Ms. Hategan as "heroes" in terms of "how they were able to take themselves out, how they were able to work the system, to basically shut down the Heritage Front" (note that the Heritage Front was an extremist white supremist group). Mr. Farber and Ms. Moore subsequently became executive members of the Canadian Anti-Hate Network and have appeared together on the platform at several educational seminars devoted to combatting racism.

15. Based on these facts and little, if anything, else capable of constituting factual evidence during the limitations period, Ms. Hategan has brought this action against Mr. Farber. In it, she claims $100,000 in general damages for injurious falsehood, civil conspiracy, wrongful appropriation of personality, unlawful interference with economic interests and negligence, as well as $50,000 in punitive damages and $50,000 in aggravated damages. ***

Unlawful interference with economic interests ***

53. The tort of wrongful interference with economic interests is intended to apply in situations where a tortfeasor commits an unlawful act against a third party that intentionally causes harm to the plaintiff. So long as the conduct would have been actionable by the third party, the plaintiff may sue even though the unlawful act was not committed directly against the plaintiff. As described by the Supreme Court of Canada, "its core captures the intentional infliction of economic injury on C (the plaintiff) by A (the defendant)'s use of unlawful means against B (the third party)".[270]

54. Mr. Farber submits that none of this applies to the facts as pleaded or to any evidence adduced by Ms. Hategan. As for considering the allegations made in the claim as possible proof of damages, those allegations are unsupported by any factual evidence. The section in Ms. Hategan's affidavit entitled "Evidence of Damage" contains no evidence of damages, its title notwithstanding.

55. Finally, Mr. Farber submits that counsel for Ms. Hategan's statement of the law regarding this tort in her supplementary factum is incorrect. However, *Grand Financial Management Inc. v. Solemio Transportation Inc.*,[271] which Ms. Hategan cites, is entirely consistent with the law as stated by the moving parties. Indeed, that case law is cited and relied upon in the *Grand Financial* case. There must be tortious conduct vis à vis a third party that causes the interference with the plaintiff's economic relations.[272] In any event, an unquestionable element of the tort is that the plaintiff must have suffered special damages by way of economic loss.[273] This element is neither pleaded by Ms. Hategan, nor is there any evidence whatsoever of economic loss or special damages anywhere in the material.

56. Again, I agree with these submissions. There is no evidence of a tort being committed against a third party that internationally caused harm to Ms. Hategan. Further there is no evidence of special damages by way of economic loss. The claim for unlawful interference with economic interests has not been made out against Mr. Farber.

87. The tort of unlawful interference with economic relations allows a plaintiff to sue a defendant for

[270] *Bram* [2014 SCC 12, [2014] 1 S.C.R. 177] note 6 at para. 23.
[271] *Grand Financial Management Inc. v. Solemio Transportation Inc.*, 2016 ONCA 175 (Ont. C.A.) [*Grand Financial*].
[272] *Ibid* at para. 65.
[273] *Ibid* at para. 75.

economic loss that results from the defendant's unlawful act against a third party.[274] As emphasized by the Supreme Court in *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, the tort's core "captures the intentional infliction of economic injury on C (the plaintiff) by A (the defendant)'s use of unlawful means against B (the third party)".[275] The tort is only available where the defendant committed an actionable wrong against a third party that was also intended to target the plaintiff and/or the plaintiff's economic activities.[276]

88. Ms. Hategan does not specify any third party to whom an actionable wrong has been committed. Ms. Hategan submits that Ms. Moore made defamatory comments to anti-racism expert Barbara Perry, and that those comments are an actionable wrong against a third party. This is incorrect. As confirmed on cross-examination, Ms. Moore communicated to Ms. Perry that "I was being stalked by somebody who had been in the Heritage Front. I did not say your [Elisa's] name. I did not say your [Elisa's] gender." Ms. Perry would have no actionable claim against Ms. Moore for these comments. In any event, they were communicated as Ms. Moore's opinion. ***

90. I agree with these submissions. Ms. Hategan has not specified any third party to whom an actionable wrong has been committed nor is there any such third party. This tort claim fails against Ms. Moore. ***

Counterclaim ***

129. In her counterclaim, Ms. Moore seeks general damages for defamation; invasion of privacy; appropriation of likeness and appropriation of personality; and interference with economic relations. Ms. Moore submits that she has provided the necessary evidentiary foundation to prove each of these claims, and that summary judgment ought to be granted. ***

143. On at least two separate occasions, Ms. Hategan threatened to sue Ms. Moore's professional colleagues in an attempt to interfere with Ms. Moore's economic relations. Ms. Moore alleges that this amounts to the tort of intimidation,[277] and is an actionable wrong committed against a third party. In at least one instance, as admitted by Ms. Hategan, these threats led to a speaking engagement being cancelled. As a result of these actions, Ms. Moore has suffered economic harm and loss. Ms. Moore does not know how many other opportunities she may have lost out on, because Ms. Hategan has refused to produce relevant communications with third parties. Ms. Moore submits that an adverse inference should be drawn.

144. Again, I agree with these submissions. Ms. Hategan has caused interference with Ms. Moore's economic relation. ***

REFLECTION:

- *Does a defendant need to have had knowledge that their conduct would cause harm to the plaintiff for the tort of causing loss by unlawful means to be made out? Why or why not?*

10.4.3 Further material

- G. Beaulne, "Supreme Court Narrows the Tort of Unlawful Interference with Economic Relations" Mondaq (Feb 16, 2014).
- J. Neyers, "Rights-Based Justification for the Tort of Unlawful Interference with Economic Relations" (2008) 28 Legal Studies 215.
- V. Iacono, "By All Unlawful Means? An Inquiry into the Scope of the Unlawful Means Tort" (2018) 26 Dalhousie J Legal Studies 137.
- K. Sun, "Corrective Justice and the Unlawful Means Tort: Is There a Right to Trade?" (2019) 28 Dalhousie J of Legal Studies 167.

[274] *Bram supra* at para. 23.
[275] *Bram supra* at para. 23.
[276] *Bram supra* at paras. 43, 45.
[277] *McIlvenna v. 1887401 Ontario Ltd.*, 2015 ONCA 830 (Ont. C.A.) at paras. 23-25 [§10.2.3].

10.5 Breach of confidence

10.5.1 XY LLC v. Zhu [2013] BCCA 352

✗REF: §10.1.4, §10.8.1

NEWBURY J.A. (CHIASSON AND SMITH J.A. concurring): ***

1. This matter consists of three appeals and a cross appeal. They arise in the context of a technology licensing agreement between the plaintiff XY, LLC ("XY") as licensor and one of the defendants, JingJing Genetic Inc. ("JingJing"), as licensee. The technology makes it possible to separate X and Y chromosomes in (*inter alia*) bovine spermatozoa, thus permitting the production of calves of a desired sex. The trial judge, Mr. Justice Kelleher, found that JingJing had provided XY with false reports concerning revenues it received from its use of the technology, underpaid the royalties it owed to XY, concealed documents from XY, and violated in several ways the confidentiality provisions in the agreement. ***

2. Three of the appeals are brought by individual defendants (the "Personal Defendants") who were employed by JingJing (and by other members of its corporate "group"). *** Mr. Zhu *** challenges as overly broad the terms of a permanent injunction [§9.8.2] granted against JingJing, the Personal Defendants and "all those over whom they exercise control", in respect of the future use of XY's technology. ***

Material Findings

16. The trial judge made the following findings that are material to these appeals: *** [2012 BCSC 319: ***

> 201. The plaintiff claims against all the defendants in breach of confidence and seeks a permanent injunction to restrain the use of XY's confidential information allegedly in the hands of the defendants. The plaintiff argues that a permanent injunction is warranted because to deny such a remedy "would be to permit the defendants to sort semen using their intimate knowledge of XY's equipment and protocols, without paying royalties to XY, and in competition with those other licensees in China, Canada or elsewhere who do not pay royalties to XY."
>
> 202. The general principle underlying breach of confidence is that where a person obtains information in confidence, the person may not use the information for activities detrimental to the person who makes the communication: *Terrapin Ltd. v. Builders' Supply Co. (Hayes) Ltd.*, [1960] R.P.C. 128 (Eng. C.A.). It is an equitable cause of action, rather than a tortious one: Peter T. Burns and Joost Blom, *Economic Interests in Canadian Tort Law* (Markham: LexisNexis, 2009) at 213. The wrong is comprised of three elements: (a) the information conveyed was confidential; (b) it was communicated in confidence; and (c) it was misused by the party to whom it was communicated: *Coco v. A.N. Clark (Engineers) Ltd.* (1968), [1969] R.P.C. 41 (Eng. Ch. Div.), at 47, cited by La Forest J. in *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.), at 635-36.
>
> 203. Material can remain confidential even though it is available to the public. "[W]hat makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process": *Saltman Engineering Co. v. Campbell Engineering Co.* (1948), 65 R.P.C. 203 (Eng. C.A.), at 215, quoted with approval by Sopinka J., dissenting in part, in *LAC Minerals Ltd.* at 610.
>
> 204. Where a contract exists between the parties, as in this case, the terms of the contract are relevant to determining the availability of a claim for breach of confidence. In *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 (S.C.C.), Binnie J., for the court, stated at para. 36:
>
> > Just as a contractual term can limit or negative a more general duty implied by the law of tort, so too can a contractual term that deals expressly or by necessary implication with confidentiality negate the general obligation otherwise imposed by equity: *337965 B.C. Ltd. v. Tackama Forest Products Ltd.* (1992), 91 D.L.R. (4th) 129 (B.C. C.A.), *per* Southin J.A., at p.

176, leave to appeal to this Court refused, [1993] 1 S.C.R. v (S.C.C.). The ability of parties to contract out of, or limit, general duties otherwise imposed by law has been labelled "private ordering", and the general principles applicable here would be analogous to the principles considered by this Court in the context of concurrent remedies in tort and contract in *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12 (S.C.C.) at p. 27:

> … the tort duty, a general duty imputed by the law in all the relevant circumstances, must yield to the parties' superior right to arrange their rights and duties in a different way. In so far as the tort duty is not contradicted by the contract, it remains intact and may be sued upon.

Contractual Indications of Confidentiality

205. As discussed above, article 3.10 of the CLA [Commercial Licensing Agreement] expressly held the parties to confidence regarding the information disclosed in the agreement. ***

The Confidential Information

209. In this case there is confidential information of three kinds. First, the SX cytometers contain specialized parts that make them different from and superior to, for the purposes of bovine semen sorting, regular cytometers. Secondly, XY provides protocols and specific information about how to use its technology most effectively. Thirdly, XY provided JingJing with its confidential patent information under the impression that JingJing required it to secure additional financing. ***

The Misuse

218. Under the third element, there must have been a misuse of XY's confidential information. The evidence establishes that there was widespread misuse of XY's confidential information. ***

229. Overall, there has been a widespread misuse of XY's confidential technology and information amounting to a breach of confidence. An appropriate remedy under this heading is a mandatory and prohibitive injunction ***. ***]

Injunctive Relief

98. As mentioned earlier, the terms of the CLA required JingJing (then known as IND Lifetech, Inc.) to keep XY's technology confidential. ***

99. Section 3.10 of the CLA contained the central covenant regarding confidentiality and the exceptions thereto:

> CONFIDENTIALITY: Each of the parties to this License Agreement shall maintain and hold confidential any and all information regarding the terms or condition of this License Agreement and any and all information regarding the Technology, the Proprietary Rights, or Improvements thereto of the other party during the Term of this License Agreement and thereafter, except to the extent that the information:
>
> i. is or becomes generally available to the public other than as a result of a disclosure by the recipient party;
>
> ii. becomes available to recipient party on a nonconfidential basis and not in contravention of applicable law from a source other than the other party or one of its officers, directors, partners, employees, independent contractors, agents, or licensees ("Representatives") not bound by a confidential relationship with disclosing party or by a confidentiality or other similar agreement;
>
> iii. can be proven was known by recipient party on a nonconfidential basis and not in contravention of applicable law or confidentiality or other similar agreement prior to disclosure to recipient party by disclosing party;

> iv. notwithstanding the foregoing, with respect to the Licensed Technical Information or any information marked or indicated by the disclosing party as confidential, recipient party shall maintain such information as confidential.
>
> Licensee agrees to limit access to information to employees or independent contractors who by express writing agree to confidentiality obligations including terms set out by Exhibit H (Assignment Agreement Terms) and Exhibit 1 (Nondisclosure Agreement Terms). ***

103. The judge rejected the defendants' argument that XY's technology was in the public domain ***. *** As well, the judge rejected Mr. Zhu's evidence that semen could be sorted by the defendants without XY's confidential information. Aside from the fact that Mr. Zhu was not found to be credible, this evidence was contrary to the "detailed and credible evidence" of Mr. Gilligan and Mr. Evans. (Para. 337.)

104. In the result, the Court granted the injunction in the terms proposed by XY. ***

105. Mr. Zhu complains on his appeal about many detailed aspects of the injunction, but the main thrust of his argument is that the definition of "Confidential Information" contained in Appendix A encompasses information that has been made publicly available (by the publication of research or through patent applications). Thus it fails to distinguish between that information and information that is truly confidential. On this view, the trial judge was "required to examine the circumstances of XY's claim for confidentiality and [to] make an independent determination as to whether the information was truly confidential such that the Court's protection of XY's information was required indefinitely".

106. The starting point for the relevant definition of "Confidential Information" in this case must be the terms of the CLA. As the trial judge noted at para. 204, the terms of any contract between the parties are relevant to the availability of a claim (and therefore, remedy) for breach of confidence. As seen above, s. 3.10 of the Agreement excepted information that is or becomes generally available to the public other than as a result of a disclosure by the recipient party, and information that was known by the recipient party "on a non-confidential basis and not in contravention of applicable law or confidentiality or other similar agreement prior to disclosure to [JingJing] by [XY]." Obviously, this would include published research and patent applications, and I did not understand XY to argue to the contrary.

107. It is not appropriate, however, for a court to refer to all such patent applications and public research in the terms of an order. While recognizing that any injunction must be clear and enforceable, it seems to me that any question of overbreadth in this instance could have been avoided by the incorporation of the exceptions listed in s. 3.10 of the CLA quoted above. Aside from this exception, JingJing agreed to keep the technology confidential, and for its part, XY took every precaution to see that the licensee did so. ***

108. The trial judge analyzed the three different types of confidential information identified in this case, beginning at para. 209. He accepted Mr. Evan's evidence concerning the components of the SX cytometer that were confidential. Mr. Evans' *in camera* testimony confirmed that licensees are not even able to modify or add to most of the cytometer components. The Court accepted that the "protocols", or information regarding the use of the SX cytometer, given to Dr. Remillard had also been confidential. The Court continued:

> As Mr. Gilligan explained in his testimony, although much of the information contained in the report had been published, the summary prepared by XY was "the entirety of our field work up to [2003] … [p]ublished and unpublished, which gives anybody who holds it a very good understanding of what we do or don't know so far, published or unpublished." In keeping with the principle from *Saltman Engineering* referred to in dissent by Sopinka J. in *Lac Minerals*, it is clear the people at XY had used their brains in creating XY's protocols based on published and unpublished research and experiments and had produced something that could only be produced by having gone through such a process. As such, it is clear that the information contained in the protocols was confidential and the plaintiff's evidence that the protocols were conveyed in confidence has not been undermined. [At para. 215; emphasis added.] ***

110. The terms of the injunction and specifically its definitions of "Proprietary Rights" and "Patent Rights" and "Trademark Rights" essentially track the corresponding definitions in the CLA. As already noted, they

were subject to the exceptions stated in s. 3.10. The definition of "Patent Rights" becomes relevant only because "Confidential Information" is defined to include "Improvements to the Confidential Information made by the defendants"; the definition of "Improvements" contains the term "XY's Technology"; XY's Technology is defined to include "Proprietary Rights"; and that term in turn includes "Patent Rights". ***

114. I would therefore allow Mr. Zhu's appeal to the extent of deleting what I have denoted as paragraph (f) of Appendix A to the order [which precluded Mr. Zhu from pursuing businesses that involve the production of embryos that are not dependent on XY's technology], and incorporating the exceptions listed in s. 3.10 of the CLA, with appropriate changes in nomenclature. In all other respects, I would dismiss the appeal concerning the terms of the permanent injunction. ***

REFLECTION:

- *What private right does the tort of breach of confidence vindicate? Is a contractual relationship a necessary prerequisite for pleading the tort?*
- *Was it necessary for the plaintiff to plead the elements of breach of confidence to protect their interests in this case? Would a claim for breach of contract have sufficed to protect their interests?*

10.5.2 ES v. Shillington [2021] ABQB 739

✗REF: §4.1.2.1, §9.2.4, §9.3.9, §9.4.6, §9.5.8, §9.8.2.5

INGLIS J.: ***

1. The Plaintiff *** seeks judgment that the Defendant's actions of publishing private images of the Plaintiff on the internet is a tort, separate from the torts of violence against her. She further seeks judgment for breach of confidence. ***

3. *** [S]he seeks injunctive relief requiring the Defendant to remove from the public domain and not repost any of her private images. ***

Facts ***

8. Between 2005 and 2016 the Plaintiff and the Defendant were partnered in a romantic relationship and they have two children together. The parties moved to New Brunswick in 2015 when the Defendant, an officer in the Canadian Armed Forces, was transferred there. ***

10. The Plaintiff testified that prior to this relationship she was a happy person, and was loving and appreciated her sexuality. As part of her relationship with the Defendant she shared with him photographs of her in which she was in various states of undress and engaging in sexual activity. These were shared with her partner as a private gift to him. One of the reasons she provided him these images was due to their separation caused by his military deployment. It was understood between them that he would not distribute these images in any way.

11. While he was deployed, near the end of their relationship, the Defendant confessed to the Plaintiff that he had posted her images online. Through accessing the Defendant's social media accounts the Plaintiff was able to track some of these postings and was disturbed to find many of those private, explicit images available on the internet at pornography sites. At no time did the Defendant have the Plaintiff's consent to publish these images. The Defendant admitted that he had posted photos as early as 2006, and the Plaintiff has located images posted as late as 2018. As recently as early 2021 the Plaintiff was able to find some of these images online.

12. The availability of these photos, including the fact that the Plaintiff is identifiable in some images, resulted in the Plaintiff being recognized in them by a neighbour that spoke to her sexually, having seen her likeness on a website. She has experienced significant mental distress and embarrassment as a result of the postings. She suffers nervous shock, psychological and emotional suffering, depression, anxiety, sleep disturbances, embarrassment, humiliation, and other impacts to her wellbeing. ***

43. The Province of Alberta has recognized that other existing torts do not offer a remedy to the particular

conduct complained of. For example, in order to establish the tort of breach of confidence, a plaintiff must prove the following:

> (a) the information conveyed was confidential;
>
> (b) the information was communicated in confidence;
>
> (c) the information was misused by the party to whom it was communicated.
>
> (*Hutton v. Canadian Broadcasting Corp*, 1992 ABCA 39 at para 15, citing from *LAC Minerals Ltd v. International Corona Resources Ltd*, [1989] 2 SCR 574.)

44. The Plaintiff is correct that imposing an obligation upon a victim to prove that their shared image was both confidential and communicated in confidence creates an unnecessary barrier to a remedy.

45. In *Jane Doe #1* [*Jane Doe 464533 v. D(N)*, 2016 ONSC 541] the element of communication in confidence was proved, and the plaintiff was reassured that no one else would see her video before she provided it to the defendant. However, in *Jane Doe #2* [*Jane Doe 72511 v. Morgan*, 2018 ONSC 6607], there was no explanation for how the defendant came into possession of the video in issue and as such the court had to reject the breach of confidence claim.

46. Breach of confidence, given that express requirement, is not a sufficient remedy for situations such as the one before this court. The element of specific confidentiality at the time of the sharing of the information bars many scenarios, and protects a distributor of private images provided he acquires those images without any communication or implied confidentiality owed to the person whose privacy is vested in the information. ***

Assessment of Defendant's liability for breach of confidence

82. The Plaintiff's claim describes the following allegations, now proven facts, which establish the Defendant's breach of confidence: the Plaintiff was the subject of private, personal and intimate images; she allowed the Defendant to have them in confidence under the express understanding that they would not be disclosed by him; and, the Defendant published the images to various publicly accessible websites.

83. These facts establish that the publication of the Plaintiff's images was also an act of the breach of confidence for which the Defendant is liable. ***

REFLECTION:

- *What is it about the elements of breach of confidence that make it generally ill-suited to redressing victims of non-consensual intimate image distribution? How were the elements nevertheless established in this case?*

10.5.3 Cross-references

- *Wainwright v. Home Office* [2003] UKHL 53, [15]: **§4.1.1.1**.
- *Jones v. Tsige* [2012] ONCA 32, [61]: **§4.1.1.2**.

10.5.4 Further material

- A. Khoday, "Resisting Revenge Pornography: When Victims Strike Back" (2016) 25 Canadian Cases L Torts 45.
- E. Turcotte, "Non-Consensual Distribution of Intimate Images: Diverging Approaches to Remedies in the Prairie Provinces" (2024) 87 Saskatchewan L Rev 51.
- M. Malone, "On the (Data) Breach of Confidence" (2021) 58 Alberta L Rev 945.
- M. Richardson, M. Bryan, M. Vranken & K. Barnett, *Breach of Confidence: Social Origins and Modern Developments* (Cheltenham: Edward Elgar, 2012).

10.6 Passing off

10.6.1 Dentec Safety Specialists Inc. v. Degil Safety Products Inc. [2012] ONSC 4721

Ontario Superior Court – 2012 ONSC 4721

CAMPBELL J.:

1. The plaintiff, Dentec Safety Specialists Inc., has launched a simplified procedure claim against the defendant, Degil Safety Products (1989) Inc. The corporate parties are competitors in the industrial safety products business. Each corporate party is owned and controlled by a Dente brother. The two siblings bear some animosity toward each other. In this action, Dentec claims that Degil wrongfully passed itself off as Dentec by registering and using the internet domain name, dentecsafety.ca, knowing full well that the plaintiff's internet web address was dentecsafety.com, and by deliberately redirecting potential internet customers of Dentec to the Degil website at degilsafety.com. ***

2. Degil admits that it registered the dentecsafety.ca domain name and, for the 5½ month period between approximately February 23 and August 6, 2009, redirected all internet traffic through the dentecsafety.ca website to the degilsafety.com website. Degil contends, however, that it did nothing wrong. The domain name was "available" and Degil had a legitimate claim to the name, given that it contained words associated with its business, namely, the words "dente" and "safety." Accordingly, Degil contends that it was lawfully entitled to register the domain name and use it as it saw fit. Degil argues that, in any event, the plaintiff is unable to establish that it, in fact, lost any customers or sales through this redirection of internet traffic, and so there can be no compensatory damages payable. Moreover, Degil argues that this is simply not a case where punitive damages are appropriate because, even it is wrong about being able to register and employ the dentecsafety.ca domain name, there was nothing malicious, oppressive, or highhanded about its conduct.

3. There are essentially two issues in this case, namely: (1) whether the plaintiff has been able to establish, on the balance of probabilities, all of the necessary components of the tort of passing-off; and (2) the quantum of any compensatory and punitive damages that are payable by the defendant. ***

Liability Analysis

A. The General Principles of the Tort of Passing-Off

9. The tort of passing-off prevents people from selling their products to consumers after having led them to believe that they are the products of another. Said simply, a person may not pass off his or her goods as those of another. In *Ciba-Geigy Canada Ltd. v. Apotex Inc.*, [1992] 3 S.C.R. 120 (S.C.C.), the Supreme Court of Canada thoroughly reviewed the law in this area, and concluded, at para. 33, that the tort of passing-off has three necessary components, namely, "the existence of good will, deception of the public due to a misrepresentation and actual or potential damage to the plaintiff." These three elements have been called the "classic trinity" defining the tort. There is no requirement that the defendant's actions be intentionally fraudulent, malicious, or even negligent. The tort of passing-off is complete without reference to the defendant's state of mind. See: C. Wadlow, *The Law of Passing-Off* (4th ed., 2011) at §1-014 *et seq*.

10. The essence of the tort is deceit by the defendant suggesting that the defendant's product is the plaintiff's product, which thereby causes confusion in the minds of consumers as to whose products are being sold. It is not necessary for the plaintiff to establish that consumers were actually misled by the defendant's conduct, but simply that the defendant made an attempt to mislead the public. It is important to avoid confusing anyone who has an actual or potential connection with the product. Such confusion may enable a competitor to secure a commercial advantage by effecting product sales it would not otherwise achieve, or it may result in a consumer purchase that might not otherwise have taken place. See also: *Reckitt & Colman Products Ltd. v. Borden Inc.*, [1990] 1 All E.R. 873 (U.K. H.L.) at p. 880; *Oxford Pendaflex Canada Ltd. v. Korr Marketing Ltd.*, [1982] 1 S.C.R. 494 (S.C.C.); *Consumers Distributing Co. v. Seiko Time Canada Ltd.*, [1984] 1 S.C.R. 583 (S.C.C.), at p. 601.

11. Practically speaking, cases of passing-off typically fall into one of two broad categories, namely: (1) where competitors are engaged in a common field of activity and the defendant has named, packaged, or described its product or business in a manner likely to lead the public to believe that the defendant's product or business is that of the plaintiff; or (2) where the defendant has promoted its product or business in such a way as to create the false impression that its product or business is in some way approved, authorized, or endorsed by the plaintiff or there is some business connection between them, thereby capitalizing on the plaintiff's reputation and good will. See: *National Hockey League v. Pepsi-Cola Canada Ltd.* (1992), 92 D.L.R. (4th) 349 (B.C. S.C.) at p. 401; *Affirmed*: (1995), 122 D.L.R. (4th) 412 (B.C. C.A.).

B. Passing-Off in the Context of Internet Domain Names

12. While the tort of passing-off originated hundreds of years ago, its application in the information age to the use of domain names is an issue of relatively recent origin. Many of the relevant authorities are helpfully collected and reviewed by Sigurdson J. in *British Columbia Automobile Assn. v. O.P.E.I.U., Local 378*, [2001] B.C.J. No. 151 (B.C. S.C.). See also: *Marks & Spencer plc v. One in a Million* (1997), [1998] 4 All E.R. 476 (Eng. Ch. Div.); *Brookfield Communications Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036 (U.S. C.A. 9th Cir. 1999); *Jews for Jesus v. Brodsky*, 993 F. Supp. 282 (U.S. D. N.J. 1998); *Affirmed*: 159 F.3d 1351 (U.S. C.A. 3rd Cir. 1998); *Law Society (British Columbia) v. Canada Domain Name Exchange Corp.* (2004), 243 D.L.R. (4th) 746 (B.C. S.C.).

13. A number of important principles can be gleaned from these authorities, which I would summarize as follows:

> (1) *Likelihood of Confusion Measured by the Ordinary Customer:* The appropriate legal standard by which to measure whether or not the defendant's conduct may have caused confusion in the minds of the public, is the standard of the "ordinary average customer" shopping for the products sold. See: *British Columbia Automobile Assn. v. O.P.E.I.U., Local 378*, at para. 117; *Jews for Jesus v. Brodsky*, at p. 303.
>
> (2) *Factors to Consider:* In considering the likelihood of potential confusion among customers, the court should consider all of the circumstances of the case, including: the degree of similarity of the secondary level domain names of the parties; the relatedness and similarity of the products sold by the parties; the strength of the plaintiff's business name in the market place; the value of the goods being sold and the care and attention reasonably expected of consumers when purchasing such goods; the defendant's intent in using the domain name; any evidence of actual confusion among members of the public; and whether the plaintiff and the defendant similarly sell their goods through the same channels and to the same market. This is not an exhaustive list of relevant factors, and the relative importance of each factor will depend on the circumstances of each case. See: *British Columbia Automobile Assn. v. O.P.E.I.U., Local 378*, at para. 85-86, 103; *Brookfield Communications Inc. v. West Coast Entertainment Corp.*, at pp. 1053-1054; *Jews for Jesus v. Brodsky*, at p. 301.
>
> (3) *Degree of Similarity to Competitor's Name:* In assessing the likelihood of confusion among customers, the degree of similarity between the plaintiff's business name and the domain name used by the defendant will always be an important consideration. If the names are entirely dissimilar, customer confusion is not likely. The greater the degree of similarity between the names, the more likely there is to be customer confusion. The greatest likelihood of customer confusion exists, of course, when the defendant registers a secondary level domain name exactly matching a competitor's business name. Such use of an exact business name weighs heavily in the "customer confusion" analysis. Indeed, in appropriate cases, the defendant's use of such a domain name may itself amount to passing-off. See: *British Columbia Automobile Assn. v. O.P.E.I.U., Local 378*, at para. 78, 89-92; *Marks & Spencer plc v. One in a Million*, at p. 497; *Law Society (British Columbia) v. Canada Domain Name Exchange Corp.*, at para. 23, 29-31; *Stenner v. ScotiaMcLeod* (2007), 62 C.P.R. (4th) 1 (B.C. S.C.) at para. 156-158, 167-169; *Brookfield Communications Inc. v. West Coast Entertainment Corp.*, at pp. 1054-1055; *Jews for Jesus v. Brodsky*, at p. 302.
>
> (4) *Similarity of Products Sold:* In assessing the likelihood of confusion among customers, the

similarity and relatedness of the goods being sold by the plaintiff and defendant is another key factor. If the parties are selling entirely different goods and products in the global market place, the chance of customer confusion is greatly reduced. However, the more related the products being sold, the more likely the average customer will be confused. When the parties are selling virtually identical products, the risk of customer confusion is greatest. See: *Brookfield Communications Inc. v. West Coast Entertainment Corp.*, at pp. 1055-1056; *Jews for Jesus v. Brodsky*, at pp. 301-302.

(5) *Initial Interest Internet Confusion:* The confusion which the tort of passing-off seeks to avoid includes "initial interest confusion," which occurs when web shoppers are looking for the plaintiff's website but, through the great similarity of the defendant's domain name, are instead directed to the defendant's web address. Internet shoppers are more likely to be confused as to the ownership of a website than more traditional patrons who do their shopping at physical "bricks-and-mortar" locations. Moreover, when the plaintiff and the defendant sell the same or similar products and both employ the internet to promote and sell their products, a significant number of shoppers who may have originally been looking for the plaintiff's internet business site, may simply decide to purchase the defendant's products instead. See: *British Columbia Automobile Assn. v. O.P.E.I.U., Local 378*, at para. 80-92; *Brookfield Communications Inc. v. West Coast Entertainment Corp.*, at p. 1062.

(6) *The Intention of the Defendant:* To be held liable for passing-off, the defendant need not have intentionally sought to confuse or mislead the public. However, proof of a defendant's intention to confuse and/or mislead the public will provide strong evidence of customer confusion. See: *British Columbia Automobile Assn. v. O.P.E.I.U., Local 378*, at para. 78, 211; *Law Society (British Columbia) v. Canada Domain Name Exchange Corp.*, at para. 26; *Brookfield Communications Inc. v. West Coast Entertainment Corp.* at p. 1059; *Jews for Jesus v. Brodsky*, at p. 304.

C. Applying the law to the facts ***

1. The Good Will of Dentec in US Safety Products ***

14. To establish the first required element in the tort of passing-off, the plaintiff must demonstrate that it possessed good will. Good will has been described as the business benefit flowing from the "good name, reputation, and connection" enjoyed by a business. It is the "attractive force" that brings in customers. It distinguishes an old, established business from a new business at its inception. Good will is the legal property of the business and adds value to it, as its strength provides a coincidentally loyal base of customers. See: *Inland Revenue Commissioners v. Muller & Co.'s Margarine*, [1901] A.C. 217 (U.K. H.L.), at pp. 223, 235.

15. To establish the good will element of the tort of passing-off, it is not enough for the plaintiff to establish a generalized business good will. The plaintiff must establish "a good will or reputation attached to the goods or services" which it supplies "in the mind of the purchasing public." See: *Reckitt & Colman Products Ltd. v. Borden Inc.*, at p. 880; *Ciba-Geigy Canada Ltd. v. Apotex Inc.*, at para. 32.

16. The defendant contends that the plaintiff has not established the good will component of the tort of passing-off. I disagree. ***

The evidence of the necessary good will ***

17. Claudio Dente testified that he has been in the industrial safety business for some 32 years. He worked in the family business, Degil Safety Products (1989) Inc., which he had founded, for some 15 years before starting his own business. ***

19. According to Claudio Dente, he was able to quickly grow the Dentec business and develop his well-respected reputation in the industrial safety supply industry. He soon achieved over $1 million in sales, and developed a significant and growing following of suppliers and customers. Dentec now operates its business from a 21,000 square foot facility in Newmarket, with approximately 25 employees.

20. As Claudio Dente explained, right from the very beginning, Dentec relied very heavily upon the internet. The name of its website, dentecsafety.com, was put on everything, including all of its advertising, business

cards, shipping cartons, invoices, packing slips, and letter heads, and was included in all outgoing company emails. As a matter of corporate policy, it was thought that the internet was both the easiest way for people to find the company's products, and an inexpensive way to advertise the company globally. In short, Dentec sought to "blast" its internet address everywhere.

21. In his evidence Claudio Dente described himself as, essentially, a "salesman" for Dentec. In his efforts to promote Dentec and its products, Claudio Dente travels very frequently in Canada and the United States. He frequently attends trade shows, designed both for the general industrial public and distributors, and he is a speaker at some of these functions.

22. Dentec has won awards for the quality of its business. In 2006, in only its second year of operation, Dentec won an award from IDI, a consortium of approximately 100 independently owned distributors, as being the "Supplier of the Year." This award was presented to Dentec for "outstanding excellence, professionalism, distributor-oriented programs and support of IDI and its independent distributor member shareholders." In 2008, Dentec won another business award, from Indicia, a competitive marketing group with the same type of distributorship. Dentec won this Vendors Award based on its business performance and its sales performance to the membership of Indicia.

23. Importantly, in February of 2007, Dentec was appointed as the exclusive master distributor for the Canadian marketplace for all US Safety products. There was a formal announcement of this important appointment. Immediately thereafter, Dentec started promoting the US Safety products on its own dentecsafety.com website. By the time Degil began diverting internet traffic through the dentecsafety.ca domain name, Dentec had been serving in this capacity for some two years. ***

24. In light of this evidence, I am satisfied that the plaintiff has established, on the balance of probabilities, that Dentec not only possesses considerable good will as an industrial safety products business, but, more particularly, has established that good will and business reputation, in connection with the sale of the brand name US Safety products as the exclusive Canadian distributor of these products. Accordingly, the plaintiff has proven the first element of the tort of passing-off.

2. The Misrepresentation by Degil ***

25. To satisfy the second element of the tort of passing-off, the plaintiff is obliged to prove that the defendant has in some way conveyed a misrepresentation to the public, whether intentionally or not, that would likely have caused confusion among ordinary average customers as to whether the goods being sold by the defendant are those of the plaintiff. I am satisfied the plaintiff has proven, on the balance of probabilities, that the defendant made such a misrepresentation. ***

26. The defendant contends that there was no misrepresentation in this case. I disagree. There is simply no gainsaying the reality that, by registering the dentecsafety.ca domain name and immediately employing it to redirect potential Dentec customers to the degilsafety.com website, Degil was offering a misrepresentation to the public. Degil was, in effect, suggesting that there was a business connection or association between Dentec and Degil when no such connection or association existed.

27. Any ordinary industrial products customer who was looking to purchase goods from Dentec, and was trying to accomplish that purchase through dentecsafety.ca, would instantly find themselves looking the degilsafety.com website where similar and near identical industrial safety products are sold. Such customers could not help but infer, in such circumstances, that they were redirected becaused Dentec and Degil were in the industrial safety products business together, or were at least operating in association with each other. Why else would they have been redirected, through the internet, from Dentec to Degil.

28. Moreover, if such customers sought to further investigate the potential existence of such a business connection, this logical inference would be confirmed. One way of learning the underlying identity of corporate entities is to conduct a "who is" internet search. The evidence establishes that if an interested potential customer conducted such a search in the present case, they would learn that dentecsafety.ca was a domain name that was registered by Degil Safety Products Inc. on February 23, 2009, and that the administrative and technical contact for Degil was Martino Dente. See: *Marks & Spencer plc v. One in a Million*.

29. Moreover, while it may not be strictly necessary for me to draw any final conclusions in this regard, I have no doubt that this misrepresentation to the public by Degil was made for the purpose of securing sales and customers that otherwise would have belonged to Dentec. In this regard it is important to recall that in February of 2009, Degil did not register any other domain names that combined the family name "Dente" and the word "safety" with any other letter of the alphabet—except the letter "c." Indeed, the only domain name that Degil registered at that time was dentecsafety.ca.

30. In my view, the only reasonable inference from this fact, in all of the circumstances of this case, was that Riccardo Dente registered and deployed the dentecsafety.ca domain name so as to intentionally divert internet traffic, and any resulting sales and customers, from Dentec to Degil. ***

The Confusion Over the Products ***

31. The defendant contends that, in any event, even if the conduct by Degil regarding its registration and use of the dentecsafety.ca domain name can be viewed as a misrepresentation, it could not have caused any potential confusion among customers of the parties as to which corporate entity was selling which goods. I disagree.

32. On this issue it is important to recall that the legal standard which must be employed to measure whether the defendant's conduct may have caused confusion in the minds of the public, is the standard of the "ordinary average customer." See: *British Columbia Automobile Assn. v. O.P.E.I.U., Local 378*, at para. 117; *Jews for Jesus v. Brodsky*, at p. 303.

33. Applying that legal standard in the circumstances of this case leads me to conclude that the plaintiff has established the necessary element of likely confusion among potential customers. While there is no evidence of actual confusion in the present case, I am nevertheless led to this conclusion by all of the following considerations:

> • *The Defendant Used Plaintiff's Business Name:* The secondary domain name that the defendant employed was the plaintiff's business name. The plaintiff had previously selected that same secondary domain name as its own internet site for precisely that reason. The only difference between the two internet addresses was that Dentec registered the ".com" version of the name, while Degil registered the ".ca" version of the name. This could only have caused significant confusion in the minds of ordinary, average safety products customers.
>
> • *The Parties Sold the Same Products:* Any comparison of the products available from Dentec and Degil, through their respective internet web sites, quickly reveals that the two corporate parties were in direct competition and were selling virtually the same or very similar products. *** The products are visually similar or, in some cases, visually identical, and would clearly cause confusion in the mind of any ordinary, average customer.
>
> • *The Parties Sold to the Same Market:* The plaintiff and the defendant similarly sell their respective goods through the same channels and to the same business market. They are in direct competition with each other. Such competition significantly increases the likelihood of confusion in the minds of ordinary customers. When customers shopping for the plaintiff's industrial safety products typed into their browser the address dentecsafety.ca, they were immediately sent to the degilsafety.com website. Any ordinary, average customer could only conclude from such electronic redirection that there must have been some business association or relationship between the parties.
>
> • *The Intent of the Defendant—To Redirect Customers:* The defendant candidly admitted that, in redirecting the internet traffic from dentecsafety.ca to degilsafety.com, it was deliberately redirecting the plaintiff's potential customers to Degil. While the defendant mistakenly believed that this was a "legitimate" exercise, there is no question that this was a deliberate business strategy adopted by the defendant. ***
>
> • *The Value of the Goods for Sale:* While the value of the industrial safety products sold by the parties predictably varied depending upon the nature of the individual product, it is fair to say that the value of the goods sold by the parties did not demand a heightened degree of attention and

> scrutiny on the part of ordinary customers. In such circumstances, ordinary customers are more likely to be confused by the defendant's internet redirection.

34. Accordingly, I am satisfied that the plaintiff has established the second element of the tort of passing-off, by proving, on the balance of probabilities, that the defendant made a misrepresentation to the public that would likely have caused confusion among ordinary average customers as to whether the goods being sold by the defendant were those of the plaintiff.

3. The Likelihood of Damage to Dentec ***

35. To establish the third component of the tort of passing-off, the plaintiff must show that there is a likelihood that the defendant's conduct resulted in damages to the plaintiff. As Professor Christopher Wadow stated in *The Law of Passing-Off*, at § 4-011, the plaintiff "does not have to prove actual damage (still less special damage)" in order to succeed in an action for passing-off, as a "[l]ikelihood of damage is sufficient." In *Ciba-Geigy Canada Ltd. v. Apotex Inc.*, the Supreme Court of Canada confirmed, at para. 33, that this last component of the tort of passing-off required proof of "actual or potential damage to the plaintiff."

36. In the circumstances of this case, I have no hesitation in concluding that, as a result of the defendant's conduct, the plaintiff suffered not only the likelihood of damages, but actual damages. While the plaintiff has not provided any direct evidence of lost sales or customers, it would be unreasonable and unrealistic to conclude that the plaintiff suffered no damages in this regard. After all, for a period of some 5½ months, Dentec deliberately redirected all internet traffic through dentecsafety.ca to its own website, degilsafety.com. Throughout that period of time, customers who were looking to shop for industrial safety products offered by Dentec were being offered very similar or identical products by a direct competitor. I cannot help but conclude that, in those circumstances, Dentec was likely to suffer (and did suffer) damages as a result of lost sales and customers to Degil. ***

4. Conclusion ***

38. Having found that the plaintiff has established, on the balance of probabilities, all three necessary elements of the tort of passing-off, I am compelled to the conclusion that the defendant is liable to the plaintiff for passing-off. ***

REFLECTION:

- *Does the tort of passing off require that a defendant intended a misrepresentation to the public? Should it?*
- *What feature of passing off makes it an intentional tort?*

10.6.2 Further material

- Gowling WLG Podcast, "IP Basics: The Law of Passing Off" (Apr 26, 2023) 🎧.
- J. Griffiths, "*Star Industrial Co Ltd v. Yap Kwee Kor*: The End of Goodwill in the Tort of Passing Off" in S. Douglas, R. Hickey & E. Waring (eds), *Landmark Cases in Property Law* (Oxford: Hart Publishing, 2015).
- R. Corbin, "Intention to Deceive: The Role It Plays in 'Passing Off'" (2004) 18 Intellectual Property J 97.

10.7 Injurious falsehood

10.7.1 Hategan v. Moore & Farber [2021] ONSC 874

✗REF: §4.1.4.1, §10.4.2, §10.8.2

FERGUSON J.: ***

35. An injurious falsehood is an untrue or malicious statement made to a third party disparaging another person's business or property. The elements of the tort are:

(a) The published statements about Ms. Hategan's business or property must be untrue;

(b) They must be made maliciously, without just cause or excuse; and

(c) Ms. Hategan must have suffered special damages.[278]

36. *** Ms. Hategan alleges that over the past two years Mr. Farber (as well as Ms. Moore) have made false statements about Ms. Hategan and her business. She does not further particularize those allegedly false statements in her claim. In her affidavit, she identifies Mr. Farber's statements on "The Agenda" [television program] as constituting an injurious falsehood. There is no other statement made by Mr. Farber within the limitation period identified in Ms. Hategan's affidavit, with the exception of the tweets at exhibit "OOO" which contain no false statements about Ms. Hategan's business.[279]

37. Neither the statements on "The Agenda" nor the series of tweets at exhibit "OOO" are capable of satisfying the prerequisites of the tort of injurious falsehood:

(i) the statements Ms. Hategan objects to are concerning Ms. Moore rather than Ms. Hategan's business;

(ii) insofar as Ms. Hategan is referred to in "The Agenda" statements, what is said about her is true;

(iii) Mr. Farber's statements represent an opinion about historical facts;

(iv) not about business or commercial facts;

(v) there is no claim for special damages in the claim and no evidence of special damages in Ms. Hategan's affidavit.

38. I agree with these submissions. Ms. Hategan has not particularized the allegedly false statements. She only identifies Mr. Farber's statements on "The Agenda". In her affidavit she relies on the same but adds some tweets. The statements are not untrue. There is no evidence that they were made maliciously, without just cause or excuse. Further there is neither a claim nor evidence of special damages. The claim for injurious falsehood has not been made out against Mr. Farber. ***

76. Ms. Hategan claims damages for injurious falsehood because "Moore and Farber have made false statements referring to Ms. Hategan and/or her business". Ms. Moore submits that this claim cannot succeed.

77. Actions for injurious falsehood require the publication of false statements, either orally or in writing, reflecting adversely on Ms. Hategan's business or property, or title to property, and calculated to induce persons not to deal with Ms. Hategan. Ms. Hategan must show that the published statements are untrue, that they were made maliciously—that is, without just cause or excuse—and that Ms. Hategan suffered special damages.[280]

78. Ms. Hategan submits that Ms. Moore uttered false statements not about Ms. Hategan, but about her own life. Ms. Hategan's concerns stem from minor discrepancies in details (i.e., the age at which Ms. Moore became a card-carrying member of the Heritage Front) and about the subjective qualifiers that Ms. Moore uses to describe her past experiences. This is not an actionable wrong.

79. At no time has Ms. Hategan particularized the alleged "false statements" that were published by Ms. Moore, how these alleged false statements reflect adversely on her business, or how these false statements were published to induce persons not to deal with her. Moreover, Ms. Hategan has not claimed or particularized any special damages, which is a necessary element of the tort. Ms. Moore submits that the claim must fail on this basis alone.

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[278] *Quenneville v. Robert Bosch GmbH*, 2017 ONSC 7422 at para 44.
[279] *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177 at para. 23 [*Bram*].
[280] *Lysko v. Braley*, 2006 CanLII 9038 at paras. 133-34, citing Raymond E. Brown in *The Law of Defamation in Canada* 2nd ed. (looseleaf, updated 1999) (Toronto: Carswell, 1994) at para. 28.1(1).

80. To the extent that Ms. Moore commented to others that she is the victim of online harassment, those statements are not false—they are true and, in any event, reflect her own opinions. Moreover, at no time has Ms. Moore ever publicly used Ms. Hategan's name or gender to describe the online harassment from which she suffers.

81. I agree with these submissions. Ms. Hategan has not established that any statements were false and that they were made maliciously and that she suffered special damages. This tort claim fails against Ms. Moore. ***

REFLECTION:

- *Did Hategan meet any of the elements of the tort of injurious falsehood?*
- *How does this tort differ from the tort of defamation? How is it similar?*

10.7.2 Further material

- J. Murphy, "The Vitality of Injurious Falsehood" (2021) 137 L Quarterly Rev 658.
- H. Young, "Revisiting Injurious Falsehood" in J. Eldridge, M. Douglas & C. Carr (eds), *Economic Torts and Economic Wrongs* (Oxford: Hart Publishing, 2021).
- H. Young, "Rethinking Canadian Defamation Law as Applied to Corporate Plaintiffs" (2013) 46 UBC L Rev 529.

10.8 Conspiracy

10.8.1 XY LLC v. Zhu [2013] BCCA 352

✗**REF: §10.1.4, §10.5.1**

NEWBURY J.A. (CHIASSON AND SMITH J.A. concurring):

1. This matter consists of three appeals and a cross appeal. They arise in the context of a technology licensing agreement between the plaintiff XY, LLC ("XY") as licensor and one of the defendants, JingJing Genetic Inc. ("JingJing"), as licensee. The technology makes it possible to separate X and Y chromosomes in (*inter alia*) bovine spermatozoa, thus permitting the production of calves of a desired sex. The trial judge, Mr. Justice Kelleher, found that JingJing had provided XY with false reports concerning revenues it received from its use of the technology, underpaid the royalties it owed to XY, concealed documents from XY, and violated in several ways the confidentiality provisions in the agreement. JingJing was found liable for breach of contract and the tort of deceit. The award of damages of some $8.6 million against JingJing is not challenged by the plaintiffs; but since the corporation is now bankrupt, the judgment is presumably a dry one.

2. Three of the appeals are brought by individual defendants (the "Personal Defendants") who were employed by JingJing (and by other members of its corporate "group"). The trial judge found that these defendants had committed the torts of deceit and civil conspiracy and awarded the damages jointly and severally against them as well as against their employer. ***

Civil Conspiracy

Elements of the Tort

43. The elements of civil conspiracy are well settled in Canada, although cases in which liability is found are rare, and the cause of the action is regarded as somewhat "anomalous". (See the seminal decision of Lord Diplock in *Lonrho Ltd. v. Shell Petroleum Co.* [1982] A.C. 173 (U.K. H.L.).) In the leading Canadian case, *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 (S.C.C.), Estey J. for the Court stated that the tort arises in two possible situations, namely where:

> (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,

> (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result. [At 471-72.]

44. The trial judge correctly identified the second branch ("unlawful act conspiracy") as relevant to this case (para. 267) and found that an agreement had existed between Dr. Remillard and the three Personal Defendants. (Para. 270.) In this regard, he identified "concerted action pursuant to the agreement", including "falsely reporting to XY and concealing material documents." (Para. 271.) Next, having found that the Personal Defendants had perpetrated the deceit found earlier in his reasons, the trial judge found that each of them knew or ought to have known that injury to the plaintiff was likely (citing *Golden Capital Securities Ltd. v. Holmes*, 2004 BCCA 565 (B.C. C.A.) at para. 74). Finally, he stated:

> … I find that the plaintiff suffered a financial loss as a result of the unlawful conduct by the defendants. It was deprived of the royalties to which it was entitled.
>
> For these reasons I concluded that the plaintiff has proved conspiracy on the part of Jesse Zhu, Selen Zhou and Tang Jin. [At paras. 276-7.]

He did not suggest that the amount of these damages should be different from the amount for which JingJing itself was found liable.

45. On behalf of Mr. Zhu, Mr. McPhee submitted in this court that in considering the question of causation flowing from the alleged conspiracy, the trial judge again "conflated" the loss suffered by XY as a result of JingJing's breach of contract, with that flowing from the conduct of the three Personal Defendants. As I understand it, this argument, like that made concerning deceit, turns on the question of causation.

46. I certainly agree that the acts of the defendants must be causally related to loss or damage to the plaintiff for purposes of establishing a civil conspiracy. As stated in *Lombardo v. Caiazzo* (2006), 211 O.A.C. 270 (Ont. C.A.), "A conspiracy that does not result in damages is not actionable." (Para. 16.) The fact that the plaintiff must have suffered loss as a result of the conspiracy, however, does not mean it must have changed its position or relied to its detriment on misconduct of the defendant. In *Canada Cement LaFarge*, for example, the defendants were alleged to have conspired to drive the plaintiff aggregate manufacturer out of business through marketing arrangements aimed at dividing the concrete products market in British Columbia between two of the defendants. Although the plaintiff's claim ultimately failed, no issue arose concerning the sustainability in theory of the plaintiff's claim to loss of the "benefits of a free market" as a result of the alleged conspiracy.

47. A more recent example is *Soleil Hospitality Inc. v. Louie*, 2010 BCSC 1183 (B.C. S.C.), ***aff'd*** 2011 BCCA 305 (B.C. C.A.), where the defendants conspired to impugn a valid settlement agreement on the basis of rights allegedly arising under non-existent agreements. There was no reliance by the plaintiffs on the false agreements, but the conspiracy was found to be made out.

48. If the tort of deceit were not made out in the case at bar, then, it would not follow that the tort of civil conspiracy on the part of the defendants other than JingJing would also be precluded. As stated above, the causation element of this branch of conspiracy requires only that the plaintiff have suffered "actual damage" as a result of unlawful conduct directed towards the plaintiff.

Unlawful act

49. There is not a great deal of case law in Canada on the meaning of "unlawful means" or "unlawful act" in the context of civil conspiracy. In 1961, in *Gagnon v. Foundation Maritime Ltd.*, [1961] S.C.R. 435 (S.C.C.), the Court referred in this context to "means … [that] were prohibited, and this of itself supplies the ingredient necessary to change a lawful agreement which would not give rise to a cause of action into a tortious conspiracy …". (At 446.) More recently, the Ontario Court of Appeal considered the issue in *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460 (Ont. C.A.) in connection with a claim of intentional inference with economic relations. The Court referred to *Bank of Montreal v. Tortora*, [2010 BCCA 139], in which it was said at para. 47 that for conspiracy to lie, the plaintiff must show unlawful conduct by each conspirator. After considering the specific context of intentional interference cases, the

Court in *Agribrands* continued:

> [R]ather than automatically adopting the meaning of unlawful conduct given in the intentional interference tort cases, I think the better course is to use those cases as a guide, but also consider the kind of conduct that the jurisprudence has found to be unlawful conduct for the purposes of the conspiracy tort.
>
> It is clear from that jurisprudence that quasi-criminal conduct, when undertaken in concert, is sufficient to constitute unlawful conduct for the purposes of the conspiracy tort, even though that conduct is not actionable in a private law sense by a third party. The seminal case of *Canada Cement LaFarge* is an example. So too is conduct that is in breach of the *Criminal Code*. These examples of "unlawful conduct" are not actionable in themselves, but they have been held to constitute conduct that is wrongful in law and therefore sufficient to be considered "unlawful conduct" within the meaning of civil conspiracy. There are also many examples of conduct found to be unlawful for the purposes of this tort simply because the conduct is actionable as a matter of private law. In Peter T. Burns & Joost Blom, *Economic Interests in Canadian Tort Law* (Markham: LexisNexis, 2009), the authors say this at p. 167-168:
>
> > … Examples of conspiracies involving tortious conduct include inducing breach of contract, wrongful interference with contractual rights, nuisance, intimidation, and defamation. Of course, a breach of contract itself will support an action in civil conspiracy and, as one Australian court has held, the categories of "unlawful means" are not closed.
> >
> > The second category of unlawful means is conduct comprising unlawful means not actionable in itself. …
> >
> > What is required, therefore, to meet the "unlawful conduct" element of the conspiracy tort is that the defendants engage, in concert, in acts that are wrong in law, whether actionable at private law or not. In the commercial world, even highly competitive activity, provided it is otherwise lawful, does not qualify as "unlawful conduct" for the purposes of this tort. [At paras. 36-8; emphasis added.]
>
> (See also *Rummery v. Matthews*, 2000 MBQB 67 (Man. Q.B.), var'd on other grounds, 2001 MBCA 32 (Man. C.A.); *Lerik v. Zaferis* (1929), [1930] 1 D.L.R. 634 (B.C. C.A.); and G.H.L. Fridman, *The Law of Torts*, *supra*, at 769-771.)

50. In my view, the misconduct of the Personal Defendants in this case—essentially the preparation of false records and reports sent by JingJing to XY and the breach of confidence found by the trial judge—satisfies in law the "unlawful act" requirement for these purposes.

Factual Findings

51. I turn next to the trial judge's findings concerning the conduct of Ms. Tang and Ms. Zhou, which counsel submit should not have attracted liability either in deceit or civil conspiracy. ***

53. *** [I]n connection with the tort of civil conspiracy specifically, [the trial judge] observed:

> On the evidence before me, I am satisfied that there [was] an agreement. Dr. Remillard testified that in a meeting involving Tang Jin, Selen Zhou, Jesse Zhu and himself, they agreed what to report to XY with the purpose being to pay them the royalties to which XY was entitled [*sic*; "less than" the royalties to which XY was entitled?] ***

54. The trial judge also considered whether it was necessary for the plaintiff to prove that each conspirator must have committed an unlawful act for the tort to be made out, as suggested in *Bank of Montreal v. Tortora*, *supra*; but the Court here reasoned that:

> It was put this way in *Golden Capital Securities* at para. 74:
>
> > A person who conspires with others to commit unlawful acts may be liable for the

> consequences even though some of the acts are instigated by a single conspirator. But a person's liability for the acts of other conspirators requires proof that the person knew or should have known that such acts were a probable consequence of carrying out the common objective: *R. v. Henderson*, [1948] S.C.R. 226 at 236, [1949] 2 D.L.R. 121, as cited in *Claiborne* [*Industries Ltd. v. National Bank of Canada* (1989), 69 O.R. (2d) 65, 59 D.L.R. (4th) 533 (C.A.)] at 79. [At paras. 273-74.]

Applying *Golden Capital Securities*, the judge concluded:

> I have found the defendants Jesse Zhu, Tang Jin and Selen Zhou liable for deceit. Additionally, in committing those unlawful acts, I am satisfied that these defendants knew or ought to have known that injury to the plaintiff was likely. These defendants were falsely reporting production and thereby underpaying the plaintiff.
>
> Finally, I find that the plaintiff suffered a financial loss as a result of the unlawful conduct by the defendants. It was deprived of the royalties to which it was entitled.
>
> For these reasons I concluded that the plaintiff has proved conspiracy on the part of Jesse Zhu, Selen Zhou and Tang Jin. [At paras. 275-77; emphasis added.]

55. Mr. Wilson referred us to various other references in the Court's reasons to evidence that fully supports the conclusions that the Personal Defendants were part of the "management team" of JingJing who not only acted in concert to carry out unlawful acts that would injure the plaintiff, but who assisted in planning how best to go about it. In my view, the evidence makes it impossible to say the judge erred in reaching these conclusions. ***

Employment Status

56. The next issue is whether the trial judge erred in law in finding that the Personal Defendants, who were presumably acting in the course of their employment, could be personally liable for the tort of civil conspiracy ***. Put another way, does the fact that they were employees of JingJing shield them from the consequences of what would otherwise be tortious conduct?

Case Law

57. Surprisingly, the case law concerning the liability of employees who on the orders of or at the request of their employer commit torts or other wrongful acts that injure a third party, is not fully developed. One of the complicating factors is that many of the cases have arisen only in the context of applications to strike out pleadings and have not been decided on the merits. Another complication is due to the fact that the employers in most of the cases are corporations. A corporation can of course act only through its agents and employees and thus it can be said in a sense that any employee who commits a tort in the course of his or her duties is acting as his or her employer's agent. For economic reasons, the injured third party usually looks to the corporation rather than the employee for recovery.

58. The seminal English case is *Said v. Butt*, [1920] 3 K.B. 497 (Eng. K.B.), where McCardie J. reasoned as follows in connection with an action against a "servant" for inducing breach of contract on the part of his "master":

> … the servant who causes a breach of his master's contract with a third person seems to stand in a wholly different position. He is not a stranger. He is the alter ego of his master. His acts are in law the acts of his employer. In such a case it is the master himself, by his agent, breaking the contract he has made, and in my view an action against the agent under the *Lumley v. Gye* [[1853] EWHC QB J73] principle must therefore fail, just as it would fail if brought against the master himself for wrongfully procuring a breach of his own contract …
>
> I hold that if a servant acting *bona fide* within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken. [At 505-6;

> emphasis added.]

However, McCardie J. added:

> Nothing that I have said today is, I hope, inconsistent with the rule that a director or a servant who actually takes part in or actually authorizes such torts as assault, trespass to property, nuisance, or the like may be liable in damages as a joint participant in one of such recognized heads of tortious wrong. [At 506; emphasis added.]

59. The scope of these remarks has given rise to much discussion and debate in the cases. I do not propose to trace that debate here; but counsel referred us to some recent Canadian authorities that illustrate how courts have treated the socalled '*Said v. Butt* exception' to the "general rule that persons are responsible for their own conduct." (See *ADGA Systems International Ltd. v. Valcom Ltd.* (1999), 168 D.L.R. (4th) 351 (Ont. C.A.) at para. 15.) ***

73. Nevertheless, it appears to be the law in Canada that as long as tortious conduct on the part of an employee or agent of a corporation (or any other employer) is properly pleaded and proven as an "independent" tort by the employee or agent, the wrongdoer can be held personally liable notwithstanding that he or she may have been acting in the best interests of (and at the behest of) the employer or principal. I see no reason in principle or policy why such liability should be restricted to cases involving physical damage (as *Said v. Butt* may have suggested in 1920), or to claims in negligence (as referred to in *London Drugs* [*Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 (S.C.C.).], *Hildebrand* [*v. Fox*, 2008 BCCA 434 (B.C. C.A.)] and *Neilson* [*The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.* 2010 BCCA 329 (B.C. C.A.)].) Certainly the Ontario Court of Appeal did not so restrict it in *ADGA*. (See also *Hogarth v. Rocky Mountain Slate Inc.*, 2013 ABCA 57 (Alta. C.A.) at para. 103; *Schembri v. Way*, 2012 ONCA 620 (Ont. C.A.) at para. 30; *Correia v. Canac Kitchens*, 2008 ONCA 506 (Ont. C.A.) at paras. 86-8; and *Unisys Canada Inc. v. York Three Associates Inc.* (2001), 150 O.A.C. 49 (Ont. C.A.) at para. 11.)

74. In any event it is clear that fraud or fraudulent conduct has historically fallen into an established category in which personal liability has been imposed on agents and employees. It is sufficient in the case at bar to rely on this exception, although the acts of the Personal Defendants were properly pleaded as amounting to civil conspiracy and in this sense constituted a tort that was independent of that alleged against JingJing.

75. In the result, it cannot in my view be said that the claims of deceit or civil conspiracy were not available to XY against the Personal Defendants as a matter of law merely because they were employees of JingJing and acting in the course of their duties to further the objectives of JingJing.

"Following Orders" Defence?

76. Counsel for Ms. Zhou and Ms. Tang did not frame their challenge to personal liability in terms of the *Said v. Butt* line of cases, however. Instead they argued that in carrying out the conduct complained of, they were "only following orders" and could not be expected to refuse to carry out the scheme apparently devised by their boss, Mr. Zhu. ***

77. It is a striking fact that no case was cited to us in which the "following orders" argument was advanced, much less successfully, in a context analogous to this case. Mr. Gudmundseth referred us to a decision of the Federal Court of Australia in *Cooper v. Universal Music Australia Pty. Ltd.*, [2006] FCAFC 187 (Australia Fed. Ct.), a copyright infringement case involving a website that contained hyperlinks to remote websites which users could use to have music transmitted directly to their computers. The website was hosted by "ComCen" and was owned and operated by the defendant Mr. Cooper. He was found to have "authorized" the infringement of copyright in sound recordings within the meaning of s. 101(1A) of the *Copyright Act 1968*, as was the defendant Mr. Takoushis, who supplied computing "support services".

78. In the course of its lengthy reasons on appeal, the Court addressed the question of whether Mr. Takoushis had in law "authorized" the infringement: ***

> In my view, the evidence before the primary judge was insufficient to establish that Mr Takoushis infringed the Record Companies' copyright by personally authorizing the relevant acts of copyright

> infringement.
>
> Further, for the reasons given above, the evidence before the primary judge was insufficient to demonstrate that Mr Takoushis held an executive or managerial role within either Com-Cen or E-Talk such that his involvement with their acts of copyright infringement rendered him personally liable for those acts of copyright infringement … [At paras. 69-74; emphasis added.]

The Personal Defendants Zhou and Tang rely on this reasoning for the proposition that a person who holds a merely supportive role should not be held liable for participation in wrongs devised by and carried out by her employer. ***

80. Here, however, the trial judge found that Ms. Zhou and Ms. Tang went beyond mere bookkeeping or 'typing' lab reports at Mr. Zhu's instructions. Both defendants *actively* assisted in devising how best to deceive XY. Their acts were, then, "tortious in themselves" and were not part of their regular duties. As stated by Burns and Blom, *supra*, it appears the law has historically held fraudulent employees liable with their employers "irrespective of whether the fraud was done at the behest and for the benefit of the latter." As for *Cooper v. Universal Music Australia Pty. Ltd.*, I regard the reasoning relied on by the defendants as confined to the meaning of "authorized" in the Australian *Copyright Act 1968*.

81. In the result, I would reject the "following orders" defence asserted on behalf of Ms. Tang and Ms. Zhou. ***

REFLECTION:

- *What are the two types of civil conspiracy recognised in Canadian common law? What constitutes an "unlawful act" sufficient to ground a claim in the second type of civil conspiracy?*
- *What are the implications of holding a defendant liable for damage caused by the unlawful acts of a co-conspirator?*

10.8.2 Hategan v. Moore & Farber [2021] ONSC 874

✗**REF: §4.1.4.1, §10.4.2, §10.7.1**

FERGUSON J.: ***

14. On September 19, 2017, Mr. Farber appeared on the television program *The Agenda* along with Ms. Moore. On that program, Mr. Farber described Ms. Moore and Ms. Hategan as "heroes" in terms of "how they were able to take themselves out, how they were able to work the system, to basically shut down the Heritage Front" (note that the Heritage Front was an extremist white supremist group). Mr. Farber and Ms. Moore subsequently became executive members of the Canadian Anti-Hate Network and have appeared together on the platform at several educational seminars devoted to combatting racism.

15. Based on these facts and little, if anything, else capable of constituting factual evidence during the limitations period, Ms. Hategan has brought this action against Mr. Farber. ***

23. Additional facts set out in the affidavit are that Mr. Farber and Ms. Moore are both members of the executive of the Canadian Anti-Hate Network who have participated together in speaking engagements.

24. As purported further evidence of Mr. Farber's tortious behaviour, under the heading of "Bernie Farber's Negligence and Endorsement of a Fraudulent Narrative," Ms. Hategan sets out at exhibit "000", attached to paragraph 297 of her affidavit, a number of tweets from Mr. Farber's Twitter account.

25. Ms. Hategan also alleges that Mr. Farber has a professional relationship or connection with a number of individuals whom she believes have not behaved well toward her. ***

26. On this basis in each case she alleges a speculative causal connection between the relationship with Mr. Farber and his behaviour toward her.

27. Ms. Hategan's affidavit also dwells at considerable length on salacious gossip and innuendo, much of

it located long in the past, some involving third parties and their personal information, none of it relevant to any matter in issue in the litigation. ***

Civil Conspiracy

39. The elements of this tort are:

> (a) an agreement between two or more defendants to injure the plaintiff by specific acts;
>
> (b) the predominant purpose of the agreement is to injure the plaintiff; (or the conduct is directed at the plaintiff and the defendant knows or should know that injury to the plaintiff is likely);
>
> (c) the defendants act in furtherance and of their agreement to injure; and
>
> (d) the plaintiff suffers injury as a result.[281]

40. *** Ms. Hategan has pleaded a conspiracy but that the facts as alleged are incapable of supporting the elements of the tort which must be demonstrated with particularity and specificity. In particular, insofar as the claim is said to be based on "tortious and unlawful statements" made by the defendants, this claim appears to be nothing more than a repetition of the claim for "injurious falsehood" or one of the other tort claims made with respect to the only statements by Mr. Farber put in evidence by Ms. Hategan (i.e. the statements in "The Agenda" and the tweets in exhibit "000"). If those statements are not tortious and unlawful, they appear incapable of causing harm to her or her business. And, indeed, there is no evidence of any loss arising to Ms. Hategan as a result of the statements.

41. Mr. Farber also submits that there is no pleaded agreement to injure Ms. Hategan and no evidence of such agreement brought forward in Ms. Hategan's affidavit. As for the allegations of "collusion", there is no evidence of anything of that sort. Even Ms. Hategan is forced to qualify her allegations with descriptions like, "I believe Ms. Moore may have been introduced to Professor Perry through Bernie Farber". Aside from such throwaway lines, there is not one factual piece of evidence in support of any element of the tort.

42. As with every other tort alleged, there is no evidence of damage as a result of the alleged conspiracy. The section in Ms. Hategan's affidavit entitled "Evidence of Damage" (paras. 373-382) contains expostulations about the unfairness of Ms. Moore reaping rewards which Ms. Hategan believes she does not deserve. However, despite the title, it contains no evidence of pecuniary loss by Ms. Hategan. Any references to loss or other damage are speculative and ungrounded in any facts. Although Ms. Hategan has pleaded conspiracy, the facts as alleged are incapable of supporting the elements of the tort. There is no evidence of any loss arising to Ms. Hategan from the statements in "The Agenda" or the tweets. There is no pleaded agreement to injure Ms. Hategan and no evidence in her affidavit. There is no evidence presented to support this tort. The claim for civil conspiracy has not been made out against Mr. Farber. ***

82. Ms. Hategan has advanced a claim of civil conspiracy and alleges that both Ms. Moore and Mr. Farber have "made and endorsed false representations that Ms. Hategan's experiences in the Heritage Front were Moore's experiences". Ms. Moore submits that this allegation is devoid of any merit. ***

84. Ms. Moore submits that the allegation of civil conspiracy is unfounded and entirely speculative. Ms. Hategan has not pleaded any of the necessary elements. There are no facts, circumstances or particulars from which a trier of fact would be able to infer that Ms. Moore and Mr. Farber entered into an agreement with each other to purposefully injure Ms. Hategan, or that Ms. Moore and Mr. Farber acted in furtherance of this alleged agreement.

85. Instead, the evidence is that Mr. Farber assisted Ms. Moore to leave the Heritage Front. Since that time, the two have been friends and often appear on panels and other speaking engagements together because of their shared work in anti-hate. Ms. Moore has enjoyed professional success as a public speaker on the topic of anti-racism, and has been endorsed by numerous individuals, including Mr. Farber. Ms. Moore

[281] *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (Ont. C.A.) at paras. 21 and 22; *Aristocrat Restaurants Ltd. v. Ontario*, [2003] O.J. No. 5331 (Ont. S.C.J.) at para. 39.

points out that this is not an actionable wrong.

86. I agree with these submissions. First of all, the necessary elements are not pleaded. There is no evidence of an agreement between Ms. Moore and Mr. Farber that they entered into an agreement to purposefully injure Ms. Hategan or that they acted in furtherance of this alleged agreement. This tort claim fails against Ms. Moore. ***

REFLECTION:

- *Does civil conspiracy cover instances where a mutual plan incidentally harms a claimant?*
- *Would Ms. Hategan have succeeded in a claim of civil conspiracy had she pleaded the necessary elements?*

10.8.3 Further material

- B. Donovan, "Intentionally Inflicted Economic Harm in Canada" (2010) 68 U Toronto Faculty L Rev 9.
- M.A. Behrens & C.E. Appel, "The Need for Rational Boundaries in Civil Conspiracy Claims" (2010) 31 Northern Illinois University L Rev 37.
- P.T. Burns, "Civil Conspiracy: An Unwieldy Vessel Rides a Judicia Tempest" (1982) 16 UBC L Rev 229.
- W. Hua, "Cybermobs, Civil Conspiracy, and Tort Liability" (2017) 44 Fordham Urban LJ 1217.

10.9 Abuse of process

10.9.1 Jacobson v. Skurka [2015] ONSC 1699

Ontario Superior Court – 2015 ONSC 1699

PERELL J.:

1. Nathan Jacobson sues Steven Skurka, a criminal law lawyer, for professional negligence. Mr. Jacobson claims damages of $32 million. Mr. Skurka has delivered a Statement of Defence denying negligence, and he asserts a Counterclaim claiming damages of $1.8 million for the tort of abuse of process. ***

75. There are four elements to the tort of abuse of process: (1) the plaintiff is or was the subject of a lawsuit initiated by the defendant; (2) the defendant's predominant purpose in initiating the lawsuit was to further some improper purpose collateral or outside the ambit of the legal process; (3) the defendant performed a definite act or threat in furtherance of that improper purpose; and (4) the plaintiff was caused to suffer some special damages or losses unique to him or her. ***

77. Although rare, the tort of abuse of process has an ancient lineage. The tort was recognized in 1883 in *Grainger v. Hill* (1838), 4 Bing. N.C. 212, 132 E.R. 769 (Eng. C.P.), where a mortgagee of an ocean vessel sued to enforce the mortgage debt. The mortgagee's lawsuit was brought to coerce the mortgagor to turn over the ship's register, which the mortgagee wished to have because of concerns about the value of the security for the loan. The mortgagee was liable for abusing the process of the law to achieve this improper purpose, which was extraneous to the enforcement of the mortgage. The tort of abuse of process exposes a litigant to liability for damages if he or she abuses the process of the law by using it to extort property or to achieve a collateral purpose outside the ambit of his or her lawsuit. See: P.M. Perell, "Tort Claims for Abuse of Process" (2007), 33 Adv. Q. 193; J. Irvine, "*The Resurrection of Tortious Abuse of Process*" (1989), 47 C.C.L.T. 217; G.H.L. Fridman, "Abuse of Legal Process" (1964), 114 L.J. 335.

78. An improper purpose is a fundamental element of the tort of abuse of process, and to be actionable, this improper purpose must be the dominant purpose of the lawsuit alleged to be an abuse of the court's process: *Scintilore Explorations Ltd. v. Larche*, [1999] O.J. No. 2847 (Ont. S.C.J.). In order to establish the tort of abuse of process, the defendant's improper purpose must be to achieve an end or outcome that is outside the ambit of his or her lawsuit: *Metropolitan Separate School Board v. Taylor*, (1994), 21 C.C.L.T. (2d) 316 (Ont. Gen. Div.); *Dooley v. C.N. Weber Ltd.*, (1994), 19 O.R. (3d) 779 (Ont. Gen. Div.); *Hawley v. Bapoo*, (2005), 76 O.R. (3d) 649 (Ont. S.C.J.); *Teledata Communications Inc. v. Westburne Industrial*

Enterprises Ltd., (1990), 71 O.R. (2d) 466 (Ont. H.C.). A plaintiff is not liable for abuse of process for employing regular legal process albeit with bad intentions: *Poulos v. Matovic* (1989), 47 C.C.L.T. 207 (Ont. H.C.).

79. Although he incorporates his Statement of Defence as material facts, Mr. Skurka's Counterclaim for abuse of process, as such, is short, and I set it out below in full: ***

> 135. Jacobson initiated this action against Skurka for the predominant purposes of attracting favourable media attention for himself and for harming Skurka. In so doing, Jacobson initiated this action against Skurka for the predominant purpose of furthering indirect and collateral objectives.
>
> 136. He has issued his claim as part of a malevolent claim of defamation against Skurka. As a measure of his malice, Jacobson caused Skurka to be served with the Statement of Claim herein a few hours before Rosh Hashanah commenced. By serving process in this way, Jacobson intended to ruin Skurka's observance of the Jewish High Holidays.
>
> 137. Jacobson has publicly stated that he wishes to be nominated to the Senate of Canada. Jacobson has also stated that he wishes to receive, among other awards, the Order of Canada and the Israel Prize. Jacobson commenced this action against Skurka for the purpose of receiving favourable media attention, increasing his likelihood of receiving such nominations and/or awards, and resuming his access to high officials of state.
>
> 138. Moreover, Jacobson, or persons acting on behalf of Jacobson, provided the Statement of Claim and other materials relating to this matter to the Globe and Mail and other media organizations, in the hope and expectation that they would be republished by those media organizations. Jacobson did so for the predominant purpose of furthering the indirect and collateral objective described above.
>
> 139. Jacobson also made false and harmful allegations against Skurka in the Statement of Claim, the Amended Statement of Claim, and the Further Amended Statement of Claim, as described above in the Statement of Defence.
>
> 140. The commencement of this action has caused significant damage to Skurka. It has damaged his reputation in the legal community, which was indeed Jacobson's objective.
>
> 141. As a result of the commencement of this action against Skurka, and the other steps described above, Jacobson is liable to Skurka for abuse of process.

80. Mr. Jacobson submits that Mr. Skurka's Counterclaim does not plead the tort of abuse of process, because it conflates an improper motive with the legal requirement that there must be an improper purpose behind the plaintiff's lawsuit collateral or outside the ambit of the lawsuit. Mr. Jacobson submits that Mr. Skurka is attempting to avoid pleading the elements of a defamation claim that is the genuine nature of his grievance with him.

81. I disagree with Mr. Jacobson's argument and dismiss his motion for two reasons. The first and simplest reason, in my opinion, it is not plain and obvious that Mr. Skurka has conflated the collateral purpose part of the tort.

82. To use the double negative, it is not plain and obvious that Mr. Skurka has not pleaded an improper purpose that is collateral or outside the ambit of Mr. Jacobson's lawsuit. To use the positive, in my opinion, Mr. Skurka has pleaded material facts that, if proven, potentially establish that Mr. Jacobson was abusing the court's process to achieve objectives outside the ambit of his lawsuit.

83. Second, and this is a more subtle and not simple point, to use the double negative, it is not plain and obvious that Mr. Skurka has not pleaded an improper purpose that is collateral or outside the *proper ambit* of Mr. Jacobson's lawsuit. To use the positive, in my opinion, Mr. Skurka has pleaded material facts that, if proven, potentially establish that Mr. Jacobson was abusing the court's process to achieve objectives outside the *proper ambit* of his lawsuit.

84. Put somewhat differently, it is not plain and obvious that the scope of the tort of abuse of process will not accommodate Mr. Jacobson's alleged *wrongful use of court proceedings beyond their proper purpose*, which would be to compensate him for the damages he suffered from Mr. Skurka's alleged barrister's negligence.

85. Here, it should be noted that it is Mr. Jacobson who infuses to the point of bloat his professional negligence claim against Mr. Skurka with the issues of Mr. Jacobson's innocence from any criminal activity and the sanctity and the importance to him of his reputation as a successful businessman and philanthropist.

86. In the case at bar, it is not a necessary element of Mr. Jacobson's professional negligence suit to prove that he was innocent of the charges of money laundering, only that it was professionally negligent of Mr. Skurka to advise Mr. Jacobson to enter into a plea bargain including a guilty plea based on what Mr. Skurka and the team of defence lawyers knew or ought to have known about sentencing and the likelihood of a conviction in the United States.

87. As noted above, Mr. Jacobson professes his innocence in 26 paragraphs of his 68-paragraph Fresh as Amended Statement of Claim and includes the heading "Complete Vindication of Nathan Jacobson—An Innocent Man." However, civil proceedings, and even criminal proceedings for that matter, are not designed as a vehicle to establish a person's innocence or to re-establish a person's reputation. As famously demonstrated by the O.J. Simpson case in the United States, an acquittal does not establish that a person is innocent of wrongdoing only that the prosecution failed to meet the burden of proof. Even in a malicious prosecution suit, the plaintiff does not have to prove that he or she was innocent, only that the criminal proceedings failed to secure a conviction. *Proulx c. Québec (Procureur général)*, [2001] 3 S.C.R. 9 (S.C.C.); *Nelles v. Ontario*, [1989] 2 S.C.R. 170 (S.C.C.). In a libel suit [§5.1], the plaintiff does not have to establish his or her good reputation, and it is for the defendant to prove by way of defence that the defamatory remark was true. *** It was not necessary for the proper purposes of his professional negligence claim against Mr. Skurka for Mr. Jacobson to make an issue of his innocence and his pristine reputation.

88. In *WestJet Airlines Ltd. v. Air Canada*, [2005] O.J. No. 2310 (Ont. S.C.J.), Westjet alleged that Air Canada had brought a lawsuit against Westjet for misappropriation of confidential information for the improper purpose of eliminating Westjet as a competitor. Justice Nordheimer, however, stated that if there was some legitimate basis for a lawsuit, then it becomes difficult to characterize the lawsuit as having been instituted for an improper purpose just because a by-product of its success would be the elimination of a competitor. Justice Nordheimer discussed the policy reasons behind a narrow scope for the tort of abuse of process, and he stated at para. 23:

> I earlier noted the narrow scope of this particular tort. There are two matters of concern that argue strongly in favour of maintaining that narrow scope. One is the prospect that, if such claims are too easily advanced, it may lead to a proliferation of litigation with every action between competitors being met in response by an abuse of process action by the defendant competitor. It would, after all, be relatively easy for many defendants to allege that they are being sued for a purpose other than what is reflected in the statement of claim. Indeed, this concern need not necessarily be restricted just to actions between competitors. The other concern is the potential chilling effect on parties from having resort to the courts for the resolution of actual or perceived wrongs if they must fear routinely being subject to such claims with the attendant costs as well as the prospect, however remote, of damages being awarded. While I accept that the court must be vigilant in ensuring that its process is not misused, at the same time the court must not readily allow claims to be advanced that may only serve to impede access to its process.

89. I agree with Justice Nordheimer's comments about a narrow ambit for the tort of abuse of process, but his comments may not be apt for the novel circumstances of the case at bar where it is arguable that Mr. Jacobson's dominant purpose in suing Mr. Skurka is beyond the incidental purpose of showing that Mr. Skurka was professionally negligent, which is its proper purpose, and rather is for the improper purpose of using a civil proceeding for a judicial determination of Mr. Jacobson's innocence and righteousness, which is what Mr. Skurka's means by pleading that Mr. Jacobson's improper purpose is to achieve favourable media attention for himself increasing his likelihood of receiving awards and resuming his access to high

officials of state.

90. Allowing Mr. Skurka's Counterclaim would not discourage access to justice for plaintiffs suing their criminal defence lawyers, but it would discourage such plaintiffs from overreaching in their civil proceeding against their criminal lawyer and making their innocence in the criminal proceedings a material issue in the civil proceeding. In the different context of abuse of process as an aspect of the law of *res judicata*, the policy of the law is to discourage such re-litigation as abusive to the administration of justice.

91. In the case at bar, it is arguable that Mr. Jacobson is using his solicitor's negligence action for purposes beyond the normal purposes of a solicitor's negligence action; i.e. proving the lawyer's professional wrongdoing, not proving the client's innocence and righteousness, but more to the point, it is not plain and obvious that the scope of the tort of abuse of process does not encompass the novel circumstances of Mr. Skurka's Counterclaim.

Conclusion

92. *** I dismiss the motion to strike the Counterclaim.

REFLECTION:

- *In what way was the narrow scope of the tort of abuse of process potentially widened in this case?*
- *Is Perell J.'s reasoning persuasive that allowing this counterclaim to proceed to trial will not discourage claimants from seeking justice, particularly in the context of suing one's criminal defence attorney?*

10.9.2 Further material

- E. Hynard & A. Lerch, "The Tort of Collateral Abuse of Process" (2021) 44 U New South Wales LJ 714.
- P. Perell, "Tort Claims for Abuse of Process" (2007) 33 Advocates Quarterly 193.
- J. Irvine, "The Resurrection of Tortious Abuse of Process" (1989) 47 Canadian Cases L Torts 217.

10.10 Spoliation of evidence

10.10.1 Trillium Power Wind Corp. v. Ontario [2023] ONCA 412

Ontario Court of Appeal – 2023 ONCA 412, leave denied: 2024 CanLII 17608 (SCC)

ROBERTS J.A. (FELDMAN AND LAUWERS J.A. concurring):

1. This appeal arises out of the abrupt cancellation by the Ontario government ("Ontario") of its much-criticized wind power projects that it had promoted between 2009 and 2013. It is the timing of their cancellation and the corresponding impact of a wholesale governmental policy of documentary destruction, rather than the wisdom of Ontario's wind power policies, that is in issue in these proceedings.

Background

2. In response to Ontario's promotion of its wind farm policies, the appellant applied for and proceeded a substantial way toward obtaining authorization to operate a wind farm in the Lake Ontario Lakebed near Main Duck Island in Prince Edward County. It had made a significant investment in performing the studies and other matters required in the approval process when, on February 11, 2011, without prior notice to the appellant, Ontario announced a halt or "moratorium" to its consideration of any offshore wind farm projects until such time as the environmental impact of such projects could be studied.

3. Ontario's announcement effectively terminated the appellant's approval application. The announcement coincided with the closing of the appellant's project financing, which consequently did not proceed.

4. On May 19, 2011, by notice of proceeding against the Crown, the appellant commenced the present proceedings against Ontario, seeking damages for its failed wind farm project. ***

6. In 2015, the appellant amended its pleadings to include a claim of spoliation after it learned that Ontario

had destroyed thousands of documents and other evidence allegedly related to internal government communications leading up to the moratorium. ***

Issues

8. The appellant submits *** that the motion judge erred by misstating and misapplying the test for spoliation, as either a standalone tort or as an evidentiary finding.

Did the motion judge err in dismissing the appellant's claim for spoliation? ***

(a) Governing principles

20. Spoliation arises out of the destruction of potentially relevant evidence. It "occurs where a party has intentionally destroyed evidence relevant to ongoing or contemplated litigation in circumstances where a reasonable inference can be drawn that the evidence was destroyed to affect the litigation": *McDougall v. Black & Decker Canada Inc.*, 2008 ABCA 353, 440 A.R. 253, at para. 18.

21. The motion judge correctly stated that "while spoliation as a self-standing cause of action is still open to question, Ontario courts have recognized spoliation as an evidentiary rule where there has been destruction of evidence by a party who reasonably anticipated litigation in which that evidence would play a part" and that this rule of evidence gives rise to a rebuttable presumption that the evidence destroyed would have been unfavourable to the party who destroyed it. He also rightly determined that he would not dismiss the spoliation claim at that stage on the basis that the cause of action is somewhat novel. While this court has not yet definitively resolved whether spoliation is a cause of action, it has permitted it to proceed to trial as a novel cause of action: *Spasic Estate v. Imperial Tobacco Ltd.*, (2000), 49 O.R. (3d) 699 (C.A.), at paras. 12 and 22, leave to appeal refused, [2000] S.C.C.A. No. 547. It is unnecessary for the purposes of this appeal to resolve the issue.

22. While a novel standalone cause of action, spoliation is not a novel issue. It arises out of a party's breach of the well-established obligation to preserve and produce relevant documents in civil proceedings. The court's intervention is required because spoliation undermines a fair trial process and interferes with the quest for the truth in judicial proceedings: *Casbohm v. Winacott Spring Western Star Trucks*, 2021 SKCA 21, at para. 36. As such, it amounts to an abuse of process.

23. In *St. Louis v. Canada*, (1896), 25 S.C.R. 649, at pp. 652-653, the Supreme Court established that the destruction of evidence carries a rebuttable presumption that "the evidence destroyed would have been unfavourable to the party who destroyed it". The Court of Appeal of Alberta described the Supreme Court's conclusion from *St. Louis* as follows, in *McDougall*, at para. 19:

> Spoliation in law does not occur merely because evidence has been destroyed. Rather, it occurs where a party has intentionally destroyed evidence relevant to ongoing or contemplated litigation in circumstances where a reasonable inference can be drawn that the evidence was destroyed to affect the litigation. Once this is demonstrated, a presumption arises that the evidence would have been unfavourable to the party destroying it. This presumption is rebuttable by other evidence through which the alleged spoliator proves that his actions, although intentional, were not aimed at affecting the litigation, or through which the party either proves his case or repels the case against him.

24. The court's jurisdiction to grant remedies in response to spoliation springs from rules of civil procedure, its inherent power to control an abuse of its process, and its inherent discretion with respect to costs: *McDougall*, at para. 22. Remedies granted have mostly included but are not limited to the application of the adverse presumption referenced above in *St. Louis*, and costs: *McDougall*, at para. 29. Whether damages, including punitive damages, may be awarded if spoliation is treated as a standalone cause of action is an issue for another day and need not be resolved in this appeal: *Armstrong v. Moore*, 2020 ONCA 49, 15 R.P.R. (6th) 200, at para. 37.

(b) Principles applied ***

25. Respectfully, the motion judge erred in dismissing the claim by holding that the evidentiary basis for the appellant's claim was absent and by concluding that the unfavourable presumption against Ontario because of its destruction of documents was rebutted by the implementation of a government policy that the motion judge acknowledged was improper.

26. First, there was an ample evidentiary basis to support spoliation by Ontario.

27. Based on the motion judge's own findings, there can be no question that the destruction in issue was deliberate and in accordance with an improper government policy. The motion judge found, based on an investigative report by the Information and Privacy Commission of Ontario, that the improper destruction of hand-held devices, emails and documents by the Premier's Office under former Premier Dalton McGuinty was a notorious violation of record-keeping obligations and raised serious issues of political accountability.

28. Moreover, there is no dispute that the impugned destruction occurred subsequent to the commencement of the appellant's claim and concerned likely relevant documents in the possession of individuals who, as the motion judge found, were intimately involved in the relevant events and who were aware of the appellant's claim. These individuals included Messrs. Mullin, Chris Morley, former Chief of Staff, and Jamison Steeve, among others, who were so engaged in the events giving rise to the wind farm moratorium and the appellant's claim that they provided affidavits in support of Ontario's summary judgment motion.

29. The motion judge also discussed how the destruction of this evidence may have affected the litigation of this case, at para. 21:

> The parties have engaged in documentary exchange, examinations for discovery, etc. During this time, it has become apparent that, among other things, the Ontario government is unable to locate and produce any emails from the email servers of any former [Office of the Premier] personnel. This lack of documentation is significant as [Office of the Premier] personnel were centrally involved in considering the offshore wind decisions in issue here, including both the decision to put a stop to offshore projects and the decision to announce that policy change on February 11, 2011.

30. It is no answer to the appellant's allegation of spoliation that Ontario's right hand did not know what the left hand was doing. Ontario is a party to these proceedings and knew about the appellant's claim prior to its destruction of documents, emails and devices. As a party to these proceedings, Ontario was required to preserve any potentially relevant documents in order to fulfill its disclosure obligations. Such documents included any potentially relevant emails, including those in the possession of departing employees who Ontario knew had relevant evidence—so relevant that Ontario put them forward as its own affiants in support of its motion for summary judgment. That these documents were potentially relevant to the issues in these proceedings is obvious from the gaps in the email exchanges that have been produced. Ontario's deliberate destruction of evidence is clear.

31. Importantly, whether Ontario's intention was to destroy relevant evidence for use in simply this litigation or in all litigation is a distinction without a difference. As the motion judge referenced, it is a matter of public record that the subsequent inquiry into Ontario's destruction policy in 2013 and related criminal proceedings against Mr. Morley's successor as Chief of Staff demonstrated that the intention of the spoliators was to destroy any incriminating documents. ***

32. The motion judge failed to look at the question of spoliation in the broader context of Ontario's obligations to preserve and produce relevant documents. He therefore applied a very narrow construction to the meaning and effect of Ontario's intentional destruction of evidence that Ontario knew it had to preserve and produce. Allowing Ontario to by-pass its clear documentary obligations in this way would amount to an abuse of process. Applying the correct analytical lens leads to the conclusion that spoliation occurred: there was a deliberate destruction of potentially relevant evidence from which the reasonable inference can be drawn that the destruction was done to affect litigation, including the present litigation. ***

36. *** In my opinion, the circumstances of Ontario's spoliation amount to an abuse of process: ***McDougall***, at paras. 22, 29. As such, the appropriate remedy is to deprive Ontario of its costs below and grant the appellant its costs of the appeal. ***

REFLECTION:

- *Is spoliation primarily an issue of civil procedure or of substantive tort law?*
- *Should spoliation be recognised as an independent cause of action?*

10.10.2 Further material

- British Columbia Law Institute, *Report on Spoilation of Evidence* (Report No. 34, 2004).
- J.E. Rivlin, "Recognizing an Independent Tort Action Will Spoil a Spoliator's Splendor" (1998) 26 Hofstra L Rev 1003.
- A. Rowse, "Spoilation: Civil Liability for Destruction of Evidence" (1985) 20 U Richmond L Rev 191.
- J. Stipancich, "The Negligent Spoilation of Evidence: An Independent Tort Action May Be the Only Acceptable Alternative" (1985) 53 Ohio St LJ 1135.

10.11 Malicious prosecution

10.11.1 Pate v. Galway-Cavendish [2011] ONCA 329, [2013] ONCA 669

Ontario Court of Appeal – 2011 ONCA 329

SIMMONS J.A. (CRONK AND MACFARLAND J.A. concurring):

1. After he had served as the Chief Building Official for the Township of Galway and Cavendish for about 9 years and then as a building inspector for the amalgamated Township of Galway-Cavendish and Harvey for about three months, the appellant, John Pate, was dismissed from his employment without notice on March 26, 1999.

2. Mr. Pate was told that discrepancies had been uncovered with respect to permit fees that had been paid to him but not remitted to the Township (the former Township of Galway and Cavendish and the amalgamated Township will be referred to collectively and individually as the "Township"). Mr. Pate was not provided with particulars; nor was he given an opportunity to respond to the allegations. Rather, he was told that the matter would not be reported to the police if he resigned immediately.

3. Mr. Pate did not resign, the matter was reported to the police and charges were laid. However, in December 2002, following a four-day criminal trial that was heard in a time frame that lasted more than a year Mr. Pate was acquitted of all charges. In December 2003, he commenced this action, claiming damages for wrongful dismissal and malicious prosecution.

4. At the commencement of the civil trial, the Township conceded that Mr. Pate was wrongfully dismissed and the parties agreed on a 12-month notice period without prejudice to Mr. Pate's right to litigate his remaining claims. Following the trial, the trial judge dismissed Mr. Pate's claim for malicious prosecution but awarded additional damages ***.

5. Mr. Pate raises two issues on appeal:

> (1) Did the trial judge err in failing to find the Township liable to Mr. Pate for malicious prosecution?
>
> (2) Did the trial judge err in assessing Mr. Pate's punitive damages at only $25,000? ***

Background ***

7. Mr. Pate was employed by the Township of Galway and Cavendish as the Chief Building Inspector from 1989 until amalgamation on December 31, 1998. Following amalgamation, Mr. Pate was a building inspector for the newly-formed amalgamated Township.

8. Mr. John Beaven, the Chief Building Official for the Township of Harvey prior to amalgamation, became the Chief Building Official for the new Township after amalgamation. On March 26, 1999, less than 3 months after amalgamation, Mr. Beaven called Mr. Pate into his office for a meeting. In this meeting, Mr. Beaven

told Mr. Pate that discrepancies had been uncovered with respect to building permit fees and, as a result, Mr. Pate's employment was being terminated, Mr. Beaven also told Mr. Pate that, if he resigned, the Township would not contact the police. ***

10. At the criminal trial, it emerged that Mr. Pate had recorded receiving the fees for one of the properties under a name different from that of the property owner because he received the fees from the owner's son-in-law. Mr. Pate had a note of this in a journal he kept. However, Mr. Beaven seized the journal when Mr. Pate was terminated and did not forward it to the police.

11. During the criminal trial, it also emerged that some of the property owners paid their fees at a satellite office operated by the Township prior to amalgamation and that many of the files for that office had been lost during a move in 1998. Although municipal officials knew about the missing files, no one told the police.

12. Finally, it emerged that, in 1995, the Township Building Committee had investigated one of the allegations and found no wrongdoing on the part of anyone. Again, no one provided the police with this piece of potentially exculpatory information.

13. At the civil trial, Officer Stokes testified that if he had known in advance of laying charges about the information relating to the allegations that emerged at the criminal trial, he would not have laid charges, That said, he confirmed that the decision to lay the charges was his. Further, he indicated that, although he knew Mr. Beaven was a former police officer, he made some inquiries into the allegations. Officer Stokes also testified that, once the charges were laid, the decision to prosecute them was that of the Crown Attorney. ***

15. At the civil trial, Mr. Pate and his former wife, Natalie Walsh, testified about the significant impact of the dismissal, the criminal trial and the associated publicity on their lives, on their marriage and on the ongoing viability of a business Ms. Walsh operated. ***

18. Mr. Beaven testified that he assumed the police would conduct their own investigation based on the information he provided to them and would lay charges as they saw fit. According to Mr. Beaven, other than contacting an O.P.P. sergeant to determine the status of the case, he had no involvement with the police investigation after turning his statements over to the police. In his view, he did not encourage the police to lay charges. Moreover, he did not knowingly provide false information to the police, nor did he consciously withhold information from the police. ***

Did the trial judge err in failing to find the Township liable to Mr. Pate for malicious prosecution?

27. The test for malicious prosecution is set out in *Nelles v. Ontario*, [1989] 2 S.C.R. 170 (S.C.C.), at pp. 192-93:

> There are four necessary elements which must be proved for a plaintiff to succeed in an action for malicious prosecution:
>
> (a) the proceedings must have been initiated by the defendant;
>
> (b) the proceedings must have terminated in favour of the plaintiff;
>
> (c) the absence of reasonable and probable cause; and
>
> (d) malice, or a primary purpose other than that of carrying the law into effect.

28. In his reasons, the trial judge focussed on the issues of initiation and malice, and found that Mr. Pate failed to establish either of these two elements. In my opinion, the trial judge made three errors that undermine his conclusions on these issues and that require that a new trial be ordered.

29. First, the trial judge set the threshold for proving malice too high. As noted above, relying on *Kvello v. Miazga*, [2009] 3 S.C.R. 339 (S.C.C.), the trial judge framed the test for malice, and his conclusion on the issue, as follows:

> In order for me to find malicious prosecution, [Mr. Pate] would be required to prove not only that no reasonable and probable grounds existed for the failed prosecution against him, but also that the [Township] intended to subvert or abuse the criminal justice system. [Citation omitted.]
>
> In this ease, there is no evidence upon which I can find that the [Township] exercised such an improper purpose and I cannot simply infer malice in these circumstances. Indeed, there may have been incompetence, honest mistake, negligence or even gross negligence in the way in which the [Township] put in motion the pursuit of charges against [Mr. Pate]. However, that is not sufficient for a finding of malicious prosecution. [Emphasis added.]

30. The test for proving malicious prosecution is the test articulated in ***Nelles***—and, under the fourth element, it is necessary to show that the defendant was motivated by "malice, or a primary purpose other than that of carrying the law into effect." In ***Miazga***, the Supreme Court of Canada reaffirmed the improper purpose test for establishing malice from ***Nelles***, and went on to elaborate how the test must be proven in the case of a Crown attorney.

31. The Supreme Court made it clear in ***Miazga*** that while the elements of the test for malicious prosecution remain the same whether a case involves private defendants or Crown defendants, "courts must take care not to simply transpose the principles established in suits between private parties to cases involving Crown defendants without necessary modification". That is because, in a case involving Crown defendants, "the contours of the tort … must be informed by the core constitutional principles governing that office." Those principles led the Court in ***Nelles*** "to adopt a very high threshold for the tort of malicious prosecution in an action against a public prosecutor": ***Miazga*** at para. 44.

32. One of the issues in ***Miazga*** was whether an inference of malice can arise from the absence of reasonable and probable grounds. Having regard to the fact that private parties involved in malicious prosecution suits often have a pre-existing relationship, the Supreme Court of Canada noted that in the context of private parties, malice had sometimes been inferred from the surrounding circumstances and the absence of reasonable and probable grounds alone:

> As a result, courts in early cases of malicious prosecution were prepared to infer malice from a finding that the prosecution was initiated absent reasonable and probable grounds. *Indeed, the circumstances of these cases easily gave rise to the question: why else would a private person initiate a prosecution based entirely on facts not believed to be true, or worse still, known to be false* (emphasis added); ***Miazga*** at para. 87.

33. However, the same considerations do not apply to a Crown prosecution where, generally speaking, there is no such pre-existing relationship and, moreover, in making the decision to prosecute, Crown prosecutors are exercising their important role as a "minister of justice".

34. The Court concluded that in a case involving a Crown defendant "a finding of absence of reasonable and probable grounds on the objective standard is entirely equivocal in terms of a Crown prosecutor's purpose": ***Miazga*** at para. 88.

35. The Court explained at para. 85 that "a demonstrable 'improper purpose' is the key to maintaining the balance struck in ***Nelles*** between the need to ensure that the Attorney General and Crown prosecutors will not be hindered in the proper execution of their important public duties and the need to provide a remedy to individuals who have been wrongfully and maliciously prosecuted." Moreover, "[b]y requiring proof of an improper purpose, the malice element of the tort of malicious prosecution ensures that liability will not be imposed in cases where a prosecutor proceeds absent reasonable and probable grounds by reason of incompetence, inexperience, poor judgment, lack of professionalism, laziness, recklessness, honest mistake, negligence or even gross negligence." As stated by Lamer J. in ***Nelles*** at pp. 196-97:

> It should be noted that what is at issue here [in a suit for malicious prosecution] is not the exercise of a prosecutor's discretion within the proper sphere of prosecutorial activity as defined by his role as a "minister of justice". Rather, in cases of malicious prosecution we are dealing with allegations of misuse and abuse of the office of the Crown Attorney. We are not dealing with merely second-guessing a Crown Attorney's judgment in the prosecution of a case but rather with the deliberate

> and malicious misuse of the office for ends that are improper and inconsistent with the traditional prosecutorial function; [Emphasis added in *Miazga*.]: *Miazga* at para. 81.

36. At para. 89 of *Miazga*, the Supreme Court summarized the requirements for proving malice against a Crown prosecutor:

> In summary, the malice element of the test for malicious prosecution will be made out when a court is satisfied, on a balance of probabilities, that the defendant prosecutor commenced or continued the impugned prosecution with a purpose inconsistent with his or her role as a "minister of justice". *The plaintiff must demonstrate on the totality of the evidence that the prosecutor deliberately intended to subvert or abuse* the office of the Attorney General *or the process of criminal justice* such that he or she exceeded the boundaries of the Office of the Attorney General. [Emphasis added.]

37. In this case, the trial judge incorporated some of the standards set out in *Miazga* for establishing malice by a Crown attorney into the requirements for establishing malice by a private individual. In particular, he concluded that he could not simply draw an inference of malice from the surrounding circumstances and the absence of reasonable and probable cause, considered objectively. Rather, he also required Mr. Pate to establish that the Township intended "to subvert or abuse the criminal justice system" to establish malice. The trial judge thus recast and narrowed the language of the malice element of the cause of action from motivated by "malice, or a primary purpose other than that of carrying the law into effect" to "intended to subvert or abuse the criminal justice system."

38. In my opinion, in doing so, the trial judge set the standard for proving malicious prosecution against a private individual too high.

39. The Supreme Court of Canada made it clear in *Miazga* that the standards for proving malicious prosecution against a Crown attorney are set at a very high threshold to ensure that courts do not engage in reviewing the prosecutorial discretion that rests, constitutionally, with Crown attorneys and to ensure that an action for malicious prosecution will lie against a Crown attorney only when he or she steps outside of his or her proper role as a minister of justice. The same considerations simply do not apply where the action is against a private individual.

40. The trial judge's second error consists of making findings about malice when addressing damages for wrongful dismissal that are inconsistent with his findings about malice in relation to malicious prosecution.

41. For convenience, I again set out the trial judge's findings at paras. 56 and 60 of his reasons concerning malice when addressing the issue of malicious prosecution:

> In this case, *there is no evidence upon which I can find that the [Township] exercised such an improper purpose and I cannot simply infer malice in these circumstances*. Indeed, there may have been incompetence, honest mistake, negligence or even gross negligence in the way in which the [Township] put in motion the pursuit of charges against [Mr. Pate]. However, that is not sufficient for a finding of malicious prosecution. ***
>
> *I do raise a concern that John Beaven, the former Chief Building Official, could not explain why he did not disclose* the 1995 building committee investigation and the missing Municipal files. I find it very troubling that *he could give no explanation, satisfactory to this court, which would justify this withholding of what appeared to be exculpatory information. However, I do not find that his actions amounted to a fraud committed against the criminal justice system and I am unable to find that he intentionally and knowingly withheld exculpatory evidence from the police. He was indeed misguided in doing so*, however, in the end, the decision to prosecute Mr. Pate was a decision of the investigating police officers. *No evidence was presented to suggest, had the police undertaken a questioning of other municipal employees or officials, that they could not have determined this information on their own accord.* [Emphasis added.]

42. Despite these conclusions, when dealing with the issue of aggravated damages, which the trial judge indicated involve compensation for "malicious conduct", the trial judge said, "[t]he facts of the case …

require the imposition of aggravated damages." He relied, in part, on his findings that the Township made an "offer of clemency [to not call for a police investigation]" to Mr. Pate and that Mr. Beaven failed to disclose information to the police "which the evidence now shows would have resulted in no charges being levelled against [Mr. Pate]." Most importantly, he said,

> The evidence overwhelmingly shows that the council of the [Township] decided to terminate [Mr. Pate] without advising him as to reasons; without providing him an opportunity to answer allegations made against him; *terminated him and then mounted an investigation in order to build a case to justify the termination*. [Emphasis added.]

43. Particularly in the light of his findings that aggravated damages were justified, at least in part, because the Township terminated Mr. Pate's services, offered him clemency if he would resign, subsequently mounted an investigation to justify its actions and failed to disclose exculpatory evidence to the police, the trial judge's finding that this case calls for aggravated damages appears to contradict his conclusion that there was no evidence based on which he could find an improper purpose. Moreover, considered in the light of these circumstances, the lack of reasonable and probable grounds on an objective standard could also support a finding of malice.

44. Further, as I have indicated, at para. 75 of his reasons, when addressing the issue of punitive damages, the trial judge said:

> *I find that the actions of the [Township] in withholding exculpatory evidence in this matter to have been an arbitrary decision made by one of its officers and which amounted to reprehensible conduct.* Had the disclosure been made, no criminal charges would have been levelled against [Mr. Pate] in this matter. *Such conduct, to this court, is a departure to a marked degree from ordinary standards of decent behaviour.* [Emphasis added.]

45. The findings that Mr. Beaven's failure to disclose exculpatory evidence amounted to "reprehensible conduct" and "a departure to a marked degree from ordinary standards of decent behaviour" fly in the face of the trial judge's earlier conclusions that the Township was no more than grossly negligent and that Mr. Beaven did not knowingly withhold exculpatory evidence from the police.

46. The trial judge's third error relates to the first step in the test for malicious prosecution—namely, a plaintiff must prove that the prosecution was initiated by the defendant.

47. It is well-established that a defendant may be found to have initiated a prosecution even though the defendant did not actually lay the information that commenced the prosecution. Although this court has not determined "all the factors that could, in any particular case, satisfy the element of initiation", it has held that a defendant can be found to have initiated a prosecution where the defendant knowingly withheld exculpatory information from the police that the police could not have been expected to find and did not find and where the plaintiff would not have been charged but for the withholding: *McNeil v. Brewers Retail Inc.*, 2008 ONCA 405 (Ont. C.A.) at para. 52.

48. In this case, the trial judge made two findings that are important to the issue of initiation. First, he said, "I do not find that [Mr. Beaven's] actions amounted to a fraud committed against the criminal justice system and I am unable to find that he intentionally and knowingly withheld exculpatory evidence from the police."

49. Second, he found that, "in the end, the decision to prosecute Mr. Pate was a decision of the investigating police officers. No evidence was presented to suggest, had the police undertaken a questioning of other municipal employees or officials, that they could not have determined [the exculpatory evidence] on their own accord. To that end, the police in this instance had the ability to undertake a meaningful investigation and exercise their discretion to prosecute or not."

50. The trial judge's misstatement of the test for malice and his inconsistent findings undermine his first finding in relation to initiation. Even so, the trial judge's second finding, if unimpeachable, is fatal to the claim for malicious prosecution.

51. However, if it is determined at a new trial that Mr. Beaven knowingly withheld exculpatory information

from the police, to decide whether the element of initiation is satisfied, in my view, it will also be necessary to assess whether the conduct of Mr. Beaven undermined the independence of the police investigation and the independence of the decision-making process concerning whether to lay charges and prosecute.

52. The trial judge stated that "[n]o evidence was presented to suggest, had the police undertaken a questioning of other municipal employees or officials, that they could not have determined [the exculpatory evidence] on their own accord." But, the trial judge did not refer to the statements provided by Mr. Beaven, or make any findings concerning whether the manner in which they were presented impacted the independence of the police investigation.

53. The statements provided by Mr. Beaven, in and of themselves, created reasonable and probable grounds for laying charges against Mr. Pate. Officer Stokes said so in his evidence. Moreover, in most of his statements, Mr. Beaven said he searched the records of the Township looking for an indication that permits had been issued concerning the relevant properties, and found that no such records existed. In these circumstances, if it is determined at a new trial that Mr. Beaven knowingly withheld exculpatory information, it will be necessary also for the trial judge to assess whether Mr. Beaven prepared his statements in a manner that misled the officers into not conducting their own search of the relevant records—and, if he did, whether that is sufficient in all the circumstances to satisfy the element of initiation. In this instance, the trial judge failed to carry out any such assessment.

54. I am mindful of the fact that proving malicious prosecution presents a significant hurdle in relation to any defendant, whether Crown prosecutor, police officer or private citizen.

55. In such circumstances, an appellate court should exercise considerable caution before ordering a new trial with respect to such a claim. In this case, however, even though he dismissed Mr. Pate's claim, the trial judge found the Township "came very close to malicious prosecution." Having regard to this finding, and the errors the trial judge made, I conclude that this is an appropriate case in which to order a new trial concerning Mr. Pate's claim for malicious prosecution. ***

Ontario Court of Appeal – 2013 ONCA 669

LAUWERS J.A. (dissenting):

1. The appellant municipality wrongfully dismissed John Gordon Pate in March 1999 after almost ten years of employment. It appeals the outcomes of two re-trial decisions in which the trial judge awarded $550,000 in punitive damages and found the municipality liable for malicious prosecution.

2. For the reasons that follow, I would affirm the trial judge's decision that the appellant is liable to the respondent for malicious prosecution. ***

85. The accumulated evidence led the trial judge to state, at para. 48 of [2012 ONSC 6740]:

> All the foregoing leads one to the conclusion that there was more than ample evidence to conclude that the Township initiated the criminal proceedings against Mr. Pate without reasonable and probable grounds to believe that he had committed the thefts and it did so maliciously in order to avoid civil liability for the termination of his employment. The Defendant offered no evidence to refute this. Indeed, Officer Stokes indicated that he reviewed the matter with a local Crown attorney, who did not recommend that charges be laid, and who allegedly opined, that the Township should "undertake its own dirty work". While I do not make my decision based upon such a statement, it underlines the backdrop against which the Defendant's actions were taken through its authorized officer, Mr. Beaven.

86. In my view, the trial judge adequately addressed the evidence, as he notes by using the expression, "all the foregoing"; he made findings on all four elements of the test for initiation of malicious prosecution set out by Simmons J.A. in the First Appeal reasons. ***

89. The Township has not demonstrated that the trial judge committed any palpable and overriding errors in respect of his evaluation of the evidence on the malicious prosecution issue, or any material errors in

respect of the law. I would therefore reject these grounds of appeal. ***

CRONK J.A. (DOHERTY J.A. concurring):

182. I have had an opportunity to review Lauwers J.A.'s draft reasons in these appeals. I agree with his proposed disposition of the malicious prosecution appeal. In particular, I agree with his conclusion that the trial judge's holding that the appellant municipality is liable to the respondent for malicious prosecution is sustainable on this evidentiary record. I also substantially agree with my colleague's reasoning in support of that conclusion.

183. *** Unlike my colleague, I conclude that the trial judge erred in his analysis of punitive damages by fixing those damages in the amount of $550,000. ***

239. When the full circumstances of this case are considered, including the total compensation to which Mr. Pate is already entitled under the trial judge's other damages awards, his costs award and the costs premium, and by the parties' agreement concerning wrongful dismissal damages, I conclude that a punitive damages award in the amount of $450,000 is sufficient to meet the need for additional punishment of the Township. An award in this amount amply denounces the Township's conduct and achieves the additional objectives of retribution and deterrence. ***

REFLECTION:

- *Why should it be more difficult to prove malicious prosecution claims against Crown prosecutors as compared to private litigants? Does the rule in Miazga undermine the Diceyan principle of equality under law (§1.1.1)?*
- *What risks might arise from recognising malicious prosecution claims in respect of omissions, such as intentionally withholding exculpatory information from the police?*

10.11.2 Fitzpatrick v. Orwin, Squires & Squires [2012] ONSC 3492

✗REF: §3.2.3, §7.1.3, §9.1.3, §9.2.3, §9.3.5, §9.5.6, §9.8.2.3

STINSON J.:

1. As was their standard practice, at approximately 5:20 a.m. on Monday, November 12, 2007, sixty year old William Squires kissed his seventy-five year old wife, Anna, goodbye at the front door of their suburban Pickering bungalow. As he descended the front steps to begin his early morning commute to his job in downtown Toronto, Mr. Squires was shocked to discover that someone had placed a large dead coyote on the hood of his pickup truck. Blood was dripping from its mouth. The Squires called 911 and the Durham Regional Police came to investigate. By the end of the day, the police had arrested and taken into custody the Squires' thirty-nine year old next door neighbour, David Fitzpatrick, and charged him with criminal harassment.

2. The charge against Mr. Fitzpatrick never proceeded to trial. Instead, Assistant Crown Attorney Roberto Corbella concluded that there was no reasonable prospect of conviction and the charge against Mr. Fitzpatrick was withdrawn.

44. Mr. Fitzpatrick was released from custody on bail on November 20, 2007. ***

47. Over the next several months, the Squires experienced a series of incidents that caused them to continue to be concerned about their safety. *** The Squires ultimately concluded that they could no longer stay in their house at 685, because of the strain and acrimony. They therefore decided to sell and relocate. They signed an agreement of purchase and sale near the end of February 2008.

48. Shortly after agreeing to sell their house, the Squires discovered that they were the subject of a half-million dollar lawsuit commenced by Mr. Fitzpatrick—the within action. Also named as a co-defendant in the action was Mr. Fitzpatrick's sister, Shelley Orwin. Among other things, Mr. Fitzpatrick sought *** damages of $150,000 for malicious prosecution and conspiracy. *** The lawsuit further complained that the defendants maliciously and without probable cause, caused criminal harassment charges to be laid against the plaintiff, resulting in his incarceration. ***

95. Based upon the evidence at trial and my assessment of the testimony of the witnesses, I make the following findings of fact: ***

> 8. I find as a fact that, before Mr. Fitzpatrick was arrested, it was the Squires' personal belief that there were reasonable and probable grounds to believe that Mr. Fitzpatrick had committed the crime of criminal harassment. From an objective standpoint, I further find that there were reasonable and probable grounds for that conclusion, having regard to the history and escalation of the hostility displayed by Mr. Fitzpatrick. ***
>
> 10. I find that throughout the Squires acted in good faith and with no malicious intent. Their primary concern was their own health, well being and safety as they sought a return to the tranquility that they enjoyed with their next door neighbour while Mary Fitzpatrick was still alive. All of the measures they took, from the installation of security cameras, to the reports to the police, to the construction of the new fence, were taken in good faith in pursuance of those objectives. Their dislike of Mr. Fitzpatrick arose from his conduct, attitude and treatment towards them. ***

Malicious prosecution

97. As noted previously, the plaintiff's case at trial was limited to this claim against the Squires and his sister for malicious prosecution. The case was confined to Mr. Fitzpatrick's complaints arising from his November 2007 arrest for the offence of criminal harassment.

98. The tort of malicious prosecution is designed to balance the public interest in administering criminal justice with the need to compensate individuals who have been wrongly prosecuted: see *Kvello v. Miazga*, 2009 SCC 51 at para. 56.

99. The Supreme Court of Canada laid out the four necessary elements of this tort in *Nelles v. Ontario*, [1989] 2 S.C.R. 170 (S.C.C.) as follows:

> a) the proceedings must have been initiated by the defendant;
>
> b) the proceedings must have terminated in favour of the plaintiff;
>
> c) the absence of reasonable and probable cause;
>
> d) malice, or a primary purpose other than that of carrying the law into effect.

100. As stated by Low J. at para. 75 *Correia v. Canac Kitchens*, [2007] O.J. No. 143 (Ont. S.C.J.) rev'd on other grounds 2008 ONCA 506, the plaintiff has a difficult burden in establishing the above four factors of the *Nelles* test. This is because failed criminal prosecutions are not necessarily malicious. The reality is that criminal prosecutions sometimes fail because the stringent standard of proof cannot be met, and not because the charge was unfounded. Moreover, criminal prosecutions are brought for the benefit of society and not the complainant or prosecutor. As such, this public interest must be protected.

101. I disagree with Mr. Fitzpatrick that the Squires initiated the proceedings against him. Rather, based on my analyses of the evidence, I conclude that the Squires acted as complainants, and that Constable Sullivan initiated the criminal harassment charge against Mr. Fitzpatrick.

102. It is settled law that the police officer laying the charge will normally be treated as the prosecutor, and that the complainant will only be treated as the prosecutor in exceptional circumstances. In *Kefeli v. Centennial College of Applied Arts & Technology*, [2002] O.J. No. 3023 (Ont. C.A. [In Chambers]) Simmons J.A. laid out this general proposition and described the rare circumstances in which a complainant may be treated as a prosecutor at para. 24:

> The moving party acknowledges that a claim for malicious prosecution requires that the defendant must have initiated the prosecution or set it in motion, and that, ordinarily, the court will view the police officer who laid the charge as being the person who set the prosecution in motion. However, he also submits, correctly, that the complainant may be treated as the prosecutor in exceptional circumstances, including the following:

> • the complainant desired and intended that the plaintiff be prosecuted;
>
> • the facts were so peculiarly within the complainant's knowledge that it was virtually impossible for the professional prosecutor to exercise any independent discretion or judgment; and
>
> • the complainant procured the institution of proceedings by the professional prosecutor, either by furnishing information which he knew to be false, or by withholding information which he knew to be true, or both.

103. In the current case, I do not find that the Squires 'desired and intended' that Mr. Fitzpatrick be prosecuted, as required in *Kefeli*. This term was discussed by Sharpe J. at para. 51 of *Wood v. Kennedy* (1998), 165 D.L.R. (4th) 542 (Ont. Gen. Div.), where he adopted the test set by the House of Lords in *Martin v. Watson*, [1995] 3 All E.R. 559 (U.K. H.L.). The House of Lords stated at p.567-569 of *Martin*:

> Where an individual falsely and maliciously gives a police officer information indicating that some person is guilty of a criminal offence and states that he is willing to give evidence in court of the matters in question, it is properly to be inferred that he desires and intends that the person he names should be prosecuted. Where the circumstances are such that the facts relating to the alleged offence can be within the knowledge only of the complainant, …, then it becomes virtually impossible for the police officer to exercise any independent discretion or judgment, and if a prosecution instituted by the police officer the proper view of the matter is that the prosecution has been procured by the complainant.

104. To begin, as I have previously stated, I do not believe that the Squires gave the police information in a false or malicious manner. Nor were the facts relied on by the police to lay the criminal charge only within the knowledge of the Squires. The video and audio tape turned over to the police provided the basis for Constable Sullivan's notes, which verified Mr. Fitzpatrick's belligerent comments. Moreover, the police were on scene soon after the dead coyote was found. Thus, the Squires gave the police information in an honest manner and the facts they provided were independently corroborated by the police.

105. Ms. Orwin also gave a video-taped statement to the police regarding Mr. Fitzpatrick's character. It is clear from the evidence however, that her information was not relied on by the police when they charged Mr. Fitzpatrick, since he had already been arrested and charged by the time she was interviewed. In any event, I am unable to conclude that she gave any information to the police in a false or malicious manner.

106. Armed with the tapes, their interviews with Mr. O'Carroll, and their own observations, the police officers were able to exercise their independent discretion in choosing to lay a charge against Mr. Fitzpatrick. This may be contrasted to a situation where the facts are solely within the knowledge of the complainant, such as an allegation of sexual assault, as was the case in *Wood*, *supra*. The Squires' submission of the tapes to the police and the attendance of the police at the Squires' home further demonstrate that the knowledge relied to ground the criminal charge was not in the exclusive purview of the Squires.

107. It is also clear that the Squires did not procure the initiation of proceedings by a professional prosecutor. Nor did Ms. Orwin, whose information was not even known to the police when they charged Mr. Fitzpatrick.

108. For the above reasons, I find that the Squires and Ms. Orwin did not initiate the proceedings against the defendant based on the test laid out in *Wood*, *supra*. Rather, it was Constable Sullivan who laid the initial charge of criminal harassment against Mr. Fizpatrick. This is in line with the holding in *Kefeli*, *supra*, that the police officer who laid the charge will ordinarily be viewed by the court as the prosecutor.

109. I now move on to the second element of the *Nelles* test, which requires that the proceedings be terminated in favour of the plaintiff. The Supreme Court in *Miazga*, *supra* at para. 54 was clear that a withdrawal of the charges leveled against the plaintiff will satisfy this element of the test. As Mr. Fitzpatrick's charges were withdrawn by Mr. Corbella, the proceedings were clearly terminated in the plaintiff's favour.

110. The third element of the *Nelles* test requires an absence of reasonable and probable cause. As stated by Charron J. in *Miazga* at para. 58, the plaintiff bears the onus of proof in this respect, and the test

necessitates a subjective and objective inquiry into the prosecutor's decision to initiate a proceeding.

111. I find that Mr. Fitzpatrick has failed to discharge his burden of establishing this element of the test for the following reasons. The Squires were credible witnesses, and so I place great weight on their testimony as to why they called the police. Mr. Fitzpatrick had been acting in a belligerent manner for some time, and had made degrading comments about the Squires. He had also threatened Mr. O'Carroll [a neighbour from up the street] during the video taped confrontation. Moreover, he, or someone acting on his instructions placed the dead coyote on Mr. Squires' vehicle. All of these incidents satisfy the objective element of the test, in that they formed a reasonable basis on which a proceeding should be commenced. Moreover, given the Squires' interpretation of the dead coyote as a death threat as seen in a mafia movie, I am also satisfied that the subjective element is satisfied. Thus, I find that the Squires had reasonable and probable cause to make their complaint to the police. In turn, based on the results of her investigation, Constable Sullivan had reasonable and probable grounds to arrest and charge Mr. Fitzpatrick on November 12, 2007.

112. The final part of the *Nelles* test requires the presence of malice on the part of the defendant. As per Lamer J. in *Nelles*, *supra*, at pp. 193-194, malice is akin to having an "improper purpose" when commencing a proceeding. From the evidence relayed at court, it was obvious that the Squires were genuinely fearful of Mr. Fitzpatrick given his historical aggressive behaviour and arms collection. When they observed his threatening behaviour with Mr. O'Carroll and the found the dead coyote on their car, they called the police out of fear. For this reason, I find that malice was not present in the Squires' actions, and that this portion of the *Nelles* test is not satisfied. Further, there is no evidence of malice on the part of Constable Sullivan.

113. In summary, in relation to the four elements of the *Nelles* test, I found the evidence to demonstrate that the criminal proceeding was not initiated by the Squires, although it was terminated in favour of Mr. Fitzpatrick. I further found the presence of reasonable and probable cause and a lack of malice on the part of the Squires. Ms. Orwin played no part in the initiation of the criminal prosecution. I therefore find the defendants not liable for the tort of malicious prosecution. Mr. Fitzpatrick's action is dismissed accordingly.
***

REFLECTION:

- *Would Fitzpatrick have had any better success had he brought a malicious prosecution claim against the police officers who arrested and charged him, only for the charges to be withdrawn?*

10.11.3 Cross-references

- *Walker v. Metropolitan Police Comm'r* [2014] EWCA Civ 897, [2]: §2.2.3.

10.11.4 Further material

- 4 New Square Chambers Podcast, "'Lawfare,' Big Money Divorces, and the Impact of the New Tort of Malicious Prosecution of Civil Proceedings" (Jun 16, 2020) 🎧.
- Burnham Law, "What Qualifies as Malicious Prosecution?" YouTube (Apr 18, 2022) 📺.
- R. Mulheron, "The Tort of Malicious Prosecution of Civil Proceedings: A Critique and a Proposal" (2022) 42 Legal Studies 470
- W. Bonython & J. Farrar, "Principle and Policy in Malicious Prosecution" (2022) 34 Bond L Rev 159.
- J. Murphy, "Malice as an Ingredient of Tort Liability" (2019) 78 Cambridge LJ 355.
- J. Goudkamp, "A Tort is Born: A Practical Perspective on the Tort of Malicious Prosecution of Civil Proceedings" (2017) 7753 New LJ 11.

10.12 Misfeasance in public office

10.12.1 Slater v. Pedigree Poultry Ltd [2022] SKCA 113

Saskatchewan Court of Appeal – 2022 SKCA 113

✗REF: §20.2.1

SCHWANN J.A. (RYAN-FROSLIE AND KALMAKOFF J.A. concurring): ***

1. The action that gives rise to these appeals concerns the tort of misfeasance in public office. It raises the difficult question of where the appropriate balance should be struck between curbing questionable behavior on the part of a regulatory body and its public officials and protecting those officials from claims brought by individuals who are adversely affected by their decisions.

2. The factual backdrop in which this tort was alleged to have occurred is in connection with the supply management regime for the broiler hatching egg producers' industry in Saskatchewan, which is established pursuant to provincial legislation. In broad-brush terms, the legislative scheme creates a regulatory tribunal to oversee the production and marketing components of the industry, principally through a licensing regime and quota limits.

3. The Saskatchewan Broiler Hatching Egg Producers' Marketing Board [Board] is the regulator of that program. The individual defendants, Mervin Slater and Victor Loewen, were directors of the Board at the relevant time as well as active producers in the broiler hatching egg industry. The plaintiffs in the action, Pedigree Poultry Ltd. [Pedigree] and Ronald Dubois [collectively, the respondents], were producers whose businesses fell under the oversight of the Board.

4. The respondents commenced an action for compensatory damages against the Board as well as Messrs. Slater and Loewen in their individual capacities as directors of the Board in relation to actions that the Board took, or omitted to take, in the discharge of its regulatory function. The respondents alleged that their actions and behavior rose to the level of misfeasance in public office.

5. The Court of Queen's Bench trial judge who heard the matter found each of the Board and the individual defendants liable for misfeasance in public office. He awarded the respondents substantial damages and imposed a punitive damage award against Mr. Slater personally: *Pedigree Poultry Ltd. v. Saskatchewan Broiler Hatching Egg Producers' Marketing Board*, 2020 SKQB 100, 87 Admin LR (6th) 66 [*Trial Decision*].

6. The Board, Mr. Slater and Mr. Loewen [collectively, the appellants] have each appealed from the *Trial Decision*. ***

Background ***

28. Mr. Dubois's difficulties with the Board began in 1991, when he purchased his production unit and then sought to transfer his operation to the Regina Beach area, near the Pedigree operation. Mr. Dubois's acquisition of that production unit was financed by a company owned by Mr. Glen. Mr. Slater saw this as a red flag, and, as the trial judge put it, this resulted in "the first skirmish" in what was referred to at trial as the "sham producer" war that "would end only when the Board was finally put under the control of an administrator in 2000" (at para 52). Mr. Slater, for the Board, said the transfer could not be approved without assurance from Mr. Glen that Pedigree would not gain an interest in or control of more than one production unit. The Board asked Mr. Dubois to file an application identifying all persons who held an interest in his operation. When he refused to do so, the Board rejected his transfer request, characterizing it as "a scheme to enlarge a farm [Pedigree's] more than 10,000 units" and that it was unfair "for one producer to use the other producers work … to further benefit himself with no respect for the others" (at para 54). ***

65. *** [I]n the midst of the aforementioned interactions between the Board, Pedigree and Mr. Dubois, the Board was tracking an expansion strategy for the industry to align itself with the possibility of an increased, province-wide market share. ***

66. The Board held a meeting on September 9, 1998, where it allocated an expansion quota of 58,220 bird units to seven of the existing producers. All who had requested an expanded quota—other than Pedigree, Mr. Dubois and another entity—were granted what they had requested, either unconditionally or on a conditional basis. ***

The Trial Decision ***

79. *** The trial judge made the following key findings of fact ***:

> (a) the Board granted an expansion quota—conditionally or otherwise—to seven of the producers who had expressed an interest;
>
> (b) the Board was aware that Pedigree and Mr. Dubois had requested an additional quota, yet it failed to grant or even consider granting an expansion quota to them;
>
> (c) Pedigree's response to the Board's January 19, 1998, solicitation of interest letter was more complete than the responses of others who had been awarded quota; and
>
> (d) many of the producers who had received an expansion quota, including Mr. Loewen, had not provided the required information or assurances the Board had demanded.

80. Based on those findings, the trial judge determined that Pedigree and Mr. Dubois had not been dealt with in the same way or on the same basis as the other producers on September 9, 1998, nor had they been awarded an expansion quota after the first round of allocation ended. His summary for why the appellants had acted as they did is as follows:

> 216. I have explained above why I have concluded the defendants took this route. The Board did not fail to allocate quota to the plaintiffs for any of the shopping list of reasons identified by the defendants—not because Mr. Dubois had said he wanted to sell his production unit, not because Sunnyland would not place chicks with Pedigree, not due to uncertainty as to their capacity to ramp up or their alleged failure to respond to the April 14 letter, not for biosecurity reasons, and not for any other reason related to the capacity of either of the plaintiffs. *It failed to allocate quota to Pedigree or Mr. Dubois on and after September 9 because it was committed to having its way in relation to the sham producer issue*. (Emphasis added)

The unfairness of it all, the trial judge said, was exacerbated by the fact that the Board kept Pedigree and Mr. Dubois "in the dark" throughout the quota expansion exercise (at para 218).

81. The trial judge rejected the Board's submission that the granting of a quota was a matter exclusively within its almost unfettered discretion. ***

82. *** [T]he trial judge was satisfied that the tort of misfeasance in public office had been made out against each of the appellants with respect to both Pedigree and Mr. Dubois. ***

The Law: Misfeasance in Public Office ***

84. The tort of misfeasance in public office is an intentional tort rooted in the principle that "those who hold public office and exercise public functions are subject to the law and must not abuse their powers to the detriment of the ordinary citizen" (*Freeman-Maloy v. Marsden*, (2006), 208 OAC 307 (CA) at para 10). In *Three Rivers District Council v. Governor and Company of the Bank of England (No 3)*, [2000] 2 WLR 1220 (HL) [*Three Rivers*], the House of Lords described the tort in a similar way (at 1230):

> The rationale of the tort is that in a legal system based on the rule of law executive or administrative power "may be exercised only for the public good" and not for ulterior and improper purposes: *Jones v. Swansea City Council*, [1990] 1 W.L.R. 54, 85F, per Nourse L.J.; a decision reversed on the facts but not on the law by the House of Lords [1990] 1 W.L.R. 1453, 1458. The tort bears some resemblance to the crime of misconduct in public office: *Reg. v. Bowden*, [1996] 1 W.L.R. 98.

85. In its earliest formulation, the tort was limited to situations where the public office holder abused a power

the officer actually possessed. In Canada, the tort was expanded, beginning with the formative decision *Roncarelli v. Duplessis*, [1959] SCR 121 [*Roncarelli*]. There, the premier of Quebec was found liable for directing the liquor licensing regulator to revoke Mr. Roncarelli's liquor licence, even though the premier had no statutory authority in the decision-making process. In light of *Roncarelli*, the tort was broadened beyond allegations of abuse of a statutory or prerogative power to situations "where a public officer with actual knowledge of his lack of statutory power or authority acted in a manner that he knew would probably harm the plaintiff" (Philip H. Osborne, *The Law of Torts*, 6th ed (Toronto: Irwin Law, 2020) at 224). In England, for example, the House of Lords in *Three Rivers* also enlarged the scope of the tort by giving effect to the idea that the tort can arise from a range of misconduct committed by a public official, including "sins of omission" (at 1275).

86. The Supreme Court revisited the tort of misfeasance in public office in *Odhavji Estate v. Woodhouse,* 2003 SCC 69, [2003] 3 SCR 263 [*Odhavji*], which remains the leading authority on the matter. Speaking for the court, Iacobucci J. concluded that the "ambit of the tort is not restricted" to situations where the public officer is engaged in the unlawful exercise of a statutory or prerogative power (at para 19). The class of conduct to which the tort applies is "more broadly based on unlawful conduct in the exercise of public functions generally" (at para 17). The focus on the alleged misconduct demands an examination of whether it was deliberate and unlawful. In this regard, the Supreme Court, adopting *Three Rivers*, said this:

> 24. Insofar as the nature of the misconduct is concerned, the essential question to be determined is not whether the officer has unlawfully exercised a power actually possessed, *but whether the alleged misconduct is deliberate and unlawful*. As Lord Hobhouse wrote in *Three Rivers*, *supra*, at p. 1269:
>
> > The relevant act (or omission, in the sense described) must be unlawful. This may arise from a straightforward breach of the relevant statutory provisions or from acting in excess of the powers granted or for an improper purpose. (Emphasis added)

87. The broader ambit of this tort, as set out in *Odhavji*, now means that it can apply to situations "where the public officer wilfully injures a member of the public by: an abuse of power possessed; intentionally exceeding powers possessed; or the deliberate failure to discharge a public duty" (Lisa Mrozinski, "Monetary Remedies for Administrative Law Errors" (2009) 22 Can J Admin L & Prac 133 at 138).

88. In *Odhavji*, Iacobucci J. set out the elements of the tort of misfeasance in public office as being these: "(i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff" (at para 32). Plaintiffs must also "prove that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law" (at para 32). Lewis N. Klar *et al*, *Remedies in Tort*, loose-leaf (2020 Rel 10) vol 3 (Toronto: Thomson Reuters, 2020), summarizes what a plaintiff needs to prove to succeed in a misfeasance in public office claim (at 24-21):

> **2. Elements of cause of action**
>
> §60 To establish the tort of misfeasance in public office a plaintiff must show: (1) the public official deliberately engaged in unlawful conduct in his or her capacity as a public officer; (2) the public official was aware both that the conduct was unlawful and that it was likely to harm the plaintiff; (3) the public official's tortious conduct was the illegal cause of the plaintiff's injuries; and (4) the injuries suffered are compensable in tort law. (Footnotes omitted)

89. Justice Iacobucci, in *Odhavji*, formulated two ways in which the tort can be committed:

> (a) Category A, also know as targeted malice, occurs where the public officer specifically intended to harm a person or class of persons; and
>
> (b) Category B involves a situation where a public officer acts with the knowledge that they have no power to do the act complained of and that the act is likely to injure the plaintiff.

90. The difference between these two categories has often been described as a question of proof. In the Category B formulation, the plaintiff must prove the two ingredients independently, i.e., that the public officer

was aware that their conduct was unlawful *and* that it was likely to harm the plaintiff. With Category A, however, the fact that the officer expressly acted for the purpose of harming the plaintiff is sufficient proof. Regardless of the formulation, there must still be proof of a "deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure" (at para 23): see also *The Law of Torts* at 225.

91. As to the knowledge component of a Category B type situation, a plaintiff must establish that the defendant had actual knowledge that the conduct was unlawful and that the likely consequence of the alleged misconduct was harm to the plaintiff. The required mental element with a Category B form of the tort is said to include subjective recklessness. In addressing the idea of subjective awareness of harm arising from the misconduct, Iacobucci J. said as follows:

> 38. The statement of claim also alleges that the defendant officers and the Chief "knew or ought to have known" that the alleged misconduct would cause the plaintiffs to suffer physically, psychologically and emotionally. Although the allegation that the defendants knew that a failure to cooperate with the investigation would injure the plaintiffs satisfies the requirement that the alleged misconduct was likely to injure the plaintiffs, misfeasance in a public office is an intentional tort that requires subjective awareness that harm to the plaintiff is a likely consequence of the alleged misconduct. *At the very least, according to a number of cases, the defendant must have been subjectively reckless or wilfully blind as to the possibility that harm was a likely consequence of the alleged misconduct*: see for example *Three Rivers*, *supra*; *Powder Mountain Resorts*, [2001 BCCA 619]; and *Alberta (Minister of Public Works, Supply and Services)* (C.A.), [2001 BCCA 619]. This, again, is not a sufficient basis on which to strike the pleading. It is clear, however, that the phrase "or ought to have known" must be struck from the statement of claim. (Underline emphasis in original, italic emphasis added.)

92. As can be seen from this discussion, by adopting the approach taken in *Three Rivers* and *Powder Mountain Resorts Ltd. v British Columbia*, 2001 BCCA 619, [2001] 11 WWR 488 [*Powder Mountain*], *Odhavji* expanded the ambit of the tort and clarified the point that subjective knowledge can include recklessness or wilful blindness on the part of the public officer. The Ontario Court of Appeal in *Foschia v Conseil des Écoles Catholique de Langue Française du Centre-Est*, 2009 ONCA 499, 266 OAC 17, synthesized the law on this point in this way: "In proving the third element [i.e., awareness], it is sufficient for the plaintiff to show that the public official acted with reckless indifference to both the unlawfulness of his or her act and the likelihood that it would injure the plaintiff" (at para 24): also see *Meekis v Ontario*, 2021 ONCA 534 at para 73, 461 DLR (4th) 307, and *Ontario Racing Commission v O'Dwyer* 2008 ONCA 446, 293 DLR (4th) 559 [*O'Dwyer*].

93. The Supreme Court recently returned to the *Odhavji* principles in *Ontario (Attorney General) v. Clark,* 2021 SCC 18, 456 DLR (4th) 361 [*Clark*]. While the decision in *Clark* did not engage in an in-depth discussion of the tort of misfeasance in public office, it did provide this summary of the tort's constituent elements:

> 22. The elements and proper scope of the tort of misfeasance are not disputed in this appeal. A successful misfeasance claim requires the plaintiff to establish that the public official engaged in deliberate and unlawful conduct in his or her capacity as a public official, and that the official was aware that the conduct was unlawful and likely to harm the plaintiff (*Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, at para. 23, per Iacobucci J.).

94. *Clark* is important in two fundamental respects. It affirmed (a) the broad scope or ambit of the tort, and (b) that subjective awareness can be established through subjective recklessness or a conscious disregard for the lawfulness of the conduct and its harmful consequences:

> 23. The unlawful conduct anchoring a misfeasance claim typically falls into one of three categories, namely an act in excess of the public official's powers, an exercise of a power for an improper purpose, or a breach of a statutory duty (*Odhavji*, at para. 24). The minimum requirement of subjective awareness has been described as "subjective recklessness" or "conscious disregard" for the lawfulness of the conduct and the consequences to the plaintiff (*Odhavji*, at paras. 25 and 29; *Powder Mountain Resorts Ltd. v. British Columbia* (2001), 94 B.C.L.R. (3d) 14(C.A.), at para.

> 7; *Three Rivers District Council v. Bank of England (No. 3)* (2000), [2003] 2 A.C. 1(H.L.), at pp. 194-95, per Lord Steyn).

Analysis ***

95. Common to all three appeals is the assertion that the trial judge erred in his interpretation and application of the subjective element of the tort of misfeasance in public office. It is the appellants' position that the mental element of the tort requires a positive finding of dishonesty or bad faith and that an honest but mistaken belief in the lawfulness of the act, mere negligence, or maladministration is not sufficient. The appellants also assert the trial judge misapplied the elements of the tort and thereby erred in law because he overlooked or overemphasized the following:

> (a) there was no statutory rule or regulation that was breached with regard to the way the Board awarded the expansion quota;
>
> (b) the respondents were not entitled to an enhanced quota (or any quota, for that matter);
>
> (c) the Board's directors were motivated with the best interests of the industry at heart;
>
> (d) if Saskatchewan producers could not ramp up production, the expansion quota would be taken away;
>
> (e) the trial judge over-emphasised the sham producer issue; and
>
> (f) the trial judge failed to consider the broader landscape of the industry and the Board's regulatory responsibilities.

1. The subjective element ***

99. The matter at hand involved an allegation of a Category B type of the tort. The appellants say that, to establish the mental element under this category, bad faith or dishonesty must be proven. Put another way, they argue that a defendant's subjective recklessness must be understood within the traditional confines of the tort—at bottom, the focus is on bad faith and dishonesty. Some would argue—as the appellants have—that proof of a bad faith type of threshold is necessary; otherwise, the alleged illegality or misuse of power is little more than the application of administrative law principles to a private law action for damages that will inevitably lead to delay, undue cost, and a chill on all public officers.

100. There is some support for the argument that bad faith is part of the liability analysis under Category B. Indeed, *Odhavji* says as much:

> 28. As a matter of policy, I do not believe that it is necessary to place any further restrictions on the ambit of the tort. The requirement that the defendant must have been aware that his or her conduct was unlawful reflects the well-established principle that misfeasance in a public office requires an element of "bad faith" or "dishonesty".

101. Support can also be drawn from *J.P. v. British Columbia (Children and Family Development)*, 2017 BCCA 308 at para 329, [2017] 12 WWR 639, leave to appeal to SCC refused, 2018 CanLII 11146 [*J.P.*]. There, the British Columbia Court of Appeal observed that a finding of liability "requires 'clear proof commensurate with the seriousness of the wrong'" and that "subjective recklessness or wilful blindness requires a higher standard of proof than objective foreseeability of harm for negligence" (at para 329, quoting *Powder Mountain*, at para 8). ***

103. All of that said, even if I accept the proposition that proof of an element of bad faith is required to make out a Category B type of the tort, the question that remains is what constitutes bad faith. David Mullan, in his article "*Roncarelli v. Duplessis* and Damages for Abuse of Power: For What Did It Stand in 1959 and For What Does It Stand in 2009?" (2010) 55 McGill LJ 587 [Mullan], suggests that debate came to a head in *Odhavji*—where the Supreme Court relied on case law that held reckless indifference to the legality of the actions was sufficient (*Three Rivers* and *Powder Mountain*) and found that formulation could establish the tort under Category B. This idea, Mullan says, is supported further by how the Supreme Court adopted

a broad interpretation of bad faith, which includes recklessness, as presented in *Finney v. Barreau du Quebec*, 2004 SCC 36, [2004] 2 SCR 17 [*Finney*]. *Finney* involved the interpretation and application of a good faith statutory immunity clause. ***

104. The contours of bad faith described in *Finney* were adopted in *Enterprises Sibeca v. Frelighsburg*, 2004 SCC 61, [2004] 3 SCR 304 [*Sibeca*]. Speaking for the Supreme Court, Deschamps J. set out the following formulation of bad faith:

> 26. Based on this interpretation, the concept of bad faith can encompass not only acts committed deliberately with intent to harm, which corresponds to the classical concept of bad faith, but also acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith. What appears to be an extension of bad faith is, in a way, no more than the admission in evidence of facts that amount to circumstantial evidence of bad faith where a victim is unable to present direct evidence of it.

105. Although both *Finney* and *Sibeca* are cases that involved the Quebec civil code, Mullan argues the bad faith formulation expressed in those decisions applies equally to the common law. ***

106. There is no question that misfeasance in public office is a fault-based tort, and, as such, it requires proof of fault. It is also beyond question that the liability threshold for this tort is a high bar to clear. Indeed, as the Supreme Court cautioned in *Odhavji*, "misfeasance in a public office is not directed at a public officer who inadvertently or negligently fails adequately to discharge the obligations of his or her office" (at para 26). However, I see no evidence that the trial judge applied a lower negligence type standard or that he failed to put his mind to the high hurdle demanded for this tort. Moreover, and quite significantly, the trial judge went so far as to make a finding of bad faith against all three defendants in the context of his discussion about statutory immunity:

> 235. Here, the plaintiffs expressly pled that the defendants acted in bad faith, including as a result of acting in a manner they knew to be unlawful. The claim is cast in misfeasance in public office, which requires proof that the tortfeasor has knowingly acted in a manner that is unlawful and likely to cause damage to the claimant, or recklessly or with wilful disregard for those factors. All of the acts of misfeasance that I have found to have been committed by the defendants fall within the definition of bad faith in *Enterprises Sibeca*.

This was a finding of mixed fact and law that was open to the trial judge to make on the evidence that was adduced at trial. Absent an error of law, or a palpable and overriding error of fact, appellate intervention is unwarranted. There is no such error here.

2. Good faith or honest but mistaken belief ***

107. The appellants next argue that they discharged their duties with an honest but mistaken belief that the respondents were acting contrary to the Regulations and Board orders and that Saskatchewan ran the risk of losing an increased market share if they did not act with immediacy on the quota expansion project. Mr. Loewen, in particular, argues that an honest but mistaken belief in the lawfulness of his conduct is a complete defence and that, as a matter of principle, it is consistent with the notion that subjective recklessness must rise to the level of bad faith or dishonesty and involve actions which are obviously inexplicable, incomprehensible and egregious.

108. On a more specific level, the appellants say the trial judge failed to clearly explain and articulate how the procedural fairness breaches amounted to deliberate, unlawful conduct. Second (as will be discussed further below), Mr. Loewen says the trial judge failed to adequately explain how his omissions amounted to bad faith or the dishonest exercise of a statutory authority. He claims the evidence demonstrates that he had an honest but mistaken belief that the respondents were non-compliant with the statutory regime.

109. The appellants arguments must be rejected. Their *ends justify the means* reasoning misses the point. The respondents' action was not a challenge to the Board's regulatory authority but to whether the means employed by the Board and the two named directors—individually and collectively—were motivated by bad faith or a reckless disregard for whether they were acting unlawfully and would likely cause harm to

Pedigree and Mr. Dubois. The argument also ignores the fundamental legal principle that, in dealing with Pedigree's and Mr. Dubois's licences and quotas—regardless of whether the regulatory scheme had been contravened by them—they were entitled to procedural fairness. I know of no law that suggests otherwise. Furthermore, in deciding who should get an expansion quota, the Board had to make its determination within the context of the directives and the objects and purposes of the statutory regime. Its actions could not be motivated by an animus or in an unrelenting pursuit of a belief that had been repeatedly rejected by the Appeal Committee.

110. The trial judge dealt squarely with these arguments and was well aware of the appellants' overarching position. After hearing and considering the evidence in its entirety, he rejected that line of defence ***.

111. On a more specific note, the trial judge squarely addressed the Board's argument that it acted within the regulatory framework and in accordance with its duties if not obligations in relation to the May 24, 1998, letter. He said as follows:

> 209. The Board may have been entitled to cancel Pedigree's or Mr. Dubois' license if they had violated the regulatory framework in the manner suspected by the Board. However, that is not a defence to the plaintiffs' claims. Just as public officers were found liable in *Nilsson CA* [2002 ABCA 283] and *Apotex* [2017 FCA 73] despite having the public interest in mind, it is no defence that the defendants claim they had a reasonable suspicion [Ronald Dubois's operation] was a sham. For the same reason, it was no defence to claim that they did so for the good of all in the context of the quota expansion project—even if that had been true, which I find it was not.
>
> 210. The fact that Mr. Dubois ultimately vindicated his position in relation to the sham producer issue puts an exclamation point to the matter. However, the Board's actions would—assuming damages could be shown—constitute misfeasance even if Mr. Dubois had ultimately been found to have been in breach of Board orders. A public officer cannot escape its lawful obligation to conduct its business lawfully—including in accordance with the duty of fairness and based on proper considerations—by asserting the result would have been the same had it acted lawfully. As *O'Dwyer* demonstrates, a breach of the duty of fairness or the principles of natural justice can be sufficient to underpin a finding of misfeasance. The fact a public officer believes their cause is righteous does not mean they can ignore the law which governs the exercise of their public functions.

112. Neither did the trial judge accept that the respondents could not establish misfeasance because the granting of expansion quota involved the exercise of discretionary authority. He found that argument was undermined by the contrasting way in which the Board had dealt with the other producers:

> 221. It is self-evident, for example, that the Board could not grant 2000 more bird unit equivalents of quota to all producers but one, for no reason but personal dislike or to punish the producer for being a squeaky wheel. With respect, the Board's position relating to this issue misses the fundamental point of judicial review of statutory delegates, which is a cornerstone of the rule of law.

113. Finally, Mr. Slater and Mr. Loewen were found to have had more than enough sophistication and experience to know that their and the Board's discretion was not unfettered: see paragraphs 224 and 225. By considering the evidence as a whole, and making explicit findings of fact, the trial judge concluded that, at least with respect to the quota issue, the appellants possessed *actual* knowledge that they were acting unlawfully and that their actions would cause the respondents harm:

> 226. In the result, the individual defendants *either knew*, or were reckless as to whether, they and the Board were acting unlawfully when they decided to exclude Pedigree and Mr. Dubois from the allocation of expansion quota. This was one more attempt to have their way without the bother of providing proper notice and a fair hearing before deciding if Mr. Dubois was a sham producer, making an order authorized by law if the Board decided he was a sham producer, and weathering the inevitable appeal. The defendants *also knew* a failure to award expansion quota to the plaintiffs would likely cause them damage. (Emphasis added)

114. To conclude, the findings of fact support the trial judge's bottom-line conclusion on liability. The

appellants contend that the trial judge should have interpreted the evidence differently and come to a different conclusion, but they do not point to any palpable and overriding error that would justify appellate intervention. As such, this argument must be rejected. An appellate court's role is to correct error, not to re-weigh or re-evaluate the evidence; intervention is limited to where there is an error of law or a palpable and overriding error of fact. The appellants have not persuaded me of either.

REFLECTION:

- *Given that mistake is generally no defence to tort liability (§6.2.3), is recklessness—rather than a defendant's actual knowledge that they are acting unlawfully—a fair and principled mental element for the tort of misfeasance in public office?*
- *Is the common law of tort an appropriate mechanism for addressing a public official's misfeasance, or should misfeasance in public office cases be exclusively governed by public law procedures and doctrines?*[282]

10.12.2 Cross-references

- *Hill v. Hamilton-Wentworth Police Services Board* [2007] SCC 41, [111]: §13.4.2.2.

10.12.3 Further material

- E. Chamberlain, "What is the Role of Misfeasance in a Public Office in Modern Canadian Tort Law?" (2009) 88 Canadian Bar Rev 575
- M. Aronson, "Misfeasance in Public Office: A Very Peculiar Tort" (2011) 35 Melbourne U L Rev 1.
- J. Tyhurst, "Intention, Recklessness and Misfeasance in Public Office" (2010) 23 Canadian J Admin L & Practice 247.
- E. Rock, "Misfeasance in Public Office: A Tort in Tension" (2019) 43 Melbourne U L Rev 337.
- D. Nolan, "Tort and Public Law: Overlapping Categories?" (2020) 135 L Quarterly Rev 272.

[282] See *Nelson (City) v. Marchi*, 2021 SCC 41, [40]-[41] [§19.5.2.2].

11 TORT THEORY

11.1 Instrumental theories

11.1.1 Professor Basil Markesinis

B.S. Markesinis, "Tort" in Encyclopedia Britannica (2008)

Throughout its long history, tort has pursued different aims: punishment, appeasement, deterrence, compensation, and efficient loss spreading of the cost of accidents. None offers a complete justification; all are important, though at different stages one may have been more prominent than the rest. *** […continue reading]

REFLECTION:

- *Continue reading Prof. Markesinis's summary of the functions of tort. Which functional aim holds the most explanatory power of tort law as it operates today?*

11.1.2 Judge Richard Posner

R.A. Posner, "Instrumental and Noninstrumental Theories of Tort Law" (2013) 88 Indiana LJ 469, 469-475

There is the idea that law is an instrument of social policy, and the idea that instead law is an expression of rights and duties regardless of the instrumental value of those rights and duties. The first idea is illustrated by Holmes's option theory of contract: to make a contract to provide some product or service is to make a commitment either to perform, or to pay the cost to the other party if you don't perform; damages for breach of contract are just the price of exercising the option of nonperformance.[283] The second idea is illustrated by the European legal slogan *pacta sunt servanda*—contracts should be performed; to break your contractual promise is to commit a wrongful act and the other party to the contract is prima facie entitled to specific performance—that is, to a judicial decree commanding you to perform on pain of sanctions for contempt of court if you refuse. In tort law the first idea, the instrumental theory of law, is illustrated by Judge Learned Hand's negligence formula, which essentially penalizes economically wasteful activity (the burden of taking a precaution that would have prevented the accidental injury to the victim, if the burden—that is, the cost—was less than the harm to the victim discounted—that is, multiplied—by the probability that such an accident would occur in the absence of the precaution[284]), and, by thus making it more costly, tends to reduce, by deterrence, the amount of wasteful behavior in the future. The second idea, the moral or deontological, is illustrated by imposing, without regard to consequences, a duty on a person who injures another through failing to exercise the care expected of a person, to compensate the victim of his want of care.

A version of the second idea goes by the name (in academic circles) of corrective justice. A variant is "civil recourse theory," the brainchild of law professors John Goldberg and Benjamin Zipursky, expounded by them in a series of law review articles.[285] ***

I don't think it's enough to say that we all know a wrong when we see it and so we don't have to get analytical about it—that won't do even apart from the fact that such a throwing up of hands leaves the civil recourse theorist with nothing interesting to say about any aspect of tort law. Often there is no agreement about what

[283] O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).
[284] *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). The "Hand Formula" is restated in formal economic terms in RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 214 n.2 (8th ed. 2011). On the economic approach to tort law generally, see WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987).
[285] Listed in Christopher J. Robinette, *Why Civil Recourse Theory Is Incomplete*, 78 Tenn. L. Rev. 431, 432 n.3 (2011). Probably the place to start is with John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010). Other articles by them (separately or together) are cited in Table 1 *infra*. And soon there will be a book by them explaining their approach at greater length: [JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS (2020)].

is wrongful conduct. Is it wrong to defame a person by accident? (Maybe you innocently and indeed nonnegligently mixed him up with someone else.) Or to defame a dead person? Is it wrong for a pharmaceutical manager to fail to disclose on the label of a drug that it can cause serious injury to one out of a million users of it? Is it wrong for a doctor or a hospital to disclaim liability for an injury caused by the doctor's or the hospital's negligence? To fail (if a railroad) to install flashing signals at all rail crossings, and instead to rely at the less busy crossings on just crossbuck signs? These are analyzable issues, rather than issues that can be shrugged off by saying that "everyone in our society, in our culture, knows that …." I don't think civil recourse theory can have much impact if it doesn't address such questions. So I'll address them.

To begin with, much can be referred to conditions of survival in what scientists refer to as the "ancestral environment," the environment of primitive man in which human beings evolved to approximately their current biological state. It is easy to see that early man would not have thrived without a lively sense of "rights," not in a modern sense but in the sense of being quick to resist aggressions threatening his survival. One is put in mind of Holmes's aphorism that even a dog knows the difference between being kicked and tripped over; so we respond more quickly and emphatically to what we perceive as deliberate invasions of our property and bodily integrity and reputation than to accidental ones. That is instinctual but in a primitive culture it is often difficult to distinguish between the instinctual and the instrumental, and so we find strict liability a more pervasive standard of liability than in modern law. Only in a much more advanced stage of human social development do we recognize that some injuries are unavoidable, or if not strictly unavoidable then unavoidable at a cost less than the risk-adjusted cost of the injury—where P in the Hand Formula (injury is negligent if B < PL) is risk, L is the magnitude of the loss (injury) if the risk materializes and so PL is the expected loss, and B is the burden (cost) of precautions [§14.1.1.3]. Instinct gives way to cost-benefit analysis, and more broadly to instrumental or pragmatic considerations designed to make tort law, along with other social responses to injury, a sensible regulatory and compensatory regime, as well as a means for deflecting vengeful acts—which play a critical regulatory role in deterring aggression in pre-legal cultures—into socially less costly systems of redress.

So some principles of tort law rest on primitive, though not irrational, reactions to invasions of rights—the torts of assault and of battery are examples—and others on sophisticated notions of optimal social ordering, which give rise to new rights and to elaborate systems of remedy and procedure. The list of rights and wrongs evolves, and lawyers and economists and psychologists and sociologists can identify and evaluate the new rights and wrongs that emerge in the evolutionary process. So far civil recourse theory has played no role in this process. *** […continue reading]

REFLECTION:

- *Judge Posner, a leading theorist of the economic analysis of law, presents tort law as a system of regulation for deterring socially harmful conduct, rather than as a system of achieving justice as between individuals. In what way does the case law support (or not) the idea that deterrence is the principal goal of tort law?*
- *Consider Prof. Goldberg and Prof. Zipursky's reply to Judge Posner: that "he has somehow managed to criticize our work while ignoring it."[286] Is Judge Posner misrepresenting civil recourse theory?*

11.1.3 Cross-references

- *Caplan v. Atas* [2021] ONSC 670, [92]-[99]: §5.2.4.
- *Ahluwalia v. Ahluwalia* [2023] ONCA 476, [131]-[133]: §9.5.5.
- *Vancouver (City) v. Ward* [2010] SCC 27, [20]-[36]: §24.2.1.

11.1.4 Further material

- L. Solum, "Legal Theory Lexicon: Formalism and Instrumentalism" Legal Theory Blog (Jan 26, 2020).
- The Private Law Podcast, "Greg Keating on Tort Theory" (Apr 11, 2021) 🎧.
- "Why Ralph Nader Wants You to Know about Tort Law" Politico (Apr 14, 2021) 📺.

[286] J.C.P. Goldberg and B.C. Zipursky, "Civil Recourse Defended: A Reply to Posner, Calabresi, Rustard, Chamallas, and Robinette" (2013) 88 Indiana LJ 569, 575.

- The American Museum of Tort Law: Online Tour.
- C. Bruce, "Applying Economic Analysis to Tort Law" Economica (Jun 1, 1998).
- B. Shmueli, "Legal Pluralism in Tort Law Theory: Balancing Instrumental Theories and Corrective Justice" (2015) 48 U Mich J L Reform 745.

11.2 Constructive theories

11.2.1 Professors Jules Coleman, Scott Hershovitz and Gabriel Mendlow

J. Coleman, S. Hershovitz & G. Mendlow, "Theories of the Common Law of Torts" in E.N. Zalta (ed), The Stanford Encyclopedia of Philosophy (Stanford University, 2015), [3]

Corrective justice theory—the most influential non-economic perspective on tort law—understands tort law as embodying a system of first- and second-order duties. First order duties prohibit conduct (e.g., assault, battery, and defamation) or inflicting an injury (either full stop or negligently). (Some theorists believe that corrective justice has nothing to say about the character of these norms; others think that it helps define their scope and content.) Second order duties in torts are duties of *repair*. These duties arise upon the breach of first-order duties. That second-order duties so arise follows from the *principle of corrective justice*, which (in its most influential form) says that an individual has a duty to repair the wrongful losses that his conduct causes. For a loss to be wrongful in the relevant sense, it need not be one for which the wrongdoer is morally to blame. It need only be a loss incident to the violation of the victim's right—a right correlative to the wrongdoer's first-order duty.

So understood, corrective justice neatly accounts for the central features of tort law. It explains why tort law links victim and injurer, since it takes the injurer to have the duty to repair the wrongful losses that he causes. And it explains why tort law presents itself as a law of wrongs, rather than as a tool for inducing efficient behavior. ***

Civil recourse theory agrees with corrective justice theory that tort's normative structure involves a variety of first-order duties, duties that establish norms of conduct. Yet civil recourse theory takes a different view of the legal consequence of a first-order duty's breach. Whereas corrective justice theory holds that such a breach saddles the would-be defendant with a second-order duty—in particular, a duty of repair—civil recourse theory holds that no such second-order duty results directly from the breach. Rather, the breach of a first-order duty endows the victim with a *right of action*: a legal power to seek redress from her injurer. That this power so arises follows from what proponents regard as a deeply embedded legal principle—*the principle of civil recourse*—which says that one who has been wronged is legally entitled to an avenue of recourse against the perpetrator. *** […continue reading]

REFLECTION:

- *Continue reading Part 3 of Prof. Coleman, Prof. Hershovitz and Prof. Mendlow's summary of the theories of corrective justice and civil recourse. What do these theories have in common? What are their key differences?*
- *What differentiates these theories from instrumental and other theories of private law?*

11.2.2 Professor Ernest Weinrib

E.J. Weinrib, "Corrective Justice in a Nutshell" (2002) 52 U Toronto LJ 349, 349

Corrective justice is the idea that liability rectifies the injustice inflicted by one person on another. This idea received its classic formulation in Aristotle's treatment of justice in *Nicomachean Ethics*, Book V.[287] More recently, it has become central to contemporary theories of private law.

Aristotle's account presents corrective and distributive justice as two contrasting forms of justice. Corrective justice, which deals with voluntary and involuntary transactions (today's contracts and torts), focuses on whether one party has committed and the other has suffered a transactional injustice. Distributive justice

[287] Aristotle, *Nicomachean Ethics*, V, 2-5, 1130a14-1133b28.

deals with the distribution of whatever is divisible (Aristotle mentions honours and goods) among the participants in a political community. For Aristotle, justice in both these forms relates one person to another according to a conception of equality or fairness (the Greek *to ison* connotes both). Injustice arises in the absence of equality, when one person has too much or too little relative to another.

The two forms differ, however, in the way they construe equality. Distributive justice divides a benefit or burden in accordance with some criterion that compares the relative merits of the participants. Distributive justice, therefore, embodies a proportional equality, in which all participants in the distribution receive their shares according to their respective merits under the criterion in question.

Corrective justice, in contrast, features the maintenance and restoration of the notional equality with which the parties enter the transaction. This equality consists in persons' having what lawfully belongs to them. Injustice occurs when, relative to this baseline, one party realizes a gain and the other a corresponding loss. The law corrects this injustice when it re-establishes the initial equality by depriving one party of the gain and restoring it to the other party. Aristotle likens the parties' initial positions to two equal lines.[288] The injustice upsets that equality by adding to one line a segment detached from the other. The correction removes that segment from the lengthened line and returns it to the shortened one. The result is a restoration of the original equality of the two lines. *** […continue reading]

REFLECTION:

- *In what ways does the case law demonstrate the principle of corrective justice?*
- *What features of tort doctrine or practice operate to correct the injustice between a defendant and a plaintiff?*

11.2.3 Professor Robert Stevens

R. Brown, "Rights-Based Torts Theory Acquires New Ambition" (2008) 47 Canadian Business LJ 113, 113-117, 128

Nearly 40 years ago, Professor George P. Fletcher famously lamented that "[t]ort theory is suffering from declining expectations."[289] "[T]he thrust of the academic literature," he explained, "is to convert the tort system into something other than a mechanism for determining the *just* distribution of accident losses."[290] And so he castigated his contemporaries for seeing in tort law nothing more than a convenient makeshift insurance scheme or a tool for maximizing social utility by cost-spreading or for achieving efficient risk-avoidance. In more recent decades theoretical inquiries oriented towards that elusive reference point of *justice*—that is, *rights*—have enjoyed something of a resurgence, at least among Commonwealth tort lawyers. While in the United States the legal economists and enterprise liability theorists still (with some notable exceptions) [291] dominate most of the discourse, [292] important work has been done by Commonwealth tort scholars emphasizing the unity of private law and of tort law's place within that unity as a normative device designed solely to vindicate injured rights.

To date, however, most efforts have been partial in the sense that they have usually restricted themselves to a single aspect of tort law, usually the tort of negligence.[293] ***

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[288] *Ibid*. 1132b6.
[289] George P. Fletcher, "Fairness and Utility in Tort Theory" (1972), 85 Harv. L. Rev. 537.
[290] *Ibid.* (Emphasis added.)
[291] See *e.g.*, Jules Coleman, *Risks and Wrongs* (Cambridge, Cambridge University Press, 1992); John C.P. Goldberg and Benjamin C. Zipursky, "The Moral of *MacPherson*" (1998), 146 U. Pa. L. Rev. 1733; Richard W. Wright, "Justice and Reasonable Care in Negligence Law" (2002), 47 Am. J. Juris. 143.
[292] See *e.g.*, Robert D. Cooter and Ariel Porat, "Liability Externalities and Mandatory Choices: Should Doctors Pay Less?" (2006), 1 J. Tort L. (Article 2); Mark Grady, "Efficient Negligence" (1998), 87 Geo. L.J. 397; A. Mitchell Polinsky and Steven Shaven, "Should Liability be Based on the Harm to the Victim or the Gain to the Injurer?" (1994), 10 J.L. Econ. & Org. 427; Gregory C. Keating, "The Idea of Fairness in the Law of Enterprise Liability" (1997), 95 Mich. L. Rev. 1266; Richard A. Posner, "Wealth Maximization and Tort Law: A Philosophical Inquiry" in David G. Owen, ed., *Philosophical Foundations of Tort Law* (Oxford, Clarendon Press, 1995), p. 100.
[293] Ernest J. Weinrib, *The Idea of Private Law* (Cambridge MA, Harvard University Press, 1995); Allan Seever,

Enter Professor Robert Stevens' important new book *Torts and Rights*,[294] a comprehensive examination of tort law that, as such, should interest both the academic and practicing lawyer. ***

Stevens' rights model might best be understood by describing what it is *not*—that is, the "loss model"—which was neatly encapsulated by both the majority and dissenting reasons at the Supreme Court of Canada in *Cunningham v. Wheeler*.[295] "[R]ecovery in an action for tort is to compensate the injured party as completely as possible for the loss suffered …",[296] said Justice Cory for the majority. Similarly, for dissenting Justice McLachlin (as she then was), tort law's goal is to compensate the plaintiff fully by way of "recovery of losses which he has sustained."[297] Stevens' point is that this understanding of tort law sees the overall object as being to compensate plaintiffs for *damage*. Control devices such as the duty of care (or, one supposes, other obstacles to recovery such as the standard of care or factual causation) are seen as derogations from a general rule that rationalizes on some policy ground a plaintiff's inability to recover from the defendant.

A rights model, in contrast, is presented as deriving from the orthodox and uncontroversial proposition that rights theorists have generally espoused. Specifically, tort law concerns itself with the infringement of two kinds of primary rights (the violation of which gives rise to a secondary right to relief): (i) a general right in respect of which the world is impressed with a duty to refrain from interfering; and (ii) a personal right. As to the first category, our rights in our property,[298] our rights in our bodily integrity and our rights in our reputation are paradigmatic[299] although Stevens casts a wider net for general rights, including (for example) the right to vote. Personal rights include, obviously, rights under a contract but also, we are told, extra-contractual undertakings or assumptions of responsibility. Being personal, such duties are imposed only upon (in the case of a contract) parties privy to the contract or (in the case of an assumption of responsibility) upon the assuming party in respect of the beneficiary of the assumed obligation.[300] ***

At a general level, Stevens' focus on the distinction between general and personal rights produces an elegant account whose basic premises most rights theorists will readily accept. It stitches together in a coherent fashion some of our most important lines of common law tort authority, while amplifying prior rights' theorists' account of areas of tort law that have persistently vexed judges and lawyers alike. Take, for example, claims for pure economic loss in negligence [**§19.3**]. Whereas the loss model presumes recoverability but then selects among a collection of policy rationales for adopting a brightline rule leading to non-recovery, the rights model takes as its starting point the principled position that pure economic loss is not recoverable because it is not the product of an infringement of the plaintiffs right.[301] Here, Stevens makes good use of Lord Denning's reasons in *Spartan Steel and Alloys Ltd. v. Martin & Co. (Contractors) Ltd.*,[302] contrasting pure economic loss with what is commonly understood as consequential economic loss. The point is that the latter is recoverable because, as its moniker suggests, it is *consequential* upon the infringement of a right, just as the lost profits from the plaintiffs' in-progress "melts" in *Spartan Steel* were recoverable because they were consequential upon the damage to the melts. In contrast, the profits that

Rediscovering the Law of Negligence (Oxford, Hart Publishing, 2007).

[294] Robert Stevens, *Torts and Rights* (Oxford, Oxford University Press, 2007).

[295] (1994), 113 D.L.R. (4th) 1, [1994] 1 S.C.R. 359, [1994] 4 W.W.R. 153.

[296] *Ibid.*, at p. 7.

[297] *Ibid.*, at pp. 24-25. See also *R. v. Beatty*, [2008] I S.C.R. 49,289 D.L.R. (4th) 577, [2008] 5 W.W.R. 1 where (at para. 6) Justice Charron, for a unanimous Supreme Court of Canada, contrasted criminal negligence with "civil negligence, which is concerned with the apportionment of loss."

[298] He carefully qualifies "property" as meaning land, goods and intellectual property. A broader sense of property, after all, does not necessarily refer to the subject-matter of rights exigible against the world, such as a beneficiary's interest in trust property. See Stevens, *Torts and Rights*, *supra*, footnote 14, at p. 7.

[299] *Allen v. Flood*, [1898] 1 A.C. 1 at p. 29.

[300] The two instances may combine. For example, in *White v. Jones*, [1995] 2 A.C. 207 (H.L.), Lord Goff maintained that the defendant solicitor had implicitly assumed responsibility towards the intended beneficiary of his client, whose will he had negligently failed to prepare. Stevens argues persuasively (*supra*, footnote 14, at pp. 178-79) that there was no such assumption, since testamentary intention is, of necessity, ambulatory until the testator's death, and can therefore be revoked at will.

[301] Stevens, *Torts and Rights*, *supra*, at pp. 21 and 42.

[302] [1973] Q.B. 27 (C.A.).

would have been derived from the four *anticipated* melts were not recoverable because they were not consequential upon damage to property. ***

While Stevens would presumably agree with Fletcher's criticism that a truly legal theory should account for *the law* (and, more particularly, the rights that the law does or does not confer), his response in *Torts and Rights* is far from modest. It is what it purports to be: an account of the law of torts—that is, *all* of its central features and principal authorities—which seeks to show "the importance and truth of conceiving of torts and the infringement of primary rights."[303] *** […continue reading]

REFLECTION:

- *Why does Prof. Stevens reject the idea that tort law is primarily about redressing loss?*
- *How does a rights-based conception of tort law differ from a loss-based conception?*

11.2.4 Professors John Goldberg and Benjamin Zipursky

J.C.P. Goldberg & B.C. Zipursky, "Thoroughly Modern Tort Theory" (2021) 134 Harv L Rev F 184, 187-190

Tort law is a law of wrongs and redress. While it might seem banal, this proposition is complex and worthy of careful consideration. ***

Tort law identifies ways in which a person must refrain from treating another (or, more rarely, must assist another). Each of the torts—not just old, musty torts like battery, but also negligence, products liability, and other "moderns"—contains a relational directive that simultaneously specifies duties not to injure others through wrongful conduct and a right in those others not to be so injured. In turn, tort law confers on right-holders who can prove that they have been so mistreated a legal power to obtain the assistance of a court in ordering the duty-bearer to redress his or her wrong.

In a liberal democracy, we claim, government owes it to members of the political community to provide law of this sort.[304] *** Our defense of tort law, understood as a law for the redress of wrongs, is not "mere" philosophizing. It is a philosophically informed account of how this well-established component of our legal system fits within the history, law, and positive political morality of our liberal democracy. As much as we have benefited from reading Rawls and Scanlon, it is not in their works that we encountered the idea of government owing community members law for the redress of wrongs. Rather, it was in Blackstone's Commentaries;[305] in Jefferson's account of the Declaration of Independence as an "appeal to the tribunal of the world";[306] in the Fourteenth Amendment's language of "equal protection" and "due process";[307] in Judge Cardozo's insistence that a tort plaintiff "sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another";[308] and in the recognition by modern courts of feminist lawyers' compelling arguments for treating workplace sexual harassment as a distinct legal wrong.[309]

*** [A]ppreciating what it means to identify tort law as a law of wrongs and redress is crucial to making sense of the field. Indeed, this understanding permits us to explain various features of the law—from "golden oldies" such as causation requirements and the objectivity of the negligence standard to "contemporary classics" such as constitutional limits on punitive damages—that have flummoxed even experts.[310] Still, some of our critics have suggested that a tort theory, and especially a theory rooted in the

[303] Stevens, *Torts and Rights*, *supra*, footnote 14, at p. 3.
[304] John C.P. Goldberg & Benjamin C. Zipursky, *Recognizing Wrongs* (Cambridge MA: Harvard U Press, 2020) at 146.
[305] 3 William Blackstone, *Commentaries* *23.
[306] *The Writings of Thomas Jefferson* 407 (H.A. Washington ed., Philadelphia, J.B. Lippincott & Co. 1869).
[307] U.S. Const. amend. XIV, § 1.
[308] *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100 (N.Y. 1928) [§13.1.3].
[309] John C.P. Goldberg & Benjamin C. Zipursky, *Recognizing Wrongs* (2020), at 30–42, 127–29. Don't believe us? How about the U.S. Supreme Court? *See Mo. Pac. Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885) ("It is the duty of every State to provide, in the administration of justice, for the redress of private wrongs. …").
[310] Another example we can't resist mentioning: Sharkey claims to be at a loss to explain how Judge Cardozo could have embraced liability-friendly cheapest cost avoider analysis in *MacPherson v. Buick*, 111 N.E. 1050 (N.Y. 1916)

claim that torts are wrongs, needs more. They say it needs an account of which ways of injuring others count, and should count, as "wrongs," and why.

In this respect, as in many others, our work bears a close resemblance to that of the social welfare scholars, for we too are pragmatists about the content of tort law.[311] Before one provides an account of which wrongs are or should count as torts, one must ask why such an account is needed. Our answer to that question is that we need it to help judges who are charged with applying, refining, and redefining the contours of tort law in a manner that is principled and practical.[312] The way judges usually do so, and should do so, is to expound the common law. This is not a matter of finding the objective truth as to which acts really are wrongs, but of constructively carrying forth ideas, principles, and norms that are already in the law. In short, our claim is that we do not need a substantive theory of wrongs if we have a positive account of what the wrongs of tort law are and a normative theory of adjudication appropriate to this domain of law.

*** If anything, it is legal economists who bring excessively strong philosophical premises to their accounts of judging. For it is they (among others) who assume that, in hard cases, courts *have no choice but to reason instrumentally* by determining whether the imposition of liability for a certain kind of harm resulting from a certain kind of conduct will produce more social benefits than costs. *** […continue reading]

REFLECTION:

- *Prof. Goldberg and Prof. Zipursky respond to instrumentalism with a constructivist account of tort law: "the wrongs of tort are 'constructions' (or 'reconstructions') of injurious wrongs explicitly or implicitly recognized in doctrine and in social norms."[313] What does this mean?*
- *Which of the instrumentalist or constructivist perspectives most resonate with you as you read the case law?*

11.2.5 Cross-references

- *Non-Marine Underwriters, Lloyd's of London v. Scalera* [2000] SCC 24, [8]-[15]: §2.1.3.
- *Atlantic Lottery Corp. Inc. v. Babstock* [2020] SCC 19, [32]-[34]: §9.7.1, §15.1.1.
- *Rankin's Garage & Sales v. J.J.* [2018] SCC 19, [24]: §13.4.2.3.
- *Clements v. Clements* [2012] SCC 32, [19], [32], [41]: §16.2.3.

11.2.6 Further material

- The Private Law Podcast, "John Goldberg and Ben Zipursky on Recognizing Wrongs" (Mar 23, 2021) 🎧; HLS Library Book Talk (Feb 27, 2020) 📻.
- The Private Law Podcast, "Zoë Sinel on Corrective Justice" (May 17, 2021) 🎧.
- A. Ripstein, "Theories of the Common Law of Torts" in E.N. Zalta (ed), The Stanford Encyclopedia of Philosophy (Stanford University, 2022)
- J. Gardner, "Tort Law and Its Theory" in J. Tasioulas (ed), *The Cambridge Companion to the Philosophy of Law* (Cambridge: Cambridge University Press, 2016).
- A. Beever, "What Does Tort Law Protect?" (2015) 27 Singapore Academy LJ 626.
- T. Honoré, "The Morality of Tort Law—Questions and Answers" in D.G. Owen (ed) *The Philosophical Foundations of Tort Law* (Oxford: Oxford University Press, 1997).

[§19.1.1], only to forego it in *Palsgraf*, 162 N.E. 99. Catherine M. Sharkey, *Modern Torts: Preventing Harms, Not Recognizing Wrongs*, 134 Harv. L. Rev. 1423, 1436 n.46 (2021). Yet she never engages the explanation that we offer in our book and elsewhere. *See* Goldberg & Zipursky, *supra*, at 200 n.32; John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 147 U. Pa. L. Rev. 1733, 1817–21 (1998). If one avoids the mistake of reading *MacPherson* as a bit of reductive instrumentalism hidden behind lawyerly verbiage, one will have no trouble seeing how the two decisions hang together.

[311] Goldberg & Zipursky, *supra*, at 73–81 (discussing the strands of pragmatism at work in our account).

[312] The phrase "help judges" here is admittedly misleading, for we do not see a lot of judges out there seeking help from academics. The point is rather that, in educating lawyers (some of whom go on to be judges), scholars must bring to bear an understanding of the field that is true to the law and that can sustain the sort of reasoning that judges and lawyers should apply when deciding tort cases.

[313] J.C.P. Goldberg & B.C. Zipursky, *Recognizing Wrongs* (Cambridge MA: Harvard U Press, 2020), 233.

- Western University, *Lectures on Tort Law* 📺.

11.3 Critical theories

11.3.1 Professors Martha Chamallas and Jennifer Wriggins

E. Stabile, "Book Review: M. Chamallas & J.B. Wriggins, The Measure of Injury: Race, Gender, and Tort Law" (2012) 27 Berkeley J Gender, L & Justice 150, 150-152, 159

> It was originally believed that the 'reasonable man' standard [§14.1.1] was gender neutral …. But man is not generic except to other men …. Because 'reasonable man' was intended to be a universal term, the change to 'reasonable person' was thought to continue the same universal standard without utilizing the gendered term 'man.' The language of tort law was neutered, made 'politically correct,' and sensitized. Although tort law protected itself from allegations of sexism, it did not change its content and character.[314]

Tort law typically is not what first comes to mind when discussing areas of the law ripe for social justice-minded reform. As Martha Chamallas writes, "[g]ender and race have disappeared from the face of tort law. The old doctrines that explicitly limited recovery exclusively to one gender have been either abolished or extended on a gender-neutral basis."[315] ***

In *The Measure of Injury: Race, Gender, and Tort Law* [(New York: NYU Press, 2010)], Martha Chamallas and Jennifer B. Wriggins explore how the social identity of victims and cultural views on gender and race affect contemporary tort law in the U.S. While tort law has generally been seen as a domain where victims are viewed without attention to their gender or race,[316] *The Measure of Injury* proposes that unconscious biases, cultural values, and cause-and-effect judgments influence decision-making in tort law. To inform their analysis of gender, race, and tort law, Chamallas and Wriggins draw from feminist theory, critical race theory, and social and cognitive psychology. While there is substantial existing scholarship on torts as a gendered area of law,[317] Chamallas and Wriggins take a novel approach to the subject by examining the interface between gender and race. ***

Chamallas and Wriggins begin by explaining the theoretical frames they use to inform their approach to tort law. They define their approach as "critical" because it sits outside of the two dominant tort theories popular today—law and economics and corrective justice (p. 14). While these two theories describe negligence and physical accidents as the most important areas of tort law, Chamallas and Wriggins' scholarship focuses largely on intentional torts (p. 15). Similarly, the *Third Restatement of Torts*, which the authors use as their point of reference for the book, purports not to advance any policy goals, but rather, as scholar John Goldberg explains, solely to compensate the injured and deter antisocial conduct (p. 17). Chamallas and Wriggins depart from Goldberg's view of the *Restatement* as a clarifying document and propose that the *Restatement* can also function to channel visions of how the law could or should function (p. 18). The authors critically examine the stated objectives of the *Restatement* and argue for a broader definition of compensation and deterrence (p. 20). ***

Chamallas and Wriggins rely heavily upon feminist theory, including liberal feminism, cultural feminism, and radical feminism, in their analysis of gender (pp. 25-26). Refreshingly, they pay careful attention to intersectional feminism and acknowledge that intersecting axes of subordination can result in a multitude of different experiences for women (p. 26). However, the authors mainly limit their intersectional analysis to the interplay of gender and race, and in doing so, they ignore other relevant intersectional identities: sexual orientation, disability, class, etc. (p. 23). While limiting the text to issues of gender and race makes the

[314] Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. Legal Educ. 3, 22 (1988).
[315] Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. Pa. L. Rev. 463 (1998).
[316] Martha Chamallas, *supra*, at 463-65.
[317] *See* Leslie Bender & Perette Lawrence, *Is Tort Law Male?: Foreseeability Analysis and Property Managers' Liability for Third Party Rapes of Residents*, 69 Chi.-Kent L. Rev. 313 (1993); Rebecca Korzec, *Maryland Tort Damages: A Form of Sex-Based Discrimination*, 37 U. Bait. L.F. 97 (2007).

scope more manageable, the authors lose opportunities to explore other subordinating identities that likely influence the same types of cases.

To examine racial biases in tort law, the authors consider both explicit unequal treatment based on race and the implicit racial biases in supposedly neutral legal doctrines, as explained by critical race theorists (p. 27). Finally, the authors draw on the critical tort theories that pave the way for their scholarship. Earlier scholars fixed upon tort law as a site ripe for investigation into male bias, racial devaluation, and the disconnect between the standards used in civil rights cases and those used for determining tort liability (p. 31). The authors stress the importance of the relationship between civil rights law and tort law, and advocate breaking down the barriers between these two areas to generate a flexible vision of torts responsive to shifting social norms (p. 34). ***

*** The main theme of *The Measure of Injury* is clear: despite appearances of race and gender neutrality, the identity of plaintiffs makes a significant difference in how tort law claims are both presented and compensated (p. 183). While Chamallas and Wriggins suggest some practical solutions for remedying the injustices the book brings to light, their focus is mainly on examining the structural inequalities of tort law (pp. 188-I 89). The authors fiercely advocate for expanding the conceptual and practical limitations of tort law to alleviate the disparate impacts on women and minority plaintiffs, and they do not shy away from radical recommendations for reframing tort law. Their interdisciplinary methodology complements the intersectional nature of the work and lends fresh insights to their analysis. *** Although the election of the first black president who ran against a female vice presidential candidate induced much speculation about whether society was moving beyond racism and sexism, it is clear from *The Measure of Damages* that society still has a long way to go to identify and remove deep-seated racism and sexism within our own legal system. Chamallas' and Wriggins' work is a substantial step forward in calling attention to how tort law can be a vehicle for social justice[318] as well as a more complete method of compensation and deterrence for individual harms. […continue reading]

REFLECTION:

- *In which tort cases do you observe feminist, racial, cultural or poverty dynamics arising? In which cases do such dynamics seem to be lying beneath the surface of the judgment?*
- *What role can or should lawyers and judges play in advancing ideas of equality in tort cases?*

11.3.2 Professor Kathleen Mahoney

K. Mahoney, "Indigenous Legal Principles: A Reparation Path for Canada's Cultural Genocide" (2019) 49 American Rev Canadian Studies 207, 212-213, 218

The traditional legal theory underlying civil remedies available for injuries negligently or deliberately inflicted is the theory of corrective justice. The corrective justice theory posits that an individual has a duty to repair the losses that his or her wrongful conduct causes. A loss need not be one for which the wrongdoer is morally to blame; it need only be a loss incident to the violation of the victim's right—a right correlative to the wrongdoer's duty not to inflict the loss on the victim. Corrective justice seeks to repair the injury of the victim by putting the victim back in the position he or she was in prior to the injury taking place. Corrective justice remedies almost always take the form of compensation in the form of money.

One problem with the theory is that it is often not possible for a wrongdoer to repair the injury inflicted with money. When a victim suffers serious bodily injury, it may be possible for the wrongdoer to pay the victim's medical bills or compensate for lost wages, but the physical damage the victim suffered may be beyond repair. The problem is all the more striking when the wrong involves a serious affront to the victim's dignity and humanity. For example, it is doubtful that sexual abusers of children could repair the "loss" suffered by their victims, regardless of the amount of compensation paid. In cases such as these, corrective justice merely corrects the expressive significance of the wrong. The victims cannot be restored to the position they were in before the wrong, but their sexual abuse can still be treated as a wrong, and compensation thereby reasserts their right not to be violated (Coleman, Hershovitz, and Mendlow 2015). If corrective

[318] For a fuller discussion of tort law as a means to promote social justice, see Leslie Bender, *Tort Law's Role as a Too/for Social Justice Struggle*, 37 Washburn L.J. 249 (1998).

justice can offer no more than money and an assertion of rights, it is an unsuitable form of redress when harms are multiple and diverse such as the violations endured by students who attended Indian residential schools. Walker points out that while corrective justice as reflected in tort law sets out a moral baseline for acceptable conduct, it is not a suitable approach to correct historic acts or forms of injustice, such as those found to have occurred in the residential schools. Where the enforcement of a degraded moral status of individuals based on group membership has relentlessly occurred, especially where systemic conditions persist over extended periods of time based on group membership, corrective justice remedies are incapable of comprehending or correcting the relationship between the oppressed and the oppressors (Walker 2006). ***

*** Indigenous legal theory requires that appropriate, fair and just reparations must directly confront the historic, individual and collective effects of colonialism on indigenous peoples (Christie 2009). Questions that need to be asked include how can we move from Western criteria for reconciliation to an indigenous understanding of reconciliation? How can the relationship be rebalanced? How did the residential school strategy affect indigenous identity, relationships, family and citizenship? How did the schools affect the economic, cultural, and linguistic knowledge of indigenous peoples? How can we make space for indigenous law, conflict resolution, and peacemaking traditions? *** […continue reading]

REFLECTION:

- *How should lawyers, judges and scholars respond to Prof. Mahoney's questions?*
- *Should the redress of systemic and historic injustice fall within the purview of the private law of tort?*

11.3.3 Cross-references

- *Kohli v. Manchanda* [2008] INSC 42: §2.2.2.
- *Tam v. Chan* [2014] HKCFI 1480: §2.3.4.
- *Gokey v. Usher & Parsons* [2023] BCSC 1312: §2.3.3.
- *Binsaris v. Northern Territory* [2020] HCA 22: §2.2.4.
- *Ahluwalia v. Ahluwalia* [2023] ONCA 476: §2.3.5.
- *R v. Le* [2019] SCC 34: §2.4.5.
- *Wilkinson v. Downton* [1897] EWHC 1 (QB): §3.1.1.
- *ES v. Shillington* [2021] ABQB 739: §4.1.2.1.
- *Yenovkian v. Gulian* [2019] ONSC 7279: §4.1.3.1.
- *Norberg v. Wynrib* [1992] CanLII 65 (SCC): §6.3.2.1.
- *PP v. DD* [2017] ONCA 180: §6.3.2.2.
- *Peter Ballantyne Cree Nation v. Canada* [2016] SKCA 124: §7.1.4.
- *Victorian Railway Comm'rs v. Coultas* [1888] UKPC 3: §19.2.1.1.
- *Mitchell v. Rochester Railway Co.* (1896) 151 NY 107 (NY CA): §19.2.1.2.
- *Jane Doe v. Toronto Police Comm'rs* [1990] CanLII 6611 (ON Div Ct): §19.5.1.1.
- *Francis v. Ontario* [2021] ONCA 197: §19.5.2.3.
- *Canada v. Greenwood* [2021] FCA 186: §19.6.2.
- *Cloud v. Canada* [2004] CanLII 45444 (ON CA): §19.7.1.
- *Blackwater v. Plint* [2005] SCC 58: §19.7.2.
- *Brown v. Canada* [2017] ONSC 251, [2018] ONSC 3429: §19.7.3.
- *ACB v. Thomson Medical Pte Ltd* [2017] SGCA 20: §19.10.5.1.

11.3.4 Further material

- S. Moreau, Z. Sinel & J. Thomas, *Tort Law & Social Equality Project* (2022).
- Dissenting Opinions Podcast, "Deep Dive into Critical Race Theory" (May 2022) 🎧.
- "'The Crits'—The Influence of Critical Legal Studies" (J. Suk Gersen & J. Mow, 2017) 📺.
- J. Richardson & E. Rackley (eds), *Feminist Perspectives on Tort Law* (Oxford: Routledge, 2012).

11.4 Reflexive theories

11.4.1 Professor Peter Cane

P. Cane, Key Ideas in Tort Law (Oxford: Hart Publishing, 2017), 17-19

Some scholars have said that the common characteristic shared by all torts is that they protect 'rights' (for example, Stevens 2007); while others describe the golden thread that runs through tort law as a purpose or use such as 'compensating for harm', or 'deterring wrongful conduct', or doing 'corrective justice' between the parties. The last of these mooted uses has been particularly popular in recent years (for example, Weinrib 1995), while the second-last (that tort law provides incentives to behave in certain ways and not in others) attracted a lot of followers in the 1960s and 1970s (for example, Posner 1973) but never really took off outside the USA. *** They are all subject to much debate and disagreement. ***

It is unlikely that a satisfactory 'grand unifying theory' of the nature of a tort and tort law will ever be found; and the reasons are easy to find. Law is what we might call a 'cumulative' phenomenon. This means that once a legal rule or principle is made by an official or an institution with the power to make tort law, it will remain part of the law until it is 'unmade'. ***

The tort law of today is a complex amalgam of law-making over a period of centuries by many different judges and many successive Parliaments, as interpreted by scholars and applied by courts. *** We would not expect such a process to generate a highly coherent and unified body of law. We could liken tort law to a patchwork quilt, gradually sown together by a group of quilters, then used and repaired for generations: all the patches will have some things in common (although perhaps not very many), but the differences between them are just as important as any similarities to our appreciation of the whole quilt.

*** Scholars who attempt to find unifying theories of tort law are engaged in a similar task to that undertaken by the early textbook writers: trying to decide what *ought to be* included in a tort book and what ought to be left out. There is no official, 'legal' answer to this question because law-makers do not write law books. Put differently, perhaps, there is no 'formal code of tort law' which sets out all the basic rules and principles of tort law in one place. *** […continue reading]

REFLECTION:

- *Is Prof. Cane right to say that tort law has no underlying grand theory? Does this mean that theories of tort are not helpful in understanding what tort law is or does or should be?*

11.4.2 Professor Jane Stapleton

J. Stapleton, "Taking the Judges Seriously v. Grand Theories" in Three Essays on Torts (Oxford: Oxford University Press, 2021), 1-2

Law is a social practice, and so it is essential we see enunciated tort law as a human construct. Its primary materials are statutes and case law, and these are distilled by real people. These people might be persuaded by arguments that the law should, for example, be conceived as being all about one thing, say economic efficiency or the infringement of primary rights; or that it is only normatively coherent if springing from 'a single integrated justification'.[319] I label scholarly theories that conceive of law this way, 'Grand Theories'; and there is no doubt that they may well be of value in a number of ways to a number of different audiences. ***

The simple point I will be making about Grand Theories is that, for one of them to have real-world impact on the common law of torts, it would need to influence the judges responsible for identifying and articulating the law's development. To do so the theory would have to: rest on an accurate presentation of the existing state of the law; explicitly distinguish normative arguments from descriptive claims; and respectfully

[319] Ernest Weinrib, *The Idea of Private Law* (Oxford University Press, 1995) 35.

understand the constitutional role of the judge in the evolution of the common law.

In contrast to many Grand Theories, the type of tort law scholarship I and many others[320] pursue places judges at centre stage and seeks a constructive dialogue with them. Indeed, the great attraction of such scholarship is the way it may potentially assist the judiciary. Judges place a high value on this dialogue too. For example, Lord Reid described academia as a 'sister profession'; Lord Hope captured judicial-academic dialogue in the phrase 'helping each other to make law' in what Lord Neuberger called 'a constructive partnership' and Lord Dyson saw as 'a symbiotic co-existence … [in which] we need each other'; while Lord Goff thought it was the fusion of the work of judge and jurist 'which begets the tough, adaptable system which is called the common law'.[321]

I call the style of scholarship that seeks a creative interactive conversation with judges 'reflexive tort scholarship'. This is because not only is it capable of smoothly absorbing legal developments signalled by courts but it can also help prompt them by, for example, influencing courts to confront tensions in judicial reasoning and doctrinal outcomes, to re-structure precedents and reassess terminology. The adjective 'reflexive' signals this two-way conversation between legal academics and the Bench, and indirectly indicates why this type of scholarship is addressed primarily to Bench and Bar, and not to other academics. *** […continue reading]

REFLECTION:

- *Prof. Stapleton develops the idea of a reflexive perspective to tort law and scholarship in which legal actors—judges, lawyers, legal scholars—contribute to the development of the common law in a dialogue with each other. This perspective emphasises the ever-continuing evolution of the common law over time and rejects the idea that tort law has developed with respect to some grand unifying theory. Which cases or doctrines particularly seem to support this conception of tort law?*
- *Does a legal theory need to have real-world impact in order to be compelling?*
- *Is there evidence of any Grand Theories influencing judicial decision-making in the case law?*

11.4.3 Cross-references

- *Donoghue v. Stevenson* [1932] UKHL 100, [80]: **§13.1.1**.
- *R v. Imperial Tobacco Canada Ltd* [2011] SCC 42, [21] **§19**.

11.4.4 Further material

- J. Goudkamp & J. Murphy, "The Failure of Universal Theories of Tort law" (2015) 21 Legal Theory 47.
- P. Hodge, "The Scope of Judicial Law-Making in the Common Law Tradition" (2020) 84 Rabels Zeitschrift 211.
- Lord Burrows, "Seven Lessons from Inside the UK Supreme Court" *All Souls College Neill Lecture* (Oxford University, 2023).
- Lord Hoffmann, "Constitutionalism and Private Law" (2014-15) 6 UK Supreme Court Yearbook 160; *2015 Cambridge Freshfields Lecture* (Cambridge: University of Cambridge, 2015) 📺.
- Lady Hale, "Principle and Pragmatism in Developing Private Law" *2019 Cambridge Freshfields Lecture* (Cambridge: University of Cambridge, 2019) 📺.
- J. Morgan, "Judges, Jurists and Style" *Inaugural Lecture as Professor of English Law* (Cambridge: University of Cambridge, 2024) 📺.

[320] For a trenchant defence of the important place this sort of scholarship should have in universities, see Andrew Burrows, 'Challenges for Private Law in the Twenty-First Century' in *Private Law in the 21st Century* (eds K. Barker, K. Fairweather, and R. Grantham) (Hart, 2017) 29, 32–40.

[321] Lord Reid, 'The Judge as Law Maker' [1972] J.S.P.T.L. 22; Lord Hope, 'Helping Each Other to Make Law' (1997) 2 Scottish Law & Practice Quarterly 93; Lord Neuberger, 'Judges and Professors—Ships Passing in the Night?' Lecture at the Max Planck Institute, Hamburg, 9 July 2012; Lord Dyson, *Justice: Continuity and Change* (Hart Publ., 2018) 35; Lord Goff, 'The Search for Principle' Proceedings of the British Academy (London) Vol. LXIX (1983) 169, 171.

12 NO-FAULT COMPENSATION SCHEMES

12.1 New Zealand's no-fault accident compensation scheme

P. Cane, Key Ideas in Tort Law (Oxford: Hart Publishing, 2017), 105-106

In 1974 a system *** was introduced in New Zealand covering most accidental injuries. In England, a Royal Commission, which reported in 1978, recommended the enactment of a system of no-fault compensation for road accidents, but this never happened. In the 1970s and 1980s many no-fault compensation schemes were put in place around the world, mostly limited to road accidents or medical mishaps. However, by the late 1980s, the move to no-fault had run out of steam, and by the 1990s the political climate had become distinctly hostile to the sort of communitarian solutions to 'the problem of personal injuries' that had been favoured by reform-minded lawyers since the 1960s.

In England in the twenty-first century, total or even partial replacement of tort law with no-fault alternatives for dealing with personal injuries is politically inconceivable. The tort system has become an entrenched feature of the 'political economy' of personal-injuries law (Cane 2007). In the 1970s political debates about personal-injury law focused on how to replace tort law. Now, they focus on how to live with it while solving what are considered its most significant problems. *** […continue reading]

REFLECTION:

- *Why did other countries not follow New Zealand in replacing the system of private tort liability for personal injuries with a public no-fault compensation scheme? Why does Prof. Cane say such a development has become politically inconceivable?*
- *What are the policy arguments for and against replacing tort systems with no-fault compensation schemes?*

12.1.1 Overview of New Zealand's ACC scheme

"Overview of the ACC Scheme," Community Law Manual (Community Law, 2020), ch 19

New Zealand's accident compensation scheme provides accident insurance cover for accidental injuries to New Zealand citizens and residents and to temporary visitors to New Zealand.

Most ACC claims involve physical injuries caused by accidents. However, sometimes nervous shock and other mental conditions are covered too ***.

Sometimes physical conditions may be covered even though they're caused gradually (for example, through long-term exposure at work to substances like asbestos ***.

To make a claim, you don't have to show that some other person was at fault and caused your injury, and so ACC is sometimes described as "a no-fault scheme". Whether you fell over at home, or twisted your knee playing sport, or were injured in a car accident when another driver failed to give way to you, you'll be covered by ACC.

The ACC scheme has been running since the mid-1970s. When the scheme was introduced, it took away the right to sue in the courts for injuries covered by the scheme. However, if your injury isn't covered by ACC and was caused by someone else's actions, you can sue them in court for compensation ("damages"). For example, you might sue for negligence. ***

Costs covered under the accident compensation scheme include:

- medical and other treatment
- loss of income (weekly compensation)
- social rehabilitation (aimed at restoring your everyday independence outside the workplace)

• vocational rehabilitation (aimed at restoring your independence in your working life)

• lump sums for permanent disabilities ("permanent impairment"). *** […continue reading]

REFLECTION:

- *When compared to the heads of damages available under a tort system (§9), what costs born by victims of personal injuries in New Zealand are and are not covered by the ACC system?*
- *How is the ACC system different from a public health system?*[322]
- *In December 2019, Whakaari White Island in New Zealand erupted while 47 people were on the volcanic crater as part of a tourism excursion. Twenty-two people died from extreme burns and blast injuries and others were severely injured. What were the victims' legal entitlements in New Zealand in the absence of a right of action in tort?*[323] *What civil redress could injured foreign tourists pursue outside of New Zealand?*[324]

12.1.2 Accident Compensation Act 2001 (NZ)

Accident Compensation Act 2001 (NZ), No 49, ss 3, 317, 319

3. Purpose

The purpose of this Act is to enhance the public good and reinforce the social contract represented by the first accident compensation scheme by providing for a fair and sustainable scheme for managing personal injury that has, as its overriding goals, minimising both the overall incidence of injury in the community, and the impact of injury on the community (including economic, social, and personal costs), through—

(a) establishing as a primary function of the [Accident Compensation] Corporation the promotion of measures to reduce the incidence and severity of personal injury:

(b) providing for a framework for the collection, co-ordination, and analysis of injury-related information:

(c) ensuring that, where injuries occur, the Corporation's primary focus should be on rehabilitation with the goal of achieving an appropriate quality of life through the provision of entitlements that restores to the maximum practicable extent a claimant's health, independence, and participation:

(d) ensuring that, during their rehabilitation, claimants receive fair compensation for loss from injury, including fair determination of weekly compensation and, where appropriate, lump sums for permanent impairment:

(e) ensuring positive claimant interactions with the Corporation through the development and operation of a Code of ACC Claimants' Rights:

(f) ensuring that persons who suffered personal injuries before the commencement of this Act continue to receive entitlements where appropriate.

317. Proceedings for personal injury

(1) No person may bring proceedings independently of this Act, whether under any rule of law or any enactment, in any court in New Zealand, for damages arising directly or indirectly out of—

[322] See The Detail Podcast, "Time for a Royal Commission into Accident Compensation" (Nov 2, 2020) 🎧; A. Bradley, "Child Wins Five-year Battle with ACC for Birth-related Injury Cover" Radio New Zealand (Jan 24, 2022).
[323] See "Support to victims of the Whakaari/White Island eruption" (Accident Compensation Corporation New Zealand, Dec 2019); "'The world is watching': Victims of White Island volcano disaster get $10 million in reparations" 9 News Australia (Mar 1, 2024) 📺.
[324] See "Florida law 'very favourable' compared to NZ's as US couple sues over White Island—lawyer" 1 News New Zealand (Jun 29, 2020) 📺; "White Island eruption survivors can sue Royal Caribbean in Florida: court" 9 News Australia (Jun 18, 2021) 📺.

(a) personal injury covered by this Act; or

(b) personal injury covered by the former Acts.

(2) Subsection (1) does not prevent any person bringing proceedings relating to, or arising from,—

(a) any damage to property; or

(b) any express term of any contract or agreement (other than an accident insurance contract under the *Accident Insurance Act 1998*); or

(c) the unjustifiable dismissal of any person or any other personal grievance arising out of a contract of service.

(3) However, no court, tribunal, or other body may award compensation in any proceedings referred to in subsection (2) for personal injury of the kinds described in subsection (1).

(4) Subsection (1) does not prevent any person bringing proceedings under—

(a) section 50 or section 51 of the *Health and Disability Commissioner Act 1994*; or

(b) any of sections 92B, 92E, 92R, 122, 122A, 122B, 123, or 124 of the *Human Rights Act 1993*. ***

319. Exemplary damages

(1) Nothing in this Act, and no rule of law, prevents any person from bringing proceedings in any court in New Zealand for exemplary damages for conduct by the defendant that has resulted in—

(a) personal injury covered by this Act; or

(b) personal injury covered by the former Acts. ***

(3) In determining whether to award exemplary damages and, if they are to be awarded, the amount of them, the court may have regard to—

(a) whether a penalty has been imposed on the defendant for an offence involving the conduct concerned in the claim for exemplary damages; and

(b) if so, the nature of the penalty.

REFLECTION:

- *Why are civil proceedings in New Zealand for damages arising from ACC-covered personal injuries barred?*
- *What tort damages claims are not barred by the ACC scheme? Why?*

12.1.3 A v. Bottrill [2002] UKPC 44

Privy Council (on appeal from New Zealand) – [2002] UKPC 44, overruled [2010] NZSC 27

LORD NICHOLLS (LORD HOPE AND LORD RODGER concurring): ***

2. The question raised by this appeal is whether under the common law of New Zealand awards of exemplary damages in cases of negligence are, or should be, restricted to cases of intentional wrongdoing or conscious recklessness. ***

4. The Parliament of New Zealand has confirmed the existence of the court's jurisdiction to award exemplary damages, and to do so in cases of accidental personal injury: see section 396 of the *Accident Insurance Act 1998* [subsequently repealed and replaced]. The court exercises this power with considerable restraint. Awards are reserved for "truly outrageous conduct" which cannot be adequately punished in any other way: see *Dunlea v. Attorney-General* [2000] 3 NZLR 136.

5. The present appeal concerns, not the existence of this jurisdiction in New Zealand, but its outer limits. The issue raised is whether the court's power to award exemplary damages is bounded only by the need for the defendant's conduct to be so outrageous as to call for condemnation and punishment. Is this the demarcation of the court's jurisdiction in cases of negligence? Or is the jurisdiction more specifically, and more narrowly, confined?

The facts

6. These questions of law arise in a singularly unhappy case of medical negligence which has aroused much concern in New Zealand. It concerns the wholesale misreading of cervical smears in the Gisborne area.

7. Dr Bottrill is a pathologist. He retired six years ago. Before then he was in private practice in Gisborne. For many years he was effectively the only pathologist examining cervical smears taken from women in the Gisborne area.

8. The Pap smear is a method of screening for cervical cancer and its precursors. A sample, taken from the cervix, is processed in a laboratory and examined under a microscope. This examination usually enables the examiner to report that the cells are normal, or reveal low grade squamous intraepithelial lesion ("SIL"), or high grade SIL, or invasive cancer. Low grade SIL calls for monitoring. High grade SIL calls for intervention. It is completely curable, but failing intervention it will progress to invasive cancer. So prompt diagnosis is of fundamental importance.

9. Between November 1990 and December 1994 Dr Bottrill examined four smears taken from the plaintiff Mrs A. Mrs A was born in 1968 and trained as a nurse. In November 1990 Dr Bottrill reported low grade SIL and in December 1990 "no atypical cells seen". He gave a similarly clean bill of health on examination of the third smear, in May 1992. In December 1994 he reported high grade SIL, and recommended referral for assessment. Investigations followed, and Mrs A was diagnosed as suffering from invasive cervical cancer. She received extensive treatment, including a radical hysterectomy and extensive radiotherapy. The treatment was extremely unpleasant and had several consequences. The radiotherapy destroyed her ovaries. She could have no more children. The surgery left her with a weakness in her left leg. She suffered depression and was unable to work for some time.

10. Subsequent investigation revealed that all four slides examined by Dr Bottrill had been misread or misreported. The first three should have been reported as revealing high grade SIL and the fourth invasive carcinoma. High grade SIL, the immediate precursor of invasive cancer, was present as early as November 1990. Reading slides is not an exact science. Abnormality is a question of degree. But Dr Bottrill's reports on both the second and third slides were two reporting categories away from the correct readings. Had any of the initial three slides been correctly reported Mrs A's treatment would have been far less severe and her prognosis much better. She would not have needed a hysterectomy or radiation.

The proceedings

11. Mrs A made a successful claim for accident compensation. Disciplinary proceedings against Dr Bottrill resulted in a finding of conduct unbecoming a medical practitioner. Mrs A brought court proceedings against Dr Bottrill, claiming exemplary damages. After a four day trial Young J, in a careful and lucid judgment, dismissed the action. He applied the legal principle stated by Tipping J in the leading case of *McLaren Transport Ltd v. Somerville* [1996] 3 NZLR 424, 434:

> "Exemplary damages for negligence causing personal injury may be awarded if, but only if, the level of negligence is so high that it amounts to an outrageous and flagrant disregard for the plaintiff's safety, meriting condemnation and punishment."

12. Young J had no doubt that Dr Bottrill was guilty of professional negligence. But the judge concluded "by a narrow margin" that the case did not fall within the very limited category of negligence cases warranting an award of exemplary damages.

13. Two developments then took place, both as a result of publicity accompanying the trial. Mrs A became

aware of ten other women whose cervical slides were misreported by Dr Bottrill. ***

14. The second development was that public concern at the state of affairs revealed by the evidence at the trial led to the Health Funding Authority carrying out an investigation into the reporting of cervical smear results in Gisborne. All slides read by Dr Bottrill were submitted to re-reading in Sydney. The report from the Sydney laboratory covered 857 slides. The report was alarming. It showed that Dr Bottrill's false reporting rate was 50 per cent or higher. He had been reporting as normal more than one slide in every two which, in fact, revealed high grade SIL.

15. In the light of this fresh evidence Mrs A applied for a re-trial. On 28 March 2000 Young J granted the application. ***

16. Dr Bottrill appealed. The appeal was heard by a five judge court, comprising Richardson P, Gault, Thomas, Blanchard and Tipping JJ. By a majority of four to one, Thomas J dissenting, the court allowed the appeal and dismissed Mrs A's application for a retrial. ***

The scope of exemplary damages in cases of negligence

18. The Court of Appeal, in a judgment given by Richardson P on behalf of himself and Gault and Blanchard JJ, defined the scope of exemplary damages in cases of negligence as follows [2001] 3 NZLR 622, 641 (in paragraph 62):

> "… exemplary damages may be awarded for negligence only in those cases where the defendant is subjectively aware of the risk to which his or her conduct exposes the plaintiff and acts deliberately or recklessly taking that risk. ***"

19. Tipping J *** delivered a separate judgment, agreeing with the views of the majority. ***

20. In his dissenting judgment Thomas J at page 643 was unwilling to see the scope of exemplary damages restricted by imposing the subjective element favoured by the majority. The essence of exemplary damages is condemnation of reprehensible wrongdoing which is totally unacceptable to the community. Cases of inadvertent negligence should not be put beyond the reach of exemplary damages.

Principle

21. *** Exceptionally, a defendant's conduct in committing a civil wrong is so outrageous that an order for payment of compensation is not an adequate response. Something more is needed from the court, to demonstrate that such conduct is altogether unacceptable to society. Then the wrongdoer may be ordered to make a further payment, by way of condemnation and punishment.

22. Thus, in distinguishing the essentially different roles of compensatory damages and exemplary damages Lord Devlin said a jury should be directed that if, but only if, the amount they have in mind to award as compensation is 'inadequate to punish [the defendant] for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it', then they might award exemplary damages: see *Rookes v. Barnard* [1964] AC 1129, 1228. In *Broome v. Cassell & Co Ltd* [1972] AC 1027, 1060, Lord Hailsham of St Marylebone LC approved this passage as a most valuable and important contribution to the law of exemplary damages. ***

51. For these reasons the Board's view is that, as a matter of principle and authority, intentional wrongdoing or conscious recklessness is not an essential prerequisite to an order for payment of exemplary damages. Legal principle does not require that the court's jurisdiction should be limited in this way. On this their Lordships respectfully part company with the Court of Appeal. Thus one strand of that court's reasoning falls away.

Policy

52. Their Lordships turn to the other strand: legal policy. The law must be practical as well as principled. The majority of the Court of Appeal [2001] 3 NZLR 638 paragraphs 49-52 referred to "three powerful legal policy considerations" pointing "strongly" in favour of its conclusion.

53. The first of these relates to the difficulty of drawing a line if intentional wrongdoing or conscious recklessness were not a prerequisite. This has already been discussed above.

54. As to the other two policy considerations, their Lordships' reading of the majority judgment of the Court of Appeal is that the factor most influencing the court's view is the existence of the statutory accident compensation scheme in New Zealand. This legislation bars proceedings for damages arising out of accidental personal injury suffered by a person in New Zealand. This bar should not lead the courts to extend the role of exemplary damages to reflect any assumed inadequacies in the legislative scheme. That would be to subvert the social and economic policies underlying the scheme and require people to carry insurance cover or self-cover themselves against compensation liability intended to be paid for by accident compensation premiums: page 637, (paragraph 45).

55. The court's concern is that, although exemplary damages are intended to punish the defendant and not to compensate the victim, those who are injured by the negligence of others may all too readily see the court's continuing jurisdiction to award exemplary damages as providing a means to augment their statutory compensation. The consequences for the public interest would be "unacceptably expansive": page 638, paragraph 51. If the need for conscious appreciation by the defendant of risk to the plaintiff were not a prerequisite, the class of potential claimants would be so wide and the circumstances for consideration so variable that "the practical limits of the potential liability for punishment would be very difficult to predict" (paragraph 51). This would have economic and social policy implications, including the responses of those at risk of proceedings and, in particular, the cost of the services they supply. There would also be insurance ramifications (paragraph 52). ***

59. The stated policy reasons are essentially "floodgates" arguments. The court is concerned at the prospect of an increase in claims for exemplary damages for personal injuries and the social and economic implications this would have. In *Daniels v. Thompson* [1998] 3 NZLR 22, 29-30, Henry J referred to the "recent upsurge in [claims for exemplary damages] … said to be attributable, at least in part, to the accident compensation scheme, and more recently the reduction in benefits payable under it".

60. Here it is important to distinguish between an increase in the number of unsuccessful claims and an increase in the number of successful claims. Although the former do not result in awards of exemplary damages, they do involve defendants in expense and inconvenience. As to these claims, it must be questionable whether the advertent conduct only limitation would have a significant effect on the flow of claims for exemplary damages in negligence cases. Claimants who are prepared to assume the burden of proving that the defendant's conduct satisfies the outrageous criterion would seem unlikely to be deterred by having to shoulder the further burden of persuading the court that the defendant "must have known" of the risks. Moreover, it is in any event difficult to see how the possibility of a spate of ill-founded claims can be a good reason for raising the exemplary damages threshold. That would be to limit the scope of the substantive law in response to the possibility of procedural problems. That would be to exclude the good along with the bad, the well-founded claims along with the ill-founded. ***

64. For these reasons their Lordships consider that under the common law of New Zealand the court's jurisdiction to award exemplary damages in cases of negligence is not rigidly confined to cases where the defendant intended to cause the harm or was consciously reckless as to the risks involved. ***

72. Their Lordships will humbly advise Her Majesty that this appeal should be allowed. The order of the Court of Appeal should be set aside. Young J's order for a new trial will be restored. ***

LORD HUTTON AND LORD MILLETT dissented.

REFLECTION:

- *What was the appropriate mechanism(s), legal or otherwise, for holding Dr. Bottrill to account for his pervasive medical negligence? What lessons should be learned from this tragic saga?*[325]
- *What are the principles and policy considerations for and against allowing negligence actions seeking*

[325] See F. Barber, "Who is this man Michael Bottrill?" The New Zealand Herald (4 Aug, 2000); National Screening Unit New Zealand, "Cervical Screening Inquiry" (Ministry of Health New Zealand, 2015).

punitive damages to proceed in New Zealand alongside a victim's ability to recover under the ACC system?

- *In Couch v. Attorney-General (No 2) [2010] NZSC 27 the New Zealand Supreme Court—over a strong dissent from Elias C.J.[326]—departed from this Privy Council decision and reinstated the Court of Appeal's view in Bottrill [2001] 3 NZLR 622 (CA) that in New Zealand punitive damages are unavailable for inadvertent negligence. Which is the more principled position in law? Which position strikes the better policy balance?[327]*

12.1.4 Taylor v. Roper & Attorney-General of New Zealand [2023] NZSC 49

New Zealand Supreme Court – [2023] NZSC 49

GLAZEBROOK AND WILLIAM YOUNG JJ. (FOR THE COURT):

1. Ms Taylor seeks compensation for post-traumatic stress disorder (PTSD) caused by Mr Roper sexually assaulting and falsely imprisoning her in the late 1980s while both were employed by the Royal New Zealand Air Force (RNZAF). On the evidence, her PTSD developed shortly afterwards, albeit that it was not diagnosed until much later and not linked to the assaults until 2015.

2. The issues in the appeal and cross appeal to this Court relate to the effect of the accident compensation scheme on Ms Taylor's claim. ***

Factual background

3. Ms Taylor joined the RNZAF in 1985 at the age of 18. She was stationed at the base in Whenuapai as a driver in the Motor Transport section. Her rank was aircraftman, the lowest of the six non-commissioned ranks. Mr Roper was her superior. At the relevant time he was a sergeant (three ranks higher than Ms Taylor).

4. Ms Taylor says that Mr Roper bullied, verbally abused, sexually harassed, inappropriately touched and falsely imprisoned her between 1985 and 1988. This included indecently assaulting her while she was driving him home late at night and regularly locking her and leaving her in a tyre cage. She says she complained about his conduct but the RNZAF failed to do anything about it.

5. In 2014, Mr Roper was found guilty of sexual offending against members of his family and three other women. Ms Taylor contacted the police and, in 2015, she was interviewed as part of an independent inquiry into Mr Roper's conduct. She filed civil proceedings in the High Court in 2016 and discontinued her police complaint.

Procedural history

6. In the High Court, Ms Taylor pleaded four causes of action: assault, intentional infliction of emotional

[326] At [1]: "I dissent from the [majority's] conclusion. It reintroduces a "cause of action" condition for exemplary damages despite earlier rejection in New Zealand, Australia, and Canada of similar attempts in the United Kingdom at such restrictions as unprincipled and arbitrary. It requires construction of a "species of negligence" in which intention or conscious recklessness is an element, in order to exclude a remedy of otherwise general application once liability in tort is established. The restriction is justified on the basis that exemplary damages are "anomalous". Such assessment rests in part on the erroneous but persistent view that making an example of the defendant is not a proper function of the law of torts. That view has been accurately characterised as question-begging. (By Lord Wilberforce in *Broome v. Cassell & Co Ltd* [1972] UKHL 3; [1972] AC 1027 (HL) at 1114; and Cooke P in *Re Chase* [1988] NZCA 181; [1989] 1 NZLR 325 (CA) at 332–333. See *Uren v. John Fairfax & Sons Pty Ltd* [1966] HCA 40; (1966) 117 CLR 118 at 130–131 per Taylor J and at 149–150 per Windeyer J. And see Nicholas McBride "Punitive Damages" in Peter Birks (ed) *Wrongs and Remedies in the Twenty First Century* (New York, 1996) 175, who says at 195 that it is "a conclusion masquerading as an argument".) It is unhistorical (As described by Taylor J and Windeyer J in *Uren v. John Fairfax & Sons Pty Ltd* [1966] HCA 40; (1966) 117 CLR 118 at 136–139 and 152–153.) and was rejected in New Zealand by all members of the Court of Appeal in *Taylor v. Beere* [1982] NZCA 15; [1982] 1 NZLR 81 (CA) at 85 per Cooke J; at 90 per Richardson J; and at 95 per Somers J; see also Cooke J in *Donselaar v. Donselaar* [1982] NZCA 13; [1982] 1 NZLR 97 (CA) at 106."

[327] See *ACB v. Thomson Medical Pte Ltd* [2017] SGCA 20, [189]-[206] [§19.10.5.1].

distress, false imprisonment (against both Mr Roper and the RNZAF) and breach of duty of care as an employer (against the RNZAF only).

7. Ms Taylor claimed that, as a result of Mr Roper's actions, she suffered from extreme distress, depression, anxiety and PTSD. She sought general damages, exemplary damages, vindicatory damages, aggravated damages, special damages for loss of earnings and medical expenses, as well as interest and costs. ***

9. The High Court found on the balance of probabilities that Mr Roper had assaulted and falsely imprisoned Ms Taylor.[328] It also found that those actions had caused Ms Taylor's PTSD but that there was insufficient evidence that it had caused her anxiety or depression.[329] ***

12. *** [T]he High Court considered that Ms Taylor had cover for her mental injury arising from the assaults under the *Accident Compensation Act 1982* (the 1982 ACC Act).[330] It did not matter that the Accident Compensation Corporation historically had rejected claims for mental injury alone until the Court of Appeal's ruling in *Accident Compensation Corp v. E* in 1991.[331] *** The Judge held, therefore, that the claim was barred by s 317(1)(b) of the *Accident Compensation Act 2001* (the 2001 ACC Act) as Ms Taylor had cover under the 1982 ACC Act.[332] ***

Legislative history

33. The objectives underpinning New Zealand's accident compensation scheme were set out in the Royal Commission of Inquiry report *Compensation for Personal Injury in New Zealand* (the Woodhouse Report).[333] At the time of the Woodhouse Report's publication, New Zealand's accident compensation regime consisted of a trifecta of the *Workers' Compensation Act 1956*, the *Social Security Act 1938* and actions in tort.[334] The Woodhouse Report recommended that this "fragmented and capricious"[335] system be replaced with one which was "unified and comprehensive".[336] A key plank of this new system would be the abolition of common law actions for personal injury, which the authors found to be illogical, uncertain, costly, slow-moving and an impediment to rehabilitation.[337] Overall, the authors of the report sought the creation of a scheme which favoured granting wide-ranging cover on a no-fault basis, unrestricted by earlier legal tests.[338]

34. Thus, the accident compensation scheme was set up to grant wide-ranging cover on a basis which was efficient, comprehensible and not beleaguered by 'capricious' legal tests. In exchange for this broad coverage under the accident compensation scheme, New Zealanders are held to a "social contract" where they forgo their right to sue under the common law.[339] The accident compensation scheme was not implemented merely to be another option alongside damages, it was intended to be a 'unified' scheme which would replace the previous regime.

35. Subsequent to the Woodhouse Report, a White Paper[340] and a Select Committee report were also published.[341] The accident compensation regime came into force on 1 April 1974 with the passage of the

[328] *M v. Roper* [2018] NZHC 2330 (Edwards J) [HC judgment] at [74]–[75] and [77].
[329] At [122] and [125].
[330] At [171] and [180].
[331] At [165] and [167] citing *Accident Compensation Corp v. E* [1992] 2 NZLR 426 (CA).
[332] The Judge therefore did not need to consider whether there was also cover under the 2001 ACC Act itself.
[333] A O Woodhouse, H L Bockett and G A Parsons *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (Government Printer, December 1967) [Woodhouse Report].
[334] At [1].
[335] At [1].
[336] At [278(a)].
[337] At [78].
[338] At [55]–[63].
[339] *Brightwell v. Accident Compensation Corporation* [1985] 1 NZLR 132 (CA) at 139-140; *Queenstown Lakes District Council v. Palmer* [1999] 1 NZLR 549 (CA) at 555; and 2001 ACC Act, s 3.
[340] Department of Labour "Personal Injury: A Commentary on the Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand" [1969] IV AJHR H50.
[341] Personal Injury Compensation Committee "Report of the Select Committee on Compensation for Personal Injury in

Accident Compensation Amendment Act 1974 (the 1974 ACC Act), providing entitlements for those who suffer "personal injury by accident".[342] It provided cover for personal injured suffered after 1 April 1974. The 1974 ACC Act was preceded by the *Accident Compensation Act 1972* (the 1972 ACC Act). This was a "scaled-down" version of the Woodhouse Report's recommendations, only providing cover for victims of motor vehicle accidents and employees.[343] ***

36. The 1982 ACC Act consolidated and amended the 1972 ACC Act and its amendments. ***

37. The 1992 ACC Act reduced the scope of cover for mental injury generally by limiting the definition of "personal injury" to "the death of, or physical injuries to, a person, and any mental injury suffered by that person which is an outcome of those physical injuries".[344] At the same time, that Act introduced a new and separate category for cover for mental injury caused by certain criminal acts.[345] These acts included indecent assault, among other sexual offences.[346] ***

38. The *Accident Insurance Act 1998* (the 1998 ACC Act) extended cover for mental injury caused by certain criminal acts suffered before 1 April 1974 provided that treatment was first received after 1 July 1999. This was achieved through ss 40 and 44, which are both largely in the same form as what is now found in ss 21 and 36 of the 2001 ACC Act.

39. The 2001 ACC Act replaced the 1998 ACC Act. Under s 21 of the 2001 ACC Act, in order to have cover, a person must suffer the mental injury on or after 1 April 2002, whether "inside or outside New Zealand".[347] The mental injury must have been caused by an act performed by another person against the claimant in New Zealand.[348] The act must be within the description of one of the specified offences listed in Schedule 3 of the 2001 ACC Act.[349] Schedule 3 includes indecent assault.[350] Section 36(1) of the 2001 ACC Act provides that, for the purposes of ss 21 or 21B, the date on which the person suffers mental injury is the date on which the person first receives treatment for the mental injury. ***

The cross appeal ***

46. We deal first with Ms Taylor's argument that she did not have cover under the 1982 ACC Act because indecent assault was not covered by the Act. We do not accept that submission. ***

47. The High Court found that Mr Roper's assaults on Ms Taylor caused her PTSD.[351] The effect of *Accident Compensation Corp v. E* was that Ms Taylor suffered personal injury by accident when she developed that disorder.[352] This was in the late 1980s. ***

48. We also agree with the Court of Appeal that Ms Taylor had cover under the 2001 ACC Act. *** Ms Taylor first received treatment in 2015 that linked her PTSD to the events at Whenuapai.[353] Her injury was

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New Zealand" [1970] IV AJHR I15.

[342] *Accident Compensation Amendment Act 1974* [1974 ACC Act], s 2.

[343] Before the 1972 ACC Act came into force, the government changed, introducing the 1974 ACC Act which substantially expanded the accident compensation scheme's scope of coverage. Section 1 of the 1974 ACC Act states that it is to be "deemed part" of the *Accident Compensation Act 1972*: see Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at 25.

[344] *Accident Rehabilitation and Compensation Insurance Act 1992* [1992 ACC Act], s 4.

[345] Section 8(3) and sch 1.

[346] Note, the *Accident Compensation Act 1982* [1982 ACC Act] included cover for bodily injuries caused by criminal acts.

[347] Section 21(1)(a).

[348] Subsections 21(1)(b), 21(2)(a) and 21(2)(b)(i). Or, if the claimant is ordinarily resident in New Zealand, it may have been performed on the claimant outside New Zealand s 21(2)(b)(ii).

[349] Section 21(2)(c).

[350] The Court of Appeal confirmed that Mr Roper indecently assaulted Ms Taylor: First CA judgment, *above*, at [142]. Section 21(3) says that, for the purposes of this section, it is irrelevant whether or not the person is ordinarily resident in New Zealand on the date on which he or she suffers the mental injury.

[351] HC judgment, *above*, at [125].

[352] *Accident Compensation Corporation v. E*, *above*, at 433–434.

[353] In its first judgment, the Court of Appeal found that Ms Taylor first received treatment for PTSD long after 2002,

therefore deemed by s 36(1) to have been suffered within the requirements of s 21. ***

50. By virtue of s 317(1)(a) of the 2001 ACC Act, no person may bring proceedings for damages arising directly or indirectly out of personal injury covered by the 2001 ACC Act or, by virtue of s 317(1)(b), if there is cover under former ACC Acts. As noted above, this is the result of the "social contract" which underlies the entire accident compensation scheme—citizens forgo their common law rights in exchange for comprehensive coverage. From the beginning, the accident compensation scheme has sought to be a "unified and comprehensive" system, requiring the closing off of the tortious avenues for recovery to which plaintiffs had access prior to the scheme's introduction.[354]

51. In this case, Ms Taylor had cover under the 1982 ACC Act. This means that the ban in s 317(1)(b) applies.[355] As Ms Taylor also had cover under the 2001 ACC Act, the ban in s 317(1)(a) applies. This means that the cross appeal must be dismissed.

The appeal ***

Damages for false imprisonment

57. As we have noted in our discussion of the cross appeal, we are satisfied that Ms Taylor has cover under the accident compensation scheme for her PTSD. As we will now explain, we are also satisfied that her cover in relation to PTSD excludes any common law claim in relation to it based on false imprisonment.

58. The effect of s 317 of the 2001 ACC Act is that Ms Taylor may not bring a claim for damages arising directly or indirectly from personal injury that is covered under the 2001 ACC Act or the former Acts (relevantly the 1982, 1992 and 1998 Acts).

59. The focus of s 317 is on the personal injury rather than its cause. If Ms Taylor had cover in relation to her PTSD, s 317 excludes any claim based on other tortious conduct for compensatory damages in relation to that PTSD. ***

64. The majority in the Court of Appeal relied on *Willis*[356] in coming to the view that Ms Taylor could seek compensatory damages for false imprisonment. That case arose from the importation by the plaintiffs of two motor vehicles that were alleged by a customs officer to have been smuggled. The plaintiffs maintained that they had been unlawfully detained during their interactions with that customs officer. Charges of smuggling that were subsequently laid against them were dismissed and they issued proceedings claiming damages for malicious prosecution, negligence and, relevantly, false imprisonment. In relation to the claim for false imprisonment, they sought damages for "inconvenience, humiliation and distress".[357]

65. In issue in the Court of Appeal in *Willis* was whether that claim was precluded by the 1982 ACC Act. This point was addressed by the Court in this way:[358]

> False imprisonment is the unlawful total restraint of the liberty of a person. It may be but is not necessarily brought about by force or the threat of force …. Force or the threat of force is not the gist of the cause of action and Atkin LJ even held that a person may be imprisoned without being aware of it at the time …. Applying again the tests of the purposes of the Accident Compensation legislation and the natural and ordinary use of [language], we have come to the conclusion that false imprisonment as such is outside the purview of the Act. In ordinary speech we do not think that it would be said of anyone who had been detained as the plaintiffs claim to have been that he

although it did not specify a precise year: First CA judgment, *above*, at [143]. In its recall judgment, the Court of Appeal found that the date on which Ms Taylor first received treatment for PTSD was "subsequent to 1 October 2008 and most likely not before November 2015": CA recall judgment, above at [15].

354 The Woodhouse Report, *above*, at [278(a)].

355 As she is covered by the 1982 ACC Act it is irrelevant whether she may have had cover also under the 1992 and 1998 ACC Acts. It suffices if she had cover under one of the former Acts. ***

356 *Willis v. Attorney-General* [1989] 3 NZLR 574 (CA) [*Willis*].

357 *Willis*, *above*, at 576.

358 At 579 (emphasis added).

> or she had suffered personal injury by accident.
>
> Accordingly we hold that claims for damages for false imprisonment or abuse of rights amounting to false imprisonment (which appears to add nothing) are not barred by the Act. If a plaintiff were to claim damages (other than exemplary) for assault or battery, the position would be different. Such claims are barred, but they are not made by the plaintiffs here. *If the detention of a plaintiff has been accompanied by physical injuries, damages cannot be claimed for those or for the pain and suffering they have caused.*
>
> No doubt there is a grey area in which it can be argued that distress or humiliation or fear for which a plaintiff alleging false imprisonment seeks damages amounts to or overlaps with personal injury by accident. But to make the Act work as Parliament must have intended … we think that the clear rule must be adopted that any claims for any kind of damages for false imprisonment alone and for any distress, humiliation or fear caused thereby are outside the scope of the accident compensation system and unaffected by the Act. *If such mental consequences have been caused by both false imprisonment and assault or battery, a plaintiff can still claim damages for them. It is enough if the false imprisonment has been a substantial cause*.
>
> Trial Judges will adopt a common sense approach, guided by what is within the broad spirit of the accident compensation system and what is outside it. Any difficulties are likely to be more theoretical than practical.

66. The second of the passages that we have emphasised was at the heart of the reasoning of the Court of Appeal majority in the judgment under appeal.[359] On the approach of the majority, it meant that, if the false imprisonment suffered by Ms Taylor were a substantial cause of her PTSD, she is entitled to compensatory damages.[360]

67. But the bar on claims for damages applies if the injured person has cover for the personal injury for which damages are sought.[361] Where a personal injury is the result of more than one factor, only one of which engages the entitlement to compensation, cover is available if that factor was a material cause of the personal injury. As long as this requirement is met, cover will not be negated by the fact that the event has one or more other causes which do not engage the entitlement. The way in which the bar of common law claims has been expressed means that where there is cover, there is no parallel right to seek damages in relation to the same injury.

68. A possible explanation for the second passage that we have emphasised is that the Court of Appeal in *Willis* may have assumed that physical injury was a prerequisite to cover under the 1982 ACC Act. It was only established definitively two years later that this was not the case: in *Accident Compensation Corp v. E*. This explanation is consistent with the first of the passages that we have emphasised. We think it most unlikely that the Court of Appeal in *Willis* was of the view that a claim for false imprisonment could be brought for mental injury in respect of which the plaintiff had cover. This would essentially amount to double recovery for the same injury.

69. An important purpose of damages in tort is to place the plaintiff in the position they would have been in if the injury had not occurred. When the accident compensation scheme provides compensation, this justification for imposing tortious compensatory damages no longer exists. To allow double recovery would run counter to the logic of the scheme's underlying social contract, where the need for compensatory damages is replaced with universal compensation.[362]

70. If, however, the Court of Appeal in *Willis* was of the view that there could be a claim for false imprisonment in such circumstances, then we consider that it was mistaken.

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[359] First CA judgment, *above*, at [206]–[208].
[360] At [206].
[361] 2001 ACC Act, s 317.
[362] See earlier discussion of purpose of the scheme and history of the ACC Acts at [33]–[41].

Conclusion

71. For the above reasons, we conclude that Ms Taylor cannot sue for compensatory damages for false imprisonment. ***

REFLECTION:

- *Prof. McLay describes ACC coverage as having a push-me-pull-you effect: if you qualify to be compensated by the accident compensation scheme, generally any potential common law action will be barred, and vice versa.[363] Does this effect operate to the benefit or detriment of personal injury victims in New Zealand?*
- *When might a victim want access to the tort system instead of coverage provided by ACC?[364]*
- *When might a victim want coverage provided by ACC instead of access to the tort system?[365]*

12.1.5 A Canadian tort lawyer's perspective on New Zealand's ACC scheme

L.N. Klar, "New Zealand's Accident Compensation Scheme: A Tort Lawyer's Perspective" (1983) 33 U Toronto LJ 80, 80-83, 105-107

The New Zealand accident compensation scheme is the most extensive no-fault compensation program for accident victims in existence today and as such has been of immense interest to those involved with the common law of torts. The challenge presented to tort lawyers by the program's abolition of common law rights for personal injury victims is obvious: can the civil cause of action be eliminated without any appreciable harms to the society and in fact with benefits to the society as promised by tort law abolitionists? ***

The New Zealand accident compensation program has adopted a non-litigious approach to the compensation of accident victims. It has eliminated common law rights and has replaced them by a compulsory, universal social insurance program which forms part of the mosaic of an intricate social welfare state. Notions of 'fault,' 'deterrence,' 'punishment,' or 'retributive justice' are foreign to the program's theory and practice, except in very exceptional circumstances such as the refusal to compensate those persons who wilfully inflict their injuries on themselves. Unlike tort law, whose primary emphasis is on 'individual responsibility,' and where compensation is predicated upon the fault of a tortfeasor, the ethic of the New Zealand scheme is the community's responsibility to compensate the disabled person and the latter's right to receive such compensation with no, or at most, very few, questions asked. The victim's entitlement has been explained in the following manner:

> [S]ociety as a whole should pay the cost of progress as well as reap the benefits. Justice demands that principles of equity be invoked to determine the standard of payment; what an individual actually loses when a community adopts a given way of life should be restored by the community. Such restoration is the right of the individual by virtue of being a victim, and no further test of eligibility should be required. Such rights exist for all on a universal basis.[366]

As stated in the Woodhouse Report, 'The nation has not merely a clear duty but also a vested interest in urging forward the physical and economic rehabilitation of every adult citizen whose activities bear upon the general welfare.'[367]

While not denigrating the value implicit in Woodhouse's notion of 'community responsibility,'[368] tort law

[363] LexisNexis Lex & Lore Podcast, "The Push-Me-Pull-You of ACC Coverage" (Jul 29, 2020) 🎧.
[364] See A. Mau & C. Owen, "Abused airwoman Mariya Taylor loses Supreme Court fight for compensation" Stuff News (May 11, 2023) 📺.
[365] See A. Wilkins, "Woman wins years-long ACC fight for recognition of the harm 'revenge porn' caused her" Newshub (May 3, 2023) 📺.
[366] Gaskins, Kronick, and Vosburgh, *Community Responsibility for Accident Victims: Changes in the New Zealand Welfare State* (1979) Social Services Review, Bryn Mawr College, University of Chicago, at 264.
[367] Woodhouse Report, [*Compensation for Personal Injury in New Zealand*, (Royal Commission of Inquiry, 1967)], at 20. ***
[368] Gaskins *et al*, *supra*, have said: 'As nearly as can be ascertained, the Woodhouse principles are a genuine invention,

advocates stress another objective, one which may popularly be called 'individual responsibility.' Simply stated, it is contended that it is a principle of elementary justice or 'common sense morality'[369] that a person who injures another by his fault should be called upon, at least as an initial step, to repair the victim's losses and that a person who negligently causes injury to himself should be asked to bear some of the responsibility for his losses. This view was discussed in the Pearson Report[370] as follows:

> A sense of responsibility for the effect of one's actions on others and a sense that one does have a duty of care towards one's fellow citizens, is an essential element in a civilized community, and a lapse in the discharge of that responsibility is a matter of blame—in other words fault or *culpa.* [Some] would regard the continued existence of the law of tort or delict as a measure of deterrence against general irresponsibility and a positive encouragement to a sense of individual responsibility towards one's fellows.[371]

The notion of 'individual responsibility' embodied in a civil cause of action is a feature of virtually all legal and political systems, and, as Friedmann has pointed out, 'no existing legal system, whether socialistically or capitalistically inclined, has so far shown any desire to abolish tort liability altogether until recently.'[372] ***

One of the advantages of the common law action in tort has been its flexibility and adaptability. Over the years the courts have been able to expand and contract liability, to recognize new needs, to set new standards, and to recognize new economic realities. One of the disadvantages in legislating programs is that this tends to perpetuate the status quo. In New Zealand, the accident compensation bureaucracy has become a rather inflexible and insensitive institution. It has been attacked as being too 'insurance-oriented' and for having lost sight of the original goals of its founders. Reform of the compensation process has been taken away from the courts and placed into the hands of politicians and bureaucrats. ***

If one examines the development of common law rights in Canada in the few years since the accident compensation scheme was introduced into New Zealand (1972), one can see that there has been recognition in Canada of important new protections for individuals, some of which might never occur in the context of an accident compensation program. Medical patients have been given new rights; Canadian doctors are legally obliged to inform their patients fully of all unusual, special, or material risks associated with medical procedures under contemplation for their patients [§19.4.3]. These new rights are a direct result of litigation brought by patients.[373] Directions have been given to school boards and physical education instructors with respect to the need for greater caution in carrying out physical education classes;[374] this has reportedly resulted in a change in the nature of these programs.[375] Prison guards[376] and police officers[377] have been called to task by individual citizens for their abusive and sometimes violent behaviour [§19.5.1]. Those engaged in sport have been taught that the sporting arena is not immune from basic tenets of decency [§6.3.1].[378] Those who engage in ultra-hazardous activities must bear the responsibility for the injurious results of their activities, even if they are not 'unusual' [§22].[379] Those who are in authority cannot deprive persons of their freedoms and liberty by abusing their statutory authority [§6.6].[380] The tort of 'nuisance' has been expanded to encompass interferences with a person's 'peace of

rather than a result of actual societal dissatisfaction, on the one hand, or some far-reaching ideology, on the other.'

[369] The question whether there is a 'common sense morality' which would require that a person who injures another should compensate his victim has been examined by Dr Sally M. Lloyd-Bostock of the Social Science Research Council, Centre for Socio-Legal Studies, Wolfson College, Oxford. Some of the results are discussed in "Common sense morality and accident compensation" [1980] Insurance Law Journal 331. ***

[370] *Royal Commission on Civil Liability and Compensation for Personal Injury* March 1978, Cmnd. 7054-11.

[371] *Ibid*, at 363.

[372] Friedmann, *Law In A Changing Society* (1972), at 163.

[373] *Reihl v. Hughes* (1980) 114 D.L.R. (3d) 1 and *Lepp v. Happ* (1980) 112 D.L. R. (3d) 66.

[374] *Myers and Myers v. Peel* (1981) 123 D.L.R. (3d) 1 (S.C.C.).

[375] The Globe and Mail (Toronto) reported that there has been a reorientation of the programs to improve safety.

[376] *Dodge v. Bridger* (1977) 4 C.C.L.T. 83, varied (1978), 6 C.C.L.T. 71

[377] *Whitehouse v. Reimer* (1979) 107 D.L.R. (3d) 283 (Alta.) rev'd (1980) 116 D. L.R. (3d) 594, new trial ordered.

[378] *Pettis v. McNeil* (1979) 8 C.C.L.T. 299 (N.S.)

[379] *Cruise v. Niessen et al.* (1977) 76 D.L.R. (3d) 343, rev'd on other grounds (1977) 4 C.C.L.T. 58 (Man. C.A.).

[380] *Tanner v. Norys* [1980] 4 W.W.R. 33 (Alta. C.A.)—abuse of *Mental Health Act*, 1972 (Alta.), c 118.

mind' [§21.1].[381] An action in privacy has been claimed for mental and physical harassment and invasion of privacy [§4.1].[382] Responsibility for highway traffic accidents does not rest only on the drivers involved but may also rest on government agencies responsible for keeping the roads in good repair[383] or for erecting adequate safety barriers [§19.5.2].[384] A distributor of a defective product was held liable to a consumer who was injured while using the product [§19.1].[385] While New Zealand has abolished the right of spouses to sue for loss of consortium, Alberta has reinforced it.[386] Many more examples could be noted. In areas of particular weakness, the common law has attempted to reform. As a result of recent Supreme Court decisions[387] in Canada, inflation is taken into account in the assessment of damages, there is a limit to the lump-sum awards for non-pecuniary losses, and victims are entitled to real compensation for their injuries, even if this means providing quadriplegic victims with individually adapted homes [§9.3]. To counter some of the negative effects of large lump-sum payments, the 'structured settlement' is being increasingly used.[388] Where the common law is unable or unwilling to react, the legislatures can intervene. Canadian jurisdictions have introduced seat belt legislation and occupier's liability statutes [§19.8.2] and have abolished guest passenger restrictions and inter-spousal tort immunities.

In the future, society will require increased protection from activities which, although potentially beneficial, will entail great risks. It is difficult to believe that many of the protections which we now enjoy, and will in the future demand, can be assured without the assistance of a civil cause of action. […continue reading]

REFLECTION:

- *What principles underpin New Zealand's ACC system? What principles underpin the tort system?*
- *What does Prof. Klar argue New Zealand has lost from eliminating tort liability for most accidentally caused personal injuries? Is the ACC system worth this trade-off?*
- *What could New Zealand lawmakers do to mitigate or address the concerns Prof. Klar raises?*

12.1.6 A New Zealand tort lawyer's perspective on New Zealand's ACC scheme

G. McLay, "Accident Compensation: What's the Common Law Got to Do with it?" [2008] New Zealand L Rev 55, 61-62, 70-71

What interests me, as a tort lawyer, is the relationship, if any, between the ACC scheme and the common law. I am no longer so much interested in the narrow issue of the bar on common law actions, or the availability of exemplary damages, but rather the relationship between a statutory regime like the ACC scheme and the common law as a generator of ideas about how to compensate accidents and the sort of injuries that ought to be recognized.[389] It has been usual to present the relationship as problematic and antagonistic. As Sir Geoffrey Palmer told us, the ACC scheme was all about destroying the common law.[390] Richard Gaskins, in a number of papers, *** has shown that the Woodhouse Report is most significant because it raised the possibility of dealing with accidents outside the old common law paradigm of an event between two parties.[391] Yet if recent case law is anything to go by, the common law continues to play an important role in the interpretation and understanding of the ACC scheme. It is not that the ACC scheme

[381] *Motherwell v. Motherwell* [1976] 6 W.W.R. 550 (Alta. C.A.).
[382] *Capan v. Capan* (1980) 14 C.C.L.T. 191 (Ont.).
[383] *Dorschell v. Corp. of City of Cambridge* (1980) 117 D.L.R. (3d) 233 (Ont. C.A.).
[384] *Malat v. Bjornson* (1981) 114 D. L. R. (3d) 612 (S.C.C.).
[385] *Leitz v. Saskatoon Drug* (1980) 112 D.L.R. (3d) 106.
[386] *Woelk v. Halvorson* (1981) 114 D. L. R. (3d) 385 (S.C.C.).
[387] *Andrew v. Grand & Toy (Alta.) Ltd.* [1978] 2 S.C.R. 229; *Thornton v. Bd. of School Trustees* [1978] 2 S.C.R. 267; *Arnold v. Teno* (1978) 2 S.C.R. 287.
[388] See *Yepremian v. Scarborough General Hospital* (1981) 15 C.C.L.T. 73 (Ont.).
[389] This is not, of course, a new question. For an interesting discussion, see Szakats, "The Re-emergence of Common Law Principles in the New Zealand Accident Compensation Scheme" (1978) 7 Indus LJ 216. For other articles dealing with the relationship, see Klar, "New Zealand's Accident Compensation Scheme: A Tort Lawyer's Perspective" (1983) 33 U Toronto LJ 80; Palmer, "New Zealand's Accident Compensation Scheme: Twenty Years on" (1994) 44 U Toronto LJ 223.
[390] Palmer, *Compensation for Incapacity: A Study of Law and Social Change in New Zealand and Australia* (1979).
[391] See, for instance, Gaskins, "Recalling the Future of ACC" (2000) 31 VUWLR 215.

can only be explained by comparison to what it is not, but rather that common law doctrine continues to inform the development of the ACC scheme and its interpretation, at least, by superior court judges.

In part, the reliance on the common law reflects the bias with which common law lawyers necessarily come to any problem. In New Zealand this cultural bias is reinforced by the small size of our legal system, which means that we will always remain heavily reliant on overseas developments and, in the absence of other comprehensive accident compensation regimes overseas, those developments will come from common law decisions. One of the advantages of a common law system is its inherent capacity for growth and learning in terms of new kinds of injuries that may be suffered or claims made, or indeed in terms of the role of the law itself. The development of product liability law in the United States over the last 50 years is a prominent example of the common law responding to economic development.[392] One of the difficulties of any statutory regime is building in a capacity to grow the system as notions of loss and injury change.

*** New Zealand has the great advantage of being able to learn from common law developments in other jurisdictions—they serve an important function in providing a frame of reference by which New Zealand judges assess what the ACC scheme ought to be covering. ***

A[n] *** example of the New Zealand courts learning from overseas common law developments is Mallon J's decision in *Accident Compensation Corporation v. D* that a pregnancy, after a failed sterilization that was intended to prevent such a pregnancy, might be covered as an injury.[393] Previously, the ACC had taken the view that a change in 1992 to the definition of accident had overruled decisions allowing cover in the case of failed sterilizations.[394] Courts in both the United Kingdom[395] and Australia[396] have debated the common law liability of doctors in such circumstances [§19.10]. The House of Lords held that public policy prevented mothers from being able to claim the costs of the child's upbringing, while the High Court of Australia held that public policy did not bar such damages. It appears that the policy and moral issues involved in such cases are incapable of being resolved satisfactorily by common law judges—there is simply too much disagreement as to what the appropriate role of the courts is in such cases.[397]

In Mallon J's view the case was one of statutory interpretation and that common law developments elsewhere might be indirectly relevant. Her Honour wrote:[398]

> Usually common law developments have little or no relevance to statutory interpretation issues under the accident compensation legislation.[399] I accept, however, that to the extent that the earlier New Zealand cases showed a reluctance to interpret the legislation as allowing compensation for the 'God-given ability to conceive and bear child' they are out-of-date with the changes that have taken place in New Zealand society and elsewhere, which is reflected in the common law development … although there is no requirement to establish 'physical injuries' before damages can be awarded [footnote omitted], the common law cases have discussed the right or interest protected or being compensated when a damages claim is made in a failed sterilization case. In doing so some of them have viewed pregnancy as an 'injury'. I consider that the discussion in the common law cases provides some guidance from that perspective.

There was clearly some place for growth in the way that the *Injury Prevention, Rehabilitation, and Compensation Act 2001* might be interpreted. In her Honour's view, the task of statutory interpretation ought

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[392] For a general account of United States product liability law, see Owen, *Products Liability Law* (2005). For a more thematic and critical policy account of the rise of product liability in the United States, see Esptein, *Modern Products Liability Law: A Legal Revolution* (1980). For a comparative account of product liability, see Stapleton, *Products Liability* (1994).

[393] [2007] NZAR 679.

[394] See the analysis in Tobin, "Common Law Actions on the Margin" [2008] NZ Law Review 37.

[395] See *McFarlane v. Tayside Health Board* [2000] 2 AC 59 (HL); *Rees v. Darlington Memorial Hospital NHS Trust* [2004] AC 309 (HL) [§19.10.1.1]. The issue had also been raised but not resolved previously in *Patient A v. Health Board X* (HC Blenheim, CIV-2003-406- 0014, 15 March 2005, Baragwanath J).

[396] See *Cattanach v. Melchior* (2003) 199 ALR 131 (HCA).

[397] The arguments are well described in Todd, "Wrongful Conception, Wrongful Birth, and Wrongful Life" (2005) 27 Sydney L Rev 525, which comes out on the side of potential liability in appropriate cases.

[398] *Accident Compensation Corporation v. D* [2007] NZAR 679, paras 55–56.

[399] See, for example, *Atkinson v. Accident Rehabilitation and Compensation Insurance Corporation* [2002] 1 NZLR 374.

to be conducted in light of the community's changed understanding of the nature of injury, and also its understanding of the effect that pregnancy has on a woman and her body. Overseas developments formed the background against which her Honour reviewed her understanding of New Zealand expectations as to the meaning of the word "injury" in this context. Her Honour devoted large portions of her decision to an analysis of that overseas case law and an examination of its problems and its significance. While it would be too much to suggest that her Honour would have reached a different conclusion in the absence of that case law and that debate, it is not clear that in the absence of such overseas case law she would have so easily reached the result that she did. *** […continue reading]

REFLECTION:

- *Does Prof. McLay's insights as to the influence of common law thinking within the operation of the ACC scheme ally the concerns raised by Prof. Klar?*

12.1.7 Further material

- Ellis & Acton, "The Land of Hobbits, Elves, and No-Fault Injury Compensation Schemes" This Week in Torts (Feb 23, 2018).
- A. Duffy, "The Common-Law Response to the Accident Compensation Scheme" (2003) 34 Victoria U Wellington L Rev 367.
- E. Gibson, "Is it Time to Adopt a No-Fault Scheme to Compensate Injured Patients?" (2016) 47 Ottawa L Rev 303.

12.2 No-fault workplace injury compensation schemes

12.2.1 WorkSafe BC

WorkSafe BC, "Our Mandate"

Our organization was established by provincial legislation as an agency with the mandate to oversee a no-fault insurance system for the workplace.

We partner with employers and workers in B.C. to do the following:

• Promote the prevention of workplace injury, illness, and disease

• Rehabilitate those who are injured, and provide timely return to work

• Provide fair compensation to replace workers' loss of wages while recovering from injuries

• Ensure sound financial management for a viable workers' compensation system. *** […continue reading]

12.2.2 British Columbia workers' compensation scheme

UBC Law Students' Legal Advice Program, "Workers' Compensation" in Law Students' Legal Advice Manual (45th ed, Vancouver: The University of British Columbia, 2021), ch 7 - 1-5

The *Workers' Compensation Act*, RSBC 2019, c 1 [WCA] is a provincial statute creating a regulatory body called the Workers' Compensation Board (Act, s. 318 ***). Since 2003, Workers' Compensation Board does business under the name of "WorkSafeBC" and is referred to as "the Board" or WCB in this section. The Board has exclusive jurisdiction over compensation to injured workers for workplace injuries, amongst other duties.

Some of the earliest forms of workers' compensation started with pirates in the pre-Revolutionary Americas.

A pirate who lost an eye was entitled to 100 pieces of eight, roughly one year's pay.[400] With the industrial revolution, more evolved workers' compensation schemes followed in Europe and eventually spread back to North America. They are now mandatory across Canada and the United States.

Today's workers' compensation schemes, including BC's, are based on the historic trade-off: employers fund a no-fault insurance scheme for injured workers and, in return, workers give up their right to legal action against their employer for work-related injuries and occupational diseases (WCA, s. 127 ***). This approach offers several benefits: it takes workplace injury claims out of the courts, minimizing the use of scare judicial resources as well as limiting cost and delay for the workers; it gives greater certainty of compensation to workers and streamlines the compensation process; and, like any insurance scheme, it spreads losses amongst employers, eliminates the concern about ruinous claims, and provides coverage regardless of fault.

Aside from compensation, the Board's other duties include:

> **Regulation of Occupational Health and Safety (OH&S):** In BC, the Board is responsible for workplace health and safety regulations, investigations, and enforcement as set out in Part 2 of the WCA *** and in the *Occupational Health & Safety Regulation*, BC Reg 296/97 (the "**OH&S Regulation**"). While most enforcement orders and penalties are against employers for safety violations, orders may also be issued against workers. Under the WCA, workers are entitled to refuse unsafe work and to be protected from retaliation for reporting unsafe work practices.
>
> **Employer Assessments:** The WCA grants specific powers to the Board to set rates and collect assessments from employers to create an Accident Fund. The Accident Fund must be sufficient to finance the compensation system and each employer is assessed annually based on a complex formula ***. The WCA requires the Board to operate a fully funded system. ***

Sections 122-125 and 19-20 of the WCA *** give the Board exclusive jurisdiction over workers' compensation and OH&S matters. The courts have historically respected these strong privative clauses.

Section 122 grants the Board the exclusive jurisdiction to inquire into, hear, and determine compensation matters under Part 4 of the Act ***. Specifically, the board may determine:

- whether an injury has arisen out of or in the course of an employment;
- the existence and degree of disability by reason of an injury;
- the permanence of disability by reason of an injury;
- the degree of reduction of earning capacity by reason of an injury;
- the average earnings of a worker, for the purpose of levying assessments, and the average earnings of a worker for purposes of payment of compensation;
- the existence of the relationship of a member of the family of a worker as defined by the Act;
- the existence of dependency;
- whether an industry is within the scope of the Act, and the class to which an industry should be assigned for the purposes of the Act;
- whether a worker is in an industry within the scope of the Act and entitled to compensation under it; and
- whether a person is a worker, a subcontractor, a contractor or an employer within the meaning of the Act.

[400] Christopher J Boggs, "Workers' Compensation History: The Great Tradeoff!", online: (2015) Academy of Insurance http://www.insurancejournal.com/blogs/academy-journal/.

Section 19 similarly grants exclusive jurisdiction to the Board to inquire into and determine health and safety matters under Part 2 of the Act ***.

Once an injured worker applies for compensation, the Board will begin to assess whether or not to accept the claim. Once the claim is accepted, the Board will then adjudicate the worker's entitlement to the type of compensation benefits listed below.

The nature of the worker's injury will generally determine the relevant law and policy. The main types of injuries are:

- Personal Injury (physical or physical/psychological) – sections 134 and 146 of the WCA ***;
- Psychological injury (only mental stress) – section 135 of the WCA ***;
- Occupational Disease – sections 136(1) and 137 of the WCA ***;
- Hearing Loss – section 145 of the WCA ***. *** […continue reading]

REFLECTION:

- *When compared to the heads of damages available under a tort system (§9), what costs born by victims of workplace accidents are and are not covered by the workers' compensation system?*

12.2.3 Provincial workers' compensation statutes

- Alberta: Workers' Compensation Act, RSA 2000, c W-15.
- British Columbia: Workers Compensation Act, RSBC 2019, c 1.
- Manitoba: The Workers Compensation Act, CCSM c W200.
- New Brunswick: Workers' Compensation Act, RSNB 1973, c W-13.
- Newfoundland and Labrador: Workplace Health, Safety and Compensation Act, RSNL 1990, c W-11.
- Nova Scotia: Workers' Compensation Act, SNS 1994-95, c 10.
- Ontario: Workplace Safety and Insurance Act, 1997, SO 1997, c 16, Sch A.
- Prince Edward Island: Workers Compensation Act, RSPEI 1988, c W-7.1.
- Québec: Act respecting industrial accidents and occupational diseases, CQLR c A-3.001.
- Saskatchewan: The Workers' Compensation Act, 2013, SS 2013, c W-17.11.

REFLECTION:

- *Workers' compensation schemes provide "a comprehensive regime for determination of entitlement to compensation for workplace injuries," by affording a Workers' Compensation Board "exclusive jurisdiction to set compensation policies" and procedures, while removing plaintiffs' "ability to make a direct claim for compensation for workplace injuries to the courts."[401] In what ways are workers' compensation schemes accountable or unaccountable to victims of workplace accidents?[402] Is the "historic trade-off" worth it?*

12.2.4 Further material

- B. Parkin, *Practice Note: Workers' Compensation (BC)* (Thomson Reuters Practical Law, 2020).
- E. Windholz, "Workers' Compensation and Injury Insurance in Australian Sport: The Status May Not Be Quo" (2022) 32 Insurance LJ 106.
- T.T. Arvind & J. Steele (eds), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Oxford: Hart Publishing, 2012).
- Workers Comp Matters Podcast, "Think You Know Workers' Comp? The Times, They Are A Changing!" (Feb 28, 2024) 🎧.

[401] *Gay v. Alberta (Workers' Compensation Board)*, 2023 ABCA 351, [9].
[402] See "Blast Victim Says WorkSafe BC Actions About to Make Him Homeless" CTV News Vancouver (Jan 4, 2012) 📺; "Grieving Couple Seeking WorkSafe BC Changes" CTV News Vancouver (May 8, 2012) 📺.

12.3 No-fault vehicular injury insurance schemes

12.3.1 Insurance Corporation of British Columbia's Enhanced Care scheme

UBC Law Students' Legal Advice Program, "Auto Insurance (ICBC)" in Law Students' Legal Advice Manual (47th ed, Vancouver: The University of British Columbia, 2023), ch 12 - 1, 3

As of May 1, 2021, ICBC switched to a primarily no-fault system. This represents one of the biggest changes to the ICBC insurance system since its inception.

Under the former ICBC system, claims were handled through a mix of litigation and no-fault benefits. This meant that, while certain benefits were awarded regardless of the fault of the parties, in other situations one party in an accident would need to take the other party to court in order to gain access to compensation through the other party's insurance. Under the new system, the vast majority of all claims are handled on a no-fault basis, with some limited exceptions.

The new no-fault system means that insured parties will file a claim directly with ICBC in the vast majority of cases, and will be compensated for injuries directly by the insurer, regardless of whether or not they were at fault. ICBC will still internally assign fault to the parties when assessing claims in order to determine changes to premiums, but fault will not need to be shown to access injury compensation.

All claims for accidents occurring on or after May 1, 2021 are subject to this new no-fault system, known as Enhanced Care. ***

Enhanced Accident Benefits

Enhanced Accident Benefits are provided as part of basic coverage and are outlined under Part 10 of the *Insurance (Vehicle) Act* [*IVA*]. These benefits apply to accidents on or after May 1, 2021, "in which there is bodily injury caused by a vehicle" (*IVA* ss 113 and 114(1)). These benefits are awarded on a no-fault basis, which means that they are paid directly by the insurer to the insured, irrespective of the fault of the insured (*IVA*, s 117). This also means that, under the new system, there is no longer a right of action (an ability to bring a lawsuit for damages against the other party) for injury arising from a vehicle accident (*IVA*, s 115). There are a few limited exceptions to this bar on actions for injury from a vehicle accident ***. ***

BC residents are covered by Enhanced Accident Benefits for accidents in BC, and for accidents in other jurisdictions in Canada and the United States.

For non-residents involved in an accident within BC, or one outside of BC but involving a BC-registered vehicle, particular considerations may apply to determine eligibility. *** […continue reading]

UBC Law Students' Legal Advice Program, "Small Claims and the CRT" in Law Students' Legal Advice Manual (45th ed, Vancouver: The University of British Columbia, 2021), ch 20 - 19

Civil Resolution Tribunal ***

The Motor Vehicle Injury jurisdiction is currently complex and evolving. For accidents between April 1, 2019, and April 30, 2021, the CRTA gives the CRT jurisdiction over disputes about accident benefits, minor injury determinations, and liability and damages claims up to $50,000. The constitutionality of the CRT's jurisdiction over minor injury determinations and fault and damage claims up to $50,000 *** [was upheld in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2022 BCCA 163]. *** For more information, visit https://civilresolutionbc.ca/solution-explorer/vehicle-accidents/.

For accidents May 1, 2021, and after, the CRT has jurisdiction over entitlement to benefits under the new Enhanced Care model. *** […continue reading]

REFLECTION:

- *Is British Columbia's primarily exclusive no-fault vehicular injury insurance scheme preferable to a hybrid no-*

fault and tort system, such as operates in Ontario?[403]

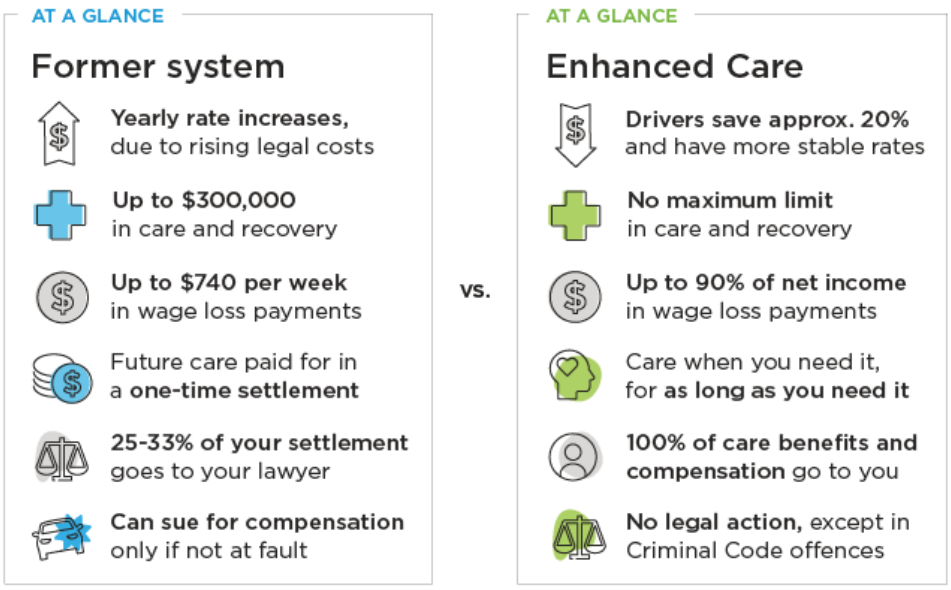
- *Why is the Trial Lawyers Association of British Columbia criticial of ICBC Enhanced Care?*[404] *Are their concerns compelling?*

12.3.2 Enhanced Care at a glance

"Enhanced Care: Why and How" (Insurance Corporation of British Columbia, 2021)

Enhanced Care is an insurance system that works for all British Columbians. That means insurance that is more affordable and provides the care and coverage you need if you're in a crash. By removing most of the legal costs associated with our former system, we're making this a reality for you. ***

We know these changes are a lot to digest. Here's a helpful side-by-side comparison of the former insurance system and Enhanced Care:



REFLECTION:

- *Watch the CTV News Vancouver news stories that aired before*[405] *and after*[406] *the launch of ICBC Enhanced Care. What are the trade-offs between British Columbia's tort system and this no-fault system?*
- *Who stands to benefit from each system? What are the costs of each system?*

12.3.3 Further material

- M. Cross, "No-fault Regime Proposed for Self-driving Cars" The Law Society Gazette (Jan 26, 2022).
- K. Sykes *et al*, "Civil Revolution: User Experiences with British Columbia's Online Court" (2022) 37 Windsor Yearbook of Access to Justice 161.
- Runnymede Radio, "Shannon Salter: BC's Civil Resolution Tribunal" (Mar 24, 2020) 🎧.

[403] See *Kolapully v. Myles*, 2024 ONCA 350, [57]-[67].
[404] See C. Urquhart & S. Boynton, "B.C. man paralyzed by crash launches legal challenge against ICBC's no-fault insurance" Global News (Jul 5, 2022) 📺; Trial Lawyers Association of British Columbia, https://www.notonofault.com/.
[405] "How 'No-fault' Insurance Affects Drivers" CTV News Vancouver (Feb 7, 2020) 📺.
[406] "Injured Cyclist Slams ICBC Changes" CTV News Vancouver (Aug 4, 2021) 📺; "Whole Foods Crash Victim Frustrated with ICBC" CTV News Vancouver (Jul 7, 2023) 📺.

12.4 Victim compensation funds

12.4.1 Brown v. Canada [2018] ONSC 3429

Ontario Superior Court – 2018 ONSC 3429

✗REF: §19.7.3

BELOBABA J.:

1. The Sixties Scoop, nationally acknowledged as a "dark and painful chapter in Canada's history,"[407] generated some 23 actions in superior and federal courts across the country. The Ontario action that is before me, *Brown v. Canada*, is the most advanced. In litigation for almost nine years, it was *Brown* that established Canada's liability in tort to the Sixties Scoop survivors in Ontario.[408] The other actions remain at the starting gate.

2. Canada agreed to settle *Brown* but only if the other actions were included in one nation-wide settlement.

3. Justice Michel Shore of the Federal Court mediated the national settlement. The parties reached an agreement in principle on August 30, 2017. The national settlement agreement ("the Settlement Agreement" or "Agreement") was formally executed on November 30, 2017. As part of the national settlement, the other actions were consolidated into an omnibus Federal Court action,[409] which I will refer to as the *Riddle* action.

4. On May 11, 2018 after two days of hearings in Saskatoon, Justice Shore approved the Settlement Agreement for the purposes of the *Riddle* action. He was satisfied that the national settlement was fair and reasonable and in the best interests of the class members.[410] ***

5. The Settlement Agreement is now before me for a similar approval in the context of the *Brown* action. It is clear from the language in the Agreement that the approval of both courts is required. If I decline to approve any part of this Agreement, then the Agreement will not take effect and Justice Shore's approval order in *Riddle* will be rendered null and void.[411]

Overview of the settlement agreement ***

7. The cornerstones of the Agreement are the payment of individual compensation without proof of harm and the establishment of a national foundation that will be devoted to memorializing the stories of the Sixties Scoop survivors and dedicated to the goals of reconciliation and healing.

8. Canada has agreed to pay a minimum of $500 million and a maximum of $750 million to cover the individual payments to Sixties Scoop survivors. The individual payments are capped at $50,000 per person. Canada has also agreed to pay a further $50 million to fund the foundation ***. ***

The applicable law

11. Section 29(2) of the *Class Proceedings Act* ("*CPA*")[412] [§20.6.1] provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of

[407] The Hon. Carolyn Bennett, Minister of Indigenous and Northern Affairs, Press Release (February 1, 2017).
[408] The certification decision is *Brown v. Canada*, 2013 ONSC 5637 (Ont. S.C.J.). The summary judgment decision establishing Canada's legal liability in tort is *Brown v. Canada*, 2017 ONSC 251 (Ont. S.C.J.).
[409] *Riddle v. Canada* [2018 CarswellNat 3170 (F.C.)], (Fed. Ct. Docket T-2212-16).
[410] *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Ont. Gen. Div.), aff'd (1998), 41 O.R. (3d) 97 (Ont. C.A.), leave to appeal to S.C.C. refused, October 22, 1998 [(1998), 235 N.R. 390 (note) (S.C.C.)].
[411] Settlement Agreement (November 30, 2017), at ss. 2.02, 12.01; and Approval Order of Justice Shore in the *Riddle* action (May 11, 2018), at s. 31.
[412] *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

the class.[413]

12. The supervising court must compare the settlement with what would probably be achieved at trial, discounting for any defences, legal or evidentiary hurdles or other risks that would have to be confronted and overcome if the matter were to proceed to trial.[414] A settlement does not have to be perfect. The question for the court is whether the settlement falls within a zone of reasonableness.[415]

Initial impression

13. On balance, I was favourably impressed when I first reviewed the Settlement Agreement. The establishment of a national foundation for reconciliation and healing was clearly of over-arching importance. The agreement to pay individual compensation based on a one-page application form and without requiring proof of harm was admirable. I was also aware that Chief Marcia Brown Martel, the representative plaintiff in the *Brown* action who was deeply involved in every aspect of both the litigation and the settlement discussions, was satisfied overall that the Settlement Agreement was fair and reasonable and in the best interests of the class.[416] ***

The size of the individual payment

17. The parties' best estimate is that 22,400 Indigenous children nation-wide were "scooped" from their homes and placed with non-Indigenous foster or adoptive parents over the applicable 40-year time-period. The best estimate of a take-up rate is that just under half of the eligible claimants—or about 10,000 claimants—will apply for compensation. If this take-up estimate proves correct, then each claimant will receive the maximum of $50,000. If there are 15,000 claimants, the individual payment will fall to $33,333. If there are 20,000 to 30,000 claimants, the individual payment will be $25,000. Class counsel believe that the individual payment will most likely be in the range of $25,000 to $50,000.

18. Only a tiny percentage of the class members in *Brown* submitted written objections or attended in court to tell their stories and voice their concerns in person. The primary concern was that the $25,000 to $50,000 payment was not enough. ***

21. There is little doubt that a $25,000 to $50,000 payment to the Sixties Scoop survivors for the loss of their cultural identity is a modest amount of money. However, after reviewing all the evidence before me and after considering the many pitfalls that await the class members if the lawsuit were to continue, I conclude that a payment in this range is indeed fair and reasonable and in the best interests of the class. I say this for the following reasons:

> • The claim itself (damages for loss of cultural identity) is a novel claim in Canadian law. It is true that some Australian courts have recognized a "loss of cultural fulfilment" tort claim in the aboriginal context but most of the damage awards in these cases are in the $10,000 to $40,000 range;[417]
>
> • In her statement of claim, the representative plaintiff claimed "at least $50,000" in general damages for the loss of cultural identity, thus signalling that a $50,000 payment would be acceptable;
>
> • The $50,000 damages award should be discounted substantially to reflect the risks that await the class members if they continue with the litigation—the limitation defences [§6.8], causation issues [§16],[418] the likely unavailability of an aggregate damages approach and the need for literally

[413] *Dabbs*, *supra*. Most recently discussed in *Welsh v. Ontario*, 2018 ONSC 3217 (Ont. S.C.J.).
[414] Discussed in more detail in *Welsh*, *supra*, at para. 68.
[415] *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (Ont. S.C.J.); and *Dabbs*, *supra*.
[416] Given Chief Brown Martel's extraordinary level of involvement in this class proceeding, I have no difficulty approving the requested $20,000 honorarium.
[417] The case law is discussed in Orr, "Damages for Loss of Cultural Fulfilment in Indigenous Community Life" (1997), online: Indigenous Law Bulletin <http://classic.austlii.edu.au/au/journals/IndigLawB/1997/90.html>.
[418] Here is an example of a causation issue. My finding of Canada's legal liability was based on a relatively narrow point—the federal government's failure to provide printed information to the provincial child care authorities for delivery

thousands of individual trials, and the inevitable and time-consuming appeal process. In short, years of further litigation with no guarantee of success and a very real risk of getting nothing. ***

• Most importantly, the Settlement Agreement provides for the establishment of a federally-funded national foundation that will be dedicated to the memorialization of the survivors' stories and to the ongoing process of reconciliation and healing. This is an important institutional benefit that could not have been attained with continued litigation.

22. Class counsel in ***Brown*** submit that the settlement, including the $25,000 to $50,000 individual payment, "exceeds our best day in court." I do not disagree.

23. I am satisfied that the payment of $25,000 to $50,000 falls within a zone of reasonableness and should be approved. In sum, I am satisfied that the core settlement provisions that provide from $550 million to $800 million in cash and non-cash benefits are fair and reasonable and in the best interests of the class. ***

Disposition

89. The Settlement Agreement *** is approved. ***

REFLECTION:

- *What are the cornerstones of the Sixties Scoop Settlement Agreement?*[419] *Why did the Court consider that the agreement was reasonable in the circumstances?*
- *What role did private rights of action and the tort system play in leading to this settlement?*
- *Watch the CBC News reports on the settlement and interviews with survivors.*[420] *What else can or should the government do in response to the injustices suffered by survivors of the Sixties Scoop?*

12.4.2 Further material

- P. Heaton, I. Waggoner & J. Morikawa, "Victim Compensation Funds and Tort Litigation following Incidents of Mass Violence" (2015) 63 Buffalo L Rev 1263.
- Office of the Federal Ombudsman for Victims of Crime, "Financial Assistance Available to Victims".
- P.A. Bernabe, "'Worth'—Netflix's Movie on the 9/11 Victims' Compensation Fund, and Interviews with Ken Feinberg" Torts Blog (Sep 19, 2021) 📺.
- Workers Comp Matters Podcast, "'A Patriotic Obligation': Kenneth Feinberg and the 9/11 Fund" (Sep 15, 2021) 🎧.

to the affected foster and adoptive parents who, in turn, would share this information with the Indigenous children under their care. But as I noted in my summary judgment decision, "[o]ne does not know how many of the foster and adoptive parents, having received this information, would have shared the information with the aboriginal child that had been placed in their home. Probably most, but this is an issue that will have to be determined on evidence that will be presented at the damages stage." See ***Brown*** (2017), *supra*, at fn. 23.

[419] See Sixties Scoop Settlement, https://sixtiesscoopsettlement.info/.

[420] "Sixties Scoop survivors split on proposed $875-million settlement" CBC News: The National (May 10, 2018) 📺; "Sixties Scoop survivors receive first settlement cheques" CBC News: The National (Jun 26, 2020) 📺.

13 NEGLIGENCE: (I) DUTY OF CARE

13.1 Development of the tort of negligence

13.1.1 Donoghue v. Stevenson [1932] UKHL 100

House of Lords – [1932] UKHL 100

LORD BUCKMASTER (dissenting):

1. The facts of this case are simple. On the 26th of August 1928 the appellant drank a bottle of ginger beer, manufactured by the respondent, which a friend had bought from a retailer and given to her. The bottle contained the decomposed remains of a snail which were not and could not be detected until the greater part of the contents of the bottle had been consumed. As a result she alleged, and at this stage her allegations must be accepted as true, that she suffered from shock and severe gastro-enteritis. She accordingly instituted the proceedings against the manufacturer which have given rise to this appeal.

2. The foundation of her case is that the respondent, as the manufacturer of an article intended for consumption and contained in a receptacle which prevented inspection, owed a duty to her as consumer of the article to take care that there was no noxious element in the goods, that he neglected such duty and is consequently liable for any damage caused by such neglect. ***

3. Before examining the merits two comments are desirable: (1) That the appellant's case rests solely on the ground of a tort based not on fraud but on negligence; and (2) that throughout the appeal the case has been argued on the basis *** that the English and the Scots law on the subject are identical. It is therefore upon the English law alone that I have considered the matter, and in my opinion it is on the English law alone that in the circumstances we ought to proceed.

4. The law applicable is the common law, and though its principles are capable of application to meet new conditions not contemplated when the law was laid down, these principles cannot be changed nor can additions be made to them because any particular meritorious case seems outside their ambit.

5. Now the common law must be sought in law books by writers of authority and in judgments of the judges entrusted with its administration. The law books give no assistance, because the work of living authors, however deservedly eminent, cannot be used as authorities, though the opinions they express may demand attention; and the ancient books do not assist. I turn therefore to the decided cases to see if they can be construed so as to support the appellant's case. One of the earliest is the case of *Langridge v. Levy* (1837, 2 M. & W. 519) [§10.1.1]. It is a case often quoted and variously explained. There a man sold a gun which he knew was dangerous for the use of the purchaser's son. The gun exploded in the son's hands and he was held to have a right of action in tort against the gunmaker. How far it is from the present case can be seen from the judgment of Parke B., who in delivering the judgment of the Court used these words: "We should pause before we made a precedent by our decision which would be an authority for an action against the vendors, even of such instruments and articles as are dangerous in themselves, at the suit of any person whomsoever into whose hands they might happen to pass and who should be injured thereby"; and in *Longmeid v. Holliday* (1851, 6 Ex. 761) the same eminent judge points out that the earlier case was based on a fraudulent misstatement, and he expressly repudiates the view that it has any wider application. ***

6. The case of *Winterbottom v. Wright* (1842, 10 M. & W. 109) is, on the other hand, an authority that is closely applicable. Owing to negligence in the construction of a carriage it broke down, and a stranger to the manufacture and sale sought to recover damages for injuries which he alleged were due to negligence in the work, and it was held that he had no cause of action either in tort or arising out of contract. This case seems to me to shew that the manufacturer of any article is not liable to a third party injured by negligent construction, for there can be nothing in the character of a coach to place it in a special category. It may be noted also that in this case Alderson B. said:

> "The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty." ***

25. In my view, therefore, the authorities are against the appellant's contention, and, apart from authority, it is difficult to see how any common law proposition can be formulated to support her claim.

26. The principle contended for must be this: that the manufacturer, or indeed the repairer, of any article, apart entirely from contract, owes a duty to any person by whom the article is lawfully used to see that it has been carefully constructed. ***

28. In *Mullen v. Barr* (1929 S.C. 461), a case indistinguishable from the present excepting upon the ground that a mouse is not a snail, and necessarily adopted by the Second Division in their judgment, Lord Anderson says this:

> "In a case like the present, where the goods of the defenders are widely distributed throughout Scotland, it would seem little short of outrageous to make them responsible to members of the public for the condition of the contents of every bottle which issues from their works. It is obvious that, if such responsibility attached to the defenders, they might be called on to meet claims of damages which they could not possibly investigate or answer."

29. In agreeing, as I do, with the judgment of Lord Anderson, I desire to add that I find it hard to dissent from the emphatic nature of the language with which his judgment is clothed. I am of opinion that this appeal should be dismissed, and I beg to move your Lordships accordingly.

LORD ATKIN:

30. The sole question for determination in this case is legal: Do the averments made by the pursuer in her pleading, if true, disclose a cause of action? *** The question is whether the manufacturer of an article of drink sold by him to a distributor, in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health. I do not think a more important problem has occupied your Lordships in your judicial capacity: important both because of its bearing on public health and because of the practical test which it applies to the system of law under which it arises. *** In the present case we are not concerned with the breach of the duty; if a duty exists, that would be a question of fact which is sufficiently averred and for present purposes must be assumed. We are solely concerned with the question whether, as a matter of law in the circumstances alleged, the defender owed any duty to the pursuer to take care. ***

32. At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour [§13.3.3] becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. This appears to me to be the doctrine of *Heaven v. Pender* as laid down by Lord Esher when it is limited by the notion of proximity introduced by Lord Esher himself and A. L. Smith L.J. in *Le Lievre v. Gould* ([1893] 1 Q.B. 491). Lord Esher, at p. 497, says:

> "That case established that, under certain circumstances, one man may owe a duty to another, even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property."

So A. L. Smith L.J.:

> "The decision of *Heaven v. Pender* was founded upon the principle, that a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other."

I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act. *** With this necessary qualification of proximate relationship as explained in *Le Lievre v. Gould* ([1893] 1 Q.B. 491), I think the judgment of Lord Esher expresses the law of England; without the qualification, I think that the majority of the Court in *Heaven v. Pender* were justified in thinking the principle was expressed in too general terms. There will no doubt arise cases where it will be difficult to determine whether the contemplated relationship is so close that the duty arises. But in the class of case now before the Court I cannot conceive any difficulty to arise. A manufacturer puts up an article of food in a container which he knows will be opened by the actual consumer. There can be no inspection by any purchaser and no reasonable preliminary inspection by the consumer. Negligently, in the course of preparation, he allows the contents to be mixed with poison. It is said that the law of England and Scotland is that the poisoned consumer has no remedy against the negligent manufacturer. If this were the result of the authorities, I should consider the result a grave defect in the law, and so contrary to principle that I should hesitate long before following any decision to that effect which had not the authority of this House. I would point out that, in the assumed state of the authorities, not only would the consumer have no remedy against the manufacturer, he would have none against anyone else, for in the circumstances alleged there would be no evidence of negligence against anyone other than the manufacturer; and except in the case of a consumer who was also a purchaser, no contract and no warranty of fitness ***. *** I confine myself to articles of common household use, where everyone, including the manufacturer, knows that the articles will be used by other persons than the actual ultimate purchaser, viz. by members of his family and his servants, and in some cases his guests. I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilised society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong. ***

36. It now becomes necessary to consider the cases which have been referred to in the Courts below as laying down the proposition that no duty to take care is owed to the consumer in such a case as this. ***

38. In *Langridge v. Levy* (1837, 2 M. & W. 519; 1838, 4 M. & W. 337) the action was in case, and the declaration alleged that the defendant, by falsely and fraudulently warranting a gun to have been made by Nock and to be a good, safe, and secure gun, sold the gun to the plaintiff's father for the use of himself and his son, and that one of his sons, confiding in the warranty, used the gun, which burst and injured him. Plea not guilty and no warranty as alleged. *** It is sufficient to say that the case was based, as I think, in the pleading, and certainly in the judgment, on the ground of fraud, and it appears to add nothing of value positively or negatively to the present discussion. *Winterbottom v. Wright* (1842, 10 M. & W. 109) was a case decided on a demurrer. *** It is to be observed that no negligence apart from breach of contract was alleged—in other words, no duty was alleged other than the duty arising out of the contract; it is not stated that the defendant knew, or ought to have known, of the latent defect. ***

41. It is always a satisfaction to an English lawyer to be able to test his application of fundamental principles of the common law by the development of the same doctrines by the lawyers of the Courts of the United States. In that country I find that the law appears to be well established in the sense in which I have indicated. *** I must not in this long judgment do more than refer to the illuminating judgment of Cardozo J. in *M'Pherson v. Buick Motor Co.* [§19.1.1] in the New York Court of Appeals (1916, 217 N.Y. 382), in which he states the principles of the law as I should desire to state them and reviews the authorities in other States than his own. ***

42. If your Lordships accept the view that this pleading discloses a relevant cause of action you will be affirming the proposition that by Scots and English law alike a manufacturer of products which he sells in such a form as to shew that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence

of reasonable care in the preparation or putting up of the products is likely to result in injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care. It is a proposition that I venture to say no one in Scotland or England who was not a lawyer would for one moment doubt. It will be an advantage to make it clear that the law in this matter, as in most others, is in accordance with sound common sense. I think that this appeal should be allowed.

LORD TOMLIN (dissenting): ***

44. First, I think that if the appellant is to succeed it must be upon the proposition that every manufacturer or repairer of any article is under a duty to everyone who may thereafter legitimately use the article to exercise due care in the manufacture or repair. It is logically impossible to stop short of this point. There can be no distinction between food and any other article. ***

51. *** Upon the view which I take of the matter the reported cases—some directly, others impliedly—negative the existence as part of the common law of England of any principle affording support to the appellant's claim, and therefore there is, in my opinion, no material from which it is legitimate for your Lordships' House to deduce such a principle.

LORD THANKERTON: ***

58. The special circumstances from which the appellant claims that such a relationship of duty should be inferred may, I think, be stated thus, viz. that the respondent, in placing his manufactured article of drink upon the market, has intentionally so excluded interference with, or examination of, the article by any intermediate handler of the goods between himself and the consumer, that he has, of his own accord, brought himself into direct relationship with the consumer, with the result that the consumer is entitled to rely upon the exercise of diligence by the manufacturer to secure that the article shall not be harmful to the consumer. ***

LORD MACMILLAN:

65. The incident which in its legal bearings your Lordships are called upon to consider in this appeal was in itself of a trivial character, though the consequences to the appellant, as she describes them, were serious enough. It appears from the appellant's allegations that on an evening in August 1928 she and a friend visited a café in Paisley, where her friend ordered for her some ice-cream and a bottle of ginger beer. These were supplied by the shopkeeper, who opened the ginger beer bottle and poured some of the contents over the ice-cream, which was contained in a tumbler. The appellant drank part of the mixture, and her friend then proceeded to pour the remaining contents of the bottle into the tumbler. As she was doing so a decomposed snail floated out with the ginger beer. In consequence of her having drunk part of the contaminated contents of the bottle the appellant alleges that she contracted a serious illness. The bottle is stated to have been of dark opaque glass, so that the condition of the contents could not be ascertained by inspection, and to have been closed with a metal cap, while on the side was a label bearing the name of the respondent, who was the manufacturer of the ginger beer of which the shopkeeper was merely the retailer. ***

80. The law takes no cognisance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence. *** The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed. ***

81. *** In the present case the respondent, when he manufactured his ginger beer, had directly in contemplation that it would be consumed by members of the public. Can it be said that he could not be expected as a reasonable man to foresee that if he conducted his process of manufacture carelessly he might injure those whom he expected and desired to consume his ginger beer? The possibility of injury so arising seems to me in no sense so remote as to excuse him from foreseeing it. ***

84. The burden of proof must always be upon the injured party to establish that the defect which caused the injury was present in the article when it left the hands of the party whom he sues, that the defect was occasioned by the carelessness of that party, and that the circumstances are such as to cast upon the defender a duty to take care not to injure the pursuer. *** The appellant accepts this burden of proof, and in my opinion she is entitled to have an opportunity of discharging it if she can. ***

REFLECTION:

- *What reasons of principle and policy does Lord Buckmaster rely upon to say no duty of care was owed?*
- *According to Lord Aitken, what principle unifies cases of negligence? What is the limit of the principle?*
- *What does Lord MacMillan mean when he says that "the categories of negligence are never closed"?*

13.1.2 The neighbour principle

A.M. Linden, "The Good Neighbour on Trial: A Fountain of Sparkling Wisdom" (1983) 17 UBC L Rev 67, 67, 73-80, 82, 85-92

In an article written on the 25th anniversary [of the decision in *Donoghue v. Stevenson*] in 1957, Professor Heuston, then and still the editor of *Salmond on Torts*, suggested that on its 50th anniversary in 1982, the decision might be of little more than antiquarian interest, a mere "repository of ancient learning", because he thought that tort law would likely be abolished and be replaced by a social insurance scheme by that time.

How wrong he was! As *Donoghue v. Stevenson* celebrates its 50th anniversary, it is not only alive and well, it is thriving, vigorous, lusty, youthful and energetic. For me, it is still and will remain like a seed of an oak tree, a source of inspiration, a beacon of hope, a fountain of sparkling wisdom, a skyrocket bursting in the midnight sky. ***

If only that little snail could speak! If he could, he might explain how he got into that bottle. The truth is, we do not even know whether there was a snail in the bottle at all, because the case was never tried on the merits. The only "facts" we have are those alleged in the pleadings and factums.[421] ***

After the House of Lords held in favour of Mrs. Donoghue on the preliminary point of law and remitted the case back to the Court of Sessions for proof of the facts, Mr. Stevenson died in November 1932. His executor settled the case with May Donoghue, paying her £100. Thereafter on December 6, 1934, "the action having been settled extra-judicially [the Court] assoilzie[d] the defenders from the conclusions of the summons and the decerns."[422]

II. The Case ***

On the appeal to the House of Lords, the case was decided by five Law Lords. Two of them (Lord Thankerton and Lord Macmillan) had been born and educated in Scotland; the third (Lord Atkin) had been born in Australia but "always regarded himself as a Welshman".[423] All but Lord Buckmaster were fairly new to the Court: Lord Atkin since 1928, Lords Tomlin and Thankerton since 1929 and Lord Macmillan since 1930. ***

Lord Atkin's reasons are the most familiar and the most impressive. He clearly recognized the importance of the case before him, observing, "I do not think a more important problem has occupied your Lordships in your judicial capacity, important both because of its bearing on public health and because of the practical test which it applies to the system under which it arises."[424]

There were two main issues in the decision. The first dealt with the question of products liability. Lord Atkin swept aside the need for privity of contract in these cases ***.

[421] Factums, House of Lords, *Donoghue v. Stevenson*, copies of which are in the author's possession.
[422] D. Ashton-Cross, "*Donoghue v. Stevenson*" (1955) 71 L.Q. Rev. 472.
[423] L.G.W. Legg and E.T. Williams, eds., *Dictionary of National Biography* (1941-50) (1959), at 27.
[424] *Donoghue v. Stevenson*, [1932] A.C. 562, at 579.

The second issue in the case was more theoretical, relating to negligence principles generally. On this question, Lord Atkin espoused the "neighbour principle." ***

Next to those of Lord Atkin, the most influential reasons are those of Lord Macmillan, who also recognized that the case involved a clash of two competing principles of law: first, that only a party to a contract can complain of its breach, and second, that negligence can give a right of action to the party injured by that negligence apart from contract. ***

Lord Macmillan, *** although concurring in the result, was careful to avoid adopting Lord Atkin's "neighbour principle". Lord Macmillan's much more cautious attitude may be attributed to the fact that his academic background was in philosophy, as well as the fact that he was the most junior judge on the panel. ***

*** In addition to his decision in *Donoghue v. Stevenson,* Lord Thankerton sat with Lord Atkin on the panel that decided *Fender v. Mildmay*, in which he wrote, "There can be little question as to the proper function of the Courts in questions of public policy. Their duty is to expound, and not to expand, such policy."[425] ***

The two Law Lords who dissented in the case were later to be described by Lord Denning as "timorous souls who were fearful of allowing a new cause of action".[426] Similarly, Sir Frederick Pollock accused them of timidity and of being "less courageous" and of forgetting that they were "judging in a Court of last resort".[427]

*** [Lord Buckmaster] did contribute one thing to the development of the law in this area, though, in an ironic twist of fate. His expression of horror that the principle espoused by the majority, if adopted, would apply even to repairers, was later relied upon by other judges to expand the scope of *Donoghue v. Stevenson* to do just that.[428] ***

[Lord Tomlin's] short reasons in *Donoghue v. Stevenson* *** were consistent with his non-speculative nature, being based exclusively on the existing law, from which he did not wish to deviate. ***

IV. Products Liability

The first contribution of *Donoghue v. Stevenson* was to establish a new area of products liability based on negligence law. To this day, fifty years later, the rule Lord Atkin laid down still governs the relationships between producers and consumers of goods in this country.[429] ***

The standard of care required of manufacturers pursuant to *Donoghue v. Stevenson* is that of reasonable care, not strict liability. ***

Not only has liability been imposed for negligent production but producers have also been required to avoid negligence in the design of their products [§19.1].[430] ***

In the next few years, I expect that all our legislatures will adopt a statutory scheme of strict liability that will handle all products liability claims. After this legislation is enacted, the common law as set out in *Donoghue v. Stevenson* may survive, but its importance will be greatly diminished because the statutory cause of action will be a far more potent weapon in the hands of injured consumers than the common law action. Even though the significance of *Donoghue v. Stevenson* in the products field in the years ahead is likely to be reduced and eventually eclipsed, it has served our society for five decades, keeping producers concerned about the quality of their products and offering some protection to consumers. It has also acted as a foundation upon which the new legislative schemes can be erected. ***

V. The Neighbour Principle

[425] [1938] A.C. 1, at 23.
[426] *R.H. Candler v. Crane, Christmas & Co.* [1951] 2 K.B. 164, at 178 (C.A.).
[427] Sir Frederick Pollock, *The Snail in the Bottle, and Thereafter* (1933) 49 L.Q. Rev. 22, at 22.
[428] *Haseldine v. Daw & Son* [1941] 2 K.B. 343 (C.A.).
[429] See generally, A.M. Linden, *Canadian Tort Law* (3rd ed. 1982), chapter 16.
[430] [1972] S.C.R. 569.

The second and, in my view, most important contribution that *Donoghue v. Stevenson* has made is to serve as a testimonial to the creative power of tort law and indeed of the common law generally. By transforming one of the basic teachings of Christianity—that you should love your neighbour—into the central principle of negligence law—that you should use reasonable care not to injure your neighbour—a glorious idea was born and indelibly imprinted on our minds. In addition to this, the statement that "the categories of negligence are never closed" furnishes a continuing invitation to tort courts to innovate if they are so inclined.

In the last fifty years, there have been many examples of judicial lawmaking based on the neighbour principle, both directly and indirectly. There have also been examples where courts have sought to restrict the scope of the neighbour principle, but I believe that has been a losing battle. The dominant sweep of history in negligence law has been toward expanding the neighbour principle into every nook and cranny of negligence law.

For example, there was once a principle that there was no liability for negligent misstatements. Relying on the spirit and language of *Donoghue v. Stevenson*, that principle was jettisoned and replaced with a new one: there can be liability for negligent misrepresentation in appropriate circumstances [§19.3.1].[431] ***

Another area where the neighbour principle has had an impact is in the field of nervous shock. For a long time there was no liability for the negligent infliction of nervous shock. Eventually, however, the neighbour principle infiltrated judicial thinking on the subject and it was declared that reasonably foreseeable nervous shock was compensable [§19.2].[432] ***

So too, rescuers are now permitted to collect from negligent wrongdoers if their intervention is reasonably foreseeable. The Canadian courts have recognized this principle and extended it to the rescuers who are being treated as neighbours [§13.3].[433]

In the area of negligently inflicted economic losses, there has been a breakthrough of sorts [§19.3].[434] ***

There are many other examples where negligence law and the neighbour principle have sought to tame human activity.[435] For example, skiers and snowmobilers must exercise reasonable care on the snow; pilots in the sky and captains of ships must be cautious; policemen must report dangerous conditions on the highways; institutions must take reasonable care of their inhabitants and not let them do damage to themselves or others; a university can be liable to a student who is driven insane by initiation ceremonies. ***

The neighbour principle has made new inroads in the relationship between the lawyer and client [§19.4.1].[436] ***

It never ends. And it never should end. A vibrant, growing negligence law should be able to respond to cover new fact situations and new social conditions. With the aid of the neighbour principle and the inspiration of *Donoghue v. Stevenson*, the law of torts will be forever fresh and supple—able to handle any new problem as it arises with humanity and rationality.

VI. Conclusion

In conclusion, I believe that the House of Lords' decision in *Donoghue v. Stevenson* can still help us in the 1980s and beyond to build a better Canada. Negligence law and the neighbour principle play an important part in humanizing humanity. The neighbour principle can and does provide a magnificent vehicle to enable us to discuss what is acceptable and proper conduct and what is unacceptable and improper conduct in the 1980s. There are many situations in which a public airing of what is right and what is wrong is useful to

[431] See *Hedley, Byrne & Co. v. Heller & Partners Ltd.* [1964] A.C. 465; A.M. Linden, *Canadian Tort Law* (3rd ed. 1982), chapter 12.
[432] *Bourhill v. Young* [1943] A.C. 92; A.M. Linden, *Canadian Tort Law* (3rd ed. 1982), chapter 11.
[433] A.M. Linden, *Canadian Tort Law* (3rd ed. 1982), at 368.
[434] *Id.*, at 410.
[435] See generally, A.M. Linden, *Canadian Tort Law* (3rd ed. 1982), chapter 5.
[436] A.M. Linden, *Canadian Tort Law* (3rd ed. 1982), at 131.

our society. A tort trial, invoking the neighbour principle, provides an opportunity for such a public catharsis. Debates about the role of the neighbour principle over the years have forced us to consider the kind of society in which we now live and which we would like to inhabit in the future.

I, for one, would welcome the extensions of Lord Atkin's principles to all areas of daily activity. In my submission, for example, the area of nonfeasance should be treated no differently than misfeasance. Negligent statements should be handled just like negligent acts. Economic loss and nervous shock should be analyzed the same way as other types of loss. Nothing should stand in the way of the fullest elaboration of the neighbour principle. […continue reading]

REFLECTION:

- *Do you agree with Prof. Linden that courts should forever continue innovating and developing tort law based on the neighbour principle?*
- *Is Prof. Linden's conclusion compelling that under the tort of negligence, nonfeasance (careless omissions) should be treated no differently than misfeasance (careless acts)?*

13.1.3 Palsgraf v. Long Island Railroad Co. (1928) 248 N.Y. 339

BACKGROUND: Legal Edimation (2013), https://youtu.be/H4yEDkae1Jg

New York Court of Appeals – 248 N.Y. 339 (1928)

CARDOZO C.J. (POUND, LEHMAN, KELLOGG JJ. concurring):

1. Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform many feet away. The scales struck the plaintiff, causing injuries for which she sues.

2. The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed. Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. 'Proof of negligence in the air, so to speak, will not do.' Pollock, *Torts* (11th Ed.) p. 455; *Martin v. Herzog*, 228 N. Y. 164, 170. *** The plaintiff, as she stood upon the platform of the station, might claim to be protected against intentional invasion of her bodily security. Such invasion is not charged. She might claim to be protected against unintentional invasion by conduct involving in the thought of reasonable men an unreasonable hazard that such invasion would ensue. These, from the point of view of the law, were the bounds of her immunity, with perhaps some rare exceptions, survivals for the most part of ancient forms of liability, where conduct is held to be at the peril of the actor. *Sullivan v. Dunham*, 161 N.Y. 290. If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong, though apparently not one involving the risk of bodily insecurity, with reference to some one else. 'In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which would have averted or avoided the injury.' McSherry, C.J., in *West Virginia Central & P. R. Co. v. State*, 96 Md. 652, 666. ***

4. The argument for the plaintiff is built upon the shifting meanings of such words as 'wrong' and 'wrongful,' and shares their instability. What the plaintiff must show is 'a wrong' to herself; i.e., a violation of her own right, and not merely a wrong to some one else, nor conduct 'wrongful' because unsocial, but not 'a wrong' to any one. We are told that one who drives at reckless speed through a crowded city street is guilty of a

negligent act and therefore of a wrongful one, irrespective of the consequences. Negligent the act is, and wrongful in the sense that it is unsocial, but wrongful and unsocial in relation to other travelers, only because the eye of vigilance perceives the risk of damage. If the same act were to be committed on a speedway or a race course, it would lose its wrongful quality. The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension. *** This does not mean, of course, that one who launches a destructive force is always relieved of liability, if the force, though known to be destructive, pursues an unexpected path. *** Here, by concession, there was nothing in the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread wreckage through the station. If the guard had thrown it down knowingly and willfully, he would not have threatened the plaintiff's safety, so far as appearances could warn him. His conduct would not have involved, even then, an unreasonable probability of invasion of her bodily security. Liability can be no greater where the act is inadvertent.

5. Negligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all. Bowen, L.J., in *Thomas v. Quartermaine*, 18 Q.B.D. 685, 694. Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right, in this case, we are told, the right to be protected against interference with one's bodily security. But bodily security is protected, not against all forms of interference or aggression, but only against some. One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person. If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended. ***

6. The law of causation, remote or proximate, is thus foreign to the case before us. The question of liability is always anterior to the question of the measure of the consequences that go with liability. *** The consequences to be followed must first be rooted in a wrong.

7. The judgment of the Appellate Division and that of the Trial Term should be reversed, and the complaint dismissed, with costs in all courts.

ANDREWS J. (dissenting with CRANE AND O'BRIEN JJ.): ***

9. Upon these facts, may [the plaintiff] recover the damages she has suffered in an action brought against the master? The result we shall reach depends upon our theory as to the nature of negligence. Is it a relative concept—the breach of some duty owing to a particular person or to particular persons? Or, where there is an act which unreasonably threatens the safety of others, is the doer liable for all its proximate consequences, even where they result in injury to one who would generally be thought to be outside the radius of danger? ***

13. But we are told that 'there is no negligence unless there is in the particular case a legal duty to take care, and this duty must be one which is owed to the plaintiff himself and not merely to others.' Salmond, *Torts* (6th Ed.) 24. This I think too narrow a conception. Where there is the unreasonable act, and some right that may be affected there is negligence whether damage does or does not result. That is immaterial. Should we drive down Broadway at a reckless speed, we are negligent whether we strike an approaching car or miss it by an inch. The act itself is wrongful. It is a wrong not only to those who happen to be within the radius of danger, but to all who might have been there—a wrong to the public at large. ***

15. Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B, or C alone. ***

18. The proposition is this: Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm, might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone. There needs be duty due the one complaining, but this is not a duty to a particular individual because as to him harm might be expected. Harm to some one being the natural result of the act, not only that one alone, but all those in fact injured may complain. ***

20. The right to recover damages rests on additional considerations. The plaintiff's rights must be injured,

and this injury must be caused by the negligence. We build a dam, but are negligent as to its foundations. Breaking, it injures property down stream. We are not liable if all this happened because of some reason other than the insecure foundation. But, when injuries do result from our unlawful act, we are liable for the consequences. It does not matter that they are unusual, unexpected, unforeseen, and unforeseeable. But there is one limitation. The damages must be so connected with the negligence that the latter may be said to be the proximate cause of the former. ***

24. … What we do mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics. Take our rule as to fires. Sparks from my burning haystack set on fire my house and my neighbor's. I may recover from a negligent railroad. He may not. Yet the wrongful act has directly harmed the one as the other. We may regret that the line was drawn just where it was, but drawn somewhere it had to be. We said the act of the railroad was not the proximate cause of our neighbor's fire. Cause it surely was. The words we used were simply indicative of our notions of public policy. Other courts think differently. ***

32. This last suggestion is the factor which must determine the case before us. The act upon which defendant's liability rests is knocking an apparently harmless package onto the platform. The act was negligent. For its proximate consequences the defendant is liable. If its contents were broken, to the owner; if it fell upon and crushed a passenger's foot, then to him; if it exploded and injured one in the immediate vicinity, to him also as to A in the illustration. Mrs. Palsgraf was standing some distance away. How far cannot be told from the record—apparently 25 or 30 feet, perhaps less. Except for the explosion, she would not have been injured. We are told by the appellant in his brief, 'It cannot be denied that the explosion was the direct cause of the plaintiff's injuries.' So it was a substantial factor in producing the result—there was here a natural and continuous sequence—direct connection. The only intervening cause was that, instead of blowing her to the ground, the concussion smashed the weighing machine which in turn fell upon her. There was no remoteness in time, little in space. And surely, given such an explosion as here, it needed no great foresight to predict that the natural result would be to injure one on the platform at no greater distance from its scene than was the plaintiff. Just how no one might be able to predict. Whether by flying fragments, by broken glass, by wreckage of machines or structures no one could say. But injury in some form was most probable.

33. Under these circumstances I cannot say as a matter of law that the plaintiff's injuries were not the proximate result of the negligence. That is all we have before us. The court refused to so charge. No request was made to submit the matter to the jury as a question of fact, even would that have been proper upon the record before us.

34. The judgment appealed from should be affirmed, with costs.

REFLECTION:

- *Why did Cardozo J. find that Palsgraf was not proximate to the railway guard? Why did Andrews J. disagree?*
- *What distinguishes a wrong to a proximate individual from a wrong to the world at large?*

13.1.4 Grant v. Australian Knitting Mills Ltd [1935] UKPC 62

Privy Council (on appeal from Australia) – [1935] UKPC 62

LORD WRIGHT:

1. The appellant is a fully qualified medical man practising at Adelaide in South Australia. He brought his action against the respondents, claiming damages on the ground that he had contracted dermatitis by reason of the improper condition of underwear purchased by him from the respondents John Martin & Co. Ltd. and manufactured by the respondents the Australian Knitting Mills Ltd.; the case was tried by Sir George Murray, Chief Justice of South Australia, who after a trial lasting for twenty days gave judgment against both respondents for the appellant for £2,450 and costs. On appeal the High Court of Australia set aside that judgment by a majority. ***

2. The appellant's claim was that the disease was caused by the presence in the cuffs or ankle ends of the underpants which he purchased and wore, of an irritating chemical, viz., free sulphite, the presence of which was due to negligence in manufacture, and also involved on the part of the respondents John Martin & Co. Ltd. a breach of the relevant implied conditions under the *Sale of Goods Act 1895 (S.A.)*, sec. 14.

3. The underwear, consisting of two pairs of underpants and two singlets, was bought by the appellant at the shop of the respondents John Martin & Co. Ltd., who dealt in such goods and who will be hereafter referred to as the retailers, on 3rd June 1931; the retailers had in ordinary course at some previous date purchased them with other stock from the respondents the Australian Knitting Mills Ltd., who will be referred to as the manufacturers; the garments were of that class of the manufacturers' make known as Golden Fleece. The appellant put on one suit on the morning of Sunday, 28th June 1931; by the evening of that day he felt itching on the ankles but no objective symptoms appeared until the next day, when a redness appeared on each ankle in front over an area of about 2½ inches by 1½ inches. The appellant treated himself with calomine lotion, but the irritation was such that he scratched the places till he bled. On Sunday, 5th July, he changed his underwear and put on the other set which he had purchased from the retailers; the first set was washed and when the appellant changed his garments again on the following Sunday he put on the washed set and sent the others to the wash; he changed again on 12th July. Though his skin trouble was getting worse he did not attribute it to the underwear, but on 13th July he consulted a dermatologist, Dr. Upton, who advised him to discard the underwear, which he did, returning the garments to the retailers with the intimation that they had given him dermatitis; by that time one set had been washed twice and the other set once. The appellant's condition got worse and worse; he was confined to bed from 21st July for 17 weeks; the rash became generalized and very acute. In November he became convalescent and went to New Zealand to recuperate. He returned in the following February and felt sufficiently recovered to resume his practice, but soon had a relapse and by March his condition was so serious that he went in April into hospital where he remained until July. Meantime in April 1932 he commenced this action, which was tried in and after November of that year. Dr. Upton was his medical attendant throughout and explained in detail at the trial the course of the illness and the treatment he adopted. Dr. de Crespigny also attended the appellant from and after 22nd July 1931, and gave evidence at the trial. The illness was most severe, involving acute suffering and at times Dr. Upton feared that his patient might die. ***

7. The Chief Justice held that the appellant's skin was normal. He had habitually up to the material time worn woollen undergarments without inconvenience; that he was not sensitive to the mechanical effects of wool seemed to be proved by an experiment of his doctors who placed a piece of scoured wool on a clear area on his skin and found after a sufficient interval no trace of irritation being produced. ***

8. *** It is a fair deduction *** from the evidence that free sulphites were present in quantities not to be described as small, but that still left the question whether they were present in quantities sufficient to account for the disease. ***

11. *** No doubt this case depends in the last resort on inferences to be drawn from the evidence, though on much of the detailed evidence the trial Judge had the advantage of seeing and hearing the witnesses. The plaintiff must prove his case but there is an onus on a defendant who, on appeal, contends that a judgment should be upset: he has to show that it is wrong. Their Lordships are not satisfied in this case that the Chief Justice was wrong.

12. That conclusion means that the disease contracted and the damage suffered by the appellant were caused by the defective condition of the garments which the retailers sold to him and which the manufacturers made and put forth for retail and indiscriminate sale. The Chief Justice gave judgment against both respondents, against the retailers on the contract of sale and against the manufacturers in tort, on the basis of the decision in the House of Lords in *Donoghue v. Stevenson* (1932) A.C. 562. The liability of each respondent depends on a different cause of action, though it is for the same damage. It is not claimed that the appellant should recover his damage twice over; no objection is raised on the part of the respondents to the form of the judgment, which was against both respondents for a single amount. ***

15. The retailers accordingly in their Lordships' judgment are liable in contract: so far as they are concerned, no question of negligence is relevant to the liability in contract. But when the position of the manufacturers is considered, different questions arise: there is no privity of contract between the appellant and the

manufacturers: between them the liability, if any, must be in tort, and the gist of the cause of action is negligence. ***

16. On this basis, the damage suffered by the appellant was caused in fact *** by the negligent or improper way in which the manufacturers made the garments. But this mere sequence of cause and effect is not wide enough in law to constitute a cause of action in negligence, which is a complex concept, involving a duty as between the parties to take care, as well as a breach of that duty and resulting damage. It might be said that here was no relationship between the parties at all: the manufacturers, it might be said, parted once and for all with the garments when they sold them to the retailers and were therefore not concerned with their future history, except in so far as under their contract with the retailers they might come under some liability: at no time, it might be said, had they any knowledge of the existence of the appellant: the only peg on which it might be sought to support a relationship of duty was the fact that the appellant had actually worn the garments, but he had done so because he had acquired them by a purchase from the retailers, who were at that time the owners of the goods, by a sale which had vested the property in the retailers and divested both property and control from the manufacturers. It was said there could be no legal relationships in the matter save those under the two contracts between the respective parties to those contracts, the one between the manufacturers and the retailers and the other between the retailers and the appellant. These contractual relationships (it might be said) covered the whole field and excluded any question of tort liability: there was no duty other than the contractual duties.

17. This argument was based on the contention that the present case fell outside the decision of the House of Lords in *Donoghue v. Stevenson*. ***

20. It is clear that the decision treats negligence, where there is a duty to take care, as a specific tort in itself, and not simply as an element in some more complex relationship or in some specialized breach of duty, and still less as having any dependence on contract. All that is necessary as a step to establish the tort of actionable negligence is to define the precise relationship from which the duty to take care is to be deduced. It is, however, essential in English law that the duty should be established: the mere fact that a man is injured by another's act gives in itself no cause of action: if the act is deliberate, the party injured will have no claim in law even though the injury is intentional, so long as the other party is merely exercising a legal right: if the act involves lack of due care, again no case of actionable negligence will arise unless the duty to be careful exists. ***

21. It is obvious that the principles thus laid down involve a duty based on the simple facts detailed above, a duty quite unaffected by any contracts dealing with the thing, for instance, of sale by maker to retailer, and again by retailer to consumer or to the consumer's friend.

22. *** [T]he distinction between things inherently dangerous and things only dangerous because of negligent manufacture cannot be regarded as significant for the purpose of the questions here involved.

23. One further point may be noted. The principle of *Donoghue's Case* can only be applied where the defect is hidden and unknown to the consumer, otherwise the directness of cause and effect is absent: the man who consumes or uses a thing which he knows to be noxious cannot complain in respect of whatever mischief follows because it follows from his own conscious volition in choosing to incur the risk or certainty of mischance.

24. If the foregoing are the essential features of *Donoghue's Case*, they are also to be found, in their Lordships' judgment, in the present case. The presence of the deleterious chemical in the pants, due to negligence in manufacture, was a hidden and latent defect, just as much as were the remains of the snail in the opaque bottle: it could not be detected by any examination that could reasonably be made. Nothing happened between the making of the garments and their being worn to change their condition. The garments were made by the manufacturers for the purpose of being worn exactly as they were worn in fact by the appellant: it was not contemplated that they should be first washed. It is immaterial that the appellant has a claim in contract against the retailers, because that is a quite independent cause of action, based on different considerations, even though the damage may be the same. Equally irrelevant is any question of liability between the retailers and the manufacturers on the contract of sale between them. The tort liability is independent of any question of contract.

25. It was argued, but not perhaps very strongly, that ***Donoghue's Case*** was a case of food or drink to be consumed internally, whereas the pants here were to be worn externally. No distinction, however, can be logically drawn for this purpose between a noxious thing taken internally and a noxious thing applied externally: the garments were made to be worn next the skin: indeed Lord Atkin specifically puts as examples of what is covered by the principle he is enunciating things operating externally, such as "an ointment, a soap, a cleaning fluid or cleaning powder". ***

28. In their Lordships' opinion it is enough for them to decide this case on its actual facts.

29. No doubt many difficult problems will arise before the precise limits of the principle are defined: many qualifying conditions and many complications of fact may in the future come before the Courts for decision. It is enough now to say that their Lordships hold the present case to come within the principle of ***Donoghue's Case*** and they think that the judgment of the Chief Justice was right in the result and should be restored as against both respondents, and that the appeal should be allowed with costs ***.

REFLECTION:

- *What was the basis of liability of the retailer and the manufacturer respectively?*
- *What was significance of defect being hidden? Does it impact the question of duty, breach or causation?*

13.1.5 Haley v. London Electricity Board [1964] UKHL 3

House of Lords – [1964] UKHL 3

LORD REID:

1. My Lords, the Appellant became blind many years ago as a result of an accident. He conquered his disability to such an extent that for some years before 1956 he was employed as a telephonist by the London County Council. He lived in a street in South East London and it was his habit to walk unaccompanied from his home for about 100 yards along the pavement and then to get someone to help him to cross the main road where he boarded a bus. With the aid of his white stick he had learned to avoid all ordinary obstacles. On the morning of 29th October, 1956, he had walked some fifty yards from his house. On that morning unknown to him the Respondents' workmen had begun excavating a trench in the pavement, and they had placed an obstacle, which I shall describe in a moment, near the end of the trench. The Appellant tripped over it and fell heavily. As a result of his head striking the pavement he has become deaf. He now sues the Respondents on the ground of negligence. The case was decided against him by the trial judge and by the Court of Appeal and he now appeals to this House.

2. The Respondents had authority to make this excavation under the *Public Utilities Street Works Act, 1950*. That Act requires that any such excavation shall be adequately fenced and guarded but the Respondents argue that there is no civil liability under that Act for breach of a statutory duty. I need not consider that question because I am of opinion that the Appellant is entitled to succeed at common law.

3. The Respondents gave no instructions to their men as to how they were to guard this excavation and gave them no apparatus for that purpose except two notice boards. What the men did was to put the notice boards in such a position in the roadway as to prevent vehicles coming near the kerb and so enable pedestrians to avoid the excavation by walking past it on the roadway. At one end of the excavation they put a pick and shovel on the pavement, and at the end to which the Appellant came they put a punner. This implement consists of a long handle like a broomstick to one end of which is attached a heavy weight. They put the heavy end on the pavement near the kerb and put the other end on to a railing, which runs along the inside of the pavement, so that it was some two feet above the ground. The handle was therefore sloping up from ground level at the outside of a height of about two feet at the inside of the pavement.

4. The Appellant approached using his stick in the proper way—keeping it in front of him more or less vertical and moving it about so as to detect anything in his way. But he missed the punner handle and his leg caught it about 4½ inches above his ankle or about 8 or 9 inches above the ground. It is not alleged that he was negligent. He gave evidence that he had more than once detected with his stick the railing which the Post Office always use to guard their excavations. A senior Post Office engineer gave evidence

that they always guard their excavations with a light fence like a towel rail about two feet high, and that they take into account the protection of blind people. ***

5. The trial judge held that what the Respondents' men did gave adequate warning to ordinary people with good sight, and I am not disposed to disagree with that. The excavation was shallow and was to be filled in before nightfall, and the punner (or the pick and shovel) together with the notice boards and the heap of spoil on the pavement beside the trench were I think sufficient warning to ordinary people that they should not try to pass along the pavement past the trench. ***

6. On the other hand if it was the duty of the Respondents to have in mind the needs of blind or infirm pedestrians I think that what they did was quite insufficient. Indeed the evidence shows that an obstacle attached to a heavy weight and only nine inches above the ground may well escape detection by a blind man's stick and is for him a trap rather than a warning.

7. So the question for your Lordships' decision is the nature and extent of the duty owed to pedestrians by persons who carry out operations on a city pavement. The Respondents argue that they were only bound to have in mind or to safeguard ordinary able-bodied people and were under no obligation to give particular consideration to the blind or infirm. If that is right, it means that a blind or infirm person who goes out alone goes at his peril. He may meet obstacles which are a danger to him but not to those with good sight because no one is under any obligation to remove or protect them. And if such an obstacle causes him injury he must suffer the damage in silence. ***

9. In deciding what is reasonably foreseeable one must have regard to common knowledge. We are all accustomed to meeting blind people walking alone with their white sticks on city pavements. No doubt there are many places open to the public where for one reason or another one would be surprised to see a blind person walking alone but a city pavement is not one of them. And a residential street cannot be different from any other. The blind people we meet must live somewhere and most of them probably left their homes unaccompanied. It may seem surprising that blind people can avoid ordinary obstacles so well as they do but we must take account of the facts. ***

10. No question can arise in this case of any great difficulty in affording adequate protection for the blind. In considering what is adequate protection again one must have regard to common knowledge. One is entitled to expect of a blind person a high degree of skill and care because none but the most foolhardy would venture to go out alone without having that skill and exercising that care. We know that in fact blind people do safely avoid all ordinary obstacles on pavements; there can be no question of padding lamp posts as was suggested in one case. But a moment's reflection shows that a low obstacle in an unusual place is a grave danger: on the other hand it is clear from the evidence in this case and also I think from common knowledge that quite a light fence some two feet high is an adequate warning. There would have been no difficulty in providing such a fence here. The evidence is that the Post Office always provide one, and that the Respondents have similar fences which are often used. Indeed the evidence suggests that the only reason there was no fence here was that the accident occurred before the necessary fences had arrived. ***

16. I can see no justification for laying down any hard and fast rule limiting the classes of persons for whom those interfering with a pavement must make provision. It is said that it is impossible to tell what precautions will be adequate to protect all kinds of infirm pedestrians or that taking such precautions would be unreasonably difficult or expensive. I think that such fears are exaggerated, and it is worth recollecting that when the Courts sought to lay down specific rules as to the duties of occupiers the law became so unsatisfactory that Parliament had to step in and pass the *Occupiers Liability Act 1957*. It appears to me that the ordinary principles of the common law must apply in streets as well as elsewhere, and that fundamentally they depend on what a reasonable man, careful of his neighbour's safety, would do having the knowledge which a reasonable man in the position of the defendant must be deemed to have. I agree with the statement of law at the end of the speech of Lord Sumner in *Glasgow Corporation v. Taylor* [1922] 1 AC 44 at p. 67: "a measure of care appropriate to the inability or disability of those who are immature or feeble in mind or body is due from others, who know of or ought to anticipate the presence of such persons within the scope and hazard of their own operations."

17. I would therefore allow this appeal. The assessment of damages has been deferred and the case must be remitted for such assessment. ***

LORD MORTON, LORD EVERSHED, LORD HODSON AND LORD GUEST concurred separately.

REFLECTION:
- *What common knowledge should the London Electricity Board workers have considered?*
- *How does the common law's regulation of people's conduct differ from statutory regulation?*[437]

13.1.6 Elements of the tort of negligence

J. Stapleton, "Conceptual Interplay between Elements of the Tort of Negligence" in Three Essays on Torts (Oxford: Oxford University Press, 2021), 65-66

The tort of negligence has five elements that the claimant must prove: that the subject matter of the complaint is of a type that is actionable in this tort [§15]; that the defendant owed the complainant a duty of care in relation to risks of that type of subject matter [§13]; that the conduct of the defendant breached that duty [§14]; that the breach was a factual cause of the injury of which complaint is made [§16]; and that this particular injurious consequence of the defendant's breach is not 'too remote'—by which is meant that it must fall within the normatively appropriate scope of the defendant's legal responsibility [§17].

Even if a claimant establishes all elements of a tort, there is a final stage in the analysis that addresses the form and extent of remedy, if any, the claimant is entitled to [§9, §20]. ***

The five elements of the tort of negligence are, analytically, dependent on each other in a sequential way. For example, the types of actionable complaints, often called types of 'actionable damage', are economic loss, nervous shock, and physical injuries excluding nervous shock. Which type of complaint is in issue determines the approach the courts take to the analysis of the duty question. *** […continue reading]

REFLECTION:
- *Do the five elements of the tort of negligence operate to facilitate or to constrain judicial law-making?*
- *Why should the elements of negligence be understood as sequentially dependent?*
- *Do judges really reason through cases by ascertaining whether there was duty of care and working through the elements of negligence sequentially, or in reality do they first determine whether the plaintiff ought to have a remedy and let that decision guide whether the elements of negligence are established?*

13.1.7 Further material

- D. Owen, "The Five Elements of Negligence" (2007) 35 Hofstra L Rev 1671.
- A.C. Hutchinson, "The Next Revolution? Negligence Law for the 21st Century" (2023) 46 Dalhousie LJ 575.
- "The Paisley Snail: *Donoghue v. Stevenson*" (Law Courts Education Society of British Columbia, 1996) 📺.
- Proof Podcast, "The Case of the Snail in the Ginger Beer" (Dec 3, 2020) 🎧.
- ABC Radio National, "An Object in Time—The Ginger Beer" (Jun 15, 2021) 🎧.
- The Law Report Podcast, "How Itchy Underpants Created Our Consumer Laws" (Jan 25, 2021) 🎧.
- Just Torts Podcast (U Sydney), "Duty of Care: Generally" (Nov 3, 2017) 🎧.
- L.N. Klar, "The Role of Fault and Policy in Negligence Law" (1996) 35 Alberta L Rev 24.
- P.T. Burns & S.J. Lyons (eds), *Donoghue v. Stevenson and the Modern Law of Negligence: The Paisley Papers* (Vancouver: Continuing Legal Education Society of British Columbia, 1991).
- Law Society of Scotland, "*Donoghue v. Stevenson* 90th Anniversary Conference: The Immortal Snail" (May 2022) 📺.
- The Paisley Irregulars, "Favourite Resources about *Donoghue v. Stevenson*" (2021).

[437] See *Donoghue v. Folkestone Properties Ltd* [2003] EWCA Civ 231, [75]-[76].

- The Law Academy (UK), "Introduction to Negligence" (Oct 12, 2023) 📺.

13.2 Misfeasance versus nonfeasance

A.M. Linden, "Tort Liability for Criminal Nonfeasance" (1966) 44 Can B Rev 25, 25-27

The common law has treated the Good Samaritan [§13.3.3] with uncommon harshness over the years, while the priest and the Levite have been treated with uncommon generosity.[438] One who attempts in good faith to assist someone in peril exposes himself to potential civil liability in the event of his negligence, but one who stands idly by without lifting a finger incurs no liability, although the latter conduct is probably more reprehensible and more deserving of a civil sanction.[439] First year law students are normally horrified to learn that the common law does not require one to rescue a drowning man,[440] that one need not warn a blind man who is stepping in front of a moving automobile,[441] and that there is no duty to prevent someone from walking into the mouth of a dangerous machine.[442] They are no less shocked when they discover that doctors, who faithfully subscribe to the glorious Hippocratic Oath, are not subjected to civil liability if they hypocritically refuse to attend on a dying patient.[443] Nor does the common law require one to feed the starving, to bind up the wounds of those who are bleeding to death,[444] nor to prevent a child from engaging in dangerous conduct.[445]

The common law has acknowledged on occasion that "the impulsive desire to save human life when in peril is one of the most beneficial instincts of humanity"[446] and that "to protect those who are not able to protect themselves is a duty which everyone owes to society",[447] but on the question of civil liability it has adopted a hands-off policy. The regulation of this type of conduct has been assigned to the "higher law" and to the "voice of conscience" both of which would appear singularly ineffective either to prevent the harm or to compensate the victim.[448] The common law courts have resisted the creation of a general civil obligation to render assistance to individuals in danger, although in several European countries such a duty has been imposed.[449]

The ethical and religious precepts of Western civilization have had more influence upon legislatures which have enacted various types of criminal or quasi-criminal legislation requiring certain affirmative conduct.[450] The legislative commandments may be decreed by statute, regulation or order in council, or municipal ordinance and their breach is normally punishable by fine, imprisonment or other sanctions.[451] One of the most prevalent pieces of this type of legislation is the "hit and run statute". Where the driver of a motor vehicle is involved in a collision, he is required to stop, to give his name and address and "to render all possible assistance" whether he was at fault for the accident or not.[452] Failure to comply is punishable by

[438] See generally, Prosser, *The Law of Torts*, (3rd ed., 1964), p. 334; Fleming, *The Law of Torts* (3rd ed., 1965), p. 145; 2 Harper and James, *The Law of Torts* (1956), p. 1044.
[439] Prosser, op. cit., *ibid*., p. 339; Ames, *Law and Morals* (1908), 22 Harv. L. Rev. 97, 112, Reprinted in *Selected Essays on The Law of Torts* (1924), p. 13; Bohlen, *The Moral Duty to Aid Others As A Basis of Tort Liability* (1908), 56 U. Pa. L. Rev. 217, 316.
[440] *Osterlind v. Hill* (1928), 263 Mass. 73, 160 N.E. 301.
[441] *The Restatement of the Law of Torts* (1934), §314, Illustration 1.
[442] *Buch v. Amory Manufacturing Co.* (1897), 69 N.H. 257, 44 Atl. 809; *Gautret v. Egerton.* (1867), L.R. 2 C.P. 371.
[443] *Hurley v. Edingfield* (1901), 156 Ind. 416, 59 N.E. 1058.
[444] *Allen v. Hixson* (1900), 111 Ga. 460, 36 S.E. 810.
[445] *Sidwell v. McVay* (1955), 282 P. 2d 756 (Okl).
[446] *Scaramanga v. Stamp* (1880), 5 C.P.D. 295, at p. 304 (Cockburn C.J.), cited in *Love v. New Fairview* (1904), 10 B.C.R. 330 (C.A.).
[447] *Jenoure v. Demege*, [1891] A.C. 73, at p. 77.
[448] Prosser, op. cit., footnote 1, p. 336.
[449] Dawson, *Negotiorum Gestio: The Altruistic Intermeddler* (1961), 74 Harv. L. Rev. 1073, at p. 1105; *Failure to Rescue: A Comparative Study* (1952), 52 Col. L. Rev. 631.
[450] See *infra*.
[451] See *infra*.
[452] See, for example, *Ontario Highway Traffic Act*, R.S.O., 1960, c. 172, s. 143a and *California Vehicle Code* (1959), §20001, 20003, 20004.

fine, imprisonment and other sanctions. Legislation which penalizes the owner of a motor vehicle who fails to insure against public liability is becoming increasingly common.[453] The purpose of this legislation is to ensure that sufficient funds will be available to satisfy any tort judgment secured by a third person against the owner of a motor vehicle that is involved in an accident. Municipal ordinances frequently require abutting owners to keep the public sidewalk bordering their property free and clear of ice and snow under threat of criminal prosecution.[454] Nor is it uncommon to find statutes that require individuals to assist a police officer in the apprehension of a criminal if so required[455] and to supply food, clothing and medical assistance to near relatives,[456] and other such legislation.[457] Thus, nonfeasance may amount to a crime. ***

Some writers have denounced as "notorious"[458] and "improper"[459] any judicial use of criminal legislation to create new tort duties,[460] others have defended such action,[461] and a good number of writers and courts generally have not distinguished between the use of criminal legislation where a common law duty is already in existence and where no common law duty has been recognized.[462] *** The courts have perpetuated unnecessarily the confusion which surrounds this area by their refusal to discuss candidly the conflicting policies to be resolved. *** […continue reading]

REFLECTION:

- *Who is the Good Samaritan, and why has the common law treated him uncommonly harshly over the years?*
- *What is misfeasance? What is nonfeasance? Should the common law of tort draw such a distinction?*

13.2.1 Yania v. Bigan (1959) 397 Pa. 316 (PA SC)

Pennsylvania Supreme Court – 397 Pa. 316 (1959)

BENJAMIN R. JONES J.:

1. A bizarre and most unusual circumstance provides the background of this appeal.

2. On September 25, 1957 John E. Bigan was engaged in a coal strip-mining operation in Shade Township, Somerset County. On the property being stripped were large cuts or trenches created by Bigan when he removed the earthen overburden for the purpose of removing the coal underneath. One cut contained water 8 to 10 feet in depth with side walls or embankments 16 to 18 feet in height; at this cut Bigan had installed a pump to remove the water.

3. At approximately 4 p.m. on that date, Joseph F. Yania, the operator of another coal strip-mining operation, and one Boyd M. Ross went upon Bigan's property for the purpose of discussing a business matter with Bigan, and, while there, were asked by Bigan to aid him in starting the pump. Ross and Bigan entered the cut and stood at the point where the pump was located. Yania stood at the top of one of the cut's side walls and then jumped from the side wall—a height of 16 to 18 feet—into the water and was drowned.

4. Yania's widow, in her own right and on behalf of her three children, instituted wrongful death and survival actions against Bigan contending Bigan was responsible for Yania's death. Preliminary objections, in the nature of demurrers, to the complaint were filed on behalf of Bigan. The court below sustained the preliminary objections; from the entry of that order this appeal was taken. ***

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[453] In the United Kingdom, *Road Traffic Act (1930)*, 20 & 21 Geo. 5, c. 43, s. 35(1); In Massachusetts, Mass. Ann. Laws, c. 90; In New York, N.Y. Vehicle and Traffic Law, §310; In North Carolina, N. C. Sess. Laws of 1957, c. 1393.
[454] For example, see *Halifax by-law in Commerford v. Board of School Commissioners*, [1950] 2 D.L.R. 207 (N.S.S.C.).
[455] See *Criminal Code of Canada*, S.C., 1953-54, c. 57 as am., s. 110(b).
[456] *Ibid*., s. 186(1), (2); *Children's Maintenance Act*, R.S.O., 1960, c. 55, s. 1.; California Penal Code, § 270.
[457] See *infra*.
[458] Fleming, op. cit., footnote 1, p. 130, footnote 23.
[459] Williams, foe. cit., footnote 21, at p. 259.
[460] Gregory; foe. cit., *ibid*., and Thayer, foe. cit., *ibid*., strongly opposed this type of judicial use of legislation.
[461] Morris, foe. cit., *ibid*.; See also Morris, *Studies in the Law of Torts* (1952), p. 141.
[462] For example, Fricke, op. cit., *ibid*.; Salmond, *Torts* (12th ed., 1957), p. 467; Charlesworth, *Negligence* (4th ed., 1962), p. 951.

6. *** Summarized, Bigan stands charged with three-fold negligence: (1) by urging, enticing, taunting and inveigling Yania to jump into the water; (2) by failing to warn Yania of a dangerous condition on the land, i.e. the cut wherein lay 8 to 10 feet of water; (3) by failing to go to Yania's rescue after he had jumped into the water.[463] ***

8. Appellant initially contends that Yania's descent from the high embankment into the water and the resulting death were caused 'entirely' by the spoken words and blandishments of Bigan delivered at a distance from Yania. The complaint does not allege that Yania slipped or that he was pushed or that Bigan made any physical impact upon Yania. On the contrary, the only inference deducible from the facts alleged in the complaint is that Bigan, by the employment of cajolery and inveiglement, caused such a mental impact on Yania that the latter was deprived of his volition and freedom of choice and placed under a compulsion to jump into the water. Had Yania been a child of tender years or a person mentally deficient then it is conceivable that taunting and enticement could constitute actionable negligence if it resulted in harm. However, to contend that such conduct directed to an adult in full possession of all his mental faculties constitutes actionable negligence is not only without precedent but completely without merit. *McGrew v. Stone*, 53 Pa. 436; *Rugart v. Keebler-Weyl Baking Co.*, 277 Pa. 408, 121 A. 198, and *Bisson v. John B. Kelly Inc.*, 314 Pa. 99, 170 A. 139, relied upon by appellant, are clearly inapposite. ***

10. The only condition on Bigan's land which could possibly have contributed in any manner to Yania's death was the water-filled cut with its high embankment. Of this condition there was neither concealment nor failure to warn, but, on the contrary, the complaint specifically avers that Bigan not only requested Yania and Boyd to assist him in starting the pump to remove the water from the cut but 'led' them to the cut itself. If this cut possessed any potentiality of danger, such a condition was as obvious and apparent to Yania as to Bigan, both coal strip-mine operators. Under the circumstances herein depicted Bigan could not be held liable in this respect.

11. Lastly, it is urged that Bigan failed to take the necessary steps to rescue Yania from the water. The mere fact that Bigan saw Yania in a position of peril in the water imposed upon him no legal, although a moral, obligation or duty to go to his rescue unless Bigan was legally responsible, in whole or in part, for placing Yania in the perilous position. *Restatement, Torts*, § 314. Cf. *Restatement, Torts*, § 322. The language of this Court in *Brown v. French*, 104 Pa. 604, 607, 608, is apt: 'If it appeared that the deceased, by his own carelessness, contributed in any degree to the accident which caused the loss of his life, the defendants ought not to have been held to answer for the consequences resulting from that accident. … He voluntarily placed himself in the way of danger, and his death was the result of his own act. … That his undertaking was an exceedingly reckless and dangerous one, the event proves, but there was no one to blame for it but himself. He had the right to try the experiment, obviously dangerous as it was, but then also upon him rested the consequences of that experiment, and upon no one else; he may have been, and probably was, ignorant of the risk which he was taking upon himself, or knowing it, and trusting to his own skill, he may have regarded it as easily superable. But in either case, the result of his ignorance, or of his mistake, must rest with himself—and cannot be charged to the defendants'. The complaint does not aver any facts which impose upon Bigan legal responsibility for placing Yania in the dangerous position in the water and, absent such legal responsibility, the law imposes on Bigan no duty of rescue.

12. *** Yania, a reasonable and prudent adult in full possession of all his mental faculties, undertook to perform an act which he knew or should have known was attended with more or less peril and it was the performance of that act and not any conduct upon Bigan's part which caused his unfortunate death.

REFLECTION:

- *What were Yania's widow's three arguments? Why did they fail to establish liability?*
- *Is the common law omissions principle a morally defensible principle?*

[463] So far as the record is concerned we must treat the 33 year old Yania as in full possession of his mental faculties at the time he jumped.

13.2.2 Zelenko v. Gimbel Bros. Inc. (1935) 158 Misc. 904 (NY SC)

New York Supreme Court – 158 Misc. 904 (1935)

LAUER J.:

1. The general proposition of law is that if a defendant owes a plaintiff no duty, then refusal to act is not negligence. (*Palsgraf v. L.I.R.R. Co.*, 248 N. Y. 339 [§13.1.3].) But there are many ways that a defendant's duty to act may arise. Plaintiff's intestate was taken ill in defendant's store. We will assume that defendant owed her no duty at all—that defendant could have let her be and die. But if a defendant undertakes a task, even if under no duty to undertake it, the defendant must not omit to do what an ordinary man would do in performing the task.

2. Here the defendant undertook to render medical aid to the plaintiff's intestate. Plaintiff says that defendant kept his intestate for six hours in an infirmary without any medical care. If defendant had left plaintiff's intestate alone, beyond doubt some bystander, who would be influenced more by charity than by legalistic duty, would have summoned an ambulance. Defendant segregated this plaintiff's intestate where such aid could not be given and then left her alone.

3. The plaintiff is wrong in thinking that the duty of a common carrier of passengers is the same as the duty of this defendant. The common carrier assumes its duty by its contract of carriage. This defendant assumed its duty by meddling in matters with which legalistically it had no concern. The plaintiff is right in arguing that when the duty arose, the same type of neglect is actionable in both cases. (See *Middleton v. Whitridge*, 213 N. Y. 499.)

4. The motion [to dismiss amended complaint on the ground that it does not state facts sufficient to constitute a cause of action] is denied.

REFLECTION:

- *What feature of this case distinguishes the defendant's conduct from that in Yania?*

13.2.3 Home Office v. Dorset Yacht Co. Ltd [1970] UKHL 2

✗REF: §17.2.2

LORD REID:

1. My lords, on 21st September 1962 a party of Borstal trainees were working on Brownsea Island in Poole Harbour under the supervision and control of three Borstal officers. During that night seven of them escaped and went aboard a yacht which they found nearby. They set this yacht in motion and collided with the Respondents' yacht which was moored in the vicinity. Then they boarded the Respondents' yacht. Much damage was done to this yacht by the collision and some by the subsequent conduct of these trainees. The Respondents sue the Appellants, the Home Office, for the amount of his damage.

2. The case comes before your Lordships on a preliminary issue whether the Home Office or these Borstal officers owed any duty of care to the Respondents capable of giving rise to a liability in damages. So it must he assumed that the Respondents can prove all that they could prove on the pleadings if the case goes to trial. The question then is whether on that assumption the Home Office would be liable in damages. It is admitted that the Home Office would be vicariously liable [§23] if an action would lie against any of these Borstal officers.

3. The facts which I think we must assume are that this party of trainees were in the lawful custody of the Governor of the Portland Borstal Institution and were sent by him to Brownsea Island on a training exercise in the custody and under the control of the three officers with instructions to keep them in custody and under control. But in breach of their instructions these officers simply went to bed leaving the trainees to their own devices. If they had obeyed their instructions they could and would have prevented these trainees from escaping. They would therefore be guilty of the disciplinary offences of contributing by carelessness or neglect to the escape of a prisoner and to the occurrence of loss, damage or injury to any person or

property. All the escaping trainees had criminal records and five of them had a record of previous escapes from Borstal institutions. The three officers knew or ought to have known that these trainees would probably try to escape during the night, would take some vessel to make good their escape and would probably cause damage to it or some other vessel. There were numerous vessels moored in the harbour, and the trainees could readily board one of them. So it was a likely consequence of their neglect of duty that the Respondents' yacht would suffer damage.

4. The case for the Home Office is that under no circumstances can Borstal officers owe any duty to any member of the public to take care to prevent trainees under their control or supervision from injuring him or his property. *** That case is based on three main arguments. First it is said that there is virtually no authority for imposing a duty of this kind. Secondly it is said that no person can be liable for a wrong done by another who is of full age and capacity and who is not the servant or acting on behalf of that person. And thirdly it is said that public policy (or the policy of the relevant legislation) requires that these officers should be immune from any such liability.

5. The first would at one time have been a strong argument. About the beginning of this century most eminent lawyers thought that there were a number of separate torts involving negligence each with its own rules, and they were most unwilling to add more. They were of course aware from a number of leading cases that in the past the Courts had from time to time recognised new duties and new grounds of action. But the heroic age was over, it was time to cultivate certainty and security in the law: the categories of negligence were virtually closed. The learned Attorney-General invited us to return to those halcyon days, but, attractive though it may be, I cannot accede to his invitation.

6. In later years there has been a steady trend towards regarding the law of negligence as depending on principle so that, when a new point emerges, one should ask not whether it is covered by authority but whether recognised principles apply to it. *Donoghue v. Stevenson* [1932] AC 562 [**§13.1.1**] may be regarded as a milestone, and the well-known passage in Lord Atkin's speech should I think be regarded as a statement of principle. It is not to be treated as if it were a statutory definition. It will require qualification in new circumstances. But I think that the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion. ***

15. *** Unfortunately tortious or criminal action by a third party is often the very kind of thing which is likely to happen as a result of the wrongful or careless act of the defendant. And in the present case, on the facts which we must assume at this stage, I think that the taking of a boat by the escaping trainees and their unskilful navigation leading to damage to another vessel were the very kind of thing that these Borstal officers ought to have seen to be likely. ***

25. It was suggested that a decision against the Home Office would have very far reaching effects: it was indeed suggested in the Court of Appeal that it would make the Home Office liable for the loss occasioned by a burglary committed by a trainee on parole or a prisoner permitted to go out to attend a funeral. But *** in the vast majority of cases that would not be so. *** I think the fears of the Appellants are unfounded: I cannot believe that negligence or dereliction of duty is widespread among prison or Borstal officers.

26. Finally I must deal with public policy. It is argued that it would be contrary to public policy to hold the Home Office or its officers liable to a member of the public for this carelessness—or indeed any failure of duty on their part. The basic question is who shall bear the loss caused by that carelessness—the innocent Respondents or the Home Office who are vicariously liable for the conduct of their careless officers. I do not think that the argument for the Home Office can be put better than it was put by the Court of Appeals of New York in *Williams v. State of New York* (1955) 127 N.E. 2d. 545 at page 550:

> "… public policy also requires that the State be not held liable. To hold otherwise would impose a heavy responsibility upon the State, or dissuade the wardens and principal keepers of our prison system from continued experimentation with 'minimum security' work details—which provide a means for encouraging better-risk prisoners to exercise their senses of responsibility and honor and so prepare themselves for their eventual return to society. ***"

27. It may be that public servants of the State of New York are so apprehensive, easily dissuaded from doing their duty, and intent on preserving public funds from costly claims, that they could be influenced in

this way. But my experience leads me to believe that Her Majesty's servants are made of sterner stuff. So I have no hesitation in rejecting this argument. I can see no good ground in public policy for giving this immunity to a Government Department. I would dismiss this appeal. ***

LORD MORRIS OF BORTH-Y-GEST: ***

47. I consider that the feature in the present case that there was a right to exercise control over the boys makes the present case sufficiently analogous with cases in which it has been held that there was a duty situation as to make it reasonable so to hold here. In his judgment in *Smith v. Leurs* 70 C.L.R. 256 Dixon J. (at page 261) said:

> "But apart from vicarious responsibility [§23] one man may be responsible to another for the harm done to the latter by a third person; he may be responsible on the ground that the act of the third person could not have taken place but for his own fault or breach of duty. There is more than one description of duty the breach of which may produce this consequence. For instance it may be a duty of care in reference to things involving special danger. It may even be a duty of care with reference to the control of actions or conduct of the third person. It is however exceptional to find in the law a duty to control another's actions to prevent harm to strangers. The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third. There are however special relations which are the source of a duty of this nature."

48. In the present case there was, I think, a special relation of this nature. ***

56. For the reasons that I have given I would dismiss the appeal. ***

LORD DIPLOCK: ***

158. The branch of English law which deals with civil wrongs abounds with instances of acts and, more particularly, of omissions which give rise to no legal liability in the doer or emitter for loss or damage sustained by others as a consequence of the act or omission, however reasonably or probably that loss or damage might have been anticipated. The very parable of the good Samaritan (Luke 10 v. 30) [§13.3.3] which was evoked by Lord Atkin in *Donoghue v. Stevenson* illustrates, in the conduct of the priest and of the Levite who passed by on the other side, an omission which was likely to have as its reasonable and probable consequence damage to the health of the victim of the thieves, but for which the priest and Levite would have incurred no civil liability in English law. Examples could be multiplied. You may cause loss to a tradesman by withdrawing your custom though the goods which he supplies are entirely satisfactory; you may damage your neighbour's land by intercepting the flow of percolating water to it even though the interception is of no advantage to yourself; you need not warn him of a risk of physical danger to which he is about to expose himself unless there is some special relationship between the two of you such as that of occupier of land and visitor; you may watch your neighbour's goods being ruined by a thunderstorm though the slightest effort on your part could protect them from the rain and you may do so with impunity unless there is some special relationship between you such as that of bailor and bailee. ***

160. In the present appeal, *** the conduct of the defendant which is called in question differs from the kind of conduct discussed in *Donoghue* v. *Stevenson* in at least two special characteristics. First, the actual damage sustained by the Plaintiff was the direct consequence of a tortious act done with conscious volition by a third party responsible in law for his own acts and this act was interposed between the act of the defendant complained of and the sustension of damage by the plaintiff. Secondly, there are two separate "neighbour relationships" of the defendant involved, a relationship with the plaintiff and a relationship with the third party. These are capable of giving rise to conflicting duties of care.

161. This appeal, therefore, also raises the lawyer's question "Am I my brother's keeper"? A question which may also receive a restricted reply. ***

200. I should *** hold that any duty of a Borstal officer to use reasonable care to prevent a Borstal trainee from escaping from his custody was owed only to persons whom he could reasonably foresee had property situate in the vicinity of the place of detention of the detainee which the detainee was likely to steel or to appropriate and damage in the course of eluding immediate pursuit and recapture. Whether or not any

person fell within this category would depend upon the facts of the particular case including the previous criminal and escaping record of the individual trainee concerned and the nature of the place from which he escaped.

201. So to hold would be a rational extension of the relationship between the custodian and the person sustaining the damage which was accepted in *Ellis v. Home Office* [[1953] 2 All E.R. 149] and *D'Arcy v. Prison Commissioners* [Times Newspaper, 15 November 1955] as giving rise to a duty of care on the part of the custodian to exercise reasonable care in controlling his detainee. In those two cases the custodian had a legal right to control the physical proximity of the person or property sustaining the damage to the detainee who caused it. The extended relationship substitutes for the right to control the knowledge which the custodian possessed or ought to have possessed that physical proximity in fact existed.

202. In the present appeal the place from which the trainees escaped was an island from which the only means of escape would presumably be a boat accessible from the shore of the island. There is thus material, fit for consideration at the trial, for holding that the plaintiff, as the owner of a boat moored off the island, fell within the category of persons to whom a duty of care to prevent the escape of the trainees was owed by the officers responsible for their custody.

203. If therefore it can be established at the trial of this action (1) that the Borstal officers in failing to take precautions to prevent the trainees from escaping were acting in breach of their instructions and not in *bona fide* exercise of a discretion delegated to them by the Home Office as to the degree of control to be adopted and (2) that it was reasonably foreseeable by the officers that if these particular trainees did escape they would be likely to appropriate a boat moored in the vicinity of Brownsea Island for the purpose of eluding immediate pursuit and to cause damage to it, the Borstal officers would be in breach of a duty of care owed to the plaintiff and the plaintiff would, in my view, have a cause of action against the Home Office as vicariously liable for the negligence of the Borstal officers.

204. I would accordingly dismiss the appeal upon the preliminary issue of law and allow the case to go for trial on those issues of fact.

LORD PEARSON concurred separately; VISCOUNT DILHORNE dissented.

REFLECTION:

- *What is the scope of the exception to the omissions principle elucidated by the House of Lords?*
- *What were the policy arguments in favour of shielding the Home Office and its Borstal officers from liability in the tort of negligence? Why were they not found to be compelling?*

13.2.4 Cross-references

- *Childs v. Desormeaux, Courrier & Zimmerman* [2006] SCC 18, [31]-[41]: **§13.4.2.1**.
- *Rankin's Garage & Sales v. J.J.* [2018] SCC 19, [57]-[61]: **§13.4.2.3**.
- *Robinson v. Chief Constable of West Yorkshire* [2018] UKSC 4, [34], [72]: **§19.5.1.2**.
- *Attorney General (British Virgin Islands) v. Hartwell* [2004] UKPC 12, [31]: **§19.5.1.3**.

13.2.5 Further material

- The Law Academy (UK), "Omissions" (Nov 19, 2023) .
- P. Benson, "Misfeasance as an Organizing Normative Idea in Private Law" (2010) 60 U Toronto LJ 731.
- S. Steel, "Rationalising Omissions Liability in Negligence" (2019) 135 L Quarterly Rev 484.
- T. Honore, "Are Omissions Less Culpable?" in P. Cane & J. Stapleton (eds), *Essays for Patrick Atiyah* (Oxford: Oxford University Press, 1991).

13.3 Affirmative duty to rescue

K.S. Abraham & L. Kendrick, "There's No Such Thing as Affirmative Duty" (2019) 104 Iowa L Rev 1649, 1651-1652

One of the fundamental propositions in tort law is that misfeasance results in much more liability than nonfeasance. The general idea is that *doing* something—creating some kind of risk—usually generates liability, while *not* doing something—failing to reduce a risk one did not create or failing to confer a benefit—usually does not.[464] The driver who negligently hits a pedestrian commits misfeasance and is subject to liability. A bystander who fails to rescue the pedestrian commits only nonfeasance and is not.[465]

This distinction is also often framed in terms of duty. In most cases, when acting, individuals have a duty to act with reasonable care to avoid risking physical harm. But to impose such a duty on those who are *not* acting—who merely fail to reduce a risk or confer a benefit—is to impose an "affirmative duty." Affirmative duties, it is often said, are exceptional.[466] The most cited illustration of this fact is that tort law does not impose a general duty to rescue in cases like that of the bystander.[467] *** […continue reading]

REFLECTION:

- *"Affirmative duties of care" refer to circumstances where the law imposes a special obligation on a defendant to avoid nonfeasance by taking action to benefit the plaintiff. An example is a defendant's duty to rescue a person that the defendant has put in peril. Childs, [31]-[40] (§13.4.2.1) discusses other affirmative duties of care. Is there a clear and principled distinction between duties to avoid misfeasance and to avoid nonfeasance?*

13.3.1 Wagner v. International Railway Co. (1921) 232 NY 176 (NY CA)

BACKGROUND: Quimbee (2021), https://youtu.be/NqlDM4Aw-GY

New York Court of Appeals – 232 NY 176 (1921)

CARDOZO J.: ***

2. The defendant operates an electric railway between Buffalo and Niagara Falls. There is a point on its line where an overhead crossing carries its tracks above those of the New York Central and the Erie. A gradual incline upwards over a trestle raises the tracks to a height of twenty-five feet. A turn is then made to the left at an angle of from sixty-four to eighty-four degrees. After making this turn, the line passes over a bridge, which is about one hundred and fifty-eight feet long from one abutment to the other. Then comes a turn to the right at about the same angle down the same kind of an incline to grade. Above the trestles, the tracks are laid on ties, unguarded at the ends. There is thus an overhang of the cars, which is accentuated at curves. On the bridge, a narrow footpath runs between the tracks, and beyond the line of overhang there are tie rods and a protecting rail.

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[464] *See, e.g.*, Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. Pa. L. Rev. & Am. L. Reg. 217, 219 (1908). Bohlen explains the dichotomy:

> There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive [inaction], a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant. *Id.*

[465] One could argue that the driver's action should be framed as inaction—failing to brake—and thus should count as nonfeasance as well. *** But tort law has typically viewed the driver as committing misfeasance. *See, e.g.*, Harold F. McNiece & John V. Thornton, *Affirmative Duties in Tort*, 58 Yale L.J. 1272, 1272–73 (1949) (calling such instances "pseudo-nonfeasance"); Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 Yale L.J. 247, 253–54 (1980) (identifying omissions that constitute misfeasance).

[466] *See, e.g.*, Kenneth S. Abraham, The Forms and Functions of Tort Law 260 (5th ed. 2017) (stating that the general rule is that there is no affirmative duty but noting that in cases involving special relationships or when engaging in certain activities an affirmative duty may be created).

[467] *See, e.g.*, Yania v. Bigan, 155 A.2d 343, 346 (Pa. 1959) [§13.2.1] (holding that when one saw a co-worker drowning there was "no legal … obligation or duty to go to his rescue").

3. Plaintiff and his cousin Herbert boarded a car at a station near the bottom of one of the trestles. Other passengers, entering at the same time, filled the platform, and blocked admission to the aisle. The platform was provided with doors, but the conductor did not close them. Moving at from six to eight miles an hour, the car, without slackening, turned the curve. There was a violent lurch, and Herbert Wagner was thrown out, near the point where the trestle changes to a bridge. The cry was raised, 'Man overboard.' The car went on across the bridge, and stopped near the foot of the incline. Night and darkness had come on. Plaintiff walked along the trestle, a distance of four hundred and forty-five feet, until he arrived at the bridge, where he thought to find his cousin's body. He says that he was asked to go there by the conductor. He says, too, that the conductor followed with a lantern. Both these statements the conductor denies. Several other persons, instead of ascending the trestle, went beneath it, and discovered under the bridge the body they were seeking. As they stood there, the plaintiff's body struck the ground beside them. Reaching the bridge, he had found upon a beam his cousin's hat, but nothing else. About him, there was darkness. He missed his footing, and fell. ***

5. Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer. *** The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had (*Ehrgott v. Mayor, etc., of N. Y.*, 96 N. Y. 264, 280, 281).

6. *** The law does not discriminate between the rescuer oblivious of peril and the one who counts the cost. It is enough that the act, whether impulsive or deliberate, is the child of the occasion.

7. The defendant finds another obstacle, however, in the futility of the plaintiff's sacrifice. He should have gone, it is said, below the trestle with the others; he should have known, in view of the overhang of the cars, that the body would not be found above; his conduct was not responsive to the call of the emergency; it was a wanton exposure to a danger that was useless (*Miller v. Union Ry. Co. of N. Y. City*, 191 N. Y. 77, 80). We think the quality of his acts in the situation that confronted him was to be determined by the jury. Certainly he believed that good would come of his search upon the bridge. He was not going there to view the landscape. The law cannot say of his belief that a reasonable man would have been unable to share it. ***

REFLECTION:

- *When does the common law recognise an affirmative duty to rescue someone in peril?*

13.3.2 Horsley v. MacLaren [1971] CanLII 24 (SCC)

Supreme Court of Canada – 1971 CanLII 24

LASKIN J. (dissenting with HALL J.):

25. On a cool evening in early May, 1966, an invited guest on board a cabin cruiser, which was on its way to its home port, Oakville, from Port Credit, accidentally fell into the lake. In the course of rescue operations, another invited guest dived into the water to help him. The effort was without avail. The rescuer was pulled from the water by others on board, could not be resuscitated and was later pronounced dead. The body of the rescuee was never recovered. These are the bare bones of two fatal accident actions brought against the boat owner, who was in charge of his craft at the time, for the benefit of the widows and dependants of the two deceased. The rescuer's family succeeded at the trial but their claim was dismissed on appeal, and they now seek restoration by this Court of the favourable trial judgment. The other claim failed at trial and was not pursued farther. ***

30. *** MacLaren was the owner of a 30-foot six inch cabin cruiser, powered by two inboard 100 h.p. engines driving two propellers. On May 7, the day of the double tragedy, he had his wife on board and five guests, including Matthews and Horsley, one Donald Marck and Mr. and Mrs. Richard Jones. The party had left Oakville in the afternoon and the boat was apparently the first to dock at the Port Credit Yacht Club that season. There was beer aboard the boat and some champagne was drunk at the Port Credit Yacht Club

but there is no ground for saying that intoxicants had anything to do with the fatal occurrences. The boat left Port Credit at about 6.30 p.m. to return to Oakville and the defendant was at the helm, proceeding at a speed of 10 to 12 knots in cool weather and with a northwest wind which created a light chop on Lake Ontario.

31. Matthews had looked after the bow line when the boat left Port Credit, and was sitting on the port side of the foredeck. Jones was in the pilot's cockpit, and the other four passengers were in the cabin below. Jones saw Matthews rise and proceed toward the stern along a narrow cat-walk on the port side, holding on to the rail with his back to the water. On reaching the windscreen in front of the cockpit he toppled over backwards into the water. Jones immediately shouted "Roly's overboard".

32. MacLaren, who was then going about 11 knots per hour, put the controls into neutral, and, leaning back, he could see Matthews about 40 to 50 feet astern to starboard, floating with head and shoulders out of the water. He put the boat in reverse, backing towards Matthews after pinning the control wheel with his stomach. He lost sight of Matthews because of the height and angle of the transom, and shut off the engines. He believed he had drifted to four or five feet of Matthews and wished to manoeuvre to get him at the rear gate on the starboard side. Jones had, in the meantime, thrown a life-ring from the stern which landed about ten feet in front of Matthews, and Marck who was also at the stern tried to hook Matthews with a six-foot pike pole. He could not succeed because, with the engines shut down, the boat drifted away to a distance of ten to twenty feet. Matthews was seen at the time still floating, but with eyes open and staring and apparently unconscious. Jones threw a second life-jacket which fell on top of Matthews or near him but he made no effort to seize it. The water that day was extremely cold, with a surface temperature of about 44 degrees or less.

33. MacLaren restarted his engines and again backed his boat towards Matthews. Three or four minutes had passed since the fall overboard, and it was then, with the boat moving, that Horsley, after taking off his shoes and trousers, dived into the water from the stern, coming up about ten feet from Matthews. According to Jones, the boat was drifting on to Matthews or Matthews was drifting towards the boat, and they were about three feet from each other when Horsley began to take off his shoes and trousers and then dived in to effect a rescue. Matthews was seen to fall forward, face and head in the water, and Mrs. Jones jumped in, one foot away, to hold up his head but Matthews disappeared under the starboard side of the boat. Jones, having seen his wife in the water, grabbed the boat controls which MacLaren yielded, swung the boat around bow on, and approached his wife on the starboard side where MacLaren and Marck, with Jones assisting, pulled her in. MacLaren then resumed control and went forward towards Horsley who was then also pulled in but in unconscious condition. Attempts at resuscitation failed. Medical opinion ascribed his death to sudden shock as a result of the immersion. ***

38. In this Court, counsel for the appellants relied on three alternative bases of liability. There was, first, the submission that in going to the aid of Matthews, as he did, MacLaren came under a duty to carry out the rescue with due care in the circumstances, and his failure to employ standard rescue procedures foreseeably brought Horsley into the picture with the ensuing fatal result. The second basis of liability was *** founded as resting *** on a common law duty of care of a private carrier to his passengers, involving a duty to come to the aid of a passenger who has accidentally fallen overboard ***. There was failure, so the allegation was, to act reasonably in carrying out these duties or either of them, with the foreseeable consequence of Horsley's encounter of danger. The third contention was the broadest, to the effect that where a situation of peril, albeit not brought about originally by the defendant's negligence, arises by reason of the defendant's attempt at rescue, he is liable to a second rescuer for ensuing damage on the ground that the latter's intervention is reasonably foreseeable.

39. None of the bases of liability advanced by the appellants is strictly within the original principle on which the "rescue" cases were founded. That was the recognition of a duty by a negligent defendant to a rescuer coming to the aid of the person imperilled by the defendant's negligence. The evolution of the law on this subject, originating in the moral approbation of assistance to a person in peril, involved a break with the "mind your own business" philosophy. Legal protection is now afforded to one who risks injury to himself in going to the rescue of another who has been foreseeably exposed to danger by the unreasonable conduct of a third person. The latter is now subject to liability at the suit of the rescuer as well as at the suit of the emperilled person, provided, in the case of the rescuer, that his intervention was not so utterly foolhardy as

to be outside of any accountable risk and thus beyond even contributory negligence.

40. Moreover, the liability to the rescuer, although founded on the concept of duty, is now seen as stemming from an independent and not a derivative duty of the negligent person. As *Fleming on Torts*, 3rd ed., 1965, has put it (at p. 166), the cause of action of the rescuer in arising out of the defendant's negligence, is based "not in its tendency to imperil the person rescued, but in its tendency to induce the rescuer to encounter the danger. Thus viewed, the duty to the rescuer is clearly independent …". ***

42. The thinking behind the rescue cases, in so far as they have translated a moral impulse into a legally protectible interest, suggests that liability to a rescuer should not depend on whether there was original negligence which created the peril and which, therefore, prompted the rescue effort. It would appear that the principle should be equally applicable if, at any stage of the perilous situation, there was negligence on the defendant's part which induced the rescuer to attempt the rescue or which operated against him after he had made the attempt. If this be so, it indicates the possibility of an action by a second rescuer against a first. On one view of the present case, this is what we have here. It is not, however, a view upon which, under the facts herein, the present case falls to be decided.

43. The reason is obvious. MacLaren was not a random rescuer. As owner and operator of a boat on which he was carrying invited guests, he was under a legal duty to take reasonable care for their safety. This was a duty which did not depend on the existence of a contract of carriage, nor on whether he was a common carrier or a private carrier of passengers. Having brought his guests into a relationship with him as passengers on his boat, albeit as social or gratuitous passengers, he was obliged to exercise reasonable care for their safety. That obligation extends, in my opinion, to rescue from perils of the sea where this is consistent with his duty to see to the safety of his other passengers and with concern for his own safety. The duty exists whether the passenger falls overboard accidentally or by reason of his own carelessness. ***

47. *** MacLaren cannot be regarded as simply a good samaritan. Rather it is Horsley who was in that role, exposing himself to danger upon the alleged failure of MacLaren properly to carry out his duty to effect Matthews' rescue. ***

49. On the view that I take of the issues in this case and, having regard to the facts, the appellants cannot succeed on the first of their alternative submissions on liability if they cannot succeed on the second ground of an existing common law duty of care. Their third contention was not clearly anchored in any original or supervening duty of care and breach of that duty; and, if that be so, I do not see how their counsel's submission on the foreseeability of a second rescuer, even if accepted, can saddle a non-negligent first rescuer with liability either to the rescuee or to a second rescuer. Encouragement by the common law of the rescue of persons in danger would, in my opinion, go beyond reasonable bounds if it involved liability of one rescuer to a succeeding one where the former has not been guilty of any fault which could be said to have induced a second rescue attempt.

50. If the appellants' third contention was based on any element of fault, it could only be fault in carrying out the attempt at rescue; and, moreover, it would have to be founded on a wide view of Lord Denning's statement in the ***Videan*** case, [[1963] 2 Q.B. 650], at p. 669 where he said that "if a person by his fault creates a situation of peril, he must answer for it to any person who attempts to rescue the person who is in danger". ***

51. The present case is *** reduced to the question of liability on the basis of (1) an alleged breach of a duty of care originating in the relationship of carrier and passenger; (2) whether the breach, if there was one, could be said to have prompted Horsley to go to Matthews' rescue; and (3) whether Horsley's conduct, if not so rash in the circumstances as to be unforeseeable, none the less exhibited want of care so as to make him guilty of contributory negligence.

52. Whether MacLaren was in breach of his duty of care to Matthews was a question of fact on which the trial judge's affirmative finding is entitled to considerable weight. That finding was, of course, essential to the further question of a consequential duty to Horsley. Lacourcière J. came to his conclusion of fact on the evidence, after putting to himself the following question: "What would the reasonable boat operator do in the circumstances, attributing to such person the reasonable skill and experience required of the master of

a cabin cruiser who is responsible for the safety and rescue of his passengers?" (see [1969] 2 O.R. 137 at p. 144). It was the trial judge's finding that MacLaren, as he himself admitted, had adopted the wrong procedure for rescuing a pas senger who had fallen overboard. He knew the proper procedure, and had practised it. Coming bow on to effect a rescue was the standard procedure and was taught as such. ***

54. I do not see how it can be said that the trial judge's finding against MacLaren on the issue of breach of duty is untenable. ***

56. I turn to the question whether the breach of duty to Matthews could properly be regarded in this case as prompting Horsley to attempt a rescue. Like the trial judge, I am content to adopt and apply analogically on this point the reasoning of Cardozo J., as he then was, in *Wagner v. International Railway Co.*, and of Lord Denning M.R. in *Videan v. British Transport Commission*, *supra*. To use Judge Cardozo's phrase, Horsley's conduct in the circumstances was "within the range of the natural and probable". The fact, moreover, that Horsley's sacrifice was futile is no more a disabling ground here than it was in the *Wagner* case, where the passenger thrown off the train was dead when the plaintiff went to help him, unless it be the case that the rescuer acted wantonly. ***

58. *** Moreover, the considerations which underlie a duty to a rescuer do not justify ruling out a particular rescuer if it be not wanton of him to intervene. The implication of Jessup J.A.'s position is that Horsley required MacLaren's consent to go to Matthews' rescue. This is not, in my view, a sufficient answer in the circumstances which existed by reason of MacLaren's breach of duty. To quote again Judge Cardozo in the *Wagner* case, "the law does not discriminate between the rescuer oblivious of peril and the one who counts the cost. It is enough that the act whether impulsive or deliberate is the child of the occasion" (133 N.E. 437 at p. 438). ***

62. *** I would allow the appeal, set aside the judgment of the Ontario Court of Appeal and restore the judgment of the trial judge ***. ***

RITCHIE J. (JUDSON AND SPENCE JJ. concurring):

1. I have had the opportunity of reading the reasons for judgment of my brother Laskin and I agree with him that the case of *Vanvalkenburg v. Northern Navigation Co.* (1913), 30 O.L.R. 142, 19 D.L.R. 649 should no longer be considered as good law and that a duty rested upon the respondent MacLaren in his capacity as a host and as the owner and operator of the Ogopogo, to do the best he could to effect the rescue of one of his guests who had accidentally fallen overboard. ***

6. I think that the best description of the circumstances giving rise to the liability to a second rescuer such as Horsley is contained in the reasons for judgment of Lord Denning in *Videan v. British Transport Commission* [1963] 2 Q.B. 650, where he said, at p. 669:

> It seems to me that, if a person *by his fault* creates a situation of peril, he must answer for it to any person who attempts to rescue the person who is in danger. He owes a duty to such a person above all others. The rescuer may act instinctively out of humanity or deliberately out of courage. But whichever it is, so long as it is not wanton interference, if the rescuer is killed or injured in the attempt, he can recover damages *from the one whose fault has been the cause of it*.

The italics are my own.

7. In the present case a situation of peril was created when Matthews fell overboard, but it was not created by any fault on the part of MacLaren, and before MacLaren can be found to have been in any way responsible for Horsley's death, it must be found that there was such negligence in his method of rescue as to place Matthews in an apparent position of increased danger subsequent to and distinct from the danger to which he had been initially exposed by his accidental fall. In other words, any duty owing to Horsley must stem from the fact that a new situation of peril was created by MacLaren's negligence which induced Horsley to act as he did. ***

14. The finding of the learned trial judge that MacLaren was negligent in the rescue of Matthews is really twofold. On the one hand he finds that there was a failure to comply with the "man overboard" rescue

procedure recommended by two experts called for the plaintiff, and on the other hand he concludes that MacLaren "was unable to exercise proper judgment in the emergency created because of his excessive consumption of alcohol." In the course of his reasons for judgment in the Court of Appeal, Mr. Justice Schroeder expressly found that there was nothing in the evidence to support the view that MacLaren was incapable of proper management and control owing to the consumption of liquor, the question was not seriously argued in this Court, and like my brother Laskin, I do not think there is any ground for saying that intoxicants had anything to do with the fatal occurrences. ***

20. I share the view expressed by my brother Laskin when he says, in the course of his reasons for judgment, that:

> Encouragement by the common law of the rescue of persons in danger would, in my opinion, go beyond reasonable bounds if it involved liability of one rescuer to a succeeding one where the former has not been guilty of any fault which could be said to have induced a second rescue attempt.

21. In the present case, *** although the procedure followed by MacLaren was not the most highly recommended one, I do not think that the evidence justifies the finding that any fault of his induced Horsley to risk his life by diving as he did. In this regard I adopt the conclusion reached by Mr. Justice Schroeder in the penultimate paragraph of his reasons for judgment where he says:

> … if the appellant erred in backing instead of turning the cruiser and proceeding towards Matthews "bow on", the error was one of judgment and not negligence, and in the existing circumstances of emergency ought fairly to be excused. ***

23. I should also say that, unlike Mr. Justice Jessup [in the Ontario Court of Appeal: *Horsley v. MacLaren*, 1970 CanLII 34 (ON CA)], the failure of Horsley to heed MacLaren's warning to remain in the cockpit or cabin plays no part in my reasoning.

24. For all these reasons I would dismiss this appeal with costs.

REFLECTION:

- *Did MacLaren owe Horsley a duty arising from Matthews' peril in falling overboard?*
- *Did MacLaren as boat captain owe a duty to rescue his passenger Matthews?*
- *Did MacLaren breach a duty to Matthews by effecting a negligent rescue?*
- *Could a breach of duty to Matthews lead to MacLaren owing a duty to Horsley by inducing him to act as a second rescuer?*

13.3.3 Parable of the Good Samaritan

Luke 10:25-37 (ESV)

25 And behold, a lawyer stood up to put him to the test, saying, "Teacher, what shall I do to inherit eternal
life?" 26 He said to him, "What is written in the Law? How do you read it?" 27 And he answered, "You shall
love the Lord your God with all your heart and with all your soul and with all your strength and with all your
mind, and your neighbor as yourself." 28 And he said to him, "You have answered correctly; do this, and you
will live."

29 But he, desiring to justify himself, said to Jesus, "And who is my neighbor?" 30 Jesus replied, "A man was
going down from Jerusalem to Jericho, and he fell among robbers, who stripped him and beat him and
departed, leaving him half dead. 31 Now by chance a priest was going down that road, and when he saw
him he passed by on the other side. 32 So likewise a Levite, when he came to the place and saw him, passed
by on the other side. 33 But a Samaritan, as he journeyed, came to where he was, and when he saw him,
he had compassion. 34 He went to him and bound up his wounds, pouring on oil and wine. Then he set him
on his own animal and brought him to an inn and took care of him. 35 And the next day he took out two
denarii and gave them to the innkeeper, saying, 'Take care of him, and whatever more you spend, I will
repay you when I come back.' 36 Which of these three, do you think, proved to be a neighbor to the man

who fell among the robbers?" [37] He said, "The one who showed him mercy." And Jesus said to him, "You go, and do likewise." […continue reading]

REFLECTION:

- *Does judicial invocation of this parable suggest that common law principles are grounded in morality?*[468]

13.3.4 Good Samaritan Act, RSBC 1996

Good Samaritan Act, RSBC 1996, c 172, ss 1-2

1. A person who renders emergency medical services or aid to an ill, injured or unconscious person, at the immediate scene of an accident or emergency that has caused the illness, injury or unconsciousness, is not liable for damages for injury to or death of that person caused by the person's act or omission in rendering the medical services or aid unless that person is grossly negligent.

2. Section 1 does not apply if the person rendering the medical services or aid

(a) is employed expressly for that purpose, or

(b) does so with a view to gain.

13.3.5 Québec's Good Samaritan laws

Charter of Human Rights and Freedoms, CQLR c C-12, s 2

2. Every person must come to the aid of anyone whose life is in peril, either personally or calling for aid, by giving him the necessary and immediate physical assistance, unless it involves danger to himself or a third person, or he has another valid reason.

Civil Code of Québec, CQLR c CCQ-1991, art 1471

1471. Where a person comes to the assistance of another or, for an unselfish motive, gratuitously disposes of property for the benefit of another, he is exempt from all liability for injury that may result, unless the injury is due to his intentional or gross fault.

Act to Promote Good Citizenship, CQLR c C-20, ss 1-2

1. In this Act, unless the context indicates a different meaning, *** (g) "rescuer" means a person who, having reasonable cause to believe another person to be in danger of his life or of bodily harm, benevolently comes to his assistance.

2. A rescuer who sustains an injury or, if he dies therefrom, a dependant, may obtain a benefit from the commission [des normes, de l'équité, de la santé et de la sécurité du travail]. ***

13.3.5.1 Other Good Samaritan statutes

- Federal: Good Samaritan Drug Overdose Act, SC 2017, c 4.
- Alberta: Emergency Medical Aid Act, RSA 2000, c E-7, s 2.
- Manitoba: The Good Samaritan Protection Act, CCSM c G65, ss 1-3.
- New Brunswick: Volunteer Emergency Aid Act, RSNB 2016, c 17, ss 1, 2.
- Newfoundland and Labrador: Emergency Medical Aid Act, RSNL 1990, c E-9, s 3.
- Nova Scotia: Volunteer Services Act, RSNS 1989, c 497, s 3.
- Ontario: Good Samaritan Act, 2001, SO 2001, c 2, ss 1-3.
- Prince Edward Island: Volunteers Liability Act, RSPEI 1988, c V-5, s 2.
- Saskatchewan: The Emergency Medical Aid Act, RSS 1978, c E-8, s 3.

[468] See *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [109] [§5.1.3]; *Bird v. Holbrook* (1825) 130 ER 911 (CP) [§7.2.1].

REFLECTION:

- *What is the moral hazard embedded in the common law's act/omissions distinction? How do Good Samaritan laws aim to correct it?*
- *What are the primary differences between the law's approach to rescuers of strangers in British Columbia as compared to Québec? What principles do they respectively reflect? Which legal regime do you prefer?*
- *In what way do Good Samaritan laws reflect (or not) the lesson of the Biblical Good Samaritan?*

13.3.6 Further material

- McGill Law Journal Podcast, "The Good Samaritan Law: Interview with Professor Pierre-Gabriel Jobin" (Apr 3, 2012) 🎧.
- A. Linden, "Toward Tort Liability for Bad Samaritans" (2016) 53 Alberta L Rev 837.
- C.H. Wellman (ed), "Special Issue: The Moral and Legal Limits of Samaritan Duties" (2000) 19 Law & Philosophy 649.
- "The Finale", *Seinfeld*, season 9, episode 22 (West-Shapiro Productions & Castle Rock Entertainment, May 14, 1998) 📺.

13.4 Recognising duties of care

13.4.1 The *Anns/Cooper* test for a novel duty of care

13.4.1.1 Anns v. Merton London Borough Council [1977] UKHL 4

House of Lords – [1977] UKHL 4

LORD WILBERFORCE: ***

17. Through the trilogy of cases in this House—*Donoghue v. Stevenson* [1932] A.C. 562 [§13.1.1], *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465 [§19.3.1.2], and *Dorset Yacht Co. Ltd. v. Home Office* [1970] AC 1004 [§13.2.3], the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter—in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise ***. ***

28. Most, indeed probably all, statutes relating to public authorities or public bodies, contain in them a large area of policy [§19.5.2]. The courts call this "discretion" meaning that the decision is one for the authority or body to make, and not for the courts. Many statutes also prescribe or at least presuppose the practical execution of policy decisions: a convenient description of this is to say that in addition to the area of policy or discretion, there is an operational area. Although this distinction between the policy area and the operational area is convenient, and illuminating, it is probably a distinction of degree; many "operational" powers or duties have in them some element of "discretion". It can safely be said that the more "operational" a power or duty may be, the easier it is to superimpose upon it a common law duty of care.

29. I do not think that it is right to limit this to a duty to avoid causing extra or additional damage beyond what must be expected to arise from the exercise of the power or duty. That may be correct when the act done under the statute *inherently* must adversely *affect* the interest of individuals. But many other acts can be done without causing any harm to anyone—indeed may be directed to preventing harm from occurring. In these cases the duty is the normal one of taking care to avoid harm to those likely to be affected. ***

LORD DIPLOCK, LORD SIMON, LORD SALMON AND LORD RUSSELL concurred.

REFLECTION:

- *Lord Wilberforce in Anns outlines a two-step duty of care test that seems untethered from the incremental development of previous precedents in which a duty of care has been established. Is this a principled framework of analysis? Was Judge Andrews in Palsgraf, [24] (§13.1.3) right—does this two-step framework arbitrarily limit the scope of negligence liability? Was Lord Buckmaster in Donoghue, [28] (§13.1.1) right—is the scope of negligence liability too unwieldly?*
- *Only 13 years after Anns was decided, the House of Lords overruled Anns and abandoned Lord Wilberforce's two-step duty of care test.*[469] *Other common law jurisdictions, including Canada, Singapore*[470] *and New Zealand,*[471] *continue to treat Anns as a useful framework of analysis. Given the methodological divergence that has emerged, should Canadian courts ignore modern English precedents when considering whether to recognise a novel duty of care?*

13.4.1.2 Cooper v. Hobart [2001] SCC 79

Supreme Court of Canada – 2001 SCC 79

MCLACHLIN C.J.C. AND MAJOR J. (FOR THE COURT):

1. The present appeal revisits the *Anns* test (from *Anns v. Merton London Borough Council* [1978] A.C. 728 (U.K. H.L.)) and, in particular, highlights and hones the role of policy concerns in determining the scope of liability for negligence. The appellant is an investor who alleges that the Registrar of Mortgage Brokers, a statutory regulator, is liable in negligence for failing to oversee the conduct of an investment company which the Registrar licensed. The question is whether the Registrar owes a private law duty of care to members of the investing public giving rise to liability in negligence for economic losses that the investors sustained. Such a duty of care is as yet unrecognized by Canadian courts. For the reasons that follow, we find that this is not a proper case in which to recognize a new duty of care. In the course of these reasons, we attempt to clarify the distinctive policy considerations which impact each stage of the *Anns* analysis.

Facts

2. Eron Mortgage Corporation ("Eron") was registered as a mortgage broker under the *Mortgage Brokers Act*, R.S.B.C. 1996, c. 313 ("the Act"), from early 1993 until 1997. On October 3, 1997, the respondent, Robert J. Hobart, in his capacity as the Registrar under the Act ("the Registrar"), suspended Eron's mortgage broker's licence and issued a freeze order in respect of its assets.

3. Eron acted as a mortgage broker for large syndicated loans. It arranged for numerous lenders (or investors) to pool their funds for the purpose of making a single loan to a borrower, which was typically a developer of commercial real estate. The syndicated loans were made in the name of Eron or one of its related companies, which held the security in trust for the investors.

4. It is alleged that the funds provided by the investors were used by Eron for several unauthorized purposes, such as funding interest payments on other non-performing mortgages and paying for personal items for the benefit of the principals of Eron. It is currently estimated that $222 million is outstanding to the investors on these loans. Investors will likely realize only $40 million from the security taken from the loans, leaving a shortfall of $182 million.

5. Soon after Eron's mortgage licence was suspended, it went out of business. The appellant Mary Francis Cooper ("Cooper"), one of over 3000 investors who advanced money to Eron, brought an action against the Registrar. The Statement of Claim alleged that the Registrar breached the duty of care that he allegedly owed to the appellant and other investors. The appellant asserted that by August 28, 1996, the Registrar

[469] *Murphy v. Brentwood District Council* [1991] 1 AC 398; see *Stovin v. Wise* [1996] AC 923; *Gorringe v. Calderdale Metropolitan Borough Council* [2004] UKHL 15; *Robinson v. Chief Constable of West Yorkshire Police* [2018] UKSC 4.
[470] *Spandeck Engineering v. Defence Science and Technology Agency* [2007] SGCA 37, [73].
[471] *Carter Holt Harvey Ltd v. Minister of Education* [2016] NZSC 95, [14]; *Body Corporate No 207624 v. North Shore City Council (Spencer on Byron)* [2012] NZSC 83, [231].

was aware of serious violations of the Act committed by Eron but that he failed to suspend Eron's mortgage broker's licence until October 3, 1997 and failed to notify investors that Eron was under investigation by the Registrar's office. According to the appellant, if the Registrar had taken steps to suspend or cancel Eron's mortgage broker's licence at an earlier date, the losses suffered by the investors would have been avoided or diminished. ***

Issue

20. Does a statutory regulator owe a private law duty of care to members of the investing public for (alleged) negligence in failing to properly oversee the conduct of an investment company licensed by the regulator?

Analysis

21. Canadian courts have not thus far recognized the duty of care that the appellants allege in this case. The question is therefore whether the law of negligence should be extended to reach this situation. While the particular extension sought is novel, the more general issue of how far the principles of liability for negligence should be extended is a familiar one, and one with which this Court and others have repeatedly grappled since Lord Atkin enunciated the negligence principle in *McAlister (Donoghue) v. Stevenson*, [1932] A.C. 562 (U.K. H.L.) [§13.1.1], almost 70 years ago. That case introduced the principle that a person could be held liable only for reasonably foreseeable harm. But it also anticipated that not all reasonably foreseeable harm might be caught. This posed the issue with which courts still struggle today: to what situations does the law of negligence extend? This case, like so many of its predecessors, may thus be seen as but a gloss on the case of *McAlister (Donoghue) v. Stevenson*.

22. In *McAlister (Donoghue) v. Stevenson* the House of Lords revolutionized the common law by replacing the old categories of tort recovery with a single comprehensive principle—the negligence principle. Henceforward, liability would lie for negligence in circumstances where a reasonable person would have viewed the harm as foreseeable. However, foreseeability alone was not enough; there must also be a close and direct relationship of proximity or neighbourhood.

23. But what is proximity? For the most part, lawyers apply the law of negligence on the basis of categories as to which proximity has been recognized in the past. However, as Lord Atkin declared in *McAlister (Donoghue) v. Stevenson*, the categories of negligence are not closed. Where new cases arise, we must search elsewhere for assistance in determining whether, in addition to disclosing foreseeability, the circumstances disclose sufficient proximity to justify the imposition of liability for negligence.

24. In *Anns* ***, the House of Lords, *per* Lord Wilberforce, said that a duty of care required a finding of proximity sufficient to create a *prima facie* duty of care, followed by consideration of whether there were any factors negativing that duty of care. This Court has repeatedly affirmed that approach as appropriate in the Canadian context.

25. The importance of *Anns* lies in its recognition that policy considerations play an important role in determining proximity in new situations. ***

28. We continue in the view, repeatedly expressed by this Court, that the *Anns* two-stage test, properly understood, does not involve duplication because different types of policy considerations are involved at the two stages. In our view, *Anns* continues to provide a useful framework in which to approach the question of whether a duty of care should be imposed in a new situation. ***

30. In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis is best understood as follows. At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the *relationship* between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties

that may negative the imposition of a duty of care. It may be, as the Privy Council suggests in *Yuen Kun Yeu*, that such considerations will not often prevail. However, we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed.

31. On the first branch of the *Anns* test, reasonable foreseeability of the harm must be supplemented by proximity. The question is what is meant by proximity. Two things may be said. The first is that "proximity" is generally used in the authorities to characterize the type of relationship in which a duty of care may arise. The second is that sufficiently proximate relationships are identified through the use of categories. The categories are not closed and new categories of negligence may be introduced. But generally, proximity is established by reference to these categories. This provides certainty to the law of negligence, while still permitting it to evolve to meet the needs of new circumstances.

32. On the first point, it seems clear that the word "proximity" in connection with negligence has from the outset and throughout its history been used to describe the type of relationship in which a duty of care to guard against foreseeable negligence may be imposed. "Proximity" is the term used to describe the "close and direct" relationship that Lord Atkin described as necessary to grounding a duty of care in *McAlister (Donoghue) v. Stevenson*, *supra*, at pp. 580-81:

> Who then, in law, is my neighbour? The answer seems to be—persons who *are so closely and directly affected* by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question. …
>
> I think that this sufficiently states the truth if *proximity* be not confined to mere physical proximity, but be used, as I think it was intended, to extend to *such close and direct relations* that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act. [Emphasis added.]

33. As this Court stated in *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.) at para. 24, *per* La Forest J.:

> The label "proximity", as it was used by Lord Wilberforce in *Anns, supra*, was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of *such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs*. [Emphasis added.]

34. Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved. Essentially, these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.

35. The factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case. One searches in vain for a single unifying characteristic. As stated by McLachlin J. (as she then was) in *Canadian National Railway v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021 (S.C.C.), at p. 1151: "[p]roximity may be usefully viewed, not so much as a test in itself, but as a broad concept which is capable of subsuming different categories of cases involving different factors" (cited with approval in *Hercules Managements, supra*, at para. 23). Lord Goff made the same point in *Davis v. Radcliffe*, [1990] 2 All E.R. 536 (England P.C.), at p. 540:

> … it is not desirable, at least in the present stage of the development of the law, to attempt to state in broad general propositions the circumstances in which such proximity may or may not be held to exist. On the contrary, following the expression of opinion by Brennan J in *Sutherland Shire Council v. Heyman* (1985) 60 ALR 1 at 43-44, it is considered preferable that 'the law should develop categories of negligence incrementally and by analogy with established categories'.

36. What then are the categories in which proximity has been recognized? First, of course, is the situation where the defendant's act foreseeably causes physical harm to the plaintiff or the plaintiff's property. This has been extended to nervous shock [§19.2] (see, for example, *Alcock v. Chief Constable of South*

Yorkshire Police, [1991] 4 All E.R. 907 (U.K. H.L.)). Yet other categories are liability for negligent misstatement: *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575 (U.K. H.L.) [§19.3.1.2], and misfeasance in public office [§10.12]. A duty to warn of the risk of danger has been recognized: *Rivtow Marine Ltd. v. Washington Iron Works* (1973), [1974] S.C.R. 1189 (S.C.C.). Again, a municipality has been held to owe a duty to prospective purchasers of real estate to inspect housing developments without negligence: *Anns*, *supra*; *Kamloops (City)*, *supra*. Similarly, governmental authorities [§19.5.2] who have undertaken a policy of road maintenance have been held to owe a duty of care to execute the maintenance in a non-negligent manner: *Just v. British Columbia*, [1989] 2 S.C.R. 1228 (S.C.C.), *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445 (S.C.C.), *etc.* Relational economic loss (related to a contract's performance) [§19.3.3] may give rise to a tort duty of care in certain situations, as where the claimant has a possessory or proprietary interest in the property, the general average cases, and cases where the relationship between the claimant and the property owner constitutes a joint venture: *Norsk Pacific Steamship Co.*, *supra*; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 (S.C.C.). When a case falls within one of these situations or an analogous one and reasonable foreseeability is established, a *prima facie* duty of care may be posited.

37. This brings us to the second stage of the *Anns* test. As the majority of this Court held in *Norsk Pacific Steamship Co.*, at p. 1155, residual policy considerations fall to be considered here. These are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized? Following this approach, this Court declined to find liability in *Hercules Managements*, *supra*, on the ground that to recognize a duty of care would raise the spectre of liability to an indeterminate class of people.

38. It is at this second stage of the analysis that the distinction between government policy and execution of policy falls to be considered. It is established that government actors are not liable in negligence for policy decisions, but only operational decisions. The basis of this immunity is that policy is the prerogative of the elected Legislature. It is inappropriate for courts to impose liability for the consequences of a particular policy decision. On the other hand, a government actor may be liable in negligence for the manner in which it executes or carries out the policy. In our view, the exclusion of liability for policy decisions is properly regarded as an application of the second stage of the *Anns* test. The exclusion does not relate to the relationship between the parties. Apart from the legal characterization of the government duty as a matter of policy, plaintiffs can and do recover. The exclusion of liability is better viewed as an immunity imposed because of considerations outside the relationship for policy reasons—more precisely, because it is inappropriate for courts to second-guess elected legislators on policy matters. Similar considerations may arise where the decision in question is quasi-judicial (see *Edwards v. Law Society of Upper Canada*, 2001 SCC 80 (S.C.C.)).

39. The second step of *Anns* generally arises only in cases where the duty of care asserted does not fall within a recognized category of recovery. Where it does, we may be satisfied that there are no overriding policy considerations that would negative the duty of care. In this sense, I agree with the Privy Council in *Yuen Kun Yeu* that the second stage of *Anns* will seldom arise and that questions of liability will be determined primarily by reference to established and analogous categories of recovery. However, where a duty of care in a novel situation is alleged, as here, we believe it necessary to consider both steps of the *Anns* test as discussed above. This ensures that before a duty of care is imposed in a new situation, not only are foreseeability and relational proximity present, but there are no broader considerations that would make imposition of a duty of care unwise.

Application of the Test ***

41. The first question is whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a *prima facie* duty of care. The first inquiry at this stage is whether the case falls within or is analogous to a category of cases in which a duty of care has previously been recognized. The answer to this question is no.

42. The next question is whether this is a situation in which a new duty of care should be recognized. It may

be that the investors can show that it was reasonably foreseeable that the alleged negligence in failing to suspend Eron or issue warnings might result in financial loss to the plaintiffs. However, as discussed, mere foreseeability is not enough to establish a *prima facie* duty of care. The plaintiffs must also show proximity—that the Registrar was in a close and direct relationship to them making it just to impose a duty of care upon him toward the plaintiffs. In addition to showing foreseeability, the plaintiffs must point to factors arising from the circumstances of the relationship that impose a duty.

43. In this case, the factors giving rise to proximity, if they exist, must arise from the statute under which the Registrar is appointed. That statute is the only source of his duties, private or public. Apart from that statute, he is in no different position than the ordinary man or woman on the street. If a duty to investors with regulated mortgage brokers is to be found, it must be in the statute.

44. In this case, the statute does not impose a duty of care on the Registrar to investors with mortgage brokers regulated by the Act. The Registrar's duty is rather to the public as a whole. Indeed, a duty to individual investors would potentially conflict with the Registrar's overarching duty to the public. ***

49. The regulatory scheme governing mortgage brokers provides a general framework to ensure the efficient operation of the mortgage marketplace. The Registrar must balance a myriad of competing interests, ensuring that the public has access to capital through mortgage financing while at the same time instilling public confidence in the system by determining who is "suitable" and whose proposed registration as a broker is "not objectionable". All of the powers or tools conferred by the Act on the Registrar are necessary to undertake this delicate balancing. Even though to some degree the provisions of the Act serve to protect the interests of investors, the overall scheme of the Act mandates that the Registrar's duty of care is not owed to investors exclusively but to the public as a whole.

50. Accordingly, we agree with the Court of Appeal *per* Newbury J.A.: even though the Registrar might reasonably have foreseen that losses to investors in Eron would result if he was careless in carrying out his duties under the Act, there was insufficient proximity between the Registrar and the investors to ground a *prima facie* duty of care. The statute cannot be construed to impose a duty of care on the Registrar specific to investments with mortgage brokers. Such a duty would no doubt come at the expense of other important interests, of efficiency and finally at the expense of public confidence in the system as a whole.

51. Having found no proximity sufficient to found a duty of care owed by the Registrar to the investors, we need not proceed to the second branch of the *Anns* test and the question of whether there exist policy considerations apart from those considered in determining a relationship of proximity, which would negative a *prima facie* duty of care, had one been found. However, the matter having been fully argued, it may be useful to comment on those submissions.

52. In our view, even if a *prima facie* duty of care had been established under the first branch of the *Anns* test, it would have been negated at the second stage for overriding policy reasons. The decision of whether to suspend a broker involves both policy and quasi-judicial elements. The decision requires the Registrar to balance the public and private interests. The Registrar is not simply carrying out a pre-determined government policy, but deciding, as an agent of the executive branch of government, what that policy should be. Moreover, the decision is quasi-judicial. The Registrar must act fairly or judicially in removing a broker's licence. These requirements are inconsistent with a duty of care to investors. Such a duty would undermine these obligations, imposed by the Legislature on the Registrar. Thus even if a *prima facie* duty of care could be posited, it would be negated by other overriding policy considerations.

53. The *prima facie* duty of care is also negated on the basis of the distinction between government policy and the execution of policy. As stated, the Registrar must make difficult discretionary decisions in the area of public policy, decisions which command deference. As Huddart J.A. (concurring in the result) found, the decisions made by the Registrar were made within the limits of the powers conferred upon him in the public interest.

54. Further, the spectre of indeterminate liability would loom large if a duty of care was recognized as between the Registrar and investors in this case. The Act itself imposes no limit and the Registrar has no means of controlling the number of investors or the amount of money invested in the mortgage brokerage system.

55. Finally, we must consider the impact of a duty of care on the taxpayers, who did not agree to assume the risk of private loss to persons in the situation of the investors. To impose a duty of care in these circumstances would be to effectively create an insurance scheme for investors at great cost to the taxpaying public. There is no indication that the Legislature intended that result.

56. In the result the judgment of the British Columbia Court of Appeal is affirmed and the appeal is dismissed with costs.

REFLECTION:

- *In what way does Cooper constrain the potentially expansive scope of Lord Wilberforce's test in Anns?*
- *What differentiates the proximity enquiry from the reasonable foreseeability enquiry?*[472]
- *What factors can you point to to show you're in a relationship of proximity with another person? What factors could Cooper point to to show she had a relationship with the Registrar of Mortgage Brokers?*
- *The House of Lords in Caparo Industries Ltd v. Dickman [1990] 2 AC 605 expounded an approach to novel duty that seemed to entail a "three-stage analysis (foreseeability, proximity and fairness, justice and reasonableness)."*[473] *Lord Reed in the Supreme Court of the United Kingdom, however, later held that "The proposition that there is a Caparo test which applies to all claims in the modern law of negligence … is mistaken." Rather, "the characteristic approach of the common law in [a novel type of case] is to develop incrementally and by analogy with established authority."*[474] *Australian courts, meanwhile, consider novel duties of care with regard to "the 'salient features' or factors affecting the appropriateness of imputing a legal duty to take reasonable care to avoid harm or injury."*[475] *What are the strengths and weaknesses of these respective approaches as compared to the Anns/Cooper test?*

[472] See *Wu v. Vancouver (City)*, 2019 BCCA 23, [51]: "The law has not defined "proximity" with precision. Indeed, as was said in *Cooper*, the word may amount to little more than a label identifying the type of relationship in which duties of care arise: *Cooper* at para. 31. Nonetheless, one can recognize the kind of considerations pertinent to analysing proximity. Such relationships are said to be "close and direct": *Cooper* at para. 32. They may involve physical closeness, direct relationships or interactions, the assumption of responsibility; or turn on expectations, representations, reliance, or the nature of property or other interests involved: see, *Cooper* at paras. 32-34. In short, proximity recognizes those circumstances in which one individual comes under an obligation to have regard for the interests of another so as to be required to take care not to act in a manner that would cause injury to those interests. Proximity involves an analysis both of the nature of the relationship between the parties and the kind of harms carelessness might cause: see *The Los Angeles Salad Company Inc. v. Canadian Food Inspection Agency*, 2013 BCCA 34. It involves having regard to all relevant factors arising from the relationship between the parties: *Deloitte* at para. 29 [**§19.3.1.3**]."

[473] *Robinson v. Chief Constable of West Yorkshire Police* [2018] UKSC 4, [83] (Lord Mance) [**§19.5.1.2**].

[474] *Robinson v. Chief Constable of West Yorkshire Police* [2018] UKSC 4, [21] and [27].

[475] *Caltex Refineries (Qld) Pty Limited v. Stavar* [2009] NSWCA 258, [102], continuing at [103]: "These salient features include: (a) the foreseeability of harm; (b) the nature of the harm alleged; (c) the degree and nature of control able to be exercised by the defendant to avoid harm; (d) the degree of vulnerability of the plaintiff to harm from the defendant's conduct, including the capacity and reasonable expectation of a plaintiff to take steps to protect itself; (e) the degree of reliance by the plaintiff upon the defendant; (f) any assumption of responsibility by the defendant; (g) the proximity or nearness in a physical, temporal or relational sense of the plaintiff to the defendant; (h) the existence or otherwise of a category of relationship between the defendant and the plaintiff or a person closely connected with the plaintiff; (i) the nature of the activity undertaken by the defendant; (j) the nature or the degree of the hazard or danger liable to be caused by the defendant's conduct or the activity or substance controlled by the defendant; (k) knowledge (either actual or constructive) by the defendant that the conduct will cause harm to the plaintiff; (l) any potential indeterminacy of liability; (m) the nature and consequences of any action that can be taken to avoid the harm to the plaintiff; (n) the extent of imposition on the autonomy or freedom of individuals, including the right to pursue one's own interests; (o) the existence of conflicting duties arising from other principles of law or statute; (p) consistency with the terms, scope and purpose of any statute relevant to the existence of a duty; and (q) the desirability of, and in some circumstances, need for conformance and coherence in the structure and fabric of the common law."

13.4.2 Applying the *Anns/Cooper* novel duty test

13.4.2.1 Childs v. Desormeaux, Courrier & Zimmerman [2006] SCC 18

Supreme Court of Canada – 2006 SCC 18

MCLACHLIN C.J.C. (FOR THE COURT):

1. A person hosts a party. Guests drink alcohol. An inebriated guest drives away and causes an accident in which another person is injured. Is the host liable to the person injured? I conclude that as a general rule, a social host does not owe a duty of care to a person injured by a guest who has consumed alcohol and that the courts below correctly dismissed the appellants' action.

2. This case arises from a tragic car accident in Ottawa in the early hours of January 1, 1999. At 1:30 a.m., after leaving a party hosted by Dwight Courrier and Julie Zimmerman, Desmond Desormeaux drove his vehicle into oncoming traffic and collided head-on with a vehicle driven by Patricia Hadden. One of the passengers in Ms. Hadden's car was killed and three others seriously injured, including Zoe Childs, who was then a teenager. Ms. Childs' spine was severed and she has since been paralyzed from the waist down. Mr. Desormeaux and the two passengers in his car were also injured.

3. Mr. Desormeaux was impaired at the time of the accident. The trial judge found that he had probably consumed 12 beers at the party over two and a half hours, producing a blood-alcohol concentration of approximately 235 mg per 100 ml when he left the party and 225 mg per 100 ml at the time of the accident—concentrations well over the legal limit for driving of 80 mg per 100 ml. Mr. Desormeaux pleaded guilty to a series of criminal charges arising from these events and received a 10-year sentence.

4. The party hosted by Dwight Courrier and Julie Zimmerman at their home was a "BYOB" (Bring Your Own Booze) event. The only alcohol served by the hosts was three-quarters of a bottle of champagne in small glasses at midnight. Mr. Desormeaux was known to his hosts to be a heavy drinker. The trial judge heard evidence that when Mr. Desormeaux walked to his car to leave, Mr. Courrier accompanied him and asked, "Are you okay, brother?" Mr. Desormeaux responded "No problem", got behind the wheel and drove away with two passengers. ***

8. The central legal issue raised by this appeal is whether social hosts who invite guests to an event where alcohol is served owe a legal duty of care to third parties who may be injured by intoxicated guests. It is clear that commercial hosts, like bars or clubs, may be under such a duty. This is the first time, however, that this Court has considered the duty owed by social hosts to plaintiffs like Ms. Childs.

1. The General Test for a Duty of Care ***

11. *** The two-stage approach of *Anns* was adopted by this Court in *Nielsen v. Kamloops (City)*, [1984] 2 S.C.R. 2 (S.C.C.), at pp. 10-11, and recast as follows:

> (1) is there "a sufficiently close relationship between the parties" or "proximity" to justify imposition of a duty and, if so,
>
> (2) are there policy considerations which ought to negative or limit the scope of the duty, the class of persons to whom it is owed or the damages to which breach may give rise? ***

2. Is the Proposed Duty Novel?

15. A preliminary point arises from a nuance on the *Anns* test developed in *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79. The Court in *Cooper* introduced the idea that as the case law develops, categories of relationships giving rise to a duty of care may be recognized, making it unnecessary to go through the *Anns* analysis. The reference to categories simply captures the basic notion of precedent: where a case is like another case where a duty has been recognized, one may usually infer that sufficient proximity is present and that if the risk of injury was foreseeable, a *prima facie* duty of care will arise. On the other hand, if a case does not clearly fall within a relationship previously recognized as giving rise to a

duty of care, it is necessary to carefully consider whether proximity is established. Following *Cooper*, the first issue raised in this case is whether claims against private hosts for alcohol-related injuries caused by a guest constitute a new category of claim. Like the courts below, I conclude that it does.

16. Canadian law does not provide a clear answer to the question of whether people who host social events where alcohol is served owe a duty of care to third-party members of the public who may be harmed by guests who leave the event inebriated. The closest comparison is that of commercial alcohol providers, who have been held to owe a duty to third-party members of the public who are injured as a result of the drunken driving of a patron: *Stewart v. Pettie*, [1995] 1 S.C.R. 131 (S.C.C.) [§19.9.1]. Although the action was dismissed on the facts, *Stewart* affirmed that a special relationship existed between taverns and the motoring public that could require the former to take positive steps to protect the latter.

17. The situation of commercial hosts, however, differs from that of social hosts. As discussed, in determining whether a duty of care arises, the focus is on the nature of the relationship between the parties. Three differences in the plaintiff-defendant relationship suggest that the possibility of a duty of care on commercial hosts does not automatically translate into a duty of care for social hosts.

18. First, commercial hosts enjoy an important advantage over social hosts in their capacity to monitor alcohol consumption. As a result, not only is monitoring relatively easy for a commercial host, but it is also expected by the host, patrons and members of the public. In fact, commercial hosts have a special incentive to monitor consumption because they are being paid for service. ***

19. Second, the sale and consumption of alcohol is strictly regulated by legislatures, and the rules applying to commercial establishments suggest that they operate in a very different context than private-party hosts. This regulation is driven by public expectations and attitudes towards intoxicants, but also serves, in turn, to shape those expectations and attitudes. In Ontario, where these facts occurred, the production, sale and use of alcohol is regulated principally by the regimes established by the *Liquor Control Act*, R.S.O. 1990, c. L.18, and the *Liquor Licence Act*, R.S.O. 1990, c. L.19. The latter Act is wide-ranging and regulates how, where, by and to whom alcohol can be sold or supplied, where and by whom it can be consumed and where intoxication is permitted and where it is not. ***

22. Third, the contractual nature of the relationship between a tavern keeper serving alcohol and a patron consuming it is fundamentally different from the range of different social relationships that can characterize private parties in the non-commercial context. The appellants argue that there is "nothing inherently special" about profit making in the law of negligence. In the case of alcohol sales, however, it is clear that profit making is relevant. Unlike the host of a private party, commercial alcohol servers have an incentive not only to serve many drinks, but to serve too many. Over-consumption is more profitable than responsible consumption. The costs of over-consumption are borne by the drinker him or herself, taxpayers who collectively pay for the added strain on related public services and, sometimes tragically, third parties who may come into contact with intoxicated patrons on the roads. Yet the benefits of over-consumption go to the tavern keeper alone, who enjoys large profit margins from customers whose judgment becomes more impaired the more they consume. This perverse incentive supports the imposition of a duty to monitor alcohol consumption in the interests of the general public.

23. The differences just discussed mean that the existence of a duty on the part of commercial providers of alcohol cannot be extended by simple analogy to the hosts of a private party. The duty proposed in this case is novel. We must therefore ask whether a duty of care is made out on the two-stage *Anns* test.

3. Stage One: A Prima Facie Duty? ***

3.1 Foreseeability ***

29. Instead of finding that the hosts ought reasonably to have been aware that Mr. Desormeaux was too drunk to drive, the trial judge based his finding that the hosts should have foreseen injury to motorists on the road on problematic reasoning. He noted that the hosts knew that Mr. Desormeaux had gotten drunk in the past and then driven. He inferred from this that they should have foreseen that unless Mr. Desormeaux's drinking at the party was monitored, he would become drunk, get into his car and drive onto the highway. The problem with this reasoning is that a history of alcohol consumption and impaired driving does not

make impaired driving, and the consequent risk to other motorists, reasonably foreseeable. The inferential chain from drinking and driving in the past to reasonable foreseeability that this will happen again is too weak to support the legal conclusion of reasonable foreseeability—even in the case of commercial hosts, liability has not been extended by such a frail hypothesis.

30. Ms. Childs points to the findings relating to the considerable amount of alcohol Mr. Desormeaux had consumed and his high blood-alcohol rating, coupled with the fact that Mr. Courrier accompanied Mr. Desormeaux to his car before he drove away, and asks us to make the finding of knowledge of inebriation that the trial judge failed to make. The problem here is the absence of any evidence that Mr. Desormeaux displayed signs of intoxication during this brief encounter. Given the absence of evidence that the hosts in this case in fact knew of Mr. Desormeaux's intoxication and the fact that the experienced trial judge himself declined to make such a finding, it would not be proper for us to change the factual basis of this case by supplementing the facts on this critical point. I conclude that the injury was not reasonably foreseeable on the facts established in this case.

3.2 Failure to Act: Nonfeasance Versus Misfeasance

31. Foreseeability is not the only hurdle Ms. Childs' argument for a duty of care must surmount. "Foreseeability does not of itself, and automatically, lead to the conclusion that there is a duty of care": G. H. L. Fridman, *The Law of Torts in Canada* (2nd ed. 2002), at p. 320. Foreseeability without more *may* establish a duty of care. This is usually the case, for example, where an *overt act of the defendant has directly caused foreseeable physical harm* to the plaintiff: see *Cooper*. However, where the conduct alleged against the defendant is a *failure to act*, foreseeability alone may not establish a duty of care. In the absence of an overt act on the part of the defendant, the nature of the relationship must be examined to determine whether there is a nexus between the parties. Although there is no doubt that an omission may be negligent, as a general principle, the common law is a jealous guardian of individual autonomy. Duties to take positive action in the face of risk or danger are not free-standing. Generally, the mere fact that a person faces danger, or has become a danger to others, does not itself impose any kind of duty on those in a position to become involved.

32. In this case, we are concerned not with an overt act of the social hosts, but with their alleged failure to act. The case put against them is that they should have interfered with the autonomy of Mr. Desormeaux by preventing him from drinking and driving. It follows that foreseeability alone would not establish a duty of care in this case.

33. The appellants' argument that Mr. Courrier and Ms. Zimmerman committed positive acts that created, or contributed to, the risk cannot be sustained. It is argued that they *facilitated* the consumption of alcohol by organizing a social event where alcohol was consumed on their premises. But this is not an act that creates risk to users of public roads. The real complaint is that having organized the party, the hosts permitted their guest to drink and then take the wheel of an automobile.

34. A positive duty of care may exist if foreseeability of harm is present *and* if other aspects of the relationship between the plaintiff and the defendant establish a special link or proximity. Three such situations have been identified by the courts. They function not as strict legal categories, but rather to elucidate factors that can lead to positive duties to act. These factors, or features of the relationship, bring parties who would otherwise be legal strangers into proximity and impose positive duties on defendants that would not otherwise exist.

35. The *first* situation where courts have imposed a positive duty to act is where a defendant intentionally attracts and invites third parties to an inherent and obvious risk that he or she has created or controls: *Hendricks v. R.* (1969), [1970] S.C.R. 237 (S.C.C.); *Horsley v. MacLaren* (1971), [1972] S.C.R. 441 (S.C.C.) [§13.3.2]; *Teno v. Arnold*, [1978] 2 S.C.R. 287 (S.C.C.); and *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186 (S.C.C.). For example, it has been held that a boat captain owes a duty to take reasonable care to rescue a passenger who falls overboard (*Horsley*) and that the operator of a dangerous inner-tube sliding competition owes a duty to exclude people who cannot safely participate (*Crocker*). These cases turn on the defendant's causal relationship to the origin of the risk of injury faced by the plaintiff or on steps taken to invite others to subject themselves to a risk under the defendant's control. If the defendant

creates a risky situation and invites others into it, failure to act thereafter does not immunize the defendant from the consequences of its acts. ***

36. The *second* situation where a positive duty of care has been held to exist concerns paternalistic relationships of supervision and control, such as those of parent-child or teacher-student: *Dziwenka v. R.* (1971), [1972] S.C.R. 419 (S.C.C.); *Bain v. Calgary Board of Education* (1993), 146 A.R. 321 (Alta. Q.B.). The duty in these cases rests on the special vulnerability of the plaintiffs and the formal position of power of the defendants. The law recognizes that the autonomy of some persons may be permissibly violated or restricted, but, in turn, requires that those with power exercise it in light of special duties. In the words of Virtue J. in *Bain*, in the context of a teacher-student relationship, "[t]hat right of control carries with it a corresponding duty to take care for the safety of, and to properly supervise the student, whether he or she is a child, an adolescent or an adult" (para. 38).

37. The *third* situation where a duty of care may include the need to take positive steps concerns defendants who either exercise a public function or engage in a commercial enterprise that includes implied responsibilities to the public at large: *Dunn v. Dominion Atlantic Railway* (1920), 60 S.C.R. 310 (S.C.C.); *Menow v. Honsberger* (1973), [1974] S.C.R. 239 (S.C.C.); *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 39 O.R. (3d) 487 (Ont. Gen. Div.) [**§19.5.1.1**]. In these cases, the defendants offer a service to the general public that includes attendant responsibilities to act with special care to reduce risk. Where a defendant assumes a public role, or benefits from offering a service to the public at large, special duties arise. The duty of a commercial host who serves alcohol to guests to act to prevent foreseeable harm to third-party users of the highway falls into this category: *Stewart v. Pettie*.

38. Running through all of these situations is the defendant's material implication in the creation of risk or his or her control of a risk to which others have been invited. The operator of a dangerous sporting competition creates or enhances the risk by inviting and enabling people to participate in an inherently risky activity. It follows that the operator must take special steps to protect against the risk materializing. In the example of the parent or teacher who has assumed control of a vulnerable person, the vulnerability of the person and its subjection to the control of the defendant creates a situation where the latter has an enhanced responsibility to safeguard against risk. The public provider of services undertakes a public service, and must do so in a way that appropriately minimizes associated risks to the public.

39. Also running through the examples is a concern for the autonomy of the persons affected by the positive action proposed. The law does not impose a duty to eliminate risk. It accepts that competent people have the right to engage in risky activities. Conversely, it permits third parties witnessing risk to decide not to become rescuers or otherwise intervene. It is only when these third parties have a special relationship to the person in danger or a material role in the creation or management of the risk that the law may impinge on autonomy. Thus, the operator of a risky sporting activity may be required to prevent a person who is unfit to perform a sport safely from participating or, when a risk materializes, to attempt a rescue. Similarly, the publican may be required to refuse to serve an inebriated patron who may drive, or a teacher be required to take positive action to protect a child who lacks the right or power to make decisions for itself. The autonomy of risk takers or putative rescuers is not absolutely protected, but, at common law, it is always respected.

40. Finally, the theme of reasonable reliance unites examples in all three categories. A person who creates or invites others into a dangerous situation, like the high-risk sports operator, may reasonably expect that those taking up the invitation will rely on the operator to ensure that the risk is a reasonable one or to take appropriate rescue action if the risk materializes. Similarly, a teacher will understand that the child or the child's parents rely on the teacher to avoid and minimize risk. Finally, there is a reasonable expectation on the part of the public that a person providing public services, often under licence, will take reasonable precautions to reduce the risk of the activity, not merely to immediate clients, but to the general public.

41. Does the situation of the social host who serves alcohol to guests fall within the three categories just discussed or represent an appropriate extension of them having regard to the factors of risk-control and reasonable preservation of autonomy that animate them? I conclude that it does not.

42. The first category concerns defendants who have created or invited others to participate in highly risky

activities. Holding a house party where alcohol is served is not such an activity. Risks may ensue, to be sure, from what guests choose to do or not do at the party. But hosting a party is a far cry from inviting participation in a high-risk sport or taking people out on a boating party. A party where alcohol is served is a common occurrence, not one associated with unusual risks demanding special precautions. The second category of paternalistic relationships of supervision or control is equally inapplicable. Party hosts do not enjoy a paternalistic relationship with their guests, nor are their guests in a position of reduced autonomy that invites control. Finally, private social hosts are not acting in a public capacity and, hence, do not incur duties of a public nature. ***

44. *** Suffice it to say that hosting a party where alcohol is served, without more, does not suggest the creation or exacerbation of risk of the level required to impose a duty of care on the host to members of the public who may be affected by a guest's conduct.

45. Nor does the autonomy of the individual support the case for a duty to take action to protect highway users in the case at bar. As discussed, the implication of a duty of care depends on the relationships involved. The relationship between social host and guest at a house party is part of this equation. A person who accepts an invitation to attend a private party does not park his autonomy at the door. The guest remains responsible for his or her conduct. Short of active implication in the creation or enhancement of the risk, a host is entitled to respect the autonomy of a guest. The consumption of alcohol, and the assumption of the risks of impaired judgment, is in almost all cases a personal choice and an inherently personal activity. Absent the special considerations that may apply in the commercial context, when such a choice is made by an adult, there is no reason why others should be made to bear its costs. The conduct of a hostess who confiscated all guests' car keys and froze them in ice as people arrived at her party, releasing them only as she deemed appropriate, was cited to us as exemplary. This hostess was evidently prepared to make considerable incursions on the autonomy of her guests. The law of tort, however, has not yet gone so far.

46. This brings us to the factor of reasonable reliance. There is no evidence that anyone relied on the hosts in this case to monitor guests' intake of alcohol or prevent intoxicated guests from driving. This represents an important distinction between the situation of a private host, as here, and a public host. ***

47. I conclude that hosting a party at which alcohol is served does not, without more, establish the degree of proximity required to give rise to a duty of care on the hosts to third-party highway users who may be injured by an intoxicated guest. The injury here was not shown to be foreseeable on the facts as found by the trial judge. Even if it had been, this is at best a case of nonfeasance. No duty to monitor guests' drinking or to prevent them from driving can be imposed having regard to the relevant cases and legal principles. A social host at a party where alcohol is served is not under a duty of care to members of the public who may be injured by a guest's actions, unless the host's conduct implicates him or her in the creation or exacerbation of the risk. ***

48. Having concluded that a *prima facie* duty of care has not been established, it is unnecessary to consider whether any duty would be negated by policy considerations at the second stage of the *Anns* test. ***

REFLECTION:

- *Why does the common law generally not hold people liable for their careless omissions to help others? Are the Court's reasons for refusing to recognise an affirmative duty of care owed by social hosts compelling?*
- *Can it always be said that party hosts would not reasonably foresee injury to road users when their guests leave their party?*
- *Was the Court's holding on foreseeability determinative to the outcome of this case?*
- *The duty question in Donoghue v. Stevenson was determined on the pleadings, rather than on the basis of evidence. To what extent should the facts proven at trial influence the question of reasonable foreseeability in a case such as this?*

13.4.2.2 Hill v. Hamilton-Wentworth Police Services Board [2007] SCC 41

Supreme Court of Canada – 2007 SCC 41

✗REF: §14.1.3.3, §14.2.5.3, §15.2.1, §16.1.3

MCLACHLIN C.J.C. (BINNIE, LEBEL, DESCHAMPS, FISH, ABELLA JJ. concurring):

1. The police must investigate crime. That is their duty. In the vast majority of cases, they carry out this duty with diligence and care. Occasionally, however, mistakes are made. These mistakes may have drastic consequences. An innocent suspect may be investigated, arrested and imprisoned because of negligence in the course of a police investigation. This is what Jason George Hill, appellant in the case at bar, alleges happened to him.

2. Can the police be held liable if their conduct during the course of an investigation falls below an acceptable standard and harm to a suspect results? If so, what standard should be used to assess the conduct of the police? More generally, is police conduct during the course of an investigation or arrest subject to scrutiny under the law of negligence at all, or should police be immune on public policy grounds from liability under the law of negligence? These are the questions at stake on this appeal.

3. I conclude that police are not immune from liability under the Canadian law of negligence, that the police owe a duty of care in negligence to suspects being investigated, and that their conduct during the course of an investigation should be measured against the standard of how a reasonable officer in like circumstances would have acted. The tort of negligent investigation exists in Canada, and the trial court and Court of Appeal were correct to consider the appellant's action on this basis. The law of negligence does not demand a perfect investigation. It requires only that police conducting an investigation act reasonably. When police fail to meet the standard of reasonableness, they may be accountable through negligence law for harm resulting to a suspect.

Facts and Procedural History

4. This case arises out of an unfortunate series of events which resulted in an innocent person being investigated by the police, arrested, tried, wrongfully convicted, and ultimately acquitted after spending more than 20 months in jail for a crime he did not commit. ***

5. Ten robberies occurred in Hamilton between December 16, 1994 and January 23, 1995. The *modus operandi* in all of the robberies seemed essentially the same. Eyewitnesses provided similar descriptions of the suspect. The police, relying on similarities in the *modus operandi* and eyewitness descriptions, concluded early on in the investigation that the same person had committed all the robberies, and labelled the perpetrator "the plastic bag robber".

6. The appellant, Jason George Hill, became a suspect in the course of the investigation of the "plastic bag" robberies. The police investigated. They released his photo to the media, and conducted a photo lineup consisting of the aboriginal suspect Hill and 11 similar looking Caucasian foils. On January 27, 1995, the police arrested Hill and charged him with 10 counts of robbery. The evidence against him at that point included: a Crime Stoppers tip; identification by a police officer based on a surveillance photo; several eyewitness identifications (some tentative, others more solid); a potential sighting of Hill near the site of a robbery by a police officer; eyewitness evidence that the robber appeared to be aboriginal (which Hill was); and the belief of the police that a single person committed all 10 robberies.

7. At the time of the arrest, the police were in possession of potentially exculpatory evidence, namely, an anonymous Crime Stoppers tip received on January 25, 1995 suggesting that two Hispanic men ("Frank" and "Pedro") were the perpetrators. As time passed, other exculpatory evidence surfaced. Two similar robberies occurred while Hill was in custody. The descriptions of the robber and the *modus operandi* were similar to the original robberies, except for the presence of a threat of a gun in the last two robberies. The police received a second Crime Stoppers tip implicating "Frank", which indicated that "Frank" looked similar to Jason George Hill and that "Frank" was laughing because Hill was being held responsible for robberies that Frank had committed. The police detective investigating the last two robberies (Detective Millin)

received information from another officer that a Frank Sotomayer could be the robber. He proceeded to gather evidence and information which tended to inculpate Sotomayer—that Sotomayer and Hill looked very much alike, that there was evidence tending to corroborate the credibility of the Crime Stoppers tip implicating "Frank", and that photos from the first robberies seemed to look more like Sotomayer than Hill. Information from this investigation of the later robberies was conveyed to the detective supervising the investigation of the earlier robberies (Detective Loft).

8. Two of the charges against Hill were dropped in response to this new evidence, the police having concluded that Sotomayer, not Hill, had committed those robberies. However, the police did not drop all of the charges.

9. Legal proceedings against Hill in relation to the remaining eight charges began. Two more charges were withdrawn by the Crown during the preliminary inquiry because a witness testified that Hill was not the person who robbed her. Five more charges were withdrawn by the Assistant Crown Attorney assigned to prosecute at trial. A single charge remained, and the Crown decided to proceed based on this charge, largely because two eyewitnesses, the bank tellers, remained steadfast in their identifications of Hill.

10. Hill stood trial and was found guilty of robbery in March 1996. He successfully appealed the conviction based on errors of law made by the trial judge. On August 6, 1997, his appeal was allowed and a new trial was ordered. Hill was ultimately acquitted of all charges of robbery on December 20, 1999.

11. To summarize, Hill first became involved in the investigation as a suspect in January of 1995 and remained involved in various aspects of the justice system as a suspect, an accused, and a convicted person, until December of 1999. Within this period, he was imprisoned for various periods totalling more than 20 months, although not continuously.

13. Hill alleges that the police investigation was negligent in a number of ways. He attacks the identifications by the two bank tellers on the ground that they were interviewed together (not separately, as non-mandatory guidelines suggested), with a newspaper photo identifying Hill as the suspect on their desks, and particularly objects to the methods used to interview witnesses and administer a photo lineup. He also alleged that the police failed to adequately reinvestigate the robberies when new evidence emerged that cast doubt on his initial arrest.

14. At trial, Marshall J. in the Ontario Superior Court of Justice held that the police were not liable in negligence ((2003), 66 O.R. (3d) 746 (Ont. S.C.J.)). ***

15. Hill appealed. The Court of Appeal unanimously held that there is a tort of negligent investigation and that the appropriate standard of care is the reasonable officer in like circumstances, subject to qualification at the point of arrest when the standard of care is tied to the standard of reasonable and probable grounds ((2005), 76 O.R. (3d) 481 (Ont. C.A.)). However, the Court of Appeal split on the application of the tort of negligent investigation to the facts.

16. A majority of three (per MacPherson J.A. (MacFarland and Goudge JJ.A. concurring)) held that the standard of care was not breached and that the police should not be held liable in negligence. ***

18. Hill appeals to this Court, contending that the majority of the Court of Appeal erred in finding that the police investigation leading to his arrest and prosecution was not negligent. The police cross-appeal, arguing that there is no tort of negligent investigation in Canadian law.

Analysis ***

20. The test for determining whether a person owes a duty of care involves two questions: (1) Does the relationship between the plaintiff and the defendant disclose sufficient foreseeability and proximity to establish a *prima facie* duty of care; and (2) If so, are there any residual policy considerations which ought to negate or limit that duty of care? (See *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.), as affirmed and explained by this Court in a number of cases (*Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79 (S.C.C.), at paras. 25 and 29-39; *** *Childs v. Desormeaux*, [2006] 1 S.C.R. 643, 2006 SCC 18 (S.C.C.), at para. 47.)

(a) Does the Relationship Establish a Prima Facie Duty of Care?

21. The purpose of the inquiry at this stage is to determine if there was a relationship between the parties that gave rise to a legal duty of care.

22. The first element of such a relationship is foreseeability. ***

23. However, as acknowledged in *McAlister (Donoghue)* [§13.1.1] and affirmed by this Court in *Cooper*, foreseeability alone is not enough to establish the required relationship. To impose a duty of care "there must also be a close and direct relationship of proximity or neighbourhood": *Cooper*, at para. 22. The proximity inquiry asks whether the case discloses factors which show that the relationship between the plaintiff and the defendant was sufficiently close to give rise to a legal duty of care. The focus is on the relationship between alleged wrongdoer and victim: is the relationship one where the imposition of legal liability for the wrongdoer's actions is appropriate?

24. Generally speaking, the proximity analysis involves examining the relationship at issue, considering factors such as expectations, representations, reliance and property or other interests involved: *Cooper*, at para. 34. Different relationships raise different considerations. *** No single rule, factor or definitive list of factors can be applied in every case. ***

25. Proximity may be seen as providing an umbrella covering types of relationships where a duty of care has been found by the courts. The vast number of negligence cases proceed on the basis of a type of relationship previously recognized as giving rise to a duty of care. The duty of care of the motorist to other users of the highway; the duty of care of the doctor to his patient; the duty of care of the solicitor to her client—these are but a few of the relationships where sufficient proximity to give rise to a *prima facie* duty of care is recognized, provided foreseeability is established. ***

26. In this case, we are faced with a claim in negligence against persons in a type of relationship not hitherto considered by the law—the relationship between an investigating police officer and his suspect. We must therefore ask whether, on principles applied in previous cases, this relationship is marked by sufficient proximity to make the imposition of legal liability for negligence appropriate.

27. *** I cannot accept the suggestion that cases dealing with the relationship between the police and victims or between a police chief and the family of a victim are determinative here, although aspects of the analysis in those cases may be applicable and informative in the case at bar. *** I find the *Jane Doe* [*v. Metropolitan Toronto (Municipality) Commissioners of Police* (1998) 160 D.L.R. (4th) 697 (Ont. Ct. (Gen. Div.))] [§19.5.1.1] decision of little assistance in the case at bar. ***

32. In this appeal, we are concerned with the relationship between an investigating police officer and a suspect. The requirement of reasonable foreseeability is clearly made out and poses no barrier to finding a duty of care; clearly negligent police investigation of a suspect may cause harm to the suspect.

33. Other factors relating to the relationship suggest sufficient proximity to support a cause of action. The relationship between the police and a suspect identified for investigation is personal, and is close and direct. We are not concerned with the universe of all potential suspects. The police had identified Hill as a particularized suspect at the relevant time and begun to investigate him. This created a close and direct relationship between the police and Hill. He was no longer merely one person in a pool of potential suspects. He had been singled out. The relationship is thus closer than in *Cooper* and *Edwards* [*v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 2001 SCC 80]. In those cases, the public officials were not acting in relation to the claimant (as the police did here) but in relation to a third party (i.e. persons being regulated) who, at a further remove, interacted with the claimants.

34. A final consideration bearing on the relationship is the interests it engages. In this case, personal representations and consequent reliance are absent. However, the targeted suspect has a critical personal interest in the conduct of the investigation. At stake are his freedom, his reputation and how he may spend a good portion of his life. These high interests support a finding of a proximate relationship giving rise to a duty of care.

35. On this point, I note that the existing remedies for wrongful prosecution and conviction are incomplete and may leave a victim of negligent police investigation without legal recourse. The torts of false arrest, false imprisonment and malicious prosecution do not provide an adequate remedy for negligent acts. Government compensation schemes possess their own limits, both in terms of eligibility and amount of compensation. As the Court of Appeal pointed out, an important category of police conduct with the potential to seriously affect the lives of suspects will go unremedied if a duty of care is not recognized. This category includes "very poor performance of important police duties" and other "non-malicious category of police misconduct" (paras. 77-78). To deny a remedy in tort is, quite literally, to deny justice. This supports recognition of the tort of negligent police investigation, in order to complete the arsenal of already existing common law and statutory remedies.

36. The personal interest of the suspect in the conduct of the investigation is enhanced by a public interest. Recognizing an action for negligent police investigation may assist in responding to failures of the justice system, such as wrongful convictions or institutional racism. The unfortunate reality is that negligent policing has now been recognized as a significant contributing factor to wrongful convictions in Canada. While the vast majority of police officers perform their duties carefully and reasonably, the record shows that wrongful convictions traceable to faulty police investigations occur. Even one wrongful conviction is too many, and Canada has had more than one. Police conduct that is not malicious, not deliberate, but merely fails to comply with standards of reasonableness can be a significant cause of wrongful convictions. ***

38. Finally, it is worth noting that a duty of care by police officers to suspects under investigation is consistent with the values and spirit underlying the *Charter*, with its emphasis on liberty and fair process. The tort duty asserted here would enhance those values, which supports the appropriateness of its recognition.

39. These considerations lead me to conclude that an investigating police officer and a particular suspect are close and proximate such that a *prima facie* duty should be recognized. Viewed from the broader societal perspective, suspects may reasonably be expected to rely on the police to conduct their investigation in a competent, non-negligent manner. (See *Odhavji*, at para. 57.)

40. It is argued that recognition of liability for negligent investigation would produce a conflict between the duty of care that a police officer owes to a suspect and the police's officer duty to the public to prevent crime, that negates the duty of care. I do not agree. First, it seems to me doubtful that recognizing a duty of care to suspects will place police officers under incompatible obligations. Second, on the test set forth in *Cooper* and subsequent cases, conflict or potential conflict does not in itself negate a *prima facie* duty of care; the conflict must be between the novel duty proposed and an "overarching public duty", and it must pose a real potential for negative policy consequences. Any potential conflict that could be established here would not meet these conditions. ***

44. In a variant on this argument, it is submitted that in a world of limited resources, recognizing a duty of care on police investigating crimes to a suspect will require the police to choose between spending resources on investigating crime in the public interest and spending resources in a manner that an individual suspect might conceivably prefer. The answer to this argument is that the standard of care is based on what a reasonable police officer would do in similar circumstances. The fact that funds are not unlimited is one of the circumstances that must be considered. Another circumstance that must be considered, however, is that the effective and responsible investigation of crime is one of the basic duties of the state, which cannot be abdicated. A standard of care that takes these two considerations into account will recognize what can reasonably be accomplished within a responsible and realistic financial framework.

45. I conclude that the relationship between a police officer and a particular suspect is close enough to support a *prima facie* duty of care.

(b) Policy Considerations Negating the Prima Facie Duty of Care

46. The second stage of the *Anns* test asks whether there are broader policy reasons for declining to recognize a duty of care owed by the defendant to the plaintiff. Even though there is sufficient foreseeability and proximity of relationship to establish a *prima facie* duty of care, are there policy considerations which negate or limit that duty of care?

47. In this case, negating conditions have not been established. No compelling reason has been advanced for negating a duty of care owed by police to particularized suspects being investigated. On the contrary, policy considerations support the recognition of a duty of care. ***

(i) The "Quasi-Judicial" Nature of Police Duties

49. It was argued that the decision of police to pursue the investigation of a suspect on the one hand, or close it on the other, is a quasi-judicial decision, similar to that taken by the state prosecutor. It is true that both police officers and prosecutors make decisions that relate to whether the suspect should stand trial. But the nature of the inquiry differs. Police are concerned primarily with gathering and evaluating evidence. Prosecutors are concerned mainly with whether the evidence the police have gathered will support a conviction at law. The fact-based investigative character of the police task distances it from a judicial or quasi-judicial role. ***

(ii) Discretion

51. The discretion inherent in police work fails to provide a convincing reason to negate the proposed duty of care. It is true that police investigation involves significant discretion and that police officers are professionals trained to exercise this discretion and investigate effectively. However, the discretion inherent in police work is taken into account in formulating the *standard* of care, not whether a duty of care arises. The discretionary nature of police work therefore provides no reason to deny the existence of a duty of care in negligence. ***

54. Courts are not in the business of second-guessing reasonable exercises of discretion by trained professionals. An appropriate standard of care allows sufficient room to exercise discretion without incurring liability in negligence. Professionals are permitted to exercise discretion. What they are not permitted to do is to exercise their discretion unreasonably. This is in the public interest.

(iii) Confusion with the Standard of Care for Arrest

55. Recognizing a duty of care in negligence by police to suspects does not raise the standard required of the police from reasonable and probable grounds to some higher standard, as alleged. The requirement of reasonable and probable grounds for arrest and prosecution informs the standard of care applicable to some aspects of police work, such as arrest and prosecution, search and seizure, and the stopping of a motor vehicle. A flexible standard of care appropriate to the circumstances, discussed more fully below, answers this concern.

(iv) Chilling Effect

56. It has not been established that recognizing a duty of care in tort would have a chilling effect on policing, by causing police officers to take an unduly defensive approach to investigation of criminal activity. In theory, it is conceivable that police might become more careful in conducting investigations if a duty of care in tort is recognized. However, this is not necessarily a bad thing. The police officer must strike a reasonable balance between cautiousness and prudence on the one hand, and efficiency on the other. Files must be closed, life must move on, but care must also be taken. All of this is taken into account, not at the stage of determining whether police owe a duty of care to a particular suspect, but in determining what the standard of that care should be. ***

58. The lack of evidence of a chilling effect despite numerous studies is sufficient to dispose of the suggestion that recognition of a tort duty would motivate prudent officers not to proceed with investigations "except in cases where the evidence is overwhelming" (Charron J., at para. 152). ***

59. It should also be noted that many police officers (like other professionals) are indemnified from personal civil liability in the course of exercising their professional duties, reducing the prospect that their fear of civil liability will chill crime prevention.

(v) Flood of Litigation

60. Recognizing sufficient proximity in the relationship between police and suspect to ground a duty of care

does not open the door to indeterminate liability. Particularized suspects represent a limited category of potential claimants. The class of potential claimants is further limited by the requirement that the plaintiff establish compensable injury caused by a negligent investigation. Treatment rightfully imposed by the law does not constitute compensable injury. These considerations undermine the spectre of a glut of jailhouse lawsuits for negligent police investigation. ***

(vi) The Risk that Guilty Persons Who Are Acquitted May Unjustly Recover in Tort

62. My colleague Charron J. (at paras. 156 ff.) states that recognizing tort liability for negligent police investigation raises the possibility that persons who have been acquitted of the crime investigated and charged, but who are in fact guilty, may recover against an officer for negligent investigation. This, she suggests, would be unjust.

63. This possibility of "injustice"—if indeed that is what it is—is present in any tort action. A person who recovers against her doctor for medical malpractice may, despite having proved illness in court, have in fact been malingering. Or, despite having convinced the judge on a balance of probabilities that the doctor's act caused her illness, it may be that the true source of the problem lay elsewhere. The legal system is not perfect. It does its best to arrive at the truth. But it cannot discount the possibility that a plaintiff who has established a cause of action may "factually", if we had means to find out, not have been entitled to recover. The possibility of error may be greater in some circumstances than others. However, I know of no case where this possibility has led to the conclusion that tort recovery for negligence should be denied. ***

65. I conclude that no compelling policy reason has been shown to negate the *prima facie* duty of care. ***

CHARRON J. (dissenting with BASTARACHE AND ROTHSTEIN JJ.):

107. The dictum that it is better for ten guilty persons to escape than for one innocent person to go to jail has long been a cornerstone of our criminal justice system: (W. Blackstone, *Commentaries on the Laws of England* (1769), Book IV, c. 27, at p. 352). Consequently, many safeguards have been created within that system to protect against wrongful convictions. Despite the presence of such safeguards, however, miscarriages of justice do occur. When an innocent person is convicted of a crime that he or she did not commit, it is undeniable that justice has failed in the most fundamental sense. ***

111. *** According to the Crown, the imposition of a duty of care in negligence would not only subsume existing torts such as false arrest, false imprisonment, malicious prosecution, and misfeasance in public office, but would upset the careful balance between society's need for effective law enforcement and an individual's right to liberty.

112. The novel question before this Court is therefore whether the new tort of negligent investigation should be recognized by Canadian law. I have concluded that it should not. A private duty of care owed by the police to suspects would necessarily conflict with the investigating officer's overarching public duty to investigate crime and apprehend offenders. The ramifications from this factor alone defeat the claim that there is a relationship of proximity between the parties sufficient to give rise to a *prima facie* duty of care. In addition, because the recognition of this new tort would have significant consequences for other legal obligations, and would detrimentally affect the legal system, and society more generally, it is my view that even if a *prima facie* duty of care were found to exist, that duty should be negatived on residual policy grounds. ***

141. By way of example, we need only consider the—unfortunately not uncommon—occurrence of the suspected impaired driver. If in acting to combat impaired driving the police were duty-bound to take into account not only the public interest but also the suspect's interests, in all but the most obvious cases of impairment, the officer might well be advised to simply let the suspect go rather than risk harming the suspect by initiating a criminal law process that may not result in a conviction. By letting the suspect go, the officer would also avoid the risk of time-consuming legal entanglements and potential civil liability. This cautionary approach may seem even more advisable to the officer if the suspect in question is a person of stature and means who may personally stand to lose more from being "wrongfully" dragged into the criminal justice system. ***

148. To sum up: in my view, although in the present case there is foreseeability of harm, there remains a lack of proximity. Consequently, I would conclude on the ground of lack of proximity alone that the relationship between the investigating officer and the suspect does not give rise to a *prima facie* duty of care. However, even if some degree of proximity were found, and even if this degree of proximity were held to be sufficient to give rise to a *prima facie* duty of care, it is my position that a consideration of additional policy considerations would militate against the recognition of such a duty. ***

REFLECTION:

- *At what point in the investigation did Hill become sufficiently proximate such that a duty of care arose?*
- *Is McLachlin C.J.'s reasoning that policy considerations favoured finding a duty of care compelling? Does her judgment satisfactorily address Charron J.'s objections?*[476]

13.4.2.3 Rankin's Garage & Sales v. J.J. [2018] SCC 19

Supreme Court of Canada – 2018 SCC 19

✗REF: §18.3.3

KARAKATSANIS J. (MCLACHLIN C.J.C, ABELLA, MOLDAVER, WAGNER, CÔTÉ, ROWE JJ. concurring): ***

3. This case emerges from a tragic set of events. On an evening in July 2006, in the small village of Paisley, Ontario, the plaintiff J. (then 15 years old) and his friend C. (then 16 years old) were at the house of C.'s mother. The boys drank alcohol (some of which was provided by the mother) and smoked marijuana.

4. Sometime after midnight, the boys left the house to walk around Paisley, with the intention of stealing valuables from unlocked cars. Eventually they made their way to Rankin's Garage & Sales, a car garage located near the main intersection in Paisley that was owned by James Chadwick Rankin. The garage property was not secured, and the boys began walking around the lot checking for unlocked cars. C. found an unlocked Toyota Camry parked behind the garage. He opened the Camry and found its keys in the ashtray. Though he did not have a driver's licence and had never driven a car on the road before, C. decided to steal the car so that he could go and pick up a friend in nearby Walkerton, Ontario. C. told J. to "get in", which he did.

5. The 16-year-old C. drove the car out of the garage and around Paisley before starting toward Walkerton. On the highway, the car crashed. J. suffered a catastrophic brain injury.

6. Through his litigation guardian, J. sued Rankin's Garage, his friend C. and his friend's mother for negligence. The issue in this appeal is whether Rankin's Garage owed the plaintiff a duty of care. ***

Judicial History

7. At trial, Morissette J. held that Rankin's Garage owed a duty of care to the plaintiff: Ontario Superior Court of Justice, September 25, 2014. The trial judge concluded that previous cases had already established the existence of this duty. She nonetheless conducted an analysis to determine whether the duty should be recognized. The trial judge held that the risk of harm to J. was reasonably foreseeable. She based this ruling, in part, on the fact that Mr. Rankin knew he had an obligation to secure his vehicles on his property, and that "[i]t certainly ought to be foreseeable that injury could occur if a vehicle were used by inebriated teenagers". The trial judge further held there were no policy reasons to negate the duty of care.

8. The jury found that all parties (including J. himself) had been negligent and made the following apportionment of liability [§18.2]: Rankin's Garage, 37 percent liable; the friend (C.), 23 percent liable; C.'s mother, 30 percent liable; and the plaintiff (J.), 10 percent liable. With respect to Rankin's Garage, the jury set out the particulars of the negligence finding as follows: • Left car unlocked; • Key in it; • Knew or ought

[476] See M.F. McLellan, "Innocence Compensation—The Success Rate of Actions for Negligent Investigation" (2020) 98 Canadian Bar Rev 34.

to have known the potential risk of theft; • Very little security; and • Testimony inconsistencies.

9. The Ontario Court of Appeal upheld the trial judge's holding that Rankin's Garage owed a duty of care to the plaintiff. Writing for the court, Huscroft J.A. held that the trial judge erred in concluding that a duty of care had already been recognized. The Court of Appeal therefore conducted a full duty of care analysis, following the test laid out in *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.), as affirmed and explained in *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 (S.C.C.) (*Anns*/*Cooper* test).

10. The Court of Appeal concluded that there was sufficient foreseeability of harm and proximity between the parties to impose a duty of care. There was "ample evidence to support the conclusion of foreseeability in this case": 2016 ONCA 718, at para. 39. The court reasoned that Rankin's Garage "had care and control of many vehicles for commercial purposes"; with that "comes the responsibility of securing them against minors, in whose hands they are potentially dangerous" (para. 57). As such, the court concluded that "it is fair and just to impose a duty of care in these circumstances" (para. 59).

11. Moving to the second stage of the *Anns*/*Cooper* test, Huscroft J.A. concluded there were no residual policy considerations that negated the *prima facie* duty of care (para. 73). The law does not already provide a remedy in this case (para. 63); the recognition of a duty in these circumstances would not create the spectre of unlimited liability (para. 65); and there are no other policy considerations (such as the illegality of the plaintiff's conduct) that negated the duty (paras. 68-73). ***

The *Anns/Cooper* Test

16. Perhaps the most famous negligence case in history also occurred in a town called Paisley—Paisley, Scotland. That decision, *McAlister (Donoghue) v. Stevenson*, [1932] A.C. 562 (U.K. H.L.) [§13.1.1], revolutionized tort law by defining a principled approach to the development of the tort of negligence. Lord Atkin's famous achievement in this regard was his articulation of the "neighbour principle", under which *parties owe a duty of care to those whom they ought reasonably to have in contemplation as being at risk when they act*: *Stewart v. Pettie*, [1995] 1 S.C.R. 131 (S.C.C.), at para. 25 [§19.9.1].

17. The modern law of negligence remains based on the foundations set out in *Donoghue*. It is still the case today that "[t]he law takes no cognizance of carelessness in the abstract": *Donoghue*, at p. 618, per Lord Macmillan. Unless a duty of care is found, no liability will follow. ***

18. It is not necessary to conduct a full *Anns/Cooper* analysis if a previous case has already established that the duty of care in question (or an analogous duty) exists: *Cooper*, at para. 36; *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114 (S.C.C.), at paras. 5-6 [§17.1.2]; *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855 (S.C.C.), at para. 26 [§19.3.1.3]. If it is necessary to determine whether a novel duty exists, the first stage of the *Anns*/*Cooper* test asks whether there is a relationship of proximity in which the failure to take reasonable care might foreseeably cause loss or harm to the plaintiff: *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 (S.C.C.), at para. 39 [§19.5.2.1]; see also *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643 (S.C.C.), at para. 12; *Cooper*, at para. 30. Once foreseeability and proximity are made out, a *prima facie* duty of care is established.

19. Whether or not a duty of care exists is a question of law and I proceed on that basis: *Galaske v. O'Donnell*, [1994] 1 S.C.R. 670 (S.C.C.), at p. 690. The plaintiff bears the legal burden of establishing a cause of action, and thus the existence of a *prima facie* duty of care: *Childs*, at para. 13. In order to meet this burden, the plaintiff must provide a sufficient factual basis to establish that the harm was a reasonably foreseeable consequence of the defendant's conduct in the context of a proximate relationship. In the absence of such evidence, the claim may fail: see, e.g., *Childs*, at para. 30.

20. Once the plaintiff has demonstrated that a *prima facie* duty of care exists, the evidentiary burden then shifts to the defendant to establish that there are residual policy reasons why this duty should not be recognized ***.

Reasonable Foreseeability and Proximity

21. Since *Donoghue*, the "neighbour principle" has been the cornerstone of the law of negligence. *** Reasonable foreseeability of harm and proximity operate as crucial limiting principles in the law of negligence. They ensure that liability will only be found when the defendant ought reasonably to have contemplated the type of harm the plaintiff suffered.

22. The rationale underlying this approach is self-evident. It would simply not be just to impose liability in cases where there was no reason for defendants to have contemplated that their conduct could result in the harm complained of. Through the neighbour principle, the defendant, as creator of an unreasonable risk, is connected to the plaintiff, the party whose endangerment made the risk unreasonable: E. J. Weinrib, "The Disintegration of Duty", in M. S. Madden, ed., *Exploring Tort Law* (2005), 143, at p. 151. The wrongdoing relates to the harm caused. Thus, foreseeability operates as the "fundamental moral glue of tort", shaping the legal obligations we owe to one another, and defining the boundaries of our individual liability: D. G. Owen, "Figuring Foreseeability" (2009), 44 *Wake Forest L. Rev*. 1277, at p. 1278.

23. In addition to foreseeability of harm, proximity between the parties is also required: *Cooper*, at para. 31. The proximity analysis determines whether the parties are sufficiently "close and direct" such that the defendant is under an obligation to be mindful of the plaintiff's interests: *Cooper*, at para. 32; *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.), at para. 24. This is what makes it just and fair to impose a duty: *Cooper*, at para. 34. The proximity inquiry considers the "expectations, representations, reliance, and the property or other interests involved" as between the parties: *Cooper*, at para. 34. In cases of personal injury, when there is no relationship between the parties, proximity will often (though not always) be established solely on the basis of reasonable foreseeability: see *Childs*, at para. 31.

24. When determining whether reasonable foreseeability is established, the proper question to ask is whether the plaintiff has "offer[ed] facts to persuade the court that the risk of *the type of damage* that occurred was reasonably foreseeable to *the class of plaintiff* that was damaged": A. M. Linden and B. Feldthusen, *Canadian Tort Law* (10th ed. 2015), at p. 322 (emphasis added). This approach ensures that the inquiry considers both the defendant who committed the act as well as the plaintiff, whose harm allegedly makes the act wrongful. As Professor Weinrib notes, the duty of care analysis is a search for the connection between the wrong and the injury suffered by the plaintiff: p. 150; see also *Anns*, at pp. 751-52; *Childs*, at para. 25.

25. The facts of this case highlight the importance of framing the question of whether harm is foreseeable with sufficient analytical rigour to connect the failure to take care to the type of harm caused to persons in the plaintiff's situation. Here, the claim is brought by an individual who was physically injured following the theft of the car from Rankin's Garage. The foreseeability question must therefore be framed in a way that links the impugned act (leaving the vehicle unsecured) to the harm suffered by the plaintiff (physical injury).

26. Thus, in this context, it is not enough to determine simply whether the theft of the vehicle was reasonably foreseeable. The claim is not brought by the owner of the car for the loss of the property interest in the car; if that were the case, a risk of theft in general would suffice. Characterizing the nature of the risk-taking as the risk of theft does not illuminate why the impugned act is wrongful in this case since creating a risk of theft would not necessarily expose the plaintiff to a risk of physical injury. Instead, further evidence is needed to create a connection between the theft and the unsafe operation of the stolen vehicle. The proper question to be asked in this context is whether the type of harm suffered—personal injury—was reasonably foreseeable to someone in the position of the defendant when considering the security of the vehicles stored at the garage.

Analysis

27. There is no clear guidance in Canadian case law on whether a business owes a duty of care to someone who is injured following the theft of a vehicle from its premises. The lower court jurisprudence is divided and there is no consensus ***. *** This Court has never addressed the issue. Like the courts below, I turn to the *Anns*/*Cooper* analysis.

28. I cannot agree with my colleague's position that this case is captured by a broad category defined simply as foreseeable physical injury: see *Cooper*; *Childs*. Such an approach would be contrary to recent guidance from this Court that categories should be framed narrowly (see *Deloitte*, at para. 28); indeed, even in

Deloitte, the "broad" categories discussed were narrower than foreseeable physical injury (e.g. the duty of care owed by a motorist to other users of the highway; the duty of care owed by a doctor to a patient) (see para. 27). Moreover, in a case like this, applying such a broad category would ignore any distinction between a business and a residential defendant that may be relevant to proximity and/or policy considerations. The application of my colleague's proposed category to the facts in this case would signal an expansion of that category in a manner that would subsume many of the categories recognized in tort law, rendering them redundant in cases of physical injury (e.g. the duty of a motorist to users of the highway (*Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129 (S.C.C.), at para. 25); the duty of a manufacturer to consumers (*Mustapha*, at para. 6)). Neither the courts below nor the parties articulated the issue in this case so broadly. Finally, foreseeability of injury is built into the category that my colleague identifies—and, as discussed below, foreseeability of injury is not present in the instant case.

A. Was the Risk of Personal Injury Reasonably Foreseeable in This Case?

29. The trial judge, in brief oral reasons on foreseeability, found that "Mr. Chad Rankin knew he had an obligation to secure his vehicles on his property". She went on to note that "[i]t certainly ought to be foreseeable that injury could occur if a vehicle were used by inebriated teenagers". ***

31. The Court of Appeal noted that Rankin's Garage was a commercial establishment with care and control of many vehicles on an ongoing basis and that several witnesses testified that Rankin's Garage had a practice of leaving cars unlocked with keys in them. In addition, it relied upon evidence of two witnesses respecting a prior history of vehicle theft from Rankin's Garage and the area in general. ***

33. All the evidence respecting the practices of Rankin's Garage or the history of theft in the area, such as it was, concerns the risk of theft. The evidence did not suggest that a vehicle, if stolen, would be operated in an unsafe manner. This evidence did not address the risk of theft by a minor, or the risk of theft leading to an accident causing personal injury. Indeed, the jury noted that it found liability based on the foreseeability of theft.

34. I accept that the evidence could establish, as the jury found, that the defendant ought to have known of the risk of theft. However, it does not automatically flow from evidence of the risk of theft in general that a garage owner should have considered the risk of physical injury. I do not accept that anyone that leaves a vehicle unlocked with the keys in it should always reasonably anticipate that someone could be injured if the vehicle were stolen. This would extend tort liability too far. Physical injury is only foreseeable when there is something in the facts to suggest that there is not only a risk of theft, but that the stolen vehicle might be operated in a dangerous manner. ***

41. I agree with the weight of the case law that the risk of theft does not *automatically* include the risk of injury from the subsequent operation of the stolen vehicle. It is a step removed. To find a duty, there must be *some* circumstance or evidence to suggest that a person in the position of the defendant ought to have reasonably foreseen the risk of injury—that the stolen vehicle could be operated unsafely. That evidence need not be related to the characteristics of the particular thief who stole the vehicle or the way in which the injury occurred, but the court must determine whether reasonable foreseeability of the risk of injury was established on the evidence before it. ***

46. The fact that something is *possible* does not mean that it is reasonably foreseeable. Obviously, any harm that has occurred was by definition possible. Thus, for harm to be reasonably foreseeable, a higher threshold than mere possibility must be met: *Childs*, at para. 29. Some evidentiary basis is required before a court can conclude that the risk of theft includes the risk of theft by *minors*. Otherwise theft by a minor would always be foreseeable—even without any evidence to suggest that this risk was more than a mere possibility. This would fundamentally change tort law and could result in a significant expansion of liability.

47. J. relies on the case of *Holian v. United Grain Growers Ltd.* (1980), 112 D.L.R. (3d) 611 (Man. Q.B.), rev'd on other grounds (1980), 114 D.L.R. (3d) 449 (Man. C.A.), for the proposition that a commercial enterprise ought to have regard for possible injury if there is a theft by a minor. In that case, the plaintiff was injured after a group of boys, aged 8 to 13, stole some insecticide from the defendant's unlocked storage shed to use as "stink bombs". They then threw the insecticide into the plaintiff's car and the plaintiff

was injured after inhaling the poisonous gas. The court concluded that the defendant's employees knew that children used the area near the storage shed as a shortcut. This made it reasonably foreseeable that minors may have stolen from the storage shed.

48. Here, there is nothing about the circumstances of cars stored in a garage lot after hours in the main intersection of this town that was intended or known to attract minors. Indeed, there is no evidence that J. or his friend were targeting Rankin's Garage in particular; they were looking all over town for unlocked cars. Unlike an ice cream truck, vehicles are not designed to attract children: see *Teno v. Arnold*, [1978] 2 S.C.R. 287 (S.C.C.), at pp. 300-302. The witnesses who discussed the history of car thefts in the area did not suggest that minors were responsible for the thefts. Thus, there was insufficient evidence to suggest that minors would frequent the premises at night, or be involved in joyriding or theft. ***

50. Given the absence of compelling evidence on this point, the Court of Appeal could only rely on speculation to connect the risk of theft to the risk of personal injury. This was inappropriate. Courts need to ensure that "common sense" is tied to the specific circumstances of the case and not to general notions of responsibility to minors. ***

53. Whether or not something is "reasonably foreseeable" is an objective test. The analysis is focussed on whether someone in the defendant's position ought reasonably to have foreseen the harm rather than whether the specific defendant did. Courts should be vigilant in ensuring that the analysis is not clouded by the fact that the event in question actually did occur. The question is properly focussed on whether foreseeability was present *prior* to the incident occurring and not with the aid of 20/20 hindsight: L. N. Klar and C.S.G. Jefferies, *Tort Law* (6th ed. 2017), at p. 212. ***

56. *** I conclude that the plaintiff did not satisfy the onus to establish that the defendant ought to have contemplated the risk of personal injury when considering its security practices. The inferential chain of reasoning was too weak to support the establishment of reasonable foreseeability: see *Childs*, at para. 29. For these reasons, the plaintiff has not met his burden of establishing a *prima facie* duty of care owed by Rankin's Garage to him. Reasonable foreseeability could not be established on this record.

B. Did the Commercial Garage Have a Positive Duty to Guard Against the Risk of Theft by Minors?

57. In this case, the plaintiff J. and interveners made additional arguments that proximity was established because Rankin's Garage had a positive duty to act. While there is no need to address this issue given my conclusion that the injury was not reasonably foreseeable, the parties made extensive submissions in this regard.

58. J. submits that Rankin's Garage had a positive duty to secure the vehicles. His position is that as a commercial establishment dealing with goods that are potentially dangerous, Rankin's Garage owed a duty to children to secure the vehicles against theft. The intervener the Ontario Trial Lawyers Association supports this analysis and suggests that businesses that introduce a danger into their communities have a duty to individuals who are injured as a result of those dangers. Since these businesses benefit from the sale or storage of dangerous goods, they have an implied responsibility to the public to reduce the risks associated with the goods. J. and the intervener argue that in this way, a car garage is analogous to a commercial vendor of alcohol, who has a duty to those who may be harmed by damage caused by an intoxicated patron: see *Stewart*.

59. In my view, this analogy is misguided. Bar owners have a positive duty to take steps to prevent potential harm caused by intoxicated patrons: see *Childs*; *Stewart* ***. The existence of this duty is based on a number of considerations specific to that relationship, including the regulatory context surrounding alcohol sales (*Childs*, at paras. 19-21), the contractual relationship between the bar and the customer, and the fact that bars have a commercial incentive to over-serve alcohol, thus increasing the risk to the public (*Childs*, at para. 22). While *Childs* contemplated that other types of commercial entities may also have positive duties to act (para. 37), in my view, commercial garages do not universally fall within this category. The context simply does not warrant it. While a garage benefits financially from servicing cars, they have no commercial relationship with, and do not profit from or encourage the persons who might steal the cars.

60. Vehicles are ubiquitous in our society. They are not like loaded guns that are inherently dangerous and

therefore must be stored carefully in order to protect the public. Commercial garages, unlike an individual who leaves a car unlocked with the keys accessible, have care and control of many vehicles and necessarily have to turn their mind to the security of those vehicles, especially after hours, to prevent theft of the vehicles. Having many vehicles, however, does not necessarily create a risk of personal injury. While cars can be dangerous in the hands of someone who does not know how to drive, this risk would only realistically exist in certain circumstances.

61. Similarly, the fact that J. was a minor does not automatically create an obligation to act. There are circumstances where courts recognize a specific duty of care owed to children. However, these duties are imposed based on the relationship of care, supervision, and control, rather than the age of the child alone. These specific duties include the obligation on school authorities to adequately supervise and protect students (*Myers v. Peel (County) Board of Education*, [1981] 2 S.C.R. 21 (S.C.C.)), on drivers to ensure that child passengers wear seatbelts (*Galaske*), and on parents and those exercising a similar form of control over children (*B. (K.L.) v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403 (S.C.C.), at para. 14). The rationale for imposing such duties is not based solely on the age of the plaintiff, but rather the relationship of control, responsibility, and supervision: *Childs*, at para. 36. No similar relationship exists here. Thus, the mere fact that the plaintiff was a minor is insufficient to establish a positive duty to act. Tort law does not make everyone responsible for the safety of children at all times. ***

Conclusion

66. Under tort law, liability is only imposed when a defendant breaches a duty of care. The *Anns*/*Cooper* test ensures that a duty of care will only be recognized when it is fair and just to do so. As such, it is necessary to approach each step in the test with analytical rigour. While common sense can play a useful role in assessing reasonable foreseeability, it is not enough, on its own, to ground the recognition of a new duty of care in this case. Aside from evidence that could establish a risk of theft in general, there was nothing else to connect the risk of theft of the car to the risk of someone being physically injured. For example, Rankin's Garage had been in operation for many years and no evidence was presented to suggest that there was ever a risk of theft by minors at any point in its history.

67. This is not to say that a duty of care will never exist when a car is stolen from a commercial establishment and involved in an accident. Another plaintiff may establish that circumstances were such that the business ought to have foreseen the risk of personal injury. However, on this record, I conclude that the courts below erred in holding that Rankin's Garage owed a duty of care to the plaintiff. I would allow the appeal and dismiss the claim against the appellant with costs in this Court and in the courts below.

BROWN J. (dissenting with GASCON J.):

68. The question raised by this appeal is whether the trial judge erred in finding that the appellant Rankin owed a duty of care to the respondent J. Having read the reasons of the majority, I disagree with its analysis in two respects that would lead me to dismiss the appeal. ***

73. The trial judge found, and J. argued before this Court, that the relationship between Rankin and J. falls within a category of relationships in which a duty of care has been previously found to exist, such that a full *Anns/Cooper* analysis is unnecessary. I agree. In *Cooper v. Hobart*, this Court identified the first category of relationships in which a duty of care has been previously recognized as being that "where the defendant's act foreseeably causes physical harm to the plaintiff". To show that the circumstances of a case fall within this category, a plaintiff need only demonstrate that physical injury to him or her was a reasonably foreseeable consequence of a defendant's overt act of negligence.[477] *** Where foreseeability of physical injury is shown, proximity is established by analogy to those cases where reasonably foreseeable physical injury had previously prompted a court to recognize a duty of care. It follows that, in such cases, a duty of care will be properly recognized under the categorical approach and there will be no need to undertake a full *Anns/Cooper* analysis.[478] ***

[477] *Childs*, at para. 31. See also A. M. Linden and B. Feldthusen, *Canadian Tort Law* (10th ed. 2015), at §9.57.
[478] *Cooper*, at paras. 36 and 39; *Edwards* [*v. Law Society of Upper Canada*, 2001 SCC 80], at paras. 9-10; *Childs*, at

77. Having concluded that the category of foreseeable physical injury is applicable in this case, I turn now to consider whether injury was, in fact, reasonably foreseeable here. Within the duty of care analysis, the reasonable foreseeability inquiry asks whether injury to the plaintiff, or to a class of persons to which the plaintiff belongs, was a reasonably foreseeable consequence of the defendant's negligence.[479] Where a plaintiff can show that he is so "closely and directly affected" by a defendant's actions that the defendant ought "reasonably to have [the plaintiff] in contemplation as being so affected when … directing [his or her] mind to the acts or omissions which are called in question", this requirement will be satisfied.[480] The inquiry being objective (that is, into what reasonably *ought* to have been foreseen), it must be undertaken from the standpoint of a reasonable person. Whether, therefore, the defendant actually foresaw the risk which ultimately manifested in injury to the plaintiff is not determinative.[481]

78. Reasonable foreseeability represents a low threshold and is "usually quite easy to overcome".[482] At this point, a plaintiff must merely provide evidence to "persuade the court that the risk of the *type of damage* that occurred was *reasonably foreseeable to the class of plaintiff* that was damaged".[483] ***

79. In this case, both the trial judge[484] and the Court of Appeal[485] held that it was reasonably foreseeable that an individual such as J. could suffer physical injury as a consequence of Rankin's negligence in the locking, securing and storing of vehicles. I see no palpable and overriding error in these findings and, therefore, would not interfere with them. And, contrary to the majority's suggestion that this holding will require "anyone that leaves a vehicle unlocked with the keys in it" to reasonably foresee physical injury,[486] my conclusion *** is merely that there was sufficient evidence, *in this case*, for the trial judge to find that physical injury was a reasonably foreseeable consequence of Rankin's negligence. ***

85. The trial judge's finding of reasonably foreseeable physical injury is sufficient to bring the circumstances of this case within a category of relationships which has already been found to support a duty of care. As a matter of law, proximity is thereby established, and it is unnecessary to proceed to the second stage of the *Anns/Cooper* framework. *** I would therefore dismiss the appeal ***.

REFLECTION:

- *Watch the exchange between Moldaver J., McLachlin C.J. and Brown J. at the oral hearing of this case.[487] What explains the judges' differing positions on the issue of foreseeability? What is the more compelling perspective?*
- *Even if there were sufficient evidence of foreseeability on the facts, was there a relationship of proximity?*
- *Regardless of any duty of care owed to thieves, did Rankin's Garage owe a duty of care to vehicle owners?[488]*

13.4.2.4 Der v. Zhao [2021] BCCA 82

British Columbia Court of Appeal – 2021 BCCA 82

BUTLER J.A. (FENLON J.A. AND GRIFFIN J.A. concurring):

1. This case concerns the liability of a property owner to pedestrians who are injured when they slip and fall on a municipal sidewalk adjacent to the property owner's residence. Most municipalities have enacted

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para. 15; *Mustapha* [§17.1.2], at para. 6; *Livent* [§19.3.1.3], at para. 26.

[479] Linden and Feldthusen, at §9.59; Klar and Jefferies, at pp. 211-12; P. H. Osborne, *The Law of Torts* (5th ed. 2015), at p. 75; *Clerk & Lindsell on Torts* (21st ed. 2014), by M. A. Jones, at para. 8-08.

[480] *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129 (S.C.C.), at para. 22 (emphasis deleted), citing *Donoghue*, at p. 580, per Lord Atkin [§13.1.1].

[481] Klar and Jefferies, at pp. 212-13; see also *Fullowka v. Royal Oak Ventures Inc.*, 2010 SCC 5, [2010] 1 S.C.R. 132 (S.C.C.), at para. 22.

[482] Linden and Feldthusen, at §9.59; see also E. J. Weinrib, "The Disintegration of Duty" (2006), 31 *Adv. Q*. 212, at p. 237.

[483] Linden and Feldthusen, at §9.59 (emphasis added).

[484] Ontario Superior Court of Justice, September 25, 2014.

[485] 2016 ONCA 718, 403 D.L.R. (4th) 408 (Ont. C.A.).

[486] At para. 34.

[487] *Rankin's Garage & Sales v. J.J.* (SCC Docket 37323, Hearing Webcast on 2017-10-05), timestamp 20:35 - 23:35.

[488] See *Great Lakes Reinsurance (UK) plc v. RAV Bahamas Ltd* [2024] UKPC 11, [21]-[23].

bylaws that require property owners to clear snow and ice off of sidewalks by a particular time each morning. However, courts across Canada have been reluctant to find that a residential property owner owes a common law duty of care to pedestrians using an adjacent sidewalk. The appellant asks this Court to conduct an *Anns/Cooper* analysis and conclude that such a duty is owed. ***

4. The factual background is not contentious. At the time of the accident the appellant was 75 years old. He was walking home from a local grocery store with his wife. There had been a snowfall two days earlier, on December 19, 2017. The temperatures had remained near the freezing level and there was still snow on the ground, including on the yards and boulevard areas adjoining the sidewalk. There was no snow on Coquitlam Street where the appellant and his wife crossed the intersection. As the appellant crossed to the corner of 12th Avenue and Coquitlam Street, he could see that the sidewalk sloped down to where it met the street. It appeared that a path approximately two feet wide had been cleared on the corner of the sidewalk adjacent to the Property. Snow was piled on the side of the area that had been cleared. The appellant did not have to step over a ridge or mound of snow as he stepped onto the sidewalk from the street. When the appellant stepped onto the sidewalk, on the sloped portion that appeared to permit wheelchair access, he slipped and fell backwards, striking his head. The cleared area of the sidewalk had not appeared to the appellant to be icy but it was extremely slippery as a result of a layer of "black ice". The injuries suffered in the fall have rendered the appellant an incomplete tetraplegic.

5. The respondents purchased the Property in September 2017 but did not move into the house on the Property until December 21, 2017, the day of the accident. Mr. Zhao learned from his realtor and from news reports that as a homeowner he was required to clean snow and ice off of sidewalks adjacent to the Property. In early November 2017, Mr. Zhao purchased salt for that purpose and, on one or more occasions prior to moving into the house, he put salt on the sidewalks. On December 20, 2017, after the snowfall, Mr. Zhao went to the Property to shovel the sidewalks. He did so because he understood it was his duty to clean the sidewalks as required by the Burnaby bylaws. He used a shovel to clean the snow and ice off of the sidewalk. Ms. Huang went to the Property on the morning of December 21 and salted the sidewalk, as it was their moving day and she and Mr. Zhao did not want the movers to have an accident. She placed salt on some areas of the sidewalk but could not remember if she salted the corner where the appellant fell. ***

Should this Court Conduct an *Anns/Cooper* Analysis?

47. The steps required for an *Anns/Cooper* analysis were summarized by Justice Garson in *Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General)* 2015 BCCA 163 at para. 50:

> 1) Does a sufficiently analogous precedent exist that definitively found the existence or non-existence of a duty of care in these circumstances;
>
> If not;
>
> 2) Was the harm suffered by the plaintiff reasonably foreseeable;
>
> If yes;
>
> 3) Was there a relationship of sufficient proximity between the plaintiff and the defendant such that it would be just to impose a duty of care in these circumstances;
>
> If yes, a *prima facie* duty arises;
>
> 4) Are there any residual policy reasons for negating the *prima facie* duty of care established in question/step 3, aside from any policy considerations that arise naturally out of a consideration of proximity.
>
> If not, then a novel duty of care is found to exist.

48. The search for a sufficiently analogous category of duty "simply captures the basic notion of precedent": *Childs v. Desormeaux* 2006 SCC 18 at para. 15. It is not necessary to conduct a full *Anns/Cooper* analysis if a previous case has already established the duty in question (or an analogous duty): *Rankin's Garage &*

Sales v. J.J., 2018 SCC 19 at para. 18. That is clearly not the case here. However, as acknowledged in *Carhoun*, the first step also considers whether the "non-existence" of a duty of care has been recognized. In other words, whether the weight of authority has rejected the existence of the alleged duty, such that there is no need to undertake a full *Anns/Cooper* analysis. ***

51. The respondents' argument stresses the considerable weight of authority and large body of case law unanimously rejecting the duty which the appellant seeks to impose. They also say that the decision of this Court in *Gardner v. Unimet Investments Ltd.* (1996) 19 B.C.L.R. (3d) 196 (C.A.) is binding and has rejected the alleged duty. ***

52. *** I have concluded that the rejection of the duty of care alleged by the appellant is well established in the jurisprudence. This case is unlike *Rankin* or *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, in which lower courts were divided and there was no consensus. Further, it does not appear to me that the appellant's formulation of the duty of care is novel in any way, as it is the very same duty that has been consistently rejected by various courts who have considered the issue.

53. However, the fact that no court has undertaken a proper *Anns/Cooper* analysis at an appellate level supports the appellant's position that we should do so in this case. I will accordingly conduct the full duty of care analysis. ***

Foreseeability

86. The second step in the *Anns/Cooper* analysis is to ask if the harm suffered by the plaintiff was reasonably foreseeable. The proper question to ask is whether the plaintiff has presented sufficient facts to persuade the court that the risk of the *type of damage* that occurred was reasonably foreseeable to the *class of plaintiff* that was damaged or injured: *Rankin* at para. 24.

87. I agree with the appellant that the answer to that question is clearly, yes. The type of damage that occurred, a slip and fall injury, was clearly foreseeable to the class of plaintiff that was injured, pedestrians using the sidewalk. It was reasonably foreseeable that if the sidewalk was not cleared of snow and ice, or was otherwise cleared in a negligent fashion, a pedestrian could fall and suffer injury. That conclusion is sufficient to find that the risk of personal injury was reasonably foreseeable. ***

Proximity

90. The third step in the analysis is to ask if there is a relationship of sufficient proximity between the plaintiff and the defendant such that it would be just to impose a duty of care in these circumstances.

91. The focus of the proximity analysis is on factors arising from the relationship between the plaintiff and the defendant: *Cooper* at para. 30. The factors to be considered are diverse and depend on the circumstances of the case. However, they include expectations, reliance, and property interests: *Hill* at para. 24. The object is to evaluate the closeness of the relationship between the plaintiff and defendant to determine whether it is just and fair to impose a duty of care: *Cooper* at para. 34.

92. It is in the context of the proximity analysis that I have given weight to the existing authorities. I do so because it appears to me that courts have rejected the existence of a duty of care on the basis of what we would now consider to be the absence of sufficient proximity under *Anns/Cooper*. In other words, courts have determined, without exception, that it is not just and fair to impose a duty of care in the circumstances of the relationship between a property owner and a pedestrian who is injured by slipping and falling on snow or ice on an adjacent municipal sidewalk. The Court concluded as much in *MacKay v. Starbucks Corporation*, 2017 ONCA 350, by saying that "there is no general common law duty of care, *based on proximity principles*, owed by an adjacent property owner or tenant in respect of sidewalks that abut that person's property": at para. 46 (my emphasis). ***

94. The sidewalks, like streets, are owned, occupied and maintained by the municipality, which thus has a much closer relationship with users of those facilities than that of an adjacent property owner. Courts have consistently concluded that the enactment of snow-clearing bylaws was not intended to create a civil cause of action in favour of pedestrians, and have applied *Saskatchewan Wheat Pool* [[1983] 1 S.C.R. 205 (SCC)]

[§14.1.2.1] in these circumstances. In other words, courts have concluded that the passage of a snow clearing bylaw did not "shift" liability for a lack of or negligent snow-clearing efforts from the municipality to the adjacent property owner.

95. I begin by considering the relationship from the perspective of a pedestrian in the position of the appellant. He was using the municipal sidewalks and roadways as he walked to and from a local store. He would have been acutely aware of the weather conditions, including the presence of snow, the temperature, and the effect that snow and changing temperatures has on streets and sidewalks. He would expect snow and ice to have a detrimental impact on the safety of streets and sidewalks. He would also expect that ice can form quickly and unexpectedly and that black ice may be difficult to detect ***.

96. A pedestrian would also be able to see what steps had been taken by residents, businesses and the municipality to clear the sidewalks and streets. It would be apparent to him or her that some property owners do a better job than others of clearing ice and snow. However, the pedestrian would understand that he or she had an obligation to take care for their own safety and well-being in the face of uncertain and frequently changing winter sidewalk conditions.

97. I make note of these expectations not to be critical of the appellant, but because a pedestrian's responsibility for their own safety in these circumstances is a factor that has influenced courts in declining to find that an adjacent property owner owes a duty of care to the pedestrian. A pedestrian would expect snow and ice to create a hazard and, even where a sidewalk had been cleared, would expect that conditions may have changed making the sidewalk slippery and less safe. These expectations suggest that a pedestrian would not reasonably be able to rely on adjacent property owners or municipalities to keep sidewalks free from hazards caused by changing winter conditions after a snowfall.

98. As the respondents argue, the nature and size of the class of property owners is also a factor in considering proximity. A pedestrian who goes for a 30-minute walk on a day with freezing temperatures after a snowfall may walk by dozens or hundreds of residential properties. The respondents suggest that this raises an issue akin to that of indeterminate liability, which is properly considered at the last stage of the *Anns/Cooper* analysis. I do not think that it raises an issue of indeterminate liability. Rather, it is a factor to take into account when considering the lack of reliance that a pedestrian could place on property owners, and the relationship between them. Given the nature of the activity and risk I am of the view that it is not reasonable to suggest that the pedestrian can be said to place reliance on each of those property owners. I would contrast that with a situation in which ice forms on the sidewalk on the "threshold of the doorway" or immediately outside of a café or hotel.

99. From the perspective of property owners, like the respondents, the same factor of changing weather conditions and the difficulty in ameliorating all risks of harm make the imposition of the general duty suggested by the appellant unfair. It is also relevant that the ability of property owners to fulfil the suggested duty of care would vary greatly. Many owners may have difficulty in doing so. The large variation in particular circumstances, including location of the property and nature of the pedestrian traffic, would, if such a duty were found to exist, place markedly different burdens on different property owners.

100. Further, the analysis of proximity cannot be divorced from the property interests of the municipality and the private owners. As the cases have highlighted, there is no duty at common law on a property owner to maintain the property of a neighbour. It is a greater stretch to recognize a duty to maintain the property of a neighbour for the benefit of strangers who may use that property. This is the context in which courts have rejected the proposition that the passage of snow-clearing bylaws by a municipality changes the common law duties or serves to shift or impose civil liability. ***

101. It is also within that context that courts have considered whether the passage of snow-clearing bylaws should lead to the imposition of the duty of care to clear sidewalks of snow and ice. This was rejected in *Bongiardina v. York (Regional Municipality)* (2000), 49 O.R. (3d) 641 (O.N.C.A.) and in every other case that has considered the issue. Courts have consistently applied *Saskatchewan Wheat Pool* to find that the existence of a statutory breach is insufficient *per se* to give rise to a claim in negligence and a right to damages. The appellant argues that the single most important factor that should lead to a finding of sufficient proximity in this case is the Bylaw. But that is the very argument that has been consistently

rejected by courts in the face of similar bylaws.

102. For commercial property owners, it may be easier to find a close and direct relationship with members of the public. These owners invite the public to access their hotels, cafés, or other businesses, which requires use of the public sidewalks immediately adjacent to entrance to their business. In these circumstances, it is not surprising that courts have been more willing to find that commercial owners become occupiers of those common areas, or that they otherwise owe a duty of care to pedestrians using public sidewalks at the threshold of their doorway. By comparison, the relationship between a residential property owner and a pedestrian on a sidewalk is much less close and direct. A residential property owner does not have control over who uses the sidewalk, nor do they invite or require pedestrians to use certain areas of sidewalks in order to access their properties.

103. In summary, I would agree with *Bongiardina* and the many cases that have followed that, generally, residential property owners do not owe a duty of care to pedestrians passing by on sidewalks adjacent to their properties that are owned by municipalities. I am of the view that there is no basis on which to find that the relationship between the appellant and the respondents is sufficiently proximate to make it just and fair to impose a duty of care. ***

110. I would dismiss the appeal. I conclude that residential property owners do not owe a general duty of care to take reasonable care with respect to the removal of snow and ice from sidewalks adjacent to their property. Accordingly, the appellant is unable to establish that such a duty of care was owed by the respondents. The trial judge did not err to decide the duty of care issue on a summary trial application.

REFLECTION:

- *Is this case best understood as entailing a careless act or a careless omission? Does it matter?*
- *Der argued that the defendants had carelessly created a dangerous condition on the sidewalk. Yet, they owed no duty of care. Is this case reconcilable with Haley v. London Electricity Board (§13.1.5)?*
- *Would the decision have been different if Zhao had attempted to clear the snow by hosing down the sidewalk with water, inadvertently creating an ice-slick?[489] What if there had been no snow, but instead Der had slipped on ball-bearings that Zhao had carelessly scattered on the sidewalk?*
- *In the wake of this judgment, should British Columbian homeowners shovel snow from their sidewalks?[490]*

13.4.3 Further material

- B. Feldthusen, "Please *Anns*: No More Proximity Soup" (2019) 93 Supreme Court L Rev 143.
- E. Chamberlain, "Affirmative Duties of Care: A Distinctly Canadian Contribution to the Law of Torts" (2018) 84 (2d) Supreme Court L Rev 101.
- J. Blom, "Do We Really Need the *Anns* Test for Duty of Care in Negligence?" (2016) 53 Alberta L Rev 895.
- A. Robertson, "Justice, Community Welfare and the Duty of Care" (2011) L Quarterly Rev 370.
- J. Hartshorne, "Confusion, Contradiction and Chaos within the House of Lords post *Caparo v. Dickman*" (2008) 16 Tort L Rev 8.
- J. Plunkett, *The Duty of Care in Negligence* (Oxford: Hart Publishing, 2018).

[489] See *Bittner. v. Tait-Gibson Optometrists Ltd.*, 1964 CanLII 288 (ON CA).
[490] P. Henderson, "When it comes to snow clearing, governments can't legislate civility" The Chilliwack Progress (Jan 21, 2022).

14 NEGLIGENCE: (II) BREACH OF DUTY OF CARE

14.1 Ascertaining the standard of care

M. Katsivela, "The Breach of the Standard of Care and the Concept of Fault in Civil Law in Canada: A Comparative Study" (2017) 95 Canadian Bar Rev 535 (translation)

In the context of the common law tort of negligence, once the duty of care is established, the plaintiff must prove that the defendant did not meet the standard of care, in other words, that he was negligent.[491] ***

In both common law and civil law traditions, the courts compare the defendant's conduct to a "model conduct" (the standard of prudence and diligence) of the reasonable, prudent and diligent person[492] placed in the defendant's position at the time of the incident in question. The difference between the defendant's behavior and that of the reasonable person constitutes negligence.[493] The reasonable person is central to the concept of negligence. In order to compare his behavior to that of the defendant, this person must first be defined.

*** [T]he reasonable person is an everyday person, of an ordinary intelligence and ability who conducts himself with prudence.[494] He is not endowed with superior intelligence or exceptional abilities; he is not able to foresee or to know everything by acting well in all circumstances.[495]

To this objective standard specific characteristics are added according to the particular case—we are referring here to the 'attributes' of the reasonable person in common law. For example, when the defendant has expertise in a field, as is the case of a professional [a lawyer or a notary (the latter in civil law),[496] a doctor],[497] or physical disabilities,[498] these will be attributed to the reasonable person. Thus, *** the standard of care for a professional will be that of a reasonably competent professional placed in the position of the defendant. Similarly, the standard of care for a person with physical disabilities will be that of a reasonable person with similar physical disabilities placed in the position of the defendant. On the other hand, if the defendant has particular moral characteristics such as recklessness, shyness, cultural or religious traits, these will not be attributed to the reasonable person in order to relax the standard of care either in common law or in civil law.[499] ***

With regard to minor defendants in common law, there are three categories:

a) Minors of tender age (under age six, approximately)[500] are exempt from liability because they

[491] *Fontaine v. Colombie-Britannique (Official Administrator)*, [1998] 1 RCS 424 at para 23.
[492] Common law: *Ryan v. Victoria (City)*, (1999) 1 SCR 201 at para 28 (*Ryan*) [§14.1.2.2]. Civil law on article 1457: *Ciment du Saint-Laurent inc v. Barrette*, 2008 CSC 64 at para 21, [2008] 3 RCS 392 at para 21 [*Ciment*]. In the present study, we will use interchangeably the terms 'standard of prudence and diligence' and 'standard of care'.
[493] Common law: *Ryan*, *supra*. Civil law: *Ciment*, *supra*, *Ouellette v. Cloutier*, [1947] SCR 521 at p. 527 [*Ouellette*].
[494] Common law: *Arland v. Taylor*, [1955] OR 131 (CA) (*Arland*). Civil law: *Baudouin, Deslauriers, Moore*, *supra* at p. 190-191. *Brisson v. Gagnon* 2007 QCCA 617 at paras 28, 31, *Ouellette*, *supra*.
[495] *Arland*, *supra*, *Ouellette*, *supra*. The CCBC referred to 'bon père de famille'. *Oeuvre des terrains de jeux de Québec v. Cannon* (1940) 69 BR 112 at page 114 (*Cannon*).
[496] Common law: *Central Trust Co v. Rafuse*, [1986] 2 RCS 147 (lawyer). Civil law: *Roberge v. Bolduc*, [1991] 1 RCS 374 (notary) (*Roberge*), *Jodoin v. Centre de l'auto Poulin inc*. 2015 QCCQ 11565 at paras 67, 69 (lawyers).
[497] Common Law: *Ter Neuzen Cardin v. City of Montreal*, (1995) 2 SCR 674 at para 33 (*Ter Neuzen*) also noting that the conduct of a specialized doctor must be compared with that of a reasonable doctor of the same specialty. Civil Law: *Abitbol v. Weiswall*, 1998 CarswellQue 37 (CA) at para 29 (citing *Ter Neuzen*, *supra*), Vincent Karim, *Les Obligations*, vol 1, Montréal, Wilson Lafleur Lté, 2015 at page 1085 (Karim). ***
[498] Common law: Allen M Linden et Bruce Feldthusen, *Canadian Tort Law*, 10e ed, Toronto, LexisNexis, 2015 at p. 161 (Linden and Feldthusen). Civil law: Han-Ru Zhou, "Le test de la personne raisonnable en responsabilité civile" (2001) 61 R du B 451 at page 480 (ZHOU).
[499] Common law: *Arland*, *supra*, (J. Laidlaw), citing other cases. Civil law: Zhou, *supra* at p. 481. *Tremblay v. Deblois*, [1998] R.R.A. 48 (C.A.) for certain of these traits.
[500] *McEllistrum v. Etches*, [1956] SCR 787 at p. 792-793. Linden and Feldthusen *supra* at p. 165.

lack the ability to understand and appreciate the nature of their actions and to comply with the standard of care.[501]

b) Minors engaged in an adult activity are held to the same standard of care as adults. In this respect, driving an automobile, a snowmobile, a motorboat or even playing golf has been described as an adult activity.[502] According to case law, it would be unfair and even dangerous for the public to subject, for example, minors who operate motor vehicles to a lesser standard of care than that required of all drivers of such vehicles.[503]

c) Minors who are six years of age and over and who are not engaged in an adult activity are subject to a relaxed standard of care: they will be compared to a reasonable child of: i) his or her age; possessing similar ii) intelligence and iii) experience.[504] The courts do not systematically rely on these three elements (minor's age, intelligence and experience).[505] *** […continue reading]

REFLECTION:

- *Based on Prof. Katsivela's summary of the principles, is the reasonable person an objective standard?*
- *What are the implications of attributing some characteristics of the defendant to the reasonable person standard, but not others?*

14.1.1 Reasonable person standard

"Reasonable Man" in Duhaime's Encyclopedia of Law (Duhaime, 2010)

Reasonable Man: An ethereal concept of an average person and his/her conduct, against which the actions of another is weighed. ***

In *Levitt v. Carr* 66 BCLR (2d) 58 (BCCA, 1992), the British Columbia Court of Appeal wrote:

> "The purpose of the reasonable man … is to determine whether a particular plaintiff has failed, judged by a community standard, in the duty of care he or she owes himself or herself."

The standard is androgynous; there is no expression of the "*reasonable woman*" known to the common law. But, in *Director of Public Prosecutions v. Camplin* [1978] AC 705, Lord Diplock wrote that the concept of a reasonable man:

> "… has never been confined to the adult male. It means an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today." ***

The foundation of the concept of a reasonable man can be found in *Blyth v. Birmingham Water Works* (1856) 11 Exch 781:

> "Negligence is the omission to do something which a *reasonable man*, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done."

[501] *Tillander v. Gosselin*, (1967) 1 OR 203 (ON SC) (*Tillander*) aff. by (1967) 61 DLR (2d) 192n (ON CA).
[502] *Ryan et al v. Hickson et al* (1974) 7 OR (2e) 352 at paras 8-10 (HC) (snowmobile), *Pope v. RGC Management Inc*, 2002 ABQB 823 at paras 30-33 (golf).
[503] *McErlean v. Sarel et al*, (1987) 61 OR (2e) 396 at paras 54-55 (CA).
[504] *Joyal v. Barsby*, (1965) 55 DLR (2d) 38 (Man. C.A.)—a six-year-old girl crosses a rural road and is hit by a negligent driver. The majority of judges did not find her negligent. She behaved like a child of the same age with a similar intelligence and experience.
[505] Linden and Feldthusen, *supra* at pages 166-167. For example: *Potvin v. CPR*, 1904 CarswellOnt 754 (Ont CA) at para 7 mentions two of the three elements (young age—general intelligence), *Oliver Blais Co Ltd v. Yachuk*, [1946] SCR 1 mentions four elements (age, capacity, experience, knowledge).

It is not an easy term to pin down as it is shaped into a different form in each case, to suit the proper legal action or response to the facts at hand. Thus in *Carlson v. Chochinov* [1947] 2 DLR 641, the Court noted:

> "The ideal of that person exists only in the minds of men, and exists in different forms in the minds of different men. The standard is therefore far from fixed as stable. But it is the best all-round guide that the law can devise." *** […continue reading]

REFLECTION:

- *Why has the common law constructed a reasonable person standard of care? Is it a sound standard?*
- *Consider alternative possible standards that the common law could have adopted for assessing the issue of breach: (a) Δ is strictly liable to Π for causing harm; (b) Δ is liable if they failed to act perfectly; (c) Δ is liable if they failed to do their best; (d) Δ is liable if they were more careless than the ordinary emotional and flawed human; (e) Δ is liable if they are morally blameworthy; (f) Δ is liable if the cost of taking care was less than the expected loss their actions caused. How does the reasonable person standard compare?*
- *Satirist A.P. Herbert wrote, in the fictional case of Fardell v. Potts: "It is impossible to travel anywhere or to travel for long in that confusing forest of learned judgments which constitutes the Common Law of England without encountering the Reasonable Man. He is at every turn, an ever-present help in time of trouble, and his apparitions mark the road to equity and right. There has never been a problem, however difficult, which His Majesty's judges have not in the end been able to resolve by asking themselves the simple question, 'Was this or was it not the conduct of a reasonable man?' and leaving that question to be answered by the jury."[506] What might Herbert have thought to be the problem obscured by this simple question?*

14.1.1.1 Booth v. St Catharines (City) [1948] CanLII 10 (SCC)

Supreme Court of Canada – 1948 CanLII 10

✗REF: §14.2.1.1, §17.2.1

RAND J.: ***

10. This action was brought to recover damages resulting from the collapse of a steel flag tower standing in Montebello Park, St. Catharines, on the occasion of the celebration on the night of August 15, 1945 of the surrender of Japan. ***

12. The flag tower had been originally erected on St. Paul Street in July, 1907 and in June, 1916 had been transferred to the Park. It was pyramidal in shape, resting on four legs attached to steel angle bars set in concrete. *** There was no interior bracing. It was found that for flag purposes the structure was adequate and would have lasted indefinitely.

13. A large crowd of over 10,000 people gathered in the Park. The fireworks were to be set off in the Rose Garden, around which for safety purposes a fence was put up of a somewhat irregular shape and between 200 and 300 feet in diameter. The flag tower was about 25 feet north of the fence. There was a variety of fireworks, consisting of sound bombs, rockets and other display pieces. Five or six men had been detailed to keep the crowd back from the fence.

14. The Park was under the superintendence of a manager of 23 years' service in the Park who was given charge of the arrangement. Under his direction the fence was erected and guarded. He had been requested by the Mayor to bring the display on early to enable the younger children to see it. About 7:20 p.m. the first sound bombs were fired off and about that time his attention was called to several children between four and six years of age climbing up the tower. Walking over to the fence, he told the children to get off which they did. About 8:00 o'clock the second discharge of bombs was made and again his attention was called to children on the tower, and again he warned them off and they obeyed. No further attention was paid to the tower. At 8:30 the fireworks commenced. The people were closely crowded around the fence, and between that time and about ten minutes to nine when the tower collapsed from ten to twenty boys up to 15 or more years of age were seen on the tower at different heights. They were probably on the north side

[506] A.P. Herbert, *Misleading Cases in the Common Law* (7th ed, New York: G.P. Putnam's Sons, 1932).

where they would face the Rose Garden, and it is stated that as the pieces were shot into the air the boys would bend backward to follow their courses. It is stated that at least one was higher up than 30 feet, and towards the end several older boys, dressed in some kind of uniform, joined the climbers. Shortly before the collapse, the tower was noticed to be swaying but no attention was paid to it by any one in authority, and finally one of the legs, probably the northeast corner, buckled, bringing the structure down and causing the injuries complained of. A young lady, the daughter of the plaintiff McCormack, was killed, and the other plaintiffs were injured. ***

16. The evidence of the engineer witnesses, although not as specifically directed to the point as it might have been, satisfies me that to a person with the intelligence and skill required of a superintendent of such a park or of a person competent to be given charge of arrangements for such a demonstration, and acting reasonably, the presence of four or five boys in their teens on one of these struts either below or above the 30-foot point would threaten the stability of the tower. ***

18. On the basis of prudent foresight, it must have been anticipated as natural and probable that boys of all ages would climb the tower to get a better view of what was going on; and, coupled with the admitted knowledge of the other facts mentioned, that there would be created a probable danger to persons attending the celebration.

19. *** I must hold the standard of reasonable foresight to be applicable to the circumstances of the demonstration. ***

KELLOCK J.: ***

36. In *Muir's case* [[1943] A.C. 448] Lord Macmillan at page 457 said:

> Legal liability is limited to those consequences of our acts which a reasonable man of ordinary intelligence and experience so acting would have in contemplation. *** The standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path beset with lions. Others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from over-apprehension and from over-confidence, but there is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation, and what, accordingly, the party sought to be made liable ought to have foreseen.

37. In the same case Lord Thankerton at page 454 said: "… this is essentially a jury question, and in cases such as the present one, it is the duty of the court to approach the question as if it were a jury, and a Court of Appeal should be slow to interfere with the conclusions of the Lord Ordinary." ***

ESTEY J.: ***

52. The standard of care required of the respondents is that which a reasonable man would have exercised in the management and direction of this celebration. ***

REFLECTION:

- *What was the standard of care applied in this case?*
- *The park manager had 23 years' experience and knew what the structure could handle. Should he have been held to a more stringent standard compared to a manager who was in their first day on the job?*

14.1.1.2 Nettleship v. Weston [1971] EWCA Civ 6

England and Wales Court of Appeal – [1971] EWCA Civ 6

✗**REF: §18.1.2.1, §20.3.1**

LORD DENNING M.R.:

1. Mrs Weston is a married woman. She wanted to learn to drive. Her husband was quite ready for her to learn on his car. She asked a friend of hers, Mr Nettleship, if he would give her some lessons. Mr Nettleship said he would do so ***. ***

2. *** On Sunday 12 November he went with her on her third lesson. She sat in the driving seat. He sat beside her. She held the steering wheel and controlled the pedals for the clutch and foot brake and accelerator. He assisted her by moving the gear lever: and applying the hand brake. Very occasionally he assisted in the steering.

3. They came to a road junction where there was a halt sign. They had to turn left. She stopped the car. He moved the gear lever into neutral and applied the hand brake. The road was clear. He said to her: 'Move off, slowly, round the corner'.

4. He took off the hand brake. She let in the clutch. He put the gear lever into first gear. The car made a smooth start. She turned the steering wheel to the left and the car moved round the corner at walking pace. He said to her: 'Now straighten out'.

5. But she did not do so. She panicked. She held the steering wheel, as he said: 'in a vice-like grip'; or, as she said: 'my hands seemed to freeze on the wheel'. *** As bad luck would have it, there was a lamp standard just by the kerb at that point. The nearside struck the lamp standard. Mr Nettleship was injured. His left knee-cap was broken.

6. On 25 January 1968 Mrs Weston was convicted by the Sheffield magistrates of driving without due care and attention. She was fined £10 and her driving licence was endorsed.

7. Mr Nettleship now claims damages for negligence against Mrs Weston. She denies negligence, alleges contributory negligence, and also pleads that he impliedly consented to run the risk of injury. The judge dismissed the claim. He said that the only duty owed by Mrs Weston to Mr Nettleship was that she should do her best, and that she did not fail in that duty. ***

11. *** The civil law *** requires *** the same standard of care as of any other driver. 'It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question': see *Glasgow Corporation v. Muir* [1943] AC 448, 457 by Lord Macmillan. The learner driver may be doing his best, but his incompetent best is not good enough. He must drive in as good a manner as a driver of skill, experience and care, who is sound in wind and limb, who makes no errors of judgment, has good eyesight and hearing, and is free from any infirmity: see *Richley (Henderson) v. Faull. Richley Third Party* [1965] 1 WLR 1454 and *Watson v. Thomas S Whitney & Co Ltd* [1966] 1 WLR 57. ***

LORD JUSTICE SALMON AND LORD JUSTICE MEGAW concurred separately.

REFLECTION:

- *Why shouldn't the relevant question be whether the defendant did their best in the circumstances?*
- *Is it fair to hold a plaintiff liable if in practice they are not capable of acting to a reasonable person standard?*

14.1.1.3 United States v. Carrol Towing Co. (1947) 159 F.2d 169 (2d Cir)

BACKGROUND: Quimbee (2020), https://youtu.be/b6IG_geYmQM

US Court of Appeals for the Second Circuit – 159 F.2d 169 (1947)

LEARNED HAND J.: ***

1. These appeals concern the sinking of the barge, 'Anna C,' on January 4, 1944, off Pier 51, [on the Manhattan, New York, side of the] North River. ***

7. It appears *** that there is no general rule to determine when the absence of a bargee or other attendant will make the owner of the barge liable for injuries to other vessels if she breaks away from her moorings.

*** It becomes apparent why there can be no such general rule, when we consider the grounds for such a liability. Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) the probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether **B < PL**.

Applied to the situation at bar, the likelihood that a barge will break from her fasts and the damage she will do, vary with the place and time; for example, if a storm threatens, the danger is greater; so it is, if she is in a crowded harbor where moored barges are constantly being shifted about. On the other hand, the barge must not be the bargee's prison, even though he lives aboard; he must go ashore at times. We need not say whether, even in such crowded waters as New York Harbor a bargee must be aboard at night at all; it may be that the custom is otherwise, as Ward, J., supposed in *The Kathryn B. Guinan* [2 Cir., 176 F.2d 301]; and that, if so, the situation is one where custom should control. We leave that question open; but we hold that it is not in all cases a sufficient answer to a bargee's absence without excuse, during working hours, that he has properly made fast his barge to a pier, when he leaves her. In the case at bar the bargee left at five o'clock in the afternoon of January 3rd, and the flotilla broke away at about two o'clock in the afternoon of the following day, twenty-one hours afterwards. The bargee had been away all the time, and we hold that his fabricated story was affirmative evidence that he had no excuse for his absence. At the locus in quo—especially during the short January days and in the full tide of war activity—barges were being constantly 'drilled' in and out. Certainly it was not beyond reasonable expectation that, with the inevitable haste and bustle, the work might not be done with adequate care. In such circumstances we hold—and it is all that we do hold—that it was a fair requirement that the Conners Company should have a bargee aboard (unless he had some excuse for his absence), during the working hours of daylight. ***

REFLECTION:

- *Should courts determine the standard of care and its breach according to a cost/benefit analysis? What might such an analysis overlook?*
- *Should courts replace the duty of care enquiry (of foreseeability, proximity, policy) with the Hand Formula?*

14.1.2 Relevance of statutory standards

14.1.2.1 R v. Saskatchewan Wheat Pool [1983] CanLII 21 (SCC)

Supreme Court of Canada – 1983 CanLII 21

✗**REF: §14.2.6.1**

DICKSON J. (FOR THE COURT):

1. This case raises the difficult issue of the relation of a breach of a statutory duty to a civil cause of action. Where "A" has breached a statutory duty causing injury to "B", does "B" have a civil cause of action against "A"? If so, is "A's" liability absolute, in the sense that it exists independently of fault, or is "A" free from liability if the failure to perform the duty is through no fault of his? In these proceedings the Canadian Wheat Board (the Board) is seeking to recover damages from the Saskatchewan Wheat Pool (the Pool) for delivery of infested grain out of a terminal elevator contrary to s. 86(c) of the *Canada Grain Act*, 1970-71-72 (Can.), c. 7. ***

12. There does seem to be general agreement that the breach of a statutory provision which causes damage to an individual should in some way be pertinent to recovery of compensation for the damage. Two very different forces, however, have been acting in opposite directions. In the United States the civil consequences of breach of statute have been subsumed in the law of negligence. On the other hand, we have witnessed in England the painful emergence of a new nominate tort of statutory breach. ***

30. The use of breach of statute as evidence of negligence as opposed to recognition of a nominate tort of statutory breach is, as Professor Fleming has put it, more intellectually acceptable. It avoids, to a certain

extent, the fictitious hunt for legislative intent to create a civil cause of action which has been so criticized in England. It also avoids the inflexible application of the legislature's criminal standard of conduct to a civil case. ***

31. Regarding statutory breach as part of the law of negligence is also more consonant with other developments which have taken place in the law. *** Statutes are increasingly speaking plainly to civil responsibility: consumer protection acts, rental acts, business corporations acts, securities acts. Individual compensation has become an active concern of the legislator.

32. In addition, the role of tort liability in compensation and allocation of loss is of less and less importance [Fleming, "More Thoughts on Loss Distribution" (1966), 4 Osgoode Hall L.J. 161]:

> … Instead of tort liability being the sole source of potential compensation (as it was throughout most of our history) it is now but one of several such sources, and (at that) carrying an ever diminishing share of the economic burden of compensating the injured.

33. Tort law itself has undergone a major transformation in this century with nominate torts being eclipsed by negligence, the closest the common law has come to a general theory of civil responsibility. The concept of duty of care, embodied in the neighbour principle, has expanded into areas hitherto untouched by tort law.

34. 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 as 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. ***

37. For all of the above reasons I would be adverse to the recognition in Canada of a nominate tort of statutory breach. Breach of statute, where it has an effect upon civil liability, should be considered in the context of the general law of negligence. Negligence and its common law duty of care have become pervasive enough to serve the purpose invoked for the existence of the action for statutory breach. ***

42. In sum I conclude that:

> 1. Civil consequences of breach of statute should be subsumed in the law of negligence.
>
> 2. The notion of a nominate tort of statutory breach giving a right to recovery merely on proof of breach and damages should be rejected, as should the view that unexcused breach constitutes negligence per se giving rise to absolute liability.
>
> 3. Proof of statutory breach, causative of damages, may be evidence of negligence.
>
> 4. The statutory formulation of the duty may afford a specific, and useful, standard of reasonable conduct. ***

REFLECTION:

- *Why is breach of a statutory provision not in itself a sufficient basis for imposing liability at common law?*
- *In the English case of Cutler v. Wandsworth Stadium Ltd [1949] AC 398, 407, Lord Simonds said that "if a statutory duty is prescribed but no remedy by way of penalty or otherwise for its breach is imposed, it can be assumed that a right of civil action accrues to the person who is damnified by the breach. For, if it were not so,*

the statute would be but a pious aspiration. …"[507] *Is this a compelling rationale for Canadian courts to recognise a distinct tort of breach of statutory duty?*

14.1.2.2 Ryan v. Victoria (City) [1999] CanLII 706 (SCC)

Supreme Court of Canada – 1999 CanLII 706

✗**REF: §14.2.6.2, §18.4.1, §21.2.1**

MAJOR J. (FOR THE COURT): ***

4. On May 4, 1987, the appellant, Murray Ryan, was thrown from his motorcycle while attempting to cross railway tracks running down the centre of Store Street, in downtown Victoria. The tracks were owned by the respondent Esquimalt & Nanaimo Railway Company ("E&N"), and were leased and operated by the respondent Canadian Pacific Limited ("CP"). The accident occurred when the front tire of the appellant's motorcycle became trapped in a "flangeway" gap running alongside the inner edge of the tracks. At the time of the accident, the flangeways on Store Street were approximately one-quarter of an inch wider than the front tire of the appellant's motorcycle. ***

7. When railway tracks run across a street or highway at grade, the rails are normally embedded in the pavement so as not to impede traffic. A groove called a "flangeway" is installed alongside the tracks in order to prevent derailments while permitting the running rails to remain flush with the road surface. The most durable and inexpensive way to construct flangeways is to lay scrap rail, or "flangerail", on its side next to the running rail to create a gap between the track and the surrounding pavement or planking. This process was approved by the Board in Order No. 9729 (February 29, 1910) as the standard design for CP highway crossings, and it has remained the accepted method of constructing flangeways in Canada for many years.

8. Regulations issued by the Canadian Transport Commission in 1965 and 1980 provide that flangeways at "crossings" may be anywhere from 2.5 to 4.75 inches wide. *** It is common ground that the flangeways on Store Street have always remained within that prescribed range. From 1944 to 1982, the flangeways were between 2.75 and 3.25 inches wide. During the 1982 reconstruction, the existing flangerail was torn out and replaced with heavier-gauge flangerail on its side; as a result, the flangeways were enlarged to a width of between 3.75 and 3.94 inches.

9. *** [T]he trial judge found that at the time of the appellant's accident, methods and technologies were available which, if employed, could have eliminated the flangeway gaps on Store Street entirely, or reduced them to the minimum width—2.5 inches—required under the "crossings" regulations. ***

11. The appellant entered Store Street on his motorcycle from a side road. *** He was moving at about 20-25 kilometres per hour and encountered the tracks at a shallow angle. As he crossed, the front tire of his motorcycle, which was three and one-half inches wide at its perimeter, fell into the flangeway and became wedged there. The motorcycle rotated over the top of the trapped tire, and the appellant was thrown forward and injured. The record confirms that six prior accidents involving the flangeways on Store Street—five of which also involved motorcycles—were reported to the Railways or the City of Victoria between 1982 and 1986. ***

22. The duty of care owed by a railway with respect to public crossings is determined, as it is for other private and public actors, under the two-step test in *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.) [§13.4.1.1] ***. ***

28. Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable

[507] See further Lord Sales, "Exploring the Interface Between the Common Law of Tort and Statute Law" (Annual Richard Davies Lecture for the Personal Injuries Bar Association, 29 November 2023).

conduct, such as custom, industry practice, and statutory or regulatory standards.

29. Legislative standards are relevant to the common law standard of care, but the two are not necessarily co-extensive. The fact that a statute prescribes or prohibits certain activities may constitute evidence of reasonable conduct in a given situation, but it does not extinguish the underlying obligation of reasonableness. *** Thus, a statutory breach does not automatically give rise to civil liability; it is merely some evidence of negligence. See, e.g., *Stewart v. Pettie*, [1995] 1 S.C.R. 131 (S.C.C.), at para. 36 [§19.9.1], and *Saskatchewan Wheat Pool*, at p. 225. By the same token, mere compliance with a statute does not, in and of itself, preclude a finding of civil liability. See Linden, *supra*, at p. 219. Statutory standards can, however, be highly relevant to the assessment of reasonable conduct in a particular case, and in fact may render reasonable an act or omission which would otherwise appear to be negligent. This allows courts to consider the legislative framework in which people and companies must operate, while at the same time recognizing that one cannot avoid the underlying obligation of reasonable care simply by discharging statutory duties. ***

38. *** A railway is presumptively bound by the common law, subject only to those situations where compliance with the statute or regulations provides "a justification for what would otherwise be wrongful"[508] [§6.1]. Like any exculpatory provision limiting common law rights, that passage should be narrowly construed. In the absence of a clear indication to the contrary, compliance with statutory standards should not be viewed as excusing a railway's obligation to take whatever precautions are reasonably required in the circumstances.

39. The weight to be accorded to statutory compliance in the overall assessment of reasonableness depends on the nature of the statute and the circumstances of the case. It should be determined whether the legislative standards are necessarily applicable to the facts of the case. Statutory compliance will have more relevance in "ordinary" cases—i.e., cases clearly within the intended scope of the statute—than in cases involving special or unusual circumstances. *** It should also be determined whether the legislative standards are specific or general, and whether they allow for discretion in the manner of performance. It is a well-established principle that an action will lie against any party, public or private, "for doing that which the legislature has authorized, if it be done negligently." See *Geddis v. Bann Reservoir* (1878), 3 App. Cas. 430 (U.K. H.L.) at pp. 455-56 ***. It follows that a party acting under statutory authority must still take such precautions as are reasonable within the range of that authority to minimize the risks which may result from its actions. ***

40. Where a statute authorizes certain activities and strictly defines the manner of performance and the precautions to be taken, it is more likely to be found that compliance with the statute constitutes reasonable care and that no additional measures are required. By contrast, where a statute is general or permits discretion as to the manner of performance, or where unusual circumstances exist which are not clearly within the scope of the statute, mere compliance is unlikely to exhaust the standard of care. This approach strikes an appropriate balance among several important policies, including deference to legislative determinations on matters of railway safety, security for railways which comply with prescribed standards, and protection for those who may be injured as a result of unreasonable choices made by railways in the exercise of official authority. ***

REFLECTION:

- *Why is compliance with a statutory provision not in itself a sufficient basis for avoiding civil liability?*
- *What distinguishes this case from Der v. Zhao (§13.4.2.4)? Do they apply the same principle?*

14.1.2.3 Nelson (City) v. Marchi [2021] SCC 41

Supreme Court of Canada – 2021 SCC 41

✗REF: §17.1.3, §19.5.2.2

[508] *Railway Act*, R.S.C., 1985, c. R-3, s. 367(4).

KARAKATSANIS AND MARTIN JJ. (FOR THE COURT): ***

4. The respondent, Taryn Joy Marchi, was injured while attempting to cross a snowbank created by the appellant, the City of Nelson, British Columbia. She sued the City for negligence. ***

5. *** The City *** owed Ms. Marchi a duty of care. ***

91. To avoid liability, a defendant must "exercise the standard of care expected that would be of an ordinary, reasonable and prudent person in the same circumstances" (*Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, at para. 28). Relevant factors in this assessment include whether the risk of injury was reasonably foreseeable, the likelihood of damage and the availability and cost of preventative measures ***. A reasonable person "takes precautions against risks which are reasonably likely to happen" (*Bolton* [*v. Stone*, [1951] A.C. 850 (H.L.) [**§14.2.1.2**]] at p. 863).

92. The reasonableness standard applies regardless of whether the defendant is a government or a private actor ***. *** It is important that the standard of care analysis not be used as another opportunity to immunize governments from liability, especially when a determination has already been made that the impugned government conduct was not core policy. ***

REFLECTION:

- *How can a municipality be compared to "an ordinary, reasonable and prudent person"? Does the comparison make sense when dealing with public authorities?*
- *What non-private law remedies might be available to address a public authority's breach of statutory duty?*[509]

14.1.3 Special knowledge, skill and experience

14.1.3.1 McCullough v. Riffert [2010] ONSC 3891

Ontario Superior Court – 2010 ONSC 3891

✗REF: §14.2.5.1, §19.4.1.1

MULLIGAN J.:

1. Robert McCullough died on February 21, 2008 just ten days after visiting his lawyer to give instructions for a Will. The Will, which was not signed, would have left his entire estate to his niece Sarah Audra McCullough (Sarah). In this action his niece Sarah, the disappointed beneficiary, claims against his lawyer Diana Siglinda Riffert (the lawyer) in negligence. The issue in this trial is simply this: in the circumstances here, was the lawyer negligent in not attending to the preparation and execution of the Will before Robert died. ***

45. In *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481 (S.C.C.), at 523 the Supreme Court of Canada defined the standard of care as follows:

> A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken. The requisite standard of care has been variously referred to as that of a reasonably competent solicitor, the ordinary competent solicitor and the ordinary prudent solicitor [citations omitted].

46. In a recent paper presented at the Law Society's 2009 *Continuing Education Program Annual Estates and Trust* summit Ian Hull defined the standard of care for estate solicitors as follows:

> Not every error of judgment will result in a finding of negligence. In a case of solicitors, the defendant will be judged according to the standard of a reasonably competent solicitor. The standard of care expected of an estate solicitor has been described as follows:

[509] See *Holland v. Saskatchewan*, 2008 SCC 42, [9].

> At the outset estate practitioners should recognize that by accepting employment to render legal advice or other such services, they impliedly agree to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possessed and exercise in the performance of the tasks they undertake. If they fail to meet the standards of fellow practitioners in the same area of law, they may be held liable. [citations omitted] ***

REFLECTION:

- *Why should lawyers (as well as doctors, police officers and other professionals) be held to the standards of their profession, rather than simply to the standard of an ordinary, reasonable and prudent person?*

14.1.3.2 Powell v. University Hospitals Sussex [2023] EWHC 736 (KB)

England and Wales High Court (King's Bench Division) – [2023] EWHC 736 (KB)

✗**REF: §14.2.5.2, §16.1.4, §18.1.1.2, §19.4.3.1**

DEXTER DIAS KC: ***

19. In the modern world, we rely on the skill, experience and advice of professionals in many facets of our life. When things go wrong, how should the court judge whether the duty to use reasonable care has been breached? The test of negligence as far as it affects professionals was famously set out by McNair J in *Bolam* [*v. Friern Hospital Management Committee* [1957] 1 W.L.R. 582]. It has come to be known as the "*Bolam test*". In those days, juries sat in negligence actions, and thus the oft-cited passage was in fact a direction of law to a jury. Shorn of the language of its time, it states:

> "… [a medical practitioner] is not guilty of negligence if [she or he] has acted in accordance with a practice accepted as proper by a responsible body of medical [practitioners] skilled in that particular art. …. Putting it the other way round, a [medical practitioner] is not negligent, if [she or he] is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view.…" (p.587)

20. The critical question was framed by McNair J as being whether the practitioner had:

> "… fallen below a standard of practice recognised as proper by a competent reasonable body of opinion" (p.589)

21. Note that the "body" of reasonable or responsible practitioners is in the singular. What must follow from this? Applying the burden of proof, it is the claimant's task to prove that there is no responsible body of practitioners who would have done as the defendant had done. Failing that, even if the majority or a large majority of practitioners would have done otherwise, there is no negligence. This may appear a curious conclusion to many people. Its rationale lies fundamentally in the fact that very often these fields of professional specialism involve great complexity and difficult judgements. If in a particular specialist niche, practitioners recognise that there are reasonable alternative treatments, a professional is not negligent because she or he advises or performs one preferred by the minority camp—so long as it is rationale and logical, as explained by Lord Browne-Wilkson in *Bolitho v. City and Hackney Health Authority* [1998] A.C. 232. ***

22. Therefore, the focus of breach of duty (negligence) in this case is whether or not there is a responsible body of practitioners which would have acted as Mr Chauhan acted. ***

REFLECTION:

- *How can a judge or jury—who are not medical experts—assess what standard of care a reasonable medical practitioner ought to take in the context of a complex medical procedure?*
- *Should the standard of care expected of a medical practitioner take into account the defendant's professional specialisation, level of experience, or the type of procedure being performed?*

14.1.3.3 Hill v. Hamilton-Wentworth Police Services Board [2007] SCC 41

✗**REF: §13.4.2.2, §14.2.5.3, §15.2.1, §16.1.3**

MCLACHLIN C.J.C. (BINNIE, LEBEL, DESCHAMPS, FISH, ABELLA JJ. concurring): ***

(a) The Appropriate Standard of Care for the Tort of Negligent Investigation ***

68. A number of considerations support the conclusion that the standard of care is that of a reasonable police officer in all the circumstances. First, the standard of a reasonable police officer in all the circumstances provides a flexible overarching standard that covers all aspects of investigatory police work and appropriately reflects its realities. The particular conduct required is informed by the stage of the investigation and applicable legal considerations. At the outset of an investigation, the police may have little more than hearsay, suspicion and a hunch. What is required is that they act as a reasonable investigating officer would in those circumstances. Later, in laying charges, the standard is informed by the legal requirement of reasonable and probable grounds to believe the suspect is guilty; since the law requires such grounds, a police officer acting reasonably in the circumstances would insist on them. The reasonable officer standard entails no conflict between criminal standards (Charron J., at para. 175). Rather, it incorporates them, in the same way it incorporates an appropriate degree of judicial discretion, denies liability for minor errors or mistakes and rejects liability by hindsight. In all these ways, it reflects the realities of police work.

69. Second, *** where the defendant has special skills and experience, the defendant must "live up to the standards possessed by persons of reasonable skill and experience in that calling". (See L. N. Klar, *Tort Law* (3rd ed. 2003), at p. 306.) These principles suggest the standard of the reasonable officer in like circumstances. ***

73. *** Like other professionals, police officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of reasonableness. The standard of care is not breached because a police officer exercises his or her discretion in a manner other than that deemed optimal by the reviewing court. A number of choices may be open to a police officer investigating a crime, all of which may fall within the range of reasonableness. So long as discretion is exercised within this range, the standard of care is not breached. The standard is not perfection, or even the optimum, judged from the vantage of hindsight. It is that of a reasonable officer, judged in the circumstances prevailing at the time the decision was made—circumstances that may include urgency and deficiencies of information. The law of negligence does not require perfection of professionals; nor does it guarantee desired results (Klar, at p. 359). Rather, it accepts that police officers, like other professionals, may make minor errors or errors in judgment which cause unfortunate results, without breaching the standard of care. The law distinguishes between unreasonable mistakes breaching the standard of care and mere "errors in judgment" which any reasonable professional might have made and therefore, which do not breach the standard of care (*Lapointe c. Hôpital Le Gardeur*, [1992] 1 S.C.R. 351 (S.C.C.); *Folland v. Reardon* (2005), 74 O.R. (3d) 688 (Ont. C.A.); Klar, at p. 359.) ***

REFLECTION:

- *When considering whether a police officer breached a duty of care, the standard is not perfection. What is the standard when considering whether an officer has trespassed (§2 and §7.1)? What explains the difference?*
- *What are the implications of assessing the standard of policing at the time of the alleged wrong, without the vantage of hindsight? Does this perspective tend to benefit the plaintiff or the defendant?*

14.1.4 Extenuating personal characteristics

14.1.4.1 McHale v. Watson [1966] HCA 13

High Court of Australia – [1966] HCA 13

OWEN J.:

1. This action, which was tried by Windeyer J., arose out of a happening which occurred in 1957. The

plaintiff was then a girl aged nine and one of the defendants, Barry Watson, was twelve years of age. The other two defendants are his parents. On the day in question the two children, along with some others, were playing together on a grass strip bordering a road. Barry Watson had a short length of metal welding rod about 6" long one end of which had been rubbed down to a chisel-like shape so that it might be used to scrape shellfish off rocks. It was referred to in the evidence as a dart. The children were standing near a small ornamental tree around which was a wooden tree guard about 3 ft. square with corner posts of 3" x 2" hardwood about 4 ft. high. Barry Watson was standing within a foot or so of one side of the tree guard and the plaintiff was standing near the opposite side. He was playing with the dart and threw it at one of the corner posts of the guard thinking that it would stick into the wood. It struck the post, glanced off it and hit the plaintiff in the eye doing her serious injury. There was conflicting evidence as to what occurred but the facts set out above are those found by the learned judge. He further found that Barry Watson had not intended the dart to hit the plaintiff and that, in acting as he had, he had not been negligent. Accordingly his Honour found in the boy's favour. ***

7. There is *** a considerable body of opinion amongst the textbook writers, supported by decisions in Canada and the United States, that where an infant defendant is charged with negligence, his age is a circumstance to be taken into account and the standard by which his conduct is to be measured is not that to be expected of a reasonable adult but that reasonably to be expected of a child of the same age, intelligence and experience. ***

8. *** I am of opinion that Windeyer J. rightly took into consideration the fact that Barry Watson was only twelve years old and that he did not misdirect himself as to the degree of care reasonably to be expected of a boy of that age.

9. I would dismiss the appeal.

MCTIERNAN A.C.J.: ***

4. Windeyer J. said in his reasons for judgment:

> "It has been strongly urged for the plaintiff that, in considering whether Barry was negligent, I must judge what he did by the standard expected of a reasonable man, and that that standard is not graduated according to age. In one sense, of course, that is so; for the question whether conduct was negligent, in a legal sense, always depends on an objective standard. This has been generally recognized ever since Tindal C.J. said in *Vaughan v. Menlove* (1837) 132 ER 490, 493:
>
> > 'Instead of saying that the liability for negligence should be coextensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe.' ***
>
> I do not think that I am required to disregard altogether the fact that the defendant Barry Watson was at the time only twelve years old. In remembering that I am not considering 'the idiosyncrasies of the particular person'. Childhood is not an idiosyncrasy. It may be that an adult, knowing of the resistant qualities of hardwood and of the uncertainty that a spike, not properly balanced as a dart, will stick into wood when thrown, would foresee that it might fail to do so and perhaps go off at a tangent. A person who knew, or might reasonably be expected to know that might be held to be negligent if he were not more circumspect than was this infant defendant. But whatever the position would be if the facts were different, my conclusion on the facts of this case is that the injury to the plaintiff was not the result of a lack of foresight and appreciation of the risk that might reasonably have been expected, or of a want of reasonable care in aiming the dart. I find that Barry Watson was not negligent in the legal sense." ***

5. The appeal was argued on two main grounds: *first* that his Honour was in error in holding that the liability or degree of responsibility of the defendant Barry Watson or the standard of care to be exercised by him in any way differed from the liability degree of responsibility or standard of care which would have been proper had he been over the age of twenty-one years; and *secondly* that his Honour should have made a finding of negligence whether he applied the standard of the ordinary reasonable man or the standard (whatever

it might be) appropriate to a twelve-year-old boy. ***

7. There is ample authority for the proposition that in cases dealing with alleged contributory negligence on the part of young children they are expected to exercise the degree of care one would expect, not of the average reasonable man, but of a child of the same age and experience. ***

16. In the present case we are concerned with a boy of the age of twelve years and two months. He was not, of course, a child of tender years. On the other hand, he was not grown up and, according to the evidence, he played as a child. I think it was right for the learned trial judge to refer to him in common with Susan and the other playmates as young children. It cannot be laid down as an absolute proposition that a boy of twelve years of age can never be liable in negligence; nor that he would always be liable in the same manner as an adult in the case of that tort. The defendant's conduct in relation to this object which he threw, a useless piece of scrap metal, is symbolic of the tastes and simplicity of boyhood. He kept the object in his pocket after using it earlier in the day to scrape marine life off the rocks at the beach; after that he carried it around with him for the rest of the day until the accident happened. It was the type of thing that a wise parent would take from a boy if he thought the boy would play with it as a dart in the company of other children. The defendant on his way from the beach took the object from his pocket to show Susan and her companions, whom he met playing in a paddock, what he was doing at the beach—apparently he was proud of how he had transformed the piece of scrap metal by rubbing it on the rocks. The game of chasings having ended, the wooden corner post was an allurement or temptation to him to play with the object as a dart. If it had stuck into the post at the first throw, doubtless, he would not have been content with one throw. The evidence does not suggest that the defendant was other than a normal twelve-year-old-boy. His Honour considered that the defendant, being a boy of twelve years, did not have enough maturity of mind to foresee that the dart might glance off the post in the direction of Susan if he did not make it hit the post squarely, and that there was a possibility that he might not succeed in doing so. It seems to me that the present case comes down to a fine point, namely whether it was right for the trial judge to take into account Barry's age in considering whether he did foresee or ought to have foreseen that the so-called dart might not stick in the post but be deflected from it towards Susan who was in the area of danger in the event of such an occurrence. I think that there is no ground for disagreeing with the conclusion of Windeyer J. on this question. The correctness of this decision depends upon the special circumstances of the case and it does not lay down any general principle that a young boy who cannot be classified as a grown-up person cannot be guilty of negligence in any circumstances.

17. I would dismiss the appeal.

KITTO J.: ***

10. Sympathy with the injured girl is inevitable. One might almost wish that mediaeval thinking had led to a modern rule of absolute liability for harm caused. But it has not; and, in the absence of relevant statutory provision, children, like everyone else, must accept as they go about in society the risks from which ordinary care on the part of others will not suffice to save them. One such risk is that boys of twelve may behave as boys of twelve; and that, sometimes, is a risk indeed.

11. In my opinion the appeal should be dismissed.

MENZIES J. (dissenting): ***

15. *** [T]he standard of care fixed by the law to determine actionable negligence is an objective standard—that is, the care to be expected of an ordinary reasonable man. This, except in special categories, is the standard to be applied to any person capable of negligence in the absence of some consensual modification—express, implied or, perhaps, imputed ***. ***

16. It may, of course, be objected that the adoption of a hard-and-fast rule to be applied to all cases will sometimes produce what appears to be some hardship but, if so, it should also be recalled that hard cases make bad law. It is, moreover, necessary to observe that the law of negligence is primarily concerned with the circumstances under which a person who suffers damage may recover compensation, and there is no necessary connexion between legal liability to make compensation and moral culpability. Another objection to a standard rule is that it may appear ridiculous in determining liability to judge immaturity by maturity or,

as it was put in argument, to put an old head upon young shoulders. Again the answer to such a criticism is that it was not without good reason that the law has adopted a general standard to determine liability for negligence and the application of a general standard to anyone who is himself either above or below the standard may produce a result that is open to criticism as ridiculous when judged by an irrelevant philosophy. Were the law to require from every person the exercise of all the skill of which he is capable to avoid harm to others, it would be a different law from the established law of negligence and it would be based upon a philosophy different from that underlying the present law. Whether or not it would be a better law is outside any question here relevant, but an attempt to use the results which would follow from the application of such a law, to test the reasonableness of what I understand the present law to require, appears to me to be misconceived.

17. My conclusion is, therefore, that as the duty of care which the respondent owed to the appellant was to take such care as an ordinary reasonable man would have taken in the circumstances, the appeal should succeed.

18. I would add that if, contrary to my opinion, the conduct of the respondent ought to be judged by the standard of a reasonable boy of the world rather than a reasonable man of the world, I would still conclude that the respondent had been negligent. It appears to me that no boy of twelve could reasonably think that he could hurl a nail into a post, and I have no doubt that the capacity of the respondent's missile to penetrate a piece of wood was less than that of an ordinary three-inch nail; it was blunt and lacked the weight of a head. Furthermore, in the face of the evidence I would not infer, as did his Honour, that the missile hit the post and was deflected. Upon the facts, I would conclude that a reasonable boy would not throw a three-inch piece of metal, head high, in the direction of another person.

19. I consider, therefore, that this appeal should be allowed and the action retried. ***

REFLECTION:

- *Was the relevant standard of care that of a reasonable person, a reasonable 12-year-old, or a reasonable 12-year-old boy? Why does it matter how the standard is framed? Where does this judgment leave Susan?*
- *Is Menzies J. correct to say that there is no necessary connection between legal liability to compensate and moral culpability? Is that inference consistent with Wittmann J.A.'s analysis in Fiala v. MacDonald?*

14.1.4.2 Fiala v. MacDonald [2001] ABCA 169

Alberta Court of Appeal – 2001 ABCA 169

WITTMANN J.A.: ***

2. On the morning of March 11, 1995, Robert John MacDonald ("MacDonald") went for a run. During his run, he experienced a severe manic episode, diagnosed later, but never previously, as bipolar disorder, type 1. He believed he was God and had a plan to save the world. ***

3. Still on his run, MacDonald approached a car, which was stopped at an intersection. MacDonald walked around the car and beat on both its driver-side window and roof. While yelling obscenities at Katalin Cechmanek ("Cechmanek"), the owner and operator of the car, he jumped on the car's trunk and roof. He then broke through the sunroof of the car and began choking Cechmanek. Cechmanek involuntarily hit the gas pedal and accelerated into the intersection, striking another car, owned and operated by the appellant Jana Fiala and carrying as a passenger, her daughter, the appellant Lenka Fiala. The Fialas were injured by the collision.

4. After the collision, MacDonald continued to threaten and yell obscenities at Cechmanek. He also approached the Fialas and shouted sexually explicit statements at 17-year-old Lenka Fiala. Clearly agitated, he flailed his arms wildly, darted back and forth between individuals who had surrounded the accident scene, and ran down the middle of the road. Despite MacDonald's relatively small stature, it took two policemen and two EMS attendants to forcibly restrain him. ***

21. While there has been much debate about the liability of the mentally ill in the context of tort law, considerable uncertainty still abounds: see G.B. Robertson, *Mental Disability and the Law in Canada*, 2d

ed. (Toronto: Carswell, 1994) at 239. A review of the opinions expressed on the topic exemplifies the confusion that has plagued this area of the law. ***

29. *** If a person is suffering from a mental illness such that it is impossible to attribute fault to him, holding him liable for his actions would create a strict liability regime. Although compensation of victims of tort is very important, the statement begs the question: what is a tort? For the most part, fault is still an essential element of Canadian tort law. Strict liability has been imposed in only limited areas of tort law such as conversion [§8.2], defamation [§5.1], and non-natural use of land that results in an escape of a harmful substance [§22.1]. But strict liability has not been extended to product liability [§19.1] as it has in the United States, nor to cases like this.

30. In "The Role of Fault and Policy in Negligence Law" (1996) 35 Alta. L. Rev. (No. 1) 24, Professor Klar describes as misguided the recent emphasis on the compensatory role of tort law. At page 29, he states:

> Negligence law is about wrongdoing. While this is admittedly an imprecise notion, there ought to be an element of moral blame in all conduct which tort law deems as negligent and hence liable for damages. The elements of the negligence action ought to conform and be interpreted by courts according to this notion of fault and the goal of correcting wrongs. Loss distribution by liability insurance, *compensating the disabled*, deterring wrongful conduct, regulating and educating professionals and industry, or achieving other public policy objectives, although frequently advanced through negligence law, *ought to remain as the consequences of the tort action and not be seen as the purposes of the tort action*. In this way, society can maintain a strong system of civil justice while recognizing the limitations to a system of civil justice. These limitations and gaps can then be best accommodated by non-tort schemes which are designed to accomplish these other objectives in an efficient and effective manner. [Emphasis Added]

31. If compensating the injured is the overriding goal of tort law, the legal process becomes rife with fictions leading to the application of legal principles in a results-oriented manner, thereby compromising tort law as a system of corrective justice. According to Professor Klar, tort law should refocus on a system of corrective justice where fault is a key consideration when determining or apportioning liability. Such a system could be supplemented by programs designed to achieve such policy goals as compensation of victims, punishment of wrongdoers, deterrence and accident prevention—programs that would be more efficient than legal process. Klar concludes at pages 43-44:

> Separated from its fundamental premise of corrective justice, tort law becomes an inefficient and expensive way to provide for the needs of accident victims. Courts ought to resist the understandable temptation to convert fault into no fault …. Gaps or deficiencies in the community's responsibility to care for the needs of the disabled or disadvantaged will be revealed, and sensible legislative programs can be devised to respond properly to them.

32. The "innocent" victim argument also falters when one considers how tort law has treated children and those who are suddenly physically disabled. Children of tender years are presumed to be incapable of negligence because they lack sufficient judgment to exercise reasonable care: *Tillander v. Gosselin* (1966), [1967] 1 O.R. 203 (Ont. H.C.); affirmed (1967), 61 D.L.R. (2d) 192n (Ont. C.A.). Unless engaging in adult activities, older children are held to a standard of a reasonable child of the same age, intelligence, and experience: *McEllistrum v. Etches*, [1956] S.C.R. 787 (S.C.C.). With respect to physically disabled defendants, courts routinely inquire into the voluntariness of their actions, whether the onset of the incapacity to control their actions could have been anticipated, and whether the damage could have been avoided: *Slattery v. Haley* (1922), 52 O.L.R. 95 (Ont. C.A.); *Boomer v. Penn* (1965), 52 D.L.R. (2d) 673 (Ont. C.A.).

33. Given increased understanding of the biological or physiological roots of mental illness, a distinction between those who are suddenly physically incapacitated due to such conditions as epilepsy or diabetic shock and those who are incapacitated as a result of mental illness seems wholly unjustified. Such a distinction risks legitimizing physical illness while reinforcing negative stereotypes concerning mental illness. Concerns about the erosion of the objective reasonable person standard have not prevented courts from taking age or physical disability into consideration. Therefore, such concern should not prevent

consideration of a defendant's mental illness. ***

48. The case law and academic literature reveals that there has been judicial recognition in Canada of the need to relieve the mentally ill of tort liability in certain circumstances. While the compensation of victims is still a worthy goal, that should not compromise the basic tenets of tort law. ***

49. In order to be relieved of tort liability when a defendant is afflicted suddenly and without warning with a mental illness, that defendant must show either of the following on a balance of probabilities:

> (1) As a result of his or her mental illness, the defendant had no capacity to understand or appreciate the duty of care owed at the relevant time; or
>
> (2) As a result of mental illness, the defendant was unable to discharge his duty of care as he had no meaningful control over his actions at the time the relevant conduct fell below the objective standard of care.

50. This test will not erode the objective reasonable person standard to such a degree that the courts will be imposing a standard "as variable as the length of the foot". It will preserve the notion that a defendant must have acted voluntarily and must have had the capacity to be liable. Fault will still be an essential element of tort law. ***

53. If a strict liability regime is to apply to the acts of the mentally ill, the Legislature must give such direction. If the courts favour the compensatory goal of tort law by treating like any other person those suddenly afflicted with a serious and debilitating mental illness, the historical roots of tort law would be submerged and fault would become irrelevant. The result would be to taunt the tort.

54. On the facts found by the trial judge, MacDonald has satisfied the onus of showing that not one, but both of the tests to relieve him of tort liability are met.

55. The appeal is dismissed.

REFLECTION:

- *Was this an exceptional case? Why was the Court concerned about holding MacDonald civilly liable?*
- *Does the Court's standard for relieving a defendant from tort liability set a high or a low threshold?*

14.1.5 Further material

- L. Solum, "Legal Theory Lexicon: The Reasonable Person" Legal Theory Blog (Mar 7, 2021).
- J. Gardner, "The Mysterious Case of the Reasonable Person" (2001) 51 U Toronto LJ 273.
- McGill Law Journal Podcast, "Deconstructing the Reasonable Person with Professor Mayo Moran" (Mar 23, 2022) 🎧; Western Law's Tort Law Research Group, "Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard" (Feb 9, 2017) 📺.
- R. Ahmed, "The Standard of the Reasonable Person in Determining Negligence—Comparative Conclusions" (2021) 24 Potchefstroom Electronic LJ 1.
- A.M. Allen, "The Emotional Woman" (2021) 99 North Carolina L Rev 1027.
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- Tiny Ruins, "Reasonable Man" on *Brightly Painted One* (Bandcamp, 2014) 🎧.

14.2 Applying the standard of reasonableness

M. Katsivela, "The Breach of the Standard of Care and the Concept of Fault in Civil Law in Canada: A Comparative Study" (2017) 95 Canadian Bar Rev 535 (translation)

If the reasonable person can vary based on the facts of each case, his behavior can too, both in common law and in civil law.[510] To establish negligence, one must consider all the circumstances of a particular case.[511] Judges have considerable discretion in this field. ***

In common law, one of the techniques used to establish the defendant's negligence is the violation of the law. This term includes not only laws but also regulations.[512] According to *R v. Saskatchewan Wheat Pool*[513] [§14.1.2.1] in common law and *Ciment*[514] in civil law, the violation of a statute does not amount to negligence per se.[515] This violation must still constitute a breach of the common law standard of care[516] or a civil law fault (art 1457 CCQ).[517]

Further, both common law and civil law raise the question whether compliance with a usage (art 1457 CCQ – civil law) or standard practice allows the defendant to escape liability.[518] In both legal cultures, usage refers to a standard practice at the time when the act or omission in question occurred.[519] However, compliance with a standard practice does not necessarily exonerate a defendant. It is still necessary that the standard practice not be negligent according to *Ter Neuzen* (common law) and *Roberge* (civil law).[520]

[510] Common law: *Ryan*, *supra* at para 28. Civil law: *Ouellette*, *supra* at pp. 525-526.
[511] *Ibid*. For example, a dangerous object may play a role in establishing negligence. *MacCabe v. Westlock Roman Catholic Separate SD No. 110*, 2001 CarswellAlta 1364 (CA)—absence of adequate supervision of students during a dangerous sport activity—(common law). See also *infra* notes 84, 87 and accompanying text (civil law). Both in civil law and in common law negligence is distinguished from an error of judgement—an error that may be attributed to a reasonable person; this error does not render a reasonable person liable. *Hill v. Commission des services policiers de la municipalité régionale de Hamilton-Wentworth*, 2007 CSC 41 at para 73, [2007] 3 RCS 129 [*Hill*] [§14.1.3.3], citing cases from both Canadian legal traditions. Thus, when a surgeon makes a decision to treat a patient without delay and on a limited basis of known and unknown factors following the honest and intelligent exercise of judgment, his liability will not be engaged. The result will not be the same if his decision does not conform to what a reasonable surgeon would have done under the same circumstances. Common law: *Wilson v. Swanson*, (1956) SCR 804 at pp. 812s. Civil law: *Lapointe v. Hôpital LeGardeur*, [1992] 1 RCS 351.
[512] *Ryan* *supra* at para 28. See also the analysis of Linden and Feldthusen, *supra* at page 245 on this topic. Common law courts primarily use three techniques to establish negligence: custom, unreasonable risk of damage, and statutory or regulatory standards (*Ryan*, *supra* at para 28).
[513] [1983] 1 RCS 205 cited by Québec case law. Before *Wheat*, case law on this topic was very complex. Linden and Feldthusen, *supra* at pp. 238-240.
[514] *Ciment*, *supra*.
[515] However, in civil law, the violation of a law which sets out an elementary standard of care (i.e. traffic rule) and causes a damage that the law sought to prevent, may constitute a fault if the harmful accident immediately follows the transgression. *Morin v. Blais*, (1977) 1 SCR 570, followed by case law subsequent to *Ciment*, *supra*.
[516] *Wheat*, *supra* at pp. 227, 228. Exceptions to this principle exist. Following *Wheat* in common law, workplace accident legislation has historically been privileged by case law and its violation leads to absolute liability in tort. *Wheat*, *supra* at page 217.
[517] *Ciment*, *supra* at para 34. See also *supra*. As in common law (*ibid*), in case of workplace accidents the *Loi sur les accidents du travail et les maladies professionnelles* establishes a no-fault liability regime. *G.D. v. Centre de santé et des services sociaux A, Centre d'accueil A*, 2006 QCCS 5573 at para 4.
[518] Although civil law often uses the term 'usage' and common law the term 'custom', the two terms will be used interchangeably here.
[519] Civil law: Karim, *supra* at page 1058 talks about a common professional practice. The common practice must be uniform, public, general, usual and old. See *Organisme d'autoréglementation du courtage immobilier du Québec v. Brunet*, 2014 CanLII 82793 (QC OACIQ) at para 66 where a common law case is cited: *Waldick v. Malcolm*, 1991 2 RCS 456 (*Waldick*). The latter talks about practices that are general and widespread.
[520] Common law: *Ter Neuzen*, *supra*. See also *Waldick*, *supra* cited by *Ter Neuzen*, *supra*. Civil law: *Roberge*, *supra*. It should be noted that *Ter Neuzen* in common law cites Roberge in civil law and other Québec cases. See *Hébert v. Centre hospitalier affilié universitaire de Québec—Hôpital de l'Enfant-Jésus*, 2011 QCCA 1521 (appeal dismissed) at para 61 citing *Ter Neuzen* on this point.

There is no doubt that the principles applicable in both Canadian legal traditions in this area are coherent.

In addition to standard practice and the law, the common law standard of care can be established based on the unreasonable risk of damage. If the defendant's conduct involves an unreasonable risk of damage that the reasonable person would not have adopted, there will be breach of the standard of care. In this regard, the doctrine proposes to assess the nature of the risk by weighing different objective factors:[521] the probability of the damage (L), its severity (S), the cost of risk avoidance (preventives measures) (C) and the social utility or the object of the defendant's conduct (O). If the probability multiplied by the severity is greater than the object multiplied by the cost (**LS>OC**), then the tortious behaviour carries an unreasonable risk of harm. If the defendant does not avoid this behaviour, then he is not behaving like a reasonable person and he will be, therefore, negligent. Conversely, if the probability multiplied by the severity of the damage is less important than the cost multiplied by the object (**LS<OC**), the tortious behaviour does not involve an unreasonable risk of harm and, therefore, the defendant will not be negligent. Although these factors are not formally considered by courts, some judgements take them into account.[522] In this sense, they serve as a general guide ***. *** […continue reading]

REFLECTION:

- *Is the weighing of factors that inform whether, on the facts of a particular case, a defendant's conduct fell below the standard of care best determined by the trial judge, a jury of laypersons, or an appellate court?*
- *Is the weighing of factors better approached as a normative contextual judgment or as a cost/benefit analysis?*

14.2.1 Probability of harm

14.2.1.1 Booth v. St Catharines (City) [1948] CanLII 10 (SCC)

✗**REF: §14.1.1.1, §17.2.1**

RAND J.: ***

19. *** The City, with a public interest and duty, brought about this gathering of thousands of its inhabitants; *** it was a complex act of such a nature as called for reasonable precautions against foreseeable risks and dangers lurking in fact within it, an act which unaccompanied by that degree of prudence became a misfeasance: *Shrimpton v. Hertfordshire* (1911) 104 L.T. 145. In the words of Scrutton L.J. in *Purkis v. Walthamstow* (1934) 151 L.T. 30 used in commenting on the latter decision, this is "a case of a local authority doing something and doing it badly". ***

KELLOCK J.: ***

38. I do not think it is too much to say that a reasonably prudent man, having the responsibility of Mr. Gray, *** would have anticipated, after having seen the fact demonstrated on two occasions, that younger persons would be likely to repeat their attempts to employ the flagpole tower as a point of vantage and that in that event *** it would, if too many climbed upon it, be likely to fall. Having so anticipated, the reasonably prudent man would have taken means to prevent such a use of the tower. Mr. Gray had means at his disposal to do so. This was the view of the learned trial judge and, as I have said, I think he was entitled to come to that conclusion. ***

ESTEY J.: ***

52. *** A reasonable man making preparations for the programme of bombs and fireworks would have, in addition to the precautions taken to erect the fence and provide the men to keep the crowd back from the fireworks, observed the flagpole, the nature of its construction and its proximity to the fireworks. He would have realized that this flagpole was rather easy to climb and boys seeking a point of vantage from which to view the fireworks would do so. *** A reasonable man in the position of manager of this park would not be

[521] For what follows in this paragraph see: Bélanger-Hardy, *supra* at p. 394.
[522] *Ibid*. See, for example: *Ryan*, *supra* at para 28 and *Hill*, *supra* at para 70. According to these cases, other factors may be considered to establish negligence. *Supra* note 51 and accompanying text.

expected to possess such detailed information but he would know the nature and character of the flagpole and that steel struts of the size in this flagpole would, under sufficient weight, bow or bend, and so reduce the strength of the flagpole that it might fall over or collapse. He would therefore upon an occasion such as this take reasonable precautions to prevent boys, not only of tender years but those in their teens, from climbing thereon. Under such circumstances, therefore, Gray should have foreseen this possibility and taken reasonable precautions earlier. In fact at 7.20 that evening he had actual knowledge that boys were climbing this flagpole and admitted that he realized the possibility of injury resulting therefrom. *** Under these circumstances, Gray's not placing a man at or near the flagpole to warn or prevent the boys from climbing or in not taking some other precautions to attain that end left a dangerous condition which might have been removed had he taken reasonable precautions to do so. His failure in this regard constituted negligence. ***

REFLECTION:

- *What evidence should have indicated to the park manager that there was a real risk of harm in this case?*

14.2.1.2 Bolton v. Stone [1951] UKHL 2

BACKGROUND: Quimbee (2021), https://youtu.be/kBXXA1JRI5E

House of Lords – [1951] UKHL 2

LORD PORTER: ***

2. *** On 9 August 1947, Miss Stone, the respondent, was injured by a cricket ball while standing on the highway outside her house, 10, Beckenham Road, Cheetham Hill. The ball was hit by a batsman playing in a match on the Cheetham Cricket Ground which is adjacent to the highway. The respondent brings an action for damages against the committee and members of the club—the striker of the ball is not a defendant.

3. The club has been in existence, and matches have been regularly played on this ground, since about 1864. *** The cricket field, at the point at which the ball left it, is protected by a fence 7 feet high but the upward slope of the ground is such that the top of the fence is some 17 feet above the cricket pitch. The distance from the striker to the fence is about 78 yards ***, and to the place where the Plaintiff was hit, just under 100 yards. *** Two members of the club of over thirty years' standing agreed that the hit was altogether exceptional to anything previously seen on that ground. They also said—and the learned judge accepted their evidence—that it was only very rarely indeed that a ball was hit over the fence during a match. On these facts the learned judge acquitted the appellants of negligence and held that nuisance was not established. ***

6. It is not enough that the event should be such as can reasonably be foreseen. The further result that injury is likely to follow must also be such as a reasonable man would contemplate before he can be convicted of actionable negligence. Nor is the remote possibility of injury occurring enough. There must be sufficient probability to lead a reasonable man to anticipate it. The existence of some risk is an ordinary incident of life, even when all due care has been, as it must be, taken.

7. *** In the present instance the learned trial judge came to the conclusion that a reasonable man would not anticipate that injury would be likely to result to any person as a result of cricket being played in the field in question and I cannot say that that conclusion was unwarranted. ***

LORD NORMAND:

9. My Lords, it is not questioned that the occupier of a cricket ground owes a duty of care to persons on an adjacent highway or on neighbouring property who may be in the way of balls driven out of the ground by the batsman. But it is necessary to consider the measure of the duty owed. *** It is not the law that precautions must be taken against every peril that can be foreseen by the timorous. ***

10. It is therefore not enough for the Plaintiff to say that the occupiers of the cricket ground could have foreseen the possibility that a ball might be hit out of the ground by a batsman and might injure people on

the road; she must go further and say that they ought, as reasonable men, to have foreseen the probability of such an occurrence. *** The issue is thus one eminently appropriate for the decision of a jury, and Oliver, J. dealt with it as a jury would and gave his decision without elaborating his reasons. ***

LORD OAKSEY: ***

14. *** The standard of care in the law of negligence is the standard of an ordinarily careful man, but in my opinion an ordinarily careful man does not take precautions against every foreseeable risk. *** He takes precautions against risks which are reasonably likely to happen. ***

15. There are many footpaths and highways adjacent to cricket grounds and golf courses on to which cricket and golf balls are occasionally driven, but such risks are habitually treated both by the owners and committees of such cricket and golf courses and by the pedestrians who use the adjacent footpaths and highways as negligible and it is not, in my opinion, actionable negligence not to take precautions to avoid such risks.

LORD REID:

24. *** If cricket cannot be played on a ground without creating a substantial risk, then it should not be played there at all. *** I think that this case is not far from the border line. *** I would have reached a different conclusion if I had thought that the risk here had been other than extremely small, because I do not think that a reasonable man considering the matter from the point of view of safety would or should disregard any risk unless it is extremely small. ***

LORD RADCLIFFE:

26. My Lords, *** I can see nothing unfair in the Appellants being required to compensate the Respondent for the serious injury that she has received as a result of the sport that they have organised on their cricket ground at Cheetham Hill. But the law of negligence is concerned less with what is fair than with what is culpable: and I cannot persuade myself that the Appellants have been guilty of any culpable act or omission in this case. ***

28. *** It seems to me that a reasonable man, taking account of the chances against an accident happening, would not have felt himself called upon either to abandon the use of the ground for cricket or to increase the height of his surrounding fences. He would have done what the Appellants did: in other words, he would have done nothing. ***

REFLECTION:

- *Why were the judges satisfied that there was no negligence in this case?*
- *Is the conclusion that Stone should receive no compensation from the cricket club for her injuries just?*
- *Is this mid-20th century case still good precedent today?*[523]

14.2.1.3 Miller v. Jackson [1977] EWCA Civ 6

England and Wales Court of Appeal – [1977] EWCA Civ 6

✗**REF: §14.2.3.2, §14.2.4.2, §21.1.1**

LORD JUSTICE GEOFFREY LANE:

20. Since about 1905 cricket has been played on a field at the village of Lintz, County Durham. The village cricket ground is an important centre of village life in the summer months. ***

21. The ground is small. *** In terms of cricket pitches, from the Southern crease to the Northern boundary it is only about 3 cricket pitches. From there to the house, less than another cricket pitch. It is therefore not

[523] See *Baekhave v. Beach Grove Golf Club (1960) Ltd.*, 2019 BCCRT 1293; S. Lazaruk, "Vancouver woman sues golfer, club for injuries after ball flies through car window" Vancouver Sun (Mar 13, 2024).

surprising that since the houses were built, there have been a number of occasions on which cricket balls have been hit from the ground into the gardens of the various houses in Brackenridge.

22. The Judge accepted that the Plaintiffs when they bought the house did not pay any particular attention to the fact that it was a cricket field at the bottom of their garden, rather than any other sort of open space.

23. At that time there was a 6 foot high concrete fence between the ground and the gardens. But there was a sharp slope down from the fence to the gardens which were well below the level of the pitch. Thus the top of the 6 foot fence is roughly on a level with the eaves of the houses. The Judge accepted the Plaintiffs' evidence that on a number of occasions cricket balls have been struck into their garden or against their house. Some chipped the brick-work—some damaged the roof. In particular in 1972 three caused damage. In 1974 several balls came over—one of which caused damage.

24. The Plaintiffs complained. At the beginning of the 1975 season, as a result, the club erected a galvanised chain-link fence above the wall. The total height of wall and fence then became 14 feet 9 inches. It was an expensive operation costing some £700. Since then the Defendants have kept a tally of offending six-hits over this boundary. In 1975 9 balls hit the fence and 6 went over it. In the 1976 season 4 hit the fence and 8 or 9 went over it—3 on one single day—August 21st. According to the Millers, five of the 1975 ones landed in their garden and 2 of those in 1976. On the 26th July, 1975 one just missed breaking the window of a room in which their son was seated. He was then aged about 11 or 12. ***

32. No one has yet suffered any personal injury ***. There is no doubt that damage to tiles or windows at the Plaintiffs' house is inevitable if cricket goes on. There is little doubt that if the Millers were to stay in their garden whilst matches are in progress they would be in real danger of being hit.

33. In these circumstances, have the Plaintiffs established that the Defendants are guilty of nuisance or negligence as alleged? ***

34. The evidence of Mr. Nevins makes it clear that the risk of injury to property at least was both foreseeable and foreseen. It is obvious that such injury is going to take place so long as cricket is being played on this field. It is the duty of the cricketers so to conduct their operations as not to harm people they can or ought reasonably to foresee may be affected. *** There is no way in which damage to the Plaintiffs' property can reasonably be prevented except by ceasing to play cricket on this ground. The learned Judge put the matter in the following terms:

> "I have no hesitation in reaching the conclusion that when cricket is played on this ground any reasonable person must anticipate that injury is likely to be caused to the property at 20 Braekenridge or its occupants."

35. That is a finding from which it would be improper to depart even if one were minded to, which I am not. ***

LORD DENNING M.R. (dissenting as to liability):

5. *** The club made a tally of all the sixes hit during the seasons of 1975 and 1976. In 1975 there were 2,221 overs, that is, 13,326 balls bowled. Of them there were 120 six hits on all sides of the ground. Of these only six went over the high protective fence and into this housing estate. In 1976 there were 2,616 overs, that is 15,696 balls. Of them there were 160 six hits. Of these only nine went over the high protective fence and into this housing estate.

6. No one has been hurt at all by any of these balls, either before or after the high fence was erected. There has, however, been some damage to property, even since the high fence was erected. ***

REFLECTION:

- *How was this case distinguishable on the facts from Bolton v. Stone? Is Lane L.J.'s reasoning compelling?*

14.2.1.4 Lewis v. Wandsworth London Borough Council [2020] EWHC 3205 (QB)

England and Wales High Court (Queen's Bench Division) – [2020] EWHC 3205 (QB)

STEWART J.:

1. This is an appeal by the Defendant against an Order made on 21st November 2019 by Mr Recorder Riza QC sitting at the Wandsworth County Court. ***

5. The Recorder said this:

> "1. This is a claim by Phoebe Lewis against the London Borough of Wandsworth for injuries she received on 28th August 2014 while she was walking through Battersea park from a cricket ball that fell on her eye and caused a serious injury…
>
> 2. *** [T]he claimant was walking through the park on 28th August at about 6.20pm. She was walking with a friend at the end of a cricket pitch. *** [S]he heard a cry from her left, turned her head to the left and inclined her head upwards, where upon she was struck on the left eye with a cricket ball, struck from the game of cricket being played on the cricket pitch. ***
>
> 20. In my judgment on the facts of this case, the possibility of an incident and the possibility of injury are quite extensive. Obviously if a ball rains down on one as one is walking on the pathway and causes an incident, the incident is probably going to be serious injury as occurred in this case to be the area of the head, and in particular the eyes.
>
> 21. Therefore, in my judgment, *** the council did owe a duty of care [and] in all the circumstances of the case, it failed in its duty of care because it allowed pedestrians to walk alongside the boundary of a cricket pitch that was not reasonably safe and that the use of the pathway was a use that the claimant was invited or permitted by the occupier to be there.
>
> 22. I am satisfied on the balance of probabilities that the claim has been established primarily because of the failure to warn this claimant that a game of cricket was in progress and that a hard ball was being using *(sic)*, and that the boundary of the cricket pitch was or went alongside the path which she was using. ***

11. Important principles are to be distilled from *Bolton v. Stone* [1951] A.C. 850 ***. In summary:

> i) Reasonable foreseeability of an accident is not sufficient to found liability.
>
> ii) The Court has to consider the chances of an accident happening, the potential seriousness of an accident and the measures which could be taken to minimise or avoid accident.
>
> iii) *Bolton v. Stone* is not a case which provides authority for a proposition that there is no liability for hitting a person with a cricket ball which has been struck out of the ground or over the boundary. It is clear from the decision that there needs to be careful analysis of the facts. ***

12. It is to be noted that in the nuisance case of *Miller v. Jackson* [1977] QB 966, [Geoffrey Lane LJ on] the Court of Appeal [would have] upheld an injunction against a cricket club on a complaint by a householder whose house had been built close to it. *** As *Clerk and Lindsell on Torts* 23rd Edition at 7-176 says:

> "It should be noted that *Bolton* is not authority for the view that it is always reasonable to disregard a low likelihood. The other factors in the balance, e.g. the severity of the harm and the cost of precautions must also be taken into account." ***

16. It was never in dispute that the Defendant owed a duty of care and/or a duty under section 2 of the *Occupiers Liability Act 1957* [§19.8]. It was not suggested that there was any difference in the two duties. ***

31. The case is very different from *Bolton v. Stone*. The risk of balls being hit towards the path was so

evident that any warning should have been superfluous. This Court does not need to overturn the finding of the Recorder that it would have made a difference to the Claimant. However it must be said that it seems to me that that statement, though undoubtedly honest, was one which may well have arisen with the benefit of hindsight. To a reasonable person a warning in the terms suggested by the Recorder was unnecessary and irrelevant. ***

36. I reach the conclusion that the Recorder's judgment was wrong. *** In the circumstances which obtained, allowing pedestrians to walk along the path when a cricket match was taking place was reasonably safe, the prospects of an accident (albeit nasty if it occurred) being remote. The remoteness is reinforced by Mr Birtles' evidence as to statistics. Further and in any event the alleged breach by failure to warn the Claimant in the terms suggested does not withstand proper analysis. ***

REFLECTION:

- *In what way was this case different from Bolton v. Stone and Miller v. Jackson? How was it similar?*

14.2.2 Gravity of risk

14.2.2.1 Paris v. Stepney Borough Council [1950] UKHL 3

House of Lords – [1950] UKHL 3

LORD NORMAND:

12. *** A workman is suffering, to the employer's knowledge, from a disability which, though it does not increase the risk of an accident's occurring while he is at work, does increase the risk of serious injury if an accident should befall him. Is the special risk of injury a relevant consideration in determining the precautions which the employer should take in fulfilment of the duty of care which he owes to the workman? ***

13. The appellant, when he entered the respondent's service in 1942, suffered from a permanent defect of the vision of his left eye which made him virtually a one-eyed man. *** From 1942 till the accident the appellant worked as a fitter's mate in the garage of the respondents' cleaning department on the maintenance and repair of vehicles. On 28 May 1947, a large vehicle, used for cleaning sewers and gulleys, was brought into the garage to be stripped for examination. It was placed on a platform let into a pit in the floor from which it was raised, after the vehicle had been placed on it, to a height of about four to five feet above the floor level. When the platform was in this position the appellant set to work to strip the vehicle. To do this it was necessary for him to stand with his eyes level with or slightly below the part at which he was working. He first removed the nuts from the U-bolt which held the springs in place and cleared away the dirt from the U-bolt itself. He then used an ordinary hammer to knock out the rusty bolts. While he was doing this a fragment of metal was broken off and lodged in his right eye, which is in consequence now completely blind. The work which the appellant was doing on this occasion was similar to the work that he had been doing for the previous five years.

14. The appellant's case is that for this sort of work the respondents ought to have supplied him with goggles to protect his eyes. The respondents supplied goggles with tinted glasses to protect the eyes of welders against excessive light and they supplied goggles for men working on grinding machines, but they supplied no goggles for men employed on the maintenance and repair of vehicles. ***

19. It is not disputed that the respondents' duty of care is a duty owed to their employees as individuals. *** The test is what precautions would the ordinary, reasonable and prudent man take? *** Would a reasonable and prudent man be influenced, not only by the greater or less probability of an accident occurring but also by the gravity of the consequences if an accident does occur? In *Mackintosh v. Mackintosh* (1864) 2. M. 1357, Lord Neaves, considering a case of alleged negligence in muir burning, said:

> "… it must be observed that in all cases the amount of care which a prudent man will take must vary infinitely according to circumstances. No prudent man in carrying a lighted candle through a powder magazine would fail to take more care than if he was going through a damp cellar. The

amount of care will be proportionate to the degree of risk run, and to the magnitude of the mischief that may be occasioned." ***

22. These are, in my opinion, accurate statements both of the law and of the ordinary man's conduct in taking precautions for his own safety. "No reasonable man handles a stick of dynamite and a walking-stick in the same way" (Winfield, *The Law of Tort*, 4th ed, p 407). ***

26. *** [Lynskey J.'s] judgment is essentially a finding that the supply of goggles was obviously necessary when a one-eyed man was put to the kind of work to which the appellant was put. The facts on which the learned judge founded his conclusion, the known risk of metal flying when this sort of work was being done, the position of the workman with his eyes close to the bolt he was hammering and on the same level with it or below it, and the disastrous consequences if a particle of metal flew into his one good eye, taken in isolation, seem to me to justify his conclusion. Even for a two-eyed man the risk of losing one eye is a very grievous risk, not to speak of the foreseeable possibility that both eyes might be simultaneously destroyed, or that the loss of one eye might have as a sequel the destruction of vision in the other. *** Blindness is so great a calamity that even the loss of one of two good eyes is not comparable, and the risk of blindness from sparks of metal is greater for a one-eyed man than for a two-eyed man, for it is less likely that both eyes should be damaged than that one eye should, and the loss of one eye is not necessarily or even usually followed by blindness in the other. *** I would allow the appeal and restore the judgment of Lynskey J. ***

LORD OAKSEY AND LORD MACDERMOTT concurred separately; LORD SIMONDS AND LORD MORTON dissented.

REFLECTION:

- *Would this same standard of care apply in an equivalent case today? How might the relevant considerations as to breach of duty have evolved since this case was decided?*
- *What impact might this judgment have had on the development of employment health and safety standards?*

14.2.2.2 Overseas Tankship (UK) Ltd v. The Miller Steamship Co. Pty. Ltd (The Wagon Mound No. 2) [1966] UKPC 10

Privy Council (on appeal from Australia) – [1966] UKPC 10

✗**REF: §21.2.2**

LORD REID:

1. This is an appeal from a judgment of Walsh J, dated 10 October 1963, in the Supreme Court of New South Wales (Commercial Causes) by which he awarded to the respondents sums of £80,000 and £1,000 in respect of damage from fire sustained by their vessels, Corrimal and Audrey D, on 1 November 1951. These vessels were then at Sheerlegs Wharf, Morts Bay, in Sydney Harbour undergoing repairs. The appellant was charterer by demise of a vessel, the Wagon Mound, which in the early hours of 30 October 1951, had been taking in bunkering oil from Caltex Wharf not far from Sheerlegs Wharf. By reason of carelessness of the Wagon Mound engineers a large quantity of this oil overflowed from the Wagon Mound on to the surface of the water. Some hours later much of the oil had drifted to and accumulated round Sheerlegs Wharf and the respondents' vessels. About 2 pm on 1 November this oil was set alight: the fire spread rapidly and caused extensive damage to the wharf and to the respondents' vessels. ***

4. In the course of repairing the respondents' vessels the Morts Dock Co, the owners of Sheerlegs Wharf, were carrying out oxy-acetylene welding and cutting. This work was apt to cause pieces or drops of hot metal to fly off and fall in the sea. So when their manager arrived on the morning of 30 October and saw the thick scum of oil round the Wharf, he was apprehensive of fire danger and he stopped the work while he took advice. He consulted the manager of Caltex Wharf and, after some further consultation, he was assured that he was safe to proceed: so he did so, and the repair work was carried on normally until the fire broke out on 1 November. Oil of this character with a flash point of 170° F is extremely difficult to ignite in the open; but we now know that that is not impossible. There is no certainty about how this oil was set

alight, but the most probable explanation, accepted by Walsh J is that there was floating in the oil-covered water some object supporting a piece of inflammable material, and that a hot piece of metal fell on it when it burned for a sufficient time to ignite the surrounding oil. ***

30. *** [In *Bolton v. Stone* [1951] A.C. 850 [§14.2.1.2]] it could not have been said that, on any ordinary meaning of the words, the fact that a ball might strike a person in the road was not foreseeable or reasonably foreseeable. It was plainly foreseeable; but the chance of its happening in the foreseeable future was infinitesimal. A mathematician given the data could have worked out that it was only likely to happen once in so many thousand years. ***

31. It does not follow that, no matter what the circumstances may be, it is justifiable to neglect a risk of such a small magnitude. A reasonable man would only neglect such a risk if he had some valid reason for doing so: eg, that it would involve considerable expense to eliminate the risk. He would weigh the risk against the difficulty of eliminating it. ***

32. In the present case there was no justification whatever for discharging the oil into Sydney Harbour. Not only was it an offence to do so, but also it involved considerable loss financially. If the ship's engineer had thought about the matter there could have been no question of balancing the advantages and disadvantages. From every point of view it was both his duty and his interest to stop the discharge immediately.

33. It follows that in their lordships' view the only question is whether a reasonable man having the knowledge and experience to be expected of the chief engineer of the Wagon Mound would have known that there was a real risk of the oil on the water catching fire in some way: if it did, serious damage to ships or other property was not only foreseeable but very likely. ***

35. In their lordships' view a properly qualified and alert chief engineer would have realised there was a real risk here ***. *** If a real risk is one which would occur to the mind of a reasonable man in the position of the defendant's servant and which he would not brush aside as far-fetched, and if the criterion is to be what that reasonable man would have done in the circumstances, then surely he would not neglect such a risk if action to eliminate it presented no difficulty, involved no disadvantage and required no expense.

36. In the present case the evidence shows that the discharge of so much oil on to the water must have taken a considerable time, and a vigilant ship's engineer would have noticed the discharge at an early stage. The findings show that he ought to have known that it is possible to ignite this kind of oil on water, and that the ship's engineer probably ought to have known that this had in fact happened before. The most that can be said to justify inaction is that he would have known that this could only happen in very exceptional circumstances; but that does not mean that a reasonable man would dismiss such risk from his mind and do nothing when it was so easy to prevent it. If it is clear that the reasonable man would have realised or foreseen and prevented the risk, then it must follow that the appellants are liable in damages. The learned judge found this a difficult case: he said that this matter is "one on which different minds would come to different conclusions". Taking a rather different view of the law from that of the learned judge, their lordships must hold that the respondents are entitled to succeed on this issue. ***

REFLECTION:

- *In both this case and in Bolton v. Stone the likelihood of harm arising in the circumstances was extremely low. Why did the courts reach different conclusions on the facts?*

14.2.3 Burden of precautionary measures

14.2.3.1 Goldman v. Hargrave [1966] UKPC 12

Privy Council (on appeal from Australia) – [1966] UKPC 12

LORD WILBERFORCE: ***

2. *** There was an electrical storm on 25 February 1961, and a tall redgum tree, about one hundred feet

in height, in the centre of the appellant's property, was struck by lightning. This tree was about 250 yards from the western boundary of the appellant's property (in which direction the respondents' properties lie) and rather less from the eastern boundary. The redgum caught fire in a fork eighty-four feet from the ground, and it was evidently impossible to deal with the blaze while the tree was standing. Early in the morning of 26 February the appellant telephoned the district fire control officer, appointed as such under the *Bush Fires Act*, 1954–58, and asked for a tree feller to be sent. Pending his arrival the appellant cleared a space round the tree of combustible material and sprayed the surrounding area with water. The tree feller arrived at mid-day on 26 February at which time the three was burning fiercely, and it was cut down. The trial judge found, and the High Court accepted the finding, that up to this point the appellant's conduct in relation to the fire was not open to criticism.

3. The judge also found, however, that if the appellant had taken reasonable care he could, on the Sunday evening (February 26), or at least early on the next morning, have put out the first by using water on it. *** The judge referred to evidence which indicated that the appellant's method of extinguishing a fire of this kind was to burn it out. "You burn it out" he was reported as saying; "that is the only way I know to put a fire out."

4. On Tuesday, 28 February the appellant was away from the property for a substantial part of the day, and it was found that he did not at any time after 27 February take any steps which could be regarded as reasonable to prevent the fire from spreading. On Wednesday, 1 March there was a change in the weather; the wind, which had previously been light to moderate, freshened to about twenty mph with stronger gusts. The air temperature rose some 10 degree to 105 degree F. The fire revived and spread over the appellant's paddock towards the west and on to the respondents' properties: it was not observed by the appellant until about noon on 1 March and by then it could not be stopped. The damage to the respondents' properties followed. ***

6. *** The result of the evidence, in their lordships' opinion, is that the appellant both up to 26 February and thereafter was endeavouring to extinguish the fire; that initially he acted with prudence, but that there came a point, about the evening of 26 February or the morning of 27 February when, the prudent and reasonable course being to put the fire out by water, he chose to adopt the method of burning it out. That method was, according to the finding of the trial judge, unreasonable, or negligent in the circumstances: it brought a fresh risk into operation, namely the risk of a revival of the fire, under the influence of changing wind and weather, if not carefully watched, and it was from this negligence that the damage arose. That a risk of this character was foreseeable by someone in the appellant's position was not really disputed ***. ***

22. *** [T]heir lordships find in the opinions of the House of Lords *** support for the existence of a general duty on occupiers in relation to hazards occurring on their land, whether natural or man-made [§19.8]. ***

24. *** In such situations the standard ought to be to require of the occupier what it is reasonable to expect of him in his individual circumstances. Thus, less must be expected of the infirm than of the able bodied: the owner of small property where a hazard arises which threatens a neighbour with substantial interests should not have to do so much as one with larger interests of his own at stake and greater resources to protect them: if the small owner does what he can and promptly calls on his neighbour to provide additional resources, he may be held to have done his duty: he should not be liable unless it is clearly proved that he could, and reasonably in his individual circumstance should, have done more. *** In the present case it has not been argued that the action necessary to put the fire out on 26 February to 27 was not well within the capacity and resources of the appellant. Their lordships therefore reach the conclusion that the respondents' claim for damages, on the basis of negligence, was fully made out. ***

REFLECTION:

- *In considering what was reasonable in the defendant's individual circumstances, was the Court adopting a subjective standard of care?*

14.2.3.2 Miller v. Jackson [1977] EWCA Civ 6

✗**REF: §14.2.1.3, §14.2.4.2, §21.1.1**

LORD JUSTICE GEOFFREY LANE:

36. It is true that the risk must be balanced against the measures which are necessary to eliminate it and against what the Defendants can do to prevent accidents from happening—*Latimer v. A.E.C.* [1953] AC 643. In that case a sudden storm had caused a factory floor to become flooded and slippery. The Defendants did all that could reasonably be expected of them, short of closing the factory, to prevent injury. It was held by the House of Lords that the risk of injury from the slippery floor was not sufficient to require the Defendants to shut the factory. Their decision in the words of Lord Oaksey (at page 656) was at the highest "an error of judgment in circumstances of difficulty, and such an error of judgment does not amount to negligence". In the present case, so far from being one incident of an unprecedented nature about which complaint is being made, this is a series of incidents, or perhaps a continuing failure to prevent incidents from happening, coupled with the certainty that they are going to happen again. The risk of injury to person and property is so great that on each occasion when a ball comes over the fence and causes damage to the Plaintiffs, the Defendants are guilty of negligence. ***

LORD DENNING M.R. (dissenting as to liability):

6. *** The cricket club have offered to remedy all the damage and pay all expenses. They have offered to supply and fit unbreakable glass in the windows, and shutters or safeguards for them. They have offered to supply and fit a safety net over the garden whenever cricket is being played. In short, they have done everything possible short of stopping playing cricket on the ground at all. But Mrs Miller and her husband have remained unmoved. Every offer by the club has been rejected. They demand the closing down of the cricket club. Nothing else will satisfy them. They have obtained legal aid to sue the cricket club. ***

7. *** I recognise that the cricket club are under a duty to use all reasonable care consistently with the playing of the game of cricket, but I do not think the cricket club can be expected to give up the game of cricket altogether. After all they have their rights in their cricket ground. They have spent money, labour and love in the making of it; and they have the right to play on it as they have done for 70 years. Is this all to be rendered useless to them by the thoughtless and selfish act of an estate developer in building right up to the edge of it? Can the developer or purchaser of a house say to the cricket club: 'Stop playing. Clear out.' I do not think so. ***

REFLECTION:

- *What was the cost of taking reasonable precautions in this case? Had the cricket club satisfied that burden?*
- *What was the essence of the disagreement between Lane L.J. and Lord Denning?*

14.2.4 Social value of activity

14.2.4.1 Watt v. Hertfordshire County Council [1954] EWCA Civ 6

England and Wales Court of Appeal – [1954] EWCA Civ 6

LORD JUSTICE SINGLETON:

1. *** There are always firemen on duty at the fire station at Watford, and on 27 July 1951, an emergency call was received there to the effect that there had been an accident and that a woman was trapped under a heavy vehicle about two hundred or three hundred yards away. *** It was clear that there might be need for lifting apparatus of some kind, and at the fire station there was a jack capable of raising heavy weights. ***

3. The defendants had an Austin vehicle fitted to carry this jack. *** [O]n this day it was properly out on other service. *** There was at the fire station only one vehicle on which the jack could be carried in the absence of the Austin vehicle, a Fordson lorry, and before leaving with his team Sub-officer Richards told the leading fireman in charge of the second team, of which the plaintiff was a member, to take the jack on the lorry. *** Obviously there might be movement of the jack in the lorry, for there were no means of securing it, no place on which anything could be tied, and no built-in system which would prevent movement. There was, therefore, a risk. The men knew what they were doing. They started their journey, which was only two

hundred or three hundred yards. But on the way something happened to cause the driver to apply his brakes suddenly, the jack moved inside the lorry, the plaintiff's leg was caught, and he was injured. ***

8. *** Would the reasonably careful head of the station have done anything other than that which Sub-officer Richards did? I think not. ***

10. The purpose to be served in this case was the saving of life. The men were prepared to take that risk. They were not, in my view, called on to take any risk other than that which normally might be encountered in this service. I agree with Barry J that, on the whole of the evidence which was given, it would not be right to find that the defendants as employers were guilty of any failure of the duty which they owed to their workmen. ***

LORD JUSTICE DENNING:

11. It is well settled that in measuring due care one must balance the risk against the measures necessary to eliminate the risk. To that proposition there ought to be added this. One must balance the risk against the end to be achieved. If this accident had occurred in a commercial enterprise without any emergency there could be no doubt that the servant would succeed. But the commercial end to make profit is very different from the human end to save life or limb. The saving of life or limb justifies taking considerable risk, and I am glad to say there have never been wanting in this country men of courage ready to take those risks, notably in the Fire Service.

12. In this case the risk involved in sending out the lorry was not so great as to prohibit the attempt to save life. ***

LORD JUSTICE MORRIS: ***

17. *** I think Mr Richards acted in accordance with the traditions of the Service, and I cannot for one moment think that the employers could be held responsible as having failed in the performance of their duties. ***

REFLECTION:

- *Why did Watt's claim fail? Why would this action have succeeded if the defendant were a commercial enterprise and there was no emergency?*
- *Even though the Fire Service was found not to be negligent, should the public authority defendant still compensate Watt for his injuries? Should the law compel the defendant to do so? If so, how?*

14.2.4.2 Miller v. Jackson [1977] EWCA Civ 6

✗**REF: §14.2.1.3, §14.2.3.2, §21.1.1**

LORD DENNING M.R. (dissenting as to liability):

1. In summer time village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch. In the village of Lintz in County Durham they have their own ground, where they have played these last 70 years. They tend it well. The wicket area is well rolled and mown. The outfield is kept short. It has a good club-house for the players and seats for the onlookers. The village team play there on Saturdays and Sundays. They belong to a league, competing with the neighbouring villages. On other evenings after work they practice while the light lasts. Yet now after these 70 years a judge of the High Court has ordered that they must not play there any more. He has issued an injunction to stop them. He has done it at the instance of a newcomer who is no lover of cricket. This newcomer has built, or has had built for him, a house on the edge of the cricket ground which four years ago was a field where cattle grazed. The animals did not mind the cricket. But now this adjoining field has been turned into a housing estate. The newcomer bought one of the houses on the edge of the cricket ground. No doubt the open space was a selling point. Now he complains that, when a batsman hits a six, the ball has been known to land in his garden or on or near his house. His wife has got so upset about it that they always go out at weekends. They do not go into the garden when cricket is being played. They say that this is intolerable. So they asked the judge to stop the cricket being played. And the judge, much

against his will, has felt that he must order the cricket to be stopped; with the consequences, I suppose, that the Lintz Cricket Club will disappear. The cricket ground will be turned to some other use. I expect for more houses or a factory. The young men will turn to other things instead of cricket. The whole village will be much the poorer. And all this because of a newcomer who has just bought a house there next to the cricket ground. ***

REFLECTION:

- *How significant is the social utility of the game of cricket to the issue of the cricket club's negligence?*

14.2.5 Custom and industry practice

14.2.5.1 McCullough v. Riffert [2010] ONSC 3891

✗REF: §14.1.3.1, §19.4.1.1

MULLIGAN J.: ***

14. On February 4, 2008 [Robert's niece Sarah] phoned a lawyer, Diana Riffert, to arrange an appointment. The lawyer had acted for her uncle many years earlier with respect to his divorce and his house purchase. There is a disagreement in the evidence as to what Sarah told the lawyer about her uncle's condition when this appointment was arranged. It was her evidence that she revealed to the lawyer that he probably had colon cancer and that he refused to go to a doctor. She said that he was unwell, had lost a lot of weight and was very sick and was not eating or going to the bathroom. It was her evidence that she used the expression that he had told her and others that he had "seen death". After this conversation she was passed his lawyer's secretary and an appointment was offered for two weeks away. She asked for an earlier appointment and was offered the date of February 11, one week away. She did not discuss her uncle's medical condition with the secretary and did not request an appointment earlier than February 11th. ***

59. The lawyer gave evidence in a straight forward manner and candidly admitted that Robert had lost a great deal of weight and appeared emaciated. I accept her evidence that she had no recollection of the detailed conversation with Sarah about Robert's poor health when the appointment was first set up. I accept her evidence that if Sarah had used the words "he had seen death" it would have made an impression on her in further alerting her to his state of health. However, even if such a conversation did take place, it was still incumbent on the lawyer to make her own observations of Robert and ask appropriate probing questions.

60. In my view the following factors inform my decision that the lawyer met the standard of care required in these circumstances:

> • An appointment was arranged at the lawyer's office within one week of Robert's niece's telephone call with the lawyer. Three days later a draft Will was prepared and sent out to Robert for review. The lawyer noted on the file that the will should be signed by February 29th. This would have been about two and a half weeks after the initial interview.
>
> • Robert attended at the office by walking in with the assistance of a cane and with some help from his niece. He was dressed in a track suit and a jacket. The lawyer did not have the benefit of seeing him at home in his bathrobe and in a dishevelled state in the weeks leading up to the office visit.
>
> • At the office visit Robert did not express any urgency other than a desire to complete the Will before a proposed trip to Texas.
>
> • The lawyer asked if he had seen a doctor and noted his negative answer and his explanation.
>
> • When Robert saw the lawyer he had not seen a doctor and there was no diagnosis as to his weight loss. Nor was there a diagnosis that he was subject to a terminal illness. This was not a visit to the client's hospital or palliative care bedside.
>
> • After the office visit Robert did not call back to advise as to the possible alternate executor or to

inquire if the Will was ready.

• Sarah did not call back in the days following the office visit to see if the Will was ready and to arrange a second appointment for Robert.

• When Robert died ten days later Sarah expressed shock; she was taken aback and not expecting it.

61. There may be circumstances where a solicitor does have a professional obligation to give priority to the preparation of a Will as soon as possible. Visits to a hospital, nursing home or a palliative care centre will give rise to greater urgency. The more so when the lawyer has the benefit of medical advice that the client has a terminal illness. Even when a client visits the lawyer's office, the level of urgency can be raised, especially in cases where the client is elderly or has been diagnosed with a serious illness which could be life-threatening.

62. In my view, there is a continuum between a client who presents without any particular concerns regarding health or age and a client who is clearly on his or her death bed. The level of urgency to prepare a will quickly will increase as factors mount. There may be situations where a lawyer should prepare a brief will at the first interview with a very elderly or a terminally ill client. Best practices may indicate that course of action to be prudent in such situations. There always exists the possibility that a client could die from the illness or an accident after the first meeting with the lawyer. To fail to prepare a will quickly may fall below the standard of care for a reasonably competent solicitor depending on all the facts in this continuum. However, I am not satisfied that, on the facts here, the lawyer fell below the standard of care.

63. For the reasons set out herein I find that the lawyer has met the reasonable standard of care. Therefore negligence by the lawyer has not been proved. In the result I dismiss the plaintiff's claim against the lawyer.

REFLECTION:

- *What facts indicated that the lawyer's delay in preparing the will had not been unreasonable?*
- *In what circumstances would a period of one week to prepare a will be unreasonable?*

14.2.5.2 Powell v. University Hospitals Sussex [2023] EWHC 736 (KB)

✗**REF: §14.1.3.2, §16.1.4, §18.1.1.2, §19.4.3.1**

DEXTER DIAS KC: ***

3. In this clinical negligence claim, Mrs Anne Powell, a woman now aged 65, was admitted into the Princess Royal Hospital in Hayward's Heath, Sussex to have what is called "left revision total knee replacement". She had a prosthesis—a metal implant—in her left knee that was causing her discomfort. The objective of the surgery was to put it right by replacing it. This was in November 2013 when she was 55. At some point, following surgical procedures she had between that November and the next June, an infection entered her body and could not be controlled. Her left leg had to be amputated above the knee in 2016. Mrs Powell is now largely confined to a wheelchair. She needs the help of her husband Colin just to have a bath. The impact on virtually every aspect of her life has been devastating. She says that this catastrophic result was caused by the negligence of Mr Sandeep Chauhan, a very experienced orthopaedic surgeon who performed surgical procedures on her in that period.

4. But was Mr Chauhan negligent? Did his negligence, if any, cause the injury and loss Mrs Powell undoubtedly suffered?

5. The specific negligence alleged is not a want of due care and skill in the surgical procedures themselves, but a lack of appropriate consenting. ***

28. Parties agreed a careful and comprehensive list of factual issues upon which findings were sought from the court. I set them out, as formulated by parties ***: ***

Issue 4: Whether, prior to the procedure on 28 January 2014, it was mandatory to advise/inform

the Claimant:

> a. That, if the infected prosthesis, cement and any necrotic material were not removed at that stage, it was unlikely that the procedure that was, in fact, carried out would successfully eradicate the deep infection ***;
>
> b. That there was a greater chance of success of eradicating the infection if she underwent the first stage of the two-stage [knee replacement/surgery] procedure on 28 January 2014 rather than a DAIR procedure [**D**ebridement: treating wound by cleaning out and removing non-viable (necrotic) tissue. **A**ntibiotics: targeted at bacterial organisms. **I**rrigation: washing out wound. **R**etention: retaining the implant];
>
> c. To undergo the first stage of a two-stage procedure as, without doing so, the chance of eradicating the infection was low. ***
>
> **Issue 6:** Whether, if the Claimant had been given the advice in 4 *** (to the extent that it was not given), she would have opted for a first stage operation on 28 January 2014. ***

35. *** Since 4a. and 4b. are conceded by the defendant, it is accepted that Mr Chauhan was in breach of his duty of care. The question logically moves onto Issue 6 and the causation question of what Mrs Powell would have done if she had been informed, advised and consented as she should have been. ***

REFLECTION:

- *Dr. Chauhan had conceded that he had breached his duty to inform his patient of the different medical procedure options available to her. Should that be a sufficient basis in itself for holding the doctor civilly liable?*

14.2.5.3 Hill v. Hamilton-Wentworth Police Services Board [2007] SCC 41

✗**REF: §13.4.2.2, §14.1.3.3, §15.2.1, §16.1.3**

MCLACHLIN C.J.C. (BINNIE, LEBEL, DESCHAMPS, FISH, ABELLA JJ. concurring): ***

(b) Application of the Standard of Care to the Facts—Was the Police Conduct in this Case Negligent?

74. The defendant police officers owed a duty of care to Mr. Hill. That required them to meet the standard of a reasonable officer in similar circumstances. ***

76. The arrest itself is not impugned as negligent. Although there were problems in the case against Hill, it is accepted that the investigation, as it stood at the time the arrest was made, disclosed reasonable and probable grounds. It is the conduct of the police prior to and following the arrest that Hill criticizes. At the pre-arrest stage, Mr. Hill alleges: witness contamination as the result of publishing his photo (McLaughlin); failure to make proper records of events and interviews with witnesses (McLaughlin and Stewart); interviewing two witnesses together and with a photo of Hill on the desk (McLaughlin); and structural bias in the photo lineup in which Hill was identified (Hill and Loft). At the post-arrest stage, Hill charges that Detective Loft failed to reinvestigate after evidence came to light that suggested the robber was not Hill, but a different man, Sotomayer. ***

77. We must consider the conduct of the investigating officers in the year 1995 in all of the circumstances, including the state of knowledge then prevailing. Police practices, like practices in other professions, advance as time passes and experience and understanding accumulate. Better practices that developed in the years after Hill's investigation are therefore not conclusive. By extension, the conclusion that certain police actions did not violate the standard of care in 1995 does not necessarily mean that the same or similar actions would meet the standard of care today or in the future. We must also avoid the counsel of perfection; the reasonable officer standard allows for minor mistakes and misjudgments. Finally, proper scope must be accorded to the discretion police officers properly exercise in conducting an investigation.

78. Considered in this light, the first four complaints, while questionable, were not sufficiently serious on the

record viewed as a whole to constitute a departure from the standard of a reasonable police officer in the circumstances. The publication of Hill's photo, the somewhat incomplete record of witness interviews, the fact that two witnesses were interviewed together and the failure to blind-test the photos put to witnesses are not good police practices, judged by today's standards. But the evidence does not establish that a reasonable officer in 1995 would not have followed similar practices in similar circumstances. Nor is it clear that if these incidents had not occurred, Hill would not have been charged and convicted. It follows that the individual officers involved in these incidents cannot be held liable to Hill in negligence.

79. This brings us to the photo lineup. The photo array consisted of one aboriginal suspect, Hill, and eleven Caucasian foils. However, a number of the subjects had similar features and colouring, so that Hill did not in fact stand out as the only aboriginal.

80. The first question is whether this photo lineup met the standard of a reasonable officer investigating an offence in 1995. The trial judge accepted expert evidence that there were "no rules" and "a great deal of variance in practice right up to the present time" in relation to photo lineups ***. These findings of fact have not been challenged. It follows that on the evidence adduced, it cannot be concluded that the photo lineup was unreasonable, judged by 1995 standards. This said, the practice followed was not ideal. A reasonable officer today might be expected to avoid lineups using foils of a different race than the suspect, to avoid both the perception of injustice and the real possibility of unfairness to suspects who are members of minority groups—concerns underlined by growing awareness of persisting problems with institutional bias against minorities in the criminal justice system, including aboriginal persons like Mr. Hill. (See Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (1996).)

81. In any event, it was established that the lineup's racial composition did not lead to unfairness. A racially skewed lineup is structurally biased only "if you can tell that the one person is non-Caucasian" and "assuming the suspect is the one that's standing out" (majority reasons in the Court of Appeal, at para. 105). Although the suspects were classified as being of a different race by the police's computer system, at least some of them appeared to have similar skin tones and similar facial features to Hill. On this evidence, the trial judge concluded that the lineup was not in fact structurally biased. Any risk that Hill might have been unfairly chosen over the 11 foils in the photo lineup did not arise from structural bias relating to the racial makeup of the lineup but rather from the fact that Hill happened to look like the individual who actually perpetrated the robberies, Frank Sotomayer.

82. It remains to consider Mr. Hill's complaint that the police negligently failed to reinvestigate when new information suggesting he was not the robber came to light after his arrest and incarceration. This complaint must be considered in the context of the investigation as a whole. The police took the view from the beginning that the 10 robberies were the work of a single person, branded the plastic bag robber. They maintained this view and arrested Hill despite a series of tips implicating two men, "Pedro" and "Frank". Other weaknesses in the pre-charge case against Hill were the failure of a search of Hill's home to turn up evidence, and the fact that at the time of his arrest Hill had a long goatee of several weeks' growth, while the eyewitnesses to the crime described the robber as a clean-shaven man. While the police may have had reasonable and probable grounds for charging Hill, there were problems with their case.

83. After Hill was charged and taken into custody, the robberies continued. ***

84. When new information emerges that could be relevant to the suspect's innocence, reasonable police conduct may require the file to be reopened and the matter reinvestigated. Depending on the nature of the evidence which later emerges, the requirements imposed by the duty to reinvestigate on the police may vary. In some cases, merely examining the evidence and determining that it is not worth acting on may be enough. In others, it may be reasonable to expect the police to do more in response to newly emerging evidence. Reasonable prudence may require them to re-examine their prior theories of the case, to test the credibility of new evidence and to engage in further investigation provoked by the new evidence. At the same time, police investigations are not never-ending processes extending indefinitely past the point of arrest. Police officers acting reasonably may at some point close their case against a suspect and move on to other matters. The question is always what the reasonable officer in like circumstances would have done to fulfil the duty to reinvestigate and to respond to the new evidence that emerged. ***

88. *** Deciding whether to ask for a trial to be postponed to permit further investigation when the case is in the hands of Crown prosecutors and there appears to be credible evidence supporting the charge is not an easy matter. In hindsight, it turned out that Detective Loft made the wrong decision. But his conduct must be considered in the circumstances prevailing and with the information available at the time the decision was made. At that time, awareness of the danger of wrongful convictions was less acute than it is today. There was credible evidence supporting the charge. The matter was in the hands of the Crown prosecutors, who had assumed responsibility for the file. *** I cannot conclude that Detective Loft's exercise of discretion in deciding not to intervene at this late stage breached the standard of a reasonable police officer similarly situated.

89. I therefore conclude that although Detective Loft's decision not to reinvestigate can be faulted, judged in hindsight and through the lens of today's awareness of the danger of wrongful convictions, it has not been established that Detective Loft breached the standard of a reasonable police officer similarly placed. ***

105. I would dismiss Hill's appeal with costs. The Court of Appeal was correct to conclude that the police conduct impugned on this appeal met the standard of care and, therefore, was not negligent. ***

REFLECTION:

- *What are the implications of assessing the standard of care as of the time of the tort, rather than in light of the expectations of police practices today? Is the Court's approach compelling?*
- *Read the summary of Hill's case on the Canadian Registry of Wrongful Convictions. Do you agree that the conduct of the police investigation into Hill did not fall below the requisite standard of care?*

14.2.6 Statutory and regulatory background

14.2.6.1 R v. Saskatchewan Wheat Pool [1983] CanLII 21 (SCC)

✗**REF: §14.1.2.1**

DICKSON J. (FOR THE COURT): ***

5. The dispute in this case arises from an infestation of rusty grain beetle larvae. On 19th September 1975 the [Canadian Wheat Board] surrendered to the pool terminal elevator receipts for a quantity of No. 3 Canada Utility Wheat at Thunder Bay and gave directions for the wheat to be loaded onto the vessel Frankcliffe Hall. On 22nd and 23rd September No. 3 Canada Utility Wheat and other wheat was loaded from the pool's terminal elevator 8 into the vessel which sailed on 23rd September 1975. During the loading routine samples were taken from the wheat. This wheat was loaded under the scrutiny of the Canadian Grain Commission's inspectors as well as the scrutiny of the pool's representatives. At the loading no one had any knowledge that the grain was infested with rusty beetle larvae. The exact cause of the infestation was not and could not be known. Visual inspection revealed no infestation. A berlase funnel test, however, conducted at the Grain Commission's headquarters after the ship had sailed, disclosed an infestation of rusty grain beetle larvae in the 273,569 bushels of wheat loaded into holds 5 and 6. This was the first rusty beetle larvae infestation known to occur in a ship. The Canadian Grain Commission ordered the board to fumigate the affected wheat. The board directed the Frankcliffe Hall to be diverted to Kingston for fumigation and was obliged to pay the vessel owner and the elevator operator at Kingston $98,261.55, comprising detention claims, cost of unloading and reloading the grain and fumigation of the grain and holds. It is this amount which the board is now claiming from the Saskatchewan Wheat Pool. ***

39. Assuming that Parliament is competent constitutionally to provide that anyone injured by a breach of the *Canada Grain Act* shall have a remedy by civil action, the fact is that Parliament has not done so. Parliament has said that an offender shall suffer certain specified penalties for his statutory breach. We must refrain from conjecture as to Parliament's unexpressed intent. ***

40. The obligation of a terminal operator under s. 61(1) of the *Canada Grain Act* is to deliver to the holder of an elevator receipt for grain issued by the operator the identical grain or grain of the same kind, grade and quantity as the grain referred to in the surrendered receipt, as the receipt requires. That obligation was

discharged.

41. Breach of s. 86(c) of the *Canada Grain Act* in discharging infested grain into the Frankcliffe Hall does not give rise, in and of itself, to an independent tortious action. *** There is no evidence at trial of any negligence or failure to take care on the part of the pool. The pool has demonstrated that it operated its terminal up to the accepted standards of the trade; it made regular checks of its terminals for infested grain; it tested samples of wheat both upon admission to and upon discharge from its terminal elevator. *** The pool successfully demonstrated that the loss was not the result of any negligence on its part.

42. In sum I conclude that *** negligence is neither pleaded nor proven. The action must fail. ***

REFLECTION:

- *Why does breach of the Canada Grain Act not equate to falling below the common law standard of care?*

14.2.6.2 Ryan v. Victoria (City) [1999] CanLII 706 (SCC)

✗**REF: §14.1.2.2, §18.4.1, §21.2.1**

MAJOR J. (FOR THE COURT): ***

42. The standard of care required of the Railways was that of a prudent and reasonable person in the circumstances, having regard to all relevant factors including applicable statutes and regulations. It is undisputed that the Railways complied with certain safety standards prescribed in regulations and Board orders. The question is whether such compliance satisfied the requirement of objective reasonableness in this case and absolved the Railways of liability for the appellant's injury. ***

50. Even if the standards for "railway-highway crossing" regulations do apply to the Store Street tracks, the Railways' compliance with those standards did not necessarily constitute reasonable conduct in the circumstances. General Order E-4 and CTC 1980-8 Rail provide that a flangeway may be as narrow as 2.5 inches (65 millimetres) or as wide as 4.75 inches (126 millimetres). The decision to construct a flangeway at a particular width within that range was a matter left to the discretion of the Railways. In exercising that discretion, they were bound by the common law and were required to take all reasonable steps to minimize foreseeable harm. It cannot be presumed that the entire range would be reasonably safe in all conditions. Indeed, the existence of a range instead of a uniform standard suggests that the appropriate width for a flangeway depends in part on the particular facts. The flangeways installed by the Railways in 1982 were between 3.75 and 3.94 inches wide. Had they been narrower by half an inch, the accident at issue in this case would not have occurred. The Railways' decision with respect to that half-inch raises an issue of reasonableness, not of regulatory compliance. ***

58. The Railways were negligent with respect to the width of the flangeways on Store Street. *** They owed a duty of care to the appellant with respect to the flangeways on Store Street, and that duty required them to exercise reasonable care in the circumstances. Their compliance with regulatory standards did not replace or exhaust that obligation. Because the Store Street tracks are not a typical "highway crossing", the Railways were required to take precautions beyond mere compliance with the safety standards which govern such crossings. In particular, they should have taken steps to minimize the risk to two-wheeled vehicles by building the flangeways at the minimum allowable width or by installing flange fillers. The trial judge's finding of negligence was a proper exercise of his discretion as the finder of fact and should not have been reversed by the Court of Appeal. ***

REFLECTION:

- *Is it appropriate for a court to scrutinise the discretionary decisions of public authorities through the lens of the private law of tort, as opposed to through the public law of judicial review?*

14.2.7 Further material

- D. Nolan, "Varying the Standard of Care in Negligence" (2013) 72 Cambridge LJ 651.
- E. Alexander, "Legislation and the Standard of Care in Negligence" (1964) 42 Canadian Bar Rev 243.

15 NEGLIGENCE: (III) DAMAGE

15.1 Damage an essential element

Re T&N Ltd [2005] EWHC 2870 (Ch)

25. Damage is a necessary element of a cause of action in the tort of negligence. Unless and until the claimant suffers a loss which is recognised in law as compensatable by an award of damages, the claimant has no claim in negligence. This is not a technical requirement. It goes to the foundation of the law of negligence and many other torts. The obligation which the law imposes in appropriate circumstances (where the legal decision is that there exists a duty of care to avoid loss of the type in question), and which a claimant may enforce by legal proceedings, is an obligation to compensate the claimant against loss which was a reasonably foreseeable consequence of his carelessness. There is no free-standing obligation or duty of care. This was clearly stated by Viscount Simonds in *Overseas Tankship (UK) Ltd v. Morts Dock and Engineering Co Ltd (The Wagon Mound)* [1961] AC 388 at 425 [§17.1.1]:

> "It is, no doubt, proper when considering tortious liability for negligence to analyse its elements and to say that the plaintiff must prove a duty owed to him by the defendant, a breach of that duty by the defendant, and consequent damage. But there can be no liability until the damage has been done. It is not the act but the consequences on which tortious liability is founded. Just as (as it has been said) there is no such thing as negligence in the air, so there is no such thing as liability in the air. ***"

26. A cause of action in negligence can therefore accrue only if and when compensatable loss is suffered. The same is not true of a cause of action for breach of contract. By making the contract, a party assumes a legally recognised and enforceable obligation to perform it. A breach of contract is therefore without more a breach of legal obligation and a cause of action has accrued, even though substantial loss has not yet been suffered and may never be suffered. ***

REFLECTION:

- *What is damage? Why is damage an essential element of negligence?*
- *How do the courts typically redress damage?*

15.1.1 Atlantic Lottery Corp. Inc. v. Babstock [2020] SCC 19

Supreme Court of Canada – 2020 SCC 19

✗**REF: §9.5.1, §9.7.1**

BROWN J. (ABELLA, MOLDAVER, CÔTÉ, ROWE JJ. concurring):

1. The appellant Atlantic Lottery Corporation Inc. ("ALC"), constituted by the governments of the four Atlantic provinces, is empowered to approve the operation of video lottery terminal games ("VLTs") in Newfoundland and Labrador by the *Video Lottery Regulations*, C.N.L.R. 760/96. The respondents Douglas Babstock and Fred Small ("the plaintiffs") applied for certification of a class action against ALC, on behalf of any natural person resident in Newfoundland and Labrador who paid to play VLTs in that province in the six years preceding the class action, or on behalf of the estate of any such person. ***

2. The plaintiffs' essential claim is that VLTs are inherently dangerous and deceptive. Indeed, they say that VLTs are so deceptive that they contravene the *Criminal Code*'s prohibition of games similar to "three-card monte" (*Criminal Code*, R.S.C. 1985, c. C-46, s. 206). Relying on three causes of action ("waiver of tort", breach of contract and unjust enrichment), the plaintiffs seek a gain-based award, quantified by the profit ALC earned by licensing VLTs. ***

6. *** In my respectful view *** none of these claims have any reasonable chance of success. I would therefore allow the appeals, set aside the certification order, and strike the plaintiffs' claims against ALC.

***

(1) Disgorgement as a Novel Cause of Action ***

30. *** First, and as this case demonstrates, the term waiver of tort is apt to generate confusion and should therefore be abandoned (Edelman, at p. 122). Secondly, and relatedly, in order to make out a claim for disgorgement, a plaintiff *must* first establish actionable misconduct. ***

33. It is therefore important to consider what it is that makes a defendant's negligent conduct wrongful. As this Court has maintained, "[a] defendant in an action in negligence is not a wrongdoer at large: he is a wrongdoer only in respect of the damage which he actually causes to the plaintiff" (*Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181 (S.C.C.), at para. 16 [§16.2.3]). There is no right to be free from the *prospect* of damage; there is only a right not to *suffer* damage that results from exposure to unreasonable risk (E. J. Weinrib, *The Idea of Private Law* (rev. ed. 2012), at pp. 153 and 157-58; R. Stevens, *Torts and Rights* (2007), at pp. 44-45 and 99). In other words, negligence "in the air"—the mere creation of risk—is not wrongful conduct. ***

34. The difficulty is not just normative, although it is at least that. The practical difficulty associated with recognizing an action in negligence without proof of damage becomes apparent in considering how such a claim would operate. As the Court of Appeal recognized, a claim for disgorgement available to any plaintiff placed within the ambit of risk generated by the defendant would entitle *any one* plaintiff to *the full gain* realized by the defendant. No answer is given as to why any particular plaintiff is entitled to recover the whole of the defendant's gain. Yet, corrective justice, the basis for recovery in tort, demands *just that*: an explanation as to why *the plaintiff* is *the* party entitled to a remedy (*Clements*, at para. 7; Weinrib [Ernest J. Weinrib, "Restitutionary Damages as Corrective Justice" (2000) 1 Theor. Inq. L. 1.], at pp. 1-7). Tort law does not treat plaintiffs "merely as a convenient conduit of social consequences" but rather as "someone to whom damages are owed to correct the wrong suffered" (Weinrib (2000), at p. 6). A cause of action that promotes a race to recover by awarding a windfall to the first plaintiff who arrives at the courthouse steps undermines this foundational principle of tort law.

35. This is not the type of incremental change that falls within the remit of courts applying the common law (*Salituro* [[1991] 3 S.C.R. 654], at p. 670). It follows that the novel cause of action proposed by the plaintiffs has no reasonable chance of succeeding at trial.

(2) Disgorgement for the Completed Tort of Negligence

36. The Court of Appeal majority concluded that, even if disgorgement for wrongdoing is not an independent cause of action, the plaintiffs have adequately pleaded the elements of the tort of negligence, and may therefore seek disgorgement for tortious wrongdoing on that basis. While disgorgement for tortious wrongdoing was initially applied only in the context of proprietary torts, including conversion, deceit, and trespass, it found broader application in the late 20th century (Martin, at pp. 505-6). It has even been suggested that disgorgement may be available for negligence in certain circumstances, and the issue remains unsettled (Edelman, at pp. 129-30; C.-M. O'Hagan, "Remedies", in L. N. Klar *et al.*, ed., *Remedies in Tort* (loose-leaf), vol. 4, at §200). While that may have to be decided in an appropriate case, as I will explain the plaintiffs have not adequately pleaded a claim in negligence, and it is unnecessary to resolve the question here.

37. Causation of damage is a required element of the tort of negligence. As I have explained, the conduct of a defendant in negligence is wrongful only to the extent that it *causes* damage (*Clements*, at para. 16). While the plaintiffs allege that ALC had a duty to warn of the inherent dangers associated with VLTs, including the risk of addiction and suicide, those dangers are not alleged to have materialized. The plaintiffs do not allege that proper warnings would have caused them to spend less money playing VLTs or to avoid them altogether.

38. It follows that I respectfully disagree with Court of Appeal's conclusion that the plaintiffs would not be "precluded from leading evidence that the breach of duty (assuming it can be proven) led to some form of injury" (para. 186). Again, causation of damage is a required element of the cause of action of negligence, and it must be pleaded. Here, not only have the plaintiffs *not* pleaded causation, their pleadings expressly

disclaim any intention of doing so. The absence of a pleading of causation, they acknowledge, arises from an intentional litigation strategy to increase the likelihood of obtaining certification of their action as a class action by avoiding having to prove individual damage. This particular claim also has no reasonable chance of success. ***

REFLECTION:

- *What pleading error was at issue in this appeal? Why was it an error, according to the majority?*
- *According to Brown J., how does the tort of negligence reflect the theory of corrective justice (§11.2.2)?*

15.1.2 Cross-references

- *1688782 Ontario Inc. v. Maple Leaf Foods Inc.* [2020] SCC 35, [18]: §19.3.2.2.

15.1.3 Further material

- D. Nolan, "Damage in the English Law of Negligence" (2013) 4 J European Tort L 259.

15.2 Categories of compensable damage

15.2.1 Hill v. Hamilton-Wentworth Police Services Board [2007] SCC 41

✗**REF:** §13.4.2.2, §14.1.3.3, §14.2.5.3, §16.1.3

MCLACHLIN C.J.C. (BINNIE, LEBEL, DESCHAMPS, FISH, ABELLA JJ. concurring): ***

Loss or Damage

90. To establish a cause of action in negligence, the plaintiff must show that he or she suffered compensable damage. Not all damage will justify recovery in negligence. Recovery is generally available for damage to person [§13.1] and property [§13.2.3]. On the other hand, debates have arisen, for example, about when an action in negligence may be brought for purely economic loss [§19.3] and psychological harm [§19.2]. (See Klar, [*Tort Law* (3rd ed. 2003)] at pp. 201-4, and T. Weir, *Tort Law* (2002), at pp. 44-51.)

91. It is not disputed that imprisonment resulting from a wrongful conviction constitutes personal injury to the person imprisoned. Indeed, other forms of compensable damage without imprisonment may suffice; a claimant's life could be ruined by an incompetent investigation that never results in imprisonment or an unreasonable investigation that does not lead to criminal proceedings. Wrongful deprivation of liberty [§2.4] has been recognized as actionable for centuries and is clearly one of the possible forms of compensable damage that may arise from a negligent investigation. There may be others.

92. On the other hand, lawful pains and penalties imposed on a guilty person do not constitute compensable loss. It is important as a matter of policy that recovery under the tort of negligent investigation should only be allowed for pains and penalties that are wrongfully imposed. The police must be allowed to investigate and apprehend suspects and should not be penalized for doing so under the tort of negligent investigation unless the treatment imposed on a suspect results from a negligent investigation and causes compensable damage that would not have occurred but for the police's negligent conduct. The claimant bears the burden of proving that the consequences of the police conduct relied upon as damages are wrongful in this sense if they are to recover. Otherwise, punishment may be no more than a criminal's just deserts—in a word, justice. ***

Limitation Period

95. The respondents claim that Hill's action is statute-barred [§6.8]. The relevant limitation period is set out in the *Public Authorities Protection Act*, R.S.O. 1990, c. P.38, s. 7(1) (now repealed):

> (1) No action, prosecution or other proceeding lies or shall be instituted against any person for an act done in pursuance or execution or intended execution of any statutory or other public duty or

> authority, or in respect of any alleged neglect or default in the execution of any such duty or authority, unless it is commenced within six months next after the cause of action arose, or, in case of continuance of injury or damage, within six months after the ceasing thereof.

96. The limitation period for negligent investigation begins to run when the cause of action is complete. This requires proof of a duty of care, breach of the standard of care, compensable damage, and causation. A cause of action in negligence arises not when the negligent act is committed, but rather when the harmful consequences of the negligence result. (See G. Mew, *The Law of Limitations* (2nd ed. 2004), at p. 148, citing L. N. Klar et al., *Remedies in Tort* (loose-leaf), ed. by L. D. Rainaldi, vol. 4 (release 5), ch. 27, at para. 217, n. 23.)

97. As discussed above, the loss or injury as a result of alleged police negligence is not established until it is clear that the suspect has been imprisoned as a result of a wrongful conviction or has suffered some other form of compensable harm as a result of negligent police conduct. The wrongfulness of the conviction is essential to establishing compensable injury in an action where the compensable damage to the plaintiff is imprisonment resulting from a wrongful conviction. In such a case, the cause of action is not complete until the plaintiff can establish that the conviction was in fact wrongful. So long as a valid conviction is in place, the plaintiff cannot do so.

98. It follows that the limitation period in this case did not start to run until December 20, 1999 when Mr. Hill, after a new trial, was acquitted of all charges of robbery. The action was commenced by notice of action on June 19, 2000, within the six-month limitation period set out in the *Public Authorities Protection Act*. Therefore, the relevant limitation period was met. ***

REFLECTION:

- *What type of damage did Hill allege? Why was it recognised as compensable in the tort of negligence?*
- *The Court's interpretation of the limitation period commencement suggests that Hill would not have suffered damage until he was acquitted of the criminal charges. Is that interpretation conceptually sound?*

15.2.2 Cross-references

- *Mustapha v. Culligan of Canada Ltd* [2008] SCC 27, [8]-[10]: §17.1.2.
- *Greenway-Brown v. MacKenzie* [2019] BCCA 137, [80]-[84]: §17.3.2.
- *Midwest Properties Ltd v. Thordarson* [2015] ONCA 819, [94]-[101]: §19.11.1.

15.2.3 Further material

- J. Skillen, "Damage in the Supreme Court" (2022) 81 Cambridge LJ 14.

16 NEGLIGENCE: (IV) CAUSATION OF DAMAGE IN FACT

16.1 But-for cause of damage

S.R. Moore, "The Supreme Court of Canada and the Law of Causation Revisited" in 6th Annual Update: Personal Injury Law and Practice (Toronto: Osgoode Hall Law School, 2010)

A starting point for a causation analysis can be found in the Supreme Court of Canada decision in *Snell*:[524]

> Causation is an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former. Is the requirement that the plaintiff prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury too onerous? Is some lesser relationship sufficient to justify compensation? … If I were convinced that defendants who have a substantial connection to the injury were escaping liability because plaintiffs cannot prove causation under currently applied principles, I would not hesitate to adopt one of these alternatives. In my opinion, however, properly applied, the principles relating to causation are adequate to the task. Adoption of either of the proposed alternatives would have the effect of compensating plaintiffs where a substantial connection between the injury and the defendant's conduct is absent. Reversing the burden of proof may be justified where two defendants negligently fire in the direction of the plaintiff and then by their tortious conduct destroy the means of proof at his disposal. In such a case it is clear that the injury was not caused by neutral conduct. It is quite a different matter to compensate a plaintiff by reversing the burden of proof for an injury that may very well be due to factors unconnected to the defendant and not the fault of anyone.

Typically causation is determined on the basis of is what is referred to as the "but for" test: if the plaintiff proves on a balance of probabilities that but for the defendant's breach the loss would not have occurred, then the causation element has been met.

Stated in this way the principle appears reasonable and simple. However in some situations this test has raised concerns that it sets the bar for liability too low or too high. For example in some cases it may be impossible for a plaintiff to satisfy the test in circumstances where it is clear that some defendant's wrong has caused the loss, but not which defendant. There are other cases where the probability that a defendant's wrong has caused the loss is less than would be required to satisfy the test. There are also cases where a wrongdoer's acts are sufficient to have caused the loss but not necessary and therefore the "but for" test cannot be satisfied.

It should therefore not be surprising that the "but for" test has been found unsuitable to achieve the policies underlying the principles that liability requires that the wrong has caused the loss for which compensation is awarded and that persons who have been injured by the wrong of another should compensate the injured person for its loss. ***

Where there is only one possible cause of the damages the causation issue is straightforward. However where there is more than one cause, or where there may be more than one cause, questions arise which the courts have had to address. The courts have had to consider policy issues and articulate legal principles to determine the result in some such cases. *** […continue reading]

REFLECTION:

- *Ms. Donoghue claimed that she would not have become ill but for the decomposed snail in Stevenson's bottle (§13.1.1). Who else could have been considered a factual cause of her gastroenteritis? Why would other but-for causes probably not pose a problem for Ms. Donoghue's claim against the ginger beer manufacturer?*

[524] *Snell v. Farrell*, [1990] 2 SCR 311 (SCC), 326.

16.1.1 Hanke v. Resurfice Corp. [2007] SCC 7

Supreme Court of Canada – 2007 SCC 7

✗**REF: §16.2.2**

MCLACHLIN C.J.C. (FOR THE COURT):

1. This case involves a tragic injury that befell a young man, Mr. Hanke, when a water hose was placed into the gasoline tank of an ice-resurfacing machine rather than the water tank. When hot water overfilled the gasoline tank, vaporized gasoline was released into the air. It was ignited by an overhead heater, causing an explosion and fire. Mr. Hanke, who was employed by the City of Edmonton to run the ice-resurfacing machine and look after the ice-rink, was badly burned.

2. Mr. Hanke sued the manufacturer and distributor of the ice-resurfacing machine for damages, alleging design defects. He contended that the gasoline tank and the water tank were similar in appearance and placed close together on the machine, making it easy to confuse the two.

3. After a lengthy trial, the trial judge [Wilson J.] dismissed Mr. Hanke's action (2003 ABQB 616). He found that Mr. Hanke had not discharged the plaintiff's burden of establishing that the accident was caused by the negligence of the manufacturer or distributor. First, he had not established that it was reasonably foreseeable that an operator of the ice-resurfacing machine would mistake the gas tank and the hot water tank. Second, he had not shown that the defendants caused the accident. The trial judge concluded that the accident had been caused by Mr. Hanke's decision to turn the water on when he knew, or should have known, that the water hose was in the gasoline tank, knowing full well, by his own admission, the difference between the two tanks. He found as a fact that Mr. Hanke was not confused by the placement and character of the tanks, and consequently that this had not caused the accident.[525]

4. On appeal, the judgment was set aside and a new trial ordered (2005 ABCA 383). The Court of Appeal concluded that the trial judge had erred in both his foreseeability and causation analyses. The trial judge's conclusion on foreseeability, the court found, was vitiated by a number of errors, namely: failure to give "adequate analytical emphasis" to certain evidence concerning the placement and marking of the tanks and other workers who had made the same mistake (para. 20); and failure to consider policy factors in determining foreseeability (para. 21). On causation, the Court of Appeal held that the trial judge had erred by failing to consider the "comparative blameworthiness" of the plaintiff and the defendants (paras. 15-16), and in applying a "but for" test instead of a material contribution test (paras. 12-14).

5. The two issues that divided the Alberta courts—foreseeability and causation—dominate the appeal before us. I will deal with each in turn.

A. Foreseeability

6. Liability for negligence requires breach of a duty of care arising from a reasonably foreseeable risk of harm to one person, created by the act or omission of another: *Menow v. Honsberger* (1973), [1974] S.C.R. 239 (S.C.C.), at p. 247, *per* Laskin J. (as he then was). By enforcing reasonable standards of conduct, so as to prevent the creation of reasonably foreseeable risks of harm, tort law serves as a disincentive to risk-creating behaviour: *Stewart v. Pettie*, [1995] 1 S.C.R. 131 (S.C.C.), at para. 50, *per* Major J [§19.9.1]. The major elements of a tort action—duty, breach causing injury and cause—reflect "the principle of moral wrongdoing which is the basis of the negligence law": L. Klar, "Downsizing Torts", in N. J. Mullany and A. M. Linden, eds., *Torts Tomorrow: A Tribute to John Fleming* (1998), 305, at p. 307.

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525 2003 ABQB 616, [48] *per* Wilson J.: "I am also forced to the conclusion that he saw [the water hose] was there [in the gasoline tank] when he turned on the machine and, I would think, when he turned on the exhaust fan for the exhaust stack. *** Hanke looked at the machine and realized that the hose was in a tank. He accepted the position of it and proceeded to operate the machine. That was a dreadful mistake. He did not, for whatever reason, think about what he was doing. That was careless and the cause of this event. He did not do a walk around. *** He looked at the water gauge and decide it needed water. Conscious of what he was doing he turned on the water and walked away. He looked and he turned on the water."

7. The trial judge found that it was not reasonably foreseeable that an operator of the ice-resurfacing machine at issue would mistake the gas tank and the hot water tank, and thus place (or allow to remain) a water hose in the gas tank, thereby generating vapourized gasoline that might be ignited by an open flame, leading to an explosion and fire. The trial judge based this conclusion on the evidence, including the different size of the two tanks (one was much taller than the other), and on the fact (as found by him) that the gas tank had a label on it that said "Gasoline Only". He emphasized Mr. Hanke's admission that he knew the difference between the two tanks, and found that he was not confused between them. ***

11. *** Foreseeability depends on what a reasonable person would anticipate, not on the seriousness of the plaintiff's injuries (as in this case) or the depth of the defendant's pockets ***.

12. I conclude that, while the Court of Appeal would have preferred a different approach to foreseeability, no error of law or palpable and overriding error of fact or mixed fact and law has been established in the trial judge's approach or conclusion. The Court of Appeal erred in interfering on this ground.

B. Causation

13. The trial judge stated that "[t]he onus is on the Plaintiff to establish that the damage was caused by the negligence of one or both of the Defendants to some degree" (para. 10). He also said: "I must find causation against these defendants before considering contribution" (para. 46). He went on to conclude: "The Plaintiff has failed to establish that the injuries were caused by negligent design … That being the case, it is not necessary for this Court to consider the apportionment of fault under the rules of contribution …" (para. 58).

14. The trial judge based these conclusions on the evidence. He emphasized Mr. Hanke's admission that "when he looked at the unit from behind he knew precisely which was the water tank and which was the gasoline tank" (para. 41), as well as his admission that "he was fully familiar with the fact that hot water should not be introduced into the gasoline tank" (para. 42). He noted that the caps on the two tanks as designed and delivered had been different, and had been replaced by similar caps by the City. He also noted the absence of evidence from Mr. Binette, who had prepped the machine before Mr. Hanke's arrival. *** He concluded that "there is no evidence that would show to the balance of probabilities that this event was caused by the defendants" (para. 54). *** [2003 ABQB 616 *per* Wilson J.:

> "55. In the final analysis, I cannot find a cause that is in any way related to an identified defect. The cause was operator error. ***
>
> 58. *** The Plaintiff has failed to establish that the injuries were caused by negligent design. The Plaintiff has failed to establish on the balance of probabilities that the defendants could have avoided the result by making alternate design choices. The first Defendant was not negligent in the design. There is no liability on either Defendant. ***
>
> 62. Starting with the case of *McAlister (Donoghue) v. Stevenson*, [1932] A.C. 562 (U.K. H.L.) [§13.1.1] and through a number of cases to the present time the principles have been firmly established. The onus is on the Plaintiff to establish on a balance of probabilities that there was a design fault that caused the accident. ***
>
> 64. Bielby J. observed in *Baker v. Suzuki Motor Co.*, [1993] A.J. No. 605, [1993] 8 W.W.R. 1 (Alta. Q.B.):
>
> > In Canada, the law does not impose strict liability on manufacturers of goods, so that they are liable for all injuries caused by those goods, no matter what the circumstances. As Finch, J. states in *Stiles v. Honda*, and unreported decision of the B.C.S.C. dated 4 January 1992, at p 24, 'the law does not require a manufacturer to produce articles which are accident proof, or incapable of doing harm. The manufacturer is not an 'insurer' of anyone who suffers injury while using, or misusing, the product.' [§19.1]
>
> 65. Thus, in this case I do not get to the point of reviewing alleged design error or failure to warn. The design error that seems to be targeted by the Plaintiff are:

1. *Similar caps used on water tank and gasoline tank.* The answer is that the machine was not supplied with those caps. The machine was then in the hands of the City for years.

2. *Hot water tank adjacent to gasoline tank.* The answer is that this was not a cause of the explosion. To say that the gasoline tank could have been located somewhere else is to use hindsight. But it does not matter, that was not the cause.

3. *Similar tanks adjacent to one another.* The answer is that the tanks, while they are of the same shape, are very different in size and appearance. Furthermore, the operator recognized them both on the day in question as being different, and as being on the one hand gasoline and on the other, water.

4. *Warning signs.* I accept that there were "Gasoline" warning signs on the gasoline tank, that the operator knew the difference and the danger of introducing hot water into the gasoline. ***

67. The danger of the event that occurred here was not reasonably foreseeable by the Defendants. There was no duty to warn beyond the warnings that had been given and I note that the labelling in this case was done by the City, not by the Defendants."]

1. Comparative Blameworthiness

16. The appellants argue that the Court of Appeal erred in suggesting that "comparative blameworthiness" is a necessary component of the causation analysis. The suggestion attributed to the Court of Appeal is that a court must approach causation not simply by asking whether the defendant's negligent act caused the loss, but by looking globally at all possible causes.

17. It is true that the trial judgment contains some passages that suggest that the carelessness of Mr. Hanke automatically absolves the respondent manufacturer and distributor of liability. That is not the case. An example, put to us in oral argument, illustrates the point. If it is industry standard to design an iron with an automatic shut off switch, and an iron is manufactured without such a switch, the manufacturer of the iron is not absolved of liability merely because the plaintiff was careless in leaving the iron on, resulting in a fire and injuries to the plaintiff. However, I am satisfied that the trial judge found not only that Mr. Hanke's carelessness was responsible for his injuries, but also that the alleged design defects were not responsible for Mr. Hanke's injuries. For example, the trial judge noted that "the accident was caused by operator error and had nothing to do with the design or manufacture of the machine" (para. 56). In light of this finding there was no need for the trial judge to engage in a contributory negligence analysis.

2. The Test for Causation

18. The Court of Appeal found, correctly, that the trial judge had applied a "but for" test in determining causation, stating, "the thrust of the reasoning is that 'but for' the Appellant putting or leaving the hose in the gasoline tank, the explosion would not have occurred" (para. 12). Referring to the observation in *Athey v. Leonati*, [1996] 3 S.C.R. 458 (S.C.C.), at para. 15, that the "but for" test "is unworkable in some circumstances", the Court of Appeal concluded that this was such a case and that the trial judge should have used a "material contribution" test instead of the "but for" test (para. 14) [§16.2.1].

19. The Court of Appeal erred in suggesting that, where there is more than one potential cause of an injury, the "material contribution" test must be used. To accept this conclusion is to do away with the "but for" test altogether, given that there is more than one potential cause in virtually all litigated cases of negligence. If the Court of Appeal's reasons in this regard are endorsed, the only conclusion that could be drawn is that the default test for cause-in-fact is now the material contribution test. This is inconsistent with this Court's judgments in *Snell v. Farrell*, [1990] 2 S.C.R. 311 (S.C.C.), *Athey v. Leonati*, at para. 14, *Walker Estate v. York-Finch General Hospital*, [2001] 1 S.C.R. 647, 2001 SCC 23 (S.C.C.), at paras. 87-88, and *Blackwater v. Plint*, [2005] 3 S.C.R. 3, 2005 SCC 58 (S.C.C.), at para. 78 [§19.7.2].

20. Much judicial and academic ink has been spilled over the proper test for causation in cases of negligence. It is neither necessary nor helpful to catalogue the various debates. It suffices at this juncture to simply assert the general principles that emerge from the cases.

21. First, the basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned, as permitted by statute [**§18.2.2**].

22. This fundamental rule has never been displaced and remains the primary test for causation in negligence actions. As stated in *Athey v. Leonati*, at para. 14, *per* Major J., "[t]he general, but not conclusive, test for causation is the 'but for' test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant." Similarly, as I noted in *Blackwater v. Plint*, at para. 78, "[t]he rules of causation consider generally whether 'but for' the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities."

23. The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone": *Snell v. Farrell*, at p. 327, *per* Sopinka J. ***

29. In this case, the Court of Appeal erred in failing to recognize that the basic test for causation remains the "but for" test. It further erred in applying the material contribution test in circumstances where its use was neither necessary nor justified.

C. Conclusion

30. I would allow the appeal, set aside the order of the Court of Appeal and restore the trial judgment, with costs throughout.

REFLECTION:

- *Did the considerations raised in terms of reasonable foreseeability affect the issue of whether a duty of care was owed when the machine was being designed, or whether a duty was breached in the way it was designed?*
- *Did the trial judge ask the correct 'but for' causation question? Did the judge apply the correct 'but for' test?*
- *Does Prof. Fleming's example of a fire ignited in a wastepaper basket, discussed in Athey v. Leonati, [17] (**§16.2.1**), shed light the plausible but-for causes of Hanke's injuries?*
- *Read Prof. Solum's Legal Theory Lexicon blog on causation.[526] Was the alleged defective design of the ice-resurfacing machine a necessary cause of Hanke's injuries? Was the design a sufficient cause? What is the appropriate counterfactual scenario to help understand whether the defendants were a but-for cause of Hanke's injuries?*

16.1.2 Clements v. Clements [2012] SCC 32

Supreme Court of Canada – 2012 SCC 32

✗REF: §16.2.3

MCLACHLIN C.J.C. (DESCHAMPS, FISH, ABELLA, CROMWELL, MOLDAVER, KARAKATSANIS JJ. concurring):

1. The parties to this appeal, Mr. and Mrs. Clements, were motor bike enthusiasts. August 7th, 2004, found them en route from their home in Prince George, British Columbia, to visit their daughter in Kananaskis, Alberta. The weather was wet. Mr. Clements was driving the bike and Mrs. Clements was riding behind on the passenger seat. The bike was about 100 pounds overloaded. Unbeknownst to Mr. Clements, a nail had punctured the bike's rear tire. Though Mr. Clements was travelling in a 100 km/h zone, he accelerated to at least 120 km/h in order to pass a car. As he crossed the centre line to commence the passing manoeuvre, the nail fell out, the rear tire deflated, and the bike began to wobble. Mr. Clements was unable to bring the bike under control and it crashed, throwing Mrs. Clements off. Mrs. Clements suffered a severe traumatic brain injury. She now sues Mr. Clements, claiming that her injury was caused by his negligence in the

[526] L. Solum, "Legal Theory Lexicon: Causation" Legal Theory Blog (Jun 27, 2021).

operation of the bike.

2. Mr. Clements' negligence in driving an overloaded bike too fast is not disputed. The only issue is whether his negligence *caused* Mrs. Clements' injury. Mr. Clements called an expert witness, Mr. MacInnis, who testified that the probable cause of the accident was the tire puncture and deflation, and that the accident would have happened even without the negligent acts of Mr. Clements.

3. The trial judge rejected this conclusion, and found that Mr. Clements' negligence in fact *contributed to* Mrs. Clements' injury. However, he held that the plaintiff "through no fault of her own is unable to prove that 'but for' the defendant's breaches, she would not have been injured", due to the limitations of the scientific reconstruction evidence (2009 BCSC 112 (B.C. S.C.), at para. 66). The trial judge went on to hold that in view of this impossibility of precise proof of the amount each factor contributed to the injury, "but for" causation should be dispensed with and a "material contribution" test applied. He found Mr. Clements liable on this basis.

4. The British Columbia Court of Appeal, *per* Frankel J.A., set aside the judgment against Mr. Clements on the basis that "but for" causation had not been proved and the material contribution test did not apply (2010 BCCA 581, 12 B.C.L.R. (5th) 310 (B.C. C.A.)).

5. The legal issue is whether the usual "but for" test for causation in a negligence action applies, as the Court of Appeal held, or whether a material contribution approach suffices, as the trial judge held. For the reasons that follow, I conclude that a material contribution test was not applicable in this case. I would return the matter to the trial judge to be dealt with on the correct basis of "but for" causation. ***

Causation in the Law of Negligence: The Basic Rule of "But For" Causation

6. On its own, proof by an injured plaintiff that a defendant was negligent does not make that defendant liable for the loss. The plaintiff must also establish that the defendant's negligence (breach of the standard of care) *caused* the injury. That link is causation.

7. Recovery in negligence presupposes a relationship between the plaintiff and defendant based on the existence of a duty of care—a defendant who is at fault and a plaintiff who has been injured by that fault. If the defendant breaches this duty and thereby causes injury to the plaintiff, the law "corrects" the deficiency in the relationship by requiring the defendant to compensate the plaintiff for the injury suffered. This basis for recovery, sometimes referred to as "corrective justice", assigns liability when the plaintiff and defendant are linked in a correlative relationship of doer and sufferer of the same harm: E. J. Weinrib, *The Idea of Private Law* (1995), at p. 156.

8. The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was *necessary* to bring about the injury—in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.

9. The "but for" causation test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendant's negligence made to the injury. See *Wilsher v. Essex Area Health Authority*, [1988] A.C. 1074 (U.K. H.L.), at p. 1090, *per* Lord Bridge; *Snell v. Farrell*, [1990] 2 S.C.R. 311 (S.C.C.).

10. A common sense inference of "but for" causation from proof of negligence usually flows without difficulty. Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant's negligence probably caused the loss. ***

11. Where "but for" causation is established by inference only, it is open to the defendant to argue or call evidence that the accident would have happened without the defendant's negligence, i.e. that the negligence was not a necessary cause of the injury, which was, in any event, inevitable. As Sopinka J. put it in *Snell*, at p. 330:

> The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced. *If some evidence to the contrary is adduced by the defendant, the trial judge is entitled to take account of Lord Mansfield's famous precept [that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted"* (*Blatch v. Archer* (1774), 1 Cowp. 63, 98 E.R. 969, at p. 970)]. This is, I believe, what Lord Bridge had in mind in *Wilsher* when he referred to a "robust and pragmatic approach to the … facts" (p. 569). [Emphasis added.]

12. In some cases, an injury—the loss for which the plaintiff claims compensation—may flow from a number of different negligent acts committed by different actors, each of which is a necessary or "but for" cause of the injury. In such cases, the defendants are said to be jointly and severally liable [§18.2.3]. The judge or jury then apportions liability according to the degree of fault of each defendant pursuant to contributory negligence legislation.

13. To recap, the basic rule of recovery for negligence is that the plaintiff must establish on a balance of probabilities that the defendant caused the plaintiff's injury on the "but for" test. This is a factual determination. Exceptionally, however, courts have accepted that a plaintiff may be able to recover on the basis of "material contribution to risk of injury", without showing factual "but for" causation. As will be discussed in more detail below [§16.2.3], this can occur in cases where it is impossible to determine which of a number of negligent acts by multiple actors in fact caused the injury, but it is established that one or more of them did in fact cause it. In these cases, the goals of tort law and the underlying theory of corrective justice require that the defendant not be permitted to escape liability by pointing the finger at another wrongdoer. Courts have therefore held the defendant liable on the basis that he materially contributed to the risk of the injury. ***

Summary

46. The foregoing discussion leads me to the following conclusions as to the present state of the law in Canada:

> (1) As a general rule, a plaintiff cannot succeed unless she shows as a matter of fact that she would not have suffered the loss "but for" the negligent act or acts of the defendant. A trial judge is to take a robust and pragmatic approach to determining if a plaintiff has established that the defendant's negligence caused her loss. Scientific proof of causation is not required.
>
> (2) Exceptionally, a plaintiff may succeed by showing that the defendant's conduct materially contributed to risk of the plaintiff's injury, where (a) the plaintiff has established that her loss would not have occurred "but for" the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and (b) the plaintiff, through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the necessary or "but for" cause of her injury, because each can point to one another as the possible "but for" cause of the injury, defeating a finding of causation on a balance of probabilities against anyone. ***

Application ***

47. The trial judge made two errors.

48. The first error was to insist on scientific reconstruction evidence as a necessary condition of finding "but for" causation. The trial judge stated, at para. 66 that

> … the plaintiff through no fault of her own is unable to prove that "but for" the defendant's breaches, she would not have been injured. This is because after the fact, it is not possible through accident reconstruction modeling to determine at what combination of lower speed and lesser weight recovery from the weave instability would have been practicable.

49. As discussed above, the cases consistently hold that scientific precision is not necessary to a conclusion that "but for" causation is established on a balance of probabilities. It follows that the trial judge erred in

insisting on scientific precision in the evidence as a condition of finding "but for" causation.

50. The trial judge's second error was to apply a material contribution to risk test. The special conditions that permit resort to a material contribution approach were not present in this case. This is not a case where we know that the loss would not have occurred "but for" the negligence of two or more possible tortfeasors, but the plaintiff cannot establish on a balance of probabilities which negligent actor or actors caused the injury. This is a simple single-defendant case: the only issue was whether "but for" the defendant's negligent conduct, the injury would have been sustained.

51. The judge accepted evidence to the effect that overloading would have increased instability in the event of a weave caused by tire deflation (para. 41). He also noted expert evidence to the effect that instability due to tire deflation increases with speed and that it was impossible to predict without tests whether the capsize would have occurred at a lower speed (para. 42). However, the trial judge rejected the evidence of the expert witness, Mr. MacInnis, that the accident would have happened even if the defendant had not negligently overloaded his bike and driven too fast (para. 62). ***

52. Having rejected the defendant's expert evidence that the accident would have happened regardless of the excess speed and excess weight, the judge was left with the fact that while there was no scientific proof one way or the other, "[o]rdinary common sense" supported the causal relationship between the injury and the excessive speed and weight (paras. 63-64). ***

53. We cannot be certain what the trial judge would have concluded had he not made the errors I earlier described. All that can be said is that the parties did not receive a trial based on correct legal principles. In my view, the appropriate remedy in these circumstances is an order for a new trial. ***

LEBEL J. (dissenting with ROTHSTEIN J.):

55. I have read the Chief Justice's reasons. I agree with the substance of her analysis of the law of causation and the nature of the "but for" test. But, in my respectful opinion, there is no basis in fact and law for ordering a new trial. ***

56. The key finding of fact made by the trial judge was that the plaintiff had not proven causation on the basis of the "but for" test. The trial judge specifically stated, at para. 66, that the plaintiff had been "unable to prove that 'but for' the defendant's breaches, she would not have been injured" (2009 BCSC 112). Given this finding, it would be exceedingly difficult to draw a common sense inference that those breaches caused the accident. Such inferences cannot be pulled out of thin air at the whim of the trier of fact. They must have a reliable factual foundation. ***

62. In this appeal, I am unable to find any basis in the trial judge's judgment for inferring that the overloading of the motorcycle and excessive speed could have been the "cause" of the accident as that term is understood in the context of the "but for" test. Nor is this a case in which it would be appropriate to send the matter back for a new trial.

63. For those reasons, I would dismiss the appeal with costs.

REFLECTION:

- *What does McLachlin C.J. mean in saying that causation is determined by a robust, pragmatic, common sense inquiry? Why should the judicial inquiry into causation not depend upon scientific proof of cause and effect?*[527]
- *Prof. Knutsen argues that what is really going on in this case is that "Mrs. Clements is only suing Mr. Clements in a friendly lawsuit to trigger his liability insurance. She must prove he is at fault and that fault caused her some harm. Mr. Clements' insurer defends Mr. Clements to protect the insurer's financial interest. Mrs. Clements is tragically severely brain injured and likely has significant compensatory needs. … Tort law's function here is fault-based gatekeeper of insurance-funded compensation. If Mrs. Clements is unsuccessful in proving her husband's faulty conduct caused her some harm, she receives no compensation from his liability*

[527] See *Hemmings v. Peng*, 2024 ONCA 318, [61]-[65].

insurance. To where, then, does she turn?"[528] In this context, is the negligence element of but-for causation an appropriate limit on tort liability? Is fault an important criterion of tort liability?

16.1.3 Hill v. Hamilton-Wentworth Police Services Board [2007] SCC 41

✗REF: §13.4.2.2, §14.1.3.3, §14.2.5.3, §15.2.1

MCLACHLIN C.J.C. (BINNIE, LEBEL, DESCHAMPS, FISH, ABELLA JJ. concurring): ***

Causal Connection

93. Recovery for negligence requires a causal connection between the breach of the standard of care and the compensable damage suffered. Negligent police investigation may cause or contribute to wrongful conviction and imprisonment, fulfilling the legal requirement of causal connection on a balance of probabilities. The starting point is the usual "but for" test. If, on a balance of probabilities, the compensable damage would not have occurred but for the negligence on the part of the police, then the causation requirement is met.

94. Cases of negligent investigation often will involve multiple causes. Where the injury would not have been suffered "but for" the negligent police investigation the causation requirement will be met even if other causes contributed to the injury as well. On the other hand, if the contributions of others to the injury are so significant that the same damage would have been sustained even if the police had investigated responsibly, causation will not be established. It follows that the police will not necessarily be absolved of responsibility just because another person, such as a prosecutor, lawyer or judge, may have contributed to a wrongful conviction causing compensable damage. ***

REFLECTION:

- *The Ontario Court of Appeal in Sacks v. Ross, 2017 ONCA 773, [45], commented that "Very few fact situations demonstrate the causal clarity of a game of billiards in which the combinations of balls striking balls can be easily replicated. The closest equivalent would be a simple case involving a single defendant who did something in breach of the standard of care that physically hurt the defendant, where the "but for" test is relatively easy to apply. …"[529] Was the casual enquiry in Hill a simple case?*

[528] E.S. Knutsen, "Causal Draws and Causal Inferences: A Solution to *Clements v. Clements* (and Other Causation Cases)" (2011) 39 Advocates Quarterly 241, 255-256.

[529] The Ontario Court of Appeal continued:

> "46. Things are more complicated where the complaint is not about something the defendant did, but about something the defendant failed to do in breach of the standard of care. When what is in issue is not the defendant's act, but an omission, the trier of fact is required to attend to the fact situation as it existed in reality the moment before the defendant's breach of the standard of care, and then to imagine that the defendant took the action the standard of care obliged her to take, in order to determine whether her doing so would have prevented or reduced the injury. Even though this exercise is bounded significantly by the actual facts, it counts as "factual" because the task is to consider how the events would actually have unfolded had the defendant taken the action she was obliged to take.
>
> 47. Regardless of whether the defendant's breach of the standard of care is an act or an omission, the trier of fact's cognitive process in determining causation has three basic steps. The first is to determine what likely happened in actuality. The second is to consider what would likely have happened had the defendant not breached the standard of care. The third step is to allocate fault among the negligent defendants.
>
> 48. There are two possible outcomes to the trier of fact's imaginative reconstruction of reality at the second step. On the one hand, if the trier of fact draws the inference from the evidence that the plaintiff would likely have been injured in any event, regardless of what the defendant did or failed to do in breach of the standard of care, then the defendant did not cause the injury. On the other hand, if the trier of fact infers from the evidence that the plaintiff would not likely have been injured without the defendant's act or failure to act, then the "but for" test for causation is satisfied: but for the defendant's act or omission, the plaintiff would not have been injured. The defendant's fault, which justifies liability, has been established."

16.1.4 Powell v. University Hospitals Sussex [2023] EWHC 736 (KB)

✗REF: §14.1.3.2, §14.2.5.2, §18.1.1.2, §19.4.3.1

DEXTER DIAS KC: ***

5. *** Mrs Powell says that if she was advised as she should have been about the risks and limitations of the [surgical] procedures Mr Chauhan offered her, and if she were informed of a reasonable alternative treatment, what is called "first stage procedure" (the removal of the implant), she would have taken this option, and that would have eradicated any infection, and her leg would not have been lost.

6. Therefore, two issues sharply arise for the court's determination: informed consent and causation. The onus rests on Mrs Powell to prove each of these issues to the requisite civil standard of a balance of probabilities. If she fails on either, her action fails. If she succeeds, parties have agreed the quantum of damages at £485,000. Thus, this is a liability-only trial. ***

Causation: "but for" test

23. Causation has been a frequently recurring and "troublesome" problem for the courts (*Cork v. Kirby Maclean Ltd* [1952] 2 All ER 402 (CA) at 406H, per Denning LJ (as then was)). In this case the applicable test is the simple "but for" test. It was stated in terms of medical negligence in *Barnett v. Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428 (QBD). In that case, a man went to a hospital complaining of severe stomach pain. He was turned away by the doctor without examination. He later died of arsenic poisoning. While the defendant was in breach of breach of duty for not examining him, he would have died anyway due to the arsenic. He did not die but for the breach—the breach did not "cause" the injury. In *Cork v. Kirby*, Denning LJ put it this way:

> "If you can say that the damage would not have happened but for a particular fault, then that fault is the cause of the damage; but if you can say if it would have happened just the same, fault or no fault, the fault is not the cause of the damage." (407B)

24. In some cases, this parsimonious and succinctly expressed test is too restrictive (*Fairchild v. Glenhaven Funeral Services Ltd* [2002] UKHL 22—especially in respect of mesothelioma claims following exposure to asbestos dust or fibres, where materially increasing the risk of injury becomes relevant [**§16.2**]). Other times, this test is too expansive (see Lord Bingham's *SS Titanic* example in *Chester* [*v. Afshar* [2004] UKHL 41] at [8]).[530] But here parties agree the but for test is precisely the right one. ***

Issues ***

33. *** [T]he defendant accepts that it was mandatory (a) to advise Mrs Powell as at 28 January that without removing the implant the DAIR procedure[531] was unlikely to eradicate infection in her knee and (b) there was a greater chance of eradication if she underwent first stage procedure.[532] ***

35. *** [I]t is accepted that Mr Chauhan was in breach of his duty of care. The question logically moves onto *** the causation question of what Mrs Powell would have done if she had been informed, advised and consented as she should have been. ***

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[530] Lord Bingham: "It is now, I think, generally accepted that the 'but for' test does not provide a comprehensive or exclusive test of causation in the law of tort. Sometimes, if rarely, it yields too restrictive an answer, as in *Fairchild v. Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32. More often, applied simply and mechanically, it gives too expansive an answer: 'But for your negligent misdelivery of my luggage, I should not have had to defer my passage to New York and embark on *SS Titanic*'. But, in the ordinary run of cases, satisfying the "but for" test is a necessary if not a sufficient condition of establishing causation. …"

[531] Para. 13: "**DAIR:** An acronym. A way of treating an infected wound. **D**ebridement: treating wound by cleaning out and removing non-viable (necrotic) tissue. **A**ntibiotics: targeted at bacterial organisms. **I**rrigation: washing out wound. **R**etention: retaining the implant."

[532] Para. 13: "**First stage procedure:** removing the infected implant, washing out the joint, inserting spacer (cement, antibiotic-suffused)."

39. It should be noted that parties agree that the causation questions are critical. If the claimant proves that a responsible body of medical practitioners would have offered Mrs Powell first stage procedure, she must further prove that she *would* have chosen first stage procedure or her claim fails. Her claim would fail because (a) she would have chosen and consented to the procedure that actually took place (DAIR plus), and therefore (b) the chain of causation from any breach of duty in consenting is broken. Put another way: proper consenting would have made no difference to outcome—in Denning LJ's terms, it would have happened just the same. ***

What the claimant would have done if appropriately advised ***

78. This causation question turns on what Mrs Powell would have done if she had been properly *informed* about the reasonable alternative treatments open to her as at 28 January and properly *advised* by Mr Chauhan about what he believed would give her the best outcome. ***

79. Mr Chauhan only ever presented her with one possible treatment, that being DAIR plus.[533] He believed as at 28 January 2014 that was the best surgical treatment for her. Thus, I have no doubt if he had laid out the two reasonable alternative treatments, he would nevertheless have stuck to his guns and advised her that DAIR plus was best for her. That obvious conclusion is reinforced by his trial testimony that if he had undertaken that exercise, he would have advised her to opt for DAIR plus and he to this day believes it was the "correct treatment".

80. One must also consider the evidence Mrs Powell gave during the course of her own testimony. Inevitably, this critical question was canvassed while she was in the witness box. She gave two material answers about the issue. I set them both out.

> **(1) Answer 1:** She was asked by her counsel what she would have done if Mr Chauhan had presented her with the two alternatives of first stage procedure and DAIR plus. She said, "If I had been advised about those things I would have thought: if the implant had been removed I would have more chance of the infection being totally eradicated. With a two-stage procedure I'd open myself up to more risk. I wouldn't know how I'd react."
>
> **(2) Answer 2:** She was given an opportunity by the court to clarify her answer. Once more, she was asked what she would have done if Mr Chauhan had presented the two choices of first stage procedure and DAIR plus prior to the procedure on 28 January. She said that if Mr Chauhan had said, "Look, Anne, I think the best thing to do "this" (being one of the two treatment alternatives)" her response was, "I think 50-50 I would have followed his advice".

81. To this we must add the attitude of Mrs Powell towards Mr Chauhan's advice. Their doctor-patient relationship stretched back many years.

> • In 2004 Mr Chauhan performed an arthroscopy on her knee. Her daughter was a nurse working in Mr Chauhan's clinic;
>
> • In April 2005 he performed a partial knee replacement on Mrs Powell;
>
> • In February 2006 she had total knee replacements, in fact on both knees, performed by Mr Chauhan;
>
> • In November 2013 he performed another replacement in the left knee.

82. Therefore, by the time we arrive at January 2014, Mr Chauhan had performed four surgical procedures on Mrs Powell. She had accepted his professional advice every time over that decade. She had not once gone against it. During that time, they developed doctor-patient relationship and she liked him. He called her Anne. She had, as she accepted, "built up a lot of trust" in him.

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[533] Para. 13: "**DAIR plus:** A convenient shorthand adopted during trial. It denotes performing a DAIR and then the surgeon deciding whether to remove the implant during the surgery itself once more information becomes available intra-operatively."

83. She said that she would in the past talk through Mr Chauhan's advice with her husband and at least some of her children, but as she put it, "generally" she would go with his advice. In fact, the historical record shows that at no previous point had she not followed his advice. Frankly, it is unsurprising that Mrs Powell gave the answers she did. The claimant's orthopaedic expert Mr Donnachie states that the decision about whether to choose a first stage procedure or a DAIR or DAIR plus is a very complex decision even for surgeons. This is supported by the existence of two schools of reasonable and responsible medical opinion on the question. Thus, it is completely understandable that Mrs Powell "wouldn't know what she would have done". Further, given that she has followed Mr Chauhan's advice uniformly and unreservedly up to January 2014 for a decade in multiple procedures, her answer of "50-50" following his advice is if anything an understatement of what would have been likely to have happened. When she turned her mind to it in the witness box and grappled with the respective risks of less of a chance of eradicating infection as against the risk of exposure to generic risk in what was likely to be two substantial surgical procedures, it is entirely predictable that she would not know what to do. ***

85. Of course, and I remind myself, Mrs Powell must prove on the balance of probabilities that she would have chosen first stage procedure instead of DAIR plus. ***

86. *** I find it improbable that Mrs Powell would have rejected her surgeon's advice to opt for DAIR plus and instead would have insisted on first stage procedure no matter what was found. What this comes to is that if the breach of duty had not occurred, and Mrs Powell had been informed properly about what her options were, it would not have made any difference to what actually happened (the result would have been just the same).

87. That is because I find that she has not proved on a balance of probabilities that she would have chosen first stage procedure. In fact, in my judgment, it is significantly more likely that she would have followed the advice of Mr Chauhan to have a second DAIR with the first stage procedure assessment proviso, even if she had been advised of the less than 50 per cent chance of infection eradication with DAIR and the greater chance with first stage procedure (eradication likely). That is because there are a number of other serious risks attending first stage procedure and second stage procedure and she would have been guided by Mr Chauhan about what was best for her.

88. Therefore, the second DAIR would have gone ahead with her consent and Mr Chauhan would have assessed during the course of the operation whether to perform first stage procedure. This is precisely what happened. On 28 January a second DAIR was performed under Mr Chauhan's supervision. Mr Chauhan did not find that first stage procedure was indicated as the knee cavity "generally was clean around the prosthesis". Thus the knee was washed out and then the wound closed with plastic surgery by Ms Nugent. I find that this is precisely what would have happened if Mrs Powell had been properly informed, advised and thus consented.

89. As such, I find that the breach of duty involving the 28 January procedure did not cause loss and damage. The necessary consequence is that the claim fails for lack of causal connection. ***

REFLECTION:

- *There was no dispute that Powell's doctor breached the duty of care he owed her by not fully informing his patient of her surgical options. Do you agree with the Court's conclusion that an absence of but-for causation—the plaintiff's failure to prove that if properly informed she would have opted for a different course of treatment—should bar her tort claim? Where does this leave Powell?*

16.1.5 Cross-references

- *Johansson v. General Motors of Canada Ltd* [2012] NSCA 120, [81]-[83], [127]: §19.1.2.
- *Adam v. Ledesma-Cadhit* [2021] ONCA 828, [55]-[63]: §19.1.3.
- *Salomon v. Matte-Thompson* [2019] SCC 14, [82]-[90]: §19.4.1.2.
- *Armstrong v. Ward* [2019] ONCA 963, [158]-[161]: §19.4.3.3.
- *Jane Doe v. Toronto Police Comm'rs* [1990] CanLII 6611 (ON Div Ct), [36]-[40]: §19.5.1.1.
- *Attorney General of Canada & Emil Anderson Maintenance Co. Ltd. v. Taylor* [2024] BCCA 156, [113]-[132]: §19.5.1.4.

- *Arndt v. Smith* [1997] CanLII 360 (SCC): §19.10.2.1.

16.1.6 Further material

- R.S. Brown, "Making Sense of Cause-in-Fact" in *Damages 2022* (Vancouver: CLEBC, 2022) 📺.
- *Causation in Tort III* (Vancouver: CLEBC, 2014) 📺.
- Law Pod UK Podcast, "Consent and Causation" (Feb 25, 2019) 🎧.
- A. Honoré & J. Gardner, "Causation in the Law" in E.N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Stanford University, 2010).
- M. Moore, "Causation in the Law" in E.N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Stanford University, 2019).
- J. Stapleton, "Unnecessary Causes" (2013) L Quarterly Rev 39.
- Note, "Rethinking Actual Causation in Tort Law" (2017) 130 Harv L Rev 2163.
- E. Bant & H. Cooney (eds), "Causation in the Law" (2022) 49 U Western Australia L Rev 1.
- S. Golru, "The Challenge of Proving Toxic Tort Causation: Genetic Markers as the Solution?" (2022) 49 U Western Australia L Rev 186.
- R. Halpern, "A Call for Change in How We Think about Causation in Tort" (Gluckstein Lawyers, 2021); Butter Torts: A Truly Canadian Legal Podcast, "Causation Simplified" (Sep 3, 2021) 🎧.
- R. Goldberg (ed), *Perspectives on Causation* (Oxford: Hart Publishing, 2011).

16.2 Material contribution to risk of damage

C. Suen, "Material Contribution: Bridging the Evidentiary Gap" LSE L Rev Blog (Sep 14, 2019)

To right a private wrong, causation is generally established between the tortfeasor's negligent act and claimant's injury. However, on occasion, the evidence will be such that a causal link is difficult or even impossible to prove by the traditional approach. Material contribution has emerged in tort law to attempt to impose liability where causation is hard to prove in the usual manner, or where applying traditional causation would lead to an undesirable outcome. *** […continue reading]

REFLECTION:

- *Does the material contribution to risk test employ a lower standard for establishing causation as compared to the but-for test? If so, in what circumstances is it fair to relieve plaintiffs of the ordinary burden of proof?*

16.2.1 Athey v. Leonati [1996] CanLII 183 (SCC)

Supreme Court of Canada – 1996 CanLII 183

✗**REF: §16.3.1, §17.2.4, §17.4.1**

MAJOR J. (FOR THE COURT):

1. The appellant suffered back injuries in two successive motor vehicle accidents, and soon after experienced a disc herniation during a mild stretching exercise. The herniation was caused by a combination of the injuries sustained in the two motor vehicle accidents and a pre-existing disposition. The issue in this appeal is whether the loss should be apportioned between tortious and non-tortious causes where both were necessary to create the injury.

2. The appellant, Jon Athey, was injured in two motor vehicle accidents, the first of which took place in February 1991 and the second in April 1991. Before the accidents, he worked as an autobody repairman and body shop manager at Budget Rent-A-Car. He was 43 years old, with a history of minor back problems since 1972.

3. In the first accident, the appellant's vehicle was demolished by front and rear end collisions. He was taken to the hospital, examined and released. Almost immediately, he began to suffer from pain and stiffness in his neck and back. Physiotherapy and chiropractic treatments were prescribed and he was on

the way to recovery when the second accident occurred.

4. In the second accident, a semitrailer truck crossed into his lane of traffic and hit his vehicle head-on. His immediate injuries did not appear to be severe. He did not lose consciousness and was able to walk from the wrecked vehicle. He continued to work full time at light tasks and managerial work but did not perform any duties involving heavy labour. The appellant continued his physiotherapy and chiropractic treatment. By the fall of 1991, his condition had improved and he was again on the road to recovery.

5. In light of the improvements in the appellant's condition, his doctor suggested that he try to resume his regular exercise routine. The appellant went to a health club where, while stretching as part of his warm-up, he felt a 'pop' in his back and immediately experienced a great deal of pain. He hobbled to the showers, dressed and returned home. By the next morning, he was unable to move. He was transported by ambulance to the hospital, where he remained for three weeks.

6. His condition was diagnosed as a disc herniation, which was ultimately treated by surgery (a discectomy) and more physiotherapy. The doctor described the result of the surgery as "good, but not excellent". Mr. Athey obtained alternative employment as a manager at another company, where he would not have heavy physical duties. The new job paid him less than the old.

7. *** The only issue was whether the disc herniation was caused by the injuries sustained in the accidents or whether it was attributable to the appellant's pre-existing back problems. ***

12. The respondents' position is that where a loss is created by tortious and non-tortious causes, it is possible to apportion the loss according to the degree of causation. This is contrary to well-established principles. It has long been established that a defendant is liable for any injuries caused or contributed to by his or her negligence. If the defendant's conduct is found to be a cause of the injury, the presence of other non-tortious contributing causes does not reduce the extent of the defendant's liability.

A. General principles

13. Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: *Snell v. Farrell*, [1990] 2 S.C.R. 311; *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.).

14. The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant: *Horsley v. MacLaren*, [1972] S.C.R. 441 [§13.3.2].

15. The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury: *Myers v. Peel (County) Board of Education*, [1981] 2 S.C.R. 21, *Bonnington Castings Ltd. v. Wardlaw*, [1956] 1 All E.R. 615 (H.L.), *McGhee v. National Coal Board*, *supra*. A contributing factor is material if it falls outside the *de minimis* range: *** *R. v. Pinske* (1988), 30 B.C.L.R. (2d) 114 (C.A.), affirmed [1989] 2 S.C.R. 979.

16. In *Snell v. Farrell*, [[1990] 2 S.C.R. 311], this Court recently confirmed that the plaintiff must prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision; as Lord Salmon stated in *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475 at 490 (H.L.), *** it is "essentially a practical question of fact which can best be answered by ordinary common sense". Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof.

17. It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the *sole cause* of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. To borrow an example from Professor Fleming (*The Law of Torts* (8th ed. 1992) at p. 193), a "fire ignited in a wastepaper basket is … caused not only by the dropping of a lighted match, but also by the presence of combustible material and oxygen, a failure of the cleaner to

empty the basket and so forth". As long as a defendant is *part* of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence. ***

19. The law does not excuse a defendant from liability merely because other causal factors for which he is not responsible also helped produce the harm ***. It is sufficient if the defendant's negligence was *a* cause of the harm ***.

20. This position is entrenched in our law and there is no reason at present to depart from it. If the law permitted apportionment between tortious causes and non-tortious causes, a plaintiff could recover 100 per cent of his or her loss only when the defendant's negligence was the *sole* cause of the injuries. Since most events are the result of a complex set of causes, there will frequently be non-tortious causes contributing to the injury. Defendants could frequently and easily identify non-tortious contributing causes, so plaintiffs would rarely receive full compensation even after proving that the defendant caused the injury. This would be contrary to established principles and the essential purpose of tort law, which is to restore the plaintiff to the position he or she would have enjoyed but for the negligence of the defendant.

B. Inapplicability of respondents' analogies

21. The respondents attempted to relate the present case to those where apportionment had been made. Consideration of the principles of tort law shows that none of the apportionment cases is analogous to this appeal. A review of the respondents' six analogies will show why apportionment was appropriate in those cases but not here.

(1) Multiple Tortious Causes

22. The respondents argued that apportionment between tortious and non-tortious causes should be permitted just as it is where multiple tortfeasors cause the injury. The two situations are not analogous. Apportionment between tortious causes is expressly permitted by provincial negligence statutes and is consistent with the general principles of tort law. The plaintiff is still fully compensated and is placed in the position he or she would have been in but for the negligence of the defendants. Each defendant remains fully liable to the plaintiff for the injury, since each was a cause of the injury. The legislation simply permits defendants to seek contribution and indemnity from one another, according to the degree of responsibility for the injury.

23. In the present case, the suggested apportionment is between tortious and non-tortious causes. Apportionment between tortious and non-tortious causes is contrary to the principles of tort law, because the defendant would escape full liability even though he or she caused or contributed to the plaintiff's entire injuries. The plaintiff would not be adequately compensated, since the plaintiff would not be placed in the position he or she would have been in absent the defendant's negligence.

(2) Divisible Injuries

24. The respondents submitted that apportionment is permitted where the injuries caused by two defendants are divisible (for example, one injuring the plaintiff's foot and the other the plaintiff's arm): Fleming, *supra*, at p. 201. Separation of distinct and divisible injuries is not truly apportionment; it is simply making each defendant liable only for the injury he or she has caused, according to the usual rule. The respondents are correct that separation is also permitted where some of the injuries have tortious causes and some of the injuries have non-tortious causes: Fleming, *supra*, at p. 202. Again, such cases merely recognize that the defendant is not liable for injuries which were not caused by his or her negligence.

25. In the present case, there is a single indivisible injury, the disc herniation, so division is neither possible nor appropriate. The disc herniation and its consequences are one injury, and any defendant found to have negligently caused or contributed to the injury will be fully liable for it.

(3) Adjustments for Contingencies

26. The respondents argued that the trial judge's assessment of probabilities in causation was similar to the assessment of probabilities routinely undertaken by courts in adjusting damages to reflect contingencies. This argument overlooks the fundamental distinction between the way in which courts deal with alleged past events and the way in which courts deal with potential future or hypothetical events.

27. Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood: *Mallett v. McMonagle*, [1970] A.C. 166 (H.L.), *Malec v. J.C. Hutton Proprietary Ltd.* (1990), 169 C.L.R. 638 (Aust. H.C.), *Janiak v. Ippolito*, [1985] 1 S.C.R. 146. For example, if there is a 30 per cent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 per cent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Schrump v. Koot* (1977), 18 O.R. (2d) 337 (C.A.), *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.).

28. By contrast, past events must be proven, and once proven they are treated as certainties. In a negligence action, the court must declare whether the defendant was negligent, and that conclusion cannot be couched in terms of probabilities. Likewise, the negligent conduct either was or was not a cause of the injury. The court must decide, on the available evidence, whether the thing alleged has been proven; if it has, it is accepted as a certainty ***. ***

30. In this case, the disc herniation occurred prior to trial. It was a past event, which cannot be addressed in terms of probabilities. The plaintiff has the burden of proving that the injuries sustained in the accidents caused or contributed to the disc herniation. Once the burden of proof is met, causation must be accepted as a certainty. ***

C. Application of Principles to Facts

39. A matter to be resolved is the identification of the competing causes. Some of the trial judge's comments suggest that the "Fitness World incident" was a possible cause of the herniation. The "Fitness World incident" was not a cause; it was the *effect*. It was the injury. Mere stretching alone was not sufficient to cause disc herniation in the absence of some latent disposition or previous injuries. There was no suggestion that it was negligent of the appellant to attempt to exercise or that he exercised in a negligent manner.

40. Some latent weakness spontaneously manifested itself during the stretching, and the issue is whether the weakness was because of the accidents or a pre-existing condition. The reasons of the trial judge show that she understood this. She referred to the appellant's poor spinal health, his history of back problems, and to the fact that there had been no herniation or injury to the disc prior to the accidents. The competing causes in this case were the injuries sustained in the accidents and a pre-existing disposition to back problems.

41. The applicable principles can be summarized as follows. If the injuries sustained in the motor vehicle accidents caused or contributed to the disc herniation, then the defendants are fully liable for the damages flowing from the herniation. The plaintiff must prove causation by meeting the "but for" or material contribution test. Future or hypothetical events can be factored into the calculation of damages according to degrees of probability, but causation of the injury must be determined to be proven or not proven. This has the following ramifications:

> 1. If the disc herniation would likely have occurred at the same time, without the injuries sustained in the accident, then causation is not proven.
>
> 2. If it was necessary to have *both* the accidents *and* the pre-existing back condition for the herniation to occur, then causation is proven, since the herniation would not have occurred but for the accidents. Even if the accidents played a minor role, the defendant would be fully liable because the accidents were still a *necessary* contributing cause.
>
> 3. If the accidents alone could have been a sufficient cause, and the pre-existing back condition

> alone could have been a sufficient cause, then it is unclear which was the cause-in-fact of the disc herniation. The trial judge must determine, on a balance of probabilities, whether the defendant's negligence materially contributed to the injury. ***

43. The findings of the trial judge indicate that it was necessary to have *both* the pre-existing condition *and* the injuries from the accidents to cause the disc herniation in this case. She made a positive finding that the accidents contributed to the injury, but that the injuries suffered in the two accidents were "not the sole cause" of the herniation. She expressly found that "the herniation was not unrelated to the accidents" and that the accidents "contributed to some degree" to the subsequent herniation. She concluded that the injuries in the accidents "played some causative role, albeit a minor one". These findings indicate that it was the combination of the pre-existing condition and the injuries sustained in the accidents which caused the herniation. Although the accidents played a lesser role than the pre-existing problems, the accidents were nevertheless a necessary ingredient in bringing about the herniation. ***

D. Conclusion

49. The trial judge erred in failing to hold the defendant fully liable for the disc herniation after finding that the defendant had materially contributed to it. Once it is proven that the defendant's negligence was a cause of the injury, there is no reduction of the award to reflect the existence of non-tortious background causes. ***

53. The appeal is allowed. Judgment is entered for the appellant for the full global amount of $221,516.78 plus interest and costs throughout.

REFLECTION:

- *Was the but-for test "unworkable" in this case?*
- *In holding that the accidents caused by the defendants were "a necessary ingredient in bringing about the herniation," how did the Court categorise this case in terms of the three ramifications listed at [41]? Did the Court ultimately apply the but-for test or the material contribution to risk test?*

16.2.2 Hanke v. Resurfice Corp. [2007] SCC 7

✗REF: §16.1.1

MCLACHLIN C.J.C. (FOR THE COURT): ***

23. The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone": *Snell v. Farrell*, at p. 327, *per* Sopinka J.

24. However, in special circumstances, the law has recognized exceptions to the basic "but for" test, and applied a "material contribution" test. Broadly speaking, the cases in which the "material contribution" test is properly applied involve two requirements.

25. First, it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test. The impossibility must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach. In those exceptional cases where these two requirements are satisfied, liability may be imposed, even though the "but for" test is not satisfied, because it would offend basic notions of fairness and justice to deny liability by applying a "but for" approach.

26. These two requirements are helpful in defining the situations in which an exception to the "but for" approach ought to be permitted. Without dealing exhaustively with the jurisprudence, a few examples may assist in demonstrating the twin principles just asserted.

27. One situation requiring an exception to the "but for" test is the situation where it is impossible to say which of two tortious sources caused the injury, as where two shots are carelessly fired at the victim, but it is impossible to say which shot injured him: *Lewis v. Cook*, [1951] S.C.R. 830 (S.C.C.). Provided that it is established that each of the defendants carelessly or negligently created an unreasonable risk of that type of injury that the plaintiff in fact suffered (i.e. carelessly or negligently fired a shot that could have caused the injury), a material contribution test may be appropriately applied.

28. A second situation requiring an exception to the "but for" test may be where it is impossible to prove what a particular person in the causal chain would have done had the defendant not committed a negligent act or omission, thus breaking the "but for" chain of causation. For example, although there was no need to rely on the "material contribution" test in *Walker Estate v. York-Finch General Hospital*, this Court indicated that it could be used where it was impossible to prove that the donor whose tainted blood infected the plaintiff would not have given blood if the defendant had properly warned him against donating blood. Once again, the impossibility of establishing causation and the element of injury-related risk created by the defendant are central. ***

REFLECTION:

- *What are the prerequisites to the application of the material contribution to risk test? Did they apply on the facts of this case?*

16.2.3 Clements v. Clements [2012] SCC 32

✗REF: §16.1.2

MCLACHLIN C.J.C. (DESCHAMPS, FISH, ABELLA, CROMWELL, MOLDAVER, KARAKATSANIS JJ. concurring): ***

Causation in the Law of Negligence: The Basic Rule of "But For" Causation ***

14. "But for" causation and liability on the basis of material contribution to risk are two different beasts. "But for" causation is a factual inquiry into what likely happened. The material contribution to risk test removes the requirement of "but for" causation and substitutes proof of material contribution to risk. As set out by Smith J.A. in *MacDonald v. Goertz*, 2009 BCCA 358, 275 B.C.A.C. 68 (B.C. C.A.), at para. 17,

> … "material contribution" does not signify a test of causation at all; rather it is a policy-driven rule of law designed to permit plaintiffs to recover in such cases despite their failure to prove causation. In such cases, plaintiffs are permitted to "jump the evidentiary gap": see "Lords a 'leaping evidentiary gaps", (2002) Torts L.J. 276, and "Cause-in-Fact and the Scope of Liability for Consequences", (2003) 119 L.Q.R. 388, both by Professor Jane Stapleton. That is because to deny liability "would offend basic notions of fairness and justice": *Hanke v. Resurfice Corp.*, para. 25.

15. While the cases and scholars have sometimes spoken of "material contribution to the injury" instead of "material contribution to risk", the latter is the more accurate formulation. As will become clearer when we discuss the cases, "material contribution" as a substitute for the usual requirement of "but for" causation only applies where it is impossible to say that a particular defendant's negligent act in fact caused the injury. It imposes liability not because the evidence establishes that the defendant's act caused the injury, but because the act contributed to the risk that injury would occur. ***

16. Elimination of proof of causation as an element of negligence is a "radical step that goes against the fundamental principle stated by Diplock L.J. in *Browning v. War Office*, [1962] 3 All E.R. 1089 (Eng. C.A.), at pp. 1094-95: '…[a] defendant in an action in negligence is not a wrongdoer at large; he is a wrongdoer only in respect of the damage which he actually causes to the plaintiff'": *Mooney v. British Columbia (Attorney General)*, 2004 BCCA 402, 202 B.C.A.C. 74 (B.C. C.A.), at para. 157, *per* Smith J.A., concurring in the result. For that reason, recourse to a material contribution to risk approach is necessarily rare, and justified only where it is required by fairness and conforms to the principles that ground recovery in tort.

The Material Contribution to Risk Approach

1. The Canadian Cases

17. The possibility of material contribution as an exceptional substitute for "but for" causation has arisen in a variety of contexts involving multiple tortfeasors.

18. One of the earliest cases on the issue is *Cook v. Lewis*, [1951] S.C.R. 830 (SCC). Three men were out hunting. Two of them fired shots, virtually simultaneously. One of the shots struck a fourth hunter, Mr. Lewis, who was injured and sued both defendants in negligence. On the evidence, it could not be established which defendant's gun had fired the shot that injured Mr. Lewis. Clearly, one of the men had caused Mr. Lewis' injury, and one had not. But which one? The evidence shed no light on this. The defendants contended that the plaintiff's action must be dismissed because he had not proved "but for" causation against either defendant, relying on the classic "point the finger at someone else" defence. Both defendants were found jointly and severally liable. The majority reasons in this Court spoke of reversing the onus in these circumstances, rather than material contribution to risk.

19. The Court in *Cook* relaxed the usual "but for" test for causation on the basis that fairness required this. It was "impossible" for the plaintiff to prove on a balance of probabilities that either man had injured him on the "but for" test; both defendants could say it was just as likely the other had caused Mr. Lewis' injury, precluding the plaintiff from discharging his burden against either. Only one of the defendants had *in fact* injured the plaintiff. But both defendants had breached their duty of care to Mr. Lewis and subjected him to unreasonable risk of the injury that in fact materialized. The plaintiff was the victim of negligent conduct "but for" which he would not have been injured. To deny him recovery, while allowing the negligent defendants to escape liability by pointing the finger at each other, would not have met the goals of negligence law of compensation, fairness and deterrence, in a manner consistent with corrective justice.

20. *Cook* was considered in *Snell*. The plaintiff in *Snell* had undergone surgery to remove a cataract. Bleeding occurred. When the bleeding cleared up nine months later, it was found that the plaintiff's optic nerve had atrophied, causing loss of sight in her right eye. Neither of the expert witnesses was able to state what caused the atrophy or when it had occurred. The trial judge, upheld by the Court of Appeal, did not apply the usual "but for" test, but applied a reverse onus test. This Court affirmed recovery, but on the basis of a robust and common sense application of the "but for" test. However, Sopinka J. suggested that had it been necessary and appropriate, a material contribution to risk approach might have been applicable ***. ***

28. *** [T]he Canadian Supreme Court jurisprudence on a material contribution approach to date may be summarized as follows. First, while accepting that it might be appropriate in "special circumstances", the Court has never in fact applied a material contribution to risk test. *Cook v. Lewis*, [1951] S.C.R. 830 was analyzed on a reverse onus basis. *Snell v. Farrell*, [1990] 2 S.C.R. 311, *Athey v. Leonati*, [1996] 3 S.C.R. 458, *Walker Estate v. York Finch General Hospital*, 2001 SCC 23, [2001] 1 S.C.R. 647 and *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333 were all resolved on a robust and common sense application of the "but for" test of causation. Nevertheless, the Court has acknowledged the difficulties of proof that multi-tortfeasor cases may pose—difficulties which in some cases may justify relaxing the requirement of "but for" causation and finding liability on a material contribution to risk approach.

2. The United Kingdom Cases

29. The courts of the United Kingdom have adopted a material contribution to risk approach to the problem of toxic agent cases involving negligence by more than one employer: *Fairchild v. Glenhaven Funeral Services Ltd.*, [2002] UKHL 22, [2002] 3 All E.R. 305 (U.K. H.L.); and *Barker v. Corus (UK) Plc*, [2006] UKHL 20, [2006] 2 A.C. 572 (U.K. H.L.). Recently, the United Kingdom Supreme Court decided that a material contribution to risk approach can apply as well when a single negligent employer has exposed a plaintiff to asbestos: see *Sienkiewicz v. Greif (UK) Ltd*, [2011] UKSC 10, [2011] 2 All E.R. 857 (Australia S.C.). ***

30. The plaintiffs in *Fairchild* and *Barker* had developed diseases related to toxic workplace agents, but were unable to prove which of several possible sources of the agents had caused their disease. In both cases, the plaintiffs had been exposed to asbestos at different times when working for different employers. A single fibre of asbestos could have caused the disease. As all the employers had exposed the employee

to the same risk, it was impossible to say which employer's negligence in fact led to the disease. In each case, the defendants pointed the finger at the negligence of others. And in each case, the court rejected this defence and found liability on the basis of material contribution. ***

32. Viewed generally, the toxic agent cases up to *Sienkiewicz* hold that resort may be had to the concept of material contribution to the risk of injury where it is plain that any or all of a number of tortfeasers could have caused the plaintiff's injury, but it is impossible to say that any particular one in fact did so. In this situation, fairness and policy support relaxation of the "but for" test. In each case, the plaintiff would not have contracted the disease, "but for" the negligence of the defendants as a group. As I will discuss further below, to allow the defendants to each escape liability by pointing the finger at one another would have been at odds with the fairness, deterrence, and corrective justice objectives of the law of negligence.

3. When Is a Material Contribution to Risk Approach Available? ***

34. In *Resurfice*, this Court summarized the cases as holding that a material contribution approach may be appropriate where it is "impossible" for the plaintiff to prove causation on the "but for" test and where it is clear that the defendant breached its duty of care (acted negligently) in a way that exposed the plaintiff to an unreasonable risk of injury. As a summary of the jurisprudence, this is accurate. However, as a test it is incomplete. A clear picture of when "but for" causation can be replaced by material contribution to risk requires further exploration of what is meant by "impossible to prove" (*Resurfice*, at para. 28) and what substratum of negligence must be shown. ***

(a) "Impossibility"

35. The idea running through the jurisprudence that to apply the material contribution approach it must be "impossible" for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test has produced uncertainty in this case and elsewhere. ***

38. "Scientific impossibility", relied on by the trial judge in this case, is merely a variant of factual impossibility and attracts the same objections. In many cases of causal uncertainty, it is conceivable that with better scientific evidence, causation could be clarified. Scientific uncertainty was referred to in *Resurfice* in the course of explaining the difficulties that have arisen in the cases. However, this should not be read as ousting the "but for" test for causation in negligence actions. The law of negligence has never required scientific proof of causation; to repeat yet again, common sense inferences from the facts may suffice. If scientific evidence of causation is not required, as *Snell* makes plain, it is difficult to see how its absence can be raised as a basis for ousting the usual "but for" test.

39. What then are the cases referring to when they say that it must be "impossible" to prove "but for" causation as a precondition to a material contribution to risk approach? The answer emerges from the facts of the cases that have adopted such an approach. Typically, there are a number of tortfeasors. All are at fault, and one or more has in fact caused the plaintiff's injury. The plaintiff would not have been injured "but for" their negligence, viewed globally. However, because each can point the finger at the other, it is impossible for the plaintiff to show on a balance of probabilities that any one of them in fact caused her injury. This is the impossibility of which *Cook* and the multiple employer mesothelioma cases speak.

(b) Substratum of Negligence Involving Multiple Possible Tortfeasors

40. The cases that have dispensed with the usual requirement of "but for" causation in favour of a less onerous material contribution to risk approach are generally cases where, "but for" the negligent act of one or more of the defendants, the plaintiff would not have been injured. This excludes recovery where the injury "may very well be due to factors unconnected to the defendant and not the fault of anyone": *Snell*, *per* Sopinka J., at p. 327. The plaintiff effectively has established that the "but for" test, viewed globally, has been met. It is only when it is applied separately to each defendant that the "but for" test breaks down because it cannot be shown which of several negligent defendants actually launched the event that led to the injury. The plaintiff thus has shown negligence and a relationship of duty owed by each defendant, but faces failure on the "but for" test because it is "impossible", in the sense just discussed, to show which act or acts were injurious. In such cases, each defendant who has contributed to the risk of the injury that occurred can be faulted.

41. In these circumstances, permitting the plaintiff to succeed on a material contribution to risk basis meets the underlying goals of the law of negligence. Compensation for injury is achieved. Fairness is satisfied; the plaintiff has suffered a loss due to negligence, so it is fair that she turns to tort law for compensation. Further, each defendant failed to act with the care necessary to avoid potentially causing the plaintiff's loss, and each may well have in fact caused the plaintiff's loss. Deterrence is also furthered; potential tortfeasors will know that they cannot escape liability by pointing the finger at others. And these goals are furthered in a manner consistent with corrective justice; the deficit in the relationship between the plaintiff and the defendants viewed as a group that would exist if the plaintiff were denied recovery is corrected. The plaintiff has shown that she is in a correlative relationship of doer and sufferer of the same harm with the group of defendants as a whole, if not necessarily with each individual defendant. ***

Summary

46. The foregoing discussion leads me to the following conclusions as to the present state of the law in Canada:

> (1) As a general rule, a plaintiff cannot succeed unless she shows as a matter of fact that she would not have suffered the loss "but for" the negligent act or acts of the defendant. A trial judge is to take a robust and pragmatic approach to determining if a plaintiff has established that the defendant's negligence caused her loss. Scientific proof of causation is not required.
>
> (2) Exceptionally, a plaintiff may succeed by showing that the defendant's conduct materially contributed to risk of the plaintiff's injury, where (a) the plaintiff has established that her loss would not have occurred "but for" the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and (b) the plaintiff, through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the necessary or "but for" cause of her injury, because each can point to one another as the possible "but for" cause of the injury, defeating a finding of causation on a balance of probabilities against anyone. ***

REFLECTION:

- *What theories of tort law (§11) does the material contribution to risk test tend to demonstrate? What tort theories might it undermine?*
- *In light of the Court's reasoning, is the rule in Cook v. Lewis, whereby causation was analysed on a reverse onus of proof basis, still good law in Canada?*

16.2.4 Jaipur Golden Gas Victims Ass'n v. Union of India [2009] INDLHC 4354

Delhi High Court – [2009] INDLHC 4354

✗**REF: §17.3.1, §19.5.2.4, §22.1.4, §22.2.1**

MANMOHAN J.: ***

2. Ms. Aruna Mehta, learned counsel for petitioner-Association, stated that on 4th April, 2004 at about 10.30 p.m. there was a huge fire in the godown [warehouse] of respondent no. 5 at Mitra Wali Gali, Roshnara Road, Delhi. She stated that in the said godown, respondent no. 5 had stored a consignment of rodent killing pesticides which contained Aluminum Phosphate and Zinc Phosphate. She further stated that the officials of respondent no. 5 along with fire brigade officials poured water over the fire in a bid to extinguish it. According to Ms. Mehta, due to pouring of water, Aluminum Phosphate and Zinc Phosphate reacted with water resulting in emission of highly poisonous Phosphine gas which continued to emit till 7th April, 2004. She stated that due to inhalation of the aforesaid gas, about thirty five persons living in the neighbourhood of respondent no. 5's godown were taken unwell and were rushed to the hospital with symptoms of breathlessness, pain in chest, vomiting, diarrhea, nausea and stomach ache. While most of sick persons were admitted in Hindu Rao Hospital for a period of a few days, a 19 years old boy, namely, Akash died in the morning of 7th April, 2004.

3. According to Ms. Mehta, subsequently three more persons, namely, Babu Lal (40 yrs.), Ved Prakash @

Raju (25 yrs.) and Poonam (18 yrs.) died due to exposure to chemical gases that were emitted during the fire in respondent no. 5's godown. ***

6. Though Ms. Mehta admitted that Babu Lal and Ved Prakash @ Raju were suffering from early stages of Tuberculosis, she stated that prognosis of Tuberculosis was excellent and in recent years death rate had declined from 25% to 2.5%. In this regard, she referred to an article on Tuberculosis published by Healthline Network as well as to the statement of Health Minister, Government of NCT of Delhi published in the Tribune newspaper. ***

16. On merits, Mr. Thadani submitted that there was no conclusive evidence that death of Babu Lal, Ved Prakash @ Raju and Poonam was attributable to inhalation of gas released. Mr. Thadani repeatedly emphasised that Babu Lal and Ved Prakash @ Raju were already suffering from Tuberculosis and, therefore, it could not be said with certainty that "but for" emission of gas from godown of respondent no. 5, they would have survived. ***

68. Mr. Thadani's argument that "but for" test is applicable in the present case is not correct. Undoubtedly, the "but for" test remains the starting point in tort, and in the case of single cause it is likely to be determinative of the factual aspect of causation, but if there is more than one cause, provided that the cause under consideration is a material contributor, it will satisfy the factual test.

70. In *Fairchild v. Glenhaven Funeral Services Limited* [2003] 1 A.C. 32 (HL), the claimant had contracted mesothelioma after being exposed—in breach of duty—to significant quantities of asbestos dust at different times by more than one employer or occupier of premises, but in circumstances where he could not prove on the balance of probabilities which period of exposure had caused or materially contributed to the cause of the disease. The House of Lords held that the claimant could nevertheless succeed, on the basis that the defendant's conduct in exposing the claimant to a risk to which he should not have been exposed should (in the words of Lord Bingham at [34]) be treated as, "making a material contribution to the contracting of the condition against which it was the defendant's duty to protect him" [paraphrased].

71. The difficulties facing claimants in proving causation in cases of industrial disease have persuaded the courts to relax the causal rules in some instances. The claimant does not have to prove that the defendant's breach of duty was the sole, or even the main, cause of his damage, provided he can demonstrate that it made a material contribution to the damage. ***

72. In *McGhee v. National Coal Board* [1973] 1 W.L.R. 1 (HL) the plaintiff contracted dermatitis from the presence of brick dust on sweaty skin. Some exposure to brick dust was an inevitable result of working in brick kilns in respect of which there was no breach of duty by his employers. But his employers negligently failed to provide washing facilities at the site so that the plaintiff cycled home every day coated with abrasive brisk dust. Medical evidence established that brick dust caused the dermatitis but it was impossible to prove whether it was the additional "guilty" exposure to dust which triggered dermatitis in this plaintiff or whether he would have developed the disease in any event as a result of the "innocent" exposure during the normal working day. At best it could be said that the failure to provide washing facilities materially increased the risk of the plaintiff contracting dermatitis. The House of Lords held the defendant's breach of duty made the risk of injury more probable even though it was uncertain whether it was the actual cause. By a majority judgment the Court treated a "material increase in the risk" as equivalent to a material contribution to the injury. Lord Simon, for example, said that "a failure to take steps which would bring about a material reduction of the risk involves, in this type of a case, a substantial contribution to the injury."

73. In *Athey v. Leonati* (1996) 3 S.C.R. 458, the Plaintiff had a history of "minor back problems" since 1972. *** While reconfirming the traditional "but for ***" test, Mr. Justice Major confirmed that causation need not be determined by scientific precision. It is essentially a practical question of fact to be answered by ordinary common sense. ***

74. In *Resurfice Corp. v. Hanke* [2007] 1 S.C.R. 333, [25], the Supreme Court of Canada held that material contribution test can be applied if two requirements are met:

> "First, it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test. The impossibility must be due to factors that are outside of

> the plaintiff's control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury."

75. In the present case, we find that respondent no. 5 breached the duty of care owed to the fire and gas victims, thereby exposing them to an unreasonable risk of injury. In fact, the loss of lives and injury falls within the ambit of risk created by respondent no. 5's breach. ***

80. Accordingly, keeping in view the medical record of deceased Babu Lal and Ved Prakash @ Raju as well as the affidavits filed by their wife and mother respectively and the fact that their Pulmonary Tuberculosis got aggravated due to inhalation of phosphine gas and they died at a premature age, we are of the opinion that they are entitled to full compensation along with deceased Akash. ***

REFLECTION:

- *On what basis did the defendant argue that their carelessness was not a but-for cause of the victims' deaths?*
- *Were the Resurfice prerequisites to the application of the material contribution to risk test met in this case?*

16.2.5 Cross-references

- *Smith v. Fonterra Co-op. Group Ltd* [2024] NZSC 5, [88]: §19.11.3.

16.2.6 Further material

- N.J. Foster, "Material Contribution in *Bonnington*: Not An Exception To 'But For' Causation" (2022) 49 U Western Australia L Rev 404.
- D. Mangan, "Confusion in Material Contribution" (2014) 91 Canadian Bar Rev 701.
- M. Stauch, "'Material Contribution' as a Response to Causal Uncertainty: Time for a Rethink" (2009) Cambridge LJ 27.
- V. Black, "The Rise and Fall of Plaintiff-Friendly Causation" (2016) 53 Alberta L Rev 1013.
- L. Collins, "Material Contribution to Risk in the Canadian Law of Toxic Torts" (2016) 91 Chicago-Kent L Rev 567.
- R. Goldberg, "Epidemiological Uncertainty, Causation, and Product Liability" (2014) 59 McGill LJ 777.

16.3 Loss of chance

G. Burnett, "The Doctrine of Loss of Chance: Recent Developments" DAC Beachcroft LLP (Apr 6, 2020)

The [loss of chance] doctrine is used to determine causation and assess damages in cases where the claimant has lost the opportunity to pursue a course of action, which they contend would have been pursued and had a "chance" of achieving some (usually monetary) benefit. Common examples are "lost litigation" cases where a claimant has lost the chance of pursuing another party and "lost transaction" cases where a claimant asserts they missed out on securing a better deal with another, because of negligent solicitors' professional advice.

Loss of chance cases are assessed in two stages. The claimant is subject to the usual "but for" test on the question of whether the chance would have been taken in the first place, but for the breach, and will need to establish they would have taken the chance on the balance of probabilities. However, the courts diverge from the "but for" test when assessing the prospects of a claimant being successful in recovering a benefit against the third party. This is because the evidence required by the claimant to prove (but for the breach) they would have secured some benefit, is outside the claimant's knowledge and control and the third party would have to speculate on the hypothetical outcome which would have been dependent on a different set of facts. This is referred to as the "counterfactual", in effect, predicting the past.

If the court accepts the chance would have been taken by the claimant and the prospects of securing some benefit were "real and substantial" ***, the court then calculates damages based upon the chances of success in percentage terms. *** […continue reading]

REFLECTION:

- *Having regard to the two stages of assessment, why did the loss of chance doctrine not apply in Powell v. University Hospitals Sussex (§16.1.4)?*

16.3.1 Athey v. Leonati [1996] CanLII 183 (SCC)

✗**REF: §16.2.1, §17.2.4, §17.4.1**

MAJOR J. (FOR THE COURT): ***

(6) The Loss of Chance Doctrine

37. The respondents submitted that the accidents merely increased the risk of herniation, and that the defendant is liable only for that increase in risk. This is an application of the "loss of chance" doctrine which is the subject of considerable controversy: see Joseph H. King, "Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences" (1981), 90 *Yale L.J.* 1353; John G. Fleming, "Probabilistic Causation in Tort Law" (1989), 68 *Can. Bar Rev.* 661.

38. The doctrine suggests that plaintiffs may be compensated where their only loss is the loss of a chance at a favourable opportunity or of a chance of avoiding a detrimental event. In this case, the loss would arguably be the loss of a chance of avoiding the disc herniation. However, this contention is not supported by the factual findings. The trial judge made no findings suggesting that the injury was a loss of chance of avoiding a disc herniation. The finding at trial was that the accidents contributed to the actual disc herniation itself. It is therefore unnecessary to consider the loss of chance doctrine, and these reasons neither approve nor disapprove of the doctrine. ***

REFLECTION:

- *Why was the defendants' contention erroneous that all they had caused the plaintiff was a loss of a chance of avoiding a disc herniation?*

16.3.2 Jarbeau v. McLean [2017] ONCA 115

Ontario Court of Appeal – 2017 ONCA 115

PARDU J.A. (SIMMONS J.A. AND LAFORME J.A. concurring):

1. The respondents, Darren and Lillian Jarbeau, had the misfortune to purchase a leaky new home from Thermolith Homes Limited ("Thermolith"). The home did not meet the standards set by Ontario's building code. Their troubles might have been avoided if the engineer hired by Thermolith, Larry Nelson, (the "engineer") had not negligently certified the design and construction of the home.

2. Unfortunately, the lawyer the Jarbeaus hired to sue those responsible for building and selling them a defective home was also negligent. Their lawyer, Ian McLean, sued Thermolith, the City of North Bay and Tarion Warranty Corporation, but he failed to sue the engineer within the limitation period. Mr. McLean negligently advised the Jarbeaus that they did not have a cause of action against the engineer because they did not have a contract with him.

3. After the Jarbeaus settled the first action, they sued Mr. McLean. The claim pleaded against Mr. McLean was that "but for" his negligence, the Jarbeaus would have successfully sued the engineer and recovered all of their losses from him. On the eve of trial, Mr. McLean admitted his advice was negligent.

4. In light of Mr. McLean's admission, the trial of the action against him focused on whether his negligence caused the Jarbeaus any damages. Following a "trial within a trial" of the cause of action that could have been brought against the engineer, a jury found in the Jarbeaus' favour.

5. The jury assessed the cost to repair the home at $433,000 and the diminution in value of the home because of the defects at $265,000. ***

6. The trial judge characterized the cost of repair finding as perverse and granted judgment for $190,000, representing the lesser of the cost to repair and the diminution of value. ***

15. Mr. McLean argues that the trial judge should have structured the Jarbeaus' claim as one for the loss of the chance to successfully sue the engineer or for the loss of the chance of having the engineer at the settlement table. He submits that this chance, being hypothetical, must necessarily be valued at less than 100%. The trial judge's charge to the jury improperly invited them to find that the Jarbeaus could recover full damages.

16. I disagree.

17. The "but for" test set out in the trial judge's charge is the appropriate test for causation in negligence in all but rare cases. ***

20. In some cases of solicitor's negligence, where it is practically impossible to determine what would have happened but for the solicitor's negligent conduct, courts have allowed a plaintiff to advance a claim for loss of the chance to recover. ***

26. In *Folland* [*v. Reardon* (2005), 74 O.R. (3d) 688 (Ont. C.A.)] this court discussed the elements of a cause of action for breach of contract based on solicitor's negligence. I extract the following principles from that decision, using the language used by Doherty J.A., at paras. 72-76:

> 1. In most cases of solicitor's negligence, liability rests on both a tort and contractual basis.
>
> 2. The imposition of liability grounded in the loss of a chance of avoiding a harm or gaining a benefit is controversial in tort law, particularly where the harm alleged is not purely economic.
>
> 3. Whatever the scope of the lost chance analysis in fixing liability for torts claims based on personal injuries, lost chance is well recognized as a basis for assessing damages in contract. In contract, proof of damage is not part of the liability inquiry. If a defendant breaches his contract with the plaintiff and as a result the plaintiff loses the opportunity to gain a benefit or avoid harm, that lost opportunity may be compensable.
>
> 4. A plaintiff can recover damages for lost chance in an action for breach of contract if four criteria are met:
>
> > a. The plaintiff must establish on the balance of probabilities that but for the defendant's wrongful conduct, the plaintiff had a chance to obtain a benefit or avoid a loss.
> >
> > b. The plaintiff must show that the chance lost was sufficiently real and significant to rise above mere speculation.
> >
> > c. The plaintiff must demonstrate that the outcome, that is, whether the plaintiff would have avoided the loss or made the gain, depended on someone or something other than the plaintiff himself or herself.
> >
> > d. The plaintiff must show that the lost chance had some practical value.

27. Where a plaintiff in a tort action arising out of solicitor's negligence can establish on the balance of probabilities that but for the negligence he or she would have avoided the loss, he or she should be fully compensated for that loss.

28. Where a plaintiff can only establish that but for the solicitor's negligence he or she lost a chance to avoid a loss, a claim for breach of contract may permit recovery for the value of that chance.

29. The case law is clear that a plaintiff in a solicitor's negligence case can fully recover her loss in appropriate circumstances. The British Columbia Court of Appeal expressed it this way, in *Nichols v. Warner, Scarborough, Herman & Harvey*, 2009 BCCA 277 *** at para. 26:

> In a case of this kind, the court is required to essentially conduct a trial within a trial to the extent

possible: the first to determine whether the solicitor has been negligent in respect of the litigation undertaken; the second to determine, if so, what loss the solicitor's negligence has caused the client. In some instances, whether there has been a loss and what it was can be readily established. In others, however, the prospect of success and recovery may not be easily shown due to uncertainties of proof and perhaps legal consequences inherent in any given case. Indeed, the mere passage of time may render the conduct of a trial within a trial virtually impossible. What the court must do in such circumstances where the prospect of recovery in the original action is inconclusive is to quantify as best it can the value of what the authorities regard a lost opportunity. The Alberta Court of Appeal summarized the approach to be taken in *Fisher v. Knibbe*, 1992 ABCA 1213, Alta. L.R. (3d) 97, at pp. 7-8:

> After conducting the "trial within a trial" to determine what damages, if any, a negligent solicitor is liable for missing a limitation period, three results are possible. First, the trial judge could find that had the case gone to trial the plaintiff would have been successful and in such case 100 per cent of the lost damages would be awarded against the solicitor. Second, the trial judge could find that the plaintiff would not have been successful therefore only nominal damages may be awarded against the solicitor. Finally, where time has passed to such an extent that a "trial within a trial" would be impossible, then the court must to the best of its ability calculate the value of the opportunity lost to the plaintiff and award damages against the solicitor on that basis. ***

31. Where a plaintiff advances a tort claim for damages founded on the "but for" causation test, *Folland* does not support Mr. McLean's argument that some degree of probability between 50% and 100% should reduce a defendant's liability.

32. In short, none of the cases cited to us involved a defendant attempting to reframe a plaintiff's case as a loss of chance, where the loss the plaintiff claims is the opportunity to successfully litigate or settle a claim in full and the "trial within a trial" approach allows the plaintiff to test that claim. In such circumstances the plaintiff is entitled to advance the trial within a trial on the balance of probabilities standard, and to fully recover if that standard is met.

33. In this case, the Jarbeaus were entitled to frame their case on an all-or-nothing basis by asserting that the engineer was negligent, and that they would have made full recovery had the engineer been sued.

34. The trial judge's instructions collapsed treatment of Mr. McLean's negligence and the engineer's negligence, and were consistent with the notion of a trial within a trial in a solicitor's negligence case, particularly where the lawyer's negligence is admitted.

35. This is not to say that some contingencies will not affect the assessment of damages. A jury could, in its assessment of damages, properly be invited to consider future contingencies in assessing the losses that properly flow from the lawyer's negligence.

36. For example, if a plaintiff successfully recovered judgment against an at-fault party but there was no possibility of collection of that judgment, the plaintiff may recover nominal damages against a negligent solicitor who caused the loss of the opportunity to sue the at-fault party ***. ***

37. This trial was focused on whether or not the Jarbeaus would have obtained judgment against the engineer if they had sued him. Mr. McLean did not suggest to the jury that the Jarbeaus would have settled the first action for less than the amount of their losses or that there was any other contingency that would have impacted the assessment of the amount necessary to put the Jarbeaus in the same position they would have been but for Mr. McLean's failure to sue the engineer. For example, no one called evidence about whether the engineer had liability insurance or the limits of any such policy, perhaps for good reason.

38. In this case, there was a "trial within a trial" on the issue of the engineer's negligence. The jury found that the engineer failed to meet the standard of care expected of a reasonable and competent professional engineer, and but for his negligence and Mr. McLean's negligence, the Jarbeaus would not have suffered the harm. If I were to adopt Lord Evershed's categorization from *Kitchen v. Royal Air Force* [[1958] 2 All E.R. 241 (Eng. C.A.)], I would say that, given the jury's finding regarding the engineer's negligence and Mr.

McLean's admission of negligence in advising the Jarbeaus not to sue the engineer, it is plain that an action could have been brought against the engineer and would have succeeded. At trial, the engineer admitted he had erred. ***

51. *** [O]n the evidence before the jury, there was a basis for the jury to assess the cost to repair and related costs at $433,000. The jury's assessment of the cost to repair was not unreasonable or unjust. It follows that the trial judge erred when he characterized this assessment as perverse. ***

57. I would set aside the verdict entered by the trial judge, and substitute judgement in favour of the Jarbeaus in the sum of $433,000, as assessed by the jury. ***

REFLECTION:

- *Why was this not a loss-of-chance causation case?*
- *Why did the Court disagree with the trial judge over whether awarding full damages against the plaintiff's negligent lawyer was perverse?*

16.3.3 Further material

- N. Acharya, "No More Chances for Lost Chances: A Weinribian Response to Weinrib" (2019) 12 McGill J of L & Health 205.
- D. Fischer, "Tort Recovery for Loss of Chance" (2001) 36 Wake Forest L Rev 605.
- M. Mims & R. Crisler, "Properly Limiting the Lost Chance Doctrine in Medical Malpractice Cases: A Practitioners' Rejoinder" (2021) 81 Louisiana L Rev 863.
- Law Pod UK Podcast, "Loss of Chance with Sarah Lambert QC and Dominic Ruck Keene" (Nov 28, 2021) 🎧.
- The Law Academy (UK), "Loss of a Chance" (Apr 20, 2024) ⍰.

17 NEGLIGENCE: (V) REMOTENESS OF DAMAGE IN LAW

R. Cooke, "Remoteness of Damages and Judicial Discretion" (1978) 37 Cambridge LJ 288

[T]he law as to remoteness of damage in contract and tort might be put in roughly this way. The purpose of the law is to ensure, as far as money can, that the plaintiff is in the same position as he would have enjoyed if his rights had not been violated by the defendant. Any damage of which the defendant's tort or breach of contract is a substantial cause is prima facie recoverable. Nevertheless, as between the parties it may be just, on the facts of any given case, to limit the damages by excluding certain heads; and in determining that question in any given case the court should have regard to a range of considerations. The main relevant considerations have already emerged from the case law and are somewhat as follows:

> (i) The degree of likelihood that such damage, or damage of broadly the same kind, would be caused by such an act or omission. In all cases this should be considered from the point of view of a reasonable man in the defendant's position immediately before the act or omission in question; but in contract an assessment as at the date of the contract will also be relevant.
>
> (ii) The directness or otherwise of the causation and its potency. Intervening human action comes in under this head.
>
> (iii) The nature of the damage—whether to person, property or purely economic interests.
>
> (iv) The degree of the defendant's culpability: for example, whether his action was deliberate or grossly negligent at the one extreme or in venial breach of a minor but strict contractual duty on the other.
>
> (v) Whether the defendant had a reasonable opportunity of limiting his liability by an agreed term. *** […continue reading]

REFLECTION:

- *Is the legal causation (remoteness) enquiry guided by any unifying principle?[534] Or is remoteness reasoning merely "contrived" to ensure that civil liability falls where the judges want it?[535]*

17.1 Reasonable foreseeability of loss

17.1.1 Overseas Tankship (UK) Ltd v. Morts Dock & Engineering Co. Ltd (The Wagon Mound No. 1) [1961] UKPC 2

Privy Council (on appeal from Australia) – [1961] UKPC 2

VISCOUNT SIMONDS: ***

1. This appeal is brought from an order of the Full Court of the Supreme Court of New South Wales dismissing an appeal by the appellants, Overseas Tankship (UK) Ltd from a judgment of Kinsella J exercising the Admiralty jurisdiction of that court in an action in which the appellants were defendants and

[534] See *Hemmings v. Peng*, 2024 ONCA 318 *per* Brown J.A.:
"66. *** The jurisprudence calls this [legal causation] requirement by various names: such as "proximate cause"; not too "remote"; and "cause-in-law". Whichever term is used, the basic inquiry remains the same: were the injuries suffered by the plaintiff linked in the right way to the carelessness of the defendant? Or, as put in *Mustapha*, at para. 12 [§17.1.2]: "whether 'the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable.'"
67. In general terms, foreseeability lies at the heart of this inquiry ***. Mere possibility that the harm would occur is not sufficient: "possibility alone does not provide a meaningful standard for the application of reasonable foreseeability": *Mustapha*, at para. 13. Instead, in *Mustapha*, the Supreme Court stated the degree of probability or likelihood that would satisfy the reasonable foreseeability requirement is a "real risk", that is "one which would occur to the mind of a reasonable man in the position of the defendan[t] … and which he would not brush aside as far-fetched" ***. ***

[535] See L. Shmilovits, *Legal Fictions in Private Law* (Cambridge: Cambridge University Press, 2022), §3.9.

the respondents, Morts Dock & Engineering Co Ltd, were plaintiffs. In the action, the respondents sought to recover from the appellants compensation for the damage which its property, known as the Sheerlegs Wharf in Sydney Harbour and the equipment thereon, had suffered by reason of fire which broke out on 1 November 1951. For this damage they claimed that the appellants were, in law, responsible.

2. *** The respondents at the relevant time carried on the business of ship-building, ship-repairing and general engineering at Morts Bay, Balmain, in the Port of Sydney. '*** [T]he appellants were charterers by demise of the SS Wagon Mound, an oil-burning vessel which was moored at the Caltex Wharf on the northern shore of the harbour at a distance of about six hundred feet from the Sheerlegs Wharf. *** During the early hours of 30 October 1951, a large quantity of bunkering oil was, through the carelessness of the appellants' servants, allowed to spill into the bay, and, by 10.30 on the morning of that day, it had spread over a considerable part of the bay, being thickly concentrated in some places and particularly along the foreshore near the respondents' property. The appellants made no attempt to disperse the oil. The Wagon Mound unberthed and set sail very shortly after. When the respondents' works manager became aware of the condition of things in the vicinity of the wharf, he instructed their workmen that no welding or burning was to be carried on until further orders. He inquired of the manager of the Caltex Oil Co, at whose wharf the Wagon Mound was then still berthed, whether they could safely continue their operations on the wharf or on the Corrimal. The results of this inquiry, coupled with his own belief as to the inflammability of furnace oil in the open, led him to think that the respondents could safely carry on their operations. He gave instructions accordingly, but directed that all safety precautions should be taken to prevent inflammable material falling off the wharf into the oil. For the remainder of 30 October and until about 2 pm on 1 November, work was carried on as usual, the condition and congestion of the oil remaining substantially unaltered. But at about that time the oil under or near the wharf was ignited and a fire, fed initially by the oil, spread rapidly and burned with great intensity. The wharf and the Corrimal caught fire and considerable damage was done to the wharf and the equipment on it.

3. The outbreak of fire was due, as the learned judge found, to the fact that there was floating in the oil underneath the wharf a piece of debris on which lay some smouldering cotton waste or rag which had been set on fire by molten metal falling from the wharf; that the cotton waste or rag burst into flames; that the flames from the cotton waste set the floating oil afire either directly or by first setting fire to a wooden pile coated with oil and that, after the floating oil became ignited, the flames spread rapidly over the surface of the oil and quickly developed into a conflagration which severely damaged the wharf. He also made the all-important finding, which must be set out in his own words:

> "The raison d'être of furnace oil is, of course, that it shall burn, but I find the [appellants] did not know and could not reasonably be expected to have known that it was capable of being set afire when spread on water."

4. This finding was reached after a wealth of evidence which included that of a distinguished scientist, Professor Hunter. ***

5. It is on this footing that their Lordships will consider the question whether the appellants are liable for the fire damage. ***

10. There can be no doubt that the decision of the Court of Appeal in *Re Polemis and Furness, Withy & Co Ltd* [1921] 3 KB 560 plainly asserts that, if the defendant is guilty of negligence, he is responsible for all the consequences, whether reasonably foreseeable or not. The generality of the proposition is, perhaps, qualified by the fact that each of the lords justices refers to the outbreak of fire as the direct result of the negligent act. There is thus introduced the conception that the negligent actor is not responsible for consequences which are not "direct", whatever that may mean. ***

13. Before going forward to the cases which followed *Polemis*, their Lordships think it desirable to look back to older authorities which appear to them to deserve consideration. In two cases, *Rigby v. Hewitt* and *Greenland v. Chaplin*, Pollock CB affirmed ((1850), 5 Exch at p 248) (stating it to be his own view only and not that of the court) that he entertained "… considerable doubt, whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person

would have anticipated." It was not necessary to argue this question and it was not argued.

14. Next, one of many cases may be cited which show how shadowy is the line between so-called culpability and compensation. In *Sharp v. Powell*, the defendant's servant, in breach of the *Metropolitan Police Act*, 1839, washed a van in a public street and allowed the waste water to run down the gutter towards a grating leading to the sewer, about twenty-five yards off. In consequence of the extreme severity of the weather, the grating was obstructed by ice, and the water flowed over a portion of the causeway and froze. There was no evidence that the defendant knew of the grating being obstructed. The plaintiff's horse, while being led past the spot, slipped on the ice and broke its leg. The defendant was held not to be liable. The judgment of Bovill CJ is particularly valuable and interesting. He said ((1872), LR 7 CP at p 258):

> "No doubt one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom; but, generally speaking, he is not liable for damage which is not the natural or ordinary consequence of such an act, unless it be shown that he knows, or has reasonable means of knowing, that consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene so as to occasion damage to a third person. Where there is no reason to expect it, and no knowledge in the person doing the wrongful act that such a state of things exists as to render the damage probable, if injury does result to a third person it is generally considered that the wrongful act is not the proximate cause of the injury, so as to render the wrongdoer liable to an action."

15. Here all the elements are blended "natural" or "ordinary consequences", "foreseeability", "proximate cause". What is not suggested is that the wrongdoer is liable for the consequences of his wrongdoing whether reasonably foreseeable or not, or that there is one criterion for culpability, another for compensation. It would, indeed, appear to their Lordships that, unless the learned chief justice was making a distinction between "one who commits a wrongful act" and one who commits an act of negligence, the case is not reconcilable with *Polemis*. In that case, it was not dealt with except in a citation from *Weld-Blundell v. Stephens* [1920] AC 956. ***

25. *** [T]he *Polemis* rule works in a very strange way. After the event even a fool is wise. Yet it is not the hindsight of a fool, but it is the foresight of the reasonable man which alone can determine responsibility. The *Polemis* rule, by substituting "direct" for "reasonably foreseeable" consequence, leads to a conclusion equally illogical and unjust. ***

27. It is, no doubt, proper when considering tortious liability for negligence to analyse its elements and to say that the plaintiff must prove a duty owed to him by the defendant, a breach of that duty by the defendant, and consequent damage. But there can be no liability until the damage has been done. It is not the act but the consequences on which tortious liability is founded. Just as (as it has been said) there is no such thing as negligence in the air, so there is no such thing as liability in the air. ***

28. Their Lordships conclude this part of the case with some general observations. They have been concerned primarily to displace the proposition that unforeseeability is irrelevant if damage is "direct." In doing so, they have inevitably insisted that the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen. This accords with the general view thus stated by Lord Atkin in *M'Alister (or Donoghue) v. Stevenson* ([1932] AC 562 at p 580) [§13.1.1]:

> "The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa,' is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay."

29. It is a departure from this sovereign principle if liability is made to depend solely on the damage being the "direct" or "natural" consequence of the precedent act. Who knows or can be assumed to know all the processes of nature? But if it would be wrong that a man should be held liable for damage unpredictable by a reasonable man because it was "direct" or "natural", equally it would be wrong that he should escape liability, however "indirect" the damage, if he foresaw or could reasonably foresee the intervening events which led to its being done; cf *Woods v. Duncan* ([1946] AC at p 442). Thus foreseeability becomes the effective test. In reasserting this principle their Lordships conceive that they do not depart from, but follow and develop, the law of negligence as laid down by Baron Alderson in *Blyth v. Birmingham Waterworks Co.*

(1856) 11 Exch 781, 784. ***

32. Their Lordships will humbly advise Her Majesty that this appeal should be allowed and the respondents' action so far as it related to damage caused by the negligence of the appellants be dismissed ***. ***

REFLECTION:

- *What was the problem with the rule in Re Polemis? Why did the Privy Council overrule it? What remoteness principle did their Lordships replace it with?*
- *Is the reasoning of this judgment consistent with The Wagon Mound No. 2 (§14.2.2.2)? In what way did the premise of the plaintiffs' arguments differ in each case?*[536]

17.1.2 Mustapha v. Culligan of Canada Ltd [2008] SCC 27

Supreme Court of Canada – 2008 SCC 27

✗REF: §17.5.2

MCLACHLIN C.J.C. (FOR THE COURT):

1. The plaintiff, Mr. Mustapha, sues for psychiatric injury sustained as a result of seeing the dead flies in a bottle of water supplied by the defendant, Culligan. In the course of replacing an empty bottle of drinking water with a full one, Mr. Mustapha saw a dead fly and part of another dead fly in the unopened replacement bottle. He became obsessed with the event and its "revolting implications" for the health of his family, which had been consuming water supplied by Culligan for the previous 15 years. The plaintiff developed a major depressive disorder with associated phobia and anxiety. He sued Culligan for damages.

2. The trial judge found that seeing the flies in the water resulted in psychiatric injuries to Mr. Mustapha, and awarded him $80,000 in general damages, $24,174.58 in special damages, and $237,600 in damages for loss of business ((2005), 32 C.C.L.T. (3d) 123 (Ont. S.C.J.)). The Ontario Court of Appeal overturned the judgment on the basis that the injury was not reasonably foreseeable and hence did not give rise to a cause of action ((2006), 84 O.R. (3d) 457 (Ont. C.A.)). The issue before this Court is whether the cause of action has been established. For different reasons than the Court of Appeal, I conclude that it has not.

3. A successful action in negligence requires that the plaintiff demonstrate (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach. I shall examine each of these elements of negligence in turn. As I will explain, Mr. Mustapha's claim fails because he has failed to establish that his damage was caused in law by the defendant's negligence. In other words, his damage is too remote to allow recovery.

1. Did the Defendant Owe the Plaintiff a Duty of Care? ***

6. The relationship between the parties in this case does not belong to a novel category. It has long been established that the manufacturer of a consumable good owes a duty of care to the ultimate consumer of that good: *McAlister (Donoghue) v. Stevenson* [§13.1.1]. It follows that Culligan owed Mr. Mustapha a duty of care in the supplying of bottled water to him.

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[536] See *Overseas Tankship (UK) Ltd v. The Miller Steamship (The Wagon Mound No. 2)* [1966] UKPC 10, [26] *per* Lord Reid: "In the present case the evidence led was substantially different from the evidence led in *Wagon Mound (No. 1)* and the findings of Walsh J are significantly different. That is not due to there having been any failure by the plaintiffs in *Wagon Mound (No. 1)* in preparing and presenting their case. The plaintiffs there were no doubt embarrassed by a difficulty which does not affect the present plaintiffs. The outbreak of the fire was consequent on the act of the manager of the plaintiffs in *Wagon Mound (No. 1)* in resuming oxy-acetylene welding and cutting while the wharf was surrounded by this oil. So if the plaintiffs in the former case had set out to prove that it was foreseeable by the engineers of the Wagon Mound that this oil could be set alight, they might have had difficulty in parrying the reply that then this must also have been foreseeable by their manager. Then there would have been contributory negligence and at that time contributory negligence was a complete defence in New South Wales [§18.2.2]."

2. Did the Defendant's Behaviour Breach the Standard of Care?

7. The second question in a negligence action is whether the defendant's behaviour breached the standard of care. A defendant's conduct is negligent if it creates an unreasonable risk of harm (Linden and Feldthusen, at p. 130). The trial judge found that the defendant Culligan breached the standard of care by providing the plaintiff with contaminated water,[537] and the parties did not appeal that finding before this Court. This is hardly surprising; it is clear that a supplier of bottled water intended for personal consumption is under a duty to take reasonable care to ensure that the water is not contaminated by foreign elements. The second element of liability in tort for negligence is therefore met.

3. Did the Plaintiff Sustain Damage?

8. Generally, a plaintiff who suffers personal injury will be found to have suffered damage. Damage for purposes of this inquiry includes psychological injury. The distinction between physical and mental injury is elusive and arguably artificial in the context of tort. As Lord Lloyd said in *Page v. Smith* (1995), [1996] 1 A.C. 155 (U.K. H.L.), at p. 188:

> In an age when medical knowledge is expanding fast, and psychiatric knowledge with it, it would not be sensible to commit the law to a distinction between physical and psychiatric injury, which may already seem somewhat artificial, and may soon be altogether outmoded. *Nothing will be gained by treating them as different "kinds" of personal injury, so as to require the application of different tests in law*. [Emphasis added.]

9. This said, psychological disturbance that rises to the level of personal injury must be distinguished from psychological upset. Personal injury at law connotes serious trauma or illness: see *Hinz v. Berry*, [1970] 2 Q.B. 40 (Eng. C.A.), at p. 42; *Page v. Smith*, at p. 189; Linden and Feldthusen, at pp. 425-27. The law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury. I would not purport to define compensable injury exhaustively, except to say that it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept. The need to accept such upsets rather than seek redress in tort is what I take the Court of Appeal to be expressing in its quote from *Vanek v. Great Atlantic & Pacific Co. of Canada* (1999), 48 O.R. (3d) 228 (Ont. C.A.): "Life goes on" (para. 60). Quite simply, minor and transient upsets do not constitute personal *injury*, and hence do not amount to damage.

10. On the findings of the trial judge, supported by medical evidence, Mr. Mustapha developed a major depressive disorder with associated phobia and anxiety. This psychiatric illness was debilitating and had a significant impact on his life; it qualifies as a personal injury at law. It follows that Mr. Mustapha has established that he sustained damage.

4. Were the Plaintiff's Damage Caused By the Defendant's Breach?

11. The fourth and final question to address in a negligence claim is whether the defendant's breach caused the plaintiff's harm in fact and in law. The evidence before the trial judge establishes that the defendant's breach of its duty of care in fact caused Mr. Mustapha's psychiatric injury. We are not asked to revisit this conclusion. The remaining question is whether that breach also caused the plaintiff's damage in law or

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[537] *Mustapha v. Culligan of Canada Ltd.*, 2005 CanLII 11990 (ON SC) *per* Brockenshire J.:
"220. The Culligan purification process was examined in considerable detail. It was clear that the water itself was extensively filtered and purified, and that the bottle and the cap were carefully washed and cleaned before being filled. However it was also clear that there were flies in the bottling plant, and although the actual bottling took place inside of an enclosed structure, that structure could be opened between batches of bottling, so that flies which were in the premises could get into the 'clean room' and one (or perhaps two, as part of a second fly was seen in the bottle), could get into a bottle before or during its filling. Indeed, the manager acknowledged that that was a possibility. Also, clearly the inspection process afterwards was not nearly as meticulous as the purification and cleaning processes for the water and the bottle before bottling. ***
221. *** Further, the company operated under the regulatory provisions of the *Food and Drug Act*, which prohibits the sale of an article of food (that by definition includes bottled water) which contains 'any filthy, putrid, disgusting, rotten, decomposed or diseased animal or vegetable substance' or was 'manufactured, prepared, preserved, packaged or stored under unsanitary conditions'. ***"

whether it is too remote to warrant recovery.

12. The remoteness inquiry asks whether "the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable" (Linden and Feldthusen, at p. 360). Since *The Wagon Mound (No. 1)*, the principle has been that "it is the foresight of the reasonable man which alone can determine responsibility" ***.

13. Much has been written on how probable or likely a harm needs to be in order to be considered reasonably foreseeable. The parties raise the question of whether a reasonably foreseeable harm is one whose occurrence is *probable* or merely *possible*. In my view, these terms are misleading. Any harm which has actually occurred is "possible"; it is therefore clear that possibility alone does not provide a meaningful standard for the application of reasonable foreseeability. The degree of probability that would satisfy the reasonable foreseeability requirement was described in *The Wagon Mound (No. 2)* [§14.2.2.2] as a "real risk", i.e. "one which would occur to the mind of a reasonable man in the position of the defendant … and which he would not brush aside as far-fetched" ***.

14. The remoteness inquiry depends not only upon the degree of probability required to meet the reasonable foreseeability requirement, but also upon whether or not the plaintiff is considered objectively or subjectively. One of the questions that arose in this case was whether, in judging whether the personal injury was foreseeable, one looks at a person of "ordinary fortitude" or at a particular plaintiff with his or her particular vulnerabilities. This question may be acute in claims for mental injury, since there is a wide variation in how particular people respond to particular stressors. The law has consistently held—albeit within the duty of care analysis—that the question is what a person of ordinary fortitude would suffer: see *White v. Chief Constable of South Yorkshire Police* [1998] 3 W.L.R. 1509 (U.K. H.L.); *Devji v. Burnaby (District)* (1999), 180 D.L.R. (4th) 205, 1999 BCCA 599 (B.C. C.A.); *Vanek*. As stated in *White*, at p. 1512: "The law expects reasonable fortitude and robustness of its citizens and will not impose liability for the exceptional frailty of certain individuals."

15. As the Court of Appeal found, at para. 49, the requirement that a mental injury would occur in a person of ordinary fortitude, set out in *Vanek*, at paras. 59-61, is inherent in the notion of foreseeability. This is true whether one considers foreseeability at the remoteness or at the duty of care stage. As stated in *Tame v. New South Wales* (2002), 211 C.L.R. 317, [2002] H.C.A. 35 (Australia H.C.), *per* Gleeson C.J., this "is a way of expressing the idea that there are some people with such a degree of susceptibility to psychiatric injury that it is ordinarily unreasonable to require strangers to have in contemplation the possibility of harm to them, or to expect strangers to take care to avoid such harm" (para. 16). To put it another way, unusual or extreme reactions to events caused by negligence are imaginable but not reasonably foreseeable.

16. To say this is not to marginalize or penalize those particularly vulnerable to mental injury. It is merely to confirm that the law of tort imposes an obligation to compensate for any harm done on the basis of *reasonable* foresight, not as insurance. The law of negligence seeks to impose a result that is fair to both plaintiffs and defendants, and that is socially useful. In this quest, it draws the line for compensability of damage, not at perfection, but at reasonable foreseeability. Once a plaintiff establishes the foreseeability that a mental injury would occur in a person of ordinary fortitude, by contrast, the defendant must take the plaintiff as it finds him for purposes of damages. As stated in *White*, at p. 1512, focusing on the person of ordinary fortitude for the purposes of determining foreseeability "is not to be confused with the 'eggshell skull' situation, where as a result of a breach of duty the damage inflicted proves to be more serious than expected". Rather, it is a threshold test for establishing compensability of damage at law.

17. I add this. In those cases where it is proved that the defendant had actual knowledge of the plaintiff's particular sensibilities, the ordinary fortitude requirement need not be applied strictly. If the evidence demonstrates that the defendant knew that the plaintiff was of less than ordinary fortitude, the plaintiff's injury may have been reasonably foreseeable to the defendant. In this case, however, there was no evidence to support a finding that Culligan knew of Mr. Mustapha's particular sensibilities.

18. It follows that in order to show that the damage suffered is not too remote to be viewed as legally caused by Culligan's negligence, Mr. Mustapha must show that it was foreseeable that a person of ordinary fortitude would suffer serious injury from seeing the flies in the bottle of water he was about to install. This he failed to do. The only evidence was about his own reactions, which were described by the medical experts as

"highly unusual" and "very individual" (C.A. judgment, at para. 52).[538] There is no evidence that a person of ordinary fortitude would have suffered injury from seeing the flies in the bottle; indeed the expert witnesses were not asked this question. Instead of asking whether it was foreseeable that the defendant's conduct would have injured a person of ordinary fortitude, the trial judge applied a subjective standard, taking into account Mr. Mustapha's "previous history" and "particular circumstances" (para. 227),[539] including a number of "cultural factors" such as his unusual concern over cleanliness, and the health and well-being of his family. This was an error. Mr. Mustapha having failed to establish that it was reasonably foreseeable that a person of ordinary fortitude would have suffered personal injury, it follows that his claim must fail. ***

Conclusion

20. For the reasons discussed, I conclude that the loss suffered by the plaintiff, Mr. Mustapha, was too remote to be reasonably foreseen and that consequently, he cannot recover damages from the defendant. ***

REFLECTION:

- *Although recognising that "the distinction between physical and mental injury is elusive and arguably artificial," in what way did the Court still draw a distinction? Is the Court's reasoning compelling?*
- *Is the Court's reasoning consistent with the eggshell skull rule (§17.3)?*

17.1.3 Nelson (City) v. Marchi [2021] SCC 41

✗**REF: §14.1.2.3, §19.5.2.2**

KARAKATSANIS AND MARTIN JJ. (FOR THE COURT): ***

96. It is well established that a defendant is not liable in negligence unless their breach caused the plaintiff's

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[538] *Culligan of Canada Ltd. v. Mustapha*, 2006 CanLII 41807 (ON CA) *per* Blair J.A. (for the Court):
"52. All of the medical evidence characterized Mr. Mustapha's reaction in individualistic terms and, in varying ways, as unique and strange. Dr. Chung said, "[H]e had never seen anything quite like the symptomatology described by Mr. Mustapha, and he felt it was highly unusual." Dr. Rai testified that the appellant's fear was "a rational fear *for that particular individual*" [emphasis added]. Dr. Litman said that Mr. Mustapha displayed a "very individual response, depending on the vulnerabilities of the particular individual." The experts were not asked to comment on the objective component of the *Vanek* test, namely, whether a person of normal fortitude would be likely to suffer psychiatric injury from having seen a dead fly in a bottle of water from which no water had been consumed."

[539] *Mustapha v. Culligan of Canada Ltd.*, 2005 CanLII 11990 (ON SC) *per* Brockenshire J.:
"226. Here, *** we are dealing with a person with the sensitivities that, in my view, would make him what he was—a good and faithful customer of the Culligan company for some 15 years, buying and using their water both at his home and at his business. He was very concerned over the purity and healthfulness of the water that he and his family consumed, and was convinced, by the Culligan representatives, that their water was better, purer and safer than the water supplied by the city public utility system. Given that, it in my view was clearly foreseeable to Culligan that if it supplied a water bottle with dead flies floating around in it, Mr. Mustapha, and other customers like him, would suffer "some degree" of nervous shock. In my view, in the particular circumstances of this case, the foreseeability test has been met.
227. Here, the resulting problems for Mr. Mustapha were unexpectedly severe, but in my view that was because of his previous history and the particular circumstances of this case. Because of cultural factors, he had an unusually high concern over the health and well being of his family. His wife maintained an unusually clean home, and was concerned about their health and the health of their children. He and his wife had planned a pregnancy, even though he knew their previous child was born prematurely, and that Mrs. Mustapha had reached an age where there was some concern over this pregnancy. In fact, the doctor had warned of high risk shortly before this incident. All of these factors contributed to his obsessive thinking after seeing the fly, which progressed to the state diagnosed by his various experts. Although his wife's subsequent problems, and eventual premature delivery were no doubt very stressful, and contributed to his eventual condition, there is no indication that those stresses, absent the fly in the bottle, would have developed into the psychological illness from which he presently suffers.
228. I find the defendant liable for the damages arising from and in relation to the illness with which he has been diagnosed by his medical experts."

loss. The causation analysis involves two distinct inquiries ***. First, the defendant's breach must be the factual cause of the plaintiff's loss. Factual causation is generally assessed using the "but for" test ***. The plaintiff must show on a balance of probabilities that the harm would not have occurred but for the defendant's negligent act.

97. Second, the breach must be the legal cause of the loss, meaning that the harm must not be too far remote ***. The remoteness inquiry asks whether the actual injury was the reasonably foreseeable result of the defendant's negligent conduct (*Mustapha*, at paras. 14-16; *Livent*, at para. 79 [§19.3.1.3]). Remoteness is distinct from the reasonable foreseeability analysis within duty of care because it focuses on the actual injury suffered by the plaintiff, whereas the duty of care analysis focuses on the type of injury ***. ***

REFLECTION:

- *In what ways does the foreseeability enquiry at the remoteness stage differ from or overlap with the foreseeability enquiry at the duty-of-care stage of the negligence analysis?*[540]

17.1.4 Armstead v. Royal & Sun Alliance Insurance Co. Ltd [2024] UKSC 6

United Kingdom Supreme Court – [2024] UKSC 6

✗**REF: §19.3.3.1**

LORD LEGGATT AND LORD BURROWS (LORD RICHARDS AND LADY SIMLER concurring):

3. The claimant (and appellant), Lorna Armstead, was unlucky enough to be involved in two road traffic collisions within a short space of time, neither of which was her fault. After the first collision, while her car was being repaired, she hired a car, a Mini Cooper, from a company called Helphire Ltd on credit hire terms. The business model of credit hire companies is that they rent out a substitute car on credit to an accident victim believed not to have been at fault while the victim's car is repaired. The hire company seeks to recover the hire cost on behalf of the victim from the other driver's insurers and only looks to the victim for payment if the claim fails. In the normal course of events this enables the accident victim to have the use of a car for which she does not have to pay.

4. The hire agreement between Helphire and Ms Armstead dated 11 November 2015 was on Helphire's standard terms, which included an obligation on the hirer to return the vehicle in the same condition as it was at the start of the hire and to indemnify Helphire for any damage to the vehicle. A further term of the agreement is central to this appeal. Clause 16 stated:

> "You will on demand pay to [Helphire] an amount equal to the daily rental rate specified overleaf,

[540] See *Hemmings v. Peng*, 2024 ONCA 318, [68] *per* Brown J.A.: "A few additional points should be made about the practical application of the principle of legal causation:

- Forseeability is assessed in the circumstances of the particular defendant: *Brenenstuhl v. Caldwell*, 2020 ABQB 315, at para. 94. As summarized in *Mustapha*, at para. 13, whether the risk of harm satisfies that degree of probability turns on whether the risk is "one which would occur to the mind of a reasonable man *in the position of the defendan[t]* … and which he would not brush aside as far-fetched." [Emphasis added].
- What must be foreseen is the type of harm suffered and not the particular manner in which that harm occurred (Fridman, [*The Law of Torts in Canada*, 4th ed. (2020)] at p. 534) or the "precise concatenation of events": *R. v. Côté et al.*, [1976] 1 S.C.R. 595 (SCC), at p. 604. The harm "suffered must be of a kind, type or class that was reasonably foreseeable as a result of the defendant's negligence": *Frazer v. Haukioja*, 2010 ONCA 249, 101 O.R. (3d) 528, at para. 51. As was explained in *Abbott and Kleysen's Cartage Co. Ltd. v. Kasza and Ace Construction Co. Ltd.*, [1975] 3 W.W.R. 163 (Alta. S.C.), at p. 172, rev'd [1976] 4 W.W.R. 20 (Alta. C.A.):

  > [T]he manner in which the damage did occur must be foreseeable in the sense that, although the precise manner in which it occurred was not foreseeable, nevertheless the kind of damage which did occur was foreseeable and the precise manner in which the damage occurred was a variant of the foreseeable or within the risk created by the negligence or not fantastic or highly improbable.

- In judging whether a personal injury is reasonably foreseeable, the legal causation analysis looks at a person of "ordinary fortitude", that is it looks at what kind of injury a person of ordinary fortitude would suffer: *Mustapha*, at paras. 14-16; ***"

> up to a maximum of 30 days in respect of damages for loss of use for each calendar day or part of a calendar day when the vehicle is unavailable to Helphire for hire because … the Hire Vehicle has been damaged."

5. There is evidence, and it is an agreed fact, that terms similar to clause 16 were common in car rental agreements.

6. On 23 November 2015 a Ford Transit Connect van collided with the Mini Cooper hire car which Ms Armstead was driving. The parties have agreed that the driver of the van was negligent and that Ms Armstead was not at fault. Although the hire car was damaged, Ms Armstead was able to carry on driving it until the repairs to her own car had been completed, whereupon she returned the hire car to Helphire. The hire car was then repaired between 8 and 21 January 2016, a period of 12 days. Helphire subsequently made a demand on Ms Armstead under clause 16 of the hire agreement for the rental charge for this period. It is agreed that the applicable daily rental rate was £130 so that the amount payable under clause 16 is £1,560.

7. It should be noted that the daily rental hire rate was what is termed the "credit-hire" rate and it is not in dispute that this was significantly higher than the standard (ie "basic") rental rate charged by a hire company that was not operating on credit hire terms. ***

8. Proceedings were brought by Ms Armstead as claimant against the van driver's insurers, Royal & Sun Alliance Insurance Company plc ("RSA") who, under the *European Communities (Rights Against Insurers) Regulations 2002*, are directly liable to a party who has a cause of action against their insured in tort arising out of an accident. The remedy claimed was damages comprising (i) the cost of repairs and (ii) the sum claimed from Ms Armstead by Helphire under clause 16 of the hire agreement, which for short we will call "the clause 16 sum".

9. It is fair to assume that Ms Armstead has not been paying out of her own pocket to pursue a claim for £1,560 all the way to the Supreme Court and that the proceedings have been funded and pursued in her name by Helphire in the exercise of a right to do so that it has under the hire agreement. While it is as well to keep an eye on this commercial reality, it is not suggested by RSA (the respondent to this appeal) that it alters the legal analysis of the claim. Ms Armstead is the claimant; it is her rights which are being enforced and whether the claim is valid or not does not depend on who is funding the proceedings.

10. In its defence RSA admitted that the collision was caused by the negligence of its insured. It did not admit liability for the cost of repairs. ***

11. The claim was allocated to the small claims track and was tried on 1 July 2019 in the County Court at Walsall before Deputy District Judge Fawcett. He dismissed the claim on the ground that Ms Armstead did not have any proprietary interest in the hire car and, accordingly, had no right to recover economic loss which she suffered as a result of the damage to the vehicle caused by the negligent driving of RSA's insured. In other words, he held that the loss was irrecoverable pure economic loss. The Deputy District Judge did not make any findings as to clause 16 being unfair, unenforceable or a penalty. ***

12. Ms Armstead appealed against this decision. The appeal was heard by Recorder John Benson QC, who dismissed the appeal: [2022] Lloyd's Rep IR 574. Before the Recorder, RSA accepted that the fact that Ms Armstead was in possession of the hire car as a bailee when it was damaged entitled her to recover compensation for the diminution in value of the car. RSA accordingly conceded that the Deputy District Judge had been wrong to reject the claim for the cost of repairs and that Ms Armstead was entitled to judgment for this sum. But RSA argued, and the Recorder accepted, that she was not entitled as a matter of law to recover the clause 16 sum. ***

15. Ms Armstead appealed, once again, to the Court of Appeal. Again, her appeal was dismissed: [2022] EWCA Civ 497; [2022] RTR 23. Two points should be noted about how the case was argued in the Court of Appeal which are relevant on this appeal. First, RSA did not pursue any argument that clause 16 was unenforceable either as an unfair term or as a penalty. Second, a concession was made by counsel for Ms Armstead that she could not claim the clause 16 sum as damages if it did not represent a genuine and reasonable attempt to assess the likely losses to be incurred by Helphire as a result of its loss of use of the

hire car. ***

23. Where it is shown that loss has (factually) been caused by the defendant's breach of a duty of care, five principles are capable of limiting the damages recoverable by the claimant. They are: (i) the scope of the duty; (ii) remoteness; (iii) intervening cause [§17.2]; (iv) failure to mitigate [§20.2]; and (v) contributory negligence [§18.2.2]. Although RSA has raised the first four of these principles as further reasons (ie over and above no duty of care being owed in respect of pure economic loss) why the clause 16 sum cannot be recovered, as we shall explain below the real issue concerns remoteness. ***

27. *** [I]n general, pure economic loss is irrecoverable in the tort of negligence *** so that loss suffered as a result of damage to property is not recoverable if the claimant had no proprietary or possessory interest in the property when the damage occurred [§19.3.3.1]. The loss in this case is not pure economic loss because it is common ground that Ms Armstead had a possessory title to the hire car. ***

31. There is no reason in principle why recoverable loss should not include a contractual liability to a third party provided that the liability is consequential on physical damage to the claimant's property. ***

39. *** [T]he bailee is entitled to sue for damages for the loss of (or damage to) the goods simply by virtue of being treated as the owner, irrespective of what rights in the property exist as between the bailee and the bailor and whether the bailee is liable to the bailor for the loss. ***

46. We mentioned earlier the concession made on behalf of Ms Armstead *** that she could not claim the clause 16 sum as damages if it did not represent a genuine and reasonable attempt to assess the likely losses to be incurred by Helphire as a result of its loss of use of the hire car. ***

47. In our view, the concession was rightly made as a matter of law. *** There is room for argument as to the appropriate legal analysis of this requirement. But, in our view, consistently with the judgment of Moore-Bick LJ in *Network Rail* [*Infrastructure Ltd v. Conarken Group Ltd* [2011] EWCA Civ 644; [2012] 1 All ER (Comm) 692], the best explanation is that this is an aspect of the normal rules on remoteness of loss. We can articulate the explanation in the following five points.

> (i) The test for remoteness in the tort of negligence, as laid down in *Overseas Tankship (UK) Ltd v. Morts Dock & Engineering Co, The Wagon Mound* [1961] AC 388, is that loss is too remote to be recoverable as damages if the type of loss suffered was not reasonably foreseeable at the time of the breach of duty. But if the type of loss was reasonably foreseeable, it does not matter that the precise manner in which it was incurred was not reasonably foreseeable: *Hughes v. Lord Advocate* [1963] AC 837.
>
> (ii) A reasonably foreseeable type of loss flowing from damage to a hire car is financial loss resulting from inability to use the car (for example, while it is being repaired). In this case the claimant did not suffer a loss of use herself because she carried on using the hire car after the accident. The type of loss that she suffered in respect of loss of use of the car was a contractual liability (under clause 16) to pay the hire company for its loss of use. Nevertheless, just as loss of use to the claimant is reasonably foreseeable and not too remote, so is the contractual liability of the claimant to pay damages for loss of use to the hire company. It can also be said that the precise manner by which the loss of use became a loss to the claimant need not have been reasonably foreseeable.
>
> (iii) However, to fall within this reasonably foreseeable type of loss, it is necessary for the claimant's contractual liability to reflect the loss of use of the hire company. As the *Network Rail* case confirms, there is nothing wrong in principle, in a case where the actual loss may be difficult to calculate, in using an amount estimated in advance as the basis of the contractual liability. But to serve this purpose the contractual liability must constitute a reasonable pre-estimate of the hire company's loss of use. If, or in so far as, the contractual liability is not a reasonable pre-estimate of the hire company's loss of use, it does not fall within the type of loss that is reasonably foreseeable.
>
> (iv) One might add that the underlying policy reason for the remoteness rule is to ensure that an excessive burden of liability does not fall on the defendant. A line must be drawn to ensure that the defendant is not held liable for all loss factually caused by the tort, however far removed in time

> and space. *** [W]e have noted the danger that in a case of this kind, without an insistence that the contractual liability is a reasonable pre-estimate of the hire company's loss of use, the contractual clause might specify a sum to be paid by the claimant (even if expressed as being for loss of use of the car) that would impose an excessive liability on the defendant. Put another way, without that restriction there is a danger that this sort of contractual arrangement would be open to abuse and would inappropriately burden the defendant with a liability that does not reflect any actual loss.
>
> (v) In this case, therefore, the loss comprising the claimant's contractual liability under clause 16 would be too remote if clause 16 was not a reasonable pre-estimate of Helphire's loss of use of its vehicle. ***

65. In this case, RSA has not pleaded a case that the clause 16 sum was not a reasonable pre-estimate of Helphire's loss of use. No argument to that effect was made by RSA at the trial and no finding to that effect was made by the trial judge. ***

69. *** On the face of it, agreeing the damages for Helphire's loss of use, by taking the contractual rate that Ms Armstead had already agreed, was a reasonable way of pre-estimating that loss. ***

72. Although it is not necessary to decide the point, the issue was raised in the submissions before us as to what the position would be if the pre-estimate of loss was found not to be a reasonable sum. Would that mean that Ms Armstead would recover no damages at all in respect of loss of use ***? In our view, the answer to that is "no". That is because, applying the sometimes overlooked principle recognised in *Cory v. Thames Ironworks and Shipbuilding Co Ltd* (1868) LR 3 QB 181, the claimant would be entitled in this situation to recover as damages such lesser sum as would represent Helphire's reasonably foreseeable loss of use. As it was put by Asquith LJ in *Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd* [1949] 2 KB 528, 539, the claimant would be "entitled to recover such part of the loss actually resulting as was … reasonably foreseeable as liable to result from the breach". Although these cases involved claims for breach of contract, we see no reason why, in respect of this principle, the position should be different in tort. ***

74. *** We would therefore allow the appeal and enter judgment in favour of Ms Armstead for the clause 16 sum of £1,560. ***

LORD BRIGGS concurred separately.

REFLECTION:

- *To what extent did the contract in this case determine the measure of recoverable damages?*
- *What policy rationale does the principle of remoteness serve?*
- *Does the United Kingdom Supreme Court's summary of "the normal rules on remoteness of loss" depart in any way from the Supreme Court of Canada's conception of remoteness in Mustapha, Marchi or Livent (§19.3.1.3)?*

17.1.5 Cross-references

- *Deloitte & Touche v. Livent Inc.* [2017] SCC 63, [76]-[79]: §19.3.1.3.
- *Salomon v. Matte-Thompson* [2019] SCC 14, [94]: §19.4.1.2.
- *Manchester Building Society v. Grant Thornton UK LLP* [2021] UKSC 20, [23]: §19.4.2.1.
- *Attorney General (British Virgin Islands) v. Hartwell* [2004] UKPC 12, [22]-[40]: §19.5.1.3.

17.1.6 Further material

- M. Stauch, "Risk and Remoteness of Damage in Negligence" (2001) 64 Modern L Rev 191.
- B.C. Zipursky, "Foreseeability in Breach, Duty, and Proximate Cause" (2009) 44 Wake Forest L Rev 1247.
- A. Linden, "Down with Foreseeability! Of Thin Skulls and Rescuers" (1969) 47 Canadian Bar Rev 545.
- Just Torts Podcast (U Sydney), "Duty of Care: Causation & Remoteness" (Dec 19, 2017).

17.2 Intervening events

"Novus actus interveniens" Hogan Lovells (Feb 2017)

Novus actus interveniens is Latin for a "new intervening act". In the *Law of Delict 6th Edition*, Neethling states that a *novus actus interveniens* is "an independent event which, after the wrongdoer's act has been concluded either caused or contributed to the consequence concerned". A *novus actus* breaks the causal chain between the initial wrongdoer's action and the liability that is imputed to him or her as a result thereof. A requirement for an act or omission committed after the initial wrongdoer's act to constitute a *novus actus* is that the secondary act was not reasonably foreseeable. If the subsequent event was reasonably foreseeable at the time of the initial wrongful act, it is not to be considered as a *novus actus* capable of limiting the liability to be imputed on the initial wrongdoer.

A *novus actus* is not confined to either factual or legal causation only, and can interrupt the causal chain at either point. In respect of factual causation, a *novus actus* interrupts the *nexus* between the wrongful act of the initial wrongdoer and the consequences of his act to such an extent that it frees him of the liability of his actions. However, when assessing *novus actus* in respect of legal causation, regard must be had to the aspects of policy, fairness, reasonableness and justice in order to determine whether liability for the initial wrongful act can still be imputed to the initial wrongdoer, and whether the causal chain has been broken. A *novus actus* therefore disrupts the "directness" aspect of the initial act and the subjective test of legal causation cannot be fulfilled.

As a *novus actus* is an "independent" intervening act, it can be occasioned by anyone or anything other than the initial wrongdoer. This general category also includes the injured party him or herself, another third party or even an act of God. Therefore, an injured patient who walks on a slippery floor after having been injured thereafter occasioning further surgery will have created his own *novus actus*, or where a storm causes further and greater damage to a property after it has been damaged by a wrongdoer will also be viewed as a *novus actus*.

Novus actus is often utilised as a defence by initial wrongdoers who wish to prove that their liability is limited or non-existent and should be imputed on another party. This must be distinguished from contributory negligence [§18.2.2]. If an act or omission occurs before the incident that gives rise to the injury, then that is classified as contributory negligence, such as when a passenger in a motor vehicle fails to wear a seatbelt, he or she is contributory negligent. Whereas an independent act that occurs after the damage-causing incident is a *novus actus*, such as when a passenger is hospitalised after a motor vehicle collision and sustains further injuries in hospital. *** […continue reading]

REFLECTION:

- *Why does the law hold that a subsequent independent event will not break the chain of causation if it was reasonably foreseeable at the time of the initial wrongful act?*[541]

[541] See *Hemmings v. Peng*, 2024 ONCA 318, [68] *per* Brown J.A.: "*** As to the effect of a subsequent event following that of the original tortfeasor ***:

- In *Jones v. Shafer*, [1948] S.C.R. 166 (SCC), the Supreme Court of Canada stated at pp. 170-71: "[T]he intervening conscious act of a third party will break the line of causation and relieve the party who may be otherwise negligent of liability, unless to a reasonable man in the same circumstances that conscious act would have been foreseeable";
- The authors of *Fridman* [*The Law of Torts in Canada*, 4th ed. (2020)] write, at p. 541, that "[I]f it was likely that something of the sort would or might happen as a result of what the defendant did to the plaintiff then the subsequent cause remains connected to the original negligence"; and
- The Manitoba Court of Appeal in *Powell v. Guttman* (1978), 89 D.L.R. (3d) 180 (Man. C.A.), stated at p. 192: "Where a tortfeasor creates or materially contributes to a significant risk of injury occurring and injury does occur which is squarely within the risk thus created or materially increased, then unless the risk is spent, the tortfeasor is liable for injury which follows from the risk, even though there are other subsequent causes which also cause or materially contribute to that injury." ***"

17.2.1 Booth v. St Catharines (City) [1948] CanLII 10 (SCC)

✗**REF: §14.1.1.1, §14.2.1.1**

CHIEF JUSTICE AND KERWIN JJ.: ***

7. *** The maxim *novus actus interveniens* has no application because while the structure was sufficient for its purpose as a flag tower, in view of the great concourse of people and of the fireworks, the presence of boys upon the tower, even though unauthorized, was the very thing that should have been anticipated. Furthermore, having permitted the public to enter the park, the respondents were under a duty not to create or permit others to create a new danger without giving warning of its existence. The presence of the boys on the tower for ten to fifteen minutes before it collapsed was such a danger which the respondents permitted to be created and to continue. Certainly no warning of its existence was given and I agree with the trial judge that the danger was not apparent to the parties injured or to Grace Ann McCormack.

ESTEY J.: ***

55. The boys in climbing the flagpole exceeded any licence or permission given to them and were as a consequence trespassers thereon. It was this very trespass that a reasonable man would have foreseen and therefore their conduct in this regard cannot constitute a *novus actus interveniens*: *Haynes v. Harwood* [1935] 1 K.B. 146. ***

REFLECTION:

- *The boys acted independently in climbing the flagpole, some perhaps disobeying the park manager's earlier instructions to keep off it. Why were their actions nevertheless not a novus actus interveniens?*

17.2.2 Home Office v. Dorset Yacht Co. Ltd [1970] UKHL 2

House of Lords – [1970] UKHL 2

✗**REF: §13.2.3**

LORD REID: ***

7. *** [I]t is said that the Respondents must fail because there is a general principle that no person can be responsible for the acts of another who is not his servant or acting on his behalf. But here the ground of liability is not responsibility for the acts of the escaping trainees: it is liability for damage caused by the carelessness of these officers in the knowledge that their carelessness would probably result in the trainees causing damage of this kind. So the question is really one of remoteness of damage. And I must consider to what extent the law regards the acts of another person as breaking the chain of causation between the defendants' carelessness and the damage to the plaintiff.

8. There is an obvious difference between a case where all the links between the carelessness and the damage are inanimate so that, looking back after the event, it can be seen that the damage was in fact the inevitable result of the careless act or omission, and a case where one of the links is some human action. In the former case the damage was in fact caused by the careless conduct however unforeseeable it may have been at the time that anything like this would happen. At one time the law was that unforeseeability was no defence (*Polemis* [1921] 3 K.B. 560). But the law now is that there is no liability unless the damage was of a kind which was foreseeable (*Wagon Mound No. 1* [1961] AC 388) [§17.1.1].

9. On the other hand, if human action (other than an instinctive reaction) is one of the links in the chain it cannot be said that looking back the damage was the inevitable result of the careless conduct. No one in practice accepts the possible philosophic view that everything that happens was predetermined. Yet it has never been the law that the intervention of human action always prevents the ultimate damage from being regarded as having been caused by the original carelessness. The convenient phrase *novus actus interveniens* denotes those cases where such action is regarded as breaking the chain and preventing the damage from being held to be caused by the careless conduct. But every day there are many cases where, although one of the connecting links is deliberate human action, the law has no difficulty in holding that the

defendant's conduct caused the plaintiff loss. ***

15. *** [W]here human action forms one of the links between the original wrongdoing of the defendant and the loss suffered by the plaintiff, that action must at least have been something very likely to happen if it is not to be regarded as *novus actus interveniens* breaking the chain of causation. I do not think that a mere foreseeable possibility is or should be sufficient, for then the intervening human action can more properly be regarded as a new cause than as a consequence of the original wrongdoing. But if the intervening action was likely to happen I do not think it can matter whether that action was innocent or tortious or criminal. Unfortunately tortious or criminal action by a third party is often the very kind of thing which is likely to happen as a result of the wrongful or careless act of the defendant. And in the present case, on the facts which we must assume at this stage, I think that the taking of a boat by the escaping trainees and their unskilful navigation leading to damage to another vessel were the very kind of thing that these Borstal officers ought to have seen to be likely. ***

LORD MORRIS OF BORTH-Y-GEST: ***

49. There was a special relation [in this case] in that the officers were entitled to exercise control over boys who to the knowledge of the officers might wish to take their departure and who might well do some damage to property near at hand. The events that are said to have happened could reasonably have been foreseen. The possibility that the property of the Company might be damaged was not a remote one. A duty arose. It was a duty owed to the Company. It was not a duty to prevent the boys from escaping or from doing damage but it was a duty to take such care as in all the circumstances was reasonable in the hope of preventing the occurrence of events likely to cause damage to the Company. ***

LORD DIPLOCK: ***

144. The only cause of action relied upon is the "negligence" of the officers in failing to prevent the youths from escaping from their custody and control.

145. It is implicit in this averment of "negligence" and must be treated as admitted not only that the officers by taking reasonable care could have prevented the youths from escaping, but also that it was reasonably foreseeable by them that if the youths did escape they would be likely to commit damage of the kind which they did commit, to some craft moored in the vicinity of Brownsea Island. ***

203. If therefore it can be established at the trial of this action (1) that the Borstal officers in failing to take precautions to prevent the trainees from escaping were acting in breach of their instructions and not in *bona fide* exercise of a discretion delegated to them by the Home Office as to the degree of control to be adopted and (2) that it was reasonably foreseeable by the officers that if these particular trainees did escape they would be likely to appropriate a boat moored in the vicinity of Brownsea Island for the purpose of eluding immediate pursuit and to cause damage to it, the Borstal officers would be in breach of a duty of care owed to the plaintiff and the plaintiff would, in my view, have a cause of action against the Home Office as vicariously liable for the negligence of the Borstal officers. ***

REFLECTION:

- *Prof. Weinrib criticises the reasoning of Lord Reid in purporting to narrow the scope of liability for intervening acts causing ulterior harm, in place of the usual reasonable foreseeability enquiry affirmed in The Wagon Mound No. 1 and applied by Lord Morris and Lord Diplock.[542] In cases where the direct cause of harm is the wrongful act of another person, does reasonable foreseeability set the standard of potential liability too low?*

17.2.3 Bradford v. Kanellos [1973] CanLII 1285 (SCC)

Supreme Court of Canada – 1973 CanLII 1285

MARTLAND, JUDSON AND RITCHIE JJ.:

1. On the morning of April 12, 1967, the appellants, who are husband and wife, were customers in the

[542] E.J Weinrib, "The *Dorset Yacht* Case: Causation, Care and Criminals" (1972) 4 Ottawa L Rev 389.

respondents' restaurant in the City of Kingston. While seated at the counter in the restaurant, a flash fire occurred in the grill used for cooking purposes. The grill was equipped with an automatic fire extinguisher system, of an approved type, which, when it became operative, discharged carbon dioxide on to the heated area to extinguish the fire.

2. Shortly after the start of the fire the fire extinguisher was activated, manually, and the fire was extinguished almost immediately. The fire was not a cause of concern to the appellants. No damage was done by the fire because the fire was of very short duration and all that burned was grease that had accumulated in the grill and a rag or rags which had been thrown on the fire when it broke out in an effort to extinguish it.

3. The fire extinguisher made a hissing or popping noise when it operated. This caused an unidentified patron in the restaurant to shout that gas was escaping and that there was going to be an explosion. The result of these words was to cause a panic in the restaurant. While people ran from the restaurant the appellant wife was pushed or fell from her seat at the counter and sustained injury.

4. The appellants brought action against the respondents, the appellant wife claiming general damages and the appellant husband claiming special damages for expenses incurred as a result of his wife's injuries. ***

7. [The trial judge's] conclusion was that, while the act of yelling out almost qualified as that of an "idiotic person", the panic could have been foreseen.

8. By unanimous decision, the Court of Appeal allowed the appeal of the present respondents. Schroeder J.A., who delivered the judgment of the Court, said:

> The practical and sensible view to be taken of the facts here leads fairly to the conclusion that it should not be held that the person guilty of the original negligence resulting in the flash fire on the grill ought reasonably to have anticipated the subsequent intervening act or acts which were the direct cause of the injuries and damages suffered by the plaintiffs.

10. *** The judgment at trial found the respondents to be liable because there had been negligence in failing to clean the grill efficiently, which resulted in the flash fire. But it was to guard against the consequences of a flash fire that the grill was equipped with a fire extinguisher system. This system was described by the Chief of the Kingston Fire Department, who was called as a witness by the appellants, as, not only an approved installation, but one of the best.

11. This system, when activated, following the flash fire, fulfilled its function and put out the fire. This was accomplished by the application of carbon dioxide on the fire. In so doing there was a hissing noise and it was on hearing this that one of the customers exclaimed that gas was escaping and that there was danger of an explosion, following which the panic occurred, and the appellant wife was injured.

12. On these facts it is apparent that her injuries resulted from the hysterical conduct of a customer which occurred when the safety appliance properly fulfilled its function. Was that consequence fairly to be regarded as within the risk created by the respondents' negligence in permitting an undue quantity of grease to accumulate on the grill? The Court of Appeal has found that it was not and I agree with that finding. ***

SPENCE AND LASKIN JJ. (dissenting): ***

23. I am not of the opinion that the persons who shouted the warning of what they were certain was an impending explosion were negligent. I am, on the other hand, of the opinion that they acted in a very human and usual way and that their actions, as I have said, were utterly foreseeable and were part of the natural consequence of events leading inevitably to the plaintiff's injury. I here quote and adopt Fleming, *The Law of Torts*, 4th ed., at pp. 192-3:

> Nowadays it is no longer open to serious question that the operation of an intervening force will not ordinarily clear a defendant from further responsibility, if it can fairly be considered a not abnormal incident of the risk created by him—if, as sometimes expressed, it is 'part of the ordinary course of things'. Nor is there room any longer for any categorical distinction in this regard between forces of

nature, like rain or ice, on the one hand, and the action of human beings even when consciously controlled, on the other.

Least difficult are instances of just normal and reasonable response to the stimulus of the hazard engendered by the defendant's negligence …. A time-honoured illustration is the famous *Squib Case: Scott v. Shepherd* (1773) 2 W.Bl.892 [§2.1.2], where a wag threw a lighted fire-work into a market whence it was tossed from one stall to another in order to save the wares until it eventually exploded in the plaintiff's face. Yet it was held that *trespass* lay because "all that was done subsequent to the original throwing was a continuation of the first force and first act and continued until the squib was spent by bursting". ***

REFLECTION:

- *What explains the disagreement between the majority and the dissenting judges? Who's view is more compelling?*

17.2.4 Athey v. Leonati [1996] CanLII 183 (SCC)

✗**REF: §16.2.1, §16.3.1, §17.4.1**

MAJOR J. (FOR THE COURT): ***

(4) Independent Intervening Events

31. The respondents also sought to draw an analogy with cases where an unrelated event, such as a disease or non-tortious accident, occurs after the plaintiff is injured. One such case was *Jobling v. Associated Dairies Ltd.*, [1981] 2 All E.R. 752 (H.L.), in which the defendant negligently caused the plaintiff to suffer a back injury. Before the trial took place, it was discovered that the plaintiff had a condition, completely unrelated to the accident, which would have proved totally disabling in a few years. Damages were reduced accordingly. In *Penner v. Mitchell* (1978), 89 D.L.R. (3d) 343 (Alta. C.A.), damages for loss of income for 13 months were reduced because the plaintiff had a heart condition, unrelated to the accident, which would have caused her to miss three months of work in any event.

32. To understand these cases, and to see why they are not applicable to the present situation, one need only consider first principles. The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). However, the plaintiff is not to be placed in a position *better* than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position", which is the plaintiff's loss. In the cases referred to above, the intervening event was unrelated to the tort and therefore affected the plaintiff's "original position". The net loss was therefore not as great as it might have otherwise seemed, so damages were reduced to reflect this.

33. In the present case, there was a finding of fact that the accident caused or contributed to the disc herniation. The disc herniation was not an independent intervening event. The disc herniation was a product of the accidents, so it does not affect the assessment of the plaintiff's "original position" and thereby reduce the net loss experienced by the plaintiff. ***

REFLECTION:

- *While the defendants' vehicular collisions injured Athey's back, Athey did not suffer disc herniation until many months later when he was exercising. Why was Athey's exercise stretching not a novus actus interveniens?*

17.2.5 Cross-references

- *Salomon v. Matte-Thompson* [2019] SCC 14, [91]-[92]: §19.4.1.2.
- *Robinson v. Chief Constable of West Yorkshire* [2018] UKSC 4, [80]: §19.5.1.2.
- *Attorney General (British Virgin Islands) v. Hartwell* [2004] UKPC 12, [22]-[25]: §19.5.1.3.

17.2.6 Further material

- A. du Bois-Pedain, "*Novus Actus* and Beyond: Attributing Causal Responsibility in the Criminal Courts" (2021) 80 Cambridge LJ S61.
- G. Williams, "*Finis* for *Novus Actus*?" (1989) 48 Cambridge LJ 391.
- The Law Academy (UK), "Intervening Causes" (Apr 11, 2024) 📺.

17.3 Eggshell skull plaintiffs

"Thin Skull" Courthouse Libraries BC (Apr 19, 2018)

The thin skull rule makes the defendant liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-exisiting yet stable condition. The defendant must take the victim as they find them with whatever peculiar weaknesses and predispositions they might have, and is liable even though the plaintiff's losses are more dramatic than they would be for the average person. […continue reading]

17.3.1 Jaipur Golden Gas Victims Ass'n v. Union of India [2009] INDLHC 4354

✗**REF: §16.2.4, §19.5.2.4, §22.1.4, §22.2.1**

MANMOHAN J.: ***

16. On merits, Mr. Thadani submitted that there was no conclusive evidence that death of Babu Lal, Ved Prakash @ Raju and Poonam was attributable to inhalation of [Phosphine] gas released. Mr. Thadani repeatedly emphasised that Babu Lal and Ved Prakash @ Raju were already suffering from Tuberculosis and, therefore, it could not be said with certainty that "but for" emission of gas from godown of respondent no. 5, they would have survived. ***

76. It is further an established principle of law that a party in breach has to take his victim *talem qualem*, which means that if it was reasonable to foresee some injury, however slight, to the claimant, assuming him to be a normal person, then the infringing party is answerable for the full extent of the injury which the claimant had sustained owing to some peculiar susceptibility.

77. In *Marconato v. Franklin* [1974] 6 W.W.R. 676 (B.C.S.C.) while on the road, Franklin (defendant) crashed into Marconato, causing her to incur some mild physical injuries. But Marconato had some paranoid tendencies and the accident caused her to develop a debilitating syndrome of psychological problems. Thin skull rule was applied and that means you take your victims as they come. Although the damage is remote and not reasonably foreseeable, the accident operated on plaintiff's pre-existing condition and the defendant must pay damages for all the consequences of her negligence. This doctrine applies only when the claimant's pre-existing hypersensitivity is triggered into inflicting the injury complained of, or an existing injury is aggravated by the infringing party's act. A clear example of the hypersensitivity type of case is that of persons suffering from hemophilia or "egg-shell" skulls. MacKinnon L.J. said that "one who is guilty of negligence to another must put up with idiosyncrasies of his victim that increase the likelihood or extent of damage to him: it is no answer to a claim for a fractured skull that its owner had an unusually fragile one. (*Owens v. Liverpool Corporation* (1939) 1 K.B. 394 at 400-401).

78. In *Smith v. Leech Brain & Co. Ltd.* (1962) 2 Q.B. 405, a workman, who was working with molten metal, suffered a burn on his lip when a fleck of metal splashed onto it. His employers were at fault in not having provided him with a proper shield. The burn eventually turned cancerous and the man died. It was proved that he had a predisposition to cancer, but this condition might never have become malignant were it not for the burn. The defendants were held liable for his death. Nervous shock cases are also consistent with this principle. The rule is that if injury from nervous shock is reasonably foreseeable to an ordinarily strong-nerved person situated in the position of the claimant, the defendant is liable for the full extent of the shock. Hypersensitivity to shock may prevent there being any initial liability; but once that is established by showing that even a strong nerved person would have suffered some shock, the defendant is liable for the full extent of the shock actually suffered by the plaintiff. ***

79. Consequently, Mr. Thadani's arguments that Babu Lal and Ved Prakash @ Raju are not entitled to any compensation as they were already suffering from Tuberculosis is not tenable in law.

80. Accordingly, keeping in view the medical record of deceased Babu Lal and Ved Prakash @ Raju as well as the affidavits filed by their wife and mother respectively and the fact that their Pulmonary Tuberculosis got aggravated due to inhalation of phosphine gas and they died at a premature age, we are of the opinion that they are entitled to full compensation along with deceased Akash. ***

REFLECTION:

- *Why was this case not a situation where the crumbling skull rule (§17.4) applied to limit liability?*

17.3.2 Greenway-Brown v. MacKenzie [2019] BCCA 137

British Columbia Court of Appeal – 2019 BCCA 137, leave denied: 2019 CanLII 117824 (SCC)

FISHER J.A. (STROMBERG-STEIN AND GRIFFIN JJ.A. concurring):

1. This is an appeal from the dismissal of a plaintiff's claims for damages arising from five separate motor vehicle accidents. All five actions were heard together, as were all five appeals. ***

6. The appellant was involved in five motor vehicle accidents as follows:

> #1 November 25, 2014: The appellant hit the rear of the defendant's vehicle while the defendant was making a right turn at an intersection;
>
> #2 May 24, 2015: While parked in a Safeway parking lot, the vehicle in front reversed into the appellant's vehicle;
>
> #3 January 30, 2016: While parked in a roundabout in front of a McDonald's restaurant, the defendant's vehicle struck the rear and side of the appellant's vehicle while attempting to pass;
>
> #4 March 28, 2016: The appellant was rear-ended at an intersection by a defendant who left the scene;
>
> #5 June 2, 2017: While parked in the passenger pick-up area at Vancouver International Airport, the defendant's vehicle struck the front driver side of the appellant's vehicle while attempting to park.

7. Liability for accidents #1 and #4 was denied. The appellant claimed damages from all of the accidents for a total of approximately $200,000: $100,000 for general damages, $30,000 for past loss of income, $60,000 for future loss of earning capacity, and $7,800 in special damages. ***

a) Damage in fact

80. It is my view that the trial judge erred in law by applying the requirement for serious and prolonged injury in *Mustapha* [2008 SCC 27] [§17.1.2] to the alleged injuries in this case, and he made palpable and overriding errors of fact in his assessment of the evidence of the appellant's injuries.

81. First, the judge concluded that the appellant's injuries in accidents #2, #3 and #5 were "so minor that they did not cause injury", as "[a]ny injury she suffered from those events was not serious and prolonged". I interpret this to mean that the judge was not satisfied that the appellant had proven that her injuries constituted damage in fact.

82. In my view, this is an incorrect application of the requirement in *Mustapha* that "compensable injury must be serious and prolonged and rise above … ordinary annoyances, anxieties and fears". *Mustapha* was concerned about mental, not physical, injury and this requirement does not translate to a requirement that physical injury must be serious and prolonged to constitute injury. If that were the case, minor physical injuries caused by a defendant's negligence would never be recoverable, and that is not the law. The essence of this threshold in *Mustapha* is that mental injury requires more than "psychological upset".

83. This interpretation is consistent with *Saadati v. Moorhead*, 2017 SCC 28 (S.C.C.) [§19.2.1.3], where the court rejected the notion that legally compensable mental injury must rest on the claimant's proving a recognized psychiatric illness. ***

84. The judge's conclusion that the appellant suffered no damage because the injury was not sufficiently serious and prolonged, incorrect in my view, flowed into his assessment of the evidence and ultimate factual findings. ***

b) Causation in law

90. The trial judge also concluded that the appellant had not established "the foreseeability that an injury would occur, from the facts in accidents 2, 3, and 5, in a person of ordinary fortitude". He acknowledged that *Mustapha* was addressing mental injury, but held that the reasoning had application to claims of physical injury as well:

> 52. … *Mustapha* finds, in part, that there is a threshold test for establishing compensability at law, which precedes a so-called thin-skull analysis. Before a court will embark upon a thin-skull analysis, a plaintiff must first establish the foreseeability that an injury would occur, or could occur, in a person of ordinary fortitude ….

91. A few paragraphs prior to this statement, the judge had found that the appellant was "highly susceptible to the 'catastrophizing' that her own doctor diagnosed in her", that very small events could trouble her out of all proportion to what one could reasonably expect of anyone, and that she had suffered from physical and emotional problems for many years before accident #1 "having to do with her chronic obesity, nutritional problems, prolonged difficulties in the workplace, and other circumstances". He then continued to find it "wholly improbable" that the appellant suffered, or could suffer damages from "the three parking lot episodes".

92. I take from all of this that the judge found that if the appellant had suffered any injury, she had an extreme reaction, which a person of ordinary fortitude would not suffer.

93. It is my view that the judge erred in applying this principle from *Mustapha* in the circumstances of this case. While I agree with the respondents that the same duty of care and foreseeability analysis applies to claims in negligence for both mental and physical injury, *Mustapha* is concerned with mental injury; more particularly, what mental injury is sufficient to constitute damage (as discussed above), and what mental injury is foreseeable to establish legal causation.

94. It is also my view that the injuries asserted by the appellant were of a substantially different nature than the injury asserted in *Mustapha*. Mr. Mustapha had to show that it was reasonably foreseeable that a person of ordinary fortitude would suffer mental injury from seeing flies in the bottle of water. He failed to do so because his reactions were considered to be highly unusual and very individual. Here, the appellant had to show that it was reasonably foreseeable that a person of ordinary fortitude would suffer soft tissue injuries in one or more minor motor vehicle accidents, leading to chronic pain and other psychological problems. These are not the kinds of injuries that are too remote to allow recovery for negligence in a motor vehicle accident. The injuries may have been more serious than expected, less serious than asserted, or they may not have been established at all. But in my opinion, it cannot be said that they were not reasonably foreseeable.

Disposition

95. For all of these reasons, I would allow the appeals and order new trials in actions CA45180, CA45181, CA45182 and CA45183, and I would dismiss the appeal in CA45184.

REFLECTION:

- *Is the eggshell skull rule an exception to the remoteness principle that damage must have been reasonably foreseeable? Why should a defendant be liable for unexpectedly severe consequences suffered by a plaintiff?*

17.3.3 Cross-references

- *Bechard v. Haliburton Estate* [1991] CanLII 7362 (ON CA), [50]: §19.2.2.1.

17.3.4 Further material

- E. Compeau, "The Price of God: Understanding Reason and Religion in the Duty to Mitigate" (2020) 25 Appeal: Review of Current L & L Reform 89.
- E.C. Lim, "Thin-Skull Plaintiffs, Socio-Cultural 'Abnormalities' and the Dangers of an Objective Test for Hypersensitivity" (2014) 37 Dalhousie LJ 749.
- O. Redko, "Religious Practice as a 'Thin Skull' in the Context of Civil Liability" (2014) 72 U Toronto Faculty of L Rev 37.
- J.S. McQuade, "The Eggshell Skull Rule and Related Problems in Recovery for Mental Harm in the Law of Torts" (2001) 24 Campbell L Rev 1.

17.4 Crumbling skull plaintiffs

"Crumbling Skull" Courthouse Libraries BC (Apr 19, 2018)

The crumbling skull rule deals with a plaintiff that has an unstable pre-existing condition. The defendant need not compensate the plaintiff for the effects of their condition, which they would have experienced anyway. The defendant is liable for additional damage, but not the pre-existing damage. […continue reading]

17.4.1 Athey v. Leonati [1996] CanLII 183 (SCC)

✗**REF: §16.2.1, §16.3.1, §17.2.4**

MAJOR J. (FOR THE COURT): ***

(5) The Thin Skull and "Crumbling Skull" Doctrines

34. The respondents argued that the plaintiff was pre-disposed to disc herniation and that this is therefore a case where the "crumbling skull" rule applies. The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.

35. The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position *better* than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage ***. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award ***. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

36. The "crumbling skull" argument is the respondents' strongest submission, but in my view it does not succeed on the facts as found by the trial judge. There was no finding of any measurable risk that the disc herniation would have occurred without the accident, and there was therefore no basis to reduce the award to take into account any such risk. ***

REFLECTION:

- *In what ways do the eggshell skull and crumbling skull rules both operate to ensure the plaintiff is put in their*

original position?

- *Prof. Roach has criticised the application of the crumbling skull doctrine in assessments of damage to victims of Indian Residential Schools.[543] Should courts refuse to apply the crumbling skull doctrine when in the interests of justice?*

17.4.2 Cross-references

- *Blackwater v. Plint* [2005] SCC 58, [80]: §19.7.2.

17.4.3 Further material

- M. McInnes, "Causation in Tort Law: Back to Basics at the Supreme Court of Canada" (1997) 35 Alberta L Rev 1013.
- R. Ferrari & L. Klar, "On Matters of Causation in Personal Injury Cases: Considerations in Forensic Examination" (2014) 1 European J of Rheumatology 150.
- T. Iezzi, M. Duckworth & S. Schenke, "To Crack or Cumble: Use of the Thin Skull and Crumbling Skull Rules" (2013) 6 Psychological Injury and L 156.

17.5 Liability limited by or concurrent with contractual terms

E. Durbin, "Torts—Nature of Tort Law and Liability" WestlawNext Canada (2022)

Concurrent liability [in tort and breach of contract] may exist where the plaintiff can establish that a common law duty of care was owed because there was a relationship of sufficient proximity between the parties to constitute that duty and there is no valid policy reason for negating the duty. The terms of the contract may indicate the nature of the relationship but the express duty must not depend upon the obligations set out under the contract and must exist independently at law. The plaintiff may assert the right or cause of action which is most advantageous, unless there is an express exclusion or limitation of liability in the contractual terms between the parties. *** […continue reading]

REFLECTION:

- *Why should it be open to plaintiffs to sue in contract as well as in tort in respect of the same wrongdoing? Does this not essentially give plaintiffs multiple bites at the apple?*

17.5.1 Driving Force Inc. v. I Spy-Eagle Eyes Safety Inc. [2022] ABCA 25

✗REF: §8.2.4

[543] K. Roach, "Blaming the Victim: Canadian Law, Causation, and Residential Schools" (2014) 64 U Toronto LJ 566, 573-574:

> "In one early case [*DW v. Canada (Attorney General) and Starr*, 1999 SKQB 187 at para 28], Maurice J of the Saskatchewan Queen's Bench reduced the residential survivor's damages for loss of earnings to 50 per cent below the wages received by an average roofer because,
>
> > The plaintiff was raised in poverty. He was the youngest of eight children born to an alcoholic mother. He never knew his father (apparently all his siblings had different fathers). His mother was unable to care for her children and, consequently, the plaintiff was removed from her care and placed in the student residence. The plaintiff's formative years were spent moving back and forth between various older siblings, relatives and his grandmother. He attended several different schools and was introduced to alcohol and drugs at an early age by his peers. His siblings have all had problems with drugs and/or alcohol and difficulty in holding employment. Many do not have a high school education and none have post-secondary education.
>
> This passage reveals as much about the judge as about the plaintiff. It displays bias against child rearing done by extended families. The judge's comments about all of the plaintiffs siblings 'apparently' having different fathers are gratuitously cruel and sexist. In the end, the result of this argument was to reduce damages of $139,000 for lost earnings over ten years to $69,500. The crumbling skull argument allowed the defendants to put the former student and his family on trial. It blamed the victim. Alas, it often worked to save Canada and the churches some money."

WATSON, SLATTER AND SCHUTZ JJ.A.: ***

22. It is well established that when a party breaches a contract, that party might also be liable in tort. For example, when it is a term of the contract that a party will provide goods or services in a non-negligent manner, parallel obligations may arise under the tort of negligence: see e.g. *Adeco Exploration Company Ltd. v. Hunt Oil Company of Canada, Inc.*, 2008 ABCA 214, 437 AR 33, 94 Alta LR (4th) 270.

23. However, in such situations, it is clear that the terms of the contract take primacy. The principles were confirmed in *BG Checo International Ltd v. British Columbia Hydro and Power Authority*, [1993] 1 SCR 12 at pp. 26-27:

> In our view, the general rule emerging from this Court's decision in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, is that where a given wrong *prima facie* supports an action in contract and in tort, the party may sue in either or both, except where the contract indicates that the parties intended to limit or negative the right to sue in tort …
>
> Viewed thus, the only limit on the right to choose one's action is the principle of primacy of private ordering—the right of individuals to arrange their affairs and assume risks in a different way than would be done by the law of tort. It is only to the extent that this private ordering contradicts the tort duty that the tort duty is diminished. The rule is not that one cannot sue concurrently in contract and tort where the contract limits or contradicts the tort duty. It is rather that the tort duty, a general duty imputed by the law in all the relevant circumstances, must yield to the parties' superior right to arrange their rights and duties in a different way … ***

REFLECTION:

- *Why should defendants be able to limit their tortious liability through contractual terms? Should contractual limitations on or ousters of responsibility in tort be construed generously or strictly?*

17.5.2 Mustapha v. Culligan of Canada Ltd [2008] SCC 27

✗REF: §17.1.2

MCLACHLIN C.J.C. (FOR THE COURT): ***

19. The plaintiff also brought a claim for damages arising out of breach of contract, although he appears not to have pursued it with vigour. This claim fails. With regards to Mr. Mustapha's psychiatric injury, there is no inconsistency in principle or in outcome between negligence law and contract law. Damages arising out of breach of contract are governed by the expectation of the parties at the time the contract was made (*Hadley v. Baxendale* (1854), 9 Exch. 341, 156 E.R. 145 (Eng. Ex. Div.), at p. 151, applied with respect to mental distress in *Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3, 2006 SCC 30 (S.C.C.)), as distinguished from the time of the tort, in the case of tort. I have concluded that personal injury to Mr. Mustapha was not reasonably foreseeable by the defendant at the time of the alleged tort. The same evidence suggests that Mr. Mustapha's damages could not be reasonably supposed to have been within the contemplation of the parties when they entered into their agreement. ***

REFLECTION:

- *Given Mustapha had a contractual relationship with the defendant, why would he pursue his claim primarily on the basis of the relationship in the tort of negligence?*
- *Is the remoteness principle in tort necessarily equivalent to the contract rule in Hadley v. Baxendale?*[544]

17.5.3 Cross-references

- *XY LLC v. Zhu* [2013] BCCA 352, [16]: §10.5.1.
- *Grant v. Australian Knitting Mills Ltd* [1935] UKPC 62, [15]-[16], [21], [24]: §13.1.4.

[544] See J.W. Neyers *et. al*, *Fridman's The Law of Contract in Canada* (7th edn, Toronto: Thompson Reuters Canada, *forthcoming* 2024), ch. 22, §1(a)(i)(A).

- *Deloitte & Touche v. Livent Inc.* [2017] SCC 63, [114], [126]: **§19.3.1.3**.
- *Winnipeg Condo. Corp. No. 36 v. Bird Constr. Co.* [1995] CanLII 146 (SCC), [16]-[26], [35]: **§19.3.2.1**.
- *1688782 Ontario Inc. v. Maple Leaf Foods Inc.* [2020] SCC 35, [19], [90]-[94]: **§19.3.2.2**.
- *Manchester Building Society v. Grant Thornton UK LLP* [2021] UKSC 20, [2]: **§19.4.2.1**.

17.5.4 Further material

- Y. Goh & M. Yip, "Concurrent Liability in Tort and Contract" (2017) 24 Torts LJ 148.
- M. Balen, "Concurrent Liability and Remoteness in Long-term Relationships" [2016] Lloyd's Maritime & Commercial Law Quarterly 187.
- N. Rafferty, "Concurrent Liability in Contract and Tort: Recovery of Pure Economic Loss and the Effect of Contributory Negligence" (1982) 20 Alberta L Rev 357.
- N. Rafferty, "The Impact of Concurrent Liability in Contract and Tortious Negligence Upon the Running of Limitation Periods" (1983) 32 U New Brunswick LJ 189.
- R. De Graaff, "Concurrent Claims in Contract and Tort: A Comparative Perspective" (2017) 25 European Rev of Private L 701.

18 DEFENCES (II)

✗REF: §6

18.1 Assumption of risk

"Assumption of risk" in Wex (Cornell Law School Legal Information Institute, 2022)

Assumption of risk is a common law doctrine that refers to a plaintiff's inability to recover for the tortious actions of a negligent party in scenarios where the plaintiff voluntarily accepted the risk of those actions. Potential plaintiffs sometimes take the risk of injury onto themselves and absolve potential defendants from any liability. ***

Assumption of risk can either be express or implied.

> • Express assumption of risk, typically achieved through a signed waiver, prevents an injured plaintiff from recovering beyond the terms of the waiver so long as the waiver is not against public policy. Although generally raised in tort cases, courts often treat express assumption of risk as a contract issue.
>
> • Implied assumption of risk prevents a party with knowledge and appreciation that they are at risk from recovering against a tortfeasor for any harm within that risk. Harm within the risk generally includes any harm which is inherent to the activity; for example, the risk of physical injury while playing contact sports. *** […continue reading]

18.1.1 Informed consent

Denman v. Radovanovic, 2024 ONCA 276

42. At the outset it is important to distinguish between consent as it relates to the tort of battery and informed consent in the context of a negligence claim. As some have commented, the terminology "informed consent" has led to some confusion.[545]

43. Where there is a failure to make adequate disclosure to a patient, this gives rise to a claim in negligence. It does not, however, vitiate consent to treatment so as to give rise to a claim in battery. A claim in battery will only arise in circumstances where there was no consent at all or where the treatment went beyond the scope of consent.[546] ***

REFLECTION:

- *What differentiates the doctrine of informed consent to the risk of negligence from implied consent to battery?*

18.1.1.1 Kohli v. Manchanda [2008] INSC 42

✗REF: §2.2.2, §6.7.3.1

RAVEENDRAN J. (FOR THE COURT): ***

6. *** On May 10, 1995, [the appellant] went to the clinic only for a diagnostic laparoscopy. Her signature was taken on some blank printed forms without giving her an opportunity to read the contents. As only a

[545] For example, Laskin C.J.C. (as he then was) commented on the confusion the terminology causes in *Reibl v. Hughes*, [1980] 2 S.C.R. 880 (SCC), at pp. 888-89: "The popularization of the term "informed consent" for what is, in essence, a duty of disclosure of certain risks of surgery or therapy appears to have had some influence in the retention of battery as a ground of liability, even in cases where there was express consent to such treatment and the surgeon or therapist did not go beyond that to which consent was given. It would be better to abandon the term when it tends to confuse battery and negligence."

[546] *Reibl v. Hughes*, [1980] 2 S.C.R. 880 (SCC), at pp. 890-91.

diagnostic procedure by way of a laparoscopic test was to be conducted, there was no discussion, even on May 10, 1995, with regard to any proposed treatment. ***

21. *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972) [United States Court of Appeals, District of Columbia Circuit] explored the rationale of a doctor's duty to reasonably inform a patient as to the treatment alternatives available and the risk incidental to them, as also the scope of the disclosure requirement and the physician's privileges not to disclose. It laid down the 'reasonably prudent patient test' which required the doctor to disclose all material risks to a patient, to show an 'informed consent'. It was held:

> "… In our view, the patient's right of self-decision shapes the boundaries of the duty to reveal. That right can be effectively exercised only if the patient possesses enough information to enable an intelligent choice. The scope of the physician's communications to the patient, then, must be measured by the patient's need, and that need is the information material to the decision. Thus the test for determining whether a particular peril must be divulged is its materially to the patient's decision: all risks potentially affecting the decision must be unmasked." ***

22. *** In England, the standard applicable ~~is~~ [was[547]] popularly known as the ***Bolam*** test, first laid down in *Bolam v. Friern Hospital Management Committee* [1957] 2 All. E.R. 118. McNair J., in a trial relating to negligence of a medical practitioner, while instructing the Jury, stated thus:

> "(i) A doctor is not negligent, if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. Putting it the other way around, a doctor is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view. At the same time, that does not mean that a medical man can obstinately and pig-headedly carry on with some old technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion. ***

26. In India, the majority of citizens requiring medical care and treatment fall below the poverty line. Most of them are illiterate or semi-literate. They cannot comprehend medical terms, concepts, and treatment procedures. They cannot understand the functions of various organs or the effect of removal of such organs. They do not have access to effective but costly diagnostic procedures. Poor patients lying in the corridors of hospitals after admission for want of beds or patients waiting for days on the roadside for an admission or a mere examination, is a common sight. For them, any treatment with reference to rough and ready diagnosis based on their outward symptoms and doctor's experience or intuition is acceptable and welcome so long as it is free or cheap; and whatever the doctor decides as being in their interest, is usually unquestioningly accepted. *** The position of doctors in Government and charitable hospitals, who treat them, is also unenviable. They are overworked, understaffed, with little or no diagnostic or surgical facilities and limited choice of medicines and treatment procedures. They have to improvise with virtual non-existent facilities and limited dubious medicines. They are required to be committed, service oriented and non-commercial in outlook. What choice of treatment can these doctors give to the poor patients? What informed consent they can take from them?

27. On the other hand, we have the Doctors, hospitals, nursing homes and clinics in the private commercial sector. There is a general perception among the middle class public that these private hospitals and doctors prescribe avoidable costly diagnostic procedures and medicines, and subject them to unwanted surgical procedures, for financial gain. ***

28. But unfortunately not all doctors in government hospitals are paragons of service, nor fortunately, all private hospitals/doctors are commercial minded. There are many a doctor in government hospitals who do not care about patients and unscrupulously insist upon 'unofficial' payment for free treatment or insist upon private consultations. On the other hand, many private hospitals and Doctors give the best of treatment without exploitation, at a reasonable cost, charging a fee, which is reasonable recompense for the service rendered. ***

31. *** Having regard to the conditions obtaining in India, as also the settled and recognized practices of medical fraternity in India, we are of the view that to nurture the doctor-patient relationship on the basis of

[547] See *Powell v. University Hospitals Sussex* [2023] EWHC 736 (KB), [17] [§18.1.1.2].

trust, the extent and nature of information required to be given by doctors should continue to be governed by the *Bolam* test rather than the 'reasonably prudential patient' test evolved in *Canterbury*. It is for the doctor to decide, with reference to the condition of the patient, nature of illness, and the prevailing established practices, how much information regarding risks and consequences should be given to the patients, and how they should be couched, having the best interests of the patient. A doctor cannot be held negligent either in regard to diagnosis or treatment or in disclosing the risks involved in a particular surgical procedure or treatment, if the doctor has acted with normal care, in accordance with a recognised practices accepted as proper by a responsible body of medical men skilled in that particular field, even though there may be a body of opinion that takes a contrary view. Where there are more than one recognized school of established medical practice, it is not negligence for a doctor to follow any one of those practices, in preference to the others. ***

33. We may note here that courts in Canada and Australia have moved towards the *Canterbury* standard of disclosure and informed consent—vide *Reibl v. Hughes* [1980] 2 SCR 880[548] decided by the Canadian Supreme Court and *Rogers v. Whittaker* [1992] HCA 58; (1992) 109 ALR 625 decided by the High Court of Australia. Even in England there is a tendency to make the doctor's duty to inform more stringent than *Bolam*'s test adopted in *Sidaway v. Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871. Lord Scarman's minority view in *Sidaway* favouring *Canterbury*, in the course of time, may ultimately become the law in England. *** We have however, consciously preferred the 'real consent' concept evolved in *Bolam* and *Sidaway* in preference to the 'reasonably prudent patient test' in *Canterbury*, having regard to the ground realities in medical and health-care in India. But if medical practitioners and private hospitals become more and more commercialized, and if there is a corresponding increase in the awareness of patient's rights among the public, inevitably, a day may come when we may have to move towards *Canterbury*. But not for the present. ***

35. The specific case of the appellant was that she got herself admitted on May 10, 1995 only for a diagnostic laparoscopy; that she was not informed either on 9th or 10th that she was suffering from endometriosis or that her reproductive organs had to be removed to cure her from the said disease; that her consent was not obtained for the removal of her reproductive organs; and that when she was under general anaesthesia for diagnostic laparoscopy, respondent came out of the operation theatre and informed her aged mother that the patient was bleeding profusely which might endanger her life and hysterectomy was the only option to save her life, and took her consent. ***

52. The evidence therefore demonstrates that on laparoscopic examination, respondent was satisfied that appellant was suffering from endometriosis. The evidence also demonstrates that there is more than one way of treating endometriosis. While one view favours conservative treatment with hysterectomy as a last resort, the other favours hysterectomy as a complete and immediate cure. *** Therefore respondent cannot be held to be negligent, merely because she chose to perform radical surgery in preference to conservative treatment. This finding however has no bearing on the issue of consent which has been held against the respondent. The correctness or appropriateness of the treatment procedure, does not make the treatment legal, in the absence of consent for the treatment. ***

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[548] *Reibl v. Hughes*, [1980] 2 SCR 880 (SCC), 884-885 *per* Laskin C.J.C.:

> "It is now undoubted that the relationship between surgeon and patient gives rise to a duty of the surgeon to make disclosure to the patient of what I would call all material risks attending the surgery which is recommended. The scope of the duty of disclosure was considered in *Hopp v. Lepp* [1980] 2 S.C.R. 192 (SCC), at p. 210, where it was generalized as follows:
>
> > In summary, the decided cases appear to indicate that, in obtaining the consent of a patient for the performance upon him of a surgical operation, a surgeon, generally, should answer any specific questions posed by the patient as to the risks involved and should, without being questioned, disclose to him the nature of the proposed operation, its gravity, any material risks and any special or unusual risks attendant upon the performance of the operation. However, having said that, it should be added that the scope of the duty of disclosure and whether or not it has been breached are matters which must be decided in relation to the circumstances of each particular case.
>
> The Court in *Hopp v. Lepp, supra,* also pointed out that even if a certain risk is a mere possibility which ordinarily need not be disclosed, yet if its occurrence carries serious consequences, as for example, paralysis or even death, it should be regarded as a material risk requiring disclosure."

REFLECTION:

- *What is the difference between the Bolam 'professional practice' test and the Canterbury 'reasonably prudential patient' test of informed consent? Why does Canadian jurisprudence favour the Canterbury test?*
- *What policy considerations was the Supreme Court of India balancing in reaffirming the Bolam test as applying to the issue of patient consent within its jurisdiction?*

18.1.1.2 Powell v. University Hospitals Sussex [2023] EWHC 736 (KB)

✗**REF: §14.1.3.2, §14.2.5.2, §16.1.4, §19.4.3.1**

DEXTER DIAS KC: ***

7. Let me emphasise at the outset that we live in an age where informed consent and patient autonomy are given great priority. Quite properly. To "consent" a patient is not a mere technicality, a box-ticking exercise for insurance or compliance purposes. Instead, it goes to the heart of legally authorising the substantial and at times severe interference with the patient's right to bodily integrity. The court takes such questions very seriously. It was put succinctly and starkly by Lord Steyn in *Chester v. Afshar* [2004] UKHL 41 at [14]:

> "Surgery performed without the informed consent of the patient is unlawful."

8. For in our modern law, "medical paternalism" no long rules (*ibid.* at [16]). This is what is at stake in this case. This ethos permeates modern medical practice. *** Although patients lack specialist medical expertise themselves, they are the experts about what they would prefer. Save in certain emergency and exceptional situations, their right to bodily integrity can only be infringed with their clear and informed permission. They should be given the right information and the right advice about alternative treatments and risks, so they can properly choose. ***

17. *** Gone are the days where we as patients are passive canvasses upon which medical practitioners develop and practice their skills. This principle was clarified with great vividness by the Supreme Court in *Montgomery* [*v. Lanarkshire* [2015] UKSC 11]. Lord Kerr and Lord Reed, with whom the rest of the court agreed, stated at [87]:

> "The correct position, in relation to the risks of injury involved in treatment, can now be seen to be substantially that adopted in *Sidaway* [*v. Board of Governors of the Bethlem Royal Hospital* [1985] AC 871] by Lord Scarman, and by Lord Woolf MR in *Pearce* [1999] PIQR P53, subject to the refinement made by the High Court of Australia in *Rogers v. Whitaker* (1992) 175 CLR 479 which we have discussed at paras 70-73.[549] An adult person of sound mind is entitled to decide which,

[549] "70. The court has been referred to case law from a number of other major common law jurisdictions. ***
71. The judgment of Mason CJ, Brennan, Dawson, Toohey and McHugh JJ in *Rogers v. Whitaker* identifies the basic flaw involved in approaching all aspects of a doctor's duty of care in the same way:
> "*Whether* a medical practitioner carries out a particular form of treatment in accordance with the appropriate standard of care is a question in the resolution of which responsible professional opinion will have an influential, often a decisive, role to play; *whether* the patient has been given all the relevant information to choose between undergoing and not undergoing the treatment is a question of a different order. Generally speaking, it is not a question the answer to which depends upon medical standards or practices. Except in those cases where there is a particular danger that the provision of all relevant information will harm an unusually nervous, disturbed or volatile patient, no special medical skill is involved in disclosing the information, including the risks attending the proposed treatment." (pp 489-490: original emphasis)

72. The High Court of Australia in *Rogers* also reformulated the test of the materiality of a risk so as to encompass the situation in which, as the doctor knows or ought to know, the actual patient would be likely to attach greater significance to a risk than the hypothetical reasonable patient might do:
> "a risk is material if, in the circumstances of the particular case, a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it or if the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it." (p 490)

73. That is undoubtedly right: the doctor's duty of care takes its precise content from the needs, concerns and circumstances of the individual patient, to the extent that they are or ought to be known to the doctor. In *Rogers v.*

> if any, of the available forms of treatment to undergo, and her consent must be obtained before treatment interfering with her bodily integrity is undertaken. The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it."

18. Put another way, as Lord Bingham said in *Chester v. Afshar* [UKHL] 41 at [1], was the patient "duly warned" of the risks (and limitations) that attended the surgery advised by the surgeon? Lord Bingham explained at [5] that the purpose of the duty was "to enable adult patients of sound mind to make for themselves decisions intimately affecting their own lives and bodies". If the surgeon does not inform the patient of the material risks and limitations and the reasonable alternative treatments, the medical practitioner is in breach of his or her common law duty of care. ***

REFLECTION:

- *How does the Montgomery test regarding a doctor's duty to disclose material risks differ from the Bolam test in the context of determining a patient's informed consent?*
- *What legal test should be applied to the assessment of whether an alternative medical treatment is reasonable and must be discussed with the patient?*[550]

18.1.1.3 Health Care (Consent) and Care Facility (Admission) Act, RSBC 1996

Health Care (Consent) and Care Facility (Admission) Act, RSBC 1996, c 181, ss 4-6

4 Consent rights

Every adult who is capable of giving or refusing consent to health care has

> (a) the right to give consent or to refuse consent on any grounds, including moral or religious grounds, even if the refusal will result in death,
>
> (b) the right to select a particular form of available health care on any grounds, including moral or religious grounds,
>
> (c) the right to revoke consent,
>
> (d) the right to expect that a decision to give, refuse or revoke consent will be respected, and
>
> (e) the right to be involved to the greatest degree possible in all case planning and decision making.

5 General rule—consent needed

(1) A health care provider must not provide any health care to an adult without the adult's consent except

---

Whitaker itself, for example, the risk was of blindness in one eye; but the plaintiff was already blind in the other eye, giving the risk a greater significance than it would otherwise have had. In addition, she had asked anxiously about risks. Expressions of concern by the patient, as well as specific questions, are plainly relevant. As Gummow J observed in *Rosenberg v. Percival* (2001) 205 CLR 434, 459, courts should not be too quick to discard the second limb (ie the possibility that the medical practitioner was or ought reasonably to have been aware that the particular patient, if warned of the risk, would be likely to attach significance to it) merely because it emerges that the patient did not ask certain kinds of questions."

[550] See *McCulloch v. Forth Valley Health Board (Scotland)* [2023] UKSC 26, [59]:
"In line with the distinction drawn in *Montgomery* [*v. Lanarkshire* [2015] UKSC 11] ***, between the exercise of professional skill and judgment and the court-imposed duty of care to inform, the determination of what are reasonable alternative treatments clearly falls within the former and ought not to be undermined by a legal test that overrides professional judgment. In other words, deciding what are the reasonable alternative treatments is an exercise of professional skill and judgment. That is why, *** it is appropriate to refer synonymously to reasonable alternative treatments or to "clinically appropriate" or "clinically suitable" alternative treatments."

under sections 11 to 15.

(2) A health care provider must not seek a decision about whether to give or refuse substitute consent to health care under section 11, 14 or 15 unless he or she has made every reasonable effort to obtain a decision from the adult.

6 Elements of consent

An adult consents to health care if

(a) the consent relates to the proposed health care,

(b) the consent is given voluntarily,

(c) the consent is not obtained by fraud or misrepresentation,

(d) the adult is capable of making a decision about whether to give or refuse consent to the proposed health care,

(e) the health care provider gives the adult the information a reasonable person would require to understand the proposed health care and to make a decision, including information about

(i) the condition for which the health care is proposed,

(ii) the nature of the proposed health care,

(iii) the risks and benefits of the proposed health care that a reasonable person would expect to be told about, and

(iv) alternative courses of health care, and

(f) the adult has an opportunity to ask questions and receive answers about the proposed health care.

18.1.1.4 Other provincial health care consent statutes

- Alberta: Personal Directives Act, RSA 2000, c P-6.
- Manitoba: The Health Care Directives Act, CCSM c H27.
- Newfoundland and Labrador: Advance Health Care Directives Act, SNL 1995, c A-4.1.
- Nova Scotia: Hospitals Act, RSNS 1989, c 208.
- Ontario: Health Care Consent Act, 1996, SO 1996, c 2, Sch A.
- Prince Edward Island: Consent to Treatment and Health Care Directives Act, RSPEI 1988, c C-17.2.
- Québec: Act respecting health services and social services, CQLR c S-4.2.
- Saskatchewan: The Health Care Directives and Substitute Health Care Decision Makers Act, 2015, SS 2015, c H-0.002.
- Yukon Territory: Care Consent Act, SY 2003, c 21, Sch B.

REFLECTION:

- *What fundamental principle underscores the Canadian health care consent statutes?*
- *Do these statutes tend to embody the Bolam test or the Canterbury test of informed consent?*

18.1.1.5 Cross-references

- *Toews v. Weisner* [2001] BCSC 15, [6]-[15]: §6.3.1.3.
- *Norberg v. Wynrib* [1992] CanLII 65 (SCC), [156]: §6.3.2.1.
- *Arndt v. Smith* [1997] CanLII 360 (SCC), [55]: §19.10.2.1.

18.1.1.6 Further material

- Law Pod UK Podcast, "The Importance of Informed Consent in Clinical Negligence" (Nov 12, 2018) 🎧.
- Law Pod UK Podcast, "Informed Consent—How much Direction do Patients Actually Want?" (Feb 4, 2019) 🎧.
- Canadian Medical Protective Association, *Consent: A Guide for Canadian Physicians* (4th edn, Apr 2021).
- M. LaFata, "Informed Consent in Maternity Care: A Global Perspective" (2019) 36 Arizona J International & Comparative L 225.
- C. Milo, "Informed Consent: An Empty Promise? A Comparative Analysis between Italy and England, Wales, and Scotland" (2022) 22 Medical L International 147.
- Manitoba Law Reform Commission, *Substitute Consent to Health Care* (Rep. 110, 2004).
- The Law Academy (UK), "The *Bolam* Test" (Mar 23, 2024) 📺.

18.1.2 Waiver of right to sue

Campbell v. 1493951 Ontario Inc., 2021 ONCA 169

12. A waiver involves a knowing relinquishment of rights. "Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them".[551] ***

REFLECTION:

- *In light of the doctrine of contributory negligence (§18.2.2), why should waivers of rights to sue generally be construed narrowly?*[552]

18.1.2.1 Nettleship v. Weston [1971] EWCA Civ 6

✗**REF: §14.1.1.2, §20.3.1**

LORD DENNING M.R.: ***

18. The special factor in this case is that Mr Nettleship was not a mere passenger in the car. He was an instructor teaching Mrs Weston to drive. *** This brings me to the defence of *volenti non fit injuria*. Does it apply to the instructor? In former times this defence was used almost as an alternative defence to contributory negligence. Either defence defeated the action. Now that contributory negligence is not a complete defence, but only a ground for reducing the damages, the defence of *volenti non fit injuria* has been closely considered, and, in consequence, it has been severely limited. Knowledge of the risk of injury is not enough. Nor is a willingness to take the risk of injury. Nothing will suffice short of an agreement to waive any claim for negligence. The plaintiff must agree, expressly or impliedly, to waive any claim for any injury that may befall him due to the lack of reasonable care by the defendant: or, more accurately, due to the failure of the defendant to measure up to the standard of care that the law requires of him. *** The doctrine has been so severely curtailed that in the view of Lord Diplock: 'the maxim in the absence of expressed contract has no application to negligence simpliciter when the duty of care is based solely upon proximity or "neighbourship" in the Atkinian sense': see *Wooldridge v. Sumner* [1963] 2 QB 43, 69.

19. Applying the doctrine in this case, it is clear that Mr Nettleship did not agree to waive any claim for injury that might befall him. Quite the contrary. He inquired about the insurance policy so as to make sure that he was covered. If and in so far as Mrs Weston fell short of the standard of care which the law required of her, he has a cause of action. But his claim may be reduced in so far as he was at fault himself—as in letting her take control too soon or in not being quick enough to correct her error.

20. I do not say that the professional instructor—who agrees to teach for reward—can likewise sue. There

[551] *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 (SCC) at para. 20.
[552] See *Chamberlin v. Canadian Physiotherapy Association*, 2015 BCSC 1260, [66]-[68].

may well be implied in the contract an agreement by him to waive any claim for injury. He ought to insure himself, and may do so, for aught I know. But the instructor who is just a friend helping to teach never does insure himself. He should, therefore, be allowed to sue. ***

REFLECTION:

- *Why would it have been problematic to hold that Nettleship had waived his right to sue Weston?*
- *Why might the situation have been different if Nettleship had been a professional instructor?*

18.1.2.2 Cross-references

- *Yania v. Bigan* (1959) 397 Pa. 316 (PA SC), [12]: §13.2.1.
- *Driving Force Inc. v. I Spy-Eagle Eyes Safety Inc.* [2022] ABCA 25, [23]: §17.5.1.
- *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd* [1963] UKHL 4, [19], [48], [122], [138]: §19.3.1.2.
- *Nelson (City) v. Marchi* [2021] SCC 41, [101]: §19.5.2.2.
- *Donahue v. Belitski* [2015] SKQB 47, [64] §22.3.2.

18.1.2.3 Further material

- Law School Toolbox Podcast, "Assumption of Risk (Torts)" (Jun 20, 2022) .
- "Liability Waivers" Dial A Law (Apr 2020).
- D. Davison & D.R. North, "Statements Limiting Responsibility (aka Waivers)" People's Law School (Apr 2020).
- D. Hoffman, "Waivers Are Some Crazy Stuff" JOTWELL (Feb 15, 2023) (reviewing K. Hylton, "Waivers" (SSRN, 2022)).
- E.K. Cheng, E. Guttel & Y. Procaccia, "Unenforceable Waivers" (2023) 76 Vanderbilt L Rev 571.

18.2 Apportionment of liability

Manitoba Law Reform Commission, Contributory Fault: The Tortfeasors and Contributory Negligence Act (Rep. 128, 2013), 2

At common law, a tort claim for a single injury was indivisible. A plaintiff who suffered a single injury caused by multiple tortfeasors had the right to recover damages for the entire loss from any tortfeasor who shared liability. A tortfeasor who paid damages to a plaintiff was not entitled to contribution from other tortfeasors, since each tortfeasor was responsible for the entire loss.

As well, contributory negligence was a complete defence to a tort action. A plaintiff whose negligent actions contributed to his or her loss was barred from recovering damages from any tortfeasor.

Legislation to alleviate the harshness of these and other common law rules relating to contribution among tortfeasors and contributory negligence was enacted in every Canadian jurisdiction in the first decades of the 20th century, beginning in Ontario in 1924. *** […continue reading]

REFLECTION:

- *What was problematic about the former common law rules, that a defendant was not entitled to contribution from other tortfeasors, and that a plaintiff's contributory negligence was a complete defence to a tort claim?*

18.2.1 Negligence Act, RSBC 1996

Negligence Act, RSBC 1996, c 333, ss 1-2, 4, 6

1. Apportionment of liability for damages

(1) If by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.

(2) Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.

(3) Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed.

2. Awarding of damages

The awarding of damage or loss in every action to which section 1 applies is governed by the following rules:

> (a) the damage or loss, if any, sustained by each person must be ascertained and expressed in dollars;
>
> (b) the degree to which each person was at fault must be ascertained and expressed as a percentage of the total fault;
>
> (c) as between each person who has sustained damage or loss and each other person who is liable to make good the damage or loss, the person sustaining the damage or loss is entitled to recover from that other person the percentage of the damage or loss sustained that corresponds to the degree of fault of that other person;
>
> (d) as between two persons each of whom has sustained damage or loss and is entitled to recover a percentage of it from the other, the amounts to which they are respectively entitled must be set off one against the other, and if either person is entitled to a greater amount than the other, the person is entitled to judgment against that other for the excess. ***

4. Liability and right of contribution

(1) If damage or loss has been caused by the fault of two or more persons, the court must determine the degree to which each person was at fault.

(2) Except as provided in section 5 if two or more persons are found at fault

> (a) they are jointly and severally liable to the person suffering the damage or loss, and
>
> (b) as between themselves, in the absence of a contract express or implied, they are liable to contribute to and indemnify each other in the degree to which they are respectively found to have been at fault. ***

6. Questions of fact

In every action the amount of damage or loss, the fault, if any, and the degrees of fault are questions of fact.

18.2.1.1 Other provincial apportionment statutes

- Alberta: Contributory Negligence Act, RSA 2000, c C-27, ss 1-2; Tortfeasors Act, RSA 2000, T-5.
- Manitoba: The Tortfeasors and Contributory Negligence Act, CCSM c T90, ss 4-6.
- New Brunswick: Contributory Negligence Act, RSNB 2011, c 131, ss 1-3; Tortfeasors Act, RSNB 2011, c 231.
- Newfoundland and Labrador: Contributory Negligence Act, RSNL 1990, c C-33, ss 2-3.
- Nova Scotia: Contributory Negligence Act, RSNS 1989, c 95, ss 2-3; Tortfeasors Act, RSNS 1989, c 471.
- Nunavut: Contributory Negligence Act, RSNWT 1988, c C-18.
- Ontario: Negligence Act, RSO 1990, c N.1, ss 1-4.
- Prince Edward Island: Contributory Negligence Act, RSPEI 1988, c C-21, ss 1-2.
- Québec: Civil Code of Québec, CQLR c CCQ-1991, art 1478.

- Saskatchewan: The Contributory Negligence Act, RSS 1978, c C-31, ss 2-3.
- Yukon: Contributory Negligence Act, RSY 2002, c 42.

REFLECTION:

- *The nine Aberdeen factors listed in Marcena v. Thomson, [34] (§18.2.2.1) guide the courts' task of apportioning liability as between an at-fault defendant and a contributorily negligent plaintiff, or between multiple at-fault defendants who are jointly and severally liable to a plaintiff, or both.[553] Having regard to these factors, should the parties' relative wealth or ability to absorb the costs of liability also be a factor that influences which at-fault party ought to bear the greater proportion of liability?*

18.2.2 Plaintiff's contributory fault

Manitoba Law Reform Commission, Contributory Fault: The Tortfeasors and Contributory Negligence Act (Rep. 128, 2013), 5-7

At common law, a defendant had a complete defence to an action for tort if the plaintiff's own negligence had contributed to the injury. The plaintiff's negligence absolved the defendant of liability.

This rule originated with the 1809 English case of *Butterfield v. Forrester*.[554] In that case, the defendant had placed a pole across a road while making home repairs. The plaintiff was riding his horse on the road at twilight at high speed and didn't see the pole. The horse struck the pole and the plaintiff suffered injuries. The jury was instructed that if Butterfield had not used ordinary care in riding they should find in favour of the defendant. The jury did so, and the case was affirmed on appeal. The plaintiff was barred from recovering damages because he did not exercise reasonable and ordinary care to avoid the injury.

As the common law continued to develop, the contributory negligence bar was held to apply even where the plaintiff's negligence was slight in comparison to the carelessness of the defendant and the seriousness of the injury suffered.[555]

Several rationales have been identified as underlying the principle at common law. Courts sought to identify a sole cause of injuries, and considered fault too uncertain a concept to make apportionment workable, although frequently the plaintiff's actions are in fact one of several causes of an injury. It was felt that a plaintiff who had been careless was simply unworthy of protection or compensation, and deserved punishment for his or her misconduct: a plaintiff was required to come to court with 'clean hands'. In an era of individualism, the principle protected the developing industrial sector from liability for the cost of accidents that accompanied economic progress, and prevented juries from succumbing to their sympathy for "the man on crutches in the courtroom".[556] The principle was also thought to act as a general deterrent, encouraging others to take care for their own safety.[557]

Eventually, however, in response to the harsh effect of the contributory negligence bar on plaintiffs, and to restrict its scope, courts developed the doctrine of 'last clear chance'. Under this doctrine, the plaintiff could recover damages if the court was satisfied that the defendant had the last clear opportunity to avoid the injury. There was still no apportionment; if the last clear chance doctrine applied, the defendant was liable for the entire amount of the damages suffered by the plaintiff. ***

Ontario was the first common law province in Canada to enact legislation alleviating the harshness of the common law rules relating to contributory negligence, in 1924.[558] The *Contributory Negligence Act*

[553] See *Hub Excavating Ltd. v. Orca Estates Ltd.*, 2008 BCSC 21, [28]-[30].
[554] 11 East 60, 103 ER 926.
[555] *Cayzer, Irvine & Co v. Carron Co* (1884), 9 App Cas 873.
[556] William L Prosser "Comparative Negligence" 41 Cal L Rev 1 (1953) at 9.
[557] Allen M Linden and Bruce Feldthusen, *Canadian Tort Law*, 9th ed (LexisNexis Canada Inc, 2011) at 494; Gary T Schwartz "Contributory and Comparative Negligence: A Reappraisal" (1978) 87 Yale LJ 697 at 722; Prosser, *ibid* at 3-4.
[558] *Contributory Negligence Act*, 1924, c 32. The Civil Code of Quebec has always provided for apportionment of fault and contribution among tortfeasors.

abolished the contributory negligence bar and provided for the apportionment of damages between defendant and plaintiff where the plaintiff had been contributorily negligent. The same year, the Uniform Law Conference of Canada (ULCC) proposed the *Uniform Contributory Negligence Act*,[559] based largely on the contributory negligence provisions of the *United Kingdom Maritime Conventions Act*, 1911[560] and the federal *Maritime Conventions Act*, 1914.[561] ***

All provinces and territories subsequently enacted legislation reforming the law relating to contributory negligence and contribution among tortfeasors, in either one or two statutes. Most jurisdictions, including Manitoba, based their contributory negligence provisions on the 1930 *Ontario Act* and the *Uniform Act*. With respect to contribution among tortfeasors, Manitoba, Alberta, New Brunswick and Nova Scotia closely follow the English 1935 statute, and the remaining jurisdictions are based more closely on the *Ontario* and *Uniform Act* models. *** […continue reading]

REFLECTION:

- *Might the plaintiff in The Wagon Mound No. 1 (§17.1.1) have framed its claim differently if the modern Negligence Act scheme had been operative in that case?*

18.2.2.1 Marcena v. Thomson [2019] BCSC 1287

British Columbia Supreme Court – 2019 BCSC 1287

✗REF: §19.2.2.2

POWER J.:

1. In this trial, the plaintiff seeks damages for nervous shock he alleges he suffered as a result of witnessing a collision between the defendant motorcycle driver and the plaintiff's wife. The plaintiff and his wife were jaywalking across Yates Street in Victoria, B.C. when the collision occurred. ***

28. The collision took place just after 9:00 a.m. on March 20, 2013. The roads were wet, but it was not raining at the time of the collision. The Marcenas were jaywalking across Yates Street at the time of the collision. Mr. Marcena initiated the jaywalking. The Marcenas were proceeding quickly and based on Ms. Koome's evidence, which I prefer, they were jogging. There were two vehicles stopped in lane one. The Marcenas proceeded in front of the first of these two vehicles and there is no evidence that they proceeded between them as suggested in closing submissions by the defence. The Marcenas jogged into lane two without looking to their left.

29. Mr. Thomson struck Ms. Marcena in lane two. *** [T]here were no vehicles stopped in lane two, and the collision occurred when the Marcenas jogged into lane two.

30. Ms. Marcena was wearing a bright yellow sweater at the time of the collision and would have been visible. ***

Legal Framework

31. Both pedestrians and drivers owe a duty to take reasonable care for the safety of themselves and others when using a roadway. This common law duty is supplemented by the statutory duties found in the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318. ***

33. In *Hmaied (Litigation Guardian of) v. Wilkinson*, 2010 BCSC 1074, Justice Dickson summarized the law guiding cases where motorists strike a jaywalking pedestrian:

> 22. When an accident occurs on a highway, the starting point for analysis is a determination of who had the right of way. Generally speaking, the party with the right of way is entitled to assume that

[559] Uniform Law Conference of Canada, *Uniform Contributory Negligence Act*.
[560] *Maritime Conventions Act*, 1911 (UK), 1 & 2 Geo V, c 57.
[561] *Maritime Conventions Act*, SC 1914, c 13 (repealed by the *Canada Shipping Act*, RSC 1985, c S-9, itself repealed by the *Canada Shipping Act*, 2001, SC 2001, c 26). ***

other highway users will obey the rules of the road: *Enright v. Marwick*, 2004 BCCA 259 at [22]. In particular, drivers are ordinarily entitled to expect that adult pedestrians will not jump out directly in front of them as they are proceeding lawfully along their way: *Enright*, *supra* at [35]; *Ibaraki v. Bamford*, [1996] B.C.J. No. 724 at [12]-[13].

23. Regardless of who has the right of way, however, there is a duty upon drivers and pedestrians alike to keep a proper lookout and take reasonable precautions in response to apparent potential hazards: *Nelson v. Shinske* (1991), 62 B.C.L.R. (2d) 302 (B.C.S.C.); *Karran v. Anderson*, 2009 BCSC 1105. Depending on the circumstances, from a driver's perspective one such hazard may be a jaywalking pedestrian: *Ashe v. Werstiuk*, 2003 BCSC 184, upheld 2004 BCCA 75; *Claydon v. Insurance Corp. of British Columbia*, 2009 BCSC 1077. If it is reasonably foreseeable or apparent that a pedestrian will disregard the law and thus create a hazardous situation, a driver is obliged to take all reasonable steps to avoid a collision. In such circumstances, if the driver has a sufficient opportunity to avoid the collision, but does not take appropriate evasive action, the driver will be found negligent: *Karran*, *supra*; *Beauchamp v. Shand*, 2004 BCSC 272.

24. The standard required of drivers in responding to pedestrian-created hazards such as jaywalking is not one of perfection. For example, in *Burke v. Leung*, [1996] B.C.J. No. 938 (S.C.) Kirkpatrick J. (as she then was) found the defendant driver was not negligent when he struck a pedestrian who ran, mid-block, into his path, despite the fact that other drivers in the area were able to stop in time: see also *Addison v. Nelles*, 2003 BCSC 1860, upheld 2004 BCCA 623; *Clifford v. Slater*, 2007 BCSC 177. The applicable standard of care is one of reasonable prudence in all of the circumstances.

25. Pursuant to s. 180 of the Act, a pedestrian must yield the right of way to a vehicle when crossing a highway at a point that is not in a crosswalk. Pursuant to s. 181 of the Act, despite s. 180, a driver is obliged to exercise due care to avoid colliding with a pedestrian who is on the highway.

26. In *Funk v. Carter*, 2004 BCSC 866, Williamson J. held that where a pedestrian has clearly established prior entry to an intersection he or she need not surrender it to an approaching vehicle, even when not crossing at a crosswalk. In *Claydon*, *supra*, Baker J. cited *Funk*, *supra* with approval in the context of a case involving a jaywalking pedestrian and a speeding driver who failed to keep a proper lookout. In so doing, she found that both parties were negligent.

27. Where a plaintiff pedestrian and defendant driver both fail to meet the requisite standard of care and an accident ensues, the court may apportion liability between them. Before liability will be apportioned, however, the defendant must establish that the plaintiff's fault was a proximate, or effective, cause of the loss: *McLaughlin v. Long*, [1927] S.C.R. 303 (S.C.C.).

[28. In *Karran*, *supra*, Cohen J. explained the proper approach to apportionment of liability where more than one proximate cause of a loss has been established. He stated, at ¶ 106 and 107:

> 106. The *Negligence Act*, R.S.B.C. 1996, c. 333, s. 1(1), requires that apportionment of liability must be made on the basis of "the degree to which each person was at fault". As stated in *Cempel v. Harrison Hot Springs Hotel Ltd.* (1997), [1998] 6 W.W.R. 233, 43 B.C.L.R. (3d) 219 (B.C.C.A.) at para. 19, the assessment to be made is of degrees of fault, not degrees of causation, with "fault" meaning blameworthiness. Courts must gauge the amount by which each proximate and effective causative agent fell short of the standard of care that was required of that person in all of the circumstances.
>
> 107. In assessing the respective fault and blameworthiness of the parties as contemplated in *Cempel*, courts are to evaluate the extent or degree to which each party departed from the standard of care each party owed under the circumstances: *Alberta Wheat Pool v. Northwest Pile Driving Ltd.*, 2000 BCCA 505 (B.C.C.A.) at para. 46. Finch J.A. (as he then was) described the range of blameworthiness, as follows:

Fault may vary from extremely careless conduct, by which the party shows a reckless indifference or disregard for the safety of person or property, whether his own or others, down to a momentary

> or minor lapse of care in conduct which, nevertheless, carries with it the risk of foreseeable harm.
>
> 29. Each case is, of course, uniquely fact-driven. It may be helpful, however, to consider the liability apportionment assessed in other cases that involve similar factual elements. ***]

34. In *Howell v. Machi*, 2017 BCSC 1806, Justice McNaughton summarized the factors and circumstances relevant to assessing liability:

> 116. In the often-cited *Aberdeen v. Langley (Township)*, 2007 BCSC 993, varied on other grounds, 2008 BCCA 420 at para. 62, Justice Groves summarized the factors courts have considered in assessing moral blameworthiness and contributory negligence. Those factors are:
>
> 1) the nature of the duty owed by the tortfeasor to the injured person;
>
> 2) the number of acts of fault or negligence committed by a person at fault;
>
> 3) the timing of the various negligent acts;
>
> 4) the nature of the conduct held to amount to fault;
>
> 5) the extent to which the conduct breaches statutory requirements;
>
> 6) the gravity of the risk created;
>
> 7) the extent of the opportunity to avoid or prevent the accident or the damage;
>
> 8) whether the conduct in question was deliberate or unusual or unexpected; and
>
> 9) the knowledge one person had or should have had of the conduct of another person at fault.
>
> 117. A review of other cases involving jaywalking pedestrians or otherwise involving pedestrians and motor vehicles, courts tend to look at the following facts or circumstances when assessing the *Aberdeen* factors: • whether the driver or pedestrian was keeping an adequate look-out for cars or pedestrians, including jaywalking pedestrians; • whether the driver or pedestrian took reasonable precautions, such as modifying speed in areas where pedestrians might be or looking both ways before proceeding into a crosswalk; • the speed of the driver compared to the speed limit and the conditions; • whether the driver obeyed the rules of the road, such as signaling; • whether the pedestrian or car was "there to be seen" including an assessment of the weather, time of day, state of traffic, use of headlights, light or dark clothing for pedestrians, and other visibility factors; • the nature of the area where the accident occurred, such as whether it is a busy street or whether there are frequent jaywalkers; • the presence of nearby crosswalks; • where the pedestrian crosses, mid-block or nearer to an intersection where any reasonable adult might be expected to attempt to cross; • whether the pedestrian was wearing headphones; and • generally, what could reasonably be foreseen by either the driver or pedestrian.

35. The burden of the proof is on the plaintiff to prove the defendant's negligence on the balance of probabilities. As Chief Justice Hinkson noted in *Wotherspoon v. Hameluck*, 2014 BCSC 2137, the mere fact that the driver did not see a pedestrian before striking them is not, in itself, sufficient to establish that the driver kept an inadequate lookout: para. 92.

Analysis

49. There is no question that Mr. Marcena is partially liable for the injury he suffered. Mr. Marcena initiated the jaywalking that was a substantial cause of the accident. The Marcenas chose to jaywalk across a multi-lane street instead of walking some meters down to a light-controlled intersection. They moved quickly across the lanes, and entered lane two without looking left for oncoming traffic. This behaviour was clearly negligent, and in breach of s. 180 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318. The plaintiff's negligence created a significant risk of harm.

50. Nonetheless, I find that Mr. Thomson bears some liability for the accident. As I discussed earlier, while

there is some inconsistency between the witnesses as to where, exactly, Ms. Marcena was when she was struck, I have found as a matter of fact that the collision occurred at some point in lane two. After stepping off the curb, the Marcenas safely passed through a parking lane, a bike lane, and a full lane of traffic before entering the lane where Ms. Marcena was struck.

51. The road Mr. Thomson was travelling down was clear and straight, on a slight downhill grade. In his read-in evidence, the defendant testified that there was nothing obstructing his view down Yates Street. Ms. Marcena was wearing a bright yellow sweater. Considering all of the circumstances, including the decline down which Mr. Thomson was travelling, I conclude that the Marcenas would have been visible.

52. I find that once Mr. and Ms. Marcena started jaywalking, they were there to be seen. Even if they were not, the presence of two stopped vehicles on the road ahead should have alerted Mr. Thomson to the risk. ***

63. I conclude that there was a hazard to be seen, and that Mr. Thomson either failed to see it, or failed to take appropriate evasive action. Had he slowed in response to the halted vehicles in lane one, or upon seeing the Marcenas—who were there to be seen—enter the road, he could have avoided the accident. I conclude that Mr. Thomson did not exercise due care to avoid colliding with a pedestrian on the highway, in violation of s. 181(a) of the Act and his common law responsibilities. As such, he bears liability. ***

Apportionment of Liability

66. Having created the hazard by negligently entering the roadway, without looking for oncoming traffic, I find that the plaintiff bears some significant liability for the accident. ***

67. The issue that I must determine is the portion of liability the defendant bears for the accident. I have concluded the defendant, for failing to keep a look out and failing to see what there was to be seen, and failing to take appropriate evasive action, bears 25% liability. ***

REFLECTION:

- *A plaintiff will be contributorily negligent where (1) the plaintiff "fail[ed] to meet the requisite standard of care" and (2) "the plaintiff's fault was a proximate, or effective, cause of the loss." How does the standard of care enquiry as to whether the plaintiff took reasonable care in their own interests differ from or relate to the enquiry as to whether the defendant breached a duty of care to the plaintiff?*
- *What does it mean for a plaintiff's conduct to be a proximate cause of their loss?*[562]

18.2.2.2 Donahue v. Belitski [2015] SKQB 47

Saskatchewan Queen's Bench – 2015 SKQB 47

✗**REF: §22.3.2**

CHICOINE J.:

1. The plaintiff, Richard Murray Donahue [Mr. Donahue], commenced an action against the defendant, Carl Joseph Belitski [Mr. Belitski] *** on October 6, 2009, for injuries which he suffered in a dog attack on Mr. Belitski's property situated in the R.M. of Buchanan. ***

2. Is Mr. Belitski liable in negligence for the injuries to Mr. Donahue? ***

71. *** Mr. Belitski owed Mr. Donahue a duty of care. Mr. Belitski was aware that his dogs were running loose in the salvage yard and that these dogs had exhibited vicious conduct, including killing the neighbour's dog and biting at least two people only weeks before. Mr. Belitski expected customers to come onto his

[562] See *Wormald v. Chiarot*, 2016 BCCA 415, [15]: "The plaintiff's conduct must be a "proximate cause" of the loss in that the loss results from the type of risk to which the appellant exposed herself: *Bevilacqua v. Altenkirk*, 2004 BCSC 945 (B.C. S.C.) at paras. 39-43 (per Groberman J., as he then was). In other words, the plaintiff's carelessness must relate to the risk that made the actual harm which occurred foreseeable: *Cempel v. Harrison Hot Springs Hotel Ltd.* (1997), 43 B.C.L.R. (3d) 219, [1998] 6 W.W.R. 233 (B.C. C.A.) at para. 13."

property and it was a common practice to allow the customer to go find the part he needed and then to come back to Mr. Belitski to ask him to remove it from the vehicle. Mr. Donahue was an invitee onto Mr. Belitski's property to whom he owed a duty to "use reasonable care to prevent damage from unusual danger, which he knows or ought to know." [§19.8] See: *Indermaur v. Dames* (1866), L.R. 1 C.P. 274 (Eng. C.P.), at 288, aff'd (1867), L.R. 2 C.P. 311 (Eng. Exch.), cited in Lewis N. Klar, *Tort Law*, 5th ed (Toronto: Carswell, 2012) [*Tort Law*] at p 622. ***

73. I am also satisfied that Mr. Belitski breached the duty of care that he owed to Mr. Donahue by not acting reasonably in relation to maintaining control of the dogs that he was using to guard his premises.

74. Finally, I also conclude that the breach of the duty of care was the proximate cause of the injuries suffered by Mr. Donahue. The injury occurred only because Mr. Belitski failed to take any reasonable care to prevent injury to persons such as Mr. Donahue who were his customers.

75. For these reasons, I find Mr. Belitski liable in negligence for Mr. Donahue's injuries.

3. If Mr. Belitski is liable in negligence, was Mr. Donahue contributorily negligent?

76. In *Tort Law*, Professor Klar at page 531 defines contributory negligence as unreasonable conduct on the part of a victim which, along with the negligence of others, has in law contributed to the victim's own injuries. He said that it is based on the principle that one has a duty not only to take reasonable care to prevent injury to others, but to oneself as well. In other words, contributory negligence is a person's carelessness in looking after his own safety.

77. In oral argument at the completion of the trial, counsel for Mr. Belitski took the position that Mr. Donahue's failure to heed the warnings on the "No Trespassing" sign at the entrance to the salvage yard showed that Mr. Donahue was careless in looking after his own safety. The sign warned anyone entering into the yard that guard dogs were on duty 24 hours a day; that they should not get out of their vehicle until somebody comes; and that anyone entering entered at their own risk. Counsel for Mr. Belitski also referred to the fact that Mr. Belitski had warned Mr. Donahue not to get out of his vehicle because the dogs were running out back. He stated that if Mr. Donahue had taken those warnings seriously, he would not have suffered any injury.

78. I have decided that Mr. Donahue was not contributorily negligent. Firstly, there was no evidence that Mr. Donahue had seen the "No Trespassing" sign or read it. At the time, Mr. Donahue was not trespassing at he entered the salvage yard with the consent of Mr. Belitski who told him where the Mustangs were located and that he would be coming to assist him when he finished his current task. Mr. Donahue had been to Mr. Belitski's premises many times before and had never previously had any problems with his dogs. Even on this occasion, on November 15, 2008, dogs had followed Mr. Donahue from the entrance to the first Mustang. There was no indication that these young dogs were anything but friendly. *** Mr. Belitski certainly did not tell Mr. Donahue that there were "dangerous" or "vicious" dogs running loose on his property because he testified that his dogs were not dangerous. For all of these reasons I find no contributory negligence on the part of Mr. Donahue. He had no inkling of what danger lay ahead when he drove into Mr. Belitski's salvage yard that morning. Mr. Belitski is solely responsible for all of Mr. Donahue's damages. ***

REFLECTION:

- *What facts here indicated that Donahue had not failed to take reasonable care in his own interests and so was not contributorily responsible for his injuries?*

18.2.3 Defendants' joint and several liability

Manitoba Law Reform Commission, Contributory Fault: The Tortfeasors and Contributory Negligence Act (Rep. 128, 2013), 13-16

'Joint and several liability' *** refers to the common law principle that tortfeasors who have combined to cause a single indivisible loss are each liable to the injured person for the full amount of the damage suffered (at common law, liability *in solidum*). Where the actions of one or more tortfeasors cause or contribute to a

single injury, the tortfeasors are said to be 'concurrent'.[563] ***

The rationale for joint and several liability for concurrent tortfeasors at common law was well summarized by the Illinois Supreme Court. The concurrent tortfeasor is liable for the entire injury because he or she was a cause of the entire injury:

> Such an "independent concurring tortfeasor" is not held liable for the entirety of a plaintiff's injury because he or she is responsible for the actions of the other individuals who contribute to the plaintiff's injury. Rather, an independent, concurring tortfeasor is held jointly and severally liable because the plaintiff's injury cannot be divided into separate portions, and because the tortfeasor fulfills the standard elements of tort liability, i.e., his or her tortious conduct was an actual and proximate cause of the plaintiff's injury. The fact that another individual also tortiously contributes to the plaintiff's injury does not alter the independent, concurring tortfeasor's responsibility for the entirety of the injury which he or she actually and proximately caused.
>
> The notion of divided responsibility among independent, concurring tortfeasors should not arise until those defendants attempt to apportion liability among themselves. At this phase, the contribution phase, courts should examine the comparative liability of those whom the jury has found to have been a substantial factor in causing an indivisible injury and to have breached a duty to another. At the contribution phase, courts can compare apples to apples and afford an opportunity to divide between the wrongdoers their share of responsibility.[564]

Joint and several liability may be contrasted with 'proportionate liability', in which each defendant is liable to the plaintiff only for the proportion of the injury that is consistent with that defendant's degree of fault. It follows that a right of contribution among defendants is then unnecessary. ***

The Supreme Court of Canada has suggested that joint and several liability, with the right of apportionment as created by provincial legislation, is consistent with general tort law principles:

> The plaintiff is still fully compensated and is placed in the position he or she would have been in but for the negligence of the defendants. Each defendant remains fully liable to the plaintiff for the injury, since each was a cause of the injury. The legislation simply permits defendants to seek contribution and indemnity from one another, according to the degree of responsibility for the injury.[565]

The question of whether joint and several liability or proportionate liability is preferable primarily turns on one's view of whether the plaintiff or the tortfeasors should bear the risk of non-recovery from one or more

---

[563] 'Joint and several liability' should not be confused with the concept of 'joint tortfeasors'. Concurrent tortfeasors, whose actions combine to cause a single injury, may be either joint tortfeasors or several tortfeasors. Persons are joint tortfeasors where one is the principal of or is vicariously responsible for the other [§23.1], a duty imposed jointly upon both tortfeasors is not performed or there is a concerted action to a common end: see *BPB v. MMB*, 2009 BCCA 365 at para 107, leave to appeal to SCC refused [2010] SCCA No 90, and Glanville Williams, *Joint Torts and Contributory Negligence* (London: Stevens, 1951) at 1. Tortfeasors who are not 'joint' are 'several'. The actions of several tortfeasors may cause different damage or may combine to produce the same damage. The main distinction at common law between joint tortfeasors and several concurrent tortfeasors was a matter of procedure. At common law, a plaintiff was required to claim against all joint tortfeasors in the same proceeding. A judgment against one joint tortfeasor discharged all joint tortfeasors, whether or not the first tortfeasor actually satisfied the judgment. If the tortfeasors were concurrent but several, the plaintiff was not able to join them in a single action and was forced to undertake separate proceedings. Joinder of parties is now dealt with by the Court of Queen's Bench Rules, Man Reg 553/88, Rules 5.02-5.05.

[564] *Woods v. Cole* (1998), 181 Ill 2d 512, 230 Ill Dec 204, 693 NE 2d 333 at paras 29-30 [citations omitted].

[565] *Athey v. Leonati*, [1996] 3 SCR 458, 140 DLR (4th) 235 at para 22 [§16.2.1]. However, the Court commented at para 23, that apportionment between tortious and non-tortious causes is contrary to tort law principles "because the defendant would escape full liability even though he or she caused or contributed to the plaintiff's entire injuries. The plaintiff would not be adequately compensated, since the plaintiff would not be placed in the position he or she would have been in absent the defendant's negligence". Note that apportionment is based on the comparative blameworthiness of the parties' actions, not on causation: ***.

of the tortfeasors for the plaintiff's injury. ***

Debates regarding joint and several versus proportionate liability tend to centre on the relative fairness of each scheme for various categories of plaintiff and tortfeasor and the impact of each scheme on matters of broader concern to the public generally, particularly the impact and availability of insurance within different business sectors. The concept of proportionate liability tends to be strongly supported by insurers and by other potential 'deep pocket defendants', such as municipalities, professional associations and businesses related to the construction industry, who may be required to pay a large proportion of the total damages awarded to a plaintiff when other liable tortfeasors are unable to pay. Events regarded as crises in the construction and financial sectors in some countries have resulted in businesses and advisors seeking to decrease their exposure to multiple plaintiffs.[566] On the other side are supporters of joint and several liability who argue that since each tortfeasor is in fact liable for the entire injury, one tortfeasor should not benefit (under proportionate liability) from, and the plaintiff be penalized by, the fact that there are others who are also liable. The principles of fairness and balance require a scheme that ensures that, as between a tortfeasor at fault and an innocent plaintiff, the plaintiff does not bear the risk of undercompensation. *** […continue reading]

REFLECTION:

- *What is the difference between joint liability, several liability, and joint and several liability?*[567]
- *Given each jointly and severally liable defendant is individually accountable to the plaintiff for the full extent of the damage the plaintiff suffered, what is the purpose of a court performing an apportionment assessment?*

[566] For example, leaky condos in British Columbia, the 'leaky home' crisis in New Zealand and the collapse of an insurer in Australia in 2002. The New Zealand Law Commission notes that analyses of the leaky home crisis show that the majority of costs continue to fall on homeowners, however. The majority of problems go unrecognized or untreated, and if they eventually lead to structural failure the limitation applying to any claim is likely to have expired: NZ Law Commission, *Review of Joint and Several Liability* (Issues Paper No 32, 2012) at para 5.13.

[567] See *Insurance Corp. of British Columbia v. Stanley Cup Rioters*, 2016 BCSC 1108 *per* Myers J.:

> "14. It is important in the present case to distinguish the concepts of joint tortfeasorship and joint and several liability. It is also important to set out the criteria for the concepts and to delineate their boundaries.
>
> 15. There have been numerous descriptions of the concepts. The classic case is the English Court of Appeal's judgment in *Re The "Koursk"*, [1924] P. 140, which dealt with collisions between three vessels. Perhaps the most commonly cited academic work is Glanville Williams, *Joint Torts and Contributory Negligence* (London: Stevens & Sons, 1951). He set out the following typology at pages 1-16.
>
> **A. Joint Tortfeasors—Joint Liability**
>
> 16. Two or more tortfeasors are joint tortfeasors in one of the following three situations:
>
> 1. Where one is the principal of or vicariously liable for another (p. 6);
> 2. Where a duty imposed jointly upon them is not performed (p. 9);
> 3. Where there is concerted action between them to a common end (p. 9).
>
> **B. Several Concurrent Tortfeasors—Joint and Several Liability**
>
> 17. Several concurrent tortfeasors are independent tortfeasors whose acts concur to produce a single result (p. 16). This can occur in two circumstances: where two causes are necessary in order to effect the consequence or where either cause would be sufficient in itself to produce the consequence. The common characteristic is that it is impossible to apportion the damage among the different tortfeasors.
>
> 18. Williams refers to all the above as concurrent tortfeasors. Concurrent tortfeasors are generally liable for all of the (same) damages. Other cases and works refer to this as joint and several liability. The use of the phrase "joint tortfeasorship" in this circumstance is inaccurate and misleading: per Bankes L.J. in *The Koursk* at p. 150. The High Court of Australia drew a helpful delineation in *Thompson v. ACTV* (1996), 186 CLR 574 at 580-1:
>
> > The difference between joint tortfeasors and several tortfeasors is that the former are responsible for the same tort whereas the latter are responsible only for the same damage.
>
> **C. Several Tortfeasors causing different damages—Several Liability**
>
> 19. The third related category that arises in cases where there are multiple people involved in an event or a case is that of several tortfeasors causing different damage. In this instance each tortfeasor is liable only for the damage which he has caused by himself."

18.2.3.1 British Columbia v. Insurance Corp. of British Columbia [2008] SCC 3

Supreme Court of Canada – 2008 SCC 3

✗**REF: §23.2.4.2**

LEBEL J.: ***

2. T.B., who was 14 years old, stole a car. An RCMP constable pursued the car through the streets of Vancouver. T.B. hit a car driven by a woman, who died in the collision. The woman's family sued T.B. and the Attorney General of British Columbia ("AGBC") for compensation under the *Family Compensation Act*, R.S.B.C. 1996, c. 126 [§20.5.1]. The British Columbia Supreme Court found T.B. 90 percent at fault and the police officer 10 percent at fault.

3. Section 4(2) of the *Negligence Act*, R.S.B.C. 1996, c. 333, provides that multiple tortfeasors who are found to be at fault for the same damage are jointly and severally liable. Under the *Police Act*, R.S.B.C. 1996, c. 367, s. 11, the AGBC is deemed to be liable for torts committed by provincial constables in the performance of their duties. Section 21(2) of the *Police Act* exempts police officers from liability to pay damages resulting from acts of simple negligence in the performance of their duties by barring any actions against them. According to s. 11, the AGBC is "jointly and severally" liable for torts committed by a police officer. ***

4. After the initial finding of liability and a judgment which determined the amount of compensation, the focus of the litigation shifted to determining who would pay the compensation—the AGBC or the Insurance Corporation of British Columbia ("ICBC")—given that T.B. was an uninsured driver. ***

11. *** As the damages are deemed to be indivisible, the police officer and T.B. would normally be jointly and severally liable under s. 4(2) of the *Negligence Act*. Because s. 21(2) of the *Police Act* [§23.2.4] exempts the officer from liability while s. 11 deems the AGBC to be liable, the victim is entitled to claim full compensation from the AGBC. ***

REFLECTION:

- *The trial judge found that the Attorney General of British Columbia's officer was careless in pursuing the child car-thief through Vancouver's streets. Even though T.B. was mostly to blame for colliding with the victim's car and killing her, the victim's estate was entitled to claim full compensation from the deeper-pocketed government defendant. Why? Is that fair to the relatively less-blameworthy defendant?*
- *Could the Government of British Columbia claim from T.B. contribution of 90% of the damages it paid to the victim?*

18.2.3.2 Hill v. Church of Scientology of Toronto [1995] CanLII 59 (SCC)

✗**REF: §5.1.3, §9.3.2, §9.4.2, §9.5.3, §24.1.1**

CORY J. (LA FOREST, GONTHIER, MCLACHLIN, IACOBUCCI, MAJOR JJ. concurring): ***

(b) Joint Liability for General Damages

174. Manning complains that the judge erred in refusing to accept his request that the verdict in general damages be rendered separately. He argues that his liability should be limited to the statement he made at the press conference and should not extend to the subsequent circulation of the notice of motion.

175. It must be remembered that at trial: a) it was the position of Manning's counsel that Manning and Scientology should be jointly and severally liable for general damages in respect of each of the defamatory statements published by them; b) Scientology admitted that it published each of the defamatory statements at issue in the action; c) Manning admitted that he published each of the defamatory statements with the exception of the notice of motion; and d) the jury specifically found that Manning published the notice of motion.

176. Thus, both Manning and Scientology published the notice of motion. It is a well-established principle that all persons who are involved in the commission of a joint tort are jointly and severally liable for the damages caused by that tort. If one person writes a libel, another repeats it, and a third approves what is written, they all have made the defamatory libel. Both the person who originally utters the defamatory statement, and the individual who expresses agreement with it, are liable for the injury. It would thus be inappropriate and wrong in law to have a jury attempt to apportion liability either for general or for special damages between the joint tortfeasors Manning and Scientology. *** However, this comment does not apply to aggravated damages, which are assessed on the basis of the particular malice of each joint tortfeasor. ***

REFLECTION:

- *Why are defendants held jointly and severally liable for compensatory damages, but not for aggravated or punitive damages?*

18.2.4 Cross-references

- *Athey v. Leonati* [1996] CanLII 183 (SCC), [12], [22]-[25]: §16.2.1.
- *Salomon v. Matte-Thompson* [2019] SCC 14, [91]: §19.4.1.2.
- *Deloitte & Touche v. Livent Inc.* [2017] SCC 63, [106]-[109]: §19.3.1.3.
- *Manchester Building Society v. Grant Thornton UK LLP* [2021] UKSC 20, [39]: §19.4.2.1.
- *Nelson (City) v. Marchi* [2021] SCC 41, [100]: §19.5.2.2.
- *Midwest Properties Ltd v. Thordarson* [2015] ONCA 819, [113]-[116]: §19.11.1.
- *Blackwater v. Plint* [2005] SCC 58, [64]-[73]: §23.1.3.

18.2.5 Further material

- Just Torts Podcast (U Sydney), "Duty of Care: Defences" (Jan 5, 2018) 🎧.
- Law Pod UK Podcast, "Multi-defendant cases: the more the merrier?" (Apr 23, 2023) 🎧.
- W. WhiteKnight, "Joint and Several Liability" Bergeron Clifford LLP (Jun 11, 2019).
- J.C. Kleefeld, "The Contributory Negligence Act at Seventy" (2015) 78 Saskatchewan L Rev 31.
- J. Goudkamp & L. Klar, "Apportionment of Damages for Contributory Negligence: The Causal Potency Criterion" (2016) 53 Alberta L Rev 849.
- R. Stevens, "Should Contributory Fault be Analogue or Digital?" in A. Dyson, J. Goudkamp and F. Wilmot-Smith (eds), *Defences in Tort* (Oxford: Hart Publishing, 2015).
- E. Adjin-Tetley, "Multi-Party Disputes: Equities Between Concurrent Tortfeasors" (2016) 53 Alberta L Rev 863.
- R. Goepel & S. Batkin, "Apportionment of Damages between Multiple Tortfeasors" (2009) 67 Advocate 53.
- K. Barker & R. Grantham (eds), *Apportionment in Private Law* (Oxford: Hart Publishing, 2019).

18.3 Illegality

18.3.1 Bang v. Kim [2024] BCCA 88

British Columbia Court of Appeal – 2024 BCCA 88

SAUNDERS J.A. (MARCHAN C.J. AND BENNETT J.A. concurring): ***

4. This action concerns persons in both Canada and the Republic of Korea. The appellant is the plaintiff in the action. He alleges that his father Younghoon Bang, a person of means in Korea, established a trust in his favour into which was deposited considerable monies that have since been entirely, and wrongly, dissipated.

5. The respondents are the appellant's maternal aunt Mi Kyung Kim, alleged to be one of two original trustees, and his maternal grandmother Myungsook Lim, who he claims acted jointly with Mi Kyung Kim, or

assisted in her breach of trust, or alternatively was herself a trustee. It is alleged the second original trustee was the appellant's deceased mother Miran Lee. ***

8. *** In response to the allegation in the Notice of Civil Claim that the respondents have wrongly spent monies impressed with a trust for the appellant's benefit, the respondents deny a trust was created. *** The respondents allege that when the appellant learned of the exhausted state of the fund, he and his siblings launched a campaign of harassment and intimidation against Miran, including assault, kidnapping, and unlawful confinement, with the objective of causing Miran to persuade Kim to transfer a significant sum to the appellant. They allege further that the appellant counselled Miran to commit suicide, which she did. ***

16. The appellant contends the judge erred in law by failing to apply the correct legal test in his analysis of the defence of *ex turpi causa non oritur actio* ***.

The *Ex Turpi Causa Non Oritur Actio* Defence

17. The maxim *ex turpi causa non oritur action*—translated as "no right of action arises from a base cause" (*Hall v. Hebert*, [1993] 2 S.C.R. 159 at 170-171, citing Professor Gibson "Comment: Illegality of Plaintiff's Conduct as a Defence" (1969) 47 Can. Bar Rev. 89) provides a defence across different fields of law, sometimes employing different descriptors, but always adhering to the same impetus discussed in *Hall*: to protect the administration of justice and integrity of the legal system. It does this by refusing a monetary remedy for "a transaction that a court ought not to countenance": *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 [§18.3.2], applied in *Hall*, at 178.

18. The question before us is how connected the wrong of the plaintiff must be to the wrong that the plaintiff complains of—the cause of the action? Can *ex turpi causa* be engaged so as to deny the plaintiff recovery, by virtue of the plaintiff committing a wrong that is not factually connected to the elements of the cause of action he advances, that is, by a collateral or tangential happening? ***

19. *** It seems to me that all of the descriptions of the application of the defence, while expressed in different words (as one expects from different authors considering different circumstances) speak to the same concept and require a tie between the illegal or immoral behaviour giving rise to the maxim's application and the cause of action advanced in the litigation. ***

21. *Hall* is the foundational case in what is termed "the modern approach" to *ex turpi causa*. In *Hall*, Justice McLachlin (later C.J.C.), for the majority, explored the basis of the defence in the context of a claim for damages, wrestling with its availability in a claim for a remedy that was compensatory only and not, in contrast, damages that arise from an illegal act. She observed, at 176-177, that "[n]o part of the award which compensates injury can be said to be the profit of, or the windfall from, an illegal act", and recognized also that the law did not allow the "stultification of the criminal law", citing Ernest J. Weinrib, "Illegality as a Tort Defence" (1976), 26 U.T.L.J. 28 at 52–53, in agreeing that a party may not use tort law to give with one hand what it takes away (in criminal law) with the other. ***

23. She observed that the prohibition on using the judicial process for abusive illegal purposes addressed two situations. One is the general application of the defence to avoid a plaintiff receiving "profit from his or her wrong" (at 172), and the second is to avoid "evasion of the consequences of the criminal law" (at 177). ***

28. The issue in *Bolianatz Estate v. Simon*, 2006 SKCA 16, bears some similarity to the question before us. In *Bolianatz*, a beneficiary under a will who had stolen money from the testator was not denied his bequest, with the court rejecting the proposition "that the bad character or behaviour of a beneficiary unconnected with the granting of a bequest can invalidate an inheritance" (at para. 67). It held that using the legacy from the testator to pay restitution for the sum stolen would not amount to his evasion of his wrong, given the "lack of a direct connection between the bequest and the theft." (At para. 68.)

29. *Giustini v. Workman*, 2021 ABCA 65, likewise bears some similarity to the issue here. In *Giustini*, the court considered the application of *ex turpi causa* to a case of alleged fraud by the plaintiffs of a third party where the benefit of the alleged fraud was collateral to, and not the subject of, the claim against the defendants. The court observed that the defence required a causal link between the illegal activity and the

damage for which the action was brought, saying "the illegality must not be collateral to the transaction on which the claimant relies." (At para. 47.)

30. These cases all share one feature: they contemplate application of *ex turpi causa* where the illegality is closely connected to the cause of action at issue; they do not allow for wrongs disconnected to the claim to relieve a party from liability for compensatory damages. Such a result would be a windfall to the defendants not contemplated by the maxim itself.

31. In the case before us, the judge found that the phrase used in *Hall* "profit from" could stretch to encompass the negation of a witness's ability to testify in the action, saying that the plaintiff's ability to recover a remedy may be assisted by the witness's absence. That benefit, he held, may be adjudged "profit" for the purpose of the defence. There is a degree of speculation in this reasoning for it presumes the witness would have given evidence that only assisted the defendants on the merits of the claim for breach of trust. This sort of speculation, on my understanding, is not within the narrow constraints of the doctrine which, on my review, have not been "loosened" as the judge said, but rather have been more tightly tied to a central organizing principle, being the integrity of the justice system. While an allegation of the elimination of a witness superficially appears to engage the integrity of the justice system, I read the discussion in *Hall* of this concept as not engaging the court in a free-flowing enquiry into the parties' moral character. Rather, I read the concern for the integrity of the justice system addressed by the *ex turpi causa* doctrine to be intimately tied to the cause before the court and the remedy sought in the litigation.

32. Respectfully, I therefore consider the illegality pleaded here as engaging *ex turpi causa* is too remote from the cause of action to undermine the integrity of the justice system. Whatever remedies there may be for the persuasion alleged in the response to civil claim, they are remedies distinct from the remedies sought by the appellant in his breach of trust claim, and should a breach of trust be established, the appellant's actions in relation to Miran could not excuse Kim and Lim from liability.

33. I conclude that the defence in respect to the appellant's alleged role in Miran's death does not relate to the trust that the appellant seeks to enforce, and the defence of *ex turpi causa* based on this theory is doomed to fail. ***

REFLECTION:

- *What is the rationale of the illegally defence? In what circumstances will a court allow or decline to afford a plaintiff relief on account of the plaintiff's own illegally?*
- *What were the Court's reasons for finding that the illegality defence did not apply here? Why did Bang's alleged role in his mother's death not relate to the trust he sought to enforce?*

18.3.2 Norberg v. Wynrib [1992] CanLII 65 (SCC)

✗**REF: §6.3.2.1, §9.4.1, §9.5.2**

LA FOREST J. (GONTHIER AND CORY JJ. concurring): ***

50. In my opinion, the principle of *ex turpi causa non oritur actio* does not bar the appellant's recovery for damages. It is wise to recall the statement of Estey J. in *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, at p. 476, that "cases where a tort action has been defeated by the *ex turpi causa* maxim are exceedingly rare." In my view, this is not one of those "rare" cases. The respondent forced the sex-for-drugs transaction on the appellant by virtue of her weakness. He initiated the arrangement for his own sexual gratification and then impelled her to engage in it. She was unwilling to participate but did so because of her addiction to drugs. It was only because the respondent prolonged the appellant's chemical dependency that the illicit relationship was available to him. The respondent has been found liable in this appeal because he took advantage of the appellant's addiction. To apply the doctrine of *ex turpi causa* in this case would be to deny the appellant damages on the same basis that she succeeded in the tort action: because she acted out of her desperation for Fiorinal. Surely public policy would not countenance giving to the appellant with one hand and then taking away with the other.

51. It is true that the appellant engaged in the offence of "double-doctoring" during the period in question. However, Estey J. in *Canada Cement LaFarge*, *supra*, p. 477, indicated that there must be a sufficient causal link between the appellant's participation in the illegal activity and the injury suffered. In my view, the offence of "double-doctoring" was irrelevant to the transaction between the appellant and the respondent. There was no causative link between the injury and the crime committed by the appellant. If the appellant had been relying on the respondent alone for her drug supply rather than "double-doctoring," she would have suffered the same harm.

52. In sum, I do not believe that it is in the public interest to absolve a doctor of civil liability where he deliberately abuses his position of power and influence by suggesting and pursuing a sex-for-drugs arrangement with a self-admitted drug addict. Accordingly, the *ex turpi causa* maxim does not operate in the circumstances of this case to bar relief.

MCLACHLIN J. (L'HEUREUX-DUBÉ J. concurring): ***

86. The first factor which is said to prevent application of the doctrine of breach of fiduciary duty is Ms. Norberg's conduct. Two terms have been used to raise this consideration to the status of a legal or equitable bar—the equitable maxim that he who comes into equity must come with clean hands and the tort doctrine of *ex turpi causa non oritur actio*. For our purposes, one may think of the two respectively as the equitable and legal formulations of the same type of bar to recovery. The trial judge found that although Dr. Wynrib was under a trust obligation to Ms. Norberg, she was barred from claiming damages against him because of her "immoral" and "illegal" conduct. While he referred to the doctrine of *ex turpi*, there seems to be little doubt that in equity the appropriate term is "clean hands" and consequently that is the expression I will use.

87. The short answer to the arguments based on wrongful conduct of the plaintiff is that she did nothing wrong in the context of this relationship. She was not a sinner, but a sick person, suffering from an addiction which proved to be uncontrollable in the absence of a professional drug rehabilitation program. She went to Dr. Wynrib for relief from that condition. She hoped he would give her relief by giving her the drug; "hustling" doctors for drugs is a recognized symptom of her illness: Wilford, *Drug Abuse, A Guide for the Primary Care Physician* (1981), at pp. 280-82. Such behaviour is commonly seen by family physicians. Patients may, as did Ms. Norberg, feign physical problems, which, if bona fide, would require analgesic relief. They may, as Ms. Norberg also did, specify the drug they wish to receive. Once a physician has diagnosed a patient as an addict who is "hustling" him for drugs the recommended response is to "(1) maintain control of the doctor-patient relationship, (2) remain professional in the face of ploys for sympathy or guilt and (3) regard the drug seeker as a patient with a serious illness": Wilford, at p. 282.

SOPINKA J.: ***

157. I agree with the reasons of Locke J.A. and La Forest J. that the appellant's claim is not barred by *ex turpi*. I would add the following. My colleague refers to the observation of Estey J. that the application of this maxim to defeat a tort action has been rare. Its use has been much less frequent in recent times. The courts have taken a less rigid view of its purpose. Emphasis is now placed on preserving the administration of justice from the taint that would result from the approval of a transaction that a court ought not to countenance. In this regard, I agree with the statement of Taylor J. in *Mack v. Enns* (1981), 30 B.C.L.R. 337 (S.C.), at p. 345:

> The purpose of the rule today must be to defend the integrity of the legal system, and the repute in which the courts ought to be held by law-abiding members of the community. It is properly applied in those circumstances in which it would be manifestly unacceptable to fair-minded, or right-thinking, people that a court should lend assistance to a plaintiff who has defied the law.

158. The views of society have changed radically in this respect. The older cases were apt to view with equal severity the misconduct of all persons who were involved in immoral or illegal transactions. I need only refer to the case of *Hegarty v. Shine* (1878), 4 L.R. Ir. 288 (Q.B.), in which the courts refused relief to a young female servant who had been infected with a venereal disease by her master. I have no doubt that such a case would be viewed quite differently today. In my view, the administration of justice will suffer no disrepute in the eyes of the public by reason of this court's lending its assistance to the appellant in this case. ***

REFLECTION:

- *What was the plaintiff's alleged illegality in this case? Why did it not afford Dr. Wynrib a defence to her action?*

18.3.3 Rankin's Garage & Sales v. J.J. [2018] SCC 19

✗REF: §13.4.2.3

KARAKATSANIS J. (MCLACHLIN C.J.C, ABELLA, MOLDAVER, WAGNER, CÔTÉ, ROWE JJ. concurring): ***

63. Rankin's Garage submits that illegal acts by the plaintiff sever any proximate relationship between the parties or, alternately, operate as a residual policy basis on which to negate the duty of care. The notion that illegal or immoral conduct by the plaintiff precludes the existence of a duty of care has consistently been rejected by this Court: see *Hall v. Hebert*, [1993] 2 S.C.R. 159 (S.C.C.); *British Columbia v. Zastowny*, 2008 SCC 4, [2008] 1 S.C.R. 27 (S.C.C.). Tort law does not seek to punish wrongdoing in the abstract. Rather, private law is corrective and based on compensation for harm that results from the defendant's unreasonable creation of the risk of that harm. If the mere fact of illegal behaviour could eliminate a duty, this would effectively immunize negligent defendants from the consequences of their actions. Seriously injured victims would be entirely denied recovery, even when the defendant bears most of the fault. While illegality can operate as a defence to a tort action in limited circumstances when it is necessary to preserve the integrity of the legal system, this concern does not arise in the circumstances of this case: see *Hall*, at pp. 169 and 179-80. Plaintiff wrongdoing is integrated into the analysis through contributory negligence, as occurred here. ***

REFLECTION:

- *Why was the plaintiff's role in the theft of the car from the defendant's garage not a reason to deny the claim?*

18.3.4 Lane v. Holloway [1967] EWCA Civ 1

✗REF: §6.2.2.1

MASTER OF THE ROLLS:

3. *** It has been argued before us that no action lies because this was an unlawful fight: that both of them were concerned in illegality; and therefore there can be no cause of action in respect of it. *Ex turpi causa oritur non actio*. To that I entirely demur. Even if the fight started by being unlawful, I think that one of them can sue the other for damages for a subsequent injury if it was inflicted by a weapon or savage blow out of all proportion to the occasion. I agree that in an ordinary fight with fists there is no cause of action to either of them for any injury suffered. The reason is that each of the participants in a fight voluntarily takes upon himself the risk of incidental injuries to himself. *Volenti non fit injuria*. But he does not take on himself the risk of a savage blow out of all proportion to the occasion. The man who strikes a blow of such severity is liable in damages unless he can prove accident or self-defence.

4. In this case the Judge found that "with a young man of 23 and a man of 64, whom he knows to be somewhat infirm, the young man cannot plead a challenge seriously: nor is he entitled to go and strike him because of an insult hurled at his wife."

5. I quite agree. Mr. Holloway in anger went much too far. He gave a blow out of proportion to the occasion for which he must answer in damages. ***

REFLECTION:

- *Why was illegality not a defence in this case?*
- *If it had been a fair fight would the plaintiff's cause of action have succeeded?*

18.3.5 Cross-references

- *Deloitte & Touche v. Livent Inc.* [2017] SCC 63, [98]-[105]: §19.3.1.3.

- *Blackwater v. Plint* [2005] SCC 58, [83]-[87]: §19.7.2.

18.3.6 Further material

- Lord Grabiner QC, "Public Policy, Illegality and Contracts" *Allen & Overy Lecture* (University of Cambridge, 2015) 📺.
- UK Law Weekly Podcast, "*Ecila Henderson v. Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43" (Dec 7, 2020) 🎧.
- UK Law Weekly Podcast, "*Stoffel & Co. v. Grondona* [2020] UKSC 42" (Nov 30, 2020) 🎧.
- UK Law Weekly Podcast, "*Patel v. Mirza* [2016] UKSC 42" (May 6, 2017) 🎧.
- J. Goudkamp, "*Ex turpi causa* and Immoral Behaviour in the Tort Context" (2011) 127 L Quarterly Rev 354.
- B. McLachlin, "Weaving the Law's Seamless Web: Reflections on the Illegality Defence in Tort Law" in A. Dyson, J. Goudkamp and F. Wilmot-Smith (eds), *Defences in Tort* (Oxford: Hart Publishing, 2015).
- S. Green & A. Bogg (eds), *Illegality after Patel v. Mirza* (Oxford: Hart Publishing, 2018).

18.4 Immunity

18.4.1 Ryan v. Victoria (City) [1999] CanLII 706 (SCC)

✗**REF: §14.1.2.2, §14.2.6.2, §21.2.1**

MAJOR J. (FOR THE COURT): ***

30. *** For more than 90 years, railway companies have benefited from a "special rule" at common law which placed them in a privileged position within the law of negligence. As long as a railway complied with the requirements imposed upon it by applicable statutes, regulations and administrative orders, it was under no further obligation—absent extraordinary circumstances—to act in an objectively reasonable manner. This rule has usually been framed in terms of limiting the "duty of care" owed by railways to the public. It is more easily understood as limiting the *standard* of care which railways must meet under an existing legal duty. Either way, the effect of the rule was the same: it excused railway companies in most cases from the ordinary obligation of prudence which governs other members of society.

31. The roots of the special rule reach back to the turn of the century, when railways occupied a position of unparalleled economic and social importance in the development of Canada. In *Grand Trunk Railway v. McKay* (1903), 34 S.C.R. 81 (S.C.C.), this Court held that the safety measures prescribed by the *Railway Act* and the Board of Railway Commissioners were exhaustive, and railways could not be held liable for failing to take precautions beyond those requirements. The harshness of that doctrine was tempered somewhat by a separate line of cases, beginning with *Lake Erie & Detroit River Railway v. Barclay* (1900), 30 S.C.R. 360 (S.C.C.), which held that in the event of exceptional danger or extraordinary conditions, a railway would be required to take greater safety measures than those officially prescribed. The *McKay* and *Barclay* doctrines have been combined in subsequent judgments to yield the current rule, which was restated by Dickson J. (as he then was.) in *Paskivski*, *supra*, at pp. 698-99:

> A long line of cases … establishes that a railway company's duty of care to users of public crossings is limited to discharge of statutory obligations under the *Railway Act* … and compliance with orders of the Canadian Transport Commission -- unless there are special or exceptional circumstances, in which event a common law duty of care will require additional precautions or safeguards.

32. This Court upheld the special rule in *Paskivski*, but it did so with reluctance. Dickson J. questioned the ongoing relevance of the rule at p. 708:

> The past seventy years have wrought many changes within Canada and today one might perhaps be inclined to question the relevance and validity of a rule of law which limits the common law duty of care of a railway to the special case or the exceptional case, particularly if those words are to

> receive a strict or narrow construction. It may well be that the interests of a young and undeveloped nation are best served by a minimum of impediment to industrial growth and economic expansion but in a more developed and populous nation this attitude of *laissez faire* may have to yield to accommodate the legitimate concern of society for other vital interests such as the safety and welfare of children.

Laskin C.J., concurring in the result reached by Dickson J., was even more pointed in his criticism of the rule, at pp. 689-90:

> … I am unable to appreciate why railway companies, in the conduct of their transportation operations, are today entitled to the benefit of a special rule, more favourable to them, by which their common law liability is to be gauged. When all allowances are made for the force and legal effect of the rules and regulations of the regulatory agency, the Canadian Transport Commission, to which railway companies are subject, and when the question of their liability turns on the common law of negligence, as is the case here, they cannot claim to be judged by any different standards than those that apply to other persons or entities charged with liability for negligence.

33. The calls for reform expressed 24 years ago in *Paskivski* are more compelling today. The special status enjoyed by railway companies under the law of negligence can no longer be justified in principle and the time has come for that rule to be set aside. Although a doctrine of such long standing should not lightly be discarded, there is little to be gained from maintaining for its own sake a line of jurisprudence which has lost its relevance.

34. The Railways contend that the *McKay/Barclay* rule should be preserved in deference to the expertise of the Board (now the Canadian Transportation Agency) on matters of railway safety. That argument is unpersuasive. The orders of an administrative board may be relevant to the determination of reasonable behaviour in specific circumstances. However, as noted, such orders do not oust the underlying standard of reasonableness imposed by common law. A railway, like any other company or individual, is subject to generally applicable principles of negligence, and should not enjoy special protection when its actions or omissions cause harm to other members of society. See *Harris v. Canadian Pacific Ltd.* (1989), 59 D.L.R. (4th) 151 (B.C. C.A.) at p. 154-55. ***

58. *** The *McKay/Barclay* "special rule" is abolished, and the Railways are therefore subject to ordinary principles of negligence. They owed a duty of care to the appellant with respect to the flangeways on Store Street, and that duty required them to exercise reasonable care in the circumstances. Their compliance with regulatory standards did not replace or exhaust that obligation. ***

REFLECTION:

- *Was it fair to the railway company for the Court to decline to afford it the longstanding immunity that had been recognised in the McKay/Barclay rule? Did this judgment retrospectively penalise the defendant?*[568]
- *In what circumstances should a defendant receive immunity from the ordinary rules of tort law?*

18.4.2 Local Government Act, RSBC 2015

Local Government Act, RSBC 2015, c 1, ss 742-743

742. Immunity in relation to building bylaw enforcement

A municipality or a member of its council, a regional district or a member of its board, or an officer or employee of a municipality or regional district, is not liable for any damages or other loss, including economic loss, sustained by any person, or to the property of any person, as a result of neglect or failure, for any reason, to enforce, by the institution of a civil proceeding or a prosecution,

> (a) the Provincial building regulations,
>
> (b) a bylaw under Division 1 *[Building Regulation]* of Part 9 *[Regional Districts: Specific Service*

[568] See S. Beswick, "Retroactive Adjudication" (2020) 130 Yale LJ 276.

Powers],

(c) a bylaw under section 8 (3) (l) *[fundamental powers—buildings and other structures]* of the *Community Charter*, or

(d) a bylaw under Division 8 *[Building Regulation]* of Part 3 of the *Community Charter*.

743. Immunity in relation to approval of certified building plans

(1) If a municipality or regional district issues a building permit for a development that does not comply with the Provincial building regulations or another applicable enactment respecting safety, the municipality or regional district must not be held liable, directly or vicariously, for any damage, loss or expense caused or contributed to by an error, omission or other neglect in relation to its approval of the plans submitted with the application for the building permit if

(a) a person representing himself or herself as a professional engineer or architect registered as such under Provincial legislation certified, as or on behalf of the applicant for the permit, that the plans or the aspects of the plans to which the non-compliance relates complied with the then current Provincial building regulations or other applicable enactment to which the non-compliance relates, and

(b) the municipality or regional district, in issuing the building permit, indicated in writing to the applicant for the permit that it relied on the certification referred to in paragraph (a).

(2) Subsection (1) does not apply if the municipality or regional district knew that the person making the certification referred to in that subsection was not, at the time of certification, registered as a professional engineer or architect under Provincial legislation.

(3) If a municipality or regional district makes an indication in accordance with subsection (1)(b), it must reduce the fee for the building permit to reflect the costs of the work that would otherwise be done by a building inspector to determine whether the plans or the aspects of the plans that were certified to comply do in fact comply with the Provincial building regulations and other applicable enactments respecting safety.

18.4.2.1 Other provincial local government statutes

- Alberta: Municipal Government Act, RSA 2000, c M-26, ss 535(2)-(4), 535.2.
- Manitoba: Municipal Act, CCSM c M225, ss 403, 404(1).
- New Brunswick: Local Governance Act, SNB 2017, c 18, ss 178, 179.
- Newfoundland and Labrador: City of St. John's Act, RSNL 1990, c C-17, s 323.
- Nova Scotia: Municipal Government Act, SNS 1998, c 18, ss 185, 300, 301, 499, 504, 513-515.
- Ontario: Municipal Act, 2001, SO 2001, c 25, s 448.
- Prince Edward Island: Municipal Government Act, RSPEI 1988, c M-12.1, s 250, 251.
- Québec: Professional Code, CQLR c C-26, art 193; Fire Safety Act, CQLR c S-3.4, s 47.
- Saskatchewan: The Municipalities Act, SS 2005, c M-36.1, ss 355, 356(1).

REFLECTION:

- *In light of the holding on the facts in Anns v. Merton London Borough Council (§13.4.1.1), why might provinces statutorily immunise local governments from suits in relation to building bylaws and certification of plans?*
- *Consider the statutes that immunise local government officers (§23.2.3) and police officers (§23.2.4) from negligence liability, imposing in their place public authority vicarious liability. What justifies such immunities?*
- *Should the creation of immunities from tort liability be a matter for the courts or the legislature?*

18.4.3 Cross-references

- *Home Office v. Dorset Yacht Co. Ltd* [1970] UKHL 2, [26]-[27]: §13.2.3.
- *Nelson (City) v. Marchi* [2021] SCC 41, [38]-[59]: §19.5.2.2.
- *Blackwater v. Plint* [2005] SCC 58, [39]-[44]: §23.1.3.

- *British Columbia v. Insurance Corp. of British Columbia* [2008] SCC 3, [10]: **§23.2.4.2**.

18.4.4 Further material

- A.F. Martin, "Statutory Good-Faith Immunity for Government Physicians: Cogent Policy or a Denial of Justice?" (2010) 4 McGill J of L and Health 75.
- E. Chamberlain, "*Francis v. Ontario*: Can the Crown Restore its Own Immunity?" (2021) 99 Canadian Bar Rev 645.
- T. Anthony, "Australia's Anachronistic Advocates' Immunity: Lessons from Comparative Tort Law" (2007) 15 Tort L Rev 11.

19 CATEGORIES OF NEGLIGENCE

Donoghue v. Stevenson [1932] UKHL 100, [80] (§13.1.1)

LORD MACMILLAN: The categories of negligence are never closed. ***

R v. Imperial Tobacco Canada Ltd, 2011 SCC 42, [21] (§19.5.2.1)

MCLACHLIN C.J.C.: The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson* [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners Ltd.* [1963] 2 All E.R. 575 (H.L.) [§19.3.1.2], a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson*. ***

19.1 Negligence in producing or supplying harmful products

M. Parrish, "Product Liability 101" (Continuing Legal Education Society of British Columbia, 2017), 1.1.2

Tort liability for damages or injuries caused by a defective or dangerous product is based on the claim of negligence.[569] There are three main types of negligence establishing tort liability for damages or injuries caused by defective products: (i) negligent manufacture; (ii) negligent design; and (iii) failure to warn. *** While general principles of Canadian negligence law will apply in any tort case, courts have developed a distinct body of law relating to the analysis and application of the elements in product liability claims. ***

The fundamental threshold concept of product liability is that the product must pose an unreasonable risk of harm to person or property when used as foreseeably intended due to the negligent design, manufacture or warning of the product.[570] While the preponderance of cases hold that products which are shoddy but not unreasonably dangerous are not capable of founding a product liability claim, a recent Ontario Court of Appeal decision has opened the door to product liability claims for shoddy but not dangerous goods.[571] There is no strict liability in Canadian product liability law—a plaintiff must always establish that his or her damages were caused by the negligence of the manufacturer.[572]

Further, while there are some narrow exceptions *** [§19.3.2], the economic loss rule normally requires that a plaintiff must suffer personal injury or property damage other than "damage" caused by the defective condition to the product itself to maintain a claim.[573] As a result, situations where a user of a product learns of a dangerous defect before injury or property damage occurs may not have a tort claim against the manufacturer due to the absence of damage to person or property. *** […continue reading]

REFLECTION:

- *In the United States, tort liability for harmful products is typically strict,[574] whereas in other common law jurisdictions such as Canada the plaintiff must prove that the defendant was at fault. What is the difference? What are the advantages and problems of tort law's treatment of product liability on each approach?*

[569] To prove negligence, the plaintiff must plead and establish the following elements: (a) the product was defective or dangerous; (b) the defendant owed a duty of care to the plaintiff with respect to the product; (c) the defendant was negligent in failing to meet the applicable standard of care; (d) the defendant's breach of the standard of care caused or contributed to the defect; (e) the defect caused or contributed to the plaintiff's damages or injuries; and (f) the plaintiff's damages or injuries were reasonably foreseeable.
[570] *Aurora v. Whirlpool Canada*, 2013 ONCA 657.
[571] *Aurora v. Whirlpool Canada*, *supra*.
[572] *Phillips v. Ford Motor Company of Canada Ltd.*, (1971), 18 DLR (3d) 641 (Ont CA); *Andersen v. St. Jude Medical Inc.*, [2002] OJ No. 260 (SCJ).
[573] *Rivtow Marine v. Washington Iron Works*, [1974] 3 SCR 1189.
[574] See "Products liability" in Wex (Cornell Law School Legal Information Institute, 2011); "Understanding the Interplay Between Strict Liability and Product Liability" LexisNexis Legal Insights (Jan 6, 2021).

19.1.1 MacPherson v. Buick Motor Co. (1916) 217 NY 382 (NY CA)

BACKGROUND: Quimbee (2020), https://youtu.be/YdWG-7wjKfs

New York Court of Appeals – 217 NY 382 (1916)

CARDOZO J. (HISCOCK, CHASE, CUDDEBACK JJ. concurring):

1. The defendant is a manufacturer of automobiles. It sold an automobile to a retail dealer. The retail dealer resold to the plaintiff. While the plaintiff was in the car, it suddenly collapsed. He was thrown out and injured. One of the wheels was made of defective wood, and its spokes crumbled into fragments. The wheel was not made by the defendant; it was bought from another manufacturer. There is evidence, however, that its defects could have been discovered by reasonable inspection, and that inspection was omitted. There is no claim that the defendant knew of the defect and willfully concealed it. The case, in other words, is not brought within the rule of *Kuelling v. Lean Mfg. Co.* (183 N.Y. 78). The charge is one, not of fraud, but of negligence. The question to be determined is whether the defendant owed a duty of care and vigilance to any one but the immediate purchaser.

2. The foundations of this branch of the law, at least in this state, were laid in *Thomas v. Winchester* (6 N.Y. 397). A poison was falsely labeled. The sale was made to a druggist, who in turn sold to a customer. The customer recovered damages from the seller who affixed the label. 'The defendant's negligence,' it was said, 'put human life in imminent danger.' A poison falsely labeled is likely to injure any one who gets it. Because the danger is to be foreseen, there is a duty to avoid the injury. Cases were cited by way of illustration in which manufacturers were not subject to any duty irrespective of contract. The distinction was said to be that their conduct, though negligent, was not likely to result in injury to any one except the purchaser. We are not required to say whether the chance of injury was always as remote as the distinction assumes. Some of the illustrations might be rejected today. The *principle* of the distinction is for present purposes the important thing.

3. *Thomas v. Winchester* became quickly a landmark of the law. In the application of its principle there may at times have been uncertainty or even error. There has never in this state been doubt or disavowal of the principle itself. ***

4. These early cases suggest a narrow construction of the rule. Later cases, however, evince a more liberal spirit. First in importance is *Devlin v. Smith* (89 N.Y. 470). The defendant, a contractor, built a scaffold for a painter. The painter's servants were injured. The contractor was held liable. He knew that the scaffold, if improperly constructed, was a most dangerous trap. He knew that it was to be used by the workmen. He was building it for that very purpose. Building it for their use, he owed them a duty, irrespective of his contract with their master, to build it with care. ***

7. *Devlin v. Smith* was decided in 1882. A year later a very similar case came before the Court of Appeal in England (*Heaven v. Pender*, L.R. [11 Q.B.D.] 503). We find in the opinion of Brett, M. R., afterwards Lord Esher (p. 510), the same conception of a duty, irrespective of contract, imposed upon the manufacturer by the law itself: 'Whenever one person supplies goods, or machinery, or the like, for the purpose of their being used by another person under such circumstances that every one of ordinary sense would, if he thought, recognize at once that unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing.' He then points out that for a neglect of such ordinary care or skill whereby injury happens, the appropriate remedy is an action for negligence. The right to enforce this liability is not to be confined to the immediate buyer. The right, he says, extends to the persons or class of persons for whose use the thing is supplied. *** What was said by Lord Esher in that case did not command the full assent of his associates. *** Like most attempts at comprehensive definition, it may involve errors of inclusion and of exclusion. But its tests and standards, at least in their underlying principles, with whatever qualification may be called for as they are applied to varying conditions, are the tests and standards of our law.

8. We hold, then, that the principle of *Thomas v. Winchester* is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. That is as far as we are required to go for the decision of this case. There must be knowledge of a danger, not merely possible, but probable. It is *possible* to use almost anything in a way that will make it dangerous if defective. That is not enough to charge the manufacturer with a duty independent of his contract. *** There must also be knowledge that in the usual course of events the danger will be shared by others than the buyer. Such knowledge may often be inferred from the nature of the transaction. But it is possible that even knowledge of the danger and of the use will not always be enough. The proximity or remoteness of the relation is a factor to be considered. We are dealing now with the liability of the manufacturer of the finished product, who puts it on the market to be used without inspection by his customers. If he is negligent, where danger is to be foreseen, a liability will follow. *** We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.

9. From this survey of the decisions, there thus emerges a definition of the duty of a manufacturer which enables us to measure this defendant's liability. Beyond all question, the nature of an automobile gives warning of probable danger if its construction is defective. This automobile was designed to go fifty miles an hour. Unless its wheels were sound and strong, injury was almost certain. It was as much a thing of danger as a defective engine for a railroad. The defendant knew the danger. It knew also that the car would be used by persons other than the buyer. This was apparent from its size; there were seats for three persons. It was apparent also from the fact that the buyer was a dealer in cars, who bought to resell. ***

12. There is nothing anomalous in a rule which imposes upon A, who has contracted with B, a duty to C and D and others according as he knows or does not know that the subject-matter of the contract is intended for their use. We may find an analogy in the law which measures the liability of landlords. If A leases to B a tumbledown house he is not liable, in the absence of fraud, to B's guests who enter it and are injured. This is because B is then under the duty to repair it, the lessor has the right to suppose that he will fulfill that duty, and, if he omits to do so, his guests must look to him (Bohlen, *supra,* at p. 276). But if A leases a building to be used by the lessee at once as a place of public entertainment, the rule is different. There injury to persons other than the lessee is to be foreseen, and foresight of the consequences involves the creation of a duty (*Junkermann v. Tilyou R. Co.*, 213 N.Y. 404, and cases there cited). ***

14. We think the defendant was not absolved from a duty of inspection because it bought the wheels from a reputable manufacturer. It was not merely a dealer in automobiles. It was a manufacturer of automobiles. It was responsible for the finished product. It was not at liberty to put the finished product on the market without subjecting the component parts to ordinary and simple tests (*Richmond & Danville R. R. Co. v. Elliott*, 149 U.S. 266, 272). ***

BARTLETT C.J. (dissenting):

17. The plaintiff was injured in consequence of the collapse of a wheel of an automobile manufactured by the defendant corporation which sold it to a firm of automobile dealers in Schenectady, who in turn sold the car to the plaintiff. The wheel was purchased by the Buick Motor Company, ready made, from the Imperial Wheel Company of Flint, Michigan, a reputable manufacturer of automobile wheels which had furnished the defendant with eighty thousand wheels, none of which had proved to be made of defective wood prior to the accident in the present case. The defendant relied upon the wheel manufacturer to make all necessary tests as to the strength of the material therein and made no such tests itself. The present suit is an action for negligence brought by the subvendee of the motor car against the manufacturer as the original vendor. The evidence warranted a finding by the jury that the wheel which collapsed was defective when it left the hands of the defendant. The automobile was being prudently operated at the time of the accident and was moving at a speed of only eight miles an hour. There was no allegation or proof of any actual knowledge of the defect on the part of the defendant or any suggestion that any element of fraud or deceit

or misrepresentation entered into the sale.

18. The theory upon which the case was submitted to the jury by the learned judge who presided at the trial was that, although an automobile is not an inherently dangerous vehicle, it may become such if equipped with a weak wheel; and that if the motor car in question, when it was put upon the market was in itself inherently dangerous by reason of its being equipped with a weak wheel, the defendant was chargeable with a knowledge of the defect so far as it might be discovered by a reasonable inspection and the application of reasonable tests. This liability, it was further held, was not limited to the original vendee, but extended to a subvendee like the plaintiff, who was not a party to the original contract of sale.

19. I think that these rulings, which have been approved by the Appellate Division, extend the liability of the vendor of a manufactured article further than any case which has yet received the sanction of this court. ***

25. I do not see how we can uphold the judgment in the present case without overruling what has been so often said by this court and other courts of like authority in reference to the absence of any liability for negligence on the part of the original vendor of an ordinary carriage to any one except his immediate vendee. *** In the case at bar the defective wheel on an automobile moving only eight miles an hour was not any more dangerous to the occupants of the car than a similarly defective wheel would be to the occupants of a carriage drawn by a horse at the same speed; and yet unless the courts have been all wrong on this question up to the present time there would be no liability to strangers to the original sale in the case of the horse-drawn carriage. ***

HOGAN J. concurs in result; POUND J. not voting.

REFLECTION:

- *According to Cardozo J., under what circumstances does a manufacturer owe a duty of care to users of its products when the product defect was not originally created by the manufacturer?*
- *Why was Bartlett C.J. concerned about extending tort liability in cases such as this to businesses that incorporate suppliers' products in their goods? Were his concerns well-founded?*
- *What might be the implications of the majority's decision for manufacturers of consumer goods?*

19.1.2 Johansson v. General Motors of Canada Ltd [2012] NSCA 120

Nova Scotia Court of Appeal – 2012 NSCA 120

FICHAUD J.A. (MACDONALD C.J.N.S., SAUNDERS J.A. concurring):

1. Mrs. Johansson's Chevrolet Lumina swerved off the road for no apparent reason. She suffered a serious brain injury. A few years later General Motors Canada issued a recall notice, citing a steering "defect" in the Lumina. Mrs. Johansson sued General Motors Canada for negligence. It was a jury trial. After Mrs. Johansson closed her case, the trial judge granted General Motors Canada's non-suit motion and dismissed her action. The judge said he was "satisfied that a *prima facie* case has been established that the plaintiff's Lumina was defective, that the defect caused the accident". But he ruled there was no evidence to establish General Motors Canada's standard of care or breach of that standard. ***

14. The judge's rulings that (1) "the defendant owed the plaintiff a duty of care to take all reasonable precautions in the assembly or distribution of the Lumina", (2) "it was reasonably foreseeable that failure to take such precautions could lead to a defective automobile being delivered to a consumer, possibly resulting in an injurious accident", and (3) "the plaintiff's Lumina was defective, that the defect caused the accident, and that the plaintiff suffered damages as a result" are not challenged on this appeal.

15. This appeal concerns the judge's ruling:

> 28. … Where the plaintiff's case falters is the element of negligence requiring establishment of the relevant standard of care and breach of that standard.

16. I will consolidate the submissions into one question—Did the judge commit an appealable error, in his application of the principles that govern a non-suit in a negligence claim, by ruling that there was no

evidence from which a properly instructed jury could infer GMC's standard of care or GMC's breach of a standard of care? That is the principal issue. ***

Analysis of Principal Issue—The Non-suit

49. The judge's analysis followed several intersecting reasoning paths that I will address separately.

The Farro Case ***

50. Mrs. Johansson cited to the judge the decision of the Ontario Court of Appeal in *Farro v. Nutone Electrical Ltd.* (1990), 72 O.R. (2d) 637 (Ont. C.A.). The Court of Appeal said that, in a products liability claim, the standard of care and its breach may be inferred from the evidence surrounding the defect. The judge (paras 44-47) discussed *Farro* at length.

51. In *Farro* the plaintiff had suffered damages from a defective part supplied by a third party to the defendant manufacturer of a ceiling exhaust fan. The defective part had been destroyed and was unavailable for testing. In those respects, *Farro* resembles Mrs. Johansson's case. The action was tried before a judge without a jury. In *Farro*, the trial judge held there was no evidence as to the appropriate standard for the manufacture of the mechanical part, and therefore no proof that the standard had been breached. There was no mid-trial non-suit. After the trial, the judge dismissed the action. The Ontario Court of Appeal reversed the judge and allowed the action for damages.

52. Justice Lacourciere for the Court of Appeal said:

> 11. A manufacturer has a duty to take reasonable care in the manufacture of his product, including all its component parts, and failure to take such reasonable care can result in liability to the ultimate user or consumer.
>
> 12. In *Charlesworth on Negligence*, 5th ed., at p. 394, paras. 631-2, the following appears:
>
> > The duty of the manufacturer may be said to be to take reasonable care in the manufacture of his product, and failure to take such care will render him liable to any consumer or user whose person or property is injured by his product, provided (1) the product causing the injury has the same defect as it had when it left the manufacturer; and (2) the manufacturer should have contemplated that the product would be consumed or used in the same condition as it was when it left him.
> >
> > *Component parts.* A manufacturer's duty is not limited to those parts of his product which he makes himself. It extends to component parts, supplied by his submanufacturers or others, which he uses in the manufacture of his own products. He must take reasonable care, by inspection or otherwise, to see that those parts can properly be used to put his product in a condition in which it can be safely used or consumed in the contemplated manner by the ultimate user or consumer.
>
> The last proposition is based on *Macpherson v. Buick Motor Co.*, 217 N.Y. 382(1916), referred to with approval by Lords Atkin and MacMillan in *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) [§13.1.1]. …
>
> 15. … The clear finding, well supported by the evidence, is that the fan motor caused the fire. The appellants not only established a prima facie case of a defect in the exhaust fan's component but also eliminated all possible extraneous causes of the fire.
>
> 16. In *Prosser on Law of Torts*, 3rd ed. (1964), p. 671, the learned author discussed the difficulty in laying the groundwork leading to an inference of the manufacturer's negligence:
>
> > Since the injured plaintiff almost never has any direct proof of what has occurred in the manufacturer's plant, he usually must resort to circumstantial evidence. In the ordinary case this means that he must rely upon the doctrine of *res ipsa loquitur*. In order to bring himself within the doctrine, he must make it appear that the cause of the injury was something which

> lay within the responsibility of the defendant. In other words, he must introduce evidence to exclude the possibility that it was due to his own conduct, or that of intermediate handlers or any meddling third party. …
>
> 18. … Having found that the fan motor caused the fire, the learned trial judge, with great respect, placed too heavy a burden on the appellants to show how the particular defect occurred. There was evidence of sufficient weight and cogency to support an inference that the fan motor was defective when it left the manufacturer's plant.
>
> 19. It is not necessary, and it is generally impossible for a plaintiff to adduce direct evidence that a defect existed when the manufactured product left the factory. I adopt the language of MacKeigan C.J.N.S. delivering the judgment of the court in *Smith v. Inglis Ltd.* (1978), 83 D.L.R. (3d) 215 at p. 218 (C.A.):
>
> > I am very respectfully of the opinion that the appellant's case against the respondent should not be judged by a comparison of likelihoods, a test which imposes a burden on the appellant of showing exactly where and how the negligent deed was done, a burden which I do not think the law requires him to assume.
> >
> > The appellant does, however, have the burden of establishing on a preponderance of probability on the evidence as a whole that the respondent was the agency responsible for the defect which caused him injury. This he may discharge by showing circumstantially that the defect must have been there when the refrigerator left the factory. He can in my opinion do this if he can exclude the probability of some other person having created the hazard after the product left the factory.

53. The judge, in Mrs. Johansson's case, distinguished *Farro* on two bases. ***

54. I respectfully disagree that *Farro* is distinguishable on either basis cited by the judge. ***

Inferring Negligence versus Strict Liability

77. Mrs. Johansson cited to the judge two authorities to the effect that the trier of fact could infer a standard of care and its breach from evidence surrounding the defect. One was *Farro*, discussed earlier. The other was *Hollis v. Birch*, [1989] B.C.J. No. 2261 (B.C. S.C.).

78. The judge (para 43) declined to follow *Hollis*. He said:

> 42. Nonetheless, the plaintiff argued that the defendant's recall of the 1997 Chevrolet Lumina, for safety reasons, is evidence of a breach of the standard of care in and of itself. The plaintiff relied principally on two cases in support of this proposition, *Hollis v. Birch*, [1989] BCJ No 2261 (QL) (BC SC) [*Hollis*] and *Farro v. Nutone Electrical Ltd.* (1990), 72 OR (2d) 637, [1990] OJ No 492 (QL) (CA) [*Farro*].
>
> 43. In *Hollis* which was a product liability case dealing with the rupture of a silicone breast implant, the trial judge cited American case law for the proposition that negligence could be inferred from the existence of a product that did not function properly. In my view, *this reasoning falls precisely within the definition of strict liability*: the defendant's liability flows immediately from the fact that the product was defective, and not from the actions or omissions that the defendant took in bringing the product to market. Strict liability is not the law in Canada. On this basis, I am not prepared to follow the decision in *Hollis*. [emphasis added]

79. GMC's submission operates from the same perspective. GMC's factum to the Court of Appeal says that the dismissal of its non-suit motion would impose "strict liability".

89. The essence of the Appellant's submissions on this point is that the fact of the Recall is evidence of breach of the standard of care. As noted above, that submission is akin to saying that there is strict liability when a manufacturer or distributor is involved in a recall and it is well-established that strict liability is not the law in Canada.

80. I don't behold any hovering spectre of strict liability. The judge and GMC confuse liability *without* negligence with the jury's function of deciding whether or not to reasonably *infer* negligence.

81. Drawing inferences is standard fare for juries. An inference is a finding deduced or induced from a premise without direct evidence of the inferred fact. It is a factual jump on the reasoning path. The judge ensures that the span is not so broad or irrational that a reasonable jury would stumble. Otherwise the system trusts the jury's common sense and agility to mind the gap and land softly. To resolve the non-suit motion simply because there is no direct evidence of GMC's standard of care for rack and pinion steering assemblies, is to emasculate the jury's function of assessing whether or not to reasonably infer the standard's particulars from appropriate evidence. In *Grant v. Australian Knitting Mills Ltd.* (1935), [1936] A.C. 85 (Australia P.C.), pp. 96 and 101 [§13.1.4], Lord Wright, in well known extracts, discussed the process of inference from circumstantial evidence in a products liability case:

> *** The appellant is not required to lay his finger on the exact person in all the chain who was responsible, or to specify what he did wrong. *Negligence is found as a matter of inference from the existence of the defects taken in connection with all the known circumstances*: even if the manufacturers could by apt evidence have rebutted that inference they have not done so. [emphasis added]

82. In Mrs. Johansson's case there is substantial evidence, and a *prima facie* finding by the judge, relating to the steering system's defect when it left GMC's possession. To itemize:

(a) GMC's Recall Notice said that "General Motors has decided that a defect, which relates to motor vehicle safety, exists" in 1997 Luminas. The defect is a "condition where the lower pinion bearing in the power steering gear may separate". This meant that "[w]hen trying to turn left" some vehicles could "assist towards the right", and "a crash could result".

(b) General Motors' internal memo to its dealers explained the reason for the problem:

> Some of the lower pinion bearings were not manufactured properly and can separate with vehicle usage over time.
>
> As the driver steers the vehicle to the left, the pinion shaft moves and power steering fluid is misdirected, so the power assist is to the right instead of to the left.

(c) GMC's Mr. Davies agreed, in his transcript, that the 1997 Luminas contained "defective parts related to the power steering gear, lower pinion bearing".

(d) Mr. Davies testified the United States National Highway and Traffic Safety Administration (NHTSA) had requested General Motors to investigate the problem. General Motors' Owners' Manual for the Johanssons' Lumina notified owners that the NHTSA was the authority to be notified if the vehicle is thought to have "a defect which could cause a crash or could cause injury or death".

(e) Mr. Davies testified:

> where there was total failure, meaning all the ball bearings in, and the cage were completely in a position where they weren't of any use to hold the pinion, that the pinion would move, which allowed redirection of fluid. And when that occurred, if you tried to move the wheel to the left, the vehicle would actually move to the right.

(f) The DVD evidence of General Motors' testing showed, according to the judge's mid-trial ruling on admissibility, "that the defect occurs in practice", making the footage "probative".

(g) Dr. Smith, qualified as an expert, commented on the DVD evidence that the retainer that holds the bearings "has completely come loose", the "balls are now no longer evenly spaced around the bearing", later "[t]he ball bearings were coming out of the bearing assembly" and "if they were in a car, the balls would end up falling into that cup at the bottom of the steering shaft". Dr. Smith testified that the bearing "was prone to failure", meaning the "retaining ring or clip would fall out", then "the ball bearings themselves would fall out", then "the steering shaft would then not be properly

> supported by the bearing, and would be able to shift and flop and move around". The "wobbling" shaft meant "erratic steering", because that "instead of just being kept (centered in line), this can flop around and, in a somewhat unpredictable way, cause this control valve to move in a somewhat unpredictable way and cause the hydraulic fluid to go into the rack in a somewhat unpredictable way, so the car doesn't go where you try to steer it".
>
> (h) The defect was avoidable. According to GMC's documents, other 1996-98 General Motors' vehicles did not have the defect, and the recalled vehicles were remediated by a standard repair protocol.

83. Each case turns on its own evidence. Nonetheless, it is instructive to overlay Mrs. Johansson's circumstances onto the background of other cases and textual authorities that discuss whether inferences reasonably may be drawn from an equivalent evidentiary premise.

84. *Farro*, *Marchuk* [*v. Swede Creek Contracting Ltd.*, [1998] B.C.J. No. 2851 (Q.L.) (C.A.)] and *Newfoundland Light & Power Co.* [*v. Furlong Estate*, [2005] N.J. No. 146, 2005 NLCA 25, (Q.L.)] are examples where three appellate courts acknowledged that similar inferences were available to establish the standard of care and its breach. ***

85. Klar, *Tort Law* (5th ed. 2012), p. 382, states:

> As stated by Waddams, and agreed to by the courts, where a product has been manufactured with a defect, and this defect has resulted in the plaintiff's injuries, "the inference of negligence is practically irresistible". This inference is predicated upon proof that the defect was in the product when it left the manufacturer. ***

86. I will return to the judge's concern about strict liability. Strict liability is defined by Linden and Feldthusen, *Canadian Tort Law* (9th ed. 2011), p. 539 as:

> One person may be required to compensate another for injury or damages, even though the loss was neither intentionally nor negligently inflicted.

87. GMC will be liable to Mrs. Johansson only if GMC is negligent—*i.e.* if, once all the evidence is in, the jury chooses to draw the inferences necessary to find that GMC has breached its standard of care. Strict liability is not in play. ***

89. In my respectful view, the judge mistook the process by which a jury may choose whether or not to infer "negligence" from circumstantial evidence, for "strict liability" without negligence. That was an error of law.

The Need for Evidence of Regulatory Benchmarks or Industry Practice ***

92. *** [T]he judge, in Mrs. Johansson's case, ruled that evidence of industry practice was mandatory for a plaintiff in a products liability claim:

> 33. … From this legal standard, the trier-of-fact must then hear evidence on what a "prudent practitioner" would mean in the particular circumstances, and assess whether the defendant met that standard.
>
> 34. In this case, the plaintiff presented no evidence addressing the standard industry practice of an automobile manufacturer, assembler or distributor with respect to parts supplied by other parties. Such evidence might include answers to the following questions: Is it industry practice for a manufacturer, assembler or distributor to test such parts? If so, what kind of testing is normally performed? Does the testing depend on the type of part and the level of risk posed by a failure of the part? Would a standard manufacturer, assembler or distributor be expected to discover an improperly-crimped lower pinion bearing, such as the alleged defect in this case? ***

98. In my respectful view, the judge erred in four respects. ***

99. *First:* The scope of jury inferences. ***

100. In *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 (S.C.C.) [§14.1.2.2], Justice Major for the Court defined the standard of care: ***

> 28. Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. ***

The judge [in Mrs. Johansson's case] referred to *Phillips v. Ford Motor Co. of Canada*, [1971] 2 O.R. 637 (Ont. C.A.), para 49:

> … our Courts do not, in product liability cases, impose upon manufacturers, distributors or repairers, as is done in some of the States of the American union, what is virtually strict liability. The standard of care exacted of them under our law is the duty to use reasonable care in the circumstances and nothing more. ***

110. *** [I]t is clear that a plaintiff may lead evidence that the defendant failed to comply with industry practice, and that evidence may assist to establish a *prima facie* case. Or the defendant may lead evidence of compliance with industry practice. Either way, the evidence is to be weighed, with other evidence, by the jury at the conclusion of the trial. But evidence of industry practice does not necessarily trump other evidence and settle the negligence issue in the jury room. So it cannot be a legal prerequisite to the plaintiff's *prima facie* case in mid-trial. A products liability plaintiff may establish her *prima facie* case with other evidence. The more common sequence is that the plaintiff leads with other evidence, and the evidence of industry practice makes its debut in the defendant's case.

111. *Second:* The evidence of "regulatory benchmarks". The judge (para 35) said there was no evidence "of how the defendant performed" against the "regulatory benchmark" of the *Motor Vehicle Safety Act* of Canada. This is not a private prosecution for an offence under s. 17 of the *Motor Vehicle Safety Act*. It is a negligence action where the trier of fact is to assess the reasonableness of GMC's conduct. GMC's Mr. Davies testified there was no Canadian investigation of the steering defect, because that investigation was underway in the United States. He said "[t]he General Motors Corporation undertook the investigation at the request of the National Highway and Safety Administration, and it would be redundant for GM of Canada to do exactly the same thing" (quoted above, para 43). This United States Government Association is the regulatory body that, according to GMC's Safety Manual for the Johanssons' Lumina, is to be notified of "a defect which could cause a crash or could cause injury or death" (quoted above, para 48). So there was evidence that the steering defect incited action—the request for an investigation—by a regulatory authority. What weight this evidence generates is for the jury. But Mrs. Johansson should not be non-suited either because evidence was lacking of a non-existent and "redundant" Canadian investigation, or because any regulations under the Canadian statute may not specifically address rack and pinion steering.

112. *Third:* The need for expert evidence. The judge, in Mrs. Johansson's case, referred to *Crits*, [*v. Sylvester* (1956), 1 D.L.R. (2d) 502 (Ont. C.A.)], and *Krawchuk v. Scherbak*, 2011 ONCA 352 (Ont. C.A.) as authority that expert evidence is required to establish the standard of care. *Crits* and *Krawchuk* discussed professional negligence claims. Neither involved a non-suit. ***

114. I disagree with the judge that the principles respecting expert evidence in professional negligence cases support a non-suit of Mrs. Johansson's claim. ***

119. In *MacDonald v. Holland's Carriers Ltd.*, 2012 NSCA 47 (N.S. C.A.), a part dislodged from a moving truck, injuring the plaintiff. *** Chief Justice MacDonald (paras 16-21) *** held that the trial judge was entitled to apply common knowledge and experience to apply the legal standard of reasonable care.

120. In *Moreau c. Évêque Catholique Romain d'Edmundston*, [2011] N.B.J. No. 85 (N.B. C.A.), another negligence case where the defendant was not a professional, Chief Justice Drapeau for the Court said:

> 17. … Although expert testimony on the accepted norms may be beneficial in many instances, it is essential only where the context is so esoteric that a person with ordinary judgment and experience could not form a valid opinion on the reasonableness of the conduct in issue (see *Beshara v. Dysart* (1998), 207 N.B.R. (2d) 14 (N.B. C.A.)). …

121. *Fourth:* Is this a "technical" issue? The judge observed (para 37) that expert evidence was required of Mrs. Johansson because:

> The defendant's manufacture, assembly and/or distribution of the 1997 Chevrolet Lumina is not of a non-technical nature.

122. The technical aspects of the manufacture and assembly of the Lumina's defective steering component were fully explained during the plaintiff's evidence. *** This evidence was sufficiently comprehensive that GMC's counsel told the Court of Appeal:

> The fact is this: We know exactly how this defect arose. It's in evidence …

Then after elaborating, with the assistance of the demonstrative exhibits, GMC's counsel stated:

> So there's no need for this Plaintiff to get inside the factory, and figure out who did what and what might have gone wrong.

123. What remains, then, is whether a reasonable person in GMC's circumstances would have taken precautions, for instance respecting inspection, testing or some other aspect of quality control, to identify and rectify such a defect before the Lumina retailed to the Johanssons. That is not esoteric "technical" territory. It is a topic well within the comprehension and appropriate function of a jury in a negligence trial.

124. *Conclusion on the Need for Evidence*: For the above reasons, in my view it is not essential that Mrs. Johansson's case contain evidence of regulatory benchmarks or expert evidence of industry practice, provided that the evidence she has adduced is sufficient to permit a jury to infer negligence. ***

Could a Jury Reasonably Infer Negligence in this Case? ***

127. I refer to the key aspects of the evidence summarized earlier (para 82). In my opinion, from that evidence, a jury reasonably could, if it wishes, infer that the low end of the standard of care governing quality control, investigation or testing for an assembler of a new vehicle does not sanction: a "defect" that impugns "safety" where "a crash could result", because steering veers opposite to the intended direction, caused by components that are "not manufactured properly", so bearings would suffer "failure" and fall out making them useless for their purpose, leading to "misdirected" power steering fluid, and a "wobbling" steering shaft that can "flop around" unpredictably, causing "erratic steering". The quoted words are extracted from the evidence set out earlier. It seems obvious that when the driver steers left, the car shouldn't turn right. This is inferable from the meaning of "steering", apart from the rest of the evidence in this record. That a jury might infer a standard of quality control to govern this circumstance is neither impermissible nor unreasonable. That the defective rack and pinion steering system was manufactured by another General Motors US subsidiary, then assembled by GMC does not alter my view of how, on this evidence, a jury may be permitted to apply the assembler's standard of reasonable care by inferring particulars governing quality control, investigation or testing. ***

129. I am not saying the jury should or would draw any of these inferences. But, given the raw material in this record of evidence, neither can I say the inferences are impermissible. That means, returning to the non-suit motion, it is for the jury to decide whether or not to draw any such inferences that assist the jury's application of the standard of reasonable care and then assess its breach.

130. In my view, Mrs. Johansson is entitled to a jury verdict. ***

REFLECTION:

- *What role do inferences play in determining whether the elements of negligence have been established? What was the inferential error that the trial judge made regarding the standard of care in this case?*
- *What are the respective roles of the judge and jury in civil litigation?*
- *What was the ratio and outcome of this case? What does it tell us about how dangerously defective products are understood in Canadian common law?*

19.1.3 Adam v. Ledesma-Cadhit [2021] ONCA 828

Ontario Superior Court – 2021 ONCA 828

BROWN J.A. (ROBERTS AND ZARNETT J.A. concurring):

1. Amina Adam was the daughter of the appellants, May Hyacenth Abudu and Abudu Ibn Adam. Amina died on November 28, 2009. She was five years old.

2. Five days prior to her death, Amina had received a vaccine called Arepanrix, which was manufactured and distributed by the respondent GlaxoSmithKline ("GSK"). Arepanrix was designed to protect against the H1N1 influenza, known as the "swine flu".

3. An autopsy concluded that the cause of Amina's death was unascertained, with sudden arrhythmic death syndrome not excluded. The investigating coroner found that the most likely cause of death was sudden arrhythmic death syndrome. However, the Paediatric Death Review Committee of the Office of the Chief Coroner ultimately classified Amina's cause of death as "undetermined".

4. Amina's parents believed the vaccine had caused their daughter's death. They commenced this action against GSK, Dr. Christine J. Ledesma-Cadhit, their family physician who had administered the vaccine to Amina, Her Majesty The Queen in Right of Canada, and Her Majesty The Queen in Right of Ontario, alleging that Arepanrix had caused their daughter's death.

5. Prior to trial, the appellants discontinued the action against Dr. Ledesma-Cadhit, and in 2014 the action was dismissed against the two government defendants: 2014 ONSC 5726.

6. Following a three-week trial, the trial judge dismissed the action against GSK. He began his reasons for judgment by observing that "[a] parent can suffer no greater loss than that of a young child." As a father and grandfather, I share that sentiment; this is a very sad case. However, the trial judge concluded that the appellants had not introduced evidence that would demonstrate, on a balance of probabilities, that GSK breached the applicable standard of care or that Arepanrix caused Amina's death. ***

17. The appellants advance five grounds of appeal:

Breach of the standard of care:

> (i) The trial judge erred in finding that GSK provided an adequate warning to Amina and her mother, as caregiver to Amina, with respect to Arepanrix;
>
> (ii) The trial judge erred in finding that GSK discharged its duty to warn by relying on the "learned intermediary rule"; ***

Causation:

> (iv) The trial judge erred in failing to find that the circumstantial evidence in this case raised an inference of negligence that called for an explanation from GSK; ***

FIRST ISSUE: The adequacy of the warning by GSK

SECOND ISSUE: The application of the "learned intermediary rule"

18. I propose to deal with the first and second issues together as the application of the learned intermediary rule is subsumed within the larger issue of whether GSK discharged its duty to warn of risks of the vaccine.

The governing legal principles

19. The general principles governing the duty to warn by manufacturers of medical products are well known, not in dispute, and were summarized by the Supreme Court in *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634, at paras. 20 to 29:

(i) A manufacturer of a product has a duty in tort to warn consumers of dangers inherent in the use of its product of which it has knowledge or ought to have knowledge;

(ii) The duty to warn is a continuing duty, requiring manufacturers to warn not only of dangers known at the time of sale, but also of dangers discovered after the product has been sold and delivered;

(iii) All warnings must be reasonably communicated and must clearly describe any specific dangers that arise from the ordinary use of the product;

(iv) The nature and scope of the manufacturer's duty to warn varies with the level of danger associated with the ordinary use of the product. Where there are significant dangers, it will rarely be sufficient for manufacturers to give general warnings concerning those dangers. Instead, the warnings must be sufficiently detailed to give the consumer a full indication of each of the specific dangers arising from the use of the product;

(v) Manufacturers of products such as drugs that are ingested, consumed or otherwise placed in the body, and thereby have a great capacity to cause injury to consumers, are subject to a correspondingly high standard of care under the law of negligence;

(vi) There is a heavy onus on manufacturers of drugs to provide clear, complete, and current information concerning the risks inherent in the ordinary use of their product;

(vii) As a general rule, the duty to warn is owed directly by the manufacturer to the ultimate consumer. However, an exception known as the "learned intermediary rule" applies where a product is highly technical in nature and is intended to be used only under the supervision of experts, such as physicians, or where the nature of the product is such that the consumer will not realistically receive a direct warning from the manufacturer before using the product. Where an intermediate inspection of the product is anticipated or where a consumer is placing primary reliance on the judgment of a "learned intermediary", such as a physician, and not on the manufacturer, a warning to the ultimate consumer may not be necessary and the manufacturer may satisfy its duty to warn the ultimate consumer by warning the learned intermediary of the risks inherent in the use of the product;

(viii) The "learned intermediary" rule presumes that the intermediary physician is "learned", in the sense that the physician is fully apprised of the risks associated with the use of the product. A manufacturer can only be said to have discharged its duty to the consumer when the intermediary's knowledge approximates that of the manufacturer. To allow manufacturers to claim the benefit of the rule where they have not fully warned the physician would undermine the policy rationale for the duty to warn, which is to ensure that the consumer is fully informed of all risks.

20. In ***Hollis***, the Supreme Court identified the overarching question to be answered as whether the manufacturer owed the patient a duty to warn of a specific risk. The Supreme Court broke that overarching question down into two sub-questions:

(i) Did the manufacturer have a duty to warn recipients of the medical product directly or could it satisfy its duty by warning a learned intermediary, such as a physician?

(ii) If the manufacturer could properly discharge its duty by warning the physician, did it adequately warn the physician of the specific risk in light of its state of knowledge at that time?

21. I will follow the framework used by the Supreme Court in ***Hollis*** and review the trial judge's reasons in light of the following two questions:

(i) Did the trial judge err by concluding that GSK could satisfy its duty to warn recipients of Arepanrix by warning a learned intermediary physician, in this case Amina's family doctor, Dr. Ledesma-Cadhit?

(ii) If GSK could properly discharge its duty by warning the physician, did the trial judge err in

> concluding that GSK adequately warned Dr. Ledesma-Cadhit of the relevant risks of Arepanrix in light of its state of knowledge at that time? ***

Did the trial judge err by concluding that GSK could satisfy its duty to warn by warning an intermediary physician?

23. The trial judge held, in effect, that GSK could satisfy its duty to warn by informing Amina's family doctor of the risks associated with Arepanrix through the product monograph that accompanied each vial of vaccine and a Product Information Leaflet that was posted on the websites of GSK and Health Canada. He wrote, at paras. 37 and 38:

> GSK did disclose in its Product Information Leaflet for the Arepanrix vaccine and in its product monograph that Health Canada had authorized the sale of the vaccine based on only limited clinical testing and no clinical experience at all with children. Dr. Ledesma-Cadhit believes she knew this from the Health Canada website. She was also aware that Arepanrix was authorized through a special process because of the pandemic.
>
> The product monograph for Arepanrix disclosed that there was limited clinical experience with an investigational formulation of another adjuvanted vaccine but no clinical experience with children. In addition, the product information leaflet and product monograph disclosed a number of risks.

24. The appellants contend that the trial judge erred in so holding.

25. The appellants first submit that since Amina's mother independently learned about the vaccine and sought it out for her children, the learned intermediary rule does not apply. I disagree. The vaccine was a product that was highly technical in nature and which could only be obtained and used under the supervision of an expert, in this case Amina's family doctor. Those circumstances bring the vaccine squarely within the ambit of the learned intermediary rule.

26. The appellants next submit that Amina's family doctor did not possess the same level of information as GSK regarding the risk of a high fever in a child after receiving the vaccine and how to treat such a high fever. Specifically, they argue that:

> (i) on November 16, 2009, about a week before Amina received her dose of the vaccine, Health Canada had emailed GSK asking for more information about three cases of significant or high-level fever observed in children who had received the full dose antigen plus adjuvant. Yet, following that request for information, GSK did not publish to the general public any advisory regarding fever; and
>
> (ii) GSK prepared a Product Information Leaflet, which was approved by Health Canada. In its November 12, 2009 communication about the Minister's authorization of the vaccine sent out to about 50,000 physicians, GSK advised physicians to consult the Leaflet for detailed information about the vaccine and provided links to the document on the websites of Health Canada and GSK. The Leaflet contained a "Consumer Information" section that stated a "common" side effect of the vaccine was fever. The Leaflet advised that "common" side effects were usually mild and should only last a day or two. It went on to state: "If any of these side effects occur, please tell your doctor or nurse immediately. If any of the side effects gets serious, or if you notice any side effects not listed in this leaflet, please tell your doctor." However, the product monograph placed in boxes of Arepanrix distributed to physicians did not contain the "Consumer Information" section.

27. It is clear the trial judge did not accept that either consideration prevented GSK from relying on Amina's family doctor to satisfy its duty to warn. ***

29. *** I see no reversible error in the trial judge applying the learned intermediary rule in the circumstances of this case.

Did the trial judge err in concluding that GSK adequately warned Dr. Ledesma-Cadhit of the relevant risks of Arepanrix in light of its state of knowledge at that time?

30. At trial, the appellants advanced several reasons why GSK had failed to adequately warn Dr. Ledesma-

Cadhit about relevant risks associated with Arepanrix: some countries had refused to make the vaccine available because of safety concerns; Arepanrix was not appropriate for people with asthma; GSK had failed to convey at an early stage findings concerning "unexplained" phenomena and harm caused by its product; and the adverse event of Amina's death was not included in tracking data about the vaccine.

31. The trial judge addressed each submission. He held that the evidence did not establish the deficiencies asserted by the appellants ***.

32. The trial judge concluded, at para. 60:

> The issues surrounding the standard of care here involve an understanding of the appropriate standards applicable to manufacturing, testing and approving drugs, as well as standards of disclosure to governments, physicians and the public when drugs are distributed. In the absence of expert evidence that GSK failed to meet a particular standard and in the face of evidence that demonstrates GSK acted responsibly to disclose information, test products and manufacture products all in circumstances of urgency, I cannot find any breach of a standard of care. ***

34. I have already concluded that there is no reversible error in the trial judge's finding that GSK was entitled to rely on a learned intermediary, Amina's family doctor, to satisfy its obligation to convey information about risks to the recipients of the vaccine. Further, the product monograph that accompanied the vaccine vial identified in some detail known adverse reactions to the vaccine, as disclosed both in the H1N1 studies conducted up until that time, as well as in the prior studies of the H5N1 vaccine which used the AS03 adjuvant. The appellants have not pointed to any evidence that GSK failed to disclose adverse risks that were known or ought to have been known at the time. ***

37. I am not persuaded by this ground of appeal. ***

FOURTH ISSUE: The inference of negligence from the circumstantial evidence

48. The appellants also take issue with two findings made by the trial judge: (i) there was no direct or circumstantial evidence from which he could infer that GSK breached the standard of care; and (ii) there was no evidence that Arepanrix could cause or in fact caused Amina's death. In challenging those findings as errors, the appellants advance submissions that blend the issue of negligence (breach of standard of care) with the issue of causation. They argue that:

> (i) The circumstances surrounding Amina's death required the trial judge to call on GSK to explain Amina's death;
>
> (ii) If a risk falls within the realm of possibility, no matter how small or miniscule, causation is proved; and
>
> (iii) Consequently, if GSK could not rule out the vaccine as a cause of Amina's death, then GSK should "share the family's burden" and be found liable. ***

(1) Inferring a breach of the standard of care from circumstantial evidence

51. The appellants' submission that the circumstances surrounding Amina's death required the trial judge to call on GSK to explain her death contains echoes of the discarded maxim of *res ipsa loquitur*, which dealt with the use of circumstantial evidence in negligence cases. The old maxim provided that a plaintiff could establish negligence by a defendant if (i) the thing that inflicted the damage on the plaintiff was under the sole management and control of the defendant, (ii) the occurrence in issue was such that it would not have happened without negligence, and (iii) there was no evidence as to why or how the occurrence took place: *Fontaine v. British Columbia (Official Administrator)*, [1998] 1 S.C.R. 424, at para. 18.

52. In *Fontaine*, the Supreme Court of Canada concluded that whatever value *res ipsa loquitur* may once have provided to the adjudicative process had long since passed and went on to clarify, at para. 27, the proper use of circumstantial evidence in negligence cases:

> It would appear that the law would be better served if the maxim was treated as expired and no

> longer used as a separate component in negligence actions. After all, it was nothing more than an attempt to deal with circumstantial evidence. That evidence is more sensibly dealt with by the trier of fact, who should weigh the circumstantial evidence with the direct evidence, if any, to determine whether the plaintiff has established on a balance of probabilities a *prima facie* case of negligence against the defendant. Once the plaintiff has done so, the defendant must present evidence negating that of the plaintiff or necessarily the plaintiff will succeed. ***

53. The trial judge followed the approach directed by *Fontaine* but it led him to conclude that there was no direct or circumstantial evidence from which he could infer that GSK breached its standard of care. Paragraphs 57 to 59 of his reasons explain the basis for that conclusion:

> Arepanrix was developed based on the fully tested H5N1 vaccine. Even though Arepanrix was distributed and administered before the full course of clinical testing had run its course, that was done for valid public health concerns and with government approval, not by virtue of carelessness.
>
> There was no evidence at trial to suggest that GSK had failed to disclose relevant information to Health Canada or to physicians. Similarly, there is no evidence to suggest that GSK disclosed false or misleading information to Health Canada or to physicians. Manufacture of Arepanrix was subject to government testing. Proactive measures were taken to become aware of safety signals once administration of Arepanrix began.
>
> In the absence of contrary expert evidence about industry or regulatory standards, these circumstances indicate that GSK was acting responsibly and meeting its standard of care. *While I agree it is possible that GSK breached its standard of care in one or more of these steps or may have otherwise breached its standard of care, I am not able to make such a finding based on the evidence before me.* *** [Emphasis added]

54. The appellants have not established that those conclusions of the trial judge rest on any misunderstanding of the applicable law, misapprehension of the evidence, or palpable and overriding error of fact.

(2) Causation

55. To succeed in an action for negligence, a plaintiff must establish that the defendant's breach of the standard of care caused the injury or death: *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at para. 6 [**§16.1.2**]. In *Rothwell v. Raes* (1990), 2 O.R. (3d) 332 (C.A.), leave to appeal refused, [1991] S.C.C.A. No. 58, it was alleged that the administration of a vaccine to an infant had caused him brain damage. This court stated, at p. 333, that unless it was established that the vaccine could cause such damage, the plaintiff could not succeed. If such a general causal relationship was found to exist, the question became whether the vaccine did cause the damage suffered by the infant plaintiff.[575]

56. In the present case, the trial judge carefully and accurately reviewed the evidence of the expert and lay witnesses relating to causation. He held that there was no evidence that the vaccine was capable of causing death and there was an absence of medical evidence that the vaccine caused or contributed to Amina's death: at paras. 119-120. Those findings were firmly anchored in the evidence adduced at trial.

57. The appellants' submission that if a risk falls within the realm of possibility, no matter how small or miniscule, causation has been demonstrated mis-apprehends the established legal principles concerning causation. The trial judge properly rejected that submission when, at para. 64, he accurately stated and

[575] In the defective drug jurisprudence, whether a drug is capable of causing harm is referred to as general causation; whether it in fact caused harm to the plaintiff is known as individual or particular causation. For a discussion, see *Harrington v. Dow Corning Corp.*, 2000 BCCA 605, 82 B.C.L.R. (3d) 1, at paras. 42 to 46, leave to appeal refused, [2001] S.C.C.A. No. 21; *Batten v. Boehringer Ingelheim (Canada) Ltd.*, 2017 ONSC 53, at para. 38, aff'd 2017 ONSC 6098 (Div. Ct.), 20 C.P.C. (8th) 414, leave to appeal to Ont. C.A. refused, M48535 (February 28, 2018); *Wise v. Abbott Laboratories, Limited*, 2016 ONSC 7275, 34 C.C.L.T. (4th) 25, at para. 340; Patricia Peppin, "Vaccines and Emerging Challenges for Public Health Law" in Tracey M. Bailey, C. Tess Sheldon, Jacob J. Shelley, eds., *Public Health Law and Policy in Canada*, 4th ed. (Toronto: LexisNexis Canada, 2019), §III.

applied the governing legal principles:

> The plaintiffs point to a number of witnesses, including defence experts, who agreed that the vaccine could not be excluded as a cause of death. That, however, is not the test that the plaintiffs must meet. The plaintiffs must prove on a balance of probabilities that the vaccine *caused* Amina's death. The fact that it could not be excluded as a possible cause does not meet the burden the plaintiffs must meet.

58. Further, the appellants' submission that they had established the vaccine caused Amina's death because some defence experts, Drs. De Serres and Langley, testified they could not rule out the vaccine as the cause of her death ignores the entirety of those experts' evidence. ***

63. When fairly read in their entirety, the testimony of Drs. De Serres and Langley provide no assistance to the appellants' task of establishing, on a balance of probabilities, that the vaccine caused Amina's death. ***

Disposition

72. For the reasons set out above, I would dismiss the appeal. ***

REFLECTION:

- *What is the nature and scope of a manufacturer's duty to warn consumers of dangers inherent in the use of its product? What is the relevant standard of care? Why was the standard not breached in this case?*
- *The appellants argued that because the vaccine could not be ruled out as a possible cause of death, causation was established. Is this consistent with the "but-for" test as outlined in Clements v. Clements (§16.1.2)?*

19.1.4 Sale of Goods Act, RSBC 1996

Sale of Goods Act, RSBC 1996, c 410, ss 17, 18, 56(2)

17. Sale by description

(1) In a contract for the sale or lease of goods by description, there is an implied condition that the goods must correspond with the description.

(2) If the sale or lease is by sample, as well as by description, it is not sufficient that the bulk of the goods correspond with the sample if the goods do not also correspond with the description.

18 Implied conditions as to quality or fitness

Subject to this and any other Act, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale or lease, except as follows:

> (a) if the buyer or lessee, expressly or by implication, makes known to the seller or lessor the particular purpose for which the goods are required, so as to show that the buyer or lessee relies on the seller's or lessor's skill or judgment, and the goods are of a description that it is in the course of the seller's or lessor's business to supply, whether the seller or lessor is the manufacturer or not, there is an implied condition that the goods are reasonably fit for that purpose; except that in the case of a contract for the sale or lease of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;
>
> (b) if goods are bought by description from a seller or lessor who deals in goods of that description, whether the seller or lessor is the manufacturer or not, there is an implied condition that the goods are of merchantable quality; but if the buyer or lessee has examined the goods there is no implied condition as regards defects that the examination ought to have revealed;
>
> (c) there is an implied condition that the goods will be durable for a reasonable period of time having regard to the use to which they would normally be put and to all the surrounding circumstances of the sale or lease;

(d) an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;

(e) an express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent with it.

56. Remedy for breach of warranty ***

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty. ***

19.1.4.1 Other provincial sale of goods statutes

- Alberta: Sale of Goods Act, RSA 2000, c S-2, ss 15, 16.
- Manitoba: The Sale of Goods Act, CCSM c S10, ss 15, 16.
- New Brunswick: Sale of Goods Act, RSNB 2016, c 110, ss 19, 20.
- Newfoundland and Labrador: Sale of Goods Act, RSNL 1990, c S-6, ss 15, 16.
- Nova Scotia: Sale of Goods Act, RSNS 1989, c 408, ss 16, 17.
- Ontario: Sale of Goods Act, RSO 1990, c S.1, ss 14, 15.
- Prince Edward Island: Sale of Goods Act, RSPEI 1988, c S-1, ss 15, 16.
- Québec: Consumer Protection Act, CQLR c P-40.1, ss 37-40.
- Saskatchewan: Sale of Goods Act, RSS 1978, c S-1, ss 15, 16.

REFLECTION:

- *What is the purpose of sale of goods statutes? How do the requirements of such statutes compare to the duties emanating from the product liability tort?*[576]

19.1.5 Business Practices and Consumer Protection Act, SBC 2004

Business Practices and Consumer Protection Act, SBC 2004, c 2, ss 4, 5, 8, 9(1), 171

4. Deceptive acts or practices

(1) In this Division: "deceptive act or practice" means, in relation to a consumer transaction,

(a) an oral, written, visual, descriptive or other representation by a supplier, or

(b) any conduct by a supplier

that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor; ***

5. Prohibition and burden of proof

(1) A supplier must not commit or engage in a deceptive act or practice in respect of a consumer transaction. ***

8. Unconscionable acts or practices

(1) An unconscionable act or practice by a supplier may occur before, during or after the consumer transaction.

(2) In determining whether an act or practice is unconscionable, a court must consider all of the surrounding circumstances of which the supplier knew or ought to have known.

[576] See *Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc.*, 2024 SCC 20, [34]-[43]; K. Robichaud, "The *Sale of Goods Act* and Warranties of Fitness and Merchantability" *21st East Region Solicitors Conference* (County of Carleton Law Association, 2015).

(3) Without limiting subsection (2), the circumstances that the court must consider include the following:

> (a) that the supplier subjected the consumer or guarantor to undue pressure to enter into the consumer transaction;
>
> (b) that the supplier took advantage of the consumer or guarantor's inability or incapacity to reasonably protect his or her own interest because of the consumer or guarantor's physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, or any other matter related to the transaction;
>
> (c) that, at the time the consumer transaction was entered into, the total price grossly exceeded the total price at which similar subjects of similar consumer transactions were readily obtainable by similar consumers;
>
> (d) that, at the time the consumer transaction was entered into, there was no reasonable probability of full payment of the total price by the consumer;
>
> (e) that the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable;
>
> (f) a prescribed circumstance.

9. Prohibition and burden of proof

(1) A supplier must not commit or engage in an unconscionable act or practice in respect of a consumer transaction. ***

171. Damages recoverable

(1) Subject to subsection (2), if a person *** has suffered damage or loss due to a contravention of this Act or the regulations, the person who suffered damage or loss may bring an action against a (a) supplier, *** who engaged in or acquiesced in the contravention that caused the damage or loss. ***

19.1.5.1 Other provincial consumer protection statutes

- Alberta: Consumer Protection Act, RSA 2000, c C-26.3, ss 5-7; Unconscionable Transactions Act, RSA 2000, c U-2.
- Manitoba: Consumer Protection Act, CCSM c C200; The Unconscionable Transactions Relief Act, CCSM c U20.
- New Brunswick: Consumer Product Warranty and Liability Act, SNB 1978, c C-18.1, s 4; Unconscionable Transactions Relief Act, RSNB 2011, c 233.
- Newfoundland and Labrador: Consumer Protection and Business Practices Act, SNL 2009, c C-31.1, ss 7-10, 14; Unconscionable Transactions Relief Act, RSNL 1990, c U-1.
- Nova Scotia: Consumer Protection Act, RSNS 1989, c 92; Unconscionable Transactions Relief Act, RSNS 1989, c 481.
- Ontario: Consumer Protection Act, 2002, SO 2002, c 30, Sch A, ss 14-18; Unconscionable Transactions Relief Act, RSO 1990, c U.2.
- Prince Edward Island: Business Practices Act, RSPEI 1988, c B-7, ss 2-4; Unconscionable Transactions Relief Act, RSPEI 1988, c U-2.
- Québec: Consumer Protection Act, CQLR c P-40.1, ss 8, 215-253.
- Saskatchewan: The Consumer Protection and Business Practices Act, SS 2013, c C-30.2, ss 6-9, 46(i); The Unconscionable Transactions Relief Act, RSS 1978, c U-1.

REFLECTION:

- *What is the purpose of consumer protection statutes? How do the requirements of such statutes compare to*

the duties emanating from the product liability tort?[577]

19.1.6 Canada Consumer Product Safety Act, SC 2010

Canada Consumer Product Safety Act, SC 2010, c 21, ss 3, 6, 8, 9, 10

3. Purpose

The purpose of this Act is to protect the public by addressing or preventing dangers to human health or safety that are posed by consumer products in Canada, including those that circulate within Canada and those that are imported.

6. Products that do not meet regulatory requirements

No person shall manufacture, import, advertise or sell a consumer product that does not meet the requirements set out in the regulations.

8. Advertising and selling

No person shall advertise or sell a consumer product that they know

(a) is a danger to human health or safety; ***

9. Misleading claims—package or label

No person shall package or label a consumer product

(a) in a manner—including one that is false, misleading or deceptive—that may reasonably be expected to create an erroneous impression regarding the fact that it is not a danger to human health or safety; or

(b) in a manner that is false, misleading or deceptive regarding its certification related to its safety or its compliance with a safety standard or the regulations.

10. Misleading claims—advertise or sell

No person shall advertise or sell a consumer product that they know is advertised, packaged or labelled in a manner referred to in section 9.

REFLECTION:

- *What is the purpose of the federal Consumer Product Safety Act? How do the requirements of this statute compare to the duties emanating from the product liability tort?*[578]

19.1.7 Cross-references

- *Donoghue v. Stevenson* [1932] UKHL 100: §13.1.1.
- *Grant v. Australian Knitting Mills Ltd* [1935] UKPC 62: §13.1.4.
- *Anns v. Merton London Borough Council* [1977] UKHL 4: §13.4.1.1.
- *Hanke v. Resurfice Corp.* [2007] SCC 7: §16.1.1.
- *Mustapha v. Culligan of Canada Ltd* [2008] SCC 27: §17.1.2.
- *Winnipeg Condo. Corp. No. 36 v. Bird Constr. Co.* [1995] CanLII 146 (SCC): §19.3.2.1.
- *1688782 Ontario Inc. v. Maple Leaf Foods Inc.* [2020] SCC 35, [47]: §19.3.2.2.

[577] See *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [123]-[133]; "Your rights under the *Consumer Protection Act*" (Ontario Government, 2014); S. Beswick, "Faulty Facades and Consumer Warranties" USask Law (Sep 8, 2016).
[578] See *Samsung Electronics Canada Inc. v. Canada (Health)*, 2020 FC 1103; D.F. Harrison, "An overview of: the *Canada Consumer Product Safety Act*" Stikeman Elliott (Dec 1, 2011).

19.1.8 Further material

- UBC Law Students' Legal Advice Program, "Consumer Protection" in *Law Students' Legal Advice Manual* (47th ed, Vancouver: The University of British Columbia, 2023), ch 11.
- *Product Liability 2023* (Vancouver: Continuing Legal Education Society of British Columbia, 2023) 📺.
- D.S. Morritt & S.L. Bjorkquist, "Product Liability in Canada: Principles and Practice North of the Border" (2000) 27 Wm Mitchell L Rev 177.
- D.W. Boivin, "Negligence, Strict Liability, and Manufacturer Failure to Warn: On Fitting Round Pegs in a Square Hole" (1993) 16 Dalhousie LJ 299.
- J.C.P. Goldberg & B.C. Zipursky, "The Moral of *Macpherson*" (1998) 146 U Pennsylvania L Rev 1733.
- S. Waddams, *Products Liability* (5th ed, Scarborough: Carswell, 2011).
- "Hot Coffee" (If Not Now Productions & The Group Entertainment, 2011) 📺.

19.2 Negligent infliction of mental injury

19.2.1 Close-call traumatic events

19.2.1.1 Victorian Railway Comm'rs v. Coultas [1888] UKPC 3

Privy Council (on appeal from Australia) – [1888] UKPC 3

SIR RICHARD COUCH: ***

2. *** [O]n or about the 8th of May, 1886, about nine in the evening, the respondents, together with John Wilson, a brother of the wife, were driving home in a buggy from Melbourne to Hawthorn, which is near Melbourne. They had to cross a level crossing on the line of railway from Melbourne to Hawthorn. When they came to it the gates were closed, and the gate-keeper came and opened the gates nearest to them and then went across the line to the gates on the opposite side. The respondents followed him, and had got partly on to the up line (the farther one) when a train was seen approaching on it. The gate-keeper directed them to go back, but James Coultas, who was driving, shouted to him to open the opposite gate, and went on. He got the buggy across the line so that the train, which was going at a rapid speed, passed close to the back of it and did not touch it. As the train approached Mary Coultas fainted, and fell forward in her brother's arms. The medical evidence shewed that she received a severe nervous shock from the fright, and that the illness from which she afterwards suffered was the consequence of the fright. One of the plaintiffs' witnesses said she was suffering from profound impression on the nervous system, nervous shock, and the shock from which she suffered would be a natural consequence of the fright. Another said he was unable to detect any physical damage; he put down her symptoms to nervous shock.

3. The jury found that the defendants' servant negligently opened the gate and invited the plaintiffs to drive over the level crossing when it was dangerous to do so, and that the plaintiffs could not have avoided what had occurred by the exercise of ordinary care and caution on their part. And they assessed the male plaintiff's damages at £342 2*s.*, and the female plaintiff's at £400 ***. ***

5. The rule of English law as to the damages which are recoverable for negligence is stated by the Master of the Rolls in *The Notting Hill* [9 P.D. 105], a case of negligent collision. It is that the damages must be the natural and reasonable result of the defendants' act; such a consequence as in the ordinary course of things would flow from the act. ***

6. According to the evidence of the female plaintiff her fright was caused by seeing the train approaching, and thinking they were going to be killed. Damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper. If it were held that they can, it appears to their Lordships that it would be extending the liability for negligence much beyond what that liability has hitherto been held to be. Not only in such a case as the present, but in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury. The

difficulty which now often exists in case of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims. *** It is remarkable that no precedent has been cited of an action similar to the present having been maintained or even instituted, and their Lordships decline to establish such a precedent. They are of opinion that the first question, whether the damages are too remote, should have been answered in the affirmative, and on that ground, without saying that "impact" is necessary, that the judgment should have been for the defendants. ***

REFLECTION:

- *What is nervous shock? Is nervous shock materially different from physical injury? If so, in what way?*
- *What was the ratio of this case? Why might 19th-century courts have been concerned about recognising nervous shock as an independent basis of recovery in negligence?*
- *What policy concerns underscored the Privy Council's reasoning? Do you find them compelling?*
- *In light of more recent precedents such as Saadati v. Moorhead (§19.2.1.3), is this case still good law?*

19.2.1.2 Mitchell v. Rochester Railway Co. (1896) 151 NY 107 (NY CA)

New York Court of Appeals – 151 NY 107 (1896)

MARTIN J.:

1. *** On the first day of April, 1891, the plaintiff was standing upon a crosswalk on Main street in the city of Rochester, awaiting an opportunity to board one of the defendant's cars which had stopped upon the street at that place. While standing there, and just as she was about to step upon the car, a horse car of the defendant came down the street. As the team attached to the car drew near, it turned to the right and came so close to the plaintiff that she stood between the horses' heads when they were stopped.

2. She testified that from fright and excitement caused by the approach and proximity of the team she became unconscious, and also that the result was a miscarriage and consequent illness. Medical testimony was given to the effect that the mental shock which she then received was sufficient to produce that result.

3. Assuming that the evidence tended to show that the defendant's servant was negligent in the management of the car and horses, and that the plaintiff was free from contributory negligence, the single question presented is whether the plaintiff is entitled to recover for the defendant's negligence which occasioned her fright and alarm, and resulted in the injuries already mentioned. While the authorities are not harmonious upon this question, we think the most reliable and better considered cases, as well as public policy, fully justify us in holding that the plaintiff cannot recover for injuries occasioned by fright, as there was no immediate personal injury. ***

5. If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation. The difficulty which often exists in cases of alleged physical injury, in determining whether they exist, and if so, whether they were caused by the negligent act of the defendant, would not only be greatly increased, but a wide field would be opened for fictitious or speculative claims. To establish such a doctrine would be contrary to principles of public policy.

6. *** The injuries to the plaintiff were plainly the result of an accidental or unusual combination of circumstances, which could not have been reasonably anticipated, and over which the defendant had no control, and, hence, her damages were too remote to justify a recovery in this action.

7. These considerations lead to the conclusion that no recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury. ***

REFLECTION:

- *Are the facts of this case analogous to Victorian Railways v. Coultas? Is the Court's reasoning analogous?*
- *Is the distinction that the Court draws between immediate personal injury and injuries occasioned by fright*

compelling? Was the basis on which Mitchell's claim failed compelling?
- *In light of more recent precedents such as Saadati v. Moorhead (§19.2.1.3), is this case still good law?*

19.2.1.3 Saadati v. Moorhead [2017] SCC 28

Supreme Court of Canada – 2017 SCC 28

BROWN J. (FOR THE COURT):

1. This appeal, which arises from a motor vehicle accident in British Columbia, concerns principally the application of the common law of negligence to claims for mental injury.[579] A trial judge awarded damages for mental injury to the appellant, Mohsen Saadati, on the strength not of expert evidence, but of the testimony of lay witnesses to the effect that, after the appellant's involvement in an automobile accident caused by the respondents, his personality had changed. The British Columbia Court of Appeal reversed, holding that recovery for mental injury requires a claimant to prove, with expert medical opinion evidence, a "recognizable [or recognized] psychiatric illness".

2. This Court has, however, never required claimants to show a recognizable psychiatric illness as a precondition to recovery for mental injury. Nor, in my view, would it be desirable for it to do so now. Just as recovery for *physical* injury is not, as a matter of law, conditioned upon a claimant adducing expert diagnostic evidence in support, recovery for *mental* injury does not require proof of a recognizable psychiatric illness. This and other mechanisms by which some courts have historically sought to control recovery for mental injury are, in my respectful view, premised upon dubious perceptions of psychiatry and of mental illness in general, which Canadian tort law should repudiate. Further, the elements of the cause of action of negligence, together with the threshold stated by this Court in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114 (S.C.C.), at para. 9 [§17.1.2], for proving mental injury, furnish a sufficiently robust array of protections against unworthy claims. I therefore conclude that a finding of legally compensable mental injury need not rest, in whole or in part, on the claimant proving a recognized psychiatric illness. It follows that I would allow the appeal and restore the trial judge's award. ***

Background

3. On the night of July 5, 2005, the appellant was driving a tractor-truck along Front Street in New Westminster, British Columbia, when his vehicle was struck by a vehicle driven by the respondent Grant Iain Moorhead. The appellant's truck sustained significant damage, but he appeared at the time to have been uninjured. He went to a nearby hospital, but was not admitted for observation.

4. This accident ("accident") was the second in a series of five motor vehicle collisions involving the appellant between January 2003 and March 2009, inclusive. The appellant had suffered chronic pain since the first accident, which was later aggravated by the third accident (which occurred on September 17, 2005). In 2007, the appellant sued the respondents in negligence, seeking damages for non-pecuniary loss and past income loss. Two further accidents followed in 2008 and 2009. In 2010, the appellant was declared mentally incompetent and his action was continued by a litigation guardian.

Judicial History

(1) Supreme Court of British Columbia—2014 BCSC 1365 (B.C. S.C.)

5. The respondents collectively admitted liability for the accident, but took the position that the appellant

[579] Legal nomenclature describes this kind of injury variously: for example, as "nervous shock" (see L. N. Klar, *Tort Law* (5th ed. 2012), at p. 498); or "mental injury" (see *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114 (S.C.C.); L. Bélanger-Hardy, "Reconsidering the 'Recognizable Psychiatric Illness' Requirement in Canadian Negligence Law" (2013), 38 Queen's L.J. 583, at p. 586); or "psychological injury" (see Bélanger-Hardy, at p. 584); or "psychiatric damage" (A. M. Linden and B. Feldthusen, *Canadian Tort Law* (10th ed. 2015), at p. 447), or "psychiatric injury" (*Mustapha*). For his part, the trial judge employed the term "psychological injury", while the Court of Appeal referred to "psychiatric or psychological illness". While there may be meaningful distinctions among these terms within the relevant disciplines, for the purpose of deciding the general bounds of recoverability in law, no legal significance attaches to the particular term used. For the sake of clarity, however, I refer to the injury alleged here as "mental injury".

suffered no damage. Expert evidence was tendered on behalf of the appellant to support his claim of an injury resulting from the accident, much of which the trial judge ruled inadmissible (2013 BCSC 636). After weighing the admissible evidence, he concluded that the appellant had not demonstrated any physical injury resulting from the accident. Citing the test for factual causation stated in *Clements (Litigation Guardian of) v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181 (S.C.C.) [§16.1.2], at para. 46, however, he did find (at para. 46) that the accident caused the appellant "psychological injuries, including personality change and cognitive difficulties". While this finding did not rest on an identified medical cause, it was based upon the testimony of friends and family of the appellant to the effect that, after the accident, the appellant's personality changed for the worse. Once a funny, energetic, and charming individual, he had become sullen and prone to mood swings. Historically close relationships with family and friends had deteriorated. He complained of headaches.

6. The trial judge further found that the appellant's mental injury was aggravated by the third (September 17, 2005) accident. Applying the principle from *Bradley v. Groves*, 2010 BCCA 361, 326 D.L.R. (4th) 732 (B.C. C.A.), he found that the mental injury originally caused by the accident was indivisible from any injury caused by that later accident. Having regard to the appellant's personality change, his loss of close personal relationships with family and friends, his age, and the period involved, the trial judge awarded him $100,000 for non-pecuniary damage. The claim for past income loss was dismissed.

(2) British Columbia Court of Appeal—2015 BCCA 393 (B.C. C.A.)

7. On appeal, the respondents argued (*inter alia*) that the trial judge erred by awarding damages for mental injury where the appellant had not proven "a medically recognized psychiatric or psychological illness or condition" (para. 22). The Court of Appeal agreed, adding that such an illness or condition must be demonstrated by "expert medical opinion evidence" (para. 32). The law in this regard, it concluded, was left unchanged by this Court's judgment in *Mustapha*. ***

Analysis ***

13. Liability in negligence law is conditioned upon the claimant showing (i) that the defendant owed a duty of care to the claimant to avoid the kind of loss alleged; (ii) that the defendant breached that duty by failing to observe the applicable standard of care; (iii) that the claimant sustained damage; and (iv) that such damage was caused, in fact and in law, by the defendant's breach (*Mustapha*, at para. 3). At issue here is the third element. ***

(1) Recovery for Mental Injury in Negligence Law

14. The early common law's posture towards claims for negligently caused mental harm was one of suspicion and sometimes outright hostility (*McLoughlin v. O'Brian* (1982), [1983] 1 A.C. 410 (U.K. H.L.), at p. 433), and was "virtually programmed to entrench primitive suspicions and prejudices about 'invisible', intangible harm" (H. Teff, *Causing Psychiatric and Emotional Harm: Reshaping the Boundaries of Legal Liability* (2009), at p. 40). Mental injury was seen as "not derived through the senses, but [as] a product of the imagination" (*Miner v. Canadian Pacific Railway* (1911), 18 W.L.R. 476 (Alta. C.A.) (Alta. S.C. *en banc*), at p. 478). This scepticism persisted into the last century, such that mental injury was not compensable unless accompanied by physical injury (see L. Bélanger-Hardy "Reconsidering the 'Recognizable Psychiatric Illness' Requirement in Canadian Negligence Law" (2013), 38 Queen's L.J. 583, at pp. 599-600).

15. While the absolute bar to recovery for mental injury absent physical injury was eventually lifted, the suspicion which originally impelled that bar persisted, and common law courts continued to impose conditions upon recovery beyond those applied to claims for negligently caused physical injury. While, therefore, in England liability for negligently caused mental injury was first recognized as early as 1901 (*Dulieu v. White & Sons*, [1901] 2 K.B. 669 (Eng. K.B.)), it was conditional upon "a shock which arises from a reasonable fear of immediate personal injury to oneself" (p. 675), or (after *Hambrook v. Stokes Brothers* (1924), [1925] 1 K.B. 141 (Eng. C.A.)), "a reasonable fear of immediate personal injury either to [the claimant, or the claimant's children]" (p. 152). While recovery for mental injury in Canada remained parasitic to recovery for compensable physical injury well into the 20th century (e.g. *Miner*), by mid-century Canadian courts had also begun to permit recovery on similar conditions as English law—typically, on claimants

having had at the material time a reasonable fear of physical injury to themselves or to their family (e.g. *Horne v. New Glasgow (Town)* (1953), [1954] 1 D.L.R. 832 (N.S. S.C.)).

16. Further obstacles to recovery for mental injury arose in English law. In *McLoughlin v. O'Brian*, at pp. 419-21, Lord Wilberforce posited three considerations that could limit the boundaries of compensable "nervous shock": the class of persons whose claims should be recognized (often referred to as relational proximity), the proximity of such persons to the accident (locational, or geographical proximity), and the means by which the "shock" is caused (temporal proximity) (G. H. L. Fridman, *The Law of Torts in Canada* (3rd ed. 2010), at p. 326). Where claimants alleged mental injury arising out of a sudden traumatic event, later judgments further distinguished between a "primary" victim (who was directly involved as a participant) and a "secondary" victim (who witnessed physical injuries caused to others) (see *Alcock v. Chief Constable of South Yorkshire Police* (1991), [1992] 1 A.C. 310 (U.K. H.L.); and *Page v. Smith* (1995), [1996] 1 A.C. 155 (U.K. H.L.)). This distinction has, however, sometimes proven difficult to apply in practice (as shown by the English law's difficulty in categorizing the status of rescuers—see *White v. Chief Constable of South Yorkshire Police* (1998), [1999] 2 A.C. 455 (U.K. H.L.)), and has been criticized as lacking foundation in principle, having no relevance to the justice of the claimant's case (A. Beever, *Rediscovering the Law of Negligence* (2007), at pp. 405-7; J. Stapleton, "In Restraint of Tort", in P. Birks, ed., *The Frontiers of Liability* (1994), vol. 2, 83, at p. 95; *Mustapha v. Culligan of Canada Ltd.* (2006), 84 O.R. (3d) 457 (O.N. C.A.), at para. 43). That this is so has never really been disputed. As Lord Hoffmann candidly acknowledged in *White*, "in this area of the law, the search for principle was called off in *Alcock* …. No one can pretend that the existing law … is founded upon principle."

17. Other Commonwealth courts have taken a different path. The High Court of Australia expressly rejected the categories delineated by the House of Lords, preferring a more flexible foreseeability of harm test (*Tame v. New South Wales*, [2002] H.C.A. 35, 211 C.L.R. 317 (Australia H.C.)). In New Zealand, the primary/secondary victim distinction has not been definitively considered (S. Todd et al., *The Law of Torts in New Zealand* (5th ed. 2009), at pp. 182-84).

18. Like the English courts, Canadian courts have occasionally struggled, as Professor Klar has described, "to find words which can clearly explain why, on the basis of arbitrary *policy* choices, certain types of claims seem to be too remote and uncompensable" (L. N. Klar, *Tort Law* (5th ed. 2012), at p. 505 (emphasis in original)). In *Beecham v. Hughes* (1988), 27 B.C.L.R. (2d) 1 (B.C. C.A.), and *Rhodes v. Canadian National Railway* (1990), 75 D.L.R. (4th) 248 (B.C. C.A.), for example, the multi-faceted proximity analysis formalized in *McLoughlin v. O'Brian* found favour. In *Beecham*, Lambert J.A. wrote (at p. 43):

> … I would not put the entire emphasis on "causal proximity", to the exclusion of "temporal proximity", "geographical proximity" or "emotional proximity". I would try to balance them all. A close but foreseeable emotional bond, as between a parent and child, may compensate, in the determination of the composite answer on liability, for a more remote causal proximity, as where the parent is not present when the child is injured.

19. This Court has not, however, adopted either the primary/secondary victim distinction, or *McLoughlin v. O'Brian*'s disaggregated proximity analysis. Rather, in *Mustapha*, recoverability of mental injury was viewed (at para. 3) as depending upon the claimant satisfying the criteria applicable to any successful action in negligence—that is, upon the claimant proving a duty of care, a breach, damage, and a legal and factual causal relationship between the breach and the damage. Each of these elements can pose a significant hurdle: not all claimants alleging mental injury will be in a relationship of proximity with defendants necessary to ground a duty of care; not all conduct resulting in mental harm will breach the standard of care; not all mental disturbances will amount to true "damage" qualifying as mental injury, which is "serious and prolonged" and rises above the ordinary emotional disturbances that will occasionally afflict any member of civil society without violating his or her right to be free of negligently caused mental injury (*Mustapha*, at para. 9); and not all mental injury is caused, in fact or in law, by the defendant's negligent conduct. ***

21. It follows that this Court sees the elements of the cause of action of negligence as furnishing principled and sufficient barriers to unmeritorious or trivial claims for negligently caused mental injury. The view that courts should require something more is founded not on legal principle, but on policy—more particularly,

on a collection of concerns regarding claims for mental injury (including those advanced in this appeal by the intervener Insurance Bureau of Canada) founded upon dubious perceptions of, and postures towards, psychiatry and mental illness in general: that mental illness is "subjective" or otherwise easily feigned or exaggerated; and that the law should not provide compensation for "trivial matters" but should foster the growth of "tough hides not easily pierced by emotional responses" ***. The stigma faced by people with mental illness, including that caused by mental injury, is notorious ***, often unjustly and unnecessarily impeding their participation, so far as possible, in civil society. While tort law does not exist to abolish misguided prejudices, it should not seek to perpetuate them.

22. Where, therefore, genuine factual uncertainty arises regarding the worthiness of a claim, this can and should be addressed by robust application of those elements by a trier of fact, rather than by tipping the scales via arbitrary mechanisms (R. Stevens, *Torts and Rights* (2007), at p. 56). Certainly, concerns about "subjective" symptoms or about feigned or exaggerated claims of mental injury are—like most matters of credibility—questions of fact best entrusted to the good sense of triers of fact, upon whose credibility determinations of liability and even of liberty often rest. In short, such concerns should be resolved by "a vigorous search for the truth, not the abdication of judicial responsibility" (Linden and Feldthusen, at p. 449; see also *Toronto Railway v. Toms* (1911), 44 S.C.R. 268 (S.C.C.), at p. 276; Stevens, at p. 56).

23. I add this. As to that first necessary element for recovery (establishing that the defendant owed the claimant a duty of care), it is implicit in the Court's decision in *Mustapha* that Canadian negligence law recognizes that a duty exists at common law to take reasonable care to avoid causing foreseeable mental injury, and that this cause of action protects a right to be free from negligent interference with one's mental health. That right is grounded in the simple truth that a person's mental health—like a person's physical integrity or property, injury to which is also compensable in negligence law—is an essential means by which that person chooses to live life and pursue goals (A. Ripstein, *Private Wrongs* (2016), at pp. 87 and 252-53). And, where mental injury is negligently inflicted, a person's autonomy to make those choices is undeniably impaired, sometimes to an even greater degree than the impairment which follows a serious physical injury (*Hay v. Young* (1942), [1943] A.C. 92 (U.K. H.L.), at p. 103; *Toronto Railway*, at p. 276). To put the point more starkly, "[t]he loss of our mental health is a more fundamental violation of our sense of self than the loss of a finger" (Stevens, at p. 55).

24. It is also implicit in *Mustapha* that the ordinary duty of care analysis is to be applied to claims for negligently caused mental injury. With great respect to courts that have expressed contrary views, it is in my view unnecessary and indeed futile to re-structure that analysis so as to mandate formal, separate consideration of certain dimensions of proximity, as was done in *McLoughlin v. O'Brian*. Certainly, "temporal", "geographic" and "relational" considerations might well inform the proximity analysis to be performed in some cases. But the proximity analysis as formulated by this Court is, and is intended to be, sufficiently flexible to capture all relevant circumstances that might in any given case go to seeking out the "close and direct" relationship which is the hallmark of the common law duty of care (*Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 (S.C.C.), at para. 32 [§13.4.1.2], citing *McAlister (Donoghue) v. Stevenson*, [1932] A.C. 562 (U.K. H.L.), at pp. 580-81 [§13.1.1]). ***

(2) Recognized Psychiatric Illness ***

31. Confining compensable mental injury to conditions that are identifiable with reference to [psychiatric] diagnostic tools is, however, inherently suspect as a matter of legal methodology. While, for treatment purposes, an accurate diagnosis is obviously important, a trier of fact adjudicating a claim of mental injury is not concerned with diagnosis, but with symptoms and their effects (Mulheron, ["Rewriting the Requirement for a 'Recognized Psychiatric Injury' in Negligence Claims" (2012), 32 *Oxford J. Leg. Stud.* 77] at p. 88). Put simply, there is no necessary relationship between reasonably foreseeable mental injury and a diagnostic classification scheme. As Thomas J. observed in *van Soest* [*v. Residual Health Management Unit*, [1999] NZCA 206, [2000] 1 N.Z.L.R. 179] (at para. 100), a negligent defendant need only be shown to have foreseen *injury*, and not *a particular psychiatric illness* that comes with its own label. ***

34. The view that a recognizable psychiatric illness requirement is necessary to prevent indeterminate liability, advanced before us by the respondents and the Insurance Bureau of Canada, is similarly

untenable. *** Further, *** robust application of the elements of the cause of action of negligence should also be sufficient to address concerns for indeterminate liability. In particular, liability for mental injury must be confined to claims which satisfy the proximity analysis within the duty of care framework, which focuses on the relationship between the parties (*Cooper*, at para. 30 [§13.4.1.2]), and the remoteness inquiry, which asks whether "the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable" (*Mustapha*, at para. 12, quoting Linden and Feldthusen, at p. 360). We have been given no reason to suppose that the same sort of constraints which negligence law imposes upon claimants alleging physical injury would be less effective in weeding out unworthy claims for mental injury. It is therefore not only undesirable, but unnecessary to distort negligence law by applying the mechanism of a diagnostic threshold for proving mental injury.

35. In short, no cogent basis has been offered to this Court for erecting distinct rules which operate to preclude liability in cases of mental injury, but not in cases of physical injury. ***

36. It follows that requiring claimants who allege one form of personal injury (mental) to prove that their condition meets the threshold of "recognizable psychiatric illness", while not imposing a corresponding requirement upon claimants alleging another form of personal injury (physical) to show that their condition carries a certain classificatory label, is inconsistent with prior statements of this Court, among others. It accords unequal—that is, less—protection to victims of mental injury. And it does so for no principled reason (Beever, at p. 410). I would not endorse it. ***

39. The trial judge found that the accident caused the appellant to suffer "psychological injuries, including personality change and cognitive difficulties" (para. 50) such as slowed speech, leading to a deterioration of his close personal relationships with his family and friends. He remarked (at para. 65) that the appellant "was a changed man with his irritability likely reflecting a dark realization that he was not the man he once was". ***

40. I see no legal error in the trial judge's treatment of the evidence of the appellant's symptoms as supporting a finding of mental injury. Those symptoms fit well within the *Mustapha* parameters of mental injury which I have already recounted. ***

Conclusion and Disposition

41. I would allow the appeal, with costs in this Court and in the courts below. ***

REFLECTION:

- *To what extent does this judgment break down barriers to recovering damages at common law for negligently inflicted mental suffering? What are the barriers after Saadati?*
- *Can it be said that in light of this judgment the judicial approach to recovery for negligently inflicted mental injury is aligned with the approach to recovery for negligently inflicted physical injury?*

19.2.2 Witnessing traumatic events

19.2.2.1 Bechard v. Haliburton Estate [1991] CanLII 7362 (ON CA)

Ontario Court of Appeal – 1991 CanLII 7362

GRIFFITHS J.A. (FOR THE COURT):

1. The central issue in this appeal is whether the plaintiff Dolores Bechard is entitled to recover damages for nervous shock caused when she witnessed an accident involving a stranger who was negligently struck and run over by an automobile owned and driven by the defendant Ben Z. Damsgard. The trial judge *** held that Dolores Bechard was, in the circumstances of this case, entitled to recover such damages. From that judgment, the defendant Damsgard appeals.

2. On October 9, 1982, at approximately 10:45 p.m., the plaintiff William V. Bechard was driving his automobile in a westerly direction on County Road No. 2, a rural road in the county of Windsor, with his wife Dolores Bechard, a passenger in the right front seat.

3. As the Bechard vehicle entered the intersection of Concession Road No. 4, the late Charles C. Haliburton, operating his motorcycle in a southerly direction on No. 4, failed to stop at a stop sign and drove into the intersection, colliding heavily with the right front side of the Bechard automobile. ***

5. Haliburton was thrown against the windshield of the Bechard car and his body came to rest approximately in the middle of the travelled portion of County Road No. 2, 19.5 metres west of the point of impact. ***

7. A Mr. Daniel MacLeod was a passenger in an automobile proceeding westerly behind the Bechard vehicle. MacLeod saw the collision between Bechard and Haliburton and his driver stopped his automobile at a point about 200 ft. east of the intersection, where he left the vehicle with its four-way flashers on.

8. William Bechard and Daniel MacLeod got out of their respective motor vehicles and went to the aid of Haliburton, who was alive but injured, still lying in the middle of the road. Haliburton told them he did not want to be moved. ***

10. The defendant Ben Z. Damsgard then came upon the scene driving his automobile in an easterly direction on County Road No. 2. When MacLeod saw the lights of the Damsgard vehicle approaching he left Dolores Bechard, ran forward and waved at the approaching car.

11. Dolores Bechard saw the Damsgard vehicle when it was some distance away. She screamed and waved her arms in an effort to stop the Damsgard vehicle in its progress towards the body of Haliburton still lying on the road. The trial judge in his reasons described what followed:

> Mrs. Bechard was unable, by her waving, to impede the movement of the Damsgard vehicle. She saw the Damsgard vehicle approach the place on the highway where her husband was. He was near Chris [Haliburton], and she saw the danger to her husband, and she saw the event, the second event, which gives rise to this action, namely, the Damsgard vehicle running over the helpless person of Chris Haliburton. She heard two bumps. Notwithstanding her screaming, the driver of the Damsgard vehicle paid no heed. She saw Chris Haliburton run over. She saw his body moved.

12. As a result of being run over by the Damsgard vehicle, Haliburton was killed.

13. Dolores Bechard was stricken at the sight of Haliburton's body being struck and run over. She suffered amnesia following the accident. She was eventually removed from the scene by ambulance and taken to hospital.

14. After he had run over and killed Haliburton, Damsgard did not stop at the scene. He was chased and caught by MacLeod and then returned to the scene of the accident. When interviewed by the police Damsgard first stated that his wife had been driving. He acknowledged having had "a couple of beers" prior to the accident but refused to take a breathalyzer test requested by the police.

15. At trial the estate of Haliburton admitted liability for the first collision between the motorcycle and the Bechard car and any resulting damages to Dolores Bechard. The trial judge found the defendant, Damsgard, negligent in the operation of his automobile in failing to keep a proper lookout as he approached the scene. ***

17. With respect to the damages suffered by Dolores Bechard, the trial judge found that she sustained a serious neck injury from the first collision, which was still causing her significant pain and disability at the time of the trial. As well, he found that the two collisions had caused a severe psychiatric illness to her, a condition known as "post-traumatic stress reaction" or "post-traumatic neurosis." ***

Findings as to Causation ***

28. In my view, the trial judge was on solid ground in concluding that under Canadian and English law, reasonable foresight of nervous shock to the plaintiff is the touchstone of liability. ***

31. The most recent decision of the House of Lords on liability for nervous shock is *McLoughlin v. O'Brian*, [1983] 1 A.C. 410, [1982] 2 All E.R. 298. ***

32. The “policy grounds” that have concerned the courts in these cases is that there should not be unlimited liability to persons who suffer nervous shock. The perceived danger is that every accident may generate an ever-widening circle of plaintiffs including possibly the casual passer-by who witnesses the accident and those who come to gaze at the scene later, as well as the relatives of all of those to whom the details will be recounted.

33. In *McLoughlin*, the House of Lords unanimously reasoned that justice is not served by withholding recovery from the mother who, immediately after an accident involving her child, comes upon the scene of destruction and suffers shock, but awarding damages to the mother who witnesses her child’s injury.

34. Lord Wilberforce and Lord Edmund-Davies agreed with the Court of Appeal that the defendant’s liability for nervous shock must be limited to a certain class, but ruled that the limits must not be arbitrarily set. Lord Wilberforce described the present state of English law at pp. 301-302 [All E.R.]: ***

> 1. While damages cannot, at common law, be awarded for grief and sorrow, a claim for damages for ‘nervous shock’ caused by negligence can be made without the necessity of showing direct impact or fear of immediate personal injuries for oneself. ***
>
> 2. A plaintiff may recover damages for ‘nervous shock’ brought on by injury caused not to him or herself but to a near relative, or by the fear of such injury. So far (subject to 5 below), the cases do not extend beyond the spouse or children of the plaintiff ***.
>
> 3. Subject to the next paragraph, there is no English case in which a plaintiff has been able to recover nervous shock damages where the injury to the near relative occurred out of sight and earshot of the plaintiff. In *Hambrook v. Stokes Bros* an express distinction was made between shock caused by what the mother saw with her own eyes and what she might have been told by bystanders, liability being excluded in the latter case.
>
> 4. An exception from, or I would prefer to call it an extension of, the latter case has been made where the plaintiff does not see or hear the incident but comes on its immediate aftermath. In *Boardman v. Sanderson* the father was within earshot of the accident to his child and likely to come on the scene; he did so and suffered damage from what he then saw. ***
>
> 5. A remedy on account of nervous shock has been given to a man who came on a serious accident involving people immediately thereafter and acted as a rescuer of those involved (*Chadwick v. British Transport Commission* [1967] 2 All ER 945, [1967] 1 WLR 912). ‘Shock’ was caused neither by fear for himself nor by fear or horror on account of a near relative. The principle of ‘rescuer’ cases was not challenged by the respondents and ought, in my opinion, to be accepted. But we have to consider whether, and how far, it can be applied to such cases as the present. ***

37. While all of the law lords place the right to recovery on the basis of foreseeability, the majority held that matters of policy and the factual proximity had to be weighed by the court in addition to foreseeability of nervous shock. On the matter of policy Lord Wilberforce held that a “rescuer”, that is, a person whom one could expect to come immediately to the scene, should be regarded as within the scope of foresight and duty. ***

40. In Australia, the courts have also extended the right of recovery to persons who have suffered nervous shock as a result of observing injury to non-relatives. In *Mount Isa Mines Ltd. v. Pusey*, 125 C.L.R. 383, 45 A.L.J.R. 88, [1971] A.L.R. 253 (H.C.), the plaintiff workman heard a loud noise resulting from an electrical short circuit. He hurried to the floor above and helped one of two electricians who had been horribly burned in the accident, one of whom died the next day. As a result of observing the injuries to these workmen, the plaintiff developed symptoms of schizophrenia and brought an action against the employer whose negligence, as well as the negligence of its employees, had caused the two workmen to be burned.

41. Windeyer J., after a thorough analysis of the authorities, concluded that liability for nervous shock depended on foreseeability of that harm. ***

Conclusions

43. The trial judge correctly held that the right of Dolores Bechard to recover damages for her nervous shock depended on whether her shock was reasonably foreseeable by the defendant Damsgard in all the circumstances. Whether one applies the rule of foreseeability as the principal exercise as suggested by Lord Scarman in *McLoughlin*, *supra*, or whether one resorts to policy considerations to place some limit on the foreseeability rule, it seems to me that Dolores Bechard should recover in the circumstances of this case.

44. Applying the test of reasonable foreseeability, the trial judge found that Damsgard should have foreseen that an accident had occurred at the scene and that there could be victims such as Dolores Bechard and Haliburton in the vicinity. The trial judge found that Dolores Bechard had to jump out of the way of the approaching Damsgard vehicle for her own safety. He considered it was entirely foreseeable that Dolores Bechard should suffer nervous shock from observing the gruesome sight of the person she was attempting to save being injured and killed. When I say she was attempting to save Haliburton I adopt the approach of the trial judge that she was indirectly attempting to save him by warning Damsgard of Haliburton's presence on the road.

45. Accepting that it is settled law that the rescuer who witnesses a horrible accident to the victim is entitled to recover, I see no reason why that right, as a matter of policy, should not be extended to cover the circumstances involving Dolores Bechard who, as the trial judge found, was performing a role similar to that of the rescuer. ***

47. The trial judge appears to have made a finding of fact that Dolores Bechard did not have a pre-existing condition which made her particularly vulnerable to the post-traumatic stress disorder. However, assuming that the first accident did initiate this condition and that the second accident significantly exacerbated the condition, it is my opinion that as a matter of law Dolores Bechard is entitled to recover. ***

50. *** [T]he law of damages draws no distinction between the eggshell skull and the eggshell personality. In each case, the tortfeasor takes the victim as found. ***

54. I would dismiss the appeal with costs.

REFLECTION:

- *What are the difficulties in setting principled limits on recovery for negligently inflicted mental injury? Why are courts concerned to set such limits?*
- *Does this case depart from previous judicial interpretations of the scope of liability for mental suffering?*
- *Should mental injury be more readily recoverable as a head of damage when incurred in the course of coming to the aid of or rescuing another?*

19.2.2.2 Marcena v. Thomson [2019] BCSC 1287

✗**REF: §18.2.2.1**

POWER J.: ***

68. The facts of this case are slightly different than most pedestrian-vehicle accidents, as the plaintiff was not the one hit by the defendant. Rather, the plaintiff submits that he suffered psychological injuries as a direct result of seeing his wife struck and injured. Having established that Mr. Thomson owed the Marcenas a duty of care, and he breached that duty, the plaintiff must establish that Mr. Thomson's breach is the proximate cause of Mr. Marcena's injuries. This means there must be a "nexus" between the injury sustained by the plaintiff and the defendant's negligent act or omission: *Agar v. Weber*, 2014 BCCA 297 (B.C. C.A.) at para. 29.

69. The guiding test for causation remains the "but for" test: but for the defendant's negligence, would the plaintiff have suffered the injuries?

70. Both medical experts in this case agree that Mr. Marcena's mental health issues, including his major depression, result from this accident. The defence does not dispute that the collision between Mr. Thomson and Ms. Marcena is the cause of Mr. Marcena's major depressive disorder. Instead, they highlight the

complexities caused by his multiple pre-existing conditions. I will address these arguments in the following section.

71. There remains the threshold question of legal causation: that is, "whether the occurrence of mental harm in a person of ordinary fortitude was the reasonably foreseeable result of the defendant's negligent conduct": *Saadati v. Moorhead*, 2017 SCC 28 (S.C.C.) at para. 20 [§19.2.1.3].

72. The law on "nervous shock" was summarized in *Ulmer v. Weidmann*, 2011 BCSC 130 (B.C. S.C.) at paras. 97-99: ***

> (a) the defendant must take reasonable care not to injure those persons who are so closely and directly affected by his/her actions that he/she ought reasonably to have them in contemplation as being so affected;
>
> (b) proximity factors inform the foreseeability analysis for claims of psychiatric injury where there is no physical injury;
>
> (c) the relevant proximity factors are the relational proximity (the closeness of the relationship between the claimant and the victim of the defendant's conduct), locational proximity (being at the scene of a shocking event and observing it or observing its immediate aftermath), and temporal proximity (the relation between the time of the event and the onset of the psychiatric illness);
>
> (d) the claim must be for actual psychiatric injury caused by the actionable conduct of the defendant;
>
> (e) it must be concluded as a matter of law that a reasonable person should foresee that his/her conduct is such that for it could create a risk of direct psychiatric injury to a person of normal fortitude and thereby give rise to a duty of care to avoid such a result;
>
> (f) a claimant must prove not just psychological disturbance or upset as a result of the defendant's negligence but also that his/her psychological disturbance rises to the level of a recognizable psychiatric illness. Mere grief or sorrow caused by a person's death is not sufficient to support any compensation. The law does not recognize upset, discord, anxiety, agitation or other mental states that fall short of a recognizable psychiatric illness.

73. I agree with the plaintiff that these factors support the plaintiff's claim. Mr. Marcena's relational proximity to Ms. Marcena (her spouse) and his locational proximity (immediately beside the collision) are very close. The evidence has established that Mr. Marcena was distraught in the immediate aftermath of the collision, and his psychological disturbances began soon after.

74. As stated, the medical evidence confirms that Mr. Marcena suffered an actual psychiatric injury and has been diagnosed with major depression as a result of Mr. Thomson's negligent conduct in striking Ms. Marcena. A reasonable person would have foreseen that striking a pedestrian with a motorcycle could cause traumatic psychological injury to a close family member who witnessed the accident.

75. I find that Mr. Thomson's negligence is a proximate cause for Mr. Marcena's injuries, and the mental harm he suffered was a reasonably foreseeable outcome for a person of ordinary fortitude. The plaintiff has established his claim for the psychological injuries he suffered as a result of the collision. ***

80. Both parties agree that the assessment of non-pecuniary damages is guided by the factors set out in *Stapley v. Hejslet*, 2006 BCCA 34 (B.C. C.A.) [§9.3.2] ***. ***

97. Overall, after consideration of the case law before me and the factors from *Stapley*, I am of the view that the appropriate award for non-pecuniary damages is $125,000. ***

REFLECTION:

- *What proximity factors favoured Mr. Marcena's claim to recovery of damages in this case?*
- *Is it always the case that plaintiffs who witness serious careless injury to a close family member can recover for mental suffering that results?*

19.2.3 Learning of traumatic events

19.2.3.1 Gifford v. Strang Patrick Stevedoring Ltd [2003] HCA 33

High Court of Australia – [2003] HCA 33

CALLINAN J.:

107. Barry Gifford was employed by the respondent stevedoring company at Darling Harbour in Sydney, New South Wales. On 14 June 1990 he was married to, but separated from Kristine Gifford (Mrs Gifford), who was then 43 years old. *** There were three children of the marriage: a son, Darren Gifford (Darren) aged 19; a daughter, Kelly Gifford (Kelly) aged 17; and a younger son, Matthew Gifford (Matthew) a schoolboy of 14 years (the appellants).

108. From the time of his separation from Mrs Gifford in 1984 to the time of his death in 1990, Mr Gifford and his three children were in a close and loving relationship. He regularly visited his former residence where the appellants lived and engaged in various activities with them. His relationship with Mrs Gifford was without rancour.

109. On 14 June 1990 Mr Gifford, in the course of his employment, was walking along a wharf when a negligently operated, heavy forklift truck reversed over him. He was crushed to death immediately. The accident was an horrific one.

110. Mrs Gifford was very soon informed of the death. Later, but on the same day, the appellants were told of it by friends of the family. Neither the appellants nor Mrs Gifford saw Mr Gifford's corpse. ***

117. In this court the appellants contend that at common law direct visual perception of a relevant event or its immediate aftermath is not [a] necessary [element of a claim for nervous shock]. They argue that statements made by this court in *Tame v. New South Wales*; *Annetts v. Australian Stations Pty Ltd*[580] which were decided after the decision of the Court of Appeal in this case make that clear. In substance that submission is correct.

118. In *Tame* I attempted to state some bright line rules distilled from the cases and elsewhere for the prosecution of what, for convenience and other reasons, I there called, and I would continue to call, claims for damages for nervous shock ***. In doing so I sought to identify and define the classes of persons in cases of nervous shock capable of being so closely and directly affected by a tortfeasor's negligence that the tortfeasor ought reasonably to have had them in contemplation in acting or omitting to act in the way in which he or she did, within the classic formulation of Lord Atkin in *Donoghue v. Stevenson*.[581] I said:[582]

> In my opinion, the reasons for judicial caution in cases of nervous shock remain valid, as do the principles formulated by the courts in this country to give effect to that caution. The principles may need to be refined as new situations, and improvements in the professional understanding, diagnosis and identification of psychiatric illness occur. Those principles are currently in summary these. There must have occurred a shocking event. The claimant must have actually witnessed it, or observed its immediate aftermath or have had the fact of it communicated to him or her, as soon as reasonably practicable, and before he or she has or should reasonably have reached a settled state of mind about it. The communicator will not be liable unless he or she had the intention to cause psychiatric injury, and was not otherwise legally liable for the shocking event. A person making the communication in the performance of a legal or moral duty will not be liable for making the communication. The event must be such as to be likely to cause psychiatric injury to a person of normal fortitude. The likelihood of psychiatric injury to a person of normal fortitude must be foreseeable. There need to exist special or close relationships between the tortfeasor, the claimant

[580] (2002) 191 ALR 449; 76 ALJR 1348 at ALR 456 [17]–[18], 459 [36]; ALJR 1353, 1355 per Gleeson CJ, ALR 461–2 [51]–[52], 465 [65]; ALJR 1357–8, 1360 per Gaudron J, ALR 504–5 [221], [225], 508 [236], [238]; ALJR 1388–91 per Gummow and Kirby JJ, ALR 541–2 [365], [366]; ALJR 1414–15 per Callinan J.
[581] [1932] AC 562 at 580 [§13.1.1].
[582] (2002) 191 ALR 449 at 541–2 [366]; 76 ALJR 1348 at 1415.

> and the primary victim. Those relationships may exist between employer and employee and co-employees and relationships of the kind here in which an assurance was sought, and given, and dependence and reliance accordingly ensued. Other relationships may give rise to liability in future cases. A true psychiatric injury directly attributable to the nervous shock must have been suffered.

119. Subject to some qualifications I do not understand a majority of the other members of the court to have stated a, or any very different view from the one that I did as to the various criteria. A particular qualification relates to "normal fortitude" which only McHugh J[583] and I[584] thought to be an indispensable element of a cause of action for nervous shock. None of the other members of the court however thought absence of normal fortitude irrelevant.[585] The balance of their opinion was that it could be of significance on the issue of foreseeability. No clear consensus emerged however as to how "perception" was to be defined or treated, or as to the classes of persons to whom a tortfeasor should be regarded as owing a duty of care not to cause nervous shock[586] because no doubt the unique features of *Tame* made it unnecessary to decide those matters conclusively.

120. Subject therefore to the qualifications to which I have referred I would adhere in this case to what I said in *Tame*.

121. There was evidence here which might possibly, arguably, if accepted, be capable of satisfying *** the common law as I understand it to be *** to ground a cause of action for nervous shock. ***

GLEESON C.J.:

1. These three appeals, which were heard together, arise out of claims for damages for negligently inflicted psychiatric injury brought by the children of a man who was killed in an accident at work. The issue is whether the man's employer owed a duty of care to the children. ***

10. In its capacity as an employer, the respondent was under a duty of care towards the father of the appellants. The question is whether, additionally, it was under a duty of care which required it to have in contemplation psychiatric injury to the children of its employee, and to guard against such injury. The relationship of parent and child is important in two respects. First, it goes to the foreseeability of injury. That a child of the age of the various appellants might suffer psychiatric injury in consequence of learning, on the day, of a terrible and fatal injury to his or her father, is not beyond the "common experience of mankind".[587] *** Secondly, it bears upon the reasonableness of recognising a duty on the part of the respondent. If it is reasonable to require any person to have in contemplation the risk of psychiatric injury to another, then it is reasonable to require an employer to have in contemplation the children of an employee. ***

12. Not all children have a close and intimate relationship with their parents; and it may be that, even when parents are killed in sudden and tragic circumstances, most grieving children do not suffer psychiatric injury. However, as a class, children form an obvious category of people who might be expected to be at risk of the kind of injury in question. Where there is a class of person, such as children, who are recognised, by the law, and by society, as being ordinarily in a relationship of natural love and affection with another class, their parents, then it is not unreasonable to require that an employer of a person in the second class, whose acts or omissions place an employee at risk of physical injury, should also have in contemplation the risk of consequent psychiatric injury to a member of the first class.

13. *** I would conclude that the respondent owed a duty of care to the appellants. ***

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[583] (2002) 191 ALR 449 at 466 [71], 475–8 [109]–[119]; 76 ALJR 1348 at 1360–1, 1367–9.
[584] (2002) 191 ALR 449 at 541 [366]; 76 ALJR 1348 at 1415.
[585] (2002) 191 ALR 449; 76 ALJR 1348 at ALR 455–6 [16], 458–9 [29], [38]; ALJR 1353, 1355–6 per Gleeson CJ, ALR 460 [45], 463–5 [59]–[65]; ALJR 1356, 1359–60 per Gaudron J, ALR 494 [187], [189], 497–9 [197]–[203]; ALJR 1380–1, 1382–4 per Gummow and Kirby JJ, ALR 512–13 [251], [253]; ALJR 1393–4 per Hayne J.
[586] See however Gummow and Kirby JJ at (2002) 191 ALR 449 at 493–4 [186]; 76 ALJR 1348 at 1380 who referred to the special relationships needed to found a negligent misstatement case as providing an imperfect analogy with relationships between tortfeasors and sufferers of nervous shock.
[587] cf *Chester v. Waverley Corporation* (1939) 62 CLR 1 at 10 per Latham CJ.

MCHUGH J.: ***

48. It is the closeness and affection of the relationship—rather than the legal status of the relationship—which is relevant in determining whether a duty is owed to the person suffering psychiatric harm. The relationship between two friends who have lived together for many years may be closer and more loving than that of two siblings. There is no policy justification for preventing a claim for nervous shock by a person who is not a family member but who has a close and loving relationship with the person harmed or put in peril. In a claim for nervous shock at common law, the reasonable foresight of the defendant extends to all those with whom the victim has or had a close and loving relationship.

49. Whether such a relationship exists in a particular case will often be a matter for evidence although, as Lord Keith pointed out in the above passage, in some cases the nature of the relationship may be such that it may be presumed. Among such relationships are those of parent and child. ***

50. Nor can the wrongdoer reasonably disregard some other close and loving relationships. Husband and wife, sibling and sibling, de facto partners and engaged couples, for example, almost invariably have close and loving relationships. No doubt the parties to such relationships may sometimes be estranged. Despite this possibility, however, so commonly are these relationships close and loving that a wrongdoer must *always* have such persons in mind as neighbours in Lord Atkin's sense whenever the person harmed is a neighbour in that sense. To require persons in such relationships to prove the closeness and loving nature of the relationship would be a waste of curial resources in the vast majority of cases. The administration of justice is better served by a fixed rule that persons in such relationships are "neighbours" for the purposes of the law of nervous shock and the defendant must always have them in mind. Similarly, the wrongdoer must *always* have in mind any person who can establish a close and loving relationship with the person harmed. ***

53. In the present case, the relationship between the children and their father made them a neighbour of Strang for duty purposes, and Strang owed the father a duty of care to provide a safe place of employment. The father was killed in the course of his employment by reason of the negligence of Strang. A reasonable employer in the position of Strang was bound to have in mind that any harm caused to its employee carried the risk that it would cause psychiatric harm to any children that he might have when they learned of his death. Because that is so, Strang owed a duty to the children to take reasonable care in its relationship with their father to protect them from psychiatric harm. And the admission that Strang negligently caused the death of their father means that Strang breached its duty to the children. However, the trial judge made no finding as to whether any of the children suffered a recognisable psychiatric injury upon being told of their father's death. Accordingly, it is not possible to enter verdicts in favour of the children. The proceedings must be remitted to the District Court for further hearing. ***

GUMMOW AND KIRBY JJ.: ***

86. The respective positions of the child of an employee and his or her employer may readily be seen to attract the "neighbourhood" principle encapsulated by Lord Atkin in *Donoghue v. Stevenson*. From the point of view of the employer, children of an employee are "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question".[588] ***

92. The respondent owed the appellants a duty of care to take reasonable care to avoid causing them a recognisable psychiatric illness as a consequence of their father's death in the course of his employment. Especially in circumstances where negligence by the respondent to the father is admitted, it is clearly arguable that the respondent breached these separate duties of care it owed to the appellants. ***

HAYNE J.: ***

103. The conclusion that the respondent owed the appellants a duty to take reasonable care to avoid causing them psychiatric injury follows from the combination of two matters. First, the respondent, as

[588] [1932] AC 562 at 580.

employer of the appellants' father, controlled the work which he did, and how, and where, he did it. Because, as employer, it controlled those matters, the respondent was bound to take reasonable care, and ensure that reasonable care was taken, to avoid harm to the employee.[589] Secondly, the employer can reasonably foresee that children of the employee may suffer psychiatric injury if the employee is killed or seriously injured at work. ***

104. Whether the respondent breached the duty it owed to the appellants has not yet been determined. The respondent's admission that it breached its duty of care to the appellants' father may well be thought to have an important bearing on that issue. Nor has it been determined whether, as a result of the respondent's negligence, the appellants suffered psychiatric injury as distinct from emotional distress. Those issues will have to be determined. ***

REFLECTION:

- *Is the High Court of Australia's judgment here consistent with the principles outlined in Saadati v. Moorhead and Marcena v. Thomson? Does it extend the law further than those precedents?*
- *In Paul v. Royal Wolverhampton NHS Trust [2024] UKSC 1, [1], Lord Leggatt and Lady Rose stated, "We all die and, when we do, the fact or manner of our deaths may cause harm to other people. Often such harm is readily foreseeable. We all know that the death of someone's child, or of their partner, or of a young child's parent, will cause grief and suffering and can have prolonged and profound effects on physical and mental health. Death may also have damaging, even ruinous, financial consequences for family members or others who were dependent economically on the deceased." When a loved-one's death is caused by the negligence of another, how should the law of negligence determine who has a right of action? Is the scope of tort liability in such cases a question of principle or policy?*

19.2.3.2 Snowball v. Ornge [2017] ONSC 4601

Ontario Superior Court – 2017 ONSC 4601

FAIETEA J.:

1. This action arises from the crash of an air ambulance helicopter that took the life of Christopher Snowball ("Snowball"). The plaintiffs, being Snowball's immediate family, have commenced an action against the defendants in negligence for damages for mental distress and damages under s. 61 of the *Family Law Act*, R.S.O. 1990, c. F.3 ("*FLA*") [§20.5.1.1], as a result of his death.

2. The family of another paramedic, Dustin Dagenais, who died in the same helicopter accident, also commenced an action against the defendants seeking the same relief. ***

3. The defendant Ornge and 7506406 Canada Inc. (hereafter collectively referred to as "Ornge"), the operator of the air ambulance service, bring this motion pursuant to r. 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 [for "[a]n order for a determination of a question of law raised by a pleading"] in respect of both actions. Ornge submits that no right of action exists at common law for mental distress resulting from the negligently caused death of a human being unless the plaintiffs witnessed the accident or its aftermath. Ornge submits that the plaintiffs' only right to claim is under s. 61 of the *FLA*. ***

Background ***

7. The Statement of Claim includes the following allegations: ***

> 2. During the night of May 31st, 2013, Christopher Snowball ("Christopher"), a paramedic, perished when a medical helicopter operated by the Defendant Ornge in Moosonee, Ontario, crashed and burned. He was 38 years old.
>
> 3. Christopher Snowball left behind a close-knit family, including his then 16-year old daughter Brook-Lynne Snowball, and his parents, John Snowball and Deborah Snowball. The loss was

[589] *Kondis v. State Transport Authority* (1984) 154 CLR 672 at 687–8; 55 ALR 225 at 235–6 per Mason J.

utterly devastating to his family members.

4. The crash and Christopher's ensuing death was completely avoidable, and occurred only because of the gross negligence of the Defendants herein.

Negligence

30. The Plaintiffs state and the fact is that the negligent acts or omissions of the Defendants caused or contributed to the crash which killed Christopher Snowball.

31. Particulars of the negligent acts and omissions of Ornge are as follows:

a) Ornge failed to ensure that the pilots had sufficient training and experience to safely complete the flight, including, without limitation, night- and instrument-flying proficiency; ***

34. In the circumstances described hereinabove, the Defendants owed the Plaintiff a duty of care. ***

Mental Distress ***

53. As a direct and foreseeable consequence of the Defendants' negligence in causing or contributing to Christopher's death, as particularized hereinabove, the Plaintiffs suffered and continue to suffer extreme mental and emotional distress. ***

56. The mental distress suffered by the Plaintiffs was caused by the negligent acts of the Defendants particularized hereinabove.

57. The Defendants were well aware that the helicopter at issue was staffed by people such as the late Christopher Snowball, and that those people could be killed if it crashed. Moreover, the Defendants were also aware that those people on board the helicopter had families and loved ones, who were likely to suffer significant emotional trauma if their family member was killed.

58. It was accordingly reasonably foreseeable that if Christopher Snowball was killed, the Plaintiffs would suffer significant mental distress, and the Plaintiffs did in fact suffer significant mental distress. ***

67. The Plaintiff states and the fact is that she is entitled to compensation from the Defendants for her loss and her injury. ***

Do the Plaintiffs' Claims in Negligence for Mental Injury have no Reasonable Prospect of Success?

12. For more than 200 years, the common law has provided that the right to bring an action in tort does not survive the death of a person. Neither the estate of the victim nor the victim's relatives have a right to sue for their losses: *Baker v. Bolton* (1808), 1 Camp. 493, 170 E.R. 1033 (Eng. Nisi Prius). In that case, the plaintiff brought an action against the proprietor of a stage-coach, in which the plaintiff and his wife were travelling, that overturned and led to the death of the plaintiff's wife about one month later. The court, at p. 1033, found that the plaintiff was not entitled to any damages for the loss of her "society", or for "distress of mind he had suffered on her account" in the form of "great grief, vexation and anguish of mind" after the moment of her death. Lord Ellenborough stated that "[i]n a civil Court, the death of a human being could not be complained of as an injury".

13. If there was a principled basis for this rule it was not described in *Baker*. Courts have been left to speculate as to why a person should be barred from seeking compensation for losses resulting from the death of a family member, but not when it results from an injury to a family member: *Ferraiuolo Estate v. Olson,* 2004 ABCA 281, 246 D.L.R. (4th) 225 (Alta. C.A.), at paras. 19-30, 68; and *Monahan v. Nelson,* 2000 BCCA 297, 76 B.C.L.R. (3d) 109 (B.C. C.A.), at paras. 5-6. One commentator has noted that a strict application of *Baker* has "the astonishingly absurd result that a parent could recover for mental disorder caused by negligent injury to their child but not where the negligence has killed their child": Dr. Norman Katter, "Reining in the Rule in *Baker v. Bolton*" (July 2015), 73 *Hearsay: The Journal of the Bar Association*

of Queensland (online). ***

15. The harshness of *Baker* led to statutory reform in England in 1846, in Ontario and Quebec in 1847 and in other provinces and common law jurisdictions. In Ontario, the impact of *Baker* is somewhat muted given that s. 61 of the *FLA* permits the family of the deceased to maintain an action for pecuniary damages including damages for loss of guidance, care and companionship. However, there is no basis under s. 61 of the *FLA* to recover for grief, sorrow or mental anguish suffered by reason of the death of a family member: *Mason* [*v. Peters* (1982), 139 D.L.R. (3d) 104 (Ont. C.A.)], at pp. 32, 39; or punitive and aggravated damages: *Latimer v. Canadian National Railway*, 2007 CanLII 5689 (ON SC), at paras. 7-10. ***

16. The plaintiffs submit that claims in negligence for damages for mental injury suffered by a family member following the injury or death of another family member are allowed. Some cases arise from witnessing the bodily injury or death suffered by a family member: *Logan v. Lovesy*, [1983] O.J. No. 262 (Ont. H.C.). Other cases arise from seeing the aftermath of the accident involving a family member: *McCartney v. Andrews*, [1987] O.J. No. 1092 (Ont. H.C.); and *McLoughlin v. O'Brian* (1982), [1983] 1 A.C. 410 (U.K. H.L.); or witnessing the injury or death of a stranger that the claimant tried to save following an accident: *Bechard v. Haliburton Estate* (1991), 5 O.R. (3d) 512 (Ont. C.A.). However, none of the cases provided by the plaintiffs involve a situation where damages for mental injury have been awarded to a person who has not suffered bodily injury or who has not witnessed the injury or death of another person or its immediate aftermath. Courts have refused to award damages for mental injury to a person who is merely informed of an accident: *Abramzik v. Brenner* (1967), 65 D.L.R. (2d) 651 (Sask. C.A.); *Rhodes v. Canadian National Railway* (1990), 50 B.C.L.R. (2d) 273 (B.C. C.A.), leave to appeal refused, [1991] S.C.C.A. No. 1 (S.C.C.) and *Latimer*, at paras. 12, 14.

17. The plaintiffs submit that the Supreme Court of Canada's decision in *Saadati v. Moorhead*, 2017 SCC 28 (S.C.C.) [§19.2.1.3], is a "game changer" in that it rejected the use of various considerations, such as geographical and temporal proximity, as absolute bars to the recovery of damages for mental injury in negligence.

18. The *ratio* of the Supreme Court of Canada's decision in *Saadati* is that a claimant in negligence is not required to prove a recognised psychiatric illness in order to establish that he or she has suffered a mental injury so long as "the disturbance suffered by the claimant is 'serious and prolonged and rise[s] above the ordinary annoyances, anxieties and fears' that come with living in civil society" (citations omitted): *Saadati*, at para. 37.

19. In arriving at the above conclusion, the court considered the legal principles governing a claim for the recovery of damages for mental injury caused by negligence. It ruled that the elements of the cause of action in negligence described in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114 (S.C.C.) [§17.1.2], at para. 3, (namely, findings that: (a) the defendant owed the plaintiff a duty of care; (b) the defendant's behaviour breached the standard of care; (c) the plaintiff sustained damage; and (d) the damage was caused, in fact and law, by the defendant's breach) furnish a sufficiently robust array of protections against unworthy claims for negligently caused mental injury without the need for satisfying arbitrary, absolute proximity criteria: *Saadati*, at paras. 19-22. ***

21. Given that courts have apparently disregarded *Baker* by allowing claims in negligence for mental injury so long as the claimant witnesses a person's injury, death or the aftermath of such injury or death (see the cases described above at paragraph 16 of these reasons), and given that the court in *Saadati* rejected the "primary/secondary victim" distinction, as well as the view that there are geographic, temporal and relational proximity restrictions that are an absolute limitation on the duty to take reasonable care to avoid causing foreseeable mental injury, it is my view that the plaintiffs' claims for mental distress following Snowball's death might succeed even though they are secondary victims who did not witness this sudden, traumatic event. As directed by the Supreme Court of Canada in *Saadati*, the outcome of the Snowball action should turn on the robust application of the elements of an action in negligence by the trier of fact rather than on the separate application of geographic, temporal, and relational considerations or a distinction between "primary" and "secondary" victims. ***

Conclusions

23. I dismiss Ornge's motion under r. 21.01(1)(b) in respect of both the Snowball action and the Dagenais action. It is not plain and obvious that the plaintiffs' claim in negligence for mental distress has no reasonable prospect of success. ***

REFLECTION:

- *Why have courts traditionally been reluctant to afford so-called "secondary victims" a cause of action? Why might it be desirable to do so? What concerns arise from extending the law in this way?*
- *Is Gifford v. Strang a persuasive precedent on the facts of this case? What are the differences? Why do you think Gifford was not cited by the Ontario Superior Court?*

19.2.4 Cross-references

- *Mustapha v. Culligan of Canada Ltd* [2008] SCC 27: §17.1.2.

19.2.5 Further material

- Law Pod UK Podcast, "Psychiatric Harm and Childbirth" (Dec 3, 2018) 🎧.
- P. Handford, "*Victorian Railways Commissioners v. Coultas*: The Untold Story" (2021) 61 American J Legal History 416.
- M. Chamallas & L.K. Kerber, "Women, Mothers and the Law of Fright: A History" (1990) 88 Modern L Rev 814.
- M.H. Matthews, "Negligent Infliction of Emotional Distress: A View of the Proposed Restatement (Third) Provisions from England" (2009) 44 Wake Forest L Rev 1177.
- L. Bélanger-Hardy, "Reconsidering the 'Recognizable Psychiatric Illness' Requirement in Canadian Negligence Law" (2013) 38 Queen's LJ 583.
- D.A. Butler, "*Gifford v. Strang* and the New Landscape for Recovery for Psychiatric Injury in Australia" (2004) 12 Torts LJ 108.
- M.A. Jones, "Liability for Psychiatric Damage: Searching for a Path between Pragmatism and Principle" in J.W. Neyers, E. Chamberlain & S.G.A. Pitel (eds), *Emerging Issues in Tort Law* (Oxford: Hart Publishing, 2007).
- C. Dunlop, A. Davis, L. David & M. D'Angelo, "Employer's Duty of Psychosocial Care in the Workplace Examined: The *Kozarov* Decision" Maddocks (Apr 19, 2022).
- B.B. Chatterjee, "Rethinking *Alcock* in the New Media Age" (2016) 7 J European Tort L 272.
- "Hillsborough" (VeryMuchSo Productions, 2016) 📺.

19.3 Negligence causing pure economic loss

19.3.1 Negligent misrepresentation

19.3.1.1 Ultramares Corp. v. Touche (1931) 255 NY 170 (NY CA)

BACKGROUND: Quimbee (2021), https://youtu.be/aVma0EZTz2A 📺

New York Court of Appeals – 255 NY 170 (1931)

CARDOZO C.J.:

1. The action is in tort for damages suffered through the misrepresentations of accountants, the first cause of action being for misrepresentations that were merely negligent and the second for misrepresentations charged to have been fraudulent.

2. In January, 1924, the defendants, a firm of public accountants, were employed by Fred Stern & Co., Inc., to prepare and certify a balance sheet exhibiting the condition of its business as of December 31, 1923. They had been employed at the end of each of the three years preceding to render a like service. Fred Stern & Co., Inc., which was in substance Stern himself, was engaged in the importation and sale of rubber.

To finance its operations, it required extensive credit and borrowed large sums of money from banks and other lenders. All this was known to the defendants. The defendants knew also that in the usual course of business the balance sheet when certified would be exhibited by the Stern company to banks, creditors, stockholders, purchasers or sellers, according to the needs of the occasion, as the basis of financial dealings. Accordingly, when the balance sheet was made up, the defendants supplied the Stern company with thirty-two copies certified with serial numbers as counterpart originals. Nothing was said as to the persons to whom these counterparts would be shown or the extent or number of the transactions in which they would be used. ***

3. By February 26, 1924, the audit was finished and the balance sheet made up. It stated assets in the sum of $2,550,671.88 and liabilities other than capital and surplus in the sum of $1,479,956.62, thus showing a net worth of $1,070,715.26. Attached to the balance sheet was a certificate as follows: ***

> 'We have examined the accounts of Fred Stern & Co., Inc., for the year ending December 31, 1923, and hereby certify that the annexed balance sheet is in accordance therewith and with the information and explanations given us. We further certify that, subject to provision for federal taxes on income, the said statement, in our opinion, presents a true and correct view of the financial condition of Fred Stern & Co., Inc., as at December 31, 1923. ***

4. Capital and surplus were intact if the balance sheet was accurate. In reality both had been wiped out, and the corporation was insolvent. The books had been falsified by those in charge of the business so as to set forth accounts receivable and other assets which turned out to be fictitious. The plaintiff maintains that the certificate of audit was erroneous in both its branches. ***

6. This action, brought against the accountants in November, 1926, to recover the loss suffered by the plaintiff in reliance upon the audit, was in its inception one for negligence. ***

8. We think the evidence supports a finding that the audit was negligently made ***. ***

13. The defendants owed to their employer a duty imposed by law to make their certificate without fraud, and a duty growing out of contract to make it with the care and caution proper to their calling. *** A different question develops when we ask whether they owed a duty to [creditors and investors] to make it without negligence. If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences. ***

21. *** [T]he conclusion is, we think, inevitable that nothing in our previous decisions commits us to a holding of liability for negligence in the circumstances of the case at hand, and that such liability, if recognized, will be an extension of the principle of those decisions to different conditions, even if more or less analogous. The question then is whether such an extension shall be made.

22. The extension, if made, will so expand the field of liability for negligent speech as to make it nearly, if not quite, coterminous with that of liability for fraud. ***

25. Liability for negligence if adjudged in this case will extend to many callings other than an auditor's. *** Negligence, moreover, will have one standard when viewed in relation to the employer, and another and at times a stricter standard when viewed in relation to the public. Explanations that might seem plausible, omissions that might be reasonable, if the duty is confined to the employer, conducting a business that presumably at least is not a fraud upon his creditors, might wear another aspect if an independent duty to be suspicious even of one's principal is owing to investors. *** 'The law does not spread its protection so far' (*Robins Dry Dock & Repair Co. v. Flint*, *supra*, at p. 309).

26. Our holding does not emancipate accountants from the consequences of fraud. It does not relieve them if their audit has been so negligent as to justify a finding that they had no genuine belief in its adequacy, for this again is fraud. It does no more than say that if less than this is proved, if there has been neither reckless misstatement nor insincere profession of an opinion, but only honest blunder, the ensuing liability for

negligence is one that is bounded by the contract, and is to be enforced between the parties by whom the contract has been made. We doubt whether the average business man receiving a certificate without paying for it and receiving it merely as one among a multitude of possible investors, would look for anything more.

REFLECTION:

- *Why has the common law of tort been reluctant to recognise claims for negligently caused pure economic loss?*[590] *Is causing another economic loss innately wrongful? Is economic loss comparable to personal injury or property harm?*[591] *How can people protect themselves from economic loss when interacting with others?*
- *Is the policy concern of indeterminate liability compelling in cases such as this?*

19.3.1.2 Hedley Byrne & Co. Ltd v. Heller & Partners Ltd [1963] UKHL 4

House of Lords – [1963] UKHL 4

LORD DEVLIN:

77. My Lords, the bare facts of this case, stated sufficiently to raise the general point of law, are these. The appellants [Hedley Byrne & Co. Ltd], being anxious to know whether they could safely extend credit to certain traders with whom they were dealing, sought a banker's reference about them. For this purpose their bank, the National Provincial, approached the respondents [Heller & Partners Ltd] who are the traders' bank. The respondents gave, without making any charge for it and in the usual way, a reference which was so carelessly phrased that it led the appellants to believe the traders to be creditworthy when in fact they were not. The appellants seek to recover from the respondents the consequent loss. ***

105. *** Is the relationship between the parties in this case such that it can be brought within a category giving rise to a special duty? As always in English law, the first step in such an inquiry is to see how far the authorities have gone, for new categories in the law do not spring into existence overnight. ***

107. The respondents in this case cannot deny that they were performing a service. Their sheet anchor is that they were performing it gratuitously and therefore no liability for its performance can arise. My Lords, in my opinion this is not the law. A promise given without consideration to perform a service cannot be enforced as a contract by the promisee; but if the service is in fact performed and done negligently, the promisee can recover in an action in tort. ***

112. My Lords, it is true that this principle of law has not yet been clearly applied to a case where the service which the defendant undertakes to perform is or includes the obtaining and imparting of information. But I cannot see why it should not be ***. ***

113. I think, therefore, that there is ample authority to justify your Lordships in saying now that the categories of special relationships which may give rise to a duty to take care in word as well as in deed are not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships which in the words of Lord Shaw in *Nocton v. Lord Ashburton* [1914] AC 932, 972 are "equivalent to contract," that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract. Where there is an express undertaking, an express warranty as distinct from mere representation, there can be little difficulty. The difficulty arises in discerning those cases in which the undertaking is to be implied. In this respect the absence of consideration is not irrelevant. Payment for information or advice is very good evidence that it is being relied upon and that the informer or adviser knows that it is. Where there is no consideration, it will be necessary to exercise greater care in distinguishing between social and professional relationships and between those which are of a contractual character and those which are not. It may often be material to consider whether the adviser is acting purely out of good nature or whether he is getting his reward in some indirect form. The service that a bank performs in giving a reference is not done simply out of a desire to assist commerce. It would discourage the customers of the bank if their deals fell through because the bank had refused to testify to their credit

[590] See *Ultracuts v. Magicuts*, 2023 MBCA 71, [46] [§10.4.1].

[591] Consider "the Jack Benny routine in which the comedian hesitates when faced with the demand, 'Your money or your life!' After an exaggerated pause, the holdup man demands, 'Well?,' to which Benny replies, 'I'm thinking, I'm thinking!' …" E. Silverstein, "On Recovery in Tort for Pure Economic Loss" (1999) 32 U Michigan J L Reform 403, 438.

when it was good. ***

122. *** I should consider it necessary to examine [the respondent's] contentions were it not for the general disclaimer of responsibility which appears to me in any event to be conclusive. I agree entirely with the reasoning and conclusion on this point of my noble and learned friend, Lord Reid. A man cannot be said voluntarily to be undertaking a responsibility if at the very moment when he is said to be accepting it he declares that in fact he is not. The problem of reconciling words of exemption with the existence of a duty arises only when a party is claiming exemption from a responsibility which he has already undertaken or which he is contracting to undertake. For this reason alone, I would dismiss the appeal.

LORD REID: ***

14. A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought: or he could give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or inquiry which a careful answer would require: or he could simply answer without any such qualification. If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require. ***

16. *** Cohen L.J. (as he then was) [in *Candler*'s case [1951] 2 KB 164] attached considerable importance to a New York decision, *Ultramares Corporation v. Touche* (1931) 255 NY 170, a decision of Cardozo C.J. But I think that another decision of that great judge, *Glanzer v. Shepherd* (1922) 233 NY 236 is more in point because in the latter case there was a direct relationship between the weigher who gave a certificate and the purchaser of the goods weighed, who the weigher knew was relying on his certificate: there the weigher was held to owe a duty to the purchaser with whom he had no contract. ***

19. Now I must try to apply these principles to the present case. What the appellants complain of is not negligence in the ordinary sense of carelessness, but rather misjudgment, in that Mr. Heller, while honestly seeking to give a fair assessment, in fact made a statement which gave a false and misleading impression of his customer's credit. *** [I]t seems to me to be unusually difficult to determine just what duty beyond a duty to be honest a banker would be held to have undertaken if he gave a reply without an adequate disclaimer of responsibility or other warning. *** But here the appellants' bank, who were their agents in making the inquiry, began by saying that "they wanted to know in confidence and without responsibility on our part," that is, on the part of the respondents. So I cannot see how the appellants can now be entitled to disregard that and maintain that the respondents did incur a responsibility to them. ***

28. I am therefore of opinion that it is clear that the respondents never undertook any duty to exercise care in giving their replies. The appellants cannot succeed unless there was such a duty and therefore in my judgment this appeal must be dismissed. ***

LORD MORRIS OF BORTH-Y-GEST: ***

33. If someone who was not a customer of a bank made a formal approach to the bank with a definite request that the bank would give him deliberate advice as to certain financial matters of a nature with which the bank ordinarily dealt the bank would be under no obligation to accede to the request: if, however, they undertook, though gratuitously, to give deliberate advice (I exclude what I might call casual and perfunctory conversations) they would be under a duty to exercise reasonable care in giving it. They would be liable if they were negligent although, there being no consideration, no enforceable contractual relationship was created. ***

46. My Lords, I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it,

then a duty of care will arise. ***

48. *** [I]n my judgment, the bank in the present case, by the words which they employed, effectively disclaimed any assumption of a duty of care. They stated that they only responded to the inquiry on the basis that their reply was without responsibility. If the inquirers chose to receive and act upon the reply they cannot disregard the definite terms upon which it was given. They cannot accept a reply given with a stipulation and then reject the stipulation. ***

LORD HODSON: ***

75. I do not think it is possible to catalogue the special features which must be found to exist before the duty of care will arise in a given case, but since preparing this opinion I have had the opportunity of reading the speech which my noble and learned friend, Lord Morris of Borth-y-Gest, has prepared. I agree with him that if in a sphere where a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry such person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows, or should know, will place reliance upon it, then a duty of care will arise. ***

LORD PEARCE: ***

138. If both parties say expressly (in a case where neither is deliberately taking advantage of the other) that there shall be no liability, I do not find it possible to say that a liability was assumed. ***

REFLECTION:

- *What reasons did the House of Lords give for recognising a duty of care in respect of misrepresentations that cause pure economic loss? In what ways was this case distinguishable from Ultramares Corp v. Touche?*
- *Would Mr. Heller have been liable to Hedley Byrne had his representation not been qualified by the disclaimer?*

19.3.1.3 Deloitte & Touche v. Livent Inc. [2017] SCC 63

Supreme Court of Canada – 2017 SCC 63

MCLACHLIN C.J.C. (dissenting in part with WAGNER AND CÔTÉ JJ.): ***

119. The saga that led to these proceedings began in 1989 when two would-be entertainment moguls, Drabinsky and Gottlieb, launched a takeover bid of their employer, Cineplex Odeon Corporation. When the bid failed, the pair formed MyGar Partnership, which purchased all of the assets and some of the liabilities of Cineplex's live entertainment division. These included Toronto's Pantages Theatre and the rights to a wildly successful show, *The Phantom of the Opera*. MyGar carried on business through its nominee corporation, Live Entertainment Corporation of Canada Inc., and both entities were rolled into Live Entertainment of Canada Inc., or Livent Inc., in 1993. Livent made its debut in Canada's equity market with an initial public offering that year. By the end of 1995, Livent's shares were also listed on New York's NASDAQ exchange.

120. Deloitte & Touche (now Deloitte LLP) became MyGar's auditor in 1989 and continued as auditors for MyGar and its successor Livent until 1998.

121. Livent's strategy was vertical integration. Unlike other players in the live entertainment industry, it brought the entire enterprise, from production to performance, under one roof—a roof that Livent, as a proprietor of theatre properties, also owned. This was an immensely costly and risky undertaking. ***

122. Drabinsky and Gottlieb were determined to prove that their business model worked. To be sure it did, they and their associates cooked the books. ***

123. Livent not only misled the markets, it also fooled its auditor. Deloitte never uncovered the company's schemes. Livent continued to raise investment capital and reinvest it in unprofitable theatre enterprises. Deloitte's auditors report for Livent's Fiscal Year 1997 did not disclose the fraud and, although Deloitte objected when Gottlieb presented a misleading quarterly financial statement to the Audit Committee in

August 1997, it did not resign.

124. The truth came to light in 1998. New equity investors appointed new management, who discovered "irregularities". Deloitte retracted its audit opinions for 1996 and 1997. A subsequent investigation and re-audit resulted in restated financial reports. Drabinsky and Gottlieb were suspended, fired, and convicted of fraud.

125. Livent filed for insolvency protection in both Canada and the United States in November 1998 and sold its assets in August 1999. It went into receivership the following month. The trial judge found that Livent lost $113,000,000 between the time of Deloitte's negligent failure to end its relationship with Livent and Livent's insolvency. He reduced that amount by 25 percent for contingencies and awarded $84,750,000 in damages. Livent seeks to recover this loss from Deloitte. ***

126. Livent sued Deloitte for $450,000,000 and other relief. It advanced concurrent claims in tort and contract; the parties agreed that the damages under either head would be the same. Livent claimed that Deloitte was responsible for every dollar Livent lost from the date of Deloitte's breach of duty. Deloitte's defence was that most of the losses claimed were beyond the scope of Deloitte's legal responsibility. ***

133. The law of negligent misstatement has limited recovery of pure economic (financial) loss for two reasons. The first reason is that it may be unfair to hold a person who makes a negligent misstatement liable for all loss incurred thereafter, where other decisions and acts contributed to that loss. This is referred to as the fair allocation of loss principle. The second reason is to avoid the spectre of indeterminate liability, which the law of negligence has never countenanced.

134. These two reasons—one of principle and the other of policy—are complementary. They work together to ensure fair outcomes and promote predictability in the law. ***

175. Although in many respects I agree with Gascon and Brown JJ.'s articulation of the general framework that governs this matter, I part company with my colleagues in two key respects. First, I take the view that, for Livent to make out its claim, it must prove on the evidence the elements required to establish Deloitte's liability on the basis of impaired shareholder supervision. *** I conclude *** that reliance cannot be presumed, but must be proved.

176. Second, I take a different view of indeterminate liability than my colleagues. They assert that liability is not indeterminate where a reviewing court can set a value or time frame for a plaintiff's claimed loss ex post facto. However, the common law's policy against indeterminacy is directed at ensuring that auditors and other advisors can determine the scope of their liability at the time they take on an engagement and render their services. The question is whether an auditor or other advisor was able to gauge the scale of its potential liability—in terms of the types of losses for which it undertook responsibility—before embarking on a course of conduct. Although Deloitte might have been in a position to identify the total net value of Livent, Livent has not proved that Deloitte bore responsibility for the myriad ways that Livent could have gone about depleting its value after receiving the auditor's statements. This is what makes the liability identified by my colleagues indeterminate and therefore outside the scope of the duty of care. ***

GASCON AND BROWN JJ. (KARAKATSANIS AND ROWE JJ. concurring): ***

3. *** In *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.), this Court recognized that a statutory audit is prepared to allow shareholders to collectively "supervise management and to take decisions with respect to matters concerning the proper overall administration of the corporatio[n]" which permits "the shareholders, acting as a group, to safeguard the interests of the corporatio[n]" (para. 56 (emphasis deleted)). This describes precisely the function which Livent's shareholders were unable to discharge by reason of Deloitte's negligence. As a consequence, Livent's corporate life was artificially prolonged, resulting in the interim deterioration of its finances. There was a sufficient evidentiary basis for liability based on impaired shareholder supervision. Application of the *Anns/Cooper* framework, coupled with the basis for auditor liability specifically identified by this Court in *Hercules*, would lead us to uphold the trial judge's finding of liability in relation to the negligently prepared statutory audit. ***

Facts and Judicial History

5. We generally agree with the facts and judicial history set out by the Chief Justice in her reasons. In particular, she correctly identifies the trial judge's core finding that Deloitte's conduct fell below the standard of care on two occasions: "… either when it failed to discover the fraud and act on that discovery in August 1997, or when it signed off on Livent's 1997 financial statements in April 1998" ***. ***

6. The trial judge's findings of negligence can be divided into two separate events: (1) Deloitte's approval of a 1997 press release ("Press Release") and provision of a comfort letter ("Comfort Letter"); and (2) Deloitte's preparation and approval of the 1997 clean audit opinion ("1997 Audit"). We would not label all of these documents "audit statements". Indeed, collapsing the distinctions between these documents obfuscates a proper duty of care analysis.

7. Livent asserts that it detrimentally relied on Deloitte in each of these events, which impaired its ability to oversee its operations. Specifically, Livent says that, had Deloitte been prudent in relation to these representations, Livent's life would not have been artificially extended and that, in turn, it would have suffered less corporate loss (calculated as the increase in the deficit between its liabilities and assets at the time of its liquidation) ***.

10. *** The purpose underlying the Press Release and the Comfort Letter is critical. It was not to inform *Livent* of its own financial position, but rather, to inform *investors* of Livent's financial position, furnishing "comfort" in respect of their investment ***. *** Deloitte approved the Press Release and Comfort Letter—all, seemingly, to maintain its profitable relationship with Livent. ***

15. We reiterate that the *purpose* of the representation is critical. Unlike the Press Release and Comfort Letter (which were intended to inform *investors* of Livent's financial position), the 1997 Audit was intended to inform *Livent* of its own financial position for various purposes, including, most importantly, shareholder oversight of management. ***

A. Duty of Care ***

(a) Stage One: Prima Facie Duty of Care

23. In *Cooper* [§13.4.1.2], this Court recognized that "foreseeability alone" is not enough to establish a *prima facie* duty of care (para. 22; see also *Edwards*, at para. 9). In doing so, it signalled a shift from the *Anns* test, which had grounded the recognition of a *prima facie* duty upon mere foreseeability of injury (*Hercules*, at paras. 25 and 27; *Norsk*, at p. 1154; *Bow Valley*, at para. 61). After *Cooper*, the first stage of the *Anns/Cooper* framework would require "something more" (*Cooper*, at para. 29). That "something more" is *proximity* ***.

24. In *Cooper*, the Court did not indicate whether proximity or reasonable foreseeability should be assessed first. In cases of negligent misrepresentation or performance of a service, however, proximity will be more usefully considered before foreseeability. What the defendant reasonably foresees as flowing from his or her negligence depends upon the characteristics of his or her relationship with the plaintiff, and specifically, in such cases, the purpose of the defendant's undertaking. That said, both proximity and foreseeability of injury merit further reflection.

(i) Proximity

25. Assessing proximity in the *prima facie* duty of care analysis entails asking whether the parties are in such a "close and direct" relationship that it would be "just and fair having regard to that relationship to impose a duty of care in law" (*Cooper*, at paras. 32 and 34). ***

30. In cases of pure economic loss arising from negligent misrepresentation or performance of a service, two factors are determinative in the proximity analysis: the defendant's undertaking and the plaintiff's reliance. Where the defendant undertakes to provide a representation or service in circumstances that invite the plaintiff's reasonable reliance, the defendant becomes obligated to take reasonable care. And, the plaintiff has a right to rely on the defendant's undertaking to do so ***. These corollary rights and obligations create a relationship of proximity ***.

31. Rights, like duties, are, however, not limitless. Any reliance on the part of the plaintiff which falls outside of the scope of the defendant's undertaking of responsibility—that is, of the purpose for which the representation was made or the service was undertaken—necessarily falls outside the scope of the proximate relationship and, therefore, of the defendant's duty of care ***. This principle, also referred to as the "end and aim" rule, properly limits liability on the basis that the defendant cannot be liable for a risk of injury against which he did not undertake to protect (*Glanzer*, at pp. 275 and 277; *Ultramares Corp.*, at pp. 445-46; *Haig*, at p. 482). By assessing all relevant factors arising from the relationship between the parties, the proximity analysis not only determines the *existence* of a relationship of proximity, but also delineates the *scope* of the rights and duties which flow from that relationship. In short, it furnishes not only a "principled basis upon which to draw the line between those to whom the duty is owed and those to whom it is not" (*Fullowka* [*v. Royal Oak Ventures Inc.*, 2010 SCC 5], at para. 70), but also a principled delineation of the scope of such duty, based upon the purpose for which the defendant undertakes responsibility. As we will explain, these principled limits are essential to determining the type of injury that was a reasonably foreseeable consequence of the defendant's negligence.

(ii) Reasonable Foreseeability ***

33. Broadly speaking, reasonable foreseeability concerns the likelihood of injury arising from the defendant's negligence (*Donoghue*, at p. 580 [§13.1.1]). This inquiry is not amenable to, and does not require, actuarial precision. The jurisprudence gives content, however, to the foreseeability inquiry, providing courts with guidance. ***

35. As a matter of first principles, it must be borne in mind that an injury to the plaintiff in this sort of case flows from the fact that he or she detrimentally relied on the defendant's undertaking, whether it take the form of a representation or the performance of a service. It follows that an injury to the plaintiff will be reasonably foreseeable if (1) the defendant should have reasonably foreseen that the plaintiff would rely on his or her representation; and (2) such reliance would, in the particular circumstances of the case, be reasonable (*Hercules*, at para. 27). Both the reasonableness and the reasonable foreseeability of the plaintiff's reliance will be determined by the relationship of proximity between the parties; a plaintiff has a right to rely on a defendant to act with reasonable care for the particular purpose of the defendant's undertaking, and his or her reliance on the defendant for that purpose is therefore both reasonable and reasonably foreseeable. But a plaintiff has no right to rely on a defendant for any other purpose, because such reliance would fall outside the scope of the defendant's undertaking. As such, any consequent injury could not have been reasonably foreseeable. ***

(b) Stage Two: Residual Policy Considerations ***

40. *** In *Cooper*, this Court identified factors which are external to the relationship between the parties, including (1) whether the law already provides a remedy; (2) whether recognition of the duty of care creates "the spectre of unlimited liability to an unlimited class"; and (3) whether there are "other reasons of broad policy that suggest that the duty of care should not be recognized" (para. 37). In this way, the residual policy inquiry is a normative inquiry. It asks whether it would be better, for reasons relating to legal or doctrinal order, or reasons arising from other societal concerns, not to recognize a duty of care in a given case. ***

42. In this case, the Chief Justice finds that, if it were necessary to proceed to the second stage of the *Anns/Cooper* framework, she would insulate Deloitte from liability based on the residual policy consideration of indeterminacy (para. 166). We concede that indeterminate liability may, in some cases, be a legitimate residual policy consideration (*Cooper*, at paras. 37 and 54; *Hercules*, at para. 31). In our view, however, rarely, if ever, should a concern for indeterminate liability persist after a properly applied proximity and foreseeability analysis (*Saadati*, at para. 34 [§19.2.1.3]; *Fullowka*, at para. 70). Robust application of stage one of the *Anns/Cooper* framework should almost always obviate concerns for indeterminate liability. This follows from an appreciation of what indeterminate liability, as a concept, actually means. ***

B. Application

46. Having set out the proper legal framework for establishing liability in cases of pure economic loss arising from negligent misrepresentation or performance of a service, we turn now to apply that framework to the trial judge's two findings of negligence in this case. ***

(1) Solicitation of Investment (August to October 1997)

(a) Prima Facie Duty of Care

49. The proximity analysis first asks whether the relationship at issue falls within, or is analogous to, a previously recognized category of proximity (*Cooper*, at para. 36; *Edwards*, at para. 9).

50. In *Hercules*, this Court found that an auditor may be in a proximate relationship with its corporate client sufficient to give rise to a duty of care. That proximate relationship was not, however, between an auditor and its client at large. Rather, the recognized relationship was limited to the preparation of a statutory audit (para. 14). ***

52. The mere fact that proximity has been recognized as existing between an auditor and its client for *one* purpose is insufficient to conclude that proximity exists between the same parties for *all* purposes. *** For this reason, we do not agree that this Court has previously established a proximate relationship as between an auditor and its client for the purposes of soliciting investment. In these circumstances, we must undertake a full proximity analysis.

53. As we have indicated above, the full proximity analysis in cases of negligent misrepresentation is focussed upon the purpose of the defendant's undertaking and the plaintiff's reliance. From August to October of 1997, the services which Deloitte provided to Livent—particularly its ongoing assistance in relation to the Press Release and the provision of the Comfort Letter—were undertaken for the purpose of helping Livent to solicit investment. Given this undertaking, Livent was entitled to rely upon Deloitte to carry out these services with reasonable care. From this, it follows that a relationship of proximity arose *in respect of the content of Deloitte's undertaking*. Deloitte's undertaking did *not* entitle Livent to rely on Deloitte's services and representations for *all* possible purposes. Rather, the "close and direct" relationship which obligated Deloitte to act with reasonable care was limited to the purpose for which Deloitte undertook to act. In this regard, we agree with the Chief Justice that "[l]oss that results from [Livent's] inability to attract investment … may fall within the scope of Deloitte's duty of care", though only in relation to the Press Release and Comfort Letter (para. 153). ***

55. In cases of negligent misrepresentation or performance of a service, a plaintiff's injury will be reasonably foreseeable where (1) the defendant should reasonably foresee that the plaintiff will rely on his or her representation; and (2) reliance by the plaintiff would, in the particular circumstances of the case, be reasonable (*Hercules*, at para. 27). Whether reliance is reasonable and reasonably foreseeable will turn on whether the plaintiff had a right to rely on the defendant *for that purpose*. Here, Livent argues that it detrimentally relied on Deloitte's services and representations to artificially extend the life of the corporation. This reliance is not, however, tied to the solicitation of investment, but was a matter of oversight of management. Phrased in terms of Deloitte's undertaking, during the fall of 1997 Deloitte undertook to assist Livent in soliciting investment, not in oversight of management. Losses related to this undertaking—for example, an inability to solicit investment because of Deloitte's negligence—may be recoverable from Deloitte. But losses outside the scope of this undertaking, including those claimed here relating to a lack of oversight of management extending Livent's solvency, are not recoverable from Deloitte. Simply put, Deloitte never undertook, in preparing the Comfort Letter, to assist Livent's shareholders in overseeing management; it cannot therefore be held liable for failing to take reasonable care to assist such oversight. And, given that Livent had no right to rely on Deloitte's representations for a purpose other than that for which Deloitte undertook to act, Livent's reliance was neither reasonable nor reasonably foreseeable. Consequently, the increase in Livent's liquidation deficit which arose from its reliance on the Press Release and Comfort Letter was not a reasonably foreseeable injury. ***

(b) Residual Policy Considerations

57. Having concluded that no *prima facie* duty of care arose in respect of Deloitte's assistance in soliciting investment and the resulting increase in Livent's liquidation deficit, there is no need to consider residual policy considerations.

(2) 1997 Clean Audit Opinion (April 1998)

(a) Prima Facie Duty of Care

58. This Court has previously established that an auditor owes its corporate client a duty of care in the preparation of a statutory audit. It follows that the established proximate relationship in *Hercules* will be dispositive of the existence of a duty of care in this case, unless the purpose of Deloitte's undertaking to prepare such an audit in this case can be distinguished from the undertaking in *Hercules Management Ltd.*. As we will show, it cannot.

59. In *Hercules*, at para. 48, this Court cited Lord Oliver's statement in *Caparo Industries plc*, at p. 583, identifying the purposes of a statutory audit:

> It is the auditors' function to ensure, so far as possible, that the financial information as to the company's affairs prepared by the directors accurately reflects the company's position in order first, *to protect the company itself from the consequences of undetected errors or, possibly, wrongdoing … and, second, to provide shareholders with reliable intelligence for the purpose of enabling them to scrutinise the conduct of the company's affairs and to exercise their collective powers to reward or control or remove those to whom that conduct has been confided.* ***

62. Given the foregoing, no basis exists for distinguishing the purpose of the statutory audit in this case from the purpose which underlay the statutory audit in *Hercules*. It follows that proximity is established between Livent and Deloitte in relation to the statutory audit, on the basis of the previously recognized proximate relationship identified by this Court.

63. Livent says that the increase in its liquidation deficit was a reasonably foreseeable consequence of Deloitte's negligent audit, because the audit preserved a false financial picture upon which Livent relied to artificially extend its solvency and delay filing for bankruptcy. In other words, if Deloitte had taken reasonable care in auditing Livent, then Livent would have discovered the fraud and avoided the interim deterioration of its assets.

64. In our view, this type of injury was a reasonably foreseeable consequence of Deloitte's negligent audit. The purpose of the 1997 Audit was, as this Court described in *Hercules*, two-fold: (1) to protect the company from the consequences of undetected errors and wrongdoing; and (2) to provide shareholders with reliable intelligence enabling oversight (para. 48, citing *Caparo Industries plc*, at p. 583). Those purposes, as we have already described in our discussion of proximity generally, inform the scope of reasonably foreseeable injury. Specifically, at the time Deloitte undertook to provide the 1997 Audit, Livent was entitled to rely on Deloitte to take reasonable care in doing so for these recognized purposes. Livent's reliance on Deloitte for the purpose of overseeing the conduct of management was therefore both reasonable and reasonably foreseeable. And, as Livent's injury arises from its detrimental reliance, the injury linked to that reliance is itself reasonably foreseeable.

65. It follows that the type of injury Livent suffered here was a reasonably foreseeable consequence of Deloitte's negligence. Through the 1997 Audit, Deloitte undertook to assist Livent's shareholders in scrutinizing management conduct. By negligently conducting the audit, and impairing Livent's shareholders' ability to oversee management, Deloitte exposed Livent to reasonably foreseeable risks, including "business losses" that would have been avoided with a proper audit. Indeed, the risk of injury flowing from undetected fraud is *precisely* the type of injury statutory audits seek to avoid. ***

(b) Residual Policy Considerations

67. Having found a proximate relationship based on a previously recognized category, we need not consider residual policy considerations to negate or limit the scope of the duty of care (*Cooper*, at para. 39). Nonetheless, as the Chief Justice finds, in the alternative, that the policy consideration of indeterminate liability would deny recovery in this case (paras. 165-166), it is useful to examine how the established proximate relationship engaged in this case precludes indeterminate liability.

68. As discussed, the character of indeterminacy in these cases has three pertinent aspects: (1) temporal; (2) claimant; and (3) value (*Hercules*, at para. 31, citing *Ultramares Corp.*, at p. 444). None of them arise here ***.

69. Here, as to temporal indeterminacy, any suggestion that Livent could recover indefinitely from the negligent preparation of the 1997 Audit fundamentally mischaracterizes the scope of *annual* statutory audits. The injury flowing from the 1997 Audit could not be assessed over an *indeterminate* time window. Rather, statutory audits must occur annually (OBCA, s. 154). As a result, the liability that could attach to one year's negligent audit could not extend beyond the following year's audit, which would effectively supersede the prior year's audit as the factual and legal cause of the injury alleged. Put simply, the time window during which liability might flow from a single negligent statutory audit is not indeterminate. It is one year.

70. Regarding claimant indeterminacy, the class of claimants here could not be further from *indeterminate*: it represents one single claimant—Livent. In *Hercules*, this Court noted that "audit reports will be relied on by many different people (e.g., shareholders, creditors, potential take-over bidders, investors, etc.)" (para. 32). That claim gave rise to indeterminate liability because the class of claimants (the "many different people") was indeterminate. For example, any number of investors could rely on an audit to inform their investment decisions. This case, in contrast, is entirely distinguishable. The fact of a single potential claimant raises no concern of claimant indeterminacy.

71. We note, parenthetically, that Deloitte characterizes Livent's claim as, in reality (that is, in light of its insolvency), a claim by its various stakeholders. But this submission conflates the plaintiff, Livent, with the stakeholders who may benefit from the success of Livent's claim, thereby disregarding Livent's separate corporate personality. ***

72. The absence of temporal and claimant indeterminacy in turn explains the absence of value indeterminacy in this case. Here, Livent's improvident use of investment funds could not result in liability of an *indeterminate* value. Rather, the liability in this case could not exceed the losses of a single corporation. When undertaking to audit Livent, Deloitte must have known that Livent was a substantial corporation, and in turn, that it could suffer large financial losses if misinformed by its auditor. But *significant* liability is distinct from *indeterminate* liability (*Gross*, at para. 38). Put differently, Deloitte was, indeed, "able to gauge the scale of its potential liability" before undertaking the 1997 Audit (Chief Justice's reasons, at para. 176). This is a far cry from the limitless potential quantum of lost investments by innumerable third parties relying on audit statements for their own investment decisions (see *Hercules*, at para. 32). The concern that Deloitte did not know "the scope of [its] liability at the time [it took] on [its] engagement" with Livent (Chief Justice's reasons, at para. 176) conflates *indeterminate* liability with *undetermined* liability. ***

75. The lack of indeterminacy here between Deloitte (an auditor) and Livent (its corporate client) is unsurprising given (1) this Court's recognition in *Hercules* that a duty of care exists between an auditor and its corporate client in relation to a statutory audit; and (2) this Court's direction in *Cooper* that the second stage of the *Anns/Cooper* framework need not be considered where a previously recognized proximate relationship exists.

(c) Remoteness

76. The Chief Justice says that Deloitte's complete immunity from liability would similarly flow from a remoteness analysis (para. 173). We disagree.

77. In a successful negligence action, a plaintiff must demonstrate that (1) the defendant owed him or her a duty of care; (2) the defendant's behaviour breached the standard of care; (3) the plaintiff sustained damage; and (4) the damage was caused, in fact and in law, by the defendant's breach (*Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114 (S.C.C.), at para. 3 [§17.1.2]; *Saadati*, at para. 13 [§19.2.1.3]). The principle of remoteness, or legal causation, examines whether "the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable" (*Mustapha*, at para. 12 ***). It is trite law that "it is the foresight of the reasonable man which alone can determine responsibility" (*Mustapha*, at paras. 11-13, citing *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co.*, [1961] A.C. 388 (New South Wales P.C.), at p. 424 [§17.1.1]). Therefore, injury will be sufficiently related to the wrongful conduct if it is a reasonably foreseeable consequence of that conduct.

78. We acknowledge that remoteness, so understood, overlaps conceptually with the reasonable foreseeability analysis conducted in the *prima facie* duty of care analysis (*Mustapha*, at para. 15). But the

two are distinct: the duty analysis is concerned with *the type of injury* that is reasonably foreseeable as flowing from the defendant's conduct, whereas the remoteness analysis is concerned with the reasonable foreseeability of *the actual injury* suffered by the plaintiff (L. N. Klar and C. S. G. Jefferies, *Tort Law*, (6th ed. 2017), at p. 565: "Remoteness questions deal with how far liability should extend in reference to *injuries caused to the plaintiff*, once a duty relationship … [has] been established" (emphasis added)).

79. Remoteness, at its core, turns on the reasonable foreseeability of the actual injury suffered by the plaintiff. But, and as we have explained, the loss here—stemming from Deloitte's failure to fulfill the specific undertaking it made to Livent—*was* reasonably foreseeable. It follows that remoteness is not a bar to Livent's recovery. ***

(d) Additional Basis for Limiting Liability: Information, Advice and the "SAAMCO Principle"

86. The Chief Justice seeks to limit Deloitte's liability because it merely provided "information" to Livent, not "advice", and, as a consequence, did not "assume responsibility for what the shareholders decide[d] to do with that information" (para. 170). In this regard, she cites (at para. 149) the following passage from *Hughes-Holland v. BPE Solicitors*, [2017] UKSC 21, [2017] 2 W.L.R. 1029 (U.K. S.C.), at para. 44:

> A valuer or a conveyancer, for example, will rarely supply more than a specific part of the material on which his client's decision is based. He is generally no more than a provider of what Lord Hoffmann [in *SAAMCO*] called "information". At the opposite end of the spectrum, an investment adviser advising a client whether to buy a particular stock, or a financial adviser advising whether to invest self-invested pension fund in an annuity are likely, in Lord Hoffmann's terminology, to be regarded as giving "advice". Between these extremes, every case is likely to depend on the range of matters for which the defendant assumed responsibility and no more exact rule can be stated.

87. It is true that Deloitte, as auditor, did not advise Livent on its business decisions. But it nevertheless "assumed responsibility" over providing accurate information upon which the shareholders could rely to scrutinize management conduct. Deloitte does not escape liability simply because a negligent audit, in itself, cannot cause financial harm. Audits never, in themselves, cause harm. It is only when they are detrimentally relied upon that tangible consequences ensue. ***

90. In simple terms, the *SAAMCO* principle denies recovery for pure economic loss where the plaintiff's injury would still have occurred even if the defendant's negligent misrepresentation were factually true. Rephrased as a test, the principle denies liability where an *alternate* cause that is *unrelated* to the defendant's negligence is the true source of the plaintiff's injury. This alternate and unrelated cause explains why the truth of the negligent misstatement has no bearing on the plaintiff's ultimate injury (i.e., because, even with that truth, the injury would have flowed as a result of the alternate cause). Or, framed from the perspective of the duty of care, the defendant could not have undertaken to protect against injuries that would have been caused by alternate and unrelated sources. In *SAAMCO*, the House of Lords explained the principle with the commendably Albertan example of a mountaineer:

> A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee. [p. 213]

91. In this example, the doctor's negligent misrepresentation (the positive knee diagnosis) is a cause that is alternate and unrelated to the cause of the mountaineer's injury (a mountaineering accident unrelated to the knee, for example, an avalanche). As a result, even had the doctor's negligent misrepresentation been true (i.e., even if the mountaineer's knee had been fit), the injury would still have occurred, since the fitness of his knee would not have prevented the injury caused by the avalanche. In other words, the doctor could not have undertaken to protect against an avalanche, which is unrelated to his or her diagnosis.

92. Deloitte is unlike the doctor. Deloitte's negligence related to a statutory audit, a purpose of which is management oversight by shareholders. That oversight, in turn, informs (or is related to) subsequent business decisions by the corporation. It follows that Livent's trading losses were not an alternate and

unrelated cause of Livent's injury. ***

93. It therefore follows from a proper understanding of the *SAAMCO* principle that it does not limit Deloitte's liability in respect of the 1997 Audit.

94. We add, however, that a full consideration of *SAAMCO*'s application in Canadian law by this Court should await future cases, with greater consideration of the principle by lower courts, more comprehensive submissions by counsel, and critically, with facts more analogous to those in the *SAAMCO* jurisprudence. ***

95. In any event, the *SAAMCO* principle, at least in the manner the Chief Justice applies it here, conflicts with Canadian jurisprudence. Under established Canadian tort law, a defendant is liable if the plaintiff proves—in respect of causation—that the defendant caused the plaintiff's injury in fact (*Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181(S.C.C.), at para. 8 [§16.2.3]) and in law (*Mustapha*, at paras. 12-13 [§17.1.2]). As we have already explained, Livent proved both in respect of its injuries after the 1997 Audit. It follows that Deloitte is liable for Livent's injuries following that audit. ***

C. Defences

96. Finally, having concluded that we would uphold the trial judge's finding that Deloitte is liable for its negligence in relation to the statutory audit, we must consider the two defences Deloitte advanced before this Court. ***

(1) Illegality

98. The defence of illegality [§18.3] bars an otherwise valid action in tort on the basis that the plaintiff has engaged in illegal or immoral conduct and, therefore, should not recover (*Hall v. Hebert*, [1993] 2 S.C.R. 159 (S.C.C.), at p. 169; *British Columbia v. Zastowny*, 2008 SCC 4, [2008] 1 S.C.R. 27 (S.C.C.), at para. 20). Grounded in public policy, it is available in very "limited" circumstances, only where it is necessary to preserve the "integrity of the justice system" (*Hall*, at pp. 179-80). And, the integrity of the justice system will only be compromised where a "damage award in a civil suit would, in effect, allow a person to profit from illegal or wrongful conduct, or would permit an evasion or rebate of a penalty prescribed by the criminal law" (*Hall*, at p. 169; *Zastowny*, at para. 3).

99. Here, the only illegal or wrongful conduct was committed by Livent's directors, Drabinsky and Gottlieb, and portions of management. It follows that, for Deloitte to rely on the defence of illegality, it must be able to attribute the "illegal or wrongful conduct" of certain directors and managers to Livent itself, the plaintiff in this case. ***

103. *** While public policy and judicial necessity may favour imputing the corporation with the actions of its directing minds in certain criminal prosecutions, the same cannot be said of attributing the actions of a directing mind for the purposes of a civil suit in the context of an auditor's negligent preparation of a statutory audit. As indicated above, the very purpose of a statutory audit is to provide a means by which fraud and wrongdoing may be discovered. It follows that denying liability on the basis that an individual within the corporation has engaged in the very action that the auditor was enlisted to protect against would render the statutory audit meaningless ***. As Livent submitted, it would be perverse to deny auditor's liability for negligently failing to detect fraud "where the harm [to the corporation] is likely to occur and likely to be most serious" ***. ***

105. Finally, given the limited application of the defence of illegality, as recognized by this Court in *Hall* and *Zastowny*, we find no further compelling reason to justify the use of the corporate identification doctrine in these circumstances.

(2) Contributory Fault

106. In the alternative, Deloitte submits that the Court of Appeal erred in holding Deloitte liable for the entirety of the proven loss, and specifically that Livent should have been found contributorily at fault in accordance with s. 3 of the *Negligence Act*, R.S.O. 1990, c. N.1 *** [§18.2.1.1].

107. Again, the only conduct implicating Livent in this case was committed by Livent's directors, Drabinsky and Gottlieb, and portions of management. It follows that, for Deloitte to rely on the defence of contributory fault, it must be able to attribute the conduct of certain directors and managers to Livent itself. ***

109. In any event, we repeat our earlier conclusion that where, as here, the use of the corporate identification doctrine would undermine the very purpose of establishing a duty of care, it will rarely be in the public interest to apply it. A negligent auditor cannot limit liability for its own negligence by attributing to the corporation the wrongful acts of its employees, such acts being the very conduct that the auditor undertook to uncover. Additionally, had Deloitte sought to limit its liability through apportionment, it need not have relied on the doctrine of corporate identification at all. Specifically, Deloitte could have brought third party claims against the guilty parties, Drabinsky and Gottlieb, for their wrongful actions. For whatever reason, it chose not to do so. Nonetheless, the availability of a third party claim against a fraudulent director weighs against the application of the doctrine. In this case, it is not in the public interest to undermine separate legal personality where the wrongdoer could have been properly named as a third party.

D. Conclusion ***

111. In our view, the trial judge and Court of Appeal erred in finding that Deloitte's negligence in relation to the Press Release and Comfort Letter resulted in injuries that were reasonably foreseeable in light of the proximate relationship between the parties. At that time, Deloitte's services were engaged for the purpose of soliciting investment, not management oversight. As Livent's losses did not flow from a failure to solicit investment, we would deny recovery for the increase in Livent's liquidation deficit beginning in the fall of 1997.

112. We would, however, allow recovery for the increase in Livent's liquidation deficit which followed the 1997 Audit. We agree with the trial judge that "Deloitte should not have signed off on the 1997 Audit in early April 1998" *** and that the increase in Livent's liquidation deficit which followed fell within the duty of care owed by Deloitte to Livent in relation to the preparation of a statutory audit, the express purpose of which was to assist Livent in management oversight.

113. The trial judge assessed Livent's damages following the 1997 Audit at $53.9 million ***. Applying the trial judge's 25 percent contingency reduction [for "contingencies" said to represent the amount Livent would have lost, even without Deloitte's negligence] to this amount results in a final damages assessment of $40,425,000. This is the amount for which Deloitte is liable.

114. Throughout these proceedings, the parties have primarily framed this dispute as one in negligence. Indeed, this was noted by the trial judge (at para. 47). At trial, Livent conceded that its losses for negligent performance of a service or breach of contract would be identical (*ibid.*). The trial judge agreed, finding that Livent's claim in contract "succeed[ed] … for the [same] reasons" as its claim of negligent performance of a service and that the elements of its claim in contract were "incorporated by reference to the finding of 'negligence'" (para. 243). Given the above, we would impose the same quantum of liability on Deloitte for the concurrent claim in breach of contract. ***

REFLECTION:

- *Why was Deloitte liable to Livent for the audit, but not for the solicitation of investment? What was the nature of the duty of care Deloitte owed in respect of the solicitation of investment? Was that duty of care breached?*
- *Of the disagreement between McLachlin C.J. (dissenting) and Gascon and Brown JJ. (writing for a majority) over the indeterminacy of Deloitte's liability, who has the more compelling argument?*
- *Aside from Deloitte, who else could have been held liable to Livent? Why might Deloitte have decided not to bring third party claims against potential co-defendants?*[592]

19.3.1.4 Cross-references

- *R v. Imperial Tobacco Canada Ltd* [2011] SCC 42, [32]-[60]: §19.5.2.1.

[592] See "Drabinsky and Gottlieb fraud convictions upheld" CBC News (Sep 13, 2011).

19.3.1.5 Further material

- V.D. Feo, "*CM Callow v. Zollinger*, Reconceptualized Through the Tort of Negligent Misrepresentation" (2022) 27 Appeal: Review of Current L & L Reform 103.
- K. Barker (ed), *The Law of Misstatements: 50 Years on from Hedley Byrne v. Heller* (Oxford: Hart Publishing, 2015).
- J. Blom, *Advanced Workshop in Contract-Tort Problems* (Vancouver: CLEBC, 2014) 📺.

19.3.2 Negligent supply of shoddy goods or structures

19.3.2.1 Winnipeg Condo. Corp. No. 36 v. Bird Constr. Co. [1995] CanLII 146 (SCC)

Supreme Court of Canada – 1995 CanLII 146

LA FOREST J. (FOR THE COURT): ***

3. On April 19, 1972, a Winnipeg land developer, Tuxedo Properties Co. Ltd. ("Tuxedo"), entered into a contract ("the General Contract") with a general contractor, Bird Construction Co. Limited ("Bird"), for the construction of a 15-storey, 94-unit apartment building. In the General Contract, Bird undertook to construct the building in accordance with plans and specifications prepared by the architectural firm of Smith Carter Partners ("Smith Carter"), with whom Tuxedo also had a contract. On June 5, 1972, Bird entered into a subcontract with a masonry subcontractor, Kornovski & Keller Masonry Ltd. ("Kornovski & Keller"), under which the latter undertook to perform the masonry portion of the work specified under the General Contract. The work called for by the General Contract commenced in April, 1972 and the building was substantially completed by December, 1974. ***

6. On May 8, 1989, a storey-high section of the cladding, approximately twenty feet in length, fell from the ninth storey level of the building to the ground below. The Condominium Corporation retained engineering consultants who conducted further inspections. Following these inspections, the Condominium Corporation had the entire cladding removed and replaced at a cost in excess of $1.5 million. ***

12. This case gives this Court the opportunity once again to address the question of recoverability in tort for economic loss. *** I stressed in *Norsk* [*Canadian National Railway v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021] that the question of recoverability for economic loss must be approached with reference to the unique and distinct policy issues raised in each of these categories. *** The present case, which involves the alleged negligent construction of a building, falls partially within the ["negligent supply of shoddy goods or structures"] category, although subject to an important caveat. The negligently supplied structure in this case was not merely shoddy; it was dangerous. In my view, this is important because the degree of danger to persons and other property created by the negligent construction of a building is a cornerstone of the policy analysis that must take place in determining whether the cost of repair of the building is recoverable in tort. As I will attempt to show, a distinction can be drawn on a policy level between "dangerous" defects in buildings and merely "shoddy" construction in buildings and that, at least with respect to dangerous defects, compelling policy reasons exist for the imposition upon contractors of tortious liability for the cost of repair of these defects.

13. Traditionally, the courts have characterized the costs incurred by a plaintiff in repairing a defective chattel or building as "economic loss" on the grounds that costs of those repairs do not arise from injury to persons or damage to property apart from the defective chattel or building itself ***. ***

16. Proceeding on the assumption, then, that the losses claimed in this case are purely economic, the sole issue before this Court is whether the losses claimed by the Condominium Corporation are the type of economic losses that should be recoverable in tort. In coming to its conclusion that the losses claimed by the Condominium Corporation are not recoverable in tort, the Manitoba Court of Appeal, we saw, followed the reasoning of the House of Lords in *D. & F. Estates Ltd. v. Church Commissioners for England*, [1988] 2 All E.R. 992 (H.L.). In that case, the House of Lords found that the cost of repairing a defect in a building

is not recoverable in negligence by a successor in title against the original contractor in the absence of a contractual relationship or a special relationship of reliance. ***

18. The House of Lords dismissed the appeal on two principal grounds. First, they decided that any duty owed by a contractor to a home owner with respect to the quality of construction in a building must arise in contract, and not in tort. They based this conclusion upon a concern that allowing recoverability for the cost of repairing defects in buildings would have the effect of creating a non-contractual warranty of fitness; see *D. & F. Estates*, at p. 1007.

19. Second, they decided that a contractor can only be held liable in tort to subsequent purchasers of a building when the contractor's negligence causes physical injury to the purchasers, damage to their other property, or where a special relationship of reliance has developed between the contractor and the purchasers along the lines suggested in *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465 (H.L.) [**§19.3.1.2**]. See *D. & F. Estates*, at p. 1014. ***

22. *** I think it important to clarify why the *D. & F. Estates* case should not, in my view, be seen as having strong persuasive authority in Canadian tort law as that law is currently developing. My reasons for coming to this conclusion are twofold: first, to the extent that the decision of the House of Lords in *D. & F. Estates* rests upon the assumption that liability in tort for the cost of repair of defective houses represents an unjustifiable intrusion of tort into the contractual sphere, it is inconsistent with recent Canadian decisions recognizing the possibility of concurrent contractual and tortious duties ***. ***

25. *** In my view, a contractor's duty to take reasonable care arises independently of any duty in contract between the contractor and the original property owner. The duty in contract with respect to materials and workmanship flows from the terms of the contract between the contractor and home owner. By contrast, the duty in tort with respect to materials and workmanship flows from the contractor's duty to ensure that the building meets a reasonable and safe standard of construction. For my part, I have little difficulty in accepting a distinction between these duties. The duty in tort extends only to reasonable standards of safe construction and the bounds of that duty are not defined by reference to the original contract. Certainly, for example, a contractor who enters into a contract with the original home owner for the use of high-grade materials or special ornamental features in the construction of the building will not be held liable to subsequent purchasers if the building does not meet these special contractual standards. However, such a contract cannot absolve the contractor from the duty in tort to subsequent owners to construct the building according to reasonable standards. ***

26. Thus, the fact that Bird negotiated a contract with Tuxedo, the original owner of the building, does not insulate Bird from a separate duty to the current owners of the building. This duty arises out of the danger created by the work and not the specifications contained in the contract. ***

27. The second reason that the *D. & F. Estates* decision should not be regarded as strong persuasive authority in the Canadian context is that the approaches taken by English and Canadian courts with respect to the recoverability of economic loss have, in recent years, diverged significantly. The decision by the House of Lords in *D. & F. Estates* was the penultimate step in a path of reasoning followed by the Law Lords culminating in *Murphy* [*v. Brentwood District Council*, [1990] 2 All E.R. 908 (H.L.)], where they overruled their earlier decision in *Anns* [*v. Merton London Borough Council*, [1977] 2 All E.R. 492] and re-established a broad bar against recovery for pure economic loss in tort. This is a path this Court has chosen not to follow.

28. The divergence in approach between this Court and the House of Lords relates in large part to the question whether courts should impose what, in *Norsk*, I called a "broad exclusionary rule" against recovery for economic loss in tort. In *Norsk*, I discussed the development of the rule against recovery for economic loss in tort at common law and observed that, in its broad formulation, that rule was said to exclude all claims in negligence for pure economic loss in the absence of property loss or personal injury loss (at pp. 1054-61). I then made the following observation, at pp. 1060-61:

> A new stage in the development of the law on economic loss opened with the great case of *Hedley*

> *Byrne v. Heller, supra*. The speeches of the Law Lords were principally concerned with the problem of liability for negligent words, rather than with the issue of economic loss itself …
>
> Only two of the Lords in *Hedley Byrne*, Lord Hodson and Lord Devlin, dealt specifically with the issue of economic loss. Both rejected the broad exclusionary rule. It was clear that henceforth economic loss was recoverable at least in some circumstances. With *Hedley Byrne* to guide the way, the broad rule came increasingly under attack in a variety of situations during this third phase. ***

35. In my view, it is reasonably foreseeable to contractors that, if they design or construct a building negligently and if that building contains latent defects as a result of that negligence, subsequent purchasers of the building may suffer personal injury or damage to other property when those defects manifest themselves. A lack of contractual privity between the contractor and the inhabitants at the time the defect becomes manifest does not make the potential for injury any less foreseeable. Buildings are permanent structures that are commonly inhabited by many different persons over their useful life. By constructing the building negligently, contractors (or any other person responsible for the design and construction of a building) create a foreseeable danger that will threaten not only the original owner, but every inhabitant during the useful life of the building. ***

36. In my view, the reasonable likelihood that a defect in a building will cause injury to its inhabitants is also sufficient to ground a contractor's duty in tort to subsequent purchasers of the building for the cost of repairing the defect if that defect is discovered prior to any injury and if it poses a real and substantial danger to the inhabitants of the building. *** If a contractor can be held liable in tort where he or she constructs a building negligently and, as a result of that negligence, the building causes damage to persons or property, it follows that the contractor should also be held liable in cases where the dangerous defect is discovered and the owner of the building wishes to mitigate the danger by fixing the defect and putting the building back into a non-dangerous state. In both cases, the duty in tort serves to protect the bodily integrity and property interests of the inhabitants of the building. ***

37. Apart from the logical force of holding contractors liable for the cost of repair of dangerous defects, there is also a strong underlying policy justification for imposing liability in these cases. Under the law as developed in *D. & F. Estates* and *Murphy*, the plaintiff who moves quickly and responsibly to fix a defect before it causes injury to persons or damage to property must do so at his or her own expense. By contrast, the plaintiff who, either intentionally or through neglect, allows a defect to develop into an accident may benefit at law from the costly and potentially tragic consequences. In my view, this legal doctrine is difficult to justify because it serves to encourage, rather than discourage, reckless and hazardous behaviour. Maintaining a bar against recoverability for the cost of repair of dangerous defects provides no incentive for plaintiffs to mitigate potential losses and tends to encourage economically inefficient behaviour. *** Allowing recovery against contractors in tort for the cost of repair of dangerous defects thus serves an important preventative function by encouraging socially responsible behaviour.

38. This conclusion is borne out by the facts of the present case, which fall squarely within the category of what I would define as a "real and substantial danger". It is clear from the available facts that the masonry work on the Condominium Corporation's building was in a sufficiently poor state to constitute a real and substantial danger to inhabitants of the building and to passersby. The piece of cladding that fell from the building was a storey high, was made of 4-inch thick Tyndal stone, and dropped nine storeys. Had this cladding landed on a person or on other property, it would unquestionably have caused serious injury or damage. Indeed, it was only by chance that the cladding fell in the middle of the night and caused no harm. In this light, I believe that the Condominium Corporation behaved responsibly, and as a reasonable home owner should, in having the building inspected and repaired immediately. Bird should not be insulated from liability simply because the current owners of the building acted quickly to alleviate the danger that Bird itself may well have helped to create. ***

41. Given the clear presence of a real and substantial danger in this case, I do not find it necessary to consider whether contractors should also in principle be held to owe a duty to subsequent purchasers for the cost of repairing non-dangerous defects in buildings. It was not raised by the parties. I note that appellate

courts in New Zealand (in *Bowen v. Paramount Builders (Hamilton) Ltd.*, [1977] 1 N.Z.L.R. 394 at 417 (C.A.)), Australia (*Bryan v. Moloney*, S.C. Tasmania, No. A77/1993, Oct. 6, 1993), and in numerous American states *** have all recognized some form of general duty of builders and contractors to subsequent purchasers with regard to the reasonable fitness and habitability of a building. *** For my part, I would require argument more squarely focussed on the issue before entertaining this possibility. ***

43. I conclude that the law in Canada has now progressed to the point where it can be said that contractors (as well as subcontractors, architects and engineers) who take part in the design and construction of a building will owe a duty in tort to subsequent purchasers of the building if it can be shown that it was foreseeable that a failure to take reasonable care in constructing the building would create defects that pose a substantial danger to the health and safety of the occupants. Where negligence is established and such defects manifest themselves before any damage to persons or property occurs, they should, in my view, be liable for the reasonable cost of repairing the defects and putting the building back into a non-dangerous state. ***

REFLECTION:

- *Why was the damage arising from the defective apartment building economic loss and not property damage?*
- *How was the duty owed in tort in this case distinct from the sorts of duties that arise from a contract? Does it make sense for tort duties to subsist alongside contractual duties?*
- *Do you agree with Profs. Feldthusen and Palmer that this decision improperly reallocates risk between parties and runs roughshod over industry practices of using warranties to protect purchasers' interests?*[593]

19.3.2.2 1688782 Ontario Inc. v. Maple Leaf Foods Inc. [2020] SCC 35

Supreme Court of Canada – 2020 SCC 35

BROWN, MARTIN JJ. (MOLDAVER, CÔTÉ, ROWE JJ. concurring):

1. This appeal is brought by 1688782 Ontario Inc., a former franchisee of Mr. Submarine Limited ("Mr. Sub") and the class representative of 424 other Mr. Sub franchisees ("appellant" or "Mr. Sub franchisees"). The appellant says that class members were affected by the decision of the respondents (collectively, "Maple Leaf Foods") to recall meat products that had been processed in a Maple Leaf Foods factory in which a listeria outbreak had occurred. Specifically, it says that they experienced a shortage of product for six to eight weeks causing economic loss and reputational injury due to their association with contaminated meat products. By this class proceeding, the appellant advances claims in tort law against Maple Leaf Foods, seeking compensation for lost past and future sales, past and future profits, capital value of the franchises and goodwill.

2. The question for this Court to decide is whether Maple Leaf Foods (with which neither the appellant nor any other franchisee was in contractual privity, but rather linked indirectly through a chain of contracts) owed Mr. Sub franchisees a duty of care, enforceable under the Canadian law of negligence. The appellant says that Maple Leaf Foods, as a manufacturer, owed a duty to Mr. Sub franchisees to supply a product fit for human consumption. ***

Background ***

8. The relationship between Mr. Sub and Maple Leaf Foods was governed by an exclusive supply agreement—pursuant to which Maple Leaf Foods was made the exclusive supplier of 14 core Mr. Sub menu items: ready-to-eat ("RTE") meats served in all Mr. Sub restaurants ("partnership agreement", signed December 12, 2005 ***). In order to give effect to this exclusive supply arrangement, the franchise agreement between Mr. Sub and its franchisees required them to purchase RTE meats produced exclusively by Maple Leaf Foods (franchise agreement, art. 6.2). This was done *not* by way of direct dealings between Mr. Sub franchisees and Maple Leaf Foods; instead, the franchisees placed an order with a distributor, which would in turn place an order with Maple Leaf Foods. No contractual relationship

[593] See B. Feldthusen & John Palmer, "Economic Loss and the Supreme Court of Canada: An Economic Critique of '*Norsk Steamship*' and '*Bird Construction*'" (1995) 74 Canadian Bar Rev 427.

ever existed between the franchisees and Maple Leaf Foods. Rather, each was linked to the other indirectly, through separate contracts with Mr. Sub.

9. It is worth noting that, while their franchise agreement with Mr. Sub required Mr. Sub franchisees to purchase RTE meats exclusively from Maple Leaf Foods, the latter was under no obligation by the terms of its contract with Mr. Sub to *supply*. Further, the franchise agreement also provided that the franchisees could not sue Mr. Sub for delays in supply of RTE meats. Nor could they look to alternative sources of supply without first seeking Mr. Sub's permission (franchise agreement, art. 6.2).

10. On August 16, 2008, Maple Leaf Foods learned that one of its products had been found to contain listeria. It was required to recall that product, along with another. Several days later, it voluntarily recalled additional products, including two of the RTE meat products used by Mr. Sub franchisees. (These products were immediately destroyed, and it is unknown whether they were actually contaminated.) In early September 2008, Maple Leaf Foods released Mr. Sub from the exclusive supply arrangement. By mid-September 2008, an alternate supplier had been selected.

11. There is no suggestion of wrongfulness in the decision to issue this voluntary recall. That said, it interrupted an important source of supply to the franchisees, leaving them without those products for a period of six to eight weeks. During that period, the franchisees did not take advantage of the clause in the franchise agreement allowing them to seek Mr. Sub's permission to find a different supplier. ***

15. *** [T]he alleged damages are substantially the result of the recall and the consequent publicity, including publicity of the illness and death of people who had eaten tainted meat (albeit not at a Mr. Sub restaurant) ***. ***

Pure Economic Loss in Negligence Law

17. As the lower courts recognized, the claims of the appellant and other Mr. Sub franchisees are for pure economic loss, in the form of lost profits, sales, capital value and goodwill. Pure economic loss is economic loss that is unconnected to a physical or mental injury to the plaintiff's person, or to physical damage to property ***. It is distinct, therefore, from *consequential* economic loss, being economic loss that results from damage to the plaintiff's rights, such as wage losses or costs of care incurred by someone physically or mentally injured, or the value of lost production caused by damage to machinery, or lost sales caused by damage to delivery vehicles.

18. To recover for negligently caused loss, irrespective of the type of loss alleged, a plaintiff must prove all the elements of the tort of negligence: (1) that the defendant owed the plaintiff a duty of care; (2) that the defendant's conduct breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach. To satisfy the element of damage, the loss sought to be recovered must be the result of an interference with a legally cognizable right. As Cardozo C.J. explained in *Palsgraf v. Long Island Railroad*, 162 N.E. 99 (U.S. N.Y. Ct. App. 1928) [§13.1.3], "[n]egligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right" ***. ***

19. This explains why the common law has been slow to accord protection to purely economic interests. While this Court has recognized that pure economic loss may be recoverable in certain circumstances, there is no general right, in tort, protecting against the negligent or intentional infliction of pure economic loss. For example, economic loss caused by ordinary marketplace competition is not, without something more, actionable in negligence ***. Such loss falls outside the scope of a plaintiff's legal rights—the loss is *damnum absque injuria* and unrecoverable ***. Indeed, the essential goal of competition is to attract more business, which may mean taking business away from others. Absent a contractual or statutory entitlement, there is no right to a customer or to the quality of a bargain, let alone to a market share. ***

21. The current categories of pure economic loss incurred between private parties are, therefore:

> (1) negligent misrepresentation or performance of a service;
>
> (2) negligent supply of shoddy goods or structures; and

(3) relational economic loss.

The distinguishing feature among each of these categories is that they describe how the loss occurred. Focussing exclusively upon how the loss occurs can, however, put strain on the analysis by obfuscating both fundamental differences and similarities among cases of pure economic loss (J. Stapleton, "Duty of Care and Economic Loss: A Wider Agenda" (1991), 107 *Law Q. Rev.* 249, at pp. 262 and 284). Further, it obscures the starting point in a principled analysis of an action in negligence, which is to identify what rights are at stake and whether a reciprocal duty of care exists (*Livent Inc.*, at para. 30 [§19.3.1.3]). It is proximity, and not a template of how a loss factually occurred, that remains a "controlling concept" and a "foundation of the modern law of negligence" (*Norsk Pacific Steamship Co.*, at p. 1152; *Design Services Ltd. v. R.*, 2008 SCC 22, [2008] 1 S.C.R. 737 (S.C.C.), at para. 25 [§19.3.3.2]).

22. Properly understood, then, these categories are simply "analytical tools" that "provide greater structure to a diverse range of factual situations … that raise similar … concerns" (*Martel*, at para. 45; *Design Services Ltd.*, at para. 31). ***

23. *** The appellant argues that a duty of care in this case "is established through the application of two well-established categories of recovery for pure economic loss [of] negligent misrepresentation or negligent performance of a service, and negligent supply of dangerous goods" ***. Again, a duty of care cannot be established by showing that a claim fits within a category of *pure economic loss*. It is necessary to determine whether the appellant's alleged loss represents an injury to a right that can be the subject of recovery in tort law and possesses the requisite factors to support a finding of *proximity* under that category. We repeat: the manner in which pure economic loss is said to have occurred or how that loss has been catalogued within the categories of pure economic loss does not signify that the defendant whose negligence caused that loss owes the plaintiff a duty of care. The relevant "category" for the purpose of supporting a duty of care is that of *proximity of relationship*. Meaning, what is necessary to support a duty of care is that the relationship between a plaintiff and a defendant bear the requisite closeness and directness, such that it falls within a previously established category *of proximity* or is analogous to one (*Livent Inc.*, at para. 26; see also *Childs*, at para. 15 [§13.4.2.1]; *Mustapha*, at para. 5) [§17.1.2]. ***

The Appellant's Claims ***

(1) Negligent Misrepresentation or Performance of a Service ***

32. In cases of negligent misrepresentation or performance of a service, two factors are *determinative* of whether proximity is established: the defendant's undertaking, and the plaintiff's reliance (*Livent Inc.*, at para. 30). Specifically, "[w]here the defendant undertakes to provide a representation or service in circumstances that invite the plaintiff's reasonable reliance, the defendant becomes obligated to take reasonable care", and "the plaintiff has a right to rely on the defendant's undertaking to do so" (*ibid*.). "These corollary rights and obligations", the Court added, "create a relationship of proximity" (*ibid*.). In other words, the proximate relationship is formed when the defendant undertakes responsibility which invites reasonable and detrimental reliance by the plaintiff upon the defendant for that purpose ***.

37. The appellant says that Maple Leaf Foods undertook to provide RTE meats fit for human consumption (and, relatedly, that these meats were safe). That this is so is supported, it says, by Maple Leaf Foods' reputation for product quality and safety, and by its public motto "We Take Care" ***.

38. But as we have also canvassed (at paras. 32-34), it is not enough to show that a defendant made an undertaking. Again, an undertaking of responsibility, where it induces foreseeable and reasonable reliance, is formative of *a relationship* of proximity between two parties. We must therefore consider whether this undertaking, if made, was made *to Mr. Sub franchisees*, and *for what purpose*. Reliance on the part of the franchisees which falls outside the scope and purpose of that representation is neither foreseeable nor reasonable (*Livent Inc.*, at para. 31) and therefore does not connote a proximate relationship. The appellant attempts to address this requirement by pointing *not* to Mr. Sub franchisees' *reliance*, but instead back to *the undertaking*, saying that the franchisees' reliance was "on the basis that customers could trust that [the] franchisees used … a supplier whose public motto is 'We take care'" ***.

39. The reference to "customers" and a "*public* motto" is, in our view, telling, and supports the Court of

Appeal's identification of the scope and purpose of Maple Leaf Foods' undertaking as being "to ensure that Mr. Sub customers who ate RTE meats would not become ill or die as [a] result of eating the meats" ***. That is, the undertaking, properly construed, was made *to consumers*, with the purpose of assuring *them* that *their* interests were being kept in mind, and not to commercial intermediaries such as Mr. Sub or Mr. Sub franchisees. Their business interests lie outside the scope and purpose of the undertaking.

40. Further, and in any event, the appellant has failed to establish that Mr. Sub franchisees relied reasonably, or at all, on the undertaking that it says they received from Maple Leaf Foods. Bear in mind that detrimental reliance is manifested by the plaintiff altering its position, thereby foregoing more beneficial courses of action that it would have taken, absent the defendant's inducement. The appellant offers no evidence of such a change in position by Mr. Sub franchisees, and indeed the evidence affirms that changing their position would not have been possible. As recalled earlier (at paras. 8-9), Mr. Sub franchisees were bound by their franchise agreement with Mr. Sub to purchase RTE meats produced exclusively by Maple Leaf Foods. While they were able to seek Mr. Sub's permission to find alternative sources of supply, there is no evidence that they did so. It follows that no undertaking on the part of Maple Leaf Foods, even had one been made to Mr. Sub franchisees, caused the franchisees to alter their position in reliance thereon. Generally, they were bound, and had no alternative courses of action to pursue; and, to the extent they had a course of action that was contingent upon the permission of Mr. Sub, they did not seek it. At bottom, there was no interference with the autonomy of Mr. Sub franchisees. Like many franchising arrangements, theirs had already restricted their autonomy in ways that foreclose their ability to sue for negligent misrepresentation.

(2) Negligent Supply of Shoddy Goods or Structures

(a) The Correlative Right and Duty of Care in Winnipeg Condominium ***

44. At first glance, the liability rule in *Winnipeg Condominium Corp. No. 36* may appear curious, since it appears as though liability is imposed *not* in respect of damage that *has* occurred to the plaintiff's rights, but in respect of a real and substantial *danger* thereto. As a general principle, there is no liability for negligence "in the air", for "[t]here is no right to be free from the *prospect* of damage" but "only a right not to *suffer* damage that results from exposure to unreasonable risk" (*Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 (S.C.C.), at para. 33 [§15.1.1] (emphasis in original); *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181 (S.C.C.), at para. 16 [§16.2.3] ***.

45. We maintain, however, that, properly understood, the liability rule in *Winnipeg Condominium Corp. No. 36* is consonant with that principle. In that case, the Court was clear about the source of the right to which the duty of care corresponds: *the plaintiff's rights in person or property* (paras. 21, 36 and 42).[594] Where a design or construction defect poses a real and substantial danger *** *and* the danger "would unquestionably have caused serious injury or damage" if realized, given the "reasonable likelihood that a defect … will cause injury to its inhabitants", it makes little difference whether the plaintiff recovers for an injury actually suffered or for expenditures incurred in preventing the injury from occurring ***. *** The point is that the law views the plaintiff as having sustained actual injury to its right in person or property because of the necessity of taking measures to put itself or its other property "outside the ambit of perceived danger" (*ibid*, at p. 440 ***).

46. As we see it, then, recovery for the economic loss sustained in *Winnipeg Condominium Corp. No. 36* was founded upon the idea that, in the eyes of the law, the defendant negligently interfered with rights in person or property. *** In our view, this normative basis for the duty's recognition—that it protects a right to be free from injury to one's person or property—also delimits its scope. This is because this basis vanishes where the defect presents no imminent threat.

47. The appellant urges us to extend the liability rule in *Winnipeg Condominium Corp. No. 36* so as to recognize what La Forest J. refrained from recognizing (para. 41), which is a duty owed to subsequent

[594] While the plaintiff in *Winnipeg Condominium Corp. No. 36* was the condominium corporation itself, La Forest J. conceived of its position as akin to that of an occupier of a building. He reasoned that the defendant contractor's negligence had "the capacity to cause serious damage to other persons and property in the community", including potential damage to the corporation (para. 21).

purchasers for the cost of repairing *non-dangerous* defects in building structures and products. But merely shoddy products, as opposed to *dangerous* products, raise different questions pertaining to issues such as implied conditions and warranties as to quality and fitness for purpose, and not of real and substantial threats to person or property (*Winnipeg Condominium Corp. No. 36*, at para. 42). In our view, those claims are better channelled through the law of contract, which is the typical vehicle for allocating risks where the only complaint is of defective quality ***. Further, and even more fundamentally, such concerns do not implicate a right protected under tort law. As Laskin J.A. explained in *Hughes v. Sunbeam Corp. (Canada) Ltd.* (2002), 61 O.R. (3d) 433 (Ont. C.A.), at para. 36 in identifying the limits of the duty, "compensation to repair a defective but not dangerous product will improve the product's quality but not its safety." Again, we observe that, absent a contractual or statutory entitlement, there is no right to the quality of a bargain.

48. It follows that the normative basis for the duty not only limits *its* scope, but in doing so also furnishes a principled basis for limiting *the scope of recovery*. As La Forest J. explained, the potential injury to persons or property grounds not only the duty but also one's entitlement to "the cost of repairing the defect", that is, the cost of mitigating the danger by "fixing the defect and putting the building back into a non-dangerous state" (para. 36). In other words, allowing recovery exceeding the costs associated with removing the danger goes beyond what is necessary to safeguard the right to be free from injury caused to one's person or property (see *Winnipeg Condominium Corp. No. 36*, at para. 49). ***

49. We *do* agree with the appellant, however, that this same normative force of protecting physical integrity in the face of a real and substantial danger *can* apply to products *other than* building structures—that is, to goods. That said, in applying the *Winnipeg Condominium Corp. No. 36* liability rule to goods, it must be borne in mind that, properly understood, it states a narrow duty. While, therefore, there is no principled reason for confining its application to dangerously defective *building structures*, what a plaintiff can recover, irrespective of whether the claim is in respect of a building structure or a good, *will* be confined by the duty's concern for averting danger. The point is not to preserve the plaintiff's continued use of a product; rather, recovery is for the cost of *averting a real and substantial danger* of "personal injury or damage to other property" (*Winnipeg Condominium Corp. No. 36*, at para. 35).

50. It follows that where it is feasible for the plaintiff to simply discard the defective product, the danger to the plaintiff's rights, along with the basis for recovery, falls away. ***

51. Whether, then, one is considering defects in a building structure or a good, it is the feasibility of discarding the thing as the means of averting the danger which will determine whether the plaintiff's loss is recoverable. We agree that few homeowners or owners of other kinds of building structures can reasonably remove the real and substantial danger posed by a defect by walking away from the building structure. *** We reiterate that a breach of the duty recognized in *Winnipeg Condominium Corp. No. 36* exposes the defendant to liability for the cost of *averting a real and substantial danger*, and *not* of repairing a defect *per se*. ***

(b) Whether the RTE Meats Created a Real and Substantial Danger to the Appellant

57. In our view, the appellant's claim based on negligent supply of goods must fail for two reasons. First, a duty of care in respect of the negligent supply of shoddy goods or structures is predicated, as we have explained, upon a defect posing a real and substantial danger to the plaintiff's rights in person or property. In this case, any danger posed by the supply of RTE meats—which arose from the possibility that they were actually contaminated with listeria—could be a danger only to *the ultimate consumer*. No such danger was posed to the Mr. Sub franchisees. Even if the RTE meats posed a real and substantial danger to *consumers*, this offers no support for the franchisees' claim that the alleged loss of past and future sales, past and future profits, capital value and goodwill was the result of interference with *their* rights. Effectively, the Mr. Sub franchisees are seeking to bootstrap their claim to the rights of *consumers*. Further, *even if* the franchisees could have established an imminent risk to their own rights in person or property, the most they could have recovered would have been the cost of *averting* this danger.

58. This leads us to our second reason why the appellant's claim must fail. While the RTE meats may have posed a real and substantial danger to consumers when they were manufactured, any such danger evaporated when they were recalled and destroyed. In other words, their dangerousness was in their

latency (*Cardwell v. Perthen*, 2007 BCCA 313, 243 B.C.A.C. 135 (B.C. C.A.), at paras. 34-35). It bears repeating that removing a danger—whether in a product like the RTE meats that cannot be repaired, or in the case of goods that can—will in many (and, indeed, in most) cases be achieved by simply discarding the good at little or no expense. We therefore agree that, once that was accomplished in this case by way of the recall, the facts would not support a finding that the RTE meats posed a real and substantial danger thereafter to anyone—not to consumers, and certainly not to Mr. Sub franchisees, who can therefore show no injury to a relevant right protected under tort law.

(c) Whether the Parties Were in a Relationship of Proximity

59. Nonetheless, even if the RTE meats *had* posed a real and substantial danger within the meaning of *Winnipeg Condominium Corp. No. 36* to Mr. Sub franchisees' rights and had not been discarded, our analysis would not end here. In *Winnipeg Condominium Corp. No. 36*, the duty of care analysis was undertaken in accordance with the then-prevailing test for recognizing a duty of care in Canadian negligence law: the *Anns* test, under which a duty of care would, *prima facie*, arise where injury to the plaintiff is a reasonably foreseeable consequence of the defendant's negligence. And so, La Forest J. concluded that a *prima facie* duty of care existed on the basis of foreseeability of "personal injury or damage to other property", without inquiring into whether the parties were in a relationship of proximity (para. 35).

60. *** While *** *Winnipeg Condominium* remains binding authority governing the duty of care in respect of shoddy goods or structures, the framework by which that duty is imposed must now distinguish more clearly between foreseeability and *proximity*. ***

1. Analogous Category of Proximity

75. The appellant argues that appellate and trial level case law support recognition of a duty of care owed by Maple Leaf Foods to Mr. Sub franchisees "for economic losses arising out of negligent manufacture and supply of a dangerous product"—a duty that, as we have already explained, is grounded in the liability rule recognized in *Winnipeg Condominium Corp. No. 36* ***. To establish that this duty is owed in its case, the appellant argues that the relationships of proximity recognized in those authorities *** "are analogous to [the relationship between Maple Leaf Foods and] the franchisees" ***.

76. In *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.*, 2004 ABCA 309, 357 A.R. 137, *** dangerously defective resin was knowingly supplied by the defendant to the plaintiffs. The pipes exploded, necessitating repairs and causing the plaintiff to suffer significant business losses. The Court of Appeal of Alberta held that Dow owed a duty "to take reasonable care not to manufacture and distribute a product that is dangerous" (*Plas-Tex Canada Ltd.*, at para. 90).

77. This is not analogous to the basis for the duty which the appellant says was owed by Maple Leaf Foods to Mr. Sub franchisees. The post-delivery circumstances of *Plas-Tex Canada Ltd.* are entirely different than the circumstances of the appellant's claim of interrupted supply. Specifically, the defect in the resin created actual physical damage, such that the resulting economic losses were not, as a matter of law, pure economic loss but consequential economic loss. Finally, and most significantly, the resin was not intended for human consumption—a central plank in the appellant's posited analogous category. ***

81. The liability rule in *McAlister (Donoghue) v. Stevenson* [§13.1.1] *** governs the relationship between manufacturers and the ultimate consumer who is physically injured by the manufacturer's negligence; it does not speak to whether a manufacturer owes a duty to an intermediary for economic losses, even where those losses are alleged to arise from that same act of negligence. ***

83. Having concluded that proximity cannot be established by reference to a recognized category of proximate relationship, we must now conduct a full proximity analysis.

2. Full Proximity Analysis

84. It follows—not only from *Cooper*'s [§13.4.1.2] emphasis upon proximity as a distinct inquiry from foreseeability, but also from *Livent Inc.*'s direction that proximity is to be assessed by examining the nature of the relationship itself—that the defendant's ability to reasonably foresee injury to a plaintiff is insufficient

to ground a finding of proximity. We stress this, in view of the appellant's submissions on proximity. In describing Maple Leaf Foods' "proximate relationship with [Mr. Sub] franchisees" ***, it points to Maple Leaf Foods' knowledge, *inter alia*, that the franchisees "were prohibited from procuring RTE meats from another supplier because of the exclusive supplier arrangement"; of the importance of product supply to the franchisees' operations; and of the losses that would flow from an interruption of supply, including goodwill, reputation, sales and profits ***. *** The appellant also points to evidence that Maple Leaf Foods not only *could* have foreseen, but *did* foresee the detrimental impact of its voluntary recall of RTE meats and "took direct measures to assist [the franchisees]" ***.

85. To the extent that these considerations are possibly relevant to the duty analysis, they go not to proximity, but to reasonable foreseeability of injury. But even when they are so considered, it bears recalling that, in *Livent Inc.*, this Court clarified that an injury or loss will be considered to be "reasonably foreseeable" only where it falls within the *scope* of a proximate relationship between the parties (*Livent Inc.*, at para. 34 ***. ***

88. The appellant says that, as a result of the terms of the franchise agreement, it and the other franchisees were "vulnerable" and unable to protect themselves from Maple Leaf Foods' negligence. *** While we agree that the franchising agreement worked a "vulnerability" upon the appellant, we do not see its significance as the appellant does. It is this simple: instead of operating as an independent restaurant, the appellant chose to operate its business through a franchise. In doing so, like any franchisee it secured advantages that it could not have obtained on its own, including the use of the franchisor's trademark (and the benefit of associated goodwill), an established and proven system of operation, training, co-operative advertising and marketing, and—significantly—the benefit of the franchisor's buying power to secure better pricing for supplies. This last benefit is precisely what Mr. Sub franchisees secured under art. 6.4 of the franchise agreement ("Group Purchasing and Rebates"), which provided them with the benefit of Mr. Sub's group purchasing program.

89. Of course, like any franchisee, the appellant also assumed certain disadvantages by operating through a franchise, all of which are typically necessary to securing the advantages. For example, the success of the system of operations and the benefit of the franchisor's buying power depend upon maintaining a degree—and, depending upon the franchise, sometimes an *exceedingly high* degree—of consistency among all franchisees in all aspects of their operations. Operating systems must be followed, the same suppliers of products must be used, and employees must take the same training. *** The appellant also says the franchise agreement leaves franchisees "vulnerable" to interruptions in supply caused by the negligence of suppliers, an observation echoed by our colleague (at paras. 147-151). As already indicated, we agree that it does. But this is not a basis for a tort law duty, but rather an unremarkable incident of the franchise model of business in which the franchisees operated. Further, such "vulnerability", if sufficiently serious, could have been addressed by the appellant obtaining insurance—an option which, as confirmed to us at the hearing of this appeal, was not pursued.

90. A finding of proximity between Mr. Sub franchisees and Maple Leaf Foods would sit uneasily with this state of affairs, linked as these parties were through Mr. Sub by a chain of contracts that reflected the typical arrangement between franchisee, franchisor and exclusive supplier. The appellant was not a consumer, but a commercial actor whose vulnerability was entirely the product of its choice to enter into that arrangement, and whose choice substantially informed the expectations of that relationship to which the proximity analysis must have regard. To allow the appellant to circumvent the strictures of that contractual relationship by alleging a duty of care in tort in a manner that undermines and even contradicts those strictures (in that the proposed duty would impose an obligation to supply upon Maple Leaf Foods whereas its agreement with Mr. Sub imposed no such obligation) would not only undermine the stability of such arrangements, but also of *the appellant*'s particular arrangement, which was predicated upon an exclusive source of supply.

91. While this is sufficient for us to conclude that the Mr. Sub franchisees and Maple Leaf Foods were not in a relationship of proximity, a related consideration also furnishes an answer to our colleague's concern for vulnerability arising from the commercial arrangement linking Maple Leaf Foods, Mr. Sub and its franchisees. As already mentioned, under the terms of the franchise agreement, the appellant and other Mr. Sub franchisees *did* have means, albeit conditional upon obtaining Mr. Sub's permission, to avoid the

risk of interrupted supply or to avoid actual interrupted supply where it occurred by seeking out alternative sources of supply. ***

92. It is not disputed that the appellant did not avail itself of this option for obtaining alternative supply sources, even after the listeria outbreak and the voluntary recall of RTE meats ***. ***

94. If the vulnerability that is typical in a multipartite contractual arrangement such as this is insufficient to ground a duty of care, it is *a fortiori* inadequate where an available means under the terms of that arrangement for avoiding or mitigating that vulnerability was not pursued. ***

3. Novel Duty of Care

95. In any event, and as we have explained, the appellant cannot show that it and other Mr. Sub franchisees were in a relationship of proximity with Maple Leaf Foods. That is fatal not only to its argument under *Winnipeg Condominium Corp. No. 36*, but also to the argument for recognition of a novel duty in these circumstances, since the novel duty also depends, *inter alia*, on the appellant showing that requisite proximate relationship with Maple Leaf Foods. This is because, while a novel duty, being *novel*, starts with a blank slate, that slate is filled by applying the same *Anns/Cooper* framework that, as we have just explained, operates to preclude recovery here under the liability rule in *Winnipeg Condominium Corp. No. 36*. ***

KARAKATSANIS J. (dissenting with WAGNER C.J., ABELLA, KASIRER JJ.): ***

101. I agree with Brown and Martin JJ. that the main thrust of the franchisees' claim does not fall within an existing category of economic loss or an established or analogous relationship of proximity. However, I would find that it is just and fair to impose a novel duty of care on Maple Leaf in these circumstances and would, accordingly, allow the appeal. ***

148. *** Given their unique and typically well-established brand or operating structure, franchisors like Mr. Sub tend to already be in a position of power when encountering those who are seeking to operate one of their franchises, who are also often entering business for the first time ***. ***

151. In my view, the fact that this power imbalance and loss of control is widespread in the franchise context does not make it any less acute or justify dismissing it. ***

152. I would *** find that *** this contractual matrix [between Maple Leaf and the franchisees] points to a particular dependency and proximity in their relationship. In the context of an almost twenty-year relationship, Maple Leaf knowingly operated as an exclusive supplier to a restaurant operating as a franchise—a business arrangement in which the franchisee typically has almost no power to bargain for contractual protection, either with the supplier or the franchisor. Compounding this vulnerability, the franchisees' businesses were unusually dependent on Maple Leaf because Mr. Sub is known for selling submarine sandwiches with ready-to-eat meats. This contractual matrix, the history between Maple Leaf and Mr. Sub, the franchisees' vulnerability and Maple Leaf's direct line of contact with the franchisees establish that Maple Leaf and the franchisees were in a close and direct relationship. ***

154. As a manufacturer, Maple Leaf already owed consumers the well-established duty to take care to produce safe products—a duty which in my view is aligned with its duty to the franchisees. Here, the exclusivity arrangement and the franchisees' unusually heightened dependence on Maple Leaf products set the franchisees apart from other retailers of Maple Leaf products, making them particularly susceptible to consumer concerns about product safety. In the context of this close and direct relationship, Maple Leaf, as manufacturer, was under a duty to take reasonable care not to place unsafe goods into the market that could cause economic loss to the franchisees as a result of reasonable consumer response to the health risk posed by those goods.

155. I would therefore conclude that, subject to the other requirements of negligence being met, it is fair and just to hold Maple Leaf responsible for the franchisees' direct economic consequences of being associated with unsafe Maple Leaf products while they posed a danger to consumer health. The duty is tied to losses resulting from reasonable consumer responses to an identifiable public safety risk, so the

franchisees should be able to recover losses that they experienced as a result of consumers reasonably avoiding a restaurant whose essential ingredients were potentially unsafe. In particular, Maple Leaf should be liable to compensate for the lost profits, sales, goodwill and capital value that the franchisees can prove were caused by reasonable consumer reaction to the risk Maple Leaf products posed to consumer health. Maple Leaf's liability should also extend to any special damages relating to clean up and disposal of the meats that the franchisees had to incur to safely handle the tainted products and mitigate the effects of Maple Leaf's breach. ***

158. Maple Leaf submits that imposing a tortious duty of care in this case would have a negative impact on the Canadian marketplace, in that manufacturers would be liable for the economic losses of anyone in their supply chain upon a recall and thereby risk indeterminate potential loss. I disagree that this duty would so disrupt the marketplace and raise the spectre of indeterminate liability for manufacturers. ***

160. Indeed, finding a duty of care in these circumstances should not be conflated with a guarantee that every possible economic loss being claimed will survive the rigours of the remaining requirements of a negligence claim. A franchisee's claim that its business has collapsed due to an isolated and contained instance of manufacturer negligence will be met with proper scrutiny. Any award of damages will still be guided by the standard principles of negligence ***. ***

161. An additional policy consideration *** is the risk that imposing a duty of care will result in a chilling effect on manufacturers issuing voluntary recalls, and thus conflict with duties owed to consumers or with public health objectives more generally. I do not find this argument compelling.

162. First, food recalls are highly regulated in Canada. Food operators are already obligated to notify the Minister of Agriculture and Agri-Food when their food presents a risk of injury to human health, and a voluntary recall may be initiated by a food operator or when the CFIA requests that the company "initiate a voluntary recall" ***. ***

163. Second, voluntary recalls actually *help* negligent manufacturers to mitigate losses caused by risky products. ***

164. As a result, none of these residual policy considerations are sufficiently persuasive to oust or negate the *prima facie* duty of care on Maple Leaf in this case. I therefore find that Maple Leaf owed the franchisees a duty to take reasonable care not to place unsafe goods into the market that could cause economic loss to the franchisees as a result of reasonable consumer response to the health risk posed by those goods. ***

REFLECTION:

- *What is the difference between pure economic loss and consequential economic loss?*
- *How did the majority construe the ratio of Winnipeg Condo.? Was this a narrowing reinterpretation of the precedent? How did the relationship of proximity in these two cases differ?*
- *Is the dissent's argument for recognising a novel duty of care in this case compelling?*
- *Aside from fast-food franchisees, who else was affected by the listeria outbreak who might have a successful tort claim against Maple Leaf Foods Inc.?*[595] *What would be the basis of their tort claim?*

19.3.2.3 Further material

- B. Feldthusen, "*16888782 Ontario Inc v. Maple Leaf Foods Inc*: The Secret Death of *Winnipeg Condominium* (SSRN, 2021).
- R. Brown, "Assumption of Responsibility and Loss of Bargain in Tort Law" (2006) 29 Dalhousie LJ 345.
- D. Styler, "*Arora v. Whirlpool Canada LP*: Negligence and Policy Considerations in the Context of a Defective, Non-Dangerous Consumer Product" The Court (Nov 12, 2013).

[595] See "Maple Leaf listeria outbreak" CBC National News (Aug 26, 2008) 📺; J. Smith, "Listeriosis victims finally receive cheques from Maple Leaf Foods settlement" Toronto Star (Feb 9, 2012).

19.3.3 Negligence causing relational economic loss

19.3.3.1 Armstead v. Royal & Sun Alliance Insurance Co. Ltd [2024] UKSC 6

✗REF: §17.1.4

LORD LEGGATT AND LORD BURROWS (LORD RICHARDS, LADY SIMLER AND LORD BRIGGS concurring):

20. [A "well-established principle" of English common law is that] someone who negligently causes physical damage to another person's property is not liable to pay compensation to a third party claimant who suffers financial loss as a result of the damage: see eg *Cattle v. Stockton Waterworks Co* (1875) LR 10 QB 453; *Candlewood Navigation Corpn Ltd v. Mitsui OSK Lines Ltd* [1986] AC 1; *Leigh and Sillavan Ltd v. Aliakmon Shipping Co Ltd (The "Aliakmon")* [1986] AC 785, 809-810. It is not enough that the claimant had contractual rights which were rendered less valuable by the damage if the property in question was not the claimant's. For example, in *Cattle v. Stockton Waterworks* the claimant contractor was engaged by a landowner to make a tunnel under a road. A water pipe running under the road which the defendant water company was responsible for maintaining leaked, causing flooding which hindered and delayed the construction work. The Court of Queen's Bench held that, even if (as alleged) the leak resulted from the defendant's negligent failure to keep the pipe in proper repair, the contractor had no claim against the water company for the economic loss which it suffered by reason of its contract with the landowner being less profitable as a result of the damage to the land. The economic loss suffered in cases of this kind, which cannot be recovered, is usually referred to as "pure economic loss", meaning economic loss that is not consequent on damage to, or loss of, the claimant's property (or on personal injury to the claimant). ***

REFLECTION:

- *What is relational economic loss? Why is relational economic loss often not recoverable in a tort action?*

19.3.3.2 Design Services Ltd v. Canada [2008] SCC 22

Supreme Court of Canada – 2008 SCC 22

ROTHSTEIIN J. (FOR THE COURT):

1. The issue in this appeal is whether an owner in a tendering process owes a duty of care in tort to subcontractors. The owner awarded a construction contract to a non-compliant bidder. The appellants were subcontractors to the contractor which should have been awarded the contract. The appellants do not have privity of contract with the owner and therefore, being unable to establish a claim for breach of contract, have asserted a claim in tort for the economic loss they have suffered. ***

4. Public Works and Government Services Canada ("PW") launched a tendering process in May 1998 for the construction of a naval reserve building in St. John's, Newfoundland, to be named HMCS Cabot. ***

6. This was a two-stage tendering process. First, under a Request for Statement of Qualifications ("SOQ"), the bid proponents were asked to provide evidence of the capabilities, qualifications and experience of key individuals within their proposed design-build teams. From this information, PW would select proponents to continue to the next stage of the process known as the Request for Proposal ("RFP"). Once the proposals were submitted, PW would evaluate them and award the contract to the winning proponent. ***

8. Olympic submitted its reply to the SOQ on June 24, 1998. Olympic's SOQ documents identified the appellants as part of Olympic's design-build team, with the exception of the mechanical subcontractor, Canadian Process Services Inc.

9. Four proponents were chosen to proceed to the RFP stage, among them Olympic and Westeinde Construction Ltd.

10. Olympic submitted its reply to the RFP on August 12, 1998. The bid indicated that Olympic was the sole proponent. Olympic also posted the bond and the evidence of financial capability.

11. PW awarded the contract to the non-compliant bidder, Westeinde. As a result, Olympic and the appellants commenced litigation against PW. On November 17, 2004, Olympic reached a settlement with PW and discontinued its action. The appellants continued with the litigation. ***

A. The Framework for Determining Duty of Care ***

23. In *Martel Building Ltd. v. R.*, [2000] 2 S.C.R. 860, 2000 SCC 60 (S.C.C.), at para. 108, this Court left the door open to a duty of care arising between subcontractors and an owner:

> *** *We believe that the issue of whether a duty of care can arise between a subcontractor and an owner must be left to a case in which it arises.* ***

27. However, as stated in *Childs* [*v. Desormeaux*, 2006 SCC 18], at para. 15 [§13.4.2.1], before determining if a new duty of care should be recognized, it must first be determined whether the present situation fits within, or is analogous to, a relationship previously recognized as having a duty of care between the parties. If it does, a duty of care will be established. By first determining whether the situation fits within or is analogous to a previously recognized category, the analysis otherwise required by *Anns* [*v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.)] [§13.4.1.1] is avoided.

B. Does This Claim Fall Within a Recognized Duty of Care?

28. *R. v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111 (S.C.C.), first established the "Contract A/Contract B" analysis for tendering processes. Under this approach, "Contract A" is formed once the proponent submits its bid to the owner. "Contract B" comes into being once the owner awards the contract to the successful bidder. Here, the trial judge found, at para. 99, that there was clearly a "Contract A" between Olympic and PW. PW does not dispute this finding.

29. As developed in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 (S.C.C.), and *Martel*, "Contract A" can impose certain implied terms on the owner such as the obligation to treat all bidders fairly and equally, as well as the obligation to only accept compliant bids. In this case, PW breached its "Contract A" with Olympic by awarding "Contract B" to a non-compliant bidder. This breach affected the appellants since their opportunity to recoup the costs of preparing their bids and their opportunity for profit from participating in the construction project depended on Olympic being awarded "Contract B".

30. The appellants' costs and lost opportunity for profit were solely financial in nature. They were not causally connected to physical injury to their persons or physical damage to their property. As such, they qualify as pure economic losses (*D'Amato v. Badger*, [1996] 2 S.C.R. 1071 (S.C.C.), at para. 13; *Martel*, at para. 34; Linden and Feldthusen, at pp. 441-43).

31. In *Canadian National Railway v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021 (S.C.C.), at p. 1049, La Forest J. recognized five different categories of negligence claims for which a duty of care has been found with respect to pure economic losses:

1. The Independent Liability of Statutory Public Authorities;
2. Negligent Misrepresentation;
3. Negligent Performance of a Service;
4. Negligent Supply of Shoddy Goods or Structures;
5. Relational Economic Loss. ***

32. The appellants' economic losses do not fall within the first four categories. This case obviously does not involve a negligent misrepresentation, a negligent performance of services or a negligent supply of shoddy good or structure. Neither is this a case of independent liability of statutory public authorities, which deals with the government's "unique public power to convey certain discretionary benefits, such as the power to enforce by-laws, or to inspect homes or roadways" (Feldthusen, at p. 358). Here, the government

is not inspecting, granting, issuing or enforcing something mandated by law. Instead, the present situation is akin to commercial dealings between private parties, not the exercise of unique government power.

33. This leaves relational economic loss as the only preexisting duty of care category within which the appellants' claims could possibly fall. Linden and Feldthusen, at p. 477, define relational economic loss as a situation in which "the defendant negligently causes personal injury or property damage to a third party. The plaintiff suffers pure economic loss by virtue of some relationship, usually contractual, it enjoys with the injured third party or the damaged property."

34. The appellants do not fit within the relational economic loss category because no property of Olympic was actually damaged in this case. From its origin, relational economic loss has always stemmed from injury or property damage to a third party.

35. The reason appears to be that physical damage tends "to ensure a reassuringly proximate nexus between tortious act and recoverable damage" (*Caltex Oil (Australia) Proprietary Ltd. v. The "Willemstad"* (1976), 11 A.L.R. 227 (Australia H.C.), at p. 255). This is not to say that in the development of new categories under the *Anns* test, physical injury or property damage would necessarily be a requirement to justify a finding of proximity. However, insofar as the existing category of relational economic loss is concerned, injury or property damage to a third party has been a requirement. ***

39. *** Here, we are dealing with the award of a bid to a non-compliant bidder, which constitutes a breach of "Contract A" between PW and a third party, Olympic. Granted, the breach of contract by PW resulted in the appellants' being unable to recoup the costs of preparing the bid and the loss of an opportunity to profit from participating in the construction project. But the breach of Olympic's contractual rights arising out of "Contract A" cannot be interpreted as damage to Olympic's property. ***

40. The rights arising out of "Contract A" between Olympic and PW are not *in rem* rights meant to exclude the rest of the world. "Contract A" only imposed *in personam* obligations between PW and Olympic. Since "Contract A" is not property, no property was damaged. Because no property was damaged, the appellants' claims do not fall within the existing category of relational economic loss. ***

44. I conclude that the appellants' claims do not fall within a preexisting category in which a duty of care has been recognized.

C. Should a New Duty of Care Be Recognized?

45. Having found that the present situation does not fit within one of the five preexisting categories of pure economic loss, it is necessary to assess whether a new category of pure economic loss should nonetheless be established, specifically a new duty of care between an owner and subcontractors. This requires the analysis mandated in *Anns*.

46. The *Anns* test was recently described by this Court in *Childs*, at para. 11: ***

> (1) is there "a sufficiently close relationship between the parties" or "proximity" to justify imposition of a duty and, if so,
>
> (2) are there policy considerations which ought to negative or limit the scope of the duty, the class of persons to whom it is owed or the damages to which breach may give rise? ***

1. First Stage of the Anns Test ***

(a) Reasonable Foreseeability

49. The usual indication of proximity is foreseeability. Here, the trial judge found that it was reasonably foreseeable that the award of the contract to a non-compliant bidder would result in financial losses for the appellants (para. 110). At the Court of Appeal, PW conceded reasonable foreseeability of harm (para. 48). In this Court, PW does not resile from that concession. However, "[f]oreseeability does not of itself, and automatically, lead to the conclusion that there is a duty of care": G.H.L. Fridman, *The Law of Torts in Canada* (2nd ed. 2002), at p. 320.

(b) Other Considerations Relevant to Proximity

50. At para. 34 of *Cooper* [§13.4.1.2], McLachlin C.J. and Major J. considered several factors for evaluating the closeness of the relationship between the parties in order to determine whether it was just and fair to find a duty of care ***.

51. From the perspective of the appellants, several factors seemed to have led them to believe that their relationship with PW was closer than in the usual owner/subcontractor situation. PW was not only selecting a design-builder but also a design-building team. Information on the respective roles and experience of the appellants had to be provided to PW at the SOQ stage. The selection process for choosing the four proponents to advance to the RFP stage was heavily reliant on the ability of the proponent's team. At least 70 of the 150 points for the SOQ evaluation were directed at the team members' ability to do the work individually and as a team. Also, the design-build team members and their key personnel could not be substituted without the express advance written consent of PW. In addition, the appellants had to attend a "partnering" session with PW's project manager.

52. Further, the appellants expended considerable time and energy preparing their bids. In so doing, they relied on PW's documentation and representations which implied a fair methodology in the selection process of the bids. The appellants were reliant on PW respecting the "Contract A" between itself and Olympic. Any breach of "Contract A" directly affected the appellants since they were not to be compensated for their work in preparing the RFP unless Olympic was awarded the bid. Given that the tendering process required significant effort and that only the team selected would be rewarded, the appellants expected the selection process to be fair (trial reasons, at para. 62).

53. Although the factors above are the type of factors that one would expect to find in a proximate relationship, as explained in *Cooper*, at the first stage of the *Anns* test the Court must also examine whether there are any policy considerations specific to the parties such that tort liability should not be recognized.

54. Linden and Feldthusen, at p. 444, indicate that when assessing proximity in the context of a pure economic loss, "[i]t may also be relevant whether the plaintiff had an opportunity to protect itself by contract from the risk of economic loss and declined to do so." This reflects Justice La Forest's caution in *Norsk*, at p. 1116, that "the plaintiff's ability to foresee and provide for the particular damage in question is a key factor in the proximity analysis".

55. Importantly, the SOQ documents provided an opportunity for a general contractor and its subcontractors to submit their bid as a "joint venture proponent". Section 3(1) of the SOQ reads:

> While there is no requirement for firms to participate in this procurement in joint venture, firms may elect to do so if they see fit.
>
> Olympic and the appellants did not choose the joint venture option. Therefore, Olympic was the only one submitting the bid and thus the only one with which PW formed a "Contract A". (Before this Court, the appellants did not argue that they were parties to the "Contract A" between PW and Olympic.)

56. The fact that the appellants had the opportunity to form a joint venture, and thereby be parties to the "Contract A" made between PW and Olympic, is an overriding policy reason that tort liability should not be recognized in these circumstances. Allowing the appellants to sidestep the circumstances they participated in creating and make a claim in tort would be to ignore and circumvent the contractual rights and obligations that were, and were not, intended by PW, Olympic and the appellants. In essence, the appellants are attempting, after the fact, to substitute a claim in tort law for their inability to claim under "Contract A". After all, the obligations the appellants seek to enforce through tort exist only because of "Contract A" to which the appellants are not parties. In my view, the observation of Professor Lewis N. Klar (*Tort Law* (3rd ed. 2003), at p. 201)—that the ordering of commercial relationships is usually in the bailiwick of the law of contract—is particularly apt in this type of case. To conclude that an action in tort is appropriate when commercial parties have deliberately arranged their affairs in contract would be to allow for an unjustifiable encroachment of tort law into the realm of contract.

(c) Conclusion as to the First Stage of the Anns Test ***

58. I conclude that the appellants have failed to satisfy the first stage of the *Anns* test justifying a finding of a *prima facie* duty of care.

2. The Second Stage of the Anns Test

59. Having found no *prima facie* duty of care at the first stage of the *Anns* test, it is unnecessary to continue with the second stage of examining residual policy concerns that could negate the creation of a new duty of care. However, it may be useful to comment on one residual policy concern—indeterminate liability.

60. The recognition of a duty of care of an owner to subcontractors in a tendering process could lead to what Cardozo C.J. of the Court of Appeals of New York coined as "liability in an indeterminate amount for an indeterminate time to an indeterminate class" (*Ultramares Corp. v. Touche*, 174 N.E. 441 (U.S. N.Y. Ct. App. 1931), at p. 444) [§19.3.1.1]. ***

63. In the present situation, the subcontractors were identified and vetted by PW at the SOQ stage of the tendering process. The subcontractors could not be substituted without the consent of PW. On its face, this seems to indicate that the class of plaintiffs was determinate. However, one of the appellants, Canadian Process Services Inc., was not named as part of the design-build team at the SOQ stage. Only its parent company, G.J. Cahill Co., was named. This suggests that the class of plaintiffs was not as well defined as found by the trial judge since a subsidiary of one of the design-build team members also made a claim. In my view, since the class of plaintiffs seems to seep into the lower levels of the corporate structure of the design-build team members, this case has indications of indeterminate liability. ***

65. That the facts here suggest indeterminacy is, I think, symptomatic of a more general concern in the construction contract field. Even where subcontractors are named and known by an owner, those subcontractors will have employees and suppliers and perhaps their own subcontractors who also could suffer economic loss. And these suppliers and subcontractors will have their own employees and suppliers who might claim for economic loss due to the wrongful failure of the owner to award the contract to the general contractor upon which they were all dependant. The construction contract context is one in which the indeterminancy of the class of plaintiffs can readily be seen.

66. Even if a *prima facie* duty of care had been found at the first stage of the *Anns* test, in my view, it would have been negated at the second stage because of indeterminate liability concerns.

Conclusion

67. The appellants' claims do not fit within one of the preexisting categories of duty of care for pure economic loss. Nor is a finding of a new duty of care justified between an owner and subcontractors in the context of a tendering process. I would dismiss the appeal with costs.

REFLECTION:

- *The Supreme Court of Canada described the appellants' action as an "unjustifiable encroachment of tort law into the realm of contract law." Are these areas of law mutually exclusive?*
- *Having regard to Maple Leaf Foods, [90] (§19.3.2.2), what is the rationale of precluding tort claims where they concern contractual choices made willingly by the parties?*
- *Is the Court's reasoning around indeterminate liability with respect to the class of plaintiffs compelling? What are the implications of this reasoning for other contractors seeking recovery for pure economic loss?*

19.3.3.3 NTUC Foodfare Co-op Ltd v. SIA Engineering Co Ltd [2018] SGCA 41

Singapore Court of Appeal – [2018] SGCA 41

CHONG J.A. (FOR THE COURT):

1. In *Spandeck Engineering (S) Pte Ltd v. Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*"), this court laid down a single test for the establishment of a duty of care in tort. In doing so,

we departed from English law which applies a general exclusionary rule against recovery for pure economic loss. We also eschewed the approach taken in some earlier Singapore cases, where our courts had applied different tests for a duty of care depending on the nature of the loss suffered by the plaintiff: see *Spandeck* at [58] and [69].

2. It is vital to recall why we rejected the exclusionary rule in *Spandeck*. The basis of that holding was the recognition that there is nothing intrinsically objectionable about recovery for pure economic loss. It is not the nature of such loss, but the circumstances in which it arises, which underpins the exclusionary rule. Unlike physical damage, economic losses are not constrained by the laws of nature: they often ripple out from a negligent act due to human responses to the same. This gives rise to the concern of indeterminate liability: that to allow recovery for pure economic loss might lead to liability for an indeterminate amount to an indeterminate class.

3. It was to address this concern that the common law barred recovery for economic loss unless such loss was *consequent* upon physical damage to person or property. Yet in *Spandeck*, we recognised that the exclusionary rule is a blunt tool for this purpose. In some cases, the concern of indeterminate liability it was designed to address will never arise. In such cases, there may be scant reason to disallow recovery for pure economic loss: see *Spandeck* at [68]–[69]. Applying the exclusionary rule may thus lead to injustice. Accordingly, in *Spandeck*, we rejected the exclusionary rule in favour of a single test for a duty of care in tort, premised on proximity and policy considerations.

4. After *Spandeck*, therefore, it is no longer necessary to characterise the nature of the plaintiff's loss before examining whether a duty of care arises in tort. ***

Facts

The parties

6. The appellant, NTUC Foodfare Co-operative Ltd ("NTUC Foodfare"), is a registered society that operates food and beverage establishments including the Wang Café franchise in Singapore. ***

7. The first respondent, SIA Engineering Company Ltd ("SIAEC"), is a Singapore-incorporated company in the business of the maintenance, repair and overhaul of aircraft. SIAEC employed the second respondent, Yap Tee Chuan ("Mr Yap"), as an equipment operator. Mr Yap operated airtugs for "aircraft towing and pushback operations". It is important to note that these airtugs were heavy vehicles powerful enough to move an aircraft. Unsurprisingly, Mr Yap was required to undergo several tests before he was allowed to operate them. He was first required to obtain a Class 5 driving licence as a pre-requisite to obtaining an airfield driving permit ("ADP") from Changi Airport Group (Singapore) Pte Ltd ("CAG"). The ADP was, in turn, a pre-requisite to in-house airtug training by SIAEC, after which Mr Yap received his permit to operate airtugs.

The leased premises

8. By a tenancy agreement dated 2 March 2012 ("the Agreement"), NTUC Foodfare took a three-year lease of 20.5m2 of the transit lounge ("the Lounge") on the second level of the Terminal 2 building of Changi Airport ("the T2 Building") from CAG. We will refer to this leased area as "the Premises". ***

9. The Premises were located on the cantilevered portion of the floor of the Lounge, directly above the underpass baggage handling area ("the UBHA") of the T2 Building. NTUC Foodfare operated an outlet of Wang Café in the form of a food kiosk at the Premises ("the Kiosk"). The Kiosk was pre-fabricated off-site, and had its own fittings, furnishings, and cement screed flooring. A waterproofing membrane was applied beneath the screeded floor of the Kiosk.

The key events

The accident and the imposition of the Closure Order ***

10. On 13 February 2014, Mr Yap was driving an airtug ("the Airtug") in the vicinity of the T2 Building. Notably, Mr Yap operated airtugs in a relatively confined area: the airside area of Changi Airport. He drove

airtugs on various roadways in the airport, including one running through the UBHA. The UBHA was therefore part of Mr Yap's fairly circumscribed theatre of operations. As we have noted, the UBHA was located directly below the cantilevered portion of the floor of the Lounge, where the Kiosk was situated (see [9] above).

11. At the material time on 13 February 2014, Mr Yap was driving on the roadway running through the UBHA when he failed to keep a proper lookout. It was not in dispute at the hearing of the appeal that Mr Yap was negligent in this regard. As a result, the Airtug collided into a pillar ("the Pillar") leading up to and supporting the floor of the Lounge ("the Accident"). The Pillar extended up to the second level of the T2 Building, where it was situated near the Kiosk.

12. The Accident caused damage to the Pillar and to the cantilevered portion of the floor of the Lounge. In particular, there was settlement movement of the floor slabs next to the Pillar and near the Kiosk, *ie*, part of the floor subsided. However, it is undisputed that the Kiosk itself did not sustain material damage, *eg*, in the form of cracks: counsel for NTUC Foodfare, Mr N Sreenivasan SC ("Mr Sreenivasan"), confirmed this before us. Mr Sreenivasan also did not contend that the Premises, where the Kiosk was situated, suffered any material damage.

13. The Building and Construction Authority ("the BCA") issued a Closure Order dated 14 February 2014 ("the Closure Order") in respect of the affected area of the Lounge. The Kiosk was situated within the affected area. NTUC Foodfare was hence unable to operate the Kiosk while the Closure Order was in force. CAG did not collect rent from NTUC Foodfare during this period.

14. CAG cut off the electricity supply to the Kiosk while the Closure Order was in force. Some of the equipment at the Kiosk—chillers, boilers, an ice maker and a toaster—were damaged due to dust, rust and lack of electricity arising from the closure.

Events after the imposition of the Closure Order

15. On 18 March 2014, CAG held a meeting with NTUC Foodfare. During this meeting, CAG expressed concern that the waterproofing membrane beneath the floor of the Kiosk (see [9] above) had been damaged and requested NTUC Foodfare to retrofit the Kiosk to address this concern. CAG initially indicated that it would bear the cost of the works. However, after NTUC Foodfare submitted a quotation for the works to CAG, the loss-adjusters appointed by CAG's insurers ("Insight") wrote to NTUC Foodfare stating that CAG did not cause the incident and should not be held liable for it. Insight sent NTUC Foodfare's quotation to the loss-adjusters appointed by SIAEC's insurers ("Crawford").

16. On 3 June 2014, Crawford informed NTUC Foodfare that it would have to prove that the waterproofing membrane had been damaged (to recover the cost of the works to the Kiosk from SIAEC or its insurers).

17. By an email dated 17 July 2014, NTUC Foodfare requested that CAG provide a report stating the reasons why it required the Kiosk to be rebuilt.

18. By an email dated 23 July 2014, CAG replied to state that it would permit NTUC Foodfare to resume operations at the Kiosk even if it did not rebuild it, provided a qualified person ("QP") or professional engineer ("PE") endorsed the safety and operational readiness of the Kiosk. However, NTUC Foodfare did not obtain such an opinion from a QP or a PE. NTUC Foodfare's position is that no QP or PE was willing to certify the safety of the Kiosk without information on the damage to the T2 Building, the rectification works to the same and how the Kiosk was built (and this information was not forthcoming). However, the respondents dispute this. At the trial, the respondents called an expert who testified that he would have been able to assess the safety of the Kiosk based on a visual inspection of the Kiosk alone. His evidence on this point was unchallenged.

The lifting of the Closure Order and subsequent events

19. On 30 July 2014, the BCA lifted the Closure Order. CAG resumed collecting rent from NTUC Foodfare from 7 August 2014.

20. On 9 October 2014, CAG agreed to grant a further 3-year term lease to NTUC Foodfare for the period of 1 May 2015 to 30 April 2018. Thereafter, NTUC Foodfare commenced works to rebuild the Kiosk and eventually resumed business at the outlet in November 2014.

21. On 10 March 2015, the loss-adjusters appointed by NTUC Foodfare's insurers, NTUC Income (see [6] above), issued a report assessing the total loss suffered by NTUC Foodfare in the sum of $176,926.85, comprising sums of $5,909.85 and $171,017.00 in respect of the damaged equipment (see [14] above) and loss of profits respectively. NTUC Income subsequently paid a sum of $176,176.85 (the total sum assessed by its loss-adjusters excluding a deductible of $750.00 provided for under the Policy) to NTUC Foodfare.

22. NTUC Foodfare then commenced the suit from which this appeal arises, alleging that it had suffered the following losses due to the Accident. ***

23. NTUC Foodfare claims a total of $176,176.85 *** on behalf of NTUC Income pursuant to the latter's right of subrogation under the Policy. It claims losses *** ("the Rebuilding Losses") in its own right. Its case is that Mr Yap drove the Airtug negligently, in breach of his duty of care to NTUC Foodfare, thereby causing the latter to sustain the aforementioned losses. ***

Duty of care

The Spandeck test

38. A duty of care will arise in tort if (a) it is factually foreseeable that the defendant's negligence might cause the plaintiff to suffer harm; (b) there is sufficient legal proximity between the parties; and (c) policy considerations do not militate against a duty of care: see *Spandeck* at [73], [77] and [83].

39. The key issue in this appeal is whether the proximity requirement is made out. The proximity requirement focuses on "the closeness of the relationship between the parties": see *Spandeck* at [77]. The crux of the inquiry is whether the plaintiff was so closely and directly affected by the defendant's actions that the latter ought to have had the former in contemplation in acting: see *Donoghue v. Stevenson* [1932] AC 562 at 580 (*per* Lord Atkin) [§13.1.1] and Andrew Robertson, "Justice, community welfare and the duty of care" (2011) 127 LQR 370 at 374. The proximity requirement serves the normative role of determining whether, as a matter of interpersonal justice between the parties, the defendant should be held to have owed a duty of care to the plaintiff: see *ACB* [*v. Thomson Medical Pte Ltd* [2017] 1 SLR 918] at [49] [§19.10.5.1].

40. What are the factors which a court should consider in assessing whether there was sufficient legal proximity between the parties?

> (a) In *Spandeck*, we held, endorsing the observations of Deane J in *Sutherland Shire Council v. Heyman* (1985) 60 ALR 1, that proximity includes physical, circumstantial and causal proximity, and incorporates the twin criteria of voluntary assumption of responsibility (by the defendant) and reliance (by the plaintiff): see *Spandeck* at [81].
>
> (b) In *Anwar Patrick Adrian v. Ng Chong & Hue LLC* [2014] 3 SLR 761 ("*Anwar*"), we developed the proximity requirement by holding that it may be apt to consider "proximity factors" in applying that requirement, citing David Tan and Goh Yihan, "The Promise of Universality: The Spandeck Formulation Half a Decade On" (2013) 25 SAcLJ 510 ("Tan & Goh"). We recognised two proximity factors: the defendant's knowledge in relation to the plaintiffs (see *Anwar* at [148]–[149]) and control over the situation giving rise to the risk of harm and the plaintiff's corresponding vulnerability (see *Anwar* at [154]). With regard to the proximity factor of knowledge, the relevant knowledge is knowledge of the risk of harm, or of reliance by the plaintiff, or of the vulnerability of the plaintiff: see Tan & Goh at paras 26–29.

41. We emphasise two further points concerning the proximity requirement. First, in cases of pure economic loss, there may be sufficient legal proximity between the parties even if the defendant does not voluntarily assume responsibility to the plaintiff and the latter does not specifically rely on the former not to cause it loss. We wish to make this clear at the outset because the Judge emphasised that Mr Yap did not voluntarily

assume responsibility to NTUC Foodfare and the latter did not specifically rely on him (see [24(d)] above). We agree with the Judge that there was no assumption of responsibility or specific reliance. However, in our judgment, these are neither essential nor inflexible conditions for the requirement of proximity to be fulfilled in cases of pure economic loss. Other aspects of the relationship between the parties may establish a sufficiently close relation between them for a duty of care to arise; it is thus necessary to consider physical, circumstantial and causal proximity and the proximity factors referred to at [40(b)] above. We reiterate that "every application of the concept of proximity is heavily dependent on the precise factual matrix concerned … there is no mechanical formula that is to be applied by the court": see *Ngiam Kong Seng v. Lim Chiew Hock* [2008] 3 SLR(R) 674 at [108].

42. Second, the proximity requirement addresses one aspect of the problem of indeterminate liability. The issue of indeterminate liability has two distinct components, liability to an indeterminate class and liability for an indeterminate amount: see Jane Stapleton, "Duty of care and economic loss: a wider agenda" (1991) 107 LQR 249 at 254–255. Notably, the problem of liability for an indeterminate amount may be addressed (in part) by the doctrine of remoteness, under which a plaintiff may not recover losses that are not reasonably foreseeable ***. The critical concern about indeterminacy, in our judgment, is in relation to liability to an indeterminate class.

43. The problem of liability to an indeterminate class arises where *the basis on which the law permits recovery for losses* would entitle an unascertainable class of parties to recover for their losses. The concern therefore does not arise if the basis on which the law permits recovery restricts recovery to a reasonably determinate class of victims. In our judgment, the proximity requirement can fulfil this role: *if a defendant only owes a duty of care to parties to whom it stands in a sufficiently close relationship, this limits the class of plaintiffs to whom the defendant may be liable*. We recognise that the extent to which the requirement of proximity can address the issue of liability to an indeterminate class depends on whether it is clear what amounts to sufficient legal proximity and this is necessarily fact sensitive. In our judgment, the indicia of proximity referred to at [40] above, supplemented by the development of a body of precedents on the proximity requirement, should provide sufficient certainty. ***

Application of the Spandeck test

45. The Judge found, and it is not in dispute, that the requirement of factual foreseeability was satisfied: it was factually foreseeable that negligent operation of the Airtug would cause NTUC Foodfare to suffer loss (see [24(d)] above).

Proximity

46. Contrary to the Judge's holding, we find that there was sufficient legal proximity between Mr Yap and NTUC Foodfare for a duty of care to arise.

47. First, we find that there was physical proximity between the parties. Mr Yap operated airtugs in close propinquity to the Kiosk: the Kiosk was located *directly* above the UBHA, which formed part of Mr Yap's theatre of operations (see [9]–[10] above). Furthermore, and significantly, Mr Yap carried out his operations within a very restricted area, the airside area of Changi Airport. It is essential to stress that we are not concerned with a case involving a driver of a heavy vehicle negligently colliding into a pillar supporting the floor of a shopping mall along a public road, causing tenants on that floor to suffer loss of profits when the floor is closed. In such a case, there would be insufficient physical proximity between the driver and the tenants, because the driver would have been carrying out his operations over a much wider public area, unlike the present case where Mr Yap was operating within a much more restricted area, giving rise to the requisite physical proximity between Mr Yap and NTUC Foodfare.

48. Second, we find that there was causal proximity between Mr Yap's negligence and NTUC Foodfare's loss, in particular, the loss of profits sustained by the latter during the period of the Closure Order. The causal chain was clearly made out: (1) Mr Yap drove the Airtug into the Pillar; (2) thus, part of the floor of the Lounge, which was supported by the Pillar, became unsafe for occupation during the period of the Closure Order; and (3) consequently, NTUC Foodfare was unable to operate the Kiosk during that period and hence suffered loss of profits. The causal links in this chain were both close and direct:

(a) First, in relation to the causal connection between events (1) and (2), we reiterate that the Airtug was a *heavy vehicle powerful enough to move an aircraft* (see [7] above). It was the natural and direct consequence of such a vehicle colliding into a structure supporting the floor of the Lounge that the floor or part thereof would become unsafe for occupation.

(b) Second, in relation to the causal link between events (2) and (3), NTUC Foodfare's loss of profits arose because the Kiosk was within the affected area and hence could not be operated while the Closure Order was in force. The loss of profits did not arise from, *eg*, reduced customer traffic due to the closure of parts of the Lounge away from the Kiosk. Such a loss would have been an indirect result of the Accident. By contrast, NTUC Foodfare's loss of profits arose *directly* from the fact that it was unable to operate the Kiosk at all since that part of the Lounge was rendered unsafe for occupation.

49. Against this, it might be said that NTUC Foodfare's inability to use the Kiosk flowed from the imposition of the Closure Order by the BCA, a third party, and that this weakens the causal connection between Mr Yap's negligence and NTUC Foodfare's loss of profits. However, it was eminently foreseeable and a natural consequence of the Accident that the BCA would step in to order a section of the Lounge to be closed for obvious safety reasons. We reiterate that the Accident involved the collision of a powerful heavy vehicle into a structure supporting the *cantilevered* floor of the Lounge (see [48(a)] above). We therefore do not consider that the interposition of the BCA weakens the causal connection between Mr Yap's negligence, and NTUC Foodfare's loss of profits during the period of the Closure Order.

50. Third, in our judgment, the proximity factor of knowledge applies here. We find that Mr Yap knew that negligence on his part carried the risk of causing a specific type of loss to a determinate class of persons. As a qualified operator of airtugs (see [7] above), he plainly knew, at the time of the Accident, that he was operating a powerful vehicle. He must have known that if he drove the Airtug negligently in the UBHA, it could collide into structures supporting the Lounge. He would have been aware of these structures since the UBHA was part of his restricted theatre of operations (see [10] above). Given the nature of the vehicle he was operating, Mr Yap would have known that if the Airtug collided into structures supporting the floor of the Lounge, the floor would likely become unsafe, and consequently, a *determinate* class of persons—the occupiers of that floor, who had a relatively settled presence there—would likely suffer a *specific kind of loss*, economic loss flowing *directly* from their inability to use their premises.

51. For these reasons, we find that there was sufficient proximity between Mr Yap and NTUC Foodfare for a duty of care to arise.

52. Notably, counsel for the respondents, Mr Kwek Yiu Wing Kevin ("Mr Kwek"), submitted that apart from the tenants of the Lounge, others, including suppliers to the Kiosk, would have sustained economic loss due to the Closure Order. Mr Kwek suggested that if a duty of care were owed to the tenants, a similar duty would have been owed to the suppliers to the Kiosk, thus giving rise to the concern of indeterminate liability. We do not agree. There was no physical proximity between Mr Yap and the suppliers. Assuming that the suppliers sustained losses, there would have been less causal proximity between Mr Yap's negligence and those losses. Those losses would have been a step removed from NTUC Foodfare's losses; they would presumably have accrued because NTUC Foodfare ceased ordering supplies during the period of the Closure Order. It is also unrealistic, given the lack of physical and causal proximity, that Mr Yap knew that negligence on his part would likely cause the suppliers to suffer losses. Thus, in our view, there was insufficient proximity between Mr Yap and the suppliers to the Kiosk for the former to have owed a duty of care to the latter. This illustrates our point that the proximity requirement adequately addresses the concern of liability to an indeterminate class. In this context, it ensures that Mr Yap is only liable for the pure economic loss suffered by a determinate class, namely, the operators of businesses in the affected area of the Lounge.

Policy

53. We are satisfied that there are no policy factors militating against the recognition of a duty of care owed by Mr Yap to NTUC Foodfare.

54. First, as we have noted, recognising that Mr Yap owed a duty of care to NTUC Foodfare does not give

rise to a concern of indeterminate liability. The proximity requirement ensures that Mr Yap's liability for pure economic loss due to the Accident is limited to a determinate class of persons who suffered such loss, namely, the operators of businesses in the Lounge. ***

57. Third, in our judgment, recognising a duty of care would not undermine the parties' contractual arrangements. The test is whether the parties "structured their contracts intending thereby to exclude the imposition of a tortious duty of care": see *Animal Concerns Research* at [71]. Here, nothing in the Agreement (between NTUC Foodfare and CAG) indicates that the parties intended to exclude the liability in tort of SIAEC's employees to NTUC Foodfare.

The foreign authorities—relational economic loss

58. Given our conclusions on proximity and policy, it would follow, under the *Spandeck* test, that Mr Yap owed a duty of care to NTUC Foodfare. *** The respondents cite several foreign cases to submit that special factors must be fulfilled for a claim for relational economic loss to succeed (see [28(b)] above). They contend that since none of these factors apply in this case, Mr Yap did not owe a duty of care to NTUC Foodfare.

59. The respondents' submission, in essence, is that a different test for the establishment for a duty of care should apply in cases of *relational* economic loss. In this regard, we observe that our courts have not considered the concept of relational economic loss before. We reject the respondents' submission. ***

60. First, as a matter of *doctrinal coherence*, the very point of *Spandeck* was to establish a single test for a duty of care for all claims in negligence, regardless of the nature of the plaintiff's loss. This is why we considered and rejected the notion that a different test should apply in determining the existence of a duty of care in cases of pure economic loss: see *Spandeck* at [65]–[72]. In this light, it would be wholly contrary to the spirit of *Spandeck* to apply a different test for a duty of care where the plaintiff suffers relational economic loss. To do so would be to introduce an even finer distinction into the duty of care inquiry, between different *types* of pure economic loss, as compared to the distinction between physical damage and pure economic loss that we rejected in *Spandeck*.

61. Second, in our judgment, there is no compelling *normative justification* for our courts to transpose the specific factors relied upon in the foreign authorities into the *Spandeck* test for two reasons. First, the criteria that have been adopted in the foreign cases have been strongly criticised. Second, it appears that the crucial reason why these criteria were formulated was to address the concern of indeterminate liability. Yet as we have emphasised, the requirement of proximity under the *Spandeck* test addresses that concern. There is therefore no necessity to hold that special criteria, beyond the proximity requirement, must be satisfied for claims for relational economic loss to succeed. We will now substantiate these points by reference to three foreign authorities cited by the respondents.

62. The first case is the decision of the High Court of Australia in *Caltex Oil (Australia) Pty Ltd v. The Dredge "Willemstad"* (1976) 136 CLR 529 ("*Caltex Oil*"). In this case, a dredge damaged a pipeline laid on the bed of Botany Bay in New South Wales. This was due to the negligent navigation of the dredge and the negligent preparation of a chart which incorrectly identified the location of the pipeline. The pipeline was owned by a refinery located on the southern shore of the bay, and was used to transport oil to the plaintiff who operated an oil terminal on the northern shore. Significantly, the defendants were aware of the pipeline and knew that it led to the plaintiff's oil terminal. Due to the damage to the pipeline, the plaintiff suffered loss in having to make alternative arrangements to transport the oil from the refinery by ship or by road to its terminal. This loss was not consequent upon damage to the plaintiff's property: it flowed from damage to the pipeline, which, as noted earlier, was owned by the refinery.

63. The High Court of Australia unanimously allowed the plaintiff's claim for the expenses incurred in arranging the alternative means of transportation of the oil. *** Three judges—Gibbs, Stephen and Mason JJ—emphasised that the defendants knew that the plaintiff specifically, as opposed to a general class of persons, would likely suffer economic loss due to negligence on their part, because they knew that the pipeline led to the plaintiff's oil terminal: see *Caltex Oil* at 555–556 (Gibbs J), 576–577 (Stephen J) and 593 (Mason J). This has come to be understood as the *ratio* of *Caltex Oil*: see *Clerk & Lindsell* at para 8-141.

64. The test articulated in *Caltex Oil* has been described as the "known plaintiff" test. It eliminates the

concern of liability to an indeterminate class, because it ensures that a defendant will only be liable for economic loss sustained by a single individual. Yet the test is not free from difficulty. There does not appear to be any principled reason why liability should turn on whether the tortfeasor knows that a single specific victim, as opposed to an unascertained class, will suffer loss due to the tortfeasor's negligence. For this reason, the Privy Council rejected the known plaintiff test in *Candlewood Navigation Corporation Ltd v. Mitsui OSK Lines* [1986] AC 1 (at 24A–F). Similarly, in *Canadian National Railway Co v. Norsk Pacific Steamship Co Ltd* (1992) 91 DLR (4th) 289 ("*Norsk*"), a decision of the Supreme Court of Canada, La Forest J, delivering the judgment of the minority, rejected the known plaintiff test on the basis that knowledge of the individual plaintiff had no normative salience. Its "sole function [was] to … 'solve' the indeterminacy problem". The test was therefore "an unjust rule owing to its sheer arbitrariness" (at 341g–342a).

65. In our judgment, there is no necessity to rely on the known plaintiff test to limit the class of persons to whom a negligent defendant may be liable. The proximity requirement adequately performs that function. Significantly, in *Caltex Oil* itself, one judge, Stephen J, endorsed a proximity-based analysis. He observed that the search was for "some principle of law which will operate as a sufficient restraint upon excessively wide liability" (at 572), and opined that the proper control mechanism was one "based upon notions of proximity between tortious act and resultant detriment" (at 574). Stephen J also added that "[t]he articulation, through the cases, of circumstances which denote sufficient proximity will provide a body of precedent productive of the necessary certainty" (at 575). We have made the same observation at [43] above.

66. In *Caltex Oil*, there was arguably sufficient legal proximity between the parties on the following grounds:

> (a) *Causal proximity*: There was causal proximity between the defendants' negligence and the plaintiff's loss—the cost of arranging for alternative means of transportation of the oil. As Stephen J observed (at 577), this loss, which reflected the loss of use of the pipeline, was "the quite direct consequence" of damage to the pipeline, as opposed to, *eg*, "loss of profits arising because [the plaintiff's] collateral commercial arrangements [were] adversely affected". This distinction is analogous to the one we have drawn between the loss suffered by NTUC Foodfare here, which flowed directly from part of the Lounge being rendered unsafe due to the Accident, and a hypothetical loss of profits flowing from reduced customer traffic at the Kiosk (see [48(b)] above).
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> (b) *Knowledge of risk that a determinate class would suffer a specific type of loss*: The defendants knew that the pipeline led to the plaintiff's oil terminal (see [62] above). They therefore knew that negligence on their part carried the risk that the plaintiff specifically would be unable to use the pipeline, and thereby suffer a particular type of loss, the cost of arranging for alternative means of transportation of the oil, which flowed directly from damage to the pipeline.

67. However, suppose that the plaintiff had passed on its enhanced costs of obtaining oil to its customers, thus causing those customers, in turn, to suffer economic losses. In our judgment, there would have been insufficient legal proximity between the defendant and the plaintiff's customers. First, there would have been inadequate causal proximity. The customers' losses would have been a step removed from the plaintiff's losses, and would have arisen only because of the plaintiff's responses to its economic loss. The losses would have been analogous to the hypothetical losses suffered by the suppliers to NTUC Foodfare (see [52] above). Second, in our judgment, the defendants in *Caltex Oil* could not be said to have known of the risk of harm to the plaintiff's customers. In this light, on the facts of *Caltex Oil*, the proximity requirement, as developed under the *Spandeck* framework, would have limited the defendant's liability to a determinate class, namely, the users of the pipeline.

68. We now turn to the second case, the decision of the Supreme Court of Canada in *Norsk*. The facts of *Norsk* are quite akin to those in this case. In *Norsk*, the defendants' negligent operation of a tug, which was towing a barge downstream, caused the barge to collide into a railway bridge. The collision caused extensive damage to the bridge, which was closed for weeks for repairs. The bridge was owned by the Department of Public Works, and was used by four railway companies. The principal user of the bridge was the plaintiff; the defendants were well aware of this. Due to the closure of the bridge, the plaintiff incurred the expense of rerouting its railway cars over another bridge. The plaintiff sued the defendants for this loss, which flowed from the damage to the bridge, notwithstanding the fact that the plaintiff did not have any

proprietary interest in the bridge.

69. By a 4–3 majority, the Supreme Court of Canada held that the plaintiff was entitled to recover the loss it had suffered from the defendants. McLachlin J delivered the principal judgment for the majority (L'Heureux-Dubé and Cory JJ concurring). McLachlin J applied, in gist, the two-stage test in *Anns v. Merton London Borough Council* [1978] AC 728 [§13.4.1.1], which is essentially the same as the *Spandeck* test albeit the latter incorporates a threshold requirement of factual foreseeability: see *Spandeck* at [73]. In finding that there was proximity between the parties, however, McLachlin J held at 376c–e that the plaintiff was in a "joint venture" with the Department of Public Works, on the basis that the former's operations were "closely allied" to the operations of the latter. *Norsk* has thus come to be understood as authority that a claim for relational economic loss may succeed if the plaintiff and the owner of the damaged property were in some "joint venture" ("the joint venture principle"): see *Clerk & Lindsell* at para 8-141.

70. However, the joint venture principle is also not without difficulty:

> (a) First, as a matter of authority, McLachlin J relied on the English case of *Morrison Steamship Co Ltd v. Greystoke Castle (Cargo Owners)* [1947] AC 265 ("*Morrison Steamship*") as authority for this principle. In that case, a negligently operated ship collided into a ship carrying the plaintiffs' cargo. The plaintiffs made general average contribution to the owners of the ship carrying their cargo. The House of Lords held, by a 3-2 majority, that the plaintiffs were entitled to recover the amount paid from the owners of the negligently operated ship. The majority stressed that the cargo owners and the owners of the cargo-carrying ship had been engaged in a "common adventure": see *Morrison Steamship* at 280 (*per* Lord Roche) and 296 (*per* Lord Porter). However, *Morrison Steamship* "had been regarded as turning on the principles of maritime law rather than establishing any general principle": see *Clerk & Lindsell* at para 8-141 fn 652 and *Murphy v. Brentwood District Council* [1991] 1 AC 398 at 468E (*per* Lord Keith of Kinkel). In this light, the doctrinal basis of the joint venture principle espoused in *Norsk* may be questionable.
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> (b) Second, as a matter of principle, the critical relation in the duty of care inquiry is the relation between the plaintiff and the defendant. However, the joint venture principle focuses on the relation between the plaintiff and a third party—the owner of the damaged property: see *Norsk* at 334 (*per* La Forest J). It is not clear why this should be of decisive importance in determining whether the defendant owes the plaintiff a duty of care.

71. We recognise that the joint venture principle may resolve the concern of liability to an indeterminate class: only a restricted class of persons would be in a sufficiently close relationship to the owner of the damaged property for the parties to be in a "joint venture". Yet the proximity requirement alone, shorn of the joint venture principle, can serve the same function. In *Norsk*, there was arguably sufficient legal proximity between the parties on these grounds:

> (a) *Physical proximity*: It appears that the master of the tug operated regularly, if not exclusively, in the river spanned by the bridge; he had been familiar with the bridge for over 40 years. The master therefore had a limited theatre of operations, analogous to the circumscribed area in which Mr Yap operated the airtugs. There would accordingly have been physical proximity between the master, who operated in the river, and the plaintiff, the principal user of the bridge over that same river.
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> (b) *Causal proximity*: The loss suffered by the plaintiff—the cost of rerouting trains that would otherwise have travelled across the bridge—flowed directly from the damage to the bridge. The loss was not premised on, *eg*, reduced passenger volume due to the rerouting of the trains. The loss was thus akin to the loss in *Caltex Oil* and the present case (see [66(a)] above).
>
> (c) *Knowledge of risk that a determinate class would suffer a specific type of loss*: The defendants must have known that if the bridge was damaged, a determinate class—the four railway companies who used the bridge—would suffer a specific type of loss, the cost of arranging for alternative means to route their railway cars, due to loss of use of the bridge.

72. However, suppose that the bridge had not been a railway bridge but was used by cars to traverse the river, and some drivers incurred economic losses in finding alternative travel routes due to closure of the

bridge. It is unclear that there would have been sufficient physical proximity between the master of the tug and any individual driver who would only have had an intermittent physical presence on the bridge. Furthermore, the class of potential plaintiffs—all of the drivers using the bridge—would have been indeterminate; the defendant would not have known of the risk of harm to a determinate class. Therefore, in such a case, there would probably have been insufficient legal proximity for a duty of care to arise. This illustrates again that the proximity requirement restricts the class of persons to whom a defendant may be liable in negligence, and therefore addresses the concern of indeterminate liability.

73. We pause here to note that in *Norsk*, McLachlin J made this same point, observing that proximity was "the controlling concept which avoids the spectre of unlimited liability": see *Norsk* at 369g–h. However, La Forest J (who delivered the judgment of the minority) and Stevenson J (who was also in the majority, but issued a separate judgment) rejected the proximity test on the basis that it expressed a conclusion rather than a principle: see *Norsk* at 344a–b and 387a–b. This is, in essence, the familiar objection that proximity is a meaningless label, which we rejected in *Spandeck* (at [80]). Proximity may be understood, as McLachlin J put it in *Norsk* at 369e, as "an umbrella [concept], covering a number of disparate circumstances". Still, those circumstances are sufficiently unified by a focus on the directness and closeness of the relationship between the parties. Proximity therefore remains a meaningful concept. Interestingly, although the High Court of Australia has declared that proximity is not a useful principle in determining whether a duty of care arises (see, *eg*, *Miller v. Miller* (2011) 242 CLR 446 at [59]), it appears that proximity continues to endure in the reasoning of Australian courts regarding the duty of care in tort: see Andrew Robertson, "Proximity: Divergence and Unity" in *Divergences in Private Law* (Andrew Robertson and Michael Tilbury eds) (Hart Publishing, 2016) at pp 21–32.

74. We now turn to the final case, the decision of the High Court of Australia in *Perre v. Apand Pty Ltd* (1999) 198 CLR 180 ("*Perre*"). In *Perre*, the defendant negligently introduced potato disease onto a farm in South Australia ("the Sparnon farm") by supplying non-certified seed to the farm. The Sparnon farm was located a few km from two plots of land owned by the Perre family. On one plot, a family company ("Rangara") grew potatoes which it sold to a second family company ("WF"). WF operated on the second plot of land, where it grew potatoes and processed both potatoes which it grew and others which it purchased from Rangara, before exporting the potatoes to Western Australia. WF processed the potatoes at a facility leased from a third family company ("PV").

75. Western Australian law prohibited the import of potatoes grown or processed within 20km of a crop infected by potato disease, for five years after detection of the disease. Significantly, the defendant knew that growers and processors of potatoes who operated within 20km of a farm to which the defendant supplied seed would suffer economic loss, due to an inability to export potatoes to Western Australia, if the seed was diseased.

76. WF, Rangara, PV and members of the Perre family sued the defendant for various economic losses. These alleged losses flowed from the damage to the Sparnon farm, rather than damage to property of the Perres (the defendant did not supply the non-certified seed to the Perres, and hence their land and crop were not blighted). The High Court of Australia held, by a 5-2 majority, that the defendant owed a duty of care to all of the plaintiffs. Hayne J held that a duty of care was only owed to WF. He reasoned that WF was the only party who grew and processed potatoes for sale to Western Australia (in his view, Rangara grew potatoes for sale to WF, not to Western Australia). Hayne J thus concluded that WF was the only party "directly affected by the application of the Western Australian regulation": see *Perre* at [352]. McHugh J held that a duty of care was not owed to PV: see *Perre* at [145].

77. No clear *ratio* emerges from the seven detailed judgments in *Perre*. We refer to *Perre* to further illustrate how the proximity requirement can address the concern of indeterminate liability. In our judgment, applying the *Spandeck* test to the facts of *Perre*, the defendant would only have been liable to WF (and possibly Rangara, depending on whether Rangara was properly considered to be a grower of potatoes for export to Western Australia), for the following reasons:

> (a) *Causal proximity*: The loss sustained by WF (loss of profits due to an inability to export potatoes to Western Australia) was the direct result of the defendant's supply of diseased seed to the Sparnon farm (given the Western Australian regulation). By contrast, the losses which PV and the

members of the Perre family sued for were far more indirect. PV pleaded that it suffered loss by losing the benefit of its tenancy with WF and the opportunity to re-let the land; the members of the Perre family claimed they suffered loss because of the diminution in value of one plot of their land, and loss of profits on the sale on the second plot. In our judgment, there would not have been sufficient causal proximity under the *Spandeck* test between the defendant's negligence and the losses suffered by PV and the members of the Perre family.

(b) *Knowledge of risk that a determinate class would suffer a specific type of loss*: The defendant knew that a determinate class of persons—growers or processors of potatoes within a 20km radius of farms to whom it supplied seed, who exported seed to Western Australia—would suffer loss of profits flowing from an inability to export potatoes to Western Australia—if it supplied diseased seed (see [75] above). WF was a member of this determinate class. PV and the members of the Perre family would not have fallen within this class.

In our judgment, the above analysis of *Perre* again indicates that the proximity requirement can manage the concern of liability to an indeterminate class.

78. In conclusion, our survey of the foreign cases indicates that there is no compelling normative basis to recognise any of the special factors relied on to justify liability in those cases. It appears to us that the special factors were crafted in the foreign cases to manage the concern of indeterminate liability. As this concern is adequately addressed by the first stage of the *Spandeck* test, *ie*, the requirement of proximity, we see no reason to transpose them into the *Spandeck* test.

Conclusion

79. In sum, we find that Mr Yap owed a duty of care to NTUC Foodfare. It is undisputed that Mr Yap operated the Airtug negligently by failing to keep a proper lookout (see [11] above). We therefore find that Mr Yap breached his duty of care. ***

REFLECTION:

- *Given the challenges of assessing proximity in relational economic loss cases, is the Singapore Court of Appeal's reasoning that relational economic loss should not be subject to a special proximity analysis persuasive?*
- *What role do foreign authorities have in guiding the Court's judgment in this case? Why might parties present foreign case law when litigating an unsettled area of law?*

19.3.3.4 Cross-references

- *R v. Imperial Tobacco Canada Ltd* [2011] SCC 42, [42], [100]: **§19.5.2.1**.

19.3.3.5 Further material

- P. Benson, "The Problem with Pure Economic Loss" (2009) 60 South Carolina L Rev 823.
- R. Perry, "Relational Economic Loss: An Integrated Economic Justification for the Exclusionary Rule" (2003) 56 Rutgers L Rev 711.
- R. Brown, *Pure Economic Loss in Canadian Negligence Law* (Toronto: LexisNexis, 2011).
- B. Feldthusen, *Economic Negligence: The Recovery of Pure Economic Loss* (6th ed, Scarborough: Carswell, 2012).

19.4 Negligent performance of professional services

19.4.1 Lawyers

19.4.1.1 McCullough v. Riffert [2010] ONSC 3891

✗**REF: §14.1.3.1, §14.2.5.1**

MULLIGAN J.: ***

1. Robert McCullough died on February 21, 2008 just ten days after visiting his lawyer to give instructions for a Will. The Will, which was not signed, would have left his entire estate to his niece Sarah Audra McCullough (Sarah). In this action his niece Sarah, the disappointed beneficiary, claims against his lawyer Diana Siglinda Riffert (the lawyer) in negligence. The issue in this trial is simply this: in the circumstances here, was the lawyer negligent in not attending to the preparation and execution of the Will before Robert died. ***

Does the Solicitor's Duty of Care Extend to Disappointed Beneficiaries?

47. The Ontario Court of Appeal affirmed this principle in *Hall v. Bennett Estate* (2003), 64 O.R. (3d) 191 (Ont. C.A.). In that case the solicitor took instructions from a death-bed client. However the solicitor had concerns about the capacity of the testator and a Will was not prepared. The client died later that day. In the particular circumstance of that case the court found that the lawyer was not negligent. Because of the issue of lack of testamentary capacity there was no retainer between the solicitor and client to complete a will. However the court did affirm the general principle of liability of a solicitor to a disappointed third party beneficiary. As Charron J.A. stated at para. 49 51:

> The solicitor's duty is of course owed primarily to the client. However the appellant rightly concedes that a solicitor's duty of care may extend to a person other than the client where that other person is injured as a result of the solicitor's negligence in performing the work for which he or she was retained by the client. Hence, a solicitor who is negligent in his or her professional work may be liable not only in contract (and possibly in tort) in respect to the client, but also in tort in respect of others to whom a duty of care can be shown to exist.
>
> The chancery division recognized the existence of a duty of care owed by a solicitor to a perspective beneficiary under a Will in *Ross v. Caunters* (1979), 3 All E.R. 580, [1980] Ch. 297 (Eng.Ch.Div.).
>
> The House of Lord subsequently reached a similar result in *White v. Jones*, [1995] 1 All E.R. 691 (U.K. HL). A solicitor who was unreasonably slow in preparing a Will, such that the testator died before it was executed, was found liable to a prospective beneficiary who was not his client.

48. The rationale for the extension of this duty to third party beneficiaries was summarized in *Earl v. Wilhelm*, [2000] S.J. No. 45, 2000 SKCA 1 (Sask. C.A.). After reviewing the leading authorities, including *White v. Jones*, (*supra*) Sherstobitoff J.A. at paras. 32-35 set out the following principles as a basis for the extension of this duty:

> Firstly, if no such duty is imposed the only persons with a valid claim, the testator and his estate, have suffered no loss, and the only person who has suffered a loss, a disappointed beneficiary, has no claim. This indicates a lacuna in the law which needs to be filled.
>
> Secondly, there exists a need to recognize the importance of the rights of persons to leave their property to whom they please and a need to rectify mistakes which frustrate those rights.
>
> Thirdly, there is no injustice in making a lawyer whose negligence has defeated his client's testamentary intentions liable to pay damages, even if the damages are payable direct to the disappointed beneficiary rather than to his client's estate for the purpose of distribution to the disappointed beneficiary.
>
> Finally, the public relies on lawyers to prepare effective Wills. To deny an effective remedy amounts to a refusal to acknowledge a lawyer's professional role in the community.

Was the Solicitor Negligent in Not Having the Will Signed in a Timely Manner?

49. There have been a number of decisions where courts have reviewed the solicitor's actions when a testator dies before the Will is executed. In *Rosenberg Estate v. Black* [[2001] O.J. No. 5051] the court reviewed a situation where the solicitor was retained to draft a tax plan including the Will. The solicitors were retained on September 25 and commenced work but there was no sense of urgency. On November

5 they learned of Mrs. Rosenberg's cancer. The solicitors continued working on the file but Mrs. Rosenberg died on November 10. In reviewing the facts of that case Swinton J. stated at para. 66:

> Although (the solicitor) knew that there was a serious health problem on Wednesday, November 5, even then, she had no reason to believe there was a substantial risk that Mrs. Rosenberg would die within the next few days. Nor did the family believe that to be the case. Mrs. Rosenberg had medical appointments for mid-November. She was not then hospitalized, and she was scheduled to begin a second round of chemotherapy on November 10.

50. Swinton J. had the benefit or expert witnesses for both the plaintiff and the defendant. It is helpful to review six factors which she referred to in her decision as presented by the plaintiff's expert Timothy Youdan. As Swinton J. stated at para. 42:

> Mr. Youdan was of the opinion that the professional standard for the preparation of a Will is "appropriately flexible, depending on the facts of each case". However, he summarized six factors to consider in determining whether a solicitor has acted reasonably in the preparation of draft Wills:
>
> (1) the terms of the lawyer's retainer—for example, whether a precise time table is agreed upon;
>
> (2) whether there was any delay caused by the client;
>
> (3) the importance of the Will to the testator;
>
> (4) the complexity of the job—for example the more complex the job the more time required;
>
> (5) the circumstances indicating the risk of death or onset of incapacity in the testator; and
>
> (6) whether there has been a reasonable ordering of the lawyer's priorities. By this, he meant that the clan has to expect the job will be done within a reasonable ordering of the priorities in the lawyer's life and practice.

51. In *White v. Jones* (*supra*), the testator wrote a letter to the solicitor requesting a change in his Will. The testator a 75 year old man attempted to make an appointment to see the lawyer but several appointments were cancelled and then the lawyer went on vacation. The Will did not get prepared and a few months later the testator died. The solicitor was held liable to the disappointed beneficiary.

52. In *X (an infant) v. Wollcombe Young*, [2001] Lloyd's Rep. 274, Part 3, Chancery Division, the court reviewed a claim in negligence against the solicitor for failing to prepare a Will for a terminally ill cancer patient. Instructions were given while the testator was in the hospital on June 26 and she died on July 1. As Neuberger J. stated at p. 282:

> First, on the facts of this case, that in the light of the appearance of (the testatrix) and the conversation he had with (the testatrix) I think (the solicitor) had no reason to believe that this alert, intelligent, albeit terminally ill, person, had a real risk of not surviving for the next week, or indeed for the next month. I do not think that, on the facts of this case, it was negligent for him not to consider talking to her doctors.

53. Neuberger, J. went on to provide the following guidance to solicitors at 282:

> There can always be said to be an imminent risk of death from heart attack, stroke or accident. The question as to whether a solicitor should be concerned about that possibility must, as I have said, be one of fact and degree. Where the client is old or ill, the delay which may be acceptable will obviously be less in the absence of age or illness. Where there is a plain and substantial risk of the client's imminent death, anything other than a handwritten rough codicil prepared on the spot for signature may be negligent. It is a question of the solicitor's judgment based on his assessment of the client's age and state of health.

54. However in the circumstances of the case before him Neuberger J. stated at 283:

> In summary, in agreement with (counsel), it appears to me that (the solicitor) aimed to complete the Will by Wednesday 2 or Thursday 3 July, was based on a view that could be held by a reasonably competent practitioner. It accorded with his client's instructions and expectations. There was nothing obviously dilatory about it. This was not a case of over two months delay coupled with broken appointments with the testator as in *White v. Jones* or a month to take instructions as in *Smith v. Claremont Haynes* [citations omitted].

55. As mentioned above, the defendant called Brian Schnurr as an expert witness. Mr. Schnurr is the author of *Estate Litigation*, 2d ed. Looseleaf (Thompson Reuters Canada, 2008). In its book of authorities the plaintiff made reference to Mr. Schnurr's text and in particular paragraph 21 dealing with solicitor's negligence in estate matters. Section 21.3(b) addresses this issue: "completing the will in a timely manner: how long is 'too long'"? Mr Schnurr reviews *White v. Jones* and *Rosenberg Estate v. Black*. Mr. Schnurr provides guidance to solicitors in circumstances where:

> [I]f that testator is elderly and is known to the lawyer (or ought to have been apparent to the lawyer), that the testator is in poor health there is a higher obligation upon the solicitor to take all reasonable steps to give priority to completing the will quickly.

56. In those circumstances Mr. Schnurr suggests:

> 1. Faced with a testator in these circumstances, the solicitor should give serious consideration to the immediate preparation of an abbreviated "temporary" will (whether typed or handwritten) setting out the essence of the testator's intentions. Another approach would be to dictate a form of holograph will for the testator to create immediately. In this way the testator's intentions would be immediately in force while the solicitor attends to the drafting and subsequent revision of the "formal" will or other components from the testator.

Did the Lawyer Meet the Reasonable Standard of Care of Competent Solicitor? ***

62. In my view, there is a continuum between a client who presents without any particular concerns regarding health or age and a client who is clearly on his or her death bed. The level of urgency to prepare a will quickly will increase as factors mount. There may be situations where a lawyer should prepare a brief will at the first interview with a very elderly or a terminally ill client. Best practices may indicate that course of action to be prudent in such situations. There always exists the possibility that a client could die from the illness or an accident after the first meeting with the lawyer. To fail to prepare a will quickly may fall below the standard of care for a reasonably competent solicitor depending on all the facts in this continuum. However, I am not satisfied that, on the facts here, the lawyer fell below the standard of care.

Conclusion

63. For the reasons set out herein I find that the lawyer has met the reasonable standard of care. Therefore negligence by the lawyer has not been proved. In the result I dismiss the plaintiff's claim against the lawyer.

Damages

64. However I am required to determine the damages that the plaintiff would have been awarded if she was successful. Counsel for the plaintiff and defendant filed a joint document brief containing some items of correspondence from the estate solicitor. Robert's major asset was his residence which sold for the sum of $138,000. It was the position of the plaintiff's counsel that Sarah would have retained this house had she been the beneficiary of the estate and thus a higher value should be used. At the time of trial Sarah had relocated to Whitehorse Yukon to pursue employment opportunities there. However, her evidence at trial was that if it wasn't for this trial she would be living in Ontario now. There was no clear and cogent evidence that she would have retained this house. Under the circumstances I am satisfied that the $138,000 figure less the cost of sale is the appropriate value for the residence. The probated value of the estate according to the estate solicitor was $181,753.47. However the accounting of the value of the estate as provided by the estate solicitor indicated that the value of the estate after reducing for a pension overpayment, real estate commissions and legal fees was $151,408. Under the circumstances I am satisfied that the damages awarded to the plaintiff if successful in her action would have been $151,408. ***

REFLECTION:

- *What is the rationale for extending a solicitor's duty of care to third party beneficiaries of a proposed will?*
- *What are the potential risks of recognising such a duty of care to third parties?*

19.4.1.2 Salomon v. Matte-Thompson [2019] SCC 14

Supreme Court of Canada – 2019 SCC 14 (on appeal from Court of Appeal of Québec)

GASCON J. (WAGNER C.J.C., ABELLA, MOLDAVER, KARAKATSANIS, BROWN, ROWE, MARTIN JJ. concurring):

1. This case concerns the professional liability of a lawyer who has referred clients to a financial advisor where that advisor subsequently turns out to be a fraudster and where, in addition to the referral, the lawyer has over a number of years been recommending and endorsing the advisor's investments.

2. By 2003, the first appellant, Kenneth F. Salomon, had been the lawyer of the respondents, Judith Matte-Thompson and 166376 Canada Inc. ("166"), in Quebec for a long time. During that year, he introduced them to Themis Papadopoulos, his personal friend and his own financial advisor, and recommended that they consult him. In the following four years, the respondents ended up investing over $7.5 million with Mr. Papadopoulos's investment firm, Triglobal Capital Management Inc. ("Triglobal"). Over the course of those four years, Mr. Salomon repeatedly endorsed Mr. Papadopoulos as a financial advisor and encouraged the respondents to make and retain investments with Triglobal. In 2007, Mr. Papadopoulos and his associate, Mario Bright, disappeared with the savings of around 100 investors, including those of the respondents.

3. The respondents claimed that Mr. Papadopoulos and Mr. Bright had fraudulently misappropriated their investments. They also claimed that Mr. Salomon and the second appellant, his law firm Sternthal Katznelson Montigny LLP ("SKM"), had been professionally negligent in two ways. First, Mr. Salomon and SKM had breached their duty to advise the respondents by recommending, endorsing and encouraging inappropriate investments with Mr. Papadopoulos's firm. Second, they had disregarded their duty of loyalty to the respondents by placing themselves in a conflict of interest that led them to turn a blind eye to the situation. The respondents sued Mr. Papadopoulos, Mr. Bright, Mr. Salomon and SKM for the loss of their investment capital, the loss of the opportunity to realize a return on those investments, and moral injury. They also sought an award of punitive damages against Mr. Papadopoulos and Mr. Bright.

4. The trial judge held that Mr. Papadopoulos and Mr. Bright were liable for the respondents' investment losses and moral injury, as well as for punitive damages, but dismissed the claim against Mr. Salomon and SKM. She concluded that Mr. Salomon had not committed any fault that was a cause of the respondents' losses. ***

5. The Court of Appeal concluded that the trial judge had made reviewable errors, and it reversed her judgment. ***

Did the Court of Appeal Err by Improperly Expanding the Professional Obligations of Lawyers Who Refer Their Clients to Independent Advisors? ***

45. *** Lawyers who refer clients to other professionals or advisors have an obligation of means, not one of result. Although lawyers do not guarantee the services rendered by professionals or advisors to whom they refer their clients, they must nevertheless act competently, prudently and diligently in making such referrals, which must be based on reasonable knowledge of the professionals or advisors in question. Referring lawyers must be convinced that the professionals or advisors to whom they refer clients are sufficiently competent to fulfill the contemplated mandates ***. In *Re Harris* [*(Succession)*, 2016 QCCA 50, 25 C.C.L.T. (4th) 1 (C.A. Que.)], the Quebec Court of Appeal pointed out that the question of the referring lawyer's liability *** "cannot be answered in the abstract. The answer necessarily depends on the facts of the case" (para. 13). The court added that "[i]n such matters, the circumstances are everything" (para. 22).

46. That is an apt description of the standard of conduct for lawyers who refer clients to other professionals and advisors, and I endorse it. ***

49. The question in the case at bar is not whether the initial referral of the respondents to Mr. Papadopoulos was or was not sufficient in and of itself to establish the appellants' professional liability. The focus here is instead on the entirety of Mr. Salomon's conduct. But one thing is clear. Just as a referral is not a guarantee of the services rendered by the professional or advisor to whom the client is referred, it is also not a shield against liability for other wrongful acts committed by the referring lawyer. ***

50. *** The Court of Appeal *** found that Mr. Salomon had done far more than merely make a referral. *** Mr. Salomon also repeatedly recommended Mr. Papadopoulos, his investment firm and their in-house products, and encouraged the respondents to invest—and retain their investments—in Triglobal funds. Moreover, Mr. Salomon turned a blind eye to a conflict of interest which resulted in him serving two masters and sacrificing the respondents' interests. It was the entirety of Mr. Salomon's conduct that led the Court of Appeal to hold the appellants liable in the circumstances.

Did the Court of Appeal Err by Interfering With the Trial Judge's Findings Relating to the Faults Committed by Mr. Salomon? ***

(1) Mr. Salomon's Duty to Advise

52. A lawyer's duty to advise is threefold, encompassing duties (1) to inform, (2) to explain, and (3) to advise in the strict sense. The duty to inform pertains to the disclosure of relevant facts; the duty to explain requires that the legal and economic consequences of a course of action be presented; and the duty to advise in the strict sense requires that a course of action be recommended ***.

53. The duty to advise is inherent in the legal profession and exists regardless of the nature of the mandate ***. Its exact scope depends on the circumstances, including the object of the mandate, the client's characteristics and the expertise the lawyer claims to have in the field in question (*Côté c. Rancourt*, 2004 SCC 58, [2004] 3 S.C.R. 248 (S.C.C.), at para. 6; Thouin, at pp. 55-69).

54. As no bright lines can be drawn in this regard, the case law is replete with examples of situations in which courts have had to perform the difficult task of deciding whether lawyers should, in advising their clients, have taken the initiative to go beyond what the clients specifically asked them for ***. One thing is clear, however: when lawyers do provide advice, they must always act in their clients' best interests and meet the standard of the competent, prudent and diligent lawyer in the same circumstances. In this respect, I agree with the Court of Appeal that any advice lawyers give that exceeds their mandates may, if wrongful, engage their liability. Whether Mr. Salomon was acting within the limits of his mandate in providing financial advice to the respondents is therefore immaterial. He is liable for any wrongful advice he gave in that context.

55. In this case, the Court of Appeal found that Mr. Salomon had failed to advise the respondents as a competent, prudent and diligent lawyer would have done. *** I conclude that the Court of Appeal had a sufficient basis to intervene as it did in this regard. ***

(2) Mr. Salomon's Duty of Loyalty

66. The Court of Appeal also concluded that Mr. Salomon's personal and financial relationship with Mr. Papadopoulos had placed him in a conflict of interest, which constituted an additional fault committed against the respondents. The trial judge had found that there was no conflict of interest. In this regard, the evidence established not only that Mr. Papadopoulos was Mr. Salomon's close friend and personal financial advisor, but also in particular that, unbeknownst to the respondents, Mr. Salomon had received payments totalling $38,000 from Mr. Papadopoulos in 2006 and 2007 while continuing to reassure them regarding their investments with Triglobal.

67. *** As the Court of Appeal noted, *** "Mr. Salomon put himself in a conflict of interest by not limiting the role he played with the [respondents] to simply recommending Triglobal, its representative, [Mr.] Papadopoulos, and the products they offered" (para. 98). ***

70. As the Court of Appeal rightly noted, the trial judge had failed to comment on or explain certain other factors that confirmed the very close nature of the relationship between Mr. Salomon and Mr. Papadopoulos

and that could not be ignored in assessing the payments received by Mr. Salomon in 2006 and 2007. A proper consideration of the evidence as a whole leads to the conclusion that this very close relationship affected Mr. Salomon's objectivity in advising the respondents. This breach of his duty of loyalty informs the assessment of Mr. Salomon's breach of his duty to advise, as it ultimately led him to turn a blind eye to a situation to which he should have been more attentive and alert.

71. As mandataries, lawyers have a duty to avoid placing themselves in situations in which their personal interests are in conflict with those of their clients ***. The duty to avoid conflicts of interest is a salient aspect of the duty of loyalty they owe to their clients (*Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39, [2013] 2 S.C.R. 649 (S.C.C.), at para. 19 ***). In conjunction with the duty of commitment to the client's cause, the duty to avoid conflicting interests ensures that "divided loyalt[ies] d[o] not cause the lawyer to 'soft peddle' his or her [representation] of a client out of concern for [other interests]" (*McKercher*, at para. 43 ***). In the same manner, the duty of loyalty shields the performance of the lawyer's duty to advise clients from the taint of undue interference.

72. It is true that Mr. Salomon's friendship with Mr. Papadopoulos had been divulged to Ms. Matte-Thompson. However, that disclosure did not entitle him to shirk his duty to properly advise the respondents. Again, the Court of Appeal had a solid basis for finding that the record showed that Mr. Salomon's relationship with Mr. Papadopoulos had caused him to neglect his professional duty to advise the respondents. ***

81. Conflicts of interest must be proven on a balance of probabilities (*** *McKercher*, at para. 38). *** The Court of Appeal was justified in finding that Mr. Salomon had been in a conflict of interest and that he had in the end neglected the respondents' interests, thereby violating his duty of loyalty to them in addition to his duty to advise them.

Did the Court of Appeal Err by Interfering with the Trial Judge's Findings Relating to Causation?

82. *** Once Mr. Salomon's faults had been properly identified and circumscribed, the causal link to the respondents' losses was in fact quite obvious. As I will explain, the Court of Appeal was right to intervene in the trial judge's conclusion on causation.

(1) True Causal Connection

83. There is no doubt that the fraud committed in the Ponzi scheme is a cause of the respondents' losses. That said, more than one fault—a contractual fault in this case—can cause a single injury so long as each of the faults is a true cause, and not a mere condition, of the injury ***. The liability of Mr. Papadopoulos and Mr. Bright for their fraud therefore does not mean that the appellants are not liable if their faults were a cause of the respondents' losses.

84. A fault is a true cause of its logical, immediate and direct consequences ***. This characterization is largely a factual matter, which depends on all the circumstances of the case ***. ***

87. Taken together, Mr. Salomon's faults with respect to both his duty to advise and his duty of loyalty were a true cause of the losses suffered by the respondents. Ms. Matte-Thompson referred to Mr. Salomon as her "friend and lawyer for the past 20+ years" ***. It is clear from the record that she had full confidence in him and that she relied not only on his legal advice on the management of the patrimonies she administered, but also on his professional judgment concerning the investments she was contemplating. *** The respondents' trust in and reliance on Mr. Salomon was based on recommendations, endorsements and reassurances that remained constant and uniform over the years. Mr. Salomon actively encouraged their reliance by providing multiple investment recommendations and professing to be knowledgeable in that field. Over the years, Mr. Salomon made every effort to convince the respondents to invest—and to retain their investments—with Triglobal. I would add that such reliance by a client on the advice and opinion of his or her lawyer is unsurprising, as it is inherent in the lawyer-client relationship. The credibility that lawyers generally enjoy with their clients is a factor to bear in mind when assessing the impact of the advice they provide (see *Harris*, at para. 19). ***

89. For the Court of Appeal, if Mr. Salomon had properly advised the respondents as a competent, prudent

and diligent lawyer, and if the conflict of interest had not tainted his recommendations, endorsements and reassurances over the years, the respondents would never have invested, nor retained their investments, with Triglobal. They would consequently not have suffered the significant losses they did. There is no dispute that the faults of Mr. Salomon occurred well before any of their losses materialized.

90. I note that the appellants argue that the respondents' losses were also caused by imprudence on Ms. Matte-Thompson's part. Given the circumstances of this case, I cannot accept this argument. While one might find that Ms. Matte-Thompson was very trusting, Mr. Salomon not only provided her with wrongful advice, but also repeatedly reassured her when she did express concern regarding the investments. In this context, Mr. Salomon's liability is neither excluded nor diminished by the fact that the respondents did not second-guess his wrongful advice. A client's ability to rely on advice given by his or her lawyer is central to the lawyer-client relationship. As a matter of principle, "[a] client's acceptance of a lawyer's negligent advice cannot shield the lawyer from liability" ***. That would turn the law of professional liability on its head ***.

(2) Absence of a Break in the Chain of Causation

91. I also agree with the Court of Appeal that the fraud did not break the causal link between Mr. Salomon's faults and the respondents' losses. It is true that a person who commits a fault is not liable for the consequences of a new event that the person had nothing to do with and that has no relationship to the initial fault. This is sometimes referred to as the principle of *novus actus interveniens*: that new event may break the direct relationship *** between the fault and the injury. Two conditions must be met for this principle to apply, however. First, the causal link between the fault and the injury must be completely broken. Second, there must be a causal link between that new event and the injury. Otherwise, the initial fault is one of the faults that caused the injury, in which case an issue of apportionment of liability may arise ***.

92. The Court of Appeal rightly found that the first of these two requirements was not met in the case at bar; the causal link between the fault and the injury was not completely broken, quite the contrary. The case law confirms that fraud committed by a third party does not shield from liability persons who failed to take required precautions ***. In the instant case, Mr. Salomon's blind endorsement of Mr. Papadopoulos, his failure to perform due diligence and his baseless reassurances caused the respondents to be vulnerable to a potential fraud ***. The fraud did not break the chain of causation. No losses would have been suffered without the faults first committed by Mr. Salomon. As this Court stated in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.), *** where the breach of an obligation "initiated the chain of events leading to the investor's loss … it is right and just that the breaching party account for this loss in full" (p. 443). ***

(3) Foreseeability and Recoverability

94. *** The major risks associated with investment advice are a decline in market prices or fraud by a third party, either of which would result in the loss of the invested money. Where these risks materialize, and where the lawyers have failed to abide by standards of professional conduct that are meant to protect their clients against these very risks, they may be liable for their clients' investment losses ***. This does not turn lawyers into insurers for their clients' losses. ***

Conclusion

96. This is not a case about a mere referral. It concerns a referring lawyer who, over the course of several years, recommended and endorsed a financial advisor and financial products, and encouraged his clients to retain their investments with that advisor. Further, in doing this, he failed to perform adequate due diligence, misrepresented investment information, committed breaches of confidentiality and acted despite being in a conflict of interest. In such a context, a lawyer cannot avoid liability by hiding behind the high threshold for establishing liability that applies in a case in which a lawyer has merely referred a client.

97. *** The trial judge made palpable and overriding errors in her assessment of fault and causation, and she also erred in analyzing the conflict of interest at issue in this case. The professional liability of the appellants for the respondents' losses has been established. ***

CÔTÉ J. (dissenting):

98. No one doubts the disastrous consequences, for the respondents *** of the fraud committed by their financial advisors, Themis Papadopoulos and Mario Bright. No one would dispute that the conduct of their lawyer, the appellant Kenneth F. Salomon, was in many respects far from commendable. Not content with referring his clients to the two financial advisors and their firm, *** Mr. Salomon went on to improperly volunteer investment advice, which he was not qualified to do. Nevertheless, after carefully and thoroughly assessing the evidence, the trial judge found that Mr. Salomon was not liable for the losses the respondents had suffered as a result of their financial advisors' fraudulent conduct ***. Contrary to my colleague, I fail to see how that finding is marred with reviewable errors. I am therefore of the opinion that the Court of Appeal's intervention was not warranted. ***

REFLECTION:

- *What are the components of a lawyer's duty to advise their client? In what way did Salomon's conduct fall short of his duty to advise?*
- *How could Salomon have avoided putting himself in a conflict of interest with his clients?*

19.4.1.3 Cross-references

- *Jarbeau v. McLean* [2017] ONCA 115, [2]-[3]: **§16.3.2**.

19.4.1.4 Further material

- Lord Justice Jackson, "The Professions: Power, Privilege and Legal Liability" (2015) 31 J Professional Negligence 122.
- T. Cockburn & B. Hamilton, "Civil and Professional Liability for Will Making and Estate Planning—A New Standard for Australian Solicitors?" (2009) 17 Waikato L Rev 52.
- UBC Law Students' Legal Advice Program, "Complaints against Lawyers" in *Law Students' Legal Advice Manual* (47th ed, Vancouver: The University of British Columbia, 2023), ch 5.

19.4.2 Financial advisors

19.4.2.1 Manchester Building Society v. Grant Thornton UK LLP [2021] UKSC 20

United Kingdom Supreme Court – [2021] UKSC 20

LORD HODGE AND LORD SALES (LORD REED, LADY BLACK, LORD KITCHIN concurring):

1. This appeal is concerned with the application of the concept of scope of duty in the tort of negligence, as illustrated by the decision of the House of Lords in *Banque Bruxelles Lambert SA v. Eagle Star Insurance Co Ltd; South Australia Asset Management Corpn v. York Montague Ltd* [1997] AC 191 ("*SAAMCO*") in relation to recovery of damages for economic loss. The context is professional advice given by expert accountants. The appeal was heard by the same expanded constitution of the court which heard the appeal in *Khan v. Meadows* [2021] UKSC 21 [**§19.4.3.2**], which is concerned with the same issue in the context of professional advice given by a medical expert. The reason the appeals were heard by the same constitution of the court was to provide general guidance regarding the proper approach to determining the scope of duty and the extent of liability of professional advisers in the tort of negligence. It is therefore desirable that the judgments in the two appeals should be read together as reflecting and supporting a coherent underlying approach. The present judgment should be read with our judgment in *Khan v. Meadows*.

2. Accountancy advice is usually given pursuant to a contract, as was the valuation advice in *SAAMCO* and the legal advice considered in the other leading judgment in this area, *Hughes-Holland v. BPE Solicitors* [2017] UKSC 21; [2018] AC 599 ("*Hughes-Holland*"). In such cases, there is a parallel duty of care in tort and in contract. The extent of the responsibility assumed by the professional adviser, and the extent of their liability if they fail to act with reasonable care, is the same in tort and in contract. Medical advice may also be given pursuant to a contract, in the private medical sector. There too there is a parallel duty of care in tort and in contract, and the extent of the responsibility assumed by the professional adviser and the extent of their liability will again be the same. In what follows, for ease of exposition we will focus on the scope of

the duty of care in tort. The scope of the parallel duty of care in contract depends on the same factors. ***

4. In summary, our view is that (i) the scope of duty question should be located within a general conceptual framework in the law of the tort of negligence; (ii) the scope of the duty of care assumed by a professional adviser is governed by the purpose of the duty, judged on an objective basis by reference to the purpose for which the advice is being given (in the context of this judgment, we use the expression "purpose of the duty" in this sense); (iii) in line with the judgment of Lord Sumption in *Hughes-Holland* at paras 39-44, the distinction between "advice" cases and "information" cases drawn by Lord Hoffmann in his speech in *SAAMCO* should not be treated as a rigid straitjacket; and, following on from this, (iv) counterfactual analysis of the kind proposed by Lord Hoffmann in *SAAMCO* should be regarded only as a tool to cross-check the result given pursuant to analysis of the purpose of the duty at (ii), but one which is subordinate to that analysis and which should not supplant or subsume it. The points which we make below in relation to the facts of the case as found by the judge reflect our view regarding the proper approach to be adopted. ***

(ii) The scope of the duty of care in professional advice cases

13. *** In our view, the scope of the duty of care assumed by a professional adviser is governed by the purpose of the duty, judged on an objective basis by reference to the reason why the advice is being given (and, as is often the position, including in the present case, paid for). Lord Hoffmann was explicit about this in *SAAMCO* at p 212:

> "*** The scope of the duty, in the sense of the consequences for which the valuer is responsible, is that which the law regards as best giving effect to the express obligations assumed by the valuer: neither cutting them down so that the lender obtains less than he was reasonably entitled to expect, nor extending them so as to impose on the valuer a liability greater than he could reasonably have thought he was undertaking." ***

17. Therefore, in our view, in the case of negligent advice given by a professional adviser one looks to see what risk the duty was supposed to guard against and then looks to see whether the loss suffered represented the fruition of that risk. ***

(iii) "Advice" cases and "information" cases

18. The distinction drawn by Lord Hoffmann in *SAAMCO* between "advice" cases and "information" cases has not proved to be satisfactory. Put shortly, as explained by Lord Sumption in *Hughes-Holland* at paras 39-44, the distinction is too rigid and, as such, it is liable to mislead. In reality, as Lord Sumption emphasises at para 44, the whole varied range of cases constitutes a spectrum. At one extreme will be pure "advice" cases, in which on analysis the adviser has assumed responsibility for every aspect of a transaction in prospect for his client. At another extreme will be cases where the professional adviser contributes only a small part of the material on which the client relies in deciding how to act. In some cases (such as those involving valuers) it is readily possible to say that the purpose of the advice given is limited and that the adviser has assumed responsibility under a duty the scope of which is delimited by that purpose, which Lord Hoffmann called an "information" case. However, Lord Sumption observed (para 44), "[b]etween these extremes, every case is likely to depend on the range of matters for which the defendant assumed responsibility and no more exact rule can be stated".

19. In our view, for the purposes of accurate analysis, rather than starting with the distinction between "advice" and "information" cases and trying to shoe-horn a particular case into one or other of these categories, the focus should be on identifying the purpose to be served by the duty of care assumed by the defendant: see section (ii) above. Ascribing a case to one or other of these categories seems to us to be a conclusion to be drawn as a result of examination of that prior question. ***

22. *** As Lord Sumption points out in *Hughes-Holland*, para 39, both "advice" and "information" cases involve the giving of advice. For the reasons we give, we think it is important to link the focus of analysis of the scope of duty question and the duty nexus question back to the purpose of the duty of care assumed in the case in hand.

(iv) Application of SAAMCO-style counterfactual analysis

23. Related to the issues examined in sections (i) to (iii) above is the use of counterfactual analysis as set out by Lord Hoffmann in *SAAMCO*. Lord Hoffmann proposed a form of counterfactual analysis as a way to assist in identifying the extent of the loss suffered by the claimant which falls within the scope of the defendant's duty, by asking in an "information" case whether the claimant's actions would have resulted in the same loss if the advice given by the defendant had been correct. This procedure generates a limit to the damages recoverable which has been called the *SAAMCO* "cap". As Lord Sumption said in *Hughes-Holland*, para 45, this is "simply a tool for giving effect to the distinction between (i) loss flowing from the fact that as a result of the defendant's negligence the information was wrong [ie the loss falling within the scope of the defendant's duty] and (ii) loss flowing from the decision to enter into the transaction at all [ie by application of a simple "but for" test]". As so explained, it is clear that the use and, in particular, the correct framing of the counterfactual scenario follows from the prior question, which is, what purpose was the duty of care assumed by the defendant supposed to serve? In that regard, we agree with Lord Burrows (paras 195-203) that the counterfactual test may be regarded as a useful cross-check in most cases, but that it should not be regarded as replacing the decision that needs to be made as to the scope of the duty of care (albeit he describes that as a policy decision, whereas we think it reflects more fundamental issues of principle: see section (ii) above). ***

26. Another problem associated with counterfactual analysis of this kind is the danger of manipulation, in argument, of the parameters of the counterfactual world. ***

(v) The facts in this case

28. The present case has some unusual features which differentiate it from the type of valuer case illustrated by *SAAMCO*. Grant Thornton advised the society in circumstances where the management of the society had made their own assessment about the nature of the commercial markets for lifetime mortgages and for swaps and had made their own judgment that a business model matching swaps and mortgages would be commercially attractive. This is not a case in which Grant Thornton was asked to give advice about these matters. Also, the management of the society understood the true underlying financial position of the society. They appreciated that the mark-to-market value of swaps was subject to constant variation and that the society would have to make payments to swaps counterparties reflecting varying interest rates. ***

29. However, the society had an interest in the accounting treatment of the swaps and the mortgages from a distinct commercial perspective. As a lending institution, the society was subject to regulation. At the material time, the regulatory authority was the Financial Services Authority ("the FSA"). Under the regulatory regime, the society was required to maintain a substantial level of capital to ensure its continuing viability should it come under stress, which is referred to as "regulatory capital". If it failed to do so, the FSA could take steps to close its operations. ***

30. In 2005 the society changed the format for the preparation of its accounts from one set of accounting standards, under which swaps were not included on its balance sheet, to the International Financial Reporting Standards ("IFRS"), under which swaps did have to be brought onto its balance sheet. In the context of the IFRS, Lord Leggatt has explained the significance of application of the "hedge accounting" convention. Application of that convention in the society's accounts would have the effect that swaps were matched with the society's mortgage book, thereby greatly reducing the appearance of volatility in the society's profits and greatly reducing the level of capital which it would be required to maintain to meet regulatory requirements.

31. Teare J made findings that Grant Thornton understood from their discussions with the society's management the regulatory capital issue and the importance for the society of being able to use hedge accounting as a "key tool in avoiding the profit volatility caused by recognising … hedging instruments at fair value" (para 162). He also found that in discussions between the society and Grant Thornton in late 2005 and early 2006 the society was looking to Grant Thornton for advice whether it was entitled to use hedge accounting in drawing up its accounts and that it needed that advice in order to make a commercial decision whether to enter into swaps to be matched against mortgages, in other words to begin to carry into effect its proposal for a new business model involving matching swaps and lifetime mortgages. He

further found that Grant Thornton were also asked to advise on whether the practice which the society was proposing to adopt of substituting different lifetime mortgages in the future against long term swaps would be permitted under the hedge accounting rules and that they confirmed by an email dated 11 April 2006 that this would be permitted and on that basis approved the society's proposal to use hedge accounting in drawing up its accounts. The significance of this was that in regulatory capital terms the society would be able to afford to implement its business model.

32. In reliance on that advice, the society decided to pursue the matched swaps and mortgages business model. It decided not to unwind its two existing swaps and it entered into further swaps. ***

33. Grant Thornton's advice was repeated thereafter each year it signed an audit opinion stating that the society's annual accounts, drawn up on the basis of the hedge accounting policy, gave a true and fair view of its financial position. *** However, the original advice given in 2006 was particularly significant, since it was on the basis of that advice that the society entered into new swaps (and decided not to unwind the existing swaps) and the disruption of financial markets in the financial crash of 2008 followed soon afterwards, resulting in a sharp fall in interest rates and exposing the society to the risk of significant financial loss if it were to be forced to break the swaps.

34. In the circumstances in which Grant Thornton gave its advice, the purpose of the advice was clear. They advised that the society could employ hedge accounting in order to reduce the volatility on its balance sheet and keep its regulatory capital at a level it could afford in relation to swaps to be held to term on the basis that they were to be matched against mortgages. In other words, the society looked to Grant Thornton for technical accounting advice whether it could use hedge accounting in order to implement its proposed business model within the constraints arising by virtue of the regulatory environment, and Grant Thornton advised that it could. That advice was negligent. It had the effect that the society adopted the business model, entered into further swap transactions and was exposed to the risk of loss from having to break the swaps, when it was realised that hedge accounting could not in fact be used and the society was exposed to the regulatory capital demands which the use of hedge accounting was supposed to avoid. That was a risk which Grant Thornton's advice was supposed to allow the society to assess, and which their negligence caused the society to fail to understand. ***

38. *** In our opinion, reference to the reason the advice was sought and given is important, because that is the foundation for the conclusion that the purpose of the advice was to deal with the issue of hedge accounting in the context of its implications for the society's regulatory capital. It is not in dispute that the loss in issue formed part of the society's "basic loss" flowing from Grant Thornton's negligent advice. Examination of the purpose for which that advice was given shows that the loss fell within the scope of their duty of care. Having regard to that purpose, we consider that Grant Thornton in 2006 in effect informed the society that hedge accounting could enable it to have sufficient capital resources to carry on the business of matching swaps and mortgages, when in reality it did not. In our opinion, this is analogous to a dividend payment case, where an auditor negligently advises a company that it has capital resources at a level which would permit payment of a dividend when in fact it does not.

39. *** [W]e consider that the judge was entitled to make the assessment that the society's damages should be reduced by 50% on the basis of its contributory negligence. The contribution by the society to its own loss arose from the mismatching of mortgages and swaps in what was an overly ambitious application of the business model by the society's management.

LORD LEGGATT: ***

41. The issue on this appeal is whether the society can recover this cost as damages from the accountants (reduced by 50% for the society's contributory negligence). ***

172. *** As the majority of the Supreme Court of Canada observed in *Livent* (at para 87) [§19.3.1.3]:

> "[The auditor] does not escape liability simply because a negligent audit, in itself, cannot cause financial harm. Audits never, in themselves, cause harm. It is only when they are detrimentally relied upon that tangible consequences ensue."

Where matters which make the auditor's advice incorrect foreseeably cause losses which the audited entity would not otherwise have incurred, there is good reason to hold the auditor liable for those losses. ***

175. For all these reasons, I conclude that the judge and the Court of Appeal were wrong to hold that the loss sustained by the society as a result of entering into long term interest rate swaps in reliance on Grant Thornton's negligent advice was not within the scope of Grant Thornton's duty. They should have concluded that it was a loss from which Grant Thornton owed a duty of care to protect the society. The loss was caused by a matter—the lack of an effective hedging relationship between the swaps and the lifetime mortgages which they were supposed to hedge—which Grant Thornton negligently failed to appreciate and report to the society and which made its advice wrong. By the same token, if Grant Thornton's advice had been correct and there had been an effective hedging relationship between the swaps and the mortgages, as Grant Thornton advised that there was, the loss would not have occurred. ***

LORD BURROWS:

177. I agree that this appeal should be allowed. ***

REFLECTION:

- *The United Kingdom Supreme Court rejected the distinction between "advice" and "information" cases. How did this approach affect the analysis of the scope of duty in this case?*
- *What role did contributory negligence play in determining Grant Thornton's liability?*
- *What measures can professional accountants take to mitigate their risk of liability in cases such as this?*
- *The SAAMCO principle was addressed in Deloitte & Touche v. Livent Inc. (§19.3.1.3). Whereas McLachlin C.J. would have applied the principle to limit the scope of liability in that case, a majority of the Court queried whether the principle "conflicts with Canadian jurisprudence" (at [95]). Should Canadian common law recognise the SAAMCO principle of causation?*

19.4.2.2 Cross-references

- *Grant Thornton LLP v. New Brunswick* [2021] SCC 31, [1]-[4]: §6.8.3.
- *Deloitte & Touche v. Livent Inc.* [2017] SCC 63, [86]-[95]: §19.3.1.3.

19.4.2.3 Further material

- UK Law Weekly Podcast, "*Manchester Building Society v. Grant Thornton* [2021] UKSC 20 & *Khan v. Meadows* [2021] UKSC 21" (Jul 6, 2021) 🎧.
- J. Blom, "The *SAAMCO* Principle: Damages in the Twilight Zone between Tort and Contract" (2018) 84 (2d) Supreme Court L Rev 311.
- A.F. Tuch, "M&A Advisor Misconduct: A Wrong Without a Remedy?" (2021) 45 Delaware J of Corporate L 177.

19.4.3 Medical practicioners

19.4.3.1 Powell v. University Hospitals Sussex [2023] EWHC 736 (KB)

✗**REF: §14.1.3.2, §14.2.5.2, §16.1.4, §18.1.1.2**

DEXTER DIAS KC: ***

3. In this clinical negligence claim, Mrs Anne Powell, a woman now aged 65, was admitted into the Princess Royal Hospital in Hayward's Heath, Sussex to have what is called "left revision total knee replacement". She had a prosthesis—a metal implant—in her left knee that was causing her discomfort. The objective of the surgery was to put it right by replacing it. This was in November 2013 when she was 55. At some point, following surgical procedures she had between that November and the next June, an infection entered her body and could not be controlled. Her left leg had to be amputated above the knee in 2016. Mrs Powell is now largely confined to a wheelchair. She needs the help of her husband Colin just to have a bath. The

impact on virtually every aspect of her life has been devastating. She says that this catastrophic result was caused by the negligence of Mr Sandeep Chauhan, a very experienced orthopaedic surgeon who performed surgical procedures on her in that period. ***

5. *** Mrs Powell says that if she was advised as she should have been about the risks and limitations of the [surgical] procedures Mr Chauhan offered her, and if she were informed of a reasonable alternative treatment, what is called "first stage procedure" (the removal of the implant), she would have taken this option, and that would have eradicated any infection, and her leg would not have been lost. ***

What the claimant would have done if appropriately advised ***

86. *** I find it improbable that Mrs Powell would have rejected her surgeon's advice ***. What this comes to is that if the breach of duty had not occurred, and Mrs Powell had been informed properly about what her options were, it would not have made any difference to what actually happened (the result would have been just the same). ***

89. As such, I find that the breach of duty involving the 28 January procedure did not cause loss and damage. The necessary consequence is that the claim fails for lack of causal connection. ***

Overall conclusion

127. *** Having reviewed the wide canvass of the evidence and examined the arguments of parties, my conclusions are as follows: *** the claimant has failed to prove that she would have chosen first stage procedure if properly informed and advised as at 28 January 2014; ***.

128. Yet, and at the same time, the court has found that Mr Chauhan was in breach of his duty of care to Mrs Powell. I must say something about that.

129. Mr Chauhan failed to inform or advise Mrs Powell about reasonable alternative treatments prior to the procedure on 28 January 2014. Further, he breached his duty of care by not informing her of the material difference in the chances of infection eradication between first stage procedure and DAIR. He holds himself out, with some justice, as a knee specialist. Knee surgery has been his sole practice for over 15 years. In that time, he has performed hundreds of operations on the knees of countless members of the public. ***

130. I have no doubt that Mr Chauhan has given many, many patients great relief from pain and has improved their mobility and capacity to enjoy life. None of this should be forgotten. Equally, the court cannot generalise from a sample size of one. It is not fair to Mr Chauhan to extrapolate from his treatment of Mrs Powell to other patients. That said, I have found that his care towards Mrs Powell was in the respects I have identified deficient and negligent. He showed a less than meticulous approach to consenting Mrs Powell. This meant that as at 28 January 2014, she was deprived of at least considering and discussing first stage procedure with her orthopaedic surgeon, a surgical treatment that the *majority* of surgeons would have advised her to undergo, carrying with it the effective certainty of eliminating infection deep in her knee joint. She was also deprived of discussing her orthopaedic surgeon's advice about the relative merits of procedures with her family, as I find she undoubtedly would have done. All of this, I am bound to say, is deeply regrettable. We live in an age of informed patient consent, not as a mere technicality, or a laborious box-ticking exercise, but as a genuine commitment to and recognition of the autonomy and self-determination of patients—a stark reminder that it is their life and their body.

131. Nevertheless, I have found that even if Mr Chauhan had complied with his duty of care, it would not have made any difference to the outcome in this case, and the very sad loss of Mrs Powell's left leg. Tragically, the *Staphylococcus epidermidis* that was (likely to have been) introduced into her body after 28 January 2014, would have resulted in the amputation of her leg even if Mr Chauhan had informed and advised her as she was entitled him to have done. I suspect that a lot of learning and reflection has followed from what happened to Anne Powell. Anyone hearing what occurred is bound to have great sympathy for her. But sympathy is different from the finding of facts. The facts do not change with the winds of sympathy and deep concern. As Lady Hale said of fact-finding in *In re B* [2008] UKSC at [31]:

> "The task is a difficult one. It must be performed without prejudice and preconceived ideas. But it

> is the task which we are paid to perform to the best of our ability."

132. That is what I have tried to do. Yet this case unmistakably underscores the importance of patient autonomy. Professor Ronald Dworkin put it this way (*Life's Dominion: An Argument about Abortion and Euthanasia*, London: Vintage Books, 1993):

> "Recognizing an individual right of autonomy makes self-creation possible. It allows each of us to be responsible for shaping our lives according to our own coherent or incoherent—but, in any case, distinctive—personality. It allows us to lead our lives rather than be led along them, so that each of us can be, to the extent a scheme of rights can make this possible, what we have made of ourselves." (p.224)

133. That said, Lord Bingham concluded in *Chester* at [9] that:

> "The patient's right to be appropriately warned is an important right, which few doctors in the current legal and social climate would consciously or deliberately violate. *I do not for my part think that the law should seek to reinforce that right by providing for the payment of potentially very large damages by a defendant whose violation of that right is not shown to have worsened the physical condition of the claimant*." (emphasis provided)

134. That is the position here. Having said this, I am acutely aware that the agreed sum of damages would have made Mrs Powell's life and that of those who care for her so diligently markedly easier. But the legal basis for awarding them is not there. However, I emphasise that nothing said here must in any way be taken to diminish or underestimate the gross pain and loss that Mrs Powell, a perfectly respectable wife, mother and member of our community, has suffered. She formed a strong impression on me as a stoical, courageous and entirely affable person, who bears her terrible loss with fortitude. Her life has been tough and she has persevered with what is admirable tenacity.

Disposal

135. This claim must fail and is dismissed. ***

REFLECTION:

- *Powell's negligence claim failed for lack of causation. Does this case illustrate the merits of no-fault compensation schemes (§12.1) over the tort system?*
- *Outside of tort law, how else might Dr. Chauhan have been held accountable for having breached his duty to obtain his patient's informed consent to the surgery?*

19.4.3.2 Khan v. Meadows [2021] UKSC 21

United Kingdom Supreme Court – [2021] UKSC 21

LORD HODGE AND LORD SALES (LORD REED, LADY BLACK, LORD KITCHIN concurring): ***

3. The appellant was alerted to the possibility that she was a carrier of the haemophilia gene, which can give rise to the hereditary disease in which the ability of blood to coagulate is severely reduced, when in January 2006 her nephew was born and subsequently diagnosed as having haemophilia. The appellant wished to avoid having a child with that condition. She therefore consulted a general medical practitioner, Dr Athukorala, in August 2006 with a view to establishing whether she was a carrier of that gene. The blood tests which were arranged were those which establish whether a patient has haemophilia. They could not confirm whether she was a carrier of the haemophilia gene. In order to obtain that information, the appellant should have been referred to a haematologist for genetic testing.

4. On 25 August the appellant saw Dr Hafshah Khan, who was another general practitioner in the same practice, to obtain and discuss the results of the blood tests. Dr Khan told her that the results were normal. As a result of the advice which she received in this and the earlier consultation the appellant was led to believe that any child she might have would not have haemophilia.

5. In December 2010 the appellant became pregnant with her son, Adejuwon. Shortly after his birth he was diagnosed as having haemophilia. The appellant was referred for genetic testing which revealed that she was indeed a carrier of the gene for haemophilia.

6. Had the general practitioners referred the appellant for genetic testing in 2006, she would have known that she was a carrier of the haemophilia gene before she became pregnant. In those circumstances, she would have undergone foetal testing for haemophilia when she became pregnant in 2010. That testing would have revealed that her son was affected by haemophilia. If so informed, the appellant would have chosen to terminate her pregnancy and Adejuwon would not have been born.

7. Adejuwon's haemophilia is severe. He has been unresponsive to conventional factor VII replacement therapy. He has suffered repeated bleeding in his joints. He has had to endure unpleasant treatment and must be watched constantly as minor injury will lead to further bleeding.

8. In December 2015 Adejuwon was diagnosed as also suffering from autism. This is an unrelated condition; his haemophilia did not cause his autism or make it more likely that he would have autism.

9. Adejuwon's autism has made the management of his treatment for haemophilia more complicated. He does not understand the benefit of the treatment he requires and so his distress is heightened. He will not report to his parents when he has a bleed. He is likely to be unable to learn and retain information, to administer his own medication, or to manage his own treatment plan. New therapies for treatment of haemophilia may mean that his prognosis in respect of haemophilia is significantly improved. However, in itself, his autism is likely to prevent him living independently or being in paid employment in the future.

10. In view of these factual findings, *** it is unsurprising that the sum needed to compensate the appellant if she were entitled to claim for the additional costs of bringing up her son that are associated with both conditions was agreed by the parties at a figure which was over six times the sum to be awarded for the additional costs associated with his haemophilia alone.

11. Dr Khan admitted that she was liable to compensate the appellant for the additional costs associated with Adejuwon's haemophilia but denied responsibility in relation to the additional costs associated with his autism.

12. In the statement of facts and issues the parties agreed that it was "reasonably foreseeable that as a consequence of [Dr Khan's] breach of duty, the appellant could give birth to a child that suffered from a condition such as autism as well as haemophilia".

13. The appellant contends that she is entitled to damages for the continuation of the pregnancy and its consequences, including all the costs related to Adejuwon's disabilities arising out of the pregnancy. The respondent contends that her liability should be limited to the costs associated with Adejuwon's haemophilia and that the costs associated with his autism fall outside the scope of the duty she owed to the appellant. ***

Discussion ***

36. What is often called "the *SAAMCO* principle" or "the scope of duty principle" is that "a defendant is not liable in damages in respect of losses of a kind which fall outside the scope of his duty of care": *Aneco Reinsurance Underwriting Ltd (in liquidation) v. Johnson & Higgins Ltd* [2001] UKHL 51; [2001] 2 All ER (Comm) 929; [2002] 1 Lloyd's Rep 157, para 11 per Lord Lloyd of Berwick. ***

38. In our view it is often helpful to ask the scope of duty question before turning to questions as to breach of duty and causation. It asks: "what, if any, risks of harm did the defendant owe a duty of care to protect the claimant against?" ***

40. Lord Sumption summarised the position in *Hughes-Holland* (paras 35-36) stating that the two fundamental features in the reasoning in *SAAMCO* were: (i) where the contribution of the defendant is to supply material which the client will take into account in making his own decision on the basis of a broader assessment of the risks, the defendant has no legal responsibility for his decision; and (ii) the scope of duty

principle has nothing to do with the causation of loss as that expression is usually understood in the law. ***

53. The mechanism by which the duty nexus question is addressed in the valuers' negligence cases is to ask a counterfactual question: what would the claimant's loss have been if the information which the defendant in fact gave had been correct? We refer to that question as "the SAAMCO counterfactual". It is sometimes misunderstood. The question is not whether the claimant would have behaved differently if the advice provided by the defendant had been correct. Rather, the counterfactual assumes that the claimant would behave as he did in fact behave and asks, whether, if the advice had been correct, the claimant's actions would have resulted in the same loss. By this means, the court can ascertain the loss which is attributable to that information being wrong. In some circumstances, as in valuers' negligence, it is appropriate to use this counterfactual. In other circumstances, the scope of duty question may identify the fair allocation of risk between the parties without the use of this counterfactual. In such cases the *SAAMCO* counterfactual may contribute nothing.

54. Where the counterfactual is applied in negligent overvaluation, the tool used to give effect to the answer to the counterfactual question has been to limit the damages awarded to the difference between the valuation and the true value of the property at the time of the negligent valuation. ***

58. *** The scope of duty principle (para 36 above) is, as Lord Sumption explained in *Hughes-Holland*, para 47, a general principle of the law of damages. It requires the court in determining the extent of the defendant's liability in damages to distinguish between what as a matter of fact are consequences of a defendant's act or omission and what are the legally relevant consequences of the defendant's *breach of duty*. A defendant's act or omission may as a matter of fact have consequences which, because they are not within the scope of his or her duty of care, do not give rise to liability in negligence (para 45 above). ***

Application to the facts

67. First, the economic costs of caring for a disabled child are of a nature that is clearly actionable. Secondly, the scope of duty question is answered by addressing the purpose for which Ms Meadows obtained the service of the general medical practitioners. She approached the general practice surgery for a specific purpose. She wished to know if she was a carrier of the haemophilia gene. *** Dr Khan owed her a duty to take reasonable care to give accurate information or advice when advising her whether or not she was a carrier of that gene. In this context it matters not whether one describes her task as the provision of information or of advice. The important point is that the service was concerned with a specific risk, that is the risk of giving birth to a child with haemophilia.

68. Thirdly, Dr Khan was in breach of her duty of reasonable care, as she readily admitted. Fourthly, as a matter of factual causation, Ms Meadows lost the opportunity to terminate the pregnancy in which the child had both haemophilia and autism. There was thus a causal link between Dr Khan's mistake and the birth of Adejuwon. But that is not relevant to the scope of Dr Khan's duty. In this case, fifthly, the answer to the scope of duty question points to a straightforward answer to the duty nexus question: the law did not impose on Dr Khan any duty in relation to unrelated risks which might arise in any pregnancy. It follows that Dr Khan is liable only for the costs associated with the care of Adejuwon insofar as they are caused by his haemophilia. One can also apply the *SAAMCO* counterfactual as an analytical tool by asking what the outcome would have been if Dr Khan's advice had been correct and Ms Meadows had not been a carrier of the haemophilia gene. The undisputed answer is that Adejuwon would have been born with autism. Sixthly, given the purpose for which the service was undertaken by Dr Khan, and there being no questions of remoteness of loss, other effective cause or mitigation of loss, the law imposes upon her responsibility for the foreseeable consequences of the birth of a boy with haemophilia, and in particular the increased cost of caring for a child with haemophilia.

69. We would dismiss the appeal.

LORD BURROWS:

70. I have had the benefit of reading the joint judgment of Lord Hodge and Lord Sales. I agree with their decision to dismiss this appeal. ***

LORD LEGGATT: ***

98. *** The subject matter of Dr Khan's advice was limited to whether Ms Meadows was carrying a haemophilia gene and accordingly only losses causally connected (or, if the terminology is preferred, which have a sufficient nexus) to that subject matter are within the scope of the defendant's duty. On the agreed facts, the losses caused by the fact that, as the defendant negligently failed to discover and report, the claimant was carrying a haemophilia gene are those associated with the haemophilia from which her child suffers and do not include costs associated only with his autism, which is causally unrelated. The appeal must therefore be dismissed.

REFLECTION:

- *How does the United Kingdom Supreme Court's application of the SAAMCO counterfactual relate to or differ from traditional "but for" causation reasoning?*
- *Is the Court's reasoning that there was no causative link between Dr. Khan's mistake and the birth of Meadow's son Adejuwon compelling?*
- *The SAAMCO principle was addressed in Deloitte & Touche v. Livent Inc. (§19.3.1.3). Whereas McLachlin C.J. would have applied the principle to limit the scope of liability in that case, a majority of the Court queried whether the principle "conflicts with Canadian jurisprudence" (at [95]). Should Canadian common law recognise the SAAMCO principle of causation?*

19.4.3.3 Armstrong v. Ward [2019] ONCA 963, rev'd [2021] SCC 1

Supreme Court of Canada – 2021 SCC 1

WAGNER C.J.C. (FOR THE COURT):

1. The appeal is allowed for the reasons of Justice van Rensburg, with costs throughout.

2. The judgment of the Court of Appeal is set aside and the trial judgment is restored.

Ontario Court of Appeal – 2019 ONCA 963

PACIOCCO J.A. (JURIANSZ J.A. concurring) [reversed on appeal]: ***

6. As the result of health concerns Ms. Armstrong was experiencing, Dr. Ward surgically removed her colon. Ms. Armstrong's colon was anatomically normal, showing no signs of tumour, thickening, or other inflammation. Its removal was nonetheless medically indicated because of the symptoms Ms. Armstrong exhibited and the previous removal of part of her intestine in an ileostomy. *** The contention is that Dr. Ward performed the surgery negligently, causing injury to Ms. Armstrong's left ureter, a tube that carries urine from her left kidney to her bladder. ***

10. Ms. Armstrong sued Dr. Ward. The central negligence theory pursued against Dr. Ward was that he caused adhesions or scar tissue that blocked her left ureter by improperly using a cauterizing device, known as a LigaSure. ***

13. Ms. Armstrong contended at trial that Dr. Ward was negligent in that he either touched her left ureter with the LigaSure or brought the LigaSure too close to the ureter causing a thermal injury or heat damage. When the injury healed, the adhesions and scarring caused the blockage.

14. The trial was held in January 2018 without a jury. Dr. Ward admitted that Ms. Armstrong sustained damages in the amount of $1,300,000. However, he did not admit negligence. He denied that he breached the standard of care expected of him as a surgeon, or that the damage Ms. Armstrong sustained was caused in fact and in law by any such breach.

15. The four expert witnesses who testified are highly experienced and celebrated physicians. Each party called two of those experts, one surgeon, and one urologist. The surgeons focused on standard of care issues, and the urologists concentrated primarily on causation questions.

16. The trial judge ultimately found that Dr. Ward breached the standard of care, and that this breach caused Ms. Armstrong's ureter injury in law and fact.

17. With respect to causation, the trial judge found that Dr. Ward caused Ms. Armstrong's injury by coming within "one or two" millimetres of her ureter "causing damage leading to scar tissue and the eventual ureter blockage." This, in turn, caused the loss of Ms. Armstrong's kidney. ***

56. A trial judge who is prepared to proceed on the basis that only negligence could cause the relevant injury is obliged to consider and rule out non-negligent causes. Only if this is done, can the trial judge properly use success as the standard of care. In determining whether this is so, the burden is not on the defendant to raise potential non-negligent causes with evidence, nor is it improper speculation for a trial judge to consider potential non-negligent causes that are open on the evidence but that the plaintiff has failed to address. A plaintiff whose liability theory is that only negligence could have caused the injury in question is obliged to demonstrate that this is so, and the trial judge is required to accept this before finding liability. That did not occur in this case.

57. Nor can liability properly be grounded in the low risk of injury identified by the trial judge. It is a logical error to infer that since an adverse result is improbable, a defendant was negligent in causing that adverse result. Negligence needs to be proved in each specific case, unless it is established that the kind of injury in question can only occur through negligence. Yet, as explained, the trial judge never found this to be so.

58. With respect, the trial judge erred in law in defining the standard of care. Having found that Dr. Ward took the steps that a prudent surgeon would take during this surgical procedure, the trial judge should have found that it was not proved that Dr. Ward breached the requisite standard of care. ***

66. I accept Dr. Ward's first ground of appeal. The trial judge erred in law in identifying and applying the standard of care. Indeed, on the findings of fact he did make, had the trial judge applied the law correctly, he would have found that Dr. Ward is not liable. ***

VAN RENSBURG J.A. [upheld on appeal]: ***

86. In general terms, the standard of care required of a medical practitioner is to exercise a reasonable degree of skill and knowledge and the degree of care that could reasonably be expected of a normal, prudent practitioner of the same experience and standing: *Crits v. Sylvester*, [1956] O.R. 132 (Ont. C.A.), at pp. 142-143, aff'd. [1956] S.C.R. 991 (S.C.C.). The standard of reasonableness is not a standard of excellence that amounts to perfection. To adopt such an approach would amount to a guarantee: *Carlsen v. Southerland*, 2006 BCCA 214, 53 B.C.L.R. (4th) 35 (B.C. C.A.), at paras. 13 and 15.

87. In any case where standard of care is at issue, the court must determine what is reasonably required to be done (or avoided) by the defendant in order to meet the standard of care: *Berger v. Willowdale A.M.C.* (1983), 41 O.R. (2d) 89 (Ont. C.A.), at p. 95, citing *Blyth v. Birmingham Water Works Co.* (1856), 156 E.R. 1047 (Eng. Exch.), at p. 1049. In a medical malpractice case, the court must determine what a reasonable physician would have done (or not done) in order to meet the standard of care: *Kennedy v. Jackiewicz*, 2004 CanLII 43635 (Ont. C.A.), at para. 20, leave to appeal refused: 2005 CarswellOnt 1669 (S.C.C.). The degree of foreseeable risk affects the determination of the standard of care: *McArdle Estate v. Cox*, 2003 ABCA 106, at para. 27.

88. Here, the question is whether the trial judge, in his determination and application of the standard of care, held Dr. Ward to a higher standard than what could reasonably be expected of a prudent and reasonable general surgeon performing a colectomy in the circumstances of this case. ***

125. In oral argument, the appellant asserted that the standard of care at best would have been to "use reasonable efforts to" avoid Ms. Armstrong's left ureter while dividing the mesentery with the LigaSure device, and that the trial judge erred by failing to consider whether Dr. Ward accidentally, and without negligence, came too close to Ms. Armstrong's left ureter. ***

128. Each of the experts testified that staying away from the ureter was part of the standard of care, and a necessary step. None of the witnesses posited a situation where a competent surgeon, in the context of

surgery on a normal abdomen, could accidentally come too close to the ureter. Dr. Burnstein said the risk should be zero, while Dr. Hagen said "you're really nowhere near the ureter" during surgery and so "it's not possible to damage the ureter if you've identified it and … taken the vessels." ***

135. In this case, the trial judge considered and explicitly rejected the non-negligent causes put forward by the appellant's expert witnesses. As I have explained, there was no evidence in this trial to suggest that a reasonably competent surgeon, "trying" to stay at least two millimetres away, might accidentally have injured the ureter during this particular operation. The expert evidence detailed earlier was to the contrary. The trier of fact is required to determine standard of care and its breach based on the evidence and not on speculation. The onus on a plaintiff in a medical malpractice case is not to disprove every possible theory that might be put forward by a defendant, let alone theories that are not raised at trial, but only on appeal.

136. *** The trial judge in this case did not reason from the injury backwards; nor did he find negligence based on the low probability of risk of an injury. Rather, *** the trial judge was satisfied by the evidence, including Dr. Hagen's statement that this type of surgery was "basic surgery for a general surgeon", that under these circumstances it would be a breach of the standard of care for a general surgeon to come within one or two millimetres of the ureter during a routine colectomy on a benign colon. ***

158. The main, if not the entire, focus of this appeal was on standard of care. The appellant however confirmed that he continues to rely on the written arguments set out in his factum in respect of the fourth ground: that the trial judge committed a palpable and overriding error in accepting the respondent's expert evidence on causation.

159. At trial there was no question that Ms. Armstrong's ureter injury occurred as a result of her colectomy. There was also no question that the injury to the ureter resulted in the harm that she suffered, including the removal of her left kidney, and the damages that the parties had agreed upon. The causation issue in this case was the mechanism of the injury—whether it occurred as a result of thermal spread from the use of the LigaSure device too close to Ms. Armstrong's ureter (the opinion of Dr. Klotz), or by one of the other two mechanisms proposed by Dr. Hagen and Dr. Robinette. Only the first mechanism would have entailed negligence on the part of Dr. Ward.

160. The appellant asserts that Dr. Klotz's theory of causation, which was accepted by the trial judge, was not supported by the literature or the evidence. The appellant then points to various aspects of the evidence to assert that the trial judge ought instead to have accepted Dr. Robinette's opinion that the ureter was damaged through unavoidable abdominal scarring that expanded inside the abdomen, eventually leading to the stricture of the ureter.

161. There was extensive evidence at trial about how Ms. Armstrong's ureter came to be injured. Indeed, as I have already observed, this was the central issue, on which there was extensive expert evidence. The trial judge's reasons review and analyze the specific opinions of the expert witnesses on this issue, and then explain why he accepted Dr. Klotz's opinion. Without question, there was evidence to support the trial judge's findings. In setting out in his factum the evidence that contradicts the trial judge's conclusion, and that supports an alternative causation theory that was rejected by the trial judge, the appellant is simply inviting this court to reconsider the evidence and to reach a different factual conclusion. For these reasons I reject this ground of appeal.

Conclusion

162. *** I would reject the appellant's contention that the trial judge made any reversible error in *** reaching his conclusion that Dr. Ward breached the standard of care, and in accepting Dr. Burnstein's opinion evidence. ***

164. Based on the evidence, the trial judge did not hold Dr. Ward to a standard that was higher than could reasonably be expected of an "average reasonable prudent practitioner" performing a colectomy where no complicating features were present. The trial judge's conclusion that a reasonably competent surgeon would have stayed two millimetres away from the ureter is fully supported by the evidence. *** On the evidence, this was a breach of the standard of care. ***

166. Finally, this appeal is about whether it was open to the trial judge on the evidence to find that a reasonable and prudent surgeon could reasonably be expected to stay at least two millimetres away from the ureter when removing a benign colon. In my view this conclusion, like the trial judge's conclusion about the cause of the damage to Ms. Armstrong's ureter, was available and fully supported by the evidence.

REFLECTION:

- *What evidence was crucial to the determination of the breach question? Who was best placed to assess it?*
- *How can a judge or jury—who are not medical experts—assess what standard of care a reasonable medical practitioner ought to take in the context of a complex medical procedure?*

19.4.3.4 Cross-references

- *Kohli v. Manchanda* [2008] INSC 42: §2.2.2.
- *Arndt v. Smith* [1997] CanLII 360 (SCC): §19.10.2.1.

19.4.3.5 Further material

- D.O. Shane, "Medical Negligence: Myths, Legends, and Reality" in *Damages 2022* (Vancouver: CLEBC, 2022) 📺.
- D. Nolan & J. Plunkett, "Keeping Negligence Simple" (2022) 138 L Quarterly Rev 175.
- L. Johnston & D. Liu, "Medical Malpractice" Dial A Law (Jun 2018).
- E. Adjin-Tetty, "Rights and Tort Law: Respecting Children's Decisional Autonomy for Medical Interventions" (2018) 84 (2d) Supreme Court L Rev 161.
- Law Pod UK Podcast, "Breast Surgeon Conviction and the Nature of Consent" (Jul 31, 2017) 🎧.
- The Hearing Podcast, "Brain Injuries in Sport: Where is the Duty of Care?" (Jul 5, 2021) 🎧.
- UBC Law Students' Legal Advice Program, "Complaints against Doctors" in *Law Students' Legal Advice Manual* (47th ed, Vancouver: The University of British Columbia, 2023), ch 5.

19.5 Negligence of public authorities

19.5.1 Emergency services

19.5.1.1 Jane Doe v. Toronto Police Comm'rs [1990] CanLII 6611 (ON Div Ct)

Ontario Court of Justice (Divisional Court) – 1990 CanLII 6611, leave denied: 1991 CanLII 7565 (ON CA)

MOLDAVER J. (FOR THE COURT):

1. On August 24, 1986, Jane Doe was confronted by an intruder. He had gained access to her second-floor apartment by forceable entry through a locked balcony door. Ms. Doe was raped. The attacker fled. The police were called immediately.

2. Several months later, the attacker was captured. He ultimately pleaded guilty to a number of sexual assaults. These included the attack upon Ms. Doe and assaults upon several other women who had been previously violated in a manner similar to Ms. Doe. The accused was sentenced to 20 years' imprisonment.

3. All of the prior attacks had occurred within a one-year period in the vicinity of Church and Wellesley Streets, Toronto. They involved white, single women, living in second- or third-floor apartments. In each case, the attacker had gained entry though a balcony door.

4. Ms. Doe has now started a civil action against: (1) Kim Derry and William Cameron, the investigating officers in charge of the case; (2) Jack Marks, Chief of the Metropolitan Toronto Police Force at that time; and (3) the Board of Commissioners of Police for the Municipality of Metropolitan Toronto. She seeks damages for pain and suffering, inconvenience and loss of enjoyment of life. In addition, she has incurred expenses and lost income. She suffers from serious and prolonged bouts of depression and anxiety. This

has led to psychiatric counselling and therapy. ***

Under what circumstances will the police owe a private law duty of care to a member of the public?

14. Section 57 of the *Police Act*, R.S.O. 1980, c. 381, reads as follows:

> The members of police forces appointed under Part II, except assistants and civilian employees, *are charged with the duty of preserving the peace, preventing robberies and other crimes and offences, including offences against the by-laws of the municipality, and apprehending offenders*, and commencing proceedings before the proper tribunal, and prosecuting and aiding in the prosecuting of offenders, and having generally all the powers and privileges and are liable to all the duties and responsibilities that belong to constables. [Emphasis added.]

This section imposes certain duties upon the police. They include (1) preserving the peace, (2) preventing crimes, and (3) apprehending offenders. The police are charged with the duty of preserving law and order within our society, including the protection of the public from those who would commit or have committed crimes.

15. When a crime has been committed, society is best protected by the ultimate detection and apprehension of the offender. This holds especially true when the criminal is at large and likely to commit further offences.

16. For the most part, the police are free to go about their task of detecting and apprehending criminals without fear of being sued by individual members of society who have been victimized. The reason for this is simple. While the police owe certain duties to the public at large, they cannot be expected to owe a private law duty of care to every member of society who might be at risk.

17. Foreseeability of risk alone is not sufficient to impose a private law duty of care. See *Hill v. Chief Constable of West Yorkshire*, [1988] 2 All E.R. 238 (H.L.).

18. To establish a private law duty of care, foreseeability of risk must co-exist with a special relationship of proximity. ***

Do the pleadings support a private law duty of care by the defendants in this case?

20. The plaintiff alleges that the defendants knew of the existence of a serial rapist. It was eminently foreseeable that he would strike again and cause harm to yet another victim. The allegations, therefore, support foreseeability of risk.

21. The plaintiff further alleges that, by the time she was raped, the defendants knew or ought to have known that she had become part of a narrow and distinct group of potential victims, sufficient to support a special relationship of proximity. According to the allegations, the defendants knew:

> (1) that the rapist confined his attacks to the Church-Wellesley area of Toronto;
>
> (2) that the victims all resided in second- or third-floor apartments;
>
> (3) that entry in each case was gained through a balcony door; and
>
> (4) that the victims were all white, single and female.

22. Accepting as I must the facts as pleaded, I agree with Henry J. that they do support the requisite knowledge on the part of the police sufficient to establish a private law duty of care. The harm was foreseeable and a special relationship of proximity existed. [Henry J. held, (1989), 58 DLR (4th) 396:

> *** [C]ounsel cited examples of circumstances where the police have been held liable for negligence because the Court found a special relationship of proximity between the police and an individual member of the public which imposed the duty on the police to act in a particular manner:
>
> (a) At common law, a constable has not only a general duty to prevent crimes and arrest criminals, but also a general duty to protect the life and property of the inhabitants. Thus, in *Haynes v.*

Harwood [1935] 1 K.B. 146 (C.A.), a constable who intervened to stop runaway horses was not a volunteer, he was under a discretionary duty to prevent what could reasonably be foreseen as a serious accident; ***.

In *Millette v. Côté*, [1971] 2 O.R. 155 ***, Galligan J. held that a constable who was at the scene of an accident while on patrol had a duty to warn persons using the highway of the dangerous condition that existed [p. 266 O.R.]:

> There is a basic and fundamental duty on the part of a police officer to observe and report dangerous conditions seen by him on his patrol.

In *O'Rourke v. Schacht* [1976] 1 S.C.R. 53, warning signs had been posted to warn of an excavation and detour on the highway. A motorist knocked down the warning sign. The police officers at the scene failed to restore the sign or post adequate warnings, and the plaintiff drove into the unmarked excavation and was injured; he sued the constables and the commissioner of the Ontario Provincial Police (O.P.P.). ***

Spence J., who wrote for the majority [of the Supreme Court of Canada], outlined the issue as whether the constables owed their duties alone to their superior officers, the commissioner and to the Crown, or are their duties to citizens who might be injured by the non-performance or the negligent performance of those duties. In the result, after canvassing some of the authorities, including *Haynes v. Harwood* and *Home Office v. Dorset Yacht Co. Ltd.* [1970], 2 All E.R. 294 [§13.2.3], he upheld the judgment of Schroeder J.A. as follows, at p. 71 [S.C.R.]:

> I have the same view as to the duty of a police officer under the provisions of s. 3(3) of the *Police Act* in carrying out police traffic patrol. In my opinion, it is of the essence of that patrol that the officer attempt to make the road safe for traffic. Certainly, therefore, there should be included in that duty the proper notification of possible road users of a danger arising from a previous accident and creating an unreasonable risk of harm. ***

(b) The police are liable for negligence in the operation of their vehicles and in the discharge of their weapons. There is no dispute about this: see, however, *Priestman v. Colangelo*, [1959] S.C.R. 615, where a constable shot at the tire of a car in which a thief was fleeing but hit the driver, and the car—then out of control—killed two pedestrians. The Supreme Court of Canada, per Locke J., found a duty not only to his superior, to capture the thief, but also a duty to persons on the highway to protect them from injury from the escaping car. The constable was justified in firing his weapon in these circumstances, both to prevent the escape and to protect the public in the vicinity. The fact that the bullet struck the driver was "simply an accident".

(c) Where a prisoner in police custody escapes in circumstances which place particular individuals at risk, then the police may be liable for negligence in failing to maintain custody of the prisoner, e.g. *Dorset Yacht Co.*, *supra*.

(d) As stated by Lord Keith in *Hill v. Chief Constable of West Yorkshire*, [1988] 2 All E.R. 238 (H.L.) at p. 240:

> There is no question that a police officer, like anyone else, may be liable in tort to a person who is injured as a direct result of his acts or omissions. So he may be liable in damages for assault, unlawful arrest, wrongful imprisonment and malicious prosecution, and also for negligence. Instances where liability for negligence has been established are *Knightley v. Johns* [1982] 1 WLR 349 and *Rigby v. Chief Constable of Northamptonshire* [1985] 1 WLR 1242. ***

I refer again to the *Air India* case [*Re Air India* (1987), 44 D.L.R. (4th) 317 (H.C.)] where the police were performing an "operational" function and were held to be capable of being vested with a duty to an identifiable group of individuals on the basis of knowledge, foreseeability and proximity of relationship.

> In all the cases, it is apparent that the Courts decide, on the particular circumstances of the case, having regard to both statutory and common law duties imposed and the facts of the case, whether a private law duty is owed to an individual member of the public, the breach of which is actionable. Moreover, the private law duties do not necessarily arise from risks of harm created by the police themselves, but can also arise where the risk is created by a third party over whom they may or may not have any control.
>
> I revert to the issue I am here addressing—whether a cause of action lies against the police; as I have said at the outset, that depends on the circumstances of the case. I have dealt with the authorities that impose a private law duty of care in the performance of their essentially operational functions as derived from Lord Wilberforce and Wilson J. ***
>
> The statement of claim on a fair and generous reading alleges that the police had undertaken to investigate the activities of the serial rapist, about whom they had considerable information; that they knew he was preying upon young women in a narrowly defined area of Toronto; that the victims had similar distinguishing characteristics which included those of the plaintiff; that they could reasonably expect him to strike again, and that the plaintiff was a potential victim. It is alleged that, given those factors, the police made a choice to forego protection of the plaintiff and a very limited group of foreseeable victims by warning or otherwise, which might have alerted the criminal, in favour of maintaining the integrity of the investigation and by implication waiting for him to strike again, which he did, the effect of which was to use her as "bait" as is expressly alleged.
>
> I have no hesitation in holding that the pleading raises the elements of knowledge, foreseeability and special relationship of proximity between the police and the plaintiff that, assuming they can be proved, raise a duty of care to her which they breached. ***]

Do the pleadings support a breach of the private law duty of care?

23. The law is clear that, in certain circumstances, the police have a duty to warn citizens of foreseeable harm. See *Schacht v. R.*, [1973] 1 O.R. 221 (C.A.), affirmed *O'Rourke v. Schacht* [1976] 1 S.C.R. 53, and *Beutler v. Beutler* (1983), 26 C.C.L.T. 229 (Ont. H.C.). The obvious purpose of the warning is to protect the citizens.

24. I would add to this by saying that, in some circumstances, where foreseeable harm and a special relationship of proximity exist, the police might reasonably conclude that a warning ought not to be given. For example, it might be decided that a warning would cause general and unnecessary panic on the part of the public which could lead to greater harm.

25. It would, however, be improper to suggest that a legitimate decision not to warn would excuse a failure to protect. The duty of protect would still remain. It would simply have to be accomplished by other means.

26. In this case, the plaintiff claims, inter alia, that the duty owed to her by the defendants required (1) that she be warned of the impending danger; or (2) in the absence of such a warning, that she be adequately protected. It is alleged that the police did neither.

27. Instead, she claims they made a conscious decision to sacrifice her in order to apprehend the suspect. They decided to use her as "bait". They chose not to warn her due to a stereotypical belief that, because she was a woman, she and others like her would become hysterical. This would have "scared off" the attacker, making his capture more difficult.

28. It should here be noted that the plaintiff cannot say which of the defendants made the decisions not to warn or adequately protect her. It is alleged that the investigating officers and the Chief of Police took part in this.

29. However, the pleadings also allege that both the Chief of Police and the Board of Commissioners were negligent in allowing or authorizing a decision which favoured apprehension of the suspect over the protection of his likely victims. Further, it is alleged that both the Chief of Police and the Board of Commissioners failed to provide adequate resources to investigate and apprehend the rapist, even though

they knew or ought to have known that he would strike again against Ms. Doe or others like her. The failure to properly protect the plaintiff is implicit in this latter allegation. ***

Basis upon which the police chose not to warn

31. The defendants submitted that the decision not to warn was obviously one of policy. As such, it could not form the basis of a cause of action in tort so long as it was reasonably and responsibly made. Mere error in judgment, if such was the case here, would not support the claim.

32. This principle is well established. It has been recognized and approved by the Supreme Court of Canada. See *Kamloops (City) v. Nielsen*, [[1984] 2 S.C.R. 2 (S.C.C.)]. In that case, Madam Justice Wilson, speaking for the majority of the court, stated that, even if a private law duty of care exists, policy decisions made by public officials will not attract liability in tort so long as they are reasonably and responsibly made. On the other hand, when it comes to the implementation of policy decisions, i.e., the operational area, public officials who owe a private law duty of care will be exposed to the same liability as others if they fail to take reasonable care in discharging their duties.

33. While this distinction will undoubtedly be important at trial, in my opinion it does not affect the validity of these pleadings. Whether the decision not to warn was one of policy made in the operational context or an operational decision made in the context of some broader policy, the facts pleaded support a claim in either case.

34. If the decision not to warn was based on policy, the plaintiff implicity alleges that it was made arbitrarily, unreasonably and irresponsibly. It stemmed from a conscious decision to use the plaintiff as “bait”, combined with an unwarranted stereotypical belief that such warning would cause hysteria.

35. I would go further and suggest that, even if the decision not to warn was one of policy and was responsibly made, it may have carried with it an enhanced duty to provide the necessary resources and personnel to protect the plaintiff and others like her. As already indicated, the plaintiff has alleged that the defendants failed to do this.

Causation

36. This leaves the question of causation. How can it be proved that, if the police had discharged their private law duty of care to the plaintiff, she would not have been assaulted?

37. In my opinion, it is open to the plaintiff to show that had she been warned, she could have taken steps to prevent the attacker from entering her apartment. Alternatively, she could have moved; stayed with a friend or had someone stay with her. Many options would have been available to her, all of which she was denied as a result of the failure to warn.

38. Furthermore, the plaintiff pleads that, in the absence of warning, if the police had properly protected her, she would not have been assaulted.

39. Where the negligent conduct alleged is the failure to take reasonable care to guard against the very happening which was foreseeable, the claim should not be dismissed for want of causal connection. See *Funk v. Clapp* (1986), 68 D.L.R. (4th) 229 (C.A.).

40. For all of these reasons, the claim in tort against all defendants must be allowed to proceed. ***

REFLECTION:

- *Was the negligence alleged in this case one of misfeasance or nonfeasance? Is the distinction significant?*
- *Is the special relationship recognised in this case comparable to relationships between private citizens for which duties of care are recognised? Is Moldaver J.’s judgment a reflection of, or an exception to, the Diceyan principle of equality under ordinary law (§1.1.1)?*

19.5.1.2 Robinson v. Chief Constable of West Yorkshire [2018] UKSC 4

United Kingdom Supreme Court – [2018] UKSC 4

LORD REED (LADY HALE P AND LORD HODGE concurring):

1. On a Tuesday afternoon in July 2008 Mrs Elizabeth Robinson, described by the Recorder as a relatively frail lady then aged 76, was walking along Kirkgate, a shopping street in the centre of Huddersfield, when she was knocked over by a group of men who were struggling with one another. Two of the men were sturdily built police officers, and the third was a suspected drug dealer whom they were attempting to arrest. As they struggled, the men knocked into Mrs Robinson and they all fell to the ground, with Mrs Robinson underneath. She suffered injuries as a result.

2. The principal question which has to be decided in this appeal is whether the officers owed a duty of care to Mrs Robinson. The other important question is whether, if they did, they were in breach of that duty. Mr Recorder Pimm held that the officers had been negligent, but that police officers engaged in the apprehension of criminals were immune from suit. The Court of Appeal held that no duty of care was owed, and that, even if the officers had owed Mrs Robinson such a duty, they had not acted in breach of it: [2014] EWCA Civ 15. ***

27. It is normally only in a novel type of case, where established principles do not provide an answer, that the courts need to go beyond those principles in order to decide whether a duty of care should be recognised. *** [T]he characteristic approach of the common law in such situations is to develop incrementally and by analogy with established authority. The drawing of an analogy depends on identifying the legally significant features of the situations with which the earlier authorities were concerned. The courts also have to exercise judgement when deciding whether a duty of care should be recognised in a novel type of case. *** As Lord Millett observed in *McFarlane v. Tayside Health Board* [1999] 4 All ER 961 at 1000, [2000] 2 AC 59 at 108, the court is concerned to maintain the coherence of the law and the avoidance of inappropriate distinctions if injustice is to be avoided in other cases. But it is also "engaged in a search for justice, and this demands that the dispute be resolved in a way which is fair and reasonable and accords with ordinary notions of what is fit and proper". ***

(i) Public authorities in general ***

32. At common law, public authorities are generally subject to the same liabilities in tort as private individuals and bodies: see, for example, *Entick v. Carrington* (1765) 2 Wils KB 275, [1558–1774] All ER Rep 41 [§7.1.1] and *Mersey Docks and Harbour Board v. Gibbs* (1866) LR 1 HL 93, [1861–73] All ER Rep 397. Dicey famously stated that 'every official, from the Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen': *Introduction to the Study of the Law of the Constitution* (3rd edn, 1889), p 181 [§1.1.1]. An important exception at common law was the Crown [§23.2.1], but that exception was addressed by the *Crown Proceedings Act 1947*, s 2 [§23.2.2].

33. Accordingly, if conduct would be tortious if committed by a private person or body, it is generally equally tortious if committed by a public authority: see, for example, *Home Office v. Dorset Yacht Co. Ltd* [1970] 2 All ER 294, [1970] AC 1004 [§13.2.3] ***. That general principle is subject to the possibility that the common law or statute may provide otherwise, for example by authorising the conduct in question: *Geddis v. Proprietors of Bann Reservoir* (1878) 3 App Cas 430. It follows that public authorities are generally under a duty of care to avoid causing actionable harm in situations where a duty of care would arise under ordinary principles of the law of negligence, unless the law provides otherwise.

34. On the other hand, public authorities, like private individuals and bodies, are generally under no duty of care to prevent the occurrence of harm: as Lord Toulson stated in *Michael v. Chief Constable of South Wales Police* [2015] AC 1732, 'the common law does not generally impose liability for pure omissions' (para [97]). This "omissions principle" has been helpfully summarised by Tofaris and Steel, "Negligence Liability for Omissions and the Police" (2016) 75 CLJ 128:

> "In the tort of negligence, a person A is not under a duty to take care to prevent harm occurring to

person B through a source of danger not created by A unless (i) A has assumed a responsibility to protect B from that danger, (ii) A has done something which prevents another from protecting B from that danger, (iii) A has a special level of control over that source of danger, or (iv) A's status creates an obligation to protect B from that danger."

35. As that summary makes clear, there are certain circumstances in which public authorities, like private individuals and bodies, can come under a duty of care to prevent the occurrence of harm ***. In the absence of such circumstances, however, public authorities generally owe no duty of care towards individuals to confer a benefit upon them by protecting them from harm, any more than would a private individual or body ***.

36. That is so, notwithstanding that a public authority may have statutory powers or duties enabling or requiring it to prevent the harm in question. ***

(ii) The police in particular

43. Turning to consider specifically the position of the police, Lord Toulson explained in the case of *Michael* at paras [29]–[35] that the police owe a duty to the public at large for the prevention of violence and disorder. That public law duty has a number of legal consequences. For example, the police cannot lawfully charge members of the public for performing their duty (*Glasbrook Bros Ltd v. Glamorgan CC* [1925] AC 270), and a police officer who wilfully fails to perform his duty may be guilty of a criminal offence (*R v. Dytham* [1979] QB 722). Some members of the public may have standing to enforce the duty, for example in proceedings for judicial review (*R v. Metropolitan Police Comr, ex p Blackburn* [1968] 2 QB 118), but in doing so they are not enforcing a duty owed to them as individuals. ***

70. *** [I]t follows that there is no general rule that the police are not under any duty of care when discharging their function of preventing and investigating crime. They generally owe a duty of care when such a duty arises under ordinary principles of the law of negligence, unless statute or the common law provides otherwise. Applying those principles, they may be under a duty of care to protect an individual from a danger of injury which they have themselves created, including a danger of injury resulting from human agency, as in *Dorset Yacht* and *Attorney General of the British Virgin Islands v. Hartwell* [2004] 1 WLR 1273 [§19.5.1.3]. Applying the same principles, however, the police are not normally under a duty of care to protect individuals from a danger of injury which they have not themselves created, including injury caused by the conduct of third parties, in the absence of special circumstances such as an assumption of responsibility. ***

Is this case concerned with an omission or with a positive act?

72. The role of the police in the accident in which Mrs Robinson was injured is not comparable to that of the defendant in the examples commonly given of pure omissions: for example, someone who watches and does nothing as a blind man approaches the edge of a cliff, or a child drowns in a shallow pool. Nor, to cite more realistic examples, is it comparable to that of the police authority in *Hill* [*v. Chief Constable of West Yorkshire* [1989] AC 53], which failed to arrest a murderer before a potential future victim was killed, or the police authority in *Michael*, which failed to respond to an emergency call in time to save the caller from an attack. In such cases the defendant played no active part in the critical events. ***

73. In the present case, the ground of action is liability for damage caused by carelessness on the part of the police officers in circumstances in which it was reasonably foreseeable that their carelessness would result in Mrs Robinson's being injured. Her complaint is not that the police officers failed to protect her against the risk of being injured, but that their actions resulted in her being injured. In short, this case is concerned with a positive act, not an omission.

Did the police officers owe a duty of care to Mrs Robinson?

74. It was not only reasonably foreseeable, but actually foreseen by the officers, that Williams was likely to resist arrest by attempting to escape. That is why Willan summoned assistance in the first place, before attempting to arrest Williams, and why it was decided that DS Roebuck and DC Green should be positioned on the opposite side of Williams from Willan and Dhurmea, so as to block his escape route. The place where the officers decided to arrest Williams was a moderately busy shopping street in a town centre.

Pedestrians were passing in close vicinity to Williams. In those circumstances, it was reasonably foreseeable that if the arrest was attempted at a time when pedestrians—especially physically vulnerable pedestrians, such as a frail and elderly woman—were close to Williams, they might be knocked into and injured in the course of his attempting to escape. That reasonably foreseeable risk of injury was sufficient to impose on the officers a duty of care towards the pedestrians in the immediate vicinity when the arrest was attempted, including Mrs Robinson.

Was the Court of Appeal entitled to overturn the Recorder's finding that the officers had failed in their duty of care? ***

78. *** This was not a situation in which Williams had to be arrested at that precise moment, regardless of the risk that a passer-by might be injured: on Willan's evidence, if he had noticed that someone was in harm's way, he would not have made the arrest at that moment.

Were Mrs Robinson's injuries caused by the officers' breach of their duty of care?

79. The chain of events which resulted in Mrs Robinson's being injured was initiated by DS Willan's and PC Dhurmea's attempt to arrest Williams. It was their taking hold of him which caused him to attempt to struggle free, and it was in the course of the resultant tussle between the three men that Mrs Robinson was knocked over and injured.

80. In these circumstances, it is impossible to argue that the chain of causation linking the attempt to arrest Williams to Mrs Robinson's being injured was interrupted by Williams' voluntary decision to resist arrest, which resulted in his knocking into her. The voluntary act of a third party, particularly when it is of a criminal character, will often constitute a novus actus interveniens, but not when that act is the very one which the defendant was under a duty to guard against: see, for example, *Dorset Yacht* and *A-G v. Hartwell*. It would be absurd to say that the officers owed Mrs Robinson a duty of care not to arrest Williams when she was in the immediate vicinity, because of the danger that she might be injured if he attempted to escape, and then to hold that his attempted escape broke the chain of causation between their negligently arresting him when she was next to him, and her being injured when he attempted to escape. In short, Mrs Robinson was injured as a result of being exposed to the very danger from which the officers had a duty of care to protect her.

81. For these reasons, I would allow the appeal, hold that the Chief Constable is liable in damages to Mrs Robinson, and remit the case for the assessment of damages. ***

LORD MANCE AND LORD HUGHES partially dissented.

REFLECTION:

- *Given Robinson was unlikely to receive significant damages for her injuries, why might she have pursued this case all the way to the United Kingdom Supreme Court?*[596]
- *Prof. Chamberlain has observed that Canadian courts tend to be more willing to impose liability on public authorities for negligent omissions as compared to English courts.*[597] *Is Lord Reed's description of the omissions principle as it applies to public authorities consistent with Moldaver J.'s understanding of the principle in Jane Doe v. Toronto Police Comm'rs?*

19.5.1.3 Attorney General (British Virgin Islands) v. Hartwell [2004] UKPC 12

Privy Council (on appeal from British Virgin Islands) – [2004] UKPC 12

✗**REF: §23.1.4**

LORD NICHOLLS OF BIRKENHEAD:

[596] See "West Yorkshire Police liable for knocking over elderly woman" BBC News (Feb 8, 2018).
[597] E. Chamberlain, "Diceyan Equality and Public Authority Liability: Floor or Ceiling?" in A. Robertson & J. Neyers (eds), *Private Law and the State* (*forthcoming* Oxford: Hart Publishing, 2024)

1. On 2 February 1994 Police Constable Kelvin Laurent was the sole police officer stationed on the island of Jost Van Dyke in the British Virgin Islands. It was the last day of his three-day tour of duty on the island. Jost Van Dyke is a small island with a population of about 135 people. Laurent was still on probation. He was subject to daily supervisory visits by a police sergeant from the West End police station on the nearby larger island of Tortola.

2. As the officer in charge of the Jost Van Dyke police substation PC Laurent had a key to the substation's strongbox. Kept in this metal box were a .38 calibre service revolver and ammunition. The Royal Virgin Islands Police Force is not an armed force. Police officers do not normally carry arms. Guns are kept in police stations and only issued to police officers when needed.

3. During the evening of 2 February 1994 PC Laurent abandoned his post. He left the island, taking with him the police revolver and ammunition. He went five miles by boat to West End, Tortola. He then travelled nine miles by road across Tortola to Road Town and from there 13 miles by boat to the island of Virgin Gorda. Presumably he was not wearing his police uniform.

4. PC Laurent next made his way to the Bath & Turtle bar and restaurant at The Valley where his partner, or former partner, and mother of his two children, Lucianne Lafond worked as a waitress. The bar was busy and full of local residents and tourists. It was a popular evening, with a band playing. At about 10.30 pm Laurent entered the bar in search of Ms Lafond. He wanted to see if she had anyone with her. In the bar was Hickey Vanterpool who, so it was said, was associating with Ms Lafond. Without further ado and without any warning Laurent fired four shots with his police service revolver. He was, apparently, intent on maiming Mr Vanterpool and, possibly, Ms Lafond herself. Two of the shots caused minor injuries to Ms Lafond and a tourist. A further shot struck and caused serious injuries to Craig Hartwell, a customer at the pub, who was standing near the doorway. Mr Hartwell was a British resident visiting the island.

5. Laurent was prosecuted and pleaded guilty to charges of unlawfully and maliciously wounding Mr Hartwell and Ms Lafond and having a firearm with intent to do grievous bodily harm. He was sentenced to five years' imprisonment and dismissed from the police force.

6. Mr Hartwell then brought these civil proceedings against Laurent and the Attorney General as the representative of the Government of the British Virgin Islands. The claim was for damages. It is common ground that as a police constable PC Laurent was an employee of the government. Judgment in default of appearance was entered against Laurent. On 21 November 2000 Georges J dismissed the action against the Attorney General. On 17 September 2001 the Court of Appeal *** allowed an appeal by Mr Hartwell and gave judgment in his favour for damages to be assessed. The Attorney General appealed against that decision to your Lordships' Board. ***

PC Laurent's police career

7. PC Laurent's career as a police officer was short. He was appointed a police constable on 2 July 1992 subject to satisfactory completion of two years' probationary service. He was then 26 years old. ***

8. After completing his training Laurent had postings at Road Town, Tortola, and at Virgin Gorda. In September and again in November 1993 he was warned about his conduct, once concerning absences from duty and once over telling a falsehood. In his annual report in December 1993 PC Laurent received good or average grades. ***

9. On 16 January 1994 there occurred the first of two events of prime importance. On that day, as recorded in the Virgin Gorda police station diary, Murphy Flavien, who lived at The Valley, Virgin Gorda, came to the station and complained about the conduct of PC Laurent. Flavien complained that Laurent had assaulted him with an eight-inch blade, white-handled knife. Laurent had threatened he would kill "the mother's cunt" the next time he, Laurent, met Flavien at Ms Lafond's apartment. Flavien requested police assistance. ***

Police force negligence: duty of care

18. The *** difficult question is whether the police authorities were negligent in permitting PC Laurent to have access to the revolver kept at the Jost Van Dyke substation. Mr Hartwell's primary case is that, wholly

distinct from any question of vicarious liability for its employee's wrongful acts, the government was itself at fault. The police authorities knew or ought to have known that Laurent was not a fit and proper person to be entrusted with a gun. Had they exercised reasonable care they would not have permitted him to have access to a police firearm. The courts below reached different conclusions on this claim. The trial judge rejected it, but the Court of Appeal accepted it. ***

Human intervention

22. A feature of the present case is that deliberate, wrongful conduct intervened between the defendant's alleged negligence and the plaintiff's damage. The immediate cause of Mr Hartwell's injuries was Laurent's deliberate act of firing the revolver, in a reckless manner, in the crowded bar.

23. This type of situation has arisen more than once in recent years. In the well known case of *Dorset Yacht Co. Ltd v. Home Office* [1970] 2 All ER 294 [§17.2.2] the plaintiff's yacht was damaged by borstal boys who had escaped from custody. Lord Reid observed (at 300) that where human action forms one of the links between the original wrongdoing of the defendant and the plaintiff's loss that action must 'at least have been something very likely to happen if it is not to be regarded as novus actus interveniens breaking the chain of causation'. He added that 'a mere foreseeable possibility' is not sufficient.

24. Lord Reid expressed himself in terms of causation and remoteness of damage. He might equally well have expressed himself in terms of the scope of the duty, as did the other members of the House. Lord Morris of Borth-y-Gest (at 303–304) spoke of foresight that the boys 'might' interfere with one of the yachts and that the risk of this happening was 'glaringly obvious'. In those circumstances a duty of care was owed by the borstal officers to the owners of the nearby yachts. Lord Pearson (at 319) said it was arguable that interference by the boys with the boats was eminently foreseeable as 'likely' to happen. 'Likely', without elaboration, was also the term adopted by Lord Diplock (at 334–335).

25. These observations on the significance of deliberate human intervention must be read in the context of the facts of the case then under consideration by the House. *Dorset Yacht* concerned liability for alleged omissions on the part of the borstal staff. Liability for omissions is less extensive than for positive acts. But that is not a satisfactory ground for putting *Dorset Yacht* on one side and distinguishing it from the present case. The better approach is to recognise that, as with the likelihood that loss will occur, so with the likelihood of wrongful third party intervention causing loss, the degree of likelihood needed to give rise to a duty of care depends on the circumstances. In some circumstances the need for the high degree of likelihood of harm mentioned by Lord Reid may be an appropriate limiting factor in cases involving deliberate wrongful human actions. In other cases foresight of a lesser risk of harm flowing from a third party's intervention will suffice to give rise to a duty of care. The law of negligence is not an area where fixed absolutes of universal application are appropriate. In each case the governing consideration is the underlying principle. The underlying principle is that reasonable foreseeability, as an ingredient of a duty of care, is a broad and flexible objective standard which is responsive to the infinitely variable circumstances of different cases. The nature and gravity of the damage foreseeable, the likelihood of its occurrence, and the ease or difficulty of eliminating the risk are all matters to be taken into account in the round when deciding whether as a matter of legal policy a duty of care was owed by the defendant to the plaintiff in respect of the damage suffered by him. ***

The present case

31. When applying these principles in the present case two factual features of cardinal importance stand out. This case does not fall on the 'omissions' side of the somewhat imprecise boundary line separating liability for acts from liability for omissions. In a police case this distinction is important. Here the police are not sought to be made liable for failure to carry out their police duties properly. This is not a case such as *Hill v. Chief Constable of West Yorkshire* [1988] 2 All ER 238 where liability was sought to be imposed on the police in respect of an alleged failure to investigate the Sutcliffe murders properly. In the present case the police authorities were in possession of a gun and ammunition. They took the positive step of providing PC Laurent with access to that gun. Laurent did not break into the strongbox and steal the gun. The police authorities gave him the key. True, Laurent disobeyed orders in taking the gun as he did. But the fact remains that the police authorities chose to entrust Laurent, who was on the island by himself, with ready

access to a weapon and the ammunition needed for its use. The question is whether in taking that positive step the government, through the police authorities, owed a relevant duty to Mr Hartwell. ***

37. In the present case the police authorities plainly owed a duty to take reasonable care to see that police officers to whom they entrusted firearms were competent and suitable. But to whom was that duty owed, and in respect of what types of damage? If police firearms are entrusted to police officers who are not competent to use them there is an obvious risk of danger to members of the public. Similarly, if firearms are allocated to police officers whose temperament makes them unsuited to carry and use firearms in discharge of police duties.

38. But the present case is different. The risk in the present case was that a police officer, entrusted with access to a firearm for police purposes, might take and use the weapon for his own purposes, namely, with the object of maliciously injuring someone else, this risk inevitably carrying with it the further risk that in the course of such criminal activity a member of the public might be injured. Were these two risks, and particularly the first of them, reasonably foreseeable? It is always possible that anyone may behave in such an irresponsible and criminal fashion. Strange and unexpected things are always happening. But were these risks so remote that a reasonable police officer would ignore them as fanciful?

39. In agreement with the Court of Appeal, their Lordships consider this last question must be answered No. In the view of their Lordships the appropriate analysis is that when entrusting a police officer with a gun the police authorities owe to the public at large a duty to take reasonable care to see the officer is a suitable person to be entrusted with such a dangerous weapon lest by any misuse of it he inflicts personal injury, whether accidentally or intentionally, on other persons. For this purpose no distinction is to be drawn between personal injuries inflicted in the course of police duties and personal injuries inflicted by a police officer using a police gun for his own ends. If this duty seems far-reaching in its scope it must be remembered that guns are dangerous weapons. The wide reach of the duty is proportionate to the gravity of the risks. Moreover, the duty imposes no more than an obligation to exercise the appropriately high standard of care to be expected of a reasonable person in the circumstances.

40. For these reasons, and contrary to Mr Guthrie's submission, their Lordships consider that, in deciding to entrust PC Laurent with the key to the strongbox in the Jost Van Dyke police substation, the police authorities owed a duty of care to Mr Hartwell in respect of damage arising in the way it did.

Breach of the duty of care

41. The question which next arises is whether the police authorities failed to exercise reasonable care when giving PC Laurent access to the gun in the strongbox at Jost Van Dyke police substation. The answer to this question turns largely on whether the police response to the 'threat incident' on 16 January 1994 was adequate. On its face Mr Flavien's complaint was serious. He alleged that Laurent had assaulted him with an eight-inch blade knife. The only recorded police response was the visit made to Laurent by PC Joseph and his colleague. They appear to have accepted Laurent's explanation. But there is no evidence that anyone interviewed Flavien or, indeed, Ms Lafond. This being so, it is difficult to see how the police could have been satisfied that Laurent's explanation represented the truth of what had occurred. It is not suggested that the police acted in bad faith. But the police response can be described as relaxed to the extent of being overly casual. ***

44. Their Lordships consider that Flavien's complaint, and the fact that it seems not to have been investigated thoroughly, are matters which should have been drawn to the attention of the officer responsible for the decision to post Laurent, still only a probationer, to Jost Van Dyke. Had this been done warning bells must surely have been set ringing. A reasonable police officer would have concluded that in the context of his family problems Laurent might well be volatile, even unstable. Until Laurent's domestic problems were resolved it would be prudent not to entrust him with sole, unsupervised responsibility for a police firearm. ***

46. The material available in support of this head of claim is distinctly meagre. The case is closely-balanced. But all in all their Lordships prefer the Court of Appeal's conclusion regarding breach of duty to that of the trial judge. As already emphasised, the standard of diligence expected of a reasonable person when entrusting another with a gun is high. Knowing what they did because of Flavien's complaint, the police

authorities ought to have foreseen there was a risk, which could not sensibly be ignored, that Laurent might lose control of himself over his family problems and find the lure of a gun irresistible, with consequent risk of personal injury to members of the public. The police authorities failed to exercise the degree of care the situation demanded.

47. For these reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed. ***

REFLECTION:

- *Was the negligence alleged in this case one of misfeasance or nonfeasance? Is the distinction significant?*
- *What was the scope of the duty of care owed by the police force in this case? To whom was a duty owed?*
- *What material facts led the Privy Council to accept that the duty of care had been breached?*[598]

19.5.1.4 Attorney General of Canada & Emil Anderson Maintenance Co. Ltd v. Taylor [2024] BCCA 156

British Columbia Court of Appeal – 2024 BCCA 156

GRIFFIN J.A. (ABRIOUX AND SKOLROOD JJ.A. concurring):

1. In the morning hours of October 10, 2016, traffic lights ceased operating on a busy highway at an intersection with a secondary cross-road, near Mission, BC.

2. At 1:36 p.m., a concerned driver called the non-emergency line of the Royal Canadian Mountain Police ("RCMP") Mission detachment advising that the lights were not functioning. His call was routed to the RCMP Operational Communications Centre at 'E' Division dispatch (the "OCC"). The caller said that some drivers were treating the intersection as a four-way stop but "tons of people [were] just racing through". He said:

> I'm concerned there's going to be a serious accident there if somebody doesn't get those lights addressed soon.

3. The traffic lights remained out. ***

5. Nothing was done to warn drivers.

6. At 3:08 p.m., a serious accident did occur at the intersection. ***

8. The trial judge held that both drivers were at fault: reasons for judgment, indexed as *Stevens v. Sleeman*, 2023 BCSC 719 (the "Reasons").

9. The question that is the focus of this appeal is who else was at fault. The trial judge held that Emil and the Attorney General of Canada ("AGC"), on behalf of the OCC, were also at fault. On appeal, they argue they were not. ***

Background

12. The intersection where the accident occurred was between Nelson Street and Lougheed Highway in Mission, BC. The highway is busy and drivers often speed.

13. The OCC provides 24-hour emergency and non-emergency call-taking and dispatching for RCMP detachments, including for the RCMP detachment at Mission.

14. The OCC call-takers and dispatchers prioritize calls and can take various actions to bring the information to the attention of police members, from doing nothing, to sending a low priority message internally from computer to computer, to creating a police file, to alerting police members by radio and dispatching a police

[598] See S. Sleigh, "Putney man who was shot by a police officer and battled to change Commonwealth gun laws tells his story" Wandsworth Times (Mar 28, 2014).

member to the scene.

15. At 1:36 p.m., the OCC received a telephone call (the "First Call") from a concerned driver, Kenneth Galpin. Mr. Galpin said:

> Hi there. Just making a report. The traffic lights at Nelson and Lougheed have been out for over an hour. You got some people doing it as a four way stop, which is correct, and tons of people just racing through there. I'm concerned there's going to be a serious accident there if somebody doesn't get those lights addressed soon.

16. Kelly Garrett was the OCC call-taker who received the First Call.

17. At 1:43 p.m., Ms. Garrett sent a message to OCC dispatcher Amanda Graham as follows:

> NELSON/ LOUGHEED PEOPLE RACING THROUGH AS POWER OUT, COM STATES SERIOUS ACCIDENT WILL OCCUR

18. Ms. Garrett did not create a police file or notify those responsible for repairing the traffic lights.

19. Ms. Graham forwarded the message to on-duty Mission RCMP members via the mobile work station located in their police vehicles. This treated the message as a low priority communication that was not likely to result in police attendance. Many of the officers on shift that day testified, and none recalled seeing the message.

20. Ms. Graham did not create a police file or dispatch an RCMP member via radio.

21. Ms. Garrett received a second call regarding the traffic lights at 2:26 p.m., and sent another message to Ms. Graham (the "Second Call"). Only at 2:37 p.m. did Ms. Graham notify the District of Mission that the traffic lights were inoperative. The District informed her that the intersection was under provincial jurisdiction.

22. At 2:42 p.m., Ms. Graham then called the Regional Transportation Management Centre ("RTMC") of the provincial Ministry of Transportation and Infrastructure ("MOTI") and spoke to Neil Doolaar, an RTMC operator. She advised him that the traffic lights were out at the intersection. She did not communicate the fact an earlier caller had described the situation as involving drivers racing through the intersection and had warned a serious accident might occur. ***

27. At 3:08 p.m., Mr. Sleeman was travelling on Lougheed Highway above the 80 km/h speed limit in a 2007 Ram pickup truck. He was travelling as fast as 120 km/h when he approached the intersection. He noticed that the usual advance warning lights prior to the intersection were not flashing. This indicated to him that the light ahead was green and so he did not slow down. As he approached the intersection he noticed another vehicle slowing down. He did not have a clear view of the McNally vehicle, a 2007 Cadillac sedan, which would have been starting to come into the intersection from his right, because there was a vehicle in the lane to his right blocking that sightline. He did not notice that the traffic lights were out until he was almost in the intersection. He slammed on his brakes but not in time to avoid the collision with Ms. McNally's vehicle. ***

29. The judge found that a modest decrease in Mr. Sleeman's speed as he approached the intersection (prior to his slamming on his brakes) would have resulted in the accident being avoided, whether it was decreased to 109 km/h or 100 km/h for example: Reasons at paras. 47-51. This conclusion was supported by two accident reconstruction expert opinions.

30. A video of the crash was captured on another driver's dashboard camera (the "Dashcam Video"). The Dashcam Video was entered into evidence, and showed that before the accident, several vehicles on the highway drove quickly through the intersection without stopping, but also showed that some vehicles were stopped and attempting to follow a four-way stop procedure.***

Trial judgment ***

35. The trial judge found that a myriad of errors contributed to the accident. In addition to the drivers, Mr. Sleeman and Ms. McNally, the judge found that the AGC, on behalf of the OCC, and Emil were each liable.

36. In summary, the judge reached these conclusions:

> a) The OCC call-taker and dispatcher (together, the "OCC employees") were warned of the hazardous condition on the highway: the lights were out and not all drivers were following the four-way stop. However, the OCC employees did not follow their internal procedures for a road hazard. Had they followed the standard operating procedure ("SOP"), they would have alerted police directly and that would have caused the police to attend quickly. If the police had attended, the presence of a police car would slow traffic down. If Mr. Sleeman had only slowed down slightly the accident would have been avoided.
>
> b) Further, if the OCC employees had acted according to procedure when first notified of the problem *** [t]here would have been personnel on site to either fix the problem or provide traffic control within 1 hour or perhaps slightly longer, but before the accident occurred.***

Grounds of appeal

38. *** The AGC submits that the judge erred in:

> a. finding the OCC employees each owed the plaintiff a duty of care;
>
> b. imposing an incorrect standard of care;
>
> c. finding causation based on an absence of evidence and/or on inference based on speculation and guesswork ***

Did the Judge err in finding that the OCC employees owed a duty of care? *

40. The AGC submits that the judge erred in finding that the OCC employees, upon learning of the inoperative traffic lights, owed a duty of care to users of the intersection, including to Mr. Stevens, the passenger in Ms. McNally's vehicle who was injured by the accident. The AGC submits that the OCC employees could not have reasonably foreseen that if they failed in their duties, it would lead to an accident in the intersection. ***

42. The judge correctly stated the principles that apply to determining whether a duty of care exists, based on the authorities interpreting *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) [§13.4.1.1] and *Cooper v. Hobart*, 2001 SCC 79 [§13.4.1.2], an approach known as the "*Anns/Cooper* analysis". ***

43. Considering the first step in the analysis, the judge found that there was case law recognizing a duty of care owed by emergency call dispatchers to a caller seeking emergency assistance. However, the case law had not yet recognized a duty of care owed by dispatchers to a broader segment of the public, specifically users of a segment of highway where the call-taker was made aware of a risk of harm to those users: Reasons at paras. 62-63, 80.

44. The judge therefore proceeded to the next part of the *Anns/Cooper* analysis, reasonable foreseeability of harm.

45. The focus of the AGC in challenging the judge's finding of a duty of care is, on this second step, reasonable foreseeability of harm.

46. As explained in *Bergen v. Guliker*, 2015 BCCA 283 at paras. 66–67, at this stage the focus is on whether it is reasonably foreseeable that the actions or omissions could cause harm to the victim. The question is therefore: was it reasonably foreseeable to the OCC employees that their failures to take the necessary actions could reasonably cause harm to the users of the highway passing through the intersection?

47. The judge noted that the test is an objective one, and without the benefit of hindsight, citing *Rankin (Rankin's Garage & Sales) v. J.J*, 2018 SCC 19 at para. 53 [§13.4.2.3]. The judge observed, correctly, that

only the general mechanism of injury need be foreseeable, not the precise mechanism, citing *McCormick v. Plambeck*, 2022 BCCA 219 at para. 28 [§19.9.2].

48. The judge appropriately asked whether the harm suffered by those in the accident was reasonably foreseeable to the OCC employees: para. 65. The judge found that the accident in the intersection, causing personal injury, was reasonably foreseeable to the OCC employees: para. 70.

49. The AGC submits that the judge wrongly inferred reasonable foreseeability from the fact that harm occurred. I disagree.

50. The judge found that the First Call made by Mr. Galpin should have alerted the OCC employees to the fact that there were "tons" of vehicles "racing" through the intersection where the lights were inoperative: para. 69. The caller warned that an accident would occur based on the road conditions at the time. This warning was foresight, not hindsight, and it focused on a very specific location, the intersection, and very specific conduct, drivers proceeding through the intersection at highway speed without stopping, and other drivers engaging in a four-way stop procedure. The Second Call alerted the OCC employees to the fact that the hazardous conditions had not been corrected. It therefore was reasonably foreseeable that there could be a serious accident in the intersection because of the hazardous road conditions.

51. The argument at trial, as noted by the judge in her Reasons at para. 58, was that the OCC employees failed in their duties in two ways:

> 1. failing to take timely steps to notify the appropriate external agency about the inoperative traffic lights; and
>
> 2. failing to dispatch RCMP members to the intersection after the First Call.

52. The AGC submits that the judge erred, because the evidence did not establish that there was a "foreseeable risk of unsafe driving" at the intersection due to the inoperative lights. The AGC submits that the fact that there were people driving motor vehicles, and that motor vehicles are inherently dangerous, does not give rise to a foreseeable risk of injury because of the inoperative lights.

53. The AGC argues that had drivers been obeying all traffic laws, they would have seen that the lights were out, stopped at the intersection and initiated the four-way stop procedure. The AGC submits it was not reasonably foreseeable to OCC employees that drivers would not do so. The AGC submits that while traffic accidents are always possible when drivers do not obey the rules of the road, that possibility cannot be said to create a duty of care for the OCC employees.

54. Further, the AGC points to the several hours that passed while the lights were inoperative, before an accident occurred, as support for the argument that the accident was unforeseeable.

55. The problem with the AGC's argument is that it fails to recognize the important purpose of OCC employees, because it suggests that even when a known dangerous road condition is reported to them, they owe no duty of care because drivers are supposed to be alert at all times and should just self-correct in the face of an unexpected road hazard.

56. Respectfully, this is faulty reasoning when there is evidence, as here, that drivers are not responding perfectly to the dangerous road condition.

57. The fact that drivers are supposed to be alert at all times in case they encounter an unexpected road hazard does not relieve an authority, knowing of that hazard, of the responsibility for warning drivers or correcting road hazards.

58. For example, in *O'Rourke v. Schacht*, [1976] 1 S.C.R. 53, a sign warning of hazardous construction was knocked down as the result of an earlier accident. The police who investigated failed to ensure that the sign was replaced. The police were found liable to a driver who drove into an open culvert. This was despite there being earlier signs warning drivers of the construction, and the driver being found negligent.

59. Importantly, on the facts of this case the driving behaviour of Mr. Sleeman and Ms. McNally that

contributed to the accident in the intersection was not unusual or unpredictable. In fact, the OCC call-taker was expressly warned in the First Call that because the traffic lights were not working, there were two kinds of driving behaviours witnessed at the intersection that could lead to a serious accident: some drivers were following the four-way stop method, meaning they were stopping first, and then entering the intersection on the premise that vehicles would stop in the other directions; and other drivers were "racing" through the intersection without stopping. The word "racing", in context, suggest that drivers were not slowing down from highway speed.

60. It would be contrary to the known danger reported to the OCC employees, for them to assume that all drivers would obey the four-way stop procedure. Even without a driver speeding on the highway (itself a foreseeable type of driving behaviour), one could predict that a driver might fail to stop at the intersection because they did not notice the lights were out and that this could lead to a serious accident.

61. The OCC employees had all the information necessary to be able to foresee the consequences to users of the intersection, if they did not promptly fulfill their responsibilities, namely: the traffic lights would continue to be inoperative and drivers would not be warned of the hazard; and there could be a collision between a vehicle obeying the four-way stop procedure and entering the intersection and a vehicle "racing" through, not noticing that the lights were out. ***

66. I add that the AGC's argument on reasonable foreseeability seems to ignore entirely the purpose of traffic lights, the location of them in this case and the content of the First Call.

67. To state it at its most obvious, traffic lights serve a very important safety function. The purpose of traffic lights at an intersection is to alert drivers travelling in one direction to slow down and stop when the lights are yellow or red, so that traffic travelling in a different direction can move safely through the intersection. The flipside of this is that the absence of yellow or red-lit traffic lights means the absence of a signal to an approaching driver that there is a need to slow down or stop before entering the intersection. While it is true that only green-lit traffic lights signal it is safe to continue through the intersection without slowing down or stopping, the absence of any lights on a highway can obviously lead to a driver assuming that they have the right-of-way and do not need to slow or stop.

68. It is entirely reasonably foreseeable that some drivers will: speed on a highway; assume any necessary traffic lights are working; and not slow down before entering an intersection without advance warning of yellow or red lights.

69. While it seems like common sense, there were also several witnesses at trial who agreed that inoperative lights at an intersection on a highway can be a hazardous situation.

70. When the OCC employees learned that the traffic lights on the highway were out and some drivers were racing through the intersection, they learned that a critically important safety feature was not working and that drivers were driving unsafely because of it. That is why the road condition was reported to them; so they would take action to correct the unsafe condition. Therefore, it should have been reasonably foreseeable to them that if they did not take the appropriate action, the dangerous conditions would continue and could lead to an accident. Respectfully, that the danger the OCC employees were warned about materialized does not take the situation from being foreseeable to one that is judged with hindsight.

71. I therefore do not accept the AGC's argument that a collision between two motor vehicles in the intersection was not a reasonably foreseeable consequence of the OCC employees failing to perform their job duties after receiving the First Call.

72. The AGC does not dispute the judge's finding that sufficient proximity existed between the OCC employees and users of the intersection: Reasons at para. 75:

> ["75. In this case, there was a determinate class of people whom Ms. Graham and Ms. Garrett should reasonably have known were at risk as a result of their carelessness, namely, motorists travelling through the Intersection on October 10, 2016 while the lights were not operational. The users of the Intersection were reasonably entitled to expect that the OCC would take steps, upon learning that the Intersection was unsafe, to ensure that it was made safe as promptly as possible,

> for the benefit of those motorists. As such, the elements of representation, reliance, and expectation were at play, and the relationship between the OCC and motorists travelling through the Intersection was one of sufficient proximity that Ms. Garrett and Ms. Graham owed a duty of care to those motorists."]

73. *** The AGC does not dispute [the] findings that policy reasons did not negate the duty of care.

74. I am therefore of the view that the trial judge did not err in finding that the OCC employees had a duty of care to road users travelling through the intersection, once the OCC employees received the notice of the dangerous situation in the First Call, to take reasonable steps towards making the intersection safe.

Did the Judge err in imposing too high a standard of care?

75. The AGC next argues that the judge erred in imposing too high a standard of care on the OCC employees. There are a few strands to this argument: the standard the judge imposed required expert evidence and there was none; the judge ignored some evidence of witnesses who worked as OCC employees; and the standard imposed by the judge was one of perfection.***

77. The judge accepted the AGC's argument that the standard of care was that of a reasonable call-taker and dispatcher in similar circumstances, and that the standard is not one of perfection: para. 82.

78. The judge found:

> 90. In all of the circumstances, I find that the actions of Ms. Garrett and Ms. Graham fell below the standard of care because:
>
> • they failed to contact the RTMC after the First Call to report the inoperative traffic lights at the Intersection and to inform the RTMC that there were safety concerns at the Intersection;
>
> • they failed to create a CAD file and dispatch an RCMP member to attend; and
>
> • they failed to broadcast the information they received in the First Call and the Second Call over police radio so all RCMP members would receive it.

79. The first finding of a breach of a standard of care was conceded by the AGC. The AGC conceded that if there was a duty of care, the standard of care required Ms. Garrett to contact the third party agency responsible for maintaining the traffic lights, as soon as possible after the First Call: para. 89. The AGC does not challenge this conclusion but it says that was all that the standard of care required in the circumstances. It argues that failure to meet this standard did not cause the accident.

80. The AGC submits on appeal that expert evidence was required for the judge to conclude the standard of care was breached in the two additional ways she found: by failing to dispatch an RCMP member to attend; and by failing to broadcast over police radio the information the OCC employees received in the First Call.***

87. In my view, the judge properly approached the question of the standard of care of OCC employees. The judge did not err in concluding she did not need expert opinion evidence and in considering that the SOP, as internal policy, "may inform the content of the standard [of care] and whether it was breached": Reasons at para. 83, citing ***Bergen*** at para. 110.***

95. The judge found that call-takers and dispatchers are trained that when there is no SOP directly on point, they are to use their discretion and apply the SOP that most closely applies to the facts at hand: Reasons at paras. 13, 84.

96. The judge found that the most analogous circumstance to the inoperative traffic lights, in the SOP, was the section dealing with "Road Hazards": Reasons at para. 85. ***

98. I cannot see any error in the judge's consideration of "Road Hazards" as the most analogous section of the SOP. ***

101. The judge noted that after the First Call, Ms. Garrett was aware that the inoperative traffic lights were creating a problem with the normal flow of traffic and that there was a risk of an accident occurring. It is a common-sense conclusion that inoperative traffic lights on a highway intersection were at least as hazardous as a situation involving some debris on the road and so at least deserved equal priority to such a situation, described in the SOP as a "Road Hazard".

102. Ms. Karr explained that priority 1 calls are the most urgent, as usually life is in danger; priority 2 is still fairly urgent and requires a dispatch; priority 3 is routine; and priority 4 does not always require police attendance, such as a motor vehicle accident with no injuries.

103. The judge's conclusion that the closest analogy in the SOP to the traffic light outage was to a road hazard means it deserved a priority 2 designation and required a police dispatch. The OCC employees failed to treat it this way.

104. However, failure to follow policy does not compel the conclusion that the standard of care was breached: ***Bergen*** at para. 111. The judge understood this in her approach, holding at para. 87:

> 87. Even if Ms. Garrett had not followed the Road Hazard SOP, I find that a reasonably prudent call-taker, in the face of a caller advising them that the lights were out, "tons" of people were "racing" through the Intersection, and an accident was going to occur, would have taken two steps as soon as reasonably practical: (i) they would have created a CAD file which would result in a general duty police officer being dispatched to the scene, and (ii) they would have contacted the RTMC in order to ensure that the lights were fixed. Neither of these steps was taken by Ms. Garrett. As such, she fell below the standard of care.

105. It was open to the judge to conclude, based on the evidence, that some immediate notice should also have gone out from the OCC employees after the First Call, so as to alert RCMP and so they could attend on the scene.

106. Further, it is consistent with the procedure in the SOP for a call-taker to create a CAD file that would result in a police officer being dispatched to the scene when they are unsure about whether the occurrence is a police matter: Reasons at para. 16.

107. The judge also found that Ms. Graham, as the dispatcher, fell below the standard of care of a reasonable dispatcher. The judge held:

> 88. With respect to Ms. Graham, I find that a reasonably prudent dispatcher would have, after they received the internal message from Ms. Garrett about the traffic safety concerns at the Intersection, sent a message over police radio (as opposed to an MDT message) so that RCMP officers would have received the message immediately and one of them could have attended the scene and assessed the public safety risks. Further, when Ms. Graham did eventually contact the RTMC, after Ms. Garrett failed to do so, she ought to have advised the RTMC that not only were the lights out at the Intersection, but cars were racing through and there was a risk to public safety. This would have alerted the RTMC to the need to set up some form of traffic control at the Intersection.

108. The above conclusions were supported by the evidence and were also open to the judge to make.

109. The AGC submits that the judge's findings raised the standard of care to one of perfection. I do not agree. The key to the judge's findings is that the information received by the OCC employees alerted them to the fact that there was a dangerous road condition on a highway, which if left untended could result in a serious accident. This required them to act promptly, both to ensure that the proper road maintenance authorities were notified, and to ensure that the RCMP were notified by radio so that a police officer could attend immediately to assess the situation.

110. It would not be onerous or difficult for the OCC employees to take prompt steps to notify the proper parties of the road hazard. The judge did not suggest a standard of perfection or misapprehend the evidence as to the requirements of their jobs.

111. In my view, the appellant has not shown that the judge made a palpable and overriding error in concluding that the OCC employees breached the standard of care.

Did the Judge err in finding the OCC employees' conduct caused the accident? ***

113. The judge found on a balance of probabilities, that but for the negligence of the OCC, the accident would not have occurred: para. 99. She also found that it was reasonably foreseeable, and not too remote from the actions and omissions of the OCC employees, that an accident could occur: para. 98. ***

115. The AGC submits that the judge erred in her finding that the OCC employees' omissions in part caused the accident because she based her conclusion on speculation rather than evidence.

116. The AGC's argument that the judge based her findings on speculation seems to be premised on the fact that there was no direct proof from witnesses as to what would have happened had the allegedly negligent omissions of the OCC employees not occurred. ***

117. The problem with this aspect of the AGC's argument is that it suggests that in applying the "but for" test of causation, the judge is not entitled to draw her own inferences from the evidence but instead must rely only on the evidence of witnesses who themselves have speculated as to what would have happened had the standard of care been met. ***

119. As the Supreme Court of Canada said in *Clements v. Clements*, 2012 SCC 32 [§16.1.2], the causation test of whether "but for" the defendant's negligence, the injury would likely not have happened, is a test that must be applied in a "robust common sense fashion", and it may be established by inference only: paras. 9-11.

120. I would add that it will be a rare case where determining causation does not require some inference-drawing. The exercise of the trial judge will involve an analysis of what actually happened (after an allegedly negligent act or omission), and then consideration of the hypothetical of what likely would have happened had the standard of care been met. While the surrounding evidence will assist the judge in the latter exercise, since the standard of care was not met, no one can know with certainty what would have happened "but for" the negligence. Ultimately it is the trial judge's task alone to draw the necessary inferences.

121. There were several pieces of evidence that supported the inferences drawn by the judge on causation:

> • approximately 90 minutes passed between the time of the First Call to the OCC at 1:36 p.m. and the accident;
>
> • multiple police officers from the Mission RCMP took only 2 minutes to get to the intersection once the accident was reported;
>
> • had Cpl. Sukkau, the watch manager at the RCMP Mission detachment on the day of the accident, received a message from dispatch that people were not following the four-way stop procedure, he would have expected officers to attend the scene;
>
> • one driver reported cars racing through the intersection, and the Dashcam Video also showed multiple cars on the highway racing through the intersection at high speed, seemingly without slowing;
>
> • drivers usually slow down in the presence of a police car on the side of the road;
>
> • simply stopping a police vehicle and putting the lights on is an effective method of traffic control, as other drivers pay attention to a police vehicle;
>
> • lights being out at that intersection would pose a potential danger or hazard; ***
>
> • had Mr. Sleeman decreased his speed even by a slight amount, it would have avoided the accident.

122. Given that the accident occurred approximately 90 minutes after the First Call, there was time to avoid it happening had the OCC employees acted promptly at 1:36 p.m. after receiving the First Call. The omissions of the OCC employees meant that there was an absence of any vehicle equipped with flashing lights that could have alerted drivers to there being some sort of hazard and caused them to slow down. ***

124. It was a capable inference for the judge to draw that if Mr. Sleeman had been alerted to something like rotary lights flashing on a police or other vehicle near the intersection, it is likely he would have slowed down somewhat and his reduction in speed, even a minor reduction, would have prevented the accident.

125. As the judge noted on the expert evidence, "[a]ll that needed to happen for the Accident to be avoided, therefore, is for there to have been some police presence to cause a slowing of traffic": para. 97.

126. Where "but for" causation is established by inference only, the defendant has the option of calling evidence that the accident was inevitable, and would have happened in any event: *Clements* at para. 11. For example, in the case of alleged medical malpractice, a defendant might call evidence that the plaintiff had a congenital defect that caused the tragic medical event, and therefore what the defendant doctor did or did not do was irrelevant. However, of course, on the facts of this case, the AGC was unable to show the accident was inevitable regardless of whether the OCC employees had met the standard of care. ***

130. The AGC focuses solely on the negligence of the drivers to argue that the accident that ultimately happened was too remote from the OCC employees' omissions. However, a plaintiff does not need to show that the defendant's conduct is the sole cause of the injury, just a necessary cause: *Athey v. Leonati*, [1996] 3 S.C.R. 458, at para. 17 [§16.2.1]; *Clements* at para. 8. ***

132. *** I am not persuaded that the judge made a palpable and overriding error in concluding that but for the negligence of the OCC employees, the accident would not have occurred. ***

Disposition

180. In summary, I agree with the respondents that the judge did not err in finding the OCC employees and Emil in part liable for the accident that occurred. The traffic light outage at the intersection of a busy highway and side-street presented a dangerous situation to users of that part of the road. I see no error in the trial judge's findings that the failures of the OCC employees *** to meet the standard of care required of them, in relation to this hazardous road condition, were contributing causes of the terrible accident that occurred when one driver drove through the intersection and into the car of a vehicle trying to turn left. The judge also did not err in apportioning 40% liability to OCC.

181. I would dismiss the appeal.

REFLECTION:

- *Why did the argument that the careless drivers were primarily to blame not absolve the government of liability?*
- *Is the Court's reasoning consistent with the view expressed by the United Kingdom Supreme Court in Robinson v. Chief Constable of West Yorkshire, [34], that "public authorities, like private individuals and bodies, are generally under no duty of care to prevent the occurrence of harm"? Is there jurisdictional divergence over the scope of public authority liability in negligence?[599] Which precedent expresses the better view of the law?*

19.5.1.5 Cross-references

- *Hill v. Hamilton-Wentworth Police Services Board* [2007] SCC 41: §13.4.2.2.
- *Watt v. Hertfordshire County Council* [1954] EWCA Civ 6: §14.2.4.1.
- *British Columbia v. Insurance Corp. of British Columbia* [2008] SCC 3: §23.2.4.2.

[599] See *Tindall v. Chief Constable of Thames Valley Police* [2022] EWCA Civ 25, [54], *leave granted:* UKSC 2023/0059.

19.5.1.6 Further material

- Law Pod UK Podcast, "Lawsuits against the Police for Arrest Operations" (Feb 14, 2018) 🎧.
- J. Morgan, "Maintaining the Elegant Façade of the Acts–Omissions Distinction" (2022) 81 Cambridge LJ 245.
- E. Chamberlain, "To Serve and Protect Whom? Proximity in Cases of Police Failure to Protect" (2016) 53 Alberta L Rev 977.
- M. Randall, "Private Law, the State and the Duty to Protect: Tort Actions for Police Failures in Gendered Violence Cases" in S. Rodgers, R. Ruparelia & L. Bélanger-Hardy (eds), *Critical Torts* (Markham: LexisNexis, 2009).

19.5.2 Government services

19.5.2.1 R v. Imperial Tobacco Canada Ltd [2011] SCC 42

Supreme Court of Canada – 2011 SCC 42

MCLACHLIN C.J.C. (FOR THE COURT):

1. Imperial Tobacco ("Imperial") is a defendant in two cases before the courts in British Columbia, *British Columbia v. Imperial Tobacco Canada Ltd.*, Docket: S010421, and *Knight v. Imperial Tobacco Canada Ltd.*, Docket: L031300. In the first case, the Government of British Columbia is seeking to recover the cost of paying for the medical treatment of individuals suffering from tobacco-related illnesses from a group of 14 tobacco companies, including Imperial ("*Costs Recovery* case"). The second case is a class action brought against Imperial alone by Mr. Knight on behalf of class members who purchased "light" or "mild" cigarettes, seeking a refund of the cost of the cigarettes and punitive damages ("*Knight* case").

2. In both cases, the tobacco companies issued third-party notices to the Government of Canada, alleging that if the tobacco companies are held liable to the plaintiffs, they are entitled to compensation from Canada for negligent misrepresentation, negligent design, and failure to warn, as well as at equity. They also allege that Canada would itself be liable under the statutory schemes at issue in the two cases. In the *Costs Recovery* case, it is alleged that Canada would be liable under the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30 ("*CRA*"), as a "manufacturer". In the *Knight* case, it is alleged that Canada would be liable as a "supplier" under the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("*BPCPA*") [§19.1.5], and its predecessor, the *Trade Practice Act*, R.S.B.C. 1996, c. 457 ("*TPA*").

3. In both cases, Canada brought motions to strike the third party notices ***, arguing that it was plain and obvious that the third-party claims failed to disclose a reasonable cause of action. In both cases, the chambers judges agreed with Canada, and struck all of the third-party notices. The British Columbia Court of Appeal allowed the tobacco companies' appeals in part. A majority of 3-2 held that the negligent misrepresentation claims arising from Canada's alleged duty of care to the tobacco companies in both the *Costs Recovery* case and the *Knight* case should proceed to trial. A majority in the *Knight* case further held that the negligent misrepresentation claim based on Canada's alleged duty of care to consumers should proceed, as should the negligent design claims in the *Knight* case. The court unanimously struck the remainder of the tobacco companies' claims.

4. The Government of Canada appeals the finding that the claims for negligent misrepresentation [§19.3.1] and the claim for negligent design [§19.1] should be allowed to go to trial. The tobacco companies cross-appeal the striking of the other claims. ***

Underlying Claims and Judicial History

A. The Knight Case

6. In the *Knight* case, consumers in British Columbia have brought a class action against Imperial under the *BPCPA* and its predecessor, the *TPA*. The class consists of consumers of light or mild cigarettes. It alleges that Imperial engaged in deceptive practices when it promoted low-tar cigarettes as less hazardous

to the health of consumers. The class alleges that the levels of tar and nicotine listed on Imperial's packages for light and mild cigarettes did not reflect the actual deliveries of toxic emissions to smokers, and alleges that the smoke produced by light cigarettes was just as harmful as that produced by regular cigarettes. The class seeks reimbursement of the cost of the cigarettes purchased, and punitive damages.

7. Imperial issued a third-party notice against Canada. It alleges that Health Canada advised tobacco companies and the public that low-tar cigarettes were less hazardous than regular cigarettes. Imperial alleges that while Health Canada was initially opposed to the use of health warnings on cigarette packaging, it changed its policy in 1967. It instructed smokers to switch to low-tar cigarettes if they were unwilling to quit smoking altogether, and it asked tobacco companies to voluntarily list the tar and nicotine levels on their advertisements to encourage consumers to purchase low-tar brands. Contrary to expectations, it now appears that low-tar cigarettes are potentially more harmful to smokers. ***

B. The Costs Recovery Case

11. The Government of British Columbia has brought a claim under the *CRA* to recover the expense of treating tobacco-related illnesses caused by "tobacco related wrong[s]". Under the *CRA*, manufacturers of tobacco products are liable to the province directly. The claim was brought against 14 tobacco companies. British Columbia alleges that by 1950, these tobacco companies knew or ought to have known that cigarettes were harmful to one's health, and that they failed to properly warn the public about the risks associated with smoking their product.

12. Various defendants in the *Costs Recovery* case, including Imperial, brought third-party notices against Canada for its alleged role in the tobacco industry. *** The allegations in this claim are strikingly similar to those in the *Knight* case. ***

Analysis ***

32. There are two types of negligent misrepresentation claims that remain at issue on this appeal. First, in the *Knight* case, Imperial alleges that Canada negligently misrepresented the health attributes of low-tar cigarettes to consumers, and is therefore liable for contribution and indemnity on the basis of the *Negligence Act* [§18.2.1] if the class members are successful in this suit. Second, in both cases before the Court, Imperial and the other tobacco companies allege that Canada made negligent misrepresentations to the tobacco companies, and that Canada is liable for any losses that the tobacco companies incur to the plaintiffs in either case. ***

35. The law first recognized a tort action for negligent misrepresentation in *Hedley Byrne* [§19.3.1.2]. Prior to this, parties were confined to contractual remedies for misrepresentations. *Hedley Byrne* represented a break with this tradition, allowing a claim for economic loss in tort for misrepresentations made in the absence of a contract between the parties. ***

38. In my view, the facts pleaded do not bring either claim within a settled category of negligent misrepresentation. *** To determine whether such a cause of action has a reasonable prospect of success, we must therefore consider whether the general requirements for liability in tort are met, on the test set out by the House of Lords in *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K.H.L.) [§13.4.1.1], and somewhat reformulated but consistently applied by this Court, most notably in *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 (S.C.C.) [§13.4.1.2]. ***

Stage One: Proximity and Foreseeability ***

42. Proximity and foreseeability are heightened concerns in claims for economic loss, such as negligent misrepresentation ***. In a claim of negligent misrepresentation, both these requirements for a *prima facie* duty of care are established if there was a "special relationship" between the parties: *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.). In *Hercules Management*, the Court, per La Forest J., held that a special relationship will be established where: (1) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (2) reliance by the plaintiff would be reasonable in the circumstances of the case (para. 24). Where such a relationship is established, the defendant may be liable for loss suffered by the plaintiff as a result of a negligent misstatement.

43. A complicating factor is the role that legislation should play when determining if a government actor owed a *prima facie* duty of care. Two situations may be distinguished. The first is the situation where the alleged duty of care is said to arise explicitly or by implication from the statutory scheme. The second is the situation where the duty of care is alleged to arise from interactions between the claimant and the government, and is not negated by the statute.

44. The argument in the first kind of case is that the statute itself creates a private relationship of proximity giving rise to a *prima facie* duty of care. *** Some statutes may impose duties on state actors with respect to particular claimants. However, more often, statutes are aimed at public goods, like regulating an industry (*Cooper*), or removing children from harmful environments (*D. (B.)).* In such cases, it may be difficult to infer that the legislature intended to create private law tort duties to claimants. This may be even more difficult if the recognition of a private law duty would conflict with the public authority's duty to the public: see, e.g., *Cooper* and *D. (B.)*. ***

45. The second situation is where the proximity essential to the private duty of care is alleged to arise from a series of specific interactions between the government and the claimant. The argument in these cases is that the government has, through its conduct, entered into a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care. In these cases, the governing statutes are still relevant to the analysis. For instance, if a finding of proximity would conflict with the state's general public duty established by the statute, the court may hold that no proximity arises: *D. (B.)*; see also *Heaslip Estate v. Mansfield Ski Club Inc.*, 2009 ONCA 594, 96 O.R. (3d) 401 (Ont. C.A.). However, the factor that gives rise to a duty of care in these types of cases is the specific interactions between the government actor and the claimant.

46. Finally, it is possible to envision a claim where proximity is based both on interactions between the parties and the government's statutory duties. ***

48. As mentioned above, there are two relationships at issue in these claims: the relationship between Canada and consumers (the *Knight* case), and the relationship between Canada and tobacco companies (both cases). The question at this stage is whether there is a *prima facie* duty of care in either or both these relationships. In my view, on the facts pleaded, Canada did not owe a *prima facie* duty of care to consumers, but did owe a *prima facie* duty to the tobacco companies.

49. The facts pleaded in Imperial's third-party notice in the *Knight* case establish no direct relationship between Canada and the consumers of light cigarettes. The relationship between the two was limited to Canada's statements to the general public that low-tar cigarettes are less hazardous. There were no specific interactions between Canada and the class members. Consequently, a finding of proximity in this relationship must arise from the governing statutes: *Cooper*, at para. 43.

50. The relevant statutes establish only general duties to the public, and no private law duties to consumers. *** At the same time, the governing statutes do not foreclose the possibility of recognizing a duty of care to the tobacco companies. Recognizing a duty of care on the government when it makes representations to the tobacco companies about the health attributes of tobacco strains would not conflict with its general duty to protect the health of the public.

51. Turning to the relationship between Canada and the tobacco companies, at issue in both of the cases before the Court, the tobacco companies contend that a duty of care on Canada arose from the transactions between them and Canada over the years. They allege that Canada went beyond its role as regulator of industry players and entered into a relationship of advising and assisting the companies in reducing harm to their consumers. They hope to show that Canada gave erroneous information and advice, knowing that the companies would rely on it, which they did. ***

53. What is alleged against Canada is that Health Canada assumed duties separate and apart from its governing statute, including research into and design of tobacco and tobacco products and the promotion of tobacco and tobacco products ***. In addition, it is alleged that Agriculture Canada carried out a programme of cooperation with and support for tobacco growers and cigarette manufacturers including advising cigarette manufacturers of the desirable content of nicotine in tobacco to be used in the manufacture of tobacco products. *** Thus, what is alleged is not simply that broad powers of regulation

were brought to bear on the tobacco industry, but that Canada assumed the role of adviser to a finite number of manufacturers and that there were commercial relationships entered into between Canada and the companies based in part on the advice given to the companies by government officials.

54. What is alleged with respect to Canada's interactions with the manufacturers goes far beyond the sort of statements made by Canada to the public at large. Canada is alleged to have had specific interactions with the manufacturers in contrast to the absence of such specific interactions between Canada and the class members. Whereas the claims in relation to consumers must be founded on a statutory framework establishing very general duties to the public, the claims alleged in relation to the manufacturers are not alleged to arise primarily from such general regulatory duties and powers but from roles undertaken specifically in relation to the manufacturers by Canada apart from its statutory duties, namely its roles as designer, developer, promoter and licensor of tobacco strains. With respect to the issue of reasonable reliance, Canada's regulatory powers over the manufacturers, coupled with its specific advice and its commercial involvement, could be seen as supporting a conclusion that reliance was reasonable in the pleaded circumstance. ***

60. In sum, I conclude that the claims between the tobacco companies and Canada should not be struck out at the first stage of the analysis. The pleadings, assuming them to be true, disclose a *prima facie* duty of care in negligent misrepresentation. ***

Stage Two: Conflicting Policy Considerations ***

(a) Government Policy Decisions

63. Canada contends that it had a policy of encouraging smokers to consume low-tar cigarettes, and pursuant to this policy, promoted this variety of cigarette and developed strains of low-tar tobacco. Canada argues that statements made pursuant to this policy cannot ground tort liability. It relies on the statement of Cory J. in *Just v. British Columbia*, [1989] 2 S.C.R. 1228 (S.C.C.), that "[t]rue policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors" (p. 1240). ***

72. The question of what constitutes a policy decision that is generally protected from negligence liability is a vexed one, upon which much judicial ink has been spilled. There is general agreement in the common law world that government policy decisions are not justiciable and cannot give rise to tort liability. There is also general agreement that governments may attract liability in tort where government agents are negligent in carrying out prescribed duties. The problem is to devise a workable test to distinguish these situations.

73. The jurisprudence reveals two approaches to the problem, one emphasizing discretion, the other, policy, each with variations. The first approach focuses on the discretionary nature of the impugned conduct. The "discretionary decision" approach was first adopted in *Dorset Yacht Co. v. Home Office*, [1970] 2 W.L.R. 1140 (U.K. H.L.) [§13.2.3]. This approach holds that public authorities should be exempt from liability if they are acting within their discretion, unless the challenged decision is irrational.

74. The second approach emphasizes the "policy" nature of protected state conduct. Policy decisions are conceived of as a subset of discretionary decisions, typically characterized as raising social, economic and political considerations. These are sometimes called "true" or "core" policy decisions. They are exempt from judicial consideration and cannot give rise to liability in tort, provided they are neither irrational nor taken in bad faith. A variant of this is the policy/operational test, in which "true" policy decisions are distinguished from "operational" decisions, which seek to implement or carry out settled policy. To date, the policy/operational approach is the dominant approach in Canada ***.

75. To complicate matters, the concepts of discretion and policy overlap and are sometimes used interchangeably. Thus Lord Wilberforce in *Anns* defined policy as a synonym for discretion (p. 500).

76. There is wide consensus that the law of negligence must account for the unique role of government agencies: *Just*. On the one hand, it is important for public authorities to be liable in general for their negligent conduct in light of the pervasive role that they play in all aspects of society. Exempting all government actions from liability would result in intolerable outcomes. On the other hand, "the Crown is not a person

and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions": ***Just***, at p. 1239. The challenge, to repeat, is to fashion a just and workable legal test.

77. The main difficulty with the "discretion" approach is that it has the potential to create an overbroad exemption for the conduct of government actors. Many decisions can be characterized as to some extent discretionary. For this reason, this approach has sometimes been refined or replaced by tests that narrow the scope of the discretion that confers immunity.

78. The main difficulty with the policy/operational approach is that courts have found it notoriously difficult to decide whether a particular government decision falls on the policy or operational side of the line. Even low-level state employees may enjoy some discretion related to how much money is in the budget or which of a range of tasks is most important at a particular time. Is the decision of a social worker when to visit a troubled home, or the decision of a snow-plow operator when to sand an icy road, a policy decision or an operational decision? Depending on the circumstances, it may be argued to be either or both. The policy/operational distinction, while capturing an important element of why some government conduct should generally be shielded from liability, does not work very well as a legal test. ***

87. *** Generally, policy decisions are made by legislators or officers whose official responsibility requires them to assess and balance public policy considerations. The decision is a considered decision that represents a "policy" in the sense of a general rule or approach, applied to a particular situation. It represents "a course or principle of action adopted or proposed by a government": *New Oxford Dictionary of English* (1998), at p. 1434. *** The weighing of social, economic, and political considerations to arrive at a course or principle of action is the proper role of government, not the courts. For this reason, decisions and conduct based on these considerations cannot ground an action in tort.

88. Policy, used in this sense, is not the same thing as discretion. Discretion is concerned with whether a particular actor had a choice to act in one way or the other. *** Policy decisions are always discretionary, in the sense that a different policy could have been chosen. But not all discretionary decisions by government are policy decisions. ***

90. I conclude that "core policy" government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. ***

95. In short, the representations on which the third-party claims rely were part and parcel of a government policy to encourage people who continued to smoke to switch to low-tar cigarettes. This was a "true" or "core" policy, in the sense of a course or principle of action that the government adopted. The government's alleged course of action was adopted at the highest level in the Canadian government, and involved social and economic considerations. *** In my view, it is plain and obvious that the alleged representations were matters of government policy, with the result that the tobacco companies' claims against Canada for negligent misrepresentation must be struck out. ***

(b) Indeterminate Liability ***

99. I agree with Canada that the prospect of indeterminate liability is fatal to the tobacco companies' claims of negligent misrepresentation. Insofar as the claims are based on representations to consumers, Canada had no control over the number of people who smoked light cigarettes. ***

100. The risk of indeterminate liability is enhanced by the fact that the claims are for pure economic loss. *** If Canada owed a duty of care to consumers of light cigarettes, the potential class of plaintiffs and the amount of liability would be indeterminate. ***

151. I conclude that it is plain and obvious that the tobacco companies' claims against Canada have no reasonable chance of success, and should be struck out. ***

REFLECTION:

- *Who are the plaintiffs and the defendants in the Costs Recovery case? Who are the plaintiffs and the defendants*

in the Knight case? What is the alleged duty of care in each case?[600]

- *In what ways can a statutory scheme affect the determination of a duty of care owed by a public authority?*
- *Unusually, the Supreme Court accepted that there was a special relationship of close proximity between the Federal Government and Imperial Tobacco in this case, yet the prima facie duty of care was negated by policy considerations. Why did the Court consider that the impugned government decisions in this case were matters of "core policy" that were immune from civil liability? Is the Court's reasoning compelling?*

19.5.2.2 Nelson (City) v. Marchi [2021] SCC 41

✗**REF: §14.1.2.3, §17.1.3**

KARAKATSANIS AND MARTIN JJ. (FOR THE COURT):

1. Under Canadian tort law, there is no doubt that governments may sometimes be held liable for damage caused by their negligence in the same way as private defendants. At the same time, the law of negligence must account for the unique role of public authorities in governing society in the public interest. Public bodies set priorities and balance competing interests with finite resources. They make difficult public policy choices that impact people differently and sometimes cause harm to private parties. This is an inevitable aspect of the business of governing. Accountability for that harm is found in the ballot box, not the courts. Courts are not institutionally designed to review polycentric government decisions, and public bodies must be shielded to some extent from the chilling effect of the threat of private lawsuits.

2. Accordingly, courts have recognized that a sphere of government decision-making should remain free from judicial supervision based on the standard of care in negligence. Defining the scope of this immunity has challenged courts for decades. In *R. v. Imperial Tobacco Canada Ltd.* 2011 SCC 42, [2011] 3 S.C.R. 45, this Court explained that "core policy" government decisions—defined as "decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors"—must be shielded from liability in negligence (para. 90). In ascertaining whether a decision is one of core policy, the key focus is always on the nature of the decision.

3. In the decade since *Imperial Tobacco*, there has been continued confusion on when core policy immunity applies. This appeal requires the Court to clarify how to distinguish immune policy decisions from government activities that attract liability for negligence. ***

4. The respondent, Taryn Joy Marchi, was injured while attempting to cross a snowbank created by the appellant, the City of Nelson, British Columbia.[601] She sued the City for negligence. Dismissing her claim, the trial judge concluded that the City did not owe Ms. Marchi a duty of care because its snow removal decisions were core policy decisions. In the alternative, he also found that there was no breach of the standard of care and, if there was a breach, Ms. Marchi was the proximate cause of her own injuries. The Court of Appeal concluded that the trial judge erred on all three conclusions and ordered a new trial. ***

5. We agree with the Court of Appeal that the trial judge erred ***. On duty of care, the relevant City decision was not a core policy decision immune from negligence liability. The City therefore owed Ms. Marchi a duty of care. ***

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[600] See Light Cigarettes Class Action, https://www.callkleinlawyers.com/class-actions/tobacco-class-action/.

[601] *Marchi v. Nelson (City)*, 2019 BCSC 308 *per* McEwan J. (trial judge):
"29. *** Around 5:00 pm on January 6 [the plaintiff] set off from her Nelson home to go to a Subway outlet in the 300 block of Baker Street. She parked in an angled spot on the north side of the street. She considered walking to the corner but rejected the idea as dangerous, as she was wearing dark clothes, and the traffic was heavy.
30. She decided to cross the snowbank onto the sidewalk and moved to a place close to the edge of the snowbank and then began to take a step with her right foot. As she shifted her weight onto that foot it dropped through the snowbank and onto something that bent her forefoot up. She describes the snow as locking her leg in place while she fell forward and felt her knee go "pop". She began to cry out for help.
31. There were no witnesses to her fall but people came to help her. Her husband was called and he arrived at the scene just before the ambulance. He stepped in the snowbank and assumed it was safe to walk on it: he also dropped through the snow almost up to his knee. ***"

13. There are three issues on appeal: whether the trial judge erred in concluding that the City did not owe Ms. Marchi a duty of care because its snow removal decisions were core policy decisions immune from negligence liability; whether the trial judge erred in his standard of care analysis; and whether the trial judge erred in his causation analysis.

A. Duty of Care

14. Duty of care is the central issue. To determine whether the trial judge erred, we proceed as follows. First, we set out the duty of care framework. Second, we explain how the previously established category from *Just v. British Columbia*, [1989] 2 S.C.R. 1228, operates, clarifying why this case falls within the *Just* category. Third, we consider the law on distinguishing core policy decisions from government activities that attract liability in negligence. We then apply the law to the trial judge's determination in this case that the City did not owe Ms. Marchi a duty of care.

(1) Duty of Care Framework ***

16. In Canada, the *Anns/Cooper* test provides a unifying framework to determine when a duty of care arises under the wide rubric of negligence law, including for allegations of negligence against government officials. ***

(2) How the *Just* Category Operates

20. This Court's majority decision in *Just* established a duty of care. The plaintiff sought damages for personal injury suffered when a boulder fell from a slope above a public highway onto his car. He claimed that the defendant government owed a private law duty of care to properly maintain and inspect the highway and that his loss was caused by the government's negligent failure to do so.

21. *Just* provided this Court with an opportunity to apply the full two-stage duty of care framework to a case involving personal injury on a public road. At the *prima facie* stage, the Court held that users of a highway are in a sufficiently proximate relationship to the province because in creating public highways, the province creates a physical risk to which road users are invited. The province or department in charge can also readily foresee a risk to road users if highways are not reasonably maintained (p. 1236).

22. At the second stage, the Court in *Just* did not have residual policy concerns about indeterminate liability or the effect of recognizing a duty on other legal obligations. The Court found that the duty of care should apply to public authority defendants "unless there is a valid basis for its exclusion" (*Just*, at p. 1242). The Court referred to two such bases: first, statutory provisions that exempt the defendant from liability, and second, immunity for "true" policy decisions (pp. 1240-44). While such policy decisions are exempt from claims in negligence, the operational implementation of policy may be subject to the duty of care in negligence.

23. The Court thus determined that public authorities owe road users a duty to keep roads reasonably safe, but recognized that the duty was subject to a public authority's immunity for true policy decisions. On the facts of *Just*, the impugned system of inspection was operational in nature, meaning it could be reviewed by a court to determine whether the government breached the standard of care (pp. 1245-46). The Court's reasoning is worth quoting at length:

> Here what was challenged was the manner in which the inspections were carried out, their frequency or infrequency and how and when trees above the rock cut should have been inspected, and the manner in which the cutting and scaling operations should have been carried out. In short, the public authority had settled on a plan which called upon it to inspect all slopes visually and then conduct further inspections of those slopes where the taking of additional safety measures was warranted. Those matters are all part and parcel of what Mason J. described [in *Sutherland Shire Council v. Heyman* (1985), 157 C.L.R. 424 (H.C.), at p. 469] as "the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness". They were not decisions that could be designated as policy decisions. Rather they were manifestations of the implementation of the policy decision to inspect and were operational in nature. As such, they were subject to review by the Court to determine whether the

respondent had been negligent or had satisfied the appropriate standard of care.

24. As we shall explain, the principles and considerations set out by the Court in *Just* to assist in distinguishing between policy and operation are relevant to any case in which a public authority is alleged to have been negligent, whether it falls under an established or analogous duty of care or a novel duty of care. The Court recognized the continuing judicial struggle to differentiate policy from operation, but nonetheless understood the necessity of ascertaining when public authorities owe duties in negligence.

25. The *Just* category of duty of care is firmly established in Canadian law. Over a decade later in *Cooper* [§13.4.1.2], when this Court gave examples of categories in which proximity had previously been recognized, it specifically observed: "… governmental authorities who have undertaken a policy of road maintenance have been held to owe a duty of care to execute the maintenance in a non-negligent manner" (para. 36 ***). ***

28. A substantial number of cases have applied the *Just* category, including decisions of this Court. In *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420, the plaintiff's car accident occurred on a sheet of black ice on the road. The Court held that the duty of care to reasonably maintain roads from *Just* "would extend to the prevention of injury to users of the road by icy conditions" (*Brown*, at p. 439). Similarly, in *Swinamer* [*v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445], a large tree fell on the plaintiff's truck while he was driving, causing serious injuries. The Court held that the duty of care from *Just* to reasonably maintain roads clearly applied (pp. 457-59). In both cases, however, the Court went on to find that the decisions at issue were core policy decisions immune from negligence liability. ***

29. As demonstrated by *Just* and subsequent jurisprudence, the factors uniting cases under the *Just* category are as follows: a public authority has undertaken to maintain a public road or sidewalk to which the public is invited, and the plaintiff alleges they suffered personal injury as a result of the public authority's failure to maintain the road or sidewalk in a reasonably safe condition. Where these factors are present, the *Just* category will apply, obviating the need to establish proximity afresh.

30. In this case, the plaintiff suffered significant physical injury on a municipal street in the City's downtown core. By plowing the parking spaces on Baker Street, the City invited members of the public to use them to access businesses along the street. The plaintiff was attempting to do just that when she fell into a snowbank that had been created by the City during snow removal. The *Just* category covers a variety of situations, including the prevention of injuries from rocks falling onto the road (*Just*), the prevention of injuries from trees falling onto the road (*Swinamer*), and the prevention of injuries from black ice on the road (*Brown*). It also clearly extends to the prevention of injuries from snowbanks created by a government defendant on the road and sidewalk. In our view, Ms. Marchi has proved that her circumstances fall within the scope of the *Just* category. As discussed below, it remains open to the City to prove that the relevant government decision was a core policy decision immune from liability in negligence.

31. We are also of the view that the relationship between the plaintiff and defendant is sufficiently close to satisfy a novel proximity analysis. This case involves foreseeable physical harm to the plaintiff and therefore engages one of the core interests protected by the law of negligence (*Cooper*, at para. 36). Other hallmarks of proximity are also evident: road users are physically present on a space controlled by the public authority; they are invited to the risk by the public authority; and the public authority intends and plans for people to use its roads and sidewalks. It would be reasonably foreseeable to the City that carrying out snow removal in a negligent manner could cause harm to those invited to use the streets and sidewalks in the downtown core. ***

36. For the purposes of this case, we need not decide whether core policy immunity is best conceived of as a rule for how the *Just* category operates, or whether it should be viewed as a stage two consideration under the *Anns/Cooper* framework even when an established category of duty applies. It makes no practical difference to the outcome of the appeal. Regardless of where core policy immunity is located in the duty of care framework, the same principles apply in determining whether an immune policy decision is at issue. Those principles apply in any case in which a public authority defendant raises core policy immunity, whether the case involves a novel duty of care, falls within the *Just* category, or falls within another

established or analogous category. What is most important is that immunity for core policy decisions made by government defendants is well understood and fully explored where the nature of the claim calls for it. It is for this reason that we will now articulate the principles underlying the immunity.

(3) Core Policy Decisions ***

(a) Government Liability for Negligence and Rationale for Core Policy Immunity

38. Before the enactment of Crown proceedings legislation in the mid-twentieth century, governments in Canada could not be held directly or vicariously liable for the negligence of Crown servants (P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at p. 7). As government functions expanded, however, this state of affairs became untenable; governments were increasingly involved in activities "that would have led to tortious liability if they had occurred between private citizens" (*Just*, at p. 1239). Accordingly, Parliament and the provincial legislatures enacted legislation allowing the Crown to be held liable for the torts of officials in a manner akin to private persons [§23.2.2]. Even before this legislation was enacted, municipal corporations were distinguished from the Crown and held liable for claims in negligence from the late eighteenth century onwards ***.

39. Applying private law negligence principles to public authorities presents "special problems" (*Sutherland Shire Council*, at p. 456, per Mason J.). While legislation makes the Crown subject to liability as though it were a person, "the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions" (*Just*, at p. 1239). Government decision-making occurs across a wide spectrum. At one end are public policy choices that only governments make, such as decisions taken "at the highest level" of government to adopt a course of action based on health policy or other "social and economic considerations" (*Imperial Tobacco*, at para. 95). Courts are reluctant to impose a common law duty of care in relation to these policy choices ***. At the other end of the spectrum, government employees who drive vehicles or public authorities who occupy buildings clearly owe private law duties of care and must act without negligence ***. Tort law must ensure that liability is imposed in this latter category of cases without extending too far into the sphere of public policy decisions.

40. Although there is consensus "that the law of negligence must account for the unique role of government agencies", there is disagreement on how this should be done (*Imperial Tobacco*, at para. 76). Some even argue that private law principles of negligence are wholly incompatible with the role and nature of public authorities. Echoing the *obiter* in *Paradis Honey Ltd. v. Canada (Attorney General)*, 2015 FCA 89, [2016] 1 F.C.R. 446, at paras. 130 and 139,[602] for example, the City of Abbotsford intervened to propose that only

[602] *Paradis Honey Ltd. v. Canada (Attorney General)*, 2015 FCA 89 *per* Stratas J.A.:
"126. Today, despite the best efforts of the Supreme Court and other courts, the doctrine governing the liability of public authorities remains chaotic and uncertain, with no end in sight. How come?
127. At the root of the existing approach is something that makes no sense. In cases involving public authorities, we have been using an analytical framework built for private parties, not public authorities. We have been using private law tools to solve public law problems. So to speak, we have been using a screwdriver to turn a bolt.
128. Public authorities are different from private parties in so many ways. Among other things, they carry out mandatory obligations imposed by statutes, invariably advantaging some while disadvantaging others. As for the duty of care, does it make sense to speak of public authorities having to consider their "neighbours"—the animating principle of *Donoghue v. Stevenson* [§13.1.1]—when they regularly affect thousands, tens of thousands or even millions at a time? As for the standard of care, how can one discern an "industry practice" that would inform a standard of care given public authorities' wide variation in mandates, resources and circumstances? ***
129. As well, the current law of liability for public authorities—the provenance and essence of which is private law—sits as an anomaly within the common law. By and large, our common law recognizes the differences between private and public spheres and applies different rules to them. Private matters are governed by private law and are addressed by private law remedies; public matters are governed by public law and are addressed by public law remedies. ***
130. This anomaly should now end. The law of liability for public authorities should be governed by principles on the public law side of the divide, not the private law side. ***
138. In an application for judicial review, remedies are discretionary ***. Courts inform their remedial discretion by examining the acceptability and defensibility of the decision, the circumstances surrounding it, its effects, and the

public law principles should govern public authority liability. Instead of examining how core policy immunity operates within negligence law, it suggests that courts should focus on indefensibility in the administrative law sense and exercise remedial discretion where appropriate to grant monetary relief.

41. Such an approach has no basis in this Court's jurisprudence. It also runs counter to Crown proceedings legislation in Canada, which subjects the Crown to liability as if it were a private person. This Court's approach has been to accept that, "[a]s a general rule, the traditional tort law duty of care will apply to a government agency in the same way that it will apply to an individual" (*Just*, at p. 1244). However, to resolve the tension arising from the application of private law negligence principles to public authorities, the Court has adopted the principle from *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), that certain policy decisions should be shielded from liability for negligence, as long as they are not irrational or made in bad faith. ***

42. The primary rationale for shielding core policy decisions from liability in negligence is to maintain the separation of powers. Subjecting those decisions to private law duties of care would entangle the courts in evaluating decisions best left to the legislature or the executive. The executive, legislative, and judicial branches of government play distinct and complementary roles in Canada's constitutional order (*Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at paras. 27-29). Each branch also has core institutional competencies: the legislative branch has the power to make new laws, the executive branch executes the laws enacted by the legislative branch and the judicial branch decides disputes arising under the laws ***.

43. It is fundamental to the constitutional order that each branch plays its proper role and that "no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other" (*New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, at p. 389; see also *Just*, at p. 1239). Separation of powers thus protects the independence of the judiciary, the legislature's ability and freedom to pass laws ***, and the executive's ability to execute those laws, set priorities, and allot resources for good governance. Since municipalities hold delegated provincial powers, they enjoy the same protection for certain responsibilities.

44. Core policy decisions of the legislative and executive branches involve weighing competing economic, social, and political factors and conducting contextualized analyses of information. *** If courts were to weigh in, they would be second-guessing the decisions of democratically-elected government officials and simply substituting their own opinions ***.

45. Relatedly, the adversarial process and the rules of civil litigation are not conducive to the kind of polycentric decision-making done through the democratic process (Hogg, Monahan and Wright, at p. 226; *Home Office v. Dorset Yacht Co.*, [1970] A.C. 1004 (H.L.) [§13.2.3], per Lord Diplock at pp. 1066-1068). Nor is the fact that one core policy decision is better than the other amenable to proof in the sense that courts usually require (*Just*, at pp. 1239-40 ***).

46. Moreover, if all government decisions were subject to tort liability, this could hinder good governance by creating a chilling effect ***. Public authorities must be allowed to "adversely affect the interests of individuals" when making core policy decisions without fear of incurring liability (*Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705, at p. 722).

47. For these reasons, although there is no question that the legislative and executive branches sometimes make core policy decisions that ultimately cause harm to private parties (Klar, at p. 650), the remedy for those decisions must be through the ballot box instead of the courts ***. Unlike public (administrative) law, where delegated government decisions are reviewed by the courts to uphold the rule of law, private law liability for core policy decisions would undermine our constitutional order.

48. Conversely, there are good reasons to hold public authorities liable for negligent activities falling outside

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public law values that would be furthered by the remedy in the particular practical circumstances of the case ***.
139. This framework—the unacceptability or indefensibility in the administrative law sense of the public authority's conduct and the court's exercise of remedial discretion—should govern whether monetary relief in public law may be had by way of action. ***"

this core policy sphere where they cause harm to private parties. “Municipalities function in many ways as private individuals or corporations do” and have the ability to “spread losses” (Makuch, at p. 239). Liability for operational activities is “a useful protection to the citizen whose ever-increasing reliance on public officials seems to be a feature of our age” (***Kamloops*** [***v. Nielsen***, [1984] 2 S.C.R. 2 (S.C.C.)] at p. 26).

49. As we will explain, the rationale for core policy immunity—protecting the legislative and executive branch’s core institutional roles and competencies necessary for the separation of powers—should serve as an overarching guiding principle in the analysis. Ultimately, whether a public authority ought to be immune from negligence liability depends on whether and the extent to which the underlying separation of powers rationale is engaged ***.

(b) Defining the Scope of Core Policy Decisions

50. This Court explained in ***Just*** that “[t]rue policy decisions” must be distinguished from “operational implementation” which is subject to private law principles of negligence (p. 1240). ***

51. *** Core policy decisions, shielded from negligence liability, are “decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith” (***Imperial Tobacco***, at para. 90). They are a “narrow subset of discretionary decisions” because discretion “can imbue even routine tasks” and protecting all discretionary government decisions would therefore cast “the net of immunity too broadly” (paras. 84 and 88).

52. Activities falling outside this protected sphere of core policy—that is, activities that open up a public authority to liability for negligence—have been defined as “the practical implementation of the formulated policies” or “the performance or carrying out of a policy” (***Brown***, at p. 441; see also ***Laurentide Motels***, at p. 718). Such “operational” decisions are generally “made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness” (***Brown***, at p. 441).

53. In ***Imperial Tobacco***, McLachlin C.J. suggested that the policy/operational distinction may not work well as a legal test, as many decisions can be characterized as one or the other when abstractly pitting policy against operation (para. 78). The Court in ***Imperial Tobacco*** therefore chose to focus on the positive features of core policy decisions and move away from the policy-operational distinction (para. 87). While we agree, the distinction nevertheless remains useful. In some cases, the juxtaposition of core policy and operational implementation may clearly identify the decisions that should not be subject to court oversight as opposed to those which attract liability in negligence.

54. However, the key focus must remain on the nature of the decision (***Just***, at p. 1245; see also ***Imperial Tobacco***, at para. 87), and this focus is supported by the identification of additional hallmarks of core policy decisions. In ***Just***, this Court explained that core policy decisions will usually (but not always) be made “by persons of a high level of authority” (p. 1245). *** In ***Brown***, the Court explained that core policy decisions involve “planning and predetermining the boundaries of [a government’s] undertakin[g]” (p. 441). ***

55. The characteristics of “planning”, “predetermining the boundaries” or “budgetary allotments” accord with the underlying notion that core policy decisions will usually have a sustained period of deliberation, will be intended to have broad application, and will be prospective in nature. For example, core policy decisions will often be formulated after debate—sometimes in a public forum—and input from different levels of authority. Government activities that attract liability in negligence, on the other hand, are generally left to the discretion of individual employees or groups of employees. They do not have a sustained period of deliberation, but reflect the exercise of an agent or group of agents’ judgment or reaction to a particular event ***.

56. Thus, four factors emerge from this Court’s jurisprudence that help in assessing the nature of a government’s decision: (1) the level and responsibilities of the decision-maker; (2) the process by which the decision was made; (3) the nature and extent of budgetary considerations; and (4) the extent to which the decision was based on objective criteria.

57. Below, we offer two clarifications and provide a framework to structure the analysis.

58. The first clarification is that a public servant's choice on how to approach government services frequently involves financial implications. For this reason, the mere presence of budgetary, financial, or resource implications does not determine whether a decision is core policy—too many government decisions, even the most operational decisions, involve some consideration of a department's budget or the scarcity of its resources ***. *** Whether a government decision involved budgetary considerations cannot be a test for whether it constituted core policy; it is but one consideration among many.

59. The second clarification is that the word "policy" has a wide range of meaning, from broad directions to a set of ideas or a specific plan ***. This is why our jurisprudence has so often qualified the word policy to focus on "true" or "core" policy, pointing towards the type of policy question that requires immunity. Accordingly, the fact that the word "policy" is found in a written document, or that a plan is labelled as "policy" may be misleading and is certainly not determinative of the question. Similarly, that a certain course of conduct is mandated by written government documents is of limited assistance. *** The focus must remain on the nature of the decision itself rather than the format or the government's label for the decision.

(c) How to Structure the Analysis

60. In addition to these cautions, the principles and factors set out in our jurisprudence, viewed from the perspective of the underlying rationale for core policy immunity, provide a helpful contextual framework for determining whether a government decision is a core policy decision. As noted, the key focus is always on the nature of the decision. Public policy choices are clearly within the role and competence of the legislative and executive branches of government. A court must consider the extent to which a government decision was based on public policy considerations and the extent to which the considerations impact the underlying purpose of the immunity—protecting the legislative and executive branch's core institutional roles and competencies necessary for the separation of powers.

61. The rationale for core policy immunity should also serve as an overarching guiding principle for how to assess and weigh the factors this Court has developed for identifying core policy decisions. We will elaborate.

62. First: the level and responsibilities of the decision-maker. With this factor, what is relevant is how closely related the decision-maker is to a democratically-accountable official who bears responsibility for public policy decisions. The higher the level of the decision-maker within the executive hierarchy, or the closer the decision-maker is to an elected official, the higher the possibility that judicial review for negligence will raise separation of powers concerns or have a chilling effect on good governance. Similarly, the more the job responsibilities of the decision-maker include the assessment and balancing of public policy considerations, the more likely this factor will lean toward core policy immunity. Conversely, decisions made by employees who are far-removed from democratically accountable officials or who are charged with implementation are less likely to be core policy and more likely to attract liability under regular private law negligence principles (*Just*, at pp. 1242 and 1245; *Imperial Tobacco*, at para. 87).

63. Second: the process by which the decision was made. The more the process for reaching the government decision was deliberative, required debate (possibly in a public forum), involved input from different levels of authority, and was intended to have broad application and be prospective in nature, the more it will engage the separation of powers rationale and point to a core policy decision. On the other hand, the more a decision can be characterized as a reaction of an employee or groups of employees to a particular event, reflecting their discretion and with no sustained period of deliberation, the more likely it will be reviewable for negligence.

64. Third: the nature and extent of budgetary considerations. A budgetary decision may be core policy depending on the type of budgetary decision it is. Government decisions "concerning budgetary allotments for departments or government agencies will be classified as policy decisions" because they are more likely to fall within the core competencies of the legislative and executive branches (see, e.g., *Criminal Lawyers' Association*, at para. 28). On the other hand, the day-to-day budgetary decisions of individual employees will likely not raise separation of powers concerns.

65. Fourth: the extent to which the decision was based on objective criteria. The more a government decision weighs competing interests and requires making value judgments, the more likely separation of

powers will be engaged because the court would be substituting its own value judgment (Makuch, at pp. 234-36 and 238). Conversely, the more a decision is based on "technical standards or general standards of reasonableness", the more likely it can be reviewed for negligence. ***

(d) Application of Core Policy Immunity

69. The City does not claim any statutory exemption from the duty of care in ***Just*** and there is no allegation that it was acting irrationally or in bad faith. As such, having determined that this case falls under the ***Just*** category, the only remaining issue at the duty of care stage is whether the City is immune from liability in negligence because the plaintiff has challenged a core policy decision. If the City's impugned actions fall outside the scope of core policy immunity, the City may be held liable for any negligence just as a private defendant would be. ***

76. We agree with Ms. Marchi and the Court of Appeal that the trial judge erred. First, he described the decision or conduct at issue too broadly, focusing on the entire process of snow removal. At issue is the City's clearing of snow from the parking stalls in the 300 block of Baker Street by creating snowbanks along the sidewalks—thereby inviting members of the public to park in those stalls—without creating direct access to sidewalks. Even if the written Policy was core policy, this does not mean that the creation of snowbanks without clearing pathways for direct sidewalk access was a matter of core policy. *** The duty asserted must be tied to the negligent conduct alleged. In this case, the plaintiff claims that the City was negligent in how they actually plowed the parking spaces. The trial judge's conclusion that the "City's actions were the result of policy decisions" was overbroad, merging together all of the City's snow removal decisions and activities. ***

77. Second, we agree with Ms. Marchi that the trial judge placed too much weight on the label of "policy", appearing to accept without question the City's description of its unwritten snow removal practices as "unwritten policies". ***

78. Third, the trial judge improperly treated budgetary implications as determinative of the core policy question. ***

81. The City reacted to the early January snowfall in the usual course: it followed the priority routes for plowing and sanding in the written Policy (unchallenged by Ms. Marchi); it waited to remove snowbanks from the downtown core until after all City streets were plowed; and it followed several unwritten practices, including with respect to snow removal from stairs around the City. Although clearing parking stalls was not covered in the written Policy, the City cleared the angled parking stalls in the 300 block of Baker Street and created a continuous snowbank blocking the stalls from the sidewalk. Throughout this process, the public works supervisor made decisions about how many employees to deploy. She also completed "road patrol throughout the day to ensure the streets [were] safe, and crews [were] working in a timely and efficient manner" ***.

82. The trial judge found that it "did not occur" to the supervisor that this process could be done in a different manner (para. 35). When the supervisor was asked at trial whether she had ever considered the potential dangers caused by clearing the parking stalls, she responded that her job was simply to follow "[the] normal protocol" and "follow direction from above me" ***. She also testified that changing the way the City plowed the streets would have required some "planning ahead" and she would not have had the authority to change the plowing method but would have had to ask her director ***. The City chose not to call any other employees of the City as witnesses.

83. On this record, the City's decision bore none of the hallmarks of core policy. Although the extent to which the supervisor was closely connected to a democratically-elected official is unclear from the record, she disclosed that she did not have the authority to make a different decision with respect to the clearing of parking stalls (the first factor). In addition, there is no suggestion that the method of plowing the parking stalls on Baker Street resulted from a deliberative decision involving any prospective balancing of competing objectives and policy goals by the supervisor or her superiors. Indeed, there was no evidence suggesting an assessment was ever made about the feasibility of clearing pathways in the snowbanks; the City's evidence is that this was a matter of custom (the second factor). Although it is clear that budgetary considerations were involved, these were not high-level budgetary considerations but rather the day-to-day

budgetary considerations of individual employees (the third factor).

84. Finally, the City's chosen method of plowing the parking stalls can easily be assessed based on objective criteria (the fourth factor). Cases involving the *Just* category will not generally raise institutional competence concerns because courts routinely consider road and sidewalk maintenance issues in occupiers' liability cases. The *Just* category engages conduct that is similar in kind to what courts routinely assess. ***

85. Thus, the City has not shown that the way it plowed the parking stalls was the result of a proactive, deliberative decision, based on value judgments to do with economic, social or political considerations. In these circumstances, a court's review of the City's chosen means of clearing the parking stalls in the 300 block of Baker Street does not engage the underlying purpose for core policy immunity. Insulating these kinds of decisions from negligence liability does not undermine the ability to make important public interest policy choices. The public interest is not served when *ad hoc* decisions that fail to balance competing interests or that fail to consider how best to mitigate harms are insulated from liability in negligence. Oversight of such decisions respects the respective roles of each branch of government under the separation of powers doctrine.

86. Therefore, the City has not met its burden of proving that Ms. Marchi seeks to challenge a core policy decision immune from negligence liability. While there is no suggestion that the City made an irrational or bad faith decision, the City's "core policy defence" fails and it owed Ms. Marchi a duty of care. ***

B. Standard of Care ***

92. The reasonableness standard applies regardless of whether the defendant is a government or a private actor (*Just*, at p. 1243). ***

93. Thus, the trial judge erred in principle in reaching his conclusion on the standard of care. However, we would reject Ms. Marchi's invitation to decide this issue without a new trial. This Court is not well-placed to make factual findings regarding the impact of the evidence from other municipalities on the obligations imposed on the City.

C. Causation

94. In the further alternative, the trial judge found that the City was not the cause of Ms. Marchi's injuries because Ms. Marchi assumed the risk in crossing the snowbank: she was the "author of her own misfortune". ***

100. *** Defences are distinct from the causation analysis and the onus is on the defendant to plead and prove defences (Linden *et al.*, at p. 463; *British Columbia Electric Railway Co. v. Dunphy* [1919] 59 S.C.R. 263, at p. 268). The trial judge appears to have misapplied the defence of contributory negligence. Under provincial statutes such as British Columbia's *Negligence Act*, R.S.B.C. 1996, c. 333 [§18.2.1], contributory negligence is no longer a complete bar to recovery. Instead, damages are apportioned on the basis of comparative fault (s. 1(1); *Resurfice Corp.*, at para. 21 [§16.1.1]). Therefore, even if the trial judge found that Ms. Marchi was also negligent, that would not justify his conclusion that the City cannot be blamed for the accident.

101. The trial judge also erred in law in relying on the plaintiff's assumption of risk, or *volenti non fit injuria*, which is a complete bar to recovery. This narrowly applied defence requires the defendant to prove that the plaintiff accepted both the physical and legal risks of the activity (Linden *et al.*, at p. 483; *Dube v. Labar*, [1986] 1 S.C.R. 649, at pp. 658-59). However, the plaintiff must have "understood that she bargained away her right to sue" (Linden *et al.*, at p. 483). There was no evidentiary basis to conclude that Ms. Marchi either explicitly or implicitly bargained away her right to sue for her injuries. ***

Conclusion

103. For these reasons, the trial judgment must be set aside. On duty of care, we would conclude that the impugned City decision was not a core policy decision and the City therefore owed Ms. Marchi a duty of

care. The standard of care and causation assessments require a new trial. ***

REFLECTION:

- *Should government decisions generally be immunised from tort liability? Why did the Supreme Court reject the argument advanced by the intervenor on the basis of Stratas J.A.'s opinion in Paradis Honey Ltd. v. Canada?*
- *Is the policy/operational distinction principled? Is the Court's guidance in this case illuminating?*
- *What errors did the trial judge make in analysing the alleged duty of care, the standard of care, factual causation and remoteness? Should these latter issues have been resolved in a new trial?*[603]

19.5.2.3 Francis v. Ontario [2021] ONCA 197

Ontario Court of Appeal – 2021 ONCA 197

✗**REF: §20.6.3, §23.2.2.2, §24.2.2**

DOHERTY AND NORDHEIMER JJ.A. (H. YOUNG J.A. concurring):

1. Her Majesty the Queen in Right of Ontario ("Ontario") appeals from the summary judgment granted by the motion judge in which he found that Ontario owed a duty of care to the respondent, and his fellow class members, arising from the system of administrative segregation used in Ontario's correctional institutions between April 20, 2015 and September 18, 2018 [2020 ONSC 1644]. The motion judge also found that Ontario had breached that duty of care. The motion judge further concluded that Ontario's system of administrative segregation breached the rights of the respondent, and his fellow class members, under ss. 7 and 12 of the Canadian Charter of Rights and Freedoms. As a consequence of these breaches, the motion judge awarded aggregate *Charter* damages against Ontario in the amount of $30 million. ***

The foundation for the negligence claim ***

102. *** [T]he motion judge engaged in a lengthy analysis of whether a duty of care arose in this case. We generally agree with that analysis. On the first branch of the test from *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537 [**§13.4.1.2**], the *prima facie* duty test, there is clearly a close relationship between Ontario and the inmates (i.e. proximity) that would support a basis for finding a duty of care. It is well-established that governments owe a duty of care to individuals while they are in custody: *MacLean v. The Queen*, [1973] S.C.R. 2, at p. 7. ***

103. It follows, from the nature of the relationship, that actions taken which result in injury to an inmate could be reasonably foreseeable. ***

104. That then leads to the second branch of the *Cooper v. Hobart* test, which is whether there are residual policy considerations that would militate against a finding of a duty of care. Those considerations lead to the issue of policy versus operational matters ***. *** [W]e view the actions taken in this case, that form the basis of the negligence claim, to be tied to operational as opposed to policy matters. ***

106. *** [T]he actions alleged in this case do not constitute different acts in different circumstances. Rather, what is challenged, at the very core of this claim, is the same act being undertaken, that is, placing inmates in administrative segregation in two specific circumstances where it is said that injury will naturally result. The first circumstance is where SMI Inmates are placed in administrative segregation for any length of time. The second circumstance is where Prolonged Inmates are placed in administrative segregation for a period of 15 or more consecutive days. The expert evidence establishes that both of these actions will give rise to injury or harm to each and every involved individual. ***

The Crown Liability and Proceedings Act, 2019

111. Having determined that a claim of systemic negligence does lie in this case, we must address Ontario's submission that any such claim is barred by virtue of the *CLPA*.

[603] See B. Metcalfe, "Nelson snowbank lawsuit settled out of court" Nelson Star (Sep 7, 2022).

112. On April 11, 2019, the provincial government tabled Bill 100, *** its omnibus budget bill, the short title of which was "*Protecting What Matters Most Act (Budget Measures), 2019*". In keeping with what appears to have become a practice in recent times, Bill 100 did not deal solely with budget matters. Rather, the Bill was 178 pages long, contained 61 schedules, and affected 199 separate statutes. Included in Bill 100, as schedule 17, was the *CLPA*. ***

113. Sections 11(4) and 11(5) of the *CLPA* are of particular relevance to the issue in this case. They read:

> (4) No cause of action arises against the Crown or an officer, employee or agent of the Crown in respect of any negligence or failure to take reasonable care in the making of a decision in good faith respecting a policy matter, or any negligence in a purported failure to make a decision respecting a policy matter.
>
> (5) For the purposes of subsection (4), a policy matter includes,
>
> (a) the creation, design, establishment, redesign or modification of a program, project or other initiative, ***
>
> (b) the funding of a program, project or other initiative, ***
>
> (c) the manner in which a program, project or other initiative is carried out, ***
>
> (d) the termination of a program, project or other initiative, including the amount of notice or other relief to be provided to affected members of the public as a result of the termination;
>
> (e) the making of such regulatory decisions as may be prescribed; and
>
> (f) any other policy matter that may be prescribed. ***

116. *** Ontario says that, while a goal of the statute was to codify existing law, it was also a goal of the statute to "clarify" the existing law. In particular, Ontario argues that the statute intended to clarify what constitutes a policy matter as opposed to an operational matter. ***

122. We approach our analysis of this issue with two specific principles of statutory interpretation in mind. They are:

> • The words of an Act are to be read in their entire context and in *their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament:* *Re: Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, at para. 21.
>
> • There is a presumption that the common law remains unchanged absent a clear and unequivocal expression of legislative intent: *Canada (Attorney General) v. Thouin*, 2017 SCC 46, [2017] 2 S.C.R. 184, at para. 19. ***

127. It is s. 11(5)(c) of the *CLPA* that is at the heart of the interpretive issue. We would not give it the broad interpretation that Ontario urges in this case. We reach that conclusion for a number of reasons. First and foremost is the principle, that we set out above, that there is a presumption that the common law remains unchanged absent a clear and unequivocal expression of legislative intent. In our view, the combination of ss. 11(4) and (5) fails to achieve that clear and unequivocal expression. Sub-section 11(4) expressly references matters of policy. Sub-section 11(5) then purports to define what a policy matter may include. It follows that this definition must be predicated on maintaining the policy/operational separation. Had the intention been to do otherwise, the legislation could have expressly said so. ***

128. Second, to adopt Ontario's expansive meaning of s. 11(5)(c) of the *CLPA* would directly offend the purpose behind statutes limiting Crown immunity, as explained by Cory J. in *Just*. There is, in fact, no limitation to the effect of the expansive meaning urged by Ontario in this case. Its logical conclusion would include virtually any step taken by the provincial government in carrying out any "program, project or other initiative". *** The difficulty with that approach is aptly expressed by McLachlin C.J.C. in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 76: "[e]xempting all government actions

from liability would result in intolerable outcomes."

129. Third, to adopt Ontario's expansive meaning would require a conclusion either that the Attorney General, at the time, did not understand the effect of the legislation being introduced, or that she misled the Legislature as to its intention and effect. Neither of those conclusions should be drawn absent there being no alternative explanation. In contrast, an interpretation of the *CLPA* that maintains the existing separation between policy decisions and operational decisions takes the Attorney General at her word.

130. Applying that approach to this case, we accept that the provincial government can adopt a policy of using administrative segregation in its correctional facilities. That is a policy matter, and its advisability is a matter for the government alone to determine, albeit within limits. ***

131. However, how the policy is actually applied, that is, its process at ground level, is not a policy matter. That is an operational matter, like any number of other operational matters that the Superintendent of a correctional institution has to determine on a day-to-day basis.

132. This line between policy and operational matters may be illustrated by adapting an example used by counsel for the Canadian Civil Liberties Association. If the provincial government decides that it wishes to provide public transit between two towns in Ontario, that is a policy decision. If the provincial government decides that it is going to provide that public transit through buses rather than trains, that is also a policy decision. However, how those buses actually transport people is an operational matter.

133. This conclusion is, in our view, consistent with the prevailing authorities on the distinction between policy and operation—admittedly a distinction that courts have found "notoriously difficult to decide": *Imperial Tobacco*, at para. 78. ***

140. In this case, s. 11(5)(c) of the *CLPA* does not protect Ontario from the actual results that flow from the implementation of its administrative segregation policy. ***

141. If a Superintendent applies the policy on administrative segregation to an inmate in a negligent manner, that is, in a manner that causes injury or harm, then Ontario is liable for that injury or harm. This negligence could include applying segregation in a manner that constitutes solitary confinement; applying segregation to seriously mentally ill inmates; imposing segregation for periods of 15 days or more on any inmate; and other like decisions that run contrary to established medical evidence as to the consequences. Such a result is beyond the reach of any expanded definition of policy contained in s. 11(5)(c) of the *CLPA* as we would interpret it. ***

Conclusion

148. The appeal is dismissed. ***

REFLECTION:

- *What was the Ontario legislature's likely purpose in "clarifying" the definition of "policy matters" through s. 11 of the Crown Liability and Proceedings Act, 2019?*[604]
- *How did Ontario's lawyers argue "policy matters" immune from tort liability ought to be judicially understood in light of the legislative clarification? What interpretation did the Court adopt?*

19.5.2.4 Jaipur Golden Gas Victims Ass'n v. Union of India [2009] INDLHC 4354

✗**REF: §16.2.4, §17.3.1, §22.1.4, §22.2.1**

MANMOHAN J.: ***

62. In the present case, MCD [the Municipal Corporation of Delhi] was remiss and negligent in discharging its statutory obligations and in ensuring that a citizen's fundamental right to health and pollution free

[604] See E. Chamberlain, "*Francis v. Ontario*: Can the Crown Restore its Own Immunity?" (2021) 99 Canadian Bar Rev 645.

environment was not infringed.

63. In fact, the present case was not the first incident of gas leak or fire in Delhi which occurred due to storage of hazardous substances. In this context, we may refer to the following extract of P.P. Chauhan Committee's report:

> *** The congested areas of the walled city are being used for storage of chemicals and other highly hazardous inflammable materials. There have been fire incidents in the past also. The remedy lies in shifting of such hazardous and chemicals godowns from the congested areas of the walled city. The Department of Industries, Delhi Administration had conducted a survey of the entire walled city area and had suggested shifting of hazardous industries from the entire walled city area and had suggested shifting of hazardous industries and godowns to the outskirts of the city. Unless immediate steps are taken to shift such hazardous units and godowns storing highly inflammable material from the walled city, the people inhabiting this area would continue to face danger and risk to their life and property. ***

64. This Court in *C.W.P. No. 3678/1999* titled as *All India Lawyers Union (Delhi Unit) v. Union of India* decided on 6th May, 2002 gave directions to MCD to ensure that hazardous substances are not stored in Delhi. ***

65. However, despite the aforesaid categorical directions, respondent-MCD failed to take any precautions and/or remedial measures. ***

67. Consequently, we are of the view that in the present case MCD has breached the precautionary principle and is also liable to pay damages to the fire and gas victims.

REFLECTION:

- *In Li v. Barber (§9.8.1.2), the defendants' counsel complained about the plaintiffs using "a private civil remedy, including a class action, as a means of effectively achieving municipal … by-law and police compliance." Is that what was happening in this case? Is it appropriate for plaintiffs to use tort law as a means of holding public authorities to account for inadequately discharging their statutory obligations?*

19.5.2.5 Cross-references

- *Haley v. London Electricity Board* [1964] UKHL 3: §13.1.5.
- *Anns v. Merton London Borough Council* [1977] UKHL 4, [28]: §13.4.1.1.
- *Cooper v. Hobart* [2001] SCC 79, [38], [44]-[55]: §13.4.1.2.
- *Home Office v. Dorset Yacht Co. Ltd* [1970] UKHL 2: §13.2.3.
- *Jane Doe v. Toronto Police Comm'rs* [1990] CanLII 6611 (ON Div Ct), [31]-[35]: §19.5.1.1.

19.5.2.6 Further material

- D.W. Hay, "I Rode into a Pothole on a City Street. I Ended up with Two Broken Arms. Can I Sue the City?" People's Law School (Mar 2022).
- M. Rowe & M. Oza, "Tort Claims Against Public Authorities" (2022) 60 Alberta L Rev 1.
- S. Nadarajah, "Student Suicide On-Campus: Tort Liability of Canadian Universities and Determining a Duty of Care" (2021) 26 Appeal: Review of Current L & L Reform 97.
- L. Klar, "The Proximity Hurdle in Negligence Actions Against Public Authorities" (2018) 84 (2d) Supreme Court L Rev 1.
- B. Feldthusen, "Unique Public Duties of Care: Judicial Activism in the Supreme Court of Canada" (2016) 53 Alberta L Rev 955.
- B. Feldthusen, "Public Authority Immunity from Negligence Liability: Uncertain, Unnecessary, and Unjustified" (2014) 92 Canadian Bar Rev 211.
- H. Wilberg, "Defensive Practice or Conflict of Duties? Policy Concerns in Public Authority Negligence Claims" (2010) 126 L Quarterly Rev 420.
- C. Booth, D. Fairgrieve & D. Squires, *The Negligence Liability of Public Authorities* (2nd ed, Oxford:

Oxford University Press, 2019).
- K. Oliphant (ed), *The Liability of Public Authorities in Comparative Perspective* (Cambridge: Intersentia, 2016).

19.6 Negligence in the workplace

19.6.1 Armstrong v. Gallagher's Garage Ltd [2018] ONSC 4347

Ontario Superior Court – 2018 ONSC 4347

MEW J.:

1. What is the standard of care owed by an employer to a prospective employee who is asked to demonstrate that she can handle the physical aspects of the job she is applying for and is injured in the course of doing so?

2. That is the issue which lies at the core of this action, brought by Sharon Armstrong, who suffered an L4 vertebrae burst fracture while attempting to hitch a six foot by twelve foot U-Haul trailer to the back of a truck.

3. The incident occurred during the course of a job interview which Ms. Armstrong was attending at Gallagher's Garage Ltd., which operates a U-Haul agency in Kanata. She had applied to be a customer service representative there. One of the job requirements was that she be able to hitch trailers to customers' vehicles. The accident happened when she was trying to demonstrate that she could.

4. The plaintiffs say that Gallagher's Garage Ltd., and Brian Gallagher, the company's president, who was conducting the "demonstration" part of the interview, owed her a duty of care and breached that duty by unreasonably exposing her to the risk of injury. The defendants say that what happened was an unfortunate accident, for which no one bears civil liability. ***

6. While it has no bearing on my decision on liability, I note for the record that by order of Pelletier J. dated 10 April 2018, the plaintiffs were permitted to amend the statement of claim. I am advised that following these amendments, which include an allegation that the defendants "stood in the place of an employer" with respect to Ms. Armstrong, the defendants have commenced an application to the Workplace Safety and Insurance Appeals Tribunal ("WSIAT"), which has exclusive jurisdiction to determine whether a personal injury action against an employer is barred by operation of s. 28 of the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sched. A [§12.2.3]. According to that provision, a worker employed by an employer covered by the Act is not entitled to commence an action against that employer in respect of a personal injury caused by an accident occurring in the course of employment. ***

Facts

9. At the time of the incident, Ms. Armstrong was 54 years old. She was 5 feet 4 inches tall and testified that she weighed between 120 and 125 pounds. ***

12. *** The advertisement was placed by Deborah Hickey on behalf of the corporate defendant. She explained how she had completed the advertisement on-line, using various drop down options that were presented to her. ***

16. Under a heading "Weight Handling", Ms. Hickey selected the option "More than 45 kg (100 lbs)". ***

18. The first interview was with Debbie Hickey and Brian Gallagher. [Ms. Armstrong] was asked about weight handling. She was told that it would involve hooking trailers to vehicles. Ms. Armstrong said that she might look small, but she had muscles in her arms and that it would not take her long to get up to handling weight. She rolled up a sleeve and flexed her bicep to further make the point. ***

21. *** She was one of three candidates who had a second interview. The first part of the interview was

conducted by Brian Gallagher's wife. At the end of that part of the interview, Ms. Gallagher told Ms. Armstrong that her husband would like to see her outside in the yard. Ms. Armstrong went out to see Mr. Gallagher who said that he wanted her to hook a trailer up to a truck. ***

23. Mr. Gallagher gave Ms. Armstrong a pair of work gloves. They were too big for her. She was not provided with any other equipment. She initially straddled the trailer tongue, with her feet facing the back of the truck and the tip of the trailer tongue a couple of feet from her. However, before she had started to lift the tongue, she says that Mr. Gallagher said to her that he found it better to stand on one side and lift with the chains with both feet on the same side of the trailer.

24. Ms. Armstrong says that she did as she was told. With her feet and body still facing the back of the truck, and the trailer tongue to her left, she grabbed onto a chain with each of her hands and lifted the trailer tongue off the ground that it had been resting on. She explained how her left arm was extended out towards the left side of the tongue. She kept her back straight so that she could lift with her knees and arms. She had lifted the tongue perhaps eight to ten inches off the ground when she heard a pop. She then does not remember anything until she was on her knees with the truck bumper in front of her. ***

25. She was subsequently diagnosed as having suffered a burst fracture of her L4 vertebrae.

26. Mr. Gallagher's recollection of the incident is different. He acknowledged at trial that when Ms. Armstrong initially went to straddle the tongue, he suggested that she not do that. His reasoning was that she would have to twist sideways. He told her that he usually lifted using the chains and bending his legs. He says that Ms. Armstrong then positioned herself with her feet and body pointing towards the tongue of the trailer. She grabbed the chains and started to lift the trailer. About half-way through, she dropped. She was clearly in pain. ***

33. In the 30 years that Mr. Gallagher has been a U-Haul agent, he has never seen or heard of anyone suffering a type of injury that Ms. Armstrong did. His daughter (now 48) and his wife (now 68) have routinely hitched trailers onto vehicles. ***

Issues ***

48. Accordingly, the contentious issues to be resolved are:

> 1. Whether the defendants owed the plaintiff a duty of care; and
>
> 2. Whether the defendants' behaviour breached the standard of care. ***

Duty of Care

50. The current Canadian approach to determining whether there is a duty of care is conveniently summarised by Perell J. in *LBP Holdings Ltd. v. Hycroft Mining Corporation*, 2017 ONSC 6342, at para. 115:

> … The first step is to determine whether the case falls within a recognized category of case. In Canada, if the relationship between the plaintiff and the defendant does not fall within a recognized class whose members have a duty of care to others, then whether a duty of care to another exists involves satisfying the requirements of the next three steps: (1) foreseeability, in the sense that the defendant ought to have contemplated that the plaintiff would be affected by the defendant's conduct; (2) sufficient proximity, in the sense that the relationship between the plaintiff and the defendant is sufficiently close *prima facie* to give rise to a duty of care; and (3) the absence of overriding policy considerations that would negate any *prima facie* duty established by foreseeability and proximity. … ***

55. The plaintiffs also posit the duty of care owed by the defendants as akin to an employment relationship. The nature of the duty owed by an employer to an employee is described in G.H.L. Fridman, *The Law of Torts in Canada*, 3rd ed. (Toronto: Carswell, 2010) at p. 577-78 as follows:

> An employer is obliged to take reasonable care for the safety of his employees. The master or

> employer must adopt whatever reasonable precautions may be necessary to protect his servant or employee from dangers inherent in the work the latter is performing, whether such danger arises from the premises where the work is undertaken, or from the machinery or the tools which the servant is using. The master or employer must take reasonable care that the plant and property used in the business on which the servant is employed are safe. ***

57. In considering the nature and scope of the duty of care owed by the defendants to Ms. Armstrong, it makes little sense that the duty of care owed to a prospective employee would be less than that owed to an actual employee.

58. In so concluding I make no finding as to whether something akin to a common-law employment relationship had already been formed. Nor do I purport to pronounce on the more specific issue of whether an employment relationship existed for the purposes of the *Workplace Safety and Insurance Act*, 1997, a question that is outwith my jurisdiction.

59. What I do find is that the duty of care owed by the defendants to Ms. Armstrong was to take such care for her safety as was reasonable in all of the circumstances to ensure that she would be reasonably safe while on the premises, including her participation in the activities being carried on there.

60. Courts should take a "common sense" approach to the determination of what care is reasonable in all of the circumstances. The fact that something is possible does not mean that it is reasonably foreseeable. See *Rankin* [*(Rankin's Garage & Sales) v. J.J.*, 2018 SCC 19], at paras. 46 and 50 [**§13.4.2.3**].

61. Common sense dictates that it is foreseeable that asking anyone, let alone someone in the position of Ms. Armstrong, to lift up a heavy trailer and to hook it onto a vehicle, exposes that person to the risk of harm through injury.

62. Accordingly, I conclude that the defendants owed a duty of care to Ms. Armstrong. ***

Standard of Care ***

73. I start with the weight that Ms. Armstrong was required to lift. If it was indeed 100 pounds or more, I would have serious concerns about the reasonableness of the defendants' conduct ***. But the evidence does not support such a conclusion.

74. It is unfortunate that no-one other than Mr. Gallagher either measured or estimated the weight that would be borne by someone undertaking the exercise given to Ms. Armstrong. I accept the evidence of Mr. Gallagher and Ms. Hickey that the advertised weight of 100 pounds was chosen out of an abundance of caution from a range of options presented by the pull-down menu when the advertisement was posted and that the actual weights involved on the day were not that great. They picked the heaviest option so that no-one could say they were misled.

75. While Mr. Gallagher says the weight involved would have been 50-60 pounds, in the absence of any actual measurement having been undertaken, I am not prepared to accept his estimate as anything more than that. But it does seem to be the case that, whatever the actual weight involved was, Mr. Gallagher's wife and daughter, as well as the employee who got the job that Ms. Armstrong was applying for, managed to perform similar manoeuvres many times over without incident. ***

77. Ms. Armstrong, of course, acknowledges that she told the defendants she could lift weights of 100 pounds or more and, indeed, had experience of having done so in previous jobs. The defendants say that their initial concerns about her ability to do the job were allayed by her assurances. ***

88. *** I am inclined, on a balance of probabilities, to conclude that Ms. Armstrong attempted the lift in the manner described by Mr. Gallagher.

89. What should the defendants have done? With the benefit of hindsight perhaps it would have been better if Mr. Gallagher had demonstrated his preferred method of lifting the trailer. Perhaps a better pair of gloves would have helped Ms. Armstrong. Perhaps if Ms. Armstrong had been advised to do a few warm-up stretches before she attempted the lift she would have been less vulnerable to injury. Or if the defendants

had asked her about her general health they may have decided she was not the person for a job involving heavy lifting. There is a range of possibilities.

90. Although the plaintiffs argue that the standard of care should be informed by health and safety standards applicable in other circumstances—such as the *Canada Labour Code*—I am unwilling to do so in the absence of any evidence of industry practice in the truck and trailer rental business or as to the correct characterisation of the job Ms. Armstrong was competing for (the *Labour Code* weight restrictions referred to by the plaintiffs apply to "office workers and whose primary task do not include manual lifting or carrying"—it is arguable whether that description matches the advertised job at the defendants' business).

91. In considering whether any of the measures discussed above—or others—were things that should have been done, such that a failure to do them would fall below the standard of care, it is appropriate to remember some first principles.

92. Professor Fridman reminds us, at pages 364-365 of his text, that negligence, or the failure to observe the applicable standard of care, must be differentiated from accident and excusable error. Professors Linden and Feldthusen observe that not all risky conduct attracts liability: virtually everything that anybody does creates some hazard to somebody: Allen M. Linden and Bruce Feldthusen, *Canadian Tort Law*, 9th ed. (Toronto: LexisNexis, 2011) at p. 134.

93. The risk of harm that Ms. Armstrong was exposed to had to be unreasonable: Linden and Feldthusen, at p. 130.

94. A recent employer's liability case—*Darlene Olaiya v. Durham Region Transit Commission*, 2017 ONSC 3938 (Ont. Div. Ct.), at para 8—contains the following summary of the applicable standard of care:

> In order to establish negligence, the plaintiff must meet the test accepted in *Kauffman v. Toronto Transit Commission*, 1960 CanLII 4 (SCC) and specifically at page 255 the passage from *Paris v. Stepney Borough Council* at page 255 of *Kauffman*, which is as follows:
>
> Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that proof of that fault of omission should be one of two kinds, either to shew that the thing that he did not do is a thing which was commonly done by other persons in like circumstances, or to shew that it was a thing that was so obviously wanted that it would be folly in anyone to neglect to provide it.

95. It is not clear to me that the defendants' conduct fell below the requisite standard of care, whether as an occupier or a quasi-employer. They are not to be held to a standard of perfection. Rather, they asked Ms. Armstrong to do something which replicated what Mr. Gallagher, his wife, his daughter and his other employees did, safely and without injury, day in, day out.

96. Perhaps there were things that the defendants could have done, but in my view, none of these things rise to the level of a failure to do what would be commonly done in similar circumstances (about which the evidence was, as already indicated, of limited assistance). Nor was it obvious that more should have been done to protect the Ms. Armstrong from injury.

97. As the experts explained, there are many variables involved in the assessment of whether this risk of injury was foreseeable. There is no magic number in terms of the maximum weight that it would have been reasonable to ask Ms. Armstrong to lift. Ultimately, the evidence does not enable me to conclude why Ms. Armstrong was injured. And, consequently—and in the absence of an industry standard or an obvious failure to take such care as was reasonable to ensure that Ms. Armstrong was reasonably safe—there is no basis for me to find that her injury was reasonably foreseeable. ***

Disposition

101. For the reasons given, the action is dismissed. ***

REFLECTION:

- *Does it necessarily follow that an employer's duty of care owed to a prospective employee must be equivalent*

to that owed to an actual employee?

- *The full judgment notes the defendants' contention that Armstrong had not disclosed her "thin bones." Bearing in mind the eggshell skull rule (§17.3) and the doctrine of contributory negligence (§18.2.2), would such an argument have helped the defendants had the Court found a breach of their duty of care?*
- *Having regard to statutory workplace compensation schemes (§12.2), why are employment-related personal injury tort claims likely to be uncommon?*

19.6.2 Canada v. Greenwood [2021] FCA 186

Federal Court of Appeal – 2021 FCA 186, leave denied: 2022 CanLII 19060 (SCC)

✗**REF: §20.6.2**

GLEASON J.A. (WEBB AND NEAR JJ.A. concurring): *

4. In an Order issued January 23, 2020 and amended on consent on April 21, 2020, reasons for which are reported as *Greenwood v. Canada*, 2020 FC 119, the Federal Court (*per* McDonald, J.) certified a class proceeding on behalf of a class consisting of, at a minimum, over two hundred thousand potential members. The class includes, with certain exceptions, virtually everyone who has ever worked for or with the Royal Canadian Mounted Police (the RCMP) or at RCMP premises, regardless of whether they were Members or employees of the RCMP or employed in the public service and assigned to work with the RCMP. ***

5. In their underlying action, the representative plaintiffs seek, on their own behalf and on behalf of class members, damages for non-sexual bullying, intimidation and harassment, which they allege is systemic in RCMP workplaces, and for related reprisals they say have been suffered by those who have raised complaints. ***

17. Of particular relevance to this appeal are the particulars of systemic negligence. In para. 110 of their statement of claim, the representative plaintiffs allege the RCMP owed class members the following duties: ***

> a) use reasonable care to ensure the safety and well-being of the plaintiffs and the other Class Members;
>
> b) provide safe workplace environments free from bullying, intimidation, and harassment;
>
> c) provide equal employment training and advancement opportunities to the plaintiffs and the other Class Members;
>
> d) establish and enforce appropriate policies, codes, guidelines, and procedures to ensure that the plaintiffs and the other Class Members would be free from bullying, intimidation, and harassment;
>
> e) implement standards of conduct for the RCMP work environment and for RCMP Employees, to safeguard the plaintiffs and the other Class Members from bullying, intimidation, and harassment;
>
> f) educate and train RCMP Employees to promote a universal understanding amongst all RCMP Employees that bullying, intimidation, and harassment are dangerous and harmful and will not be tolerated;
>
> g) properly supervise the conduct of RCMP Employees so as to prevent the plaintiffs and the other Class Members from being and/or being exposed to bullying, intimidation, and harassment;
>
> h) investigate and adjudicate complaints of bullying, intimidation, and harassment fairly and with due diligence and make efforts to prevent retaliation;
>
> i) act in a timely fashion to resolve situations of bullying, intimidation, and harassment, and to work to prevent re-occurrence; and,
>
> j) ensure that the plaintiffs and the other Class Members would not suffer from reprisals or retaliation

by RCMP Employees for reporting or objecting to incidents of bullying, intimidation, harassment and other misconduct. ***

Issues

87. *** [The Crown] submits that the Federal Court erred in law in *** finding that the negligence claim had a reasonable prospect of success and more specifically erred in:

a. finding that there exists a reasonable cause of action in negligence related to workplace harassment;

b. presuming that different requirements apply to a claim framed as systemic negligence; and

c. finding that the alleged class-wide duty of care is sustainable at law. ***

Did the Federal Court err in finding that the negligence claim discloses a reasonable cause of action? ***

145. The Crown rests its submissions on this issue primarily on the decisions of the Ontario Court of Appeal in *Piresferreira* [*v. Ayotte*, 2010 ONCA 384]; *Colistro v. Tbaytel*, 2019 ONCA 197; and *Merrifield #2* [*v. Canada (Attorney General)*, 2019 ONCA 205] [§5.2.2]. In *Piresferreira*, the Ontario Court of Appeal found that no recovery lies in tort for the negligent infliction of mental suffering in the employment context and in *Merrifield* that there is no tort of harassment.

146. More specifically, in *Piresferreira*, the Court had before it an appeal from a trial decision that granted an employee of Bell Canada damages for constructive dismissal and in tort for, among other things, a tort that the trial judge had described as "Negligent Infliction of Emotional Distress, Mental Suffering, Nervous Shock and/or Psycho-traumatic Disability". The plaintiff had suffered psychological injury caused by the harassment of her supervisors, which included a physical assault. Because an appellate court had not extended an entitlement to damages for negligent infliction of such harm in the employment context, the Court of Appeal undertook the analysis for the recognition of a new duty of care from *Anns v. Merton London Borough Council*, [1978] A.C. 728 [§13.4.1.1], as developed by the case law of the Supreme Court of Canada in *Cooper v. Hobart*, 2001 SCC 79 [§13.4.1.2] and subsequent cases. This analysis asks, first, whether the relationship between the plaintiff and the defendant is sufficiently close or proximate to render injury of the type incurred reasonably foreseeable so as to justify the imposition of a duty of care and, next, whether there are countervailing policy considerations as to why a duty of care should be limited or not recognized.

147. The Court of Appeal held that the employment relationship in that case was sufficiently proximate to have rendered the psychological damages suffered by the plaintiff reasonably foreseeable as a result of the abusive and harassing conduct that the plaintiff had experienced at the hands of her supervisor and the actions of other members of management. However, the Court held that countervailing policy considerations prevented the recognition of recovery in negligence because the remedies open to employees in contract already provide adequate redress through a claim for wrongful dismissal or constructive dismissal. And, allowing an action in tort for less serious instances of harassment falling short of constructive dismissal, the Court reasoned, would give rise to an impermissibly broad duty of care and create an undesirable incursion into the workplace that would have the potential of undermining efficiency (at para. 62). ***

149. As concerns the availability of recovery for mental injury in negligence generally, in 2017, in *Saadati v. Moorhead*, 2017 SCC 28 [§19.2.1.3], relying on its earlier decision in *Mustapha v. Culligan of Canada*, 2008 SCC 27 [§17.1.2], the Supreme Court of Canada confirmed that recovery lies in negligence for mental injury. However, both *Saadati* and *Mustapha* arose in contexts other than employment. ***

151. In *Merrifield #2*, the Ontario Court of Appeal had before it an appeal from a trial decision that awarded damages to a former RCMP Member for what the trial judge termed the tort of harassment. ***

152. In terms of the availability of recovery in tort for harassment, the Ontario Court of Appeal held that

Canadian law does not recognize the tort of harassment and that the case was not one "whose facts cry out for the creation of a novel remedy" (at para. 41). It further noted that adequate remedies already existed, including through the tort of intentional infliction of mental suffering. ***

153. I agree with the Crown that the representative plaintiffs' claims relevant to this appeal are grounded in negligence and that the required elements that a plaintiff must establish are the same in all negligence claims, regardless of whether or not they are pursued on a systemic basis. While the scope and content of the duty of care owed by a defendant and the evidence required to establish a breach will be different when the claim is made on a systemic basis, the elements of the tort of negligence are the same.

154. Justice Brown outlined the elements of the tort of negligence at para. 13 of *Saadati* in the following terms: "[l]iability in negligence law is conditioned upon the claimant showing (i) that the defendant owed a duty of care to the claimant to avoid the kind of loss alleged; (ii) that the defendant breached that duty by failing to observe the applicable standard of care; (iii) that the claimant sustained damage; and (iv) that such damage was caused, in fact and in law, by the defendant's breach." To the extent that the Federal Court suggested otherwise or that different elements pertain in a systemic negligence claim, it erred.

155. I also agree with the Crown that a claim in negligence for workplace harassment—whether brought on an individual or systemic basis—is liable to being struck when it is brought by or on behalf of those governed by written or unwritten contracts of employment. As held by the Ontario Court of Appeal, remedies available to employees in contract law militate against the recognition of the existence of a duty of care to take reasonable steps to prevent workplace harassment.

156. However, the holding in *Piresferreira* does not apply to RCMP Members because no employment contract applies to them and they accordingly have no contractual remedies available in employment law. RCMP Members are statutory office holders and not employees. ***

157. Thus, the policy reasons which led the Ontario Court of Appeal to decline to extend a duty of care in negligence to prevent workplace harassment in *Piresferreira* do not pertain to RCMP Members.

158. Moreover, in *Merrifield #2*, the Ontario Court of Appeal left the door open to the recognition of a new tort of workplace harassment in an appropriate case (at para. 53).

159. I also note that, standing in contrast to the decision in *Merrifield*, the British Columbia Court of Appeal came to an opposite conclusion in *Sulz* [*v. Minister of Public Safety and Solicitor General*, 2006 BCCA 582] and upheld an award of damages against the provincial Crown in tort for workplace harassment incurred by an RCMP Member. There is thus divided appellate authority on the issue of whether RCMP Members may recover damages in tort for workplace harassment.

160. Further, as noted by the respondents, common law class actions for workplace harassment have been certified in respect of RCMP Members in *Davidson* [*v. Canada (Attorney General)*, 2015 ONSC 8008], *Merlo* [*v. Canada*, 2017 FC 533], *Tiller* [*v. Canada*, 2019 FC 895] and *Ross* [*et al. v. Her Majesty the Queen*, Federal Court Action T-370-17]. While the latter three cases were decided in the context of the Crown's consent to the issuance of a certification order for purposes of settlement and the arguments made by the Crown in *Davidson* were different from those advanced by the Crown in the instant case, such that the cases may be of lesser precedential value, these cases cannot be completely ignored. ***

162. Given the foregoing and the high threshold for a successful motion to strike a pleading, it cannot be said that it is plain and obvious that there is no cause of action in negligence for workplace harassment experienced by an RCMP Member.

163. As for the Crown's suggestion that there cannot be a class-wide duty of care owed to class members given the individual considerations that must be addressed in a workplace negligence claim, such assertion is without foundation. Actions claiming systemic negligence have often been certified: see, for example, *Rumley* [*v. British Columbia*, 2001 SCC 69]; *Cloud v. Canada (Attorney General)*, 73 O.R. (3d) 401, [2004] O.J. No. 4924 [**§19.7.1**]; and *Francis v. Ontario*, 2021 ONCA 197 [**§20.6.3**], to name only a few. The circumstances in the foregoing cases are not so different as to render them inapplicable to the case at bar.

164. Thus, the first criterion for certification [that the pleadings disclose a reasonable cause of action] is met in the instant case ***. ***

REFLECTION:

- *Is the reasoning of Piresferreira v. Ayotte compelling that a tort action for negligent infliction of mental suffering in the employment context is unnecessary in light of contractual remedies available to employees? Should the availability of contractual redress preclude employees from succeeding under tort law?*
- *Why should systemic negligence claims be determined by the same requirements as other negligence claims?*

19.6.3 Cross-references

- *Paris v. Stepney Borough Council* [1950] UKHL 3: §14.2.2.1.
- *Watt v. Hertfordshire County Council* [1954] EWCA Civ 6: §14.2.4.1.
- *CCIG Investments Pty Ltd v. Schokman* [2023] HCA 21: §23.1.2.

19.6.4 Further material

- J. Turc, "No Claim in Negligence for Improper Workplace Investigation—Luan v. ADP Canada" McCarthy Tétrault Employer Advisor Blog (Oct 18, 2020).
- K. Burns, "Liability for Workplace Psychiatric Injury in Australia: New Coherence and Unresolved Tensions" (2023) 45 Sydney L Rev 157.
- M.A. Rothstein & J. Irzyk, "Employer Liability for 'Take-Home' COVID-19" (2021) 49 JL Med and Ethics 126.

19.7 Negligent treatment of indigenous children

S. Beswick, "Equality Under Ordinary Law" (2024) 2 Supreme Court L Rev (3d) (forthcoming)

The principle of equality under ordinary law is an ideal. Certainly no legal system has lived up to it in practice. *** Through adjudicating claims, the courts hold a vital role in reinforcing the notion of law enforcement officers and institutions as ordinary defendants under law. Yet, systemic obstacles plaintiffs face in pursuing civil recourse, exacerbated by an access to justice crisis, lead to too few cases actually reaching the courts. *** [T]he Indian pass system,[605] residential schools[606] and the forced scooping of indigenous children from their families[607] not so long ago were effected by governments and public servants that failed to treat First Nations people as equals under law. The legal system neglected the principle of equality by failing to hold public authorities accountable to victims through the ordinary laws of trespass and negligence. But the common law can and should recognize such injustices as wrongful and redressable.[608]

[605] Rob Nestor, "Pass System in Canada" in The Canadian Encyclopedia (July 16, 2018); Keith Douglas Smith, *Liberalism, Surveillance, and Resistance: Indigenous Communities in Western Canada, 1877–1927* (Edmonton: Athabasca University Press, 2009) at 60-73.

[606] J.R. Miller, "Residential Schools in Canada" in The Canadian Encyclopedia (October 10, 2012); Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future* (2015); "American Indian Boarding School" in Encyclopaedia Britannica (2023); Bryan Newland, *Federal Indian Boarding School Initiative Investigative Report* (United States Department of the Interior, May 2022).

[607] Niigaanwewidam James Sinclair and Sharon Dainard, "Sixties Scoop" in The Canadian Encyclopedia (Jun. 22, 2016); *Haaland v. Brackeen*, 143 S. Ct. 1609 at 1641–46 (2023) (Gorsuch J. concurring).

[608] Kent Roach, "Blaming the Victim: Canadian Law, Causation, and Residential Schools" (2014) 64 U.T.L.J. 566; Andrea A. Curcio, "Civil Claims for Uncivilized Acts: Filing Suit against the Government for American Indian Boarding School Abuses" (2006) 4 Hastings Race & Poverty L.J. 45; see *Cloud v. Canada*, 73 OR (3d) 401, 2004 CanLII 45444 [§19.7.1] (ON CA) (certifying a class action of former residential school students for breach of fiduciary duty, negligence, breach of aboriginal rights, and vicarious liability for assault, sexual assault, and battery); *Blackwater v. Plint*, [2005] 3 SCR 3, 2005 SCC 58 [§23.1.3] (holding the Government of Canada and the Presbyterian Church of Canada vicariously liable for physical and sexual abuse of residential school victims); *Brown v. Canada*, 136 OR (3d) 497, 2017 ONSC 251 [§19.7.3] (holding, in the Sixties Scoop class action, that "Canada had [and breached] a common law duty of care to take reasonable steps to prevent on-reserve Indian children in Ontario, who had been placed in the care of non-

The equality principle remains an ideal worth striving for. *** The rule of law suffers when those with power are not equally responsible under law for their illegal harmful actions. […continue reading]

REFLECTION:

- *Is the common law an answer to redressing the injustices suffered by victims of institutional abuse? Or is it part of the problem?*

19.7.1 Cloud v. Canada [2004] CanLII 45444 (ON CA)

Ontario Court of Appeal – 2004 CanLII 45444

GOUDGE J.A. (CATZMAN AND MOLDAVER JJ.A. concurring):

1. The appellants seek to bring this action on behalf of the former students of the Mohawk Institute Residential School, a native residential school in Brantford, Ontario, and their families. They seek to recover for the harm said to have resulted from attending the School. The action is against those said to be responsible for running the School, namely Canada, the Diocese of Huron and the New England Company.

2. The question before us is whether the action should be certified pursuant to s. 5(1) of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 (the *CPA*) [§20.6.1].

3. The motion judge and the majority of the Divisional Court found that the action should not be certified, primarily because they saw no identifiable class of plaintiffs and no common issues, and, therefore, a class action could not be the preferable procedure. Rather, they viewed the case as one in which the issues were almost exclusively unique to each student and hence required adjudication individual by individual. ***

The Background ***

8. The facts relevant to this appeal centre on the Mohawk Institute Residential School which was located in Brantford near the Six Nations Reserve. The School began its existence in 1828 as a residential school for First Nations children. It was founded by the New England Company, an English charitable organization dating back to the 17th century, with the mission of teaching the Christian religion and the English language to the native peoples of North America. ***

10. This action covers the years from 1922 to 1969. During that time, there were 150 to 180 students at the School each year, ranging in age from 4 to 18 and split roughly equally between boys and girls. All were native children, that is Indians within the meaning of the *Indian Act*, R.S.C. 1906, c. 81, as amended. In all, approximately fourteen hundred native children attended the School in these years. They constitute the primary class of claimants proposed for this action. The appellants put forward two additional classes, a "siblings" class (namely the parents and siblings of the students) and a "families" class (namely their spouses and children). ***

12. Broadly put, their claim is that the School was run in a way that was designed to create an atmosphere of fear, intimidation and brutality. Physical discipline was frequent and excessive. Food, housing and clothing were inadequate. Staff members were unskilled and improperly supervised. Students were cut off from their families. They were forbidden to speak their native languages and were forced to attend and participate in Christian religious activities. It is alleged that the aim of the School was to promote the assimilation of native children. It is said that all students suffered as a result.

13. The statement of claim commencing this action was issued on October 5, 1998. It seeks damages on behalf of the students for breach of fiduciary duty, negligence, assault, sexual assault, battery, breach of aboriginal rights and breach of treaty rights. Damages are also claimed on behalf of the siblings and families of the students for breach of fiduciary duty and for loss of care, guidance and companionship pursuant to

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aboriginal foster or adoptive parents, from losing their aboriginal identity"); *Brown v. Canada*, [2018] OJ No. 3286, 2018 ONSC 3429 [§12.4.1] (approving settlement of the Sixties Scoop class action); see also *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 at 2234 (2023) (Sotomayor J. dissenting: "Equality requires acknowledgment of inequality").

the *Family Law Act*, R.S.O. 1990, c. F.3. Finally, the statement of claim advances a claim for punitive damages. ***

36. The Supreme Court of Canada has issued three important decisions to guide the development of class actions in Canada: *Western Canadian Shopping Centres Inc. v. Dutton* (2001), 201 D.L.R. (4th) 385 (S.C.C.); *Hollick v. Metropolitan Toronto (Municipality)* (2001), 205 D.L.R. (4th) 19 (S.C.C.), and *Rumley v. British Columbia* (2001), 205 D.L.R. (4th) 39 (S.C.C.). In *Hollick*, the Supreme Court of Canada had its first opportunity to enunciate the interpretive approach to be applied to the *CPA* in general and to its certification provisions in particular.

37. Speaking for the Court at paras. 14-16, McLachlin C.J.C. made clear that in light of its legislative history, the *CPA* should be construed generously and that an overly restrictive approach must be avoided in order to realize the benefits of the legislation as foreseen by its drafters, namely serving judicial economy, enhancing access to justice and encouraging behaviour modification by those who cause harm. She underlined the particular importance of keeping this principle in mind at the certification stage.

38. In addition, she emphasized that the certification stage is decidedly not meant to be a test of the merits of the action, but rather focuses on its form. As she said at para. 16, "The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action." ***

The Cause of Action Criterion—s. 5(1)(a)

41. It is now well established that this requirement will prevent certification only where it is "plain and obvious" that the pleadings disclose no cause of action, as that test was developed in *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.).

42. Although the parties originally differed on whether that test is met here, by the time of argument in this court they had come to agree that the appellants' pleadings disclose the following causes of action within the meaning of that test:

> (a) The claim for vicarious liability of the defendants over the full period of this action namely, 1922 to 1969 (although the appellants do not contest Cullity J.'s conclusion that these claims do not give rise to any common issue);
>
> (b) The claim for breach of fiduciary duty owed to the members of the student class over the full time frame of the action;
>
> (c) The claim for breach of fiduciary duty owed to the members of the families and siblings classes over the full time frame of the action ***; and
>
> (d) The claims for negligence of the defendants but only between 1953 and 1969. ***

The Identifiable Class Requirement—s. 5(1)(b)

45. *Hollick*, *supra*, at para. 17, describes what is necessary to meet this requirement. The appellants are required to show that the three proposed classes are defined by objective criteria which can be used to determine whether a person is a member without reference to the merits of the action. In other words, each class must be bounded and not of unlimited membership. As well, there must be some rational relationship between the classes and the common issues. The appellants have an obligation, although not an onerous one, to show that the classes are not unnecessarily broad and could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issues. ***

47. *** The appellants satisfy all the dimensions of this requirement. Membership in the student class is defined by the objective requirement that a member have attended the school between 1922 and 1969. Membership in the families class requires that a person meet the objective criterion of being a spouse, common law spouse or child of someone who was a student. Likewise the siblings class is defined as the parents and siblings of those students. None of the three proposed classes is open-ended. Rather all are circumscribed by their defining criteria. All three classes are rationally linked to the common issues found

by Cullity J. in that it is the class members to whom the duties of reasonable care, fiduciary obligation and aboriginal rights are said to be owed and they are the ones who are said to have experienced the breach of those duties. Finally, because all class members claim breach of these duties and that they all suffered at least some harm as a result, these classes are not unnecessarily broad. All class members share the same interest in the resolution of whether they were owed these duties and whether these duties were breached. Any narrower class definition would necessarily leave out some who share that interest. Thus I conclude that the identifiable class requirement is met.

The Common Issues Requirement—s. 5(1)(c) ***

51. *Hollick* also explains the legal test by which the common issues requirement is to be assessed. After dealing with the identifiable class factor, the Supreme Court addressed this question at para. 18:

> A more difficult question is whether "the claims…of the class members raise common issues", as required by s. 5(1)(c) of the *Class Proceedings Act*, 1992. As I wrote in *Western Canadian Shopping Centres*, the underlying question is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". Thus an issue will be common "only where its resolution is necessary to the resolution of each class member's claim" (para. 39). Further, an issue will not be "common" in the requisite sense unless the issue is a "substantial…ingredient" of each of the class members' claims.

52. This requirement has been described by this court as a low bar. ***

53. In other words, an issue can constitute a substantial ingredient of the claims and satisfy s. 5(1)(c) even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution. ***

58. The respondents' basic challenge is that the claims of the class members are so fundamentally individual in nature that any commonality among them is superficial. I do not agree. Cullity J. focused on the appellants' claim of systemic breach of duty, that is whether, in the way they ran the School, the respondents breached their lawful duties to all members of the three classes. In my view, this is a part of every class member's case and is of sufficient importance to meet the commonality requirement. It is a real and substantive issue for each individual's claim to recover for the way the respondents ran the School. As the analysis in *Hollick*, *supra*, exemplifies, the fact that beyond the common issues there are numerous issues that require individual resolution does not undermine the commonality conclusion. Rather, that is to be considered in the assessment of whether a class action would be the preferable procedure. ***

61. Equally the respondents' assertion of limitations defences does not undermine the finding of common issues. In the context of these issues, these defences must await the conclusion of the common trial. They can only be dealt with after it is determined whether there were breaches of the systemic duties alleged and over what period of time and when those breaches occurred. Only then can it be concluded when the limitations defence arose. Moreover, because an inquiry into discoverability will undoubtedly be a part of the limitations debate and because that inquiry must be done individual by individual, these defences can only be addressed as a part of the individual trials following the common trial. As with other individual issues, the existence of limitations defences does not negate a finding that there are common issues. ***

65. *** [A]t para. 33 of *Rumley*, the Supreme Court made clear that the comparative extent of individual issues is not a consideration in the commonality inquiry although it is obviously a factor in the preferability assessment. *** Thus the extent of individual issues that may remain after the common trial in this case does not undermine the conclusion that the commonality requirement is met.

66. I therefore agree that the appellants have met the commonality requirement. A significant part of the claim of every class member focuses on the way that the respondents ran the School. It is said that their management of the School created an atmosphere of fear, intimidation and brutality that all students suffered and hardship that harmed all students. It is said that the respondents did this both by means of the policies and practices they employed and because of the policies and practices they did not have that would reasonably have prevented abuse. Indeed, it is said that their very purpose in running the School as they did was to eradicate the native culture of the students. It is alleged that the respondents breached various

legal duties to all class members by running the School in this way.

67. In the affidavits of the ten representative plaintiffs there is a clear showing of some basis in fact supporting this description of the way in which the School was run. *** They have met their evidentiary burden. ***

The Preferable Procedure Requirement—s. 5(1)(d)

73. As explained by the Supreme Court of Canada in ***Hollick***, *supra*, at paras. 27-28, the preferability requirement has two concepts at its core. The first is whether or not the class action would be a fair, efficient and manageable method of advancing the claim. The second is whether the class action would be preferable to other reasonably available means of resolving the claims of class members. The analysis must keep in mind the three principal advantages of class actions, namely judicial economy, access to justice, and behaviour modification and must consider the degree to which each would be achieved by certification. ***

81. I agree with Cullity J. that whether framed in negligence, fiduciary obligation or aboriginal rights the nature and extent of the legal duties owed by the respondents to the class members and whether those duties were breached will be of primary importance in the action as framed. If class members are to recover, they must first succeed on this issue. It is only at that point that individual issues of the kind raised by the respondents would arise. Save for those relating to limitations they are all aspects of harm and causation, both of which the appellants acknowledge they will have to establish individual by individual. The limitations questions are all individual defences, which the appellants also acknowledge will require individual adjudication.

82. The resolution of these common issues therefore takes the action framed in negligence, fiduciary duty and aboriginal rights up to the point where only harm, causation and individual defences such as limitations remain for determination. This moves the action a long way. ***

86. *** I think that a single trial of the common issues will achieve substantial judicial economy. Without a common trial, these issues would have to be dealt with in each individual action at an obvious cost in judicial time possibly resulting in inconsistent outcomes. As Cullity J. said, a single trial would make it unnecessary to adduce more than once evidence of the history of the establishment and operation of the School and the involvement of each of the respondents.

87. Access to justice would also be greatly enhanced by a single trial of the common issues. ***

88. In short, I think that the access to justice consideration strongly favours the conclusion that a class action is the preferable procedure. The language used by the Chief Justice in ***Rumley*** at para. 39 is equally apt to this case:

> Litigation is always a difficult process but I am convinced that it will be extraordinarily so for the class members here. Allowing the suit to proceed as a class action may go some way toward mitigating the difficulties that will be faced by the class members. ***

Conclusion

96. I conclude that the appellants have shown that their action satisfies all the requirements of s. 5(1) of the *CPA*. It must therefore be certified and remitted to the supervision of the Superior Court judge assigned to manage the action. ***

REFLECTION:

- *What are the advantages and challenges of seeking recourse for institutional abuse through a tort action?*
- *In what ways did common law rights of action facilitate or frustrate justice in this case?*[609]

[609] See *In re Residential Schools Settlement Agreement* (May 8, 2006); "Residential School Timeline", National Centre for Truth and Reconciliation (2021).

- *What alternative rights of recourse, outside of litigation, are available to historically marginalised victims?*
- *Prof. Roach argues that Canadian law has failed "to appreciate the multi-generational and collective harms of residential schools [which] underlines the need to provide greater room for Aboriginal justice."[610] What are the limits of the common law in affording justice to victims of residential schools? What is the solution?*
- *Watch the Breakfast Television story on the Mohawk Institute Residential School.[611] Why is it important that such sites of historic injustice are preserved?*

19.7.2 Blackwater v. Plint [2005] SCC 58

Supreme Court of Canada – 2005 SCC 58

✗REF: §23.1.3

MCLACHLIN C.J.C. (FOR THE COURT):

1. Are the Government of Canada and the United Church of Canada (the "Church") liable to Aboriginal students who attended residential schools operated by them in British Columbia in the 1940s, 1950s and 1960s? If so, on what legal basis are they liable, and how should liability be apportioned between them? Finally, what damages should be awarded? These are the central questions on this appeal.

2. The appeal arises from four actions commenced in 1996 by 27 former residents of the Alberni Indian Residential School (AIRS) claiming damages for sexual abuse and other harm. The children had been taken from their families pursuant to the *Indian Act*, S.C. 1951, c. 29, and sent to the school, which had been established by the United Church's predecessor, the Presbyterian Church of Canada, in 1891 to provide elementary and high school education to Aboriginal children whose families resided in remote locations on the west coast of Vancouver Island. The children were cut off from their families and culture and made to speak English. They were disciplined by corporal punishment. Some, like the appellant Mr. Barney, were repeatedly and brutally sexually assaulted.

3. A number of former students, including Mr. Barney, brought an action for damages for the wrongs they had suffered. The trial proceeded in two stages; an inquiry into vicarious liability ((1998), 52 B.C.L.R. (3d) 18 (B.C. S.C.) (the "1998 decision")) followed by a further liability and damages assessment three years later ((2001), 93 B.C.L.R. (3d) 228, 2001 BCSC 997 (B.C. S.C.), (the "2001 decision")).

4. The trial judge found that all claims other than those of a sexual nature were statute-barred. He held a dormitory supervisor, Plint, liable to six plaintiffs for sexual assault. He held Canada liable for the assaults on the basis of breach of non-delegable statutory duty, and also found that Canada and the Church were jointly and vicariously liable for these wrongs. He apportioned fault 75% to Canada and 25% to the Church. The trial judge awarded Mr. Barney $125,000 general damages and $20,000 aggravated damages, against the Church and Canada. In addition, the trial judge awarded Mr. Barney punitive damages against Plint in the sum of $40,000 plus a future counselling fee of $5,000. Other plaintiffs were awarded amounts commensurate with their situations.

5. All the parties appealed to the B.C. Court of Appeal. The Court of Appeal applied a doctrine of charitable

[610] K. Roach, "Blaming the Victim: Canadian Law, Causation, and Residential Schools" (2014) 64 U Toronto LJ 566, 570. See further at 566-567:

> "Canadian law failed to prevent the various physical, sexual, cultural, and spiritual abuses that took place at residential schools for Aboriginal children. In the last few decades, various attempts to obtain redress have been made but Canadian law has frequently failed to appreciate the full scope of the harms of residential schools. *** [T]his restrictive approach re-victimized residential school survivors and downplayed the responsibility of Canadian governments, churches, and society for the harmful legacy of the schools.
>
> Some of the harms endured by Aboriginal children in the residential schools were crimes at the time they were committed. Almost 38,000 former living students have applied under the 2006 settlement for compensation for serious physical or sexual abuse. This number dwarfs the handful of criminal prosecutions against alleged abusers in the schools. *** A very live question in all residential school cases is whether the survivors would have been better off had they avoided engagement with Canadian law. ***"

[611] "Inside The Mohawk Institute Residential School" Breakfast Television (Sep 30, 2020) 📺.

immunity to exempt the Church from liability and to place all liability on Canada on the basis of vicarious liability (2003), 21 B.C.L.R. (4th) 1, 2003 BCCA 671 (B.C. C.A.)). It expressed the view that Canada was more responsible than the Church and in a better position to compensate for the damage, and concluded that vicarious liability should not be imposed on the Church. It also granted one of the plaintiffs, M.J., a new trial, and increased the damages of two others. The Court of Appeal awarded Mr. Barney an additional $20,000 for loss of future earning opportunity. Otherwise, it maintained the differing awards for sexual abuse. ***

Negligence

11. Mr. Barney argues that the trial judge erred in dismissing the claims that the Church and Canada were negligent in employing and continuing to employ various employees when they knew or ought to have known that the employees were paedophiles, in failing to take reasonable steps to prevent or stop physical and sexual assaults, in failing to investigate abuse after it was reported by the students, and in failing to exercise reasonable supervision and direction over their employees.

12. The trial judge carefully considered the law and the evidence on the issue of negligence. He found that both Canada and the Church were sufficiently proximate to the claimants to give rise to a duty of care to them. He rejected the argument that Canada was exempt from negligence on the basis that its decisions arose from policy decisions: “Here Canada is being taken to task for not only its policy of having Indian residential schools such as AIRS, but also the steps that it took or failed to take to execute that policy” (2001 decision, para. 79).

13. Having concluded that both the Church and Canada owed a duty of care to the claimants, the trial judge examined the applicable standard of care to define the extent of that duty. The question was what Canada and the Church knew or ought to have known, judged by the standards applicable at the time of the acts—the 1940s to the 1960s. In other words, was the risk of sexual assault of the children reasonably foreseeable at the time?

14. The trial judge concluded that the harm was not foreseeable on the evidence before him. There was no evidence that the possibility of sexual assault was actually brought to the attention of the people in charge of AIRS. The trial judge found that the children had not been very clear in reporting the abuse and the adults to whom they reported did not realize the children were talking about sexual abuse, an almost unthinkable idea at the time. Former employees at AIRS testified that they were ignorant of any systemic or widespread abuse at the school and the doctor who cared for the children there never suspected abuse. On the two occasions that a sexual abuse was brought to the supervisor’s attention, the perpetrator was immediately fired.

15. Nor, given the standards and awareness of the time, could it be contended that they ought to have known of the risks; as the trial judge stated, “…when the evidence is examined closely, one is drawn to the conclusion that the unspeakable acts which were perpetrated on these young children were just that: at that time they were for the most part not spoken of” (2001 decision, para. 135). By contemporary standards, the measures taken were clearly inadequate and the environment unsafe. But by the standards of the time, constructive knowledge of a foreseeable risk of sexual assault to the children was not established. As a result, the trial judge dismissed the claims of negligence against the Church and Canada.

16. Mr. Barney does not point to specific errors in the trial judge’s application of the test and conclusion on standard of care. Instead he focuses on the trial judge’s factual findings. In particular, he argues that the Church and Canada should have investigated why so many children were running away from AIRS and clarified the complaints of the children. This goes to the actual and constructive knowledge of the defendants, and more particularly, what steps they should have taken if they had had knowledge of sexual abuse. The trial judge addressed these matters thoroughly and sensitively in his reasons, and the Court of Appeal correctly concluded that no error in his conclusions on negligence had been demonstrated.

17. Mr. Barney’s appeal on this point must be dismissed.

Vicarious Liability

18. The trial judge accepted that the Church and Canada were vicariously liable for the wrongful acts of the dormitory supervisor, Plint. ***

38. *** I conclude that the Church should be found jointly vicariously liable with Canada for the assaults, contrary to the conclusions of the Court of Appeal. ***

Damages: The Effect of Prior Abuse

74. The calculation of damages for sexual assault to Mr. Barney is complicated by two other sources of trauma: (1) trauma suffered in his home before he came to AIRS; and (2) trauma for non-sexual abuse and deprivation at AIRS that was statute barred. In reality, all these sources of trauma fused with subsequent experiences to create the problems that have beset Mr. Barney all his life. Untangling the different sources of damage and loss may be nigh impossible. Yet the law requires that it be done, since at law a plaintiff is entitled only to be compensated for *loss caused by the actionable wrong*. It is the "essential purpose and most basic principle of tort law" that the plaintiff be placed in the position he or she would have been in had the tort not been committed: *Athey v. Leonati*, [1996] 3 S.C.R. 458 (S.C.C.), para. 32 [§17.2.4].

75. The trial judge followed this principle and sought to exclude damages relating to trauma suffered by Mr. Barney before coming to AIRS and statute-barred wrongs. In his view, the plaintiff's family background, his institutionalization at AIRS and the non-sexual traumas he suffered, fell to be considered as factors inherent in his position, distinct from the sexual assaults. The trial judge clearly concluded that Mr. Barney's family life prior to AIRS, as well as other experiences at AIRS, made it likely that he would have suffered serious psychological difficulties even if the sexual abuse had never occurred. ***

77. For the reasons that follow, I am not persuaded that the trial judge erred in proceeding as he did.

78. It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. *** Mr. Barney's submissions that injury from traumas other than the sexual assault should not be excluded amount to the contention that once a tortious act has been found to be a material cause of injury, the defendant becomes liable for all damages complained of after, whether or not the defendant was responsible for those damages.

79. At the same time, the defendant takes his victim as he finds him—the thin skull rule. Here the victim suffered trauma before coming to AIRS. The question then becomes: what was the effect of the sexual assault on him, in his already damaged condition? The damages are damages caused by the sexual assaults, not the prior condition. However, it is necessary to consider the prior condition to determine what loss was caused by the assaults. Therefore, to the extent that the evidence shows that the effect of the sexual assaults would have been greater because of his pre-existing injury, that pre-existing condition can be taken into account in assessing damages.

80. Where a second wrongful act or contributory negligence of the plaintiff occurs after or along with the first wrongful act, yet another scenario, sometimes called the "crumbling skull" scenario, may arise. Each tortfeasor is entitled to have the consequences of the acts of the other tortfeasor taken into account. The defendant must compensate for the damages it actually caused but need not compensate for the debilitating effects of the other wrongful act that would have occurred anyway. This means that the damages of the tortfeasor may be reduced by reason of other contributing causes: *Athey*, at paras. 32-36.

81. All these scenarios flow from the basic principle that damages must seek to put the plaintiff in the position he or she would have been in but for the tort for which the defendant is liable.

82. The trial judge correctly apprehended the applicable legal principles. He recognized the "daunting task" of untangling multiple interlocking factors and confining damages to only those arising from the actionable torts, the sexual assaults (2001 decision, para. 365). He tried his best to award fair damages, taking all this into account. He recognized the thin skull principle, but in the absence of evidence that Mr. Barney's family difficulties prior to coming to AIRS had exacerbated the damage he suffered from the sexual assaults he sustained at AIRS, the trial judge had no choice but to attempt to isolate those traumas. Similarly, there was no legal basis upon which he could allow damages suffered as a result of statute-barred wrongs committed at AIRS, like the beatings, to increase the award of damages.

83. More broadly, Mr. Barney relies on the maxim that none should profit from his own wrong, *ex turpi causa non oritur actio* [§18.3], to argue that the respondents should not be enriched by their improper care of him. He argues that reducing his damages award because of the harm caused by placing Aboriginal children in residential schools allows the Church and Canada to profit from their own immoral and illegal conduct.

84. This argument cannot succeed, notwithstanding its instinctive appeal. First, it is not correct to view the respondents' case as an attempt to profit from immoral and illegal conduct by reducing damages. The amount of damages is limited by loss caused by the actionable torts, in this case sexual assault. Not awarding damages for loss caused by other factors does not "reduce" damages. On the contrary, to award damages for such loss would be to "increase" them beyond what the law allows. Thus it cannot be said that the respondents are profiting from their wrong.

85. Second, the maxim *ex turpi causa non oritur actio* cannot be applied to evade legal limits or undermine the legal system. Applying it to permit damages to be awarded for wrongful acts that are subject to limitation periods that have expired would subvert the legislation and compensate for torts that have been alleged but not proven. It would be to override legislative intent and fix liability in the absence of legal proof.

86. Third, even if these difficulties could be overcome, *ex turpi causa non oritur actio* should be applied cautiously, where it is clearly mandated: *Hall v. Hebert*, [1993] 2 S.C.R. 159 (S.C.C.). Compensation for the impact of attending residential schools is fraught with controversy and difficulty. Here, as for the broad claim for collective breach of fiduciary duty, the necessary record to permit consideration of past policy wrongs is lacking.

87. I conclude that Mr. Barney's contention that the trial judge erred in failing to properly consider wrongs other than the actionable sexual assaults in assessing damages cannot succeed. ***

Punitive Damages

90. The trial judge awarded punitive damages only against Plint. The appellant asks for $25,000 of punitive damages to be awarded against Canada as well.

91. No compelling reason exists to disturb the trial judge's award. Punitive damages are awarded against a defendant only in exceptional circumstances for "high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour": *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18 (S.C.C.), para. 94. The trial judge made no finding that Canada's behaviour in this case met any of those thresholds. He correctly stated that punitive damages cannot be awarded in the absence of reprehensible conduct specifically referable to the employer. While he found the Church liable on the basis of vicarious liability and Canada liable vicariously and on the basis of a non-delegable statutory duty, this was by virtue of the relationship between the parties and Mr. Plint, not because of any specific misconduct.

92. I conclude that the contention that the punitive damage award should include Canada should be rejected. ***

Conclusion

97. *** The trial judge correctly apportioned the damages unequally between the Church and Canada. No basis has been established for finding negligence, breach of fiduciary duty or for reassessing the damage awards in this case. ***

REFLECTION:

- *What duty of care did the Government of Canada and the United Church of Canada directly owe the plaintiffs in this case? What reasons did the courts give for holding that the duty of care was not breached?*
- *On what basis were Canada and the Church held indirectly liable to the plaintiffs?*[612]
- *What were the challenges in accounting for the effect of Mr. Barney's prior abuse when assessing damages*

[612] See R. Wright, "At 13, Willie Blackwater stood up to his abuser at a B.C. residential school" Broadview (Mar 1, 2016).

owed by the defendants on account of their indirect liability? Was the Court's reasoning compelling?
- *Why did the Court reject the plaintiffs' claim for punitive damages? Could an argument have been advanced that Canada's conduct had satisfied the Whiten criteria?*

19.7.3 Brown v. Canada [2017] ONSC 251

Ontario Superior Court – 2017 ONSC 251

✗**REF: §12.4.1**

BELOBABA J.:

1. After eight years of protracted procedural litigation,[613] the Sixties Scoop class action is before the court for a decision on the first stage of the merits. ***

4. The Sixties Scoop happened and great harm was done.

5. There is no dispute about the fact that thousands of aboriginal children living on reserves in Ontario were apprehended and removed from their families by provincial child welfare authorities over the course of the class period—from 1965 to 1984—and were placed in non-aboriginal foster homes or adopted by non-aboriginal parents.

6. There is also no dispute about the fact that great harm was done. The "scooped"[614] children lost contact with their families. They lost their aboriginal language, culture and identity. Neither the children nor their foster or adoptive parents were given information about the children's aboriginal heritage or about the various educational and other benefits that they were entitled to receive. The removed children vanished "with scarcely a trace."[615] As a former Chief of the Chippewas Nawash put it: "[i]t was a tragedy. They just disappeared."[616]

7. The impact on the removed aboriginal children has been described as "horrendous, destructive, devastating and tragic."[617] The uncontroverted evidence of the plaintiff's experts is that the loss of their aboriginal identity left the children fundamentally disoriented, with a reduced ability to lead healthy and fulfilling lives. The loss of aboriginal identity resulted in psychiatric disorders, substance abuse, unemployment, violence and numerous suicides.[618] Some researchers argue that the Sixties Scoop was even "more harmful than the residential schools":

> Residential schools incarcerated children for 10 months of the year, but at least the children stayed in an Aboriginal peer group; they always knew their First Nation of origin and who their parents

[613] *Brown v. Canada (Attorney General)* was certified as a class proceeding by Perell J. at 2010 ONSC 3095 (Ont. S.C.J.). Two appeals followed, first to the Divisional Court at 2011 ONSC 7712 (Ont. Div. Ct.) and then to the Court of Appeal at 2013 ONCA 18 (Ont. C.A.). The Court of Appeal reversed the certification decision and directed that the matter be reheard by a different class action judge. I reheard the matter and again certified the action as a class proceeding at 2013 ONSC 5637 (Ont. S.C.J.). The defendant sought and was granted leave to appeal from my decision at 2014 ONSC 1583 ((Ont. Div. Ct.). The Divisional Court dismissed the appeal and affirmed the certification at 2014 ONSC 6967 (Ont. Div. Ct.).

[614] It was Patrick Johnson, the author of a 1983 research study on "Native Children and the Child Welfare System" that coined the name "Sixties Scoop." He took this phrase from the words of a British Columbia child-protection worker who noted that provincial social workers "would literally scoop children from reserves on the slightest pretext." See Chambers, *infra*, note 4, at 122.

[615] Fournier and Grey, *Stolen from our Embrace: The Abduction of First Nations Children and the Restoration of Aboriginal Communities* (1997) as cited in Chambers, *A Legal History of Adoption in Ontario*, (2016) at 120. I referred this recent publication of the Osgoode Society to counsel because one of the chapters was directly on point.

[616] Affidavit of former Chief Wilmer Nadjiwon (December 14, 2015) at para. 6.

[617] *Brown v. Canada (Attorney General)*, 2010 ONSC 3095 (Ont. S.C.J.) at para. 1.

[618] *Ibid*., at para. 59. The loss of culture and identity is particularly devastating to an aboriginal person because Canada has had a "particularly destructive relationship with it First Nations." (Affidavit of psychiatrist Harvey Armstrong, May 28, 2009 at para. 10.)

> were and they knew that eventually they would be going home. In the foster and adoptive system, Aboriginal children vanished with scarcely a trace, the vast majority of them placed until they were adults in non-Aboriginal homes where their cultural identity and legal Indian status, their knowledge of their own First Nation and even their birth names were erased, often forever.[619]

8. One province, Manitoba, has issued a formal apology. On June 18, 2015, the premier of Manitoba apologized on behalf of the province for the "historical injustice" of the Sixties Scoop and "the practice of removing First Nation, Métis and Inuit children from their families and placing them for adoption in non-Indigenous homes, sometimes far from their home community, and for the losses of culture and identity to the children and their families and communities."[620]

9. All of this, however, is background and is not determinative of the legal issue that is before the court. The court is not being asked to point fingers or lay blame. The court is not being asked to decide whether the Sixties Scoop was the result of a well-intentioned governmental initiative implemented in good faith and informed by the norms and values of the day, or was, as some maintain, state-sanctioned "culture/identity genocide"[621] that was driven by racial prejudice to "take the savage out of the Indian children."[622] This is a debate that is best left to historians and, perhaps, to truth and reconciliation commissions.

10. The issue before this court is narrower and more focused. The question is whether Canada can be found liable in law for the class members' loss of aboriginal identity *after* they were placed in non-aboriginal foster and adoptive homes.

Common issue

11. The certified common issue that is before the court for adjudication is this:

> When the Federal Crown entered into the *Canada-Ontario Welfare Services Agreement* in December 1, 1965 and at any time thereafter up to December 31, 1984:
>
> > (1) Did the Federal Crown have a fiduciary or common law duty of care to take reasonable steps to prevent on-reserve Indian children in Ontario who were placed in the care of non-aboriginal foster or adoptive parents from losing their aboriginal identity?
> >
> > (2) If so, did the Federal Crown breach such fiduciary or common law duty of care?[623] ***

13. Put simply, the common issue asks whether Canada had and breached any fiduciary or common law duties (when it entered into the 1965 Agreement or over the course of the class period) to take reasonable steps in the post-placement period to prevent the class members' loss of aboriginal identity.

Class definition

14. The class is defined to include the estimated 16,000 aboriginal children who were removed from reserves in Ontario and placed in non-aboriginal foster homes or were adopted by non-aboriginal parents. The class period covers 19 years—from December 1, 1965 (when Canada entered into the 1965 Agreement) to December 31, 1984 (when Ontario amended its child welfare legislation to recognize for the first time that aboriginality should be a factor to be considered in child protection and placement matters).[624]

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[619] *Supra*. Also see *Brown v. Canada (Attorney General)*, 2013 ONSC 5637 at para. 12.
[620] Manitoba, Legislative Assembly, *Official Report of Debates (Hansard)*, 40th Parl., 4th Sess., No. 49(b) (18 June 2015), at p. 1993, Hon. Greg Selinger (Premier).
[621] *Brown v. Canada (Attorney General)*, 2013 ONSC 5637 (Ont. S.C.J.) at para. 11. Also see Chambers, *A Legal History of Adoption in Ontario, 1921ù2015* (The Osgoode Society, 2016), at 122 and 123.
[622] Affidavit of former Chief Wilmer Nadjiwon (December 14, 2015), at para. 6.
[623] The term "Indian" will be used throughout this judgment in its legal sense only. The court is aware of the derogatory meaning of this term outside of this context.
[624] *Child and Family Services Act*, S.O. 1984, c. 55. The CFSA took effect on January 1, 1985. Section 1(f) of the CFSA provides that "Indian and native people should be entitled to provide, whenever possible, their own child and family services, and that all services to Indian and native children and families should be provided in a manner that recognizes their culture, heritage and traditions and the concept of the extended family."

The 1965 agreement

15. The genesis of the 1965 Agreement can be found in the discussions that took place at the 1963 Federal-Provincial Conference. According to the preamble in the 1965 Agreement, the 1963 Conference "determined that the principal objective was the provision of provincial services and programs to Indians on the basis that needs in Indian Communities should be met according to standards applicable to other communities." The stated goal of the 1965 Agreement was to "make available to the Indians in the province the full range of provincial welfare programs." ***

20. Ontario's undertaking to extend the provincial welfare programs as set out in s. 2(1) was made "subject to (2)." Sub-section 2(2) of the Agreement said this:

> No provincial welfare program shall be extended to any Indian Band in the Province unless that Band has been consulted by Canada or jointly by Canada and by Ontario and has signified its concurrence.

21. It is obvious not only from the plain meaning of this provision but also from the circumstances surrounding the execution of the 1965 Agreement that the obligation to consult with Indian Bands and secure their concurrence was intended to be a key component of the Agreement. One only has to consider what was said in a background memorandum prepared by Canada for use at the 1963 Federal-Provincial Conference:

> The utmost care must be taken … to ensure that the Indians are not again presented with a fait accompli in the form of a blueprint for their future which they have had no part in developing and which they have been given no opportunity to influence. This means that the Federal Government should make crystal clear that before any final arrangements are made, the Indians must be fully consulted. ***

24. In short, Canada was prepared to exercise its spending power to fund the extension of the provincial programs to reserves but only with the advice and consent of every affected Indian Band to every one of the 18 provincial programs that were being so extended. It is obvious from the record that the obligation to consult, as set out in s. 2(2) of the 1965 Agreement, was intended to include explanations, discussions and accommodations. It was meant to be a genuinely meaningful provision. ***

36. On the record before me, I find that no Indian Bands were ever consulted before provincial child welfare services were extended to the reserves and no Bands ever provided their "signified concurrence" following such consultations. The evidence supporting the plaintiff on this point is, frankly, insurmountable. ***

40. I therefore have no difficulty concluding that under section 2(2) of the 1965 Agreement, Canada undertook to consult with the Indian Bands, that it failed to do so and thus breached this provision of the Agreement.

If the Indian Bands had been consulted

41. Canada argues that even if it had consulted with the Indian bands, as it was obliged to do under section 2(2), there is no evidence that any of the Indian bands would have provided any ideas or advice that could have prevented the Indian children who had been removed and placed in non-aboriginal foster or adoptive homes from losing their aboriginal identity. Counsel for Canada put it this way: "[W]ould life have been different had they been consulted?"

42. This is an odd and, frankly, insulting submission. Canada appears to be saying that even if the extension of child welfare services to their reserves had been fully explained to the Indian Bands and if each Band had been genuinely consulted about their concerns in this regard, that no meaningful advice or ideas would have been forthcoming.

43. In the documentation produced by Canada over the course of the class period, there are numerous memoranda and letters from both federal and First Nations representatives setting out in some detail the kinds of things that could have been done to prevent the loss of aboriginal identity post-placement. For

example: educating non-aboriginal foster and adoptive parents about the relevant cultural differences and providing them with information about the aboriginal child's entitlement to various federal benefits and payments. ***

49. If these ideas and suggestions had been implemented as part of the extension of the provincial child welfare regime—that is, if the foster or adoptive parents had been provided with information about the aboriginal child's heritage and the federal benefits and payments that were available when the child became of age, and if the foster or adoptive parents had shared this information with the aboriginal child that was under their care,[625] it follows in my view that it would have been far less likely that the children of the Sixties Scoop would have suffered a complete loss of their aboriginal identity.

50. Canada says things were different back then. Canada argues that in 1965 and in the years immediately following, it was not foreseeable, given the state of social science knowledge at the time, that trans-racial adoptions or placements in non-aboriginal foster homes would have caused the great harm that resulted.

51. Canada's submission misses the point.

52. The issue is not what was known in the 1960's about the harm of trans-racial adoption or the risk of abuse in the foster home. The issue is what was known in the 1960's about the existential importance to the First Nations peoples of protecting and preserving their distinctive cultures and traditions, including their concept of the extended family. There can be no doubt that this was well understood by Canada at the time. For example, focusing on adoption alone, Canada knew or should have known that the adoption of aboriginal children by non-aboriginal parents constituted "a serious intrusion into the Indian family relationship" that could "obliterate the [Indian] family and … destroy [Indian] status."[626] ***

The federal booklet

56. Until the publication of the federal informational booklet in or around 1980, Canada had little to no interaction with the removed children or their foster or adoptive parents in the post-placement period. The evidence indicates that on occasion the Indian Affairs Branch of the federal Department of Northern Affairs and National Resources would receive a letter of inquiry from the adoptive parent of a removed aboriginal child. Here is how the registrar of the Indian Affairs Branch responded on January 7, 1966 to one such letter:

> … [*Names redacted*] are registered as Indians. They have no band number, however, as Indian children who are adopted by non-Indians are removed from their natural parents' band number and registered in a special index so that the facts of their adoption may be kept confidential. This index also enables us to identify them as Indians in future if they are informed of their Indian status and make inquiries as to their funds, enfranchisement, or other relevant matters. Whether or not they are informed of their Indian status is left to their adoptive parents.
>
> It is now the policy of the Branch to administer the funds of children adopted by non-Indians and keep them available for the children until they become of age. The funds are held in trust in savings accounts and paid out to the children on application at any time after twenty-one years of age.

57. Three points are made clear in this response: (i) the Indian Affairs Branch maintained a special registry of adopted Indian children that would allow them to be identified as Indians in the future but only "if they are informed of their Indian status and make inquiries as to their [entitlements]"; (ii) the Indian Affairs Branch was not providing any such information to the adoptive parents ("whether or not [the children] are informed of their Indian status is left to their adoptive parents"); and (iii) the Indian Affairs Branch was holding the monies that were payable to the adopted children in trust accounts, to be released when they turned 21 and made the required "application".

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[625] One does not know how many of the foster and adoptive parents, having received this information, would have shared the information with the aboriginal child that had been placed in their home. Probably most, but this is an issue that will have to be determined on evidence that will be presented at the damages stage.

[626] As Laskin C.J.C. noted in *Re British Columbia Birth Registration No. 67-09-022272* [1976] 2 S.C.R. 751 (S.C.C.) at 756-57.

58. In short, the only way that an apprehended aboriginal child would ever learn about his or her aboriginal identity or the various federal entitlements was if he or she had the good fortune to be placed in a home where the non-aboriginal foster or adoptive parents themselves knew and shared this information with the aboriginal child or if the child or his non-aboriginal parents made the effort to obtain this information by writing to the federal government. Canada, however, took no steps to provide any of this information on its own—at least not until 1980.

Returning to the common issue

62. Let me sum up what I have found thus far. I have found that Canada was obliged under section 2(2) of the 1965 Agreement to consult with each Indian Band before any provincial welfare program, including child welfare services, was extended to the reserve in question. I have found that no such consultations ever took place. I have also found that if the Indian Bands had been consulted they would have suggested, amongst other things, that information about the apprehended child's aboriginal heritage and the availability of federal benefits be provided to the foster or adoptive parents. This booklet alone, assuming that the foster and adoptive parents would have shared this information with the aboriginal child in their care,[627] would probably have prevented the loss of the apprehended child's aboriginal identity.

63. That is, Canada failed to take reasonable steps to prevent the loss of aboriginal identity in the post-placement period by failing, *at a minimum*, to provide to both foster and adoptive parents (via the CAS) the kind of information that was finally provided in 1980 and thereafter.

64. Was Canada legally obliged to provide such information? The plaintiff says yes and makes two submissions, one based on fiduciary law and the second based on the common law. For the reasons that follow, I find that Canada's liability cannot be established under fiduciary law but can be established under the common law. I will explain each of these findings in turn. ***

Common law duty of care

72. *** In my view, section 2(2) and the obligation to consult creates a common law duty of care and provides a basis in tort for the class members' claims.

73. The common law duty of care arises out of the fact that the 1965 Agreement is analogous to a third-party beneficiary agreement. Canada undertook the obligation to consult in order to benefit Indian Bands (and by extension, Indians living on the reserves, including children). The Indian Bands are not parties to the Agreement. But a tort duty can be imposed on Canada as a contracting party in these circumstances. As a leading contracts scholar explains:

> There are…cases in which the tort duty owed to the third party appears to arise directly from the breach of contract. In recent English cases, for example, solicitors have been held liable to prospective beneficiaries for their failure to draw up a will or execute it properly. Such failures would constitute breach of contractual duties owed to their clients that could not be enforced in a contract claim by the prospective beneficiaries because of the third-party beneficiary rule. Their claim in tort, which avoids the third-party beneficiary rule, appears to flow directly from the initial breach of contract.[628]

74. Similarly here, the plaintiff's claim in tort (the existence and breach of a common law duty of care) flows directly from the fact that at the time of entering the 1965 Agreement, Canada assumed and breached the obligation to consult with the third-party Indian Bands. If the circumstances of a solicitor drafting a will for the benefit of a third party beneficiary is "sufficient to create a special relationship to which the law attaches a duty of care",[629] the same should follow even more where there is not only a unique and pre-existing

[627] *Guerin v. R.*, [1984] 2 S.C.R. 335 (S.C.C.) and *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 (S.C.C.).
[628] McCamus, *The Law of Contracts* (2nd ed.) at 315. And see Waddams, *The Law of Contracts*, (5th ed.) at 198 and *Whittingham v. Crease & Co.*, [1978] B.C.J. No. 1229 (B.C. S.C.); *Ross v. Caunters* (1979), [1980] 1 Ch. 297 (Eng. Ch. Div.); and *White v. Jones*, [1995] A.C. 207 (U.K. H.L.).
[629] *White v. Jones*, *ibid*. at 276.

"special relationship" based on both history and law but a clear obligation to consult the beneficiaries about matters of existential importance.

75. I pause here to acknowledge that strictly speaking the third-party beneficiaries under the 1965 Agreement were the Indian Bands not the apprehended children—that is, not the class members. It is certainly open to Canada to take the position that the breach of the Agreement and the duty of care that flowed from this breach applied only to the Indian Bands and not to the removed Indian children. I remain confident, however, that such a formalistic argument, fully acceptable in the commercial context, will not be advanced in the First Nations context where notions of good faith, political trust and honourable conduct are meant to be taken seriously,[630] and where Canada's breach of the 1965 Agreement was so flagrant.

76. If I am wrong in my conclusion that the common law duty of care as alleged herein can be established under existing law as just described, and instead is better understood as a novel claim, I now turn to the analysis that applies when dealing with a novel claim.

77. The applicable legal approach is the "two stage" analysis known as the *Anns-Cooper* test. ***

78. In my view, under the first stage of the analysis, a *prima facie* duty of care is established. It is beyond dispute that there is a special and long-standing historical and constitutional relationship between Canada and aboriginal peoples that has evolved into a unique and important fiduciary relationship.

79. It is also beyond dispute that given such close and trust-like proximity it was foreseeable that a failure on Canada's part to take reasonable care might cause loss or harm to aboriginal peoples, including their children. As the Supreme Court noted in *Cooper v. Hobart* [§13.4.1.2], by looking at the "expectations" and "interests involved" the court can evaluate "the closeness of the relationship between the plaintiff and the defendant" and can "determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant."[631]

80. Even in the absence of section 2(2) and the obligation to consult, Canadian law, during the time period in question, "accepted" that Canada's care and welfare of the aboriginal peoples was a "political trust of the highest obligation."[632] And there can be no doubt that the aboriginal peoples' concern to protect and preserve their aboriginal identity was and remains an interest of the highest importance. As the Divisional Court put it: "[i]t is difficult to see a specific interest that could be of more importance to aboriginal peoples than each person's connection to their aboriginal heritage."[633]

81. The content of the 1965 Agreement and Canada's clear obligation to consult and secure the signified concurrence of the affected Indian Band before the child welfare regime was extended to that reserve reinforces the conclusion that the proximity criterion is easily satisfied on the evidence herein and that it is indeed just and fair to impose a duty of care upon the defendant. All the more so when the focus of the extended child welfare regime was a highly vulnerable group, namely children in need of protection. I therefore find that a *prima facie* duty of care has been established.

82. I can now turn to the second stage of the *Anns-Cooper* analysis. In my view, Canada has not advanced any credible policy consideration that would negate the common law duty of care. Canada says that imposing a duty on the federal government to provide essential information about aboriginal identity and federal financial benefits to the non-aboriginal foster and adoptive parents would "penalize Canada for having used its spending power to ensure that Ontario had the capacity to provide Indian children on reserves in need of protection with that very protection." In my view, this submission does not succeed.

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[630] As the Supreme Court noted in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.) at 1108: "[t]he relationship between the Government and aboriginals is trust-like rather than adversarial" and in *Manitoba Métis*, 2013 SCC 14, at para. 77: "… an honourable interpretation of an obligation cannot be a legalistic one that divorces the words from their purpose."

[631] *Cooper v. Hobart*, [2001] 3 S.C.R. 537, [2001] S.C.J. No. 76, 2001 SCC 79, at para. 34.

[632] In *St. Ann's Island Shooting & Fishing Club Ltd. v. R.*, [1950] S.C.R. 211 (S.C.C.) at 219, the Supreme Court described the aboriginal peoples as "wards of the state, whose care and welfare are a political trust of the highest obligation." The language used was paternalistic and condescending, but according to the Supreme Court it was the "accepted view" in the 1950's—a view that at the very least acknowledged the historic partnership between the Federal Crown and the First Nations and the importance of respecting the latter's way of life.

[633] *Brown v. Canada (Attorney General)*, 2014 ONSC 6967 (Ont. Div. Ct.) at para. 30.

Imposing a duty of care to provide said information would not have "penalized" anybody. All that would have happened in this case is that Canada would have provided the much-needed information in and around 1965 and not fifteen years later.

83. I therefore find that a common law duty to take steps to prevent aboriginal children who were placed in the care of non-aboriginal foster or adoptive parents from losing their aboriginal identity has been established. ***

85. For the reasons set out above, when Canada entered into the 1965 Agreement and over the years of the class period, Canada had a common law duty of care to take reasonable steps to prevent on-reserve Indian children in Ontario, who had been placed in the care of non-aboriginal foster or adoptive parents, from losing their aboriginal identity. Canada breached this common law duty of care.

Disposition

86. The common issue is answered in favour of the plaintiff. Canada is liable in law for breaching a common law duty of care to the class members. This is not an issue that requires a trial.

87. The class action now moves forward to the damages assessment stage. Counsel should schedule a case conference to discuss next steps. ***

REFLECTION:

- *Why was compensation of $25,000 to $50,000 per victim considered by the Court to be within the zone of reasonableness? Do you agree? What hurdles might victims have faced in pursuing their tort actions to trial?*
- *What opportunities and obstacles does tort law hold for achieving accountability for grave historical injustices like the Sixties Scoop?*
- *How might Indigenous legal principles, such as principles of restorative justice or collective healing, operate within a tort framework or provide alternative frameworks for addressing grave historical injustices?*

19.7.4 Cross-references

- *Insurance Corp. of British Columbia v. Ari* [2023] BCCA 331, [31]-[32]: **§23.1.1**

19.7.5 Further material

- Historica Canada Podcast, "Residential Schools" (Feb 21, 2020) 🎧.
- K. Mahoney, "Indigenous Legal Principles: A Reparation Path for Canada's Cultural Genocide" (2019) 49 Am Rev Can Stud 207.
- T. McMahon, "The Horrors of Canada's Tort Law System: The Indian Residential School Civil Cases" (SSRN, 2017).
- M. Moran and K. Roach (eds), *Special Issue: The Residential Schools Litigation and Settlement* (2014) 64 U Toronto LJ 479.
- J.R. Miller, *Residential Schools and Reconciliation: Canada Confronts Its History* (Toronto: U Toronto Press, 2017).
- A.D. Davis, "Corrective Justice and Reparations for Black Slavery" (2021) 34 Canadian J L & Jurisprudence 329.
- M. Moran, "The Problem of the Past: How Historic Wrongs became Legal Problems" (2019) 69 U Toronto LJ 421.

19.8 Negligence of occupiers of premises

19.8.1 Hatty v. Reid [2005] NBCA 5

New Brunswick Court of Appeal – 2005 NBCA 5

LARLEE J.A.: ***

2. The accident that gave rise to this action occurred at the respondent's property, a modest home in Nauwigewauk, a suburb of Saint John, N.B. Ms. Reid tripped and fell on Ms. Hatty's walkway. The women are neighbours, with approximately six houses separating them. There were two concrete walkways located in front of Ms. Hatty's home. One ran parallel to the driveway and led to the garage; the second ran perpendicular to the first and connected it and the steps of Ms. Hatty's house. There was a 4-inch step or rise where the two walkways intersected. When activated, a motion sensor light on the house illuminated the intersection of the two walkways and stayed on for 5 minutes.

3. On February 7, 1999, Ms. Reid stopped at Ms. Hatty's house to deliver some mail belonging to an elderly neighbour who was in the hospital. Ms. Reid's husband drove their vehicle into the driveway and stopped behind a parked one. Ms. Reid got out and went to the front door of Ms. Hatty's house. As Ms. Reid was leaving the property, she tripped at the point where the walkways met and she fell to the ground. She had been warned to watch her step.

4. Ms. Reid was subsequently treated at the emergency room of the hospital and released that night. She continued to work for three weeks but stopped because she was unable to use her left hand properly. She has not worked since. The trial judge found Ms. Hatty 50% negligent and awarded the respondent, Ms. Reid, damages in the amount of $127,535.34 ***. Ms. Hatty appeals both the finding of negligence and the damages awarded. For the reasons that follow, I find the trial judge erred in law when he found that Ms. Hatty was responsible for Ms. Reid's damages. ***

Standard of Care ***

16. Canadian jurisdictions take three different approaches to the question of the standard of care expected of homeowners, or which property owners must meet. Those approaches are based on occupiers' liability legislation, the common law of occupiers' liability and general principles of negligence.

17. Most provinces, including Ontario, British Columbia, Alberta, Manitoba, Nova Scotia, and Prince Edward Island, have occupiers' liability legislation which sets the standard of care required of property owners towards those who come onto their property. The legislation does away with the difference between invitees and licensees and puts both invitees and licensees into the common defined class of visitor. The statutes impose an affirmative duty upon occupiers to take reasonable care for the safety of people who are permitted on the premises. Additionally, the legislation does away with the old common law position that an occupier was only liable for unusual dangers of which the occupier was aware or ought to have been aware. Under the old law, the occupier could escape liability by giving notice. Now, the occupier has to make the premises reasonably safe. That does not absolve the visitor of his duty to take reasonable care, but does place an affirmative duty on each and every occupier to make the premises reasonably safe. Legislation from Ontario is typical. The statutory standard of care under the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2 is set forth in s. 3(1) which reads as follows:

> 3(1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

18. This section imposes on occupiers an affirmative duty to make the premises reasonably safe for persons entering them by taking reasonable care to protect such persons from foreseeable harm. The section subsumes occupiers' liability with the modern law of negligence. It is explained in *Waldick v. Malcolm* (1989), 70 O.R. (2d) 717 (Ont. C.A.); aff'd [1991] 2 S.C.R. 456 (S.C.C.), by Blair J.A. at page 723:

> I agree with the description of an occupier's duty under the Act in *Preston v. Canadian Legion, Kingsway Branch No. 175* (1981), 123 D.L.R. (3d) 645, 29 A.R. 532 (C.A.), which has been quoted with approval by courts of other provinces. In dealing with the comparable section of the *Occupiers' Liability Act*, R.S.A. 1980, c. O-3, Moir J.A. said at p. 648:
>
> > *** [T]he statute now imposes an affirmative duty upon occupiers to take reasonable care for the safety of people who are permitted on the premises. This change is most marked because it does away with the old common law position that an occupier was only liable for unusual dangers of which he was aware or ought to have been aware. Under the old law the occupier

> could escape liability by giving notice. Now, the occupier has to make the premises reasonably safe….

19. Also, Prowse J.A. stated in *Tutinka v. Mainland Sand & Gravel Ltd.* (1993), 110 D.L.R. (4th) 182 (B.C. C.A.), at 197-98 with respect to the British Columbia legislation:

> As is plainly stated in s. 2, the Act is a codification of the duty which occupiers owe to those coming on their property. It does away with the common law distinctions between the duties owed by occupiers of premises to various classes of visitors, depending on whether those visitors were invitees, licensees, or trespassers. It replaces those disparate duties with a single positive duty on every occupier to take reasonable care to see that all visitors are reasonably safe in using the premises….

20. One province, Saskatchewan, still applies specific common law principles for occupiers' liability. Under these principles, the duty and standard of care vary depending on the classification in which the person injured on the premises is placed. Another, Newfoundland, determines liability on the basis of the common law of occupiers' liability but it applies it in a manner virtually indistinguishable from ordinary negligence: *Gallant v. Roman Catholic Episcopal Corp. for Labrador* (2001), 200 Nfld. & P.E.I.R. 105 (Nfld. C.A.). Aside from recent Newfoundland decisions, New Brunswick is the only province that applies general principles of negligence to this area. ***

21. In New Brunswick, the *Law Reform Act*, S.N.B. 1993, c. L-1.2, s. 2(1) abolished the law of occupier's liability. Since we do not have a statute that places a positive obligation on all occupiers of premises by imposing a duty and prescribing the standard of care, liability in this province is governed by the ordinary rules of negligence. Therefore, one might ask what use New Brunswick courts can make of cases dealing with occupiers' liability from other provinces.

22. Because of the different approaches to the standard of care owed by property owners to those who come on their property, looking at cases from other provinces with similar facts to the case at bar is problematic. The standard of care in those cases will be dictated by legislation or the common law of occupiers' liability, neither of which apply in New Brunswick. The Newfoundland Court of Appeal, however, appears to have stated that the standard of care set down in occupiers' liability legislation throughout Canada is the same as that set out by the common law of negligence. In *Gallant v. Roman Catholic Episcopal Corp. for Labrador* the plaintiff slipped on an icy walkway while approaching a door to the basement of the Roman Catholic Church in Labrador City. Cameron J.A. explained the applicable law at para. 14:

> As noted above, the Appellants have raised the question of whether the law of occupiers' liability should be different than the general tort law respecting negligence. … In *Stacey*, at para. [29], Gushue J.A., for the Court, stated the test for the evaluation of the liability of an occupier to be:
>
> > An occupier's duty of care to a lawful visitor to his or her premises is to take such care as in all the circumstances is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he or she is invited or permitted by the occupier to be there or is permitted by law to be there.

23. She sets out four principles at para. 27 of the decision:

> As already noted, in the common law jurisdictions in Canada a generally consistent approach to occupiers' liability has emerged, one which is compatible with *Stacey*. The following is not an attempt to create an exhaustive list but a collection of principles which emerge from the cases under the current, generally accepted view of occupiers' liability and which are relevant to the law in this province, post *Stacey*:
>
> > 1. There is a positive obligation upon occupiers to ensure that those who come onto their properties are reasonably safe (see: *Stacey*; *DeMeyer v. National Trust Co.* (1995), 104 Man. R. (2d) 170 (Q.B.); *Preston v. Canadian Legion, Kingsway Branch No. 175* (1981), 123 D.L.R. (3d) 645 (Alta.C.A.));

> 2. The onus is upon the plaintiff to prove on a balance of probabilities that the defendant failed to meet the standard of reasonable care—the fact of the injury in and of itself does not create a presumption of negligence—the plaintiff must point to some act or failure to act on the part of the defendant which resulted in her injury (see: *Kayser v. Park Royal Shopping Centre Ltd.* (1995), 16 B.C.L.R. (3d) 330 (C.A.); *Empire Ltd. v. Sheppard*, 2001 NFCA 10);
>
> 3. When faced with a *prima facie* case of negligence, the occupier can generally discharge the evidential burden by establishing he has a regular regime of inspection, maintenance and monitoring sufficient to achieve a reasonable balance between what is practical in the circumstances and what is commensurate with reasonably perceived potential risk to those lawfully on the property. An occupier's conduct in this regard is to be judged not by the result of his efforts (i.e. whether or not the plaintiff was injured) but by the efforts themselves (see: *Empire Stores*);
>
> 4. The occupier is not a guarantor or insurer of the safety of the persons coming on his premises. (See: *Empire Stores*; *Qually v. Pace Homes Ltd. and Westfair Foods Ltd.* (1993), 84 Man.R. (2d) 262 (Q.B.) and also, *Stevenson v. City of Winnipeg Housing Co.* (1988), 55 Man. R. (2d) 137 (Q.B.) in which the court found that there was no duty to completely clear sidewalks of snow in a Winnipeg winter, and that frozen patches were inevitable, notwithstanding that the occupier took reasonable care to make the property reasonably safe.) […]

24. Finally Cameron J.A. summarizes at para. 30:

> In summary, it can be said that the experience in other jurisdictions where the general law of negligence has been applied to occupiers' liability has not been to place an onerous burden upon the occupier. Generally the courts examine the procedures used by the occupier to ensure reasonable safety for the visitor. What is reasonable is determined in the context of the circumstances of each case…. ***

26. While New Brunswick courts may be able to utilize occupiers' liability cases decided with respect to specific legislation, cases decided on the basis of the common law of occupiers' liability (older cases from every province and current cases from Saskatchewan) are of no use.

Application of the Standard in this Case ***

34. This is a case where: (1) The designated access to Ms. Hatty's front door, if properly made use of, was safe; (2) Ms. Reid had attended at the Hatty residence on a previous occasion; (3) Ms. Reid lived six houses from Ms. Hatty's residence on the same street; (4) Ms. Hatty urged Ms. Reid to "watch her step" as she left the front door; and (5) the visitor fell while running on the walkway. The trial judge held the appellant to too high a standard and thereby committed reversible error. A homeowner cannot be held to a standard of perfection.

35. In my view, Ms. Hatty had in place safeguards for the protection of visitors that were reasonable in the circumstances. She was not required to install safeguards that would have protected visitors who chose not to employ the walkways leading to her front door. Nor was she expected to foresee that Ms. Reid would be running down the darkened walkway after leaving her front door. On entering the property Ms. Reid chose not to employ the walkways. As a result, the sensor light was not triggered and the rise was not adequately illuminated. She is the author of her own misfortune. ***

REFLECTION:

- *How does the statutory occupiers' liability framework of New Brunswick differ from that of British Columbia?*
- *What are the advantages and disadvantages to plaintiffs of relying solely upon the common law of negligence rather than specific legislation in claims against occupiers of premises?*

19.8.2 Provincial occupiers' liability statutes

- Alberta: Occupiers' Liability Act, RSA 2000, c O-4, ss 1(d), 5-7.

- British Columbia: Occupiers Liability Act, RSBC 1996, c 337, s 3.
- Manitoba: The Occupiers' Liability Act, CCSM c O8, ss 1, 3(1)-(3), 3(5).
- New Brunswick: Law Reform Act, RSNB 2011, c 184, s 2.
- Nova Scotia: Occupiers' Liability Act, SNS 1996, c 27, ss 2(b), 4, 5.
- Ontario: Occupiers' Liability Act, RSO 1990, c O.2, ss 1, 3, 4.
- Prince Edward Island: Occupiers' Liability Act, RSPEI 1988, c O-2, ss 1(b), 3, 4.
- Saskatchewan: The Trespass to Property Amendment Act, 2019, SS 2019, c 26, s 11.

REFLECTION:

- *Having regard to the discussion in Hatty v. Reid, what purpose do occupiers' liability statutes serve?*
- *Does the standard of care in relation to the statutory occupiers' liability duty differ from the ordinary negligence standard applied in other contexts?*[634]

19.8.3 Cross-references

- *Goldman v. Hargrave* [1966] UKPC 12, [22]: §14.2.3.1.

19.8.4 Further material

- P. Warnett, "If You Slip and Fall" People's Law School (Apr 2021).
- M. Major, "Torts/Municipal Law: Occupiers' Liability" CanLIIConnects (May 11, 2022).
- Law Society of Saskatchewan, "Summary of *Criss v. The Sutherland Hotel Inc.*" CanLII Connects (Mar 17, 2014).
- R. Buckley, "Occupiers' Liability in England and Canada" (2006) 35 Common L World Rev 197.

19.9 Negligence in hosting patrons and guests

19.9.1 Stewart v. Pettie [1995] CanLII 147 (SCC)

Supreme Court of Canada – 1995 CanLII 147

MAJOR J. (FOR THE COURT):

1. On December 8, 1985, Gillian Stewart, her husband Keith Stewart, her brother Stuart Pettie, and his wife Shelley Pettie went to the Stage West Dinner Theatre in Edmonton for an evening of dinner and live theatre. Before the evening was finished tragedy had struck. After leaving Stage West at the conclusion of the evening a minor single vehicle accident left Gillian Stewart a quadriplegic. Among others, she sued Mayfield Investments Ltd. ("Mayfield"), the owner of Stage West, claiming contribution for her injuries. This appeal is to decide whether on the facts of this case the principles of commercial host liability, first established by this Court in *Jordan House Ltd. v. Menow* [1974] S.C.R. 239, apply to impose liability on Mayfield.

2. Gillian Stewart and her sister-in-law, Shelley Pettie, were both employed by Dispensaries Limited. For its 1985 Christmas party, Dispensaries Limited paid the price of admission for its employees and their spouses and friends to attend a performance at Stage West, a dinner theatre operated in Edmonton by the appellant, Mayfield Investments Ltd., and located at the Mayfield Inn. ***

4. The dinner theatre was organized with a full buffet dinner to be followed at 7:45 by a three-act play. In addition, cocktail waitresses provided table service of alcohol. The Stewart and Pettie table was served by the same waitress all evening, and she kept a running total of all alcohol ordered, which she then presented at the end of the evening for payment. ***

5. Stuart Pettie and Keith Stewart each ordered several drinks over the course of the evening, ordering the

[634] See *Lyng v. Ontario Place Corporation*, 2024 ONCA 23, [25]: "… occupiers are not required to take unrealistic or impractical precautions against known risks, nor are they required to protect against every possible danger: *Waldick v. Malcolm*, [1991] 2 S.C.R. 456 (SCC), at pp. 470-72. The standard is not perfection."

first drinks before dinner, and, in addition, ordering drinks after dinner but before Act I, and then during each of the two intermissions. Their wives, on the other hand, had no alcohol during the entire evening. They were present at the table during the entire course of the evening, while the drinks were ordered, served, and consumed. Gillian Stewart's testimony was clear that she knew, at least in general terms, the amount that Stuart Pettie had to drink during the evening.

6. Stuart Pettie was drinking "double" rum and cokes throughout the evening. The trial judge found that he drank five to seven of these drinks, or 10 to 14 ounces of liquor. The trial judge also found that despite the amount that he had to drink, Stuart Pettie exhibited no signs of intoxication. This appearance was deceiving, however, as he was intoxicated by the end of the evening.

7. The group left the dinner theatre around 11:00 p.m. Once out in the parking lot, they had a discussion amongst themselves about whether or not Stuart Pettie was fit to drive, given the fact that he had been drinking. Neither his wife, nor his sister (who acknowledged that she knew what her brother was like when he was drunk), had any concerns about letting Stuart Pettie drive. All four therefore got into the car and started home, with Stuart Pettie driving, Keith Stewart in the front passenger seat, and their spouses in the back seat.

8. That particular December night in Edmonton there was a frost which made the roads unusually slippery. The trial judge found that Pettie was driving slower than the speed limit (50 km/h in a 60 km/h zone), and also accepted the evidence of Gillian Stewart that he was driving properly, safely and cautiously in the circumstances. Despite his caution, Stuart Pettie suddenly lost momentary control of the vehicle. The car swerved to the right, hopped the curb, and struck a light pole and noise abatement wall which ran alongside the road. Three of the four persons in the vehicle suffered no serious injuries. Gillian Stewart, however, who was not wearing a seat belt, was thrown across the car, struck her head, and was rendered a quadriplegic. ***

18. *** The main issue is:

> Did Mayfield Investments Ltd. meet the standard of care required of a vendor of alcohol, or was it negligent in failing to take any steps to ensure that Stuart Pettie did not drive after leaving Stage West? ***

20. This Court has not previously considered a case involving the liability of a commercial host where the plaintiff was not the person who became inebriated in the defendant's establishment. In both *Jordan House v. Menow*, *supra*, and *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186, it was the plaintiff who became drunk and as a consequence was unable to look after himself. ***

22. The present appeal is one in which a third party is claiming against the commercial host. This raises the question of whether the establishment owed any duty of care to that third party. ***

A. Duty of Care ***

26. In *Jordan House Ltd. v. Menow*, *supra*, it was established that a duty of care exists between alcohol-serving establishments and their patrons who become intoxicated, with the result that they were unable to look after themselves. The plaintiff, who was a well-known patron of that bar, became intoxicated and began annoying customers. He was ejected from the bar, even though the waiters and employees of the bar knew that, in order to get home, he would have to walk along a busy highway. While doing so, he was struck by a car. Laskin J. (as he was then) said that the bar owed a duty of care to Menow not to place him in a situation where he was at risk of injury. He said (at pp. 247-48):

> If the hotel's only involvement was the supplying of the beer consumed by Menow, it would be difficult to support the imposition of common law liability upon it for injuries suffered by Menow after being shown the door of the hotel and after leaving the hotel … The hotel, however, was not in the position of persons in general who see an intoxicated person who appears to be unable to control his steps. It was in an invitor-invitee relationship with Menow as one of its patrons, and it was aware, through its employees, of his intoxicated condition, a condition which, on the findings of the trial judge, it fed in violation of applicable liquor licence and liquor control legislation. There was a

> probable risk of personal injury to Menow if he was turned out of the hotel to proceed on foot on a much-travelled highway passing in front of the hotel.
>
> There is, in my opinion, nothing unreasonable in calling upon the hotel in such circumstances to take care to see that Menow is not exposed to injury because of his intoxication.

27. Laskin J. held that the hotel had breached the duty owed to Menow by turning him out of the hotel in circumstances in which they knew that he would have to walk along the highway. The risk to Menow that the hotel's actions created was foreseeable. The hotel was therefore found to be liable for one-third of Menow's injuries.

28. It is a logical step to move from finding that a duty of care is owed to patrons of the bar to finding that a duty is also owed to third parties who might reasonably be expected to come into contact with the patron, and to whom the patron may pose some risk. It is clear that a bar owes a duty of care to patrons, and as a result, may be required to prevent an intoxicated patron from driving where it is apparent that he intends to drive. Equally such a duty is owed, in that situation, to third parties who may be using the highways. In fact, it is the same problem which creates the risk to the third parties as creates the risk to the patron. If the patron drives while intoxicated and is involved in an accident, it is only chance which results in the patron being injured rather than a third party. The risk to third parties from the patron's intoxicated driving is real and foreseeable.

29. In this case, there was a sufficient degree of proximity between Mayfield Investments Ltd. and Gillian Pettie that a duty of care existed between them. ***

30. *** In so far as the existence of a duty of care is concerned it is irrelevant that Gillian Stewart was a passenger in the vehicle driven by the patron rather than the passenger or driver of another vehicle, other than for ancillary purposes such as contributory negligence. The duty of care arises because Gillian Stewart was a member of a class of persons who could be expected to be on the highway. It is this class of persons to whom the duty is owed. ***

B. Standard of Care

34. *** The respondents argued, and the Court of Appeal agreed, that Mayfield was negligent because they (a) served Stuart Pettie past the point of intoxication, and (b) failed to take any steps to prevent harm from coming to himself or a third person once he was intoxicated.

35. I doubt that any liability can flow from the mere fact that Mayfield may have over-served Pettie. To hold that over-serving Pettie per se is negligent is to ignore the fact that injury to a class of persons must be foreseeable as a result of the impugned conduct. I fail to see how the mere fact that an individual is over-imbibing can lead, by itself, to *any* risk of harm to third parties. It is only if there is some foreseeable risk of harm to the patron or to a third party that Mayfield and others in their position will be required to take some action. This standard of care is the second "duty" identified by the respondents and the Court of Appeal.

36. It is true that applicable liquor control legislation in Alberta, and across the country, prohibits serving alcohol to persons who are apparently intoxicated. Counsel for the respondents pressed that point in argument. There are, however, two problems with this argument. The first is that it is not clear that there was any violation of liquor control legislation in this case, given the fact that Pettie was apparently not exhibiting any signs of intoxication. Moreover, even if it could be said that Mayfield was in violation of legislation, this fact alone does not ground liability: *Saskatchewan Wheat Pool v. Canada*, [1983] 1 S.C.R. 205 [§14.1.2.1]. Without a reasonably foreseeable risk of harm to him or a third party, the fact of over-serving Pettie is an innocuous act. Therefore, liability on the part of Mayfield, if it is to be found, must be in their failure to take any affirmative action to prevent the reasonably foreseeable risk to Gillian Stewart.

37. Historically, the courts have been reluctant to impose liability for a failure by an individual to take some positive action. This reluctance has been tempered in recent years where the relationship between the parties is such that the imposition of such an obligation has been warranted. In those cases, there has been some "special relationship" between the parties warranting the imposition of a positive duty. *Jordan House Ltd. v. Menow*, *supra*, was such a case. ***

42. There is no dispute that neither the appellant or anyone on its behalf took any steps to ensure that Stuart Pettie did not drive. Mayfield suggested that they remained "vigilant" and maintained "careful observation" of Stuart Pettie, and that this should be sufficient. However, remaining "vigilant" is not the same as taking positive steps, and it is common ground that none of Mayfield's employees made inquires about whether Stuart Pettie intended to drive or suggested any alternative. Therefore, if Mayfield is to avoid liability, it will have to be on the basis that, on the facts of this case, Mayfield had no obligation to take any positive steps to ensure that Stuart Pettie did not drive. ***

47. There is little difficulty with the proposition, supported by the above cases, that the necessary "special relationship" exists between vendors of alcohol and the motoring public. This is no more than a restatement of the fact, already mentioned, that a general duty of care exists between establishments in Mayfield's position and persons using the highways.

48. I do, however, have difficulty accepting the proposition that the mere existence of this "special relationship", without more, permits the imposition of a positive obligation to act. Every person who enters a bar or restaurant is in an invitor-invitee relationship with the establishment, and is therefore in a "special relationship" with that establishment. However, it does not make sense to suggest that, simply as a result of this relationship, a commercial host cannot consider other relevant factors in determining whether in the circumstances positive steps are necessary.

49. The existence of this "special relationship" will frequently warrant the imposition of a positive obligation to act, but the sine qua non of tortious liability remains the foreseeability of the risk. Where no risk is foreseeable as a result of the circumstances, no action will be required, despite the existence of a special relationship. The respondents argue that Mayfield should have taken positive action, even though Mayfield knew that the driver was with three other people, two of whom were sober, and it was reasonable to infer from all of the circumstances that the group was travelling together. ***

51. Obviously, the fact that tragedy has befallen Gillian Stewart cannot, in itself, lead to a finding of liability on the part of Mayfield. The question is whether, before 11:00 p.m. on December 8, 1985, the circumstances were such that a reasonably prudent establishment should have foreseen that Stuart Pettie would drive, and therefore should have taken steps to prevent this.

52. I agree with the Court of Appeal that Mayfield cannot escape liability simply because Stuart Pettie was apparently not exhibiting any visible signs of intoxication. The waitress kept a running tab, and knew that Pettie had consumed 10 to 14 ounces of alcohol over a five-hour period. On the basis of this knowledge alone, she either knew or should have known that Pettie was becoming intoxicated, and this is so whether or not he was exhibiting visible symptoms.

53. However, I disagree with the Court of Appeal that the presence of the two sober women at the table cannot act to relieve Mayfield of liability. Laskin J. in *Jordan House Ltd. v. Menow*, *supra*, made it clear that the hotel's duty to Menow in that case could have been discharged by making sure "that he got home safely by taking him under its charge *or putting him under the charge of a responsible person* …" (emphasis added) [p. 249]. Had Pettie been alone and intoxicated, Mayfield could have discharged its duty as established in *Jordan House Ltd. v. Menow* by calling Pettie's wife or sister to take charge of him. How, then, can Mayfield be liable when Pettie was already in their charge, and they knew how much he had had to drink? While it is technically true that Stuart Pettie was not "put into" the care of his sober wife and sister, this is surely a matter of semantics. He was already in their care, and they knew how much he had to drink. It is not reasonable to suggest in these circumstances that Mayfield had to do more.

54. *** In the circumstances, it was reasonable for Mayfield to assume that the four people at the table were not travelling separately, and it was reasonable for Mayfield to assume that one of the two sober people who were at the table would either drive or find alternative transportation. ***

57. *** Mayfield was aware of the circumstances in which Stuart Pettie was drinking. In the environment of the case at bar, it was not reasonable for them to intervene.

58. On the facts of this case I conclude that Mayfield Investments Ltd. did not breach the duty of care they owed to Gillian Stewart. On this basis I would allow the appeal. ***

REFLECTION:

- *What features of the relationship between publicans and patrons favour the imposition of a duty of care?*
- *What standard of care applies in commercial host cases? Why was the duty not breached in this case?*

19.9.2 McCormick v. Plambeck [2020] BCSC 881, [2022] BCCA 219

British Columbia Supreme Court – 2020 BCSC 881, aff'd 2022 BCCA 219

HINKSON C.J.:

1. In the early morning of September 16, 2012, following a party at the home of the defendants Stephen Patrick Pearson and Lidia Diana Pearson ("the Pearsons"), a 1992 Subaru motor vehicle left the roadway on North End Road on Salt Spring Island ("the accident"). After leaving the roadway, the vehicle crashed into the woods beside the road.

2. The Subaru was owned by the defendants Megan and Andrew Coupland ("the Couplands"). The driver of the Subaru, the defendant Ryan Plambeck ("Ryan"), was killed in the accident, and the plaintiff, a passenger in the vehicle, sustained serious injuries.

3. The plaintiff has settled his claims against the Couplands and Ryan, but seeks a finding of liability for the accident against the Pearsons on the basis of what is referred to in a number of authorities as "social host liability". ***

7. Salt Spring Island is one of the Southern Gulf Islands. It was described by a number of witnesses as a "laid-back" community, where the lifestyle is slower paced than in larger urban centers. Several witnesses commented on the habit of many on the Island leaving their homes and vehicles unlocked, and of some leaving car keys in unlocked vehicles.

8. In 2012, the use of marijuana and the consumption of alcohol by minors was apparently widespread, and condoned by many Salt Spring Island parents, despite the illegality of the use of the former at the time of the accident, and the prohibition of the latter pursuant to s. 33 of the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267, in force at the time of the party. ***

47. I will refer to the gathering at the Pearsons' home on September 15-16, 2012 as "the party". ***

53. Elise testified that the party was for her friend Olivia's birthday. She and her sister asked their parents if they could host a party for her.

54. Ms. Pearson gave evidence that she had just come back from visiting her son in Montreal when her daughter Hannah asked to host the party. She agreed but was adamant that there was to be no drinking and driving. Ms. Pearson agreed that she knew that some of the attendees would bring alcohol. Her expectation was that parents would come and pick up attendees.

55. Elise gave evidence that her parents agreed to the party and stipulated that car keys would be taken from the people who drove, and that she, her sister, and their parents would circulate throughout the party, which would end at 1:00 a.m. ***

78. Mr. Pearson observed cider, coolers, and beer being consumed by the guests. He did not tell any attendees to slow down their consumption of alcohol nor restrict the kinds of alcohol that could be consumed that night. He did not have a recollection of seeing hard liquor, nor did he recall seeing any drinking games. He saw kids dancing and having fun. The music was quite loud. He smelled marijuana outside.

79. Mr. Pearson said that no one was turned away from the party, and neither he nor his wife took alcohol from any of the attendees. He agreed that had he seen anyone extremely intoxicated, he would have taken some steps as a matter of safety. Not surprisingly, he agreed that bad things such as falling, passing out or being struck by a car could occur to an intoxicated minor walking down the street. None of these things occurred. ***

81. Ms. Pearson went to her bedroom when more guests began arriving at the party. She gave evidence that she came out occasionally to check on the attendees, and that her husband did the same. ***

82. Ms. Pearson felt that the attendees were responsible, independent kids. She said that she had a "good vibe" when she walked around. She did not feel that any bad behavior came to her attention nor did she see anything out of the ordinary. She did not see anything that alarmed her. She further clarified that she felt that the teenagers were not consuming more alcohol than the limit, although she then acknowledged that the legal limit for both alcohol and marijuana for minors was zero.

83. Ms. Pearson testified that she felt the party seemed well controlled. She agreed that she saw minors with beer and bottle-type drinks during the party. She agreed that nothing was done to control the kinds of alcohol coming into the home and there was no rule against hard liquor being consumed. She did not take any alcohol from the attendees as she saw no signs that doing so was necessary. ***

120. Mr. Pearson said that around 1:00 a.m., the music was turned off, the lights were turned up, and the partygoers were told to call for rides. He said that there was a general migration of partygoers out of the home. Some were picked up, and some simply walked away. He acknowledged that there was no plan for the attendees who showed up at the party on foot. Mr. Pearson did not see Tom or the plaintiff leave.

121. Mr. Pearson said that it took some time for him to ascertain the attendees who did not have a ride. Once they were identified, his wife coordinated driving them home. She made one such trip. He thought she left the residence at 1:30 a.m. to do so. ***

126. The plaintiff's evidence was that he left the party at around midnight to walk to Ryan's house. He gave evidence that Ryan drove a car up the Pearsons' driveway and everyone ran up to the car to see who was driving. The plaintiff said that Ryan was offering rides to people, and he was concerned that Ryan was intoxicated.

127. The plaintiff gave evidence that Nicole Love indicated that she would only accept a ride if there was a sober passenger. The plaintiff was then asked to get in the backseat of the car and refused to do so. He gave evidence that he was then pushed into the car by a bunch of older "more sporty" people including Kyle Matheson and Byron Muscle who locked the door, rendering him unable to get out. Ryan then drove Ms. Love to the Stibbard home. There the plaintiff said he got out of the car. He then recalled being back in the car, though he could not remember how this happened. ***

145. The plaintiff testified that he knew that prior to the accident, Ryan was looking for a car. He knew this because, on the way to the party, Ryan told people they were walking with that there was a car just up the road, that he had contacted the owner, and that the keys to the vehicle would be left with him for a test drive.

146. I reject this evidence as confabulation on the part of the plaintiff.

147. Mr. Coupland testified that he was at home on the evening of September 15, 2012. He was sleeping in his bedroom at the front of the home with the window open when he was awoken by the sound of at least one male and one female voice. The voices stopped, some time passed, during which he remained awake, and then the car started up. When he looked outside, the vehicle was gone. He did not see the individuals who took the vehicle. ***

151. The plaintiff said that once he was back in the car, Ryan then began driving. The plaintiff said that he recalled laying in the back seat with multiple seatbelts on. He recalled Ryan driving erratically and leaving the road. His next memory was waking up in the backseat with Ryan's elbow poking him. He believed Ryan was decapitated, but also suggested that Ryan may have spoken to him. ***

(a) Duty of Care

175. In advancing his claim, the plaintiff is asking this Court to extend the ambit of a duty of care previously recognized in the jurisprudence.

176. The plaintiff submits that the Pearsons' duty of care is that duty of care that exists between adults and

minors who such adults invite or knowingly allow to be invited to their homes, when it is or becomes known that the minors' attendance is for the purpose of consuming alcohol or drugs or participating in activities in the course of which alcohol or drugs will be, or are consumed, to take reasonable steps so that the minors do not injure themselves and are not injured by other partygoers. ***

182. The existence of a general duty of care between a social host and users of public highways injured by an adult party guest was rejected by the Supreme Court of Canada in *Childs v. Desormeaux*, 2006 SCC 18 (S.C.C.) [§13.4.2.1]. ***

193. The plaintiff submits that the following decisions on unsuccessful summary judgment applications that post-date the decision in *Childs*, support a duty of care in the present case: *Oyagi v. Grossman*, [2007] O.J. No. 1087 (Ont. S.C.J.); *Hamilton v. Kember*, [2008] O.J. No. 734 (Ont. S.C.J.); *Sidhu (Litigation Guardian of) v. Hiebert*, 2011 BCSC 1364 (B.C. S.C.); *Lutter v. Smithson*, 2013 BCSC 119 (B.C. S.C.); *Wardak v. Froom*, 2017 ONSC 1166 (Ont. S.C.J.); and *Williams v. Richard*, 2018 ONCA 889 (Ont. C.A.). ***

203. While I have reviewed and considered these cases, my task remains to determine reasonable foreseeability, proximity, and ultimately whether a duty of care was owed on the facts as I have found them.

204. The first stage of the *Anns/Cooper* analysis [§13.4.1.2] asks whether the relationship between the plaintiff and the defendants discloses reasonable foreseeability and sufficient proximity to establish a *prima facie* duty of care.

205. The duty of care asserted by the plaintiff here is confined to minor attendees of a party hosted by adult social hosts. He says that his status as a minor adds the additional element contemplated by the Court in *Childs* at para. 47 as the harm in such a case is far more foreseeable and the relationship between him and the Pearsons far more proximate than in *Childs*. ***

220. The societal values and interests represented by the provisions of the *Liquor Control and Licensing Act* *** can inform the first part of the *Anns* test, but it is well-established that a breach of statute does not create liability in negligence: *R. v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 (S.C.C.) at 225 [§14.1.2.1].

221. While I accept that the societal values and interests represented by the provisions of the *Liquor Control and Licensing Act* should be considered in applying the first part of the *Anns* test, I find that they are overwhelmed by the community standards on Salt Spring Island at the time of the accident. ***

228. Here, the impugned act was described as allowing intoxicated minors to venture off on foot from the party in the middle of the night. Applying *Rankin's Garage & Sales v. J.J.*, 2018 SCC 19 [§13.4.2.3], the question of foreseeability in this case must be framed in a way that links that act to the harm suffered by the plaintiff; in other words: was physical injury reasonably foreseeable as a result of letting minors who have consumed alcohol and/or marijuana leave the Pearsons' premises on foot at night?

229. *** [T]he Court in *Rankin* at para. 46 held that simply because something is *possible* does not mean it is *foreseeable*. The plaintiff submits that trips and falls, being hit by a car, fights and scuffles, and the hazards that accompany wandering on foot intoxicated were all foreseeable. I am unable to accept that contention. These harms may have all been possible, but my inquiry must focus on whether personal injury was foreseeable. I find that these harms were not foreseeable.

230. The post-*Childs* jurisprudence has focused heavily on a social host's knowledge as to the relevant guest's level of intoxication, and I have rejected the submission that the plaintiff was intoxicated when he left the party. In the result, I find that there were no obvious signs that the plaintiff would suffer injury by walking home from the party.

231. Despite his argument that the foreseeability inquiry should focus on the foreseeability of his injury, rather than the theft of a car, he submits that the theft of a car was nevertheless foreseeable in the circumstances. ***

233. I am unable to accept this contention. I find that the culture of leaving vehicles unlocked, even with

keys somewhere in or near them existed because the risk of vehicle theft was too remote to create a duty on the Pearsons to anticipate that guests from their party would steal a vehicle to drive after drinking alcohol.

234. I have already indicated above that I am not persuaded that the plaintiff was an intoxicated minor at the time he left the party. ***

237. By all accounts, the plaintiff was not a bad or unreliable young man. In these circumstances, should the defendants have foreseen that someone from the party would leave on foot, and then steal a car?

238. I find that duty did not extend to foreseeing that one or more of the party guests would steal a car and drive it unsafely.

239. I nevertheless turn to proximity.

240. The plaintiff submits that the duty of care for which he contends is fully in keeping with the already established duties of care in cases, "where a defendant intentionally attracts and invites third parties to an inherent and obvious risk that he or she has created or controls" and "paternalistic relationships of supervision and control, such as those of parent-child or teacher-student": *Childs* at paras. 35 and 36. ***

243. The plaintiff submits that a large party where alcohol is being consumed by dozens of minors with little to no supervision is an obvious risk, and to the extent that parents of the hosts knowingly allowed this to happen, it implicates them in the creation of the risk. The plaintiff says that those adults also put themselves in a position of supervision and control over the intoxicated minors. In this way, the specific iteration of a social host duty of care being advanced by the plaintiff is manifestly different than the one discussed in *Childs*, and is best seen as an extension of two already existing positive duties of care, in a very specific, social host, context.

248. The Pearsons permitted minors to come to their home, and acquiesced in the use of marijuana and the consumption of alcohol at their home. They accept that they could have refused entry to their home of anyone they did not wish to attend the party and that they had the ability to prohibit excessive drinking. The Pearsons did assert some supervisory role and made some attempt to control the activities of the attendees at the party. Thus, they asserted some paternalistic relationship with the guests of the party.

249. I find as well that the Pearsons assumed some element of control over the minors who attended the party, but I am not prepared to find that they created an inherent and obvious risk that the minor guests would or could be injured.

250. Although I have found that the defendants were in a paternalistic relationship with the guests of the party, I find that no duty of care has been established in this case because the injury complained of was not reasonably foreseeable as a result of the defendants' conduct. The plaintiff's case thus fails on the duty of care analysis.

251. Having concluded that a *prima facie* duty of care has not been established, I find it unnecessary to consider whether any duty would be negated by policy considerations at the second stage of the *Anns* test.

(b) Breach of the Standard of Care

252. In case my conclusion about the duty of care is incorrect, I will consider whether the defendants nevertheless met the standard of care in the circumstances. ***

261. As hosts, the Pearsons had to take all reasonable steps to minimize the risks of harm to their guests, including the plaintiff. The standard is one of reasonableness, not perfection. ***

274. The defendants had collected or had their daughters collect car keys from those who were thought to have driven to the party. There is no evidence that any of the partygoers who had consumed alcohol drove from the party.

275. The plaintiff contends that the Pearsons should have ensured that the minors leaving their home had a safe means of getting home. I find that the Pearsons not only foresaw this issue, they addressed it.

276. While Mr. Pearson conceded that there was no plan for minors who attended the party on foot and then decided to walk away, as he did not feel that there needed to be any such plan, I find that this mischaracterizes the circumstances. The plan was to let those who walked to the party walk home from the party.

277. The Pearsons did not encounter minors who were intoxicated and had no safe way of getting home. They asked the partygoers who needed a ride to call their parents. For those without rides who needed them, Ms. Pearson offered to drive them. She eventually drove home five guests of the party. The Pearsons also allowed Dylan McLeod to stay over and sleep on their porch when he returned later in the early morning hours.

278. There is no evidence that any of the guests at the party, other than Ryan or the plaintiff, drove whilst impaired or rode with a driver who had been drinking. I find that the Pearsons' plan of taking keys from anyone who might have intended to drive after consuming alcohol at their home and offering rides to those who had no safe way of leaving the party was successful in avoiding reasonably foreseeable harm to their guests.

279. Finally, I address an additional aspect of the plaintiff's argument. The plaintiff submits that the defendants are subject to a higher standard of care because they chose to host a party in violation of the statutory regime which prohibits the consumption of alcohol by minors. This, the plaintiff says, makes the Pearsons akin to commercial hosts.

280. While I acknowledge that the party constituted a breach of the statutory regime governing alcohol consumption by minors, I cannot accept that this fact alone demands a higher standard of care. It did not make the Pearsons akin to commercial hosts. As Gould J. found in *Baumeister v. Drake* (1986), 5 B.C.L.R. (2d) 382 (B.C. S.C.), the court takes judicial notice of the fact that graduation parties are an established custom in British Columbia, notwithstanding that they constitute, when minors are involved, a breach of the law.

281. In the result, I find that if they owed a duty of care to the plaintiff, the Pearsons met the required standard of care. ***

(c) Damage

282. Clearly the plaintiff sustained serious injuries as a result of the accident. ***

(d) Causation

287. Having found that the Pearsons owed no duty of care to the plaintiff and, if they did, met their required standard of care, it follows that the plaintiff's damage was not caused by any breach of a duty of care by the Pearsons. ***

Conclusion

423. The plaintiff's claim is dismissed.

424. Had I not dismissed the plaintiff's claim I would have awarded him the following damages:

a) Non-pecuniary damages: $300,000;

b) Loss of Past Earning Capacity: $150,000;

c) Loss of Future Income Earning Capacity: $1,800,000;

d) Cost of Care to Date: $150,000;

e) Future Care Costs: $2,644,802.55;

f) Special Damages: $42,278.31;

g) Claim pursuant to the *Health Care Costs Recovery Act*: $771,326.68.

Total: $5,858,407.54.

British Columbia Court of Appeal – 2022 BCCA 219

FENLON J. (BENNETT AND GRAUER JJ. concurring): ***

39. In the case at bar, the question is whether the respondents ought reasonably to have foreseen that the appellant, who had arrived at their home on foot and left the party on foot, would suffer personal injury from riding in a car being operated dangerously. If the Pearsons had reason to know that the appellant and Ryan were impaired and had access to a car, personal injury as a result of dangerous operation of a motor vehicle might have been foreseeable. It would not have been necessary for the respondents to foresee the precise mechanism of injury, whether due to the car leaving the road as it did, colliding with another car, or failing to avoid an object on the road. Nor would it have been necessary for the severity of the injuries to be foreseeable. But on the facts of this case, the foreseeability analysis must be rooted in the circumstances of a 17- and 18-year-old walking home from a party. I see no error in the judge's finding that it was not foreseeable that Ryan and the appellant could sustain personal injury from riding in a car being operated in a dangerous manner. ***

43. *** The broad mechanism of injury the judge focused on was injury arising out of the dangerous operation of a motor vehicle. It is the foreseeability of that general mechanism that mattered, not which of the two boys stole the car or indeed whether the car was, in fact, stolen.

44. In conclusion, I find that the judge did not give weight to irrelevant considerations in conducting the foreseeability analysis, and was correct to conclude that the harm suffered by the appellant was not foreseeable on the facts of this case.

45. I would accordingly dismiss the appeal.

REFLECTION:

- *In what respects was the special relationship alleged in this case analogous to and different from that considered in Childs (§13.4.2.1)? Does Childs support finding a relationship of proximity here?*
- *What facts support, or might undermine, the trial judges' reasoning that the Pearsons could not have reasonably foreseen injury to McCormick?*
- *Do policy considerations favour or run against recognising a duty of care owed by social hosts to their guests?*

19.9.3 Cross-references

- *Childs v. Desormeaux, Courrier & Zimmerman* [2006] SCC 18: §13.4.2.1.

19.9.4 Further material

- E. Adjin-Tettey, "Social Host Liability: A Logical Extension of Commercial Host Liability?" (2002) 65 Sask L Rev 515.
- F. Kelly, "Before You Host a Party Read This: Social Host Liability and the decision in *Childs v. Desormeaux*" (2006) 39 UBC L Rev 371.
- I. Malkin & T. Voon, "Social Hosts' Responsibility for Their Intoxicated Guests: Where Courts Fear to Tread" (2007) 15 Torts LJ 62.
- J. de Beer, "Social Host Liability in Canada" (2006) 14 Tort L Rev 174.
- E. Chamberlain, R. Simpson & G. Smith, "When Should Casinos Owe a Duty of Care toward Their Patrons?" (2018) 56 Alberta L Rev 963.

19.10 Negligence concerning unborn children

19.10.1 Parent claim of wrongful conception

19.10.1.1 Rees v. Darlington Memorial Hospital NHS Trust [2003] UKHL 52

House of Lords – [2003] UKHL 52

LORD BINGHAM OF CORNHILL:

1. My Lords, in *McFarlane v. Tayside Health Board* [2000] 2 AC 59 a husband and wife, themselves healthy and normal, sought to recover as damages the cost of bringing up a healthy and normal child born to the wife, following allegedly negligent advice on the effect of a vasectomy performed on the husband. Differing from the Inner House of the Court of Session (1998 SLT 307), the House [of Lords] unanimously rejected this claim. A factual variant of that case reached the Court of Appeal in *Parkinson v. St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530: the mother, who had undergone a negligently performed sterilisation operation, conceived and bore a child who was born with severe disabilities. Following *McFarlane*, the Court of Appeal held that the mother could not recover the whole cost of bringing up the child; but it held that she could recover the additional costs she would incur so far as they would be attributable to the child's disabilities. There was no appeal from that decision. The present case raises a further factual variant of *McFarlane*. The claimant in these proceedings (Ms Rees) suffers a severe and progressive visual disability, such that she felt unable to discharge the ordinary duties of a mother, and for that reason wished to be sterilised. She made her wishes known to a consultant employed by the appellant NHS Trust, who carried out a sterilisation operation but did so negligently, and the claimant conceived and bore a son. The child is normal and healthy but the claimant's disability remains. She claimed as damages the cost of rearing the child. The Court of Appeal (Robert Walker and Hale LJJ, Waller LJ dissenting) held that she was entitled to recover the additional costs she would incur so far as they would be attributable to her disability: [2002] EWCA Civ 88. The appellant NHS Trust now challenges that decision as inconsistent with *McFarlane*. The claimant seeks to uphold the decision, but also claims the whole cost of bringing up the child, inviting the House to reconsider its decision in *McFarlane*.

2. Since the argument in this appeal the High Court of Australia has given judgment in *Cattanach v. Melchior* [2003] HCA 38. That case arose from negligent advice following an incompletely performed sterilisation operation and one of the issues (the only issue litigated in the High Court) was whether the parents could recover as damages the cost of rearing the child, both parents and child being normal and healthy. The trial judge upheld that claim and her decision was affirmed by a majority of the Court of Appeal of the Supreme Court of Queensland ([2001] QCA 246) and by a bare majority of the High Court. I have found the judgments of the High Court of particular value since, although most of the arguments deployed are not novel (as they could scarcely be, given the volume of litigation on this subject in many different countries), the division of opinion among the members of the court gives the competing arguments a notable sharpness and clarity.

3. It is convenient to begin by considering *McFarlane*. In that case there were, as it seems to me, broadly three solutions which the House could have adopted to the problem then before it. (I can, for present purposes, omit two of the solutions which Kirby J listed in paragraph 138 of his judgment in *Melchior* but gratefully adopt his formulation of the remaining three, while altering their order). They were:

> (1) That full damages against the tortfeasor for the cost of rearing the child may be allowed, subject to the ordinary limitations of reasonable foreseeability and remoteness, with no discount for joys, benefits and support, leaving restrictions upon such recovery to such limitations as may be enacted by a Parliament with authority to do so.
>
> (2) That damages may be recovered in full for the reasonable costs of rearing an unplanned child to the age when that child might be expected to be economically self-reliant, whether the child is "healthy" or "disabled" or "impaired" but with a deduction from the amount of such damages for the joy and benefits received, and the potential economic support derived, from the child.
>
> (3) That no damages may be recovered where the child is born healthy and without disability or

impairment.

4. An orthodox application of familiar and conventional principles of the law of tort would, I think, have pointed towards acceptance of the first of these solutions. The surgeon whose allegedly negligent advice gave rise to the action was exercising his professional skill for the benefit of the McFarlanes who relied on it. The foreseeable result of negligent advice would be the birth of a child, the very thing they wished to avoid. No one can be unaware that bringing up a child has a financial cost. All members of the House accepted that the surgeon owed *a* duty of care to the McFarlanes, and the foreseeable result was that which occurred. Thus the proven violation of a legal right would lead to a compensatory remedy. I do not find it surprising that this solution has been supported by the line of English authority which preceded *McFarlane* ***, by the Inner House in *McFarlane* itself ***, by decisions of the Hoge Raad in the Netherlands and the Bundesverfassungsgericht in Germany ***, and now by a majority of the High Court of Australia. Faithful adherence to the precepts articulated by Lord Scarman in *McLoughlin v. O'Brian* [1983] 1 AC 410, 429-430 would have pointed towards adoption of this first solution.

5. The second solution has been adopted in 6 state courts in the United States (see La Croix and Martin, "Damages in Wrongful Pregnancy Tort Actions", in Ireland and Ward, *Assessing Damages in Injuries and Deaths of Minor Children* (2002) 93, 97-98, quoted by Callinan J in his judgment in *Melchior*, paragraph 287). But this solution did not commend itself to any member of the House in *McFarlane* or any member of the High Court in *Melchior*, it was not supported by counsel in the present appeal and the objections to it are in my opinion insuperable. While it would be possible to assess with some show of plausibility the likely discounted cost of rearing a child until the age when the child might reasonably be expected to become self-supporting, any attempt to quantify in money terms the value of the joys and benefits which the parents might receive from the unintended child, or any economic benefit they might derive from it, would, made when the child is no more than an infant, be an exercise in pure speculation to which no court of law should lend itself. I need say no more of this possible solution.

6. The five members of the House who gave judgment in *McFarlane* adopted different approaches and gave different reasons for adopting the third solution listed in paragraph (3) above. *** The policy considerations underpinning the judgments of the House were, as I read them, an unwillingness to regard a child (even if unwanted) as a financial liability and nothing else, a recognition that the rewards which parenthood (even if involuntary) may or may not bring cannot be quantified and a sense that to award potentially very large sums of damages to the parents of a normal and healthy child against a National Health Service always in need of funds to meet pressing demands would rightly offend the community's sense of how public resources should be allocated. ***

8. My concern is this. Even accepting that an unwanted child cannot be regarded as a financial liability and nothing else and that any attempt to weigh the costs of bringing up a child against the intangible rewards of parenthood is unacceptably speculative, the fact remains that the parent of a child born following a negligently performed vasectomy or sterilisation, or negligent advice on the effect of such a procedure, is the victim of a legal wrong. The members of the House who gave judgment in *McFarlane* recognised this by holding, in each case, that some award should be made to Mrs McFarlane (although Lord Millett based this on a ground which differed from that of the other members and he would have made a joint award to Mr and Mrs McFarlane). I can accept and support a rule of legal policy which precludes recovery of the full cost of bringing up a child in the situation postulated, but I question the fairness of a rule which denies the victim of a legal wrong any recompense at all beyond an award immediately related to the unwanted pregnancy and birth. *** To speak of losing the freedom to limit the size of one's family is to mask the real loss suffered in a situation of this kind. This is that a parent, particularly (even today) the mother, has been denied, through the negligence of another, the opportunity to live her life in the way that she wished and planned. I do not think that an award immediately relating to the unwanted pregnancy and birth gives adequate recognition of or does justice to that loss. I would accordingly support the suggestion favoured by Lord Millett in *McFarlane* (at p 114) that in all cases such as these there be a conventional award to mark the injury and loss, although I would favour a greater figure than the £5,000 he suggested (I have in mind a conventional figure of £15,000) and I would add this to the award for the pregnancy and birth. This solution is in my opinion consistent with the ruling and rationale of *McFarlane*. The conventional award would not be, and would not be intended to be, compensatory. It would not be the product of calculation. But it would not be a nominal, let alone a derisory, award. It would afford some measure of recognition of the wrong

done. And it would afford a more ample measure of justice than the pure *McFarlane* rule.

9. I would for my part apply this rule also, without differentiation, to cases in which either the child or the parent is (or claims to be) disabled:

> (1) While I have every sympathy with the Court of Appeal's view that Mrs Parkinson should be compensated, it is arguably anomalous that the defendant's liability should be related to a disability which the doctor's negligence did not cause and not to the birth which it did. ***
>
> (3) It is undesirable that parents, in order to recover compensation, should be encouraged to portray either their children or themselves as disabled. There is force in the points made by Kirby J in paragraphs 163-166 of his judgment in *Melchior*.
>
> (4) In a state such as ours, which seeks to make public provision for the consequences of disability, the quantification of additional costs attributable to disability, whether of the parent or the child, is a task of acute difficulty. This is highlighted by the inability of the claimant in this appeal to give any realistic indication of the additional costs she seeks to recover.

10. I would accordingly allow the appeal, set aside the orders of the Court of Appeal and of the Deputy Judge, and order that judgment be entered for the claimant for £15,000. ***

LORD NICHOLLS, LORD MILLETT AND LORD SCOTT concurred separately; LORD STEYN, LORD HOPE AND LORD HUTTON dissented separately.

REFLECTION:

- *In what sense is carelessly caused pregnancy a tortious injury? What jurisprudential, ethical and practical challenges arise in assessing the damage flowing from involuntary parenthood?*
- *Does the House of Lords' approach to causation differ in this case from the negligence claim regarding the conception of a child in Khan v. Meadows (§19.4.3.2)?*

19.10.1.2 PP v. DD [2017] ONCA 180

✗REF: §6.3.2.2, §10.1.2

ROULEAU J.A.: ***

The damages issue in involuntary parenthood cases

47. There have been numerous cases dealing with involuntary parenthood both in Canada and abroad. These normally involve law suits brought by parents against health care providers whose negligence resulted in the unwanted birth of a child. Recovery in such claims has generally been allowed for the damages suffered as a result of the pregnancy and birth of the child, but not for the cost associated with the mere fact of having become a parent or raising a healthy child. Although some jurisdictions—such as Quebec (see *Suite c. Cooke*, [1995] R.J.Q. 2765 (C.A. Que.)), New Brunswick (see *Stockford v. Johnston Estate*, 2008 NBQB 118, 335 N.B.R. (2d) 74 (N.B. Q.B.)), and Australia (see *Cattanach v. Melchior*, [2003] H.C.A. 38, 199 A.L.R. 131 (Australia H.C.))—have allowed some form of recovery for the cost of raising a healthy child,[635] Ontario courts have, to date, generally not followed that approach in involuntary parenthood cases: see *Paxton v. Ramji*, 2008 ONCA 697, 92 O.R. (3d) 401 (Ont. C.A.), at n. 7. In the oft-cited case of *Kealey v. Berezowski* (1996), 30 O.R. (3d) 37 (Ont. Gen. Div.), Lax J. discussed the question at length and held that, while the general principles for the award of damages for child-rearing costs should evolve on a case-by case basis,

> [t]he responsibilities and the rewards [of rearing a child] are inextricably bound together and do not neatly balance one against the other, at least not in the case of children. Who can say whether the

[635] The result in Cattanach was subsequently modified by legislation in three Australian states, essentially restricting recovery for involuntary parenthood to the extra cost of raising a child born with a disability: see B. Feldthusen, "Supressing Damages in Involuntary Parenthood Actions," (2014) 29 Can. J. Fam. L. 11, n.12.

> time, toil and trouble, or the love, guidance and money which parents devote to a child's care and upbringing, will bring rewards, tangible or intangible, today, tomorrow or ever. No court can possibly determine this in any sensible way. Nor should it attempt to do so…. The responsibilities and the rewards cancel each other out.

48. The issue of damages in involuntary parenthood cases was extensively considered by the House of Lords in *McFarlane v. Tayside Health Board (Scotland)*, [1999] 4 All E.R. 961, [2000] 2 A.C. 59 (U.K. H.L.) and again in *Rees v. Darlington Memorial Hospital NHS Trust*, [2003] UKHL 52, [2004] 1 A.C. 309 (U.K. H.L.). Both of these cases dealt with the most common form of such claims, that is, those brought by one or both parents against third-party health care providers.

49. In *McFarlane*, the plaintiff's husband had a vasectomy and was advised that his sperm count was nil and that contraceptive precautions were no longer necessary. The couple acted on that advice and the plaintiff subsequently became pregnant and delivered a healthy child. The parents alleged that they had suffered loss as a result of the health board's negligence. The plaintiff sought damages from the health board for pain and suffering arising out of pregnancy and labour as well as for the financial consequences of the parents' duty to raise the child, whom they loved and cared for as an integral part of their family.

50. The House of Lords was unanimous in rejecting the claim for the financial cost of raising a healthy child. Although the reasoning adopted by each of the Lords varied, the ratio was fairly summarized in a lecture made to the Personal Injury Bar Association's Annual Conference in 2003 by Sir Roger Toulson, the chairman of the Law Commission. He described the House of Lords' reasoning as follows:

> Although at a detailed level there are therefore significant differences between the judgments, at a broader level two features dominate them. These are, first, the incalculability in monetary terms of the benefits to the parents of the birth of a healthy child; and, secondly, a sense that for the parents to recover the costs of bringing up a healthy child ran counter to the values which they held and which they believed that society at large could be expected to hold.

51. In the subsequent involuntary parenthood case of *Rees*, the plaintiff was a mother who did not want a child as she was severely visually disabled and would find it difficult to raise the child. As a result of the negligence of the health care provider, she gave birth to a healthy child. The House of Lords confirmed its decision in *McFarlane* and denied any recovery for the costs of raising the healthy child. In *Rees*, however, a majority of the House for different reasons supported a modest "conventional" award of £15,000 to the plaintiff mother who was raising the child (the father having taken no interest in the child), as a nominal, non-compensatory recognition of the mother's loss of autonomy.

52. In *Rees*, the Lords unanimously declined to reconsider the holding in *McFarlane*, upholding that decision's refusal to grant recovery of the costs of the child's upbringing. In his speech, Lord Millett reiterated his view, as expressed in *McFarlane*:

> In my opinion the law must take the birth of a normal, healthy baby to be a blessing, not a detriment. In truth it is a mixed blessing. It brings joy and sorrow, blessing and responsibility. The advantages and the disadvantages are inseparable. Individuals may choose to regard the balance as unfavourable and take steps to forgo the pleasures as well as the responsibilities of parenthood. They are entitled to decide for themselves where their own interests lie. But society itself must regard the balance as beneficial. It would be repugnant to its own sense of values to do otherwise. It is morally offensive to regard a normal, healthy baby as more trouble and expense than it is worth.

53. While the decision is controversial,[636] it is nonetheless relevant. In my view, the Lords' reasoning to the effect that the kind of damage sought by the appellant is fundamentally incalculable and not recoverable in

[636] See, for example: J. K. Mason, *The Troubled Pregnancy: Legal Wrongs and Rights in Reproduction* (Cambridge: CUP, 2007), at p. 163; J. C. Thompson, "You Should Never Look a Gift Horse in the Mouth: One-Size-Fits-All Compensation in Wrongful Conception" (2012) 2 Westminster Law Review 73-96; N. M. Priaulx, "Damages for the 'Unwanted' Child: Time for a Rethink?" (2005) 73 Medico-Legal Journal 152-63; B. Feldthusen, "Supressing Damages", *supra*.

tort has particular force in the circumstances of this case, namely where a father claims damages as against a mother for the emotional and/or economic costs associated with the rearing of a healthy child.

54. There is no determinative precedent in Canada respecting a claim by one or other parent against a third party for involuntary parenthood involving a healthy child and that issue is not before us in this case. However, the incalculability of any purported loss is particularly acute where the claim is made not by the parents as against a third party, but by one parent as against the other parent with whom he shares equally the legal and moral responsibility of maintaining the child. *** [T]o award damages in this case would be contrary to the spirit and purpose of Ontario's statutory family law regime. ***

REFLECTION:

- *Why have courts been reluctant to award a parent of a wrongfully conceived child damages equivalent to the costs of raising the child? Why might the decision to refuse such damages awards be controversial?*

19.10.2 Parent claim of wrongful birth

19.10.2.1 Arndt v. Smith [1997] CanLII 360 (SCC)

Supreme Court of Canada – 1997 CanLII 360

MCLACHLIN J. (concurring in part):

31. The plaintiff Arndt sues for costs associated with rearing her daughter, who was congenitally injured by chickenpox. The plaintiff contends that had her physician properly advised her of the risk of injury to her fetus, she would have aborted the pregnancy and avoided the costs she now incurs. The defendant Smith contends that the plaintiff would not have aborted the pregnancy even if she had been fully advised, and therefore asserts that the loss claimed was not caused by the failure to advise of risk. The issue on appeal is what legal principles a trial judge, facing an issue such as this, should apply in determining whether the loss claimed was caused by the failure to advise of the risk. ***

33. It is a fundamental rule of tort law that the plaintiff must prove two things. First, the plaintiff must prove that the defendant breached a duty owed to the plaintiff. Second, the plaintiff must prove that the breach caused the loss for which the plaintiff claims damages. The trial judge found the plaintiff had satisfied the first requirement of proving breach, but had failed to establish that she would have had an abortion had she been properly advised. He dismissed her claim on the ground that she had failed to establish that the breach had caused the loss: 93 B.C.L.R. (2d) 220 (B.C. S.C.).

34. The trial judge, although alluding to a "reasonable person" test, asked himself whether, on all the evidence, the plaintiff would have chosen to abort her pregnancy had she been advised of the risk of injury to her fetus from her chickenpox. Evaluating her testimony at trial that she would have had an abortion against the fact that she desired a child, that she was sceptical of "mainstream" medical intervention, that an abortion in the second trimester held increased risks and that an abortion would have required the approval of a committee on health grounds, the trial judge concluded that the plaintiff would not, on a balance of probabilities, have aborted the pregnancy. Also supportive of the trial judge's conclusion was evidence that the risk of serious injury to the fetus was very small and medical advisors would have recommended against an abortion.

35. The Court of Appeal held that the trial judge applied the wrong test and directed a new trial: 6 B.C.L.R. (3d) 201 (B.C. C.A.). Lambert J.A. and Wood J.A. held that the law required the judge to determine not what this plaintiff would have done, but what a hypothetical reasonable person in her position would have done. ***

39. Applying the law of negligence, is the proper test what the particular plaintiff before the court would have done had she been fully informed, or what a hypothetical reasonable person would have done?

40. The fundamental principles of negligence law suggest that the test is what the particular plaintiff before the court would have done. Breach established, the question in a negligence action is whether the breach

caused loss to the plaintiff. This is a factual, not a hypothetical, inquiry. In cases of negligent action or misfeasance, the matter is clear. If a plaintiff breaks her leg as a result of being struck by a negligently driven automobile, the question is not whether a reasonable person so struck would have broken her leg; it is whether she, the particular plaintiff at bar, in fact broke her leg. There is no reason in principle why the inquiry should be different where the claim is based on the defendant's failure to act or non-feasance, raising the question of what the plaintiff would have done in a hypothetical state of affairs. ***

42. The physician's failure to advise constitutes a failure to take an action required by law. *** General tort principles suggest that this question is a purely factual inquiry to be answered by reference to all the evidence. This evidence may include evidence from the plaintiff at trial as to what she would have done. But it also includes relevant evidence of her situation, circumstances and mind-set at the time the decision would have been made. The trial judge must look at all the evidence and determine whether the plaintiff would have taken the suggested course on a balance of probabilities. One way of expressing this is to say that the plaintiff's hindsight assertion at trial of what she would have done is tested or evaluated by reference to the evidence as to her circumstances and beliefs at the time the decision would have been made. These circumstances include the medical advice she would have received at the time which might have influenced her decision. In this way, the plaintiff's subjective evidence as to what she would have done is evaluated by reference to the reasonableness of the competing courses of action. As Sopinka J. (dissenting, but not on this ground) put it in *Hollis v. Birch*, [1995] 4 S.C.R. 634 (S.C.C.), at p. 689: "the most reliable approach in determining *what would in fact have occurred* is to test the plaintiff's assertion by reference to objective evidence as to what a reasonable person would have done" (emphasis in original). ***

44. The approach suggested by the fundamental principles of tort law is subjective, in that it requires consideration of what the plaintiff at bar would have done. However, it incorporates elements of objectivity; the plaintiff's subjective belief at trial that she would have followed a certain course stands to be tested by her circumstances and attitudes at the time the decision would have been made as well as the medical advice she would have received at the time.

55. I conclude that while views diverge, the preponderance of authority in other common law jurisdictions as well as academic commentary support a test which asks what the particular plaintiff would have done in all the circumstances, but accepts that the reasonableness of the one choice over another, as reflected in the medical advice the plaintiff would have received, is an important factor bearing on that decision. ***

72. I find no legal basis for interference with the trial judge's conclusion that the plaintiff failed to establish on a balance of probabilities that had she been given the required information concerning risk, she would have ended her pregnancy. ***

CORY J. (LAMER C.J.C., LA FOREST, L'HEUREUX-DUBÉ, GONTHIER, MAJOR JJ. concurring): ***

2. The starting point for this question must be *Reibl v. Hughes*, [1980] 2 S.C.R. 880 (S.C.C.), which set out the basic principles for assessing causation in cases involving allegations of negligence by doctors. *Reibl* involved an action by a patient against a surgeon for failing to warn him of the risk of paralysis associated with the elective surgery performed by that surgeon. One of the defences raised was that even if the surgeon had disclosed all of the risks of the procedure, the plaintiff would nonetheless have gone ahead with the operation. In other words, the physician disputed whether his negligent failure to disclose had, in fact, caused the plaintiff's loss.

3. The question presented to the Court was how to determine whether the patient would have actually chosen to decline the surgery if he had been properly informed of the risks. ***

4. Laskin C.J. *** rejected the pure subjective approach to causation. He explained at p. 898 that the plaintiff's testimony as to what he or she would have done, had the doctor given an adequate warning, is of little value. *** [T]he plaintiff would always testify that the failure to warn was the determining factor in his or her decision to take the harmful course of action. Accordingly the subjective test would necessarily cause the trier of fact to place too much weight on inherently unreliable testimony.

5. While an objective test would prevent an inappropriate emphasis being placed on the plaintiff's testimony, Laskin C.J. thought that a purely objective test also presented problems. ** In short, the purely objective

standard might result in undue emphasis being placed on the medical evidence, essentially resulting in a test which defers completely to medical wisdom.

6. To balance the two problems, Laskin C.J. opted for a modified objective test for causation, which he set out at length at pp. 898-900:

> I think it is the safer course on the issue of causation to consider objectively how far the balance in the risks of surgery or no surgery is in favour of undergoing surgery. The failure of proper disclosure pro and con becomes therefore very material. And so too are any special considerations affecting the particular patient. For example, the patient may have asked specific questions which were either brushed aside or were not fully answered or were answered wrongly. In the present case, the anticipation of a full pension would be a special consideration, and, while it would have to be viewed objectively, it emerges from the patient's particular circumstances. So too, other aspects of the objective standard would have to be geared to what the average prudent person, the reasonable person in the patient's particular position, would agree to or not agree to, if all material and special risks of going ahead with the surgery or foregoing it were made known to him. *** These words are as persuasive today as they were when they were written. The test enunciated relies on a combination of objective and subjective factors in order to determine whether the failure to disclose *actually* caused the harm of which the plaintiff complains. It requires that the court consider what the reasonable patient *in the circumstances of the plaintiff* would have done if faced with the same situation. The trier of fact must take into consideration any "particular concerns" of the patient and any "special considerations affecting the particular patient" in determining whether the patient would have refused treatment if given all the information about the possible risks. ***

10. An example may serve to illustrate this. Imagine a patient considering plastic surgery on his nose. During a pre-operative consultation, the patient asks if the surgery will affect his sense of smell. The physician fails to fairly and adequately explain the attendant risks to this sensory function and does not mention that a certain percentage of patients suffer a permanent loss of a small fraction of their ability to smell. After the surgery, the patient can no longer smell with the same acuity food that is cooking. Under Laskin C.J.'s test in ***Reibl***, the patient's question about the risks to his sense of smell are clearly relevant. The question posed suggests that the patient had a special concern about losing the sense of smell. This is not an unreasonable concern. The loss of a keen sensory perception of smell which is so closely related to the sense of taste is crucial to both those who artistically prepare and those who have a particular appreciation for finely prepared food. This special fear of the loss of a keen sense of smell could be considered by the trier of fact in determining whether the reasonable person with the particular expressed concern of the plaintiff would have consented to the proposed course of treatment if all the risks had been disclosed. ***

12. As further evidence that the patient's state of mind is relevant to the ***Reibl*** test, Laskin C.J. goes on at pp. 899-900 to caution that the trier of fact may only take into account those particular concerns of the patient which are reasonable.

> [T]he patient's particular concerns must also be reasonably based … Thus, for example, fears which are not related to the material risks which should have been but were not disclosed would not be causative factors.

Clearly, evidence of *reasonable* fears and concerns can be taken into consideration and this is evidence which could go to establishing the plaintiff's subjective state of mind. Therefore, it is apparent that Laskin C.J. intended that the reasonable subjective beliefs of the patient should be attributed to the hypothetical reasonable person used to set the objective standard in order to properly reflect the circumstances of the plaintiff.

13. If the patient's fears and beliefs were not considered when assessing how the "reasonable person in the plaintiff's position" would have responded had all risks of a procedure been disclosed, absurd verdicts could be produced. For example, let us suppose that a plaintiff brought an action based on her doctor's failure to disclose that there was a very significant risk of her giving birth to a disabled child, that the risk was material and the only issue was causation. If the plaintiff's beliefs are not to be considered, the trier of

fact could conclude that a reasonable person in the position of the plaintiff would have chosen to terminate the pregnancy and find in favour of the patient even if the plaintiff was so resolutely and unalterably opposed to abortion that she would never have terminated the pregnancy. The failure to disclose would not have been the actual cause of the harm. Despite this, under the purely objective standard, the plaintiff could recover. This example demonstrates why it is important to include some subjective aspects in the assessment of what the reasonable person in the position of the plaintiff would have done if all the risks had been disclosed. ***

18. Turning now to this appeal, it is appropriate to infer from the evidence that a reasonable person in the plaintiff's position would not have decided to terminate her pregnancy in the face of the very small increased risk to the fetus posed by her exposure to the virus which causes chickenpox. Ms. Arndt did make a very general inquiry concerning the risks associated with maternal chickenpox. However, it should not be forgotten that the risk was indeed very small. In the absence of a specific and clearly expressed concern, there was nothing to indicate to the doctor that she had a particular concern in this regard. It follows that there was nothing disclosed by Ms. Arndt's question which could be used by the trier of fact as an indication of a particular fear regarding the possibility of giving birth to a disabled child which should be attributed to the hypothetical reasonable person in the patient's situation. Further, factors such as the plaintiff's desire for children and her suspicion of the mainstream medical profession can be taken into consideration when determining what a reasonable person in the plaintiff's position would have done if informed of the risks. It is not necessary to assess the relative importance these beliefs would have in the determination of the question of causation. It is sufficient to observe that all these are factors indicating the state of mind of the plaintiff at the time she would have had to make the decision, and therefore may be properly considered by the trier of fact. I agree with the trial judge that the failure to disclose some of the risks to the fetus associated with maternal chickenpox did not affect the plaintiff's decision to continue the pregnancy to term. It follows that the failure to disclose did not cause the financial losses for which the plaintiff is seeking compensation.

19. I would allow this appeal, set aside the judgment of the Court of Appeal and reinstate the judgment of the trial judge. ***

SOPINKA AND IACOBUCCI JJ. (dissenting): ***

30. Because of the flaws in the trial judge's consideration of causation, in our view his judgment cannot stand. We would dismiss the appeal and order a new trial on causation, applying the test set out in McLachlin J.'s reasons. ***

REFLECTION:

- *What was the appropriate counterfactual scenario to help determine whether the doctor was a but-for cause of Arndt's daughter's being born with congenital injuries?*
- *In cases of careless professional failure to advise, what is problematic about applying a pure subjective approach to causation? What is problematic about not undertaking a subjective enquiry?*
- *Is this case materially equivalent to Powell v. University Hospitals Sussex (§16.1.4)? Are the cases distinguishable from each other?*

19.10.3 Child claim of wrongful pre-natal treatment

19.10.3.1 Liebig v. Guelph General Hospital [2010] ONCA 450

Ontario Court of Appeal – 2010 ONCA 450

GOUDGE, FELDMAN, SHARPE, GILLESE, LAFORME JJ.A.:

1. This appeal arises from a rule 21.01 order to determine a point of law on the pleadings in relation to the claim brought by the infant plaintiff Kevin Liebig.

2. *** The defendants are the hospital, the physicians and the nurses who provided maternal-fetal care up to and including delivery. Kevin Liebig suffered hypoxic-ischemic encephalopathy during childbirth resulting in cerebral palsy. The plaintiffs allege that Kevin Liebig's injuries were caused by the negligence (or breach

of contract) of the defendants immediately before and during the delivery process.

3. The motion arose following a request made by the plaintiffs to the defendants to admit that they owed a duty of care to the infant plaintiff in relation to his delivery. The defendants refused to give an affirmative response to the request to admit and gave the following reason for their refusal: "No such duty of care exists in law".

4. The plaintiffs then moved for a declaration before trial, pursuant to Rule 21, that the defendants owed a duty of care to Kevin in relation to his delivery. The motion judge reviewed the relevant case law and granted the plaintiffs the declaration they sought. ***

6. In our view, this appeal may be properly decided on the basis of the very long and well-established line of cases, duly cited by the motion judge, holding that an infant, once born alive, may sue for damages sustained as a result of the negligence of health care providers during labour and delivery: see *Crawford v. Penney* (2003), 14 C.C.L.T. (3d) 60 (Ont. S.C.J.) at para. 210, aff'd (2004), 26 C.C.L.T. (3d) 246 (Ont. C.A.); *Commisso v. North York Branson Hospital* (2000), 48 O.R. (3d) 484 (Ont. S.C.J.) at para. 23.

7. These cases follow from the general principle that "a child may sue in tort for injury caused before birth", although the legal status to sue arises "only when the child is born" and "damages are assessed only as at the date of birth": see *Winnipeg Child & Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925 (S.C.C.) at para. 21; *Montreal Tramways Co. v. Léveillé*, [1933] S.C.R. 456 (S.C.C.); *Duval v. Seguin* (1973), 1 O.R. (2d) 482 (Ont. C.A.); *Family Law Act*, R.S.O. 1990, c. F.3, s. 66.

8. As the facts alleged in the present case clearly fall within an established category where a duty of care exists, it is not necessary to engage in a *Cooper-Anns* analysis: see *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 S.C.R. 114 (S.C.C.) at para. 5 [§17.1.2]; *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, [2007] 3 S.C.R. 129 (S.C.C.) at para. 25 [§13.4.2.2]; *Childs v. Desormeaux*, [2006] 1 S.C.R. 643 (S.C.C.) at para. 15 [§13.4.2.1].

9. The central point of contention before both the motion judge and this court arises from the defendants' contention that two recent decisions of this court—*Bovingdon v. Hergott* (2008), 88 O.R. (3d) 641 (Ont. C.A.) and *Paxton v. Ramji* (2008), 299 D.L.R. (4th) 614 (Ont. C.A.)—introduced a fundamental change to the law that requires us to depart from this established line of authority and to hold that Kevin Liebig has no cause of action against them. The plaintiffs dispute this proposition and add that if *Bovingdon* and *Paxton* do go that far, they should be overruled.

10. Both *Bovingdon* and *Paxton* dealt with the situation of a doctor prescribing drugs to a woman who was not pregnant at the time. In *Bovingdon*, the drug was a fertility drug that increased the likelihood of bearing twins and, by extension, the risk of complications associated with the birth of twins. In *Paxton*, the drug was intended to treat the woman's acne, but could harm a foetus if conception were to occur while it was being taken. Both the doctor and the woman believed that the woman could not become pregnant because her husband had undergone a vasectomy years earlier.

11. Cases in the vein of *Bovingdon* and *Paxton*, which involve claims made by infants yet to be conceived at the time the alleged negligence occurred, have been characterized as and rejected by other courts as claims for "wrongful life": see *Lacroix v. Dominique* (2001), 202 D.L.R. (4th) 121 (Man. C.A.) leave to appeal denied (2002), [2001] S.C.C.A. No. 477 (S.C.C.); *McKay v. Essex Area Health Authority*, [1982] Q.B. 1166 (Eng. C.A.). In *Bovingdon* and *Paxton*, however, this court held that the "wrongful life" approach ought not to be used. The court proceeded not by determining whether to recognize a claim for "wrongful life", but by conducting an analysis of whether a doctor owed a separate duty of care to a future child. Both *Bovingdon* and *Paxton* hold that there is no duty of care to a future child if the alleged negligence by a health care provider took place prior to conception. ***

13. We do not read those passages as governing the issue raised on this appeal. In accordance with the tradition of the common law and the doctrine of precedent, *Paxton* and *Bovingdon* must be read in the light of their precise facts, the issues they addressed, and in a proper legal context: see Rupert Cross, *Precedent in English Law*, 2nd ed. (Oxford: OUP, 1968) at pp. 39-43. In our view, the authority of the labour and delivery cases remains intact and is unaffected by *Bovingdon* and *Paxton*. ***

16. *** [T]he facts of this case fall within the familiar and well-established category of labour and delivery cases where it has never been seriously questioned that negligent health care providers are liable. As we can decide this case on the basis of this body of case law, we need not venture into less familiar territory or speculate as to how the law might evolve with respect to other scenarios. ***

18. Our refusal to engage in making the kind of sweeping statements requested by the parties does not amount to an abdication of our duty as an appellate court to provide the guidance required to ensure that the law of Ontario is administered in an orderly and consistent fashion. Difficult cases are bound to arise in this area of the law. When such cases do arise, the courts will be guided by certain established legal principles that have evolved in this contentious area of law. We have already mentioned one of those principles, namely, that a child born alive may sue in tort for injury caused before birth. Other relevant principles were canvassed in written and oral argument before us, including:

> • "[T]he law of Canada does not recognize the unborn child as a legal or juridical person": *Winnipeg Child & Family Services* at para. 11; *Tremblay v. Daigle*, [1989] 2 S.C.R. 530 (S.C.C.) at p. 553.
>
> • The primacy of maternal autonomy concerning choices made regarding preconception and pre-natal medical treatment: *Winnipeg Child & Family Services* at paras. 37-39.
>
> • Maternal immunity from suit by the infant after birth for pre-natal injuries: *Dobson v. Dobson*, [1999] 2 S.C.R. 753 (S.C.C.). ***

20. As we can decide this case on the basis of established case law, in keeping with the tradition and spirit of the common law, we refrain from doing any more. ***

REFLECTION:

- *How did the Court distinguish between "wrongful life" claims and the duty of care to a future child?*
- *Why did the Court decline the opportunity to consider the duty of care owed to a future child beyond established precedent? Was the Court right not to "venture into less familiar territory"?*

19.10.4 Child claim of wrongful life

19.10.4.1 Florence v. Benzaquen [2021] ONCA 523

Ontario Court of Appeal – 2021 ONCA 523, leave denied: 2022 CanLII 21667 (SCC)

GILLESE J.A. (MACPHERSON J.A. concurring): ***

2. Dana Florence began taking Serophene, a fertility drug, in early July 2007. She was 25 years old and had been attempting to conceive for only a few weeks. By the end of July, Ms. Florence was pregnant. On January 1, 2008, at 26 weeks' gestation, she gave birth to triplets: Brody, Cole, and Taylor (the "Appellants"). As a result of having been born prematurely, the Appellants have serious disabilities.

3. In 2011, Ms. Florence and her husband, Jared Florence, together with the Appellants[637] (collectively, the "Plaintiffs") commenced this action in which they claim against Dr. Benzaquen (the "Respondent") in negligence (the "Action").[638] The Respondent was Ms. Florence's gynecologist from 2004-7 and had prescribed the Serophene.

4. In the Action, the Plaintiffs claim that Ms. Florence was not given all the information necessary to make an informed decision about the use of Serophene. *** They plead that if Ms. Florence had been aware of the significant risks associated with multiple births, she would not have taken Serophene.

5. In the Action, the Appellants assert that they brought it in "their own right". Below and on appeal, the

[637] As minors, the Appellants' claims are brought by their mother, in her role as their litigation guardian.
[638] The Action was commenced by Notice of Action issued March 25, 2011. It was originally brought against Dr. Benzaquen and Dr. Barrett. Dr. Barrett was the obstetrician who managed Ms. Florence's pregnancy. On June 4, 2018, the Action was dismissed, on consent, as against Dr. Barrett.

Appellants argue that their case is not predicated on the issue of their mother's informed consent. Rather, they assert that the Respondent owed a concurrent duty of care to their mother and to them to not prescribe to their mother a contraindicated and potentially dangerous medication (Serophene) that the Respondent knew, or ought to have known, could cause harm not only to Ms. Florence but also to them. ***

8. In her reasons (the "Reasons"), the motion judge concluded that the Appellants' claims are not recognized at law and, thus, they have no viable cause of action. ***

The Motion Judge's Reasons ***

15. The motion judge described a claim for wrongful life as one asserted by the child for a pregnancy that results in birth defects and where the child argues that, but for the negligence of the doctor, the child would not have been born.

16. The motion judge then discussed the relevant caselaw, beginning with *Dobson (Litigation Guardian of) v. Dobson,*, [1999] 2 S.C.R. 753, in which the Supreme Court held no duty of care could or should be imposed on a pregnant woman to her fetus or subsequently born child.

17. Next, the motion judge discussed *Lacroix (Litigation Guardian of) v. Dominique*, 2001 MBCA 122, 202 D.L.R. (4th) 121, leave to appeal refused, [2001] S.C.C.A. No. 477. In *Lacroix*, a claim was brought because of abnormalities to a child caused by epilepsy medication the mother had taken while pregnant. The Manitoba Court of Appeal described the case as one of wrongful life because, had the mother known the effect of the medication, she either would not have taken it while pregnant or she would not have become pregnant; thus, the child would not have been born. The court did not recognize an action for wrongful life. It followed the reasoning in *McKay v. Essex Area Health Authority*, [1982] Q.B. 1166 (Eng. C.A.), and held that a doctor did not owe a future child a duty of care to not prescribe a medication to the mother because the imposition of such a duty "would immediately create an irreconcilable conflict between the duty owed by the doctor to the child and that owed to the mother": at para. 39. In *Lacroix*, the court also said that claims based on the imposition of a duty on doctors to a future child are contrary to public policy because it would be impossible to assess damages.

18. The motion judge then summarized three Ontario appellate decisions discussed later in these reasons: *Bovingdon (Litigation Guardian of) v. Hergott*, 2008 ONCA 2, 88 O.R. (3d) 641, leave to appeal refused, [2008] S.C.C.A. No. 92; *Paxton v. Ramji*, 2008 ONCA 697, 92 O.R. (3d) 401, leave to appeal refused, [2008] S.C.C.A. No. 508; and, *Liebig v. Guelph General Hospital*, 2010 ONCA 450, 321 D.L.R. (4th) 378. ***

This Court's Caselaw

35. The primary task on this appeal is to determine whether the motion judge properly adhered to this court's jurisprudence. Consequently, before addressing the issues, it is necessary to carefully examine the decisions of this court in *Bovingdon*, *Paxton*, and *Liebig*.

Bovingdon

36. A doctor prescribed a fertility drug to Ms. Bovingdon. She became pregnant with twins and gave birth to them prematurely. The twins were profoundly disabled as a result of their premature birth. Ms. Bovingdon, her husband, the twins, and other family members sued the doctor claiming that he failed to provide Ms. Bovingdon with all the information necessary to make an informed decision whether to take the fertility drug. The jury found the doctor negligent for failing to provide Ms. Bovingdon with the necessary information. The jury further found that had she been given that information, Ms. Bovingdon would not have taken the fertility drug. ***

40. In *Bovingdon*, Feldman J.A. concluded that the doctor did not owe a duty of care to future children not to cause them harm by prescribing the fertility drug to the mother. The doctor owed a duty of care only to the mother to provide her with sufficient information to make an informed decision whether to take the fertility drug; so long as that was done, the decision whether to take the drug was entirely that of the mother.

41. Justice Feldman viewed policy analysis as supporting her conclusion: a co-extensive duty of care to a future child would create a potential conflict of interest for the doctor, given the doctor's duty to the mother. The policy of ensuring that women's choice of treatment be preserved further supported her conclusion that the doctor owed no legal duty to the future children. ***

Paxton

43. In *Paxton*, a doctor prescribed Accutane, an acne medication, to the mother of the appellant child on the understanding that she could not get pregnant while taking the medication. The doctor's understanding—shared by the mother—was based on the appellant's father having had a vasectomy four and a half years earlier, which had been successful up to the time the mother became pregnant with the appellant. The appellant, her parents, and her siblings sued the doctor.

44. The trial judge found that the doctor owed a duty of care to the appellant pre-conception to not prescribe Accutane to her mother without taking all reasonable steps to ensure the mother would not become pregnant while taking the medication. However, the trial judge found that the doctor met the standard of care by relying on the father's vasectomy as an effective form of birth control. Accordingly, the trial judge dismissed the appellant's action against the doctor.

45. The appellant appealed to this court. Justice Feldman, writing for the court, agreed that the appellant's action against the doctor should be dismissed but did so because she concluded that the doctor did not owe a duty of care to the future child. She stated that, rather than deciding whether the appellant's claim was for wrongful life, the court should determine whether the doctor owed the future child a duty of care in accordance with the *Anns* test.

46. In *Paxton*, Feldman J.A. concluded that the potential for harm to a fetus while *in utero* from exposure to Accutane is reasonably foreseeable. However, the doctor and future child were not in a sufficiently "close and direct" relationship to make it fair and just that the doctor should owe a duty of care to the future child. The relationship was "necessarily indirect": the doctor could not advise or take instructions from a future child.

47. Justice Feldman also viewed policy considerations as militating against a finding of proximity. She pointed to the prospect of conflicting duties if the doctor were found to owe a duty of care to the future child as well as the mother, noting that these conflicting duties could well have an undesirable chilling effect on doctors.

48. Justice Feldman further found that residual policy considerations at the second stage of the *Anns* analysis make it unwise to impose such a duty of care. In addition to the policy issues she identified in the first stage of the analysis, Feldman J.A. said that recognizing such a duty would interfere with the doctor's existing legal obligation to the patient, which includes the women's right to abort a fetus. Imposing a duty of care on a doctor to a future child would interfere with the exercise of that right. ***

Issue #1: Did the motion judge err in failing to apply the "limited-form" Anns test to the facts of this case? ***

59. It is trite law that for a claim in negligence against a doctor to succeed, the plaintiff must establish that: the doctor owed the plaintiff a duty of care; the doctor breached the standard of care; and, the plaintiff suffered damages as a consequence of the breach.

60. In this case, there is no question that the doctor-patient relationship between the Respondent and Ms. Florence gave rise to a duty of care. In fulfilling that duty of care, among other things, the Respondent was obliged to give Ms. Florence the information necessary for her to make an informed decision whether to take medications that the Respondent prescribed to her. On the pleadings, the Respondent allegedly breached the standard of care by failing to give Ms. Florence the information necessary to make an informed decision whether to take Serophene and by prescribing Serophene to Ms. Florence when it was contraindicated.

61. The duty of care the Respondent owed to her patient, Ms. Florence, cannot be conflated with the

Respondent's obligation to meet the standard of care that she owed Ms. Florence. The additional allegation is relevant to whether the Respondent breached the standard of care; it is not relevant to whether she owed Ms. Florence a duty of care.

62. For the same reason, the additional allegation is not relevant to whether the Respondent owed the Appellants, as unconceived babies, a duty of care. A consideration of the *Anns* analysis demonstrates this. ***

64. The focus of the *Anns* analysis is on the relationship between the parties at the relevant time. In this case, as the motion judge correctly recognized, the Appellants' claims rest on the purported relationship between the Respondent and them, as unconceived babies, when the Respondent prescribed Serophene to their mother. That was the relationship which had to be examined, using the *Anns* analysis, to determine whether the Respondent owed the Appellants a duty of care.

65. The additional allegation is not part of the proposed relationship. It is an alleged breach of the standard of care. That is, it is an allegation that the Respondent fell below the standard of care either by prescribing Serophene to Ms. Florence or by failing to give Ms. Florence the necessary information so she could make an informed decision whether to take the Serophene. As I have explained, a consideration of the additional allegation would be undertaken only if the court had found that the Respondent owed the Appellants, as unconceived babies, a duty of care.

Issue #2: Did the motion judge err in her application of Bovington and Paxton? ***

68. *** I agree with the motion judge that the claims made in *Bovingdon* are very similar to those in this case for the purposes of the *Anns* analysis. In both, the doctor prescribed a fertility drug to the mother, allegedly having failed to provide her with sufficient information to make an informed decision whether to take the drug. ***

69. Nor are the similarities between this case and *Bovingdon* and *Paxton* superficial. In all three, the proposed duty of care was precisely the same: at the time that the doctor prescribed the medication to the mother, did the doctor owe the unconceived baby or babies a duty of care? ***

72. The Appellants contend that there would be no conflicting duties owed by the doctor in this case because the duty owed to Ms. Florence and the Appellants was one and the same: to not prescribe contraindicated and potentially dangerous medications. This argument arises from the same misunderstanding I identified in Issue #1. There is no "duty of care" to not prescribe contraindicated medication. Whether the medication is contra-indicated is not relevant when the court is determining whether the doctor owes a duty of care to unconceived babies as well as to the mother when the doctor is prescribing fertility medication.

73. In any event, the Appellants' contention is misguided. The conflict of interest consideration is part of the policy analysis in the stage one *Anns* analysis. Policy considerations are necessarily general in nature. In general, doctors would be placed in a conflict of interest position if they owed a duty of care to their patient and to that patient's future, unconceived children. While there might be situations in which no such conflict arises in respect of a particular medication or treatment, that does not derogate from the validity of the general policy concern that doctors would be placed in an unworkable position due to the inherent conflict of interest that would arise if they were found to owe a duty of care both to their patient and that patient's future children. The motion judge made no error in concluding that such a concurrent duty of care would place the doctor in an impossible position. ***

The Broader Issues ***

87. *** [A]t para. 11 of *Liebig*, a five-person panel of this court stated that both *Bovingdon* and *Paxton* hold that "there is no duty of care to a future child if the alleged negligence by a healthcare provider took place prior to conception" (the "Statement"). As a member of the panel that decided *Liebig*, I agreed with the Statement then and I agree with it now. ***

89. Further and importantly, the *Anns* analysis conducted by the motion judge in this case shows that,

based on this court's jurisprudence, the claims by unconceived babies against physicians for alleged negligence that occurred pre-conception will necessarily result in a determination that the claims are not viable in law. While the reasonable foreseeability requirement will normally be met, the policy considerations at both the first and second stages of the *Anns* analysis militate against finding such a duty of care. Those same proximity and policy considerations exist whenever the proposed duty of care by a future child is based on a physician's alleged negligence that occurred pre-conception.

90. *Stare decisis* is the policy of the courts to stand by precedent and not disturb settled points of law. Once a principle of law has been held to be applicable to a certain state of facts, the courts are to adhere to that principle, provided the facts of the case before them are substantially the same. Accordingly, in my view, in Ontario, it is settled law that a physician does not owe a duty of care to a future child for alleged negligence that occurred pre-conception.

Disposition

91. For these reasons, I would dismiss the appeal with costs to the respondents ***.

FAIRBURN A.C.J.O. (dissenting): ***

156. *** I do not read *Bovingdon*, *Paxton*, and *Liebig* as settling conclusively that there could never be any circumstances in which a physician owes a duty of care to a future child where the alleged negligence takes place prior to conception. *** I read those decisions as explicitly leaving the door open—even if just a crack—to the possibility that such a duty could exist.

157. I also do not accept the narrower proposition that, based on *Bovingdon*, it is settled law in Ontario that a physician could never owe a duty of care to future children when prescribing fertility drugs to the mother. I respectfully part ways with my colleague's view that whether a drug is "indicated" or "contraindicated" represents a factual "distinction without a difference", one that cannot possibly inform a relationship of proximity between the respondent and the appellants. While I would not suggest at this stage that it is a distinction with a dispositive difference, I would say that the matter needs to be explored with the benefit of a full record at trial, including expert evidence to amplify upon the concept of "contraindication".

158. Thus, on my reading of the relevant caselaw, it cannot be said that the claim of the appellants, who are all individuals in their own right, has no chance of success. Therefore, I would allow the appeal, set aside the dismissal of the claim on the r. 21 motion, and order that this matter proceed to trial.

REFLECTION:

- *What jurisprudential, ethical and practical considerations arise in determining whether a physician owes a duty of care to future children for alleged negligence that occurred prior to conception?*

19.10.5 Parent claim of wrongful in-vitro fertilisation

19.10.5.1 ACB v. Thomson Medical Pte Ltd [2017] SGCA 20

Court of Appeal of Singapore – [2017] SGCA 20

PHANG J.A. (FOR THE COURT): ***

3. The Appellant and her husband sought to conceive a child through in-vitro fertilisation ("IVF"). The Appellant underwent IVF treatment and delivered a daughter, whom we shall refer to as "Baby P". After the birth of Baby P, it was discovered that a terrible mistake had been made: the Appellant's ovum had been fertilised using sperm from an unknown third party instead of sperm from the Appellant's husband. The Appellant sued the Respondents in the tort of negligence and for breach for contract and sought damages for, among other things, the expenses she would incur in raising Baby P ("upkeep costs"). The Respondents conceded liability but argued that the Appellant should not be allowed to recover upkeep costs. *** The High Court Judge ("the Judge") agreed. In the penultimate paragraph of his judgment he added, "[w]ere the [Appellant] to succeed in her upkeep claim, whether in tort or in contract every cent spent in the upbringing of Baby P will remind her that it was money from compensation for a mistake. Baby P should not ever have

to grow up thinking that her very existence was a mistake" (see *ACB v. Thomson Medical Pte Ltd* [2015] 2 SLR 218 at [16] ("the Judgment")).

4. *** The question which was presented to us for determination was whether the Appellant was entitled to bring a claim for upkeep costs. The horns of the dilemma would appear to be these. On the one hand, if we refuse the award of upkeep costs, the Appellant would receive a comparatively modest award for (in the main) pain and suffering. This would appear to undercompensate the Appellant for the wrong which has been done to her—after all, the only reason why she elected to conceive *via* IVF was because she desired a child *with her husband*, but, because of the Respondents' mistake, she finds herself the mother of a child fathered by a *complete stranger*. On the other hand, the award of upkeep costs, it was argued, denigrates the worth of Baby P because it necessarily entails viewing her existence as a *continuing* source of loss to the Appellant, such that every dollar spent on raising her from the day of her birth until she reaches the age of majority sounds in damages.

5. There can be no doubt that this is a "hard case" (in both the colloquial and jurisprudential senses of the word) but if anything this calls for greater analytical clarity and rigour in order to avoid the reproach that hard cases make bad law (see the House of Lords decision of *Fairchild v. Glenhaven Funeral Services Ltd* [2002] 3 WLR 89 at [36], *per* Lord Nicholls of Birkenhead). Before we turn to the substance of our decision, however, we pause to emphasise a general point of the first importance. ***Nothing we say in this judgment should—or, indeed (as will be evident from the analysis that follows), could—be taken as a reflection of this court's view of the worth of Baby P. This is because that is not the issue before this court nor can it ever be. The life of every person carries with it its own inestimable value and dignity and the worth of a person can neither be enlarged nor its importance abridged by any pronouncement of this court.*** ***

Background ***

10. On 4 June 2012, the Appellant commenced Suit No 467 of 2012, suing all the Respondents in the tort of negligence ***. *** [T]he Appellant alleged that the mix-up had taken place due to the absence of proper safeguards to prevent the mishandling of specimens ***. ***

11. *** [T]he Appellant put forward two principal heads of claim. The first was for pain and suffering relating to the pregnancy as well as damages for mental distress. The second was for upkeep costs and it included, among other things, the cost of enrolling Baby P in an international school in Beijing where the Appellant and her Husband presently reside, the cost of tertiary education in Germany, travelling expenses, medical expenses, and the cost of feeding and caring for Baby P until she is financially self-reliant. For ease of reference, we shall refer to the second head of claim as the "upkeep claim". ***

The decision below ***

15. *** [T]he Judge concluded that the upkeep claim must fail for the simple reason that the Appellant "had wanted a second child all along" (at [15]). He noted that the authorities which were cited to him all concerned claims for upkeep costs arising out of the birth of children who had been conceived after the plaintiff-mothers had been negligently advised that sterilisation procedures they underwent were complete and that no contraception was required. These cases, which he noted were referred to variously as "wrongful birth", "unwanted birth" or "unwanted pregnancy" cases, were readily distinguishable as the plaintiffs there *did not wish to conceive*. By contrast, he observed, the Appellant *wanted* to have a second child and was prepared to expend money bringing up a second child (albeit one that she conceived with her Husband's sperm). This, he held, was "an important distinction", as it meant that it could "not be said that the [Appellant] and her husband were not contemplating having to expend money to bring up a child" (at [15]). On this basis alone, he held that the Appellant was not entitled to claim damages for upkeep costs in either contract or tort (at [17]).

16. Nevertheless, the Judge proceeded to express the view, albeit by way of *obiter dicta*, that there were "cogent policy considerations against finding liability for upkeep" (at [16]). Chief among his reasons was the sense that there was, in the words of Lord Millett in the House of Lords decision of *McFarlane v. Tayside Health Board* [1999] 3 WLR 1301 ("*McFarlane*") at 1345D which the Judge cited at [16] of the Judgment, "something distasteful, if not morally offensive, in treating the birth of a normal, healthy child as a matter for

compensation". To this, he added two more specific concerns. The first was the detrimental impact that an award of damages might have on Baby P's well-being; the second was his view any such award would be antithetical to the essence of a parent-child relationship (at [16]). ***

The upkeep claim

25. The basic question which is before this court can be framed as follows: Are the expenses which arise in relation to the unplanned birth of a healthy child who was born as a result of the negligence of a medical professional a compensable head of damage? ***

The landscape of reproductive wrongs

27. As the Judge rightly noted, this case is unlike most cases in which upkeep costs are sought. The premise of the Appellant's case is not that she did not want to conceive. Rather, it is quite the opposite—the Appellant actively desired to have a child and was fully willing to bear the costs of raising one, although she *only planned* to have a child that was conceived using *her Husband's sperm*. On this basis alone, the Judge held that the upkeep claim had to fail. With respect to the Judge, we do not think that this is correct. In order to properly analyse his decision, it is necessary for us to begin with a broad overview of the decided cases in this area.

Three categories of reproductive wrongs: wrongful life, wrongful birth, wrongful conception

28. The cases which were cited to us (and to the Judge) all concern claims for what we shall, for ease of exposition, term "reproductive wrongs". We will clarify immediately that what we have in our contemplation are not the full breadth of claims that may arise out of surgical or medical procedures which relate to reproductive medicine, but *only* those where the damage or loss relates to the unplanned birth of a child. In broad terms, the relevant cases in this area all possess the following four features (see Stephen Todd, "Wrongful Conception, Wrongful Birth and Wrongful Life" (2005) 27 Sydney Law Review 525 ("Todd"): (a) there is an allegation of wrongful conduct on the part of a healthcare professional (whether a doctor or a nurse or otherwise) in relation to the treatment of a patient or the patient's partner; (b) by reason of this, a child has been born; (c) if proper care had been taken, the child would not have been born; and (d) by reason of the birth either the parents or the child has suffered damage which consists of, among other things, upkeep costs.

29. These cases are all acutely difficult because they raise the question of whether, and if so, to what extent, "the expense associated with the unplanned … existence of a human being ought to be recognised in law as amounting to damage of a kind which can found an action" (see Todd at 526). In general terms, the cases in this area can be divided into three broad categories falling under the following headings: "wrongful life", "wrongful birth", and "wrongful conception". We note that the use of these terms is not without controversy, as they appear to carry with them a negative evaluation of the life which is brought into being (see Todd at 525). We clarify that is not our intention to espouse any such view, and we use these terms for the sake of exposition only.

> (a) Wrongful life claims are actions brought by the children themselves (that is to say, the children who are born as a result of the allegedly wrongful act of a healthcare professional) in circumstances when the children suffer from some disability or disadvantage. In bringing such claims, the children argue, in essence, that they would have been better off not being born at all and that the very fact of their birth is an injury for which they should be compensated.
>
> (b) Wrongful birth claims are brought by the parents of children who are born in circumstances where the healthcare professional had either failed to (i) inform them that the mother was pregnant; or (ii) to advise them, while the child was *in utero*, that the foetus would be born disabled. The essence of such a claim is that the mother would have terminated the pregnancy had she been informed timeously that she was pregnant or that the foetus which she was carrying would be born disabled. In broad terms, the healthcare professional is being held liable for the wrongful prolongation of a pregnancy—whether it be a pregnancy that was unwanted from the start or an initially wanted pregnancy that the mother subsequently wished to terminate.

> (c) Wrongful conception claims almost always arise in the context of sterilisation operations. They are brought by the parents for the failure of a healthcare professional to perform a sterilisation operation properly or to properly advise on the efficacy of the procedure (*eg*, by advising the parents that the procedure was successful when it was not). The essence of such a claim is that the parents never planned to have children—hence, it is the "conception" that is unwanted—and, concomitantly, never planned to undertake the commitments of parenthood. Wrongful conception cases may be distinguished from wrongful birth cases because the act which is complained of (that is to say, the negligent sterilisation or the negligent advice) takes place *pre*-conception; whereas in wrongful birth cases, the tortfeasor's wrongful act takes place *post*-conception.

30. It is immediately apparent that the present case does not fit neatly into any of the aforementioned categories. The wrongful life cases are plainly not relevant because the plaintiff in this case is the mother and not the child. Wrongful life cases involve acutely difficult questions of morality (whether a life is worth living) and philosophy (whether it is possible to compare a state of existence with one of non-existence). In the only local reported decision on the subject, recovery was denied on the ground of public policy (see the Singapore High Court decision of *JU v. See Tho Kai Yin* [2005] 4 SLR(R) 96). In our assessment, the wrongful birth cases are also not material because, as the Judge noted, the Appellant neither pleaded nor did she ever aver that she would have terminated the pregnancy if she had been informed of the mix-up ahead of time (this is the gist of a wrongful birth claim). The Appellant has not disputed the correctness of the Judge's decision on this point on appeal, and for our part, we think that the Judge was right to reject such an argument.

31. This leaves the wrongful conception cases. The present case resembles the wrongful conception cases in the sense that the Appellant's core argument is that if the Respondents had not been negligent, Baby P would not have been born and the Appellant would not now be put to the expense of raising Baby P. However, as the Judge observed, there is an important point of difference: The Appellant, unlike the plaintiffs in the wrongful conception cases, *did* want a child. The significance of this will be considered shortly.

Wrongful fertilisation

32. While cases of mix-ups in IVF procedures are, regrettably, not uncommon (see, generally, Leslie Bender, "'To Err is Human' ART Mix- Ups: A Labor-Based, Relational Proposal" (2006) 9 J Gender, Race & Just 443 for documented cases of such mix-ups), there are few reported cases on the subject in the law reports. *Leeds Teaching Hospitals NHS Trust v. Mr A* [2003] EWHC 259 (QB) ("*Leeds*"), a decision of the English High Court, is one of the rare few. It was a case involving facts similar to the present. Two couples (referred to in the judgment as Mr and Mrs A and Mr and Mrs B, respectively) sought IVF treatment. Due to a mistake, Mr B's sperm was used to inseminate Mrs A's egg and the resultant embryo was implanted in her womb. Mrs A subsequently gave birth to twins and the mistake was discovered. When the matter came before the court, the issue was the legal parentage of the children. Thus, the judgment itself is of little relevance to this case. However, a pair of commentators broached the possibility that a claim for upkeep costs *could* have been mounted in such a situation (see Mary Ford and Derek Morgan, "Leeds Teaching Hospitals NHS Trust v. A—Addressing a misconception" (2003) 15 Child & Fam L Q 199) and their article contains a succinct statement of the differences, but also the essential similarity, between that case and cases involving wrongful conception (at 203):

> … Any wrongful conception action by Mrs A would accordingly seek damages, not on the basis that a conception took place, but rather on the basis that *this* conception took place … [t]o use deliberately provocative language, the 'harm' would consist not in the conception and subsequent birth of a child to the woman who did not wish to become a mother, but in the conception and birth of *these* children to a woman who wished to become a mother to *different* children. [emphasis in original]

33. To the best of our knowledge, there has only been one wrongful fertilisation case in which the subject of upkeep costs was considered by a court of law. This is the decision of the New York State Supreme Court in New York County in *Andrews v. Keltz* 15 Misc 3d 940 (2007) ("*Andrews*"), where the mistake likewise consisted of the insemination of the plaintiff-mother's egg with the sperm of third party stranger.

The plaintiff delivered a healthy child and subsequently brought a claim for upkeep costs. Her claim was dismissed on the basis that public policy precluded recovery for the ordinary costs of raising a healthy child. The court did not elaborate on the policy reasons in any great level of detail and merely held itself to be bound by the decision of the New York Court of Appeals in *O'Toole v. Greenberg*, 477 NE 2d 445 (1985) and *Weintraub v. Brown*, 98 AD 2d 339 (1983), both of which were cases involving wrongful conception.

34. *Leeds*, *Andrews*, and the present case may be labelled as ones involving "wrongful fertilisation" (see Ronald JJ Wong, "Upkeep claims for wrongful birth, wrongful conception or wrongful fertilisation? IVF mix-up in the Singapore High Court: *ACB v. Thomson Medical Pte Ltd* [2015] SGHC 9" (2015) 23 Tort L Rev 172). Cases belonging in this category arise where assisted reproduction technology, usually IVF, is used and a claim is brought by the gestational mother (that is to say, the mother who bears the child to term) and/or her partner in circumstances where a healthcare professional uses the wrong gametes in the fertilisation procedure or where the "wrong" embryo is implanted in the womb of the gestational mother and carried to term. In so far as the claim is one for upkeep, the essence of the claim would be that the plaintiffs never planned to have *this child* (that is to say, the child who was born as a result of the use of the wrong genetic material) but instead planned for and desired to have a child with whom they would share genetic kinship. ***

The UK

58. *** A useful starting point is the decision of the English High Court in *Udale v. Bloomsbury Area Health Authority* [1983] 1 WLR 1098 ("*Udale*"), which involved—as many of these cases do—an unsuccessful sterilisation operation. *** Jupp J allowed the claim for pain and suffering but denied the claim for upkeep costs. His decision was grounded firmly in public policy (at 1109D–G):

> The considerations that particularly impress me are these: (1) It is highly undesirable that any child should learn that a court has publicly declared his life or birth to be a mistake—a disaster even—and that he or she is unwanted or rejected. Such pronouncements would disrupt families and weaken the structure of society. (2) A plaintiff such as Mrs. Udale would get little or no damages because her love and care for her child and her joy, ultimately, at his birth, would be set off against and might cancel out the inconvenience and financial disadvantages which naturally accompany parenthood. By contrast, a plaintiff who nurtures bitterness in her heart and refuses to let her maternal instincts takeover would be entitled to large damages. In short virtue would go unrewarded; unnatural rejection of womanhood and motherhood would be generously compensated. This, in my judgment, cannot be just. (3) Medical men would be under subconscious pressure to encourage abortions in order to avoid claims for medical negligence which would arise if the child were allowed to be born. (4) It has been the assumption of our culture from time immemorial that a child coming into the world, even if, as some say, "the world is a vale of tears," is a blessing and an occasion for rejoicing.

As will be seen, these four reasons have formed the standard bases for the rejection of upkeep claims worldwide (see J K Mason, *The Troubled Pregnancy: Legal Wrongs and Rights in Reproduction* (Cambridge University Press, 2007) ("*The Troubled Pregnancy*") at p 108). ***

60. *** [I]n *Emeh v. Kensington and Chelsea and Westminster Area Health Authority* [1985] 2 WLR 233 ("*Emeh*"), [the English Court of Appeal] unanimously rejected the public policy reasons articulated in *Udale*. For 15 years thereafter, the courts regularly awarded damages for upkeep costs (see *The Troubled Pregnancy* at pp 110–111). However, this changed in 1999, when the House of Lords handed down its seminal decision in *McFarlane*.

(1) McFarlane: healthy parents and healthy child

61. The facts of *McFarlane* were, in a sense, entirely unremarkable. A vasectomy was performed on Mr McFarlane, but it turned out to be unsuccessful. *** Soon after, Mrs McFarlane became pregnant and delivered a healthy daughter, which the judgment also records as having been accepted into the family with "love and joy" (at 1341C). An action in negligence was brought against the defendant-hospital and, in the usual way, two heads of claim were asserted: the first was what was referred to as the "mother's claim" for pain and suffering arising out of the pregnancy and the childbirth; the second was the "parents' claim" for

upkeep costs. The former was allowed by a majority of 4-1; the latter was unanimously disallowed. One difficulty with *McFarlane* is that even though the law lords were agreed on the result, they spoke in vastly different terms.

62. It will be helpful to begin with the speech of Lord Millett ***. He admitted that, as a *factual proposition*, the birth of a child is "a mixed blessing"—in his words, it "brings joy and sorrow, blessing and responsibility" (at 1347G–H). For this reason, individuals might elect to eschew parenthood, and it would be perfectly open for them to do so. However, as a matter of *legal policy*, he held that "society itself must regard the balance as beneficial. It would be repugnant to its own sense of values to do otherwise. It is morally offensive to regard a normal healthy baby as more trouble and expense than it is worth" (at 1347H). In an oft-quoted line, he stressed, drawing on the language of the law of restitution, that the plaintiffs could not be allowed "by a process of subjective devaluation, to make a detriment out of a benefit" (at 1346F). ***

63. The remaining law lords adopted a narrower approach. *** Lord Clyde considered that the award of upkeep costs would "[go] beyond what should constitute a reasonable restitution for the wrong done" (at 1340B). His reasoning, in essence, proceeded in three parts: (a) the object of compensation was to place the plaintiffs in a position as if no wrong had been committed; (b) it was impossible for such an exercise to be carried out here because the benefits received by the plaintiffs from the birth of the child were unquantifiable and no set-off could be effected (at 1337H); and (c) in conclusion, it would not be reasonable or proportionate for the plaintiffs to enjoy the blessings of parenthood but be relieved of the obligations which it necessarily entails (at 1340B).

64. *** Lord Hope likewise concluded that it would not be "fair, just or reasonable" for the upkeep claim to succeed. His reasons, in essence, were the same as those of Lord Clyde, namely, that the compensatory principle would demand that a deduction be made for the benefits of parenthood, but that no such deduction could be made: in his words, "the value which is to be attached to these benefits is incalculable" and he thus concluded that upkeep costs would not be recoverable (at 1332D–E). Lord Steyn, on the other hand, sought recourse to the concept of distributive justice which, he said, concerned the "just distribution of burdens and losses among members of a society" (at 1318D). He held simply that members of society would "instinctively" say that "the law of tort has no business to provide legal remedies consequent upon the birth of a healthy child, which all of us regard as a valuable and good thing" (at 1318F–H). ***

66. After *McFarlane*, the issue as to whether upkeep costs could be awarded for the birth of a healthy child was well-settled, and it was consistently applied in the wrongful conception cases which were decided afterwards. ***

67. However, *McFarlane* left two points unresolved:

> (a) First, it expressly left undecided the question of whether recovery should be allowed if the unplanned child was born disabled (at 1320C *per* Lord Steyn and at 1334D *per* Lord Clyde).
>
> (b) Second, it also did not address the question of whether recovery would be allowed if one or both of the *parents*, rather than the child, was disabled.

(2) Parkinson: healthy parents and disabled child

68. The issue as to whether upkeep costs could be awarded where the child was born disabled arose for decision in *Parkinson v. St James and Seacroft University Hospital NHS Trust* [2002] QB 266 ("*Parkinson*"). The claimant, Mrs Parkinson, underwent a sterilisation operation which was negligently performed, and as a consequence she gave birth to her fifth child, who was born significantly disabled. ***

69. Brooke LJ, delivering the first of the two fully reasoned judgments in this case, noted that parents in Mrs Parkinson's situation (that is to say, parents of children with congenital defects) had been able to recover upkeep costs for the better part of 15 years (since *Emeh*). This, he held, was not affected by the decision in *McFarlane*, which stood for the proposition that a medical professional did not, for reasons of policy, owe a duty of care in respect of the costs of raising a healthy baby. He accepted that this would preclude recovery for the *ordinary* costs of raising a child. However, the calculus was quite different where the *extra* expenses associated with the raising of a disabled child were concerned. In such a case, he ruled that it

would both be "fair, just and reasonable" *** to permit recovery of those extra costs: see *Parkinson* at [50].

70. The speech of Hale LJ *** confined the holding in *McFarlane* only to upkeep claims involving healthy children. There was, she said, "no reason or need to take that limitation any further than it was taken in *McFarlane*'s case" (at [90]). She was careful to add, however, that her approach did not have the effect of treating a disabled child as being of any less worth than a healthy child. Instead, she concluded that her approach "treats a disabled child as having exactly the same worth as a non-disabled child. It affords him the same dignity and status. It simply acknowledges that he costs more" (at [90]). She also added that she thought that such an award could not be impugned as being either unfair, unjust, or disproportionate (at [95]).

(3) Rees: disabled mother and healthy child

71. The issue of whether upkeep costs could be awarded where a healthy child was born to disabled *parents* came up for decision in *Rees v. Darlington Memorial Hospital NHS Trust* [2003] 3 WLR 1091 ("*Rees*") [§19.10.1.1]. *** By a slim majority of 4-3, the Court of Appeal was reversed and the upkeep claim was denied. ***

72. On the issue of upkeep costs, the majority was clear that the present case fell within the scope of the rule in *McFarlane*. Lord Millett was perhaps the clearest on this, as he pointed out that the focus in *McFarlane* was on the costs associated with the raising of a *healthy child* and, on this point, the holding of the House was that such costs were irrecoverable. ***

Australia ***

75. All of [the] disparate lines of authority were swept away by the decision of the High Court of Australia in *Cattanach* [*v. Melchior* (2003) 199 ALR 131]. *** The trial judge made a finding of negligence on the basis that the doctor had too uncritically accepted the wife's assertion that her right fallopian tube had been removed and ought to have advised her to have it specifically investigated. The judge allowed the claim for upkeep but his decision was reversed on appeal to the Queensland Court of Appeal. By the time the matter came before the High Court of Australia, the claim in contract had been abandoned. By a slim majority of 4-3, the High Court reversed the decision of the Queensland Court of Appeal and allowed the upkeep claim.

76. The majority, comprising McHugh, Gummow, Callinan, and Kirby JJ, proceeded from the premise (as did the law lords in the later case of *Rees*) that the claim—being one that was causatively linked to the defendant's negligence and reasonably foreseeable—was recoverable under the ordinary principles of tort liability and that the onus *** was on those who opposed recovery to put forward cogent reasons for the denial of liability (at [51], [179] and [298]). *** They warned against the creation of a "zone of legal immunity" (at [149] *per* Kirby J) for healthcare professionals, which they said would not only be unprincipled, but also contrary to the public interest (at [57] *per* McHugh and Gummow JJ and at [295] *per* Callinan J). ***

80. In an interesting postscript to the judgment, three Australian States swiftly moved to pass legislation to reverse the decision of the High Court of Australia. In New South Wales (see s 71 of the *Civil Liability Act 2002* (NSW)) and South Australia (see s 67 of the *Civil Liability Act 1936* (SA)), the position now mirrors that in the UK post-*Parkinson*, that is to say, no damages may be awarded for the ordinary costs of raising a healthy child although damages may be claimed for the *additional* costs of raising a child born with disabilities. ***

Some interim conclusions on the foreign authorities

81. If nothing else, this brief survey of the foreign authorities demonstrates that there is no path which is free from difficulties. This is not surprising in the least, given the deep complexity as well as sensitivity of the issues involved. However, we think that it is possible to commence making some headway by identifying three reasons upon which we would *not* decide this matter. *** These three reasons are:

> (a) that the success of the claim is to be determined (or even affected) by its classification either as one for pure economic loss or consequential economic loss;

(b) the contention that the arguments against recovery rest on dubious factual propositions and should be rejected out of hand; and

(c) the suggestion that the Appellant's decision to accept Baby P constitutes a *novus actus interveniens*. ***

83. *** [W]e think that it is important to emphasise that the dispute is fought not at the factual, but at the normative level. The claim that all children are a "blessing" or that the well-being of the unplanned children will suffer as a consequence of the making of an award for upkeep are, of course, contestable factual propositions. This point was well made by the majority in *Cattanach* (see above at [77(b)]). However, those who seek to deny upkeep costs have never seen themselves as making a factual claim that the benefits of having a child always outweigh the burdens, or that the children of the claimants will necessarily carry the psychological scars of the litigation. Rather, their claim is that the award of upkeep costs would be antithetical to settled legal policy concerning the value human life or the character of a parent-child relationship. As Gleeson CJ put it, the "value of human life, which is universal and beyond measurement, is not to be confused with the joys of parenthood, which are distributed unevenly" (see *Cattanach* at [6]; see also *McFarlane* at 1347G–H *per* Lord Millett, cited above at [62]). ***

Analysis

86. After careful consideration of the competing arguments, we are ultimately persuaded by the arguments ***against*** the award of upkeep costs. Our essential reasons are twofold (and which, as we shall see, are, by their very nature, closely related):

(a) The obligation to maintain one's child is an obligation at the heart of parenthood and cannot be a legally cognisable head of loss.

(b) To recognise the upkeep claim would be fundamentally inconsistent with the nature of the parent-child relationship and would place the Appellant in a position where her personal interests as a litigant would conflict with her duties as a parent. ***

The obligations of parenthood

87. Turning to the first reason, a common theme among those who would permit recovery is the argument that the upkeep claim is maintainable simply on the application of the conventional principles of civil liability. *** In the present case (and in upkeep claims more generally), the complaint is *not* about the direct consequences to the Appellant ***qua patient*** of the physical and other aspects of pregnancy and birth; rather, it is about the consequences to the Appellant ***qua mother*** of the existence of the child and the concomitant creation of a relationship pursuant to which there are legal, moral, and social obligations to care for, support, and nurture Baby P (see Todd at 532). In short, the upkeep claim is an action seeking relief in respect of a particular consequence of parenthood—the duty to provide material support for one's child—and its success therefore necessarily depends on the recognition of the obligations of parenthood as actionable damage. In our judgment, this is *not* a step that this court should take. ***

90. The point, for present purposes, is this. The duty to maintain one's child is a duty which lies at the very heart of parenthood, and thus the expenses which are incurred towards the discharge of this estate are not capable of characterisation as a loss. This is not a factual claim and it has nothing to do with the subjective perceptions of individual parents; nor has it anything to do with the felt reality of parenthood, which, on occasion, can even feel like a chore. Rather, it is a *normative* claim about the paradigm of family relationships which exists in the law, which views the responsibilities of parenthood as obligations of a legal and moral character that arise in relation to the birth of *new life* (see, generally, *Cattanach* at [258] *per* Hayne J). These are obligations which arise out of the dual character of parenthood, which "inhabits the intersection of two distinct relationships": a *custodial* relationship between parent and child and a relationship of *trusteeship* between the parents and wider society (see Elizabeth Brake and Joseph Millum, "Parenthood and Procreation" in *The Stanford Encyclopedia of Philosophy* (Winter 2016 Edition), (Edward Zalta, gen ed), (accessed 5 December 2016)). Neither of these relationships gives rise to obligations which are capable of valuation as "loss" in any meaningful sense and therefore cannot, in our judgment, be the subject of a claim for damages.

91. It is important to emphasise that this is not a statement about the *difficulty* of any putative valuation exercise ***, but, rather, about its *impossibility*, when viewed from a *holistic* perspective. *** As Heydon J put it at [356] of *Cattanach*:

> Human life is invaluable in the sense that it is incapable of valuation. It has no financial worth which is capable of estimation. It cannot be sold for money, at least not lawfully. *The duty cast on parents which flows from the arrival of new human life is also incapable of valuation or estimation or discharge by payment.* The financial costs of child-rearing can be calculated, but they represent only part—and in some ways an insignificant part—of the onerous aspects of the duty. *To calculate them in money terms and then permit their recovery in relation to the performance of the duty is to engage in an activity* ***lacking any meaningful correspondence with the duty****,* just as much as seeking to calculate the economic and other advantages of the new life is to engage in an activity lacking any meaningful correspondence with the phenomenon under consideration. [emphasis added in italics and b3old italics]

92. A moment's reflection will reveal that parents provide for their children in a myriad of ways besides ensuring their material well- being. As Hale LJ put it in *Parkinson* at [72], "[t]he law has found it much easier to focus on the associated financial costs … [but these] costs are not independent of the caring responsibility but part and parcel of it". If this is so, one might justifiably ask if there is any principled reason why the financial costs incurred in raising a child should be distinguished from the emotional investment in providing for a child's self-esteem, happiness, and sense of worth, and so identified as being capable of being the subject of a claim (see *Cattanach* at [9] *per* Gleeson CJ). The challenge, for those who would allow claims for the costs of upkeep, is to find a principled justification as to why the pecuniary consequences of the birth of an unplanned child should sound in damages but the non-pecuniary costs should not. One solution to this incongruity would be to say that these non-pecuniary aspects of parenthood, too, should also sound in damages, but this suggestion need only be stated for it to be rejected. This intuition, we think, stems from the fact that to do so would be to seek recompense for a matter which is *intrinsically incapable of valuation*—the nurturing of a human relationship which has long been held up as the "natural and fundamental group unit of society". ***

93. In the premises, we do not think that it is open to the Appellant to argue, on the one hand, that she and her Husband have accepted Baby P as their own (and therefore assumed the status of parents) and yet, on the other hand, argue that the responsibility or obligation of maintaining the child is something which they have not accepted. Baby P is ***a holistic person*** who must be accepted as she is. If she is accepted, as we are gratified to observe she has been, then the Appellant must be taken to have simultaneously assumed the responsibility of maintaining her (financially and in all other respects). *** Once again, this not a factual claim, but a normative one about the meaning of legal parenthood. The reality is that there are many parents who do not in fact shoulder the bulk of the financial burden of raising their children. This may be so for many reasons, but it does not detract from the force of the normative argument, which is that the obligations of parenthood are *fundamental, indivisible, and incapable of sounding in damages*.

94. The majority in *Cattanach* (and those courts which have permitted claims for upkeep to proceed) was at pains to stress that what was being counted as loss was not the unplanned child *per se*, but the unplanned and unwanted *financial expenses* which attend the fact of the child's birth (see above at [77(a)]). This is correct, as far as it goes, and it might be a possible answer to the objection that the upkeep claim results in the denigration of the worth of the child. However, it is *not* an adequate answer to the present objection, which is this: no *parent* can claim a legal entitlement to be free from the responsibilities of parenthood (whether financial or otherwise). ***

Inconsistency with the nature of the parent-child relationship

95. This brings us to our second reason, which is that the essentially custodial and fiduciary nature of the parental relationship raises the spectre of a possible conflict of interest between the parents' private interests in the litigation and their duties *vis-à-vis* their children. In order to establish a case for the recovery of upkeep costs, parents would have to come to court to prove that their children represent a net *loss* to them. The very nature of such an exercise encourages the exaggeration of any infirmities and the diminution of benefits as might exist in their children, in order that the account may be as favourable to the parents as

possible. This is conduct which is fundamentally at odds with the overarching duty that parents have to provide, care for, and love their children. In the decision of the Supreme Court of Massachusetts in *Burke v. Rivo*, 551 NE.2d 1 (Mass, 1990), O'Connor J (dissenting, with Nolan and Lynch JJ) put the point in the following way (at 7):

> "It is … the policy of this commonwealth to direct its efforts … to the strengthening and encouragement of family life for the protection and care of children." … That policy is surely not served, indeed it is disserved, by a rule of damages that would require parents, if their litigation is to succeed, to persuade a judge or jury that their child is not worth to them the cost of rearing that child. The Supreme Court of Illinois put it this way: "It can be seen that permitting recovery then requires that the parents demonstrate not only that they did not want the child but that the child has been of minimal value or benefit to them. They will have to show that the child remains an uncherished, unwanted burden so as to minimize the offset to which the defendant is entitled. …" ***

Conclusion on upkeep costs

101. For the foregoing reasons, we would uphold the decision of the Judge on the issue of upkeep costs. The recognition of a claim for upkeep would require the court to regard, as actionable damage, the incidents of a relationship which is regarded as socially foundational and incapable of estimation as loss. Such recognition would also be inconsistent with, and deleterious to, the health of the institution of parenthood and would be against the public interest. ***

The "real loss": genetic affinity ***

127. We begin with this. The Appellant's desire to have a child of *her own, with her Husband*, is a desire that is a basic human impulse, and its loss is keenly and deeply felt, even if it is difficult to put into words. Her desire (and therefore her loss), as explained by Fred Norton in an excellent article, was for "genetic affinity" (see Fred Norton, "Assisted Reproduction and the Frustration of Genetic Affinity: Interest, Injury, and Damages" (1999) 74 NYU L Rev 793 ("*Genetic Affinity*")). ***

129. It is "affinity"—which Norton uses as a convenient shorthand for all those ties which are partly a result of genetic relatedness and partly a result of the social significance which it carries—which distinguishes familial ties from ties of friendship. Put simply, families cannot be thought of as just another social group such as a football club or a running club. This difference lies at the root of why the obligations of parenthood and the relationship between parents and children are so special and socially fundamental: obligations of kinship are inherited and not voluntarily assumed. Now, all this is not to lay out a prescriptive definition of what family should be or, worse, to denigrate adoption, which is a precious and valuable thing, but to explain that persons who *consciously choose* to undergo IVF do so because of a deep desire to experience, as far as it is possible, the ordinary experience and incidents of parenthood. And when, as in the present case, a person has been denied this experience due to the negligence of others then she has lost something of profound significance and has suffered a serious wrong.

130. It is for this reason that we consider, returning to a point we made above at [92], that one significant problem with the upkeep claim is that it severely misconstrues the nature of the harm. It suggests that the Appellant's loss consists solely or only of the obligations of childbirth and rearing, when that is far from being the case. The focus on the economic ramifications of what has taken place ignores the serious consequences that the disruption of the Appellant's reproductive plans have had on her life. These consequences consist not only in the frustration of the Appellant's decisional autonomy—her ability to make free choices about her reproductive life—but also in the substantive impact that it has had on the Appellant's well-being; in this case, the Appellant has suffered, among other things, a loss of "affinity", and the chance to have a family structure which comports with her aspirations (see *Reproductive Negligence* at 174). As a consequence of what has taken place, the Appellant's welfare has been detrimentally affected in myriad of significant ways. ***

135. In summary, the loss suffered by the Appellant as a result of the Respondents' negligence is the result of a complex amalgam of biological, social, ethical, and historical factors. Many of these have to do with certain aspects of human relationships and personhood that are fundamental parts of the human condition,

such as the role of genetic relatedness, physical resemblance, race, culture, and the importance of familial relations. Some are matters which are rightly cherished; others are perhaps regrettable features of the society which we inhabit. However, what is clear is that the Appellant would be ill-served by a judicial refusal to fully engage with these issues in order to recognise the true loss which has been suffered. In our judgment, the Appellant's interest in maintaining the integrity of her reproductive plans in this very specific sense—where she has made a conscious decision to have a child *with her Husband* to maintain an intergenerational genetic link and to preserve "affinity"—is one which the law should recognise and protect. And given that interests are the "positive aspects of damage" (see J A Weir, "Liability for Syntax" [1963] CLJ 216 at 218), we hold that the damage to the Appellant's interest in "affinity" is a cognisable injury that should sound in damages. ***

Quantification of damages

150. As we have explained above at [102], the award of full upkeep costs would amount to giving the Appellant an indemnity for the costs of raising Baby P. This would not, in our judgment, be appropriate compensation for the loss which has been suffered. However, it is also neither logical nor desirable to award the Appellant a merely nominal sum because to do so would be to make a mockery of the value of the interest at stake. It is clear that the damages to be awarded should therefore lie somewhere between these two extremes. On the issue of precisely where along the spectrum it should fall, the facts and circumstances are of the first importance. In our judgment, it is clear that *substantial damages* ought to be awarded to the Appellant. Whilst (as we have already noted), the Appellant and her Husband have accepted Baby P as their own, the reality of the situation cannot be denied (see, especially, the anguish, stigma, disconcertment, and embarrassment suffered by the Appellant and her family as expressed in the Appellant's affidavit (reproduced above at [131] and discussed at [132]–[135])). In the circumstances, we are of the view that the Appellant ought to be awarded ***30%*** of the financial costs of raising Baby P as compensation, which is an amount that, we consider, properly reflects sufficiently the seriousness of the Appellant's loss and is ***just, equitable, and proportionate*** in the circumstances of the case. ***

Conclusion

210. *** In summary, we dismiss the appeal in so far as the issue of upkeep costs is concerned. However, we recognise the Appellant's right to claim, as general damages, a sum in recompense of the injury which she has suffered to her interest in "genetic affinity". ***

REFLECTION:

- *What role did public policy considerations play in the Court's decision barring the appellant's claim for full upkeep costs in the context of wrongful fertilisation?*
- *How did Phang J.A. approach weighing the normative implications of any decision to allow ACB's claim for upkeep costs?*
- *How might the common law influence, or be influenced by, social norms and attitudes in this context?*
- *Do you agree with how the Court determined damages for injury to "genetic affinity"?*

19.10.6 Cross-references

- *Khan v. Meadows* [2021] UKSC 21: **§19.4.3.2**.

19.10.7 Further material

- S. Grover, "Maternal Tort Immunity, the Born Alive Rule and the Disabled Child's Right to Legal Capacity: Reconsidering the Supreme Court of Canada Judgment in *Dobson v. Dobson*" (2017) 21 International J Human Rights 708.
- E.L. Nelson, "Prenatal Harm and the Duty of Care" (2016) 53 Alberta L Rev 933.
- C. Meng Lam, "Damages for Wrongful Fertilisation: Reliance on Policy Considerations" (2019) 24 Deakin L Rev 139
- E. Adjin-Tettey, "Claims of Involuntary Parenthood: Why the Resistance?" in J.W. Neyers, E. Chamberlain & S.G.A. Pitel (eds), *Emerging Issues in Tort Law* (Oxford: Hart Publishing, 2007).

- S. Todd, "Wrongful Conception, Wrongful Birth and Wrongful Life" (2005) 27(3) Sydney L Rev 525.
- S. Agarwal, "Mother's Liability for Pre-natal injuries: A Critical Analysis" iPleaders (Aug 5, 2020).

19.11 Negligent pollution of the environment

19.11.1 Midwest Properties Ltd v. Thordarson [2015] ONCA 819

Ontario Court of Appeal – 2015 ONCA 819, leave denied: 2016 CanLII 30455 (SCC)

✗**REF: §21.1.5**

HOURIGAN J.A. (FELDMAN AND BENOTTO JJ.A. concurring):

1. The appellant, Midwest Properties Ltd. ("Midwest"), and the respondent, Thorco Contracting Limited ("Thorco"), own adjoining properties in an industrial area of Toronto.

2. Thorco has stored large volumes of waste petroleum hydrocarbons ("PHC") on its property for several decades. As a result of Thorco's storage practices, PHC has contaminated the soil and groundwater on its property. From 1988-2011, Thorco was in almost constant breach of its license and/or compliance orders issued by the Ontario government ministry now known as the Ministry of the Environment and Climate Change (the "MOE").

3. Groundwater flows from Thorco's property into Midwest's property, and this has contaminated the latter with significant concentrations of PHC. Midwest discovered the contamination after it acquired its property in December 2007. Midwest sued Thorco and its owner, John Thordarson, relying upon three causes of action: breach of s. 99(2) of the *Environmental Protection Act*, R.S.O. 1990, c. E.19 (the "*EPA*"), nuisance, and negligence.

4. The trial judge held that the respondents were not liable under any of the causes of action. She found that Midwest failed to prove that it had suffered damages, in particular because it had not proven that the PHC contamination lowered the value of its property. ***

5. Midwest appeals and seeks judgment for the cost to remediate its property, approximately $1.3 million. ***

Analysis ***

94. The trial judge *** dismissed Midwest's negligence claim on the basis that it had failed to prove damage. She referred *** to [*Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.*, 1996 2 C.P.C. (4th) 143 (Ont. Gen. Div.)], at para. 9, for the proposition that, "A fundamental requirement of negligence is the constituent element of there being shown actual damage suffered by the plaintiff as a result of the defendant's breach of a duty of care towards the plaintiff." ***

98. In my view, the trial judge erred in dismissing these claims on the basis that damage had not been established. There was uncontradicted evidence at trial that established a diminution in the value of the appellant's property and a human health risk. Nowhere in her reasons did the trial judge consider the evidence. Instead she made findings that damage had not been established without reference to the evidence at trial.

99. With respect to property values, Messrs. Vanin and Tossell testified that PHC contamination would lower the value of property and/or make it more difficult to obtain financing. Although not professional appraisers, they were experts in the environmental assessment of realty. They have expert knowledge of the relationship between particular contaminants and their general effect on property values. While the experts did not quantify the loss, quantification of damages is not required to establish that Midwest has suffered damage compensable under the law of nuisance and negligence.

100. With respect to health risks, Mr. Tossell testified that the F1 and F2 fractions for PHC are volatile and constitute a risk to human health and the environment. Soil and groundwater sampling at 285 Midwest

showed results which exceeded the permitted concentrations at several locations on the property. Monitoring well 106, installed underneath the building at 285 Midwest to assess the condition for the occupants of the building, showed an F2 reading over the MOE limit. Mr. Tossell testified that there is a risk that the volatile PHC will get into the building and that this is a potential health risk to the occupants.

101. The fact that the contamination of the property with PHC presented a health risk to the employees of Midwest is evidence of physical and material harm or injury to the property. ***

105. In my view, the trial judge erred in dismissing the claims in nuisance and negligence on the basis that the appellant had not established any damage. There was uncontradicted evidence that supported a finding that damage had been suffered. The trial judge committed a palpable and overriding error in not considering that evidence and in reaching the unsupported finding that damage had not been proven. ***

108. Midwest's claim in negligence is *** made out. Beyond proof of damage, to succeed in a negligence action, the plaintiff must demonstrate that the defendant owed it a duty of care, that the defendant breached the standard of care, and that the damage was caused, legally and factually, by that breach: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114 (S.C.C.), at para. 3 [**§17.1.2**].

109. A landowner owes a duty to adjoining landowners to avoid acts or omissions that may cause harm to those adjoining landowners: *Canadian Tire* [*Real Estate Ltd. v. Huron Concrete Supply Ltd.*, 2014 ONSC 288], at para. 299. There can be no serious suggestion on the facts of this case that Thorco actually complied with the standard of care expected of a reasonable landowner. The evidence established that the respondents were never in compliance with the Certificate of Approval issued by the MOE in 1988 with respect to the limits on waste material or required storage practices. On the contrary, excessive amounts of waste materials were stored on 1700 Midland in conditions that easily allowed the contents to be infiltrated by rainwater and escape to the natural environment.

110. The trial judge found, at paras. 8-9 of her reasons, that the expert evidence established that the contamination at 285 Midwest was caused by the migration of the known contamination at 1700 Midland, through the flow of groundwater, onto 285 Midwest.

111. While the respondents were only convicted of failing to comply with an MOE order once, the series of reports from Officer Mitchell, beginning in 2008, disclose a repeated pattern of what can only be described as utter disregard for the effect that the deficient storage practices of chemicals stored on the property could have on the surrounding environment, including 285 Midwest.

112. In conclusion, the appellant established an entitlement to damages under both nuisance and negligence. The trial judge erred in dismissing these claims.

113. Mr. Thordarson cannot rely on the "corporate veil" principle in [*Montreal Trust Co. of Canada v. ScotiaMcLeod Inc.* (1995), 26 O.R. (3d) 481 (Ont. C.A.)] to avoid personal liability for the commission of these torts. It is well-established in the law of Ontario that "employees, officers and directors will be held personally liable for tortious conduct causing physical injury, property damage, or a nuisance even when their actions are pursuant to their duties to the corporation": *ADGA Systems International Ltd. v. Valcom Ltd.* (1999), 43 O.R. (3d) 101 (Ont. C.A.), at para. 26.

114. As noted above, Thorco is a small business whose day-to-day operations are effectively controlled by Mr. Thordarson, and there is no question that he was intimately and equally involved in the conduct which was both a nuisance and negligent.

115. The following passage from *Desrosiers v. Sullivan* (1986), 76 N.B.R. (2d) 271N.B. C.A., leave to appeal refused, 1987 79 N.B.R. (2d) 90 (note) (S.C.C.), has often been quoted and is equally applicable in the circumstances of this case: ***

> The question here, as I have pointed out, is not whether Mr. Sullivan was acting on behalf of or even if he "was" the company, but whether a legal barrier, here a company, can be erected between a person found to be a wrongdoer and an injured party thereby relieving the wrongdoer of his liability. In my opinion, once it is determined that a person breaches a duty owed to neighbouring

> landowners not to interfere with their reasonable enjoyment of their property, liability may be imposed on him and he may not escape by saying that as well as being a wrongdoer he is also a company manager or employee.

116. As a result, I would hold Thorco and Mr. Thordarson jointly and severally liable to Midwest.

Punitive Damages ***

122. On the facts of this case a punitive damages award was clearly warranted. Thorco's history of non-compliance with its Certificate of Approval and MOE orders, and its utter indifference to the environmental condition of its property and surrounding areas, including Lake Ontario, demonstrates a wanton disregard for its environmental obligations. This conduct has continued for decades and is clearly driven by profit. Mr. Thordarson testified at trial that one of the reasons he did not comply with the 22,520 gallon limit on waste in the Certificate of Approval, when that certificate was issued in 1988, was that he was not aware of an economical way of doing so.

123. The 1999 report from XCG Consultants informed the respondents that it would cost approximately $43,000 to dispose of the inventory of PHC and catalyst at the property, and recommended that "soil and groundwater should be investigated to assess potential soil impacts and rule out groundwater impacts on-site." Thorco and Mr. Thordarson made a business decision not to invest this modest sum, or conduct further investigations. Instead they permitted the level of contamination and the costs of remediation to increase exponentially.

124. This is the type of conduct by a defendant that warrants punitive sanction by the court. I would award Midwest punitive damages in the amounts of $50,000 against Thorco and $50,000 against Mr. Thordarson.

Disposition

125. I would allow the appeal, set aside the judgment of the trial judge and substitute judgment against both respondents jointly and severally for $1,328,000 in damages under s. 99 of the EPA. Given that the respondents are liable in nuisance and negligence, I would also award Midwest $50,000 in punitive damages against each of the respondents. ***

REFLECTION:

- *What was the nature of the duty of care that Thorco owed to Midwest as an adjoining landowner?*
- *What was the evidential basis on which damage to Midwest's property was proved?*
- *Why was an award of punitive damages warranted in this case?*

19.11.2 Minister for the Environment v. Sharma [2022] FCAFC 35

Full Court of the Federal Court of Australia – [2022] FCAFC 35

This summary is intended to assist in understanding the outcome of this proceeding and is not a complete statement of the conclusions reached by the Court [in its 888-paragraph judgment]. ***

The appeal concerns the orders made by the primary judge declaring that the Commonwealth Minister for the Environment owed a duty of care at common law when exercising her power under ss 130 and 133 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("*EPBC Act*") to consider and approve an extension of a coal mine in New South Wales: [2021] FCA 560. The duty was expressed to require the Minister to take reasonable care to avoid causing personal injury or death to all people in Australia under 18 years of age at the time of the commencement of the proceeding arising from the emissions of carbon dioxide into the Earth's atmosphere from the combustion of the coal to be mined in the extension of the mine. In so finding such a duty of care the primary judge also found that human safety was an implied mandatory consideration in the making of the decision.

The respondents to the appeal, the applicants below, did not seek to support the primary judge's conclusion that human safety was a mandatory consideration in the making of the decision.

As to the posited duty of care, the Full Court is unanimous in the view that the duty should not be imposed upon the Minister. The three judgments of the Court have different emphases as to why this conclusion should be reached. Before summarising the central reasoning of each member of the Court some comment is appropriate as to the hearing of the matter before the primary judge.

A substantial body of evidence was led by the applicants about climate change and the dangers to the world and humanity, including to Australians, in the future from it. None of the evidence was disputed. There was no cross-examination of any witness brought by the applicants by those acting for the Minister, and there was no contrary or qualifying evidence led by the Minister.

In a detailed and comprehensive judgment, the primary judge analysed the factual material closely and thoroughly. The Minister submitted that some of the primary judge's findings were incorrect and reached beyond the evidence. The Court is unanimously of the view that these complaints are unfounded. All of the findings of the primary judge were open to be made on the uncontested evidence before his Honour.

THE CHIEF JUSTICE is of the view that the duty should not be imposed for a number of reasons. First, the content and scope of the duty would call forth at the point of assessment of breach the need to re-evaluate, change or maintain high public policy, the assessment of which is unsuited to decision by the judicial branch in private litigation. Secondly, the imposition would be incoherent and inconsistent with the decision-making in question under the *EPBC Act* according to its terms, as understood in its context as part of Commonwealth and State responsibilities for the protection of the environment. Thirdly, taken in conjunction with these two matters, the lack of control over the harm (as distinct from over the tiny contribution to the overall risk of damage from climate change), a lack of special vulnerability in the legal sense, the indeterminacy of liability and the lack of proportionality between the tiny increase in risk and lack of control and liability for all damage by heatwaves, bushfires and rising sea levels to all Australians under the age of 18, ongoing into the future, mean that the duty in tort should not be imposed.

JUSTICE BEACH is also of the view that the duty should not be imposed. His Honour has given emphasis to two factors in support of that conclusion. First, in his Honour's view there is not sufficient closeness and directness between the Minister's exercise of statutory power and the likely risk of harm to the respondents and the class that they represent. Secondly, to impose a duty would result in indeterminate liability. As for the other matters argued by the Minister, in his Honour's view none of them individually or collectively warrant [] recognising the duty found by the primary judge.

JUSTICE WHEELAHAN is of the view that no duty of care arises for three main reasons. The first is that the *EPBC Act* does not erect or facilitate a relationship between the Minister, and the respondents and those whom they represent, that supports the recognition of a duty of care. In particular, his Honour is of the view that the control of carbon dioxide emissions, and the protection of the public from personal injury caused by the effects of climate change, were not roles that the Commonwealth Parliament conferred on the Minister under the *EPBC Act*. Secondly, his Honour is of the view that it would not be feasible to establish an appropriate standard of care, with the consequence that there would be incoherence between the suggested duty and the discharge of the Minister's statutory functions. Thirdly, his Honour is not persuaded that it is reasonably foreseeable that the approval of the extension to the coal mine would be a cause of personal injury to the respondents or those whom they represent, as the concept of causation is understood for the purposes of the common law tort of negligence. ***

REFLECTION:

- *Do you agree with the Chief Justice of the Federal Court of Australia that the asserted duty of care in this case was "unsuited" to judicial determination? What is the appropriate forum for the issues the plaintiffs raised?*[639]
- *Consider the three types of indeterminacy of liability addressed in Ultramares Corp v. Touche, [13] (§19.3.1.1) and Deloitte & Touche v. Livent Inc., [68]-[75] (§19.3.1.3). In what sense was liability indeterminate in this case? Is indeterminate liability an insurmountable barrier to climate change tort actions generally?*

[639] See L. Scott, J. Feller & W. Denyer, "Teen activist Anjali Sharma wages war on government climate inaction from dorm room" ABC News Australia (Mar 10, 2024) 📺; 7am Podcast, "The Young Australians Suing for Climate Action" (Aug 11, 2020) 🎧; "Case Study: *Sharma v. Minister for the Environment*" Environmental Law Australia (2022).

19.11.3 Smith v. Fonterra Co-op. Group Ltd [2024] NZSC 5

New Zealand Supreme Court – [2024] NZSC 5

✗**REF: §21.2.3, §25.1.1**

WILLIAMS AND KÓS JJ.:

1. This appeal concerns strike out of a claim in tort (comprised of three causes of action) relating to damage caused by climate change. The question is whether the plaintiff's claim should be allowed to proceed to trial, or whether, regardless of what might be proved at trial, it is bound to fail and should be struck out now. ***

3. The plaintiff, Mr Smith, is an elder of Ngāpuhi and Ngāti Kahu, and a climate change spokesperson for the Iwi Chairs Forum, a national forum of tribal leaders. In August 2019 he filed a statement of claim in the High Court, against the seven respondents. Each is a New Zealand company said to be involved in an industry that either emits greenhouse gases (GHGs) or supplies products which release GHGs when burned.[640] Mr Smith alleges that the respondents have contributed materially to the climate crisis and have damaged, and will continue to damage, his whenua and moana, including places of customary, cultural, historical, nutritional and spiritual significance to him and his whānau.

4. Mr Smith raises three causes of action in tort: public nuisance, negligence and a proposed new tort involving a duty, cognisable at law, to cease materially contributing to: damage to the climate system; dangerous anthropogenic interference with the climate system; and the adverse effects of climate change.[641] ***

Second cause of action: negligence

66. The second (additional or alternative) cause of action is negligence.

67. Mr Smith alleges that the respondents owe him, and persons like him, a duty to take reasonable care not to operate their businesses in a way that will cause him loss by contributing to dangerous anthropogenic interference in the climate system.

68. He claims that the respondents have breached this duty by doing acts that have contributed to, and will continue to contribute to, dangerous anthropogenic interference in the climate system; that they knew, or ought reasonably to have known from 2007, that their activities would contribute to such interference; that they then knew, or ought reasonably to have known, that it was necessary for them to immediately and significantly reduce their GHG emissions; and that, despite that knowledge, they have continued to emit GHGs into the atmosphere (or to produce and supply products which result in the emission of GHGs) and have failed to significantly reduce their GHG emissions (and have, in some instances, increased them).

69. Mr Smith claims that the respondents' breach of duty has or will cause him harm; that the respondents' contribution to that harm is material; and that requiring cessation or reduction of the respondents' GHG emissions will reduce that harm. ***

87. The High Court Judge considered one of the policy factors that negated the imposition of a duty of care was that the alleged duty was "inconsistent with Parliament's regulation of emissions".[642] The Judge continued:[643]

> Recognising a liability in negligence would potentially compromise Parliament's response, and would require the Courts to engage in complex polycentric issues, which are more appropriately

[640] The sixth and seventh respondents, Channel Infrastructure NZ Ltd and BT Mining Ltd, filed separate submissions, claiming that they are differently placed to the other respondents.
[641] We will refer to the last of these as the "proposed climate system damage tort".
[642] *Smith v. Fonterra Co-operative Group Ltd* [2020] NZHC 419, [2020] 2 NZLR 394 [HC judgment], at [98](e).
[643] At [98](f) (footnotes omitted).

> left to Parliament. It is an area where the authority of Parliament should be respected. This is not to say that climate change is a "no go" area. Rather, the better course is for aggrieved victims of climate change to seek to hold the Government responsible. The provisions of s 5ZM of the [*Climate Change Response Act 2002*] … are directly in point.

88. The Court of Appeal agreed ***.[644] [French, Cooper and Goddard JJ held, [2021] NZCA 552:

> 94. The statement of claim pleads that each of the respondents owed Mr Smith (and persons like him) a duty to take reasonable care not to operate its business in a way that would cause him loss by contributing to dangerous anthropogenic interference with the climate system.
>
> 95. It goes on to plead that the respondents have breached that duty by doing acts that contributed to and will continue to contribute to dangerous anthropogenic interference in the climate system, and the adverse consequences of climate change for persons including Mr Smith.
>
> 96. The duty of care as pleaded is a novel one. That, as the Judge recognised, requires the court to undertake a two-stage proximity and policy inquiry in order to decide whether it would be just, fair and reasonable to recognise the duty.[645] At the first stage, the court considers whether the claimed harm was a reasonably foreseeable consequence of the alleged wrongdoer's actions and also considers the degree of proximity between the alleged wrongdoer and the claimant. At the second stage, the court considers matters external to the parties, namely the effect imposition of the claimed duty would have on society and the law generally.[646] Resolution of the second stage depends ultimately on judicial conceptions of desirable policy.[647]
>
> 97. In this case, the Judge held that the claim failed at each stage and should be struck out. The harm was not reasonably foreseeable, proximity was lacking and there were compelling policy considerations militating against recognising a duty.[648]
>
> 98. On appeal, Mr Salmon challenges all of those conclusions.
>
> *Reasonable foreseeability and proximity*
>
> 99. The Judge held that because the respondents' collective emissions are "miniscule in the context of the global greenhouse gas emissions" (identified as the cause of the harm to Mr Smith), his pleaded damage was such an unlikely or distant result of the respondents' emissions that it could not be reasonably foreseeable.[649]
>
> 100. However, as Mr Salmon points out, what is pleaded is that the respondents are or ought reasonably to be aware of the adverse climate effects on coastal areas caused by greenhouse gas emissions. If knowledge and foreseeability are pitched at that more general level, then we agree that reasonable foreseeability of harm is arguably a trial issue and not of itself a ground for striking out.
>
> 101. Proximity however is a different concept to foreseeability. It concerns the closeness of the connection between the parties in terms of their physical, temporal, relational and causal proximity. The notion of proximity requires the isolation of facts that in Lord Atkin's words indicate that the defendant's act or omission closely and directly affected the plaintiff and that the parties are in this

[644] *Smith v. Fonterra Co-operative Group Ltd* [2021] NZCA 552, [2022] NZLR 284 (French, Cooper and Goddard JJ) [CA judgment], at [116]. These sentiments were also reflected by the United States Federal Court of Appeals (2nd Circuit) in *City of New York v. Chevron Corp* 993 F 3d 81 (2d Cir 2021), where that Court found that the *Federal Clean Air Act* 42 USC § 7401 displaced the common law in so far as control of GHGs was concerned.
[645] High Court judgment, *above*, at [76].
[646] *North Shore City Council v. Attorney-General*, *above*, at [157]–[160]; and *Carter Holt Harvey Ltd v. Minister of Education* [2016] NZSC 95, [2017] 1 NZLR 78 at [14].
[647] Todd, *above*, at [5.4].
[648] High Court judgment, *above*, at [81], [92] and [98]–[99].
[649] At [82].

sense neighbours.[650]

102. Mr Salmon submits there is a tenable basis for a sufficiently proximate relationship between Mr Smith and the respondents. He says knowledge of actual risk is a significant indicator of sufficient proximity as is vulnerability. He further contends Mr Smith forms part of an identifiable class of plaintiffs, namely coastal Māori in Northland.

103. However, like the Judge, we are not persuaded there is a close connection between the parties. There is no physical or temporal proximity. There is no direct relationship and no causal proximity.

104. It is accepted by Mr Salmon that in a negligence action there must be a causal nexus between the alleged wrongdoer's actions and the pleaded harm. He also accepts that Mr Smith will be unable to establish at trial that but for the respondents' activities he would never have suffered the harm.

105. However, Mr Salmon also (correctly) points out that there are exceptions to the "but for" causation test and that there is no fundamental legal impediment to a collective approach to causation. He identifies three such approaches in the case law, each of which he submits provides legally tenable grounds on which Mr Smith could establish causation at trial. According to Mr Salmon, the case law in question shows a modern aversion to allowing negligent defendants to escape liability by hiding behind the collective harmful actions of others to obscure their own contribution. It thus reflects principles of corrective justice and least-cost avoidance of harm which underpin the tort of negligence.

106. Mr Salmon says further that whether these various alternative methods of establishing causation are applicable or appropriate will depend heavily on the evidence. For strike-out purposes, he says it must be sufficient that there is no doubt that the respondents in this case *have* contributed to climate change and continue to do so.

107. The first approach Mr Salmon relies on is derived from two House of Lords decisions: *Fairchild v. Glenhaven Funeral Services Ltd* and *Barker v. Corus UK Ltd*.[651] In *Fairchild*, according to the scientific evidence, there was no way of knowing in which period of employment the claimants had inhaled the fatal asbestos fibre(s) which led to them developing mesothelioma. It could have been in any one of them. The House of Lords held in those circumstances the claimants had a claim against each of their previous employers despite being unable to prove which one had caused the harm.[652] *Barker* was a subsequent decision in which the House of Lords clarified the extent of the liability of each employer. It was held that when liability was exceptionally imposed on a defendant because they *might* have caused harm, liability should be divided according to the probability the particular defendant caused the harm.[653] In determining the apportionment, it was suggested that relevant factors would include the period of exposure, the intensity of exposure and the type of asbestos involved.[654]

108. The second approach suggested by Mr Salmon is the Canadian formulation of the "material contribution to risk test" as explained in *Clements v. Clements* [§16.2.3].[655] It applies where although a plaintiff can establish their loss would not have occurred but for the negligence of one

[650] Todd, *above*, at [5.3.02].
[651] *Fairchild v. Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32; and *Barker v. Corus UK Ltd* [2006] UKHL 20, [2006] 2 AC 572.
[652] *Fairchild v. Glenhaven Funeral Services Ltd*, *above*, at [34] per Lord Bingham, [42] per Lord Nicholls, [47] per Lord Hoffmann, [116] per Lord Hutton, and [168] per Lord Rodger.
[653] *Barker v. Corus UK Ltd*, *above*, at [43] per Lord Hoffmann, [62] per Lord Scott, [109] per Lord Walker, and [126]–[127] per Baroness Hale. The United Kingdom Parliament subsequently enacted legislation that reinstated joint and several liability: *Compensation Act 2006* (UK).
[654] At [62] per Lord Scott.
[655] *Clements v. Clements* 2012 SCC 32, [2012] 2 SCR 181; and *Resurfice Corp v. Hanke* 2007 SCC 7, [2007] 1 SCR 333 [§16.2.2].

or more defendants, they are unable to prove a particular defendant's negligence caused the loss because each tortfeasor can blame the other as the possible but for cause.

109. The third approach advanced is the "market share liability" approach. That approach is derived from a landmark Californian products liability decision, *Sindell v. Abbott Laboratories*.[656] The plaintiff, who developed cancer as a result of her mother taking a drug during pregnancy, was unable to prove which of a large number of manufacturers who had manufactured the drug in question had manufactured the particular batch ingested by her mother. This was held not to be fatal to her claim. The Court found it could hold each defendant liable in proportion to its share of the market.[657]

110. We accept that at a superficial level Mr Smith's claim has some similarities with these cases relied on by Mr Salmon. Like them, it too involves a single causative agency (greenhouse gas emissions) and multiple tortfeasors.

111. But the similarities end there. In all these cases, as in the public nuisance cases, the individual tortfeasors making up the group were known or readily identifiable and all before the Court as defendants. Any one or more of them was responsible for all the harm suffered by the claimant. Even in the most liberal of the approaches, the market share liability case, the prerequisites to liability include that a substantial share of the manufacturers who produced the product must be named as defendants in the action.[658]

112. In contrast in this case, the class of possible contributors is virtually limitless and on any view it cannot be said that Mr Smith would not have been injured but for the negligence of the named defendants viewed globally.

113. In our assessment, the inability to join to the proceeding all material contributors or a substantial share of contributors is an insuperable problem. It is not a trial issue. And nor is it a pleading issue. It can only be overcome by the Court agreeing to abolish the relational underpinnings that are fundamental to tort law. And that in our view is something the Court should not countenance in the interests of preserving a coherent body of law.

114. Turning then to the second external stage of the duty inquiry.

115. We accept that the vulnerability of a person in the same position as the claimant is a relevant factor in favour of recognising a duty. But in our assessment in the circumstances of this case it is far outweighed by other policy considerations.

116. These include the consideration that recognition of a duty would create a limitless class of potential plaintiffs as well as a limitless class of potential defendants. Defendants would be subjected to indeterminate liability and embroiled in highly problematic and complex contribution arguments on an unprecedented scale potentially involving overseas emitters as well as New Zealand emitters. Another crucial factor telling against a duty is the existence of international obligations and a comprehensive legislative framework. To superimpose a common law duty of care is likely to cut across that framework, not enhance or supplement it. Further for the reasons already canvassed we consider the courts are in any event ill-equipped to address the issues that the claim raises. Finally, there is the impact on the coherence of the law generally.

117. All of these factors were also identified by the Judge and we agree with his conclusion that the duty of care alleged by Mr Smith would have wide effects on society and the law generally.[659] We agree too that were the action allowed to proceed, Mr Smith would be unable to establish a

[656] *Sindell v. Abbott Laboratories* 26 Cal 3d 588 (Cal 1980).
[657] At 612.
[658] At 612.
[659] High Court judgment, *above*, at [99].

duty of care in the terms alleged and that the negligence claim is clearly untenable. ***]

89. Speaking more generally, the Court of Appeal was also of the view that Mr Smith's claims were "not consistent with the policy goals and scheme of the legislation and in particular the goals of ensuring that this country's response to climate change is effective, efficient and just".[660] Private litigation could mean emitters are required to "comply with requirements that are more stringent than those imposed by statute".[661] The Court's role was instead to "[support] and [enforce] the statutory scheme for climate change responses and [hold] the Government to account".[662] ***

Submissions

128. Mr Bullock [counsel for Mr Smith] submits that it is irrelevant that there are other contributors not before the Court, and that, if the respondents consider others should be put before the Court, it is open to them to join them. He concluded, on this point, "Mr Smith is entitled to restrain anyone doing him wrong, and he is not required to identify and restrain *everyone* doing so". ***

131. We start by noting that, at a broad level, counsel for the respondents, led by Mr Kalderimis, submitted that the Court ought not to engage in a judicial response to climate change, because it is not equipped to design or implement one. The problem is polycentric and political; there are a broad range of interests and trade-offs at issue; and complex scientific and economic judgements are required.[663] They submit that Mr Smith's claim is legally incoherent and would damage the integrity of tort law. Tort law is founded, they say, on a relational connection between plaintiff and tortfeasor.[664] Mr Smith's claim, involving no relationship with the respondents, "would do violence to New Zealand's law of obligations". It would abrogate "the relational underpinnings that are fundamental to tort law".[665] They argue that the fact that the appeal is to the courts' rights-protection function, rather than to the executive or legislative branches, should of itself be a warning sign. It is a departure from the common law's "incremental method of development", and an invitation to the judiciary to "rewrite the foundations of tort law, and to step beyond tort law and into the domain of the political branches". They contrast the development of the common law in invasion of privacy in *Hosking v. Runting*,[666] which they say was a "logical development" from United States and British jurisprudence. ***

Concluding observations ***

173. In sum, we do not consider the obstacles [to Mr Smith establishing the tort of public nuisance] are so overwhelming as to meet the standard for strike out ***. The consequence, therefore, is that they must now submit to argument, and evidence, at trial. ***

174. Where the primary cause of action is not struck out, the authorities generally discourage striking out any remaining causes of action as a point of principle, unless it can be said they both meet the criteria for striking out *and* are likely to add materially to costs, hearing time and deployment of other court resources.[667]

175. In this case, there are good reasons to follow that approach. As the pleading itself demonstrates, the same facts are alleged, and are alleged to be relevant, in all three causes of action. Striking out the

[660] At [33].
[661] At [33].
[662] At [35].
[663] Among other authorities, the respondents refer to the decision of the Federal Court of Australia, Full Court in *Minister for Environment v. Sharma* [2022] FCAFC 35, (2022) 291 FCR 311 at [228] and [253]—a claim in negligence.
[664] Counsel cited *MacPherson v. Buick Motor Co* 217 NY 382 (Court of Appeals of New York 1916) at 385 [§19.1.1], referred to in *M'Alister v. Stevenson* [1932] AC 562 (HL) (commonly known as *Donoghue v. Stevenson*) [§13.1.1].
[665] Citing CA judgment, *above*, at [113].
[666] *Hosking v. Runting* [2005] 1 NZLR 1 (CA), at [117] per Gault P and Blanchard J.
[667] See, for example, *Jull v. Little* [2012] NZCA 364 (affirming *Little v. Jull* [2012] NZCCLR 3 (HC)); *Williams and Humbert Ltd v. W & H Trade Marks (Jersey) Ltd* [1986] AC 368 (HL); *Lonrho plc v. Fayed* [1992] 1 AC 448 (HL); *Three Rivers District Council v. Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 (HL); *Sun Earth Homes Pty Ltd v. Australian Broadcasting Corp* (1990) 98 ALR 101 (FCA); and *John Holland Pty Ltd v. Maritime Union of Australia* [2009] FCA 437.

remaining claims in negligence and the proposed climate system damage tort would be unlikely to produce a material saving in hearing time or other court resources. And, although each cause of action has its own doctrinal underpinning, the deeper questions of necessary relationship, proximity, causation, disproportionality and indeterminacy raise issues common to all. Any added burden the respondents may be required to bear in confronting two additional causes of action will not be significant. Counsel for the respondents did not suggest otherwise.

176. It follows that it is neither necessary nor appropriate that this Court traverse the remaining claims struck out in the Courts below, and we do not do so. ***

190. For the above reasons, the appeal is allowed and the appellant's claim is reinstated. ***

REFLECTION:

- *On what basis did the New Zealand Court of Appeal find that Smith had no relationship of proximity with the respondents? Did the Supreme Court disagree? What will Smith need to show at trial in order to establish proximity between himself and the seven defendant companies?*
- *What obstacles will Smith encounter establishing causation in this context? Are the obstacles insurmountable?*
- *In what way did the plaintiff's pleading in this case differ from the claim brought in Australia in Sharma?*
- *In what way did the principle of division of powers underpin the lower courts' reasoning and the defendants' submissions? What is the proper role of the judiciary in the face of emerging crises like climate change?*

19.11.4 Cross-references

- *Clements v. Clements* [2012] SCC 32, [29]-[32]: **§16.2.3**.
- *Smith v. Inco Ltd* [2011] ONCA 628, [6]-[40]: **§21.1.4**.

19.11.5 Further material

- The Law Report Podcast, "Climate Change Litigation" (Jul 13, 2021) 🎧.
- B.D. Stewart, "*Sharma v. Minister for Environment*: A Unique '*Anns*-wer' to Public Authority Non-Liability for Climate Change Harms in Canada?" (2022) McGill J Sustainable Development L 181.
- L. Stack, "Warm Climate, Slow Change: Climate Tort Claims in Canada and the Potential for Legislative Intervention" (2022) 55 UBC L Rev 251.
- B. Mayer, "The Duty of Care of Fossil-Fuel Producers for Climate Change Mitigation" (2022) 11 Transnational Environmental L 407.
- W. Bonython, "Tort Law and Climate Change" (2021) 40 U Queensland LJ 421.
- D.A. Kysar, "The Duty of Climate Care" (2024) 73 DePaul L Rev 487.
- S. Glazebrook, "The Role of Judges in Climate Governance and Discourse", *Asia Pacific Judicial Conference on Climate Change: Adjudication in the Time of COVID-19* (Wellington: Courts of New Zealand, 2020).
- C.M. Sharkey, "Common Law Tort as a Transitional Regulatory Regime: A New Perspective on Climate Change Litigation" in Jonathan Adler (ed), *Climate Liberalism: Perspectives on Liberty, Property, and Pollution* (New York: Palgrave Macmillan, 2022).
- International Justice and Human Rights Clinic, *Remedies Guidebook for International Climate Change Litigation* (Vancouver: The University of British Columbia, 2023).
- *Toxic Torts 2015* (Vancouver: CLEBC, 2015) 📺.
- Law Pod UK Podcast, "Toxic Torts" (Dec 18, 2023) 🎧.

20 REMEDIES AND PROCEDURE

✗REF: §9

20.1 *Restitutio in integrum*

Livingstone v. Rawyards Coal Co. (1880) 5 A.C. 25, 39 (HL)

LORD BLACKBURN: *** I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation. ***

REFLECTION:

- *What is the aim of compensatory damages? How does the measure differ in cases of tort and contract?*

20.1.1 McCliggot v. Elliott [2022] BCCA 315

✗REF: §9.3.1

DICKSON J.A. (MARCHAND J.A. concurring):

1. The respondent, Patricia Elliott, sustained soft tissue injuries in a motor vehicle accident. Seven years later, a jury awarded her $463,385.54 in damages, including $350,000 for non-pecuniary damage, $46,500 for past income loss, and $15,000 for the cost of future care. The appellants, Ryan McCliggot and Slegg Construction Materials Ltd., seek an order allowing the appeal, setting aside the jury's verdict and remitting the assessment of damages to the trial judge. Alternatively, they ask this Court to reassess Ms. Elliott's non-pecuniary damage, past income loss and cost of future care. ***

5. For the reasons that follow, based on the evidence viewed most favourably for Ms. Elliott and the review standard articulated in *Moskaleva v. Laurie*, 2009 BCCA 260, I would allow the appeal to the extent of reducing the non-pecuniary damage award from $350,000 to $250,000. ***

45. In the trilogy of cases decided in 1978, the Supreme Court of Canada imposed a rough upper limit of $100,000 as the amount to be awarded for non-pecuniary damages in cases involving catastrophic injuries: *Andrews*; *Arnold v. Teno*, [1978] 2 S.C.R. 287 (SCC); *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267 (SCC). A rule of law and policy, the legal ceiling acts as a "governor on an engine" and, adjusted for inflation, to limit what could otherwise be an unlimited sum without influencing the assessment of non-pecuniary damages before the limit is reached. ***

46. Because the specific circumstances of each case govern, non-pecuniary damage awards are by their nature highly variable and not amenable to a tariff: *Lindal* [*v. Lindal*, [1981] 2 S.C.R. 629], at 637. However, as Chief Justice Finch observed in *Dilello* [*v. Montgomery*, 2005 BCCA 56], the effect of the upper limit has filtered down to non-pecuniary damage awards generally, which has resulted in a rough tariff system in cases involving judge-alone awards. In non-catastrophic cases tried by juries, though, the jury is not told about the upper limit, in part because the amount of damage caused by an injury is a factual question and also to preserve the educational value of the independent judgment of the jury. For these reasons, juries are left to apply their own understanding of community values and common sense to their subjective appreciation of the evidence, consistent with the law as the judge explains it. Consequently, jury awards are even less predictable than judge-alone awards. They also tend to suggest that non-pecuniary damage awards made by judges may not conform to contemporary community standards as to appropriate compensation. In particular, jury awards tend to suggest that judges improperly suppress non-pecuniary damage awards by scaling them to the upper limit, whether consciously or unconsciously: *Dilello* at paras. 23-30; *Boyd* [*v. Harris*, 2004 BCCA 146] at paras. 8, 30, 36; *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 117-121, leave to appeal ref'd, [2006] S.C.C.A. No. 100 (SCC). ***

110. *** I acknowledge the great deference due to the jury's assessment of appropriate compensation based on its best judgment and full subjective appreciation of the evidence, unfettered by the inclination to scale the award to the upper limit. I also acknowledge the presumptive depth and intensity of Ms. Elliott's emotional suffering as a single parent rendered less capable of caring for her special-needs children, which, in my view, would increase the reasonable range of likely judge-alone awards from that the appellants proposed to something in the range identified by the plaintiff in *Little* [*v. Schlyecher*, 2020 BCCA 381], namely, $147,000 and $171,000. That said, considering the nature and extent of Ms. Elliott's injuries, their significant but not devastating impacts and the ameliorative amenities such as supplementary childcare support available to help ease Ms. Elliott's emotional suffering, in my view the award is sufficiently anomalous that it amounts to an "outlier" in the sense contemplated in *Boyd*. Accordingly, it requires moderation on appeal.

111. While I am persuaded that the award should be modified, I do not consider it just or necessary to order a new trial or remit the assessment of non-pecuniary damages to the trial judge. The appellants chose to have Ms. Elliott's claim tried by a jury with all of the attendant risks and uncertainties, including the risk that an unsustainable award would be replaced with an award made by this Court based on the most favourable view of the evidence and significantly higher than a likely conventional judge-alone award. Applying that standard and bearing in mind the unique consequences of Ms. Elliott's injuries in her challenging life and this Court's guidance in *Little*, I would reduce the non-pecuniary damage award from $350,000 to $250,000. ***

122. *** I would allow the appeal to the extent of reducing the non-pecuniary damage award from $350,000 to $250,000, but I would not otherwise disturb the award. ***

REFLECTION:

- *Juries tend to be more generous in awarding damages, leading to the suggestion "that judges improperly suppress non-pecuniary damage awards by scaling them to the upper limit" of the "trilogy of cases" on non-pecuniary damages. Should the Supreme Court of Canada overrule its inflation-adjusted cap on non-pecuniary damages and encourage judges instead to equilibrate their awards to the levels reached by juries? What might be problematic about such an approach?*

20.1.2 Stewart v. Collins [2022] ABQB 258

Alberta Court of Queen's Bench – 2022 ABQB 258

DEVLIN J.:

1. George Stewart died in a tragic accident at the roadside of Stoney Trail in Calgary. His widow, Mrs. Lorna Stewart ("Mrs. Stewart"), and family brought this action against the driver and owner of the truck which struck him, under the *Fatal Accidents Act*, RSA 2000, c F–8 [§20.5.1.1].

2. At the time of his death, George Stewart was working with Westana Equipment Leasing Inc. ("Westana"). Given his long service as a valued employee of this close-knit company, Westana continued paying his salary for several months after the accident and thereafter agreed to continue a stream of payments to Mrs. Stewart in lieu of workplace insurance. The parties held this trial of an issue to determine whether the defendants are entitled to deduct any of the payments made by Westana to Mrs. Stewart from her dependency claim against them arising from her husband's death. ***

The Governing Principles

28. I begin by noting Cromwell J.'s insightful observation at the outset of *IBM Canada Ltd v. Waterman*, 2013 SCC 70 at para 3, that the question of when collateral payments received by the victim of a loss-event are to be deducted from the damages owed by the wrong-doer who caused the loss is subtle and complex. As he held for a majority of the Supreme Court, a case such as this:

> … in fact raises one of the most difficult topics in the law of damages, namely when a "collateral benefit" or a "compensating advantage" received by a plaintiff should reduce the damages otherwise payable by a defendant. The law has long recognized that applying the general rule of

> damages strictly and inflexibly sometimes leads to unsatisfactory results. The question is how to identify the situations in which that is the case.

29. This acute description of law stands in contrast to the ostensibly simple root principle at play, namely that damages are meant to make a plaintiff whole, not to enrich them beyond the scope of their proven loss.

(i) The Rule against double recovery

30. The basic rule against double-recovery is straightforward. Plaintiffs in tort cases should not be over-compensated for their injury. Rather, they are meant to be compensated according to the principle of restitution, which seeks to restore them to the position they were in prior to the negligent event. It follows that plaintiffs should not receive double compensation. This principle was articulated by the Supreme Court in *Ratych v. Bloomer*, [1990] 1 SCR 940 at para 94, in the following terms:

> The general principles underlying our system of damages suggest that a plaintiff should receive full and fair compensation, calculated to place him or her in the same position as he or she would have been had the tort not been committed, in so far as this can be achieved by a monetary award. This principle suggests that in calculating damages under the pecuniary heads, the measure of the damages should be the plaintiff's actual loss. It is implicit in this that the plaintiff should not recover unless he can demonstrate a loss, and then only to the extent of that loss. Double recovery violates this principle. It follows that where a plaintiff sustains no wage loss as a result of a tort because his employer has continued to pay his salary while he was unable to work, he should not be entitled to recover damages on that account.

31. Subject to limited exceptions, this principle dictates that a defendant is only liable to make a plaintiff whole for their actual loss, and in a reduced amount if that loss (or potential loss) was otherwise ameliorated: see also *Cunningham v. Wheeler*, [1994] 1 SCR 359, [1994] SCJ No 19 at para 75. This may include situations in which the plaintiff received a 'collateral benefit' from another source that lessened their actual loss.

32. However, not all collateral benefits received by a person who has suffered a loss-event will trigger an overcompensation concern, as the Supreme Court stated in *Waterman* at paras 23, 28 and 32:

> Not all benefits received by a plaintiff raise a collateral benefit problem. Before there is any question of deduction, the receipt of the benefit must constitute some form of excess recovery for the plaintiff's loss and it must be sufficiently connected to the defendant's breach of legal duty. …
>
> Returning to the issue of connection between the benefit and the breach, the question is what sort of link is required before the issue about deduction arises. The cases suggest two answers. The advantage must either be one that (a) would not have accrued to the plaintiff "but for" the defendant's breach *or* (b) was intended to indemnify the plaintiff for the sort of loss resulting from it. If neither of these conditions is present, there is no issue about deduction. If either of these conditions is present, there is. …
>
> To sum up, a potential compensating advantage problem exists if the plaintiff receives a benefit that would result in compensation of the plaintiff beyond his or her actual loss and *either* (a) the plaintiff would not have received the benefit but for the defendant's breach, *or* (b) the benefit is intended to be an indemnity for the sort of loss resulting from the defendant's breach. These factors identify a potential problem with a compensating advantage, but do not decide how it should be resolved. [emphasis added]

33. This general articulation of the principles is subject to a robust series of exceptions. ***

35. The focus on the nature of the benefit at issue was crystalized in the Supreme Court's most recently visitation of this issue in *Waterman*. There, the Court reviewed the evolution of the law and restated the general principles on deductibility of collateral benefits in the following terms at para 76:

> From this review of the authorities, I reach these conclusions:

> (a) There is no single marker to sort which benefits fall within the private insurance exception.
>
> (b) One widely accepted factor relates to the nature and purpose of the benefit. The more closely the benefit is, in nature and purpose, an indemnity against the type of loss caused by the defendant's breach, the stronger the case for deduction. The converse is also true.
>
> (c) Whether the plaintiff has contributed to the benefit remains a relevant consideration, although the basis for this is debatable.
>
> (d) In general, a benefit will not be deducted if it is not an indemnity for the loss caused by the breach and the plaintiff has contributed in order to obtain entitlement to it.
>
> (e) There is room in the analysis of the deduction issue for broader policy considerations such as the desirability of equal treatment of those in similar situations, the possibility of providing incentives for socially desirable conduct, and the need for clear rules that are easy to apply.

36. The current state of the law following *Waterman* is that deductibility of collateral benefits is more contextual than black-line categorical. Trial Courts are called upon to consider the relationship of the benefit to the rationale of the traditional exceptions, read those in light of the policy considerations at play, and situate each case within the matrix of outcomes in similar cases to reach fair and consistent results.

(ii) Exceptions to the rule against double recovery

37. The two classic exceptions to deductibility are benefits obtained by the injured party through voluntary payments or gifts, and those flowing from private contracts of insurance: *Cunningham* at para 80.

38. In respect of a plaintiff receiving charitably given monies, the Supreme Court held in *Waterman*, at para 4, that:

> [t]he rule is that charitable gifts made to the plaintiff are generally not deductible from the plaintiff's damages even though they were made as a result of and in response to the injury or loss caused by the defendant's wrong

39. A charitable payment from an employer should not be treated any differently than one made by a relative, friend, or stranger: *Provost v. Dueck Downtown Chevrolet Buick GMC Ltd*, 2021 BCCA 164 at para 71; *Boarelli v. Flannigan*, [1973] OJ No 1989 (CA) at para 35.

40. This exception extends to an employer's voluntary and gratuitous payment of an injured employee's salary. There is strong authority that such voluntary payments will not be deducted from tortious damages awarded against a third party who caused an injury that resulted in some measure of job loss. *** [I]n *Mazepa v. Edwards*, [1953-54] 10 WWR (NS) 565 (Alta SC) at para 8, *** McBride J declined to reduce damages for lost income due to a voluntary continence of salary by the plaintiff's employer, holding that:

> [o]n the authorities, in my view, a compassionate payment of this kind by a generous employer does not enure to the benefit of the wrongdoer, and I accordingly allow her the full amount [of lost wages] notwithstanding the compassionate payment received by her. ***

42. The second general exception to double recovery is for insurance proceeds: *Cunningham* at para 74. The basis for this exception is that a wrongdoer should not benefit from plaintiffs having planned for negative contingencies through the prior purchase of insurance: *Krawchuk v. Scherbak*, 2011 ONCA 352 at para 11.

43. As will be discussed below, the initially narrow private insurance exception has been expanded to include certain public insurance schemes, such as EI and CPP benefits. The Supreme Court has also attenuated the importance of direct beneficiary contribution to schemes of insurance. Most recently in *Waterman*, the Court openly questioned the rationale for requiring that a plaintiff personally contribute to the insurance. This follows Justice Cory's conclusion in *Cunningham*, at para 88, that:

> [t]o say that the exception applies only to private insurance, where actual premiums are paid to the insurance company, would create barriers that are unfair and artificial …. This would be manifestly

unfair. There is no basis for such a socially regressive distinction.

44. Finally, and critically to this case, the Supreme Court in *Cunningham*, at paras 95-96, also held that, on a principled basis, the private insurance exception should encompass situations where companies self-insure. ***

45. The present case must be considered in the framework of these principles.

Application of the principles ***

47. I find that the 2011 payments made in lieu of George Stewart's salary were in substance a charitable gift. No one asked for these payments. They were made reflexively by Westana out of a sense of loyalty and remembrance of a dearly regarded co-worker. Most of these monies were paid before the absence of WCB benefits, and its impact on Mrs. Stewart, were known to Westana. I find as a fact that the August-to-December 2011 payments were voluntary, without consideration, and *ex gratia*. ***

50. The payments in lieu of salary made in 2011 are not deductible. ***

65. To the extent that the periodic payments are not purely charitable, they were made in moral and legal contemplation of Westana's role in leaving Mrs. Stewart without insurance coverage in the event of a debilitating accident to her husband. I find as a fact that this was the essence of the discussions between the Stewarts and Westana and the *raison d'être* of their arrangement.

66. As such, these payments were effectively a form of self-insurance in lieu of either public workplace insurance, or other analogous coverage, that Westana determined it ought to have provided to George Stewart. ***

67. Applying the reasoning of Cory J in *Cunningham*, as quoted above, I can find no principled reason why such payments should not be given similar treatment to the proceeds of formal insurance. Doing so advances the Supreme Court's mandate to achieve "equal treatment … in similar situations" with a focus on the "nature and purpose of the benefit". It is also consistent with the Supreme Court's modern departure from the moralistic risk/return underpinnings of the traditional private insurance exception. ***

70. Deducting these payments from the damages owed by the parties responsible for George Stewart's death would be contrary to their dual purposes: charitable assistance and replacement of non-deductible workplace insurance. That outcome would be unfair, arbitrarily disadvantage Mrs. Stewart relative to similarly situated tort victims, and disincentivize corporate social responsibility.

Conclusion

71. A stranger to the tort came voluntarily to the aid of its victim, in part from moral concern and in part as recompense for failing to provide a private indemnity that the victim and his dependents had mistakenly relied upon. Exempting Westana's payments from deductibility is a principled extension of the evolving law in this area.

72. For these reasons, none of the monies received by Westana to date are deductible from any damages owed by the defendants for their role in George Stewart's tragic accident.

REFLECTION:

- *When an accident or tort victim receives charitable gifts, private insurance payments or pension benefits as a consequence of the position the defendant has put them in, why should these payments not be taken into account when determining what amount of damages the defendant must pay to restore the plaintiff to their original position? Are such payments effectively a windfall for the plaintiff?*

20.1.3 Further material

- D.B. Garrow, D.S. Hansen & M.L. Parkes, "Damages for Personal Injury or Wrongful Death in Canada" (2004) 69 J Air L & Commerce 233.

- D. Murynka, "Collateral Benefits Revisited: A Case Comment on *IBM Canada Limited v. Waterman*" (2015) 53 Alberta L Rev 243.
- E. Adjin-Tettey & K. Cooper Stephenson, *Personal Injury Damages in Canada* (3rd ed., Toronto: Thomson Reuters, 2018).

20.2 Mitigation of loss

Sharp Corp. Ltd. v. Viterra B.V. [2024] UKSC 14

85. The principle of mitigation requires the injured party to take all reasonable steps to avoid the consequences of a wrong. This means that (i) there is no recovery for loss which should reasonably have been avoided; (ii) there is recovery for loss incurred in taking reasonable mitigating steps, even if that increases the loss and (iii) if the loss is successfully reduced by the taking of reasonable mitigating steps then the party in breach is entitled to the benefit of that—there is no recovery for avoided loss—see, for example, the judgment of Robert Goff J. in *Koch Marine Inc v. d'Amica Societa di Navigazione arl (The Elena d'Amico)* [1980] 1 Lloyd's Rep 75 at p 88. In *McGregor on Damages* 21st ed (2021), paras 9.002-9.007 these are described as the "three rules" of mitigation. Andrew Dyson and Adam Kramer suggest that there is one underlying rule: "damages are assessed as if the claimant acted reasonably, if in fact it did not act reasonably"—see A. Dyson and A. Kramer, "There is No 'Breach Date Rule'" (2014) 130 LQR 259, 263.

86. In many cases the compensatory principle [which aims to put the injured party in the same position as if the breach of duty had not occurred] and the principle of mitigation work together and it is reasonable steps taken in mitigation which fix the measure of compensatory damages. So, for example, in the sale of goods the mitigatory step of obtaining a reasonable substitute sale (where the injured party is the seller) or purchase (where the injured party is the buyer) will generally be the basis of the compensatory damages recoverable. ***

REFLECTION:

- *Why does the common law expect plaintiffs to mitigate their loss? Why shouldn't defendants be liable for all of the losses their tortious conduct causes?*
- *What is the consequence for a plaintiff who does not reasonably mitigate their loss?*

20.2.1 Slater v. Pedigree Poultry Ltd [2022] SKCA 113

✗REF: §10.12.1

SCHWANN J.A. (RYAN-FROSLIE AND KALMAKOFF J.A. concurring): ***

2. The factual backdrop in which this tort was alleged to have occurred is in connection with the supply management regime for the broiler hatching egg producers' industry in Saskatchewan, which is established pursuant to provincial legislation. In broad-brush terms, the legislative scheme creates a regulatory tribunal to oversee the production and marketing components of the industry, principally through a licensing regime and quota limits. ***

66. The [Saskatchewan Broiler Hatching Egg Producers' Marketing] Board held a meeting on September 9, 1998, where it allocated an expansion quota of 58,220 bird units to seven of the existing producers. All who had requested an expanded quota—other than Pedigree, Mr. Dubois [collectively, the respondents] and another entity—were granted what they had requested, either unconditionally or on a conditional basis. ***

81. The trial judge rejected the Board's submission that the granting of a quota was a matter exclusively within its almost unfettered discretion. ***

82. *** [T]he trial judge was satisfied that the tort of misfeasance in public office had been made out against each of the appellants with respect to both Pedigree and Mr. Dubois. ***

114. To conclude, the findings of fact support the trial judge's bottom-line conclusion on liability. ***

266. The appellants contend the trial judge erred in his mitigation analysis: first, by concluding that the respondents had no duty to mitigate their losses because they were immersed in settlement negotiations, and second, by failing to take account of the fact that they had not appealed the Board's allocation decision to the Appeal Committee.

267. It is settled law that a plaintiff is obliged to take all reasonable steps or measures to reduce their damages. *** The rationale underpinning the duty to mitigate is fairness. In the *Law of Damages*, the authors discuss the objective in the following way (at 430-431):

> The objective of the rule of mitigation is to give the plaintiff an incentive to take steps to minimize the total costs of the tort or breach of contract, and to avoid unduly burdening the defendant with avoidable losses. The plaintiff is debarred from recovering losses that could reasonably be avoided. What is reasonable is a question of fact, not law, and *the burden of proof is upon the defendant to demonstrate that the plaintiff could reasonably have avoided a loss or was unreasonable in her conduct.* … However, the plaintiff is not obliged to make extraordinary efforts, to take serious business risks or gambles, or risk its reputation or business relationships to reduce a loss. The plaintiff need only do what is prudent under the circumstances. (Footnotes omitted, underline emphasis in original, italic emphasis added.) ***

270. The appellants begin by asserting that the respondents would have known in December of 1998 that they had not been allocated any of the expansion quota. That discovery, they argue, should have prompted Pedigree and Mr. Dubois to appeal the Board's decision or purchase quota in the subsequent auction. There are several problems with this supposition.

271. The timing of when the respondents knew about the conditional quota expansion is directly relevant to this issue. As mentioned, the trial judge found as fact *** that the respondents did not know about the grant of expansion quota to the other producers until November of 2000. ***

272. *** At the time the respondents became aware of how the Board had cut them out of the dispersal of the expansion quota, no Board decision or order had been made in connection with the respondents. This meant there was, arguably, nothing for the respondents to appeal in connection with the expansion quota matter because no decision had been made by the Board that directly engaged or affected them. At most, the Board failed to respond to their expression of interest. In any event, the respondents' case is grounded in fault, not invalidity. ***

274. The appellants' final argument under the mitigation wing is that they could have purchased additional bird units at the quota auction held in June of 2001, where 10,000 bird units were up for bidding. Mr. Glen attended the auction but did not bid. Mr. Slater, who also attended the auction, bought all of the bird units for a price of $360,000.

275. This is an entirely speculative argument. Pedigree would have had to outbid Mr. Slater, who obviously had an interest in the whole lot. Pedigree also would have had to have the financial resources to do so. The appellants curiously point to the trial judge's finding that Mr. Glen had the financial resources to build new facilities (a point with which they took issue in an earlier argument). However, even though Pedigree may have had the resources to build new facilities, there was no evidence that it could also afford the cost of purchasing quota outright. The appellants bore the burden of proof, yet no such evidence was adduced. Furthermore, one wonders whether it would have been reasonable for Pedigree to purchase expansion quota when the other producers had received quota without paying for it directly. The law does not oblige a plaintiff to take extraordinary efforts; they need only take measures that are prudent, all things considered.

276. There is no error here. ***

REFLECTION:

- *Which party bears the onus of demonstrating that the plaintiff (in)adequately mitigated their loss?*

20.2.2 Cross-references

- *1688782 Ontario Inc. v. Maple Leaf Foods Inc.* [2020] SCC 35, [17], [94]: §19.3.2.2.

20.2.3 Further material

- E. Compeau, "The Price of God: Understanding Reason and Religion in the Duty to Mitigate" (2020) 25 Appeal: Review of Current Law & Law Reform 89.
- L. Thibierge, "The Obligation to Mitigate Loss" [2016] 4 International Business LJ 365.
- E. Kontrovich, "The Mitigation of Emotional Distress Damages" (2001) 68 U Chicago L Rev 491.

20.3 Insurance

20.3.1 Nettleship v. Weston [1971] EWCA Civ 6

✗REF: §14.1.1.2, §18.1.2.1

LORD DENNING M.R.: ***

11. *** In the civil law if a driver goes off the road on to the pavement and injures a pedestrian, or damages property, he is prima facie liable. Likewise if he goes on to the wrong side of the road. It is no answer for him to say: 'I was a learner driver under instruction. I was doing my best and could not help it'. The civil law permits no such excuse. It requires of him the same standard of care as of any other driver.

12. *** The high standard thus imposed by the judges is, I believe, largely the result of the policy of the Road Traffic Acts. Parliament requires every driver to be insured against third party risks. The reason is so that a person injured by a motor car should not be left to bear the loss on his own, but should be compensated out of the insurance fund. The fund is better able to bear it than he can. But the injured person is only able to recover if the driver is liable in law. So the judges see to it that he is liable, unless he can prove care and skill of a high standard; see *The Merchant Prince* [1892] P 179 and *Henderson v. Henry E Jenkins & Sons Ltd* [1970] RTR 70. Thus we are, in this branch of the law, moving away from the concept: 'No liability without fault'. We are beginning to apply the test: 'On whom should the risk fall?' Morally the learner driver is not at fault; but legally she is liable to be because she is insured and the risk should fall on her. ***

23. In my opinion when a learner driver is being taught to drive a car under the instruction of an experienced driver, then, if the car runs off the road and there is an accident in which one or other or both of them are injured, it should be regarded as the fault of one or other or both of them. In the absence of any evidence enabling the court to draw a distinction between them, they should be regarded as equally to blame, with the result that the injured one gets damages from the other, but they are reduced by one half owing to his own contributory negligence [**§18.2.2**]. The only alternative is to hold that the accident is the fault of neither, so that the injured person gets no compensation from anyone. To my mind, that is not an acceptable solution, at any rate in these days of compulsory insurance.

24. I would, therefore, allow the appeal and hold that the damages (now agreed) be divided half-and-half. ***

REFLECTION:

- *Was it appropriate for Lord Denning to take into account the insurance positions of the parties in determining legal responsibility this case?*
- *How does Lord Denning's reasoning compare to the adjudicative approaches in Clements (§16.1.2) and Armstead, [8]-[9] (§17.1.4), which were also cases decided in the shadow of liability insurance?*

20.3.2 Insurance undermines tort system?

S. Hedley, "Corrective Justice—An Idea Whose Time Has Gone?" in M. Del Mar & M. Lobban (eds), Law in Theory and History: New Essays on a Neglected Dialogue (Oxford: Hart Publishing, 2016), 232-233

The law has not abandoned the personal responsibility of actual real people—how could it?—but tort and contract have little to say on it. Personal responsibility has largely moved elsewhere. Take any major

category of tort litigation in the UK:

> • Car accidents: The law goes to a great deal of trouble to establish personal responsibility, but does this through the criminal law, untrammelled by considerations of interpersonal rights or correlativity. The cost of the civil liability is met by compulsory insurance, and the personal civil defendant plays only a nominal part in any actual claim, which is indeed not much affected even if the defendant is untraceable, insolvent or uninsured.[668]
>
> • Accidents at work: Personal liability here is, in the UK at least, maintained in form only, on condition that it is not allowed to affect anyone's rights. So we pretend that defendants personally responsible for accidents are liable for the result, but then invoke vicarious liability to ensure that someone else—the company, their insurers—picks up the bill, with a 'gentleman's agreement' that the employee's liability will remain theoretical only.[669]
>
> • Medical liability: Again, it is taken for granted that individuals will not be held responsible, but rather will have taken out insurance.[670]

In relation to tort, it is no secret that liability is only rarely a matter of personal liability, almost invariably being borne by a company, perhaps an insurer, or perhaps the state.[671] The time for talk of corrective justice is well and truly gone. That this became so is partly a matter of governmental fiat—compulsory liability insurance is a major factor here—but also simply the economics of the matter, a claim against a single individual being far less of a good financial prospect. The law often makes that individual suffer for their misbehaviour, but it does not usually do so through the medium of tort; 'the claims which are brought closely match the areas where liability insurance is to be found'.[672] *** […continue reading]

REFLECTION:

- *Does the prevalence of liability insurance today undermine the traditional rationales of tort liability, such as individual responsibility and corrective justice, as Prof. Hedley claims?*

20.3.3 Insurance facilitates tort system?

J.C.P. Goldberg & B.C. Zipursky, Recognizing Wrongs (Cambridge: Harvard University Press, 2020), 274-276

[T]ort law today is bound up with liability insurance. Consider a doctor found to have committed medical malpractice, or a manufacturer held liable for injuring someone through the sale of a defective product. Hedley claims that it simply blinks reality to assert, as we do, that tort law enables the victims of wrongs

[668] See generally P Cane, *Atiyah's Accidents, Compensation and the Law* 6th edn (Cambridge University Press, 2004) especially 175–77, 200–01, 208–12. Some argue that, while in theory the system depends on proof of fault (though we do not then insist that the award is met by the person at fault), in practice it operates on strict liability lines: see eg N Freeman Engstrom, '"Sunlight and Settlement Mills"' (2011) 86 New York University Law Review 805.

[669] Cane, *ibid* especially 177–79. The 'gentleman's agreement' was discussed in *Morris v. Ford Motor Co* [1973] QB 792. Some jurisdictions have preferred not to trust that insurers are 'gentlemen', explicitly enacting that insurers may not seek an indemnity from negligent employees, absent compelling circumstances such as employee fraud: see P Giliker, *Vicarious Liability in Tort* (Cambridge University Press, 2010) 32–34.

[670] Cane, *ibid* especially 179–81. For the effects of liability insurance on actual behaviour by medical professionals, see B CJ van Velthoven and PW van Wijck, '"Medical Liability": Do Doctors Care?' (2012) 33 Recht der Werkelijkheid 28. For those who suspect that I am cherry-picking my examples to minimise the importance of personal responsibility, I would point out that those three categories of claim together compromise over 85% of negligence personal injury claims: Cane, *ibid* 168.

[671] Some argue that mechanisms for enforcing tort judgments against individuals are today so feeble that personal tort liability is not a meaningful threat to most individuals: S Gilles, '"The Judgment-Proof Society"' (2006) 83 Washington and Lee Law Review 603.

[672] R Lewis, 'How Important are Insurers in Compensating Claims for Personal Injury in the UK?' (2011, ssrn.com/abstract=1939971) 14. For discussion see R Merkin and S Dziobon, 'Tort Law and Compulsory Insurance' in Arvind and Steele (n 36) 303. Whether or to what extent the distribution of insurance reflects market forces, principled governmental action, or raw political power, is a discussion for another occasion.

such as these to hold defendants accountable to them. For in the great majority of cases, the compensation paid out to a victorious tort plaintiff is paid not by the defendant but by the company that has issued a liability insurance policy to the defendant. It is therefore a fantasy to suppose that tort law is about empowering victims to hold wrongdoers to account.

*** As Jules Coleman long ago observed, the liability insurance argument relies on a false premise: namely, that if a person owes a duty to another, it is not possible for her to make a contractual arrangement with a third party to assist her in fulfilling the duty.[673] If Kit contracts with Hertz to provide her with a rental car on a particular day, but the Hertz operation at the relevant airport has run out of cars, a Hertz agent might arrange for Avis to provide Kit with the contracted-for car. Assuming that the Avis car is offered on the same terms (with respect to model, price, availability, and so on), Hertz, by making this arrangement with Avis, has fulfilled its duty to provide Kit with a rental car. Were Hertz to make advanced arrangements with Avis for this kind of situation, it would seem to be nearly identical to a case in which a company that expects, sooner or later, to be sued in tort, buys insurance to cover some of the cost of the liability the company might incur as a result of such a suit.[674] ***

Laws that enable persons to enter into contracts for the purchase of liability insurance *** help ease concerns about tort law's demanding aspects. Moreover, *** they have a salutary effect so far as tort law is concerned—they enable many tortfeasors who would not otherwise be in a position to pay what they owe their victims to actually provide the redress to which victims are entitled. In addition, liability insurance at times serves to reinforce tort obligations. Because insurers are often the ones who stand to pick up the "tort tab," they frequently monitor or incentivize their insureds to promote compliance with applicable tort duties. *** […continue reading]

REFLECTION:

- *Does the prevalence of liability insurance today facilitate the effective running of the tort system, as Prof. Goldberg and Prof. Zipursky claim?*

20.3.4 Cross-references

- *Non-Marine Underwriters, Lloyd's of London v. Scalera* [2000] SCC 24, [46]-[49]: §6.3.1.1.
- *1688782 Ontario Inc. v. Maple Leaf Foods Inc.* [2020] SCC 35, [89]: §19.3.2.2.
- *Stewart v. Collins* [2022] ABQB 258, [42]-[44]: §20.1.2.
- *Transco Plc v. Stockport Metropolitan Borough Council* [2003] UKHL 61, [29], [39], [46]-[49]: §22.1.2.

20.3.5 Further material

- C.C. French, "Insuring Intentional Torts" (2022) 83 Ohio State LJ 1069.
- B. Billingsley, "Policies & Prejudice: The Mandatory Disclosure of Liability Insurance Policies & Policy Limits in Tort Litigation in Canada" (2014) 47 UBC L Rev 329.
- T. Baker, "Liability Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action" (2005) 12 Connecticut Insurance LJ 1.
- J. Stapleton, "Tort, Insurance and Ideology" (1995) 58 Modern L Rev 820.

20.4 Claims by estate

20.4.1 Wills, Estates and Succession Act, SBC 2009

Wills, Estates and Succession Act, SBC 2009, c 13, s 150(1)-(5)

150. Proceedings by and against estate

[673] Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 Ind. L.J. 349, 370 (1992).
[674] Although civil recourse theory is often lumped together with corrective justice theory, they are in important respects different. ***

(1) Subject to this section, a cause of action or a proceeding is not annulled by reason only of the death of

(a) a person who had the cause of action, or

(b) a person who is or may be named as a party to the proceeding.

(2) Subject to this section, the personal representative of a deceased person may commence or continue a proceeding the deceased person could have commenced or continued, with the same rights and remedies to which the deceased person would have been entitled, if living.

(3) Subsections (1) and (2) do not apply to a proceeding for libel or slander or a proceeding under section 1 [violation of privacy actionable] or 3 [unauthorized use of name or portrait of another] of the *Privacy Act*.

(4) Recovery in a proceeding under subsection (2) does not extend to

(a) damages in respect of non-pecuniary loss, or

(b) damages for loss of future income for a period following death.

(5) A person may commence or continue a proceeding against a deceased person that could have been commenced or continued against the deceased person if living, whether or not a personal representative has been appointed for the deceased person. ***

20.4.1.1 Other provincial survival-of-actions statutes

- Alberta: Survival of Actions Act, RSA 2000, c S-27, ss 2-7.
- Manitoba: The Trustee Act, CCSM c T160, ss 53-54.
- New Brunswick: Survival of Actions Act, RSNB 2011, c 227, ss 4-7.
- Newfoundland and Labrador: Survival of Actions Act, RSNL 1990, c S-32, ss 2-5.
- Nova Scotia: Survival of Actions Act, RSNS 1989, c 453, ss 2-5.
- Ontario: Trustee Act, RSO 1990, c T.23, s 38.
- Prince Edward Island: Survival of Actions Act, RSPEI 1988, c S-11, ss 2-5.
- Saskatchewan: The Survival of Actions Act, SS 1990-91, c S-66.1, ss 3-7.

REFLECTION:

- *Survival-of-actions statutes supercede the common law rule that a person's rights of action are extinguished upon their death. Nevertheless, not all rights of action survive. Why might a deceased's estate be precluded from bringing an action for defamation, invasion of privacy or non-pecuniary damages?*[675]

20.4.2 Further material

- C.L. Brown, "*Duncan v. Baddeley*: A Case Comment" (1999) 37 Alberta L Rev 772.
- Manitoba Law Reform Commission, *The Estate Claim for Loss of Expectation of Life* (Rep. 35, 1979).

20.5 Claims by family

20.5.1 Family Compensation Act, RSBC 1996

Family Compensation Act, RSBC 1996, c 126, ss 2-3

2. Action for death by wrongful act, neglect or default

If the death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not resulted, have entitled the party injured to maintain an action and recover damages for it, any person, partnership or corporation which would have been liable if death had not

[675] See *Lougheed Estate v. Wilson*, 2017 BCSC 1366, [594]-[611].

resulted is liable in an action for damages, despite the death of the person injured, and although the death has been caused under circumstances that amount in law to an indictable offence.

3. Procedures for bringing action

(1) The action must be for the benefit of the spouse, parent or child of the person whose death has been caused, and must be brought by and in the name of the personal representative of the deceased.

(2) The court or jury may give damages proportioned to the injury resulting from the death to the parties respectively for whose benefit the action has been brought.

(3) The amount recovered, after deducting any costs not recovered from the defendant, must be divided among the parties in shares as the court or jury by their judgment or verdict directs.

(4) If there is no personal representative of the deceased, or, there is a personal representative but no action has been brought within 6 months after the death of the deceased person by the personal representative, the action may be brought by and in the name or names of all or any of the persons for whose benefit the action would have been if it had been brought by the personal representative.

(5) Every action brought must be for the benefit of the same person or persons as if it were brought in the name of the personal representative.

(6) If a defendant in any action desires to pay money into court in satisfaction, the defendant may pay the money into court in one sum as compensation to all persons entitled to recover damages in the action, without specifying the shares into which, or the parties among whom, it is to be divided under this Act.

(7) If the money is not accepted and an issue is taken by the plaintiff as to its sufficiency, and the court or jury finds it sufficient, the defendant is entitled to a verdict on that issue.

(8) In assessing damages any money paid or payable on the death of the deceased under any contract of assurance or insurance must not be taken into account.

(9) In an action brought under this Act, damages may also be awarded for any of the following expenses if the expenses have been incurred by any of the parties for whom and for whose benefit the action is brought:

> (a) any medical or hospital expenses which would have been recoverable as damages by the person injured if death had not ensued;
>
> (b) reasonable expenses of the funeral and the disposal of the remains of the deceased person.

20.5.1.1 Other provincial fatal accidents statutes

- Alberta: Fatal Accidents Act, RSA 2000, c F-8, ss 2-3.
- Manitoba: The Fatal Accidents Act, CCSM c F50, ss 2-6.
- New Brunswick: Fatal Accidents Act, RSNB 2012, c 104, ss 3-11.
- Newfoundland and Labrador: Fatal Accidents Act, RSNL 1990, c F-6, ss 2-6.
- Nova Scotia: Fatal Injuries Act, RSNS 1989, c 163, ss 3-5.
- Ontario: Family Law Act, RSO 1990, c F.3, s 61.
- Prince Edward Island: Fatal Accidents Act, RSPEI 1988, c F-5, ss 2, 6-8.
- Québec: Civil Code of Québec, S.Q. 1991, c. 64, art 1457; Crime Victims Compensation Act, CQLR c I-6.
- Saskatchewan: The Fatal Accidents Act, RSS 1978, c F-11, ss 3-4.

REFLECTION:

- *Fatal accidents statutes supercede the common law rule that a person has no cause of action arising from another's death.*[676] *To what extent does this legislation aim to put the deceased's dependants in the position*

[676] *Stevens v. Oyster Bed*, 2023 PECA 7, [10].

they would have been in but for the wrongful death?
- *Under the BC legislation, "[c]laimants may recover pecuniary benefits they would otherwise have derived from their relationship with deceased but not non-pecuniary losses."*[677] *Is this a just limitation on remedies?*[678]

20.5.2 Cross-references

- *Horsley v. MacLaren* [1971] CanLII 24 (SCC), [25]: §13.3.2.
- *British Columbia v. Insurance Corp. of British Columbia* [2008] SCC 3, [2]: §18.2.3.1.
- *Snowball v. Ornge* [2017] ONSC 4601, [12]-[15]: §19.2.3.2.
- *Stewart v. Collins* [2022] ABQB 258, [1]: §20.1.2.

20.5.3 Further material

- J. Witt, "From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family" (2000) 25 L & Social Inquiry 717.
- Manitoba Law Reform Commission, *Assessment of Damages Under The Fatal Accidents Act for the Loss of Guidance, Care and Companionship* (Rep. 105, 2000).

20.6 Class actions

OAG Glossary of Terms: A lawsuit commenced by a single person or small group of people on behalf of a larger group of people who may all have a legal action against the same defendant.

20.6.1 Class actions statutes

- Federal: Federal Courts Rules, SOR/98-106, Part 5.1.
- Alberta: Class Proceedings Act, SA 2003, c C-16.5, ss 2(1), 5(1).
- British Columbia: Class Proceedings Act, RSBC 1996, c 50, ss 2(1), 4(1).
- Manitoba: Class Proceedings Act, CCSM c C130, ss 2(1), 4.
- New Brunswick: Class Proceedings Act, RSNB 2011, c 125, ss 3(1), 6(1).
- Newfoundland and Labrador: Class Actions Act, SNL 2001, c C-18.1, ss 3(1), 5(1).
- Nova Scotia: Class Proceedings Act, SNS 2007, c 28, ss 4(1), 7(1).
- Ontario: Class Proceedings Act, 1992, SO 1992, c 6, ss 2(1), 5(1).
- Prince Edward Island: *King & Dawson v. Government of PEI*, 2019 PESC 27.
- Québec: Code of Civil Procedure, CQLR c C-25, ss 574-575; Act respecting the Fonds d'aide aux actions collectives, CQLR c F-3.2.0.1.1.
- Saskatchewan: The Class Actions Act, SS 2001, c C-12.01, ss 4(1), 6(1).

REFLECTION:
- *What is the purpose of class certification? How does it differ from the procedural steps involved in bringing an individual tort action?*[679]

20.6.2 Canada v. Greenwood [2021] FCA 186

✗**REF: §19.6.2**

GLEASON J.A. (WEBB AND NEAR JJ.A. concurring):

1. Class proceedings in the Federal Court provide a procedural vehicle to advance or defend similar claims by members of a group. For plaintiffs, pursuit of such claims via a class proceeding, commenced by one or

[677] *Valencia-Palaciao v. KCP Heavy Industries Co. Ltd.*, 2022 BCSC 1171, [28].
[678] See T. Lovgreen, "Grieving Families Say their Lost Loved Ones are 'Worthless' under B.C. Law, Call for Changes" CBC News (Feb 15, 2021) 📺.
[679] See A. Macnab, "What you need to know about class-action lawsuits" Canadian Lawyer (Mar 24, 2022).

a few representatives on behalf of members of a larger class, is meant to facilitate access to justice, advance judicial economy and encourage defendants and potential defendants to modify behaviours that give rise to liability. In the Federal Court, as elsewhere in Canada, a representative plaintiff who wishes to pursue a class proceeding must have a judge certify (i.e. authorize) the proceeding as a class proceeding before it can proceed.

2. Certification is a procedural step that does not create substantive rights or give rise to new causes of action. Under the *Federal Courts Rules*, SOR/98-106 (the *Rules*), Part 5.1 of which governs class proceedings, certification is available only if the judge hearing the certification motion determines that five criteria are met.

3. As set out in rule 334.16(1) of the *Rules*, these criteria are the following in the context of an action that a plaintiff wishes to have certified: ***

> ["(a) the pleadings disclose a reasonable cause of action;
>
> (b) there is an identifiable class of two or more persons;
>
> (c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;
>
> (d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and
>
> (e) there is a representative plaintiff or applicant who
>
> > (i) would fairly and adequately represent the interests of the class,
> >
> > (ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing,
> >
> > (iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and
> >
> > (iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record."]

4. In an Order issued January 23, 2020 and amended on consent on April 21, 2020, reasons for which are reported as *Greenwood v. Canada*, 2020 FC 119, the Federal Court (*per* McDonald, J.) certified a class proceeding on behalf of a class consisting of, at a minimum, over two hundred thousand potential members. The class includes, with certain exceptions, virtually everyone who has ever worked for or with the Royal Canadian Mounted Police (the RCMP) or at RCMP premises, regardless of whether they were Members or employees of the RCMP or employed in the public service and assigned to work with the RCMP.

5. In their underlying action, the representative plaintiffs seek, on their own behalf and on behalf of class members, damages for non-sexual bullying, intimidation and harassment, which they allege is systemic in RCMP workplaces, and for related reprisals they say have been suffered by those who have raised complaints. They further request damages for the consequential loss of care, companionship and guidance suffered by the families of class members under the *Ontario Family Law Act*, R.S.O. 1990, c. F.3 or comparable legislation in other provinces [§20.5.1.1]. ***

The Evidence before the Federal Court ***

57. Both representative plaintiffs provided generalized assertions that other class members have experienced instances of bullying, intimidation and harassment and claimed that they have witnessed bullying behaviour on the part of other RCMP Members, including those in positions of leadership, with whom they have worked. However, with the exception of the evidence about Mr. Gray's wife, neither gave any details of what category of employee or individual might have been subjected to such alleged bullying,

harassment or intimidation nor of the impact on others of the alleged toxic work environment in RCMP workplaces. And, as noted, Mr. Gray alleged his spouse was singled out for discriminatory treatment as a retaliatory measure against him.

58. The employee of the law firm acting for the representative plaintiffs indicated in her evidence that the firm had received inquiries from several hundred individuals who would fall within the scope of class certified by the Federal Court, but, once again, no details were given as to their experiences.

59. The employee of the law firm, as noted, attached a number of reports to her affidavit (collectively, the Reports) ***.

60. Some of the Reports document the existence of a workplace culture that permitted bullying and harassment to occur within the RCMP as well as a dysfunctional grievance process that failed to adequately respond to complaints of harassment filed by RCMP Members and public service employees assigned to work with the RCMP. On the latter point, several Reports document Members' concerns about the negative impact speaking out against bullying and harassment might have on their careers.

61. However, with one exception, the Reports contain no specifics of harassment, bullying or intimidation experienced by individuals who were not Members of the RCMP or of the public service in a permanent position assigned to work with the RCMP. ***

The Reasons of the Federal Court ***

80. Turning to the criteria set out in Rule 334.16(1) of the *Federal Courts Rules*, the Federal Court started by addressing whether the pleadings disclose a reasonable cause of action, observing that its task was "simply to answer, at a threshold level, whether the proceeding can go forward as a class proceeding", assuming the facts outlined in the statement of claim to be true (at para. 41).

81. The Federal Court noted that courts have recognized systemic negligence claims in *Davidson v. Canada (Attorney General)*, 2015 ONSC 8008 and *Rumley v. British Columbia*, 2001 SCC 69 and that claims of systemic harassment within the RCMP were found to meet the cause of action requirement in *Merlo v. Canada*, 2017 FC 533 [*Merlo*], and *Tiller v. Canada*, 2019 FC 895. It dismissed the Crown's suggestion that the decisions of the Ontario Court of Appeal in *Merrifield v. Canada (Attorney General)*, 2019 ONCA 205 [**§5.2.2**], and *Piresferreira v. Ayotte*, 2010 ONCA 384 established that there was no cause of action, holding that "the Crown in relying on these cases has taken too narrow an interpretation of the nature of the claims proposed" which "were not 'just' workplace disputes" but claims for systemic negligence that attacked "the very processes and systems that the Crown claims should provide a remedy" (at para. 48). The Federal Court accordingly was not convinced it was plain and obvious that the claims would fail; to the contrary, it was satisfied that a reasonable cause of action had been established. ***

83. Regarding the identifiable class requirement, the Federal Court held that all class members shared characteristics of professional involvement with the RCMP and being subject to its internal policies, which bore a rational connection to the systemic negligence claim. The Court rejected its understanding of the Crown's argument that the class is overly broad and includes individuals whose claims are statutorily barred under the *FPSLRA* [*Federal Public Sector Labour Relations Act*]. It found that the size of the class alone is not a ground to deny certification and that the argument that some claims may be barred was a defence that the Crown could raise, but not a ground to deny certification.

84. The Federal Court went on to find that the common issues would serve to advance the resolution of each class member's claim. Noting the evidentiary requirement was low, it found the facts outlined in the Statement of Claim and in the Reports were sufficient to meet the "some basis in fact" requirement.

85. As for the inquiry into whether a class proceeding was the preferable procedure for the just and efficient resolution of the common questions, the Court pointed to the relevant factors set out in Rule 334.16(2) and emphasized that the preferability analysis considers three principal goals, namely, judicial economy, behaviour modification and access to justice. It observed that because the cause of action was framed as systemic negligence, the common questions of fact and law would necessarily predominate. In addition,

the Court noted in para. 76 that a class proceeding "would likely mitigate the difficulties faced by members of the class coming forward with their claims, without fear of reprisal". In terms of judicial economy, it noted that "even if some of the class members have internal mechanisms to exhaust, others may not" and without a class action "there would most certainly be duplication of fact-finding and legal analysis" (at para. 77). The Court held that a class proceeding also favoured access to justice. It was therefore satisfied that the class proceeding was the preferable procedure to address the class members' claims.

86. With respect to the appropriateness of the proposed representative plaintiffs, the Federal Court did not accept the Crown's argument that they were statutorily barred from advancing a claim by reason of the *Pension Act* and section 9 of the *Crown Liability and Proceedings Act*, R.S.C. 1985 c. C-50 (the *CLPA*) [§23.2.2]. *** It was thus satisfied that the representative plaintiffs would serve as satisfactory representatives of the class.

Issues

87. I turn next to set out the several issues raised by the Crown in this appeal. It submits that the Federal Court erred in law in:

> 1) confusing the evidentiary standards for determination of the initial jurisdictional question and the reasonable cause of action standard with the "some basis in fact' standard for the remaining four branches of the certification test;
>
> 2) its admission of and reliance on the Reports in respect of the jurisdictional and cause of action requirements; ***

Did the Federal Court err in its choice of evidentiary standards and in its use of the Reports?

90. The Crown first submits that the Federal Court erroneously applied the "some basis in fact" standard for the assessment of the jurisdictional and cause of action issues and erred in relying on the contents of the Reports in respect of these issues. On the latter point, the Crown submits that, "while the Reports may be used in addition with other admissible evidence in establishing some basis in fact for certification requirements, statements in these public reports are not admissible for the truth of their contents and should not have been relied upon in determining the jurisdictional question or the cause of action requirement" ***.

91. It is true that the Federal Court mentioned the Reports as "providing the necessary evidence to support a reasonable cause of action" at para. 49 of its Reasons. This is an error of law because no evidence is admissible on this issue. Rather, the principles for assessment of the first criterion for certification are the same as those applicable on a motion to strike. The facts alleged in the statement of claim are presumed to be true, and no evidence may be considered. The test is whether it is "plain and obvious" that the pleadings, assuming the facts pleaded to be true, disclose no reasonable cause of action: see, e.g. *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 63; *Canada (Attorney General) v. Jost*, 2020 FCA 212 at para. 29; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at p. 980.

92. Although the Federal Court erroneously referred to the Reports in para. 49 of its Reasons, it did not premise its determination on the cause of action requirement on this evidence but rather centred its analysis on whether, as a matter of law, the pleadings disclosed a cause of action. Its mention of the Reports was only made in passing.

93. Thus, on a fair reading of the Federal Court's reasons, it relied on the Reports only in respect of the jurisdictional issue and the final four criteria for certification but not in respect of the cause of action requirement. Moreover, it applied the "some basis in fact" standard only to the final four criteria for certification.

94. For the final four criteria for certification (identifiable class, common questions, preferable procedure and character of the representative plaintiff(s)), plaintiffs bear the burden of adducing evidence to show "some basis in fact" that these criteria have been met: *Hollick*, at para. 25; *Pro-Sys*, at para. 99; *AIC Limited v. Fischer*, 2013 SCC 69 at para. 40. This threshold is lower than the balance of probabilities as certification

is not the appropriate stage to resolve conflicts in the evidence. That said, the lower standard does require the plaintiff to lead enough evidence to satisfy the certification judge that the requirements for certification have been met such that the proceeding should be allowed to proceed: *Pro-Sys*, at paras. 102-105. ***

95. Evidence is admissible on a jurisdictional issue such as that which arose in this case, where the Court is asked to decline to exercise its jurisdiction in favour of alternate administrative processes. Evidence as to the nature and efficacy of the suggested alternate processes is necessary to provide a basis for the Court's determination of whether it ought to decline jurisdiction in favour of the alternate administrative remedies. ***

96. As the respondent rightly notes, evidence similar to the Reports has frequently been relied on in certification matters, along with other evidence, to support that there is some basis in fact for the final four criteria for certification: see, e.g. *Johnson v. Ontario*, 2016 ONSC 5314, at paras. 50-67; *Bigeagle v. Canada*, 2021 FC 504, at paras. 37-47; *R.G. v. The Hospital for Sick Children*, 2017 ONSC 6545, at paras. 22-27, aff'd on other grounds 2018 ONSC 7058; *Gay et al. v. Regional Health Authority 7 and Dr. Menon*, 2014 NBCA 10, at para. 18.

97. Indeed, the Crown recognizes that the Reports could be admitted on this basis to establish, along with other evidence, that the final four criteria for certification were met. Here, there was such other evidence from the representative plaintiffs in respect of their own situations and observations. The Federal Court thus did not err in admitting and relying on the Reports along with the evidence from the representative plaintiffs in consideration of the final four criteria for certification.

98. Given this, I see no error in the Federal Court's having likewise considered the Reports on the jurisdictional issue, which raises questions that are very similar, if not identical, to the preferable procedure criterion for certification.

99. I accordingly do not believe that the Federal Court made a reviewable error of law in its consideration of the Reports. ***

REFLECTION:

- *As the Court states, where the pleadings disclose a reasonable cause of action, plaintiffs must show "some basis in fact" to meet the latter four criteria of certification. What is the rationale for this low evidentiary threshold?*

20.6.3 Francis v. Ontario [2021] ONCA 197

✗**REF: §19.5.2.3, §23.2.2.2, §24.2.2**

DOHERTY AND NORDHEIMER JJ.A. (H. YOUNG J.A. concurring): ***

5. As found by the motion judge, the respondent suffers from serious mental illness. He was held in the Toronto South Detention Centre for over two years on remand while awaiting trial on charges relating to a bank robbery. He was ultimately acquitted of all charges.

6. During his incarceration, the respondent was placed in administrative segregation twice, once for eight days. On both occasions he was alleged to have refused to take mental health medication that had caused him negative side-effects in the past. Correctional officials considered this conduct to constitute "refusing to follow an order", which they determined justified a placement in administrative segregation. As found by the motion judge, the respondent's experience in administrative segregation was excruciating; his anxiety was out of control; he felt terrorized and was in a state of delirium and shock.

7. In 2017, the respondent commenced this proceeding as a class action. He sought declarations that his, and the class members', rights under the *Charter* had been infringed by Ontario's system of administrative segregation and that Ontario was liable in negligence. The respondent sought damages in negligence and under s. 24 of the *Charter*. He also sought punitive damages.

8. The class action was certified on consent by order dated September 18, 2018. The class in this case is made up of two groups. One group is made up of inmates who are seriously mentally ill, such as the

respondent (“SMI Inmates”). The other group is made up of those inmates, who may not be acutely unwell, but who were left in segregation for 15 or more consecutive days (“Prolonged Inmates”). ***

107. There is no reason in principle to adopt an approach to these claims that requires each individual inmate to commence their own action in order to seek relief for the resulting harm. Indeed, such a result would run counter to the very purpose behind the *Class Proceedings Act*, 1992, S.O. 1992, c. 6.

108. Such a result would also be contrary to the approach taken in other similar types of claims. ***

110. *** [I]n this case, the actions of Superintendents directing, or allowing, the SMI Inmates and the Prolonged Inmates to be subjected to administrative segregation can be determined without reference to their individual circumstances. In other words, those actions are capable of being determined on an institution-wide basis through the institution’s own records. The institution’s records will establish which inmates were subjected to administrative segregation and, of those individuals, who falls within either the SMI Inmates or Prolonged Inmates groups. We repeat that the expert evidence then establishes that harm will be occasioned to each and every individual in both of those groups. While individual circumstances may ultimately be relevant to the proof of individual levels of damages, they are not required for proof of a breach of the duty of care on a system-wide basis, nor are they required for determining a base level of damages applicable to all: *Good v. Toronto (Police Services Board)*, 2016 ONCA 250, 130 O.R. (3d) 241, at para. 75, leave to appeal refused, [2016] S.C.C.A. No. 255. ***

REFLECTION:

- *What are the potential benefits and drawbacks of resolving claims for harm suffered by inmates through a class action as opposed to individual actions?*

20.6.4 Cross-references

- *Insurance Corp. of British Columbia v. Ari* [2023] BCCA 331, [4]: §4.2.5.
- *Atlantic Lottery Corp. Inc. v. Babstock* [2020] SCC 19, [1]-[6]: §15.1.1.
- *1688782 Ontario Inc. v. Maple Leaf Foods Inc.* [2020] SCC 35, [1]: §19.3.2.2.
- *Cloud v. Canada* [2004] CanLII 45444 (ON CA), [36]-[88]: §19.7.1.
- *Brown v. Canada* [2017] ONSC 251: §19.7.3, [2018] ONSC 3429, [11]-[12]: §12.4.1.
- *Canada v. Whaling* [2022] FCA 37: [7]-[8]: §24.1.2.3.

20.6.5 Further material

- N. Semple, “Topic 13a: Class Actions” in *An Introduction to Civil Procedure: Readings* (Ottawa: Canadian Legal Information Institute, 2021).
- J. Murray, “Class Actions in British Columbia” Dial A Law (Oct 2017).
- R.P. Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Oxford: Hart Publishing, 2004).
- J. Kalajdzic, “Class Actions in Canada: The Promise and Reality of Access to Justice” (Vancouver: U British Columbia Press, 2018).
- I.N. Cofone (ed), *Class Actions in Privacy Law* (Oxford: Routledge, 2021).
- S. Penney, “Mass Torts, Mass Culture: Canadian Mass Tort Law and Hollywood Narrative Film” (2004) 30 Queen’s LJ 205.
- “Erin Brockovich” (Universal Pictures, 2000) 📺.

20.7 Apologies

20.7.1 Apology Act, SBC 2006

Apology Act, SBC 2006, c 19, ss 1-2

1. Definitions

In this Act: "apology" means an expression of sympathy or regret, a statement that one is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit or imply an admission of fault in connection with the matter to which the words or actions relate; ***

2. Effect of apology on liability

(1) An apology made by or on behalf of a person in connection with any matter

> (a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter,
>
> (b) does not constitute an acknowledgement of liability in relation to that matter for the purposes of section 24 of the *Limitation Act*,
>
> (c) does not, despite any wording to the contrary in any contract of insurance and despite any other enactment, void, impair or otherwise affect any insurance coverage that is available, or that would, but for the apology, be available, to the person in connection with that matter, and
>
> (d) must not be taken into account in any determination of fault or liability in connection with that matter.

(2) Despite any other enactment, evidence of an apology made by or on behalf of a person in connection with any matter is not admissible in any court as evidence of the fault or liability of the person in connection with that matter. ***

20.7.1.1 Other provincial apology statutes

- Alberta: Alberta Evidence Act, RSA 2000, c A-18, s 26.1.
- Manitoba: Apology Act, CCSM c A98.
- Newfoundland and Labrador: Apology Act, SNL 2009, c A-10.1.
- Nova Scotia: Apology Act, SNS 2008, c 34.
- Ontario: Apology Act, 2009, SO 2009, c 3.
- Prince Edward Island: Health Services Act, RSPEI 1988, c H-1.6, s 32.
- Québec: Civil Code of Québec, CQLR c CCQ-1991, art 2853.1.
- Saskatchewan: Evidence Act, SS 2006, c E-11.2, s 23.1.

REFLECTION:

- *What is the rationale behind barring defendants' apologies from being used as evidence of their fault in litigation? Does an apology statute operate to the benefit of defendants, plaintiffs or both?*

20.7.2 An open letter regarding the wrongful arrest of Hon. Mr. Selwyn Romilly

J. Narwal, "An Open Letter Regarding the Wrongful Arrest of Hon. Mr. Selwyn Romilly", The Georgia Straight (May 17, 2021)

History repeated itself last Friday, with the wrongful arrest of the Honourable Selwyn Romilly ("Hon. S. Romilly").

In 1974, Valmond Romilly, the younger brother of Hon. S. Romilly, who also later became a provincial court judge ("Hon. V. Romilly"), was wrongfully arrested in Downtown Vancouver as a young lawyer. Hon. V. Romilly successfully sued and was awarded $100 from each of the arresting officers plus costs. In Hon. V. Romilly's case, officers believed him to be Hugh Saunders, a man with an outstanding warrant who was described as Black and four and a half inches shorter than Hon. V. Romilly. After his arrest, Hon. V. Romilly told the officers he was a lawyer and endured laughter and humiliation. After the officers confirmed he was not Hugh Saunders, they detained him to conduct an immigration investigation.

In the cases of both brothers, the arrests were made only because they were Black—they matched no other part of the suspect descriptions. Fortunately, these brothers were also legally trained, knew their rights and

did not face long-term detention. But what about the people of colour who do not have the same legal background?

It is shocking and unacceptable that, in downtown Vancouver, 47 years later, the same police force has made the same inexcusable mistake—arresting an individual only because of the colour of their skin.

However, there is reason to believe in hope for the future.

Between the two incidents, there is a remarkable difference in the response of the VPD and the Mayor. With Hon. V. Romilly, the VPD and officers refused to apologize, which is what prompted the lawsuit. In the aftermath of the judgment, VPD issued a memo advising all members to be guided by the comments of the court, and also said Hon. V. Romilly was entitled to an apology.

Now, with Hon. S. Romilly, both the VPD and Mayor have issued public apologies, likely motivated in part by Hon. S. Romilly's status as a retired judge and the more practical reality that the institutions are now protected from civil liability that might flow from an apology by operation of the B.C. *Apology Act*. But nevertheless, I believe it is a positive sign, and I hope this becomes a meaningful teaching moment and an opportunity for concrete action. *** […continue reading]

REFLECTION:

- *An apology statute enables institutions that are responsible for abuse of others to acknowledge it and apologise to victims without fear of their statements being used against them in court. Does this facilitate opportunities for closure with victims?* [680] *Does it simply give institutions "cost-free public relations" opportunities?*[681]

20.7.3 Caplan v. Atas [2021] ONSC 670

✗**REF: §5.1.2, §5.2.4, §6.8.4, §9.8.2.7**

CORBETT J.: ***

221. The law in this area is developing and I acknowledge that some courts have ordered retractions and apologies as remedies for defamation.[682] I see a place for such orders, in some cases, but I see no utility in an apology here.

222. First, Atas is not a public person whose word carries with it credibility or weight.

223. Second, Atas did not publish the impugned words under her own name. She published them anonymously or pseudonymously, on internet sites understood not to exercise editorial control over published contents.

224. Third, flooding the internet with apologies from the various identities used by Atas, to apologize for the thousands of posts made against dozens of people, would have the effect of drawing further attention to the impugned words and cause further damage.

225. Fourth, it is generally understood that the plaintiffs' vindication comes from this court's judgment. This is not a case where an unqualified retraction from an established media source would further add to the credibility of the court's findings.

226. Fifth, unlike some "apology" cases, the plaintiffs do not ask that the apology be published in reputable

[680] See C. Howorun, "Residential school survivor prepares for historic audience with Pope" CityNews Winnipeg (Dec 14, 2021).
[681] See S. Fine, "Pope Francis's Apology for Abuses at Church-run Residential Schools Unlikely to Have Legal Ramifications, Experts Say" The Globe and Mail (Apr 1, 2022).
[682] See Peter A. Downard, *The Law of Libel in Canada*, 4th ed. (Toronto: LexisNexis, 2018), paras. 15.1-15.27; David A. Potts, *Cyberlibel: Information Warfare in the 21*st Century (Toronto: Irwin Law, 2011), pp. 213-215; Brent T. White, "Say you're sorry: Court-Ordered Apologies as a Civil Right Remedy" (2006) Cornell L.R. 1261; *Ottawa-Carleton District School Board v. Scharf*, [2007] O.J. No. 3030 (Ont. S.C.J.).

media sources. ***

REFLECTION:

- *When might a court-ordered apology be an appropriate remedy?*

20.7.4 Further material

- C. Truesdale, "Apology Accepted: How the Apology Act Reveals the Law's Deference to the Power of Apologetic Discourse" (2012) 17 Appeal: Review of Current L & L Reform 83.
- S. McLennan, L. Rich & R. Truog, "Apologies in Medicine: Legal Protection is Not Enough" (2015) 5 Canadian Medical Association J E156.
- R. Carroll, "Apologies as a Legal Remedy" (2013) 35 Sydney L Rev 317.
- W. Vandenbussche, "Rethinking Non-Pecuniary Remedies for Defamation: The Case for Court-Ordered Apologies" (2021) 9 J of International Media & Entertainment L 109.
- B.T. White, "Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy" (2006) 91 Cornell L Rev 1261.

20.8 Legal costs

OAG Glossary of Terms

Costs: A money award made by a court or tribunal for expenses in bringing or defending a legal proceeding or a step in a proceeding. Costs may also be ordered against a party, in favour of the other, for failing to follow the court's directions or instructions before or during a step in the case.

Partial Indemnity Costs: Costs awarded in civil matters against a party to pay some of the legal expenses incurred by the other party.

Substantial Indemnity Costs: Costs awarded in civil matters against a party to pay most, but not all, of the actual legal expenses incurred by the other party (e.g., lawyer's fees).

REFLECTION:

- *Jurisdictions vary in their treatment of legal costs as a remedy.[683] In England and Wales, the losing party typically pays the successful party's actual lawyers' fees and legal costs. In the United States, each party typically bears their own lawyers' fees. In Canada, there are "various provincial statutes and rules of civil procedure which make costs a matter for the court's discretion."[684] What are the incentive-effects of each approach? Which approach is best in your view?*

[683] See "Costs around the World" in *DLA Piper Global Litigation Guide* (DLA Piper, 2021).

[684] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [19], continuing:

"20. In the usual case, costs are awarded to the prevailing party after judgment has been given. The standard characteristics of costs awards were summarized by the Divisional Court of the Ontario High Court of Justice in *Hamilton-Wentworth (Regional Municipality) v. Hamilton-Wentworth Save the Valley Committee Inc.* (1985), 51 O.R. (2d) 23 (Ont. Div. Ct.), at p. 32, as follows:

(1) They are an award to be made in favour of a successful or deserving litigant, payable by the loser.

(2) Of necessity, the award must await the conclusion of the proceeding, as success or entitlement cannot be determined before that time.

(3) They are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceeding.

(4) They are *not* payable for the purpose of assuring participation in the proceedings.

21. The characteristics listed by the court reflect the traditional purpose of an award of costs: to indemnify the successful party in respect of the expenses sustained either defending a claim that in the end proved unfounded (if the successful party was the defendant), or in pursuing a valid legal right (if the plaintiff prevailed). Costs awards were described in *Ryan v. McGregor* (1926), 58 O.L.R. 213 (Ont. C.A.), at p. 216, as being "in the nature of damages awarded to the successful litigant against the unsuccessful, and by way of compensation for the expense to which he has been put by the suit improperly brought". ***"

20.8.1 Gokey v. Usher & Parsons [2023] BCSC 1983

British Columbia Supreme Court – 2023 BCSC 1983

✗**REF: §2.2.1, §2.3.3, §4.2.3, §5.2.6, §7.1.2, §9.3.4, §9.4.3, §9.5.4, §9.8.2.1, §10.2.1, §21.1.3**

PUNNETT J.: *

7. As the defendants were the successful parties, they are entitled to their costs. The only issues then are the claims of the defendants relating to the scale of costs, double costs, and alternatively special costs and uplift costs. ***

Scale C Costs

8. Appendix B of the [*Supreme Court Civil*] *Rules* provides that a Court may exercise its discretion in awarding costs on the following principles and factors to consider:

> 2(2) In fixing the scale of costs the court must have regard to the following principles:
>
> (a) Scale A is for matters of little or less than ordinary difficulty;
>
> (b) Scale B is for matters of ordinary difficulty:
>
> (c) Scale C is for matters of more than ordinary difficulty. ***

9. The defendants submit the action was of unusual difficulty and importance. Factors relevant to determining the degree of difficulty or importance of an action were considered by Justice R. D. Wilson in *Mort v. School Trustees of School Board No. 63 (Saanich)*, 2001 BCSC 1473 at para. 6:

> (a) the length of the trial;
>
> (b) the complexity of the issues involved;
>
> (c) the number and complexity of pre-trial applications;
>
> (d) whether or not the action was hard fought with little or nothing being conceded along the way; ***
>
> (g) the extent of the effort required in the collection and proof of facts. ***

11. The trial was scheduled for 15 days commencing February 14, 2022. *** The trial ended up being 23.5 days in length.

12. Trials of over two or three weeks may support a finding that a matter was of unusual difficulty: *Slocan Forest Products Ltd. v. Trapper Enterprises Ltd.*, 2010 BCSC 1494 at para. 9; *Monument Mining Limited v. Balendran Chong & Bodi*, 2013 BCSC 179 at para. 7.

13. The plaintiffs took pre-trial steps that added to the complexity of their claim. ***

14. The legal issues involved were not unusually difficult or complex, however the many different types of claims advanced by both the plaintiffs and the defendants resulted in a large number of legal issues having to be addressed.

15. The factual issues however were unusually lengthy and complex as they involved a series of incidents and interactions between the parties over many years. In addition, there was a complicated history of prior litigation between the parties that was necessarily reviewed to provide context to the conduct of the parties, in particular issues of the plaintiff Mr. Gokey's motive for his conduct over the years. This history was also relevant to the relief sought by the defendants concerning their use and access to the easement area in dispute.

16. The action was hard-fought. That in itself does not justify Scale C costs. However, the plaintiffs persisted in advancing meritless claims both against the defendants and in response to the defendants' counterclaim, adding to the complexity and length of the trial. ***

19. I am satisfied this litigation was more than of ordinary difficulty and that costs at Scale C are warranted up to January 24, 2022.

Double Costs from January 24, 2022

20. The defendants seek double costs pursuant to R. 9–1 of the *Rules* as a result of their offer to settle on January 24, 2022. ***

22. On January 24, 2022, the defendants presented an offer under R. 9–1 to the plaintiffs (the "January 24 Offer"). They had also presented an earlier offer to settle on January 5, 2022 (the "January 5 Offer"). The proposed consent order in the January 5 Offer had several provisions about the plaintiffs' and defendants' respective usage of the joint well and the well easement area, and various permanent injunction terms to prevent the continuation of Mr. Gokey's acts of nuisance towards the defendants including his production of smoke. The January 5 Offer's consent order would have provided an award of $50,000 in damages inclusive of costs. ***

26. The law regarding the Court's exercise of its discretion to award double costs under R. 9–1 was reviewed in *Hartshorne v. Hartshorne*, 2011 BCCA 29 at paras. 25–26:

> 25. An award of double costs is a punitive measure against a litigant for that party's failure, in all of the circumstances, to have accepted an offer to settle that should have been accepted. Litigants are to be reminded that costs rules are in place "to encourage the early settlement of disputes by rewarding the party who makes a reasonable settlement offer and penalizing the party who declines to accept such an offer" (*A.E. v. D.W.J.*, 2009 BCSC 505, 91 B.C.L.R. (4th) 372 at para. 61, citing *MacKenzie v. Brooks*, 1999 BCCA 623, *Skidmore v. Blackmore* (1995), 1995 CanLII 1537 (BC CA), 2 B.C.L.R. (3d) 201 (C.A.), *Radke v. Parry*, 2008 BCSC 1397). In this regard, Mr. Justice Frankel's comments in *Giles* are apposite:
>
> > 74. The purposes for which costs rules exist must be kept in mind in determining whether appellate intervention is warranted. In addition to indemnifying a successful litigant, those purposes have been described as follows by this Court:
> >
> > • "[D]eterring frivolous actions or defences": *Houweling Nurseries Ltd. v. Fisons Western Corp*. (1988), 1988 CanLII 186 (BC CA), 37 B.C.L.R. (2d) 2 at 25 (C.A.), leave ref'd, [1988] 1 S.C.R. ix;
> >
> > • "[T]o encourage conduct that reduces the duration and expense of litigation and to discourage conduct that has the opposite effect": *Skidmore v. Blackmore* (1995), 1995 CanLII 1537 (BC CA), 2 B.C.L.R. (3d) 201 at para. 28 (C.A.);
> >
> > • "[E]ncouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases: *Bedwell v. McGill*, 2008 BCCA 526, 86 B.C.L.R. (4th) 343 at para. 33; ***

27. As noted in *Hartshorne*, one purpose of an award of double costs is to deter frivolous actions or defences. As made clear in the reasons for judgment, the plaintiffs' claims and defences were without merit or value. They were frivolous and lacked foundation, yet the plaintiff pursued them. ***

33. The acceptance by Mr. Gokey of the [defendants' proposed] consent order would clearly have been more favourable to him financially than the trial outcome. Had he accepted it he would have been responsible to pay $50,000 inclusive of costs. The damages awarded at trial were $230,000 plus pre-judgment interest from May 4, 2018 on $200,000 of them. In addition, the plaintiffs now face a costs award against them which would have been avoided had the January 24 Offer been accepted. ***

36. The plaintiffs were self-represented during the action and at trial. There was no indication or evidence, however, to suggest that this was as a result of impecuniosity or an inability to pay to counsel to represent

them.

37. I agree with defence counsel's assessment that Mr. Gokey's conduct during the trial indicated that he may have thought he did not need counsel because he considered that he was obviously "right" and the defendants "wrong" regarding all of their interactions over the years at issue. Likewise, I agree a factor in the plaintiffs being self-represented may have been that Mr. Gokey simply enjoyed the experience of representing himself and his wife. Of note in his written reply submissions at trial he wrote: "[t]he Gokeys honestly feel that there is not an attorney anywhere who could know and present what the Gokeys have endured better than Mr. Gokey, himself". During the trial, Mr. Gokey appeared at times to be acting in his handling of procedural and evidentiary issues as if he was involved in a game, and one that he enjoyed playing.

38. The defendants' financial circumstances indicate that being engaged in prolonged litigation and a 23.5-day BCSC trial has been financially onerous to them. Mr. Usher retired in 2008 for medical reasons. The subsequent road maintenance work is only seasonal. Ms. Parsons has not worked since 1985 and receives a disability pension because of a work injury. Her ability to work as a seamstress ended years ago because of rheumatoid arthritis.

39. In summary, the offer to settle was clearly one that ought to have been accepted during the time provided in advance of trial. Overall, it was favourable to the plaintiffs given the trial outcome where more substantial damages were awarded alongside more restrictive injunctive relief. The expiry date was reasonable given the pending trial date and the anticipated costs of preparing for trial and conducting the trial. Acceptance of the offer would have saved the defendants substantial legal fees unlikely to be fully addressed by the costs award and the saving of judicial time would have been considerable.

40. I award the defendants costs at Scale C up to January 24, 2022 and thereafter double costs, and direct that costs be assessed accordingly. ***

REFLECTION:

- *Under the British Columbia Supreme Court Civil Rules,[685] each step of litigation is assigned some number of units, which are then used in conjunction with the scale of costs to calculate the total legal costs. Scale A provides $60 per unit, Scale B provides $110 per unit, and Scale C provides $170 per unit. What is the advantage of a range of scales rather than a fixed scale? Are there any disadvantages?*
- *What is the rationale for awarding double costs? Do double costs unfairly punish the losing party?*

20.8.2 Jones v. Tsige [2012] ONCA 32

✗**REF: §4.1.1.2, §9.3.6, §24.1.2**

SHARPE J.A. (WINKLER C.J.O. AND CUNNINGHAM A.C.J. concurring): ***

3. The central issue on this appeal is whether the motion judge erred by granting summary judgment and dismissing Jones' claim for damages on the ground that Ontario law does not recognize the tort of breach of privacy. ***

92. *** I would allow the appeal, set aside the summary judgment dismissing the action and in its place substitute an order granting summary judgment in Jones' favour for damages in the amount of $10,000.

93. Both parties have filed bills of costs asking for significant awards. In my view, it is appropriate to take into account the novel issue raised by this case which has clearly broken new ground. There is discretion to depart from the usual order in cases of novelty. In my view, in the unusual circumstances of this case, the parties should bear their own costs throughout and I would make no order as to costs.

REFLECTION:

- *Jones incurred $127,607 in legal fees pursuing her tort claim, but was awarded only $10,000 in damages. As between a plaintiff who succeeds on a novel theory of tort liability, and a defendant who is found liable for a*

[685] *Supreme Court Civil Rules*, BC Reg 168/2009 (enabling statute: *Court Rules Act*, RSBC 1996, c 80).

novel tort, who should bear the costs burden?

20.8.3 DuVernet v. Jones [2013] ONSC 928

1. On February 28, 2012, the plaintiff, Steward Du Vernet, a lawyer, filed a statement of claim against the defendant, Sandra Jones, a past client of his, seeking damages for the balance of legal fees he alleges are owing to him. Ms. Jones filed a defence and counterclaim denying the claim and counterclaiming for the return of $50,000 in fees she had paid. Mr. Du Vernet seeks summary judgment for the balance of fees for legal services rendered from January 2010 to February 2012.

2. Ms. Jones was employed in the IT Department of the Bank of Montreal ("the BMO"). In January 2010, she approached Mr. Du Vernet with the prospect of suing a co-worker for invasion of privacy. The co-worker had gained unauthorized access on numerous occasions to Ms. Jones' financial records at the bank.

3. Mr. Du Vernet was initially retained to do research in the area of invasion of privacy which he did. He advised Ms. Jones there were no Canadian cases on the common law right to privacy but there were cases that appeared to support such a claim. The parties entered a retainer agreement dated March 2, 2010 which, in addition to setting hourly fees, also contained warnings about the risks of being unsuccessful; the risk of prolonged litigation; costs consequences; and the right of appeal.

4. The retainer was on a "deferred fees" basis. The accounts would not be payable until the case was concluded by settlement, judgment or otherwise; or either the lawyer or client terminated the retainer. Ms. Jones signed the retainer on March 15, 2010.

5. Ms. Jones brought a summary judgment motion on the invasion of privacy claim but was unsuccessful. Ms. Jones then brought an appeal to the Court of Appeal where Ms. Jones was successful. The Court of Appeal by unanimous decision dated January 18, 2012, set aside the decision of the motion court and founded the novel tort of "intrusion upon seclusion" and in another novel move set a $20,000 cap on damages [*Jones v. Tsige*, 2012 ONCA 32 [§4.1.1.2]]. Ms. Jones recovered $10,000 damages. Mr. Du Vernet conducted the appeal on a deferred fee basis. Ms. Jones at first wished to appeal the damage award to the Supreme Court of Canada but she changed her mind about seeking leave, although Mr. Du Vernet again offered to defer fees.

6. The total billing for legal services and disbursements was $127,607. Ms. Jones gave an assignment to Mr. Du Vernet on any judgment she might obtain. Mr. Du Vernet collected the $10,000 awarded by the Court of Appeal. After Mr. Du Vernet issued his statement of claim against Ms. Jones, Ms. Jones paid $50,000 toward the legal account. It is that $50,000 that she seeks to recover through her counterclaim. The net amount Mr. Du Vernet seeks is $67,607.46.

Issues ***

8. Though Ms. Jones disputes the amount of fees, she bases her position on allegations about Mr. Du Vernet's professional conduct, such as failure to give proper advice, failure to represent her interests and breach of fiduciary duty, etc. I have been provided with an ample record from which to determine conduct related issues. As will be seen, I ultimately do not accept Ms. Jones' allegations in that regard. I however have not been provided with a sufficient record of billing particulars to allow me to make a decision on the quantum of legal fees. ***

Disposition

24. *** I accept that the record amply establishes the credibility of Mr. Du Vernet's evidence about the quality of his legal services. Ms. Jones' affidavit evidence simply does not meet the standard of trustworthiness. ***

25. I grant the following relief:

> a) a declaration pursuant to s. 97 of the *Courts of Justice Act*, R.S.O. 1990, c.C-43 that Mr. Du Vernet served Ms. Jones in a professional and competent manner honouring his fiduciary duty of

trust to his client;

b) a dismissal of the counterclaim; and

c) a direction for a reference for an assessment officer to determine the remaining issue of quantum of legal fees and disbursements

Costs

26. Mr. Du Vernet was fully successful on this motion and in accordance with the principle that costs follow the event he is entitled to an award of costs.

27. The Court of Appeal set down the principle that the objective of a determination on costs is to fix an amount the unsuccessful party is required to pay that is fair and reasonable rather than an amount reflecting the actual costs of the successful party. In deciding what is fair and reasonable, the expectation of the parties concerning the quantum of a costs award is a relevant factor [*Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (Ont. C.A.)].

28. If successful, Mr. Du Vernet would seek partial indemnity costs of $16,160.21 inclusive of HST and disbursements. Ms. Jones would seek partial indemnity costs of $14,811.12 inclusive of HST and disbursements.

29. I award partial indemnity costs of $16,000 against Ms. Jones inclusive of HST and disbursements. This award is reasonable and within the reasonable expectations of the parties. ***

REFLECTION:

- *Given Mr. Du Vernet sought and received an award of partial indemnity costs, what does this suggest about his actual costs in claiming from Jones the balance of his legal fees incurred representing her?*

20.8.4 Anderson v. Alberta [2022] SCC 6

Supreme Court of Canada – 2022 SCC 6

✗**REF: §25.1.2**

KARAKATSANIS AND BROWN JJ. (FOR THE COURT):

1. In *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, this Court established a framework for assessing claims for advance costs to offset the anticipated litigation expenses of public interest litigants. Among its requirements was that an applicant demonstrate *impecuniosity*—meaning, that it "genuinely cannot afford to pay for the litigation" (para. 40).

2. This appeal concerns an application for advance costs by Beaver Lake Cree Nation to fund its litigation under s. 35 of the *Constitution Act*, 1982. A band within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5, Beaver Lake has about 1,200 members, approximately 450 of whom live on a reserve located near Lac La Biche, Alberta. In 2008, band chief Germaine Anderson sued on her own behalf and as a representative of all Beaver Lake Cree Nation beneficiaries of Treaty No. 6 and of Beaver Lake Cree Nation (collectively, Beaver Lake).

3. While contending that it is "impecunious", Beaver Lake has access to resources—both assets and income—that could potentially be applied to fund this litigation. Beaver Lake says, however, that these resources must be applied to address other priorities. The issue to be decided here, then, is how the requirement of impecuniosity applies in this circumstance. That is, we must consider how a First Nation government applicant may demonstrate impecuniosity where it has access to resources that could fund litigation, but says it must devote those resources to other priorities.

4. We conclude that a First Nation government that has access to resources may meet the impecuniosity requirement if it demonstrates that it requires such resources to meet its pressing needs. While the impecuniosity requirement is guided by the condition of necessity, pressing needs are not defined by the

bare necessities of life. Rather, and in keeping with the imperative of reconciliation, they ought to be understood from the perspective of that First Nation government. A court may therefore consider the broader context in which a First Nation government sets priorities and makes financial decisions, accounting for competing spending commitments, restrictions on the uses of its resources, and fiduciary and good governance obligations. It follows that, in appropriate cases, a First Nation government may succeed in demonstrating impecuniosity despite having access to resources whose value equals or exceeds its litigation costs.

5. All this said, the threshold of impecuniosity remains high and is not easily met. Bearing in mind the constraints on the judicial role imposed by the separation of powers, the extraordinary nature of the remedy and the importance of accountability for the expenditure of public funds it entails, the court's analysis must be firmly grounded in the evidence. The court must be able to (1) identify the applicant's pressing needs; (2) determine what resources are required to meet those needs; (3) assess the applicant's financial resources; and (4) identify the estimated costs of funding the litigation. This approach is sufficiently flexible to account for the realities facing First Nations governments and the importance of furthering the goal of reconciliation while adhering to the appropriate judicial role. ***

Advance Costs

Guiding Judicial Discretion

19. We begin with first principles. A court's equitable jurisdiction over costs confers discretion to decide when, and by whom, costs are to be paid (*Okanagan*, at para. 35). This includes the power to award advance costs (also referred to as "interim costs") prior to the final disposition of public interest litigation and in any event of the cause ***. Such awards are "meant to provide a basic level of assistance necessary for the case to proceed" (*Little Sisters*, at para. 43).

20. In *Okanagan*, this Court held that advance costs could be awarded based on the strong public interest in obtaining a ruling on a legal issue of exceptional importance, that not only transcended the interests of the parties but also would, in the absence of public funding, have failed to proceed to a resolution, creating an injustice (para. 34; *R. v. Caron*, 2011 SCC 5, at para. 6). Access to justice is an important policy consideration underlying advance costs awards where a litigant seeks a determination of their constitutional rights and other issues of broad public significance, but lacks the financial resources to proceed. It has also been recognized by this Court as "fundamental to the rule of law" (*Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, at para. 39; see also *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, at p. 230). Further, costs awards can permit litigants of limited means, including vulnerable and historically disadvantaged groups, to have access to the courts in cases of public importance.

21. But this Court has also emphasized that "*Okanagan* did not establish the access to justice rationale as the paramount consideration in awarding costs" and that "[c]oncerns about access to justice must be considered with and weighed against other important factors" (*Little Sisters*, at para. 35). Indeed, as this Court explained in Little Sisters, at para. 5, notwithstanding obstacles to access to justice such as underfunded and overwhelmed legal aid programs and growing instances of self-representation, the Court in *Okanagan* "did not seek to create a parallel system of legal aid or a court-managed comprehensive program". Rather, *Okanagan* applies to those rare instances where a court would be "participating in an injustice—against the litigant personally and against the public generally"—by declining to exercise its discretion to order advance costs (*Little Sisters*, at para. 5). To award advance costs outside those instances would amount to "imprudent and inappropriate judicial overreach" (*Little Sisters*, at para. 44).

22. The root of the concern underlying this narrow scope for an advance costs order is the separation of powers. In *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, this Court affirmed that "our constitutional framework prescribes different roles for the executive, legislative and judicial branches" (para. 27) and that it is "fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other" (para. 29 ***). And so, in Caron, at para. 6, the Court observed that "[a]s a general rule, of course, it is for Parliament and the provincial legislatures to determine if and how public monies will be used to fund litigation against the Crown" (see also *St-Arnaud v. C.L.*, 2009

QCCA 97, at para. 29: "… the long-lasting solution, if there is one, is to be found in distributive justice and falls within the purview of the legislator, rather than in corrective justice, which involves the intervention of the courts"). Allocating public resources among competing priorities is "a policy and economic question; it is a political decision" (*Criminal Lawyers' Association*, at para. 43).

23. Where, therefore, an applicant seeks to have its litigation funded by the public purse, courts must be mindful of the constraints of their institutional role. Those constraints necessarily confine a court's discretion to grant such an award to narrow circumstances (*Okanagan*, at para. 41). It must be a "last resort" (*Little Sisters*, at paras. 36, 41, 71 and 73), reserved for the "rare and exceptional" case (*Okanagan*, at para. 1) and where, again, to refrain from awarding advance costs would be to participate in an injustice.

24. In further keeping with these concerns, the test for advance costs is rigorous. *Okanagan* states three "absolute requirements" (*Little Sisters*, at para. 37) that must be satisfied: impecuniosity, a *prima facie* meritorious case, and issues of public importance. Further, while meeting these requirements is necessary, doing so does not automatically entitle an applicant to an advance costs award (*Caron*, at para. 39). Where the requirements are satisfied, a court—having considered all relevant individual circumstances of the case—retains residual discretion to decide whether to award advance costs, or to consider other ways of facilitating the hearing of the case (*Little Sisters*, at para. 37). ***

The Terms of an Advance Costs Award

28. Where a court decides that an award of advance costs is justified, the terms of the order must be carefully crafted. They must balance the interests of the parties, and should not impose an unfair burden (*Okanagan*, at para. 41). Accordingly, the order must provide for, or allow for the later provision of, oversight in the form of a "definite structure … imposed or approved by the court itself" that sets limits on the rates and hours of legal services and caps the award at an appropriate global amount (*Little Sisters*, at para. 42). The order should also build in judicial oversight to allow the court to "closely monitor the parties' adherence to its dictates" (para. 43). In short, an advance costs order is not free rein. Because the public purse is burdened, there must be "scrutiny" of how a litigant spends the opposing party's money (para. 42).

29. Other terms of the order will, of course, be informed by a court's findings in deciding impecuniosity. *** [A]n applicant pleading impecuniosity must provide a litigation plan and sufficient evidence of its financial resources. While this will obviously be relevant to the quantum of the award, which should represent "a basic level of assistance necessary for the case to proceed" (*Little Sisters*, at para. 43), it will also assist in determining whether, for example, the terms of an advance cost order should include a requirement that the applicant commit to making some contribution to the litigation. ***

REFLECTION:

- *Why might courts tend to be wary of awarding advance costs in litigation? What are the risks?*
- *What other options may be available to an impecunious party to fund their legal action?*

20.8.5 Further material

- C. Hanycz, "More Access to Less Justice: Efficiency, Proportionality and Costs in Canadian Civil Justice Reform" (2008) 27 Civil Justice Quarterly 98.
- E.S. Knutsen, "The Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada" (2010) 36 Queen's LJ 113.
- M. Twigg, "Costs Immunity: Banishing the 'Bane' of Costs from Public Interest Litigation" (2013) 36 Dalhousie LJ 193.
- J.F. Laberge, C. Morin & M. Nehme, "Show Me the Money: A Review and Update on Legal Costs" (38th Annual Civil Litigation Conference, 2018).

21 NUISANCE

21.1 Private nuisance

Manitoba Law Reform Commission, The Nuisance Act and the Farm Practices Protection Act (Rep. 126, 2013), 3-6

A leading Canadian case endorsed the following proposition, outlining the essential principles of the tort of private nuisance:

> A person, then, may be said to have committed the tort of private nuisance when he is held to be responsible for an act directly causing physical injury to land or substantially interfering with the use or enjoyment of land or an interest in land where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable.[686]

A variation of this definition has been adopted in a long line of Canadian authority.

Interference can take the form of actual physical damage to the land, as in the case of flooding or structural damage, or intangible interference with the claimant's enjoyment and comfort of the land. The focus is on the harm done to the claimant's interest in his or her land, rather than any particular conduct on the part of the defendant.[687]

In deciding whether a given interference constitutes a legal nuisance, courts have asked if the defendant is using his or her property reasonably having regard to the fact that he or she has a neighbour.[688] In other instances, the courts have questioned whether in the circumstances it is reasonable to deny compensation to the aggrieved party.[689] These various formulations of the test highlight the importance of balancing the parties' interests, and the highly fact-specific nature of the inquiry.

The role of nuisance law in achieving a balance among competing interests is by no means an exclusively modern phenomenon. The elaboration of common law nuisance principles has taken place over the course of many centuries. From as early as the 13th century, people have brought law suits in nuisance against their neighbours in connection with offensive odours, excessive noise, and air and water pollution. The subject matter of many of these early cases will be familiar to the modern reader. A significant 17th century case, for example, concerned odours emanating from a pig sty. The claimant raised arguments about the effect of such odour on the natural environment and health of nearby residents, and, in his defence, the defendant relied on the social benefits of raising pigs.[690]

The Ontario Court of Appeal's recent decision in *Antrim Truck Centre*[691] articulates a two-part test for determining whether a particular interference constitutes an actionable nuisance: first, is the interference *substantial* and, second, is the interference *unreasonable*? The first part of the test derives from lengthy authority to the effect that the law will not provide a remedy for trivial annoyances, and that "the very existence of organized society depends on a generous application of 'give and take, live and let live'".[692]

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[686] *Royal Anne Hotel Co. v. Ashcroft (Village)* (1979), 95 DLR (3d) 756 at 760 (BC CA), citing Street, *Law of Torts*, at 215.

[687] These principles are confirmed in a long line of authority including the Supreme Court of Canada's decision in *St. Lawrence Cement v. Barrette*, 2008 SCC 65 at para 77, [2008] 3 SCR 392. Although the court was deciding on the interpretation of Quebec's Civil Code, the judgment includes a description of the principal features of the common law tort of private nuisance.

[688] *Canada (National Capital Commission) v. Pugliese* (1977), 17 OR (2d) 139 (Ont CA), aff'd [1979] 2 SCR 104.

[689] *Tock v. St. John's (City) Metropolitan Area Board*, [1989] 2 SCR 1181 [*Tock*].

[690] *Aldred's Case* (1610) 77 ER 816 [1558-1794] as cited in Gregory Pun & Margaret Hall, *The Law of Nuisance in Canada* (Markham: Lexis Nexis, 2010) [Pun] at 24.

[691] *Antrim Truck Centre Ltd. v. Ontario (Transportation)* 2011 ONCA 419, 106 OR (3d) 81 [*Antrim*], leave to appeal to S.C.C. granted, 34413 (February 2, 2012).

[692] *Tock*, *supra*, citing Knight Bruce V.C. in *Walter v. Selfe* (1851), 4 De G. & Sm. 315, 64 ER 849, and Bramwell B. in

In determining whether the interference is unreasonable, courts generally refer to four main factors:

> (1) The severity of the interference;
>
> (2) The character of the neighbourhood;
>
> (3) The utility of the defendant's conduct; and
>
> (4) The sensitivity of the plaintiff.[693]

Historically, the extent to which these factors are applied and their relative weight has depended on whether the nuisance complained of caused physical damage to the claimant's land. In most circumstances, the courts have found that physical damage to land is an unreasonable interference and actionable nuisance, without giving extensive consideration to the factors identified above. These factors are more significant in cases involving interferences with the use and enjoyment of land, in which courts are generally more reluctant to find liability and more inclined to engage in a balancing exercise.[694]

Nuisance is frequently described as a strict liability tort, on the basis that:

> Liability does not depend upon the nature of the defendant's conduct or on any proof of intention of negligence. It depends primarily upon the nature and extent of the interference caused to the plaintiff.[695]

However, most commentators now identify a drift in the law of nuisance away from its strict liability origins. A leading authority states that "while there is an 'aura' of strict liability in nuisance actions, in most cases there is no liability without some fault."[696] Fault in this context has been interpreted as a quite neutral concept, signifying the defendant's involvement in the creation of an annoyance.[697]

The notion of fault in private nuisance analysis has led to some blurring of the line between nuisance and negligence.[698] And while the same set of facts may often give rise to both causes of action, there are important differences between the two. Unlike in negligence, the focus in nuisance is on the harm suffered by the plaintiff rather than on the defendant's conduct. In nuisance, the defendant cannot defeat the action solely by establishing that he or she exercised all reasonable care.[699]

Perhaps most significantly, in nuisance the initial onus is on the plaintiff to prove damage resulting from the defendant's activity, or a significant degree of discomfort or inconvenience. The onus then shifts to the defendant to prove that the interference was not unreasonable.[700] By contrast, in a negligence action, the plaintiff must prove that the defendant did not exercise reasonable care.

While there are four principal defences to an action in private nuisance, in practice the most significant are those of statutory immunity [§18.4] and statutory authority [§6.6].[701]

The defence of statutory immunity is available when legislation expressly defines certain activity as non-tortious, or bars a law suit in respect of particular activities. ***

Bamford v. Turnel (1862) 122 ER 27.

[693] *Antrim*, *supra* at para 83. Malice on the part of the defendant may also be a factor in some cases: see *Christie v. Davey*, [1893] 1 Ch 316.

[694] See discussion in Philip Osborne, *The Law of Torts* 4th ed (Toronto: Irwin Law, 2011) at 378, 380.

[695] *Ibid* at 378.

[696] Fleming, *supra*. See also the statement of the Judicial Committee of the Privy Council in *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty (The Wagon Mound No. 2)*, [1966] 2 All ER 709 at 716 [§21.2.2]: "although negligence may not be necessary, fault of some kind is almost always necessary".

[697] Pun, *supra* at 8.

[698] Pun, *supra* at 2.

[699] Cullingham, *supra* at 17-13.

[700] See Allen Linden & Bruce Feldthusen, *Canadian Tort Law* (Markham: LexisNexis, 2011) at 579.

[701] The others are prescription and consent, both described in Osborne, *supra* at 394-395.

The defence of statutory authority operates to preclude a finding of liability if the defendant's activity is authorized by statute, and the defendant proves that the disturbance to others is the inevitable result of exercising the statutory authority. Courts have interpreted this defence narrowly, placing the onus on the defendant to prove that the activity was authorized by statute, that there were no alternative methods of carrying out the work, and that it was practically impossible to avoid the nuisance.[702]

Canadian law does not recognize a defence of coming to the nuisance whereby a defendant is absolved of liability if he was engaged in the activity complained of before the plaintiff moved into the area.[703] Courts will not necessarily give priority to first-in-time land use, although some such considerations may enter into a nuisance analysis under the category of "the character of the neighbourhood".

There are two remedies available for a successful action in private nuisance: an injunction and an award of damages. Although injunctions are typically awarded in cases of continuing nuisance, courts have begun to demonstrate flexibility in this regard, giving consideration to the hardship to the defendant or to the public in deciding whether to grant an injunction.[704] Damages are an appropriate remedy in cases "where the harm is small, where adequate damages are easily estimated, and where an injunction would create intolerable hardship for the defendant."[705] […continue reading]

REFLECTION:

- *In what sense might nuisance be considered a strict liability tort? In what sense is fault an aspect of the modern tort of nuisance?*
- *How do the features of the tort of nuisance compare to the elements of the tort of negligence? What are the similarities and differences?*

21.1.1 Miller v. Jackson [1977] EWCA Civ 6

✗REF: §14.2.1.3, §14.2.3.2, §14.2.4.2

LORD DENNING M.R. (dissenting as to liability):

1. In summer time village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch. In the village of Lintz in County Durham they have their own ground, where they have played these last 70 years. They tend it well. The wicket area is well rolled and mown. The outfield is kept short. It has a good club-house for the players and seats for the onlookers. The village team play there on Saturdays and Sundays. They belong to a league, competing with the neighbouring villages. On other evenings after work they practice while the light lasts. Yet now after these 70 years a judge of the High Court has ordered that they must not play there any more. He has issued an injunction to stop them. He has done it at the instance of a newcomer who is no lover of cricket. This newcomer has built, or has had built for him, a house on the edge of the cricket ground which four years ago was a field where cattle grazed. The animals did not mind the cricket. But now this adjoining field has been turned into a housing estate. The newcomer bought one of the houses on the edge of the cricket ground. No doubt the open space was a selling point. Now he complains that, when a batsman hits a six, the ball has been known to land in his garden or on or near his house. His wife has got so upset about it that they always go out at weekends. They do not go into the garden when cricket is being played. They say that this is intolerable. So they asked the judge to stop the cricket being played. And the judge, much against his will, has felt that he must order the cricket to be stopped; with the consequences, I suppose, that the Lintz Cricket Club will disappear. The cricket ground will be turned to some other use. I expect for more houses or a factory. The young men will turn to other things instead of cricket. The whole village will be much the poorer. And all this because of a newcomer who has just bought a house there next to the

[702] *Ryan v. Victoria (City)* [1999] 1 SCR 201 at para 55 [§21.2.1].
[703] *O'Regan v. Bresson* (1977), 23 NSR (2d) 587, 3 CCLT 214 (NS Co Ct); *Russell Transport Ltd. v. Ontario Malleable Iron Co.* [1952] OR 621 (Ont Sup Ct); *Sturges v. Bridgman* [1879] 11 Ch D852 at 865. This is in contrast with U.S. law which has historically given priority to land use that is first-in-time. This principle is embodied in much of the U.S. right-to-farm legislation.
[704] See discussion in Lewis Klar, *Tort Law*, 4th ed (Scarborough: Thomson Carswell, 2008) at 744.
[705] Osborne, *supra* at 396.

cricket ground.

2. I must say that I am surprised that the developers of the housing estate were allowed to build the houses so close to the cricket ground. No doubt they wanted to make the most of their site and put up as many houses as they could for their own profit. The planning authorities ought not to have allowed it. The houses ought to have been so sited as not to interfere with the cricket. But the houses have been built and we have to reckon with the consequences.

3. At the time when the houses were built it was obvious to the people of Lintz that these new houses were built too close to the cricket ground. It was a small ground, and there might be trouble when a batsman hit a ball out of the ground. But there was no trouble in finding purchasers. Some of them may have been cricket enthusiasts. But others were not. In the first three years, 1972, 1973 and 1974, quite a number of balls came over or under the boundary fence and went into the gardens of the houses, and the cricketers went round to get them. Mrs Miller [the second plaintiff] was very annoyed about this. To use her own words:

> 'When the balls come over, they the cricketers, either ring or come round in twos and threes and ask if they can have the ball back, and they never ask properly. They just ask if they can have the ball back, and that's it. They have been very rude, very arrogant and very ignorant, and very deceitful … to get away from any problems we make a point of going out on Wednesdays, Fridays and the weekends.'

4. Having read the evidence, I am sure that that was a most unfair complaint to make of the cricketers. They have done their very best to be polite. It must be admitted, however, that on a few occasions before 1974 a tile was broken or a window smashed. The householders made the most of this and got their rates reduced. The cricket club then did everything possible to see that no balls went over. In 1975, before the cricket season opened, they put up a very high protective fence. The existing concrete fence was only six feet high. They raised it to nearly 15 feet high by a galvanised chain-link fence. It cost £700. *** They told the batsmen to try to drive the balls low for four and not hit them up for six. This greatly reduced the number of balls that got into the gardens. So much so that the rating authority no longer allowed any reduction in rates.

5. Despite these measures, a few balls did get over. The club made a tally of all the sixes hit during the seasons of 1975 and 1976. In 1975 there were 2,221 overs, that is, 13,326 balls bowled. Of them there were 120 six hits on all sides of the ground. Of these only six went over the high protective fence and into this housing estate. In 1976 there were 2,616 overs, that is 15,696 balls. Of them there were 160 six hits. Of these only nine went over the high protective fence and into this housing estate.

6. No one has been hurt at all by any of these balls, either before or after the high fence was erected. There has, however, been some damage to property, even since the high fence was erected. The cricket club have offered to remedy all the damage and pay all expenses. They have offered to supply and fit unbreakable glass in the windows, and shutters or safeguards for them. They have offered to supply and fit a safety net over the garden whenever cricket is being played. In short, they have done everything possible short of stopping playing cricket on the ground at all. But Mrs Miller and her husband have remained unmoved. Every offer by the club has been rejected. They demand the closing down of the cricket club. Nothing else will satisfy them. They have obtained legal aid to sue the cricket club.

7. In support of the case, the plaintiff relies on the dictum of Lord Reid in *Bolton v. Stone* ([1951] AC 850 at 867) [§14.2.1.2]: 'If cricket cannot be played on a ground without creating a substantial risk, then it should not be played there at all.' I would agree with that saying if the houses or road were there first, and the cricket ground came there second. We would not allow the garden of Lincoln's Inn to be turned into a cricket ground. It would be too dangerous for windows and people. But I do not agree with Lord Reid's dictum ([1951] AC 850 at 867) when the cricket ground has been there for 70 years and the houses are newly built at the very edge of it. I recognise that the cricket club are under a duty to use all reasonable care consistently with the playing of the game of cricket, but I do not think the cricket club can be expected to give up the game of cricket altogether. After all they have their rights in their cricket ground. They have spent money, labour and love in the making of it; and they have the right to play on it as they have done for 70 years. Is this all to be rendered useless to them by the thoughtless and selfish act of an estate developer in building

right up to the edge of it? Can the developer or purchaser of a house say to the cricket club: 'Stop playing. Clear out.' I do not think so. And I will give my reasons. ***

12. *** The tort of nuisance in many cases overlaps the tort of negligence. The boundary lines were discussed in two adjoining cases in the Privy Council: *The Wagon Mound (No. 2)* [§21.2.2] and *Goldman v. Hargrave* ([1967] 1 AC 645 at 657) [§14.2.3.1]. But there is at any rate one important distinction between them. It lies in the nature of the remedy sought. Is it damages? Or an injunction? If the plaintiff seeks a remedy in damages for injury done to him or his property, he can lay his claim either in *negligence* or in *nuisance*. But, if he seeks an injunction to stop the playing of cricket altogether, I think he must make his claim in nuisance. The books are full of cases where an injunction has been granted to restrain the continuance of a nuisance. But there is no case, so far as I know, where it has been granted so as to stop a man being negligent. At any rate in a case of this kind, where an occupier of a house or land seeks to restrain his neighbour from doing something on his own land, the only appropriate cause of action, on which to base the remedy of an injunction, is nuisance: see the report of the Law Commission. It is the very essence of a private nuisance that it is the unreasonable use by a man of his land to the detriment of his neighbour. ***

14. I would, therefore, adopt this test: is the use by the cricket club of this ground for playing cricket a reasonable use of it? To my mind it is a most reasonable use. Just consider the circumstances. For over 70 years the game of cricket has been played on this ground to the great benefit of the community as a whole, and to the injury of none. No one could suggest that it was a nuisance to the neighbouring owners simply because an enthusiastic batsman occasionally hit a ball out of the ground for six to the approval of the admiring onlookers. Then I would ask: does it suddenly become a nuisance because one of the neighbours chooses to build a house on the very edge of the ground, in such a position that it may well be struck by the ball on the rare occasion when there is a hit for six? To my mind the answer is plainly No. The building of the house does not convert the playing of cricket into a nuisance when it was not so before. If and insofar as any damage is caused to the house or anyone in it, it is because of the position in which it was built. Suppose that the house had not been built by a developer, but by a private owner. He would be in much the same position as the farmer who previously put his cows in the field. He could not complain if a batsman hit a six out of the ground and, by a million to one chance, it struck a cow or even the farmer himself. He would be in no better position than a spectator at Lord's or the Oval or at a motor rally. At any rate, even if he could claim damages for the loss of the cow or the injury, he could not get an injunction to stop the cricket. If the private owner could not get an injunction, neither should a developer or a purchaser from him.

15. It was said, however, that the case of the physician's consulting-room was to the contrary: *Sturges v. Bridgman* (1879) 11 Ch D 852. But that turned on the old law about easements and prescriptions, and so forth. It was in the days when rights of property were in the ascendant and not subject to any limitations except those provided by the law of easements. But nowadays it is a matter of balancing the conflicting interests of the two neighbours. That was made clear by Lord Wright in *Sedleigh-Denfield v. O'Callagan* ([1940] 3 All ER 349 at 364, [1940] AC 880 at 903), when he said:

> 'A balance has to be maintained between the right of the occupier to do what he likes with his own and the right of his neighbour not to be interfered with.'

16. In this case it is our task to balance the right of the cricket club to continue playing cricket on their cricket ground, as against the right of the householder not to be interfered with. On taking the balance, I would give priority to the right of the cricket club to continue playing cricket on the ground, as they have done for the last 70 years. It takes precedence over the right of the newcomer to sit in his garden undisturbed. After all he bought the house four years ago in mid-summer when the cricket season was at its height. He might have guessed that there was a risk that a hit for six might possibly land on his property. If he finds that he does not like it, he ought, when cricket is played, to sit in the other side of the house or in the front garden, or go out; or take advantage of the offers the club have made to him of fitting unbreakable glass, and so forth. Or, if he does not like that, he ought to sell his house and move elsewhere. I expect there are many who would gladly buy it in order to be near the cricket field and open space. At any rate he ought not to be allowed to stop cricket being played on this ground.

17. This case is new. It should be approached on principles applicable to modern conditions. There is a contest here between the interest of the public at large and the interest of a private individual. The *public* interest lies in protecting the environment by preserving our playing fields in the face of mounting development, and by enabling our youth to enjoy all the benefits of outdoor games, such as cricket and football. The *private* interest lies in securing the privacy of his home and garden without intrusion or interference by anyone. In deciding between these two conflicting interests, it must be remembered that it is not a question of damages. If by a million-to-one chance a cricket ball does go out of the ground and cause damage, the cricket club will pay. There is no difficulty on that score. No, it is a question of an injunction. And in our law you will find it repeatedly affirmed that an injunction is a discretionary remedy. ***

18. *** As between their conflicting interests, I am of opinion that the public interest should prevail over the private interest. The cricket club should not be driven out. In my opinion the right exercise of discretion is to refuse an injunction; and, of course, to refuse damages in lieu of an injunction. ***

LORD JUSTICE GEOFFREY LANE (dissenting as to remedy): ***

Nuisance

37. In circumstances such as these it is very difficult and probably unnecessary, except as an interesting intellectual exercise, to define the frontiers between negligence and nuisance. See Lord Wilberforce in *Goldman v. Hargrave* [1967] 1 AC 645, 656 [**§14.2.3.1**].

38. Was there here a use by the Defendants of their land involving an unreasonable interference with the Plaintiffs' enjoyment of *their* land? There is here in effect no dispute that there has been and is likely to be in the future an interference with the Plaintiffs' enjoyment of No. 20 Brackenridge. The only question is whether it is unreasonable. It is a truism to say that this is a matter of degree. What that means is this. A balance has to be maintained between on the one hand the rights of the individual to enjoy his house and garden without the threat of damage and on the other hand the rights of the public in general or a neighbour to engage in lawful pastimes. Difficult questions may sometimes arise when the Defendants' activities are offensive to the senses for example by way of noise. Where, as here, the damage or potential damage is physical the answer is more simple. There is, subject to what appears hereafter, no excuse I can see which exonerates the Defendants from liability in nuisance for what they have done or from what they threaten to do. It is true no one has yet been physically injured. That is probably due to a great extent to the fact that the householders in Brackenridge desert their gardens whilst cricket is in progress. The danger of injury is obvious and is not slight enough to be disregarded. There is here a real risk of serious injury.

39. There is, however, one obviously strong point in the Defendants' favour. They or their predecessors have been playing cricket on this ground (and no doubt hitting sixes out of it) for 70 years or so. Can someone by building a house on the edge of the field in circumstances where it must have been obvious that balls might be hit over the fence, effectively stop cricket being played. Precedent apart, justice would seem to demand that the Plaintiffs should be left to make the most of the site they have elected to occupy with all its obvious advantages and all its equally obvious disadvantages. It is pleasant to have an open space over which to look from your bedroom and sitting room windows, so far as it is possible to see over the concrete wall. Why should you complain of the obvious disadvantages which arise from the particular purpose to which the open space is being put? Put briefly, can the Defendants take advantage of the fact that the Plaintiffs have put themselves in such a position by coming to occupy a house on the edge of a small cricket field, with the result that what was not a nuisance in the past now becomes a nuisance? *** In *Sturges v. Bridgman* (1879) 11 Ch D 852 this very problem arose. The Defendant had carried on a confectionary shop with a noisy pestle and mortar for more than twenty years. Although it was noisy, it was far enough away from neighbouring premises not to cause trouble to anyone, until the Plaintiff who was a physician built a consulting room on his own land but immediately adjoining the confectionary shop. The noise and vibrations seriously interfered with the consulting room and became a nuisance to the physician. The Defendant contended that he had acquired the right either at Common Law or under the *Prescription Act* by uninterrupted use for more than twenty years to impose the inconvenience. It was held by the Court of Appeal affirming the judgment of Lord Jessel, the Master of the Rolls, that use such as this which was, prior to the construction of the consulting room, neither preventable nor actionable, could not found a prescriptive right. That decision involved the assumption, which so far as one can discover has never been

questioned, that it is no answer to a claim in nuisance for the Defendant to show that the Plaintiff brought the trouble on his own head by building or coming to live in a house so close to the Defendant's premises that he would inevitably be affected by the Defendant's activities, where no one had been affected previously. *** It may be that this rule works injustice, it may be that one would decide the matter differently in the absence of authority. But we are bound by the decision in *Sturges v. Bridgman* and it is not for this Court as I see it to alter a rule which has stood for so long.

Injunction

40. Given that the Defendants are guilty of both negligence and nuisance, is it a case where the Court should in its discretion give discretionary relief, or should the Plaintiffs be left to their remedy in damages? There is no doubt that if cricket is played damage will be done to the Plaintiff's tiles or windows or both. There is a not inconsiderable danger that if they or their son or their guests spend any time in the garden during the weekend afternoons in the summer they may be hit by a cricket ball. So long as this situation exists it seems to me that damages cannot be said to provide an adequate form of relief. Indeed, quite apart from the risk of physical injury, I can see no valid reason why the Plaintiffs should have to submit to the inevitable breakage of tiles and/or windows, even though the Defendants have expressed their willingness to carry out any repairs at no cost to the Plaintiffs. I would accordingly uphold the grant of the injunction to restrain the Defendants from committing nuisance. However, I would postpone the operation of the injunction for 12 months to enable the Defendants to look elsewhere for an alternative pitch.

41. So far as the Plaintiffs are concerned, the effect of such postponement will be that they will have to stay out of their garden until the end of the cricket season but thereafter will be free to use it as they wish. ***

LORD JUSTICE CUMMING-BRUCE:

43. I agree with all that Lord Justice Lane has said in his recital of the relevant facts and his reasoning and conclusion upon the liability of the Defendants in negligence and nuisance, including his observation about the decision in *Sturges v. Bridgman*. ***

48. With all respect, in my view the learned judge *** does not appear to have had regard to the interest of the inhabitants of the village as a whole. Had he done so he would in my view have been led to the conclusion that the plaintiffs having accepted the benefit of the open space marching with their land should accept the restrictions upon enjoyment of their garden which they may reasonably think necessary. That is the burden which they have to bear in order that the inhabitants of the village may not be deprived of their facilities for an innocent recreation which they have so long enjoyed on this ground. There are here special circumstances which should inhibit a court of equity from granting the injunction claimed. If I am wrong in that conclusion, I agree with Lord Justice Lane that the injunction should be suspended for one year to enable the defendants to see if they can find another ground.

Order: Appeal allowed. Past and future damages at £400.

REFLECTION:

- *Sturges v. Bridgman established that "coming to the nuisance" is not a defence. Is Lord Denning's dissent rejecting that doctrine in this case compelling? Was the cricket club imposing a nuisance on the Millers?*
- *Injunctions are a discretionary remedy (§9.8). Was the majority of the Court right to decline injunctive relief and award the Millers damages in lieu?*
- *Adjusted for inflation, the value of damages if they had been awarded in 2024 equates to around £2,250. Was this an adequate remedy?*
- *Read Prof. Solum's Legal Theory Lexicon blog on the Coase Theorem.*[706] *What externalities was the cricket club generating in this case? What were the transaction costs of reaching a bargain between the parties?*

[706] L. Solum, "The Coase Theorem" Legal Theory Blog (Feb 20, 2021); see also One Minute Economics, "The Coase Theorem Explained" (Dec 22, 2019) .

21.1.2 Tam v. Chan [2014] HKCFI 1480

✗**REF: §2.3.4, §5.2.1, §9.8.2.2**

DEPUTY JUDGE LINDA CHAN SC: ***

3. *** Ms Tam and Mr Chai reside at 2/F of 34F [Braga Circuit, Kadoorie Hill, Kowloon, Hong Kong]. The defendant *** (Mr Chan) and his mother (Mrs Chan), who is the 2nd defendant in the Nuisance Action, reside at 1/F of 34F. Although the parties are neighbours, they are not acquainted with each other. ***

27. It is Ms Tam's case that between November 2010 and 26 April 2011, Mr Chan and Mrs Chan have wrongfully interfered with her right of quiet enjoyment of her premises at 2/F of 34F by causing and/or allowing an unreasonable level of noise to emanate from their premises at 1/F of 34F, which included many instances of loud thumping noises as if someone was striking or pounding the ceiling, and causing excessively loud television and/or radio noises to emanate from their premises, some of them took place from late at night to the early hours of the next morning. Despite repeated complaints made to the management company and the police, Mr Chan and Mrs Chan did not stop the noises complained of by Ms Tam. ***

47. *** In the documents disclosed by the parties in the Nuisance Action, there were two letters dated 13 and 28 April 2011 issued by the police which summarised the five occasions from 11 March 2011 to 19 April 2011 when they dealt with the complaints made by Ms Tam in respect of excessive noises emanating from 1/F of 34F. It was stated in these letters that on three occasions, the police went to 1/F of 34F to investigate but the residents refused to open the door and the noises subsided afterwards. Despite these letters, Mr Chan maintains that he was not aware of anyone complaining about any noises emanated from his premises until the writ in the Nuisance Action was served on him and Mrs Chan. When being asked about each of these five occasions recorded by the police, Mr Chan gives the same answer that it did not happen, and he disagrees with the contents of the police's records which he says are "wrong". ***

76. There is no dispute between the parties on the principles governing the tort of nuisance, which *** may be summarised as follows:

> (1) Nuisance is an act or omission which is an interference with, disturbance of, or annoyance to a person in the exercise or enjoyment of his ownership or occupation of land: *Clerk & Lindsell on Torts*, (20th ed., 2010) at para. 20-01.
>
> (2) There is no absolute standard to apply as to what degree of interference, disturbance, or annoyance amounts to a nuisance; it is always a question of fact and circumstances including the time of the commission of the act. As stated by Oliver J in *Stone v. Bolton* [1949] 1 All ER 237[707] at 238-239:
>
> > Whether such an act does constitute a nuisance must be determined not merely by an abstract consideration of the act itself, but by reference to all the circumstances of the particular case, including, for example, the time of the commission of the act complained of; the place of its commission; the manner of committing it, that is, whether it is done wantonly or in the reasonable exercise of rights; and the effect of its commission, that is, whether those effects are transitory or permanent, occasional or continuous; so that the question of nuisance or no nuisance is one of fact.
>
> (3) A useful test which balances the interest between neighbours as to their respective use of their properties is what is reasonable according to ordinary usages of mankind living in a particular society. In assessing the question of nuisance in the context of Hong Kong, the Court should take into account the particular habits of Hong Kong people, in particular later bedtimes: *Capital Prosperous Ltd v. Sheen Cho Kwong* [1999] 1 HKLRD 633 at 639H-640I.
>
> (4) Where noise is created deliberately and maliciously for the purpose of causing annoyance, its

[707] Affirmed on appeal by the Court of Appeal [1950] 1 KB 201 and House of Lords [1951] AC 850 [§14.2.1.2].

> *mala fides* character alone would render it an actionable nuisance even if it would otherwise have been legitimate: *Christie v. Davey* [1893] 1 Ch 316 at 326-327.
>
> (5) An occupier of land who did not create the nuisance but has allowed it to continue will be liable for that nuisance if with knowledge or presumed knowledge of its existence and being in a position to take effective steps to bring it to an end, he fails to take any reasonable means to do so: *Smeaton v. Ilford Corp* [1954] Ch 450 at 462.

77. It is Ms Tam's evidence that from November 2010, which was shortly after she had given birth to her first baby and was resting at home, loud thumping noises began to emanate from the defendants' premises at 1/F of 34F at late hours in the night or early hours in the morning. The noises were as if someone was deliberately striking or hitting the ceiling of 1/F of 34F. The noises occurred a few times a week, repeated a few times on the same day and lasted for several minutes on each occasion. In addition, from February 2011 onwards, there were excessively loud television and/or radio noises emanating from the defendants' premises, again at late hours of the night or early hours in the morning. ***

80. *** On a few occasions, the noises were so disturbing and loud that [the nanny Madam Chan] and the newborn baby of Ms Tam were woken up by the noises. Due to the noises, after the first few nights, she together with the baby had to move to another room where the noises were not so direct and loud so that they would not be woken up so frequently. Despite the many complaints made by Ms Tam and Mr Chai, excessive noise continued to emanate from 1/F, whereupon Madam Chan said to Ms Tam she should considering suing the defendants so as to stop the noises.

81. *** Although Mr Fong submits that the noises emanating from the defendants' premises were reasonable or not excessive relying on the contents of the two letters from the police, I do not accept his submission as it is not the defendants' case that they caused or allowed the noises to emanate from their premises. To the contrary, Mr Chan in his evidence makes clear that he does not accept the contents of the letters from the police to be accurate.

82. For the above reasons, I find that the defendants caused or allowed excessive noise to emanate from their premises in the manner described by Ms Tam as corroborated by Madam Chan. Such noises have interfered with and disturbed Ms Tam's quiet enjoyment of her premises and constituted a nuisance. ***

REFLECTION:

- *What is a nuisance? Is the law of nuisance contingent on interference with property rights?*
- *Having regard to the nuisance principles summarised at [76], what facts of this case indicated that Mr Chan and his mother were causing a nuisance for Ms. Tam and Mr. Chai?*

21.1.3 Gokey v. Usher & Parsons [2023] BCSC 1312

✗**REF: §2.2.1, §2.3.3, §4.2.3, §5.2.6, §7.1.2, §9.3.4, §9.4.3, §9.5.4, §9.8.2.1, §10.2.1, §20.8.1**

PUNNETT J.:

1. The plaintiffs and defendants became neighbours in Sandspit, British Columbia on Haida Gwaii in July 1997. The plaintiffs, Edward C. and Diane Gokey, purchased the property at 495 Beach Road. It is the property immediately east of the defendants' property at 497 Beach Road. In June 1998, the plaintiffs also purchased the property to their east at 493 Beach Road. To the north across Beach Road is a public beach area on the Pacific Ocean. Properties to the south of the parties' properties are vacant.

2. Initially, the parties were neighbourly but after a few years that neighbourly relationship ended. ***

232. Both sides advance claims of nuisance against the other. The plaintiffs allege nuisance by the defendants from the smell from their marijuana-growing operation and its fan noise. The defendants allege the plaintiffs are liable in nuisance for smoke, smell, the noise of the plaintiffs' telephone ringer and low water pressure alarm and the feeding of the defendants' dogs.

233. The underlying principle of nuisance is the Latin maxim *sic utere tuo ut alienum non laedas* (use your

own property so as not to injure that of your neighbours): Allen M Linden & Bruce Feldthusen, *Canadian Tort Law* (Markham: Butterworths, 2006) at p. 559. Compensation is recoverable where one's use or enjoyment of private land is interfered with by the unreasonable use of another's land (p. 660). Private nuisance can arise from objectionable activities such as noise, vibrations, noxious odours, air and water pollution (p. 560).

234. In *Royal Anne Hotel Co. Ltd. v. Village of Ashcroft*, 95 D.L.R. (3d) 756 at 759–760 (B.C.C.A.), the Court said this about nuisance: ***

> As has been said: "The essence of the tort of nuisance is interference with the enjoyment of land." (Street, *Law of Torts*, at p. 212.) That interference need not be accompanied by negligence. In nuisance one is concerned with the invasion of the interest in the land, in negligence one must consider the nature of the conduct complained of. Nuisances result frequently from intentional acts undertaken for lawful purposes. The most carefully designed industrial plant operated with the greatest care may well be or cause a nuisance, if for example effluent, smoke, fumes or noise invade the right of enjoyment of neighbouring land owners to an unreasonable degree: see *Lord Mayor, Aldermen & Citizens of City of Manchester v. Farnworth*, [1930] A.C. 171, and *Walker v. McKinnon Industries Ltd*., [1949] 4 D.L.R. 739, as examples.
>
> When then can it be said that the tort of nuisance has been committed? A helpful proposition is advanced by the learned author of Street, *Law of Torts*, at p. 215 in these terms:
>
> > A person then, may be said to have committed the tort of private nuisance *when he is held to be responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land or an interest in land where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable*.
>
> What is an unreasonable invasion of an interest in land? All circumstances must, of course, be considered in answering this question. *** It is impossible to lay down precise and detailed standards but the invasion must be substantial and serious and of such a nature that it is clear according to the accepted concepts of the day that it should be an actionable wrong. *** In reaching a conclusion, the Court must consider the nature of the act complained of and the nature of the injury suffered. Consideration must also be given to the character of the neighbourhood where the nuisance is alleged, the frequency of the occurrence of the nuisance, its duration, and many other factors which could be of significance in special circumstances. ***

235. I turn first to the plaintiffs' claim of nuisance regarding the growing of marijuana by the defendants and noise from a radio left on to discourage break and enters.

236. In May 2009, the defendants obtained a license under the two personal use production licences issued by Health Canada for medical reasons. Ms. Parsons suffers from back pain and arthritis and Mr. Usher from lymphoma and prostate cancer as well as other medical problems. They were also authorized to grow plants for a third individual under a designated persons production licence because of that individual's medical condition. He has since died. They subsequently provided marijuana to another approved individual.

237. The defendants' three licenses from Health Canada have expired and Ms. Parsons testified Health Canada no longer requires such licences because of the Federal Court's decision in *Allard v. Canada*, 2016 FC 236, reconsideration ref'd, 2016 FC 492, which to her understanding permits the growing of marijuana for personal use without requiring a license.

238. Mr. Gokey claims the growing of marijuana creates a skunk smell and noise from fans running which unreasonably and substantially interfere with the plaintiffs' enjoyment of their property. He complains of the lack of licensing for growing medical marijuana because the defendants' licenses have expired. He alleges the value of his property has been reduced by the presence of the "grow op".

239. Ms. Parsons testified that the plants on occasion can produce some smell; however, in her opinion it is a mild smell and they have taken steps to minimize it by decreasing the need to exhaust air from the

garage. The vents are also placed such that the prevailing wind blows the smell onto their property and not that of the plaintiffs.

240. Mr. Gokey's evidence of noise and smell is his alone. He called no other witnesses regarding the smell nor the alleged noise of fans. As for the illegality of the marijuana production, he has not established that to be the case. ***

242. Nor could Mr. Gokey provide any evidence at trial to support his submissions to the Property Assessment Appeal Board that the marijuana growing had resulted in "traffic, smell & noise" nor that "many [of the defendants' customers] have told me 'it is the best dope on the islands'". He admitted under cross examination that his submission to the Property Assessment Appeal Board that the defendants had over 300 plants and were clearing $120,000 to $180,000 a year tax-free was based simply on his speculation. ***

244. In summary the plaintiffs' claims are dismissed in their entirety for the reasons given above. ***

Smoke ***

256. Private nuisance arises when an individual's use or enjoyment of land is interfered with. In *Allison* [*v. Radtke*, 2014 BCSC 1832], Justice Ker stated:

> 160. In *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 [*Antrim*], the Supreme Court of Canada addressed the legal principles governing private nuisance. A nuisance "consists of an interference with the claimant's use or enjoyment of land that is both substantial and unreasonable" (para. 18). Cromwell J., writing for the Court, elaborated on the test for private nuisance at para. 19:
>
> > 19. The elements of a claim in private nuisance have often been expressed in terms of a two-part test of this nature: to support a claim in private nuisance the interference with the owner's use or enjoyment of land must be both *substantial* and *unreasonable*. A substantial interference with property is one that is non-trivial. Where this threshold is met, the inquiry proceeds to the reasonableness analysis, which is concerned with whether the non-trivial interference was also unreasonable in all of the circumstances. This two-part approach found favour with this Court in its most recent discussion of private nuisance and was adopted by the Court of Appeal in this case, at para. 80 …
>
> 161. Justice Cromwell in *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13, described the first part of the test for private nuisance (a *substantial* interference with the owner's use or enjoyment of land) as follows:
>
> > 22. What does this threshold require? In *St. Lawrence Cement* [2008 SCC 64], the Court noted that the requirement of substantial harm "means that compensation will not be awarded for trivial annoyances": para. 77. In *St. Pierre* [[1987] 1 S.C.R. 906 (SCC)], while the Court was careful to say that the categories of nuisance are not closed, it also noted that only interferences that "substantially alte[r] the nature of the claimant's property itself" or interfere "to a significant extent with the actual use being made of the property" are sufficient to ground a claim in nuisance: p. 915 (emphasis added). One can ascertain from these authorities that a substantial injury to the complainant's property interest is one that amounts to more than a slight annoyance or trifling interference. As La Forest J. put it in *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181, actionable nuisances include "only those inconveniences that materially interfere with ordinary comfort as defined according to the standards held by those of plain and sober tastes", and not claims based "on the prompting of excessive 'delicacy and fastidiousness'": p. 1191. Claims that are clearly of this latter nature do not engage the reasonableness analysis.
> >
> > 23. In referring to these statements I do not mean to suggest that there are firm categories of types of interference which determine whether an interference is or is not actionable, a point I will discuss in more detail later. Nuisance may take a variety of forms and may include not only

> actual physical damage to land but also interference with the health, comfort or convenience of the owner or occupier: *Tock*, at pp. 1190-91. The point is not that there is a typology of actionable interferences; the point is rather that there is a threshold of seriousness that must be met before an interference is actionable.

162. Justice Cromwell described the second part of the test for private nuisance (an *unreasonable* interference with the owner's use or enjoyment of land) as follows:

> 25. … As in other private nuisance cases, the reasonableness of the interference must be assessed in light of all of the relevant circumstances. The focus of that balancing exercise, however, is on whether the interference is such that it would be unreasonable in all of the circumstances to require the claimant to suffer it without compensation.
>
> 26. In the traditional law of private nuisance, the courts assess, in broad terms, whether the interference is unreasonable by balancing the gravity of the harm against the utility of the defendant's conduct in all of the circumstances: see, e.g., A. M. Linden and B. Feldthusen, *Canadian Tort Law* (9th ed. 2011), at p. 580. The Divisional Court and the Court of Appeal identified several factors that have often been referred to in assessing whether a substantial interference is also unreasonable. In relation to the gravity of the harm, the courts have considered factors such as the severity of the interference, the character of the neighbourhood and the sensitivity of the plaintiff: see, e.g., *Tock*, at p. 1191. The frequency and duration of an interference may also be relevant in some cases: *Royal Anne Hotel*, at pp. 760-61. A number of other factors, which I will turn to shortly, are relevant to consideration of the utility of the defendant's conduct. The point for now is that these factors are not a checklist; they are simply "[a]mong the criteria employed by the courts in delimiting the ambit of the tort of nuisance": *Tock*, at p. 1191; J. P. S. McLaren, "Nuisance in Canada", in A. M. Linden, ed., *Studies in Canadian Tort Law* (1968), 320, at pp. 346-47. Courts and tribunals are not bound to, or limited by, any specific list of factors. Rather, they should consider the substance of the balancing exercise in light of the factors relevant in the particular case.

257. Mr. Gokey does not dispute that he burns but disputes the allegation that the volume of smoke produced is anything out of the ordinary for the area. He further suggests that the pictures of smoke over the defendants' yard is not severe or compromising. He asserts it is not uncommon in that area for homeowners to heat or supplement their homes heat with wood-burning devices. He submits that he cannot only burn when the wind directs the smoke away from the defendants as he is only a part-time resident and has to attend to his burning when there.

258. It is clear from the evidence of the defendants that they raise no objection to the smell of wood-burning related to home heating. There is no evidence there were any issues with smoke in the area before Mr. Gokey purchased his property. Mr. Gokey's unsupported attempts to justify his burning as comparable to household heating smoke are rejected.

259. However, the activities of Mr. Gokey producing the smoke establish he has deliberately placed some of the devices used to burn immediately adjacent to the property line he shares with the defendants and that given the prevailing winds, when he burns the smoke drifts over their property and not his. He also uses multiple devices to burn, sometimes several at once. He also burns noxious-smelling substances.

260. He does not burn occasionally. He burned frequently. The records kept by Ms. Parsons date from January 1, 2010 to November 16, 2021. ***

261. His burning increased from 2017 up to the COVID-19 travel ban, when it paused as he was not present. It then continued at this increased level after the end of the travel ban. Mr. Gokey has also increased the number of devices or locations from which he burns at the same time; he sometimes burns from up to three locations.

262. He does so knowing it is a significant issue for the defendants. Instead of modifying his behavior out of consideration for his neighbours he continues to burn excessively. In my view, he deliberately produces excessive smoke and does so when the prevailing winds cause it to envelope the defendants' property. ***

268. The photos and videos in evidence reveal thick lingering smoke rendering the defendants back yard uninhabitable. Mr. Gokey has denied the smoke is a problem when in the face of the documented evidence there clearly is. He has offered no rational explanation for the types of smoke he produces, its volume and his use of more than one device at a time. I am satisfied he is deliberately creating as much smoke as often as he can. ***

290. Unlike many nuisance cases, in this instance the conduct of the plaintiff is deliberate in the sense it is consciously taken to intimidate the defendants, to taunt them and to make their lives miserable. I am satisfied it is not simply a matter of his use of his property for legitimate purposes creating a nuisance. His use is motivated by an intention to inflict harm on the defendants. His placement of the burning facilities, the nature and frequency of the burning at times with multiple sources producing the smoke, his machinery use (including the use a wood planer at 5:00 a.m.) and the times at which such is operated, lead me to conclude the plaintiff's activities go beyond legitimately conducting matters which incidentally create nuisances. Rather, Mr. Gokey is specifically targeting the defendants and their property.

291. I am satisfied that the actions of Mr. Gokey have substantially interfered with the defendant's enjoyment of their lands and home and that the interference has been and continues to be unreasonable. Mr. Gokey's actions are not appropriate, particularly in the neighbourhood in which the parties reside. It is out of character for that neighbourhood. His burning is excessive. He has not established it is necessary nor that it serves or provides any public benefit despite submitting he works to keep the neighbourhood presentable. ***

294. In *Deumo v. Fitzpatrick*, [2008] O.J. No. 3015 (S.C.), the plaintiffs were neighbours of the defendants. The defendants' burning of wood in a wood stove caused excessive smoke to invade the plaintiff's home and yard. As a result, they had to keep their windows closed and were unable to use their yards. Justice Ramsay of the Ontario Superior Court of Justice stated: ***

> 2. The approach that the courts take to nuisance is set out in a quotation from Supreme Court of Canada authority that is itself quoted within internal quotations in the Court of Appeal's Judgment in *Mandrake Management Consultants v. T.T.C*., (1993), 102 D.L.R. (4th) 12. The quotation, is as follows:
>
> > *** It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together. The very existence of organized society depends upon the principle of 'give and take, live and let live,' and therefore the law of torts does not attempt to impose liability or shift the loss in every case in which one person's conduct has some detrimental effect on another. Liability … is imposed only in those cases in which the harm or risk to one is greater than he ought to be required to bear under the circumstances, at least without compensation.
>
> 3. Mr. Justice Galligan then goes on to set out the factors that a court ought to weigh in determining a claim of nuisance:
>
> > a) the nature of the locality in question;
> >
> > b) the severity of the harm;
> >
> > c) the sensitivity of the plaintiff; and
> >
> > d) the utility of the defendant's conduct. ***

299. I note some similarity between the attitude of Mr. Gokey and the attitude of the defendant in *Deumo* towards his neighbours, and his belief of entitlement to inflict smoke on his neighbours. In addition, in *Deumo* the nuisance lasted for about four years compared to the eight years relevant here. As well, Mr. Gokey has an active campaign against the defendants while the defendant in *Deumo* simply did not care how his actions affected his neighbours. ***

REFLECTION:

- *What sort of interferences with property rights qualify as nuisance? What sort of interferences do not?*
- *What facts here demonstrated that Gokey's burning activities and production of smoke were substantial as well as unreasonable interferences with the defendants' use or enjoyment of their land?*
- *Does it make sense to hold someone liable for nuisance even when their act was undertaken in pursuit of a lawful purpose? Does the answer depend on whether or not the act was authorised by statute?*
- *The United Kingdom Supreme Court in Fearn v. Tate Gallery, [18]-[21] (§21.1.6) averred that "unreasonableness" is not itself a useful legal standard or test, and that it merely means the defendant's interference must be "unlawful" or "undue" before liability will be imposed. Citing Fearn, the New Zealand Supreme Court in Smith v. Fonterra, [111] (§21.2.3) considered that "whether an unreasonableness requirement adds ballast or not" to the nuisance evaluation "remain opaque." What role does unreasonableness play in the "two-part test" for private nuisance elaborated in Antrim Truck? Is the Supreme Court of Canada's approach consistent with comparative precedent on the tort of nuisance?*

21.1.4 Smith v. Inco Ltd [2011] ONCA 628

Ontario Court of Appeal – 2011 ONCA 628, leave denied: 2012 CanLII 22100 (SCC)

✗**REF: §22.1.3, §22.2.2**

DOHERTY, MACFARLAND JJ.A. AND HOY J.: ***

6. Inco opened a nickel refinery in Port Colborne in 1918. The refinery lies to the east of the Welland Canal. Inco was for many years the major employer in the Port Colborne area, employing as many as 2,000 people. The refinery closed in 1984.

7. Between 1918 and 1984, Inco emitted waste products including nickel, mostly in the form of nickel oxide, into the air from the 500-foot smoke stack located on its property. The vast majority of the nickel emissions occurred before 1960. None occurred after the closure of the refinery in 1984.

8. Nickel, consisting mostly of nickel oxide, has been found in widely varying amounts in the soil on many of the properties located within several miles around the Inco refinery. Inco accepts that its refinery is the source of the vast majority of the nickel found in the soil.

9. It was not alleged that Inco operated its refinery unlawfully or negligently at any time. To the contrary, the evidence indicated that Inco complied with the various environmental and other governmental regulatory schemes applicable to its refinery operation. There was no evidence that the emission levels from the refinery contravened any regulations. Nor did the claimants allege at trial that the presence of the nickel in the soil on their properties posed any immediate or long-term threat to human health. ***

26. The claims rested on six assertions:

> (1) The refinery emitted nickel particles for 66 years.
>
> (2) Over the 66 years, nickel particles, primarily in the form of nickel oxide, made their way into the soil on the claimants' properties and became part of that soil. The vast majority of the nickel in the soil came from the refinery.
>
> (3) Until 2000, while there were isolated complaints mostly about plant life contamination, there were no significant public health concerns associated with the nickel levels in the soil on the properties around the refinery.
>
> (4) Beginning in early 2000 and continuing thereafter, as soil samplings revealed higher levels of nickel in the soil of many properties than had previously been recorded, widespread concerns about the potential health effects of those nickel deposits developed in the community and became a matter of widespread public concern and controversy.
>
> (5) Those concerns caused a measurable negative effect on the value of properties owned by the

> claimants. After 2000, property values increased less than they would have but for the negative publicity surrounding the potential nickel contamination of the properties.
>
> (6) The negative effect on the values of the properties could be quantified by comparing the increase in the property values on the claimants' properties with the larger increases in the values of similar properties in the nearby city of Welland during the same time period (1997–2008).

37. As we understand the trial judge's reasons, he found that an actionable nuisance arose at some point after the fall of 2000 when public concerns about potential health risks associated with the nickel levels in the soil began to adversely affect the appreciation in the value of the properties. On his analysis, the actual physical damage said to be caused when the nickel particles became part of the soil between 1918 and 1984 only became material physical damage more than 15 years later when public concerns about the potential health risks associated with the nickel particles emerged and negatively affected the value of the properties.

38. Also on the trial judge's analysis, the levels of nickel in the soil and the actual effects, if any, of that nickel on the property or its occupiers were irrelevant to Inco's liability. Any amount of nickel in the soil attributable to Inco's refinery, even if it posed no risk to the residents and did not interfere with the use of their properties, constituted a nuisance if at some point in time public concern about the potential harm caused by the nickel could be shown to have adversely affected the market values of the properties. ***

39. People do not live in splendid isolation from one another. One person's lawful and reasonable use of his or her property may indirectly harm the property of another or interfere with that person's ability to fully use and enjoy his or her property. The common law of nuisance developed as a means by which those competing interests could be addressed, and one given legal priority over the other. Under the common law of nuisance, sometimes the person whose property suffered the adverse effects is expected to tolerate those effects as the price of membership in the larger community. Sometimes, however, the party causing the adverse effect can be compelled, even if his or her conduct is lawful and reasonable, to desist from engaging in that conduct and to compensate the other party for any harm caused to that person's property. In essence, the common law of nuisance decided which party's interest must give way. That determination is made by asking whether in all the circumstances the harm caused or the interference done to one person's property by the other person's use of his or her property is unreasonable: *Royal Anne Hotel Co. v. Ashcroft (Village)* (1979), 95 D.L.R. (3d) 756 (B.C. C.A.), at pp. 760-61.

40. The reasonableness inquiry focuses on the effect of the defendant's conduct on the property rights of the plaintiff. Nuisance, unlike negligence, does not focus on or characterize the defendant's conduct. The defendant's conduct may be reasonable and yet result in an unreasonable interference with the plaintiff's property rights. The characterization of the defendant's conduct is relevant only to the extent that it impacts on the proper characterization of the nature of the interference with the plaintiff's property rights: *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)* (2011), 106 O.R. (3d) 81 (Ont. C.A.), at para. 77 ***.

41. Scholars and judges agree that the uncertain origins and the protean nature of the tort of private nuisance make it difficult to provide an exhaustive definition of the tort ***.

42. In *St. Pierre v. Ontario (Minister of Transportation & Communications)*, [1987] 1 S.C.R. 906 (S.C.C.), at para. 10, McIntyre J. for the court, accepted as a working definition of private nuisance, the definition found in an earlier edition of *Street on Torts*:

> A person, then, may be said to have committed the tort of private nuisance when he is held to be responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land or of an interest in land, where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable. [Emphasis added.]

43. As evident from the definition relied on in *St. Pierre*, while all nuisance is a tort against land predicated on an indirect interference with the plaintiff's property rights, that interference can take two quite different forms. The interference may be in the nature of "physical injury to land" or it may take the form of substantial interference with the plaintiff's use or enjoyment of his or her land. ***

44. The claimants do not argue that the nickel particles in the soil caused any interference with their use or enjoyment of their property. Instead, they claim that the nickel particles caused "physical injury" to their property. That physical injury was the product of the nickel particles becoming part of the soil and the subsequent adverse effect on the value of the property because of the public concerns over the potential health consequences of those particles being in the soil.

45. The courts have taken a somewhat different approach to nuisance claims predicated on physical damage to property and those claims based on amenity or nonphysical nuisance. Where amenity nuisance is alleged, the reasonableness of the interference with the plaintiff's property is measured by balancing certain competing factors, including the nature of the interference and the character of the locale in which that interference occurred. Where the nuisance is said to have produced physical damage to land, that damage is taken as an unreasonable interference without the balancing of competing factors. The distinction first appeared some 150 years ago in *St. Helen's Smelting Co. v. Tipping* (1865), 11 H.L.C. 642 (U.K. H.L.), at pp. 650-51:

> My Lords, in matters of this description it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. *With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs.* If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop. *But when an occupation is carried on by one person in a neighbourhood of another, and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration. I think, my Lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible injury to the value of the property.* [Emphasis added.]

46. The distinction drawn in *St. Helen's Smelting Co.* perhaps reflects the real property origins of the tort of nuisance and the priority and status attached by the common law to land ownership and one's right to physical dominion over one's land: see John Murphy, "The Merits of *Rylands v. Fletcher*" (2004) 24 Oxford J. Legal Stud. 643, at p. 649. The give and take required between neighbours called for the balancing of potentially competing factors where the actions of one interfered with another's enjoyment of his or her property. The spirit of give and take could not, however, go so far as to require one to countenance actual and material physical harm to his or her property.

47. The distinction between physical damage nuisance and amenity nuisance described in the passage from *St. Helen's Smelting Co.* quoted above has been repeatedly applied by courts in this province ***.

48. There is, however, relatively recent *dicta* suggesting that there may be some role for the balancing of competing factors even where the nuisance takes the form of actual physical damage to land: see *Tock v. St. John's (City) Metropolitan Area Board*, [1989] 2 S.C.R. 1181 (S.C.C.), at p. 1192; *Royal Anne Hotel Co.* at p. 761. The difficulty that sometimes arises in distinguishing between what constitutes amenity nuisance and nuisance based on physical damage to land suggests that a uniform approach to nuisance claims allowing a court to balance competing factors, although perhaps weighing them differently depending on the nature of the interference alleged, may be preferable. We need not decide that issue. We approach this ground of appeal on the basis that the claimants are correct in contending that competing factors cannot be balanced where the nuisance involves actual physical damage to the claimants' lands.

49. In *St. Helen's Smelting Co.*, the Lord Chancellor used different phrases to describe the kind of harm to land that would suffice to establish nuisance. He referred to "material injury to the property" and to "circumstances the immediate result of which is sensible injury to the value of the property". Subsequent cases have used somewhat different terminology, some of which now seems outdated and inappropriate: *e.g.* see *Salvin v. North Brancepeth Coal Co.* (1874) 9 Ch. App. 705 (Eng. Ch. Div.), at p. 709. In our view, the requirement of "material injury to property" referred to in *St. Helen's Smelting Co.* is satisfied where the actions of the defendant indirectly cause damage to the plaintiff's land that can be properly characterized as material, actual and readily ascertainable.

50. Material damage refers to damage that is substantial in the sense that it is more than trivial: *Barrette c. Ciment du St-Laurent inc.*, [2008] 3 S.C.R. 392 (S.C.C.), at para. 77. Actual damage refers to damage that has occurred and is not merely potential damage that may or may not occur at some future point: *Walker v. McKinnon Industries Ltd.* [[1949] O.R. 549 (Ont. H.C.)] at pp. 558-59. Damage that is readily ascertainable refers to damage that can be observed or measured and is not so minimal or incremental as to be unnoticeable as it occurs. We do agree, however, with counsel for the claimants that the damage may be readily ascertainable even if it is not visible to the naked eye and does not produce some visibly noticeable change in the property. In our view, a change in the chemical composition of the soil measurable through established scientific techniques would constitute a readily ascertainable change in the soil: see *Gaunt v. Fynney* (1872) L.R. 8 Ch. App. 8 (U.K. H.L.). For the reasons we will develop below, the claimants' problem is not with the ascertainability of the change caused by the nickel particles, but with the characterization of that change as damage or harm to the property. ***

55. *** [W]e think the trial judge erred in finding that the nickel particles in the soil caused actual, substantial, physical damage to the claimants' lands. In our view, a mere chemical alteration in the content of soil, without more, does not amount to physical harm or damage to the property. For instance, many farmers add fertilizer to their soil each year for the purpose of changing, and enhancing, the chemical composition of the soil. To constitute physical harm or damage, a change in the chemical composition must be shown to have had some detrimental effect on the land itself or rights associated with the use of the land. ***

57. Where the nuisance is said to flow from the physical harm to land caused by the contamination of that land, the claimants must show that the alleged contaminant in the soil had some detrimental effect on the land or its use by its owners. In this case, potential health concerns were the only basis upon which it could be said that the nickel particles harmed the land of the claimants. It was incumbent on the claimants to show that the nickel particles caused actual harm to the health of the claimants or at least posed some realistic risk of actual harm to their health and wellbeing. ***

58. Had the claimants shown that the nickel levels in the properties posed a risk to health, they would have established that those particles caused actual, substantial, physical damage to their properties. However, the claims as advanced and as accepted by the trial judge were not predicated on any actual risk to health or wellbeing arising from the particles in the soil. The result at trial would presumably have been the same had it been established beyond peradventure that nickel particles at any level had no possible effect on human health.

59. The approach followed by the trial judge effectively removes any need to show that Inco's operation of its refinery caused any harm of any kind to the claimants' land. It extends the tort of private nuisance beyond claims based on substantial actual injury to another's land to claims based on concerns, no matter when they develop and no matter how valid, that there may have been substantial actual injury caused to another's land. On this approach, nuisance operates as an inchoate tort hanging over a property to become actionable, not by virtue of anything done to the property by the defendant, but because of public concerns generated many years after the relevant events about the possible effect of the defendant's conduct on the property. ***

63. The extent to which the trial judge divorced actual, substantial, physical damage to the land from liability for nuisance is evident by considering a variation in the facts as actually found at trial. On the trial judge's analysis, even if the concerns which arose after 2000 were totally unfounded and were ultimately shown to be based on "junk science", Inco would still be liable in nuisance assuming those totally unfounded public concerns generated the same impact on property values.

64. The trial judge's analysis of nuisance raises a further anomaly. The primary *raison d'être* of nuisance is to equip a party who is suffering damage to his land or interference with his use of the land with a means of forcing the party causing that damage to stop doing so. However, on the trial judge's reasoning, the claimants would have had no basis upon which to gain any injunctive relief against Inco when it was operating the refinery up to 1985. As the trial judge analyzes the claim, a person seeking an injunction prior to 1985 would have no basis upon which to argue that Inco's actions caused any actual, substantial, physical damage to the land. It is inconsistent with the essential nature of nuisance as an interference with property to hold that Inco was not engaged in any interference with property when it operated the refinery and emitted the particles, but that it was engaged in an actionable nuisance 15 years after it stopped operating the refinery, when concerns were raised from a variety of sources about the potential health effects of the nickel in the soil and the property values were negatively affected as a result of those concerns. ***

67. In our view, actual, substantial, physical damage to the land in the context of this case refers to nickel levels that at least posed some risk to the health or wellbeing of the residents of those properties. Evidence that the existence of the nickel particles in the soil generated concerns about potential health risks does not, in our view, amount to evidence that the presence of the particles in the soil caused actual, substantial harm or damage to the property. The claimants failed to establish actual, substantial, physical damage to their properties as a result of the nickel particles becoming part of the soil. Without actual, substantial, physical harm, the nuisance claim as framed by the claimants could not succeed. ***

168. The appeal is allowed. The judgment is set aside. Inco is entitled to judgment dismissing the action with costs of the appeal fixed at $100,000. ***

REFLECTION:

- *How does the reasonableness inquiry under the nuisance tort differ from the reasonableness inquiry under the negligence tort?*
- *How has the judicial approach to nuisance cases of physical injury to land tended to differ from the approach in cases of interference with use or enjoyment (amenity) of land? Is the distinction always material?*
- *Why did the claim of nuisance flowing from physical harm to land caused by contamination fail in this case?*
- *What is the "give and take" principle? What are its limits?*

21.1.5 Midwest Properties Ltd v. Thordarson [2015] ONCA 819

✗REF: §19.11.1

HOURIGAN J.A. (FELDMAN AND BENOTTO JJ.A. concurring):

1. The appellant, Midwest Properties Ltd. ("Midwest"), and the respondent, Thorco Contracting Limited ("Thorco"), own adjoining properties in an industrial area of Toronto.

2. Thorco has stored large volumes of waste petroleum hydrocarbons ("PHC") on its property for several decades. As a result of Thorco's storage practices, PHC has contaminated the soil and groundwater on its property. From 1988-2011, Thorco was in almost constant breach of its license and/or compliance orders issued by the Ontario government ministry now known as the Ministry of the Environment and Climate Change (the "MOE"). ***

Analysis ***

91. The trial judge dismissed Midwest's nuisance claim on the basis that it had failed to prove damages. She noted that, because there was no evidence of the environmental state of 285 Midwest at the time it was acquired in 2007, Midwest could not prove that there was any chemical alteration in the soil and groundwater on its property. She held that Midwest would have to prove that there was an increase in the contamination level of the property. The trial judge then cited [*Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.*, 1996 2 C.P.C. (4th) 143 (Ont. Gen. Div.)], where the court approved, at para. 9, of the following statements of law:

> Actual damage must be proven to succeed in nuisance…. No special damages (for alleged devaluation of property) can be advanced on the basis of mere speculation that a prospective purchaser might be apprehensive about the impact of the alleged nuisance on the property…. An interference with the health of the plaintiffs thereby interfering with their enjoyment of the lands would fall within the essence of nuisance.

92. She further cited *Smith v. Inco Ltd.*, 2011 ONCA 628, 107 O.R. (3d) 321 (Ont. C.A.), leave to appeal refused, [2012] 1 S.C.R. xii (note) (S.C.C.), in part for the proposition that:

> [A]ctual, substantial, physical damage to the land in the context of this case refers to nickel levels that at least posed some risk to the health or wellbeing of the residents of those properties. Evidence that the existence of the nickel particles in the soil generated concerns about potential health risks does not, in our view, amount to evidence that the presence of the particles in the soil caused actual, substantial harm or damage to the property. The claimants failed to establish actual, substantial, physical damage to their properties as a result of the nickel particles becoming part of the soil. Without actual, substantial, physical harm, the nuisance claim as framed by the claimants could not succeed.

93. The trial judge then concluded that Midwest had not proven damage in nuisance. ***

98. In my view, the trial judge erred in dismissing these claims on the basis that damage had not been established. There was uncontradicted evidence at trial that established a diminution in the value of the appellant's property and a human health risk. Nowhere in her reasons did the trial judge consider the evidence. Instead she made findings that damage had not been established without reference to the evidence at trial. ***

102. This situation is distinguishable from the facts in [*Smith v. Inco Ltd.*, 2011 ONCA 628 [§21.1.4]] where there was nickel contamination but no evidence that the change in the chemical composition of the soil posed any health risk to the occupants or diminished the value of the plaintiffs' property at the time of the contamination. ***

106. It is also clear that the other elements of the torts of nuisance and negligence are made out on the facts of this case. Nuisance is a substantial and unreasonable interference with the plaintiff's use or enjoyment of land: *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)*, 2013 SCC 13, [2013] 1 S.C.R. 594 (S.C.C.), at para. 18. While the jurisprudence prior to *Antrim* established that physical or material harm to land was presumptively unreasonable, in *Antrim* the Supreme Court held, at para. 51, that the reasonableness of the interference must be assessed in all cases. The court, however, also held that where actual physical damage is at issue, the reasonableness analysis will likely be brief: *Antrim*, at para. 50.

107. Such is the case here. The invasion of PHC onto Midwest's property, to the point that the product is of such a concentration that it can no longer dissolve in groundwater and is found to pose a risk to human health, cannot be classified as trivial, insubstantial, or reasonable. The interference becomes all the more unreasonable when the significant cost to Midwest to remediate the contamination and undo the damage to the soil and groundwater on its property is considered. This is not the kind of interference with the use or enjoyment of property that society, through the law of nuisance, expects a property owner such as Midwest to bear in the name of being a good neighbour. ***

112. In conclusion, the appellant established an entitlement to damages under both nuisance and negligence. The trial judge erred in dismissing these claims. ***

REFLECTION:

- *Was this an obvious case of nuisance? In what way was this case distinguishable from Smith v. Inco Ltd.?*

21.1.6 Fearn v. Board of Trustees of the Tate Gallery [2023] UKSC 4

United Kingdom Supreme Court – [2023] UKSC 4

LORD LEGGATT (LORD REED AND LORD LLOYD-JONES concurring): ***

1. On the top floor of the Blavatnik Building, which is part of the Tate Modern art museum on Bankside in London, there is a public viewing gallery. It is a popular visitor attraction. From the viewing gallery visitors can enjoy 360-degree panoramic views of London. About 5½ million people visit the Tate Modern each year and, of them, several hundred thousand (between 500,000 and 600,000 on one estimate) visit the viewing gallery, with a limit of 300 people at any one time. Entry to the museum and the viewing gallery is free but the top floor of the Blavatnik Building is also available to hire for external events. Such events are very important financially to the Tate Modern because they bring in significant income.

2. Unfortunately for the claimants in this case, visitors to the viewing gallery can see straight into the living areas of their flats. The flats in question are located on, respectively, the 13th, 18th, 19th and 21st floors of a block which is part of the nearby Neo Bankside residential and commercial development. The distance between the two buildings is about 34 metres and the flats on the 18th and 19th floors—which are the most affected—are at about the same height above ground level as the viewing gallery. The walls of the Neo Bankside flats are constructed mainly of glass. The trial judge found that, on the southern walkway of the viewing gallery, "[a] major part of what catches the eye is the apparently clear and uninterrupted view of how the claimants seek to conduct their lives in the flats. One can see them from practically every angle on the southern walkway": [2019] Ch 369, para 203. ***

4. In this action the claimants are seeking an injunction requiring the Board of Trustees of the Tate Gallery to prevent members of the public from viewing their flats from the relevant part of the viewing gallery walkway; or alternatively, an award of damages. Their claim is based on the common law of private nuisance.

5. *** The judge found that the extent of the viewing and interest shown in the claimants' flats is a material intrusion into the privacy of their living accommodation, using the word "privacy" in its everyday sense. He held that intrusive viewing from a neighbouring property can in principle give rise to a claim for nuisance. But he nevertheless concluded that the intrusion experienced by the claimants in this case does not amount to a nuisance. The judge's reasoning *** was in essence that the Tate's use of the top floor of the Blavatnik Building as a public viewing gallery is reasonable and that the claimants are responsible for their own misfortune: first, because they have bought properties with glass walls and, second, because they could take remedial measures to protect their own privacy such as lowering their blinds during the day or installing net curtains.

6. On appeal, the Court of Appeal (Sir Terence Etherton MR, Lewison and Rose LJJ) found that the judge's reasoning involved material errors of law and that, if the principles of common law nuisance are correctly applied to the facts of this case, the claim should succeed. Nevertheless, they dismissed the appeal. They did so on the ground that "overlooking", no matter how oppressive, cannot in law count as a nuisance. By way of cold comfort to the claimants, they explained that "even in modern times the law does not always provide a remedy for every annoyance to a neighbour, however considerable that annoyance may be": [2020] Ch 621, para 79. ***

Core Principles of Private Nuisance

(1) The scope of private nuisance

9. In his classic article "The Boundaries of Nuisance" (1949) 65 LQR 480 Professor Francis Newark described private nuisance as a "tort to land"—by which he meant that its subject matter is wrongful interference with the claimant's enjoyment of rights over land. ***

10. In *Hunter v. Canary Wharf Ltd* [1997] AC 655 the House of Lords emphatically endorsed this thesis: see especially pp 687G-688E (Lord Goff of Chieveley), 696B (Lord Lloyd of Berwick), 702H, 707C (Lord Hoffmann) and 723D-E (Lord Hope of Craighead). By a majority of four to one (Lord Cooke of Thorndon dissenting), the House of Lords decided that, because the interest protected by the tort of private nuisance is the use and enjoyment of land, only a person with a legal interest in the land can sue. Generally, the required interest is a right to exclusive possession of the land. That requirement is satisfied by the claimants in this case who are the leasehold owners of their flats under 999-year leases.

11. It follows from the nature of the tort of private nuisance that the harm from which the law protects a

claimant is diminution in the utility and amenity value of the claimant's land, and not personal discomfort to the persons who are occupying it: see eg *Hunter* [1997] AC 655, 696B-D (Lord Lloyd), 705G-707C (Lord Hoffmann), 724F-725A (Lord Hope); *Williams v. Network Rail Infrastructure Ltd* [2019] QB 601, para 43. As Professor Newark put it in his article, at pp 488-489:

> "… the interest of the plaintiff which is invaded is not the interest of bodily security but the interest of liberty to exercise rights over land in the amplest manner. A sulphurous chimney in a residential area is not a nuisance because it makes householders cough and splutter but because it prevents them taking their ease in their gardens."

(2) Nuisance can be caused by any means

12. A second fundamental point, directly relevant in this case, is that there is no conceptual or *a priori* limit to what can constitute a nuisance. To adapt what Lord Macmillan said of negligence in *Donoghue v. Stevenson* [1932] AC 562, 619 [§13.1.1], the categories of nuisance are not closed. Anything short of direct trespass on the claimant's land which materially interferes with the claimant's enjoyment of rights in land is capable of being a nuisance.

13. Frequently, such interference is caused by something emanating from land occupied by or under the control of the defendant which physically invades the claimant's land. This may be something tangible, as where—to take a recent example—an incursion of Japanese knotweed from neighbouring land gave rise to a claim: see *Williams v. Network Rail* [2019] QB 601. Or it may be something intangible, such as fumes, noise, vibration or an unpleasant smell. In all such cases, however, the basis of the claim is not the physical invasion itself but the resulting interference with the utility or amenity value of the claimant's land. Moreover, there is no requirement that the interference must be caused by a physical invasion and, as commentators have pointed out, there are many cases which do not fit this model: see C Essert, "Nuisance and the Normative Boundaries of Ownership" (2016) 52 Tulsa L Rev 85, 96-98; D Nolan, "The Essence of Private Nuisance" in Ben McFarlane and Sinéad Agnew (eds), *Modern Studies in Property Law*, vol 10 (2019) 71, 81-83. So, for example, a nuisance may be caused by obstructing access to land (eg *Guppys (Bridport) Ltd v. Brookling* (1983) 14 HLR 1); by a withdrawal of support for the claimant's land (eg *Holbeck Hall Hotel Ltd v. Scarborough Borough Council* [2000] QB 836); by obstruction of an acquired right to light (eg *Jolly v. Kine* [1907] AC 1) or to a flow of air (eg *Bass v. Gregory* (1890) 25 QBD 481) through a defined aperture; or by preventing connection to a public sewer (*Barratt Homes Ltd v. Dŵr Cymru Cyfyngedig (No 2)* [2013] 1 WLR 3486). ***

(3) "Unreasonable" interference

18. At a general level, the law of private nuisance is concerned with maintaining a balance between the conflicting rights of neighbouring landowners—"between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with": *Sedleigh-Denfield v. O'Callaghan* [1940] AC 880, 903 (Lord Wright). It is evident that, if such a balance is to be maintained, not every interference with a person's use and enjoyment of their land can be actionable as a nuisance. It is sometimes said, as if it were a governing principle, that to give rise to liability the interference must be "unreasonable". However, the term "unreasonable" in this statement has no explanatory power: see in particular Allan Beever, *The Law of Private Nuisance* (2013), p 10 ("It is presented as an explanation of the operation of the law, but it does not, cannot, explain anything"). The requirement that the interference must be "unreasonable" is just another way of saying that—as it is also put—the interference must be "unlawful" (see eg *Winfield and Jolowicz on Tort*, 20th ed (2020), para 15-010, and the cases there cited); or that to give rise to liability an activity must "unduly" interfere with a person's use or enjoyment of land (see eg *Clerk & Lindsell on Torts*, 23rd ed (2020), para 19-01; *Lawrence v. Fen Tigers Ltd* [2014] UKSC 13; [2014] AC 822, para 3, per Lord Neuberger of Abbotsbury).

19. The authors of *Winfield and Jolowicz on Tort*, para 15-017, explain that the term "unreasonable" in this context "signifies what is legally right between the parties taking account of all the circumstances of the case." In other words, it is no more than a way of stating a conclusion about whether the defendant's activity is lawful and is not itself a legal standard or test which assists in reaching such a conclusion. ***

21. In applying these principles, the first question which the court must ask is whether the defendant's use

of land has caused a *substantial* interference with the *ordinary* use of the claimant's land. The two evaluative judgments involved in this test each merit some elaboration.

(4) The interference must be substantial

22. Courts have adopted varying phraseology to express the point that the interference with the use of the claimant's land must exceed a minimum level of seriousness to justify the law's intervention. The terms "real", "substantial", "material" and "significant" have all been used. Put the other way round, the courts will not entertain claims for minor annoyances. As Lord Wensleydale said in *St Helen's Smelting Co v. Tipping* (1865) 11 HL Cas 642, 653-654:

> "the law does not regard trifling and small inconveniences, but only regards sensible inconveniences, injuries which sensibly diminish the comfort, enjoyment or value of the property which is affected."

23. The test is objective. What amounts to a material or substantial interference is not judged by what the claimant finds annoying or inconvenient but by the standards of an ordinary or average person in the claimant's position. *** The objective nature of the test reflects the fact that the interest protected by the law of private nuisance is the utility of land, and not the bodily security or comfort of the particular individuals occupying it. ***

(5) The ordinary use of land

24. Fundamental to the common law of private nuisance is the priority accorded to the general and ordinary use of land over more particular and uncommon uses. In *Fleming v. Hislop* (1886) 11 App Cas 686, 691, the Earl of Selborne L-C encapsulated this well when he defined a nuisance as "what causes material discomfort and annoyance *for the ordinary purposes of life* to a man's house or to his property" (emphasis added). ***

25. One aspect of this core principle is that an occupier cannot complain if the use interfered with is not an ordinary use. ***

27. The other aspect of this core principle is that, even where the defendant's activity substantially interferes with the ordinary use and enjoyment of the claimant's land, it will not give rise to liability if the activity is itself no more than an ordinary use of the defendant's own land. In the leading case of *Bamford v. Turnley* (1862) 3 B & S 66 at 83, Bramwell B formulated a test which has since been regularly cited, approved and applied, including at the highest level ***:

> "There must be, then, some principle on which such cases must be excepted. It seems to me that that principle may be deduced from the character of these cases, and is this, viz, that *those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action*." (emphasis added)

Bramwell B justified this principle in the following way:

> "There is an obvious necessity for such a principle as I have mentioned. It is as much for the advantage of one owner as of another; for the very nuisance the one complains of, as the result of the ordinary use of his neighbour's land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live."

28. Subsequent cases have shown that this justification is not limited, as Bramwell B suggested, to situations where the reciprocal nuisances "are of a comparatively trifling character." The rule of "give and take, live and let live" applies wherever a nuisance results from the ordinary use of land.

"Reasonable user"

29. In *Cambridge Water Co v. Eastern Counties Leather plc* [1994] 2 AC 264, 299, Lord Goff said that:

> "although liability for nuisance has generally been regarded as strict, … [it] has been kept under control by the principle of reasonable user—the principle of give and take as between neighbouring occupiers of land, under which 'those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action:' see *Bamford v. Turnley* (1862) 3 B & S 62, 83, per Bramwell B. The effect is that, if the user is reasonable, the defendant will not be liable for consequent harm to his neighbour's enjoyment of his land; but if the user is not reasonable, the defendant will be liable, even though he may have exercised reasonable care and skill to avoid it." ***

31. The point that it is no answer to a claim for nuisance to say that the defendant is using its land reasonably has been reiterated in many later cases ***. In *Southwark* Lord Millett (with whom Lords Slynn, Steyn and Clyde agreed) addressed directly Lord Goff's description in *Cambridge Water* of Bramwell B's principle as "the principle of reasonable user", saying, at p 20:

> "The use of the word 'reasonable' in this context is apt to be misunderstood. It is no answer to an action for nuisance to say that the defendant is only making reasonable use of his land."

Lord Millett went on to reiterate that the principle which limits the liability of a landowner who causes a sensible interference with his neighbour's enjoyment of his property is that stated by Bramwell B in *Bamford v. Turnley*, and that where the two conditions of that test are satisfied, no action will lie against the landowner "for that substantial interference with the use and enjoyment of his neighbour's land that would otherwise have been an actionable nuisance" (p 21). ***

Reciprocity

34. The underlying justification for those [tests formulated by Bramwell B] was spelt out by Lord Millett in *Southwark*, when he explained (at p 20) that:

> "The governing principle is good neighbourliness, and this involves reciprocity. A landowner must show the same consideration for his neighbour as he would expect his neighbour to show for him."

This explanation gets to the nub of the rule of "give and take, live and let live" stated by Bramwell B in *Bamford v. Turnley*. It is a principle of equal justice, a form of the golden rule that you should "do as you would be done by". Put negatively, people cannot fairly demand of others behaviour which they would not at the same time allow others to demand of them. See further Ernest J Weinrib, *The Idea of Private Law* (2012) pp 190-194 [§11.2.2]; C Essert, "Nuisance and the Normative Boundaries of Ownership" (2016) 52 Tulsa L Rev 85, 103-106. ***

The freedom to build ***

37. The right to build (and demolish) structures is fundamental to the common and ordinary use of land, involving as it does the basic freedom to decide whether and how to occupy the space comprising the property. It follows that interference resulting from construction (or demolition) works will not be actionable provided it is, in Bramwell B's phrase, "conveniently done", that is to say, in so far as all reasonable and proper steps are taken to ensure that no undue inconvenience is caused to neighbours: see *Andreae v. Selfridge & Co Ltd* [1938] Ch 1.

(6) The locality principle

38. It is also well settled that what is a "common and ordinary use of land" is to be judged having regard to the character of the locality. In *Sturges v. Bridgman* (1879) 11 Ch D 852, 865, Thesiger LJ giving the judgment of the Court of Appeal expressed this in a famous statement that "what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey". ***

(7) Coming to a nuisance is no defence

42. A further rule, also illustrated by *Sturges v. Bridgman*, is that "coming to a nuisance" is not a defence. In other words, it is not in itself a defence to a claim for nuisance that the defendant was already using his land in the way now complained of before the claimant acquired or began to occupy the neighbouring land.

Nor is it a defence that the defendant's activity did not amount to a nuisance until the claimant's land was built on or its use was changed. ***

(8) The public interest

47. The last core principle that I need to mention is the principle that it is not a defence to a claim for nuisance that the activity carried on by the defendant is of public benefit: see eg *Clerk & Lindsell on Torts*, 23rd ed (2020), para 19-107. I will come back to this principle later in this judgment.

Applying the Law in This Case

48. I have summarised the legal principles which the court must apply in this case. I confess that their application to the facts found by the trial judge seems to me entirely straightforward. Mann J found that the living areas of the claimants' flats are under constant observation from the Tate's viewing gallery for much of the day, every day of the week; that the number of spectators is in the hundreds of thousands each year; and that spectators frequently take photographs of the interiors of the flats and sometimes post them on social media. It is not difficult to imagine how oppressive living in such circumstances would feel for any ordinary person—much like being on display in a zoo. It is hardly surprising that the judge concluded that this level of visual intrusion would reasonably be regarded by a homeowner as a material intrusion into the privacy of their living accommodation. On his findings it is beyond doubt that the viewing and photography which take place from the Tate's building cause a substantial interference with the ordinary use and enjoyment of the claimants' properties.

49. The Tate does not encourage visitors to peer into the claimants' flats. Indeed, in response to complaints from the claimants it posted a sign in the viewing gallery asking visitors to respect the privacy of the Tate's neighbours and instructed security guards to stop photography of the flats. However, the judge did not regard these steps as likely to achieve much, describing them as "not quite wholly useless": [2019] Ch 369, paras 69, 221. No attempt has been made, nor could realistically be made, to stop visitors from looking, sometimes intently, into the claimants' flats whenever the south side of the gallery is open; and in an age when most people carry a smartphone with a high powered camera it is a natural and foreseeable consequence of allowing thousands of visitors a week to look out from a viewing gallery from which they get a clear view of the claimants' living accommodation that a significant number will take photographs of the interiors of the flats, just as the judge found that they in fact do.

50. The judge characterised the locality in which the Tate Modern and the Neo Bankside flats are situated as "a part of urban south London used for a mixture of residential, cultural, tourist and commercial purposes." He noted that an occupier in that environment "can expect rather less privacy than perhaps a rural occupier might" and that "[a]nyone who lives in an inner city can expect to live quite cheek by jowl with neighbours": para 190. But he made no finding that there is any other viewing platform in that part of London; nor that operating a public viewing gallery is necessary for the common and ordinary use and occupation of the Tate's land. The Tate did not make, and could not credibly have made, any such allegation. Inviting members of the public to look out from a viewing gallery is manifestly a very particular and exceptional use of land. It cannot even be said to be a necessary or ordinary incident of operating an art museum. Hence, the Tate cannot rely on the principle of give and take and argue that it seeks no more toleration from its neighbours for its activities than they would expect the Tate to show for them.

51. I have indicated that it would not have mattered if the viewing gallery had already been operating when the Neo Bankside flats were built or when the claimants acquired their flats; and that even if the question of who was there first had been relevant, it would not have assisted the Tate. ***

52. Applying the well settled legal tests, therefore, the claim ought to succeed. ***

Policy arguments

105. *** I will consider whether any of the policy reasons given by the Court of Appeal for not extending nuisance to overlooking could justify creating a special exception from the ordinary principles of nuisance for interference caused by watching and photography. ***

Invasion of privacy

111. *** [T]he Court of Appeal suggested that "what is really the issue in cases of overlooking in general, and the present case in particular, is invasion of privacy rather than (as is the case with the tort of nuisance) damage to interests in property": [2020] Ch 621, para 84. They pointed out that there are already other laws which bear on privacy, including the law relating to confidentiality [§10.5], misuse of private information [§4.1.1], data protection [§4.3], harassment and stalking [§5.2]. They expressed the view that this is an area which is better left to the legislature to decide whether any further laws are needed rather than for the courts to extend the law of private nuisance (para 85).

112. This again assumes that applying the common law of nuisance to the activity complained of in this case would require an extension of the law, rather than simply the application of well settled tests. As discussed above, I consider this to be a wrong assumption. A further point is that "privacy" is a very broad term which encompasses an assortment of more specific concepts and human interests. As the list given by the Court of Appeal indicates, various legally distinct wrongs are all capable of being described as "invasions of privacy". The watching and photography that takes place from the Tate's viewing gallery can be said to fall under that broad description. Contrary to what is said by the Court of Appeal, however, the claimants' complaint is indeed one of damage to interests in property. The concepts of invasion of privacy and damage to interests in property are not mutually exclusive. An important aspect of the amenity value of real property is the freedom to conduct your life in your own home without being constantly watched and photographed by strangers. Damage to that interest might in some cases also give rise to other causes of action, for example harassment, though they do not here. The (sole) issue in this case is whether the viewing and photography to which the claimants are subjected on a daily basis violates the claimants' rights to the use and enjoyment of their flats. No new privacy laws are needed to deal with this complaint. The general principles of the common law of nuisance are perfectly adequate to do so. ***

Why the public interest is not relevant to liability

121. I said I would come back to the principle that a defendant cannot avoid liability for nuisance by arguing that its activity is of public benefit. The reason is simply that private nuisance is a violation of real property rights (see paras 10-11 above). The very nature of property rights requires that, as a general principle, they be respected by all others unless relinquished voluntarily. The fact that it would be of general benefit to the community to use your land for a particular purpose—say, as a short-cut or as a place for taking exercise—is not a reason to allow such use without your consent. The same applies to nuisance. It is not a justification for carrying on an activity which substantially interferes with the ordinary use of your land that the community as a whole will benefit from the interference. In *Sturges v. Bridgman*, for example, no one thought it relevant to examine the public utility of Mr Bridgman's use of his land for making confectionery or to seek to compare this with the public utility of Dr Sturges' use of his consulting room. *** The point of the law of private nuisance is to protect equality of rights between neighbouring occupiers to the use and enjoyment of their own land when those rights conflict. In deciding whether one party's use has infringed the other's rights, the public utility of the conflicting uses is not relevant. ***

126. The real issue, therefore, in a case where it is said that a continuing activity which causes a nuisance is for the public benefit is not whether the individuals harmed by the activity should have to bear the loss—which on any view would be unjust. It is whether it is sufficient to compensate the loss by awarding damages or whether the activity should be stopped by an injunction. ***

Remedy

133. I would therefore allow the appeal, hold that the Tate's use of the viewing gallery gives rise to liability to the claimants under the common law of nuisance and remit the case to the High Court to determine the appropriate remedy. ***

LORD SALES (dissenting with Lord KITCHIN):

134. This case is concerned with the law of private nuisance. It raises two questions. First, is it possible, in principle, to find that a private nuisance exists in the case of a residential property by reason of visual

intrusion by people looking into the living areas of the property? Secondly, if that is possible, have the claimants (the appellants in the appeal) established that there was an actionable private nuisance by reason of the visual intrusion which they have experienced in the circumstances of this case entitling them to injunctive relief? ***

Issue (1): The ambit of the tort of private nuisance: can visual intrusion be a nuisance? ***

156. As mentioned above, the basis for the Court of Appeal's decision was its ruling that "mere overlooking" is incapable of giving rise to a cause of action in private nuisance. ***

157. Much of the law relating to the basic ground rules in respect of the tort of private nuisance is common ground. Mann J and the Court of Appeal approached it in the same way. Private nuisance is a tort concerned with real property and the violation of rights pertaining to real property. ***

170. As regards the first issue in this appeal, the formulations adopted in the case-law from *Bamford v. Turnley* onwards to explain the ambit of the tort are relevant. Bramwell B referred to "a nuisance to the [claimant]'s habitation by causing a sensible diminution of the comfortable enjoyment of it". According to that formulation, there is no reason to say that visual intrusion which, at a certain level of intensity, may indeed cause a sensible diminution of the comfortable enjoyment of one's home should fall outside the scope of the tort. Similarly, Pollock CB took the tort to be concerned with, among others, things which "[lessen] the comfort … of a neighbour", and again there is no good reason to think that this would not cover visual intrusion. Lord Westbury in *St Helen's Smelting Co.* referred to matters producing "sensible personal discomfort", and the same point applies.

171. In *Hunter* Lord Goff approved (p 688B) a statement by Professor Newark that nuisance protects against the invasion of the claimant's "liberty to exercise rights over land in the amplest manner." Lord Lloyd referred (p 696B) to "interference with land or the enjoyment of land". The formulation employed by Lord Neuberger in *Lawrence*, at para 3, refers to action (or sometimes a failure to act) "which causes an interference with the claimant's reasonable enjoyment of his land, or … which unduly interferes with the claimant's enjoyment of his land". ***

175. In my judgment the formulations of the relevant principle above are authoritative and are of a width which—leaving aside questions of balancing of interests, which is the second issue in the appeal—covers instances of intense visual intrusion at the level which has occurred in this case. Also, the rationale given for the tort, which underlies these formulations, is capable of covering the present case.

176. A person of ordinary sensitivity would regard the extreme degree of visual intrusion experienced by the claimants in this case as a serious interference with their ability to enjoy their property as a domestic habitation. Anyone would be likely to regard living their lives within their own home under the gaze of a multitude of strangers as having a highly inhibiting and unpleasant effect. An important aspect of the enjoyment of the rights of property in one's own home is that one can live there with a reasonable degree of privacy and without intrusion by others, hence the well- known saying that a person's home is their castle. Over the years there have been a number of judicial statements which acknowledge this dimension of the enjoyment of a residential property. ***

179. In my view, intense visual intrusion into someone's domestic property is capable of amounting to a nuisance. ***

Issue (2): Was there a nuisance in this case? Application of the principle of reasonable reciprocity and compromise ("give and take")

209. The reason why a principle of reasonable reciprocity and compromise, or "give and take", should apply in relation to the tort of nuisance seems clear. On the one hand, if one landowner uses their land in a way which impinges in a material way on the enjoyment of a neighbour's property, if no remedy is given that means that the neighbour has in some sense to bear the cost of the landowner's use. But on the other hand, if a court grants injunctive relief to prevent that use and to protect the use to which the neighbour puts their land, that will have the effect of forcing the first landowner to bear the cost of the neighbour's use: to the extent that relief is given, the first landowner will be deprived of their usual right, as emphasised in

Hunter, to build as they please on their own property or use it as they wish. There is no reason why the rights of one landowner must necessarily prevail over those of the other. A balance has to be struck between them. Each of them is entitled to expect a degree of good neighbourliness and toleration on the part of the other. ***

212. The application of the "give and take" principle as a way of modulating and reconciling the property rights of neighbouring landowners is particularly important where the issue is visual intrusion or overlooking. Many types of nuisance, such as those to do with smell, vibration and noise, naturally tend to occur over relatively short distances. But lines of sight may be open across considerable distances, and where a landowner can look out from their property then others can look in. Particularly in an urban environment, a degree of overlooking and visual intrusion is inevitable. ***

214. In striking the appropriate balance between the competing property interests, I can see no good reason why one should leave out of account reasonable self-help measures which might be available to the person complaining about visual intrusion. ***

271. In my view, the judge's approach to the application of the "give and take" test was correct. Property owners in this part of London have to expect to be overlooked to a significant degree and the risk of people being able to look through their windows from neighbouring properties is an inevitable part of community life in the area. It is normal to expect people to use curtains, blinds and other screening measures to limit the annoyance which that might cause. As the judge rightly observed, the nature of the nuisance alleged (visual intrusion) is significant. He found that the Tate's viewing gallery would not have constituted a nuisance if Neo Bankside had been built and the winter gardens had been used in a way which did not involve heightened sensitivity to that form of intrusion and which did not invite "the consequence of an increased exposure to the outside world", beyond that to be expected by the "appropriate measure" for the area: paras 205-206 and 208-211.

272. *** The owners of the flats at Neo Bankside could not acquire any right vis-à-vis neighbouring landowners to maintain their aspect looking out, since that would interfere to an unacceptable degree with the rights of neighbouring landowners to develop their own land for use as they wished. Nor in my view could they acquire any right against being overlooked and subjected to visual intrusion which would be seriously burdensome in terms of preventing neighbouring landowners developing their own land for use as they wished, to a degree beyond that which would be regarded as reasonable for the area.

273. In assessing what was a reasonable balance to strike between the competing interests and property rights of the claimants and the Tate in the context of the particular neighbourhood and in light of the nature of the particular nuisance alleged (ie by visual intrusion), I consider that the judge was entitled in the circumstances to have regard to the availability of self-help measures which it was not unreasonable to expect them to take. ***

Conclusion

280. For the reasons given above, which differ from those given by the Court of Appeal but reflect those given by Mann J, I would have dismissed this appeal. ***

REFLECTION:

- *Was the harm suffered by the plaintiffs equivalent to the harms suffered in previous nuisance cases? In what novel way does Lord Leggatt's judgment extend the law of nuisance? What might be the implications?*[708]
- *Are the "core principles of private nuisance" elucidated by Lord Leggatt consistent with Canadian precedent?*
- *Was the wrong to the plaintiffs here more appropriately addressed by the tort of nuisance or by a cause of action for invasion of privacy?*
- *What is Lord Leggatt's rationale for determining that public interest is not a relevant consideration in the context of nuisance? How might such a consideration conflict with the rights inherent in property ownership?*

[708] See P. Hubbard, "The fight between Tate Modern and its wealthy neighbours reveals the gentrification of the skies" The Conversation (Feb 13, 2023); J. Hariharan, "Private Nuisance and Privacy after *Fearn v. Tate Gallery*" Chinese University of Hong Kong Centre for Comparative and Transnational Law (Jan 29, 2024) 📺.

- *Does Lord Sales' finding (in dissent) that it was not unreasonable to expect the plaintiffs to take self-help measures demonstrate a balanced application of the "give and take" principle? How does it differ from Lord Leggatt's application of the same principle?*

21.1.7 Cross-references

- *Li v. Barber* [2022] ONSC 1513: §9.8.1.2.
- *Goldman v. Hargrave* [1966] UKPC 12, [24]: §14.2.3.1.

21.1.8 Further material

- Just Torts Podcast (U Sydney), "Private Nuisance" (Oct 14, 2017) 🎧.
- The Law Report Podcast, "Bad Neighbours: Smells" (May 8, 2024) 🎧.
- L. Frey, "Untidy Premises and Other Neighbourhood Nuisances" People's Law School (Nov 2020).
- C.L. Saw & A. Yoong, "Whither Privacy Protection in the Law of Nuisance" (2022) 34 Singapore Academy LJ 505.
- D. Nolan, "Nuisance and Privacy" (2021) 137 L Quarterly Rev 1.
- J. Neyers & J. Diacur, "What (is) a Nuisance?" (2011) 90 Canadian Bar Rev 215.
- C. Seaborn, "How *Smith v. Inco* Failed: Recognizing the Category of 'Chemical Interference' in Private Nuisance Cases" (2013) 26 J Environmental L & Practice 59.
- B. Atkin, "The Tort of Nuisance: 'Trucking On'" in S. Griffiths, M. Henaghan and M.B. Rodriguez Ferrere (eds), *The Search for Certainty: Essays in Honour of John Smillie* (Wellington: Thomson Reuters, 2016).
- D. Nolan, "The Essence of Private Nuisance" in B. McFarlane and S. Agnew (eds), *Modern Studies in Property Law* (vol 10, Oxford: Hart Publishing, 2019).
- G.S. Pun & M.I. Hall, *The Law of Nuisance in Canada* (2nd ed, Markham: LexisNexis, 2015).
- J. Murphy, *The Law of Private Nuisance* (Oxford: Oxford University Press, 2010).
- J. Wicks, B. Faulkner & D. Petrides (eds), *Current Issues in Nuisance and Trespass* (London: Wilberforce Chambers, 2022).
- J. Wilson, *Court and Bowled: Tales of Cricket and the Law* (London: Wildy, Simmonds & Hill, 2014), 235.

21.2 Public nuisance

Manitoba Law Reform Commission, The Nuisance Act and the Farm Practices Protection Act (Rep. 126, 2013), 3-6

Private nuisance and public nuisance are separate concepts, and are generally thought to have quite distinct origins.[709] Private nuisance has historically been a tool for resolving private disputes about conflicting land usage. Public nuisance has its origins in the criminal law and concerns interference with public rights, not necessarily connected with the use or enjoyment of land.

In *Ryan v. Victoria (City)* [at [52]], the Supreme Court of Canada summarized the principal features of public nuisance ***. *** […continue reading]

REFLECTION:

- *Given their distinct origins and purposes, what do the torts of public and private nuisance have in common?*

21.2.1 Ryan v. Victoria (City) [1999] CanLII 706 (SCC)

✗**REF: §14.1.2.2, §14.2.6.2, §18.4.1**

[709] For the prevailing view, see Lewis Klar, *Tort Law*, 4th ed (Scarborough: Thomson Carswell, 2008) at 716.

MAJOR J. (FOR THE COURT):

1. This appeal considers the effect of statutory authority on the civil liability of railways. A motorcyclist was injured while attempting to cross railway tracks located on an urban street in Victoria, British Columbia. The motorcyclist sued the City of Victoria ("the City") and the railway companies which owned and operated the tracks ("the Railways"). The Railways denied liability on the ground that the tracks were authorized by, and complied with, all applicable statutes, regulations and administrative orders. ***

3. The second issue is whether the Railways are liable in public nuisance. Again, the Railways disclaim liability on the ground that the tracks involved were authorized by statute and regulations. The appellant submits that such a defence is unavailable because the hazard posed by the tracks was not an "inevitable consequence" of exercising statutory authority. ***

4. On May 4, 1987, the appellant, Murray Ryan, was thrown from his motorcycle while attempting to cross railway tracks running down the centre of Store Street, in downtown Victoria. The tracks were owned by the respondent Esquimalt & Nanaimo Railway Company ("E&N"), and were leased and operated by the respondent Canadian Pacific Limited ("CP"). The accident occurred when the front tire of the appellant's motorcycle became trapped in a "flangeway" gap running alongside the inner edge of the tracks. At the time of the accident, the flangeways on Store Street were approximately one-quarter of an inch wider than the front tire of the appellant's motorcycle. ***

16. The trial judge *** held that the Railways were liable in public nuisance. Relying on *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181 (SCC), he rejected the Railways' defence of "statutory authority" since, in his view, the hazard created was not an inevitable consequence of discharging any statutory duty. The trial judge also held that the City of Victoria was liable for its failure to provide adequate warnings to the public of the danger on Store Street. He dismissed a nuisance claim against the City on the basis that the City had no property interest in the tracks. ***

18. The Court of Appeal *** reversed the trial judge's holding with respect to nuisance, on the basis that the Railways were protected by the defence of statutory authority. In the Court of Appeal's view, the danger posed by the flangeways was an "inseparable consequence" of the Board orders which required the tracks to be laid at street grade with pavement between the rails. However, the Court of Appeal did find that both the Railways and the City were at fault for failing to warn the public of the hazard created by the flangeways. ***

52. The doctrine of public nuisance appears as a poorly understood area of the law. "A public nuisance has been defined as any activity which unreasonably interferes with the public's interest in questions of health, safety, morality, comfort or convenience": see Klar, *supra*, at p. 525. Essentially, "[t]he conduct complained of must amount to … an attack upon the rights of the public generally to live their lives unaffected by inconvenience, discomfort and other forms of interference": see G.H.L. Fridman, *The Law of Torts in Canada*, Vol. I (1989), at p. 168. An individual may bring a private action in public nuisance by pleading and proving special damage. See, e.g., *Chessie v. J.D. Irving Ltd.* (1982), 22 C.C.L.T. 89 (N.B. C.A.). Such actions commonly involve allegations of unreasonable interference with a public right of way, such as a street or highway. See *ibid.*, at p. 94.

53. Whether or not a particular activity constitutes a public nuisance is a question of fact. Many factors may be considered, including the inconvenience caused by the activity, the difficulty involved in lessening or avoiding the risk, the utility of the activity, the general practice of others, and the character of the neighbourhood. See *Chessie*, *supra*, at p. 94. The trial judge found, at p. 206, that "the configuration and design of the railway tracks on Store Street constituted an unreasonable interference to the public of its right of access". He noted that Store Street was a mixed retail, industrial, and commercial area, and that the Railways should have foreseen the hazard posed by the flangeways to riders of two-wheeled vehicles. He found, at p. 207, that the cost of that hazard should be borne by the Railways as a matter of policy: ***.

54. Statutory authority provides, at best, a narrow defence to nuisance. The traditional rule is that liability will not be imposed if an activity is authorized by statute and the defendant proves that the nuisance is the "inevitable result" or consequence of exercising that authority. See *Manchester (Borough) v. Farnworth* (1929), [1930] A.C. 171 (U.K. H.L.) at p. 183; *British Columbia Pea Growers Ltd. v. Portage la Prairie (City)*

(1965), [1966] S.C.R. 150 (S.C.C.); *Schenck v. Ontario*, [1987] 2 S.C.R. 289 (S.C.C.). ***

55. In the absence of a new rule it would be appropriate to restate the traditional view, which remains the most predictable approach to the issue and the simplest to apply. That approach was expressed by Sopinka J. in *Tock*, at p. 1226:

> The defendant must negative that there are alternate methods of carrying out the work. The mere fact that one is considerably less expensive will not avail. If only one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance. It is insufficient for the defendant to negative negligence. The standard is a higher one. While the defence gives rise to some factual difficulties, in view of the allocation of the burden of proof they will be resolved against the defendant.

56. Turning to the facts of this case, the question raised by the traditional test is whether the hazard created on Store Street was an "inevitable result" of exercising statutory authority; that is, whether it was "practically impossible" for the Railways to avoid the nuisance which arose from the flangeways. As noted previously in the context of negligence, the regulations relied upon by the Railways prescribed a minimum width of 2.5 inches for flangeways. The Railways' decision to exceed that minimum by more than one inch was a matter of discretion and was not an "inevitable result" or "inseparable consequence" of complying with the regulations. The same may be said of the Railways' decision not to install flange fillers when such products became available after 1982. The flangeways created a considerably greater risk than was absolutely necessary. Accordingly, the Court of Appeal erred in permitting the Railways to assert the defence of statutory authority against the claim for nuisance. ***

59. The Store Street tracks created an unreasonable interference with the public's use and enjoyment of Store Street and therefore constituted a public nuisance. The Court of Appeal erred in finding that the Railways were entitled to the defence of statutory authority. The appropriate test is the traditional rule restated by Sopinka J. in *Tock*, *supra*. It was not "practically impossible" for the Railways to avoid the nuisance which arose from the flangeways on Store Street. Because the Railways had discretion with regard to the width of the flangeways, their failure to minimize the hazard was not an "inevitable consequence" of exercising regulatory authority. ***

REFLECTION:

- *What are the principal features of public nuisance?*
- *Why did the Court consider that the width of the railway track flangeways across Store Street were a public nuisance? Who had the right to sue over this nuisance?*

21.2.2 Overseas Tankship (UK) Ltd v. The Miller Steamship Co. Pty. Ltd (The Wagon Mound No. 2) [1966] UKPC 10

✗**REF: §14.2.2.2**

LORD REID:

1. *** The appellant was charterer by demise of a vessel, the Wagon Mound, which in the early hours of 30 October 1951, had been taking in bunkering oil from Caltex Wharf not far from Sheerlegs Wharf. By reason of carelessness of the Wagon Mound engineers a large quantity of this oil overflowed from the Wagon Mound on to the surface of the water. Some hours later much of the oil had drifted to and accumulated round Sheerlegs Wharf and the respondents' vessels. About 2 pm on 1 November this oil was set alight: the fire spread rapidly and caused extensive damage to the wharf and to the respondents' vessels. ***

6. *** There is no doubt that the carelessness of the appellant's servants in letting this oil overflow did create a public nuisance by polluting the waters of Sydney Harbour. Also there can be no doubt that anyone who suffered special damage from that pollution would have had an action against the appellants; but the special damage sustained by the respondents was caused not by pollution but by fire. ***

23. Comparing nuisance with negligence the main argument for the respondent was that in negligence

foreseeability is an essential element in determining liability, and therefore it is logical that foreseeability should also be an essential element in determining the amount of damages: but negligence is not an essential element in determining liability for nuisance, and therefore it is illogical to bring in foreseeability when determining the amount of damages. It is quite true that negligence is not an essential element in nuisance. Nuisance is a term used to cover a wide variety of tortious acts or omissions, and in many negligence in the narrow sense is not essential. An occupier may incur liability for the emission of noxious fumes or noise, although he has used the utmost care in building and using his premises. The amount of fumes or noise which he can lawfully emit is a question of degree, and he or his advisers may have miscalculated what can be justified. Or he may deliberately obstruct the highway adjoining his premises to a greater degree than is permissible hoping that no one will object. On the other hand the emission of fumes or noise or the obstruction of the adjoining highway may often be the result of pure negligence on his part: there are many cases (eg, *Dollman v. Hillman*) where precisely the same facts will establish liability both in nuisance and in negligence. And although negligence may not be necessary, fault of some kind is almost always necessary and fault generally involves foreseeability, eg, in cases like *Sedleigh-Denfield v. O'Callaghan* the fault is in failing to abate a nuisance of the existence of which the defender is or ought to be aware as likely to cause damage to his neighbour. *** The present case is one of creating a danger to persons or property in navigable waters (equivalent to a highway) and there it is admitted that fault is essential—in this case the negligent discharge of the oil.

> "But how are we to determine whether a state of affairs in or near a highway is in danger? This depends, I think, on whether injury may reasonably be foreseen. If you take all the cases in the books you will find that if the state of affairs is such that injury may reasonably be anticipated to persons using the highway it is a public nuisance" (per Denning LJ in *Morton v. Wheeler*).

So in the class of nuisance which includes this case foreseeability is an essential element in determining liability.

24. It could not be right to discriminate between different cases of nuisance so as to make foreseeability a necessary element in determining damages in those cases where it is a necessary element in determining liability, but not in others. So the choice is between it being a necessary element in all cases of nuisance or in none. In their lordships' judgment the similarities between nuisance and other forms of tort to which *The Wagon Mound (No. 1)* [§17.1.1] applies far outweigh any differences ***. It is not sufficient that the injury suffered by the respondents' vessels was the direct result of the nuisance, if that injury was in the relevant sense unforeseeable. ***

36. In the present case the evidence shows that the discharge of so much oil on to the water must have taken a considerable time, and a vigilant ship's engineer would have noticed the discharge at an early stage. The findings show that he ought to have known that it is possible to ignite this kind of oil on water, and that the ship's engineer probably ought to have known that this had in fact happened before. *** If it is clear that the reasonable man would have realised or foreseen and prevented the risk, then it must follow that the appellants are liable in damages. ***

REFLECTION:

- *Is this judgment consistent with the view in Fiala v. MacDonald, [29] (§14.1.4.2) that "for the most part, fault is still an essential element of Canadian tort law"? What was the nature of the defendant's fault here?*
- *How does reasonable foreseeability relate to fault? Was the damage reasonably foreseeable in this case?*

21.2.3 Smith v. Fonterra Co-op. Group Ltd [2024] NZSC 5

✗**REF: §19.11.3, §25.1.1**

WILLIAMS AND KÓS JJ.:

1. This appeal concerns strike out of a claim in tort (comprised of three causes of action) relating to damage caused by climate change. The question is whether the plaintiff's claim should be allowed to proceed to trial, or whether, regardless of what might be proved at trial, it is bound to fail and should be struck out now. ***

3. The plaintiff, Mr Smith, is an elder of Ngāpuhi and Ngāti Kahu, and a climate change spokesperson for the Iwi Chairs Forum, a national forum of tribal leaders. In August 2019 he filed a statement of claim in the High Court, against the seven respondents. Each is a New Zealand company said to be involved in an industry that either emits greenhouse gases (GHGs) or supplies products which release GHGs when burned.[710] Mr Smith alleges that the respondents have contributed materially to the climate crisis and have damaged, and will continue to damage, his whenua and moana, including places of customary, cultural, historical, nutritional and spiritual significance to him and his whānau.

4. Mr Smith raises three causes of action in tort: public nuisance, negligence and a proposed new tort involving a duty, cognisable at law, to cease materially contributing to: damage to the climate system; dangerous anthropogenic interference with the climate system; and the adverse effects of climate change.[711] He seeks a declaration that the respondents have (individually and/or collectively) unlawfully either breached a duty owed to him or caused or contributed to a public nuisance, and have caused or will cause him loss through their activities. Injunctions also are sought requiring the respondents to produce or cause a peaking of their emissions by 2025, a particularised reduction in their emissions by the ends of 2030 and 2040 (by linear reductions in net emissions each year until those times), and zero net emissions by 2050. Alternatively, a (potentially suspended) injunction requiring the respondents to immediately cease emitting (or contributing to) net emissions is sought.[712]

5. A distinctive aspect of the proceeding in this Court is that Mr Smith pleads that tikanga Māori should inform the reach and content of his causes of action, this in accordance with the general proposition that tikanga should inform the common law of New Zealand generally. He does not allege that the respondents directly owed, or violated, any obligations under tikanga Māori. ***

First cause of action: public nuisance ***

63. Mr Smith claims that he will suffer harm from the effects of dangerous anthropogenic interference with the climate system caused or contributed to by the respondents jointly and separately. In particular, he pleads that climate change will:

> (a) result in increasing sea levels, irrevocably damaging his family land at Mahinepua C by the physical loss of land from erosion and inundation, the loss of productive land, the loss of economic value, and the loss of sites of cultural and spiritual significance;
>
> (b) irrevocably damage customary resources and sites, including traditional or customary fisheries, landing sites and burial caves and cemeteries;
>
> (c) result in ocean warming and acidification which will adversely impact coastal and freshwater fisheries he customarily uses;
>
> (d) result in the irrevocable and irreplaceable loss of land, resources and species that are economically, culturally and spiritually significant to him as tangata whenua; and
>
> (e) result in increasing adverse health impacts to which he and Māori communities have particular vulnerability.

64. It is then said that the respondents' actions have interfered with or will interfere with the following public rights: the rights to public health, public safety, public comfort, public convenience, public peace, and a safe and habitable climate system. Mr Smith pleads that the respondents' interference with these public rights is substantial, material and unreasonable and that they knew, or ought reasonably to have known, since at least the release of the Intergovernmental Panel on Climate Change's Fourth Assessment Report in 2007, that (a) their activities were contributing to dangerous anthropogenic interference with the climate system

[710] The sixth and seventh respondents, Channel Infrastructure NZ Ltd and BT Mining Ltd, filed separate submissions, claiming that they are differently placed to the other respondents.
[711] We will refer to the last of these as the "proposed climate system damage tort".
[712] This language comes from Mr Smith's amended draft statement of claim. It differs from his written submissions, which refer to (potentially suspended) "injunctions requiring the respondents to *cease their emissions-creating activities* immediately" (emphasis added).

and (b) it was necessary for them to immediately and significantly reduce their GHG emissions (or production and supply of products which result in GHG emissions) in order to avoid causing or contributing to dangerous anthropogenic interference in the climate system and the adverse consequences of climate change. He pleads that despite that knowledge, the respondents have continued to emit GHGs into the atmosphere (or to produce and supply products which result in GHG emissions) and have failed to significantly reduce their GHG emissions (and have, in some instances, increased them). He further pleads that requiring the respondents to reduce, or cease, their GHG emissions (directly or arising from their fossil fuel products) will reduce the injury that will otherwise be suffered by him and his descendants as a result of the adverse effects of climate change. ***

Is the public nuisance claim bound to fail?

102. The question we address here is whether it can be said that, whatever the facts proved or policy arguments advanced at trial, the pleaded public nuisance claim is bound to fail. ***

Evolution and elements of the tort ***

108. The leading authority in New Zealand on public nuisance—*Attorney-General v. Abraham and Williams Ltd*, which concerned noise, odour and pests emitted from a long-established insanitary stockyard in a once-rural, suburbanised location—was delivered by the Court of Appeal almost 75 years ago.[713] Most of the case law cited within it was English. ***

109. The principal English authority on public nuisance is now *Regina v. Rimmington*.[714] ***

> … a person is guilty of a public nuisance (also known as common nuisance), who—
>
> (a) does an act not warranted by law, or
>
> (b) omits to discharge a legal duty,
>
> if the effect of the action or omission is to endanger the life, health, property or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects … ***

110. Thus stated, the tort of public nuisance is subject to a number of important limits particular to it. First, while the tort is one of strict liability, meaning negligence is not required, a defendant will only be liable if the kind of harm suffered was a reasonably foreseeable consequence of the defendant's conduct, meaning there was a real risk of damage.[715]

111. Second, the defendant's act or omission must substantially and unreasonably interfere with public rights.[716] As to the need for an unreasonable interference, Romer LJ observed, in the context of a footpath obstruction case, that the "law relating to the user of highways is in truth the law of give and take".[717] The Court of Appeal in the present case observed that the two elements—"substantially and unreasonably"—are conjunctive,[718] a point also made by this Court in *Wu v. Body Corporate 36661*, a private nuisance case.[719] But in *Fearn v. Board of Trustees of the Tate Gallery* [§21.1.6], the United Kingdom Supreme Court

[713] *Attorney-General v. Abraham and Williams Ltd* [1949] NZLR 461 (CA).
[714] *Regina v. Rimmington* [2005] UKHL 63, [2006] 1 AC 459.
[715] *Hamilton v. Papakura District Council* [2002] UKPC 9, [2002] 3 NZLR 308 at [39] per Lord Nicholls, Sir Andrew Leggatt and Sir Kenneth Keith referring to *Overseas Tankship (UK) Ltd v. The Miller Steamship Co Pty* [1967] 1 AC 617 (PC) at 639–640 [*The Wagon Mound (No 2)*].
[716] *Harper v. G N Haden and Sons Ltd* [1933] Ch 298 (CA) at 304 per Lord Hanworth MR; Carolyn Sappideen and Prue Vines (eds) *Fleming's The Law of Torts* (10th ed, Thomson Reuters, Sydney, 2011) [Fleming] at [21.50]; and Allen M Linden and others *Canadian Tort Law* (12th ed, LexisNexis, Toronto, 2022) at 573–574.
[717] *Harper*, *above*, at 320.
[718] *Smith v. Fonterra Co-operative Group Ltd* [2021] NZCA 552, [2022] NZLR 284 (French, Cooper and Goddard JJ) [CA judgment], at [41].
[719] *Wu v. Body Corporate 366611* [2014] NZSC 137, [2015] 1 NZLR 215, where it was noted that "[o]ften the concepts of substantial and unreasonable will overlap" (at [130], n 117 per Elias CJ, McGrath, Glazebrook and Tipping JJ).

held, in the context of private nuisance at least, that the unreasonableness element added nothing of substance to the evaluative process.[720] The leading public nuisance cases, *Rimmington* and, in New Zealand, *Abraham and Williams Ltd*, remain opaque on whether an unreasonableness requirement adds ballast or not. That question remains one for judicial determination in New Zealand in due course.

112. Third, the tort does not generally depend on any particular person suffering damage. However, private actionability may be limited to persons who can demonstrate they have suffered some damage particular to them arising from the interference. This is the so-called "special damage" rule, and we return to it later in this judgment.[721]

113. A fourth particular limit arguably may exist: that of independent illegality (that is, illegality apart from the tort itself). For reasons given later, we conclude that limit does not apply in New Zealand.[722]

High Court and Court of Appeal ***

115. The Court of Appeal analysed Mr Smith's public nuisance claim by reference to four questions:

(a) whether actionable public rights were pleaded;

(b) whether independent illegality was required;

(c) whether the special damage rule was met or required; and

(d) whether there was a "sufficient connection" between the pleaded harm and the respondents' activities.

Ultimately it found for Mr Smith on the first two questions, and for the respondents on the last two. ***

Our assessment

143. As noted earlier, we are satisfied that the four questions posed by the Court of Appeal—see at [115] above—are the right questions to address on strike out. But we are not satisfied that the Court reached the right conclusion on each of them. In the end, we consider the standard for strike out of this cause of action *** is not met. ***

(a) The "first question": actionable public rights tenably pleaded

144. We agree with the Court of Appeal's approach to the first question—whether actionable public rights are tenably pleaded. The Court concluded that a nuisance is public if it (1) affects a class of the public, such as the inhabitants of a local neighbourhood or a representative cross-section of them (the adverse effects need not extend to a public place); and/or (2) infringes rights belonging to the public as such.[723] ***

145. For present purposes it is sufficient to observe that rights pleaded by Mr Smith—the rights to public health, public safety, public comfort, public convenience and public peace—fall tenably within (or bear sufficient relation to) the particular rights identified in *Rimmington* as providing foundation for a public nuisance pleading: i.e. public rights to life, health, property or comfort. Similar rights were relied on by our Court of Appeal in *Abraham and Williams Ltd*.[724]

(b) The "second question": independent illegality not required

146. We turn now to the second question posed by the Court of Appeal—whether independent illegality is required. It will be recalled that the Court of Appeal concluded that it was not necessary for the act or

[720] *Fearn v. Board of Trustees of the Tate Gallery* [2023] UKSC 4, [2024] AC 1 at [18]–[21] per Lord Leggatt SCJ (with whom Lord Reed P and Lord Lloyd-Jones SCJ agreed).
[721] See below at [148]–[152].
[722] See below at [146]–[147].
[723] CA judgment, *above*, at [67].
[724] *Abraham and Williams Ltd*, *above*, at 484 per Gresson J.

omission to be in itself a legal wrong separate from the alleged nuisance, and that what mattered was that the act or omission caused common injury. This raises a question of law.

147. Here English law is less relevant to the analysis, for the tort of public nuisance there arose *** largely in lockstep with the parallel common law criminal offence. The criminal law of this country has been codified by statute for 130 years, since the *Criminal Code Act 1893*. We consider that parallel unlawfulness is not a prerequisite in New Zealand, and it may be doubted that it still is in England.[725] Nor is it readily apparent why, as a matter of policy, liability in tort for public nuisance—i.e. a substantial common injury to rights to life, health, property or comfort of the public—should need to be dependent on an alternative underlying illegality. The primary limit noted at [111] above still applies: the defendant's act or omission must substantially and unreasonably interfere with public rights before it is actionable. We agree, therefore, with the Court of Appeal's observation that what really matters is that the act or omission causes common injury. As that Court put it, "the focus as a matter of principle is not on the legal character of the act or omission complained of but rather its adverse effect".[726] The tort can stand on its own two feet. Its development in New Zealand does not require the act or omission complained of to be independently unlawful.

(c) The "third question": special damage rule requires reconsideration

148. We turn now to the special damage rule. Correctly for a strike out, the Court of Appeal said that it was willing to adopt the "most liberal formulation of the special damage rule" and would only look to see whether the pleaded harm was "capable of being viewed as appreciably exceeding that suffered by the general public".[727] However, the Court then took the view that the harm suffered by Mr Smith's interests did not sufficiently exceed the degree of harm to very many other people in New Zealand (or elsewhere in the world) who suffer the same interference, including landowners, other iwi and hapū.

149. The special damage rule is a rule of standing. It is said to come down to a "simple question": whether the damage suffered by the plaintiff is different from that suffered by other members of the community.[728] Its justifications are broadly two: a proposition that relief for common injury should be in the hands of the Crown, and a concern about potential multiplicity of actions.[729] The former is logically connected to the 18th- and 19th-century connections made between the tort and crime of public nuisance, which no longer apply in New Zealand, and the latter concern predates 20th-century developments in class actions and case management. As the authors of *Fleming's The Law of Torts* suggest, the rationales for the standing rule are not now particularly convincing:[730]

> The mere fact that a great number of people have cause to complain is not otherwise recognised as a disqualification from bringing suit; indeed, if the complainants could establish their standing to sue for private nuisance, it would not matter how many there were who shared the same plight. Besides, the requirement ill befits our renewed consciousness for safeguarding the environment and the desirability of encouraging private initiative against polluters.

150. Modern authority suggests a rather more nuanced question than the "simple" question suggested above lies at the heart of the special damage rule. *Fleming's The Law of Torts* identifies a "clear modern tendency to reject the elusive distinction between difference in kind and in degree, and to allow recovery if the obstruction causes more than mere infringement of a theoretical right which the plaintiff shares with everyone else".[731] A similar point is made by the authors of *Fridman's The Law of Torts in Canada*:[732]

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[725] *Halsbury's Laws of England* (5th ed, 2018, online ed) vol 78 Nuisance, at [105]; John Murphy *The Law of Nuisance* (Oxford University Press, Oxford, 2010), at 138; and Law Commission (of England and Wales) *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com No 358, 4 June 2015), at [2.4].
[726] CA judgment, at [72].
[727] At [82].
[728] *Stein v. Gonzales* (1985) 14 DLR (4th) 263 (BCSC) at 267–277.
[729] See, for example, Fleming, *above*, at 490.
[730] At 490 (footnote omitted). See also Murphy, *above*, at 144–147.
[731] Fleming, *above*, at 211.
[732] Erika Chamberlain and Stephen GA Pitel (eds) *Fridman's The Law of Torts in Canada* (4th ed, Thomson Reuters, Toronto, 2020) at 238 (footnotes omitted) citing *Ricket v. Metropolitan Railway Co* (1867) LR 2 HL 175 (HL).

> Although arguments can be made in support of each view [whether difference in kind or in degree is required], [a] liberal approach to the special damage requirement [where a difference in degree suffices] is preferable. This is because it coheres better with the traditional understanding of the requirements of particularity and directness. The particularity requirement is best interpreted as requiring that an individual plaintiff bringing an action for public nuisance has suffered some loss over and above the mere interference with his or her rights as a member of the public, and this is captured by a difference in degree or extent rather than by a difference in kind. And the directness requirement, which can be traced back to *Ricket v. Directors of the Metropolitan Railway Company*, is nothing but the requirement that the damages in question must flow from an interference with the plaintiff's exercise of his or her public rights, rather than from an interference with the public rights of somebody else. The directness requirement, in short, is a matter of privity.

151. As noted, the authoritative requirement for special damage in New Zealand dates back to a 19th-century decision of the Court of Appeal, *Mayor of Kaiapoi v. Beswick*.[733] Even then the Court of Appeal observed that "[t]o reconcile the authorities [on the special damage rule] would be difficult, perhaps impossible".[734] We consider the special damage rule requires reconsideration in a 21st century context, in which the implications of ubiquitous harms such as pollution (including from GHGs) are more evident and better understood, and in which class actions and active judicial case management have developed and are better able to meet fears of an oppressive multiplicity of actions. In public law, for instance, New Zealand takes a liberal approach to standing in cases involving the public interest.[735] ***

152. However, regardless of whether the standing rule is revoked, retained or reformed, we consider Mr Smith has a tenable claim to meeting its present requirements because of his pleading of damage to coastal land at Mahinepua C in which he and others he represents claim both a legal interest and distinct tikanga interests. If the interests of many others, whether proprietary or tikanga, are likewise affected, that may say more about the gravity of the alleged tort than the propriety of entertaining it. While the effects of human-caused climate change are ubiquitous and grave for humanity, their precise impact is distributed and different. The pleaded effects, including inundation of coastal land and impacts on fishing and cultural interests, go beyond a wholly common interference with public rights.

(d) The "fourth question": sufficient connection, or causation ***

154. Ultimately, the Court of Appeal considered that "climate change simply cannot be appropriately or adequately addressed by common law tort claims". It was, it said, "quintessentially a matter that calls for a sophisticated regulatory response at a national level supported by international co-ordination".[736] It may indeed be beyond the capacity of the common law to resolve climate change in fact, but we are not presently convinced, at this stage of the proceeding, addressing only strike out, that the common law is incapable of addressing tortious aspects of climate change. ***

166. How the law of torts should respond to cumulative causation in a public nuisance case involving newer technologies and newer harms (GHGs, rather than sewage and other water pollution) is a matter that should not be answered pre-emptively, without evidence and policy analysis exceeding that available on a strike out application. Accordingly, suppliers of fuels producing GHGs—here the fifth, sixth and seventh respondents, who supply retail and commercial customers with fuel products; operate a shipping terminal, storage tanks and a pipeline that carries fuel; and who mine coal principally for export, respectively—should not in our view be eliminated as parties until these difficult but fact- and policy-driven questions have been resolved by full trial and (potential) appeal.

167. In any case, and as we have already said, we must assume for present purposes that the consequence of those emissions attributable to the respondents' activities is harm to the land and other pleaded interests

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[733] *Mayor of Kaiapoi v. Beswick* (1869) 1 NZCA 192, at 207 per Arney CJ. Mr Bullock submitted that it is far from clear that *Beswick* remains good law, if it ever was.
[734] At 206 per Arney CJ.
[735] See, for example, *Environmental Defence Society Inc v. South Pacific Aluminium Ltd (No 3)* [1981] 1 NZLR 216 (CA); and *Budget Rent-A-Car Ltd v. Auckland Regional Authority* [1985] 2 NZLR 414 (CA).
[736] CA judgment, *above*, at [16].

held by Mr Smith. Likely evidence at trial will include evidence as to the scientific attribution of climate change to the respondents' activities,[737] bearing in mind that Mr Smith submits that these contributions collectively represent about one-third of New Zealand's total reported GHG emissions, but that New Zealand's GHG emissions are a fractional proportion of the global total and that historic emissions remain substantially contributory. One question that will need to be considered at trial, on the basis of evidence and policy analysis, is whether New Zealand's law of public nuisance should sanction GHG emissions here, given this state of affairs.

168. It is also the case, as we have already established, that a defendant's actions or omissions must amount to a substantial and unreasonable interference with public rights. Even allowing for the uncertainty noted there as to the impact (if any) of the unreasonableness element, this limit still creates a significant threshold for plaintiffs. Only some emitters will cross it. ***

169. Whether the respondents' actions amount to a substantial and unreasonable interference with public rights remains a fundamental issue of fact for trial. We do not prejudge that issue here. ***

Concluding observations

172. As we have said already, real caution is necessary before pre-emptively disposing of a claim where seriously arguable non-trivial harm is in issue. The courts in New Zealand have barely touched (let alone grappled with) the law of public nuisance in the last century.[738] The leading authority in this country—*Abraham and Williams Ltd*—was delivered by the Court of Appeal almost 75 years ago, and most of the case law cited within it was English.[739] The principles governing public nuisance ought not to stand still in the face of massive environmental challenges attributable to human economic activity. The common law, where it is not clearly excluded, responds to challenge and change in a considered way, through trials involving the testing of evidence.

173. In sum, we do not consider the obstacles are so overwhelming as to meet the standard for strike out ***. The courts must be measured as to the pre-emptive denial of access to justice where it is incontestable that the respondents' actions form a part of a collective activity causing a plaintiff substantial harm. The consequence, therefore, is that they must now submit to argument, and evidence, at trial. In this area, the common law must develop, if at all, in the fertile fields of trial, not on the barren rocks of a strike out application. ***

190. For the above reasons, the appeal is allowed and the appellant's claim is reinstated. ***

REFLECTION:

- *What is the standard of review on a strike-out application? On what basis did the New Zealand Court of Appeal and Supreme Court disagree regarding whether Smith's claim met the standard? Does the Supreme Court's judgment mean that the defendant's activities have been found to be a public nuisance?*
- *The Court of Appeal had held that "the claim in public nuisance is clearly untenable" and "to allow it to proceed would not extend the existing law but distort it."[740] Partridge characterises the New Zealand Supreme Court's judgment as "a new touchstone" for the legal adage "hard cases make bad law."[741] By contrast, counsel for Smith, Dr. Bullock, describes this judgment as "firmly grounded in centuries-old common law precedent on the tort of public nuisance and an orthodox application of strike out principles."[742] Who is right?*
- *Dr. Norman of Greenpeace New Zealand has said the Supreme Court's decision puts other companies "on*

[737] For the developing literature on attribution science see, for example, Sophie Marjanac and Lindene Patton "Extreme weather event attribution science and climate change litigation: an essential step in the causal chain?" (2018) 36 JERL 265; and Michael Burger, Jessica Wentz and Radley Horton "The Law and Science of Climate Change Attribution" (2020) 45 Colum J Envtl L 57.
[738] For a rare excursion see, for example, *Coldicutt v. Ffowcs-Williams* HC Auckland AP 130-SW00, 8 February 2001.
[739] *Abraham and Williams Ltd*, above.
[740] *Smith v. Fonterra Co-operative Group Ltd* [2021] NZCA 552, [93].
[741] R. Partridge, "Supreme Court surprise in climate change case" New Zealand Herald (Feb 14, 2024); see also The New Zealand Initiative Podcast, "Mike Smith climate change case" (Feb 20, 2024) 🎧.
[742] D. Bullock, "Public Nuisance and Climate Change" LinkedIn (Feb 21, 2024).

notice."[743] What does this statement suggest about the broader implications of this case for greenhouse gas emitters? Are such implications likely to facilitate systemic change?

21.2.4 Criminal Code, RSC 1985

Criminal Code, RSC 1985, c C-46, s 180

180. Common nuisance

(1) Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than two years or is guilty of an offence punishable on summary conviction who commits a common nuisance and by doing so

(a) endangers the lives, safety or health of the public, or

(b) causes physical injury to any person.

(2) For the purposes of this section, every one commits a common nuisance who does an unlawful act or fails to discharge a legal duty and thereby

(a) endangers the lives, safety, health, property or comfort of the public; or

(b) obstructs the public in the exercise or enjoyment of any right that is common to all the subjects of Her Majesty in Canada.

REFLECTION:

- *What is the relationship between the crime of common nuisance and the tort of public nuisance?[744]*

21.2.5 Further material

- D. Bullock, "Public Nuisance and Climate Change: The Common Law's Solutions to the Plaintiff, Defendant and Causation Problems" (2022) 85 Modern L Rev 1136.
- J.H. Alder, "Why State Common Law Nuisance Claims Against Fossil Fuel Companies Are Not Preempted" The Volokh Conspiracy (Oct 27, 2021).
- T.W. Merrill, "Is Public Nuisance a Tort?" (2011) 4 J Tort L 1.
- D. Bullock, "Public Nuisance is a Tort" (2022) 15 J Tort L 137
- L. Kendrick, "The Perils and Promise of Public Nuisance" (2022) 132 Yale LJ 702.
- J.C.P. Goldberg, "On Being a Nuisance" (2024) 99 NYU L Rev (*forthcoming*); Harvard Law School Carter Professor of General Jurisprudence Chair Lecture (Mar 28, 2023) 📺.
- D. Grinlinton, "The Continuing Relevance of Common Law Property Rights and Remedies in Addressing Environmental Challenges" (2017) 62 McGill LJ 633.
- J.W. Neyers & A. Botterell, "*Tate & Lyle*: Pure Economic Loss and the Modern Tort of Public Nuisance" (2016) 53 Alberta L Rev 1031.
- S. Wood, "Class Action against Old-Growth Highway Blockades Would Hit A Roadblock" Allard Law Blog (Aug 17, 2022).

[743] W. Terite, "Activist's Fight Against NZ's Major Polluters Can go to Trial" Newshub (Feb 6, 2024) 📺; see also The Detail Podcast, "World-first climate action in NZ's top court" (Feb 21, 2024) 🎧.

[744] See *Valeant Canada LP/Valeant Canada S.E.C. v. British Columbia*, 2022 BCCA 366, [181]: "… Some aspects of public nuisance originated in the criminal law, and remain a part of that law, as common nuisance: see *Criminal Code*, s. 180. Other strands of public nuisance are rooted in public rights common to all members of the general public, enjoyed by each person qua member of the public. Typically, public rights are such rights as rights of unobstructed access to public facilities, highways or navigable waterways, public rights to fish, to clean air and water, or to other public resources. Public rights in this sense are to be contrasted with private rights, the protection of which belongs to other domains of the law."

22 STRICT LIABILITY TORTS

L.N. Klar, "Torts in Canada" in The Canadian Encyclopedia (Jul 30, 2013)

Certain activities are so fraught with risk that compensation to those injured is awarded without the need to establish the defendant's fault. These are strict liability torts. According to the English case of *Rylands v. Fletcher*, anyone who brings something onto his land which is not naturally there is strictly liable if the thing escapes and injures someone. People are strictly liable for injuries caused by wild animals they keep; or even by domestic pets if they are known to be dangerous; or by fires they have started. However, in view of the expansion of negligence law, these strict liability actions are relatively rare. *** […continue reading]

REFLECTION:

- *What theories of tort law (§11) do strict liability torts tend to embody? What theories might they undermine?*
- *Prof. Coleman, Prof. Hershovitz and Prof. Mendlow express the underlying intuition of strict liability torts in this way: "I have a duty to clean up my messes and the existence of this duty does not appear to depend on how hard I have tried not to make a mess in the first place. … All that matters is that it is my mess; that is to say, I made it. And if I make it, it is mine to clean."[745] Why shouldn't a defendant always be liable for messing up a plaintiff's person, property or pecuniary position regardless of whether their conduct was careless or intentional?*

22.1 Non-natural use of land

22.1.1 Rylands v. Fletcher [1868] UKHL 1

BACKGROUND: Quimbee (2020), https://youtu.be/Nj9qH9jjAIM

House of Lords – [1868] UKHL 1

LORD CAIRNS L.C.:

1. The plaintiff in this case is the occupier of a mine and works under a close of land. The defendants are the owners of a mill in his neighbourhood, and they proposed to make a reservoir for the purpose of keeping and storing water to be used about their mill upon another close of land, which, for the purposes of this case, may be taken as being adjoining to the close of the plaintiff ***. Underneath the close of land of the defendants on which they proposed to construct their reservoir there were old and disused mining passages and works. There were five vertical shafts, and some horizontal shafts communicating with them. The vertical shafts had been filled up with soil and rubbish; and, it does not appear that any person was aware of the existence either of the vertical shafts or of the horizontal works communicating with them. In the course of the working by the plaintiff of his mine, he had gradually worked through the seams of coal underneath the close, and had come into contact with the old and disused works underneath the close of the defendants.

2. In that state of things the reservoir of the defendants was constructed. *** However, when the reservoir was constructed and filled, or partly filled, with water, the weight of the water, bearing upon the imperfectly filled-up and disused vertical shafts, broke through those shafts. The water passed down them and into the horizontal workings and from the horizontal workings under the close of the defendants, it passed on into the workings under the close of the plaintiff and flooded his mine, causing considerable damage, for which this action was brought. ***

3. The principles on which this case must be determined appear to me to be extremely simple. The defendants *** might lawfully have used that close for any purpose for which it might, in the ordinary course of the enjoyment of land, be used, and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if by the operation of the laws of

[745] J. Coleman, S. Hershovitz and G. Mendlow, "Theories of the Common Law of Torts" in E.N. Zalta (ed), The Stanford Encyclopedia of Philosophy (Stanford University, 2015), [1.2].

nature that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain on him to have done so by leaving or by interposing some barrier between his close and the close of the defendants in order to have prevented that operation of the laws of nature. ***

4. On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which, in its natural condition, was not in or upon it—for the purpose of introducing water, either above or below ground, in quantities and in a manner not the result of any work or operation on or under the land, and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril; and if in the course of their doing it the evil arose to which I have referred—the evil, namely, of the escape of the water, and its passing away to the close of the plaintiff and injuring the plaintiff—then for the consequence of that, in my opinion, the defendants would be liable. ***

5. These simple principles, if they are well founded, as it appears to me they are, really dispose of this case. The same result is arrived at on the principles referred to by Blackburn, J, in his judgment in the Court of Exchequer Chamber, where he states the opinion of that court as to the law in these words:

> "We think that the true rule of law is that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or, perhaps, that the escape was the consequence of via major or the act of God; but, as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule as above stated seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. On authority this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches."

6. In that opinion, I must say, I entirely concur. ***

LORD CRANWORTH:

7. I concur with my noble and learned friend in thinking that the rule of law was correctly stated by Blackburn, J, in delivering the opinion of the Exchequer Chamber. If a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape and cause damage, he is responsible, however careful be may have been, and whatever precautions be may have taken to prevent the damage. In considering whether a defendant is liable to a plaintiff for damage which the plaintiff may have sustained, the question in general is, not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage. ***

9. *** The plaintiff had a right to work his coal *** up to the old workings. If water naturally rising in the defendants' land *** had by percolation found its way down to the plaintiff's mine through the old workings and so had impeded his operations, that would not have afforded him any ground of complaint. *** But that is not the real state of the case. The defendants, in order to effect an object of their own, brought on to their land *** a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage, to the plaintiff, and for that damage, however skilfully and carefully the accumulation was made,

the defendants, according to the principles and authorities to which I have adverted, were certainly responsible. ***

REFLECTION:

- *What is the rule in Rylands v. Fletcher? What differentiates this tort from the torts of negligence and nuisance?*
- *What principles, purposes or policy goals does this tort embody?*

22.1.2 Transco Plc v. Stockport Metropolitan Borough Council [2003] UKHL 61

House of Lords – [2003] UKHL 61

LORD BINGHAM OF CORNHILL:

1. My Lords, in this appeal the House is called upon to review the scope and application, in modern conditions, of the rule of law laid down by the Court of Exchequer Chamber, affirmed by the House of Lords, in *Rylands v. Fletcher* (1866) LR 1 Exch 265, (1868) LR 3 HL 330.

2. *** As a multi-storey block of flats built by a local authority and let to local residents, Hollow End Towers was typical of very many such blocks throughout the country. It had been built by the respondent council. The block was supplied with water for the domestic use of those living there, as statute has long required. Water was carried to the block by the statutory undertaker, from whose main the pipe central to these proceedings led to tanks in the basement of the block for onward distribution of the water to the various flats. The capacity of this pipe was much greater than the capacity of a pipe supplying a single dwelling, being designed to meet the needs of 66 dwellings. But it was a normal pipe in such a situation and the water it carried was at mains pressure. Without negligence on the part of the council or its servants or agents, the pipe failed at a point within the block with the inevitable result that water escaped. Since, again without negligence, the failure of the pipe remained undetected for a prolonged period, the quantity of water which escaped was very considerable. The lie and the nature of the council's land in the area was such that the large quantity of water which had escaped from the pipe flowed some distance from the block and percolated into an embankment which supported the appellant Transco's 16-inch high-pressure gas main, causing the embankment to collapse and leaving this gas main exposed and unsupported. There was an immediate and serious risk that the gas main might crack, with potentially devastating consequences. Transco took prompt and effective remedial measures and now seeks to recover from the council the agreed cost of taking them.

3. Few cases in the law of tort or perhaps any other field are more familiar, or have attracted more academic and judicial discussion, than *Rylands v. Fletcher* ***:

> (i) The plaintiff framed his claim as one of negligence: see (1866) LR 1 Exch 265. It was only when a majority of the Court of Exchequer (Pollock CB and Martin B, Bramwell B dissenting: (1865) 3 H & C 774), held against him, ruling that no claim would lie in the absence of negligence, that the plaintiff changed tack and contended that defendants were liable even if negligence could not be established against them.
>
> (ii) Blackburn J did not conceive himself to be laying down any new principle of law. *** The Lord Chancellor regarded the principles on which the case was to be determined as "extremely simple". Had the House regarded the case as raising issues of great moment, steps might no doubt have been taken to assemble a stronger quorum to hear the appeal: see Heuston, "Who was the Third Lord in *Rylands v. Fletcher*?" (1970) 86 LQR 160-165. It seems likely, as persuasively contended by Professor Newark ("The Boundaries of Nuisance" (1949) 65 LQR 480, 487-488), that those who decided the case regarded it as one of nuisance, novel only to the extent that it sanctioned recovery where the interference by one occupier of land with the right or enjoyment of another was isolated and not persistent.
>
> (iii) Those involved in *Rylands v. Fletcher*, as counsel or judges, must have been very much alive to the catastrophic results which may ensue when reservoir dams burst. *** The damage suffered by Fletcher was not the result of a dam failure, but nor was Rylands' reservoir a mere pond:

> inspecting it before writing his article, Simpson found it still in use, with a capacity of over 4 million gallons and covering 1½ acres when full. ***

9. The rule in *Rylands v. Fletcher* is a sub-species of nuisance, which is itself a tort based on the interference by one occupier of land with the right in or enjoyment of land by another occupier of land as such. ***

10. It has from the beginning been a necessary condition of liability under the rule in *Rylands v. Fletcher* that the thing which the defendant has brought on his land should be "something which … will naturally do mischief if it escape out of his land" ((1865) LR 1 Exch 265, 279 per Blackburn J), "something dangerous …" (*ibid*), "anything likely to do mischief if it escapes …" (*ibid*), "something … harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's …"(*ibid*, at p 280), "… anything which, if it should escape, may cause damage to his neighbour …"((1868) LR 3 HL 330, 340 per Lord Cranworth). *** It must be shown that the defendant has done something which he recognised, or judged by the standards appropriate at the relevant place and time, he ought reasonably to have recognised, as giving rise to an exceptionally high risk of danger or mischief if there should be an escape, however unlikely an escape may have been thought to be.

11. No ingredient of *Rylands v. Fletcher* liability has provoked more discussion than the requirement of Blackburn J ((1866) LR 1 Exch 265, 280) that the thing brought on to the defendant's land should be something "not naturally there", an expression elaborated by Lord Cairns ((1868) LR 3 HL 330, 339) when he referred to the putting of land to a "non-natural use" ***. Read literally, the expressions used by Blackburn J and Lord Cairns might be thought to exclude nothing which has reached the land otherwise than through operation of the laws of nature. But such an interpretation has been fairly described as "redolent of a different age" (*Cambridge Water* [1994] 2 AC 264, 308), and in *Read v. Lyons & Co Ltd* [1947] AC 156, 169, 176, 187 and *Cambridge Water* at p 308 the House gave its imprimatur to Lord Moulton's statement, giving the advice of the Privy Council in *Rickards v. Lothian* [1913] AC 263, 280:

> "It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community."

I think it clear that ordinary user is a preferable test to natural user, making it clear that the rule in *Rylands v. Fletcher* is engaged only where the defendant's use is shown to be extraordinary and unusual. ***

12. By the end of the hearing before the House, the dispute between the parties had narrowed down to two questions: had the council brought on to its land at Hollow End Towers something likely to cause danger or mischief if it escaped? and was that an ordinary user of its land? Applying the principles I have tried to outline, I think it quite clear that the first question must be answered negatively and the second affirmatively, as the Court of Appeal did: [2001] EWCA Civ 212.

13. It is of course true that water in quantity is almost always capable of causing damage if it escapes. But the piping of a water supply from the mains to the storage tanks in the block was a routine function which would not have struck anyone as raising any special hazard. In truth, the council did not accumulate any water, it merely arranged a supply adequate to meet the residents' needs. The situation cannot stand comparison with the making by Mr Rylands of a substantial reservoir. Nor can the use by the council of its land be seen as in any way extraordinary or unusual. It was entirely normal and routine. Despite the attractive argument of Mr Ian Leeming QC for Transco, I am satisfied that the conditions to be met before strict liability could be imposed on the council were far from being met on the facts here. ***

LORD HOFFMANN: ***

27. *Rylands v. Fletcher* was *** an innovation in being the first clear imposition of liability for damage caused by an escape which was not alleged to be either intended or reasonably foreseeable. ***

29. It is tempting to see, beneath the surface of the rule, a policy of requiring the costs of a commercial enterprise to be internalised; to require the entrepreneur to provide, by insurance or otherwise, for the risks to others which his enterprise creates. *** With hindsight, *Rylands v. Fletcher* can be seen as an isolated victory for the internalisers. The following century saw a steady refusal to treat it as laying down any broad

principle of liability. I shall briefly trace the various restrictions imposed on its scope.

Restrictions on the rule

(a) Statutory authority

30. A statute which authorises the construction of works like a reservoir, involving risk to others, may deal expressly with the liability of the undertakers. It may provide that they are to be strictly liable, liable only for negligence or not liable at all. But what if it contains no express provision? *** In *Geddis v. Proprietors of Bann Reservoir* (1878) 3 App Cas 430, 455 Lord Blackburn summed up the law:

> "It is now thoroughly well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone."

31. The effect of this principle was to exclude the application of the rule in *Rylands v. Fletcher* to works constructed or conducted under statutory authority ***.

(b) Acts of God and third parties

32. Escapes of water and the like are often the result of natural events—heavy rain or drains blocked by falling leaves—or the acts of third parties, like vandals who open taps or sluices. This form of causation does not usually make the damage any the less a consequence of the risk created by the presence of the water or other escaping substance. No serious principle of allocating risk to the enterprise would leave the injured third party to pursue his remedy against the vandal. But early cases on *Rylands v. Fletcher* quickly established that natural events ("Acts of God") and acts of third parties excluded strict liability. In *Carstairs v. Taylor* (1871) LR 6 Exch 217, 221 Kelly CB said that he thought a rat gnawing a hole in a wooden gutter box counted as an Act of God and in *Nichols v. Marsland* (1876) 2 Ex D 1 Mellish LJ (who, as counsel, had lost *Rylands v. Fletcher*) said that an exceptionally heavy rainstorm was a sufficient excuse. ***

(c) Remoteness

33. *Rylands v. Fletcher* established that, in a case to which the rule applies, the defendant will be liable even if he could not reasonably have foreseen that there would be an escape. But is he liable for all the consequences of the escape? In *Cambridge Water Co v. Eastern Counties Leather plc* [1994] 2 AC 264, the House of Lords decided that liability was limited to damage which was what Blackburn J had called the "natural", ie reasonably foreseeable, consequence of the escape. Lord Goff of Chieveley *** took the rule back to its origins in the law of nuisance and said that liability should be no more extensive than it would have been in nuisance if the discharge itself had been negligent or intentional. ***

(d) Escape

34. In *Read v. Lyons & Co Ltd* [1947] AC 156 a radical attempt was made to persuade the House of Lords to develop the rule into a broad principle that an enterprise which created an unusual risk of damage should bear that risk. *** But the invitation to generalise the rule was comprehensively rejected. The House of Lords stressed that the rule was primarily concerned with the rights and duties of occupiers of land. Escape from the defendant's land or control is an essential element of the tort.

(e) Personal injury

35. *** [D]amages for personal injuries are not recoverable under the rule.

(f) Non-natural user

36. *** [T]he most generalized restriction was formulated by Lord Moulton in *Rickards v. Lothian* [1913] AC 263, 280:

> "It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community." ***

Is it worth keeping? ***

40. In *Burnie Port Authority v. General Jones Pty Ltd* (1994) 179 CLR 520 a majority of the High Court of Australia lost patience with the pretensions and uncertainties of the rule and decided that it had been "absorbed" into the law of negligence. Your Lordships have been invited by the respondents to kill off the rule in England in similar fashion. It is said, first, that in its present attenuated form it serves little practical purpose; secondly, that its application is unacceptably vague ("an essentially unprincipled and ad hoc subjective determination" said the High Court (at p 540) in the *Burnie* case) and thirdly, that strict liability on social grounds is better left to statutory intervention. ***

43. *** I do not think it would be consistent with the judicial function of your Lordships' House to abolish the rule. It has been part of English law for nearly 150 years and despite a searching examination by Lord Goff of Chieveley in the *Cambridge Water* case [1994] 2 AC 264, 308 there was no suggestion in his speech that it could or should be abolished. I think that would be too radical a step to take.

44. *** [T]he question of what is a natural use of land or, (the converse) a use creating an increased risk, must be judged by contemporary standards. ***

47. In the present case, I am willing to assume that if the risk arose from a "non-natural user" of the council's land, all the other elements of the tort were satisfied. ***

49. In my opinion the Court of Appeal was right to say that [the pipe] was not a "non-natural" user of land. I am influenced by two matters. First, there is no evidence that it created a greater risk than is normally associated with domestic or commercial plumbing. *** Secondly, I think that the risk of damage to property caused by leaking water is one against which most people can and do commonly insure. This is, as I have said, particularly true of Transco, which can be expected to have insured against any form of damage to its pipe. It would be a very strange result if Transco were entitled to recover against the council when it would not have been entitled to recover against the Water Authority for similar damage emanating from its high pressure main.

50. I would therefore dismiss the appeal.

LORD HOBHOUSE, LORD SCOTT AND LORD WALKER concurred separately.

REFLECTION:

- *What are the differences between the rule in Rylands v. Fletcher and the tort of private nuisance (§21.1)?*
- *Do you agree with Lord Hoffmann that the rule in Rylands v. Fletcher is worth keeping?*

22.1.3 Smith v. Inco Ltd [2011] ONCA 628

✗**REF: §21.1.4, §22.2.2**

DOHERTY, MACFARLAND JJ.A. AND HOY J.:

1. Inco Limited ("Inco") appeals from a judgment rendered after a trial of common issues in a class proceeding. The trial judge found that the soil on the properties of the class members *** contained nickel particles placed in the soil as a result of emissions generated by Inco's nickel refinery in Port Colborne, Ontario over a 66-year period prior to 1985. The trial judge further held that beginning in 2000 concerns about the levels of nickel in the soil caused widespread public concern and adversely affected the appreciation in the value of the properties after September 2000. The trial judge held that Inco was liable in private nuisance and under strict liability imposed by the rule set down in *Rylands v. Fletcher* (1866), L.R. 7 Ex. 265 (Eng. Exch.), aff'd (1868), L.R. 3 H.L. 330 (U.K. H.L.) ***. He fixed damages at $36 million. ***

68. The rule in *Rylands v. Fletcher* imposes strict liability for damages caused to a plaintiff's property (and probably, in Canada, for personal damages) by the escape from the defendant's property of a substance "likely to cause mischief". *** In Canada, *Rylands v. Fletcher* has gone largely unnoticed in appellate courts in recent years. However, in 1989 in *Tock* [*v. St. John's (City) Metropolitan Area Board*, [1989] 2 S.C.R. 1181 (S.C.C.)], the Supreme Court of Canada unanimously recognized *Rylands v. Fletcher* as continuing

to provide a basis for liability distinct from liability for private nuisance or negligence. ***

70. The meaning of "non-natural use" of property has vexed lawyers and judges since the phrase was penned by Lord Cairns. Its uncertainty and vagueness led the High Court of Australia to abandon the rule entirely in favour of a negligence standard that took into account the dangerous nature of the activity in issue: *Burnie Port Authority v. General Jones Pty. Ltd.* at p. 540. In Canada, apart from some description of the "non-natural use" requirement found in *Tock*, appellate courts have paid no attention to the details of the rule much less the more fundamental question of the need for its continued existence. Inco does not suggest that the rule should be abrogated. It does, however, argue that it was misapplied in this case.

71. There are various formulations of the rule found in the case law and the academic commentary. The authors of *The Law of Nuisance in Canada* suggest different potential formulations, including one, at p. 113, that requires four prerequisites to the operation of the rule:

- the defendant made a "non-natural" or "special" use of his land;
- the defendant brought on to his land something that was likely to do mischief if it escaped;
- the substance in question in fact escaped; and
- damage was caused to the plaintiff's property as a result of the escape. ***

95. Inco operated a refinery on its property. The nickel emissions were part and parcel of that refinery operation and were not in any sense an independent use of the property. The use of the property to which the *Rylands v. Fletcher* inquiry must be directed is its use as a refinery. The nickel emissions are a feature or facet of the use of the property as a refinery. The question must be—was the operation of the refinery at the time and place and in the manner that it was operated a non-natural use of Inco's property? ***

97. The emphasis in *Tock* at para. 13 on a "user inappropriate to the place" and, at para. 10, to "changing patterns of existence" demonstrate that the distinction between natural and non-natural use cannot be made exclusively by reference to the origin of the substance in issue. To decide whether a use is a non-natural one, the court must have regard to the place where the use is made, the time when the use is made, and the manner of the use. Planning legislation and other government regulations controlling where, when and how activities can be carried out will be relevant considerations in assessing whether a particular use is a non-natural use in the sense that it is a use that is not ordinary.

98. The approach to non-natural user taken in *Tock* and in *Cambridge Water Co.* [*v. Eastern Counties Leather Plc* [1994] 2 A.C. 264 (U.K. H.L.)] restricts those situations in which *Rylands v. Fletcher* applies. The non-natural use requirement of the *Rylands v. Fletcher* rule serves a similar role to the "give and take between neighbours" principle that is applied when determining whether one person's interference with another person's use and enjoyment of his property constitutes an actionable nuisance. Like the reasonable user inquiry in cases involving amenity nuisance, the non-natural user inquiry seeks to distinguish between those uses of property that the community as a whole should accept and tolerate and those uses where the burden associated with accidental and unintended consequences of the use should fall on the user. The nature and degree of the risk inherent in the use is obviously an important feature of this inquiry, but as *Tock* demonstrates, it is not the entire inquiry: see *Cambridge Water Co.* at pp. 299-300. ***

100. We agree that compliance with various environmental and zoning regulations is not a defence to a *Rylands v. Fletcher* claim. In our view, however, compliance is an important consideration in light of the approach to non-natural user taken in *Tock*. ***

101. The claimants bore the onus of showing that the operation of the refinery was a non-natural use of the property in the sense that it was not an ordinary or usual use. In *Transco plc*, Lord Bingham, at para. 11, suggests the following inquiry:

> An occupier of land who can show that another occupier of land has brought or kept on his land an exceptionally dangerous or mischievous thing in extraordinary or unusual circumstances is in my opinion entitled to recover compensation from that occupier for any damage caused to his property

interest by the escape of that thing subject to defences ….

102. Lord Bingham's inquiry is directed both at the degree of dangerousness posed by the activity and the circumstances surrounding the activity. We think that approach is consistent with the "user appropriate" approach in *Tock*.

103. Any industrial activity, and perhaps even more so a refinery, certainly carries with it the potential to do significant damage to surrounding properties if something goes awry. The claimants did not, however, in our view, demonstrate that Inco's operation of its refinery for over 60 years presented "an exceptionally dangerous or mischievous thing" or that the circumstances were "extraordinary or unusual". To the contrary, the evidence suggests that Inco operated a refinery in a heavily industrialized part of the city in a manner that was ordinary and usual and did not create risks beyond those incidental to virtually any industrial operation. In our view, the claimants failed to establish that Inco's operation of its refinery was a non-natural use of its property. ***

114. With respect to the careful and thoughtful reasons of the trial judge, we hold that he erred in finding Inco liable under either private nuisance or the rule in *Rylands v. Fletcher*. In any event, *** the claimants failed to prove damages, an essential component of both causes of action. ***

REFLECTION:

- *How have Canadian jurists characterised the elements of the tort in Rylands v. Fletcher?*
- *Why was the operation of the nickel refinery in this case not a non-natural use of land?*
- *Was Transco plc applied or distinguished?*

22.1.4 Jaipur Golden Gas Victims Ass'n v. Union of India [2009] INDLHC 4354

✗**REF: §16.2.4, §17.3.1, §19.5.2.4, §22.2.1**

MANMOHAN J.: ***

2. Ms. Aruna Mehta, learned counsel for petitioner-Association, stated that on 4th April, 2004 at about 10.30 p.m. there was a huge fire in the godown [warehouse] of respondent no. 5 at Mitra Wali Gali, Roshnara Road, Delhi. She stated that in the said godown, respondent no. 5 had stored a consignment of rodent killing pesticides which contained Aluminum Phosphate and Zinc Phosphate. She further stated that the officials of respondent no. 5 along with fire brigade officials poured water over the fire in a bid to extinguish it. According to Ms. Mehta, due to pouring of water, Aluminum Phosphate and Zinc Phosphate reacted with water resulting in emission of highly poisonous Phosphine gas which continued to emit till 7th April, 2004. She stated that due to inhalation of the aforesaid gas, about thirty five persons living in the neighbourhood of respondent no. 5's godown were taken unwell and were rushed to the hospital with symptoms of breathlessness, pain in chest, vomiting, diarrhea, nausea and stomach ache. While most of sick persons were admitted in Hindu Rao Hospital for a period of a few days, a 19 years old boy, namely, Akash died in the morning of 7th April, 2004. ***

12. *** Mr. D.R. Thadani, learned counsel for respondent no. 5 stated that the said respondent had been using the aforesaid godown since 1998. He further stated that despite an application for licence having been filed on 4th December, 1998 by respondent no. 5, respondent-[Municipal Corporation of Delhi] took no action. ***

14. Though Mr. Thadani admitted the fact that on 4th April, 2004 there was an incident of fire in respondent no. 5's godown and as a consequence of the said fire, about 34 persons were admitted on 7th April, 2004 in Hindu Rao Hospital, he did not admit that fire was caused due to negligence attributable to any official of respondent no. 5. In this connection, he relied upon a report prepared by the Loss Prevention Association of India Ltd. for respondent no. 5's insurance company. According to him, the said report concluded that an electrical spark in all probability was the cause of the fire.

15. He further submitted that *M.C. Mehta v. Union of India*, (1987) 1 SCC 395 was not applicable to the present facts as opening of a godown could not by any stretch of imagination be said to be an inherently

dangerous and hazardous activity. ***

23. Having heard the parties and having perused the papers, we are of the view that the admitted position is that respondent no. 5 was using the premises at Roshnara Road as a godown without any prior mandatory statutory permission. In fact, in the present case, the undisputed position was that there had been violation of Section 417 of the *Delhi Municipal Corporation Act*, 1957. The relevant portion of the said Section is reproduced hereinbelow:

> "**417. Premises not to be used for certain purposes without license**
>
> (1) No person shall use or permit to be used any premises for any of the following purposes without or otherwise than in conformity with the terms of a license granted by the Commissioner in this behalf, namely: ***
>
> (b) any purpose which is, in the opinion of the Commissioner dangerous to life, health or property or likely to create a nuisance; …."

24. Moreover, the incident of fire and emission of gases on 4th April, 2004 in respondent no. 5's godown wherein pesticides were stored was not disputed. It was also not denied that as a consequence of the fire and inhalation of chemical gases, thirty four persons were hospitalised. In fact, death of Akash due to inhalation of poisonous phosphine gas immediately in the aftermath of the fire incident was also not disputed. ***

50. The principle of liability without fault was enunciated in *Rylands v. Fletcher* (1868) LR 3 HL 330. ***

51. To oppose the application of *Rylands v. Fletcher* rule the only submission advanced by respondent no. 5 before us was that running of a godown *per se* is not an inherently dangerous or hazardous industry and further the cause of fire could not be attributed to negligence of respondent no. 5.

52. But the fact is that the rule in *Rylands v. Fletcher* was subsequently interpreted to cover a variety of things likely to do mischief on escape, irrespective of whether they were dangerous per se, e.g. water, electricity, explosions, oil, vibralious, noxious fumes, colliery spoil, poisonous vegetation, a flagpole, etc. (see *Winfield and Jolowiez on Tort*, 13th edn., p.425) ***.

53. Consequently, in our view, the submission of respondent no. 5 that running of a godown would not attract the rule enunciated in *Rylands v. Fletcher* is untenable in law.

54. Moreover, in our opinion, the dispute raised with regard to cause of fire is irrelevant for attraction of the rule in *Rylands v. Fletcher* inasmuch as one has only to see as to whether a person has put the land to a non-natural use and whether as a consequence of such use, some damage has been caused to the public at large. In the present instance, the above test is admittedly satisfied as respondent no. 5's premises was situated in a residential area which could not have been used as a godown and further as a consequence of fire in the godown containing consignment of pesticides, gas escaped which caused loss of lives and injuries to people living in the neighbourhood. Accordingly, the rule in *Rylands v. Fletcher* is attracted in the present case. ***

REFLECTION:

- *Why might it be appropriate to hold the defendant strictly liable under the rule in Rylands v. Fletcher in this case, but not in Smith v. Inco Ltd? In what material respect was the operation of the defendant's commercial enterprise in Smith v. Inco Ltd distinguishable from this case?*[746]

22.1.5 Local Government Act, RSBC 2015

Local Government Act, RSBC 2015, c 1, s 744

744. Immunity in relation to certain nuisance actions

[746] See "Poisonous gas leakage at Sabzi Mandi godown" The Times of India (Apr 8, 2004).

A municipality, municipal council, regional district, regional district board, improvement district or greater board is not liable in any action based on nuisance or on the rule in the *Rylands v. Fletcher* case if the damages arise, directly or indirectly, out of the breakdown or malfunction of

> (a) a sewer system,
>
> (b) a water or drainage facility or system, or
>
> (c) a dike or a road.

22.1.5.1 Other local government nuisance immunity statutes

- Alberta: Municipal Government Act, RSA 2000, c M-26, s 528.
- Manitoba: Municipal Act, CCSM c M225, Part 2, s 395.
- New Brunswick: Local Governance Act, SNB 2017, c 18, s 177.
- Newfoundland and Labrador: City of St. John's Act, RSNL 1990, c C-17, s 179; City of Mount Pearl Act, RSNL 1990, c C-16, s 179; City of Corner Brook Act, RSNL 1990, c C-15, s 180.
- Nova Scotia: Municipal Government Act, SNS 1998, c 18, ss 515-516.
- Ontario: Municipal Act, 2001, SO 2001, c 25, s 449.
- Prince Edward Island: Municipal Government Act, RSPEI 1988, c M-12.1, s 246.
- Québec: Municipal Powers Act, CQLR c C-47.1, s 21.
- Saskatchewan: The Municipalities Act, SS 2005, c M-36.1, ss 339-340.

REFLECTION:

- *In light of Transco plc, is this public authority immunity from tort liability necessary or appropriate?*
- *Who stands to be impacted by this statutory immunity?*

22.1.6 Further material

- D. Nolan, "The Distinctiveness of *Rylands v. Fletcher*" (2005) 121 L Quarterly Rev 421.
- J. Murphy, "The Merits of *Rylands v. Fletcher*" (2004) 24 Oxford J Legal Studies 643.
- J.W. Looney, "*Rylands v. Fletcher* Revisited: A comparison of English, Australian and American Approaches to Common Law Liability for Dangerous Agricultural Activities" (1996) 1 Drake J of Agricultural L 149.

22.2 Ultrahazardous activities

22.2.1 Jaipur Golden Gas Victims Ass'n v. Union of India [2009] INDLHC 4354

✗**REF: §16.2.4, §17.3.1, §19.5.2.4, §22.1.4**

MANMOHAN J.: ***

55. In any event, storage of chemical pesticides was certainly an inherently dangerous and/or hazardous activity and, therefore, the principle evolved by the Supreme Court in *M.C. Mehta v. Union of India*, (1987) 1 SCC 395 would apply. In the said judgment, Supreme Court held as under: ***

> We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that in any other foreign country. We no longer need the crutches of a foreign legal order. We are certainly prepared to receive light from whatever source it comes but we have to build up our own jurisprudence and we cannot countenance an argument that merely because the law in England does not recognise the rule of strict and absolute liability in cases of hazardous or inherently dangerous liability or the rule as laid down in *Rylands v. Fletcher* [§22.1.1] as developed in England recognises certain limitations and exceptions, we in India must hold back our hands and not venture to evolve a new principle of liability since English courts have not done so. We have to develop our own law and if we find that it is necessary to construct a new principle

> of liability to deal with an unusual situation which has arisen and which is likely to arise in future on account of hazardous or inherently dangerous industries which are concomitant to an industrial economy, there is no reason why we should hesitate to evolve such principle of liability merely because it has not been so done in England. *We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part.* ***
>
> If the enterprise is permitted to carry on an hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such hazardous or inherently dangerous activity as an appropriate item of its over-heads.
>
> Such hazardous or inherently dangerous activity for private profit can be tolerated only on condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of the carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not. *** (emphasis supplied).

56. A Division Bench of this Court in the case of *Association of Victims of Uphaar Tragedy v. Union of India*, 2003 III AD (Delhi) 321 held that where an accident occurs at an enterprise engaged in a hazardous or inherently dangerous activity, then the said enterprise would be strictly and absolutely liable to compensate all those who are affected by the said accident and such liability is not subject to any of the exceptions which operate under the *Rylands v. Fletcher* rule. ***

61. From the undisputed facts, it is apparent that respondent no. 5 was engaged in an inherently dangerous or hazardous activity as it had stored chemical pesticides and consequently, its duty of care was absolute. Accordingly, the exceptions to strict liability as evolved in *Rylands v. Fletcher* rule are not applicable. Therefore, respondent no. 5 is liable to compensate the victims of the gas and fire tragedy in accordance with the strict liability principle evolved by the Supreme Court in *M.C. Mehta* case (*supra*). ***

REFLECTION:

- *In what way did the M.C. Mehta case depart from English (and Canadian) law in construing the rule in Rylands v. Fletcher? Why might the Supreme Court of India favour expanding the scope of strict liability torts within its jurisdiction?*
- *Having regard to Smith v. Inco Ltd, why have Canadian courts refrained from expanding the rule in Rylands v. Fletcher beyond cases of escapes from non-natural uses of land?*

22.2.2 Smith v. Inco Ltd [2011] ONCA 628

✗REF: §21.1.4, §22.1.3

DOHERTY, MACFARLAND JJ.A. AND HOY J.: ***

75. The trial judge's assessment of the *Rylands v. Fletcher* [§22.1.1] claim was driven by his understanding that strict liability under *Rylands v. Fletcher* was premised on the rationale that an entity who chooses to engage in potentially hazardous activity assumes the risk of any damages caused by that activity. ***

77. The strict liability theory favoured by Linden and Feldthusen [*Canadian Tort Law*, 8th ed. (Markham, Ont.: LexisNexis Butterworths, 2006), at pp. 540-41] (and others, for example, see *Restatement of Torts* (2d), ss. 519, 520) is considerably broader than the strict liability rule under *Rylands v. Fletcher*. Under their theory, it is not necessary that the dangerous substance "escape" from the defendant's property or that the

use of the defendant's land be characterized as "special" or "non-natural". Strict liability flows entirely from the nature of the activity conducted by the defendant. Linden and Feldthusen acknowledge that the theory of strict liability they present goes beyond *Rylands v. Fletcher*. According to them, support for their theory "lies hidden in the cases waiting to be openly embraced by Canadian courts": *Canadian Tort Law*, 9th ed. at p. 556.

78. We do not accept that strict liability based exclusively on the "extra hazardous" nature of the defendant's conduct is or should be part of the common law in this province. ***

82. *** Strict liability under *Rylands v. Fletcher* aims not at all risks associated with carrying out an activity, but rather with the risk associated with the accidental and unintended consequences of engaging in an activity. The *Rylands v. Fletcher* cases are about floods, gas leaks, chemical spills, sewage overflows, fires and the like. They hold that where the defendant engages in certain kinds of activities, the defendant will be held strictly liable for damages that flow from mishaps or misadventures that occur in the course of that activity. The escape requirement in *Rylands v. Fletcher* connotes something unintended and speaks to the nature of the risk to which the strict liability in *Rylands v. Fletcher* attaches: see *The Law of Nuisance in Canada* at pp. 132, 137.

83. The "extra hazardous" risk-based strict liability theory employed by the trial judge holds a defendant strictly liable for all damages associated with the activity. The defendant is liable for damages even if they are not the product of any accident or misadventure, but are instead the product of the intended consequences of the activity.

84. The two risks described above are quite different. The risk addressed in *Rylands v. Fletcher* is a more limited one, imposing strict liability for things that go wrong and produce unintended consequences that damage the property (or perhaps the person) of another. The trial judge overstated the rationale for *Rylands v. Fletcher* strict liability when he described it as applicable to damages caused by activities which create "an abnormal risk of harm".

85. There are, of course, policy arguments in favour of the imposition of strict liability where activities create "extra hazardous" risks. Examples of that kind of liability can be found in various statutes, such as the *Environmental Protection Act*, R.S.O. 1990, c.E.19, s. 99. The question is whether the courts, through a modification of the common law and in particular the rule in *Rylands v. Fletcher*, should impose that strict liability on all activities that are found to fit within a necessarily broad and generic description, or leave it to the various Legislatures to make that decision through appropriate statutory enactments applicable to specific activities.

86. The House of Lords has rejected any attempt to judicially extend *Rylands v. Fletcher* strict liability to all hazardous activities: see *Read v. J. Lyons & Co.* [1947] A.C. 156 (H.L.), per Lord Macmillan at pp. 172-73, per Lord Simonds at pp. 181-82; ***. ***

92. The judgment in *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181 (SCC) forecloses treating strict liability under *Rylands v. Fletcher* as referable to all "ultra hazardous" activities. As explained in *Tock*, the rule is triggered by "a user inappropriate to the place". The appropriateness of a use depends on factors that include, but are not limited to, the risk posed by the use.

93. There are no doubt strong arguments for imposing strict liability on certain inherently dangerous activities. In our view, however, that is fundamentally a policy decision that is best introduced by legislative action and not judicial fiat. In declining to take the bold step advocated by Linden and Feldthusen, we observe that those who engage in dangerous activities are, of course, subject to negligence actions under which the dangerousness of the activity would be reflected in the standard of care required, nuisance actions, and in ever increasing situations, detailed and sometimes punitive statutory regimes. ***

114. With respect to the careful and thoughtful reasons of the trial judge, we hold that he erred in finding Inco liable under either private nuisance or the rule in *Rylands v. Fletcher*. ***

REFLECTION:

- *Why might strict liability be a suitable standard in Canada in cases of escapes from non-natural uses of land*

but not in cases of ultrahazardous activities generally?
- *What are the policy arguments in favour of imposing strict liability on ultrahazardous activities? Who is best-placed to determine what the legal standard should be?*

22.2.3 Further material

- G. Bowley, "Diminishing Strictness: The Growing Gap in Ontario's Private Law Environmental Liability Regime" (2019) 3 Lakehead LJ 22.
- M.H. Freedman, "Nuisance, Ultrahazardous Activities, and the Atomic Reactor" (1956) 30 Temple L Quarterly 77.

22.3 Keeping dangerous animals

22.3.1 Evans v. Berry [2024] BCCA 103

British Columbia Court of Appeal – 2024 BCCA 103

SKOLROOD J.A. (FITCH, GRAUER J.A. concurring):

1. On November 11, 2017, the appellant, Linda Evans, suffered injuries when her face was bitten by a dog owned by the respondents Ms. Berry and Ms. Anderson. Ms. Evans brought an action for damages against Ms. Berry and Ms. Anderson. Her claim was grounded in *scienter*, negligence and occupiers' liability. ***

Background ***

7. Bones lived with Ms. Berry and Ms. Anderson for about seven months before the incident with Ms. Evans. During that time, they observed certain behavioural issues with Bones. For example, on a trip to the Sunshine Coast with friends in August 2017, Bones "nipped" the ankles of three of the people who were present, including Ms. Evans. In her testimony, Ms. Berry agreed that "nipping" meant that Bones had opened his jaw and latched on to a person's leg or ankle, but without leaving a mark or drawing blood. There was no evidence that either Ms. Berry or Ms. Anderson witnessed these incidents. ***

10. The most serious incident involving Bones, prior to the incident with Ms. Evans, occurred in October 2017 when Bones bit Ms. Berry's father on the arm, drawing blood. Ms. Berry described the incident in these terms:

> … He nipped my father on the forearm, but we believe that was—at the time we believed that was food motivated, because I had passed a cheese toasty sandwich, basically, over him to my father, and he was not familiar with my father, as he was visiting from Australia.

11. Ms. Berry agreed that this incident involved a bite, rather than a nip, because it broke the skin and drew blood. ***

13. Ms. Berry and Ms. Anderson attempted to address Bones' behavioural issues by taking him to dog trainers. They tried two trainers, beginning in August 2017. After two sessions with the first trainer, they decided that the training was ineffective so they switched to the "Dog Dudes" and had a further five or six sessions. The focus of the training was largely on how Bones interacted with other dogs.

14. They also made arrangements to see a dog behaviourist, but the appointment was scheduled for a date after the date of the incident involving Ms. Evans.

15. That incident occurred on November 11, 2017. Ms. Evans was one of a group of friends who gathered for dinner at Ms. Berry and Ms. Anderson's home. Towards the end of the evening when people were getting ready to leave, Ms. Evans approached Bones who was lying on the floor. She testified:

> … I kneeled down to pet him and to say goodbye to him, and that seemed fine. And I remember when I was, you know, kneeling down and rubbing him, that he turned over onto his back exposing

> his belly, so that, to me, was a good indication that he was enjoying himself, and so I was—I was petting him on the belly.
>
> And I recall Erin saying, oh, that's so lovely. He loves rubs from his aunty Linda. It was almost like seconds after that, you know, that he jumped straight at my face.
>
> I just—I just jerked backwards, like, really quickly, I just put my hands right up to my face ….There was, like, the feeling of blood and then I kind of took them down to look, and that's when I knew this was bad.

16. As a result of Bones' bite, Ms. Evans suffered a three-inch laceration to her forehead and a two-inch laceration to the left side of her face which required numerous stitches. ***

The Judge's Reasons

18. The judge first addressed Ms. Evans' claim in *scienter* and cited this Court's decision in *Janota-Bzowska v. Lewis* (1997), 96 B.C.A.C. 70 at para. 20 where the elements of the doctrine were described:

> 20. The law with respect to the doctrine of *scienter* is relatively clear. The owner of a dog which bites another will not be liable simply for being the owner. Liability will only attach under the doctrine if the three conditions set forth in the *Neville* decision have been satisfied. In other words, the plaintiff (not the defendant) must establish:
>
> i) that the defendant was the owner of the dog;
>
> ii) that the dog had manifested a propensity to cause the type of harm occasioned; and
>
> iii) that the owner knew of that propensity.

19. The onus is on the person seeking to impose liability on an animal owner to establish all three elements of the *scienter* test: *Janota-Bzowska* at para. 17.

20. As the judge noted, the first element of the test was not in issue, however she found that Ms. Evans had failed to establish the second and third elements (at para. 96). As to whether Bones had manifested a propensity to cause the type of harm occasioned by the incident in issue, the judge noted that Bones had exhibited nipping behaviour at peoples' ankles and legs and some aggression towards other dogs (at para. 101). The judge also considered the incident involving Ms. Berry's father, which Ms. Evans argues was evidence of a manifest propensity. Given the circumstances of that incident, the judge found that "it is simply not clear that this was an act of aggression on Bones' part towards Ms. Berry's father" (at para. 103).

21. The judge concluded on this element:

> 109. I agree with counsel for Ms. Evans that a dog need not have caused a specific type of harm on a prior occasion for the doctrine of *scienter* to apply: see *Janota-Bzowska*, at para. 19; see also *Gallant v. Slootweg*, 2014 BCSC 1579 at para. 24; *Sparvier v. MacMillan*, [1990] S.J. No. 124 (Sask. Q.B.) at para. 10. In proving *scienter*, it is not necessary that the animal had actually done the particular kind of harm on a previous occasion; it is sufficient if, to the defendant's knowledge, it had manifested a trait, inclination or propensity to do that type of harm. Nevertheless, considering the evidence in its entirety, I am simply unable to conclude that Bones had manifested "a propensity to cause harm of the type occasioned" on the night of Ms. Evans' Injury. Even broadly defined as a propensity to bite or harm, the evidence does not establish, on a balance or probabilities, that Bones had that propensity, inclination, trait or habit. ***

23. The judge then went on to consider Ms. Evans' claim in negligence. She found, and indeed Ms. Berry and Ms. Anderson acknowledged, that they owed Ms. Evans a duty of care. As to whether they breached the requisite standard of care, the judge found that Ms. Berry and Ms. Anderson acted prudently when they first adopted Bones by having him examined by a veterinarian. They continued to do so by attempting to address his behavioural issues through dog training.

24. Considering the evidence as a whole, the judge found that Bones' actions on the night Ms. Evans was injured were "out of character, unexpected and 'contrary to his usual habits'" (at para. 129). She found that Ms. Berry and Ms. Anderson did not fail to take reasonable care to prevent Ms. Evans' injury and as such did not breach the standard of care. ***

Analysis

Scienter

27. Ms. Evans submits that the judge failed to give effect to the central principle underlying the doctrine of *scienter* that "every dog is entitled to one bite". That principle was referred to in *Janota-Bzowska*:

> 18. In another more recent British Columbia decision, *Woods v. Standish* (1991), 58 B.C.L.R. (2d) 307 (B.C.S.C.), the Court summed up the essence of the doctrine of *scienter* at p.306:
>
> > In short the adage that "every dog is entitled to one bite" seems to sum up the law reasonably accurately.
>
> 19. While the adage quoted in the *Woods* decision may be a reasonably accurate statement of the law it should be pointed out that a dog need not have caused the specific type of harm on a prior occasion for the doctrine to apply. It would be enough if the owner knew that the dog had a propensity or manifested a trait to do that kind of harm even if it had not actually caused that particular harm.

28. Ms. Evans submits that Bones' "one bite" occurred when he bit Ms. Berry's father as a result of which they were aware of Bones' propensity. Accordingly, when Bones again bit a house guest approximately one month later, strict liability should be imposed under the doctrine of *scienter*.

29. Respectfully, I do not agree for two reasons. First, I do not agree that the adage "every dog gets one bite" forms part of the *scienter* doctrine. While the Court in *Janota-Bzowska* described it as "a reasonably accurate statement of the law", it is an overreach to say that the Court endorsed the adage as a principle of law. Indeed, elsewhere in that decision, at para. 20, the Court set out the three essential elements of the legal test (see para. 18 above) and it is those three elements that must guide the analysis.

30. Second, the judge made a number of findings of fact about Bones' behaviour, including that the incident with Ms. Berry's father did not establish that Bones was a source of danger or that he had manifested a propensity to bite or cause harm (at para. 102). Such findings of fact are entitled to considerable deference—an appellate court will only intervene when it is demonstrated that the judge below made a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 10.

31. Ms. Evans also submits that the judge failed to address relevant jurisprudence, specifically a number of cases in which liability pursuant to the doctrine of *scienter* was found in similar circumstances: see for example *Kerby (Guardian of) v. Visco*, 1994 CanLII 553 (BC SC); *Laws v. Wright*, 2000 ABQB 49; *Kwok v. Jennings*, 2016 SKQB 170; *Weeks v. Baloniak*, 2003 BCSC 1684; and *Gallant v. Slootweg*, 2014 BCSC 1579. Ms. Evans argues that the decision of the judge here is an outlier in the sense that it may be the only authority in which there is clear evidence of a previous dog bite yet the owner is not found liable in *scienter* for a subsequent bite ***.

32. I am unable to accede to this argument. The *scienter* analysis is intensely fact based and context-dependant. It thus involves an application of the evidence in the case to each of the three elements of the test. That is the exercise that the judge engaged in here. As noted, she made a number of key findings of fact leading to her conclusion that Ms. Evans had not established the second and third elements of the doctrine of *scienter*. In my view, her conclusion is entitled to deference. ***

42. Finally, as submitted by Ms. Berry and Ms. Anderson, Ms. Evans' arguments focus solely on the issue of manifest propensity, which is but one part of the *scienter* test. She does not address the third element—knowledge of that propensity on the part of Ms. Berry and Ms. Anderson. While not strictly required to do so given her conclusion on the second element, the judge found that Ms. Berry and Ms. Anderson lacked

the requisite knowledge. Ms. Evans has demonstrated no error on the part of the judge in so finding.

43. In summary on this point, I find that the judge did not err in holding that Ms. Evans had failed to establish the requisite elements of the doctrine of *scienter*.

Negligence—Standard of Care ***

45. Ms. Evans does advance one additional argument in support of her negligence claim. She submits that the judge erred in failing to consider whether the standard of care included a duty on the part of Ms. Berry and Ms. Anderson to warn guests, including Ms. Evans, that Bones had recently bitten someone i.e., Ms. Berry's father.

46. I do not agree that the judge erred in this respect. A duty to warn would only arise if it were established that Bones had a propensity to bite people and cause harm and that Ms. Berry and Ms. Anderson knew of that propensity, such that the type of harm suffered by Ms. Evans was reasonably foreseeable. The judge found to the contrary on each of these elements.

47. In the circumstances, the judge did nor err in failing to consider, or find, a duty to warn. ***

Conclusion

49. For the reasons given, I would dismiss the appeal.

REFLECTION:

- *Is the lower court judge's finding compelling that Bones had not manifested "a propensity to cause harm of the type occasioned" on the night Evans was injured? In the absence of a bright-line test, how should courts approach the question of whether previous harm is sufficiently akin to the harm occasioned?*

22.3.2 Donahue v. Belitski [2015] SKQB 47

✗**REF: §18.2.2.2**

CHICOINE J.:

1. The plaintiff, Richard Murray Donahue [Mr. Donahue], commenced an action against the defendant, Carl Joseph Belitski [Mr. Belitski] *** on October 6, 2009, for injuries which he suffered in a dog attack on Mr. Belitski's property situated in the R.M. of Buchanan. ***

2. Mr. Donahue testified that on November 15, 2008, he attended at the premises of Mr. Belitski approximately four miles West and a half mile North of the Town of Canora, Saskatchewan, just off of Highway 5. Mr. Belitski runs an auto wrecker business on his farmstead. Mr. Donahue stated that he probably attended to Mr. Belitski's place on 40 occasions previously to look for car parts, to purchase a car and also to leave cars with Mr. Belitski for him to sell on consignment. Mr. Belitski ran the business himself. Mr. Donahue never dealt with anyone else. ***

6. It was shortly after 10 o'clock in the morning when Mr. Donahue drove to Mr. Belitski's place to inquire if he might have rims for a 1989 Mustang upon which to mount new winter tires. He met Mr. Belitski just off the main road into his yard. Mr. Belitski was hauling cars with his tow truck. Mr. Donahue noticed that there was a bunch of dogs running around but that was not unusual at Mr. Belitski's place. Mr. Donahue got out of his truck to talk to Mr. Belitski. He told Mr. Belitski what he was looking for. Mr. Donahue testified that Mr. Belitski told him that there were a couple of Mustangs out there and to just go ahead and look. If he found what he needed, he was to come back to see Mr. Belitski who would take them off the car. ***

8. Mr. Donahue testified that there were dogs around when he got out of his truck to inspect the first Mustang, and that they followed him to where he stopped to look at a second Mustang. These were not full-grown dog, but great big pups. He parked just off the roadway and got out of his truck to have a look at the wheels on the second Mustang car. He had decided that these wheels would work and he started walking back to his truck, intending to go find Mr. Belitski to have him take the wheels off. As he approached

his vehicle another smaller brown dog appeared. The dogs that had followed him attacked the smaller dog. Mr. Donahue said that he started to walk backward to his truck, keeping an eye on the fighting dogs.

9. As Mr. Donahue was moving toward his truck, other dogs attacked him from behind, biting his legs and his arms. The dogs that attacked him were larger, black dogs. He had seen them in Mr. Belitski's yard before. The first dog to attack him grabbed his right leg. Another dog grabbed his left leg. Yet another jumped at his face but Mr. Donahue punched at it and it went down. A couple more dogs began grabbing at his legs as one or two jumped on his back and pulled him down. Mr. Donahue fought with the dogs, kicking and hollering at them, trying to get away from them. However the dogs just kept chewing on him, pulling his boot off, refusing to stop. He could not get away and the dogs kept up their attack.

10. Mr. Donahue said that he twice heard Mr. Belitski's truck approaching along the roadway, coming to within 75 or 100 feet of where he was on the ground, but Mr. Belitski drove right by, behind where his truck was parked. He assumes Mr. Belitski did not see what was going on. The dogs continued attacking him. Mr. Donahue managed to get his back up against a car so the dogs were no longer attacking him from behind. He kept punching at the dogs and kicking at them. The dogs kept trying to pull him away from the car. At the point where he thought he could not go on with one of the dogs chewing on his shoeless foot, exposing what he assumed was bone, he spotted a stick and picked it up. As soon as the dogs saw the stick they immediately backed off as if they were afraid of the stick. Mr. Donahue pulled out his cell phone and dialled 911. He got a response. He told the person on the phone what had happened to him but had difficulty explaining where he was. She assured him that help was on the way. He kept holding up the stick to keep the dogs at bay. He said there were five or six dogs involved in the attack on him. He could not estimate how long the attack had lasted, but to him it seemed like a long time. ***

24. In cross-examination, Mr. Donahue admitted that there were signs posted at Mr. Belitski's scrap yard reading: "Beware of Dogs". Mr. Donahue testified that he did not think he put himself at risk by getting out of his vehicle.

25. Mr. Donahue's wife, Jackie Donahue [Ms. Donahue], testified about the injuries suffered by her husband and the effect which the dog attack has had on him and his family. She described his slow and painful recovery after the surgery at the Pasqua Hospital and his recovery in the Yorkton hospital. She also described his period of recovery at home over the course of the next 10 months—the frequent visits by the home care workers to change his dressings; his inability to go outside; the slow healing of the wounds, especially his right leg and foot. Ms. Donahue described Mr. Donahue's foot and lower leg as "a mess, a big ugly mess." She also said that Mr. Donahue was not fully healed when he went back to work, but he forced himself to go back. He still had no feeling in his foot and had to use heated socks and boots. She stated that at the present time his foot is still a mess though some feeling has returned and it is down to a more normal size.

26. When asked about his present condition, she described him as "not the same person he used to be." He is especially nervous about dogs and reacts irrationally when he hears a dog bark or if one should unexpectedly show up in the yard. She has seen him jump into the box of his truck when a dog comes into the driveway. There was an especially poignant incident on Canada Day in 2010 when Mr. Donahue was camping with his family at Madge Lake. They were walking toward the beach in the dark to go watch the fireworks. All of a sudden, Mr. Donahue quit walking and froze like a statue. The family realized that numerous dogs had accompanied the other campers and Mr. Donahue could not stay there. He went back to the campsite and sat in the truck. ***

1. Is Mr. Belitski strictly liable under the doctrine of scienter?

56. Philip H. Osborne in *The Law of Torts*, 4th ed (Toronto: Irwin Law, 2011) describes the elements of liability for a cause of action based on strict liability for harm caused by dangerous animals as follows, at page 355:

> Under the scienter action, the keepers of dangerous animals are strictly liable for injuries and harm caused by them. Scienter, which means knowledge, is the central element of this cause of action. The plaintiff must prove not only that the animal was dangerous but also that the keeper knew that the animal was dangerous. For the purpose of this action, animals are divided into two classes:

> animals *ferae naturae* and animals *mansuete naturae*.
>
> Animals *ferae naturae* are those that are considered, by their nature, to be dangerous to people. They include such animals as tigers, elephants, wolves, and bears. These animals are conclusively deemed to be dangerous and their keepers are conclusively presumed to know that such animals are dangerous. A keeper is strictly liable even though the injury may not have been of the kind that led the courts to categorize the animal as *ferae naturae*.
>
> Animals *mansuete naturae* are by their nature harmless to people and include domesticated farm animals and cats and dogs. A normally harmless animal may, however, have shown a dangerous propensity to cause damage of the kind suffered by the plaintiff. In those circumstances, the keeper is strictly liable under the scienter action if he was aware of its dangerous nature before it attacked the plaintiff. [Footnotes omitted]

57. In the case of *Janota-Bzowska v. Lewis* (1997), 96 B.C.A.C. 70 (B.C. C.A.) at para 20, [*Janota-Browska*], Cumming J.A. of the British Columbia Court of Appeal described the three conditions that must be established for liability to apply to the owner of the animal:

> 20. The law with respect to the doctrine of scienter is relatively clear. The owner of a dog which bites another will not be liable simply for being the owner. Liability will only attach under the doctrine if the three conditions set forth in the Neville decision have been satisfied. In other words, the plaintiff (not the defendant) must establish:
>
> i) that the defendant was the owner of the dog;
>
> ii) that the dog had manifested a propensity to cause the type of harm occasioned; and
>
> iii) that the owner knew of that propensity. (…)

58. There is legislation in this Province which in my view has modified the common law doctrine of scienter. I refer specifically to s. 380 of *The Municipalities Act*, SS 2005, c M-36.1 which reads as follows:

> 380. In an action brought to recover damages for injuries to persons or property caused by an animal, it is not necessary for the person injured to prove that the animal is, or that the owner knew that the animal was:
>
> (a) of a dangerous or mischievous nature; or
>
> (b) accustomed to doing acts causing injury.

An identical provision is found in *The Cities Act*, SS 2002, c C-11.1 at ss 327(8).

59. It therefore appears that it is no longer necessary for a plaintiff to prove that the defendant knew of the animal's propensity. Liability has been made much stricter and basically will arise because of the fact that the animal has caused injury. There are a limited number of defences in such cases.

60. In this case, I am satisfied that Mr. Donahue has proved on a balance of probabilities all three conditions referred to in *Janota-Bzowska* without resort to the evidentiary presumption set out in s. 380 of *The Municipalities Act*. Mr. Belitski did not deny that he was the owner of the dogs that attacked Mr. Donahue on November 15, 2008. There is also ample evidence that Mr. Belitski's dogs had manifested a propensity to cause the type of harm occasioned. In this regard, there was an admission by Mr. Belitski that his dogs had killed a dog belonging to his neighbour, Adolph Kowalchuk, in April of 2008. Mr. Belitski also admitted that his dogs had bitten two other individuals, Lawrence Belitski and Dale Karcha only a few weeks prior to the attack on Mr. Donahue. There was also evidence that a Public Health Inspector had visited Mr. Belitski at his home on November 3, 2008, to speak to him about the dog biting incidents and to investigate the situation with his dogs being at large at his place of business where customers would be coming around. Finally, I am satisfied that Mr. Belitski had actual knowledge of the propensity of his dogs to attack other dogs and to bite people. He received a visit from the municipal councillor about his dogs being over at Adolph Kowalchuk's place and he knew about his dogs biting Lawrence Belitski and Dale Karcha. In fact,

Mr. Donahue testified that he destroyed any dog that had bitten these individuals. The Public Health Inspector, Roger Fielding, testified about his conversation with Mr. Belitski about his dogs running loose at his place of business on November 3, 2008, and the fact that he had drafted an order regarding Mr. Belitski's dogs and abating a health hazard which was not finalized before the attack on Mr. Donahue. ***

62. There can be defences to a scienter action, such as default of the plaintiff, consent, trespass of the plaintiff, and illegality. In the text referred to above, Philip H. Osborne, at page 356, states that these defences withhold the advantage of strict liability where, for one reason or another, the plaintiff is undeserving or to some degree blameworthy.

63. An injury by an animal may be blamed solely on the fault of the plaintiff in cases where, for instance, the plaintiff enters into an animal's cage, comes too close to an animal, or attempts to feed or pet an animal. These cases are resolved on the basis that there had been no loss of control by the keeper. I am of the view that the attack on Mr. Donahue by Mr. Belitski's dogs was not the fault of Mr. Donahue. Mr. Donahue was aware that Mr. Belitski had dogs on the premises and in fact, some of these dogs followed Mr. Donahue to where the Mustangs were located. It was not any of these dogs that attacked Mr. Donahue, but another pack of larger dogs. Mr. Belitski's suggestion that Mr. Donahue was attacked because he was hitting the dogs with a stick is without foundation and quite simply preposterous in the circumstances. The defence of fault of the plaintiff has no application in this case.

64. The defence of consent [§18.1.2] applies when a plaintiff has voluntarily exposed himself to the risk of injury by the animal. This assumes that the plaintiff knows that the animal is dangerous. In this case, I find no evidence that Mr. Donahue was aware that a feral pack of dangerous dogs was roaming Mr. Belitski's salvage yard. The defence of consent does not exist in this case.

65. The defence of trespass [§7.2], according to Philip H. Osborne (at page 357 or his text) reflects the old common law rule that the occupier of premises is under no obligation to a trespasser other than to not intentionally or recklessly injure him. However, the common law has evolved and the standard of care is now much higher, being generally one of common humanity or reasonable care. In any event, I find that Mr. Donahue was not a trespasser but an invitee of Mr. Belitski. I accept Mr. Donahue's version of events at the entrance gate to the effect that Mr. Belitski pointed Mr. Donahue in the direction of the Mustangs and told him to go ahead and look for suitable rims.

66. The fourth defence, illegality [§18.3], has no application here either. That defence assumes that the plaintiff was on the property for an illegal purpose, such as theft.

67. The result is that I find Mr. Belitski strictly liable for the damages to Mr. Donahue under the doctrine of scienter. ***

Conclusion

85. Mr. Donahue shall have judgement against Mr. Belitski in the sum of $324,347.11, plus pre-judgment interest on the award of non-pecuniary damages and the pre-trial loss of earnings calculated in accordance with *The Pre-judgment Interest Act*, plus taxable costs.

REFLECTION:

- *Did the judge reach his decision based on the common law doctrine of scienter or based on the dangerous animals provision in Saskatchewan's Municipalities Act? What is the difference between these two rules?*
- *What distinguishes this case from Evans v. Berry?*

22.3.3 Provincial scienter statutes

- Manitoba: Animal Liability Act, CCSM c A95, ss 2, 4.
- Newfoundland and Labrador: Animal Health and Protection Act, SNL 2010, c A-9.1 s 34.
- Nova Scotia: Municipal Government Act, SNS 1998, c 18, s 179.
- Ontario: Dog Owner's Liability Act, RSO 1990, c D-16, s 2; Protection of Livestock and Poultry from Dogs Act RSO 1990, c L-24, s 3.

- Prince Edward Island: Dog Act, RSPEI 1988, c D-13, s 11(2).
- Saskatchewan: Municipalities Act, SS 2005, c M-36.1, s 380; Animal Protection Act, SS 2018, c A-21.2, s 31.
- Northwest Territories: Dog Act, RSNWT 1988, c D-7, s 23.
- Nunavut: Dog Act, RSNWT (Nu.) 1988, c D-7, s 12.
- Yukon: Animal Protection and Control Act, SY 2022, c 13, s 41.

REFLECTION:

- *As Donahue v. Belitski discusses, some provincial statutes have modified the elements of the doctrine of scienter. What is the policy rationale behind scienter statutes that hold owners responsible regardless of whether they were aware of their animal's propensity to harm? Is this consistent with the ordinary principles and polices of tort liability?*
- *In British Columbia, "the Animals Act, RSBC 1979, c 16 had reversed the common law onus of proof, thereby requiring owners to show they did not know or have the means to know their dog 'was or is vicious … or accustomed to causing injury.' However, the Animals Act was repealed and the common law onus of proving strict liability under the doctrine of scienter shifted from the dog owner back to the plaintiff."[747] How should the law of scienter balance the aims of redress for plaintiffs against fairness for defendants?*

22.3.4 Further material

- Z. Olijnyk, "$5000 Award for Yorkshire Terrier Bite in Condo Highlights Limits of Litigation: Animal Law Lawyer" Canadian Lawyer (Aug 29, 2023).
- M.L. Parker & F. Oritz, "Recent Developments in Tort Law and Insurance Law" (2023) 58 Tort Trial & Ins Prac LJ 197.
- Manitoba Law Reform Commission, *Tort Liability for Animals* (Rep. 78, 1992).

[747] *Evans v Anderson*, 2023 BCSC 143, [95].

23 VICARIOUS LIABILITY

23.1 Common law vicarious liability

"Vicarious liability" in Wex (Cornell Law School Legal Information Institute, 2012)

Liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties. *** […continue reading]

23.1.1 Insurance Corp. of British Columbia v. Ari [2023] BCCA 331

✗**REF: §4.2.5**

GRIFFIN J.A. (BUTLER AND GRAUER JJ.A. concurring):

12. ICBC employed Candy Rheaume as a claims adjuster. She had a record of agreeing to ICBC's information and security policies and, in 2010, she completed an online information and privacy tutorial. In 2011, she accessed the personal information of 78 customers for no apparent business reason. She searched for the customers' personal information by running license plate numbers provided to her by Aldorino Moretti, which information she then sold to him for $25 or more per license plate number. There was no monitoring of staff access to personal information in the database during the time Ms. Rheaume was carrying out these activities.

13. Between April 2011 and January 2012, the homes and vehicles of 13 of the 78 customers were targeted in arson, shootings, and vandalism. All the customers' vehicles had been parked at the Justice Institute of British Columbia's parking lot at some point. Vincent Eric Gia-Hwa Cheung, Thurman Ronley Taffe and others carried out the attacks using the information obtained from Ms. Rheaume through Mr. Moretti. At Mr. Cheung's criminal trial, there was evidence establishing that he was engaging in substance use, held a delusion that he was being targeted and controlled by the Justice Institute, and had paid to obtain information about the vehicles in the parking lot that he believed were owned by police officers. ***

Issues on Appeal

34. ICBC alleges that the summary trial judge erred when he held that, pursuant to the *Privacy Act* [§4.2.1], the employee breached the Class Members' privacy when she accessed their personal information without an apparent business purpose. ***

36. In the alternative, if the judge did not err in finding a breach of the *Privacy Act*, ICBC submits that the judge erred in finding ICBC was vicariously liable for the employee's breaches ***. ***

General Principles of Vicarious Liability

121. Much judicial ink has been spilled trying to discern a workable and rational theory for the imposition of vicarious liability on an employer for an employee's unauthorized wrong, including in Justice Rowle's comprehensive judgment in *British Columbia Ferry Corp. v. Invicta Security Service Corp.* (1998), 58 B.C.L.R. (3d) 80 [*Invicta*]. In that case, this Court upheld the imposition of vicarious liability on a security company for damage caused by the arson attack committed by one of its security guards. The security guard was hired to protect the very property at issue.

122. What is clear from the many authorities reviewed in *Invicta* is that the degree of connection between the wrongdoing and the wrongdoer's employment have traditionally been highly relevant to the question of when vicarious liability should be imposed, but the courts have had difficulty articulating a clear test. What is also clear from the many authorities is that the full context of the wrongdoing and employment relationship is relevant.

123. In *Bazley v. Curry* [1999] 2 S.C.R. 534 [*Bazley*], the Supreme Court of Canada took on the task of

rationalizing the principles applicable to an employer's vicarious liability for an employee's unauthorized acts, where precedent is inconclusive. In attempting to articulate a test that would capture when the degree of connection between the wrongdoing and the wrongdoer's employment suffices to attract vicarious liability, the Court rejected previous attempts at categorizing conduct as within the "scope of employment", as well as previous attempts to focus on the "mode of conduct". Instead, the Court focused on whether the conduct was "sufficiently related" to conduct authorized by the employer to justify the imposition of vicarious liability, in light of the policy reasons that underly the imposition of vicarious liability.

124. ***Bazley*** concerned an employee of a residential care facility for children who sexually exploited and abused children in the care of the facility. The Supreme Court of Canada affirmed the imposition of vicarious liability on the employer, noting that this is known as strict liability or no fault liability because it is imposed in the absence of fault on the employer.

125. Both parties in ***Bazley*** adopted the Salmond test of vicarious liability, at para. 10:

> [T]he Salmond test … posits that employers are vicariously liable for (1) employee acts authorized by the employer; or (2) unauthorized acts so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing an authorized act.

126. The Court in ***Bazley*** noted the considerable divergence in the caselaw on the meaning and application of the second branch of the Salmond test for vicarious liability. It is difficult to distinguish between an unauthorized "mode" of performing an authorized act, and an entirely independent act: at para. 11.

127. In an attempt to provide guidance to the lower courts, McLachlin C.J.C. articulated the following principles in ***Bazley***:

> 41. Reviewing the jurisprudence, and considering the policy issues involved, I conclude that in determining whether an employer is vicariously liable for an employee's unauthorized, intentional wrong in cases where precedent is inconclusive, courts should be guided by the following principles:
>
> (1) They should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of "scope of employment" and "mode of conduct."
>
> (2) The fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires. Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections to the employment enterprise, like time and place (without more), will not suffice. Once engaged in a particular business, it is fair that an employer be made to pay the generally foreseeable costs of that business. In contrast, to impose liability for costs unrelated to the risk would effectively make the employer an involuntary insurer.
>
> (3) In determining the sufficiency of the connection between the employer's creation or enhancement of the risk and the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case. When related to intentional torts, the relevant factors may include, but are not limited to, the following:
>
> (a) the opportunity that the enterprise afforded the employee to abuse his or her power;
>
> (b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);
>
> (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;

> (d) the extent of power conferred on the employee in relation to the victim;
>
> (e) the vulnerability of potential victims to wrongful exercise of the employee's power. [Emphasis in original.]

128. The Court then considered the application of this approach to the facts of the case in ***Bazley***:

> 42. Applying these general considerations to sexual abuse by employees, there must be a strong connection between what the employer was asking the employee to do (the risk created by the employer's enterprise) and the wrongful act. It must be possible to say that the employer *significantly* increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks. The policy considerations that justify imposition of vicarious liability for an employee's sexual misconduct are unlikely to be satisfied by incidental considerations of time and place. For example, an incidental or random attack by an employee that merely happens to take place on the employer's premises during working hours will scarcely justify holding the employer liable. Such an attack is unlikely to be related to the business the employer is conducting or what the employee was asked to do and, hence, to any risk that was created. Nor is the imposition of liability likely to have a significant deterrent effect; short of closing the premises or discharging all employees, little can be done to avoid the random wrong. Nor is foreseeability of harm used in negligence law the test. What is required is a material increase in the risk as a consequence of the employer's enterprise and the duties he entrusted to the employee, mindful of the policies behind vicarious liability. [Italicized emphasis in original; underline emphasis added.]

129. The Court held in relation to vicarious liability for an employee's sexual abuse:

> 46. In summary, the test for vicarious liability for an employee's sexual abuse of a client should focus on whether the employer's enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the harm. The test must not be applied mechanically, but with a sensitive view to the policy considerations that justify the imposition of vicarious liability—fair and efficient compensation for wrong and deterrence. This requires trial judges to investigate the employee's specific duties and determine whether they gave rise to special opportunities for wrongdoing. Because of the peculiar exercises of power and trust that pervade cases such as child abuse, special attention should be paid to the existence of a power or dependency relationship, which on its own often creates a considerable risk of wrongdoing. [Emphasis added.]

130. The result in ***Bazley*** can be contrasted to another case where an employee sexually assaulted children: ***B.(E.) v. Order of the Oblates of Mary Immaculate (British Columbia)*** 2005 SCC 60 [***Oblates***].

131. In ***Oblates***, a residential school for Indigenous children operated by the Catholic Church employed a baker who repeatedly sexually assaulted a child attending the school. The trial judge imposed vicarious liability on the Oblates. The Supreme Court of Canada affirmed the Court of Appeal's reversal of the finding of vicarious liability.

132. What distinguished ***Bazley*** from ***Oblates*** was the nature of the employees' duties and the opportunity or risk those duties created for the wrong to occur. Clearly neither employee was authorized to sexually abuse children, nor was that abhorrent conduct in the scope of their duties. But the Court in ***Oblates*** looked at the "job-conferred power" of the employee. The employee in ***Bazley*** had specific tasks which put children in his care creating an opportunity for the abuse. In contrast, the employee in ***Oblates*** was merely a baker whose responsibilities were "remote from actually looking after the children": at para. 42.

133. There are additional examples showing the fact-specific nature of the imposition of vicarious liability, and dichotomy between the ***Bazley*** fact-pattern and the fact-pattern in ***Oblates***. Similar to the result in ***Bazley***, in ***M. (F.S.) v. Clarke***, [1999] 11 W.W.R. 301 (B.C. S.C.), vicarious liability was imposed on a residential school for the wrongdoing of a dormitory supervisor. But similar to the result in ***Oblates***, in ***G. (E.D.) v. Hammer*** affirmed at (2001), 197 D.L.R. (4th) 454, 2001 BCCA 226 (B.C.C.A.), affirmed on other grounds, [2003] 2 S.C.R. 459, 2003 SCC 52 (S.C.C.), there was no vicarious liability imposed on the school board for the sexual abuse committed by a janitor of a day school, where the janitor had no direct duties

related to students.

Did the Judge Understand the Principles of Vicarious Liability?

134. Turning to the judge's understanding of the applicable legal principles, ICBC is critical of the judge for starting his analysis by citing *Invicta*. This submission is without merit. The judge at para. 69 correctly cited *Invicta* for the proposition that there must be a connection between the employee's wrongful conduct and their relationship to the employer. This basic proposition is consistent with *Bazley*. ***

Did the Judge Err in His Application of the Principles of Vicarious Liability?

136. ICBC next submits that the judge erred in the application of the principles set out in *Bazley* for the imposition of vicarious liability.

i. Relevant Factors

137. ICBC submits that the judge treated "mere opportunity" by ICBC employees to access databases containing information, as dispositive of the vicarious liability analysis, without considering the five relevant factors mentioned in *Bazley*, at para. 41(3) (set out above). I disagree and consider this assertion not to be a fair reading of the judge's reasons or of *Bazley*.

138. The judge found that "ICBC clearly created the risk of wrongdoing by an employee in Ms. Rheaume's position" and "her wrongdoing was directly connected to her employment": at para. 73. The judge found that "Ms. Rheaume was expected to access the databases" (para. 74). While succinct, these were key findings of fact central to the vicarious liability analysis and were well supported by the evidence.

139. In *Bazley*, the Court distinguished the situation of an employee committing a wrong during working hours and on the jobsite, where the employee had an enhanced opportunity to commit the wrong, from the situation where the wrong occurred offsite and after hours. These may be relevant circumstances, with vicarious liability being potentially more appropriately imposed in the first situation. Here, the facts were squarely within the first situation.

140. Ms. Rheaume was not in a position akin to a janitor cleaning the office, or a person delivering the mail, or an employee who after-hours surreptitiously went outside of their job responsibilities and looked at an open computer or a file on a desk. The abuse she engaged in as an employee was closely connected to her employment and in circumstances much more akin to *Bazley* than to *Oblates*.

141. ICBC submits that the judge was too general in his finding that ICBC created the risk. ICBC submits that the judge needed to analyze whether or not the risk was that Ms. Rheaume would sell the information to persons with criminal motives. I disagree. ICBC has not pointed to any authority to support the suggestion that in order for vicarious liability to be imposed, the employer needs to foresee with specificity the exact wrong that occurs.

142. The risk was that Ms. Rheaume's employment responsibilities as a claims adjuster, which involved working with ICBC's computer database to access personal information that customers had provided, could lead her to access private information for an improper purpose. ICBC knew that information was vulnerable to abuse. This was the risk that materialized: misuse of private customer information. ***

145. It was inherent in ICBC's enterprise that it would collect personal information of its customers and that information would be stored in a database and could be linked to an electronic search of license plates. That information was intimate in the sense of being private. ICBC understood that its customers "entrusted" it with the information and knew that customers were vulnerable to abuse of this information. ICBC acknowledged that there were risks inherent in its collection and storage of this information. Knowing all this, ICBC gave Ms. Rheaume unlimited power to search and access its customers' private information as part of her regular employment duties. It is readily apparent that Ms. Rheaume's unlimited access to the searchable electronic database made her work more efficient and thereby furthered ICBC's aims.

146. I see no error in the judge's consideration of relevant factors and his application of *Bazley* to the facts of this case.

ii. Policy Reasons

147. ICBC further submits that the judge failed to give sufficient heed to policy reasons for not imposing vicarious liability, which it says should loom large because there already exist policies for employers dealing with private information in accord with the obligations imposed by *FOIPPA* [the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165] [§4.3.1]. It also points to other deterrents, such as the criminal charge of unauthorized and fraudulent use of a computer.

148. ICBC's policy argument is unpersuasive. Again, ICBC seeks to use purported compliance with *FOIPPA* as a defence to claims under the *Privacy Act*, which it is not. The fact that there are other potential deterrents to misuse of private information is no answer to the imposition of vicarious liability. The same point about other legal deterrents can be said with respect to many torts including those involving negligence, where nonetheless vicarious liability is imposed. The conduct in *Bazley* was subject to the deterrent of the criminal law but that did not detract from the Court's imposition of vicarious liability, nor should it in this case.

149. ICBC's argument fails to appreciate the lessons of *Bazley* and *Oblates* and ignores the policy rationale for imposition of vicarious liability. Vicarious liability can be imposed on an employer even where the employee's wrongful conduct is in specific defiance of the employer's policies: *Oblates* at para. 26.

150. The policy considerations underlying vicarious liability are the provision of an adequate and just remedy and deterrence. Unless the employer is liable, the injured party might not be able to recover compensation. Providing that an employer will be liable for an employee's wrong is fair because it is the employer who put the enterprise into the community, and it is the employer who is best positioned to absorb any losses, whether through insurance, higher prices, or otherwise. Further, the imposition of liability has a deterrent effect because it encourages employers to reduce the risk and to engage in protective measures against the risk: *Bazley* at paras. 30-32. Even where an employer's conduct might not rise to the level of negligence, there may remain a "vast area where imaginative and efficient administration and supervision can reduce the risk that the employer has introduced": *Bazley* at para. 33.

151. The policy question is whether the employer has "introduced the risk of the wrong" that has occurred, because the wrong is "so connected with the employment" that the employer is "fairly and usefully charged with its management and minimization", so as to justify imposition of liability in order to provide an adequate remedy and to create deterrence of similar conduct in the future: *Bazley* at paras. 37-39.

152. The judge found that the risk was clearly foreseeable to ICBC that an employee would ignore ICBC's rules forbidding improper use of its databases: paras. 74, 75. This supports the policy reason underlying the imposition of vicarious liability. As stated in *Bazley*, "[o]nce engaged in a particular business, it is fair that an employer be made to pay the generally foreseeable costs of that business" (para. 41).

153. It is just to impose liability on ICBC in order to provide an adequate remedy and to create deterrence of similar conduct in the future. As between ICBC and a customer required to provide their private information to ICBC, it is just that the risk of improper use of the information, by an ICBC employee in Ms. Rheaume's position, should be borne by ICBC and not the customer. The imposition of tort liability serves to incentivize employers to create workplace environments that guard against the misuse of private information, and deters employers from being lax in their oversight of the private information they collect and store electronically.

154. An undercurrent to ICBC's submission on appeal is the idea that it is too difficult to protect electronic information and therefore employers should not be responsible for rogue employees. However, surely the same could be said about employees of residential care facilities responsible for caring for vulnerable persons; it may be difficult to guard against a determined employee's deliberate and secretive abuse in these settings. But vicarious liability serves an important social purpose in encouraging employers to guard against abuse.

155. If anything, the need to incentivize employers to guard private information is greater than ever given the proliferation of electronic databases, and should not be minimized simply because the business convenience of an electronic database may also make it more vulnerable to abuse.

156. I therefore reject ICBC's argument that the judge failed to properly consider policy reasons underlying the imposition of vicarious liability.

iii. UK Case

157. ICBC further asserts that a case decided by the UK Supreme Court should be persuasive on the issue of vicarious liability, citing *Various Claimants v. WM Morrison Supermarket Plc* [2020] UKSC 12 [*Morrison*]. In that case, a supermarket chain was held not vicariously liable when a contractor maliciously released personal and banking data of the chain's employees on a publicly accessible website.

158. I do not find the *Morrison* case to be of assistance. Importantly, the UK approach to vicarious liability is much narrower than the approach in *Bazley* and to follow it would lead us astray.

Conclusion on Vicarious Liability

159. A finding of vicarious liability is one of mixed fact and law: *Oblates* at para. 23. The judge properly applied the correct legal principles and considered relevant factors. The facts as well as policy reasons support the imposition of vicarious liability. ICBC has not established that the judge made an extricable error of law or a palpable and overriding error in his determination that ICBC is vicariously liable for Ms. Rheaume's breach of privacy. ***

REFLECTION:

- *Having regard to CCIG Investments Pty Ltd v. Schokman, what are the different common law approaches to determining vicarious liability?*[748] *Which approach did the British Columbia Court of Appeal apply? Is its reasoning compelling?*
- *What were the best policy arguments for and against recognising the vicarious liability of ICBC in this case?*
- *Does the doctrine of vicarious liability, being a form of strict liability of principals such as employers, undermine a wrongs-based conception of tort law? What is the best justification for the doctrine?*

23.1.2 CCIG Investments Pty Ltd v. Schokman [2023] HCA 21

High Court of Australia – [2023] HCA 21

KIEFEL CJ, GAGELER, GORDON, JAGOT JJ.:

1. In late 2016 the respondent, Mr Schokman, commenced employment with the appellant at Daydream Island Resort and Spa as a food and beverage supervisor. The island is part of the Whitsunday Islands, which are situated off the coast of Queensland. His employment contract contained a clause which stated "[a]s your position requires you to live on the island, furnished shared accommodation located at Daydream Island Resort and Spa will be made available to you while you are engaged in this position at a cost of $70 per week". ***

3. Initially Mr Schokman was provided with a room to himself, but shortly thereafter a new worker, Mr Hewett, moved in and shared the accommodation with Mr Schokman. Mr Hewett's contract of employment was not in evidence. The case was conducted on the basis that Mr Hewett's contract of employment, so far as it related to accommodation, was in the same terms as Mr Schokman's contract. Both men worked at a restaurant within the resort. Mr Schokman held the superior position as supervisor; Mr Hewett was a team leader.

4. In the late evening of 6 November 2016, Mr Schokman spent some time at the staff bar. Mr Hewett came to the bar after finishing work at the restaurant. Mr Schokman observed Mr Hewett have a few drinks, but Mr Hewett did not seem overly intoxicated. Mr Schokman left the bar at approximately 1:00 am and returned to his room. Mr Hewett followed shortly afterwards. Mr Hewett was visibly upset and began complaining about his work environment and told Mr Schokman that he had issues with the management team. Mr Schokman said that he did not wish to discuss work issues at home and that they could talk about them at work the following day. Mr Hewett said that he would let Mr Schokman get some sleep and he left the

[748] See D. Priel, "Vicarious Liability: The Two Approaches" The Court.ca (Sep 13, 2023).

unit, taking some drinks with him.

5. Mr Hewett returned at about 3:00 am. Mr Schokman heard him vomiting in the bathroom and then walking around whilst hiccupping. Mr Schokman went back to sleep. He was woken about 30 minutes later in a distressed condition and unable to breathe. Mr Hewett was standing over Mr Schokman's bed with his shorts pulled down and his penis exposed. He was urinating on Mr Schokman, who was inhaling the urine and choking. Mr Schokman yelled at Mr Hewett, who continued urinating on him for a short period of time and then stepped away. Mr Hewett went into the bathroom, and then came out and apologised to Mr Schokman. When Mr Schokman attempted to leave the room, Mr Hewett stood in front of him and apologised again.

6. Mr Schokman suffered a cataplectic attack as a result of the incident. The trial judge described such an attack as a sudden and ordinarily brief loss of voluntary muscle tone which is triggered by emotional stress. A medical expert explained that cataplexy is a condition most commonly associated with narcolepsy. Mr Schokman had a history of these conditions, but prior to the incident had been functioning well with the assistance of medication.

7. The trial judge accepted that, at the time of the incident, Mr Hewett was in a state of semi-consciousness which was precipitated by his level of intoxication. The likelihood was that Mr Hewett intended to urinate into the toilet but, due to his state of intoxication and the late hour, he urinated on Mr Schokman by mistake. His Honour considered that the evidence was insufficient for a finding that the act of Mr Hewett was committed intentionally.

8. Mr Schokman brought proceedings against the appellant. He claimed damages on two alternative bases. In the first place, he claimed damages based on a breach of the appellant's duty of care owed to him as an employee [**§19.6**].[749] The alternative claim was that the appellant was vicariously liable as employer for the negligent act of its employee, Mr Hewett. Both claims failed.

9. The claim for vicarious liability was the subject of an appeal to the Court of Appeal, and is the subject of this appeal. In some respects, however, the argument for Mr Schokman reflects a case of a duty of care owed by his employer to him. This may be seen especially in its focus on the position in which Mr Schokman was placed by the employment, rather than attention being directed to the position of Mr Hewett, and the connection between Mr Hewett's employment and his tortious act as relevant to vicarious liability.

The judgments below

10. The trial judge did not accept that the actions of Mr Hewett were committed in the course of his employment with the appellant.[750] His Honour considered that the relevant enquiry was as to whether there was a connection or nexus between the employment enterprise and the wrong that justified the imposition

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[749] *Schokman v. CCIG Investments Pty Ltd* [2021] QSC 120 *per* Crow J.:
"**Defendant's Duty of Care** ***
85. *** [T]he existence of the duty of care is not in dispute. ***
86. Accordingly, I conclude that the scope of the duty of care owed by the defendant to Mr Schokman was a duty to take reasonable care: (a) To avoid exposing Mr Schokman to an unnecessary risk of injury; (b) To design, establish, maintain and enforce a safe system of accommodation; (c) To devise, establish and maintain a safe place of accommodation. ***
92. *** [T]he relevant risk was a risk that the plaintiff, Mr Schokman, having a confrontation or an unpleasant personal interaction with his designated roommate, Mr Hewett, which could give rise to a risk of injury to Mr Schokman. ***
102. The most difficult issue in the case is the proper determination of breach …. The first difficulty in determining whether Mr Schokman as plaintiff has shown that a reasonable person in the position of the defendant would have taken the precautions is to attempt to identify the precautions. The evidence does not identify the precautions with any acceptable level of certainty. ***
124. I cannot find that the defendant is in breach of its duty of care to the plaintiff in failing to have an appropriate alcohol policy and an appropriate code of conduct policy in respect of its shared accommodation facility. The lack of detail of such policies also creates significant issues in respect of causation. ***"

[750] *Schokman v. CCIG Investments Pty Ltd* [2021] QSC 120 at [136]-[138].

of vicarious liability on the employer for the wrong. Whilst his Honour accepted that the occasion for the tort committed by Mr Hewett arose out of the requirement of shared accommodation, his Honour did not consider that it was a fair allocation of the consequences of the risk arising to impose vicarious liability on the employer for the drunken misadventure of Mr Hewett with respect to his toileting. There was no history of Mr Hewett becoming intoxicated and nothing which would have put the employer on notice that Mr Hewett may have engaged in what was bizarre conduct.[751]

11. The Court of Appeal allowed Mr Schokman's appeal.[752] McMurdo JA (Fraser and Mullins JJA agreeing) considered that the circumstances of this case were analogous to those in *Bugge v. Brown*,[753] where the employer had been held vicariously liable for the acts of the employee by reference to the terms of his employment. ***

In the course or scope of employment

12. For an employer to be held liable for the tort of an employee the common law [of Australia] requires that the tortious act of the employee be committed in the course or scope of the employment. *** The principle upon which the rule is based is that it is just to make the employer, whose business the employee is carrying out, responsible for injury caused to another by the employee in the course of so acting, rather than to require that the other, innocent, party bear their loss[754] or have only the remedy of suing the individual employee.

13. It has been observed that the attribution of vicarious liability reflects the policy of the law.[755] It is also the policy of the law that the just limits of that liability are marked out by the rule that the employee's wrongful act, for which the employer is made liable, must be committed in the course or scope of the employment. Other policies, which could have the effect of extending vicarious liability, have been discussed in other jurisdictions. In Canada, the enterprise risk theory was suggested in *Bazley v. Curry*[756] and further explained in subsequent cases.[757] In the United Kingdom, more general notions of what might be considered fair and just were referred to in *Mohamud v. Wm Morrison Supermarkets Plc*,[758] although this approach too has more recently been the subject of explanation.[759] It was pointed out in *Prince Alfred College*[760] that these approaches have not attracted support from this Court.

14. The common law of Australia adheres to the rule that the employee's wrongful act be done in the course or scope of employment in order for liability to attach to the employer. The rule has the advantage of being objective and rational,[761] which probably explains why it has endured. ***

16. Whether an act was committed in the course or scope of employment is not determined by reference to whether the tortious employee's act can be said to have been authorised by the employer.[762] An unauthorised, intentional or even criminal act may be committed in the course or scope of employment, and therefore render the employer liable. In that sense, the rule may have a broad operation. On the other hand, the law also recognises that it would be unjust to make the employer responsible for every act which the employee chooses to do, as Isaacs J said in *Bugge v. Brown*.[763] Most relevantly, an act done when the

[751] *Schokman v. CCIG Investments Pty Ltd* [2021] QSC 120 at [138].
[752] *Schokman v. CCIG Investments Pty Ltd* (2022) 10 QR 310.
[753] (1919) 26 CLR 110, cited in *Schokman v. CCIG Investments Pty Ltd* (2022) 10 QR 310 at 326-327 [42].
[754] *Bugge v. Brown* (1919) 26 CLR 110 at 117.
[755] *Jacobi v. Griffiths* [1999] 2 SCR 570 at 589 [29].
[756] [1999] 2 SCR 534 at 560-561 [42]-[43].
[757] See *Prince Alfred College Inc v. ADC* (2016) 258 CLR 134 at 153-154 [60]-[62] and the cases referred to there.
[758] [2016] AC 677 at 695 [54].
[759] *Various Claimants v. Wm Morrison Supermarkets Plc* [2020] AC 989. See, especially, at 1015 [24]. See also *BXB v. Trustees of the Barry Congregation of Jehovah's Witnesses* [2023] 2 WLR 953 at 970 [55]-[56], 972 [58(iv)]; [2023] 3 All ER 1 at 18, 19-20.
[760] (2016) 258 CLR 134 at 149-150 [45], 153 [59], 156 [68], 158 [74].
[761] *Prince Alfred College Inc v. ADC* (2016) 258 CLR 134 at 148 [40].
[762] Salmond, *The Law of Torts* (1907) at 83-84.
[763] (1919) 26 CLR 110 at 117-118.

employee was on a "frolic of [their] own" will not attract liability.[764] Consistently with the policy of the law, an employer should not be held liable for acts totally unconnected with the employment.

The decided cases and connection with the employment

17. Because the law strives for coherence, the courts commonly look to decided cases for guidance as to when vicarious liability may be said to arise. Such an approach was said in *Prince Alfred College* to be orthodox and one which should be followed.[765] It has been regarded as a first step by the Supreme Court of Canada.[766] ***

27. *** In *Bazley v. Curry*,[767] it was said that the question in each case is whether there is a connection or nexus between the employment enterprise and the wrong which justifies the allocation of risk. And in *Jacobi v. Griffiths*,[768] it was further said that this nexus needs to be a sufficiently strong connection to impose vicarious liability. ***

An analogy with *Bugge v. Brown*?

39. Mr Schokman *** contended that an analogy might be drawn between this case and the case of *Bugge v. Brown*.[769] The two circumstances which he identifies as common to both cases are that the tortious act of the employee occurred whilst he was on a break from his employment and that each employee was fulfilling the requirements of his employment when carrying out the tortious act.

40. In the present case, Mr Hewett was at leisure and not at his place of work when he committed the tortious act. He was on a "break" only in the sense that it occurred outside the carrying out of his duties or in the period between carrying them out. The functional, geographical and temporal aspects of Mr Hewett's course or scope of employment were absent.[770] In *Bugge v. Brown*,[771] the employee's act, lighting a fire, was in preparation for the employee's midday meal whilst working remotely. It occurred whilst he was carrying out his work. These comparisons may be put to one side.

41. Central to the case in *Bugge v. Brown*[772] was that the act of lighting the fire was itself a requirement of, and authorised by, the employment. By contrast in this case, Mr Hewett could only be said to be acting in accordance with his employment contract by sharing the accommodation provided for and being present in it. As has been explained, that does not provide a proper connection to the employment.

42. The employee in *Bugge v. Brown*[773] worked on a grazing property, and at the relevant time he was working in a paddock cutting thistles. His remuneration included food. When he was at the homestead of the property it was prepared by the station cook. When he was working remotely, he was usually provided with a midday meal which included cooked food. On the day in question the cook was absent and he was given raw meat, potatoes, and a pan in which to cook. The employee was instructed by the employer to go to a place where there was an old homestead and a hut where he could cook. But the place was some distance from where the employee was working and he chose not to do so. Cooking closer to his work meant lighting an open fire with its attendant risks. One such risk eventuated. The fire escaped and damaged the plaintiff's land.

43. Isaacs J held it to be beyond question that the cooking of the meal was "intimately connected" with the performance of the day's task. ***

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[764] *Bugge v. Brown* (1919) 26 CLR 110 at 128.
[765] *Prince Alfred College Inc v. ADC* (2016) 258 CLR 134 at 150 [46]-[47].
[766] *Bazley v. Curry* [1999] 2 SCR 534 at 545 [15].
[767] [1999] 2 SCR 534 at 557 [37].
[768] [1999] 2 SCR 570 at 602 [53].
[769] (1919) 26 CLR 110.
[770] *New South Wales v. Lepore* (2003) 212 CLR 511 at 535 [40].
[771] (1919) 26 CLR 110.
[772] (1919) 26 CLR 110 at 128-129.
[773] (1919) 26 CLR 110.

46. It may readily be seen that the circumstances in *Bugge v. Brown*[774] are in no way analogous to the present case. Nothing in the present case points to the drunken act in question being authorised, being in any way required by, or being incidental to, the employment. In truth, it had no real connection to it.

Conclusion

47. The appeal should be allowed with costs. ***

EDELMAN AND STEWARD JJ.:

48. In 1916, Laski wrote of vicarious liability that "[i]n no branch of legal thought are the principles in such sad confusion".[775] Half a century later, in 1965, in a case that is sometimes (erroneously) considered to be a classic instance of vicarious liability, Lord Denning MR remarked that, on this subject, "the cases are baffling".[776] Not much has improved in the last 60 years. The problem lies in the tendency to think about vicarious liability in a stovepipe manner as an agglomeration of areas of law where a defendant is liable in the absence of fault. "The reason … 'stovepipe' lawyers cannot move confidently from one area of the law to another is that nobody has shown them the map".[777] By conflating different areas of law, and treating them all as "vicarious liability", analogies drawn between them are confusing and legal tests for liability in one area are "stretched to breaking point" in another.[778]

49. Any coherent map of vicarious liability must recognise that the cases which have been described as concerning "vicarious liability" now span across three different areas of law, each involving different legal principles. ***

50. The *first* area of law generally involves cases where one person is, in broad terms, an agent for another. It is a primary liability: the acts of another are attributed to the defendant on the basis that they were part of a joint enterprise, or procured, authorised or ratified by the defendant. Each of these notions conveys the sense of something that is done for another with the "seal of [their] approval", amounting to an acceptance of the act as the other's own; "everyone can see that [an employer] ought to answer for [an employee's] acts", when those acts are performed with the employer's authority in this broad sense.[779] This type of liability is really based on "vicarious act[s]"[780] or "vicarious conduct",[781] rather than "vicarious liability". It applies to all principals, whether an employer or not, for whom the acts are done with their authority.

51. The *second* area of law, also described as "vicarious liability", involves cases where "vicarious liability" is used in its true, or proper, sense of liability based on the attribution of the liability of another. This second area of law developed from the first area of law using similar language but involving a very different concept. Rather than attributing to one person the authorised acts of another, it attributed to an employer the liability of an employee, based on the wrongful acts of the employee, whether or not those acts were authorised in the broad sense described above. But the employee's wrongful acts had to be sufficiently or closely connected to the employee's duties or powers of employment so that they could be said to have been performed in the "course of their employment". This Court has not extended vicarious liability in this sense beyond employees.[782]

52. It has sometimes been argued that these two conceptions of "vicarious liability" are in competition and

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[774] (1919) 26 CLR 110.
[775] Laski, "The Basis of Vicarious Liability" (1916) 26 *Yale Law Journal* 105 at 105-106.
[776] *Morris v. C W Martin & Sons Ltd* [1966] 1 QB 716 at 724.
[777] Birks, "Introduction", in Birks (ed), *English Private Law* (2000), vol 1 at xxxvi.
[778] *Mohamud v. Wm Morrison Supermarkets Plc* [2016] AC 677 at 691 [39]; *Various Claimants v. Wm Morrison Supermarkets Plc* [2020] AC 989 at 1014 [21].
[779] Laski, "The Basis of Vicarious Liability" (1916) 26 *Yale Law Journal* 105 at 105, 107.
[780] *Broom v. Morgan* [1953] 1 QB 597 at 609.
[781] Williams, "Vicarious Liability: Tort of the Master or of the Servant?" (1956) 72 *Law Quarterly Review* 522 at 544.
[782] Compare *Various Claimants v. Catholic Child Welfare Society* ("the *Christian Brothers Case*") [2013] 2 AC 1 at 18 [47]; *BXB v. Trustees of the Barry Congregation of Jehovah's Witnesses* [2023] 2 WLR 953 at 971 [58(ii)]; [2023] 3 All ER 1 at 19.

that only one should be accepted. One view is that the only proper conception is attribution of acts.[783] The other view is that the only proper conception is attribution of liability.[784] But, as Glanville Williams observed, "the law may recognise both vicarious responsibility in the proper sense of the term and also a doctrine of vicarious conduct".[785] The confusion arises because these two areas of law, concerning two different types of liability, are conflated by the use of the same label.

53. Matters are further complicated because "vicarious liability" is sometimes used to describe a *third* area of law. As early as Sir Frederick Pollock's famous writing on what he described as "the rule of vicarious liability",[786] instances were included under the label of "vicarious liability" where an employer owed a duty to ensure that reasonable care was taken in the performance of the duties of an employee or even an independent contractor. If an employer had delegated "general authority to a manager or superintendent", the employer could not "cast off this duty by handing over the performance of it" to another.[787] Cases in which this non-delegable duty arises do not involve "vicarious liability" in the first or second areas of law. Unlike the second area they are not confined to employers. Nevertheless, the liability, unfortunately, has also been described as "vicarious".

54. Once these areas of law concerning "vicarious liability" are disentangled, this appeal can be seen to concern only the second area: liability based on the attribution of the liability of another. Mr Schokman was required by the appellant, his employer, to live in shared accommodation at Daydream Island Resort and Spa. There is no sense in which the appellant agreed to, procured, authorised, or ratified Mr Hewett's negligent act of urinating on Mr Schokman at 3.30 am in the accommodation. Nor was Mr Schokman's claim pleaded or argued as one involving liability based on a breach of a non-delegable duty to ensure that care was taken to provide a safe place of work. The issue is whether Mr Hewett's act of negligent urination was so closely connected with Mr Hewett's employment duties that the act could be said to have occurred in the course of Mr Hewett's employment. It was not. The appeal must be allowed. ***

GLEESON J.: ***

101. I agree with the orders proposed by Kiefel CJ, Gageler, Gordon and Jagot JJ.

REFLECTION:

- *Vicarious liability in Australia centres on the classic "scope of employment" enquiry. The High Court of Australia has not embraced the policy-centred approached to vicarious liability that the Supreme Court of Canada elucidated in Bazley v. Curry. Would a Canadian court nevertheless reach the same conclusion rejecting vicarious liability in Schokman's case?*
- *Is Edelman and Steward JJ.'s map of three different areas of vicarious liability a compelling explanation of the state of the doctrine?*

23.1.3 Blackwater v. Plint [2005] SCC 58

✗REF: §19.7.2

MCLACHLIN C.J.C. (FOR THE COURT): ***

2. The appeal arises from four actions commenced in 1996 by 27 former residents of the Alberni Indian Residential School (AIRS) claiming damages for sexual abuse and other harm. The children had been taken from their families pursuant to the *Indian Act*, S.C. 1951, c. 29, and sent to the school, which had been established by the United Church's predecessor, the Presbyterian Church of Canada, in 1891 to

[783] Darling Island Stevedoring and Lighterage Co Ltd v. Long (1957) 97 CLR 36 at 60-61; Morris v. C W Martin & Sons Ltd [1966] 1 QB 716 at 724; Stevens, *Torts and Rights* (2007) at 259.
[784] Darling Island Stevedoring and Lighterage Co Ltd v. Long (1957) 97 CLR 36 at 57. See also Bernard v. Attorney General of Jamaica [2005] IRLR 398 at 402 [21]; Majrowski v. Guy's and St Thomas's NHS Trust [2007] 1 AC 224 at 228 [7]; Woodland v. Swimming Teachers Association [2014] AC 537 at 572 [3].
[785] Williams, "Vicarious Liability: Tort of the Master or of the Servant?" (1956) 72 *Law Quarterly Review* 522 at 544. See also Pioneer Mortgage Services Pty Ltd v. Columbus Capital Pty Ltd (2016) 250 FCR 136 at 149 [57].
[786] Pollock, *Essays in Jurisprudence and Ethics* (1882) at 116.
[787] Pollock, *Essays in Jurisprudence and Ethics* (1882) at 133.

provide elementary and high school education to Aboriginal children whose families resided in remote locations on the west coast of Vancouver Island. The children were cut off from their families and culture and made to speak English. They were disciplined by corporal punishment. Some, like the appellant Mr. Barney, were repeatedly and brutally sexually assaulted.

3. A number of former students, including Mr. Barney, brought an action for damages for the wrongs they had suffered. ***

4. The trial judge found that all claims other than those of a sexual nature were statute-barred. He held a dormitory supervisor, Plint, liable to six plaintiffs for sexual assault. He held Canada liable for the assaults on the basis of breach of non-delegable statutory duty, and also found that Canada and the Church were jointly and vicariously liable for these wrongs. ***

Vicarious Liability

18. The trial judge accepted that the Church and Canada were vicariously liable for the wrongful acts of the dormitory supervisor, Plint. The Court of Appeal disagreed. While it upheld the trial judge's finding that Canada was vicariously liable because of its control over the principal and activities at AIRS, the court held that the Church's non-profit status exempted it from any liability.

19. I conclude that the trial judge was correct in concluding that both the Church and Canada are vicariously liable for the wrongful acts of Plint.

20. Vicarious liability may be imposed where there is a significant connection between the conduct authorized by the employer or controlling agent and the wrong. Having created or enhanced the risk of the wrongful conduct, it is appropriate that the employer or operator of the enterprise be held responsible, even though the wrongful act may be contrary to its desires: *Bazley v. Curry*, [1999] 2 S.C.R. 534 (S.C.C.). The fact that wrongful acts may occur is a cost of business. The imposition of vicarious liability in such circumstances serves the policy ends of providing an adequate remedy to people harmed by an employee and of promoting deterrence. When determining whether vicarious liability should be imposed, the court bases its decision on several factors, which include: (a) the opportunity afforded by the employer's enterprise for the employee to abuse his power; (b) the extent to which the wrongful act furthered the employer's interests; (c) the extent to which the employment situation created intimacy or other conditions conducive to the wrongful act; (d) the extent of power conferred on the employee in relation to the victim; and (e) the vulnerability of potential victims.

21. I turn first to the vicarious liability of the Church. On the documents, the Church was Plint's immediate employer. Plint was in charge of the dormitory in which Mr. Barney slept and was answerable to the Church. The trial judge considered the legal test for vicarious liability and concluded that the Church was one of Plint's employers. It employed him in furtherance of its interest in providing residential education to Aboriginal children, and gave him the control and opportunity that made it possible for him to prey on vulnerable victims. In these circumstances, the trial judge found the Church, together with Canada, to be vicariously liable for Plint's sexual assault of the children. However, the Court of Appeal concluded that because of management arrangements between the Church and Canada, the Church could not be considered Plint's employer for purposes of vicarious liability. ***

34. *** [T]he incontrovertible reality is that the Church played a significant role in the running of the school. It hired, fired and supervised the employees. It did so for the government of Canada, but also for its own end of promoting Christian education to Aboriginal children. The trial judge's conclusion that the Church shared a degree of control of the situation that gave rise to the wrong is not negated by the argument that as a matter of law Canada retained residual control, nor by formalistic arguments that the Church was only the agent of Canada. Canada had an important role, to be sure, which the trial judge recognized in holding it vicariously liable for 75% of the loss. But that does not negate the Church's role and the vicarious liability it created.

38. In this case, the trial judge specifically found a partnership between Canada and the Church, as opposed to finding that each acted independently of the other. No compelling jurisprudential reason has been adduced to justify limiting vicarious liability to only one employer, where an employee is employed by a

partnership. Indeed, if an employer with *de facto* control over an employee is not liable because of an arbitrary rule requiring only one employer for vicarious liability, this would undermine the principles of fair compensation and deterrence. I conclude that the Church should be found jointly vicariously liable with Canada for the assaults, contrary to the conclusions of the Court of Appeal.

The Doctrine of Charitable Immunity

39. The Court of Appeal went on to find that in any event the Church would be exempted from any liability on the basis of the doctrine of charitable immunity. In effect, the Court of Appeal created a limited status-based exemption from liability for non-profit organizations. It stated that in a situation where "the government is liable and in which the non-profit charitable organization is not at fault and, if it can be said to have introduced the risk at all, did so to a lesser degree than government, no liability should be imposed upon the organization" (para. 48).

40. This conclusion rests on a misapprehension of the principles governing vicarious liability and more particularly, the decisions of this Court in ***Bazley*** and ***Jacobi v. Griffiths***, [1999] 2 S.C.R. 570 (S.C.C.). It seeks to ground itself in the discussion in ***Bazley*** of risk allocation, namely the argument that as between the enterprise that introduces the risk which produces the harm and the victim, it may be fair to require the enterprise to bear the loss, provided there is a sufficient connection between the enterprise and the harm. The Court of Appeal then extends this observation to reason that it is the party best able to bear the loss that should be liable, provided it bears more responsibility than a party less able to pay. Reasoning that the government of Canada is more at fault and better able to bear the loss than the Church, a non-profit organization, it concludes that the Church should not be liable and that Canada alone should bear the loss. The result is to convert a policy observation in ***Bazley*** into a free-standing legal test that dictates that non-profit organizations should be free from liability for wrongs committed by their employees, provided they are less at fault than a party better able to bear the loss.

41. This class-based exemption finds support neither in principle nor in the jurisprudence. It ignores the other concerns raised in ***Bazley*** that led the Court to reject a class-based exemption from vicarious liability. First, exempting non-profit organizations when government is present would not motivate such organizations to take precautions to screen their employees and protect children from sexual abuse. The presence of government does not guarantee the safety of children, particularly where, as in this case, the non-profit organization has day-to-day management of the institution.

42. Second, the Church in this case was not working with volunteers and in fact was running a residential school with employees. Thus, arguments that it was less able to supervise its employees' actions are inapplicable; the Church clearly supervised its employees' work and actions and arguably was best placed to do so. The Church enhanced the risk it had introduced by placing Mr. Barney in the care of Plint, whose activities the Church managed.

43. The proposed charitable exemption is problematic on yet other grounds. It raises the difficulty that a host of organizations may claim to be non-profit, some of which the law might not wish to favour with an exemption. Indeed, the government itself may be considered a non-profit institution. And it suggests, contrary to legal principle, that lesser responsibility should be converted to no liability, violating the precept that the judge-made common law must proceed incrementally: ***R. v. Salituro***, [1991] 3 S.C.R. 654 (S.C.C.), at p. 666.

44. One may sympathize with the situation of the Church, which generally acts with laudable motives and now finds itself facing large claims for wrongs committed in its institutions many years ago. However, sympathy does not permit courts to grant exemptions from liability imposed by settled legal principle. I conclude that the Court of Appeal erred in exempting the Church from liability on the ground of charitable immunity. ***

Apportionment of Damages

64. Having found the Church and Canada vicariously liable (and Canada liable for breach of non-delegable duty), the trial judge found Canada to have been 75% at fault and the Church 25% at fault. Since he found them jointly and severally liable, the parties may recover full damages against either or both of them.

However, the issue remains whether either of the parties to the joint enterprise that led to the loss is entitled to be completely or partially indemnified by the other. ***

67. It remains an open question whether the term "fault" in the *Negligence Act*, R.S.B.C. 1996, c. 333 [§18.2.1] includes vicarious liability. *** However, it is not necessary to resolve this dispute. If vicarious liability amounts to "fault" under the *Negligence Act*, the trial judge's conclusion that Canada was 75% at fault would amount to a finding that fault could be apportioned, with the result that s. 1(2) would not apply to impose an equal allocation. On the other hand, if vicarious liability is not "fault" under the Act, then the Act does not apply. In this case, liability may be assigned at common law, with the same result. ***

73. I would confirm that damages should be apportioned 75% to Canada and 25% to the Church. ***

Conclusion

97. I conclude that the Court of Appeal erred in finding that the Church was not vicariously liable for the sexual abuse to Mr. Barney. The Court of Appeal also misapplied *Bazley* to find the Church immune from liability. ***

REFLECTION:

- *What considerations favoured the imposition of vicarious liability for Plint's sexual abuse? In what way was the principal-agent relationship different in this case as compared to B.(E.) v. Order of the Oblates (§23.1.1)?*
- *How significant to the vicarious liability enquiry is a principal's affording an agent a position of power or authority over vulnerable persons?*[788]
- *What was the Court of Appeal's rationale for shielding the Church under the "doctrine of charitable immunity"? What was problematic about that holding as a matter of principle and policy?*

23.1.4 Attorney General (British Virgin Islands) v. Hartwell [2004] UKPC 12

✗**REF: §19.5.1.3**

LORD NICHOLLS OF BIRKENHEAD: ***

14. The immediate cause of Mr Hartwell's injuries was the deliberate, reckless act of Laurent firing his revolver in the crowded bar. Laurent was consumed by anger and jealousy at the sight of Ms Lafond in company with Mr Vanterpool on the fateful evening. He fired shots at one or other or both of them. So this is not a case where a police officer used a service revolver incompetently or ill-advisedly in furtherance of police duties. Laurent used a service revolver, to which he had access for police purposes, in pursuit of his

[788] See *Hayes v Saint-John (City)*, 2023 NBCA 79:
"52. In *Jacobi v. Griffiths*, the minority rejected the suggestion "that an employee's job must bear a sufficient similarity to parenting to invoke vicarious liability in child abuse cases": para. 26. ***
54. The denial of vicarious liability by the City for Estabrooks' sexual abuse of class members, during his working hours as a City police officer, cannot be reconciled with the observations of both the majority and the minority in *Jacobi v. Griffiths* relating to vicarious liability for sexual assaults committed by police officers while on duty. Nor, for that matter, can the denial be harmonized with the factors *Bazley* tells us predominate in determining vicarious liability in cases involving sexual abuse of children by employees with job-created authority over them.
55. In cases of sexual assaults on children by police officers, it is their job-created power over the children that is the most relevant source of "connectedness": *Jacobi v. Griffiths*, para. 64. Indeed, the power relationship between Estabrooks and the children he sexually abused, which is traceable to his job with the City, provides the close connection needed to warrant the imposition of vicarious liability: *Bazley*, para. 46. The City provided not only the locale (City police cruiser) and the opportunity to commit the sexual assaults; it enhanced the risk of their occurrence by providing Estabrooks with job-sourced authority over the children and all the "bells and whistles" that led them to trust him unconditionally (police cruiser, police uniform and police badge) and to fear him (handgun).
56. In my judgment, the requisite strong connection between Estabrooks' job and his wrongdoing is established. I am satisfied that, on a proper application of the principles adopted in *Bazley* and *Jacobi v. Griffiths*, the City is vicariously liable, at common law, for Estabrooks' sexual abuse of the class members, during his working hours as a City police officer. For an illustration of the application of those principles to a case of sexual assault by a police officer, while on duty, see *Evans v. Sproule*, [2008] O.J. No. 4518 (QL) (S.C.J.), paras. 83-100. ***"

own misguided personal aims.

15. Mr Hartwell's claim is that, none the less, the Government of the British Virgin Islands is liable in law for the consequences of PC Laurent's wrongful acts. There are many circumstances where one person may be liable for a wrong deliberately committed by another. Foremost among such instances are those giving rise to 'vicarious' liability of an employer for acts done by an employee in the course of his employment. Mr Hartwell has advanced a case based on the government's vicarious liability as employer for acts done by Laurent as a police officer.

16. *** The applicable test is whether PC Laurent's wrongful use of the gun was so closely connected with acts he was authorised to do that, for the purposes of liability of the government as his employer, his wrongful use may fairly and properly be regarded as made by him while acting in the ordinary course of his employment as a police officer: see *Lister v. Hesley Hall Ltd* [2001] UKHL 22, [2001] 2 All ER 769 at [28], [69] and *Dubai Aluminium Co Ltd v. Salaam* [2002] UKHL 48, [2003] 3 LRC 682 at [23]. The connecting factors relied upon as satisfying this test are that Laurent was a police constable on duty at the time of the shooting (working his three-day shift on Jost Van Dyke), that his jurisdiction extended to Virgin Gorda and that before leaving Jost Van Dyke he had improperly helped himself to the police revolver kept in the substation on that island.

17. These factors fall short of satisfying the applicable test. From first to last, from deciding to leave the island of Jost Van Dyke to his use of the firearm in the bar of the Bath & Turtle, Laurent's activities had nothing whatever to do with any police duties, either actually or ostensibly. Laurent deliberately and consciously abandoned his post and his duties. He had no duties beyond the island of Jost Van Dyke. He put aside his role as a police constable and, armed with the police revolver he had improperly taken, he embarked elsewhere on a personal vendetta of his own. That conduct falls wholly within the classical phrase of 'a frolic of his own'. ***

REFLECTION:

- *Do you agree with the Privy Council's reasoning? How would this case be decided under the approach elucidated by the Supreme Court of Canada in Bazley v. Curry and Jacobi v. Griffiths?*

23.1.5 Cross-references

- *Binsaris v. Northern Territory* [2020] HCA 22, [23], [43]-[44]: §2.2.4, §6.6.4.
- *Boucher v. Wal-Mart Canada Corp.* [2014] ONCA 419, [3]: §3.2.4.
- *Armory v. Delamirie* [1722] EWHC KB J94: §8.2.2.
- *Home Office v. Dorset Yacht Co. Ltd* [1970] UKHL 2, [2]-[3]: §13.2.3.

23.1.6 Further material

- S. Deakin, "The Evolution of Vicarious Liability" *Allen & Overy Lecture* (University of Cambridge, 2017) 📺.
- Law Pod UK Podcast, "Vicarious Liability" (Apr 9, 2020) 🎧.
- J.W. Neyers, "A Theory of Vicarious Liability" (2005) 43 Alberta L Rev 287.
- Y. Shao, "Evolution of Vicarious Liability: How the Independent Contractor Defence was Lost" (2019) 6 NZ Pub Int LJ 63.
- N.D. Stefano, "A Comparative Look at Vicarious Liability for Intentional Wrongs and Abuses of Power in Canadian Law" (2020) 98 Canadian Bar Rev 1.
- M. Cappelletti, "A Pluralist View of Vicarious Liability in Tort" (2024) 140 L Quarterly Rev 61.
- P. Huberman, "A Theory of Vicarious Liability for Autonomous-Machine-Caused Harm" (2021) 58 Osgoode Hall LJ 233.
- B. von Tigerstrom, "Direct and Vicarious Liability for Tort Claims Involving Invasion of Privacy" (2018) 96 Canadian Bar Rev 539.
- P. Giliker (ed), *Vicarious Liability in the Common Law World* (Oxford: Hart Publishing, 2022).

- C. Baksi, "Judges Owed a Duty of Care, Government Concedes" The Law Society Gazette (July 23, 2021).

23.2 Statutory vicarious and direct liability

23.2.1 Proceedings against the Crown in Victorian England

A.V. Dicey, Introduction to the Study of the Law of the Constitution (8th ed., 1915), Roger E. Michener ed. (Indianapolis: Liberty Fund, reprint 1982), 417-418

Technically it is impossible under English law to bring an action against the Crown, and this impossibility is often said to be based on the principle that the Crown can do no wrong. Hence well-informed foreign critics, and perhaps some Englishmen also, often think that there is in reality no remedy against the Crown, or in other words, against the Government, for injuries done to individuals by either,

1. The breach of a contract made with the Crown, or with a Government department, or

2. A wrong committed by the Crown, or rather by its servants.

This idea is however in substance erroneous. ***

Neither an action nor a Petition of Right lies against the Crown for a wrong committed by its servants.

The remedy open to a person injured by a servant of the Crown in the course of his service is an action against the person who has actually done or taken part in doing the wrongful act which has caused damage. But, speaking generally, no injustice results from this, for the Crown, i.e. the Government, usually pays damages awarded against a servant of the State for a wrong done in the course of his service. Actions, for instance, have been constantly brought against officers of the Royal Navy for damage done by collisions with other ships caused by the negligence of such officers. The damage recovered against the officer is almost invariably paid by the Admiralty.

It would be an amendment of the law to enact that a Petition of Right should lie against the Crown for torts committed by the servants of the Crown in the course of their service. But the technical immunity of the Crown in respect of such torts is not a subject of public complaint, and in practice works little, if any, injustice.

It should be further remembered that much business which in foreign countries is carried on by persons who are servants of the State is in England transacted by corporate bodies, e.g. railway companies, municipal corporations, and the like, which are legally fully responsible for the contracts made on their behalf or wrongs committed by their officials or servants in the course of their service.[789] *** […continue reading]

REFLECTION:

- *Is Prof. Dicey's argument compelling that in Victorian England the ability to sue servants of the Crown made up for the then inability to sue the Crown directly owing to the doctrine of sovereign immunity?*
- *If the principle of equality under ordinary law was fully reflected in the English law of Dicey's time, why were the Crown Proceedings Acts enacted in the mid-twentieth century considered to be necessary?*[790]

[789] See Lowell, *The Government of England*, ii. pp. 490–494.

[790] See *Republic v. High Court (fast Track Div.) Accra* [2013] GHASC 140 *per* Dr. Date-Bah JSC: "At common law, originally, proceedings could be brought against the Crown for breach of contract or restitution of property only after obtaining a *fiat* from the Crown and through the procedure of the petition of right. Indeed, in tort, the Crown could not be sued at all, since "the King could do no wrong". By the *Crown Proceedings Act* 1947 of the United Kingdom, these two antiquated common law doctrines were abolished and the liability of the Crown was made as near as possible to that of a private citizen. This reform of abolishing the necessity for a *fiat* and a petition of right and the removal of the State's immunity from suit for tort made the State and all other legal persons equal before the law, at least in the formal sense. This is to be contrasted with the regime in many European States, where a different and separate system of administrative law governs the relations between the State and other legal persons. Indeed the common subjection of

23.2.2 Crown liability

Crown Liability and Proceedings Act, RSC 1985, c C-50, s 3

3. Liability

The Crown is liable for the damages for which, if it were a person, it would be liable *** in respect of

(i) a tort committed by a servant of the Crown, or

(ii) a breach of duty attaching to the ownership, occupation, possession or control of property.

23.2.2.1 Provincial Crown liability statutes

- Alberta: Proceedings Against the Crown Act, RSA 2000, c P-25.
- British Columbia: Crown Proceeding Act, RSBC 1996, c 89.
- Manitoba: The Proceedings Against the Crown Act, CCSM c P140.
- New Brunswick: Proceedings Against the Crown Act, RSNB 1973, c P-18.
- Newfoundland and Labrador: Proceedings Against the Crown Act, RSNL 1990, c P-26.
- Nova Scotia: Proceedings against the Crown Act, RSNS 1989, c 360.
- Ontario: Crown Liability and Proceedings Act, 2019, SO 2019, c 7, Sch 17.
- Prince Edward Island: Crown Proceedings Act, RSPEI 1988, c C-32.
- Saskatchewan: The Proceedings Against the Crown Act, 2019, SS 2019, c P-27.01.

REFLECTION:

- *What is the purpose of the Crown liability statutes? Do they facilitate the Diceyan principle of equality under ordinary law (§1.1.1)?*

23.2.2.2 Francis v. Ontario [2021] ONCA 197

✗**REF: §19.5.2.3, §20.6.3, §24.2.2**

DOHERTY AND NORDHEIMER JJ.A. (H. YOUNG J.A. concurring): ***

7. In 2017, the respondent commenced this proceeding as a class action. He sought declarations that his, and the class members', rights under the *Charter* had been infringed by Ontario's system of administrative segregation and that Ontario was liable in negligence. The respondent sought damages in negligence and under s. 24 of the *Charter*. He also sought punitive damages. ***

142. *** Ontario asserts that the respondent's claim is fundamentally flawed because it does not advance specific allegations of tortious conduct by individual Crown servants, for whom Ontario would be vicariously liable. Rather, Ontario says that the claim advanced is effectively one of direct liability from which Ontario is immune under s. 5 of the [*Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27].[791] Ontario is only liable for indirect claims, under s. 5(1) ***. ***

144. *** [I]t is clear that the allegations being made against Ontario arise from its vicarious liability for the negligent acts of its servants. *** It is axiomatic to point out that Ontario can only operate through the actions of individuals.

145. There is no absolute requirement that the individual servants of the Crown, who undertake the negligent acts, must be named in the proceeding. Section 5(2) of the PACA simply says that no proceeding can be brought against the Crown "unless a proceeding in tort in respect of such act or omission *may* be brought against that servant or agent" (emphasis added). The section does not require that the proceeding

the State and other legal persons to the same body of rules was viewed by Dicey as an important aspect of his conception of the rule of law. ***"

[791] Section 31(3) of the [*Crown Liability and Proceedings Act*, 2019, S.O. 2019 c. 7, Sch. 17] continues the application of the PACA to claims made prior to s. 31 coming into force.

must be brought against that servant or agent.

146. We accept that best practices in pleadings might suggest that the negligent individual, from whom vicarious liability arises, be named as a party, at least in a case where only one event or individual is involved. However, this is a class proceeding in which collective claims are made. As the motion judge pointed out, it is impractical to expect a representative plaintiff, advancing a claim covering a class period of almost three and one-half years, with class members in 32 correctional institutions, to name all of the individuals involved in the collectively negligent acts.

147. As an alternative, best practices in pleadings might suggest naming a John and Jane Doe to represent all of those individuals in such situations, but the failure to do so is not fatal to the claim. ***

REFLECTION:

- *Why is it beneficial that the Crown can be sued directly for the torts of its servants?*
- *Why might it be problematic to require plaintiffs to name individual Crown servants in their pleadings?*

23.2.2.3 Cross-references

- *Binsaris v. Northern Territory* [2020] HCA 22, [44]: §6.6.4.
- *Robinson v. Chief Constable of West Yorkshire* [2018] UKSC 4, [32]: §19.5.1.2.

23.2.3 Local government liability

Local Government Act, RSBC 2015, c 1, s 738, 740

738. Immunity for individual local public officers ***

(2) No action for damages lies or may be instituted against a local public officer or former local public officer

(a) for anything said or done or omitted to be said or done by that person in the performance or intended performance of the person's duty or the exercise of the person's power, or

(b) for any alleged neglect or default in the performance or intended performance of that person's duty or the exercise of that person's power.

(3) Subsection (2) does not provide a defence if

(a) the local public officer has, in relation to the conduct that is the subject matter of the action, been guilty of dishonesty, gross negligence or malicious or wilful misconduct, or

(b) the cause of action is libel or slander.

(4) Subsection (2) does not absolve any of the corporations or bodies referred to in subsection (1) (a) to (l) from vicarious liability arising out of a tort committed by any of the individuals referred to in subsection (1) for which the corporation or body would have been liable had this section not been in force.

740 Indemnification against proceedings for local government officials

(1) In this section:

"indemnification" means the payment of amounts required or incurred

(a) to defend an action or prosecution brought against a person in connection with the exercise or intended exercise of the person's powers or the performance or intended performance of the person's duties or functions,

(b) to satisfy a judgment, award or penalty imposed in an action or prosecution referred to in paragraph (a), or

(c) in relation to an inquiry under the *Public Inquiry Act*, or to another proceeding, that involves the administration of the municipality or regional district or the conduct of municipal or regional district business; ***

(2) Indemnification for municipal officials and regional district officials may be provided as follows:

(a) a council may do the following:

(i) by bylaw, provide for the indemnification of municipal officials in accordance with the bylaw;

(ii) by resolution in a specific case, indemnify a municipal official;

(b) a board may do the following:

(i) by bylaw, provide for the indemnification of regional district officials in accordance with the bylaw;

(ii) by resolution in a specific case, indemnify a regional district official.

(3) As a limit on indemnification under subsection (2), a council or board must not pay a fine that is imposed as a result of a municipal official or regional district official, as applicable, being convicted of an offence that is not a strict or absolute liability offence. ***

23.2.3.1 Other provincial local government statutes

- Alberta: Municipal Government Act, RSA 2000, c M-26, ss 535(2)-(4), 535.2.
- Manitoba: Municipal Act, CCSM c M225, ss 403, 404(1).
- New Brunswick: Local Governance Act, SNB 2017, c 18, ss 178, 179.
- Newfoundland and Labrador: City of St. John's Act, RSNL 1990, c C-17, s 323.
- Nova Scotia: Municipal Government Act, SNS 1998, c 18, ss 185, 300, 301, 499, 504, 513-515.
- Ontario: Municipal Act, 2001, SO 2001, c 25, s 448.
- Prince Edward Island: Municipal Government Act, RSPEI 1988, c M-12.1, s 250, 251.
- Québec: Professional Code, CQLR c C-26, art 193; Fire Safety Act, CQLR c S-3.4, s 47.
- Saskatchewan: The Municipalities Act, SS 2005, c M-36.1, ss 355, 356(1).

REFLECTION:

- *Local government statutes often immunise and indemnify government officers and employees from personal liability for negligence (but not for intentional or gross misconduct), while maintaining their government employer as vicariously liable for their actions. How might this operate to the benefit of both plaintiffs and government employees?*
- *Does government servant immunity from negligence liability undermine the goals or principles of tort law?*

23.2.4 Police liability

Police Act, RSBC 1996, c 367, ss 11, 21

11. Ministerial liability

(1) The minister, on behalf of the government, is jointly and severally liable for torts committed by

(a) provincial constables, auxiliary constables, special provincial constables, IIO investigators and enforcement officers appointed on behalf of a ministry, if the tort is committed in the performance of their duties, and

(b) municipal constables and special municipal constables in the performance of their duties when acting in other than the municipality where they normally perform their duties.

(2) Even though a person referred to in subsection (1)(a) or (b) is not found liable for a tort allegedly

committed by the person in the performance of his or her duties, the minister may pay an amount the minister considers necessary to

> (a) settle a claim against the person for a tort allegedly committed by the person in the performance of his or her duties, or
>
> (b) reimburse the person for reasonable costs incurred by the person in defending a claim against the person for a tort allegedly committed in the performance of his or her duties.

(3) The Minister of Finance must pay out of the consolidated revenue fund, on the requisition of the minister, money required for the purposes of subsection (2).

21. Personal liability ***

(2) No action for damages lies against a police officer or any other person appointed under this Act for anything said or done or omitted to be said or done by him or her in the performance or intended performance of his or her duty or in the exercise of his or her power or for any alleged neglect or default in the performance or intended performance of his or her duty or exercise of his or her power.

(3) Subsection (2) does not provide a defence if

> (a) the police officer or other person appointed under this Act has, in relation to the conduct that is the subject matter of action, been guilty of dishonesty, gross negligence or malicious or wilful misconduct, or
>
> (b) the cause of action is libel or slander.

(4) Subsection (2) does not absolve any of the following, if they would have been liable had this section not been in force, from vicarious liability arising out of a tort committed by the police officer or other person referred to in that subsection:

> (a) a municipality, in the case of a tort committed by any of its municipal constables, special municipal constables, designated constables, enforcement officers, bylaw enforcement officers or an employee of its municipal police board, if any;
>
> (b) a regional district, government corporation or prescribed entity, in the case of a tort committed by any of its designated constables or enforcement officers;
>
> (c) the minister, in a case to which section 11 applies.

23.2.4.1 Other provincial police statutes

- Alberta: Police Act, RSA 2000, c P-17, ss 39.
- Manitoba: The Police Services Act, CCSM c P94.5, ss 40, 44.
- New Brunswick: Police Act, SNB 1977, c P-9.2, ss 17, 17.6.
- Newfoundland and Labrador: Royal Newfoundland Constabulary Act, 1992, SNL 1992, c R-17, s 58.
- Nova Scotia: Police Act, SNS 2004, c 31, s 43.
- Ontario: Police Services Act, RSO 1990, c P.15, s 50.
- Prince Edward Island: Police Act, RSPEI 1988, c P-11.1, ss 14.4, 15, 45, 46, 50, 51.
- Québec: Civil Code of Québec, CQLR c CCQ-1991, arts 1457, 1463, 1464.
- Saskatchewan: Police Act, 1990, SS 1990-91, c P-15.01, s 10(3).

REFLECTION:

- *In British Columbia, police officers are immune from personal liability for negligence (but not for intentional or gross misconduct). In Ontario officers are not immune from negligence claims, though they are indemnified from the financial costs of suit by their employment arrangement. In all jurisdictions the relevant public authority is also legally responsible for its officers' actions. Why might a plaintiff wish to sue an officer*

personally rather than only the relevant public authority?[792]

23.2.4.2 British Columbia v. Insurance Corp. of British Columbia [2008] SCC 3

✗REF: §18.2.3.1

LEBEL J.: ***

3. *** Under the *Police Act*, R.S.B.C. 1996, c. 367, s. 11, the AGBC is deemed to be liable for torts committed by provincial constables in the performance of their duties. Section 21(2) of the *Police Act* exempts police officers from liability to pay damages resulting from acts of simple negligence in the performance of their duties by barring any actions against them. According to s. 11, the AGBC is "jointly and severally" liable for torts committed by a police officer.

4. After the initial finding of liability and a judgment which determined the amount of compensation, the focus of the litigation shifted to determining who would pay the compensation—the AGBC or the Insurance Corporation of British Columbia ("ICBC")—given that T.B. was an uninsured driver. ***

6. In the meantime, the family of the deceased received full payment of the damages from the AGBC. [The family] assigned its rights to the AGBC. ***

7. At the hearing in this Court, the AGBC stated that the sole issue before us is the scope of his vicarious liability under the *Police Act*. He asserted that the Court need not comment on any other issue.

8. The AGBC addressed the scope of his liability. In brief, he argued that it is limited and does not exceed the proportion of the damages attributed to the fault of the police officer.

9. In my opinion, Levine J.A. [2003 BCSC 958] correctly defined the scope and effect of the vicarious liability imposed on the AGBC for torts committed by police officers. She stated, at paras. 21 and 22, that the AGBC's liability was the liability that would have been imposed on the officer were it not for the immunity granted in s. 21.

10. Section 21 grants immunity to the police officer. But s. 11 protects the victim by transferring the tortfeasor's liability to the AGBC. The AGBC takes the officer's place. The victim retains his or her rights, but against a different debtor. If the officer would have been jointly and severally liable with another tortfeasor but for the statutory immunity, the AGBC will also be so liable.

11. Under the *Police Act*, the imposition of vicarious liability requires fault on the officer's part and damages. Section 21 exempts the officer from liability, and the liability arising from his fault is transferred to the AGBC. As the damages are deemed to be indivisible, the police officer and T.B. would normally be jointly and severally liable under s. 4(2) of the *Negligence Act* [§18.2.1]. Because s. 21(2) of the *Police Act* exempts the officer from liability while s. 11 deems the AGBC to be liable, the victim is entitled to claim full compensation from the AGBC. ***

REFLECTION:

- *Should public officers be personally liable to private suit for negligence in the course of their public duties? Or is it more appropriate that only the public authority bear liability?*

23.2.5 Motor vehicle owner liability

Motor Vehicle Act, RSBC 1996, c 318, s 86

86. Responsibility of owner or lessee in certain cases

(1) In the case of a motor vehicle that is in the possession of its owner, in an action to recover for loss or damage to persons or property arising out of the use or operation of the motor vehicle on a highway, a

[792] See S. Beswick, "Equality Under Ordinary Law" (2024) 2 Supreme Court L Rev (3d) (*forthcoming*).

person driving or operating the motor vehicle who

(a) is living with, and as a member of the family of, the owner, or

(b) acquired possession of the motor vehicle with the consent, express or implied, of the owner,

is deemed to be the agent or servant of, and employed as such by, that owner and to be driving or operating the motor vehicle in the course of his or her employment with that owner. ***

(2) Nothing in this section relieves a person deemed to be the agent or servant of the owner or lessee and to be driving or operating the motor vehicle in the course of his or her employment from the liability for such loss or damage. ***

23.2.5.1 Other provincial motor vehicle statutes

- Alberta: Traffic Safety Act, RSA 2000, c T-6, s 187(2).
- Manitoba: The Highway Traffic Act, CCSM c H60, s 153(3).
- New Brunswick: Motor Vehicle Act, RSNB 1973, c M-17, s 267.
- Newfoundland and Labrador: Highway Traffic Act, RSNL 1990, c H-3, s 200.
- Nova Scotia: Insurance Act, RSNS 1989, c 231, s 148D(2).
- Ontario: Highway Traffic Act, RSO 1990, c H.8, s 192.
- Prince Edward Island: Highway Traffic Act, RSPEI 1988, c H-5, s 287.
- Saskatchewan: The Automobile Accident Insurance Act, RSS 1978, c A-35, s 42(1).

REFLECTION:

- *Why should the owner of a vehicle be legally responsible for the careless actions of another driver to whom they have lent their vehicle? Is this consistent with the principles or policies that underpin tort law?*

23.2.6 Parental liability

Parental Liability Act, SBC 2001, c 45, s 3

3. Parent's liability

Subject to section 6 and Part 3, if a child intentionally takes, damages or destroys property of another person, a parent of the child is liable for the loss of or damage to the property experienced as a result by an owner and by a person legally entitled to possession of the property.

6 Maximum award

(1) Subject to subsection (2), if either an owner of property or a person legally entitled to possession of property suffers property loss, the owner, the person legally entitled to possession of the property or both may commence a civil action under this Act against a parent of a child who caused the property loss to recover damages, in an amount not exceeding $10,000, excluding interest and costs, in respect of the property loss.

(2) If one or more persons has suffered property loss as a result of the action of one or more children, the total amount of damages awarded against all the parents of all the children who caused the property loss must not exceed $10,000, irrespective of the number of parents of the children who are liable under this Act.

School Act, RSBC 1996, c 412, s 10

10. Liability for damage to property

If property of a board or a francophone education authority is destroyed, damaged, lost or converted by the intentional or negligent act of a student or a francophone student, that student and that student's parents are jointly and severally liable to the board or francophone education authority in respect of the act of that

student.

23.2.6.1 Other provincial parental liability statutes

- Manitoba: The Parental Responsibility Act, CCSM c P8, s 3.
- Ontario: Parental Responsibility Act, 2000, SO 2000, c 4, s 2(1).
- Québec: Civil Code of Québec, CQLR c CCQ-1991, arts 1459, 1460.

REFLECTION:

- *Why should parents be legally responsible for the harmful actions of their child when the child is in the care and supervision of a third party?*

23.2.6.2 Nanaimo-Ladysmith School District No. 68 v. Dean [2015] BCSC 11

British Columbia Supreme Court – 2015 BCSC 11

FITZPATRICK J.:

1. On January 17, 2012, the defendant, Carson Dean, was a 14-year-old student attending Wellington Secondary School in Nanaimo, BC, a school owned by the plaintiff, Board of Education of School District No. 68. During the lunch break that day, Carson decided to play a prank on his friend by attaching his friend's padlock to a sprinkler head. That prank led to the school's entire sprinkler system being activated which caused extensive damage to the school. ***

93. In my view, the School District has proven its case in terms of the applicability of s. 10 of the *School Act* to the circumstances here.

94. I am sure that this is a very unfortunate result for the Dean family and perhaps it will be for other families in the future. This was clearly the result of a young boy misbehaving and thinking that the only grief to come of it would be to Ben and perhaps the janitor in removing the padlock. Obviously, more dire consequences followed. However, if there is to be any change to this provision in the *School Act*, that is a matter for the legislature, not the courts.

95. The action is allowed and judgment is granted against all defendants in the amount of $48,630.47, plus court order interest and costs to be assessed.

REFLECTION:

- *The school was insured for this damage. Was it fair that Carson's parents had to foot the bill?*[793]

23.2.7 Further material

- J. Dietrich & I. Field, "Statute and Theories of Vicarious Liability" (2019) 43 Melbourne U L Rev 515.
- P. Hogg, P. Monahan, W.K. Wright & E. Chamberlain, *Liability of the Crown* (*forthcoming* 5th edn, Toronto ON: Carswell, 2024).

[793] See K. Yu, "Parents pay for Nanaimo student's school prank" Nanaimo News Bulletin (Jan 12, 2015).

24 CIVIL WRONGS UNDER BILLS OF RIGHTS

24.1 Charter rights and values

"General Principles for the Interpretation and Application of the Charter" in Charterpedia (Government of Canada, 2022)

The obligation on courts to adopt *Charter*-consistent interpretations of law also extends to the common law. Courts should, where possible, develop common law rules in light of *Charter* values,[794] even in the absence of an element of government action sufficient to engage the *Charter* directly.[795] Courts and tribunals must also ensure that that any discretion available to them is exercised in a manner consistent with the *Charter*.[796]

The courts are cautious when it comes to major changes to the common law which may require the development of subsidiary rules and procedures relevant to their implementation. Complex legal developments are best left to legislators. Courts will not shy away from incremental changes to common law rules where required to reflect societal change.[797] *** […continue reading]

REFLECTION:

- *Why do Charter rights not apply directly to tort disputes between parties?*
- *What are "Charter values"? How should Charter values influence our understanding of the common law?*

24.1.1 Hill v. Church of Scientology of Toronto [1995] CanLII 59 (SCC)

✗**REF: §5.1.3, §9.3.2, §9.4.2, §9.5.3, §18.2.3.2**

CORY J. (LA FOREST, GONTHIER, MCLACHLIN, IACOBUCCI, MAJOR JJ. concurring): ***

63. *** The appellants contend that the common law of defamation has failed to keep step with the evolution of Canadian society. They argue that the guiding principles upon which defamation is based place too much emphasis on the need to protect the reputation of plaintiffs at the expense of the freedom of expression of defendants. This, they say, is an unwarranted restriction which is imposed in a manner that cannot be justified in a free and democratic society. The appellants add that if the element of government action in the present case is insufficient to attract *Charter* scrutiny under s. 32, the principles of the common law ought, nevertheless, to be interpreted, even in a purely private action, in a manner consistent with the *Charter*. ***

65. The appellants have not challenged the constitutionality of any of the provisions of the *Libel and Slander Act*, R.S.O. 1990, c. L.12. The question, then, is whether the common law of defamation can be subject to *Charter* scrutiny. ***

(1) Section 32: Government Action ***

67. In *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, McIntyre J., with regard to the application of the *Charter* to the common law, stated at pp. 598-99:

> It is my view that s. 32 of the *Charter* specifies the actors to whom the *Charter* will apply. They are

[794] *R. v. Salituro*, [1991] 3 S.C.R. 654; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Bell ExpressVu Limited Partnership v. Rex*, at para. 61.
[795] *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 [§24.1.1].
[796] *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at page 1078; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459; *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, at paras. 55, 77; *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 SCR 134, at para. 117; *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] 3 S.C.R. 157, at para. 49).
[797] *R. v. Mann*, [2004] 3 S.C.R. 59 at para. 17.

> the legislative, executive and administrative branches of government. It will apply to those branches of government whether or not their action is invoked in public or private litigation …. It will apply to the common law, however, only in so far as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom. [Emphasis added.]

68. La Forest J., writing for the majority in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, stressed the importance of this limitation on the application of the *Charter* to the actions of government. He said this at p. 262:

> The exclusion of private activity from the *Charter* was not a result of happenstance. It was a deliberate choice which must be respected. We do not really know why this approach was taken, but several reasons suggest themselves. Historically, bills of rights, of which that of the United States is the great constitutional exemplar, have been directed at government. Government is the body that can enact and enforce rules and authoritatively impinge on individual freedom. Only government requires to be constitutionally shackled to preserve the rights of the individual.

69. La Forest J. warned that subjecting all private and public action to constitutional review would mean reopening whole areas of settled law and would be "tantamount to setting up an alternative tort system" (p. 263). He expressed the very sage warning that this "could strangle the operation of society" (p. 262). ***

82. There is no government action involved in this defamation suit. It now must be determined whether a change or modification in the law of defamation is required to make it comply with the underlying values upon which the *Charter* is founded.

(2) Section 52: *Charter* Values and the Common Law

(a) Interpreting the Common Law in Light of the Values Underlying the Charter ***

91. It is clear from *Dolphin Delivery*, *supra*, that the common law must be interpreted in a manner which is consistent with *Charter* principles. This obligation is simply a manifestation of the inherent jurisdiction of the courts to modify or extend the common law in order to comply with prevailing social conditions and values. ***

92. Historically, the common law evolved as a result of the courts making those incremental changes which were necessary in order to make the law comply with current societal values. The *Charter* represents a restatement of the fundamental values which guide and shape our democratic society and our legal system. It follows that it is appropriate for the courts to make such incremental revisions to the common law as may be necessary to have it comply with the values enunciated in the *Charter*.

93. When determining how the *Charter* applies to the common law, it is important to distinguish between those cases in which the constitutionality of government action is challenged, and those in which there is no government action involved. It is important not to import into private litigation the analysis which applies in cases involving government action.

94. In *Dolphin Delivery*, *supra*, it was noted that the *Charter* sets out those specific constitutional duties which the state owes to its citizens. When government action is challenged, whether it is based on legislation or the common law, the cause of action is founded upon a *Charter* right. The claimant alleges that the state has breached its constitutional duty. The state, in turn, must justify that breach. While criminal cases present the prime example of government action, challenges to government action can also arise in civil cases. The state's obligation to uphold its constitutional duties is no less pressing in the civil sphere than in the criminal. ***

95. Private parties owe each other no constitutional duties and cannot found their cause of action upon a *Charter* right. The party challenging the common law cannot allege that the common law violates a *Charter* right because, quite simply, *Charter* rights do not exist in the absence of state action. The most that the private litigant can do is argue that the common law is inconsistent with *Charter* values. It is very important to draw this distinction between *Charter* rights and *Charter* values. Care must be taken not to expand the application of the *Charter* beyond that established by s. 32(1), either by creating new causes of action, or

by subjecting all court orders to *Charter* scrutiny. Therefore, in the context of civil litigation involving only private parties, the *Charter* will "apply" to the common law only to the extent that the common law is found to be inconsistent with *Charter* values.

96. Courts have traditionally been cautious regarding the extent to which they will amend the common law. Similarly, they must not go further than is necessary when taking *Charter* values into account. Far-reaching changes to the common law must be left to the legislature.

97. When the common law is in conflict with *Charter* values, how should the competing principles be balanced? In my view, a traditional s. 1 framework for justification is not appropriate. It must be remembered that the *Charter* "challenge" in a case involving private litigants does not allege the violation of a *Charter* right. It addresses a conflict between principles. Therefore, the balancing must be more flexible than the traditional s. 1 analysis undertaken in cases involving governmental action cases. *Charter* values, framed in general terms, should be weighed against the principles which underlie the common law. The *Charter* values will then provide the guidelines for any modification to the common law which the court feels is necessary.

98. Finally, the division of onus which normally operates in a *Charter* challenge to government action should not be applicable in a private litigation *Charter* "challenge" to the common law. This is not a situation in which one party must prove a *prima facie* violation of a right while the other bears the onus of defending it. Rather, the party who is alleging that the common law is inconsistent with the *Charter* should bear the onus of proving both that the common law fails to comply with *Charter* values and that, when these values are balanced, the common law should be modified. In the ordinary situation, where government action is said to violate a *Charter* right, it is appropriate that the government undertake the justification for the impugned statute or common law rule. However, the situation is very different where two private parties are involved in a civil suit. One party will have brought the action on the basis of the prevailing common law which may have a long history of acceptance in the community. That party should be able to rely upon that law and should not be placed in the position of having to defend it. It is up to the party challenging the common law to bear the burden of proving not only that the common law is inconsistent with *Charter* values but also that its provisions cannot be justified. ***

REFLECTION:

- *Why should courts be cautious regarding the extent to which they develop the common law?*
- *Should such judicial caution extend to the adoption of Charter values-reasoning in common law interpretation?*

24.1.2 Jones v. Tsige [2012] ONCA 32

✗**REF: §4.1.1.2, §9.3.6, §20.8.2**

SHARPE J.A. (WINKLER C.J.O. AND CUNNINGHAM A.C.J. concurring): ***

39. *Charter* jurisprudence identifies privacy as being worthy of constitutional protection and integral to an individual's relationship with the rest of society and the state. The Supreme Court of Canada has consistently interpreted the *Charter's* s. 8 protection against unreasonable search and seizure as protecting the underlying right to privacy. In *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] 2 S.C.R. 145 (S.C.C.), at p. 158-59, Dickson J. adopted the purposive method of *Charter* interpretation and observed that the interests engaged by s. 8 are not simply an extension of the concept of trespass, but rather are grounded in an independent right to privacy held by all citizens.

40. In *R. v. Dyment*, [1988] 2 S.C.R. 417 (S.C.C.) at p. 427, La Forest J. characterized the s. 8 protection of privacy as "[g]rounded in a man's physical and moral autonomy" and stated that "privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order." La Forest added, at p. 429:

> In modern society, especially, retention of information about oneself is extremely important. We

> may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected.

41. *Charter* jurisprudence has recognized three distinct privacy interests: *Dyment* at pp. 428-9; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432 (S.C.C.), at paras. 19-23. The first two interests, personal privacy and territorial privacy, are deeply rooted in the common law. Personal privacy, grounded in the right to bodily integrity, protects "the right not to have our bodies touched or explored to disclose objects or matters we wish to conceal." Territorial privacy protects the home and other spaces where the individual enjoys a reasonable expectation of privacy. The third category, informational privacy, is the interest at stake in this appeal. In *Tessling*, Binnie J. described it, at para. 23:

> Beyond our bodies and the places where we live and work, however, lies the thorny question of how much *information* about ourselves and activities we are entitled to shield from the curious eyes of the state (*R. v. S.A.B.*, [2003] 2 S.C.R. 678, 2003 SCC 60). This includes commercial information locked in a safe kept in a restaurant owned by the accused (*R. v. Law*, [2002] 1 S.C.R. 227, 2002 SCC 10, at para. 16). Informational privacy has been defined as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others": A. F. Westin, *Privacy and Freedom* (1970), at p. 7. Its protection is predicated on the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain … as he sees fit. (Report of a Task Force established jointly by Department of Communications/Department of Justice, *Privacy and Computers* (1972), at p. 13.)

42. This characterization would certainly include Jones' claim to privacy in her banking records.

43. In *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 (S.C.C.), Cory J. observed, at para. 121, that the right to privacy has been accorded constitutional protection and should be considered as a *Charter* value in the development of the common law tort of defamation. In *Hill*, Cory J. stated, at para. 121: "reputation is intimately related to the right to privacy which has been accorded constitutional protection." See also *R. v. O'Connor*, [1995] 4 S.C.R. 411 (S.C.C.) at para. 113, *per* L'Heureux-Dubé J.: identifying privacy as "an essential component of what it means to be 'free'."

44. The *Charter* treatment of privacy accords with art. 12 of the *Universal Declaration of Human Rights*, G.A. Res. 271(III), UNGAOR, 3d Sess., Supp. No. 13, UN. Doc. A/810 (1948) 71, which provides that "[n]o one shall be subjected to arbitrary interference with his privacy, home or correspondence" and proclaims that "[e]veryone has the right to the protection of the law against such interference or attacks". Privacy is also recognized as a fundamental human right by art. 17 of the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171.

45. While the *Charter* does not apply to common law disputes between private individuals, the Supreme Court has acted on several occasions to develop the common law in a manner consistent with *Charter* values: see *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, [1986] 2 S.C.R. 573 (S.C.C.), at 603; *R. v. Salituro*, [1991] 3 S.C.R. 654 (S.C.C.), at pp. 666 and 675; *Hill v. Church of Scientology of Toronto* at p. 1169; *Pepsi-Cola Canada Beverages (West) Ltd. v. R.W.D.S.U., Local 558*, 2002 SCC 8, [2002] 1 S.C.R. 156 (S.C.C.); *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640 (S.C.C.) [§5.1.4].

46. The explicit recognition of a right to privacy as underlying specific *Charter* rights and freedoms, and the principle that the common law should be developed in a manner consistent with *Charter* values, supports the recognition of a civil action for damages for intrusion upon the plaintiff's seclusion: see John D.R. Craig, "Invasion of Privacy and Charter Values: The Common Law Tort Awakens" (1997), 42 McGill L.J. 355. ***

REFLECTION:

- *The text of the Canadian Charter of Rights and Freedoms does not mention "privacy." How is privacy nevertheless considered to be a value protected by the Charter?*
- *Given how the Ontario Court of Appeal considered the Charter value of privacy weighed in favour of recognising a new tort of intrusion upon seclusion, what other Charter values might weigh in favour of*

recognising other new torts?

24.1.3 Cross-references

- *R v. Le* [2019] SCC 34, [2]: §2.4.5.
- *Insurance Corp. of British Columbia v. Ari* [2023] BCCA 331, [62]-[88]: §4.2.5.
- *Grant v. Torstar Corp.* [2009] SCC 61, [1]-[3], [38]-[87]: §5.1.4.
- *R. v. Tim* [2022] SCC 12, [3]-[22]: §6.6.2.
- *Neill v. Vancouver Police Dept.* [2005] BCSC 277, [5]-[21]: §8.4.2.
- *Li v. Barber* [2022] ONSC 1513: §9.8.1.2.
- *Hill v. Hamilton-Wentworth Police Services Board* [2007] SCC 41, [38]: §13.4.2.2.

24.1.4 Further material

- P.D. Lauwers, "What Could Go Wrong with Charter Values?" (2019) 91 (2d) Supreme Court L Rev 1; Runnymede Society (Oct 29, 2020) 📺.
- R. Ruparelia, "'I Didn't Mean it that Way!': Racial Discrimination as Negligence" (2009) 44 (2d) Supreme Court L Rev 81.
- J.A. Mackey, "Privacy and the Canadian Media: Developing the New Tort of 'Intrusion Upon Seclusion' with Charter Values" (2012) 2 Western J Legal Studies 1.
- K.J.M. Vallance, "'Lest You Undermine Our Struggle': Sympathetic Action and the Canadian Charter of Rights and Freedoms" (2015) Alberta L Rev 139.
- M. Flaherty, "Private Law and its Normative Influence on Human Rights" in K. Barker & D. Jensen (eds), *Private Law: Key Encounters with Public Law* (Cambridge: Cambridge University Press, 2013).

24.2 Constitutional torts and damages

S. Beswick, "Equality Under Ordinary Law" (2024) 2 Supreme Court L Rev (3d) (forthcoming)

Law enforcement entails the performance of public functions and is subject to public law: the law that governs individuals' relationships with their government. ***

In Canada, constitutional tort claims proceed against the government entity, not against officers personally.[798] Section 24(1) of the *Charter* provides that anyone whose *Charter* rights have been infringed may apply to a court to "obtain such remedy as the court considers appropriate and just in the circumstances."[799] In *Vancouver v. Ward*, the Supreme Court of Canada recognised within s. 24(1) a judicial discretion to award damages against public authorities for the violation of constitutional rights. The purposes of such constitutional tort damages are to compensate victims of government wrongdoing, to vindicate society's interest in upholding *Charter* rights, and to deter the state (not just individual officers) from future violations.[800] *** […continue reading]

REFLECTION:

- *In what ways can Canadian constitutional tort actions be understood to 'follow' common law tort claims?*
- *In the United States, constitutional tort actions are subject to the doctrine of qualified immunity (§6.6.8). What is the rationale of this doctrine? Should constitutional tort actions in Canada be subject to qualified immunity?*

[798] *Vancouver v. Ward*, [2010] 2 SCR 28, 2010 SCC 27 at para. 22 [§24.2.1]. ***
[799] *The Constitution Act*, 1982, Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s. 24.
[800] *Ward*, *supra* at para. 25. See Robert E. Charney and Josh Hunter, "Tort Lite?: *Vancouver (City) v. Ward* and the Availability of Damages for Charter Infringements" (2011) 54 S.C.L.R. 393; W.H. Charles, *Understanding Charter Damages. The Judicial Evolution of a Charter Remedy* (Toronto: Irwin Law, 2016) at ch. 5.

24.2.1 Vancouver (City) v. Ward [2010] SCC 27

Supreme Court of Canada – 2010 SCC 27

MCLACHLIN C.J.C. (FOR THE COURT):

1. The *Canadian Charter of Rights and Freedoms* guarantees the fundamental rights and freedoms of all Canadians and provides remedies for their breach. The first and most important remedy is the nullification of laws that violate the *Charter* under s. 52(1) of the *Constitution Act*, *1982*. This is supplemented by s. 24(2), under which evidence obtained in breach of the *Charter* may be excluded if its admission would bring the administration of justice into disrepute, and s. 24(1)—the provision at issue in this case—under which the court is authorized to grant such remedies to individuals for infringement of *Charter* rights as it "considers appropriate and just in the circumstances". ***

Facts

6. On August 1, 2002, Prime Minister Chrétien participated in a ceremony to mark the opening of a gate at the entrance to Vancouver's Chinatown. During the ceremony, the Vancouver Police Department ("VPD") received information that an unknown individual intended to throw a pie at the Prime Minister, an event that had occurred elsewhere two years earlier. The suspected individual was described as a white male, 30 to 35 years, 5' 9'', with dark short hair, wearing a white golf shirt or T-shirt with some red on it.

7. Mr. Ward is a Vancouver lawyer who attended the August 1 ceremony. *** Based on his appearance, Mr. Ward was identified—mistakenly—as the would-be pie-thrower. When the VPD officers noticed him, Mr. Ward was running and appeared to be avoiding interception. The officers chased Mr. Ward down and handcuffed him. ***

8. Mr. Ward was arrested for breach of the peace and taken to the police lockup in Vancouver, which was under the partial management of provincial corrections officers. Upon his arrival, the corrections officers instructed Mr. Ward to remove all his clothes in preparation for a strip search. Mr. Ward complied in part but refused to take off his underwear. The officers did not insist on complete removal and Mr. Ward was never touched during the search. After the search was completed, Mr. Ward was placed in a small cell where he spent several hours before being released.

9. *** VPD detectives subsequently determined that they did not have grounds to obtain the required search warrant or evidence to charge Mr. Ward for attempted assault. Mr. Ward was released from the lockup approximately 4.5 hours after he was arrested and several hours after the Prime Minister had left Chinatown following the ceremony. ***

14. Section 24(1) of the *Charter* provides as follows:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. ***

When are Damages Under Section 24(1) Available?

(1) The Language of Section 24(1) and the Nature of Charter Damages ***

20. The general considerations governing what constitutes an appropriate and just remedy under s. 24(1) were set out by Iacobucci and Arbour JJ. in *Doucet-Boudreau v. Nova Scotia (Department of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 (S.C.C.). Briefly, an appropriate and just remedy will: (1) meaningfully vindicate the rights and freedoms of the claimants; (2) employ means that are legitimate within the framework of our constitutional democracy; (3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and (4) be fair to the party against whom the order is made ***.

21. Damages for breach of a claimant's *Charter* rights may meet these conditions. They may meaningfully vindicate the claimant's rights and freedoms. They employ a means well-recognized within our legal framework. They are appropriate to the function and powers of a court. And, depending on the

circumstances and the amount awarded, they can be fair not only to the claimant whose rights were breached, but to the state which is required to pay them. I therefore conclude that s. 24(1) is broad enough to include the remedy of damages for *Charter* breach. That said, granting damages under the *Charter* is a new endeavour, and an approach to when damages are appropriate and just should develop incrementally. *Charter* damages are only one remedy amongst others available under s. 24(1), and often other s. 24(1) remedies will be more responsive to the breach.

22. The term "damages" conveniently describes the remedy sought in this case. However, it should always be borne in mind that these are not private law damages, but the distinct remedy of constitutional damages. As Thomas J. notes in *Dunlea v. Attorney General*, [2000] NZCA 84, [2000] 3 N.Z.L.R. 136 (New Zealand C.A.), at para. 81, a case dealing with New Zealand's *Bill of Rights Act 1990*, an action for public law damages "is not a private law action in the nature of a tort claim for which the state is vicariously liable, but [a distinct] public law action directly against the state for which the state is primarily liable". In accordance with s. 32 of the *Charter*, this is equally so in the Canadian constitutional context. The nature of the remedy is to require the state (or society writ large) to compensate an individual for breaches of the individual's constitutional rights. An action for public law damages—including constitutional damages—lies against the state and not against individual actors. Actions against individual actors should be pursued in accordance with existing causes of action. However, the underlying policy considerations that are engaged when awarding private law damages against state actors may be relevant when awarding public law damages directly against the state. Such considerations may be appropriately kept in mind.

(2) Step One: Proof of a Charter Breach

23. Section 24(1) is remedial. The first step, therefore, is to establish a *Charter* breach. This is the wrong on which the claim for damages is based.

(3) Step Two: Functional Justification of Damages

24. A functional approach to damages finds damages to be appropriate and just to the extent that they serve a useful function or purpose. This approach has been adopted in awarding non-pecuniary damages in personal injury cases (*Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 (S.C.C.)), and, in my view, a similar approach is appropriate in determining when damages are "appropriate and just" under s. 24(1) of the *Charter*.

25. I therefore turn to the purposes that an order for damages under s. 24(1) may serve. For damages to be awarded, they must further the general objects of the *Charter.* This reflects itself in three interrelated functions that damages may serve. The function of *compensation*, usually the most prominent function, recognizes that breach of an individual's *Charter* rights may cause personal loss which should be remedied. The function of *vindication* recognizes that *Charter* rights must be maintained, and cannot be allowed to be whittled away by attrition. Finally, the function of *deterrence* recognizes that damages may serve to deter future breaches by state actors. ***

30. In most cases, all three objects will be present. Harm to the claimant will evoke the need for compensation. Vindication and deterrence will support the compensatory function and bolster the appropriateness of an award of damages. However, the fact that the claimant has not suffered personal loss does not preclude damages where the objectives of vindication or deterrence clearly call for an award. ***

31. *** Achieving one or more of these objects is the first requirement for "appropriate and just" damages under s. 24(1) of the *Charter*.

(4) Step Three: Countervailing Factors ***

33. However, even if the claimant establishes that damages are functionally justified, the state may establish that other considerations render s. 24(1) damages inappropriate or unjust. A complete catalogue of countervailing considerations remains to be developed as the law in this area matures. At this point, however, two considerations are apparent: the existence of alternative remedies and concerns for good governance.

34. A functional approach to damages under s. 24(1) means that if other remedies adequately meet the need for compensation, vindication and/or deterrence, a further award of damages under s. 24(1) would serve no function and would not be "appropriate and just". The *Charter* entered an existent remedial arena which already housed tools to correct violative state conduct. Section 24(1) operates concurrently with, and does not replace, these areas of law. Alternative remedies include private law remedies for actions for personal injury, other *Charter* remedies like declarations under s. 24(1), and remedies for actions covered by legislation permitting proceedings against the Crown.

35. The claimant must establish basic functionality having regard to the objects of constitutional damages. The evidentiary burden then shifts to the state to show that the engaged functions can be fulfilled through other remedies. The claimant need not show that she has exhausted all other recourses. Rather, it is for the state to show that other remedies are available in the particular case that will sufficiently address the breach. For example, if the claimant has brought a concurrent action in tort, it is open to the state to argue that, should the tort claim be successful, the resulting award of damages would adequately address the *Charter* breach. If that were the case, an award of *Charter* damages would be duplicative. In addition, it is conceivable that another *Charter* remedy may, in a particular case, fulfill the function of *Charter* damages.

36. The existence of a potential claim in tort does not therefore bar a claimant from obtaining damages under the *Charter*. Tort law and the *Charter* are distinct legal avenues. However, a concurrent action in tort, or other private law claim, bars s. 24(1) damages if the result would be double compensation: *Simpson v. Attorney General*, [1994] 3 N.Z.L.R. 667 (New Zealand C.A.), at p. 678.

37. Declarations of *Charter* breach may provide an adequate remedy for the *Charter* breach, particularly where the claimant has suffered no personal damage. ***

38. Another consideration that may negate the appropriateness of s. 24(1) damages is concern for effective governance. Good governance concerns may take different forms. At one extreme, it may be argued that any award of s. 24(1) damages will always have a chilling effect on government conduct, and hence will impact negatively on good governance. The logical conclusion of this argument is that s. 24(1) damages would never be appropriate. Clearly, this is not what the Constitution intends. Moreover, insofar as s. 24(1) damages deter *Charter* breaches, they promote good governance. Compliance with *Charter* standards is a foundational principle of good governance.

39. In some situations, however, the state may establish that an award of *Charter* damages would interfere with good governance such that damages should not be awarded unless the state conduct meets a minimum threshold of gravity. *** The rule of law would be undermined if governments were deterred from enforcing the law by the possibility of future damage awards in the event the law was, at some future date, to be declared invalid. Thus, absent threshold misconduct, an action for damages under s. 24(1) of the *Charter* cannot be combined with an action for invalidity based on s. 52 of the *Constitution Act*, *1982*: *Mackin* [*v. New Brunswick*, 2002 SCC 13, [2002] 1 S.C.R. 405], at para. 81. ***

45. If the claimant establishes breach of his *Charter* rights and shows that an award of damages under s. 24(1) of the *Charter* would serve a functional purpose, having regard to the objects of s. 24(1) damages, and the state fails to negate that the award is "appropriate and just", the final step is to determine the appropriate amount of the damages.

(5) Step Four: Quantum of Section 24(1) Damages ***

48. Where the objective of compensation is engaged, the concern is to restore the claimant to the position she would have been in had the breach not been committed, as discussed above. As in a tort action, any claim for compensatory damages must be supported by evidence of the loss suffered.

49. In some cases, the *Charter* breach may cause the claimant pecuniary loss. Injuries, physical and psychological, may require medical treatment, with attendant costs. Prolonged detention may result in loss of earnings. *Restitutio in integrum* requires compensation for such financial losses.

50. In other cases, like this one, the claimant's losses will be non-pecuniary. Non-pecuniary damages are harder to measure. Yet they are not by that reason to be rejected. Again, tort law provides assistance. Pain

and suffering are compensable. Absent exceptional circumstances, compensation is fixed at a fairly modest conventional rate, subject to variation for the degree of suffering in the particular case. In extreme cases of catastrophic injury, a higher but still conventionally determined award is given on the basis that it serves the function purpose of providing substitute comforts and pleasures: *Andrews v. Grand & Toy*.

51. When we move from compensation to the objectives of vindication and deterrence, tort law is less useful. Making the appropriate determinations is an exercise in rationality and proportionality and will ultimately be guided by precedent as this important chapter of *Charter* jurisprudence is written by Canada's courts. That said, some initial observations may be made.

52. A principal guide to the determination of quantum is the seriousness of the breach, having regard to the objects of s. 24(1) damages. *** Generally speaking, the more egregious the conduct and the more serious the repercussions on the claimant, the higher the award for vindication or deterrence will be.

53. Just as private law damages must be fair to both the plaintiff and the defendant, so s. 24(1) damages must be fair—or "appropriate and just"—to both the claimant and the state. The court must arrive at a quantum that respects this. Large awards and the consequent diversion of public funds may serve little functional purpose in terms of the claimant's needs and may be inappropriate or unjust from the public perspective. In considering what is fair to the claimant and the state, the court may take into account the public interest in good governance, the danger of deterring governments from undertaking beneficial new policies and programs, and the need to avoid diverting large sums of funds from public programs to private interests. ***

(6) Forum and Procedure ***

59. As was done here, the claimant may join a s. 24(1) claim with a tort claim. It may be useful to consider the tort claim first, since if it meets the objects of *Charter* damages, recourse to s. 24(1) will be unnecessary. This may add useful context and facilitate the s. 24(1) analysis. This said, it is not essential that the claimant exhaust her remedies in private law before bringing a s. 24(1) claim.

Application to the Facts ***

68. The state has not established that alternative remedies are available to achieve the objects of compensation, vindication or deterrence with respect to the strip search. Mr. Ward sued the officers for assault, as well as the City and the Province for negligence. These claims were dismissed and their dismissal was not appealed to this Court. While this defeated Mr. Ward's claim in tort, it did not change the fact that his right under s. 8 of the *Charter* to be secure against unreasonable search and seizure was violated. No tort action was available for that violation and a declaration will not satisfy the need for compensation. Mr. Ward's only recourse is a claim for damages under s. 24(1) of the *Charter*. Nor has the state established that an award of s. 24(1) damages is negated by good governance considerations, such as those raised in *Mackin*.

69. I conclude that damages for the strip search of Mr. Ward are required in this case to functionally fulfill the objects of public law damages, and therefore are *prima facie* "appropriate and just". ***

73. Considering all the factors, including the appropriate degree of deference to be paid to the trial judge's exercise of remedial discretion, I conclude that the trial judge's $5,000 damage award was appropriate. ***

78. I conclude that a declaration under s. 24(1) that the vehicle seizure violated Mr. Ward's right to be free from unreasonable search and seizure under s. 8 of the *Charter* adequately serves the need for vindication of the right and deterrence of future improper car seizures. ***

REFLECTION:

- *What are the purposes of constitutional tort damages? How do they differ from the purposes of common law tort damages?*
- *Prof. Varuhas has suggested that human rights violations may be better addressed through the law of*

intentional torts, given how public law damages awards tend to be quite modest.[801] *Prof. Roach, on the other hand, argues that "there are still a number of compelling advantages to continuing to conceive of damages as a public law remedy."*[802] *What are those advantages?*

24.2.2 Francis v. Ontario [2021] ONCA 197

✗**REF: §19.5.2.3, §20.6.3, §23.2.2.2**

DOHERTY AND NORDHEIMER JJ.A. (H. YOUNG J.A. concurring): ***

4. The use of administrative segregation in Ontario's correctional institutions is authorized by *General*, R.R.O. 1990, Reg. 778 ("Regulation 778") promulgated under the *Ministry of Correctional Services Act*, R.S.O. 1990, c. M.22, s. 60(1). ***

6. During his incarceration, the respondent was placed in administrative segregation twice, once for eight days. On both occasions he was alleged to have refused to take mental health medication that had caused him negative side-effects in the past. Correctional officials considered this conduct to constitute "refusing to follow an order", which they determined justified a placement in administrative segregation. As found by the motion judge, the respondent's experience in administrative segregation was excruciating; his anxiety was out of control; he felt terrorized and was in a state of delirium and shock.

7. In 2017, the respondent commenced this proceeding as a class action. He sought declarations that his, and the class members', rights under the *Charter* had been infringed by Ontario's system of administrative segregation and that Ontario was liable in negligence. The respondent sought damages in negligence and under s. 24 of the *Charter*. He also sought punitive damages. ***

10. Ontario does not appeal any findings of fact about its practice of administrative segregation. The motion judge found the conditions of administrative segregation in Ontario were "the same or very similar" as those in the federal system, which this court has twice found to constitute cruel and unusual treatment, in *Canadian Civil Liberties Association v. Canada (Attorney General)*, 2019 ONCA 243 ("*CCLA*"), leave to appeal granted but appeal discontinued [2019] S.C.C.A. No. 96 and *Brazeau v. Canada (Attorney General)*, 2020 ONCA 184 ("*Brazeau/Reddock*").

29. *** [I]n our view, the present claims more appropriately find their foundation in the *Charter*, than in the law of negligence.

Did the motion judge err in finding that detaining SMI Inmates in administrative segregation violated ss. 7 and 12 of the *Charter*? ***

49. We would not interfere with the motion judge's holding that the s. 7 ["the right to life, liberty and security of the person …"] and s. 12 ["the right not to be subjected to any cruel and unusual treatment or punishment"] rights of the SMI Inmates were breached when those inmates were placed in administrative segregation.

Did the motion judge err in awarding *Charter* damages?

50. The motion judge awarded aggregate *Charter* damages of $30 million, without prejudice to the right of each class member to claim further compensation in an individual issues trial. The motion judge also indicated, at paras. 618-620, that any damage award for negligence would be included in, and not in addition to, the $30 million award for *Charter* damages.

(i) The context ***

55. *** [F]ive fundamental facts crucial to the constitutional arguments remained constant features of

[801] J. Varuhas, *Damages and Human Rights* (Oxford: Hart Publishing, 2016). See also A. Linden, "Charter Damage Claims: New Dawn or Mirage?" (2012) 39 Advocates Quarterly 426.
[802] K. Roach, *Remedies for Human Rights Violations: A Two-Track Approach to Supra-national and National Law* (Cambridge: Cambridge University Press, 2021), 269.

administrative segregation, as practised in Ontario jails throughout the claim period:

> • administrative segregation, as practised in Ontario, fell squarely within the widely accepted definition of solitary confinement;
>
> • SMI Inmates could be placed in administrative segregation;
>
> • placement of inmates in administrative segregation was indefinite;
>
> • there was no "hard cap" limiting the maximum time period for which an inmate could be held in administrative segregation; and
>
> • no inmate held in administrative segregation had access to timely, independent reviews of that status.

56. The five facts set out above were crucial to the motion judge's ultimate conclusion that the s. 7 and s. 12 rights of all inmates within the class were routinely and consistently infringed throughout the entire class period. The nature and seriousness of the *Charter* breaches identified by the motion judge, particularly the s. 12 breach, were necessarily central to whether damages provided an "appropriate and just" remedy for those *Charter* violations: *Brazeau/Reddock*, at para. 72.

(ii) Applicable legal principles ***

57. An examination of any claim to *Charter* damages begins with the oft-quoted words of McLachlin C.J.C in *Vancouver (City) v. Ward*, [2010] 2 S.C.R. 28 (SCC), at para. 4:

> I conclude that damages may be awarded for a *Charter* breach under s. 24(1) where appropriate and just. The first step in the inquiry is to establish that a Charter right has been breached. The second step is to show why damages are a just and appropriate remedy, having regard to whether they would fulfil one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches. *At the third step, the state has the opportunity to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust*. The final step is to assess the quantum of the damages. (Emphasis added)

58. The third step identified in *Ward* is the focus of this case. As explained in *Ward*, the Crown may defeat an otherwise viable claim to *Charter* damages by demonstrating countervailing factors, rendering damages an inappropriate or unjust remedy: at para. 33. *Ward* refers to the availability of alternative remedies and "concerns for good governance" as two examples of countervailing factors: at paras. 32-38. Ontario relies on "good governance" concerns in its argument that damages are an inappropriate remedy in this case.

59. *Ward* uses the terms "good governance" and "effective governance" interchangeably. It does not offer a definition of either. Generally speaking, good governance concerns describe the potentially negative impact of *Charter* damage awards on the conduct of state actors charged with the responsibility of enacting laws and implementing and enforcing those duly enacted laws. The concern is that state actors will be deterred from performing those functions if they fear that, at some future point, a court will declare those duly enacted laws unconstitutional and award damages for acts done relying on the authority of the now unconstitutional laws: *Ward*, at paras. 39-41; *Henry v. British Columbia (A.G.)* 2015 SCC 24, [2015] 2 S.C.R. 214, at paras. 39-41.

60. *Ward* makes it clear that good governance concerns do not necessarily defeat a claim for damages. State conduct that is sufficiently blameworthy will give rise to *Charter* damages despite good governance concerns. For example, a law passed in bad faith will not be immunized from *Charter* damages by good governance concerns. To the contrary, awarding *Charter* damages for state actions based on laws enacted in bad faith promotes good governance. The blameworthiness threshold referred to in *Ward* is not a single bright line but will vary with the nature of the state conduct giving rise, both to the *Charter* violations and the good governance claim: see *Ward*, at paras. 39-43; *Brazeau/Reddock*, at paras. 66-67.

(iii) The Brazeau/Reddock Charter damages analysis

61. The *Ward* principles governing *Charter* damages were considered in the context of administrative segregation in federal prisons in *Brazeau/Reddock*. In the cases of both Mr. Brazeau and Mr. Reddock, the motion judge had awarded aggregate *Charter* damages of $20 million for breaches of ss. 7 and 12 of the *Charter*: *Brazeau* (ONSC), at para. 445; *Reddock v. Canada (Attorney General)*, 2019 ONSC 5053, 441 C.R.R. (2d) 1 ("*Reddock (ONSC)*"), at paras. 397, 486, rev'd on other grounds, 2020 ONCA 184. In Mr. Reddock's appeal, this court upheld that award in respect of inmates held in administrative segregation for more than 15 consecutive days: *Brazeau/Reddock*, at paras. 102-104. In Mr. Brazeau's appeal, this court agreed that seriously ill inmates who had been unconstitutionally held in administrative segregation were entitled to *Charter* damages. The court further determined that the motion judge attached certain improper conditions to the damage award he made. The court remitted that issue to the motion judge for reconsideration. He subsequently confirmed an award of $20 million in aggregate damages: *Brazeau/Reddock*, at paras. 105-113; *Brazeau v. Canada (Attorney General)*, 2020 ONSC 3272.

62. The evidence, arguments and findings in *Brazeau/Reddock* relevant to the *Charter* damage claims were very similar to the evidence, arguments and findings made here. As in this case, the appropriateness of damages as a *Charter* remedy in *Brazeau/Reddock* turned on whether good governance concerns should preclude a damage award and, if so, whether the state conduct was sufficiently blameworthy to override those concerns. Finally, as in this case, the regulatory scheme in *Brazeau/Reddock* giving rise to the *Charter* breaches was an amalgam of general statutory powers, a broadly worded regulation, and a series of policies and operational decisions implemented by the correctional authorities. ***

(iv) Is the Brazeau/Reddock analysis determinative? ***

69. On the findings of the motion judge in *Brazeau (ONSC)* and *Reddock (ONSC)*, as confirmed by this court in *Brazeau/Reddock*, Canada maintained an administrative segregation regime in the face of overwhelming evidence that the regime imperiled the constitutional rights of inmates. Given the reckless disregard for those rights, Canada could not successfully advance good governance concerns in answer to the damage claim advanced by the inmates. ***

74. Ontario contends that, as only the courts can interpret and apply the constitution, only judicial pronouncements are relevant to whether state conduct shows a clear disregard for constitutional rights. There is no doubt only courts can authoritatively interpret the constitution. Constitutional interpretation is, however, not the same thing as assessing the degree of risk that a certain course of conduct will result in the infringement of constitutional rights. Ontario cannot turn a blind eye to overwhelming evidence of the unconstitutionality of its actions just because a court has yet to pronounce on that which is obvious.

75. Judicial pronouncements on the constitutionality of government action go further than identifying a risk of a constitutional violation. They establish the reality of the violation. Other kinds of evidence, while not capable of establishing a violation, provide a basis against which the risk that certain state conduct violates well-established constitutional norms can be assessed. ***

78. The information relied on in *Brazeau/Reddock* and by the motion judge in this case was properly considered in assessing the blameworthiness of Ontario's actions at the third step of the *Ward* inquiry. That material fully justified the conclusion that Ontario's clear disregard for the *Charter* rights of the inmates precluded any reliance on those good governance concerns.

79. *** Simply put, *Brazeau/Reddock* controls. On that authority, damages for the *Charter* breaches were an "appropriate and just" remedy. We would affirm the damage award made by the motion judge. ***

REFLECTION:

- *What Charter rights of the plaintiffs had Ontario violated?*
- *What common law tort actions might arise from incarceration in administrative segregation?*
- *On what grounds did Ontario argue that Charter damages were inappropriate in this case? Why did its argument not succeed?*

24.2.3 Slater v. Attorney-General (No. 2) [2006] NZHC 979

✗**REF: §8.5.1, §9.3.3**

KEANE J.: ***

7. Exemplary damages will only be awarded when there has been intentional wrong doing which is 'particularly appalling': *A v. Bottrill* [2003] 2 NZLR 721 [§12.1.3] ***. Public law damages are to vindicate the right, not to punish, and where damages are given in tort cannot be given twice over: *Simpson v. Attorney General* [1994] 3 NZLR 667, CA, *Attorney General v. Udompun* [2005] 3 NZLR 204, CA. ***

14. Mr Slater was held for in excess of seven hours, and that is primary. Counterbalancing that, the police acted in good faith. Their want of authority, though critical, was momentary. Mr Slater, by overreacting aggressively in contrast to Mr Wirehana, contributed to his own arrest and detention. He was subjected, as the Judge found, to no more than reasonable restraint. Mr Slater can only then, I consider, be entitled to damages in tort, compensating him for the time he was held in custody. He cannot be entitled to exemplary damages. Nor to public law damages to vindicate his right under s 22 of the *Bill of Rights Act*. ***

REFLECTION:

- *Why was Slater "entitled" to common law damages, but not to constitutional damages? Why are constitutional damages not available as of right when the state violates constitutional rights?*

24.2.4 Cross-references

- *Baxter v. Bracey* (2020) 140 S Ct 1862 (Mem): §6.6.8.2.

24.2.5 Further material

- P. Adourian, "*Conseil Scolaire v. BC*" Charter Damages Blog (Jun 13, 2020).
- G. Jamieson, "Using Section 24(1) Charter Damages to Remedy Racial Discrimination in the Criminal Justice System" (2017) 22 Appeal: Review of Current L & L Reform 71.
- E. Cunliffe, "*Henry v. British Columbia*: Still Seeking a Just Approach to Damages for Wrongful Conviction" (2016) (2d) 76 Supreme Court L Rev 143.
- R.E. Charney & J. Hunter, "Tort Lite?: *Vancouver (City) v. Ward* and the Availability of Damages for Charter Infringements" (2011) 54 (2d) Supreme Court L Rev 393.
- UBC Law Students' Legal Advice Program, "Human Rights" in *Law Students' Legal Advice Manual* (47th ed, Vancouver: The University of British Columbia, 2023), ch 6.
- J.N.E. Varuhas, *Damages and Human Rights* (Oxford: Hart Publishing, 2016).
- J. Wright, *Tort Law and Human Rights* (2nd ed, Oxford: Hart Publishing, 2017).
- E. Aristova & U. Grusic (eds), *Civil Remedies and Human Rights in Flux* (Oxford: Hart Publishing, 2022); Bonavero Institute of Human Rights Book Launch (May 11, 2022) 📻.

25 INDIGENOUS VOICES IN DISPUTE RESOLUTION

25.1 Influence on common law development

25.1.1 Smith v. Fonterra Co-op. Group Ltd [2024] NZSC 5

✗REF: §19.11.3, §21.2.3

WILLIAMS AND KÓS JJ.: ***

3. The plaintiff, Mr Smith, is an elder of Ngāpuhi and Ngāti Kahu, and a climate change spokesperson for the Iwi Chairs Forum, a national forum of tribal leaders. In August 2019 he filed a statement of claim in the High Court, against the seven respondents. Each is a New Zealand company said to be involved in an industry that either emits greenhouse gases (GHGs) or supplies products which release GHGs when burned.[803] ***

5. A distinctive aspect of the proceeding in this Court is that Mr Smith pleads that tikanga Māori should inform the reach and content of his causes of action, this in accordance with the general proposition that tikanga should inform the common law of New Zealand generally. He does not allege that the respondents directly owed, or violated, any obligations under tikanga Māori. ***

177. Mr Smith claims, in accordance with tikanga, a whakapapa (genealogical) and whanaungatanga (kinship) connection to the subject whenua (land), wai (fresh water) and moana (sea) in and around Mahinepua C. He claims that the respondents have contributed to climate change effects that are causing ongoing injury to the customary, cultural, historical, spiritual and nutritional values associated with these places. He alleges that his tikanga-based connection to the subject environment provides a foundation for the claim that the injury to place is also an injury to himself, his whānau (extended family) and descendants. It is alleged that the respondents must bear some responsibility for these harms.

178. The Court of Appeal found these matters did not assist in formulating a claim in tort. *** [French, Cooper and Goddard JJ held, [2021] NZCA 552:

> 7. In another proposed amendment to the statement of claim, Mr Smith seeks the addition of a clause referencing tikanga Māori. The proposed new clause reads:
>
> > Kaitiakitanga as a principle of tikanga Māori incorporates concepts of guardianship, protection and stewardship of the natural environment including recognising that a right in a resource carries with it a reciprocal obligation to care for its physical and spiritual welfare as part of an ongoing relationship.
>
> 8. As is apparent from the wording and confirmed by counsel, this proposed amendment is not intended to assert a separate cause of action but rather to plead a principle and value that should infuse the court's consideration of the issues in relation to all three causes of action. ***
>
> 33. *** [T]he claims made in this proceeding are not consistent with the policy goals *** of ensuring that this country's response to climate change is effective, efficient and just. ***
>
> 34. Nor in our view can it be suggested *** that striking out these claims against private commercial entities would be a breach of the Treaty of Waitangi. On the contrary, we consider the Treaty underlines the need for shared action and a common approach that pays attention to distributional effects, not a piecemeal one. Similarly, we consider that controlling climate change through regulatory means [such as the *Climate Change Response Act 2002*] is consistent with kaitiakitanga.
>
> 35. All of that is not to suggest the courts have no meaningful role in responding to the exigencies

[803] The sixth and seventh respondents, Channel Infrastructure NZ Ltd and BT Mining Ltd, filed separate submissions, claiming that they are differently placed to the other respondents.

> of climate change. They do in fact have a very important role in supporting and enforcing the statutory scheme for climate change responses and in holding the Government to account. Our point is simply that it is not the role of the courts to develop a parallel common law regulatory regime that is ineffective and inefficient, and likely to be socially unjust. ***]

In other words, legislative regulation was already consistent with the responsibility, according to tikanga, of traditional owners to care for their lands and, implicitly, tort-based controls were not. The Court also commented, in relation to the special damage rule, that Mr Smith could not overcome this by "re-pleading or invoking concepts of tikanga".[804]

Submissions

179. For Mr Smith, Ms Coates submitted that caution should be exercised in striking out claims that involve the application of tikanga to areas of law to which it has not previously been applied. Expert evidence will generally be required. She argued that the essence of Mr Smith's case is not that tikanga Māori creates direct obligations on the parties to this case; rather it is that its principles must inform tort law's development in New Zealand in relation to climate change. There are aspects of tikanga, she submitted, that speak to the existing torts of public nuisance and negligence but, in particular, tikanga principles would assist in framing the proposed climate system damage tort. For example, she argued, tikanga would push against a narrow conception of proximity founded on individualism.

180. Mr Kalderimis submitted that Mr Smith's generalised references to tikanga principles do not, any more than generalised allusions to values underlying the English common law, salvage Mr Smith's claim. What is missing from Mr Smith's claim is any adequate articulation of how tikanga principles work coherently within the framework and principles of tort law to bridge the gaps to an arguable claim. For example, there is no existing principle of tikanga, he argued, that imposes obligations on one party where they have no relational proximity to the alleged wrongdoer.

181. On behalf of Te Hunga Rōia Māori o Aotearoa, Mr Mahuika submitted that the common law must evolve within the context and needs of New Zealand, of which tikanga forms a part. He submitted that tikanga was clearly relevant to the development of the common law, and to the development of any new tort, although it may also have relevance to the application of the established torts of public nuisance and negligence. Further, assessing the application of tikanga and its precise relevance will require an evidentiary inquiry, and evidence (including tikanga evidence) would be critical at trial. A broad approach, he argued, that accords with principles of tikanga Māori, should be applied to standing, including in respect of public nuisance—that being a reference to the special damage rule in that context.

Our assessment

182. It is important to keep to the fore that the specific loss pleaded by Mr Smith in this case is in part tikanga-based. Since that form of loss is an essential fact, in addressing this part of the claim the trial court will be required to engage with tikanga. Apart from any more conceptual impact tikanga may be argued to have on the framing of particular causes of action, that engagement will need to consider the potential effect of tikanga on any special damage requirement in public nuisance (if in fact special damage is required) and, with regard to all causes of action, whether tikanga-related harm is a cognisable form of loss.

183. This is not a new phenomenon. Tikanga has in fact been applied to tort actions as required by the case and the evidence since the early days of the common law's operation in this country. Two examples will suffice: one concerning pounamu (greenstone) and the other about whales.

184. In the 1866 case of *Reynolds v. Tuangau*, there was a dispute over title to a pounamu boulder weighing "considerably more than a ton".[805] Mr Reynolds said that he had found it in a West Coast river. He broke the boulder up and had it removed in 16 bags by horse and boat to the mouth of the Taramakau river. The

[804] At [82].

[805] *James Reynolds v. Simon Tuangau* West Coast Times (New Zealand, 8 August 1866) at 2–3. It was common in the 19th century for newspapers to report court proceedings in detail. A summary of this case is provided in *Reynold v. Tuangau* SC Wellington, 7 August 1866 available at www.wgtn.ac.nz/law/nzlostcases/.

bags were seized by the police at the direction of the local mining warden who considered the pounamu belonged to one Simon Tuangau.

185. Mr Reynolds sued Mr Tuangau in the Hokitika Supreme Court in trover, detinue and conversion, seeking return of the pounamu. Mr Tuangau contended the pounamu was his according to tikanga as he had worked the boulder and had left his mark on it to render it tapu (restricted) to him alone. Counsel for Mr Reynolds argued that evidence of tikanga was inadmissible "on English territory". Gresson J nonetheless admitted independent evidence about tikanga rendering objects tapu to their owner in this way. He directed the jury that this tikanga had been proved for the purpose of their consideration of the case.[806] While the first jury was unable to reach a verdict, a second returned a "special verdict", finding that Mr Tuangau was the "first discoverer" of the pounamu, had worked it, and had not abandoned it by the time Mr Reynolds claimed it. Mr Reynolds' claim was summarily dismissed by a five-judge appellate bench (which included Gresson J).[807]

186. Better known is the 1910 case of *Baldick v. Jackson*.[808] In that case Stout CJ dismissed an appeal by Mr Baldick and others, who were whalers, against a judgment in the Magistrate's Court in Blenheim in favour of the plaintiff, Mr Jackson, also a whaler. Mr Jackson had filed a plaint note in conversion. He claimed that Mr Baldick and company had converted the carcass of a right whale belonging to him, valued at £200. In response, the appellants argued that a 14th-century statute affirmed that the King owned all whales, meaning Mr Jackson could not establish a proprietary interest in the whale sufficient to maintain an action in conversion.[809] Stout CJ held that this statute did not apply to the circumstances of the colony of New Zealand because "Maoris … were accustomed to engage in whaling" and such activity was protected by Article Two of the Treaty of Waitangi.[810] Judgment was entered for Mr Jackson.

187. In more recent times, the common law has re-engaged with tikanga. For example, in 2003, a five-judge bench in the Court of Appeal affirmed that Māori land rights (including in the foreshore and seabed) derived from tikanga were cognisable at common law.[811] Citing extensive authority, the Court found that this had been the position since the common law's arrival in 1840. And in *Takamore v. Clarke*,[812] *Trans-Tasman Resources Ltd v. Taranaki-Whanganui Conservation Board*[813] and *Ellis v. R (Continuance)*[814] this Court considered the relationship between tikanga and the common law as it operates outside the sphere of customary title.[815] To summarise the essential conclusions reached, tikanga was the first law of New Zealand, and it will continue to influence New Zealand's distinctive common law as appropriate according to the case and to the extent appropriate in the case.[816] The respondents do not challenge these propositions. As noted, their argument is not with the relationship between tikanga and the common law, but with its practical utility in the circumstances of this case.

188. So, to return to the starting point, whatever the cause of action, the trial court will need to grapple with the fact that Mr Smith purports to bring proceedings not merely as an alleged proprietor who has suffered loss, but as a kaitiaki acting on behalf of the whenua, wai and moana—distinct entities in their own right.[817] And it must consider some tikanga conceptions of loss that are neither physical nor economic. In other

[806] "The Supreme Court" *West Coast Times* (New Zealand, 11 August 1866) at 5.
[807] See "Court of Appeal" *Daily Southern Cross* (New Zealand, 9 November 1866) at 6.
[808] *Baldick v. Jackson* (1910) 30 NZLR 343 (SC).
[809] It is unclear whether the statute was enacted in 1322: Statute of the King's Prerogative (Eng) 15 Edw II c 2; or 1324: Statute of the King's Prerogative (Eng) 17 Edw II c 2. But in any event, s 13 provided that "the King shall have" shipwrecks, sturgeons and whales taken in the sea.
[810] *Baldick*, at 344–345. The other ground of appeal, that Mr Jackson had abandoned the whale, also failed.
[811] *Attorney-General v. Ngati Apa* [2003] 3 NZLR 643 (CA).
[812] *Takamore v. Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.
[813] *Trans-Tasman Resources Ltd v. Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801.
[814] *Ellis v. R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239.
[815] Customary title is also known as "native title" in Australia and "aboriginal title" in Canada.
[816] The past and present interface of tikanga and the common law was recently discussed in: Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023).
[817] We note that a proprietary interest in the affected land is not an element of public nuisance: see Kit Barker and others *The Law of Torts in Australia* (5th ed, Oxford University Press, Melbourne, 2012) at 219–220.

words, addressing and assessing matters of tikanga simply cannot be avoided. ***

REFLECTION:

- *In this era of reconciliation and given the disproportionate impact of climate change on Indigenous communities,[818] how should Indigenous legal traditions inform courts' approaches to climate change litigation? How should they influence the development of the common law more generally?*
- *In a news interview, Smith describes his work as engaging with iwi communities in Aotearoa New Zealand to spread climate change awareness and working with governments to design national policies.[819] Is private law litigation an effective means of achieving these goals?*

25.1.2 Anderson v. Alberta [2022] SCC 6

✗REF: §20.8.4

KARAKATSANIS AND BROWN JJ. (FOR THE COURT): ***

Reconciliation

25. Since [*British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371], this Court has decided *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388. These judgments and others affirmed the Crown's obligation to consult and accommodate Indigenous groups, and emphasized that the "fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions" (*Mikisew Cree*, at para. 1; see also Haida Nation, at para. 32; *Taku River*, at para. 42; *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, at para. 22). In *R. v. Desautel*, 2021 SCC 17, at para. 22, this Court reiterated that "the two purposes of s. 35(1) [*Constitution Act*, 1982] are to recognize the prior occupation of Canada by organized, autonomous societies and to reconcile their modern-day existence with the Crown's assertion of sovereignty" and that "[t]he same purposes are reflected in the principle of the honour of the Crown, under which the Crown's historic assertion of sovereignty over Aboriginal societies gives rise to continuing obligations to their successors as part of an ongoing process of reconciliation." ***

26. Where litigation raises novel issues concerning the interpretation of Aboriginal and treaty rights and the infringement of those rights, this may have significant weight in a court's analysis of the public importance branch of the advance costs test and the exercise of its residual discretion. Other aspects of the Crown-Aboriginal relationship may be relevant to a court's exercise of its residual discretion since, at this stage, "the court must remain sensitive to any concerns that did not arise in its analysis of the test" (*Little Sisters*, at para. 72). ***

27. In assessing impecuniosity, a court must respectfully account for the broader context in which First Nations governments such as Beaver Lake make financial decisions. Promoting institutions and processes of Indigenous self-governance fosters a positive, mutually respectful long-term relationship between Indigenous and non-Indigenous communities, thereby furthering the objective of reconciliation (*First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58, [2017] 2 S.C.R. 576, at para. 10; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at paras. 9-10). In the context of the impecuniosity analysis, this means that the pressing needs of a First Nation should be considered from the perspective of its government that sets its priorities and is best situated to identify its needs. ***

REFLECTION:

- *How should the principle of reconciliation influence the judicial interpretation of common law and statutory rules? How should it influence lawyers' approaches to civil litigation?*

[818] See V. Reyes-Garcia *et al*, "Local Studies Provide a Global Perspective of the Impacts of Climate Change on Indigenous Peoples and Local Communities" (2024) 7 Sustainable Earth Reviews 1.

[819] O. Wannan, "Tikanga Needs to be Heard in Case Against Big Emitters, Court Hears" Stuff (Aug 15, 2022) 📺.

25.1.3 The reasonable Cree person

H. Friedland, "Navigating Through Narratives of Despair: Making Space for the Cree Reasonable Person in the Canadian Justice System" (2016) 67 U New Brunswick LJ 269, 274-275

Surely, the common-law's best-loved mythical figure is the 'Reasonable Person' [§14.1.1]. One of the best judicial descriptions of the 'reasonable person,' by Justice Laidlaw in *Arland and Arland v. Taylor*, is as follows:

> […] he is a mythical creature of law whose conduct is the standard by which the Courts measure the conduct of all other persons and find it to be proper or improper in particular circumstances as they may exist from time to time. He is not an extraordinary or unusual creature; he is not superhuman; he is not required to display the highest skill of which anyone is capable; he is not a genius who can perform uncommon feats, nor is he possessed of unusual powers of foresight. He is a person of normal intelligence who makes prudence a guide to his conduct. […] His conduct is the standard "adopted in the community by persons of ordinary intelligence and prudence."[820]

I think we need a reasonable Indigenous person to help us navigate out of the narratives of despair, by moving us beyond just ameliorating current social ills, or accepting unexamined practices, to understanding a process of explicit reasoning through particular Indigenous laws. I think we need to do this with specificity, to avoid pan-Indigenous generalities, and so I will do this through the reasonable *Cree* person.

The reasonable Cree person, as an ordinary person of normal intelligence and prudence, is clearly a cut above the mythical images of Indigenous peoples such as lawless, vanishing, performing, essentialized,[821] or "arcadians or barbarians".[822] At the same time, the reasonable Cree person does not "require the wisdom of Solomon",[823] and thus falls well below the equally mythical creatures of the "wise old elder," or "noble" selfless environmental stewards.[824] Rather, the reasonable Cree person muddles along like the rest of us, an ordinary human actor who is capable of understanding and engaging rationally with laws. *** […continue reading]

REFLECTION:

- *Continue reading Prof. Friedland's exploration of the reasonable Cree person as a representative figure of Cree legal thought. How should lawyers engage with Indigenous legal traditions in the practice of the common law? How might Indigenous laws and concepts influence and integrate with common law reasoning?*

25.1.4 Cross-references

- *Binsaris v. Northern Territory* [2020] HCA 22: §2.2.4.
- *Peter Ballantyne Cree Nation v. Canada* [2016] SKCA 124: §7.1.4.
- *Brown v. Canada* [2018] ONSC 3429: §12.4.1.
- *Hill v. Hamilton-Wentworth Police Services Board* [2007] SCC 41: §14.2.5.3.
- *Cloud v. Canada* [2004] CanLII 45444 (ON CA): §19.7.1.
- *Blackwater v. Plint* [2005] SCC 58: §19.7.2.

[820] [1955] OR 131 at 142, [1955] 3 DLR 358 (CA).
[821] See descriptions of non-Indigenous people's images of Indigenous peoples under these and other categories in Daniel Francis, *The Imaginary Indian: The Image of the Indian in Canadian Culture* (Vancouver: Arsenal Pulp Press, 1992).
[822] James B Waldram, *Revenge of the Windigo: The Construction of the Mind and Mental Health of North American Aboriginal Peoples* (Toronto: University of Toronto Press, 2004) at 300 [Waldram, *Revenge of the Windigo*], talking about the obvious pervasive influence of a "primitivist discourse" of Indigenous peoples as "arcadians or barbarians" on researchers leading to conflicting and contradictory portraits of Indigenous peoples in the mental health field.
[823] *Stewart v. Pettie*, [1995] 1 SCR 131 at 150, 121 DLR (4th) 222 [§19.9.1].
[824] Francis, *supra*.

25.1.5 Further material

- The Law Report Podcast, "Tikanga: incorporating Māori concepts in NZ common law" (Apr 30, 2024) 🎧.
- New Zealand Law Commission, *He Poutama (Weaving Tikanga and State Law Together)* (Study Paper 24, 2023).
- S. Bookman, "Indigenous Climate Litigation in Anglophone Settler-Colonial States" VerfBlog (Mar 25, 2022).
- D. Lindberg, "UNDRIP and the Renewed Application of Indigenous Laws in the Common Law" (2022) 55 UBC L Rev 1.
- C.M. Clemente, "More Than Just a Trapline: A Torts Law Approach to Protecting Indigenous Trappers' Environmental Rights" (2021) 4 Lakehead LJ 78.
- K. Feint, "A Commentary on the Supreme Court Decision of *Proprietors of Wakatū v. Attorney-General*" (2017) 25 Waikato L Rev 1.
- J. Borrows, "Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education" (2016) 61 McGill LJ 795.
- LawCast BC Podcast, "Indigenous reconciliation and cultural safety" (Feb 7, 2024) 🎧.
- P.R.A. Grant, "Indigenous Cultural Damages" in *Damages 2022* (Vancouver: CLEBC, 2022) 📺.
- Attorney General of Canada, *Directive on Civil Litigation Involving Indigenous Peoples* (Ottawa: Department of Justice Canada, 2018).

25.2 Indigenous laws

25.2.1 Indigenous legal orders

M. Coyle, "Recognizing Indigenous Legal Orders: Their Content, Embeddedness in Distinct Indigenous Cultures, and Implications for Reconciliation," SSHRC Knowledge Synthesis Report (Sep 11, 2017), 4-5, 14

The task of describing and analyzing Indigenous legal orders is still at an embryonic stage in Canada. ***

Self-identified Indigenous scholars wrote the majority of the publications identified in this Report, an unsurprising finding given their lived knowledge of Indigenous norms and ways of thinking. *** This investigation reveals that the most prominent themes analyzed within this field are the following: methodologies appropriate to the study of Indigenous legal orders; arguments for the recognition and revitalization of Indigenous legal orders in Canada; descriptions of the principles and processes of the legal orders distinct to particular Indigenous peoples; contemporary examples of Indigenous legal principles in action; the relationship between Indigenous legal orders and state-based law; and approaches to transmitting and teaching Indigenous law. ***

The common starting point of the scholarship reviewed in this Report is the legal fact that over the past 150 years the Canadian state, its legislation and its courts, have left little space for the recognition and application of Indigenous law. *** [U]ntil relatively recently the policy of the Canadian state has been to suppress the autonomy of Indigenous peoples and their ability to regulate their societies in accordance with their own values and norms. The tragic effects of that intrusion were widely publicised by the reports of the federal Truth and Reconciliation Commission. The Supreme Court of Canada has acknowledged in several decisions over the past two decades that Aboriginal peoples' customary laws survived the assertion of Canadian sovereignty and, in concert with the common law tradition, helped shape the Aboriginal and treaty rights guaranteed by Canada's constitution.[825] However, having identified this promising opportunity for the recognition of Indigenous legal orders, the Court has yet to identify and apply a specific Indigenous legal concept or principle in deciding an Aboriginal rights or treaty dispute.

As for Canadian legislation, since 1876 the federal *Indian Act* has expressly imposed on First Nation

[825] See *R. v. Van der Peet*, [1996] 2 SCR 507; *Mitchell v. Canada (Minister of National Revenue)*, [2001] 1 SCR 911; *R. v. Marshall*, [1999] 3 SCR 456.

communities non-Indigenous rules of governance and law-making. ***

The importance of recognizing and respecting Indigenous legal traditions has recently been highlighted by the report of the Truth and Reconciliation Commission and by Article 5 of UNDRIP, which has now been embraced by the federal government of Canada. The time is ripe, then, for reflection about Indigenous legal traditions in Canada and opportunities for revitalizing those traditions. Indigenous communities, government policy-makers, judges, and legal scholars need answers to the following questions. How can Indigenous laws be identified? What are the sources of Indigenous law? What is unique about Indigenous ways of understanding law? And, what can be done to better implement and recognize the legal systems of Indigenous peoples? *** […continue reading]

REFLECTION:

- *Continue reading Prof. Coyle's survey of writings on the legal principles created by Indigenous peoples in Canada to guide their societies in maintaining social order. What could be considered distinct and unique about the study of Indigenous legal orders?*
- *What values must be kept in mind when approaching the legal traditions of Indigenous peoples?*
- *What are the challenges of revitalising and implementing Indigenous legal orders today?*

25.2.2 Indigenous constitutionalism and dispute resolution

K. Drake, "Indigenous Constitutionalism and Dispute Resolution Outside the Courts: An Invitation" (2020) 48 Federal L Rev 570, 570-573

From one perspective, the story of constitutionally protected Indigenous rights in Canada has been one of progress.[826] Section 35(1) of the *Constitution Act*, *1982*[827] recognizes and affirms the Aboriginal rights (including Aboriginal title) and treaty rights of the Aboriginal peoples of Canada.[828] A series of court victories mean that, as Indigenous peoples, we have greater ability to engage in our cultural practices,[829] to use our territories[830] and to exercise our rights protected by our treaties with the Crown.[831] But from another perspective, the story is one of disappointment and distortions. Despite the promise of 'reconciliation',[832] the legal tests developed by the courts protect frozen rights instead of self-determination,[833] and Aboriginal title is closer to a property interest in land than a power to exercise jurisdiction over territory.[834] ***

[A]ttempts to implement Indigenous laws within the political and legal architecture of a liberal state result in incoherence and structural violence to Indigenous law, which Mills describes as constitutional capture[835] and which Gordon Christie describes as a liberal or colonial snare.[836] As Christie demonstrates, the Supreme Court of Canada's s. 35(1) jurisprudence is one immense liberal snare.[837] From this perspective, the Court's s. 35(1) jurisprudence is not the rejection of colonialism but rather the perfection of it.[838] ***

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[826] Gordon Christie, *Canadian Law and Indigenous Self-Determination* (University of Toronto Press, 2019) 17, 130 ('*Canadian Law*').
[827] *Canada Act 1982* (UK) c 11, sch 3 ('*Constitution Act 1982*').
[828] I use the term 'Indigenous' to cohere with preferences for this term. I use the term 'Aboriginal' when referring to rights or peoples described in s 35.
[829] *R v. Powley* [2003] 2 SCR 207.
[830] *Tsilhqot'in Nation v. British Columbia* [2014] 2 SCR 257 ('*Tsilhqot'in Nation*').
[831] *R v. Marshall* [1999] 3 SCR 456.
[832] *R v. Van der Peet* [1996] 2 SCR 507 [31] ('*Van der Peet*').
[833] *Ibid*; *R v. Pamajewon* [1996] 2 SCR 821.
[834] *Tsilhqot'in Nation* (*supra*) [149]–[151]; Gordon Christie, 'Who Makes Decisions over Aboriginal Title Lands?' (2015) 48(3) *University of British Columbia Law Review* 743. See especially 754.
[835] [Aaron James (Waabishki Ma'iingan) Mills, *Miinigowiziwin: All That Has Been Given for Living Well Together: One Vision of Anishinaabe Constitutionalism* (PhD Dissertation, Faculty of Law, University of Victoria, 22 July 2019) 39 ('*Miinigowiziwin*')] 8, 28, 36.
[836] [Gordon Christie, 'Culture, Self-Determination and Colonialism: Issues Around the Revitalization of Indigenous Legal Traditions' (2007) 6(1) *Indigenous Law Journal* 13 ('Culture')] 14–18, cited in Mills, *Miinigowiziwin* (*supra*) 36.
[837] Christie, 'Culture' (*supra*) 16–17; Christie, *Canadian Law* (*supra*) chs 7–8.
[838] Gordon Christie, 'Indigenous Legal Orders, Canadian Law and UNDRIP' in *UNDRIP Implementation: Braiding*

I propose that disputes about the operation of Indigenous laws could be addressed through a forum that facilitates dispute resolution grounded in Indigenous constitutionalism. The forum would provide an alternative to s. 35 litigation and replace both the Comprehensive Claims process[839] and the federal government's Inherent Rights Policy (and the accompanying process for negotiating self-government agreements).[840] It could also serve as an alternative to the Specific Claims Tribunal.[841] These existing dispute resolution mechanisms employ concepts and processes 'drawn solely from the dominant settler legal system'[842] and thus exhibit the same constitutional capture produced by the s. 35 jurisprudence.[843] The benefits of the new forum would include avoiding not only constitutional capture but also the drawbacks of litigation. The inefficiencies and tremendous costs (in terms of money, time, resources and uncertainty) of litigation of Aboriginal rights are well known.[844] Although the Supreme Court of Canada has nudged the parties toward negotiation,[845] the Crown still has 45,000 legal claims against it by First Nations.[846] Moreover, a new dispute resolution process grounded in Indigenous procedures could fulfill art 27 of the *United Nations Declaration on the Rights of Indigenous Peoples*, which requires states in conjunction with Indigenous peoples to implement a process for recognizing Indigenous peoples' rights that gives due recognition to Indigenous peoples' laws.[847] *** […continue reading]

REFLECTION:

- *Continue reading Prof. Drake's proposal for an institution that facilitates dispute resolution between Canadian governments and Indigenous peoples grounded in Indigenous constitutionalism. What opportunities does this proposal hold over civil litigation and alternative dispute resolution procedures?*
- *What are the points of contrast between the foundational norms and dispute resolution procedures of Anishinaabe constitutionalism and liberal constitutionalism?*

25.2.3 Further material

- K. Mahoney, "What Indigenous Solutions Look Like" Centre for International Governance Innovation (Jun 27, 2019).
- B.D. Lundy, T.L. Collette & J.T. Downs, "The Effectiveness of Indigenous Conflict Management Strategies in Localized Contexts" (2022) 56 Cross-Cultural Research 3.

International, Domestic and Indigenous Laws (Centre for International Governance Innovation, 2017) 48, 49.

[839] 'Comprehensive Claims', *Government of Canada* (Web Page, 13 July 2015) <www.rcaanc-cirnac.gc.ca/eng/1100100030577/1551196153650>.

[840] 'The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government', *Government of Canada* (Web Page, 15 September 2010) <www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136>.

[841] 'Specific Claims Tribunal Canada', *Specific Claims Tribunal Canada* (Web Page, 12 May 2020) <www.sct-trp.ca/hom/index_e.htm>. For a discussion of the development of Canada's Specific Claims and Comprehensive Claims policies, see Michael Coyle, 'ADR Processes and Indigenous Rights: A Comparative Analysis of Australia, Canada and New Zealand' in Benjamin J Richardson, Shin Imai and Kent McNeil (eds), *Indigenous People and the Law: Comparative and Critical Perspectives* (Hart Publishing, 2009) 371, 383–5 ('ADR Processes').

[842] ADR Processes (*supra*) 398. See also Michael Coyle, 'Transcending Colonialism? Power and the Resolution of Indigenous Treaty Claims in Canada and New Zealand' (2011) 24(4) *New Zealand Universities Law Review* 596, 619 ('Transcending Colonialism?') (explaining that 'both the Specific Claims Policy and the enabling legislation of the Specific Claims Tribunal fail almost entirely to incorporate indigenous values as relevant criteria in resolving treaty claims').

[843] An exception may be the Office of the Treaty Commissioner in Saskatchewan which collected and documented elders' understandings of the treaties covering what is now known as Saskatchewan: Harold Cardinal and Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized as Nations* (University of Calgary Press, 2000).

[844] Douglas R Eyford, *A New Direction: Advancing Aboriginal and Treaty Rights* (Report by the Canadian Ministerial Special Representative on Renewing the Comprehensive Land Claims Policy, 2015) 29; *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)* [2005] BCCA 128, [54]–[55]; @benralstonyxe (Benjamin Ralston) (Twitter, 28 February 2020) <https://twitter.com/benralstonyxe/status/1233576426961391616>.

[845] *Delgamuukw v. British Columbia* [1997] 3 SCR 1010, [186]; *Tsilhqot'in Nation* (*supra*) [17].

[846] Hayden King and Shiri Pasternak, *Canada's Emerging Indigenous Rights Framework: A Critical Analysis* (Yellowhead Institute, 5 June 2018) 19.

[847] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) art 27.

- J. Hewitt, “Indigenous Restorative Justice: Approaches, Meaning & Possibility” (2016) 67 U New Brunswick LJ 313.
- P.L. Tait, *Systems of Conflict Resolution within First Nations Communities: Honouring the Elders, Honouring the Knowledge* (National Centre for First Nations Governance, 2007).
- B.J. Richardson, S. Imai & K. McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart Publishing, 2009).
- J. Borrows, *Canada’s Indigenous Constitution* (Toronto: U Toronto Press, 2010).
- G. Christie, *Canadian Law and Indigenous Self-Determination: A Naturalist Analysis* (Toronto: U Toronto Press, 2019).

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