Tort Law: Cases and Commentaries

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Tort Law: Cases and Commentaries
Second Edition

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Samuel Beswick, B.Com, LL.B. (Hons), LL.M., S.J.D.

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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 coursebook provides an introduction to tort law: the law that recognises and responds to civil wrongdoing. The material is arranged in two parts. Part I comprises §§1-11 and addresses intentional and dignitary torts and the overarching theories and goals of tort law. Part II comprises §§12-25 and addresses no-fault compensation schemes, negligence, nuisance, strict liability, and tort law’s place within our broader legal systems.

This coursebook 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. expected 2023) provided research assistance on the first edition (published 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.

Themes

Themes explored within this coursebook 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 (§2.4.4) addressing police racial profiling, trespass, and false imprisonment; the opinion dissenting from the Supreme Court of the United States’ denial of certiorari in Baxter v. Bracey (§6.6.9.2) 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 (§19.7.2) certifying a class action of First Nations residential school survivors’ claims in negligence, battery, and assault.

While primarily focussing on case law from Canadian courts, this coursebook incorporates judgments from comparative common law jurisdictions such as Hong Kong, India, and New Zealand, as well as extracts of commentaries from the world’s leading tort law scholars.
Teaching and learning from this coursebook

This coursebook is designed to complement the 1L curriculum in common law Canadian law schools. It does not try to present an exhaustive overview of all of Canadian tort law. Instead, it focusses on the central doctrines and topics that are most commonly taught in 1L torts courses.

The cases have been selected and curated to help build up in-depth understanding of material over a course while minimising the amount of ‘new’ cases students must learn. For example, the case of Lu v. Shen, 2020 BCSC 490, appears across six cross-referenced sections addressing the topics of intentional infliction of mental suffering (§3.2.4), invasion of privacy (§4.3.3), defamation (§5.1.3), harassment (§5.2.3), general compensatory damages (§9.3.9), and permanent injunctions (§9.8.2.3). The case of Barnett v. Chelsea & Kensington Hospital [1968] 2 WLR 422 (QB) appears in the sections on standard of duty of care (§14.1.3.4), breach of duty of care (§14.2.5.3), but-for causation (§16.1.3), and vicarious liability (§23.1.5).

The coursebook was designed with flexibility in mind. Each chapter is largely self-contained so that teachers can assign topics to suit their syllabi. The edited cases link back to original judgment transcripts on open-access platforms. Extracts of relevant British Columbia statutes are accompanied by lists of all other provinces’ equivalent statutes.

Readers who wish to delve deeper will benefit from the links to podcasts 🎧, videos 📽️, blogs, news, articles, and books on relevant topics that appear in the Further material sections.

Quizzes and problem exercises

Students may complete multiple-choice quizzes and guided exam answer exercises based on the coursebook content by visiting https://blogs.ubc.ca/beswick/torts-quizzes/.

Recommended reference reading on Canadian tort law


Highly recommended reading for first-year law students

- JD Advising, “A Case Brief Template” (2020) and “An In-Depth Guide to Outlining” (2020).
# Tort Law: Cases and Commentaries

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1 INTRODUCTION

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1.1.1 The 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; there can be with us nothing really corresponding to the “administrative law” (*droit administratif*) or the “administrative tribunals” (*tribunaux administratifs*) of France.⁴ The notion which lies at the bottom of the “administrative law” known to foreign countries is, that affairs or disputes in which the government or its servants are concerned are beyond the sphere of the civil Courts and must be dealt with by special and more or less official bodies. This idea is utterly unknown to the law of England, and indeed is fundamentally inconsistent with our traditions and customs.

The “rule of law,” lastly, may be used as a formula for expressing the fact that with us the law of

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¹ *Mostyn v. Fabregas*, Comp. 161; *Musgrave v. Pulido*, 5 App. Cas. 102; *Governor Wall's Case*, 28 St. Tr. 51.
² *Entick v. Carrington*, 19 St. Tr. 2030. [§7.1.1]
³ *Phillips v. Eyre*, L.R., 4 Q.B. 225.
⁴ See Chap. XII.
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.***

1.1.2 Further material


1.2 Overview of tort law

1.2.1 The common law of torts


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 shifts all of the plaintiff’s legally cognizable costs to the defendant [§9.2]. (It is controversial whether tort really lives up to this principle in practice.) On rare occasions, a plaintiff may also be awarded punitive damages, which go beyond what it necessary for compensation [§9.5]. In other cases, a plaintiff may obtain an injunction: a court order preventing the defendant from injuring her or from invading her rights (perhaps harmlessly) [§9.8]. 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 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, battery, defamation, and trespass, among many others.

Rather than focusing on categories of torts, it is more fruitful to begin by conceptualizing torts in
§1.2.2 • Overview of tort law

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 or that the plaintiff consented to the otherwise unlawful touching.

Many think of battery and trespass as the paradigmatic private wrongs and thus as paradigmatic torts. Conceiving of torts in terms of the paradigmatic case invites the thought that tort law proceeds by identifying wrongs that share some important normative characteristics with either trespass or battery—for example, that a tort involves an intention to disregard certain protected rights of others; and perhaps that the fundamental rights protected by torts are those pertaining to the security of person and property. It also invites the thought that the aim or purpose of tort law is to redress those wrongs. In such a view, the core concepts of tort law appear to be “rights”, “wrongs” and “redress” and the dual goals of tort theory are to identify the principle that connects the category of wrongs that torts addresses and to justify the distinctive mode(s) of redress for wrongs that tort law adopts. We will explore this approach to tort law in some detail in what follows.

While not denying or downplaying the significance of the concept of wrong to understanding tort law, other theorists are inclined to express the centrality of it in torts in terms of a more generic formulation: namely, the duty each us has in undertaking various activities not to injure those our undertakings put at risk. On this view, the core duty in torts is not to injure others (either full stop or unjustifiably).

Such a general approach to conceptualizing tort law has many appealing features, not the least of which is the fact that in the modern context tort suits typically begin with the plaintiff’s allegation that the defendant wronged her by breaching a duty not to injure her. In addition, this alternative view captures the centrality of the notion of a wrong without inviting the idea that the wrongs that fall within the domain of tort law must exhibit some of the normatively significant features of battery or trespass. Beyond that, the alternative view introduces the notion of injury and invites the idea that the concern of tort law is to address injuries in some way or other; either, for example, by addressing their costs or the suffering that normally attends them. Thus, while the notion of a wrong remains important to our understanding of tort law, the alternative view invites the thought that the underlying concern of tort law is to address the costs, suffering, or more generally, the losses that victims suffer as a result.

As helpful as the focus on injuries is, it is important to see that the concept of an injury cannot, by itself, play the foundational role in a theory of tort law. After all, the law does not recognize just any injury as the basis of a claim in tort. If you beat me in tennis or in competition for the affections of another, I may well be injured. Yet I have no claim in tort to repair my bruised ego or broken heart. Since you lack a legal duty not to beat me in tennis or in competition for the affections of another, you do not act tortiously when you succeed at my expense. Thus, even if we take tort to be an institution that addresses injuries, we still stand in need of an account of just which injuries it is wrong to cause.

1.2.2 Further material

1.3 From forms of action to statements of claim

1.3.1 The modern law of tort: fourteenth century beginnings?


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. 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 that trespass is a direct forcible injury to the person, or property in the possession, of the plaintiff (like assault or trespass to land), then look to the eighteenth century. 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 Polestede about why (ostensurus quare) he made his granddaughter a nun.’ 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

6 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].
7 D M Stenton, ed, Pleas before the King or his Justices, (London: Selden Society 1953) 187, no 2148 (Michaelsmas 1199): ‘Hugo de Polstede [essoniavit se] versus 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.
Henry III, between 1261 and 1272.⁸ The classic form of the writ is as follows:⁹

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 and trespass for taking or damaging personal property. ***

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),¹⁰ 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 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.

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⁹ Registrum brevium (London 1687) fol 93 (the text dates from the 14th century).

¹⁰ Palmer’s explanation (supra, note 10, at 226) that this case involves a change in the form of writs for such cases is plausible.
1.3.2 The forms of action


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.11 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,12 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. ***

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. ***

1.3.3 Letang v. Cooper [1964] EWCA Civ 5

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

CROSS-REFERENCE: §6.7.5

THE 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

11 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 Westminster 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 Law. 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 began as an action on the case, as did elements of the law of negligence.

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

**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 to-day 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 to-day “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

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13 See *Markevich v. Canada*, 2003 SCC 9, [27]; *Do Carmo v. Ford Excavations Pty Ltd* [1984] HCA 17, [13].
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 to-day 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”. **
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)

FROM:
Fill in the name, address and telephone number of the person(s) or business(es) making the claim.

CLAIMANT(S):

NAME

ADDRESS

CITY TOWN

PROV.

POSTAL CODE

Tel. #

TO:
Fill in the name, address and telephone number of the person(s) or business(es) the claim is against.

DEFENDANT(S):

NAME

ADDRESS

CITY TOWN

PROV.

POSTAL CODE

Tel. #

WHAT HAPPENED?
Tell what led to the claim.

WHERE?
Tell where this happened.

CITY TOWN

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 and show the amount for each part. Add these amounts and fill in the total claimed.

a $ 

b $ 

c $ 

d $ 

e $ 

TIME LIMIT FOR A DEFENDANT TO REPLY
The defendant must complete and file the attached reply with 14 days from being served with this notice, unless the defendant satisfies 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.

TOTAL $ 0.00

+ FILING FEES 

+ SERVICE FEES 

= TOTAL CLAIMED $ 

The Court Address for filing documents is:

court copy

2021 CanLIIDocs 1859
1.4 Simplified (civil) court hierarchies

1.4.1 Canada

[Judicial Committee of the Privy Council (until 1947)]

Supreme Court of Canada (since 1867)

Provincial Courts of Appeal

Provincial/Territorial Superior/Supreme Courts

Provincial/Territorial Courts

1.4.2 England & Wales and Scotland

Supreme Court of the United Kingdom (since 2009)

[Appellate Committee of the House of Lords (1876–2009)]

Court of Appeal of England and Wales (since 1875)

High Court of Justice (since 1875)

[King’s/Queen’s Bench and Court of Common Pleas (~1215–1875)]

County Courts

Sheriff Courts

1.4.3 Australia

[Judicial Committee of the Privy Council (until 1986)]

High Court of Australia (since 1903)

State Courts of Appeal

State Supreme Courts

District/County Courts

Full Court of the Federal Court

Federal Court
§1.4.5 Simplified (civil) court hierarchies

1.4.4 United States

Supreme Court of the United States (since 1789)

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State Supreme Courts U.S. Circuit Courts of Appeals (Federal)

⇑

State Courts of Appeals U.S. District Courts (Federal)

⇑

State Superior/District Courts

1.4.5 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].
2 TRESPASS TO THE PERSON

2.1 Foundational concepts: intention, volition, directness

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 trespass against Stone _pedibus ambulando_ , the defendant pleads this special plea in justification, _viz._ that he was carried upon the land of the plaintiff by force, and violence of others, and was not there voluntarily, which is the same trespass, for which the plaintiff brings his action. The plaintiff demurs to this plea.

In this case Roll Justice said, that it is the trespass of the party that carried the defendant upon the land, and not the trespass 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.

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

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

_England Court of King’s Bench – [1558-1774] All ER Rep 295_

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 maintaineable.

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

BLACKSTONE J. (dissenting): ***

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.
§2.2.1 • Battery

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. *** 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. *** 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 Naress, JJ, that the present action is maintainable.

2.1.3 Cross-references

• Letang v. Cooper [1964] EWCA Civ 5, [29]-[30], [10]-[11]: §1.3.3, §6.7.5.

2.1.4 Further material


2.2 Battery

2.2.1 Bettel v. Yim [1978] CanLII 1580 (ON CC)

Ontario County Court, Judicial District of York – 1978 CanLII 1580

CROSS-REFERENCE: §6.2.2.1, §9.2.1, §9.3.5, §20.8.1

BORINS CO.CT.J.:

1. In this action the infant plaintiff, Howard Bettel, seeks damages for assault. His father, Murray Bettel, seeks special damages in the amount of $1,113. ***

The Facts

2. The events giving rise to this action took place on 22nd May 1976, in a variety store owned and operated by the defendant, Ki Yim, situated in a small commercial plaza located in Metropolitan Toronto. ***
6. The defendant testified that the plaintiff, together with six or seven other boys, entered the store and went to the area of the pinball machines. Some of the boys were playing with a toy football and toy guns and the defendant told them to leave his store. Half of the boys, including the plaintiff, left and went outside. The defendant saw the plaintiff lighting matches and throwing them into the store. On the first occasion, the plaintiff entered the store and retrieved a burning match. The second match that was thrown into the store burned itself out. Then the plaintiff reentered the store, proceeded toward the pinball machines and said “What’s the smell?” The defendant smelled nothing, but after twenty or thirty seconds he saw flames coming from the bag of charcoal and proceeded to remove the bag from the store unassisted by the plaintiff who remained inside. The defendant did not see who had thrown the match which started the fire.

7. As the defendant returned to the store he saw the plaintiff walking toward the door. He grabbed the plaintiff by the arm as he did not want the plaintiff to leave. The plaintiff denied that he set the fire. The plaintiff did not try to leave. He stood where he was. Because the plaintiff denied setting the fire the defendant grabbed him firmly by the collar with both hands and began shaking him. His purpose in doing so was to obtain a confession from the plaintiff before he called the police. The plaintiff’s constant denials had made the defendant unhappy. He shook the plaintiff two or three times and then his head came down and struck the plaintiff’s nose. He relaxed his hold on the plaintiff who fell to the ground. The defendant obtained some kleenex for the plaintiff, who was bleeding from the nose, and helped him to his feet. The defendant then telephoned the police.

8. In explaining the incident the defendant said: “I shook him maybe three times and my head and his nose accidentally hit; I didn’t intend to hit him.” In cross-examination he stated that he did not mean to hit the plaintiff with his head and that is why he said it was an accident. ***

The Law

13. The plaintiff has framed his action in assault. Properly speaking the action should have been framed in battery which is the intentional infliction upon the body of another of a harmful or offensive contact. However, in Canada it would appear that the distinction between assault and battery has been blurred and when one speaks of an assault, it may include a battery: Gambriell v. Caparelli (1974), 7 O.R. (2d) 205, 54 D.L.R. (3d) 661 [§6.5.1]. It is on the basis that this is an action framed in battery that I approach the facts in this case.

14. It would appear to be well established in this country, (although not necessarily warmly received), following the dictum of Cartwright J. (as he then was) in Cook v. Lewis, [1951] S.C.R. 830, [1952] 1 D.L.R. 1, that once the plaintiff proves that he was injured by the direct act of the defendant, the defendant is entitled to judgment only “if he satisfies the onus of establishing the absence of both intention and negligence on his part”: Dahlberg v. Naydiuk (1969), 72 W.W.R. 210, 10 D.L.R. (3d) 319 (Man. C.A.) per Dickson J.A. (as he then was) at 328-29. On the defendant’s evidence, his act in grabbing the plaintiff with both hands and shaking him constituted the intentional tort of battery. It is obvious that he desired to bring about an offensive or harmful contact with the plaintiff for the purpose of extracting a confession from him. Viewed as such, the defendant’s own evidence proves, rather than disproves, the element of intent insofar as this aspect of his physical contact with the plaintiff is concerned. Indeed, the defendant’s admitted purpose in grabbing and shaking the plaintiff does not fit into any of the accepted defenses to the tort of battery—consent, self-defence, defence of property, necessity and legal authority [§6]: Fleming, The Law of Torts (5th ed., 1977), 74 et seq. Furthermore, assuming the onus created by Cook v. Lewis requires the defendant to establish absence of negligence in the sense that he must show that his trespass was not careless (which, I readily concede, can be seen to ‘be’ a
contradiction in terms) it is my opinion that he has failed to do so. In grabbing the plaintiff and shaking him firmly, it ought to have been apparent to the defendant that in doing so he created the risk of injury to the plaintiff resulting from some part of the plaintiff’s body coming into contact with some part of the defendant’s body while the plaintiff was being shaken. If Cartwright J. meant that the defendant must disprove negligence such as would give rise to an action in negligence, the defendant would be put in a very unusual position because, with respect, the element of negligence is, by definition, absent from the intentional tort of battery.

15. That there is no liability for accidental harm is central to the submission of defence counsel who argues that the shaking of the plaintiff by the defendant and the striking of the plaintiff by the defendant’s head must be regarded as separate and distinct incidents. While he concedes that the defendant intentionally grabbed and shook the plaintiff, he submits that the contact with the head was unintentional. I have, of course, accepted the defendant’s evidence in this regard. This, in my view, gives rise to the important question: Can an intentional wrongdoer be held liable for consequences which he did not intend? Another way of stating the problem is to ask whether the doctrine of foreseeability as found in the law of negligence is applicable to the law of intentional torts? Should an intentional wrongdoer be liable only for the reasonably foreseeable consequences of his intentional application of force or should he bear responsibility for all the consequences which flow from his intentional act?

16. To approach this issue one must first examine what interests the law seeks to protect. A thorough discussion of the history of the old actions of trespass and case is found in Prosser, *Handbook of the Law of Torts* (4th ed., 1971), 28 et seq. Terms such as battery, assault and false imprisonment, which were varieties of trespass, have come to be associated with intent. The old action on the case has emerged as the separate tort of negligence. Today it is recognized that there should be no liability for pure accident, and that for there to be liability the defendant must be found at fault, in the sense of being chargeable with a wrongful intent, or with negligence. Thus, “with rare exceptions, actions for injuries to the person, or to tangible property, now require proof of an intent to inflict them, or of failure to exercise proper care”: Prosser, *supra*, 30.

17. In discussing battery Fleming writes, *supra*, 23-4:

Of the various forms of trespass to the person the most common is the tort known as battery, which is committed by intentionally bringing about a harmful or offensive contact with the person of another. The action, therefore, serves the dual purpose of affording protection to the individual not only against bodily harm but also against any interference with his person which is offensive to a reasonable sense of honour and dignity. The insult involved in being touched without consent has been traditionally regarded as sufficient to warrant redress, even though the interference is only trivial and not attended with actual physical harm. ‘The least touching of another in anger is a battery’, and so is such offensive and insulting behaviour as spitting in another man’s face, cutting his hair or kissing a woman. The element of personal indignity is given additional recognition in the award of aggravated damages to compensate for any outrage to the plaintiff’s feelings….

Battery is an intentional wrong: the offensive contact must have been intended or known to be substantially certain to result. On the other hand, it is not necessary that the actor intended to inflict bodily harm, since we have seen that the legal injury is complete without it. Indeed it may be sufficient that he intended only to frighten but in a manner fraught with serious risk of bodily contact or harm. (Footnotes omitted.) ***
§2.2.2 • Battery

34. It is my respectful view that the weight of opinion is that the concept of foreseeability as defined by the law of negligence is a concept that ought not to be imported into the field of intentional torts. While strong policy reasons favour determining the outer limits of liability where conduct falls below an acceptable standard, the same reasons do not apply to deliberate conduct, even though the ultimate result in terms of harm caused to plaintiff is not what was intended by the defendant. In the law of intentional torts, it is the dignitary interest, the right of the plaintiff to insist that the defendant keep his hands to himself, that the law has for centuries sought to protect. In doing so, the morality of the defendant’s conduct, characterized as “unlawful”, has predominated the thinking of the courts and is reflected in academic discussions. The logical test is whether the defendant was guilty of deliberate, intentional and unlawful violence or threats of violence. If he was, and a more serious harm befalls the plaintiff than was intended by the defendant, the defendant, and not the innocent plaintiff, must bear the responsibility for the unintended result. If physical contact was intended, the fact that its magnitude exceeded all reasonable or intended expectations should make no difference. To hold otherwise, in my opinion, would unduly narrow recovery where one deliberately invades the bodily interests of another with the result that the totally innocent plaintiff would be deprived of full recovery for the totality of the injuries suffered as a result of the deliberate invasion of his bodily interests. To import negligence concepts into the field of intentional torts would be to ignore the essential difference between the intentional infliction of harm and the unintentional infliction of harm resulting from a failure to adhere to a reasonable standard of care and would result in bonusing the deliberate wrongdoer who strikes the plaintiff more forcefully than intended. For example, in the case of a deliberate blow to the eye liability should cover not only the black eye and the bloody nose but also the resultant brain damage caused when the plaintiff falls to the ground and strikes his head, even though the latter was never intended. Thus, the intentional wrongdoer should bear the responsibility for the injuries caused by his conduct and the negligence test of “foreseeability” to limit, or eliminate, liability should not be imported into the field of intentional torts. ***

37. I have, therefore, reached the conclusion that the defendant must bear the responsibility for the injury suffered by the plaintiff. The defendant intentionally grabbed the plaintiff and shook him. This constituted a battery. While he was shaking the plaintiff, the defendant’s head came into contact with the plaintiff’s nose and injured it. This was the end result of a brief chain of events set in motion by the defendant. Subjectively, the defendant did not intend to strike the plaintiff’s nose. Legally, because it was the result of the defendant’s intentional interference with the plaintiff, responsibility for the injury which it caused must fall on the defendant. ***

2.2.2 Kohli v. Manchanda [2008] INSC 42

Supreme Court of India – [2008] INSC 42

CROSS-REFERENCE: §6.8.3.1, §18.1.1.1, §19.4.2.3

RAVEENDRAN J.:

1. This appeal is filed against the order dated November 19, 2003 passed by the National Consumer Disputes Redressal Commission (for short “Commission”) rejecting the appellant’s complaint (O.P. No.12/1996) under Section 21 of the Consumer Protection Act, 1986 (“Act” for short).

2. On May 9, 1995, the appellant, an unmarried woman aged 44 years, visited the clinic of the first respondent (for short “the respondent”) complaining of prolonged menstrual bleeding for nine
§2.2.2 • Battery

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 Rengan, 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 hysterectomy (removal of uterus) and bilateral salpingo-oopherectomy (removal of ovaries and fallopian tubes).

4. *** The appellant alleged *** 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; ***. 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-
§2.2.2 • Battery

oophorectomy (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 Schoendorf 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 [§6.8.3], 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. ***

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. ***
§2.2.3 • Battery

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-oopherectomy. ***

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 set aside the order of the Commission and allow the appellant’s claim in part.

2.2.3 Collins v. Wilcock [1984] 1 WLR 1172 (QB)

England and Wales High Court (Divisional Court)

ROBERT GOFF L.J.:

1. There is before the Court an appeal by way of a case stated by a Metropolitan Stipendiary Magistrate sitting at Marylebone, under which the defendant, Alexis Collins, appeals against her conviction on January 20, 1983, of assaulting the prosecutor, Tracey Wilcock, a constable of the Metropolitan Police Force, in the execution of her duty at Craven Road, London W.2, on July 22, 1982, contrary to section 51(1) of the Police Act 1964.

2. The magistrate found the following facts: (a) On July 22, 1982, W.P.C. Wilcock, the prosecutor, and P.S. Benjamin were on duty in a police vehicle and saw two women walking along the street; one of the two was a known prostitute, the other was the defendant. (b) The officers observed the two women, both of whom appeared to them to be soliciting men in the street. (c) The officers, without alighting from their vehicle, asked the two women to get into the police car so that they
could have a word with them. One woman got into the car, the defendant refused to do so. (d) The officers repeated their request to the defendant, who again refused and walked away, followed by the police car which then pulled up alongside her. She again walked away. (e) The prosecutor got out of the car and followed the defendant on foot, asking her why she didn’t want to talk to the police, and also for her name and address. The defendant again started to walk away. The prosecutor told her that she had not finished talking to her and the defendant replied “fuck off” and started to walk away yet again. (f) The prosecutor took hold of the defendant by the left arm to restrain her and the defendant shouted “Just fuck off copper” and scratched the prosecutor’s right forearm with her fingernails. (g) The defendant was then arrested for assaulting a police officer in the execution of her duty. ***

4. It may be convenient if at this stage we refer to the relevant provisions of that Act. Section 1(1) provides as follows:

“(1) It shall be an offence for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution.”

Section 1(3) provides:

“(3) A constable may arrest without warrant anyone he finds in a street or public place and suspects, with reasonable cause, to be committing an offence under this section.”

5. We should also refer to the system of cautioning which is adopted by the police. ***

6. We were told that, in practice, the system of cautioning is carried into effect as follows. A police officer who observes a woman in a street or public place, whom he believes to be a common prostitute loitering or soliciting there for the purposes of prostitution, will approach her and ask her for her name and address. Having been given it, he will check by radio with the police station to ascertain whether there are any cautions on her record. If there are none, he will caution her; if there is one, he will administer a second caution; and if there are two, he will arrest her on suspicion of committing an offence under section 1(1). ***

10. *** We think it right to consider whether, on the facts found in the case, the magistrate could properly hold that the police officer was acting in the execution of her duty. In order to consider this question, it is desirable that we should exposes the underlying principles.

11. The law draws a distinction, in terms more easily understood by philologists than by ordinary citizens, between an assault and a battery. 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. The requisite mental element is of no relevance in the present case.

12. We are here concerned primarily with battery. 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. So Holt C.J. held in 1704 that “the least touching of another in anger is a battery”: see Cole v. Turner (1704) Mod. 149. The breadth of the principle reflects the fundamental nature of the interest so protected; as Blackstone wrote in his Commentaries on the Laws of England, “the law cannot draw the line between
different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man’s person being sacred, and no other having a right to meddle with it, in any the slightest manner” (3 Bl.Com. 120). The effect is that everybody is protected not only against physical injury but against any form of physical molestation.

13. But so widely drawn a principle must inevitably be subject to exceptions. For example, children may be subjected to reasonable punishment; people may be subjected to the lawful exercise of the power of arrest; and reasonable force may be used in self-defence or for the prevention of crime. But, apart from these special instances where the control or constraint is lawful, a broader exception has been created to allow for the exigencies of everyday life. Generally speaking, consent is a defence to battery; and most of the physical contacts of ordinary life are not actionable because they are impliedly consented to by all who move in society and so expose themselves to the risk of bodily contact. So nobody can complain of the jostling which is inevitable from his presence in, for example, a supermarket, an underground station or a busy street; nor can a person who attends a party complain if his hand is seized in friendship, or even if his back is (within reason) slapped (see Tuberville v. Savage (1669) 1 Mod. 3 [§2.3.1]). Although such cases are regarded as examples of implied consent, it is more common nowadays to treat them as falling within a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of daily life. We observe that, although in the past it has sometimes been stated that a battery is only committed where the action is “angry or revengeful, or rude or insolent” (see 1 Hawkins Pleas of the Crown, chap. 62, s.2), we think that nowadays it is more realistic, and indeed more accurate, to state the broad underlying principle, subject to the broad exception.

14. Among such forms of conduct, long held to be acceptable, is touching a person for the purpose of engaging his attention, though of course using no greater degree of physical contact than is reasonably necessary in the circumstances for that purpose. So, for example, it was held by the Court of Common Pleas in 1807 that a touch by a constable’s staff on the shoulder of a man who had climbed on a gentleman’s railing to gain a better view of a mad ox, the touch being only to engage the man’s attention, did not amount to a battery (see Wiffin v. Kincard (1807) 2 Bos. & Pul. N.R. 471): for another example, see Coward v. Baddeley (1859) 4 H. & N. 478. 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. *** 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. *** In each case, the test must be whether the physical contact so persisted in has in the circumstances gone beyond generally acceptable standards of conduct; and the answer to that question will depend upon the facts of the particular case.

15. *** 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, 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 (1969) 54 Cr.App.R. 229; [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 restraints 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 enquiry. 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 unlawfulness 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.

16. We have been referred by counsel to certain cases directly concerned with charges of assaulting a police officer in the execution of his duty, the crucial question in each case being whether the police officer, by using physical force on the accused in response to which the accused assaulted the police officer, was acting unlawfully and so not acting in the execution of his duty. In Kenlin v. Gardiner [1967] 2 Q.B. 510; [1966] 3 All E.R. 931, it was held that 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 at p.519 and p.934, per Winn L.J. Similarly, in Ludlow v. Burgess (1970) 54 Cr.App.R. 233 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: see at p.228, per Lord Parker C.J. ***

19. We now return to the facts of the present case. Before us, Mr. Armstrong, for the prosecutor police officer, sought to justify her conduct, first by submitting that, since the practice of cautioning women found loitering or soliciting in public places for the purposes of prostitution is recognised by section 2 of the Act of 1959, therefore it is implicit in the statute that police officers have a power to caution, and for that purpose they must have the power to stop and detain women in order to find out their names and addresses and, if appropriate, caution them. This submission, which accords with the opinion expressed by the magistrate, we are unable to accept. The fact that the statute recognises the practice of cautioning by providing a review procedure does not, in our judgment, carry with it an implication that police officers have the power to stop and detain women for the purpose of implementing the system of cautioning. If it had been intended to confer any such power on police officers that power could and should, in our judgment, have been expressly conferred by the statute.

20. Next, Mr. Armstrong submitted that the purpose of the police officer was simply to carry out the cautioning procedure and that, having regard to her purpose, her action could not be regarded as unlawful. Again, we cannot accept that submission. If the physical contact went beyond what is allowed by law, the mere fact that the police officer had the laudable intention of carrying out the cautioning procedure in accordance with established practice cannot, we think, have the effect of rendering her action lawful. Finally, Mr. Armstrong submitted that the question whether the police officer was or was not acting in the execution of her duty was a question of fact for the magistrate to decide; and that he was entitled, on the facts found by him to conclude that the prosecutor had been acting lawfully. We cannot agree. The fact is that the prosecutor took hold of the defendant by the left arm to restrain her. In so acting, she was not proceeding to arrest the defendant; and since her action went beyond the generally acceptable conduct of touching a person to engage his or her attention, it must follow, in our judgment, that her action constituted a battery on the defendant, and was therefore unlawful. It follows that the defendant’s appeal
must be allowed, and her conviction quashed. ***

2.2.4 Binsaris v. Northern Territory [2020] HCA 22

High Court of Australia – [2020] HCA 22

CROSS-REFERENCE: §6.6.5, §6.8.2.2

KIEFEL C.J. AND KEANE J.:

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. ***

GAGELER J. (minority opinion): ***

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 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”.14 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 and to staff”.15 The effect of the deployment of the CS gas on the other detainees was not ignored in that calculus but was,

14 (2017) 317 FLR 324 at 347-348 [139] (original emphasis). See also at 353 [166].
15 (2017) 317 FLR 324 at 349 [152]. See also at 338-340 [86]-[91], 352-353 [165].
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”.\textsuperscript{16}

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 \textit{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 \textit{Weapons Control Act (NT)}.\textsuperscript{17}

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 \textit{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”),\textsuperscript{18} 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

\textsuperscript{16} (2017) 317 FLR 324 at 352-353 [165].  
\textsuperscript{17} Section 12(2).  
\textsuperscript{18} (2017) 317 FLR 324 at 348 [140].
§2.2.4 • Battery

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 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”. 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 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.

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: ***

110. *** [T]he Court of Appeal erred in holding that the deployment of CS gas by a prison officer

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19 In re F (Mental Patient: Sterilisation) [1990] 2 AC 1 at 73 [§6.8.3]. 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].

20 See Spade v Lynn (1899) 52 NE 747 at 748.

21 See R (Laporte) v Chief Constable of Gloucestershire Constabulary [2007] 2 AC 105 at 141-142 [83].
at the Detention Centre on 21 August 2014 was not an unlawful battery of the appellants. ***

2.2.5 Cross-references

- PP v. DD [2017] ONCA 180, [71]: §6.3.2.1.
- Norberg v. Wynrib [1992] CanLII 65 (SCC), [26]: §6.3.2.3.
- Slater v. Attorney-General (No. 1) [2006] NZHC 308, [41]: §8.5.2.

2.2.6 Further material

- “Don Dale Detainee Trying to Turn His Life Around” ABC News (Nov 16, 2017).
- 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).
- M. Gollom, “‘Her Voice is Heard’: Why Some Accusers Pursue Civil rather than Criminal Justice in Harassment Cases” CBC News (Jan 5, 2018).

2.3 Assault

2.3.1 Tuberville v. Savage [1669] EWHC KB J25


*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.

2.3.2 Stephens v. Myers [1830] EWHC KB J37

*England Court of King’s Bench – [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
§2.3.3 • Assault

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 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.

2.3.3 Pong Seong v. Chan [2014] HKCFI 1480

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

CROSS-REFERENCE: §§5.2.1, §9.8.2.2, §21.1.4

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. 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
§2.3.3 • Assault

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. ***
§2.3.3 • Assault

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)22, 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?

22 Overturned partially on appeal in [2001] 1 HKLRD 736 on issue of vicarious liability [§23.1].
§2.3.4 • Assault

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. ***

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. ***

2.3.4 Further material

### 2.4 False imprisonment

#### 2.4.1 Bird v. Jones [1845] EWHC QB J64

*Queen’s Bench of England – [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. ***

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. ***

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. ***


Newfoundland Supreme Court – 1961 CanLII 404

CROSS-REFERENCE: §7.2.2

DUNFIELD J.:

1. The plaintiff, Bowring Brothers Limited, which has been in St. John's for about a century and a half, operates, among other activities, what is called a Department Store, one of the largest in the Province. The plaintiff, Mrs. Vera Chaytor is Manager of the Children's Department therein and the plaintiff John Delgado Jr., is a Buyer for Bowring Brothers Limited.
§2.4.3 • False imprisonment

2. The defendant, London, New York and Paris Association of Fashion Limited, operates another Department Store in St. John’s, a little smaller and younger perhaps, but it has been operating for a generation. The second defendant, Richard Price was at the relevant time Store Manager for the defendant company and says that as at the time his Managing Director, Mr. Joseph Goldstone, was out of the Province, he himself was in full charge of operations.

3. On May 18, 1961 at about 4:00 p.m. the plaintiffs, Mrs. Chaytor and Mr. Delgado entered the defendants’ premises on Water Street to examine the merchandise the defendant company was offering for sale. ***

4. The plaintiffs, who were known by sight were immediately identified by Mr. Tulk, a Department Manager, who reported the fact of their presence to Mr. Price, the Store Manager. Mr. Price went and saw the plaintiffs Mrs. Chaytor and Mr. Delgado and asked if he could do anything for them and they said they were merely looking. At the time they were examining some merchandise. At this point there seems to have occurred a sort of flare-up, which is not too fully explained, and which resulted in the raising of voices. I am quite satisfied that Mr. Price used towards Mrs. Chaytor and Mr. Delgado words implying that they were “spies.” *** Apparently the words, or manner, or both, gave offence to Mr. Delgado, who also raised his voice, and used words to Mr. Price including the accusation of being “ignorant” or handling the situation in an ignorant manner. ***

6. One never gets more than a part of the wording of these exchanges, but it is clear that there is an accusation of spying on one side and the accusation of ill-manners on the other. Mr. Price and Mr. Delgado are both sturdy young men of what I might call comparable fighting weight if it came to a question of black eyes.

7. Without delay, and very rapidly it would seem, Mr. Price did three things. (1) He called the Store Detective Mr. Williams, whom he had summoned, and told him to “watch these people” or words to that effect. (2) He shouted at the plaintiffs about getting out of the place. (3) He rushed to the telephone, which was close at hand and telephoned the Police Station to ask that constables be sent, referring to the plaintiffs as suspicious characters. The Police Station, is across the street, and within a hundred yards or so.

8. The Sergeant in charge immediately sent two men across to see what was the matter; they were unfortunately rather junior men, one having about four years’ service and the other less than a year. Naturally these police arrived very quickly, and came up the stairs to the second floor where the altercation was proceeding; in fact it is said that not more than twelve or fourteen minutes elapsed from the time they left the Station until as later mentioned, they arrived back at the Station with Mrs. Chaytor and Mr. Delgado. ***

16. *** The principal question in the case is whether the measures taken by Mr. Price to get them out of his shop exceeded what was proper and reasonable and amounted to and brought about false imprisonment.

17. *** In my view, the close watching of competitors is a normal commercial practice and does not carry any opprobrium. Moreover, people like department managers and buyers are dependent for their own status within their own establishment upon being closely in touch with the competition, and even if they were not told to keep themselves in touch they would naturally do so. ***
§2.4.3 • False imprisonment

19. Now the proper course in my view for a Shop Manager who recognised such emissaries and did not want them in his shop would be to identify them and ask them politely to leave and, to wait awhile and see whether they did so before taking any further measures; and further, in view of the well-recognised situation in the City, politeness would be in order and would be forthcoming from both sides. I think that any trouble there was was brought on by rather angry and hasty action of Mr. Price, which would, I feel, be not in accord with the common manners of the town. Whatever may do in big cities among strangers, roughness and incivility are neither common nor necessary in this environment. ***

21. I am disposed to think that persons who admittedly come as hostile or at any rate competitive observers are not invitees but trespassers; and the basic question in this case is, what rights has a shop as against such trespassers? ***

26. Hillen and Pettigrew v. I.C.I. (Alkali) Ltd., [1936] A.C. 65, is a case of an invitee, from the point of view of the duty of the occupier not to expose the invitee to risks. Lord Atkin says that “the duty to invitees only extends so long and so far as the invitee is making what can reasonably be contemplated as an ordinary and reasonable use of the promises for the purposes of which he had been invited.” The defence in the instant case uses this as an argument that even if the public generally was invited into the shop to see the goods, as soon as it became clear that the plaintiffs were interested only in inspecting, not in buying, they became trespassers. That seems reasonable; though the subject matter in the Hillen case is not in pari materia with ours.

27. It would seem that a trespasser should be asked to leave and only upon his refusal to leave may he be expelled with the minimum of force necessary. Most certainly he cannot be charged with anything, as the remedy for trespass is civil action. ***

28. Mr. Delgado’s position is that he and Mrs. Chaytor were most desirous of terminating the matter promptly and avoiding any embarrassment, and that they would have departed peaceably on request if asked peaceably to do so; but that he felt that if they tried to go they might be detained, which would have added to the embarrassment; and that once the police had been called they could not safely go until the character of the situation as between themselves and the police had been examined. *** I accept the evidence of Mr. Delgado that the junior constable said to him “You must come with us” or something to that effect. This was a mistake on the part of the junior constable, and I think both constables should have stayed together until the senior constable had settled the question as to whether there was any charge or not. ***

31. I consider therefore that there was what one might call a psychological type of imprisonment. In addition to this of course the plaintiffs were subjected to an objectionable form of public treatment. If they went to the Police Station voluntarily, I think it was because they felt they could hardly do otherwise; and by the mere operation of normal delays, they were psychologically compelled to remain there in the surroundings appropriate to suspected criminals for fifteen or twenty minutes.

32. We find cases of this kind mostly in connection with shoplifting; and I refer to a few cases, some raised by counsel, some not.

33. In Conn v. David Spencer Ltd., [1930] 1 D.L.R. 805, the plaintiff, who had been shopping in the self-service department of the defendant’s departmental store in Vancouver was tapped on the shoulder by a house detective and accused of having stolen a cake of soap and requested by her to leave the basement and go upstairs to one of the rooms. Plaintiff had not committed any
theft, but still he thought it advisable in view of the crowded state of the store to give way without any exhibition of force on the part of the detective, so he went upstairs accompanied by her and her assistant and upon being searched satisfied them that a mistake had occurred. They went upstairs with the detective walking beside him and her assistant behind. The detective, Mrs. Kinser, was asked whether she was taking the plaintiff into custody when she took him upstairs and replied that she was taking him up there to question him. She was asked whether she intended to let the plaintiff out of the room and stated that she might not have been able to hold him but she would have done her best to prevent it when protecting the goods of her employer. Macdonald J. therefore concludes that while physical force was not exerted to compel the plaintiff to leave the basement of the store and go to the room to remain and be searched, still that the control and detention arising out of a mistake was inexcusable and unwarranted, and he quotes Alderson B. in *Peters v. Stanway* (1835), 6 C. & P. 737, where Baron Alderson says “The question therefore is whether you think the going to the station-house proceeded originally from the plaintiff’s own willingness, or from the defendant’s making a charge against her; for, if it proceeded from the defendant’s making a charge, the plaintiff will not be deprived of her right of action by her having willingly gone to meet the charge.” ***

37. A point was made by Mr. Dawe Q.C. for the defence that there is another exit from the area where Mrs. Chaytor was, by a stair which leads to the street. But plaintiffs may not have known that. It is not the regular main entrance known to everybody. And indeed, I do not think that anybody who had done something to detain a person can say that she could, if she had insisted or resisted, or been clear about her rights and position, have effected an escape.

38. As to whether touching of the person is necessary to false imprisonment, *Bird v. Jones* (1846), 15 L.J.Q.B. 82 is cited. But I hardly think we need argue the pretty obvious point that there can be restraint of freedom without touching of the person. ***

41. I must therefore find plaintiffs claim proved, and feel I must award them damages. ***

2.4.4  **R v. Le [2019] SCC 34**

*Supreme Court of Canada – 2019 SCC 34*

**CROSS-REFERENCE:** §6.6, §7.1.3

**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 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
§2.4.4 • False imprisonment

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. ***

26. Even 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 ***.

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 at both stages 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. ***

(vi) The Duration of the Encounter

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. ***

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. ***

(c) Particular Characteristics or Circumstances of the Accused ***

72. An important consideration when assessing when a detention occurred is that Mr. Le is a
§2.4.5 • False imprisonment

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. ***

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). ***

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

2.4.5 R v. Brockhill Prison Governor, ex p Evans (No. 2) [2000] UKHL 48

House of Lords – [2000] UKHL 48

LORD SLYNN OF HADLEY: ***

2. On 12 January 1996 the respondent was sentenced inter alia to two years in prison. Because of the period she had spent in prison before trial she was entitled to a reduction in the actual period to be served pursuant to section 67 of the Criminal Justice Act 1967. It was for the governor of the prison where she was detained, not the sentencing judge, to work out the reduction and hence her release date. She was entitled to release on the date properly calculated and any detention after that date was unlawful unless some justification can be found.

3. The governor calculated the release date in accordance with earlier decisions of the Divisional Court in other cases which the Home Office and the governor thought that they were bound to follow. *** Accordingly the governor said that her release date was to be 18 November 1996. The respondent contended that the governor, and therefore the Divisional Court in the earlier cases, were wrong and that her release date should be 17 September 1996. On 6 September she applied for a writ of habeas corpus to procure her release and on 16 October she sought leave for judicial review of the decision fixing her release date together with damages for false imprisonment. On 15 November 1996 the Divisional Court held that her release date properly calculated was 17 September 1996 and ordered that she be released immediately: [1997] Q.B. 443. On 10 June 1997 Collins J. dismissed her application for damages for false imprisonment: the Court of Appeal by a majority allowed her appeal on liability and increased the judge’s assessment of damages from £2,000 to £5,000: [1999] Q.B. 1043.

4. *** Here the court order did not specify the release date and the sentence of two years
§2.4.7 • False imprisonment

imprisonment had to be read subject to the governor’s duty to calculate the release date. The governor cannot therefore rely on the court’s sentence alone. He has to rely on compliance with the statutory provisions. He thought that he was complying with those provisions because what he did was in compliance with what the law was thought to be. The Divisional Court has since held that that is not the law; the statutory provisions have never had the meaning he thought they had.

5. Is it a defence to a claim for false imprisonment that he complied with the law as the court then said it was? The Solicitor-General has adduced forceful arguments to the effect that the governor had no choice. He was bound to obey the law as expounded by the court not just once but several times. Not to do so would be to ignore the separation of powers between the judiciary and the executive. ***

7. If the claim is looked at from the governor’s point of view liability seems unreasonable; what more could he have done? If looked at from the respondent’s point of view she was, it is accepted, kept in prison unlawfully for 59 days and she should be compensated. Which is to prevail?

8. Despite sympathy for the governor’s position it seems to me that the result is clear. She never was lawfully detained after 17 September 1996. She was merely thought to be lawfully detained. That is not a sufficient justification for the tort of false imprisonment even if based on rulings of the court. Although in form it is the governor, it is in reality the State which must compensate her for her unlawful detention.

9. *** I consider that there may be situations in which it would be desirable, and in no way unjust, that the effect of judicial rulings should be prospective or limited to certain claimants. ***

10. But even if such a course is open to English courts there could in my view be no justification for limiting the effect of the judgment in this case to the future. The respondent’s case has established the principle and she is entitled to compensation for false imprisonment; there could it seems in any event be no compensation for the period after the Divisional Court’s decision since she was released immediately.

11. I would dismiss the appeal on these grounds. ***

2.4.6 Cross-references

- Slater v. Attorney-General (No. 1) [2006] NZHC 308, [41]: §8.5.2.

2.4.7 Further material

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. 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
§3.1.1 • The tort in Wilkinson v. Downton

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 [§19.1.1.1], 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 B.B., 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
da 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.

§3.1.2  Wainwright v. Home Office [2003] UKHL 53

House of Lords – [2003] UKHL 53

CROSS-REFERENCE: §4.1.1

LORD HOFFMANN: ***

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
§3.1.2 • The tort in Wilkinson v. Downton

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 reside 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
§3.2.1 • The modern IIMS tort

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.

3.2 • The modern IIMS tort

3.2.1 Rhodes v. OPO [2015] UKSC 32

**United Kingdom Supreme Court – [2015] UKSC 32**

**CROSS-REFERENCE: §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, f***ed, 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. ***

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.

3.2.2 Fitzpatrick v. Orwin [2012] ONSC 3492

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

CROSS-REFERENCE: §7.1.2, §9.1.2, §9.2.4, §9.3.6, §9.5.4, §9.8.2.1

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. He also advances allegations of conspiracy against all three defendants. 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 ***


(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 Prinzio, 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 Pirosferreira 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 provable 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. ***

3.2.3 Boucher v. Wal-Mart [2014] ONCA 419

Ontario Court of Appeal – 2014 ONCA 419

CROSS-REFERENCE: §9.3.8, §9.4.3, §9.5.5

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".

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
§3.2.3 • The modern IIMS tort

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.


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.23 ***

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 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

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23 Counsel for Pinnock and Wal-Mart on appeal were not counsel at trial.
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. ***

3.2.4  

Lu v. Shen [2020] BCSC 490

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

CROSS-REFERENCE: §4.3.3, §5.1.3, §5.2.3, §9.3.9, §9.8.2.3

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. ***

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. ***

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 (Ms. Shen’s Affidavit No. 4, Exhibit 1 p. 68) 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 (found at Ms. Shen’s Affidavit No. 4 Exhibit 1 p. 56; 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 (found at Ms. Shen’s Affidavit No. 4, Exhibit 1 p. 57; 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.
3.2.6 • The modern IIMS tort

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.

3.2.5 Cross-references


3.2.6 Further material

4  INVASION OF PRIVACY

4.1  Common law invasion of privacy torts

4.1.1  Wainwright v. Home Office [2003] UKHL 53

CROSS-REFERENCE: §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 Commr [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.

### 4.1.2 Jones v. Tsige [2012] ONCA 32

*Ontario Court of Appeal – 2012 ONCA 32*

**CROSS-REFERENCE: §9.3.7, §24.1.1.2**

**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. ***

**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, defamation, breach of copyright, nuisance, and various property rights. 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.”


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. ***
§4.1.2 • Common law invasion of privacy torts

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 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. [§5.1.2] 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.

4.1.3 ES v. Shillington [2021] ABQB 739

Alberta Court of Queen’s Bench – 2021 ABQB 739
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 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.


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:
§4.1.6 • Common law invasion of privacy torts

(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. ***

4.1.4 Cross-references


4.1.5 Further material on intrusion upon seclusion tort


4.1.6 Further material on public disclosure of private facts tort

§4.2.1 • Invasion of privacy in British Columbia

- E. Laidlaw & H. Young, “Creating a Revenge Porn Tort for Canada” (2020) 96 (2d) Supreme Court L Rev 147.

4.1.7 Further material on false light tort


4.2 Invasion of privacy in British Columbia

4.2.1 Tucci v. Peoples Trust Co. [2020] BCCA 246

British Columbia Court of Appeal – 2020 BCCA 246

GROBERMAN J.A.:

1. The defendant appeals from an order of a judge of the Supreme Court certifying certain of the plaintiffs’ claims as class proceedings under the Class Proceedings Act, R.S.B.C. 1996, c. 50: 2017 BCSC 1525. The plaintiffs cross-appeal from the judge’s failure to certify their claim for breach of confidence and from his failure to certify compensable damages (apart from nominal damages) as a common issue. ***

Breach of Privacy and Intrusion Upon Seclusion in the Law of B.C.

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.

56. There are three decisions of this Court usually cited for the proposition that no common law
§4.2.1 • Invasion of privacy in British Columbia

tort of breach of privacy exists in B.C. The first, chronologically, is 

Hung v. Gardiner, 2003 BCCA 257 (B.C. C.A.). In the court below, in a decision indexed as 2002 BCSC 1234 (B.C. S.C.), a chambers judge summarily dismissed a claim that alleged numerous causes of action, including common law breach of privacy. The breach of privacy claim did not figure prominently in the chambers judge’s reasons. He said only:

[110] The plaintiff asserts a common law tort of invasion of privacy in addition to that created by the Privacy Act. She has not provided any authorities that persuade me there is a common law tort of invasion of privacy in this province.

57. This Court dismissed the appeal, but found it unnecessary to address the issue of whether a common law tort of breach of privacy exists. Levine J.A., for the Court, said:

[4] Mr. Justice Joyce, after a summary trial under Rule 18A of the Supreme Court Rules, dismissed all of the appellant’s claims, finding that they were barred by the absolute privilege that surrounded the act of providing the report to the professional bodies .... As I agree with that conclusion, I do not find it necessary to review his consideration of the other defences raised, or the appellant’s grounds of appeal on those matters.

58. The decision of this Court in Hung v. Gardiner, then, does not stand for the proposition for which it is usually cited. It does not touch on the question of whether a common law action for breach of privacy exists in British Columbia.

59. Mohl v. University of British Columbia, 2009 BCCA 249 (B.C. C.A.) was, like Hung v. Gardiner, an appeal brought by a self-represented litigant who was attempting to pursue a convoluted theory of liability in his claim. The case has a rather tortured history. Mr. Mohl failed a course at UBC in 1998, and, after unsuccessful appeals within the University’s administrative regime, brought a judicial review application. He was unsuccessful, both at first instance (Mohl v. Senate Committee on Appeals on Academic Standing, 2000 BCSC 1849 (B.C. S.C.)) and on appeal (2001 BCCA 722 (B.C. C.A.)). He then brought a lawsuit against the University, which was dismissed as an abuse of process (Mohl v. University of British Columbia, 2004 BCSC 1238 (B.C. S.C.), appeal dismissed 2006 BCCA 70 (B.C. C.A.)). After the appeal judgment in that case was released, counsel for the University gave an interview to a reporter in which he stated that Mr. Mohl had failed his practicum and was no longer a student at the University of British Columbia. Those facts were already notorious, having been alluded to in the judgments of the various courts. Mr. Mohl then brought a new action against the University, alleging that it breached his privacy by revealing that he had failed a course. A master refused to strike the claim, but on appeal, a Supreme Court chambers judge struck it. ***

61. On appeal, this Court’s judgment with respect to the privacy claim was brief:


62. The conclusion that “[t]here is no common-law claim for breach of privacy” is, on its face, a broad one, but it is not entirely clear that it was intended to be a bold statement of general principle as opposed to a conclusion with respect to the specific circumstances of Mr. Mohl’s case. In any event, the observation was not critical to this Court’s reasoning.
§4.3.1 • Statutory privacy torts

63. In Ari v. Insurance Corp. of British Columbia, 2015 BCCA 468 (B.C. C.A.), as I have indicated, neither side contended that there was a common law tort of breach of privacy, and this Court was not called upon to decide that issue.

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.

65. It is also important to note that the world has changed significantly, even in the years since Hung v. Gardiner. In Jones v. Tsige, 2012 ONCA 32 (Ont. C.A.) [§4.1.2], the Ontario Court of Appeal recognized the tort of intrusion upon seclusion. It considered the increasing need for legal protection of privacy ***.

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. ***

4.3 Statutory privacy torts

4.3.1 Privacy Act, RSBC 1996

Privacy Act, RSBC 1996, c 373, ss 1 and 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.

69
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.

4.3.1.1 Other provincial privacy tort statutes

- Manitoba: Privacy Act, RSM 1987, c P125.
§4.3.2 • Statutory privacy torts

4.3.2 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 Getejan 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?
§4.3.2 • Statutory privacy torts

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.
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... 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.
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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. ***

4.3.3  Lu v. Shen [2020] BCSC 490

CROSS-REFERENCE: §3.2.4, §5.1.3, §5.2.3, §9.3.9, §9.8.2.3

ADAIR J.: ***


[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.
§4.3.4 • Statutory privacy torts

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. ***

4.3.4 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.

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] 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.

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.

4.3.5 Further material on statutory privacy torts

- B. Fox, “Click and Consent: Douez v. Facebook” The Court (Jan 28, 2018).
- C. Hunt, “Reasonable Expectations of Privacy under Canada’s Statutory Privacy Torts” (2018) 84 (2d) Supreme Court L Rev 269.

4.4 Data privacy statutes

4.4.1 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.(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
§4.4.3 • Data privacy statutes

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.

4.4.2 Other data privacy statutes

- Manitoba: The Freedom of Information and Protection of Privacy Act, CCSM c F175.
- Québec: Act respecting Access to documents held by public bodies and the Protection of personal information, CQLR c A-2.1; Act respecting the protection of personal information in the private sector, CQLR c P-39.1.

4.4.3 Further material

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.

Libel and Slander

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.

Succeeding in a Defamation Action

In order to succeed in an action for defamation, the claimant must prove three things. First, that the material is defamatory. This means that it lowers the person’s reputation in the eyes of the “right-thinking” person.

Second, it must be proved that the material refers to the claimant. In other words, people who hear or see the material must realize that it is the claimant whose reputation has been tarnished. This requirement prevents many individual members of defamed groups from suing for defamation since it is the group itself that has been targeted. It is only where the claimant can prove that due to their role in the group, or the nature and size of the group that the claimant is identifiable, that a suit can succeed.

Third, it must be proved that the material is communicated to or published for someone other than the person actually defamed.

Once these three elements are proved, the action will succeed unless there is a defence.

Defences Against Defamation

There are a number of defences against defamation.

In the common-law provinces (all provinces except Québec), truth is an absolute defence. If the
Defamatory material can be shown to be substantially true, the defendant will not be held liable, even if the defendant published the material in order to harm the person defamed. In Québec, truth is only a defence if the material is in the public interest and there is no malice. Certain communications are protected by an absolute privilege. Thus, for example, statements made in legislative or judicial proceedings are protected by an absolute privilege, as are statements made between spouses. The rationale behind protecting statements made within the context of legislative or judicial proceedings is that people in such arenas should not be deterred from commenting freely, thereby contributing to a more complete and truthful exploration of a particular issue.

There are certain occasions of qualified privilege when a defamation can be published, as long as this is not done maliciously. In general terms, when a person has a legal or moral duty to publish material to a person who has a legitimate interest in receiving it, that occasion is protected by a qualified privilege. Reports of public proceedings are also protected by a qualified privilege.

The defence of fair comment protects any opinion fairly made on a matter of public interest. This can involve political commentary, or the critical review of books, movies or even restaurants.

A new defence is that of “responsible communication on a matter of public interest.” This allows anyone who publishes something of public interest to be protected from a defamation action as long as they have been responsible in researching and reporting on the matter by, for example, giving the person defamed the opportunity to answer the allegations before they are published.

Communications made with the express or implied consent of a person are also protected from a claim of defamation by that person.

Damages

If someone is found liable of defamation, compensatory and punitive damages may be awarded. Punitive damages are awarded when the defamation is particularly outrageous or serious, and can be in the thousands or even hundreds of thousands of dollars. The court can also order that there be no further publications of the defamatory material.

§5.1.1 • Defamation

5.1.1 Hill v. Church of Scientology of Toronto [1995] CanLII 59 (SCC)

Supreme Court of Canada – 1995 CanLII 59 (SCC)

CROSS-REFERENCE: §9.3.3, §9.4.2, §9.5.3, §18.2.6, §24.1.1.1

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 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

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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
§5.1.1 • Defamation

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. ***


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
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 responsibility.
§5.1.2 • Defamation

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.

5.1.2 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.
§5.1.2 • Defamation

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 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,
§5.1.2 • Defamation

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. The 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. ***

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. ***

5.1.3 Lu v. Shen [2020] BCSC 490

CROSS-REFERENCE: §3.2.4, §4.3.3, §5.2.3, §9.3.9, §9.8.2.3

ADAIR J.: ***
§5.1.3 • Defamation

(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;
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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, 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:
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The 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 NCC 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, at para. 29. 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.

190. Chief Justice McLachlin summarized the more detailed elements of the defence, at para. 126:

[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.

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:


[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.
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[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 NCC was filed) as statute-barred under the Limitation Act. 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
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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. ***(iii) 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. ***

(vi) 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. ***

(ix) 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. ***

5.1.4 Caplan v. Atas [2021] ONSC 670

Ontario Superior Court of Justice – 2021 ONSC 670

CROSS-REFERENCE: §5.2.4, §6.7.6, §9.8.2.4, §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), 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. *** 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. ***

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. ***

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.24 ***

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. ***

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24 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.
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. ***

5.1.5  

**Levant v. DeMelle [2022] ONCA 79**

**Ontario Court of Appeal – 2022 ONCA 79**


3. Ezra Levant is a journalist and broadcaster. In 2015, he founded Rebel News Network Ltd. ***  

Mr. Levant *** says that Rebel News could be considered to hold an anti-Islamist orientation, Islamism being the political manifestation of radical Islam. Rebel News believes that radical Islam promotes violence and erodes secular civil liberties.

4. Brendan DeMelle is a journalist, writer and researcher specializing in media, politics, climate change and clean energy. Since 2010, Mr. DeMelle has reported on climate misinformation campaigns as the executive director of DeSmog, an online news outlet focused on climate change and environmental concerns. ***

**The DeMelle statements***

13. Mr. DeMelle wrote and published an article on or about October 19, 2019. The article was entitled “Right Wing Attacks on Greta Thunberg: How Low Can They Go? Canada’s Extremist Network ‘The Rebel’ Tries for the Prize”.

14. In the article, Mr. DeMelle referred to Mr. Levant and Rebel News as follows:

   The Rebel was founded by disgraced neo-Nazi sympathizer Ezra Levant, a climate denier who once interned at the Charles Koch Foundation. Levant and The Rebel Media earned some notoriety for their laudatory coverage of the deadly 2017 Unite the Right rally in Charlottesville.

15. In the article, the words “laudatory coverage of the deadly 2017 Unite the Right rally in Charlottesville” are hyperlinked to an article written by Dan Lett, on August 19, 2017, entitled “Rebel Media’s meltdown and the politics of hate” and published on the website of the Winnipeg Free Press.

16. After receiving a Notice of Libel from the appellants, in early November 2019, Mr. DeMelle made the following revisions to the article:

   (a) He removed the words “disgraced neo-Nazi sympathizer”; and,

   (b) He removed the words “Levant and” in reference to the coverage of the Charlottesville rally, and amended the description of that coverage by indicating that it had been provided with respect to “participants” in the rally rather than the rally itself.
17. The article generated slightly fewer than 16,000 views on the internet.

The Decisions Below

18. *** Mr. Levant and Rebel News *** commenced a simplified procedure action against Mr. DeMelle *** for defamation. ***

25. *** [T]here was no dispute that the expressions were those of Mr. DeMelle. On whether the expressions related to a matter of public interest, the motion judge concluded “with some reluctance” that they did. Consequently, Mr. DeMelle had met his onus and the burden shifted to Mr. Levant and Rebel News.

26. On the issue of whether the action had substantial merit, the question again arose as to whether the reputations of Mr. Levant and Rebel News could be lowered as a result of the expressions ***. *** The motion judge concluded that the presence of grounds to believe that the defamation action had substantial merit “cannot be questioned”.

27. *** [T]he motion judge concluded that none of the defences were valid. In finding that the defence of fair comment was not valid, the motion judge found that referring to Mr. Levant as a neo-Nazi sympathizer “traverses too far into the realm of fact, or at least imputation of fact,” and thus could not constitute comment. Consequently, the defence of fair comment was not available. In finding that the defence of responsible journalism was not valid, the motion judge found that Mr. DeMelle had not shown that he was reasonably diligent in verifying the accuracy of the impugned expressions.

28. The motion judge then proceeded to the final issue, the weighing of the competing public interests. On this issue, the motion judge noted that Mr. Levant and Rebel News had not led any evidence of specific harm or damage to their reputations as a result of the expressions. He therefore found that Mr. Levant and Rebel News had not shown the necessary harm that would outweigh the public interest in permitting public expression. Consequently, he dismissed the action. ***

Analysis ***

37. *** [O]n a s. 137.1 [Courts of Justice Act, R.S.O. 1990, c. C.43] motion, the motion judge is not finally determining whether a defence will succeed. *** Rather, the motion judge only considers whether there are grounds to believe that there is no valid defence. ***

47. *** [W]eighing [of interests under s. 137.1(4)(b)] was described by Côté J. in [1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22], at para. 61, as “the crux of the analysis”. The subsection reads:

   No judge shall dismiss a proceeding under subsection (3) if the responding party satisfies the judge that, ...

   (b) the harm likely to be or have been suffered by the responding party as a result of the moving party’s expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression. ***
a) Statements relating to a matter of public interest

57. The appellants take issue with the motion judge’s conclusion that the impugned expressions were on a matter of public interest—a conclusion that he reached “with some reluctance”. In making their submissions, the appellants focus on the accusation that Mr. Levant is “a neo-Nazi sympathizer”. They say that the accusation is nothing more than a gratuitous insult and cannot be characterized as having anything to do with any matters of public interest.

58. The flaw in the appellants’ argument on this point is that they isolate the “neo-Nazi sympathizer” statement from the rest of the article. That is not the proper approach to determining whether the expression in issue relates to a matter of public interest. Rather, it is the entire expression that must be considered. In other words, in this case, it is the article as a whole that must be considered in determining whether the expression is on a matter of public interest.

59. That this is the proper approach is clear from the decision in ***Grant v. Torstar Corp., 2009 SCC 61, [2009] 3 S.C.R. 640 (S.C.C.), at para. 101***.

60. *** The article, taken as a whole, clearly related to a matter of public interest. Indeed, it is difficult to identify an issue that is more in the public interest currently than the issue of climate change and its related topics, including the actions of climate change deniers. The alleged actions of climate change deniers in terms of trying to silence, or intimidate, or otherwise harass a person, who is as outspoken on the subject of climate change as Greta Thunberg, would naturally draw the public’s interest. I see no reason for “reluctance” in concluding that the expression related to a matter of public interest.

b) The defence of fair comment ***

62. I do not consider it necessary to review each of the three defences that the motion judge found were not valid. His conclusions regarding the defence of justification and the defence of responsible journalism were open to him on the record and are entitled to deference. However, his analysis of fair comment is flawed, even though his conclusion that there are grounds to believe that Mr. DeMelle’s fair comment defence is not valid is correct.

63. The motion judge erred in concluding that “calling Levant a neo-Nazi sympathizer traverses too far into the realm of fact, or at least imputation of fact,” to permit a defence of fair comment. *** [I]n Ross v. New Brunswick Teachers’ Assn., 2001 NBCA 62, at para. 56, *** the New Brunswick Court of Appeal said that “comment” includes a “deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof”. *** [W]ords that may appear to be statements of fact may, in pith and substance, be properly construed as comment. ***

64. In the context in which it appears in the article, the statement that Mr. Levant is a neo-Nazi sympathizer is clearly a matter of comment. It therefore opens the door to the defence of fair comment. The elements of that defence are well-established. They were set out recently in Blair v. Ford, 2021 ONCA 841, at para. 45:

There are five elements to the defence of fair comment:

(i) the comment must be on a matter of public interest;
(ii) the comment must be based on fact;

(iii) the comment, although it can include inferences of fact, must be recognizable as comment;

(iv) the comment must be one that any person could honestly make on the proved facts; and

(v) the comment was not actuated by express malice.

65. Where Mr. DeMelle’s reliance on this defence falters is on the fourth element. Based on the record before us, no person could honestly express that opinion on the proved facts. Undoubtedly, that is the reason why, immediately upon the Notice of Libel being delivered, Mr. DeMelle removed that comment from the article. The removal of the comment is not a defence to the claim for defamation, however. Rather, it is relevant to the issue of any damage that may have been caused by it: Raymond E. Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States* (Toronto: Carswell, 1994) (loose-leaf updated 2020, release 5), ch. 25 at 124–25.

c) The weighing of public interests

66. The motion judge concluded that the weighing exercise required by s. 137.1(4)(b) favoured the respondent because, as was the case in the Al Jazeera action, the appellants had not led any evidence of “particular or specific economic harm or damage to their reputation”. Largely for the same reasons that I have set out above in considering the weighing exercise in the Al Jazeera motion, I agree with the motion judge’s conclusion, but not with his analysis. ***

68. The presumption of damages in a defamation action involving an individual only goes so far. While it may be sufficient to establish the existence of damages, it is not sufficient to establish the level of those damages. ***

69. I accept that the “neo-Nazi sympathizer” comment is a serious one. I would not, however, draw an inference that it resulted in serious reputational harm to Mr. Levant on the record in this case. First, the statement was fairly quickly removed from the article in question. Second, the article itself drew limited attention, given the evidence that it generated slightly fewer than 16,000 views on the internet. Third, is the evidence regarding the state of Mr. Levant’s reputation as reflected in the affidavits filed on behalf of the respondent. Balanced against all of that is the sole statement of Mr. Levant in his affidavit:

I believe that the dissemination of these defamatory statements has damaged my reputation in this regard, and accordingly, Rebel News and I should be entitled to compensation.

That statement is not only self-serving, it is completely devoid of any foundation for the belief.

70. Finally, on this point, when a person injects themselves into public debate over a contentious topic, they must expect that they are going to be met with some measure of rebuttal, perhaps forceful rebuttal, by those who take an opposite view. The case of *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420 is an example of that reality. The evidence demonstrates that the appellants quite readily inject themselves into the public debate on many of these types of
issues. Indeed, there is evidence that they consider that to be part of the rationale for their existence. The appellants should not be surprised when they are then met with a response—even a very forceful response. While such responses do not justify crossing the line into defamatory speech, they are a factor to consider in assessing the level of damages that the defamatory aspect of the response may create. As Binnie J. said in *WIC Radio*, at para. 4:

> We live in a free country where people have as much right to express outrageous and ridiculous opinions as moderate ones.

71. *** [T]he appellants have failed to lead evidence of any specific harm or any level of serious harm. Balanced against whatever harm may be presumed, is the public interest in protecting freedom of expression and in having robust debates on matters of public importance. I agree with the motion judge that the appellants failed to establish, in the words of s. 137.1(4)(b), that “the harm likely to be or have been suffered by the [appellants] as a result of [the respondent’s] expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression”. ***

**Conclusion**

92. I would dismiss [the appeal]. ***

### 5.1.6 Libel and Slander Act, RSBC 1996, c 263

*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
5.1.6 • Defamation

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

- New Brunswick: Defamation Act, RSNB 2011, c 139.
- Nunavut: Defamation Act, RSNWT 1988, c D-1.
- Québec: Press Act, RSQ, c P-19.
5.1.7 Cross-references

- Subway v. CBC & Trent University [2021] ONCA 25, [4]: §19.3.3.

5.1.8 Further material

- Law Commission of Ontario, Defamation Law in the Internet Age (March 2020).
- “McLibel: The Story of Two People Who Wouldn’t Say McSorry” (Spanner Films, 2005).

5.2 Harassment

5.2.1 Pong Seong v. Chan [2014] HKCFI 1480

CROSS-REFERENCE: §2.3.3, §9.8.2.2, §21.1.4

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 seem 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.
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. (per curiam):

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. ***

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. ***

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


   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.) [§4.1.2], 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


28. She erred in doing so. Taken as a whole, these cases confirm neither the existence of the tort nor its elements.

36. ***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 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?

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.
§5.2.3 Lu v. Shen [2020] BCSC 490

CROSS-REFERENCE: §3.2.4, §4.3.3, §5.1.3, §9.3.9, §9.8.2.3

ADAIR J.: ***

96. *** [T]he “tort of harassment” is doubtful on the authorities. ***

§5.2.4 Caplan v. Atas [2021] ONSC 670

CROSS-REFERENCE: §5.1.4, §6.7.6, §9.8.2.4, §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.

171. The plaintiffs propose, drawn from American case law 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.

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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]. 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 [§4.1.2]). She has persistently published false statements about a broad range of people to cause harm to her primary victims. ***

5.2.5 Cross-references


5.2.6 Further material

6 DEFENCES (I)

CROSS-REFERENCE: §18

6.1 Justifications versus excuses


Classification of defences

[26-002] Justifications are defences that apply when the defendant acted reasonably. Conversely, public policy defences are defences that may be enlivened irrespective of the reasonableness of the defendant’s conduct.

The concept of an excuse

[26-114] The nature of the distinction between justifications and excuses is one of the most contested issues in legal philosophy although it is widely agreed that the separation between the concepts is important. There is also a general consensus that justifications cast one in a better moral light than excuses. Whereas a defendant who claims that he was justified asserts that he acted reasonably, a defendant who offers an excuse accepts that he did not achieve the same success in terms of leading a rational life as a justified defendant. It is sometimes said that an excused defendant accepts that what he did was wrong but “denies responsibility” for it. This has the potential to mislead in so far as it suggests that such a defendant was not a responsible agent. The difficulty here is that it is quite clear that defendants who are thought to be excused, such as defendants who were provoked, are rational agents who act for reasons (albeit reasons that are insufficiently strong to result in their being justified).

Tort law does not recognise excuses

[26-115] According to conventional wisdom, tort law, unlike the criminal law, does not recognise any excuses. On this view, excused defendants are liable for their torts. Three exculpatory arguments that are widely regarded as excusatory in nature are not tort defences. These are provocation, duress and excessive self-defence.

6.1.1 Further material


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26 See, further, Goldberg in Dyson, Goudkamp and Wilmot-Smith (eds), Defences in Tort (2014); Goldberg (2015) 103 Calif. L. Rev. 467.
§6.2.1 • Non-defences (excuses)

6.2 Non-defences (excuses)

6.2.1 Provocation and duress


Provocation

[26-116] The fact that the defendant was provoked has no effect on tort liability. Provocation can, however, diminish the claimant’s entitlement to damages (it is settled that provocation can reduce punitive damages, but the effect of provocation on compensatory damages is unclear).

Duress

[26-117] Duress (i.e., threatened injury to a person or to third parties unless the former commits a tort) was held many years ago not to be a tort defence. In Gilbert v. Stone121 12 unknown armed men threatened to kill the defendant unless he entered the claimant’s house with them, which he did. The defendant was held not to have any defence to an action in trespass. There are several points to note in this connection. First, actual physical compulsion, as opposed to threats, will prevent liability from arising in trespass. That is because the requirement of volitional action will not be satisfied, and no tort will consequently be committed. Secondly, a person who commits a tort under duress will usually have an action against the person who threatened him. Thirdly, there is an obvious parallel between duress and private necessity. Duress has been said to be a species of the genus of “necessity”. It may be thought, therefore, that the availability of a duress as a defence should turn on whether private necessity is a defence in tort.

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

Demurrer upon a plea in trespass.

Gilbert brought an action of trespass quare clausum fregit, 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.

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121 See para.26-050.
32 Edelman and Dyer in Dyson, Goudkamp and Wilmot-Smith (eds), Defences in Tort (2014); Murphy (2018) 38 L.S. 571.
33 (1647) Al. 35; 82 E.R. 902.
34 See para.4-008.
35 Regarding private necessity, see para.26-050.
36 R. v. Howe [1987] A.C. 417 at 429 per Lord Hailsham LC. In the criminal law context, necessity is sometimes labelled “duress of circumstances” (as opposed to duress by threats).
37 See para.26-050.
The plaintiff demurred to this plea; Roll Justice, This is no plea to justify the defendant; for I may not do a trespass to one for fear of threatenings of another, for by this means the party injured shall have no satisfaction, for he cannot have it of the party that threatened. Therefore let the plaintiff have his judgement.

6.2.2 Unintended consequence

6.2.2.1 Bettel v. Yim [1978] CanLII 1580 (ON CC)

CROSS-REFERENCE: §2.2.1, §9.2.1, §9.3.5, §20.8.1

BORINS CO.CT.J.: ***

8. In explaining the incident the defendant said: “I shook him maybe three times and my head and his nose accidentally hit; I didn’t intend to hit him.” In cross-examination he stated that he did not mean to hit the plaintiff with his head and that is why he said it was an accident. ***

34. *** [T]he intentional wrongdoer should bear the responsibility for the injuries caused by his conduct and the negligence test of “foreseeability” to limit, or eliminate, liability should not be imported into the field of intentional torts. ***

6.2.3 Mistake of fact


[3-170] Mistake may lead the defendant into liability which he did not, and sometimes could not, reasonably anticipate. However, mistake of law will not excuse, nor, speaking generally, will mistake of fact. So, to deal with the goods of one person under the honest and even reasonable\(^{38}\) mistake that they belong to someone else is a conversion.\(^{39}\) To mow the grass of a neighbour under the mistaken notion that it is one’s own is a trespass.\(^{40}\) So, also, to publish a libel to a person under the mistaken belief that he is privileged to receive the communication would still be actionable,\(^{41}\) as would a publication under the belief that no such person as the claimant in fact existed\(^ {42}\) (subject to the protection afforded by ss.2–4 of the Defamation Act 1996, and that afforded to innocent disseminators of a libel).\(^{43}\) Belief in the truth of the statement is no defence in defamation.

[3-171] Nevertheless, wherever wrongful motive, or reasonableness is a condition of liability, then a bona fide mistake of fact may have the effect of negating liability (although strictly, a mistake as to a matter which is a condition of liability is not a true “defence”; rather the requirements for liability have not been met). So, an involuntary bailee may return chattels to a person under the

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\(^{39}\) Hollins v. Fowler (1875) L.R. 7 H.L. 757.

\(^{40}\) Basely v. Clarkson (1682) 3 Lev. 37.

\(^{41}\) See para.21-64.


\(^{43}\) See Ch.21.
mistaken belief that he is the bailor provided that he has acted reasonably. From the earliest times a bona fide belief in the truth of a statement was a defence in slander of title, and also a defence in deceit. The whole question that will arise will be whether the necessary intention or negligence can be said to be present.

6.2.3.1 Cross-references


6.2.4 Mistake of law

6.2.4.1 R. v. Tim [2022] SCC 12

Supreme Court of Canada – 2022 SCC 12

CROSS-REFERENCE: §6.6.4, §6.6.9.1

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

44 Elvin and Powell v. Plummer Roddis (1933) 50 T.L.R. 158; see para.16-80.
6.3.1 • Consent

_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._”). *** 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 (“An officer who arrests someone on the basis of a ‘non-existent offence’ may be civilly liable”). ***

6.2.4.2 Cross-references

- _R v. Brockhill Prison Governor, ex p Evans (No. 2)_ [2000] UKHL 48, [7]-[8]: §2.4.5.

6.2.5 Further material


6.3 Consent

6.3.1 Indicia of consent


Consent by the claimant

[14-93] On one view, consent is not a true defence to an action for battery, in that the absence of consent is part and parcel of the tort itself. In _Freeman v. Home Office (No.2)_46 McCowan J held

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that the claimant has the burden of proving the absence of consent.\textsuperscript{47} an approach which effectively redefines battery to mean an “unconsented to interference with another’s bodily integrity”. The traditional view, however, is that consent operates as a defence, and accordingly it is for the defendant to prove that the claimant consented.\textsuperscript{48} In Canada\textsuperscript{49} and Australia\textsuperscript{50} this is undoubtedly the case. It is suggested that this latter approach is also consistent with the basic principle that any direct interference with the person is unlawful and must be justified by the defendant. A claimant attacked in the street with a knife should not have to plead and prove that he did not consent to the attack (easy though that may be). By the same token, a competent patient cut by the surgeon’s scalpel should not have to prove the absence of consent—it is a matter for the surgeon to justify by reference to the patient’s consent.\textsuperscript{51}

The limits of consent

[14–94] The victim’s consent alone does not constitute a defence to a criminal charge of assault “if actual bodily harm is intended and/or caused”.\textsuperscript{52} Some lawful justification for the permission to do, or risk, harm must be present, as is the case where a person participates in a lawful game or sport or consents to surgery. It is not in the public interest that “people should try to cause, or should cause each other actual bodily harm, for no good reason”\textsuperscript{53} and hence such conduct is prohibited by the criminal law. The House of Lords in \textit{R v. Brown},\textsuperscript{54} holding that consensual sadomasochism could constitute criminal assault, found that it was irrelevant that the ensuing bodily harm was trifling or transient. Any degree of ascertainable bodily harm is justifiable only if “good reason” justifies the accused’s conduct.\textsuperscript{55} In \textit{R v. BM}\textsuperscript{56} the Court of Appeal ruled that body modification, such as the removal of an ear or nipple, or tongue splitting, performed on a consenting adult by a practitioner with no medical training or qualification, could not form an exception to the general rule in \textit{R v. Brown} that consent was no defence to causing actual bodily harm or wounding. Nonetheless, even though consent may not bar a prosecution, it is submitted that consent will constitute a good defence to a civil action in battery.\textsuperscript{57} The claimant cannot claim compensation for the consequences of an act which he has freely invited, or in respect of which he has consented. The footballer cannot allege that a legitimate tackle is a battery.\textsuperscript{58} consent to

\textsuperscript{47} Note, however, that the correctness of this conclusion was questioned by Sir Anthony Clarke MR in \textit{Ashley v. Chief Constable of Sussex} [2006] EWCA Civ 1085; [2007] 1 W.L.R. 398 at [31].


\textsuperscript{50} \textit{Secretary, Department of Health and Community Services v. JWB (Marion’s Case)} (1992) 106 A.L.R. 385 at 453, per McHugh J (but see now obiter comments in \textit{White v. Johnston} [2015] NSWCA 18).

\textsuperscript{51} For the general principles governing consent to medical treatment, see para.9-53 onwards.

\textsuperscript{52} \textit{Att Gen’s Reference (No. 6 of 1980)} [1981] Q.B. 715 at 719; \textit{R. v. Coney} (1882) 8 Q.B.D. 534 (prize fighters were held guilty of assault despite mutual consent).


\textsuperscript{54} [1994] 1 A.C. 212. The European Court of Human Rights has ruled that the judgment in \textit{R. v. Brown} did not constitute a violation of art.8 of the Convention (respect for private life); \textit{Jassard and Brown v. United Kingdom} (1997) 24 E.H.R.R. 39.

\textsuperscript{55} \textit{R. v. Brown} was distinguished in \textit{R. v. Wilson (Alan Thomas)} [1997] Q.B. 47. In \textit{R. v. Dica} [2004] EWCA Crim 1103; [2004] Q.B. 1257 the Court of Appeal held that it was possible to consent to the risk of contracting a potentially fatal disease (HIV) through “ordinary” sexual intercourse (although if the defendant deliberately caused infection or spread HIV with intent to cause grievous bodily harm, the agreement of the participants provides no defence: [2004] EWCA Crim 1103; [2004] Q.B. 1257 at [58]).


\textsuperscript{57} \textit{Murphy v. Culhane} [1977] Q.B. 94.

\textsuperscript{58} Although this is sometimes referred to as the defence of volenti non fit injuria, volenti is not appropriate. The players in a contact sport have consented to the contacts that, in a different context, would otherwise amount to a battery. They
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physical contact within the rules of the game may be implied.\(^{59}\) Thus, when the defendant maintains that the claimant consented to the force used against him, the key question becomes whether that consent extended to the degree or type of force employed against him. The claimant’s consent need not be specific to the alleged act of battery. He may consent to the general contact envisaged in a fight or in sport.\(^ {60} \) ***

Consent to proportionate force

[14-95] Whenever consent or *ex turpi causa* is pleaded as a defence to an action in battery, the force used by the defendant must be proportionate to the circumstances. Consent to the considerable degree of rough contact in rugby does not extend to savage blows and kicks. Players consent only to the use of force of the “kind reasonably expected to happen during a game”.\(^ {61}\) Evidence of initial harassment and provocation will not excuse a fatal attack on the victim either on grounds of consent or *ex turpi causa*.\(^ {62}\)

6.3.1.1 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.


... 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

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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 unpredicated 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. ***

6.3.1.2 Pile v. Chief Constable of Merseyside [2020] EWHC 2472

England and Wales High Court (Queen’s Bench Division) – [2020] EWHC 2472 (QB)

CROSS-REFERENCE: §6.8.3.2

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.
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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. ***

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.

6.3.2 Vitiation of apparent consent: fraud, duress, mistake, public policy


Consent induced by fraud

[14-96] A consent induced by fraud is invalid where the misapprehension of the consenting party goes to the root of the whole transaction and affects the nature and quality of the act done. In R.
v. Dica\textsuperscript{63} the Court of Appeal held that a defendant who, knowing that he was HIV positive, recklessly transmitted the disease through consensual sexual intercourse could be guilty of inflicting grievous bodily harm, contrary to s.20 of the Offences against the Person Act 1861, and that consent to sexual intercourse could not be regarded as consent to the risk of the consequent disease (although if the victim did in fact consent to the risk that would be a defence). It is submitted that the logic of \textit{R. v. Dica} is equally applicable to actions in tort.

\textbf{Consent and fraud in the context of medical treatment}

[14-97] It has been said that if a patient’s consent to medical treatment has been obtained by fraud or misrepresentation then it is not a valid consent,\textsuperscript{64} though in \textit{Sidaway v. Bethlem Royal Hospital Governors}\textsuperscript{65} Sir John Donaldson MR limited this to situations where there has been fraud or misrepresentation as to the nature of what is proposed to be done.\textsuperscript{66} However, in the light of \textit{R. v. Dica} the position may have to be reconsidered. In \textit{Appleton v. Garrett}\textsuperscript{67} a dentist was held liable in trespass to the person for carrying out unnecessary dental treatment, on a large scale, for profit. He withheld the information that the treatment was unnecessary because he knew that the claimants would not have consented had they known the true position. In such cases, arguably, what occurs is not strictly “medical treatment”, so the consent must go not simply to the defendant’s act (e.g. drilling a tooth), but also to the context in which the act takes place (i.e. providing bona fide, medical treatment that is appropriate). On the other hand, the failure by a dentist to tell patients that she had been struck off the dental register did not vitiate the patient’s consent and thus render the accused criminally liable for assault as there was still bona fide treatment supplied and it merely related to the dentist’s qualifications or attributes.\textsuperscript{68} However, a fraudulent misrepresentation that the person administering Botox injections was a medical practitioner where administration by a medically qualified practitioner was for each woman a condition of giving consent would be regarded as deception capable of vitiating consent.\textsuperscript{69}

\textbf{Consent obtained by duress}

[14-98] Consent affords no defence if the will of the consenting party was overpowered by force or the fear of violence. A claimant cannot give a real consent unless he has in fact the freedom to choose whether or not he should do so. A mistaken belief as to the authority of the defendant may destroy in substance the claimant’s freedom to choose.\textsuperscript{70} In \textit{Freeman v. Home Office}\textsuperscript{71} the claimant contended that, as a prisoner, his relationship with prison medical staff was such that, as a matter of law, he could not give a free and effective consent to medical treatment proposed


\textsuperscript{64}“Of course, if information is withheld in bad faith, the consent will be vitiated by fraud”: \textit{Chatterton v. Gerson} [1981] Q.B. 432 at 443, per Bristow J.

\textsuperscript{65}[1984] Q.B. 493 at 511.

\textsuperscript{66}This approach is reflected in \textit{Chatterton v. Gerson} [1981] Q.B. 432 at 443 where Bristow J said: “once the patient is informed in broad terms of the nature of the procedure which is intended, and gives her consent, that consent is real”. See also \textit{Hills v. Potter} [1984] 1 W.L.R. 641 at 653; [1983] 3 All E.R. 716 at 728; \textit{Freeman v. Home Office (No.2)} [1984] Q.B. 524 at 556, per Sir John Donaldson MR.


\textsuperscript{70}\textit{See T v. T} [1964] P. 85 at 99 and 102; and see decisions on volenti by employees, para.3-126 onwards. Note, however, that a conditional discharge from an hospital order under s.73 of the Mental Health Act 1983 which states that the patient “shall comply” with medication prescribed by a particular doctor does not amount to compulsion: \textit{R. (H) v. Mental Health Review Tribunal} [2007] EWHC 884 (Admin); (2007) 10 C.C.L. Rep. 306.

\textsuperscript{71}[1984] Q.B. 524.
by the prison medical officer. The judge rejected that submission, holding each case must be
looked at on its own facts to determine whether in the prison context and in the light of the medical
officer's power to influence the prisoner's future, a valid consent was given. It was accepted that
an abuse of authority by the defendants could vitiate an apparent consent even without evidence
of the use or threat of physical force.

6.3.2.1 PP v. DD [2017] ONCA 180

Ontario Court of Appeal – 2017 ONCA 180

CROSS-REFERENCE: §19.10.1.1

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 vitiating, 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

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
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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, 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 [§6.3.2.3]. For the purpose of this appeal, I will focus only on fraud.

73. In Linden and Feldthuens, 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".
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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 *Scalerera*, at para. 111. For the purpose of 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 Feldhusen, 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. Guerrier*, [1998] 2 S.C.R. 371 (S.C.C.) and *R. v. Mabier*, 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

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72 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.
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.

6.3.2.2 Toews v. Weisner [2001] BCSC 15

British Columbia Supreme Court – 2001 BCSC 15

CROSS-REFERENCE: §9.3.11, §9.5.7

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. ***

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.


   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. ***
6.3.2.3 Norberg v. Wynrib [1992] CanLII 65 (SCC)

Supreme Court of Canada – 1992 CanLII 65

CROSS-REFERENCE: §9.4.1, §9.5.2, §18.3.1

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. ***

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. ***

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. ***

**MCLACHLIN J. (L’HEUREUX-DUBÉ J. concurring): ***

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. ***

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. ***

**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.

128. In assessing the reality of consent and the existence and impact of any of the factors that tend to negate true consent, it is important to take a contextually sensitive approach. In relation to medical procedures, several courts have emphasized the need to consider all relevant surrounding circumstances in assessing whether there was valid consent ***. Such an approach applies equally in other situations. ***

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. ***
§6.4.1 • Self-defence

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. ***

STEVENSON J. took no part in the judgment.

6.3.3 Cross-references

• Collins v. Wilcock [1984] 1 WLR 1172 (QB), [13]-[14], [20]: §2.2.3.
• Wainwright v. Home Office [2003] UKHL 53, [50]: §3.1.2.
• Babiu v. Tran [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


6.4 Self-defence

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.
§6.4.2 • 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
§6.4.2 • Self-defence

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.

6.4.3 R v. Debbie Bird [1985] EWCA Crim 2

England and Wales Court of Appeal – [1985] EWCA Crim 2

THE LORD CHIEF JUSTICE:

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.
§6.4.4 • Self-protection

6.4.4 A comparison: United States ‘stand your ground’ laws


At approximately 7:00 p.m. on February 26, 2012, neighborhood watch leader George Zimmerman shot and killed seventeen-year-old Trayvon Martin in an Orlando-area neighborhood.73 While the events that triggered the shooting are clouded in controversy, it remains uncontested that Martin was unarmed and on his return from the local convenience store.74 Though Zimmerman admitted to firing the shot that killed Martin, he asserted that it was done in self-defense.75 Authorities did not arrest or charge Zimmerman immediately after the incident.76 In the months that followed, the case gained national attention77 and placed Florida’s “Stand Your Ground” law under scrutiny.

In particular, the initial decision by police not to arrest Zimmerman sparked protest from both the public78 and the Martin family.79 Sanford Police Chief Bill Lee stated in a press conference on March 12, 2012: “[i]n this case Mr. Zimmerman has made the statement of self-defense .... Until we can establish probable cause to dispute that, we don’t have the grounds to arrest him.”80 This statement reflects the implications of an immunity provision passed in 2005 as a part of Florida’s “Stand Your Ground” law.81 Since 2005, upwards of twenty states have passed similar “Stand Your Ground” statutes containing provisions for criminal immunity, civil immunity, or both, for persons “justified” in using force.82 ***

75 Dahl, supra note 1.
76 Id.
77 In April of 2012 30% of Americans indicated they were following the Trayvon Martin case more than any other story. Timeline, supra note 2.
79 See Timeline, supra note 2.
81 Dahl, supra note 1.
82 See Wyatt Holliday, Comment, “The Answer to Criminal Aggression is Retaliation”: Stand Your Ground Laws and the Liberalization of Self-Defense, 43 U. TOL. L. REV. 407, 407 (2012); P. Luevonda Ross, The Transmogrification of
§6.4.4 • Self-defence

Procedurally, the new “Stand Your Ground” laws generally prohibit arrest without probable cause that unlawful force was used,83 permit pre-trial immunity hearings for persons asserting self-defense,84 and prevent remedies in the civil courts when a person asserts statutory immunity.85

A. Florida: Where it All Began

The movement towards broader self-defense legislation and immunity provisions began in Florida in 2005.86 Conceived by former National Rifle Association (NRA) President Marion P. Hammer, Florida’s Protection of Persons Bill passed unanimously in the Senate and by overwhelming majority in the House of Representatives.87 It was promptly signed into law by Governor Jeb Bush on April 26, 2005,88 and became effective October 1, 2005.89

Prior to 2005, self-defense law in Florida combined statutory and common law and included a duty to retreat.90 The prior version of Florida’s self-defense statute 776.012 permitted the use of force if the defendant reasonably believed he or she faced imminent death or great bodily harm.91 Criminal prosecution prior to the new legislation permitted a person charged with a crime involving force, including homicide, to raise an affirmative defense of self-defense, but it did not provide for a pre-trial determination of that defense.92 A prima facie case of self-defense under the old self-defense statute consisted of: (1) a reasonable belief (2) that deadly force was necessary to prevent imminent death (3) to himself or herself (4) or another (5) or to prevent the imminent commission of a felony.93 Once a defendant proved a prima facie case of self-defense, the burden of proof was placed on the state 94 to prove beyond a reasonable doubt that deadly force was not justified or that the defendant did not reasonably believe that deadly force was necessary. The new “Stand Your Ground” law places this burden on the state to prove not only that deadly force was not justified, but that the defendant did not reasonably believe that such force was necessary to prevent imminent death or great bodily harm to himself.95

Self-Defense by National Rifle Association-Inspired Statutes: From the Doctrine of Retreat to the Right to Stand Your Ground, 35 S.U. L. REV. 1, 2 (2007); see, e.g., ALA. CODE § 13A-3-23(d) (2012); ALASKA STAT. ANN. § 09.65.330 (West 2012); GA. CODE ANN. § 16-3-24.2 (West 2013); IDAHO CODE ANN. § 6-808 (West 2012); KAN. STAT. ANN. § 21-5231 (West 2012); KY. REV. STAT. ANN. § 503.085 (West 2012); LA. REV. STAT. ANN. § 9:2800.19 (2006); MICH. COMP. LAWS ANN. § 600.2922b (West 2012); MISS. CODE ANN. § 97-3-15(5)(b) (West 2012); MO. ANN. STAT. § 563.074 (West 2012); N.H. REV. STAT. ANN. § 627:1-a (2012); N.C. GEN. STAT. ANN. § 14-51.2(e) (West 2012); N.D. CENT. CODE ANN. § 12.1-05-07.2 (West 2011); OHIO REV. CODE ANN. § 2307.60(2)(B)(c) (West 2011); OKLA. STAT. ANN. tit. 21, § 1289.25 (West 2012); 42 PA. CONS. STAT. ANN. § 8340.2 (West 2012); S.C. CODE ANN. § 16-11-450 (2006); TENN. CODE ANN. § 39-11-622 (West 2012); TEX. CIV. PRAC. & REM. CODE ANN. § 83.001 (West 2012); W. VA. CODE ANN. § 55-7-22(d) (West 2012); WIS. STAT. ANN. § 895.82(2) (West 2012); WYO. STAT. ANN. § 6-1-204 (West 2012). Though additional states have amended their self-defense statutes to reflect traditional aspects of “Stand Your Ground” legislation, the previous list reflects those that have added some form of immunity provision since the enactment of the Florida statute in 2005. The specific aspects of these state laws will be discussed in the sections that follow.

83 See, e.g., FLA. STAT. ANN. § 776.032 (West 2012).
85 See, e.g., IDAHO CODE ANN. § 6-808 (West 2012); TENN. CODE ANN. § 39-11-622 (West 2012); TEX. CIV. PRAC. & REM. CODE ANN. § 83.001 (West 2012).
86 Ross, supra note 10, at 18.
89 See Michael, supra note 106, at 200.
90 Weiand v. State, 732 So. 2d 1044, 1049 (Fla. 1999).
91 Hernandez v. State, 842 So. 2d 1049, 1051 (Fla. Dist. Ct. App. 2003) (noting that Section 776.012 allows for the use of deadly force “only if he or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself” and that “[w]hether a person was justified in using deadly force is a question of fact for the jury to decide if the facts are disputed”).
92 See generally Weiand, 732 So. 2d at 1049 (articulating Florida self-defense law in 1999).
93 FLA. STAT. ANN. § 776.012 (West 2004).
shifted at trial to the state to prove, beyond a reasonable doubt, that the defendant did not act in self-defense. The jury was left with the ultimate decision, to determine whether the defendant subjectively held a belief and whether such a belief was objectively reasonable.

The 2005 “Stand Your Ground” law substantially amended Florida’s pre-existing statutes by eliminating the duty to retreat, establishing a presumption that force was used reasonably where a defendant was faced with an unlawful intruder in the home or occupied vehicle, and expanding the right of an individual to use force, including deadly force, without the possibility of criminal or civil consequences. With respect to this last aspect, immunity, the law stated: “A person who uses force as permitted in § 776.012, § 776.013, or § 776.031 is justified in using such force and is immune from criminal prosecution and civil action ….” It further defined the term criminal prosecution to include “arresting, detaining in custody, and charging or prosecuting the defendant.”

Most provocatively, the new law prohibits arrest until there is probable cause to support the belief that the use of force was unlawful. In describing the dramatic change to self-defense law, the Florida Supreme Court in Dennis v. State stated:

While Florida law has long recognized that a defendant may argue as an affirmative defense at trial that his or her use of force was legally justified, section 776.032 contemplates that a defendant who establishes entitlement to the statutory immunity will not be subjected to trial. The statute does not merely provide that a defendant cannot be convicted as a result of legally justified force.

The Florida legislature was the first to pass a comprehensive update of its self-defense law pursuant to NRA lobbying, but it was most certainly not the last. Due to the success of the legislation in Florida, the NRA increased its efforts to have similar legislation passed across the country. Since 2005, more than half of the states have enacted or considered similar legislation to Florida’s statute. This Comment specifically focuses on those statutes containing provisions

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96 See FLA. STAT. ANN. § 776.012 (West 2012).
97 See FLA. STAT. ANN. § 776.013 (West 2012).
98 FLA. STAT. ANN. § 776.032(1) (West 2012).
99 Id.; see also id. at § 776.012 (Use of force in defense of person); id. at § 776.013 (Home protection; use of deadly force; presumption of fear of death or great bodily harm); id. at § 776.031 (Use of force in defense of others).
100 FLA. STAT. ANN. § 776.032 (West 2012).
101 FLA. STAT. ANN. § 776.032(2) (West 2012) (“A law enforcement agency may use standard procedures for investigating the use of force as described in subsection (1), but the agency may not arrest the person for using force unless it determines that there is probable cause that the force that was used is unlawful.”). Thus, ruling out self-defense becomes part of the statutory requirement for a law enforcement officer to sign a complaint. See Bartlett v. State, 993 So. 2d 157, 159–60 (Fla. Dist. Ct. App. 2009).
102 Dennis v. State, 51 So. 3d 456, 462 (Fla. 2010).
103 Ross, supra note 10, at 16–17.
104 Michelle Jaffe, Up in Arms Over Florida’s New “Stand Your Ground” Law, 30 NOVA L. REV. 155, 178 (2005–2006) (“Because the law passed in Florida so emphatically, the NRA plans to ride their ‘big tailwind’ and get similar laws passed across the nation.”). NRA Executive Vice President Wayne LaPierre stated that this was the “first step of a multi-state strategy.” Roig-Franzia, supra note 106. He stated further, “we start with the red and move to the blue.” Michelle Cottle, Shoot First, Regret Legislation Later, TIME, May 1, 2005, at 80, available at http://www.time.com/time/magazine/article/0,9171,1056283-1,00.html.
105 See Ross, supra note 10, at 2.
granting the accused immunity from civil and/or criminal liability for justified use of force.

B. Criminal and Civil Immunity: Florida and its Followers

At least five states have enacted statutes that include immunity provisions with the same language as Florida, including: Alabama, Kansas, Kentucky, Oklahoma, and South Carolina. Although North Carolina enacted a statute containing substantially similar language to Florida’s legislation, it does not specifically prohibit an officer from arresting an individual without probable cause that the force used was unlawful. All of these statutes, however, broadly immunize a defendant from both criminal and civil liability.

II. The Problematic Aspects of Immunity in the Civil Context

An increasingly large number of states have established provisions to allow for a defendant’s immunity from civil liability if the defendant used lawful force. Though there is not yet substantial judicial interpretation, a careful analysis reveals a number of potential problems.

Specifically, the laws do not distinguish between liability for injury to the unlawful aggressor and liability for injury to a third party. In fact, North Dakota is among the minority of these states that permits immunity from civil liability but recognizes an exception if a person “recklessly or negligently injures or creates a risk of injury to other persons.” Such an individual would be liable “in a prosecution for such recklessness or negligence.” In statutes that do not carve out this particular exception, a person justified in utilizing force may not be held liable for injuries that result to a third party. This situation is exemplified by an occurrence in Miami-Dade County, Florida in 2006. As a nine-year old girl sat outside her home playing with her dolls, she was shot in the crossfire between two men, both of whom asserted a claim of self-defense. If both are successful in a claim of immunity, this eliminates any legal remedy, either civil or criminal, for the innocent girl. The Florida statute may justify a deadly defense, even if it was executed negligently or recklessly.

Though criminal and civil self-defense cases involving the same defendant are rare, the availability of a civil remedy has afforded some individuals or their families a remedy when the criminal justice system did not. The case of Bernhard Goetz is arguably the paradigmatic

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106 See ALA. CODE § 13A-3-23(d)-(e) (2012); KAN. STAT. ANN. § 21-5231 (West 2012); KY. REV. STAT. ANN. § 503.085 (West 2012); N.C. GEN. STAT. ANN. § 14-51.2(e) (West 2013); OKLA. STAT. ANN. tit. 21, § 1289.25 (West 2012); S.C. CODE ANN. § 16-11-450 (2012).
108 See, e.g., ALA. CODE § 13A-3-23(d)-(e) (2012); KAN. STAT. ANN. § 21-5231 (West 2012); KY. REV. STAT. ANN. § 503.085 (West 2012); OKLA. STAT. ANN. tit. 21, § 1289.25 (West 2012).
109 See supra text accompanying notes 138–143.
110 See Jansen, supra note 159, at 7.
113 See Jansen, supra note 159, at 6.
114 See id.
115 Id. At the time of this writing, Florida has proposed legislation providing that “immunity does not apply to injuries to children and bystanders who are not affiliated with an overt act.” H.B. 123, 115th Leg., Regular Sess. (Fla. 2013); see also S.B. 362, 115th Leg., Regular Sess. (Fla. 2013) (reflecting the same exclusion for children and bystanders).
116 See Forell, supra note 27, at 1406.
example of the use of self-defense by the same defendant in both a criminal and civil trial. In Goetz, Bernhard Goetz boarded a subway train at Fourteenth Street in Manhattan and sat down in the same car as four youths. In his possession was an unlicensed .38 caliber pistol. One of the youths approached Goetz and stated “give me five dollars.” None of the juveniles displayed a weapon. Goetz responded by firing shots at each of the four boys. One youth was struck in the chest, another in the back, the third in his left side, and the fourth was initially unscathed. Goetz then turned to the fourth youth and stated, “you seem to be all right, here’s another.” He fired a fifth bullet at the fourth youth, severing his spinal cord. Goetz fled immediately following the incident. However, nine days later Goetz surrendered himself to police. Goetz was eventually indicted for attempted murder, assault, reckless endangerment, and criminal possession of a weapon. Goetz argued that his actions were justified as self-defense. New York self-defense law at the time of the incident justified the use of deadly force when a person “believed deadly force was necessary to avert the imminent use of deadly force or the commission” of an enumerated felony and, if the District Attorney did not prove beyond a reasonable doubt that he or she did not have such beliefs, the jury would determine “if a reasonable person could have had such beliefs.”

On June 16, 1986, a jury acquitted Goetz of attempted murder, assault, and reckless endangerment. He was convicted only of one count of illegal weapons possession, a felony that carries a maximum penalty of seven years confinement. Despite this acquittal, Goetz was later subject to civil suit. Darryl Cabey, the fourth youth who suffered from a severed spinal cord as a result of the shooting, filed a $50 million civil suit in the Bronx Supreme Court alleging that the shots taken at his back were made “deliberately, willfully, and with malice.” Cabey prevailed in this later civil suit in 1996, receiving a $43 million judgment in his favor. With the enactment of provisions providing civil immunity, however, such civil suits may no longer be filed. This would result in the denial of a remedy to a person who might otherwise receive an award of damages.

6.4.5 Cross-references

- Scott v. Shepherd [1773] All ER Rep 295 (KB), [7]-[8]: §2.1.2.
- Collins v. Wilcock [1984] 1 WLR 1172 (QB), [13]: §2.2.3.

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117 Id. at 1407.
119 Id. at 43.
120 Id.
121 Id. at 43–44.
122 Goetz, 497 N.E.2d at 44.
123 Id. at 45. There were a series of indictments and dismissals before these charges were solidified. Id.
124 Id. at 46–50 (discussing New York self-defense law).
125 Goetz, 497 N.E.2d at 52.
126 Lillian B. Rubin, Quiet Rage: Bernhard Goetz in A TIME OF MADNESS 257 (1986). The media attention surrounding this event largely exalted Goetz as a hero who had thwarted a mugging. Id. at 7. Even before Goetz had turned himself in as the gunman, there was a media “love affair” with him. Id. at 9.
127 Id. at 257. Goetz was ultimately sentenced to six months confinement, $5,000 fine, and five years of probation. Id. at 262.
128 See Forell, supra note 27, at 1407.
129 Rubin, supra note 244, at 189.
§6.5.1 • Defence of others

6.4.6 Further material


6.5 Defence of others

6.5.1 Gambriell v. Caparelli [1974] CanLII 679 (ON CC)

Ontario County Court, Judicial District of York – 1974 CanLII 679

CROSS-REFERENCE: §9.1.1

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 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.
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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. ***

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
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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. ***
6.6 Legal authority

6.6.1 Citizens in uniform


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.131

It is often suggested that this account of the legal position in England, even if true at the start of the twentieth century, was falsified during the course of that century by the rise of modern administrative law. But the rise of administrative law is totally irrelevant to Dicey’s point. Administrative law adds new ways to hold public servants and public authorities responsible in law, but it does not take away any of the old ones. Police officers and tax inspectors may still be sued in the civil courts for trespass, defamation, and breach of confidence, just like the rest of us. Prison guards and traffic wardens may still be prosecuted in the criminal courts for theft, perverting the course of justice, and blackmail, just like you and me. That MI5 officers, immigration officials, and local authority librarians are banned from murder, torture, and kidnapping comes of the fact that everyone is banned from murder, torture, and kidnapping. That at the time these people were or purported to be occupying their official roles, or fulfilling their official functions, does not in itself give them any legal protection against any criminal charge or cause of action to which they would otherwise be vulnerable.132

Of course it is true that many public officials have extra legal permissions that are incidents or constituents of their role. Police officers, for example, have extra permissions to enter onto land, seize goods, and detain persons, all of which give them extra scope to defend their actions in a criminal or civil court beyond what would be possible for an ordinary member of the public in the same circumstances. Dicey never denied this. His point was only that any such extra permissions need to be pleaded as a defence in the ordinary way in an ordinary court in the face of an ordinary charge or claim for an ordinary crime or tort. Both police officers and employees of private utility companies have special permissions to enter onto land. Both customs officers and private bailiffs enforcing judgment debts have special permissions to seize goods. The legal question, when any of these people is sued for trespass or conversion, or charged with burglary or theft, is simply whether he or she had the special permission that he or she claims to have had, not whether the


132 Although it certainly adds some, notably misconduct in a public office, which is both a crime and a tort at common law. At common law, bribery (in its ‘receiving bribes’ form) was also an offence that could be committed only by holders of a public office, but this restriction has recently been removed in England and Wales by statute. For some interesting and pertinent reflections on the reform, see Peter Aldridge, ‘Reforming the Criminal Law of Corruption’ (2002) 11 Criminal Law Forum 287.
office in virtue of which he or she had it was in the public or the private sector.

This is the ‘citizens in uniform’ doctrine. There is some poetic licence in the name, because the literal presence of a uniform is neither here nor there, and nor, strictly speaking, is anyone’s citizenship. Yet the name conveys the core of the doctrine. It can be expressed as an admonition: ‘Don’t think that when you step into your official role (your “uniform”) you stop being yourself and can abdicate responsibility in your capacity as an ordinary member of the public (a “citizen”) for the things that you do. You still answer to the law as yourself, and you can’t hide behind your public role when you do it.’

Dicey famously idealized this doctrine, which he rightly took to be a settled doctrine, not only of English law, but also of the British Constitution. He cast correspondingly infamous aspersions on the Napoleonic alternative, in which (he claimed) the existence of a special droit administratif with special courts of its own was coupled with extensive immunities for public officials from the ordinary processes and liabilities of criminal and private law. As is well known, he thought that English law here conforms to the ideal of the rule of law in a way in which French law does not. In this he was both right and wrong. It depends on how one understands the words ‘in a way in which’.

6.6.2 Criminal Code, RSC 1985

_Criminal Code, RSC 1985, c C-46, ss 25, 494(1)-(2), 495(1)_

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.

(2) Where a person is required or authorized by law to execute a process or to carry out a sentence, that person or any person who assists him is, if that person acts in good faith, justified in executing the process or in carrying out the sentence notwithstanding that the process or sentence is defective or that it was issued or imposed without jurisdiction or in excess of

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133 On uniforms more literally, see Christopher Kutz, ‘The Difference that Uniforms Make’ (2005) 33 Philosophy and Public Affairs 148.

134 Dicey, _Introduction_, n 1 above, eg at p 190.

135 As Dicey says (Dicey, _Introduction_, n 1 above, at p 486), what French lawyers call ‘droit administratif’ does not correspond to what English lawyers call ‘administrative law’. So I follow Dicey in leaving the expression untranslated.
(3) Subject to subsections (4) and (5), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless the person believes on reasonable grounds that it is necessary for the self-preservation of the person or the preservation of any one under that person’s protection from death or grievous bodily harm.

(4) A peace officer, and every person lawfully assisting the peace officer, is justified in using force that is intended or is likely to cause death or grievous bodily harm to a person to be arrested, if

(a) the peace officer is proceeding lawfully to arrest, with or without warrant, the person to be arrested;

(b) the offence for which the person is to be arrested is one for which that person may be arrested without warrant;

(c) the person to be arrested takes flight to avoid arrest;

(d) the peace officer or other person using the force believes on reasonable grounds that the force is necessary for the purpose of protecting the peace officer, the person lawfully assisting the peace officer or any other person from imminent or future death or grievous bodily harm; and

(e) the flight cannot be prevented by reasonable means in a less violent manner.

494(1). Arrest without warrant by any person

(1) Any one may arrest without warrant

(a) a person whom he finds committing an indictable offence; or

(b) a person who, on reasonable grounds, he believes

(i) has committed a criminal offence, and

(ii) is escaping from and freshly pursued by persons who have lawful authority to arrest that person.

494(2). Arrest by owner, etc., of property

(2) The owner or a person in lawful possession of property, or a person authorized by the owner or by a person in lawful possession of property, may arrest a person without a warrant if they find them committing a criminal offence on or in relation to that property and

(a) they make the arrest at that time; or

(b) they make the arrest within a reasonable time after the offence is committed and they believe on reasonable grounds that it is not feasible in the circumstances for a peace officer to make the arrest.
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. ***

6.6.3 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-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
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Code ***.


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.


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 *Leviz 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: *Bernt 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.
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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.

6.6.4  R. v. Tim [2022] SCC 12

CROSS-REFERENCE: §6.2.4.1, §6.6.9.1

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 provide that a peace officer may arrest without warrant “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” or “a person whom he finds committing a criminal offence”.

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[ted] 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*, 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 ***. *** [Underlining added.]

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. [§14.1.3.2] (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 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 ***. ***

6.6.5  Binsaris v. Northern Territory [2020] HCA 22

CROSS-REFERENCE: §2.2.4, §6.8.2.2

GAGELER J. (minority opinion): ***

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”.

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 damages awarded”. 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. Hence, the provision to a “public champion” of a defence of public necessity.

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, and by police officers in particular. 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”. 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. ***

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. There were no findings in the courts below, nor was

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136 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.
138 eg Respublica v. Sparhawk (1788) 1 US 357 at 363.
140 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).
142 cf Esso Australia Resources Ltd v. Federal Commissioner of Taxation (1999) 201 CLR 49 at 59-60 [18]-[20], 61-63 [23]-[27].
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. ***

6.6.6  R v. Le [2019] SCC 34

CROSS-REFERENCE: §2.4.4, §7.1.3

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

30. In our respectful view, the trial judge and the majority of the Court of Appeal for Ontario erred at both stages 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. ***

(a) Circumstances Giving Rise to the Encounter as They Would Reasonably Be Perceived

33. The circumstances giving rise to the encounter between the officers and the young men in the backyard of the L.D. townhouse support a finding of detention arising prior to Cst. O’Toole’s inquiry about the contents of the appellant’s satchel. ***

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.

37. These investigative purposes are important when assessing whether the detention was arbitrary and whether the police were acting in good faith. However, when determining whether a detention has occurred, the circumstances giving rise to the encounter are assessed based on how they would reasonably be perceived. The subjective purposes of the police are less relevant in this analysis because a reasonable person in the shoes of the putative detainee would not have known why these police officers were entering the property. ***

40. In such a situation, 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 (R. v. Wong, 2015 ONCA 657, 127 O.R. (3d) 321 (Ont. C.A.), at paras. 45-46; R. v. Koczab, 2013 MBCA 43, 294 Man. R. (2d) 24 (Man. C.A.), at paras. 90-104, per Monnin J.A. (dissenting), adopted in 2014 SCC 9, [2014] 1 S.C.R. 138 (S.C.C.)). 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.

42. Regardless of the intentions of the officers as they approached the backyard, or the legitimacy of their investigative purposes, a reasonable person would not perceive their entry into the backyard as merely “assisting in meeting needs or maintaining basic order” (Grant, at para. 40).

(b) Nature of the Police Conduct ***

(i) The Police Officers Were Trespassers

44. The police entered the property as trespassers. ***

(ii) The Actions of the Police and the Language Used ***

46. Our colleague makes much of the fact that the trial judge said that the police spoke “cordially” when they first entered the backyard. “Cordially” was the label chosen by the judge and was not a descriptor used by any witness. The only evidence comes from one of the young men who said that the police asked “how are you guys doing?” as they entered the backyard. There was no evidence about the tone of voice employed, but only a recollection of the words used.

47. In our view, even accepting that there was a cordial greeting, the contemporaneous actions of the police and the language employed immediately after that statement illustrate the police were exerting dominion over the individuals in the backyard from the time of entry. In many instances, and this is one of them, actions speak louder than words. The nicest of hellos could not mask the fact that the three persons entering onto this private property were uniformed police officers acting without permission, consent or legal authorization. Any momentary “cordiality” must also be placed in perspective and in the context of events as they actually unfolded. The language subsequently used by the police involved questioning the young men, asking for identification and telling one young man to keep his hands visible. One officer said his partner “yelled” this instruction and the young man complied immediately. ***

(iii) The Use of Physical Contact

50. There is no evidence the police made any physical contact with the young men. There was, however, physical proximity: once the officers entered the backyard, there were eight people in a small space. Each of the officers positioned themselves in a way to question specific young men apart from the others. Lauwers J.A. observed that the officers positioned themselves in a manner to block the exit. This type of deliberate physical proximity within a small space creates an atmosphere that would lead a reasonable person to conclude that the police were taking control and that it was impossible to leave.

(iv) The Place Where the Interaction Occurred and the Mode of Entry ***

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). ***

(v) The Presence of Others ***

64. The police did not tell any of the young men in the backyard that they were free to go and/or were not required to answer their interrogatories. What Mr. Le saw occurring to others likely increased the perception and reality of coercion. The others simply did what the police told them to do—consistent conduct, which strongly suggests what a reasonable person would also have thought and done in these circumstances. A reasonable person would have thought they had no alternative, but to remain and obey. ***

6.6.7 Cross-references

- Collins v. Wilcock [1984] 1 WLR 1172 (QB), [15]-[20]: §6.2.3.
- Bracken v. Vancouver Police Board [2006] BCSC 189, [37], [52]: §4.3.4.
- Entick v. Carrington (1765) 19 State Tr 1029 (KB), [41]-[43]: §7.1.1.
- Slater v. Attorney-General (No. 1) [2006] NZHC 308, [32]-[39]: §8.5.2.

6.6.8 Further material

- Stereo Decisis Podcast, “Pictograms and Pipelines” (Dec 6, 2019) 🎧.

6.6.9 A comparison: United States public officer immunities

6.6.9.1 R. v. Tim [2022] SCC 12

CROSS-REFERENCE: §6.2.4.1, §6.6.4

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. ***

6.6.9.2 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.,
§6.6.9 • Legal authority

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 liability[ 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).144

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.145

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.

6.6.9.3 Further material

- The Lawfare Podcast, “Alex Reinert on Qualified Immunity” (Mar 26, 2021).
- Dissed Podcast, “The King Can Do No Wrong” (May 5, 2021).

6.7 Limitation

6.7.1 Policies

Brisbane South Regional Health Authority v. Taylor [1996] HCA 25

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MCHUGH J.: ***

4. The discretion to extend time must be exercised in the context of the rationales for the existence of limitation periods. 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.” 146 ***

5. Even before the passing of the Limitation Act 1623 (Imp), many civil actions were the subject of time limitations147. Moreover, the right of the citizen to a speedy hearing of an action that had been commenced was acknowledged by Magna Carta itself148. 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 parties149.

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 goes by, relevant evidence is likely to be lost150. 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 passed151. Third, people should be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them152. Insurers, public institutions and businesses, particularly limited liability companies, have a significant interest in knowing that they have no liabilities beyond a definite period153. *** Even where the cause of action relates to personal injuries154, 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

146 R v. Lawrence [1982] AC 510 at 517 per Lord Hailsham of St Marylebone LC.
147 Bacon, New Abridgment of the Law, 5th ed (1798), vol 4 at 461 et seq.
148 cap 40, Magna Carta.
151 RB Policies at Lloyd’s v. Butler [1950] 1 KB 76 at 81-82.
153 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.”
154 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.
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.

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.

6.7.2 The interpretative principle of discoverability


In broad terms, Canada’s provinces have experienced three waves of statutory limitation reform.

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. This first wave of provincial legislation largely inherited its drafting language and principles from England. The ordinary limitation period was six years. It commenced from when “the cause

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156 See Mew, *Limitations*, supra note 2 at paras 1.12-1.47.
of action arose.” The Uniform Limitations Act 1931, which precipitated these reforms, provided exceptions in cases of fraudulent misrepresentation, concealed fraud, and for “actions grounded on accident, mistake or other equitable ground of relief.” In such cases, the ordinary period of limitation ran not from when the cause of action occurred, but from “discovery” of the action. Ontario and British Columbia did not adopt the Uniform Act. Although both provinces recognized equitable rules that postoned the running of time in some circumstances of “mistake,” their scope and application came to be considered as “neither clear nor sufficient.”

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. As in England, provincial legislatures enacted more expansive discoverability provisions. These 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

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160 Uniform Limitations Act 1931, supra note 9 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].

161 Mew, Limitations, supra note 2 at para 1.11. The Uniform Limitations Act 1931 was the basis for the limitatation 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).

162 Uniform Limitations Act 1931, supra note 9 at cl 3(1)(g).

163 ibid, cl 4.

164 ibid, cl 3(1)(h).

165 Ontario, Limitations Act 1937, supra note 9; Limitations Act, SO 1966, c 214.

166 Statute of Limitations, RSBC 1857, c 123; Statute of Limitations, RSBC 1960, c 370.


170 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. See Novak v. Bond, [1999] 1 SCR 808 at paras 34, 72, McLachlin J [Novak]; Kent Roach, “Reforming Statutes of Limitations” (2001) 50 UNBLJ 25 at 32 (discussing Novak and considering the “obscure” and “troublesome” drafting of British Columbia’s discoverability provision).
§6.7.2 • Limitation

claims into its limitation statute in 1967,\textsuperscript{171} modelled after the 1963 English legislation,\textsuperscript{172} and expanded the statutory principle in 1980\textsuperscript{173} following the English Court of Appeal’s watershed judgment five years earlier in \textit{Sparham-Souter v. Town & Country (Essex) Ltd.}\textsuperscript{174} Judges, too, came to reconsider their understanding of limitation provisions. In \textit{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.”\textsuperscript{175} Courts across the Commonwealth took up then-Master of the Rolls Lord Denning’s novel interpretation of the accrual of negligence actions\textsuperscript{176} even after the House of Lords repudiated it less than seven years later.\textsuperscript{177}

\textit{Sparham-Souter} was assumed to be good law in Canada when the Court of Appeal for British Columbia ruled in \textit{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.\textsuperscript{178} Before a decision on appeal was rendered,\textsuperscript{179} \textit{Sparham-Souter} was overruled in England, and the SCC was (in the majority’s view) called to resolve an interpretative choice in \textit{Nielsen}.\textsuperscript{180} Did the plaintiffs’ cause of action “arise”\textsuperscript{181} 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 \textit{Sparham-Souter}: The plaintiffs’ cause of action did not arise, and the limitation period did not commence, until the defects became reasonably discoverable.\textsuperscript{182} Whereas the House of Lords in \textit{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 \textit{Limitation Act 1939} that discoverability was not to be implied into the statute’s other provisions,\textsuperscript{183}

\begin{flushleft}
\textsuperscript{171} 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.
\textsuperscript{173} An Act to Amend the Limitation of Actions Act, SM 1980, c 28.
\textsuperscript{177} 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. \textit{Pirelli General Cable Works Ltd v. Oscar Faber & Partners}, [1983] 2 AC 1 (HL Eng) [\textit{Pirelli}], Parliament responded by enacting the Latent Damage Act 1986, supra note 19. See also \textit{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).
\textsuperscript{178} (1981), 129 DLR (3d) 111 at 122-23 (BCCA).
\textsuperscript{179} \textit{Rafuse}, supra note 1 at 221; \textit{Pirelli}, supra note 27. \textit{Pirelli} was decided after oral submission in \textit{Nielsen}, so the SCC called for written submissions on the question. See \textit{Nielsen}, supra note 1.
\textsuperscript{180} \textit{Nielsen}, supra note 1 at 40.
\textsuperscript{181} 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.
\textsuperscript{182} \textit{Nielsen}, supra note 1 at 39-40.
Justice Wilson in *Nielsen* disagreed that the equivalent statutory schemes before her necessarily confined discoverability to cases of fraud, concealment, and mistake.\(^{184}\) 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 bringing an action many years after its occurrence.\(^{185}\) 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.”\(^{186}\) 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.”\(^{187}\)

Over the next decade, despite some resistance,\(^ {188}\) discoverability came to be adopted as a principle of general application to the interpretation of when a cause of action accrues or arises\(^ {189}\) under Canadian limitation statutes.\(^ {190}\) 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.”\(^ {191}\) 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”\(^ {192}\) or “shall have first arisen,”\(^ {193}\) or “from the discovery of the cause of action.”\(^ {194}\) Thus, even statutory language that incorporates a knowledge-based inquiry is construed as complementary with common law discoverability.\(^ {195}\) 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,”\(^ {196}\) or where an action for the recovery of damages must be brought within X years “from the time when the damages were sustained,”\(^ {197}\) or where an action arising by reason of a deprivation of land must be brought within X years “from the date

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\(^{184}\) *Nielsen*, supra note 1 at 40.

\(^{185}\) Ibid.

\(^{186}\) Ibid.


\(^{189}\) Zack, supra note 10 at 169. See *Nykredit Mortgage Bank Plc*, supra note 10 at 1638, Hoffmann LJ; *Costello 1989 Alta CA*, supra note 10 at 741.


\(^{191}\) [1997] 3 SCR 549 at para 37 [*Peixeiro*]. For the Supreme Court’s most recent review of the principle, see *Pioneer Corp, supra* note 5 at paras 31-42.

\(^{192}\) Rafuse, supra note 1 at 217, citing Statute of Limitations, RSNS 1967, c 168, s 2(1)(e) [Statute of Limitations 1967]; *Costello 1989 Alta CA*, supra note 10 at 735, citing Limitation of Actions Act, RSA 1980, c L-15, s 51(1) [Limitation of Actions Act 1980].

\(^{193}\) Nielsen, supra note 1 at 40, citing Municipal Act 1960 BC, supra note 31, s 738.

\(^{194}\) Lameman, supra note 1 at para 14, citing Limitation of Actions Act 1980, supra note 41, s 4(1)(e)). See Uniform Limitations Act 1931, cl 3(1)(h).

\(^{195}\) Nielsen, supra note 1 at 42; Novak, supra note 20 at para 10.

\(^{196}\) Pioneer Corp, supra note 5 at paras 43-44, citing Competition Act, RSC 1985, c C-34, s 36(4)(a)(i).

when the deprivation took place.”

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.

Three problems persisted. First, discoverability exacerbated inconsistencies in the running of limitation between different causes of action. Second, it gave rise to the possibility that “undiscovered” actions could potentially be indefinitely postponed until such point as a claimant’s cause of action became reasonably discoverable. Except where longstop provisions or the equitable doctrine of laches applied, 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. 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.

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. In these Acts, it is the “claim,” 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, 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.” The right to sue is further constrained by default


199 Zacks, supra note 10 at 170; Roach, supra note 20 at 40. See Guttel & Novick, supra note 18 at 179 (providing an economic analysis and critique of contemporary limitation law).

200 See Blom, supra note 38 at 438-439, 443-448; Zacks, supra note 10 at 182.

201 Bauman, supra note 38 at 79; Mullany, supra note 37 at 46.

202 See Roach, supra note 20 at 26, 42, 44-46.

203 See Bauman, supra note 38 at 80-82; Francis A Anglin, Limitations of Actions Against Trustees (Canada Law Book Company, 1990) at 9-10.


206 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 note 24; Mew, Limitations, supra note 2 at para 3.66; Pioneer Corp, supra note 5 at para 32.

207 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).

208 Zacks, supra note 10 at 182.

209 See Limitations Act, RSA 2000, c L-12, s 3(1)(a)(iii) [Alberta Limitations Act]; Uniform Limitations Act (2005), s 6.7.2 • Limitation
ultimate limitation periods that apply across the board, subject to prescribed exceptions and extensions.\textsuperscript{210} 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,\textsuperscript{211} since the statutory discoverability provisions take precedence. Courts nevertheless frequently refer back to the interpretive principle in construing modern limitation statutes.\textsuperscript{212}

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.\textsuperscript{213} Second-wave reform drafting also subsists in key federal limitation statutes,\textsuperscript{214} as well as hundreds of particular provincial and federal limitation provisions.\textsuperscript{215} Those statutes remain subject to common law discoverability, as do actions that arose prior to the modern reforms.\textsuperscript{216}

Canada’s common law understanding of discoverability may also usefully inform the interpretation of limitation provisions in other jurisdictions.\textsuperscript{217} 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 \textit{Pirelli} declined to infer a general principle of discoverability into the interpretation of the English \textit{Limitation Act 1939}, it constrained considerations of discoverability to those provisions in which Parliament specifically provided for it.\textsuperscript{218} 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 \textit{Limitation Act

\textsuperscript{5(a)(iv); Limitations Act, SO 2002, c 24, s 5(1)(a)(iv). See also Manitoba Law Reform, \textit{Limitations, supra note 24 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.”).}

\textsuperscript{210} Zacks, \textit{supra} note 10 at 183-84. See \textit{Apopex Inc v. Nordion (Canada) Inc}, 2019 ONCA 23 at para 86.

\textsuperscript{211} Zacks, \textit{supra} note 10 at 185. See \textit{Rooprai v. Fodor}, 2019 ONSC 7211 at para 5 (holding that the discoverability provisions in the \textit{Limitations Act, SO 2002, c 24, oust common law discoverability in Ontario}).


\textsuperscript{213} 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.

\textsuperscript{214} 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.

\textsuperscript{215} 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, \textit{Limitations, supra note 2 at Appendix B, C}.

\textsuperscript{216} See Mew, \textit{Limitations, supra note 2 at paras 1.73-1.86}.


\textsuperscript{218} See \textit{Pirelli, supra} note 27 at 10, 14.
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”\(^\text{219}\)—is clearly paralleled in Canadian limitation statutes and in the interpretative principle of discoverability.\(^\text{220}\) Indeed, it was English legislation and cases that provided “the source for the development of the Canadian rule.”\(^\text{221}\) Canada’s understanding of discoverability can, in the relevant contexts, usefully inform the adjudicative approach in England and elsewhere.\(^\text{222}\)

### 6.7.3 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;

- (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; ***

\(^{219}\) Limitation Act 1980 (E&W), s 32(1) [Limitation Act 1980 E&W] [emphasis added].


\(^{221}\) See Mew, Limitations, supra note 2 at para 3.29.

\(^{222}\) Andrews, supra note 18 at 593, citing Limitation Act 1980 E&W, supra note 69 (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)).
(m) fines or penalties under the Offence Act. ***

(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. ***

6.7.3.1 Other limitation statutes

- British Columbia: Statute of Limitations, RSBC 1897, c 123 (repealed).
- British Columbia: Statute of Limitations, RSBC 1960, c 370 (repealed).
- 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.
6.7.4 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”).

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.

6.7.5 Letang v. Cooper [1964] EWCA Civ 5

CROSS-REFERENCE: §1.3.3
§6.7.6 • Limitation

THE MASTER OF THE ROLLS: ***

3. The sole question is whether the action is statute-barred. 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, sub-section (1), of the Law Reform (Limitation of Actions) Act, 1954:

“Actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty 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. ***

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. “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, and then only on proof of want of reasonable care. 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, in 1959 1 Queen’s Bench, 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 to-day.

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. ***

6.7.6 Caplan v. Atas [2021] ONSC 670

CROSS-REFERENCE: §5.1.4, §5.2.4, §9.8.2.4, §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. ***

6.7.7 Cross-references

- *Cloud v. Canada* [2004] CanLII 45444 (ON CA), [61], [81]-[82]: §19.7.2.
- *Blackwater v. Plint* [2005] SCC 58, [82], [85]: §19.7.3.

6.7.8 Further material

- P.S. Spiro, “Ignorance of the Law and Limitations Periods for Class Actions” CanLII Connects (Feb 14, 2022).
- J. Fiddick & C. Wardell (eds), The CanLII Manual to British Columbia Civil Litigation (Ottawa: Canadian Legal Information Institute, 2020), [3.3.3].

6.8 Necessity

6.8.1 Public necessity


[26-045] Public necessity\(^{223}\) is a defence to all forms of trespass. It is available where the defendant uses reasonable force against, or otherwise infringes the rights of, an innocent person to avoid an imminent and greater harm to some important public interest.\(^{224}\) The defence will be

\(^{223}\) See, further, Virgo in Dyson, Goudkamp and Wilmot-Smith (eds), *Defences in Tort* (2014).

\(^{224}\) For a case where the requirement of reasonableness was not met, see *Rigby v. Chief Constable of*
lost if the situation of necessity was brought about by the defendant’s own negligence.\textsuperscript{225}

\subsection*{6.8.1.1 Austin v. Metropolitan Police Commissioner [2007] EWCA Civ 989}

\emph{England and Wales Court of Appeal – [2007] EWCA Civ 989, aff’d [2009] UKHL 5}

\textbf{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 \textit{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. ***

\section*{II 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 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

\begin{footnotesize}
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\item Northamptonshire [1985] 1 W.L.R. 1242.
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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.

IV 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.

V Breach of the peace ***
17. In Laporte [IR (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 Ir 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
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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. ***

VIII 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.

IX 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. ***

XVII 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
§6.8.2 • Necessity

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 ***.

6.8.1.2 Further material


6.8.2 Private necessity


[26-050] It is unclear whether the fact that the claimant used reasonable force against, or otherwise infringed the rights of, an innocent person (including that person’s property) to protect his own private interests will not afford him any defence.²²⁶ On one view tort law does not recognise a defence of private necessity.²²⁷ Thus, to give a classic illustration, a hiker who enters a cabin in order to save himself from a storm and who eats the food kept therein and burns the furniture to supply warmth is liable in tort to the cabin’s owner. These types of cases are often referred as involving an “incomplete privilege”.²²⁸ The idea is as follows. Because (to continue the mountaineering example) the hiker acted reasonably he had a privilege to enter the cabin (the cabin owner could not have kept him out had he been present because he would not be acting reasonably in doing so to defend his property) but, because the privilege is incomplete, he must pay compensation. Matters would be simplified, however, if the concept of an “incomplete privilege” were not invoked to explain these types of cases. The reason why the hiker has to pay compensation to the cabin owner is simply that he committed a tort and has no defence. There is no difficulty in holding the hiker liable although he acted reasonably given that the tort of trespass routinely attaches liability to reasonable conduct. For instance, a person who without consent enters property reasonably but mistakenly believing that he is the owner is liable to the actual owner.²²⁹

The rival view is that tort law recognises a defence of private necessity. Cope v. Sharpe (No.2)²³⁰ is the leading authority in support of this position. The court held that D did not commit a trespass to land in going onto C’s land and creating a firebreak in view of a blaze that threatened to cross onto property over which C had sporting rights. Further, it was held that provided that D’s acts were reasonably necessary, it did not matter to liability whether the risk would have materialised but for C’s intervention. The issue, instead, was said to be whether there was a “real and imminent danger to” C’s property.²³¹ Further, in Re F [§6.8.3] Lord Goff evidently considered that both public and private necessity may admit of a defence. He remarked:²³²

“That there exists in the common law a principle of necessity which may justify action that would otherwise be unlawful is not in doubt. But historically the principle has been seen to

²²⁶ cf. Cope v. Sharpe (No.2) [1912] 1 K.B. 496.
²²⁷ The decision of the Supreme Court of Minnesota in Vincent v. Lake Erie Transportation Co 124 N.W. 221 (Minn. 1910) [§6.8.2.1] is often cited as authority for this proposition. cf Ploot v. Putnam 71 Atl. 188 (Vt. 1908).
²²⁹ See at para.14-001.
²³⁰ [1912] 1 K.B. 496.
²³¹ [1912] 1 K.B. 496 at 504 per Buckley LJ.
²³² [1990] 2 A.C. 1 at 74.
be restricted to two groups of cases, which have been called cases of public necessity and cases of private necessity. The former occurred when a man interfered with another man’s property in the public interest—for example (in the days before we could dial 999 for the fire brigade) the destruction of another man’s house to prevent the spread of a catastrophic fire, as indeed occurred in the Great Fire of London in 1666. The latter cases occurred when a man interfered with another’s property to save his own person or property from imminent danger—for example, when he entered upon his neighbour’s land without his consent, in order to prevent the spread of fire onto his own land."

6.8.2.1 Vincent v. Lake Erie Transport Co. (1910) 109 Minn. 456


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 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 Proef 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.

6.8.2.2 Binsaris v. Northern Territory [2020] HCA 22

CROSS-REFERENCE: §2.2.4, §6.6.5

GAGELER J. (minority opinion): ***

45. The decision of the House of Lords in *Burmah Oil Co Ltd v. Lord Advocate* 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

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233 [1965] AC 75.
§6.8.2 • Necessity

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. But it was moderated by the principle of distributive justice that “the loss to the individual must be made good at the public expense”.

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 and the United States. Although I have found them to have no direct utility, I have also considered the concepts of “incomplete privilege” and “conditional fault” developed in academic and professional writing in the United States by reference to Vincent v. Lake Erie Transportation Co.

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 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.

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240 (1910) 124 NW 221. See Restatement (Third) of Torts: Intentional Torts to Persons, Tentative Draft No 5 (2020), §26 and §44.
§6.8.3 • Necessity

6.8.2.3 Further material


6.8.3 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 ***.

6.8.3.1 Kohli v. Manchanda [2008] INSC 42

CROSS-REFERENCE: §2.2.2, §18.1.1.1, §19.4.2.3

RAVEENDRAN J.: ***

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. McMurphy [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) [§6.8.3]. 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
§6.8.3 • Necessity

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 *Marshell v. Curry* [1933] 3 DLR 260 decided by the Supreme Court of NS, 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. ***

6.8.3.2 Pile v. Chief Constable of Merseyside [2020] EWHC 2472

CROSS-REFERENCE: §6.3.1.2

TURNER J.: ***

30. Section 39 of PACE [Police and Criminal Evidence Act 1984] *** 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.”
§6.8.3 • Necessity

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. ***

6.8.3.3 Further material

7 INTENTIONAL INTERFERENCE WITH REAL PROPERTY

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 2000l. ***

[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. ***
§7.1.2 • Trespass to land

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.

7.1.2 Fitzpatrick v. Orwin [2012] ONSC 3492

CROSS-REFERENCE: §3.2.2, §9.1.2, §9.2.4, §9.3.6, §9.5.4, §9.8.2.1

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. ***

7.1.3 R v. Le [2019] SCC 34

CROSS-REFERENCE: §2.4.4, §6.6

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

44. *** 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 ***. 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. ***

7.1.4 Trespass Act, RSBC 2018

_Trespass Act, RSBC 2018, c 3, ss 2 and 3_

2. Trespass prohibited

(1) Subject to section 3, a person who does any of the following commits an offence:

(a) enters premises that are enclosed land;

(b) enters premises after the person has had notice from an occupier of the premises or an authorized person that the entry is prohibited;

(c) engages in activity on or in premises after the person has had notice from an occupier of the premises or an authorized person that the activity is prohibited.

(2) A person found on or in premises that are enclosed land is presumed to be on or in the premises without the consent of an occupier of the premises or an authorized person.

(3) Subject to section 3, a person who has been directed, either orally or in writing, by an occupier of premises or an authorized person to

(a) leave the premises, or

(b) stop engaging in an activity on or in the premises

commits an offence if the person

(c) does not leave the premises or stop the activity, as applicable, as soon as practicable after receiving the direction, or
(d) re-enters the premises or resumes the activity on or in the premises, as applicable.

3. Defences to trespass charge

A person may not be convicted of an offence under section 2 in relation to premises if the person’s action or inaction, as applicable to the offence, was with

(a) the consent of an occupier of the premises or an authorized person,

(b) other lawful authority, or

(c) colour of right.

7.1.4.1 Other provincial criminal trespass statutes

- Manitoba: The Petty Trespasses Act, CCSM c P50.
- New Brunswick: Trespass Act, RSNB 2012, c 117.
- Prince Edward Island: Trespass to Property Act, RSPEI 1988, c T-6.
- Saskatchewan: The Trespass to Property Act, SS 2009, c T-20.2.

7.1.5 Cross-references


7.1.6 Further material


7.2 Defence of real property


§7.2.1 • Defence of real property

The plea of defence of one’s property is a variation on the same theme as that of self-defence\textsuperscript{242} and is, therefore, also a private justification.\textsuperscript{243} 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.\textsuperscript{244} 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,\textsuperscript{245} 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,\textsuperscript{246} a person cannot apply lethal force merely to protect his property.\textsuperscript{247} 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.\textsuperscript{248}

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 20l. 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

\textsuperscript{242} *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).

\textsuperscript{243} 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.

\textsuperscript{244} Attorney-General’s Reference (No 2 of 1983) [1984] QB 456 (CA).

\textsuperscript{245} 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).


\textsuperscript{247} Restatement (Second) of Torts, § 77; Civil Liability Act 2002 (NSW), s 52(3); cf Hackshaw v. Shaw (1984) 155 CLR 614 (HCA).

\textsuperscript{248} Kline v. The Central Pacific Railroad Company of California 37 Cal 400 (1869); Jordan House Ltd v. Menow [1974] SCR 239.
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.

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 120l. 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.


CROSS-REFERENCE: §2.4.3

DUNFIELD J.: ***

27. It would seem that a trespasser should be asked to leave and only upon his refusal to leave may he be expelled with the minimum of force necessary. Most certainly he cannot be charged with anything, as the remedy for trespass is civil action. I think therefore that the action of Mr. Price went beyond his rights in that there was a great display of anger and some show of force in that the Store Detective was openly told to watch them, and that the telephoning at an open telephone in the shop and in the presence of the trespassers for the police amounted to a threat, of the validity of which Mr. Delgado was uncertain; and that they were subjected to the indignity of being taken out through the lower shop in the company of police and the shop detective in a way which would lead an observer to suppose they were undesirables. ***

7.2.3 Further material

8 INTENTIONAL INTERFERENCE WITH CHATTELS

8.1 Trespass to chattels


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.\(^{249}\)


New Zealand High Court – [1989] 1 NZLR 74

CROSS-REFERENCE: §8.2.1, §9.2.3

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 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.

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.

\(^{249}\) Now legislation also allows the courts to compel the return of property still held by the wrongdoer.
§8.1.2 • Trespass to chattels

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 willful damage to them.”

Reference is made by the learned authors to Lord Diplock's speech in R v. Inland Revenue Commissioners, ex parte Rossmirer Ltd [1980] AC 952 where his Lordship said at p 1011:

“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. ***

8.1.2 Further material

8.2 Conversion (trover)

Conversion (also known as “trover”)

Conversion (also known as “trover”)

Conversion (also known as “trover”)250 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.

8.2.1 Wilson v. New Brighton Panelbeaters Ltd [1989] 1 NZLR 74 (NZHC)

CROSS-REFERENCE: §8.1.1, §9.2.3

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

250 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 • Conversion (trover)

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. ***

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. 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
§8.2.2 • Conversion (trover)

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. ***

8.2.2 Armory v. Delamirie [1722] EWHC KB J94


Englend Court of King’s Bench – [1722] EWHC KB J94
§8.2.3 • Conversion (trover)

The plaintiff being a chimney sweater’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.\[^{251}\] \([\S 23.1]\)

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.

8.2.3  Robertson v. Stang [1997] CanLII 2122 (BC SC)

*British Columbia Supreme Court* – 1997 CanLII 2122

**CROSS-REFERENCE**: \(\S 9.2.2\)

**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

§8.2.3 • Conversion (trover)

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
§8.2.3 • Conversion (trover)

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
§8.2.5 • Conversion (trover)

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 vitiating 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. For these reasons, I conclude that the tort of conversion has not been made out by the plaintiff.

***

8.2.4 Cross-references


8.2.5 Further material

§8.3.1 • Detinue

8.3 Detinue


Detinue (derived from an Old French word\(^{252}\) 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.

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

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\(^{252}\) 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.
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 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 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.


> 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. ***

### 8.3.2 Cross-references


### 8.4 Replevin


**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.

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

- Manitoba: The Court of Queen's Bench Act, CCSM c C280, s 59.
- 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).

8.4.2 Neill v. Vancouver Police Department [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.
§8.4.2 • Replevin

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. ***
§8.5.1 • Recaption

8.5 Recaption

8.5.1 Self-Help


We begin our analysis of recaption with a tragic and true story. Late one Saturday night, eighteen-
year-old Jeremy Ryan Cook lost his cell phone. Recent advances in technology allowed Cook to
track his phone remotely. He traced it to a poorly lit parking lot. It was here that he found his phone
in the possession of three unknown individuals. Cook confronted the men and bravely demanded
that they return his property. They refused and a quarrel ensued. As the thieves drove away,
Cook reached for the driver-side door to block their escape. In the words of a local reporter, ‘Cook
did what many 18-year-olds might do if someone was stealing their stuff. He tried to stop them.’
When Cook grabbed the door, one of the car’s occupants opened fire on him. Police found Cook
a few hours later, dead at the scene.

Cook’s behaviour is not anomalous. A growing number of private citizens forgo a call to the police
and instead choose to take justice into their own hands and pursue their stolen property and its
pilferers. Although Cook’s actions were made possible through twenty-first-century technology,
brain behaviour like Cook’s enjoys a long common law history in the self-help remedy of recaption. The
classic case of *Blades v. Higgs* provides a colourful illustration of this hoary remedy. Here,
rabbits snared by poachers on the Marquis of Exeter’s land were sold and given over to a game
dealer, the plaintiff in the action. While the plaintiff was taking the rabbits away, the defendants
arrived on the scene and demanded their return, claiming that they belonged to their master, the
Marquis. The plaintiff refused, and the defendants used force to obtain possession. The plaintiff
responded with legal actions for assault, battery, and loss of goods. Chief Justice Erie of the Court
of Common Pleas rejected the plaintiff’s claims.

How is it that the law sanctions this unilateral remedial determination? Indeed, according to Erie
CJ, not only was the use of physical force and threats thereof to repossess the rabbits justified,
but they were also a better remedial option than seeking the aid of the law: ‘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.’ The fundamental question raised by self-help behaviour like recaption is what
justifies the self-authored and apparently self-authorized exercise of force against another.

In this way, recaption highlights the feature of self-help that makes it both interesting and
worrisome. Self-help enables its exerciser to perform an action that, in other circumstances, would
be a legal wrong. Cook, absent the remedy of self-help, could not grab onto the door of a vehicle
belonging to another; this is trespass to chattels. The servants of the Marquis, equally, could not
use force or threaten to use force to take back the game; this would be battery, assault, and (as
soon as they retook the game) conversion. What is it about self-help remedies like recaption that
appears to justify this *prima facie* wrongful behaviour? What story can we tell about it that explains
its non-wrongfulness and therefore provides part of its justification? In fact, there are three

254 See Ian Lovett, ‘When Hitting “Find My iPhone” Takes You to a Thief’s Doorstep’ New York Times (3 May 2014),
255 (1865) 11 ER 1474 (HL).
256 Ibid.
different stories we can tell about behaviour like Cook’s and the Marquis’s servants’. The first is causal; the second is psychological; and the third is conceptual. ***

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. In this final section, I want to explore further this feature of unilateral behaviour and reinforce my position that one individual’s say-so cannot alter the normative relationship between her and another.

It is not the case that self-help behaviour is a conclusive determination of the normative relationship of the parties. At best, it is a defeasible determination of the contours of their relationship. This determination is always vulnerable to an order from a legal authority, such as a court. Subsequent an exercise of self-help, the individual acted upon can always seek civil recourse and complain of the self-helper’s conduct. Indeed, the few self-help cases on the books reflect just this situation. In *Blades v. Higgs*, the purchaser of the poached game sued the self-helping defendants for their exercise of recaption. In *Lemmon v. Webb*, Mr Lemmon sued Mr Webb for the self-helping actions he undertook to abate a nuisance. In cases of self-defence, it is the defendant who raises the self-help remedy as a defence to the plaintiff’s claim against him in assault or battery. Self-help in this way appears to function as a shield: it is a defendant’s defence to actions he has taken against the plaintiff in order to vindicate his own rights. Of equal importance, the self-helper can also go before a court to seek legal redress following her self-help undertaking.257 ***

### 8.5.2 Slater v. Attorney-General (No. 1) [2006] NZHC 308

*New Zealand High Court* – *[2006] NZHC 308*

**CROSS-REFERENCE:** §9.3.4, §24.1.2.4

**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

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257 Perhaps for this reason, civil recourse theory looks like a hospitable theoretical foundation for self-help. ***
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
§8.5.2 • Recaption

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 unco-operative. 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. ***
9 REMEDIES (I)

CROSS-REFERENCE: §20

9.1 Nominal damages

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. OAG Glossary of Terms.


CROSS-REFERENCE: §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.

9.1.2 Fitzpatrick v. Orwin [2012] ONSC 3492

CROSS-REFERENCE: §3.2.2, §7.1.2, §9.2.4, §9.3.6, §9.5.4, §9.8.2.1

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. ***

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. ***
§ 9.2.2 • Compensatory damages—pecuniary/special

9.1.3 Cross-references


9.1.4 Further material

- S. Blanchard, “Nominal Damages and the Other Ends of Adjudication” (*forthcoming*).

9.2 Compensatory damages—pecuniary/special

Damages intended to compensate a plaintiff for a quantifiable monetary loss. Examples of such losses include: lost earnings, medical bills, and repair costs. [OAG Glossary of Terms](#).

9.2.1 Bettel v. Yim [1978] CanLII 1580 (ON CC)

CROSS-REFERENCE: § 2.2.1, § 6.2.2.1, § 9.3.5, § 20.8.1

BORINS CO.CT.J.: ***

38. As a result of his injury, the plaintiff received emergency treatment at a hospital on 22nd May 1976, and was permitted to go home. He consulted Dr. Hands, a certified specialist in diseases of the ear, nose and throat, on 25th May 1976, and remained under his care until 4th November 1977. In addition, he was examined on behalf of the defendant by Dr. Goodman on 4th September 1977. The evidence of both doctors was given by way of medical reports. Special damages of $1,113.22 for medical services and hospital expenses are not in issue. No other special damages are sought. ***

45. *** The plaintiff, Murray Bettel, will have judgment in the amount of $1,113.22. ***

9.2.2 Robertson v. Stang [1997] CanLII 2122 (BC SC)

CROSS-REFERENCE: § 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. ***


CROSS-REFERENCE: §8.1.1, §8.2.1

TIPPING J.: ***
29. *** The sole question is whether or not the loss claimed resulted from the trespass: see Salmond and Heuston on Torts (19th ed, 1987) at p 119 where the learned authors say:

“If the defendant has thus intentionally interfered with a chattel without lawful justification and the loss of the chattel does in fact result from the interference, it is no defence that such a loss was not intended, or even that it was not the natural or probable result.”

30. Similar considerations apply with conversion. 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 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 ***. ***

9.2.4 Fitzpatrick v. Orwin [2012] ONSC 3492

CROSS-REFERENCE: §3.2.2, §7.1.2, §9.1.2, §9.3.6, §9.5.4, §9.8.2.1

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. ***

9.2.5  ES v. Shillington [2021] ABQB 739

CROSS-REFERENCE: §4.1.3, §9.3.10, §9.4.4, §9.5.6, §9.8.2.5

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. ***

9.2.6  Further material


9.3  Compensatory damages—non-pecuniary/general

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. OAG Glossary of Terms.

9.3.1  Factors that influence award of non-pecuniary damages

Stapley v. Hejslet, 2006 BCCA 34

46. The inexhaustive list of common factors *** 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. I would add the following factors, although they may arguably be subsumed in the above list: (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] B.C.J. No. 163, 2005 BCCA 54 (B.C. C.A.)). ***
9.3.2 Cap on non-pecuniary damages

L. Bau, “The History and Treatment of Damages in Canada” Lindsay LLP (Sep 18, 2014)

As a body of jurisprudence emerges, courts rely on previous case law to determine the appropriate award. Given that the calculation of non-pecuniary damages is not an exact science, the Supreme Court of Canada feared that an escalation of these damages would arise from the case law and would subsequently be followed in the future.

Supreme Court of Canada Trilogy


In the judgment of Andrews, Mr. Justice Dickson explained that non-pecuniary damages were difficult to quantify and did not rely on an objective measure. The presence of these attributes provided the potential for an increasingly substantial and excessive amount of damages to be awarded. The court’s fear was partially grounded on the developing landscape of non-pecuniary damage awards in the United States. ***

Mr. Justice Dickson found there would not be any unfairness to the plaintiff if an upper limit was imposed. Non-pecuniary damages were not, in the direct sense, compensatory in nature as no amount of money can replace the pain and suffering of the plaintiff. The amounts awarded would instead be considered additional money to help the plaintiff in making his or her life more endurable. Furthermore, any future financial burdens to the plaintiff may be awarded through future loss of income or future care heading of damages.

Consequently, Justice Dickson for the Supreme Court of Canada imposed a conservative upper limit on non-pecuniary damages:

I would adopt as the appropriate award in the case of a young adult quadriplegic like Andrews the amount of [CDN]$100,000. Save in exceptional circumstances, this should be regarded as an upper limit of non-pecuniary loss in cases of this nature (Andrews at p. 21). ***

The $100,000 upper limit was again imposed in Arnold. Mr. Justice Spence noted that part of the exercise undertaken was a social and economic attempt to prevent runaway insurance premiums:

The very real and serious social burden of these exorbitant awards has been illustrated graphically in the United States in cases concerning medical malpractice. We have a right to fear a situation where none but the wealthy could own or drive automobiles because none but the wealthy could afford to pay the enormous insurance premiums which would be required by insurers to meet such exorbitant awards (Arnold at p. 28).

In addition to imposing an upper limit, the Supreme Court in Andrews further explained that the amount of non-pecuniary awards should not vary greatly from part of the country to another.
“Everyone in Canada, wherever he may reside, is entitled to a more or less equal measure of compensation for similar non-pecuniary loss” *(Andrews* at pp. 263-264).

**Cases that are Exempted from the Upper Limit Cap**

Since the Trilogy, the Supreme Court of Canada has exempted the application of the upper limit cap in particular types of cases. One such case where the cap did not apply involved injuries resulting from the defamation of a lawyer by the Church of Scientology *(Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 (SCC) [§9.3.3]). The lawyer was awarded $300,000 in general damages.

Similarly, a case involving a loss of reputation resulted in $430,000 in non-pecuniary damages being awarded *(Young v. Bella*, 2006 SCC 3). ***

Although not a Supreme Court of Canada case, the British Columbia Court of Appeal refused to impose the cap on damages for civil sexual assault cases *(S.Y. v. F.G.C.* (1996), 78 B.C.A.C. 209 (BCCA) at para. 30). ***

**The Current Upper Limit**

In the 1981 Supreme Court of Canada decision of *Lindal v. Lindal* ([1981] S.C.J. No. 108 (SCC)), it was agreed upon that the $100,000 cap would be adjusted at the rate of inflation to determine the upper limit at the time of trial.

**Challenging the Upper Limit**

In 2003, *Lee v. Dawson*, 2003 BCSC 1012 attempted to challenge the upper limits of non-pecuniary damages. In the British Columbia Supreme Court, a jury awarded $2,000,000 to a 15 year old who suffered a traumatic brain injury, severe depression, stunted psychological growth and permanent facial scarring from a motor vehicle accident. The trial judge lowered the jury award to the upper limit as suggested under *ter Neuzen v. Korn*, [1995] S.C.J. No. 79, which amounted to $294,000 after it was adjusted for inflation.

The plaintiff appealed the decision to the BC Court of Appeal *(Lee v. Dawson*, [2006] B.C.J. No. 679 (BCCA)) with the main argument being that the upper limit violated Section 15 of the *Canadian Charter of Rights and Freedoms* (the right to equality). ***

The Court of Appeal reinforced the BC Supreme Court’s reasoning that the courts are bounded by the trilogy with the upper limit to be applied as a rule of law. ***

**9.3.3  Hill v. Church of Scientology of Toronto [1995] CanLII 59 (SCC)**

** CROSS-REFERENCE: §5.1.1, §9.4.2, §9.5.3, §18.2.6, §24.1.1.1**

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 *Lev 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
§9.3.3 • Compensatory damages—non-pecuniary/general

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
§9.3.4  Compensatory damages—non-pecuniary/general

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. ***

9.3.4  Slater v. Attorney-General (No. 2) [2006] NZHC 979

New Zealand High Court – [2006] NZHC 979

CROSS-REFERENCE: §8.5.2, §24.1.2.4

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. ***

9.3.5 Bettel v. Yim [1978] CanLII 1580 (ON CC)

CROSS-REFERENCE: §2.2.1, §6.2.2.1, §9.2.1, §20.8.1

BORINS CO.CT.J.: ***

44. The plaintiff has suffered an obvious injury that has caused him a degree of distress and has adversely affected his breathing for a period of about twenty-one months. Two surgical procedures were necessitated which in the opinion of Dr. Hands and Dr. Goodman have produced a satisfactory result. His breathing is expected to return to normal and the adverse cosmetic effect of the injury has been corrected. I would assess the plaintiff’s general damages at $5,000.

45. In the result, the infant plaintiff, Howard Bettel, will have judgment in the amount of $5,000 which is to be paid into Court pursuant to the usual terms. ***

9.3.6 Fitzpatrick v. Orwin [2012] ONSC 3492

CROSS-REFERENCE: §3.2.2, §7.1.2, §9.1.2, §9.2.4, §9.5.4, §9.8.2.1

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;
9.3.7  Jones v. Tsige [2012] ONCA 32

CROSS-REFERENCE: §4.1.2, §24.1.1.2

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. ***

9.3.8  Boucher v. Wal-Mart [2014] ONCA 419

CROSS-REFERENCE: §3.2.3, §9.4.3, §9.5.5

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. ***

9.3.9 Lu v. Shen [2020] BCSC 490

CROSS-REFERENCE: §3.2.4, §4.3.3, §5.1.3, §5.2.3, §9.8.2.3

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 NCC.

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. ***

9.3.10 ES v. Shillington [2021] ABQB 739

CROSS-REFERENCE: §4.1.3, §9.2.5, §9.4.4, §9.5.6, §9.8.2.5
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. ***

**9.3.11 Toews v. Weisner [2001] BCSC 15**

**CROSS-REFERENCE: §6.3.2.2, §9.5.7**

**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. Berryman, “Non-Pecuniary Damages—In Search of a Purpose” (SSRN, 2021).
§9.4.2 • Aggravated damages


9.4 Aggravated damages

Damages designed to compensate a plaintiff for suffering intangible damages such as humiliation and distress, as a result of the defendant’s actions. [OAG Glossary of Terms](#).


**CROSS-REFERENCE: §6.3.2.3, §9.5.2, §18.3.1**

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)

**CROSS-REFERENCE: §5.1.1, §9.3.3, §9.5.3, §18.2.6, §24.1.1.1**

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 Boucher v. Wal-Mart [2014] ONCA 419

CROSS-REFERENCE: §3.2.3, §9.3.8, §9.5.5

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.

9.4.4 ES v. Shillington [2021] ABQB 739

CROSS-REFERENCE: §4.1.3, §9.2.5, §9.3.10, §9.5.6, §9.8.2.5

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.

9.5 Punitive/exemplary damages

Damages awarded to punish a defendant for their purposely harsh, vindictive or malicious behaviour. OAG Glossary of Terms.

9.5.1 Atlantic Lottery Corp. Inc. v. Babstock [2020] SCC 19

CROSS-REFERENCE: §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). ***


CROSS-REFERENCE: §6.3.2.3, §9.4.1, §18.3.1

LA FOREST J. (GONTHIER AND CORY JJ. concurring): ***

54. *** Punitive 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 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)

CROSS-REFERENCE: §5.1.1, §9.3.3, §9.4.2, §18.2.6, §24.1.1.1

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 Fitzpatrick v. Orwin [2012] ONSC 3492

CROSS-REFERENCE: §3.2.2, §7.1.2, §9.1.2, §9.2.4, §9.3.6, §9.8.2.1

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 Canra, 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 Canra. I therefore award punitive damages of $20,000 against him. This sum shall be payable to the Squires jointly. ***

9.5.5 Boucher v. Wal-Mart [2014] ONCA 419

CROSS-REFERENCE: §3.2.3, §9.3.8, §9.4.3

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 [§19.7.3], “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.

9.5.6 ES v. Shillington [2021] ABQB 739

CROSS-REFERENCE: §4.1.3, §9.2.5, §9.3.10, §9.4.4, §9.8.2.5

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. ***

9.5.7 Toews v. Weisner [2001] BCSC 15

CROSS-REFERENCE: §6.3.2.2, §9.3.11
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 overrode 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. ***

9.5.8 Cross-references


9.5.9 Further material


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 is to create for the victim a personal right to the payment of money, usually in the form of monetary damages, 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

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258 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. ***

259 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. ***
§9.6.2 • Restitutionary damages

assets. 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.

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. The confusion comes as no
surprise since both restitution for unjust enrichment and restitutionary damages operate the same
way insofar as both force the defendant to give back the value of the benefit he received from the
plaintiff. 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.

9.6.1 Cross-references


9.6.2 Further material

- J. Berryman, “The Case for Restitutionary Damages Over Punitive Damages: Teaching the
- E.J. Weinrib, “Restitutionary Damages as Corrective Justice” (2000) 1 Theoretical Inquiries L
  1.
  Melbourne University L Rev 1.
  (eds), Research Handbook on Unjust Enrichment and Restitution (Cheltenham: Edward Elgar

260 To refer to restitutionary damages as “gain-based” is somewhat of a misnomer. Restitutionary damages are not
strictly gain-based; like restitution for unjust enrichment, they are loss-based as well, insofar as the transfer of value to
the defendant causes the plaintiff a loss.
262 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/].
263 According to Edelman’s account, restitution and restitutionary damages are 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.
§9.7.2 • Disgorgement damages

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, 990-992

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.264 ***

9.7.1 Atlantic Lottery Corp. Inc. v. Babstock [2020] SCC 19

CROSS-REFERENCE: §9.5.1, §15.1.1

BROWN J. (ABELLA, MOLDAVER, CÔTÉ, ROWE JJ. concurring): ***


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. 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


264 Edelman, supra note 1 at 72.
9.8  Injunctions


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. ***

9.8.1  Interim and interlocutory injunctions

Cambie Surgeries Corp. v. British Columbia, 2010 BCCA 396

17. *** [T]he normal test for the granting of an interlocutory injunction requires a three-stage analysis: first, the applicant must demonstrate that there is a serious question to be tried; second, the applicant must show that it may suffer irreparable harm if the relief is not granted; finally, the court must determine whether the balance of convenience favours the applicant or the respondent. [RJR-MacDonald v. Canada, [1994] 1 S.C.R. 311.] ***

39. *** An injunction … should be tailored to an individual case. It is an extraordinary remedy, and anyone who infringes an injunction is subject to the possibility of being found in contempt of court. Injunctions must, of course, be drawn broadly enough to ensure that they will be effective. They should not, however, go beyond what is reasonably necessary to effect compliance. ***

9.8.1.1 Rhodes v. OPO [2015] UKSC 32

CROSS-REFERENCE: §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
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. ***

98.1.2 Li v. Barber [2022] CanLII 13686 (ON SC)

Ontario Superior Court – 2022 CanLII 13686

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 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. ***

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. ***

[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
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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 [§24.1.1]. 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.: ***

UPON READING the motion records of the parties and UPON HEARING the oral arguments made by counsel for the parties by Zoom [concerning the plaintiff’s application for an interlocutory injunction and costs], ***

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 60 days from the date of this Order, or until further order of this Court.

3. THIS COURT ORDERS that any persons having notice of this Order are hereby restrained and enjoined from ordering, requesting, inciting, counselling, promoting or encouraging in any manner whatsoever, either directly or indirectly, via social media or otherwise, any person to use air horns or train horns in downtown Ottawa for as long as the Order is in effect. ***

5. 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. ***

8. 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. ***

9.8.1.3 Cross-references


9.8.1.4 Further material

- S. Thiele, “Understanding the Ambassador Bridge Injunction Against the Freedom Convoy Protestors” *Mondaq* (Feb 17, 2022).

9.8.2 Permanent/perpetual injunctions


72. *** [T]he proper approach to determining whether a perpetual injunction should be granted as a remedy for a claimed private law wrong is to answer the following questions:
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(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 not, 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? ***

9.8.2.1 Fitzpatrick v. Orwin [2012] ONSC 3492

CROSS-REFERENCE: §3.2.2, §7.1.2, §9.1.2, §9.2.4, §9.3.6, §9.5.4

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. ***

9.8.2.2 Pong Seong v. Chan [2014] HKCFI 1480

CROSS-REFERENCE: §2.3.3, §5.2.1, §21.1.4

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:
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(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,
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harassing, threatening, or pester 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 Lu v. Shen [2020] BCSC 490

CROSS-REFERENCE: §3.2.4, §4.3.3, §5.1.3, §5.2.3, §9.3.9

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; ***
§9.8.2 • Injunctions

(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. ***

9.8.2.4 Caplan v. Atas [2021] ONSC 670

CROSS-REFERENCE: §5.1.4, §5.2.4, §6.7.6, §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. ***

9.8.2.5 ES v. Shillington [2021] ABQB 739

CROSS-REFERENCE: §4.1.3, §9.2.5, §9.3.10, §9.4.4, §9.5.6

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 Cross-references


9.8.2.7 Further material


§10.1.1 • What is tort law (for)?

10   TORT THEORY

10.1 What is tort law (for)?

10.1.1 Functions of tort law


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.

Punishment and appeasement

Originally, tort and criminal law were indistinguishable, and, even when the two branches began to acquire independent identities, the former remained for a very long time in the shadow of the latter. Offenses against the community and the king’s interests increasingly became the subject of criminal law, whereas wrongs against the individual came to be dealt with by the emerging (or, in the case of continental Europe, reemerging Roman-inspired) law of torts. Early tort law, however, was concerned only with the most serious kinds of wrongs—bodily injury, damage to goods, and trespass to land. Not until the 19th century was it extended to cover such conduct as intentional infliction of economic loss. In the 20th century the compensation of negligently inflicted economic loss and other violations of subtler interests (such as psychological injuries and violations of privacy) took centre stage in the wider debate that aimed to set the proper boundaries of tort liability.

The emancipation of tort law from criminal law resulted from the need to buy off private vengeance and to strengthen law and order during the Middle Ages. Most authors would probably agree that punishment and appeasement are no longer major aims of tort law. Nevertheless, some common-law jurisdictions—notably the United States—retain in their damage awards a strong element of punishment for certain types of tortious conduct. These punitive or exemplary damages, as they are sometimes called, are in England limited to three rather narrow instances. The most troublesome and oft-encountered is the case of an activity calculated by the defendant to make a profit (a term not confined to moneymaking in the strict sense). In these instances it is felt that “it is necessary to teach the wrongdoer that tort does not pay” by making him not only compensate the plaintiff for the latter’s loss but also disgorge any gain he may have made from his conduct. That this is right few would doubt. Less defensible, however, is the resulting windfall for the plaintiff and the loss of important procedural safeguards for the defendant in a situation in which “punishment” is meted out by unpredictable and unguided juries. In England the latter objection was partially countered by the courts’ greater willingness, encouraged by modern statutory rules, to control such jury awards and to keep them within reasonable limits. But the same cannot be said of the United States, where punitive awards, often amounting to millions of dollars, had a significant effect on the tort strategies of litigants.

Notwithstanding these doctrinal doubts, the award of punitive damages remains a possibility in some common-law countries, especially the United States. Favourable attitudes toward punitive awards may arise from a multitude of factors, such as a certain dislike for regulation as a means of influencing human conduct (e.g., to prevent accidents), the existence of contingent fees ***,
§10.1.1 • What is tort law (for)?

and the desire, more keenly felt by juries, to punish wealthy defendants. In the United States these and other factors deeply—yet indirectly—affect tort law in practice and account for some of the major differences from its progenitor, the English law of torts, with which the American progeny otherwise has much conceptual affinity. Civil-law systems have, by contrast, taken a hostile attitude toward penal damages in civil actions, though there are limited instances in the German law of tort (privacy) and the French law of contract (astreinte) in which a penal element has been allowed to creep into the civil award.

Deterrence

In its modern, economic sense, deterrence aims at reducing the number of accidents by imposing a heavy financial cost on unsafe conduct. A distinction is necessary between specific and general deterrence. The former depends largely on the admonitory effect of tort law. This, however, is limited where insurance cushions the defendant from the economic consequences of an adverse judgment (though insurance premiums may subsequently be increased). This deterrent element, however, almost completely evaporates in the case of traffic accidents, where harm is statistically inevitable and in most cases results from momentary inattention, the occurrence of which no tort award can ever prevent. Tort law is, therefore, in some cases the second best means of preventing accidents after criminal law. Its greater (deterrent) influence may be in cases involving damage to property and tortious harm resulting from intentional activities.

Very different was the theory of general deterrence principally argued by the U.S. legal scholar and judge Guido Calabresi in The Cost of Accidents (1970). In Calabresi’s words, general deterrence involves deciding what the accident costs of activities are and letting the market determine the degree to which, and the ways in which, activities are desired given such costs. Similarly it involves giving people freedom to choose whether they would rather engage in the activity and pay the costs of doing so, including accident costs, or, given the accident costs, engage in safer activities that might otherwise have seemed less desirable.

Calabresi’s approach reflected the belief that the market mechanism not only achieves the optimum allocation of resources but also ensures that most of society’s decisions vis-à-vis accident-causing activities are left to the cumulative choice of individuals rather than to imposition by government.

But is it possible to rely on the degree of rationality in human behaviour seemingly presupposed by economic theories? And is it always possible to identify the activity that causes the accident? For example, a tool defectively manufactured by A injures one of B’s employees who has been supplied with it by B. Whose activity has caused this injury? And, in accidents involving automobiles and pedestrians, can such an economic choice be made? Calabresi treated the motorist as the best cost-avoider on the grounds that he has both better information and the means of reducing such accidents. But are such assumptions truly tenable? Finally, general deterrence so conceived cannot provide all the answers, as Calabresi was well aware. Wider considerations of fairness and justice also obtain, and it would be a mistake to assert that certain antisocial activities can and will be allowed so long as those taking part in them are prepared to pay for them. Moreover, collective judgments are often reached, and an infinite number of calculated risks determined, according to political criteria rather than cost-benefit equations. Thus, although economic analysis has spawned some imaginative writing, in the area of tort law it seems to have left the courts rather indifferent. This is especially true outside the United States.
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Compensation

Compensation is arguably the most important contemporary function of tort law, and modern insurance practice has made it easier to satisfy the injured without financially crushing the injurer. The welfare state, however, is now the main source of accident compensation. But even where tort law plays a major compensatory role—for example, in the most serious cases of personal injury—it does not function with great efficiency. Though tort lawyers rightly regard tort as the compensation system that caters best to the particular victim on the basis of the pre-accident situation and prognosis of his future, it nonetheless remains expensive, capricious, and dilatory. The Royal Commission on Civil Liability and Compensation for Personal Injury (1978) in England once estimated that it cost 85 pence to award £1 of net benefits to the victim. (The administrative cost of the New Zealand Scheme [§12.1] was apparently less than 10 percent.) The tort system is capricious in that compensation may depend on finding a tortfeasor (wrongdoer) and credible witnesses, not to mention a good lawyer. Delay can also produce injustice, especially since it tends to benefit wealthy defendants (usually insurance companies) whose in-house legal advisers can sometimes delay payments in the hope of wearing down a plaintiff so that he accepts a low settlement. Difficulties of this kind have led some authors to refer to the tort law as a “forensic lottery” and have given rise to remedial legislation in areas particularly affected, such as automobile accidents. Most importantly, they have led many jurists to reconsider the utility of modern tort law. Nonetheless, threatened radical overhaul of tort law has not taken place.

Loss spreading

Compensation in its crudest form meant that the cost of an accident was shifted from the victim to the tortfeasor. For a long time the only plausible excuse for such a shift was deemed to be the tortfeasor’s fault. Certainly it seemed right to make wrongdoers pay. The corollary, that he who is not at fault need not pay, also appealed to 19th-century judges and jurists, who were often more concerned with shielding nascent industries from the crushing costs of litigation than with compensating the growing number of such industries’ victims. Although the first argument still has its appeal, the second has lost cogency given the modern insurance system. This has revolutionized tort reasoning, for victims can now be compensated without tortfeasors’ being ruined financially. It thus helps erode the requirement of fault, while strict liability correspondingly proliferates ***. Finally, where liability without fault has not been introduced in an open manner, such notions as fault, foreseeability, and causation become stretched in an attempt to do justice to the victim while allegedly remaining faithful to a fault-based law of torts. It is only since about the 1960s that Anglo-American courts have tended to refer openly to such considerations, and they have been active not only in shifting the loss but also in trying to pin it on the person who is in the best position to spread it. ***

10.1.2 Theories of tort law: justice, rights, and duties


Corrective Justice

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
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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.

We can bring out what is distinctive about the corrective justice approach to tort law by contrasting it with various alternatives.

Corrective Justice versus Economic Analysis

From the standpoint of economic analysis, all legal liabilities are just costs of one sort or another. From an economic perspective, there are no significant normative differences among such things as licensing fees, tort liability, and taxes: normative differences that would in any event make a difference in how the law should approach them. From an economic perspective, the choice among them is based on their relative comparative advantages in securing the goals the law seeks to reach. All are tools for achieving social goals, and in some cases, taxes are better tools than licenses are. In other cases, tort liability is better than both. In many cases a mix of tools will prove optimal. The important point is that within the economic analysis, the “fit” or “aptness” of a response to wrongdoing is determined by its effectiveness in securing the aim in question; and in tort law, that aim is optimal deterrence. Tort liability is a tool that achieves that aim by shifting costs.

In contrast, corrective justice theory maintains that tort liability is not simply a mechanism for shifting costs. A licensing fee imposes a cost, as does a tax, but we would not say that in levying fees or taxes we are holding people responsible or accountable for their wrongdoing. In contrast, when we hold a defendant liable in tort, we say that he committed a wrong—assault, battery, negligence, or the like—and it is in respect of that wrong that he must be made to pay. For this reason, corrective justice theory insists that different legal liabilities are not simply interchangeable cost-shifting implements in the legal tool box, as they can have radically different expressive consequences, and some are appropriate, apt, or fitting responses to the wrongdoing in question while others are not.

Corrective Justice versus Retributive Justice

Many theorists believe that a principle of retributive justice—say, that the blameworthy deserve to suffer—does a good job of interpreting and justifying criminal law. Yet most theorists think that such a principle does a rather poor job of interpreting and justifying tort law (except, perhaps, for the part of tort law concerned with punitive damages). First, tort liability does not communicate condemnation, since (as explained above) a defendant can be liable in tort even though he did nothing blameworthy. Second, the duty of repair in tort is treated as a debt of repayment, in that it can be paid by third parties—and not just when the creditor (the plaintiff) has authorized repayment. By contrast, “debts” incurred as a result of criminal mischief can never be paid by third
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parties. You cannot serve my prison sentence. Third, a person cannot guard against liability to
criminal sanction by purchasing insurance. Yet it is common to purchase insurance to guard
against the burdens of tort liability. Indeed, in some areas of life (e.g., driving), purchasing third-
party insurance is mandatory.

Corrective Justice versus Distributive Justice

Some theorists are skeptical of the idea that corrective justice is really an independent principle
of justice. Their concern is twofold: considerations that make corrective justice seem like a
genuine principle of justice also seem to undermine its independence from distributive justice
(justice in the distribution of resources); at the same time, considerations that support the
principle’s independence from distributive justice also seem to undermine its status as a genuine
principle of justice. This twofold concern stems from the fact that corrective justice requires the
reversal of wrongful changes to an initial distribution of resources. If, on the one hand, some initial
distribution of resources is just, then corrective justice seemingly does no more than require that
we return individuals to the position to which they are entitled merely as a matter of distributive
justice. This suggests that corrective justice is but distributive justice from an ex post perspective
rather than an independent principle of justice. If, on the other hand, an initial distribution of
resources is unjust, then corrective justice seemingly requires that we sustain, enforce, or
entrench what is ex hypothesi an injustice. This suggests that corrective justice is not really a
matter of justice at all: independent, yes; a genuine principle of justice, no.

First Response: Corrective Justice as Transactional Justice. Some theorists respond by
suggesting that we understand corrective justice as a kind of transactional justice. These theorists
identify the domain of distributive justice with the initial distribution of holdings and take corrective
justice to be concerned exclusively with norms of transfer, norms that govern whether departures
from an initial distribution are legitimate. Whatever the underlying pattern of holdings, we can
distinguish legitimate modes of transfer from illegitimate ones. If agreement or gift moves
resources from one person to another, then the mode of transfer is legitimate. Never mind whether
the resultant allocation of resources is unequal or unfair: that is a concern of distributive, not
transactional, justice. If fraud or force moves resources from one person to another, then the
mode of transfer is illegitimate. Even if an illegitimate transfer gives rise to an equitable
distribution, the transaction is unjust and must therefore be annulled.

Second Response: Justice versus Legitimacy. Other theorists respond by distinguishing between
a distribution’s justness and its legitimacy. These theorists allow that a legitimate distribution of
resources may fall short of being a fully just distribution. But they insist that a (merely) legitimate
distribution can suffice to generate duties of repair.

Civil Recourse Theory

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
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against the perpetrator.

Civil recourse theory has substantial explanatory power. Perhaps most obvious, it explains why tort suits have a bilateral structure—why the victim of a tortious wrong seeks redress from the wrongdoer herself instead of drawing on a common pool of resources. It also explains why tort suits are privately prosecuted—why the state does not act of its own accord to impose liability on those who breach first-order duties. According to civil recourse theory, the breach of a first-order duty gives rise not to a legal duty but to a legal power, a power the victim can choose not to exercise.

Furthermore, civil recourse theory accommodates a number of tort’s central substantive features, features that arguably elude corrective justice theory. Prominent among these are (i) the fact that tort offers a variety of different remedies, only some of which are designed to restore the plaintiff’s antecedent holdings, and (ii) the fact that the defendant incurs a legal duty to pay damages only upon a lawsuit’s successful conclusion (either by settlement or by the final judgment of a court), rather than immediately upon the breach of a first-order duty.

Despite its explanatory power, civil recourse theory is vulnerable to a potentially serious objection—or else it seems to leave tort law vulnerable to such an objection. Because civil recourse theory offers little guidance as to what sort of redress is appropriate, the theory depicts tort law primarily as an institution that enables one person to harm another with the aid of the state’s coercive power. Tort law may well be such an institution, of course. But if it is, it may be deeply flawed—indeed, it may be unjust. This problem can be posed in the form of a dilemma. Either the principle of civil recourse is grounded in a principle of justice or it is not. If the principle of civil recourse is grounded in a principle of justice, then civil recourse theory threatens to collapse into a kind of a justice-based theory. If the principle of civil recourse is not so grounded, then the principle apparently does no more than license one party to inflict an evil on another. If that is what the principle does, we might reasonably wonder whether it can justify or even make coherent sense of an entire body of law. ***

10.1.3 Instrumental and noninstrumental theories of tort law


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.265 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 [%14.1.1.3], which essentially penalizes economically

265 O.W. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 462 (1897).
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\textsuperscript{266}), 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.\textsuperscript{267} The use of the term “corrective justice” to describe a duty to compensate must make Aristotle, the inventor of the term, write in his grave. For he meant by it something quite different: that your injuring someone is not excused by the fact that you’re a higher-status person than he. Status allocation belongs to what Aristotle called distributive justice, corrective justice being the domain of law, which, as the modern judicial oaths have it, is administered “without respect to persons.” It is the concept of law that was symbolized by a blindfolded goddess, and it is the core of what today we call the “rule of law.”\textsuperscript{268}

“Civil recourse theory” is not the most perspicuous term but at least it jettisons the historical baggage that makes “corrective justice” a source of confusion. Professor Zipursky has summarized it with commendable brevity: “The core idea of civil recourse theory is that tort law is about empowering people who have been wrongly injured to obtain some sort of redress against the injurers.”\textsuperscript{269} “Tort law functions best as a means of reinforcing social norms.”\textsuperscript{270} Whereas the legal realists argued that modern tort law was about shifting the costs of accidents to producers (as in products liability law) and insurers (and hence to insurance pools), the economic analysts of law argued and argue that tort law is about minimizing the sum of accident and accident-avoidance costs (but also deterring intentional and reckless loss-inflicting acts), and modern corrective justice analysts argue that it is about implementing a moral duty to redress an imbalance created by an injury, civil recourse theorists argue that tort law is about implementing a more complex set of moral notions—a set that includes limitations on redress for injuries (on punitive damages, for example). ***

There is a further problem with civil recourse theory, and that is the assumption that a single theory could explain all of tort law. American tort law is the joint product of the judges of the courts of fifty different states, of federal judges, of state legislatures, and of Congress, and it is a product that has been created over a period of hundreds of years (initially with a dominant English influence), with many of its doctrines preserved into modernity by reason of stare decisis even if they are not perfectly adapted to modern conditions. It would be surprising if the rise of the regulatory state, social insurance, and economic analysis has left tort law untouched (we’ll see


\textsuperscript{267} Listed in Christopher J. Robinette, \textit{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, \textit{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: [\textit{John C.P. Goldberg & Benjamin C. Zipursky, Recognizing Wrongs} (2020)].


\textsuperscript{270} Id.
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that civil recourse theory is actually ambivalent on this point).

I have another question to put to civil recourse theorists: supposing that tort law is dedicated to providing “some sort of redress” for people injured by “wrongful” conduct, where do we go to find out what is a “wrong”? Without an answer to that question, the theory is at risk of collapsing into a tautology: tort law provides redress for wrongful injury; injury is wrongful if tort law provides redress for it.

No answer having been given, I conclude that the theory does collapse into tautology. But surprisingly its application does not, and this creates the ambivalence that I noted. Remember that all that the theorists insist upon is “some sort” of redress. They realize that tort law does not provide complete remedies for a number of losses inflicted by wrongful acts, and they explain these remedial limitations in instrumental terms, much as an economist would do. But if they are to go beyond economics, as they want to do, they have to explain how one determines whether an act is wrongful, or wrongful in a sense that requires “some sort” of redress even if not complete. I don’t see that in their work. They seem to think that everyone knows right from wrong, but if this is so then what is there to civil resource theory except instrumental limitations on tort remedies for wrongs?

And as the critics of civil resource theory have pointed out, a great deal of tort law is about those limitations: think of contributory and comparative negligence, assumption of risk, causation and foreseeability, the economic loss rule, contribution and indemnity, res ipsa loquitur, punitive damages, limitations on duties to avoid injuries to trespassers and licensees, general damages, the choice between negligence and strict liability, the distinction between independent-contractor liability and respondeat superior, sovereign immunity, official immunity, contractual waivers of liability, loss of a chance (latent or probabilistic injury), mass torts, and constitutional limitations on defamation and on the tort right of privacy. Tort remedies are an issue about which economic analysis of law has had a lot to say,271 and I don’t see anything in civil recourse theory to challenge what economic analysis has had to say about them. ***

The civil recourse theorists’ failure to explain how one identifies a “wrong” leaves them with nothing distinctive to say about tort law, because once the wrong is specified the focus of tort law switches to the question how much redress to provide for it, and that is the pragmatic question about which civil recourse theory seems to offer nothing distinctive to say. ***

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 instincual but in a primitive culture it is often difficult to distinguish between the instincual 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

271 See, e.g., POSNER, supra note 2, at 167–213.
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. ***

10.1.4 Civil recourse defended: a reply to Posner


An academic adage says that it is better to be criticized than ignored. Alas it offers us little solace in dealing with Judge Richard Posner’s commentary, for he has somehow managed to criticize our work while ignoring it. ***

We are interested in identifying the distinctive features of tort law. *** [W]e argue that it identifies a special category of wrongs and that it empowers persons who can establish that they are victims of such wrongs to demand, through court proceedings, responsive action from a wrongdoer. *** Finally, civil recourse theory emphasizes that tort law’s articulation of wrongs and its provision of an avenue of recourse against wrongdoers is the fulfillment of a political obligation owed by government to its citizens. ***

10.1.5 Tort law is the law of torts


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. The cumulative nature of (tort) law enables it to perform an important function, of securing settled continuity of social normative practices, which is critical to stable and successful human life. On the other hand, the ability of law-makers to change the law allows law to perform the equally important function of keeping social normative practices abreast of changing circumstances and changing values. For instance, the dramatic social changes associated with industrialisation in the nineteenth century were reflected in equally radical changes in the law, including tort law. In more recent decades, changes of ideology associated with the transition, in the 1980s and 1990s, from the politics of the welfare state in its heyday after World War II, to the more individualistic values of ‘neo-liberalism’, have (arguably, anyway) also brought about changes in tort law. Our current tort law is the evolved product of the activities of many law-makers over a very long period. 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. ***

10.1.6 Cross-references

- Clements v. Clements [2012] SCC 32, [19], [32], [41]: §16.2.2.

10.1.7 Further material

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- C. Bruce, “Applying Economic Analysis to Tort Law” Economica (Jun 1, 1998).
- Tort Law & Social Equality Project.
- Western University Lectures on Tort Law.
- The American Museum of Tort Law: Online Tour.
11 Examination Questions (I)

11.1 Intentional torts and tort theory

11.1.1 Preparation guides


11.1.2 S. Beswick, UBC LAW-241.003: Torts Exam (Dec 2020)

Every year following their first set of exams at Allard Law, First Year students in the Gee small group hold a celebratory parade. Their parade begins at 3pm outside Allard Hall on UBC’s Vancouver campus and finishes at the Gastown Steam Clock in downtown Vancouver. The students walk on the city sidewalks each dressed as their favourite law professor, waving streamers and singing anthems like Queen’s “We are the Champions”, and blowing horns and kazoos that they borrow with permission from UBC’s School of Music. While the parade tends to be lively and jovial, the students obey the traffic lights and do their best not to disrupt traffic.

Glenn Cullen and Terri Coverley are two Gee students who took part in the parade on Friday, December 21, 2018. Their friend Hugh Abbot, who is in the Film Studies program at UBC, joined them with his video camera to document the event.

As the small group of students noisily marched eastward through the suburb of Kitsilano, they passed by the house of notorious local grinch, Oliver Reeder. Oliver had been tending to his award-winning tulip garden when he became perturbed by Glenn’s enthusiastic horn-blowing. Oliver pointed at Glenn, raised his fist, and yelled, “Oi! If you keep wailing on like that in my neighbourhood, I’ll come over there and give you something real to wail about.” While the other Gee students continued on parading down the street, Glenn—who is known to be a bit of a hothead—stopped and responded, “bring it on, old man.” After an exchange of insults, Glenn walked up the driveway toward Oliver. Glenn stood a metre in front of Oliver and said, “This is a free country. And I’m a law student. I’ve read the Charter. I have freedom of speech and music!” In response, Oliver grabbed the horn out of Glenn’s hand and shoved Glenn backwards, saying, “Not on my property you don’t. Get lost.” Oliver’s shove caused Glenn to lose his footing and fall backwards into a bush. As he landed, Glenn impaled his arm on an old upturned rake that had been lying concealed beneath the bush. Glenn’s arm immediately began bleeding. Oliver threw Glenn’s horn over the fence onto the front yard of his neighbour, Nicola Murray, and Oliver went inside his home.

Hugh had stayed back to film this commotion between Glenn and Oliver from the sidewalk with his video camera. He filmed as Glenn left Oliver’s driveway and stepped over Nicola’s picket fence to collect his horn from her yard. Glenn then hurried off to the Emergency Room to have his wound treated.

Rather than carrying on, Hugh stayed where he was after becoming distracted by music coming
through a window on the second floor of Nicola’s house. Though the curtains had been pulled three-quarters shut, the window was open and a strong breeze was causing the curtains to flutter apart. Still recording, Hugh zoomed his camera in toward the window. Through the camera viewer he saw Nicola dancing around the bedroom and singing to herself. She was singing along to Lady Gaga’s pop hit, “Born This Way”, using her hairbrush as a microphone. As she danced and sang around the room she began to pull items of clothing out of her wardrobe. Hugh continued filming as Nicola removed the top outer garment she was wearing and continued dancing around in her singlet. After a few minutes, Nicola noticed in her vanity mirror that someone outside was filming her with a camera. She screamed with alarm, threw on her dressing-gown, locked the window, and closed the curtains. She then hurried downstairs to lock all the windows and doors. Hugh promptly fled the scene. Nicola was upset for the rest of the day and couldn’t sleep a wink that night, anxious that the filming stranger might return.

Meanwhile, Terri led her fellow Gee students parading toward Granville Bridge on their way to the Gastown Steam Clock. As they marched up from the southwest end of the bridge with cars rushing by them and the sun setting, they noticed that two large men wearing leather jackets and gang patches were slowly walking about 20 metres behind them. The men had three vicious-looking dogs at their side. Near the northeast end of the bridge they encountered a third man wearing a similar leather jacket. This third man introduced himself to Terri and her friends as “Malcolm Tucker, toll collector.” Malcolm said he was collecting a $10 toll from each person who crosses Granville Bridge. When Terri protested that this was a public bridge and he had no right to charge a toll, Malcolm responded that while he wasn’t a violent guy, he couldn’t say the same about his associates standing on the bridge sidewalk 20 metres behind the group. He said the students had no option but to pay up, given their route southwest was now blocked. Afraid to turn back, Terri and the other students each gave Malcom a $10 note, which he pocketed, and the students passed by. They ultimately reached the Gastown Steam Clock and gathered together in a nearby pub, feeling a little deflated about their encounter on the bridge, but mostly pleased and contented that their first set of law exams were now behind them.

Explain what tort actions Glenn, Nicola and Terri could bring and whether, in light of any defences, they are likely to succeed.

11.1.3  B. Goold, UBC LAW-241.004: Torts Exam (Dec 2019)

1. Should distributive justice be the basis of modern tort law? What would be the implications of moving away from the current commitment to corrective justice in the law of torts?

2. Do we need intentional torts of assault and battery? Would it be better to leave harms against the person to be dealt with through the criminal law?

3. Why do we have torts? What is it that the law of torts sets out to do?

4. Alan, Bruce, and Carly are all university students who live together in a small house off campus. Every Saturday afternoon they play street hockey in the laneway behind their house. Their games are friendly but usually very rough. There is a lot of pushing and shoving, and all three of them have been knocked over many times during their games.

One day Alan, Bruce, and Carly are playing street hockey together—Alan is in goal, Bruce is defending, and Carly is on offence. While they are playing, their friend David stops by and asks if he can join the game. Alan, Bruce, and Carly all say yes, and so David joins Carly on offence.
After about five minutes of playing, David gets the ball and prepares to take a shot on goal. Before David has a chance to shoot, Bruce runs into him with his shoulder and knocks him to the ground. David gets up and yells: “What was that?” Before Bruce has a chance to answer, David hits him hard on the arm with his stick. David then drops his stick and starts walking towards Bruce with clenched fists. Carly rushes between them and pushes David to the ground. Alan then comes over and sits on David, telling him: “I’m not getting off until you calm down.” After five minutes of struggling David says: “Okay, I’m calm. Now get off me.” Alan gets off David, who starts to leave. As David walks away Alan calls out: “If you ever come over here again, I’ll do more than just sit on you!”

Advise Alan, Bruce, Carly, and David of any potential liability in intentional torts.

5. Scott and Bobby live together in a two-bedroom apartment. Bobby is an avid comic book collector and keeps thousands of comic books in his room. Many of the comic books are valuable collector’s editions that have never been read and are contained in sealed plastic pouches. Bobby is also a very private person and usually keeps the door to his bedroom locked. Scott does not know anything about comic books and finds it strange that Bobby always locks the door to his room.

One day while Bobby is out, Scott decides to go into Bobby’s room to see if he has anything to read. Scott tries the door to Bobby’s room and finds that it is unlocked. Scott looks around the room and sees a comic book in a plastic pouch on Bobby’s desk. Scott takes the comic book back to the living room, opens the plastic pouch, and starts to read the comic book.

Bobby comes back to the apartment and sees Scott reading his comic book. Bobby is extremely upset and yells at Scott: “What are you doing? That comic is worth a fortune!” Scott tells Bobby to calm down and says: “What’s the big deal? It’s just a stupid comic book.” Bobby keeps yelling at Scott, who eventually leaves the apartment with the comic book. As he walks out, Scott says: “I am sick of living with you. I’m never coming back!”

The next day Bobby receives an email from Scott saying that he is not coming back to the apartment and he is keeping the comic book to punish Bobby for yelling at him. Attached to the email is a photo of Scott holding the comic-book. Bobby notices that some of the pages of the comic book appear to be torn.

Based on the facts above, what actions may be available to Bobby in intentional torts? Is he likely to be able to bring a successful action against Scott?
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.

12.1 New Zealand’s no-fault accident compensation scheme

12.1.1 Overview of the ACC scheme

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
§12.1.2 • New Zealand’s no-fault accident compensation scheme

- 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”). ***

12.1.2 A tort lawyer’s perspective on ACC

L.N. Klar, “New Zealand’s Accident Compensation Scheme: A Tort Lawyer’s Perspective” (1983) 33 U Toronto LJ 80, 80-84, 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? Professor Terry Ison and Mr Geoffrey Palmer have been two of the most formidable and articulate advocates for the abolition of common law rights of action and their replacement by no-fault compensation rights,272 and their recent studies of the New Zealand program were awaited with great interest, even apprehension, by tort law advocates.273 Why did New Zealand decide to restrict common law rights of action so severely in the creation of its scheme? What discernible effects has this had, or might it have, on New Zealand society? Is the decision acceptable to the New Zealand public? From the tort lawyer’s perspective, these are the concerns which are of the most interest.

Before looking at these issues, a few important even if obvious points must be made. The restriction of common law rights is only one aspect of the program, which has made significant contributions to New Zealand society in terms of income maintenance guarantees, medical care, and rehabilitation. To be critical of the decision to restrict common law rights is in no way to deny the major benefits which the program affords to New Zealand society. To restrict one’s attentions to the tort law repercussions of the scheme is not to imply that the program’s concerns with rehabilitation, safety, and guaranteed income maintenance and its methods of delivering and financing these services are not important matters worthy of serious attention. As Palmer correctly points out, however, ‘[r]eforming personal injury and welfare law requires an array of expert skills.’274 Lawyers are competent to provide critical comment on the legal aspects of the scheme; others, such as statisticians, actuaries, therapists, and safety engineers, must also be involved.

272 Professor Ison’s leading text is The Forensic Lottery (1967). This work was used by New Zealand’s Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand, 1967, otherwise known as the ‘Woodhouse Inquiry,’ and the report produced by the commission favourably acknowledges the value of Ison’s work in the commission’s deliberations. Ison has stated that the present New Zealand program is of particular interest to him because of its structural similarity with his proposed scheme. Geoffrey Palmer, an opposition Member of Parliament in New Zealand and a former academic, was one of the architects of the New Zealand scheme. He was retained by the government to draft a white paper on the 1967 Woodhouse Report. He acted as Woodhouse’s principal assistant in the Inquiry into Compensation and Rehabilitation in Australia.


274 Ibid, at 10.
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 willfully 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.275

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.’276

While not denigrating the value implicit in Woodhouse’s notion of ‘community responsibility,’277 tort law 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’278 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

276 Woodhouse Report, supra note 1, at 20. It is interesting to note that, as with other programs, the actual working of the New Zealand scheme does not completely reflect the value structure which underlines it. The value refers to the community’s duty to restore productive citizens to their former levels of productivity as soon as possible after a disabling injury. Society has a duty to do so because it was in furtherance of society’s objectives that the injury occurred and it is in society’s interest to restore productive workers to their former levels. The victim has a right to compensation because of the circumstances of his accident. In the program, however, coverage is not exclusively predicated upon these objectives. All victims of accidents are entitled to cover, be they adults or children, workers or non-workers, residents or non-residents, and it matters not whether the accident resulted from productive or non-productive conduct, legal or illegal conduct, or work or leisure. Also, compensation is not based solely on what is required to restore the victim and is paid for tangible or intangible losses, without the requirement to demonstrate ‘need.’
277 Gaskins et al, supra note 4, have said: ‘As nearly as can be ascertained, the Woodhouse principles are a genuine invention, rather than a result of actual societal dissatisfaction, on the one hand, or some far-reaching ideology, on the other.’
278 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. While the findings are subject to various interpretations, it appears that there is a correlation, although an imperfect one, between attributing fault for one’s accident to another and believing that compensation for one’s injuries ought to be provided by the wrongdoer or some other third party. Although Lloyd-Bostock is opposed to the tort law process, she concedes that ‘the evidence suggests that the norms embodied in law are indeed widely applied by ordinary people.’ Her point, however, is that these norms are taught, may not be functional, and can be reaccommodated to new circumstances.
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himself should be asked to bear some of the responsibility for his losses. This view was discussed in the Pearson Report\textsuperscript{279} 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 \textit{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.\textsuperscript{280}

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.’\textsuperscript{281} In fact, contrary to the notion that it is the capitalist ideology which clings onto the private cause of action and the socialist which would remove it, Friedmann indicates that ‘it is the capitalist countries that have tended to move away from the individual fault principle—characteristic of an individualistic, laissez-faire economy—toward some form of insurance and collectivist liability, while the socialist countries maintain the fault principle, along with social insurance.’\textsuperscript{282} For the non-profit oriented economy, accountability is a principal instrument of control.

The goals of community and individual responsibility can co-exist, and both can be represented in a ‘mixed’ system of fault and no-fault accident compensation. With the exception of the New Zealand model, this is what occurs today and what has been recommended by all studies investigating the issue since the publication of the two Woodhouse Reports.\textsuperscript{283} In this paper I will support this approach, arguing that it provides a reasonable compromise between two competing viewpoints as to what is in the best long-range interests of society. Although I will deal with the plethora of ‘factual’ arguments raised by both tort law opponents and advocates to further their cases, I will insist that at the heart of the matter is a question of values. As Lloyd-Bostock states, ‘The question of whether or not the law should provide compensation on the basis of fault ultimately comes down to value judgments about what kind of society we want to live in, and what principles and priorities we want reflected in our lives.’\textsuperscript{284} It is regrettable that this is often overlooked and that dishonourable motives are attributed to those who favour the retention of a common law cause of action within a larger framework of social insurance. Opponents of the mixed system often characterize those who wish to abolish the civil cause of action as being scholarly, public-spirited, and liberal, while those who opt for a mixed system are described as anti-intellectual, conservative, and motivated by self-interest. Among legal academics, the public defence of common law rights has become unfashionable. Atiyah, for example, has explained the turning of the tide against a no-fault system by reference to a ‘conservative backlash’ and the replacement of liberal or left-wing governments in the United Kingdom, Australia, Canada, and New Zealand by ‘right-wing governments.’\textsuperscript{285} In Canada, no such political swing has occurred. In Australia, one of the strongest pressure groups against reform was the trade union movement. In New Zealand it was the conservative National government which initially introduced the accident

\textsuperscript{279} Royal Commission on Civil Liability and Compensation for Personal Injury March 1978, Cmdn. 7054-11.

\textsuperscript{280} \textit{Ibid.}, at 363.

\textsuperscript{281} Friedmann, \textit{Law In A Changing Society} (1972), at 163.

\textsuperscript{282} \textit{Ibid.}, at 187.

\textsuperscript{283} The most important of the subsequent studies was the Pearson Commission Report. There have been no moves anywhere else to a New Zealand style reform.

\textsuperscript{284} \textit{Supra} note 7, at 345.

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compensation legislation.

Finally, I will submit that on the matter of the abolition of common law rights, the New Zealand program goes too far, and that this has impeded and will continue to impede logical growth of the program. The decision to preclude common law rights entirely has to a certain extent ‘strait-jacketed’ the program, creating additional problems and prejudicing the public’s long-range commitment to the ideals of the Woodhouse Report. ***

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. One has only to witness the recent attempts at reform of the program to realize how political the issue has become. Not only must reform be acceptable to a range of vested interests, but it must now be acceptable to the bureaucracy itself.

Palmer notes how proposals made by him in 1975 for co-ordinating the welfare effort and for extending the accident compensation program to sickness were resisted by the Accident Compensation Commission: ‘The Accident Compensation Commission resisted the development and was successful in excluding from the terms of reference any mention of the manner in which the Accident Compensation Act was working, and any revisions in the legislation.’

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 [§19.4.2]. These new rights are a direct result of litigation brought by patients.

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; this has reportedly resulted in a change in the nature of these programs. Prison guards and police officers 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]. 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]. Those who are in authority cannot deprive persons of their freedoms and liberty by abusing their statutory authority [§6.6]. The tort of ‘nuisance’ has been expanded to encompass interferences

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286 Palmer, supra note 2, at 331.
289 The Globe and Mail (Toronto) reported that there has been a reorientation of the programs to improve safety.
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with a person’s ‘peace of mind’ [§21.1]. An action in privacy has been claimed for mental and physical harassment and invasion of privacy [§4.1]. 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 or for erecting adequate safety barriers [§19.5.2]. A distributor of a defective product was held liable to a consumer who was injured while using the product [§19.13]. While New Zealand has abolished the right of spouses to sue for loss of consortium, Alberta has reinforced it. 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 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. 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] 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.

12.1.3 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

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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—

(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
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(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.

12.1.4 A v. Bottrill [2002] UKPC 44

Privy Council (on appeal from New Zealand) – [2002] UKPC 44

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. 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. ***

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
§12.1.5 • New Zealand’s no-fault accident compensation scheme

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.

12.1.5 Further material

12.2 No-fault workers’ 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.

12.2.2 British Columbia workers’ compensation

B. Parkin, Practice Note: Workers’ Compensation (BC) (Thomson Reuters Practical Law, 2020)

Purpose of Workers’ Compensation

In British Columbia, compensation for workplace injuries and occupational diseases is provided through a public insurance plan established by the Workers Compensation Act, R.S.B.C. 2019, c. 1 (WCA). The WCA creates a collective liability scheme whereby employers fund the system through payment of assessments based on an employer’s payroll, the risk associated with their industry and the particular employer’s claims experience rating. In exchange for funding the system, employers gain immunity from lawsuits for work-related personal injuries, mental disorders, deaths, or disablement from occupational diseases.

Workers are entitled to benefits for workplace injuries and occupational diseases regardless of fault and without the necessity of court proceedings. In exchange for compensation that depends neither on fault nor the employer’s ability to pay, workers are barred from bringing legal actions against employers and other workers in respect of work-related injury or disease.

This compromise, whereby employers fund the scheme in return for immunity from suit and workers obtain guaranteed benefits but give up the right to a tort action has come to be known as the “historic trade-off” (Newfoundland (Workplace Health, Safety & Compensation Commission) v. Ryan Estate, 2013 SCC 44, at para. 29 and Bradshaw v. Workers’ Compensation Board, 2017 BCSC 1092, at para. 9). The historic trade-off is a central element of the system.

The scheme is administered by an independent public agency established under the WCA and called the Workers’ Compensation Board (the “Board”). In British Columbia, the WCA also establishes a comprehensive health and safety regulatory regime. The Board has branded itself “WorkSafeBC” in keeping with its statutory health and safety mandate. British Columbia’s system
is similar to New Brunswick, the Northwest Territories, Nunavut, Prince Edward Island, Quebec and Yukon, where responsibility for workplace health and safety rests solely with the provincial or territorial board or commission. Other jurisdictions in Canada (Ontario, Nova Scotia, Manitoba and Newfoundland and Labrador), share responsibility for occupational health and safety with a branch of government, with the board or commission being responsible for training and education and the government department being responsible for enforcement. In Alberta and Saskatchewan, responsibility for occupational health and safety rests solely with the government.

In British Columbia, the Board has three primary mandates:

- Regulation of occupational health and safety in the workplace (Part 2, WCA).

- Adjudication and payment of compensation for workplace injuries and occupational diseases (Part 4, WCA).

- Assessment and collection of sufficient funds from employers to support the system (Part 5, WCA). ***

Workers' Compensation vs. Tort

Whereas the goal behind a tort award is to place the individual in the position he would have been in but for the tortfeasor’s negligence (i.e., to make the individual whole), the goal behind workers’ compensation benefits is to compensate all workers fairly, regardless of fault, and to provide rehabilitation for a timely return to work. Workers’ compensation benefits are prescribed by the WCA and provide less than full economic compensation.

Unlike tort awards, there is no provision in the WCA to compensate for pain and suffering or other types of non-pecuniary losses. However, because workers’ compensation benefits are paid without regard to fault, a worker’s benefits are not reduced by reason of any contributory negligence on the part of the worker as they would be under the tort system. ***

Workers’ Compensation vs. Private Insurance

While funding of the workers’ compensation system is much like a private insurance scheme based upon a model of modified collective liability, there are some significant differences.

Whereas private insurance is based on contract and is voluntary, workers’ compensation is compulsory for all industries covered by the WCA. Employers cannot opt out of the scheme, although some attempt to avoid registering or paying assessments. Even in those situations, workers are covered by the scheme. The Board must pay benefits even if it is unable to collect assessments from a worker’s employer. (Isaac v. British Columbia (Workers’ Compensation Board), 1994 CanLII 1444, 1994 CarswellBC 294 (B.C. C.A.), at para. 106). ***

Workers’ Compensation Benefits for Workers

The WCA creates a comprehensive scheme providing for a variety of benefits and services for injured workers at no cost to workers and on a no-fault basis. The goal is to provide fair protection, but not full protection, to workers against economic loss resulting from work-related injury, mental disorder, or occupational disease.
§12.3.1 • No-fault vehicular insurance schemes

An application for compensation must be filed within one year after the date of the worker’s injury, mental disorder, death, or disablement from occupational disease. This time period can be extended in certain circumstances (section 151 and 152, WCA).

The type and extent of compensation to which a worker is entitled will vary with the nature and degree of injury and with the worker’s average pre-injury earnings. ***

Where a worker is killed in a workplace accident or dies from an occupational injury or disease, compensation is payable to a worker’s surviving dependants and, in some cases, to non-dependant relatives having a reasonable expectation of the pecuniary benefit from the continuation of the deceased worker’s life (Part 4, Division 5, WCA).

12.2.3 Provincial workers’ compensation statutes

- Quebec: Act respecting industrial accidents and occupational diseases, CQLR c A-3.001.
- Saskatchewan: The Workers’ Compensation Act, 2013, SS 2013, c W-17.11.

12.2.4 Further material

- K. Woo & R. Press, “Am I my Brother’s Keeper? Supreme Court of Canada Confirms Employers are Responsible for the Safety of their Contractors’ Employees as well as their Own Employees” CanLIIConnects (May 24, 2018).

12.3 No-fault vehicular insurance schemes

12.3.1 British Columbia’s Enhanced Care Model


Automobile Insurance [Insurance Corporation of British Columbia]

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.
§12.3.2 • No-fault vehicular insurance schemes

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. ***

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. ***

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 is being litigated (Trial Lawyers Association of British Columbia v. British Columbia, 2021 BCSC 348, at para 414. ***). In the meantime, people can proceed to either the CRT or the court. The court challenge does not affect the CRT’s jurisdiction over entitlement to accident benefits. *** 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. ***

12.3.2 Enhanced Care at a glance

"Why and How" (ICBC Enhanced Care, 2021)

Here’s a helpful side-by-side comparison of the former insurance system and Enhanced Care:
12.3.3 Further material

- “How ‘No-fault’ Insurance Affects Drivers” CTV Vancouver (Feb 7, 2020) 📺.

12.4 Victim compensation funds

12.4.1 Brown v. Canada [2018] ONSC 3429

Ontario Superior Court – 2018 ONSC 3429

CROSS-REFERENCE: §19.7.4

BELOBABA J.:

1. The Sixties Scoop, nationally acknowledged as a “dark and painful chapter in Canada’s
history," 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. 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, 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.

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.

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”)[19.6.1] 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 the class.\(^{309}\)

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.\(^{310}\) A settlement does not have to be perfect. The question for the court is whether the settlement falls within a zone of reasonableness.\(^{311}\)

**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.\(^{312}\)

**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

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\(^{310}\) Discussed in more detail in *Welsh*, *supra* note 8, at para. 68.


\(^{312}\) Given Chief Brown Martel’s extraordinary level of involvement in this class proceeding, I have no difficulty approving the requested $20,000 honorarium.
to $40,000 range; 313

• 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 [§6.7], causation issues [§16], 314 the likely unavailability of an aggregate damages approach and the need for literally 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. ***

12.4.2 Further material


314 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 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 note 2, at fn. 23.
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. ***

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). 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 defendants 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 defendants, 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
§13.1.1 • Development of the tort of negligence

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 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
§13.1.1 • Development of the tort of negligence

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. [§19.13.1] 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: ***
§13.1.1 • Development of the tort of negligence

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. ***
§13.1.2 • Development of the tort of negligence

13.1.2 The neighbour principle


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.315 ***

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.”316

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”.317 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.”318

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 .... ***

The second issue in the case was more theoretical, relating to negligence principles generally.

315 Factums. House of Lords, Donoghue v. Stevenson, copies of which are in the author’s possession.
318 Supra, note 1, at 579.
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.”319 ***

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”.320 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”.321

*** [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.322 ***

[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.323 ***

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.324 [§19.13] ***

In the next few years, I expect that all our legislatures will adopt a statutory scheme of strict liability

321 Supra, note 10, at 22.
323 See generally, A. M. Linden, Canadian Tort Law (3rd ed. 1982), chapter 16.
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

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. 325 [§19.2] ***

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. 326 [§19.1.2] ***

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. 327 [§19.1.4]

In the area of negligently inflicted economic losses, there has been a breakthrough of sorts. 328 [§19.3] ***

There are many other examples where negligence law and the neighbour principle have sought to tame human activity. 329 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

326 *Bourhill v. Young* [1943] A.C. 92; supra, note 72, chapter 11.
327 *Supra*, note 72, at 368.
328 Id., at 410.
329 See generally, *supra*, note 72, chapter 5.
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.330 [§19.4.1] ***

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 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.

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 AND 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

330 Supra, note 72, at 131.
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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 highway 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. Quatermaine, 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
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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 out 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
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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.


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.

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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
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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.
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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 ***.

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
§13.1.5 • Development of the tort of negligence

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 give adequate warning to ordinary people with good sight, and I am not disposed to disagree with that. ***

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
§13.1.6 • Development of the tort of negligence

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.

13.1.6 Elements of the tort of negligence


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; that the defendant owed the complainant a duty of care in relation to risks of that type of subject matter; that the conduct of the defendant breached that duty; that the breach was a factual cause of the injury of which complaint is made; 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
§13.1.7 • Development of the tort of negligence

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. This means that, in the tort of negligence where the remedy of an award of damages is sought, there is a sixth analytical stage in which the claimant confronts a ‘valuation’ requirement: the claimant must prove the claim has value in damages terms by showing that the breach had made them worse off than they would have been absent tortious conduct.

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.

The duty of care is a forward-looking concept concerning the risks in relation to which the defendant must take care. The scope of the risks in relation to which the defendant owes a duty to exercise care, often referred to as ‘the scope of the duty’, is a pivotal notion in other elements of the tort. For example, it confines the sorts of breach allegations that can be made: the conduct of a defendant can only be in breach of the duty if that conduct was unreasonable in relation to a risk that fell within the scope of the defendant’s duty.

Another example of the notion’s importance is that when courts come to judge the backward-looking, remoteness, question of whether the actual consequence of breach at issue in the claim comes within the normatively appropriate scope of legal responsibility of the defendant, they confine this responsibility, inter alia, to consequences that were the materialisation of risks that fell within the scope of the defendant’s duty.

13.1.7 Further material

13.2 Misfeasance versus nonfeasance

13.2.1 Tort liability for criminal nonfeasance


The common law has treated the Good Samaritan with uncommon harshness over the years, while the priest and the Levite have been treated with uncommon generosity.331 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.332 First year law students are normally horrified to learn that the common law does not require one to rescue a drowning man,333 that one need not warn a blind man who is stepping in front of a moving automobile,334 and that there is no duty to prevent someone from walking into the mouth of a dangerous machine.335 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.336 Nor does the common law require one to feed the starving, to bind up the wounds of those who are bleeding to death,337 nor to prevent a child from engaging in dangerous conduct.338

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”339 and that “to protect those who are not able to protect themselves is a duty which everyone owes to society”,340 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.341 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.342

336 Hurley v. Edingfield (1901), 156 Ind. 416, 59 N.E. 1058.
337 Allen v. Hixson (1900), 111 Ga. 460, 36 S.E. 810.
341 Prosser, op. cit., footnote 1, p. 336.
343 See infra.
regulation or order in council, or municipal ordinance and their breach is normally punishable by fine, imprisonment or other sanctions.\textsuperscript{344} 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.\textsuperscript{345} Failure to comply is punishable by 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.\textsuperscript{346} 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.\textsuperscript{347} Nor is it uncommon to find statutes that require individuals to assist a police officer in the apprehension of a criminal if so required\textsuperscript{348} and to supply food, clothing and medical assistance to near relatives,\textsuperscript{349} and other such legislation.\textsuperscript{350} Thus, nonfeasance may amount to a crime. ***

Some writers have denounced as "notorious"\textsuperscript{351} and "improper"\textsuperscript{352} any judicial use of criminal legislation to create new tort duties.\textsuperscript{353} Others have defended such action\textsuperscript{354} 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.\textsuperscript{355} *** The courts have perpetuated unnecessarily the confusion which surrounds this area by their refusal to discuss candidly the conflicting policies to be resolved. ***

13.2.2 Home Office v. Dorset Yacht Co. Ltd [1970] UKHL 2

CROSS-REFERENCE: §17.2.2

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 [§13.1.1] 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

\textsuperscript{344} See infra.
\textsuperscript{345} See, for example, Ontario Highway Traffic Act, R.S.O., 1960, c. 172, s. 143a and California Vehicle Code (1959), §20001, 20003, 20004.
\textsuperscript{346} 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.
\textsuperscript{347} For example, see Halifax by-law in Commerford v. Board of School Commissioners, [1950] 2 D.L.R. 207 (N.S.S.C.).
\textsuperscript{348} See Criminal Code of Canada, S. C., 1953-54, c. 57 as am., s. 110(b).
\textsuperscript{349} Ibid., s. 186(1), (2); Children's Maintenance Act, R.S.O., 1960, c. 55, s. 1.; California Penal Code, § 270.
\textsuperscript{350} See infra.
\textsuperscript{351} Fleming, op. cit., footnote 1, p. 130, footnote 23.
\textsuperscript{352} Williams, foe. cit., footnote 21, at p. 259.
\textsuperscript{353} Gregory, foe. cit., ibid., and Thayer, foe. cit., ibid., strongly opposed this type of judicial use of legislation.
\textsuperscript{354} Morris, foe. cit., ibid.; See also Morris, Studies in the Law of Torts (1952), p. 141.
§13.2.3 Misfeasance versus nonfeasance

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. ***

13.2.3 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. ***

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.356 ***

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

356 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.
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.

### 13.2.4 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
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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.

13.2.5 Cross-references

- 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.

13.2.6 Further material


13.3 Rescuers

13.3.1 Wagner v. International Railway Co. (1921) 232 NY 176 (NY CA)

BACKGROUND: Quimbee (2021), https://youtu.be/NqIDM4Aw-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.
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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.

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. ***

13.3.2 Horsley v. MacLaren [1971] CanLII 24 (SCC)

Supreme Court of Canada – 1971 CanLII 24

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
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.”

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.

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 rescue 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. ***

39. *** 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. ***

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
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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 ***. ***

13.3.3 Parable of the Good Samaritan

Luke 10:29-36 (ESV)

But [the lawyer], desiring to justify himself, said to Jesus, “And who is my neighbor?” 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. Now by chance a priest was going down that
road, and when he saw him he passed by on the other side. So likewise a Levite, when he came
to the place and saw him, passed by on the other side. But a Samaritan, as he journeyed, came
to where he was, and when he saw him, he had compassion. 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. 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.’
Which of these three, do you think, proved to be a neighbor to the man who fell among the
robbers?”

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.
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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

- Good Samaritan Drug Overdose Act, SC 2017, c 4.
- 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.
- Saskatchewan: The Emergency Medical Aid Act, RSS 1978, c E-8, s 3.

13.3.6 Further material


13.4 Novel duties of care

13.4.1 The Anns/Cooper test for a novel duty of care: foreseeability, proximity, policy

13.4.1.1 Anns v. Merton London Borough Council [1977] UKHL 4

House of Lords – [1977] UKHL 4

LORD WILBERFORCE: ***
§13.4.1 • Novel duties of care

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 [§19.2.2], and Dorset Yacht Co. Ltd. v. Home Office [1970] AC 1004 [§17.2.2], 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. 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. ***

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 (1977), [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
§13.4.1 • Novel duties of care

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 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 negating 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 (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.
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575 (U.K. H.L.) [§19.2.2], and misfeasance in public office. 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 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) 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.
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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.

**13.4.2 Applying the *Anns/Cooper* 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. *** Following Cooper v. Hobart, [2001] 3 S.C.R. 537, 2001 SCC 79 (S.C.C.), 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 Annis 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
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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 the 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. ***

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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. ***

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. ***

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.). 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. ***

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. ***

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
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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.

13.4.2.2 Hill v. Hamilton-Wentworth Regional Police Services Board [2007] SCC 41

Supreme Court of Canada – 2007 SCC 41

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CROSS-REFERENCE: §14.1.3.2, §14.2.5.1

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. ***

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
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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 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? ***

(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) 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


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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.

113. Therefore, for the reasons that follow, I would allow the Crown’s cross-appeal and find that the tort of negligent investigation is not a remedy available at common law. ***

### 13.4.2.3 Rankin’s Garage & Sales v. J.J. [2018] SCC 19

*Supreme Court of Canada – 2018 SCC 19*

**CROSS-REFERENCE: §18.3.2**

**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. ***

**The Anns/Cooper Test***

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;
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Mustapha v. Culligan of Canada Ltd., 2008 SCC 27, [2008] 2 S.C.R. 114 (S.C.C.), at paras. 5-6 [§17.1.3]; Deloitte & Touche v. Livent Inc. (Receiver of), 2017 SCC 63, [2017] 2 S.C.R. 855 (S.C.C.), at para. 26 [§19.2.3]. 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.

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 foreseeable theft of a vehicle.

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. ***

61. *** 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.

69. First, this case does not require this Court to undertake a full Anns/Cooper analysis to establish a novel duty of care. Instead, it involves the unremarkable application of a category of relationships that has long been recognized as imposing a duty of care—namely, “where the defendant’s act foreseeably causes physical harm to the plaintiff” (Cooper, at para. 36). So long as the trial judge did not err in finding that physical injury to J. was a reasonably foreseeable consequence of Rankin’s negligence, it follows that proximity is established on the basis of this previously recognized duty of care.

70. This brings me to the second point of divergence from the majority. On the record before her, the trial judge did not err in finding that physical injury to J. was a reasonably foreseeable consequence of Rankin’s negligence. I would therefore uphold the trial judge’s finding that a duty of care was owed. ***

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 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
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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.

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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.199619 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: see, for example, the comments of Justice Cory in Brown v. British Columbia (Minister of Transportation and Highways), [1994] 1 S.C.R. 420.

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 fulfill 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
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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.

13.4.3 Further material

14 NEGLIGENCE: (ii) BREACH OF DUTY OF CARE

14.1 Standard of care


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.\(^{357}\) ***

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\(^{358}\) 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.\(^{359}\) 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.\(^{360}\) 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.\(^{361}\)

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)],\(^{362}\) a doctor,\(^{363}\) or physical disabilities,\(^{364}\) 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


\(^{358}\) 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’.


\(^{361}\) Arland, supra note 20, Ouellette, supra note 19. 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).


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will not be attributed to the reasonable person in order to relax the standard of care either in common law or in civil law.\textsuperscript{365}

Under the attributes or characteristics of the reasonable person appear minority and mental incapacity. According to \textit{Fiala v. Cechmanek},\textsuperscript{366} mental incapacity exonerates from liability the person who invokes it in common law if he proves that because of his condition, either he could not understand or appreciate his duty of care, or he could not discharge it—that is to say he could not comply with the standard of care—since he did not exercise control over his actions.\textsuperscript{367} In that case, the defendant was suffering from type 1 bipolar disorder and had never previously been diagnosed with this condition. One day, during a manic episode, he caused significant bodily injuries to third persons. Because of his condition (the defendant was unable to understand his duty of care towards the victims) and since he was also unaware of his illness, the court did not hold him liable. ***

With regard to minor defendants in common law, there are three categories:

a) Minors of tender age (under age six, approximately)\textsuperscript{368} are exempt from liability because they lack the ability to understand and appreciate the nature of their actions and to comply with the standard of care.\textsuperscript{369}

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.\textsuperscript{370} According to case law, it would be unfair and even dangerous for the public to object, for example, minors who operate motor vehicles to a lesser standard of care than that required of all drivers of such vehicles.\textsuperscript{371}

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.\textsuperscript{372} The courts do not systematically rely on these three elements (minor’s age, intelligence and experience).\textsuperscript{373} ***

14.1.1 Reasonable person standard


\begin{itemize}
\item \textsuperscript{365} Common law: \textit{Arland}, supra note 20, (J. Laidlaw), citing other cases. Civil law: ZHOU, supra note 24 at p. 481. \textit{Tremblay v. Deblois}, [1998] R.R. A. 48 (C.A.) for certain of these traits.
\item \textsuperscript{366} (2001) 94 Alta L.R. (3e) 201 (C.A.) (\textit{Fiala}).
\item \textsuperscript{367} \textit{Ibid} at para 15.
\item \textsuperscript{368} \textit{McElistrom v. Etches}, [1956] SCR 787 at p. 792-793. Linden and Feldthusen \textit{supra} note 24 at p. 165.
\item \textsuperscript{369} \textit{Tillander v. Gosselin}, (1967) 1 OR 203 (ON SC) (\textit{Tillander}) aff. by (1967) 61 DLR (2d) 192n (ON CA).
\item \textsuperscript{370} Ryan et al v. Hickson et al (1974) 7 OR (2e) 352 at paras 8-10 (HC) (snowmobile), \textit{Pope v. RGC Management Inc}, 2002 ABQB 823 at paras 30-33 (golf).
\item \textsuperscript{371} \textit{McErlain v. Sarel et al}, (1987) 61 OR (2e) 396 at paras 54-55 (CA).
\item \textsuperscript{372} \textit{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.
\item \textsuperscript{373} Linden and Feldthusen, \textit{supra} note 24 at pages 166-167. For example: \textit{Potvin v. CPR}, 1904 CarswellOnt 754 (Ont CA) at para 7 mentions two of the three elements (young age—general intelligence), \textit{Oliver Blais Co Ltd v. Yachuk}, [1946] SCR 1 mentions four elements (age, capacity, experience, knowledge).
\end{itemize}
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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.”

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.” ***

14.1.1.1 Booth v. City of St Catharines [1948] CanLII 10 (SCC)

*Supreme Court of Canada – 1948 CanLII 10*

**CROSS-REFERENCE: §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 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. ***

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
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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. ***


England and Wales Court of Appeal – [1971] EWCA Civ 6

CROSS-REFERENCE: §18.1.2.1, §20.4.1

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
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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. ***

14.1.1.3 United States v. Carrol Towing (1947) 159 F.2d 169 (2d. Cir.)


US Court of Appeals for the Second Circuit – 159 F.2d 169 (1947)

LEARNED HAND J.: ***

[T]he owner’s duty *** 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. *** 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. ***
14.1.2 Relevance of statutory standards


Supreme Court of Canada – 1983 CanLII 21

CROSS-REFERENCE: §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? ***

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. ***

37. *** 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.

14.1.2.2 Ryan v. Victoria (City) [1999] CanLII 706 (SCC)

Supreme Court of Canada – 1999 CanLII 706

CROSS-REFERENCE: §14.2.6.2, §21.2.1

MAJOR J.: ***
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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 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"[374] [§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. ***

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14.1.2.3 Nelson (City) v. Marchi [2021] SCC 41

CROSS-REFERENCE: §17.1.4, §19.5.2.2

Supreme Court of Canada – 2021 SCC 41

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 (P. H. Osborne, The Law of Torts (6th ed. 2020), at pp. 29-30; Bolton v. Stone, [1951] A.C. 850 (H.L.) [§14.2.1.2]). A reasonable person “takes precautions against risks which are reasonably likely to happen” (Bolton, 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. ***

14.1.2.4 Cross-references

- Der v. Zhao [2021] BCCA 82, [101]: §13.4.2.4.

14.1.3 Special knowledge, skill and experience


New Zealand Court of Appeal – [1983] NZCA 37

CROSS-REFERENCE: §17.5.1, §19.4.1.1

MCMULLIN J.: ***

61. This appeal raises the question as to whether a solicitor instructed to prepare a will for a client has any legal liability to a person who, but for the solicitor’s negligent failure to prepare the will, would have been a beneficiary under it. ***
§14.1.3 • Standard of care

73. It is altogether reasonable that those who because of their occupation and the skill, experience and expertise associated with it are engaged to perform a service which if properly performed, will benefit an identifiable person should make good the loss which the latter may suffer from the former’s negligence. And where that negligence is likely to result in only nominal damage to the estate of the deceased there seems no good reason for denying to those whose expectations are more substantially affected an award of damages proportionate to the loss which they have sustained. ***

14.1.3.2 Hill v. Hamilton-Wentworth Regional Police Services Board [2007] SCC 41

CROSS-REFERENCE: §13.4.2.2, §14.2.5.1

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.)


CROSS-REFERENCE: §14.2.5.2

Ontario Court of Appeal – 2019 ONCA 963

VAN RENSBURG J.A. [upheld on appeal]: ***


14.1.3.4 Barnett v. Chelsea & Kensington Hospital [1968] 2 WLR 422 (QB)

England and Wales High Court (Queen’s Bench Division) – [1968] 2 WLR 422 (QB)

CROSS-REFERENCE: §14.2.5.3, §16.1.3.1, §23.1.5

NIELD J.: ***

2. The plaintiff is the widow of William Patrick Barnett, who died on 1 January 1966, from arsenical poisoning, and she is also the administratrix of his estate. She claims damages on behalf of herself and two of her children as dependants of the deceased and also on behalf of his estate. The defendant committee were at all material times responsible for the management of St Stephen’s Hospital, Chelsea.

3. The deceased was employed as a night watchman at a hall of residence at the Chelsea College of Sciences and Technology. Also employed in a similar capacity but in a different part of the college were Frederick Whittall and Herbert Weighall ***. ***

4. At about 5 am all three watchmen drank some tea. *** After drinking the tea the deceased complained of the heat in the room and then within twenty minutes of drinking the tea all three
men started to vomit, and the vomiting continued persistently until about 8 am when the day workers arrived at the college. The three watchmen then made their way in the deceased’s car—which he drove quite normally—to the casualty department of St Stephen’s Hospital. ***

5. *** When Mr Weighall told Nurse Corbett that the vomiting followed the drinking of tea, Nurse Corbett said “tea would not cause that”, and it is clear to me that it was at first thought that these three men had been drinking to excess, although Nurse Corbett did not continue to have this impression.

6. At this time Mr Weighall became angry and speaking abruptly and almost shouting he said “I didn’t come here for nothing. We are ill. Can we or can we not see a doctor?” Nurse Corbett then spoke on the telephone, not immediately after speaking to Mr Weighall as she says, but five or ten minutes later, and said words to this effect: “Is that Dr Banerjee? There are three men complaining of vomiting after drinking tea” and Dr Banerjee replied: “Well, I’m vomiting myself and I have not been drinking. Tell them to go home and go to bed and call in their own doctors.” ***

8. Dr Banerjee’s message was given by the nurse to the three men and they, thinking it was final, all left. ***

13. *** [T]he deceased died about 1.30 pm ***. The inference is that some person with murderous intent had introduced arsenic into the tea, and the coroner’s verdict was one of murder by a person or persons unknown. ***

15. It is put on behalf of the plaintiff that the defendants should have inferred that the deceased was suffering, or might be suffering, from poisoning; that they failed to investigate or diagnose the deceased’s condition when he presented himself at the hospital; that they failed to treat him for poisoning, and they so failed having knowledge of the history of vomiting. ***

17. *** This is not a case of a casualty department which closes its doors and says that no patients can be received. The three watchmen entered the defendants’ hospital without hindrance, they made complaints to the nurse who received them and she in turn passed those complaints on to the medical casualty officer, and he sent a message through the nurse purporting to advise the three men. Is there, on these facts, shown to be created a relationship between the three watchmen and the hospital staff such as gives rise to a duty of care in the defendants which they owe to the three men? ***

19. In my judgment, there was here such a close and direct relationship between the hospital and the watchmen that there was imposed on the hospital a duty of care which they owed to the watchmen. Thus I have no doubt that Nurse Corbett and Dr Banerjee were under a duty to the deceased to exercise that skill and care which is to be expected of persons in such positions acting reasonably ***. ***

14.1.3.5 White v. Turner [1981] CanLII 2874 (ON SC)

Ontario Superior Court – 1981 CanLII 2874, aff’d 1982 CanLII 1919 (ON CA)

CROSS-REFERENCE: §14.2.5.4, §16.1.4, §18.1.1.2, §19.4.2.2

LINDEN J.: ***
2. In August of 1976, Mrs. White consulted the defendant, Dr. Ronald Turner, about breast reduction surgery, a mammoplasty as it is called. The surgery was performed by the defendant at the Sudbury Memorial Hospital in October of 1976 and the plaintiff was discharged from the hospital, after an apparently uneventful recovery, soon thereafter. The stitches were removed a few days later at Dr. Turner’s office.

3. Unfortunately, after Mrs. White returned home, the incisions opened up, causing considerable discomfort and necessitating additional treatment and surgery. *** Instead of having smaller breasts with only slight scarring, as she had expected, Mrs. White’s breasts were badly scarred, the shape of her breasts was poor, there was a “z” scar below the bra line, her nipples were positioned too high and they looked in instead of straight ahead. ***

4. Dr. Turner himself admitted that the result of the operation was “not 100%”. He suggested corrective surgery under a local anaesthetic. He tried to do the repair work at the Copper Cliff Clinic in April of 1977, but the plaintiff fainted during the attempt, when she saw blood running down her body. Consequently, the corrective surgery had to be aborted by Dr. Turner before it could be completed.

5. Several months later, in May of 1978, the plaintiff visited Dr. Donald Robertson in Toronto, who performed a further operation in order to correct, as much as possible, the poor result obtained by the defendant.

6. The plaintiffs, Mrs. White and her husband, bring this action against the defendant, Dr. Turner, alleging that he was negligent in four respects: (1) he did not perform the operation itself properly; (2) he did not properly disclose the risks of the surgery to Mrs. White; (3) the post-operative care he furnished was inadequate; and (4) the corrective surgery, which was attempted and aborted, was negligently done. ***

29. Needless to say, a mere error in judgment by a professional person is not by itself negligence. The Courts recognize that professionals may make mistakes during the course of their practice, which do not bespeak negligence. Sometimes medical operations do not succeed. Sometimes lawyers lose cases. The mere fact of a poor result does not mean that there has been negligence. In order to succeed in an action against a professional person, a plaintiff must prove, on the balance of probabilities, not only that there has been a bad result, but that this was brought about by negligent conduct.

30. Before liability can be imposed for the operation itself, therefore, the plaintiff must prove that the defendant performed the surgery in such a way that a reasonable plastic surgeon would consider it to have been less than satisfactory. *** In other words, unless it is established on a balance of probabilities that this mammoplasty was done in a substandard way by the defendant, he cannot be held liable in negligence.

31. Plastic surgery is a specialty that has its own standards—standards which are unique to that specialty. If the work of a plastic surgeon falls below the accepted practices of his colleagues, he will be held civilly liable for any damage resulting. But if his work complies with the custom of his confreres he will normally escape civil liability for his conduct, even where the result of the surgery is less than satisfactory. ***

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§14.1.4  Standard of care

14.1.4 Extenuating personal characteristics


High Court of Australia – [1966] HCA 13

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. ***

McTIERNAN A.C.J.: ***

4. Windeyer J. said in his reasons for judgment:

***** 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". ***

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.

14.1.4.2 Fiala v. MacDonald [2001] ABCA 169

Alberta Court of Appeal – 2001 ABCA 169

WITTLMANN 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. ***
§14.1.5 • Standard of care

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 [§19.13] as it has in the United States, nor to cases like this. ***

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.

14.1.5 Further material

§14.1.5 • Applying the standard of reasonableness

- Tiny Ruins, “Reasonable Man” on Brightly Painted One (Bandcamp, 2014).

14.2 Applying the standard of reasonableness


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. To establish negligence, one must consider all the circumstances of a particular case. 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. According to R v. Saskatchewan Wheat Pool\(^\text{378}\) [§14.1.2.1] in common law and Cimen\(^\text{379}\) in civil law, the violation of a statute does not amount to negligence per se.\(^\text{380}\) This violation must still constitute a breach

\(^{375}\) Common law: Ryan, supra note 18 at para 28. Civil law: Ouellette, supra note 19 at pp. 525-526.
\(^{376}\) Ibid. For example, a dangerous object may play a role in establishing negligence. 

\(^{377}\) Ryan, supra note 18 at para 28. See also the analysis of Linden and Feldthusen, supra note 24 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 note 18 at para 28).

\(^{378}\) [1983] 1 RCS 205 cited by Québec case law. Before Wheat, case law on this topic was very complex. Linden and Feldthusen, supra note 24 at pp. 238-240.

\(^{379}\) Cimen, supra note 18.

\(^{380}\) 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 Cimen, supra note 18.
of the common law standard of care\textsuperscript{381} or a civil law fault (art 1457 CCQ).\textsuperscript{382}

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.\textsuperscript{383} In both legal cultures, usage refers to a standard practice at the time when the act or omission in question occurred.\textsuperscript{384} 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 \textit{Ter Neuzen} (common law) and \textit{Roberge} (civil law).\textsuperscript{385} 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: 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.\textsuperscript{387} In this sense, they serve as a general guide ***.

14.2.1 Probability of harm

14.2.1.1 Booth v. City of St Catharines [1948] CanLII 10 (SCC)

CROSS-REFERENCE: §14.1.1.1, §17.2.1

RAND J.: ***

\textsuperscript{381} \textit{Wheat}, supra note 54 at pp. 227, 228. Exceptions to this principle exist. Following \textit{Wheat} in common law, workplace accident legislation has historically been privileged by case law and its violation leads to absolute liability in tort. \textit{Wheat}, supra note 54 at page 217.

\textsuperscript{382} \textit{Ciment}, supra note 18 at para 34. See also supra note 56. As in common law (\textit{ibid}), in case of workplace accidents the \textit{Loi sur les accidents du travail et les maladies professionnelles} establishes a no-fault liability regime. \textit{G.D. v. Centre de santé et des services sociaux A, Centre d'accueil A}, 2006 QCCS 5573 at para 4.

\textsuperscript{383} Although civil law often uses the term ‘usage’ and common law the term ‘custom’, the two terms will be used interchangeably here.


\textsuperscript{385} Common law: \textit{Ter Neuzen}, supra note 23. See also \textit{Waldick}, supra note 60 cited by \textit{Ter Neuzen}, supra note 23. Civil law: \textit{Roberge}, supra note 22. It should be noted that \textit{Ter Neuzen} in common law cites Roberge in civil law and other Québec cases. See \textit{Hébert v. Centre hospitalier affilié universitaire de Québec—Hôpital de l'Enfant-Jésus}, 2011 QCCA 1521 (appeal dismissed) at para 61 citing \textit{Ter Neuzen} on this point.

\textsuperscript{386} For what follows in this paragraph see: Bélanger-Hardy, supra note 7 at p. 394.

\textsuperscript{387} \textit{Ibid}. See, for example: \textit{Ryan}, supra note 18 at para 28 and \textit{Hill}, supra note 51 at para 70. According to these cases, other factors may be considered to establish negligence. \textit{Supra} note 51 and accompanying text.
§14.2.1 • Applying the standard of reasonableness

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 ***. ***

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 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. ***


BACKGROUND: Quimbee (2021), https://youtu.be/kBXXA1JRI5E 📹

House of Lords – [1951] UKHL 2

CROSS-REFERENCE: §17.1.1

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. *** 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 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. ***


England and Wales Court of Appeal – [1977] EWCA Civ 6

CROSS-REFERENCE: §21.1.3

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 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. ***

32. No one has yet suffered any personal injury, though Mrs. Craig at least was perhaps lucky to have avoided it. 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. ***

36. It is true that the risk must he balanced against the measures which are necessary to eliminate it and against what the Defendants can do to prevent accidents from happening ***. *** 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. ***
§14.2.2 • Applying the standard of reasonableness

14.2.1.4 Lewis v. Wandsworth LBC [2020] EWHC 3205 (QB)

England and Wales High Court (Queen’s Bench Division) – [2020] EWHC 3205 (QB)

STEWART J.:

5. *** “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…” ***

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 in] 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.” ***

14.2.2 Severity/Gravity of Risk

14.2.2.1 Paris v. Stepney [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? ***

26. *** 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
§14.2.2 • Applying the standard of reasonableness

a particle of metal flew into his one good eye, taken in isolation, seem to me to justify his conclusion. *** 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. ***

LORD OAKSEY: ***

28. The duty of an employer towards his servant is to take reasonable care for the servant’s safety in all the circumstances of the case. The fact that the servant has only one eye, if that fact is known to the employer, and that, if he loses it he will be blind, is one of the circumstances which must be considered by the employer in determining what precautions, if any, shall be taken for the servant’s safety. The standard of care which the law demands is the care which an ordinarily prudent employer would take in all the circumstances. *** It is a simple and inexpensive precaution to take to supply goggles and a one-eyed man would not be likely, as a two-eyed man might be, to refuse to wear the goggles. Lynskey J appears to me to have weighed the extent of the risk and of the damage to a one-eyed man, and I am of opinion that his judgment should be restored. ***

14.2.2.2 Overseas Tankship v. The Miller Steamship (The Wagon Mound No. 2) [1966] UKPC 10

Privy Council (on appeal from Australia) – [1966] UKPC 10

CROSS-REFERENCE: §21.2.2

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. ***

4. *** 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
§14.2.3 • Applying the standard of reasonableness

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. *** 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. ***

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. *** 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. *** [T]he 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 tree was burning fiercely, and it was cut down. ***

3. *** [I]f the appellant had taken reasonable care he could, on the Sunday evening (Feb 26), or at least early on the next morning, have put out the first by using water on it. ***

4. *** 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 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. ***
§14.2.3 • Applying the standard of reasonableness

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. ***

14.2.3.2 Vaughn v. Halifax-Dartmouth Bridge Commission [1961] CanLII 444 (NS CA)

Nova Scotia Supreme Court – 1961 CanLII 444

CROSS-REFERENCE: §21.1.5, §22.1.3

ILSLEY C.J.: ***

2. The damage sustained by the plaintiff was the hardening of flecks of paint blown on to his car from painting operations on the bridge connecting Halifax and Dartmouth, a bridge which by s. 9 of c. 7 of the Acts of 1950 the defendant was constituted and given power to construct, maintain and operate. The painting operations complained of were carried on upon the part of the bridge under which there is dry land on the Halifax side of the harbour. ***

13. Non constat but that the defendant could have given warning to, or in such a way that the warning would reach, those parking cars in the parking lot in question of the defendant’s intention to paint the bridge at the time and place in question and of the danger to parked cars that would be constituted thereby, and that such warning would have been effective to avert any damage. ***

14. And non constat but that the defendant could, within the range of practical feasibility, have procured permission to station and have stationed a sufficient number of men in the dockyard to keep any cars in the parking lot wiped clean of flecks of paint before they dried if any were deposited on the cars. ***

CURRIE J.: ***

30. *** [O]n the particular facts of this case, and on these facts only, the defendant should have given adequate notice to the plaintiff. As to the sufficiency of the notice, I think it would have been enough if the defendant had obtained permission to post notices in the relevant area, or have engaged the services of some one to give early warning to car owners. I do not think it was necessary to advertise in the newspapers or on radio.
31. The failure on the part of the defendant to give adequate notice to the plaintiff was actionable negligence which caused injury to the plaintiff. ***

MACDONALD J.: ***

41. What was inevitable here was that paint would drip from the neighbouring section of the bridge during the painting season and be deposited on cars parked in an area subjacent to it. It is clear law, however, that even where nuisance or damage is necessarily implicit in and consequent upon the exercise of a permissive authority, the duty still remains to minimize or reduce the danger thereby created, to whatever degree is practicable by reasonable precautions, even if it can’t be eliminated altogether. ***

43. The proper form of action would seem to be one of negligence. On that view it must be held, I think, that the defendant owed the plaintiff a duty of reasonable care because of the proximity of his parked car to the bridge and the foreseeable risk of its injury during the painting season. In view of the known propensity of paint to fall or blow from the bridge, this duty would require not merely care in the painting operation itself (such as was taken), but care to prevent or minimize damages from the inevitable dripping ***. ***

14.2.4 Social value of activity

14.2.4.1 Watt v. Hertfordshire CC [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. *** On 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. ***

14.2.5 Custom and industry practice

14.2.5.1 Hill v. Hamilton-Wentworth Regional Police Services Board [2007] SCC 41

CROSS-REFERENCE: §13.4.2.2, §14.1.3.2

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. ***
$14.2.5$ • Applying the standard of reasonableness

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 ***32***. 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.


CROSS-REFERENCE: §14.1.3.3

Supreme Court of Canada – 2021 SCC 1
§14.2.5 • Applying the standard of reasonableness

WAGNER C.J.C. (FOR THE COURT per curiam (orally)):

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. [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. ***

VAN RENSBURG J.A. [upheld on appeal]: ***

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. ***

136. *** [T]he 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. ***

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. ***

14.2.5.3 Barnett v. Chelsea & Kensington Hospital [1968] 2 WLR 422 (QB)

CROSS-REFERENCE: §14.1.3.4, §16.1.3.1, §23.1.5

NIELD J.: ***

23. (i) Should Dr Banerjee have seen the deceased? (ii) Should he have examined the deceased? (iii) Should he have admitted the deceased to the wards? (iv) Should he have treated or caused to be treated the deceased?

24. The first two of those four questions can be answered together. It is not, in my judgment, the case that a casualty officer must always see the caller at his department. Casualty departments are misused from time to time. If the receptionist, for example, discovers that the visitor is already attending his own doctor and merely wants a second opinion, or if the caller has a small cut which the nurse can perfectly well dress herself, then the casualty officer need not be called. ***

26. Without doubt Dr Banerjee should have seen and examined the deceased. His failure to do either cannot be described as an excusable error as has been submitted, it was negligence. It is unfortunate that Dr Banerjee was himself at the time a tired and unwell doctor, but there was no one else to do that which it was his duty to do. Having examined the deceased I think that the first and provisional diagnosis would have been one of food poisoning.

27. *** It is sufficient to say *** that, having regard to all the circumstances, it was Dr Banerjee’s duty to have admitted him.

28. The fourth question is should Dr Banerjee have treated the deceased or caused him to be treated, and it is the case that, once admitted, the deceased’s case could have gone to the medical registrar or to others if such was the desire. The immediate purpose of admission would be for observation and diagnosis. No-one who has listened to the evidence can doubt that arsenical poisoning is extremely difficult to diagnose. ***
29. I conclude that after a period of observation and after taking the patient’s blood pressure and subjecting him to other general tests, and on a reconsideration of the history, in particular the fact that vomiting had occurred within twenty minutes of drinking the tea and also finding loss of fluid, the doctor would have rejected the provisional diagnosis of food or staphylococcal poisoning and have decided that it might well have been a case of metallic poisoning. In any event, I am satisfied that the deceased’s condition of dehydration and severe malaise was such that intravenous treatment should have been given. Further, I think it would have become plain that it was necessary to test a specimen of the deceased’s blood and in the end to send certain other specimens away for analysis to discover what poison it was which was causing the deceased’s condition.

30. Thus it is that I find that under all four headings the defendants were negligent and in breach of their duty in that they or their servants or agents did not see and did not examine and did not admit and did not treat the deceased.

14.2.5.4 White v. Turner [1981] CanLII 2874 (ON SC)

CROSS-REFERENCE: §14.1.3.5, §16.1.4, §18.1.1.2, §19.4.2.2

LINDEN J.: ***

35. The reason for the bad result here was that insufficient tissue was removed by Dr. Turner. Because of this, the tension on the skin flaps caused them to open, which ultimately resulted in the very bad scarring—2 to 3 inches wide instead of the usual 3/4 inch wide. This was also the main reason why the nipples were too high. The evidence is clear that, if more tissue had been removed, Mrs. White’s nipples would have been situated lower and would have been more natural looking. In addition, this was the reason why there was excess skin, necessitating its removal, which caused the “mysterious” z-scars that were present below Mrs. White’s breasts. ***

36. There were two reasons why Dr. Turner did not remove sufficient tissue, both of which I find were negligence in the circumstances: (1) the operation was done too quickly, and (2) the suturing was started before a proper check was made of whether enough tissue had been removed.

37. As for the length of time taken to perform the operation, the evidence is clear that the usual time required is between 2 and 4 hours. ***

38. *** Dr. Turner did this Strombeck in approximately one hour, 35 minutes. This was described by Dr. Birch as “very fast”. He said that the operation was “very rapidly done”. Dr. Turner must have seen no “hitches” to go at that speed, he concluded. Dr. Robertson was less charitable than Dr. Birch. *** Dr. Robertson could not imagine that a Strombeck could be properly done in one hour and 35 minutes. To him, it was “almost incredible” that it could. He thought it would take one hour just to close up. *** “Detail takes time”, he said and, consequently, the necessary attention to detail, which required some stepping back, was not done in this case. ***

39. I hold, therefore, that Dr. Turner did this operation too quickly. This resulted in his not removing enough tissue, which in turn caused the incisions to open, leading to the substandard result. This was actionable negligence.

40. As for the failure to make a check of the amount of tissue removed before closing, Dr. Birch
14.2.6 Testifying that it was standard practice, at the conclusion of the cutting, to tack the flaps of skin together with a few sutures and make a judgment about the bulk of the breast. ***

41. *** Dr. Turner did not say that he made such a check. He did not even indicate that he was aware that it was standard practice. *** If Dr. Turner had paused to do a proper check, he would have learned that he had removed only 705 grams, that this was less than usual, and that there was too much tension on the flaps. This would have revealed his error to him and permitted him to take the necessary corrective measures before closing. This, in turn, would have avoided the bad result. I find, therefore, that this failure to do the customary check was actionable negligence. ***

14.2.6 Statutory and regulatory background


CROSS-REFERENCE: §14.1.2.1

DICKSON J.: ***

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. *** The board has not proved what Lord Atkin referred to as statutory negligence, i.e. an intentional or negligent failure to comply with a statutory duty. There is no evidence at trial of any negligence or failure to take care on the part of the pool.

42. In sum I conclude that *** [i]n the case at bar negligence is neither pleaded nor proven. The action must fail. ***

14.2.6.2 Ryan v. Victoria (City) [1999] CanLII 706 (SCC)

CROSS-REFERENCE: §14.1.2.2, §21.2.1

MAJOR J.: ***

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
§14.2.6 • Applying the standard of reasonableness

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. ***
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, [1961] 1 All ER 404 at 425 [§17.1.2]:

“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. ***

15.1.1 Atlantic Lottery Corp. Inc. v. Babstock [2020] SCC 19

Supreme Court of Canada – 2020 SCC 19

CROSS-REFERENCE: §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 [§16.2.2]). 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. ***

15.1.2 Cross-references


15.1.3 Further material

16 NEGLIGENCE: (IV) CAUSATION OF DAMAGE IN FACT

16.1 But-for cause of damage

Snell v. Farrell, 1990 CanLII 70 (SCC)

15. *** [T]raditional principles in the law of torts [require] that the plaintiff must prove on a balance of probabilities that, but for the tortious conduct of the defendant, the plaintiff would not have sustained the injury complained of. ***

27. 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. ***

16.1.1 Blaming the victim

K. Roach, “Blaming the Victim: Canadian Law, Causation, and Residential Schools” (2014) 64 U Toronto LJ 566, 572

CROSS-REFERENCE: §17.3.2, §18.3.3, §19.7.1

The need to establish a causal link between a wrong and harms that can be compensated is a central feature of Canadian tort law. For example, the Supreme Court explained, in a 1996 traffic accident case called Athey [§17.2.4], that:

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 plaintiffs 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.388

This passage reflects the logic of corrective justice, which focuses on repairing the harm that defendants cause to plaintiffs. Since Aristotle, corrective justice has been contrasted with distributive justice. Corrective justice achieves justice by repairing the wrongs that one individual does to another, while distributive justice is concerned with the distribution of resources throughout society.389 The logic of corrective justice allows defendants to argue that they should not be held responsible for compensating harm that pre-existed a wrongful act or that was caused by factors other than a wrongful act. Such compensation would be an undeserved windfall for the

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§16.1.2 • But-for cause of damage

plaintiff and an unjust imposition on the defendant. This approach has been described as based on ‘a linear cause-and-effect’ understanding of the world often found in ‘Western modes of reasoning.’\textsuperscript{390} Corrective justice also sometimes serves as an implicit marker between law and politics. Courts should focus on restoring the status quo ante before the wrongful act and leave issues of distributive justice to the elected branches of government. This allows judges to be sympathetic to the difficulties faced by Aboriginal people while maintaining that other branches of government should take remedial action. ***

16.1.2 Causation theory


Causation is one of the basic conceptual tools of legal analysis. And for most purposes, we can get along with a notion of causation that is both vague and ambiguous. In the world of medium sized physical objects (automobiles, pedestrians, etc.), our judgments about causation rarely depend on conceptual niceties. The driver’s negligence caused the death of the pedestrian but did not cause Barak Obama to win the Iowa caucuses in 2008. In these cases, various notions of causality converge. The person on the street, the scientist, and lawyer can all agree in such cases that for all practical purposes X caused Y but not Z. But sometimes the various notions of cause come apart exposing ambiguities and vagueness in both ordinary and legal talk about causes and effects. ***

Cause-in-Fact

What do we mean when we say that X is a cause-in-fact of Y? Many law students learn that the answer to this question is but-for causation. If it is the case that but for X, Y would not have occurred, then X is a but-for cause of Y and hence X is a cause-in-fact of Y. This simple story works most of the time, and as a rough and ready rule of thumb, it isn’t half bad. But it turns out that if you try to use but-for causation as a hard and fast rule for determining whether X is the cause of Y, you will run into trouble, sooner or later. ***

Necessary and Sufficient Causes

The first item in the causation toolkit is the distinction between necessary and sufficient cause. The basic ideas are simple and familiar. X is a necessary cause of Y, if Y would not have occurred without X. Ben’s running the red light is a necessary cause of the damage to Alice’s car, just in case the damage would not have occurred without Ben’s having run the light. The idea of “necessary cause” is the same idea expressed by the phrase “but-for cause.”

X is a sufficient cause of Y, if Y would have occurred so long as X occurred. Alice’s shooting Ben through the heart is a sufficient cause of Ben’s death, just in case the shot thru the head by itself would have caused Ben’s death. This is true, even though Ben would have died anyway, because Cynthia shot him through the head at the same time Alice shot him through the heart.

This rough ready distinction between necessary and sufficient causes really won’t do all the necessary work. For example, Alice’s shooting Ben through the heart is not truly sufficient, by itself, no matter what other conditions obtain, to cause Ben’s death. If Ben had been on an

operating table awaiting a heart transplant, then he might have lived despite the shot. One suggestion for dealing with cases like this is to identify “sufficient causes” as a “necessary element of a sufficient set.” Things get even more complex from here. For the purposes of this introduction the point is simply to see the inadequacy of “necessary and sufficient cause” as a tool for dealing with complex cases in a precise way.

The Role of Counterfactuals

The notions of necessary and sufficient causation are familiar to almost everyone. We use these ideas all the time in everyday life. But the very familiarity of these concepts creates a temptation to take them for granted. There is an important feature of these ideas that our day-to-day use of them does not make explicit. Both necessary and sufficient causation are counterfactual concepts. What does that mean? “Counterfactual” is simply the fancy name for “what if” thinking. What if Ben had stopped at the red light? Would the damage to Alice’s car still have occurred? What if the Ben had gotten immediate medical attention? Would the shot through the head still have killed him? Every statement regarding a necessary or sufficient cause can be interpreted as making a counterfactual (“what if”) claim.

What-if reasoning is itself familiar and ordinary. When we say, Ben’s running the red light was a necessary cause of the damage to Alice’s car, we are claiming that if the world had been different and Ben had not run the red light, then Alice’s car would not have been damaged. We imagine what the world would have been like if Ben had stopped at the red light, and Alice had proceeded through the intersection without being struck by Ben’s car. Counterfactual reasoning can get more complicated than this, but for our purposes we can use everyday what-if reasoning as our model of role of counterfactuals in necessary and sufficient causation.

Overdetermination

Once we’ve gotten the notions of necessary and sufficient causes, we can move on to the idea of overdetermination. An effect is overdetermined if it has more than one sufficient cause. Take the case of Alice shooting Ben through the heart. We have postulated that the bullet passing through the heart was a sufficient cause of Ben’s death, but it may not have been a necessary cause. Suppose that Alice was a member of a firing squad, and that at the exact same moment that Alice’s bullet passed through Ben’s heart, another Bullet, fired by Cynthia, passed through Ben’s cerebral cortex and that this would have resulted in Ben’s death, even if Alice’s had not fired or her bullet had missed. Ben’s death now results from two sufficient causes, but neither Alice’s shot nor Cynthia’s shot was necessary. If Alice had not fired, Cynthia’s shot would have killed Ben. If Cynthia had not fired, Alice’s shot would have killed Ben.

Overdetermination is important, because it undermines the idea that but-for causation tells us everything we need to know about cause-in-fact. We might say that both Alice and Cynthia’s shooting caused Ben’s death or we might say they were both partial causes of Ben’s death, but we would not be likely to say that neither Alice nor Cynthia’s shot was the cause.

The firing squad example was described as a case of simultaneous overdetermination—both sufficient causes occurred at the same time. What if Cynthia shot a few seconds before Alice and Ben died before Alice’s shot pierced his heart? In that case, Cynthia’s shot would have preempted the causal role of Alice’s shot. If Cynthia had missed, then Alice’s shot would have killed Ben. This kind of case is sometimes called preemptive causation.
Coincidence

Overdetermination poses one kind of problem for but-for causation, coincidence poses another a different sort of difficulty. Suppose the driver of a trolley is speeding. As a result the trolley is in just wrong place and time and a tree falls, injuring a passenger. If trolley had gone just a little faster or just a little slower, the tree would have missed the trolley and the injury would not have occurred. Given these circumstances, speeding was a but-for cause (a necessary cause) of the tree injuring the passenger. So what? Coincidence is no problem for cause-in-fact, but it does pose a problem for the legal system. Intuitions vary, but lots of folks are inclined to believe that one should not be legally responsible for harms that one causes as a result of coincidences.

Coincidence is related to a variety of other problems with but-for causation. Take our example of Ben running the stoplight and hitting Alice’s car. Running the stoplight was one but-for cause of this accident, but there are many others. For example, Alice’s being in the intersection was also a but-for cause. And how did Alice come to be in the intersection at just the time when Ben was running the red light? If her alarm clock hadn’t gone off, she would have slept in and arrived in the intersection long after Ben, so her alarm clock’s ringing was another but-for cause. And you know how the story goes from here. As we trace the chain of but-for causes back and out, we discover that thousands and millions and billions of actions and events are but-for causes of the accident. ***

16.1.3 Barnett v. Chelsea & Kensington Hospital [1968] 2 WLR 422 (QB)

CROSS-REFERENCE: §14.1.3.4, §14.2.5.3, §23.1.5

NIELD J.: ***

31. It remains to consider whether it is shown that the deceased’s death was caused by this negligence or whether, as the defendants have said, the deceased must have died in any event. ***

32. There has been put before me a timetable which, I think, is of much importance. The deceased attended at the casualty department at 8.5 or 8.10 am. If Dr Banerjee had got up and dressed and come to see the three men and examined them and decided to admit them, the deceased (and Dr Lockett agreed with this) could not have been in bed in a ward before 11 am. I accept Dr Gouding’s evidence that an intravenous drip would not have been set up before 12 noon, and if potassium loss was suspected it could not have been discovered until 12.30. Dr Lockett, dealing with this, said “If [the deceased] had not been treated until after 12 noon the chances of survival were not good”.

33. Without going in detail into the considerable volume of technical evidence which has been put before me, it seems to me to be the case that when death results from arsenical poisoning it is brought about by two conditions; on the one hand dehydration and on the other disturbance of the enzyme processes. If the principal condition is one of enzyme disturbance—as I am of the view that it was here—then the only method of treatment which is likely to succeed is the use of the specific or antidote which is commonly called BAL. Dr Gouding said this in the course of his evidence: “The only way to deal with this is to use the specific B.A.L. I see no reasonable prospect of the deceased being given B.A.L. before the time at which he died,” and at a later point in his evidence: “I feel that even if fluid loss had been discovered death would have been caused by the enzyme disturbance. Death might have occurred later.”
34. I regard that evidence as very moderate, and that it might be a true assessment of the situation to say that there was no chance of BAL being administered before the death of the deceased.

35. For these reasons, I find that the plaintiff has failed to establish, on the grounds of probability, that the defendants’ negligence caused the death of the deceased. Judgment for the defendants.


CROSS-REFERENCE: §14.1.3, §14.2.5, §18.1.1.2, §19.4.2.2

LINDEN J.: ***

56. *** [A]n objective test of causation is to be employed in assessing whether the patient would have consented to the operation if he had been properly warned. Unlike the situation in battery, where proof of actual damage is unnecessary, negligence law will only furnish compensation if the substandard conduct being assessed has caused some loss to the plaintiff.

57. If the patient would still have agreed to the operation, even if he had been supplied with full information about the risks, the failure to inform him fully cannot be described as a cause of the damage he may suffer. Hence, he could not succeed in negligence theory. In order to recover in negligence law, therefore, it must be established that the patient would have refused to undergo the surgery if he had been told about all the relevant risks. ***

74. As for causation, I find that the test of Reibl v. Hughes [[1980] 2 SCR 880] has been fully met. I believe Mrs. White’s testimony to the effect that, if she had been given the full information by Dr. Turner, she would have foregone the operation. Although she felt she would gain some cosmetic and psychological benefits from smaller breasts, including some relief from pain, this was not of major importance to her. Her wish to have it was not strong. ***

75. Moreover, I cannot find that Mrs. White, acting reasonably, would have gone ahead with this operation, if given the full picture of the material and special risks involved. On the contrary, I find that a reasonable person, in the position of Mrs. White, if she were shown the photographs of what her breasts looked like following the first operation and were told that this was a possible result of the surgery, would probably not have undergone the operation, except perhaps in rare circumstances. The words of the plastic surgeon in a cosmetic mammoplasty case should warn with equal clarity about such a possible result, if he is to comply with the standards set out in Reibl v. Hughes. One might expect that some patients, acting reasonably, might be more reluctant to proceed in similar circumstances. ***

16.1.5 Boon v. Mann [2016] BCCA 242

British Columbia Court of Appeal – 2016 BCCA 242

GARSON J.A. (STROMBERG-STEIN J.A. AND FITCH J.A. concurring):

1. On July 12, 2011, a fire occurred in the suite that the appellants, Kenneth Boon and Leona Douglas, rented from the respondent, Kashmir Mann. The appellants lost property in the fire. Mr. Boon sustained some moderate physical injuries in his attempt to rescue their dogs, and both appellants allege psychological injury caused by the frightening escape from the fire. They
§16.1.5 • But-for cause of damage

brought the within action against the respondent, alleging that their losses and injuries were caused by his negligent failure to install smoke detectors.

2. The trial judge dismissed their claim: Boon v. Mann, 2015 BCSC 990 (B.C. S.C.). Although he was satisfied the respondent was negligent in failing to install the smoke alarms, he held that the appellants had failed on a balance of probabilities to establish that the respondent’s negligence caused the losses claimed. ***

12. The appellants say that on a common sense application of the causation test, as described in Snell v. Farrell, [1990] 2 S.C.R. 311 (S.C.C.), the judge should have concluded that, had there been smoke alarms, they would have awoken earlier, and their losses would have been lessened (if not eliminated). ***

14. The respondent submits that Snell affirms that the onus of proving causation rests with the plaintiff. As to whether causation can be inferred in the absence of precise scientific evidence, they distinguish Snell on its facts. In Snell, the respondent suffered an injury to his optic nerve. Expert medical evidence could not definitively determine that the damage caused to the optic nerve was the result of surgery or natural causes. However, the judge made a number of findings virtually ruling out natural causes, and there was at least some evidence upon which a finding of causation could be grounded. By contrast, in this case, the respondent notes that the trial judge found that there was no evidence supporting a finding of causation. ***

16. As a general rule, a plaintiff in a negligence action cannot succeed unless he shows as a matter of fact he would not have suffered the loss “but for” the defendant’s negligent act. As noted, the appellants say that a trial judge should take a robust, pragmatic approach to determining causation, and that “scientific proof” is not always required: Clements v. Clements, 2012 SCC 32 (S.C.C.) at para. 46 [§16.2.2].

17. Both Snell and Clements underscore the importance of establishing a substantial connection between the injury in question and the defendant’s negligence. Summarizing Snell, the Court in Clements said the following (at para. 21):

...The usual requirement of proof of “but for” causation should not be relaxed where the result would be to permit plaintiffs to recover in the absence of evidence connecting the defendant’s fault to the plaintiff’s injury. ...

18. The trial judge held that the appellants were required to show that “the malfunction of the smoke alarm, or its non-existence, was causally linked to the spread of the fire and the damage caused by the fire” (at para. 54, emphasis added). ***

20. In this case, there was no evidence as to the precise cause of the fire. There was no evidence as to whether the fire would have produced smoke sufficient to have activated the fire alarm, but not sufficient to create an active fire within the time frame that would have permitted fire suppression from the small fire extinguishers available for use, or within the seven minutes that it took the fire department to arrive. The trial judge found that the absence of evidence on these points was fatal to the appellants’ claim. In my view, he did not err in his articulation of the “but for” test. As the Court stated in Clements, “but for” causation should not be relaxed where to do so would allow for recovery in the absence of evidence creating a nexus between the injury and the loss.
21. I would not accede to the first ground of appeal. ***


Supreme Court of Canada – 2019 SCC 14

CROSS-REFERENCE: §17.1.5, §17.2.5, §19.4.1.2

GASCON J. (WAGNER C.J.C., ABELLA, MOLDAVER, KARAKATSANIS, BROWN, ROWE, MARTIN JJ. concurring):

1. This case concerns the professional liability of a lawyer [Mr. Salomon] who has referred clients to a financial advisor [Mr. Papadopoulos] 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. ***

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. ***

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 ***. ***

16.1 Cross-references

- jane doe v. toronto police commissioners [1990] canlII 6611 (ON CJ Div Ct), [36]-[40]: §19.5.1.1.

16.1.8 Further material

- causation in tort III (vancouver: clebc, 2014) 📺.
- law pod uk podcast, “consent and causation” (Feb 25, 2019) 🎧.
- M. Moore, “Causation in the Law” in E.N. Zalta (ed), the stanford encyclopedia of philosophy (Stanford University, 2019).
- R. Halpern, “A Call for Change in How We Think about Causation in Tort” (Gluckstein Lawyers, 2021).

16.2 Material contribution to risk of damage


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. ***
16.2.1 Athey v. Leonati [1996] CanLII 183 (SCC)

Supreme Court of Canada – 1996 CanLII 183

CROSS-REFERENCE: §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


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.


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
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.

16.2.2 Clements v. Clements [2012] SCC 32

Supreme Court of Canada – 2012 SCC 32

MCLACHLIN C.J.C.:

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 operation of the bike.

2. Mr. Clements’ negligence in driving an overloaded bike too fast is not disputed. The only issue
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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. ***

Causedation in the Law of Negligence: The Basic Rule of “But For” Causation ***

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.


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. ***

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. ***

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*** ***

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 ***. ***


2. The United Kingdom Cases


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 tortfeasors 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 Resurfiçe, 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” (Resurfiçe, 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 Resurfiçe 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 tortfeascors 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. ***

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. ***

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. ***
54. I would allow the appeal and order a new trial. ***

16.2.3 Jaipur Golden Gas Victims Association v. Union of India [2009] INDLHC 4354

Delhi High Court – [2009] INDLHC 4354

CROSS-REFERENCE: §17.3.1, §19.5.2.4, §22.1.5, §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
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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 [$16.2.1], 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 Resurfiace 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. ***

16.2.4 Cross-references


§16.3.1 • Loss of chance

- Beam v. Pittman [1997] CanLII 14694 (NL CA), [22]-[28]; §20.3.2.

16.2.5 Further material


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. ***

16.3.1 Athey v. Leonati [1996] CanLII 183 (SCC)

CROSS-REFERENCE: §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
§16.3.2 • Loss of chance

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.

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.

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
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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.

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.

16.3.3 Further material

- M. Mims & R. Crisler, “Properly Limiting the Lost Chance Doctrine in Medical Malpractice Cases: A Practitioners’ Rejoinder” (2021) 81 Louisiana L Rev 863.
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. ***

17.1 Reasonable foreseeability of actual injury

17.1.1 Bolton v. Stone [1951] UKHL 2

CROSS-REFERENCE: §14.2.1.2

LORD PORTER: ***

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. ***

17.1.2 Overseas Tankship v. Morts Dock & Engineering (The Wagon Mound No. 1) [1961] UKPC 2

Privy Council (on appeal from Australia) – [1961] UKPC 2
2. *** 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. ***

25. *** 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. ***

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. ***
§17.1.3 • Reasonable foreseeability of actual injury

28. *** [T]he 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):

“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 preceding 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. ***

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 ***. ***

17.1.3 Mustapha v. Culligan [2008] SCC 27

*Supreme Court of Canada – 2008 SCC 27*

**CROSS-REFERENCE: §17.5.3**

**MCLACHLIN C.J.C.:**

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.* It follows that Culligan owed Mr. Mustapha a duty of care in the supplying of bottled water to him.

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, 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 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” (Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. [1961] A.C. 388 (New South Wales P.C.), at p. 424).

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” (Overseas Tankship (U.K.) Ltd. v. Miller Steamship Propriety Ltd. [1967] 1 A.C. 617 (New South Wales P.C.), at p. 643).

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). 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), 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.

17.1.4 Nelson (City) v. Marchi [2021] SCC 41

CROSS-REFERENCE: §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 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.
§17.1.7 • Intervening events

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 [§19.2.3]). 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 ***. ***

17.1.5 Salomon v. Matte-Thompson [2019] SCC 14

CROSS-REFERENCE: §16.1.6, §17.2.5, §19.4.1.2

GASCON J. (WAGNER C.J.C., ABELLA, MOLDAVER, KARAKATSANIS, BROWN, ROWE, MARTIN JJ. concurring): ***

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. ***

17.1.6 Cross-references

- Deloitte & Touche v. Livent Inc. [2017] SCC 63, [76]-[79]: §19.2.3.

17.1.7 Further material


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. 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.

17.2.1 Booth v. City of St Catharines [1948] CanLII 10 (SCC)

CROSS-REFERENCE: §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. ***

17.2.2 Home Office v. Dorset Yacht Co. Ltd [1970] UKHL 2

House of Lords – [1970] UKHL 2

CROSS-REFERENCE: §13.2.2

LORD REID:
§17.2.2 • Intervening events

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 if an action would lie against any of these Borstal officers. ***

9. *** 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. ***

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 there are two reasons why in the vast majority of cases that would not be so. In the first place it would have to be shewn that the decision to allow any such release was so unreasonable that it could not be regarded as a real exercise of discretion by the responsible officer who authorised the release. And secondly it would have to be shewn that the commission of the offence was the natural and probable, as distinct from merely a foreseeable, result of the release—that there was no novus actus interveniens. *** 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 carefree 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:** ***

52. *** If the Appellants are right in the present case it would mean that however careless the officers in charge might be and however obvious it might be that the boys in their charge might do damage to some nearby property which by reasonable care the officers could prevent, there could in no circumstances be liability to the owners of that property because the only duty owed by the officers would be to their employers and to the boys. ***

56. For the reasons that I have given I would dismiss the appeal. ***

**LORD DIPLOCK:** ***

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.
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 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

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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”. ***

**17.2.4 Athey v. Leonati [1996] CanLII 183 (SCC)**

**CROSS-REFERENCE: §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. ***

17.2.5 Salomon v. Matte-Thompson [2019] SCC 14

CROSS-REFERENCE: §16.1.6, §17.1.5, §19.4.1.2

GASCON J. (WAGNER C.J.C., ABELLA, MOLDAVER, KARAKATSANIS, BROWN, ROWE, MARTIN JJ. concurring): ***

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 Hodkinson 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). ***

17.2.6 Cross-references

17.2.7 Further material


17.3 Eggshell skull plaintiffs


The thin skull rule makes the defendant liable for the plaintiff’s injuries even if the injuries are unexpectedly severe owing to a pre-existing 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.

17.3.1 Jaipur Golden Gas Victims Association v. Union of India [2009] INDLHC 4354

CROSS-REFERENCE: § 16.2.3, § 19.5.2.4, § 22.1.5, § 22.2.1

MANMOHAN J.: ***

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. ***

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] 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.) [§19.1.2.1], 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.

17.3.3 Cross-references


17.3.4 Further material


17.4 Crumbling skull plaintiffs


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.

17.4.1 Athey v. Leonati [1996] CanLII 183 (SCC)

CROSS-REFERENCE: §16.2.1, §16.3.1, §17.2.4

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

(5) The Thin Skull and “Crumbling Skull” Doctrines
§17.4.2 • Crumbling skull plaintiffs

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. ***

17.4.2 Blaming the victim

K. Roach, “Blaming the Victim: Canadian Law, Causation, and Residential Schools” (2014) 64 U Toronto LJ 566, 573-574

CROSS-REFERENCE: §16.1.1, §18.3.3, §19.7.1

Although the Court accepted the logic of the crumpling skull argument, it did not prevail in the 1996 traffic accident case.391 The plaintiff was able to recover $200,000 in damages for a herniated disc, even though he had a back problem before his back was injured in the traffic accident and even though his back was hurt again, both in a subsequent accident and when he attempted to engage in physical activity. The Supreme Court concluded that the plaintiff did not have to establish that the defendant’s wrongdoing was the sole cause of his injury as long as the herniated disc would not have been caused but for the defendant’s wrongdoing. In other words, the plaintiffs pre-existing back condition and the second accident did not sever the chain of causation or relieve the defendant of responsibility for compensating for the herniated disc. One might have thought that this case would work to the advantage of the residential school survivors who suffered harms both before and after they attended residential school, so long as the harms for which they sought compensation would not have occurred but for their experience in school. Unfortunately, this was often not the case.

391 The Court explained that ‘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’; Athey v. Leonati, (1996] 3 SCR 458 at para 35 [§17.4.1].
§17.4.2 • Crumbling skull plaintiffs

The federal government and churches’ crumbling skull arguments based on causation often had more success in residential school cases than in the 1996 traffic accident case. In one early case, Maurice 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.392

This passage reveals as much about the judge as about the plaintiff.393 It displays bias against child rearing done by extended families. The judge’s comments about all of the plaintiff’s 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.

Some judges rejected crumbling skull arguments. Justice Williamson suggested that it was ‘troubling’ and ‘disquieting’ that Canada and the Anglican Church had argued that the plaintiffs who attended residential school would have lived difficult lives because of the effect of ‘dysfunctional families, ill health, alcoholism, violence, poverty and abandonment’394 before they attended the school. He questioned whether such arguments were consistent with the honour of the Crown or would be available to others who assumed the role of a parent in a child’s life. Alas, his dismissal of crumbling skull arguments and award of just under $200,000 to plaintiffs was overturned by a unanimous, five-judge panel of the British Columbia Court of Appeal, which held that he had erred by not properly considering the defendant’s crumbling skull arguments.395 The Court of Appeal’s judgment rested on the logical position that the defendants should only be responsible for the harms that they caused. The court ruled that damages should be reduced to reflect risks that the plaintiffs might have experienced similar harms if they had not been sexually abused at the residential school. This of course ignored the possibility that residential schools had adversely affected their families. Although the crumbling skull argument was defended on the basis of the logic of corrective justice, it was actually based on counter-factual speculation about historical ‘might have been’: a type of reasoning that the courts have rejected in other contexts.396

392 **DW v. Canada (Attorney General) and Starr**, I999 SKQB 187 at para 28.
393 The same judge rejected similar crumbling skull arguments (in the context of a traffic accident) in relation to a beauty salon owner whom he described as an ‘aggressive business woman.’ He concluded that the women’s depression and suicide were foreseeable when she sustained a serious neck sprain in a traffic accident ‘because human beings are by nature fragile creatures, it is foreseeable that anything might happen to a person injured by an accident.’ He awarded the woman’s family close to $300,000 in damages for her loss of earnings; **Hayes v. Green** (1983) 30 Sask R 166 at para 8 (QB).
395 **TWNA v. Canada (Ministry of Indian Affairs)**, 2003 BCCA 670 at para 49.
396 See for example **R v. Strachan**, (1988] 2 SCR 980, rejecting the requirement of a causal connection between a
§ 17.5.1 • Concurrent liability (in contract or statute)

17.4.3 Cross-references

- Beam v. Pittman [1997] CanLII 14694 (NL CA), [16]-[17], [27]: § 20.3.2.

17.5 Concurrent liability (in contract or statute)

E. Durbin, “Torts – Nature of Tort Law and Liability” WestlawNext Canada

Liability may be imposed upon a defendant for both a tortious wrong and breach of contract. Where a contract exists between the parties, the plaintiff must establish, to succeed in an action for tort, that there also existed a special relationship that gives rise to a common law duty of care in tort. If the breach alleged is of a duty arising out of the obligations undertaken by the contract, which cannot be established without reference thereto, the action must be founded in contract.

Concurrent liability 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. ***

17.5.1 Gartside v. Sheffield [1983] NZCA 37

CROSS-REFERENCE: § 14.1.3.1, § 19.4.1.1

MCMULLIN J.: ***

74. *** The first policy consideration suggested as precluding liability was that to sustain it would be to allow a person not a party to the contract between solicitor and client to receive from the solicitor the very benefit which he would have received had he been a party to the actual contract which imposed the obligation on the solicitor. This the Judge thought was contrary to a principle well established in the law of contract which has long since denied a right of action to a third party seeking to claim under a contract to which he was not a party—Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd [1915] AC 847; Midland Silicones Ltd v. Scruttons Ltd [1962] AC 446; Beswick v. Beswick [1968] AC 58. I think that the answer to this point is that the duty of care in tort to a beneficiary springs from a right now well recognised by cases which for decades have allowed a person to sue in tort. To deny that right now would be to put the clock back on cases which find their genesis in Donoghue v. Stevenson [1932] AC 562. A recent illustration in this Court is Allied Finance and Investments Ltd v. Haddow & Co [1983] NZLR 22. Persons suing in tort do so in their own right. The duty which a negligent solicitor owes to a third party is a duty imposed upon him by law, not because he made a contract, but because he entered upon the activity. The duty of care to a beneficiary in a will case does not spring from the contract between solicitor and client;
it arises from the undertaking by the solicitor of work the negligent carrying out of which will, within the reasonable contemplation of the person concerned, be likely to cause damage to the expectant beneficiary. It is true that the shortcomings in the law of contract which prevented a person who was not a party to it from suing upon it could only be remedied by statute and that in this country the Contracts (Privity) Act 1982 was enacted to overcome the problem. But the law of tort has not recognised the absence of a jus quaesitum tertio as a bar to an action in tort by a person outside the contract for the reason that such an action is not an attempt to sue on the contract of retainer. As Megarry V-C put it, the duty “far from diluting the solicitor’s duty to his client, marches with it, and, if anything, strengthens it” ([1980] Ch 297, 322).

### 17.5.2 BG Checo Int. Ltd v. BC Hydro and Power Authority [1993] CanLII 145 (SCC)

**Supreme Court of Canada – [1993 CanLII 145](https://canlii.org/en/ca/scc/145)***

**CROSS-REFERENCE: [§20.1.1](https://canlii.org/en/ca/scc/145)**

**IACOBUCCI J. (dissenting in part with SOPINKA J.):**

55. The narrow question raised by this appeal is what remedy should be available for pre-contractual representations made during the tendering process. This question also raises a more general and more important issue. In light of the decision of this Court in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, can a plaintiff who is in a contractual relationship with the defendant sue the defendant in tort if the duty relied upon by the plaintiff in tort is also made a contractual duty by an express term of the contract?

**Facts**

56. The appellant and respondent on the cross-appeal, B.C. Hydro and Power Authority, is a British Columbia Crown corporation. The respondent and appellant on the cross-appeal, BG Checo International Ltd., is a large corporation in the business of constructing electrical transmission lines and distribution systems. I will refer to the parties as “Hydro” and “Checo”, respectively.

57. In November of 1982, Hydro called for tenders to erect transmission towers and to string transmission lines. In December, 1982, prior to submitting its tender for the contract, Checo’s representative inspected the area by helicopter. He noted that the right-of-way had been partially cleared, and also noted evidence of ongoing clearing activity. The representative assumed that the right-of-way would be further cleared prior to the commencement of Checo’s work. On January 2, 1983, Checo submitted its tender, and on February 15, 1983, Hydro accepted Checo’s tender and the parties entered into a written contract. Checo contracted to construct 130 towers and install insulators, hardware and conductors over 42 kilometres of right-of-way near Sechelt, British Columbia.

58. In fact, no further clearing of the right-of-way ever took place. The “dirty” condition of the right-of-way caused Checo a number of difficulties in completing its work. Checo sued Hydro seeking damages for negligent misrepresentation, or, in the alternative, for breach of contract.

59. The evidence at trial indicated that Hydro had contracted the clearing out to another company,
and that, to Hydro’s knowledge, the work was not done adequately. There was no direct discussion between the representatives of Checo and Hydro concerning this issue. There was evidence led at trial that the contract between the parties did not specify clearing standards with the same degree of detail as was present in similar contracts entered into by Hydro. ***

61. The trial judge found that Hydro had acted fraudulently in its dealings with Checo and awarded Checo $2,591,580.56, being “the total loss suffered by [Checo] as a result of being fraudulently induced to enter into this contract.” Hydro appealed to the Court of Appeal for British Columbia, which rejected the finding of fraud, but found that there had been a negligent misrepresentation which induced Checo to enter into the contract. The Court of Appeal awarded the sum of $1,087,729.81, for the misrepresentation, and referred the question of breach of contract and damages flowing therefrom to the British Columbia Supreme Court. Checo’s cross-appeal for punitive damages and for a higher scale of costs was dismissed: [1990] 3 W.W.R. 690. ***

Concurrence of Tort and Contract ***

119. *** If the parties to a contract choose to define a specific duty as an express term of the contract, then the consequences of a breach of that duty ought to be determined by the law of contract, not by tort law. *** If a duty is an express term of the contract, it can be inferred that the parties wish the law of the contract to govern with respect to that duty. This is of particular significance given that the result of a breach of a contractual duty may be different from that of a breach of a duty in tort. ***

128. To summarize, if the liability of a party to a contract is limited or excluded by a term of the contract, or if a contractual term limits or negates the duty owed by one party to the other (whether in contract or in tort), the other party to the contract may not use an action in tort to impose a wider liability on the first party than would be available under the contract. ***

158. *** I would order a new trial on the issue of breach of contract. I have found that Hydro breached the contract in that the right-of-way was not properly cleared. Damages for this breach should be assessed at the new trial. In addition, Checo is entitled to recover for any breaches of the contract unconnected with the condition of the right-of-way which it may establish at the new trial. ***

LA FOREST AND MCLACHLIN JJ. (L’HEUREUX-DUBÉ AND GONTHIER JJ. concurring):

1. We have had the advantage of reading the reasons for our colleague Justice Iacobucci. We agree with his conclusion that Hydro is liable to Checo for breach of contract. We disagree, however, with his conclusion that the contract precludes Checo from suing in tort. In our view, our colleague’s approach would have the effect of eliminating much of the rationalizing thrust behind the movement towards concurrency in tort and contract. Rather than attempting to establish new barriers to tort liability in contractual contexts, the law should move towards the elimination of unjustified differences between the remedial rules applicable to the two actions, thereby reducing the significance of the existence of the two different forms of action and allowing a person who has suffered a wrong full access to all relevant legal remedies. ***

The Theory of Concurrency ***

14. Iacobucci J. concludes that a contract between the parties may preclude the possibility of suing in tort for a given wrong where there is an express term in the contract dealing with the
§17.5.2 • Concurrent liability (in contract or statute)

matter. We would phrase the applicable principle somewhat more narrowly. As we see it, the right to sue in tort is not taken away by the contract in such a case, although the contract, by limiting the scope of the tort duty or waiving the right to sue in tort, may limit or negate tort liability.

15. 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. This limitation on the general rule of concurrency arises because it is always open to parties to limit or waive the duties which the common law would impose on them for negligence. This principle is of great importance in preserving a sphere of individual liberty and commercial flexibility. *** The mere fact that the parties have dealt with a matter expressly in their contract does not mean that they intended to exclude the right to sue in tort. It all depends on how they have dealt with it. ***

17. This is illustrated by consideration of the three situations that may arise when contract and tort are applied to the same wrong. The first class of case arises where the contract stipulates a more stringent obligation than the general law of tort would impose. In that case, the parties are hardly likely to sue in tort, since they could not recover in tort for the higher contractual duty. The vast majority of commercial transactions fall into this class. The right to sue in tort is not extinguished, however, and may remain important, as where suit in contract is barred by expiry of a limitation period.

18. The second class of case arises where the contract stipulates a lower duty than that which would be presumed by the law of tort in similar circumstances. This occurs when the parties by their contract indicate their intention that the usual liability imposed by the law of tort is not to bind them. The most common means by which such an intention is indicated is the inclusion of a clause of exemption or exclusion of liability in the contract. Generally, the duty imposed by the law of tort can be nullified only by clear terms. We do not rule out, however, the possibility that cases may arise in which merely inconsistent contract terms could negative or limit a duty in tort, an issue that may be left to a case in which it arises. The issue raises difficult policy considerations, viz., an assessment of the circumstances in which contracting parties should be permitted to agree to contractual duties that would subtract from their general obligations under the law of tort. These important questions are best left to a case in which the proper factual foundation is available, so as to provide an appropriate context for the decision. In the second class of case, as in the first, there is usually little point in suing in tort since the duty in tort and consequently any tort liability is limited by the specific limitation to which the parties have agreed. An exception might arise where the contract does not entirely negate tort liability (e.g., the exemption clause applies only above a certain amount) and the plaintiff wishes to sue in tort to avail itself of a more generous limitation period or some other procedural advantage offered by tort.

19. The third class of case arises where the duty in contract and the common law duty in tort are co-extensive. In this class of case, like the others, the plaintiff may seek to sue concurrently or alternatively in tort to secure some advantage peculiar to the law of tort, such as a more generous limitation period. The contract may expressly provide for a duty that is the same as that imposed by the common law. Or the contractual duty may be implied. ***

20. The case at bar, as we see it, falls into this third category of case. The contract, read as we have proposed, did not negate Hydro’s common law duty not to negligently misrepresent that it would have the right-of-way cleared by others. Had Checo known the truth, it would have bid for a higher amount. That duty is not excluded by the contract, which confirmed Hydro’s obligation to
clear the right-of-way. Accordingly, Checo may sue in tort.

21. We conclude that actions in contract and tort may be concurrently pursued unless the parties by a valid contractual provision indicate that they intended otherwise. This excludes, of course, cases where the contractual limitation is invalid, as by fraud, mistake or unconscionability. Similarly, a contractual limitation may not apply where the tort is independent of the contract in the sense of falling outside the scope of the contract, as the example given in Elder, Dempster & Co. v. Paterson, Zochonis & Co., [1924] A.C. 522 (H.L.), of the captain of a vessel falling asleep and starting a fire in relation to a claim for cargo damage. ***

Conclusion

54. We would dismiss the appeal, allow the cross-appeal in part and refer the question of damages in tort and contract to the trial division to be reassessed in accordance with the principles set forth in these reasons. ***

STEVENSON J. took no part in the judgment.

17.5.3 Mustapha v. Culligan [2008] SCC 27

CROSS-REFERENCE: §17.1.3

MCLACHLIN C.J.C.: ***

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. ***

17.5.4 Cross-references


17.5.5 Further material

18  DEFENCES (II)

CROSS-REFERENCE: §6

18.1 Assumption of risk


In relation to negligence, the defence of consent is usually expressed in terms of the Latin maxim ‘volenti non fit injuria’ or its English translation ‘voluntary assumption of risk’. It has often been argued that the notion of consent-in-advance is inconsistent with the legal concept of negligence because it is impossible fully to appreciate in advance the risks attendant upon lack of reasonable care. This argument depends partly on the incorrect assumption that legal negligence implies inadvertence: in cases where negligence liability attaches to deliberate conduct, there is no logical difficulty in the idea of prospective consent. If I freely allow myself to be driven at night in a car which the driver has told me has no lights, I may be said to have voluntarily assumed the risk of being injured in an accident attributable to absence of lights. If I freely agree to be a passenger in an aircraft piloted by a person whom I know to have consumed 20 units of alcohol in a few hours, I may be said to have voluntarily assumed the risk of being injured in an accident attributable to the pilot’s drunkenness (Morris v. Murray [1991] 2 QB 6). In such cases I may be said, by my conduct, to have consented to a lack of reasonable care on the part of another. ***

18.1.1 Informed consent

18.1.1.1 Kohli v. Manchanda [2008] INSC 42

CROSS-REFERENCE: §2.2.2, §6.8.3.1, §19.4.2.3

RAVEENDRAN J.: ***

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 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. ***

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 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 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. [397] ***

18.1.1.2 White v. Turner [1981] CanLII 2874 (ON SC)

CROSS-REFERENCE: §14.1.3.5, §14.2.5.4, §16.1.4, §19.4.2.2

LINDEN J.: ***

43. It is clear that Canadian doctors are obligated to disclose to their patients “the nature of a proposed operation, its gravity, any material risks and any special or unusual risks attendant upon the performance of the operation”. (See Hopp v. Lepp, 13 C.C.L.T. 66 at 87, [1980] 4 W.W.R. 645, 32 N.R. 145, 22 A.R. 361 (S.C.C.).) It is also clear, since Reibl v. Hughes (1980), 14 C.C.L.T. 1, 33 N.R. 361 (S.C.C.), that these problems are to be analyzed with negligence law theory, rather than with the law of battery. Further, the language of “informed consent” should be avoided in these cases, since it spawns confusion between these two distinct theories of liability. ***

46. The matter of disclosure of risks by a doctor may be viewed as not entirely unlike the manufacturers’ duty to warn consumers about the dangerous properties of their products. In

§18.1.1 • Assumption of risk

relation to products, there is an obligation to inform consumers reasonably about the dangers inherent in the product they are about to purchase. *** It is, therefore, consistent to expect full information about the dangers involved in a surgical operation to be communicated to patients. There are, of course, differences in the two situations, but the similarities should be kept in mind.

47. Further, in analyzing the quality and quantity of the information given to a patient under negligence principles, the test to be employed is no longer the professional medical standard, heretofore used by our Courts, but rather the reasonable patient standard. This is a major shift heralded by the Supreme Court of Canada in Reibl v. Hughes, supra. ***

48. The essential issue, then, is to determine what a reasonable patient in the position of the plaintiff would consider to be “material risks” or “special or unusual risks” about which he would want to receive information. ***

51. The patients’ right to know, therefore, is no longer to be limited by what the medical profession customarily tells them; henceforth, the patients’ right to be able to make an intelligent choice about any proposed surgery transgresses the interest of the medical profession in setting its own autonomous standards of disclosure. ***

52. *** In my view, material risks are significant risks that pose a real threat to the patients’ life, health or comfort. In considering whether a risk is material or immaterial, one must balance the severity of the potential result and the likelihood of its occurring. Even if there is only a small chance of serious injury or death, the risk may be considered material. On the other hand, if there is a significant chance of slight injury this too may be held to be material. As always in negligence law, what is a material risk will have to depend on the specific facts of each case.

53. As for “unusual or special risks”, these are those that are not ordinary, common, everyday matters. These are risks that are somewhat extraordinary, uncommon and not encountered every day, but they are known to occur occasionally. Though rare occurrences, because of their unusual or special character, the Supreme Court has declared that they should be described to a reasonable patient, even though they may not be “material”. There may, of course, be an overlap between “material risks” and “unusual or special risks”. If a special or unusual risk is quite dangerous and fairly frequently encountered, it could be classified as a material risk. But even if it is not very dangerous or common, an unusual or special risk must be disclosed. As was explained by Laskin C.J.C., 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”. (Reibl v. Hughes, supra [C.C.L.T.] at p. 5.)

54. It should also be mentioned that there are some common, everyday risks that exist in all surgery, which everyone is expected to know about. Doctors need not warn about them, since they are obvious to everyone. Consequently, just as one need not warn that a match will burn or that a knife will cut, because that would be redundant, one need not warn that, if an incision is made, there will normally be some bleeding, some pain and a scar will remain when the cut has healed. So too, everyone is expected to know that there is a chance of infection in any surgical procedure. ***

55. In summary then, this exercise of defining the scope of the duty of disclosure is now a complex one for the Court, requiring much time, effort, thought and evidence. The cooperation and assistance of the medical profession will be vital to the task. ***
58. There is a danger here, though, that every patient who becomes a plaintiff will insist that he would have foregone the operation if he had been properly warned. Hindsight is always wiser than foresight. The Courts have always mistrusted judgments made from hindsight and have sought to minimize the danger of such evidence. Hence, the Supreme Court of Canada has wisely adopted an objective test here, not a subjective one. It is not enough, therefore, for the Court to be convinced that the plaintiff would have refused the treatment if he had been fully informed; the Court must also be satisfied that a reasonable patient, in the same situation, would have done so. ***

59. This is a sensible stance which is quite consistent with tort principles in other contexts. For example, the requirement is not unlike the need for proof of reasonable reliance in actions for deceit and negligent misrepresentation. In those types of cases, our Courts have avoided assisting gullible fools, who rely on every bit of silly advice they receive. (See Prosser, Handbook of the Law of Torts (4th ed., 1971), at p. 714). Consequently, a patient, who says he would have foregone life-saving treatment because it might have caused a rash or a headache, cannot recover on the basis of inadequate disclosure, even if he is believed, because a reasonable patient would have gone ahead. ***

18.1.2 Contractual waiver

*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”: *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 at para. 20. ***

18.1.2.1 Nettleship v. Weston [1971] EWCA Civ 6

CROSS-REFERENCE: §14.1.1.2, §20.4.1

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.
§18.2.1 • Apportionment of liability

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 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.

18.1.3 Cross-references

- BG Checo Int. Ltd v. BC Hydro and Power Authority [1993] CanLII 145 (SCC), [14]-[18]: §17.5.2.
- Hedley Byrne v. Heller [1963] UKHL 4, [19], [48], [122], [138]: §19.2.2.
- Nelson (City) v. Marchi [2021] SCC 41, [101]: §19.5.2.2.

18.1.4 Further material


18.2 Apportionment of liability

18.2.1 Plaintiff’s contributory fault


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.\footnote{11 East 60, 103 ER 926.} 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.\footnote{Cayzer, Irvine & Co v. Carron Co (1884), 9 App Cas 873.}

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”.\footnote{William L Prosser “Comparative Negligence” 41 Cal L Rev 1 (1953) at 9.} The principle was also thought to act as a general deterrent, encouraging others to take care for their own safety.\footnote{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.}

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.\footnote{Contributory Negligence Act, 1924, c 32. The Civil Code of Quebec has always provided for apportionment of fault and contribution among tortfeasors.} The Contributory Negligence Act 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,\footnote{Maritime Conventions Act, 1911 (UK), 1 & 2 Geo V, c 57.} based largely on the contributory negligence provisions of the United Kingdom Maritime Conventions Act, 1911\footnote{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).} and the federal Maritime Conventions Act, 1914.\footnote{Uniform Law Conference of Canada, Uniform Contributory Negligence Act.} 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. ***
18.2.1.1 Principles for establishing contributory fault

Wormald v. Chiarot, 2016 BCCA 415

14. The analysis for contributory negligence involves two considerations: (1) whether the plaintiff failed to take reasonable care in her own interests; and (2) if so, whether that failure was causally connected to the loss she sustained: Enviro West Inc. v. Copper Mountain Mining Corp., 2012 BCCA 23 (B.C. C.A.) at para. 37.

15. To satisfy the requirement of a causal connection between the plaintiff’s breach of the standard of care and the loss sustained, the defendant must establish more than that but for her negligence, the damage would have been avoided. 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. ***

18.2.2 Defendants’ joint and several liability


‘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’.406 ***

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

406 ‘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, 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.
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.

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.

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 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. On the other side are supporters of joint and several liability

\[\text{§18.2.2} \times \text{Apportionment of liability}\]

\[407\] \text{Woods v. Cole} (1998), 181 Ill 2d 512, 230 Ill Dec 204, 693 NE 2d 333 at paras 29-30 [citations omitted].

\[408\] \text{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: “***.”

\[409\] 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
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. ***

18.2.3 Negligence Act, RSBC 1996

Negligence Act, RSBC 1996, c 333, ss 1-2, 4

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.

3. Liability and right of contribution

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: ibid at para 5.13.
§18.2.3 • Apportionment of liability

(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.

18.2.3.1 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.
- Nunavut: Contributory Negligence Act, RSNWT 1988, c C-18.
- Prince Edward Island: Contributory Negligence Act, RSPEI 1988, c C-21, ss 1-2.
- Yukon: Contributory Negligence Act, RSY 2002, c 42.

18.2.3.2 Principles for apportioning fault between parties

Heller v. Martens, 2002 ABCA 122

34. Apportionment of fault *** requires an assessment of the parties’ degree of departure from the standard of care. Although not an exhaustive list, in assessing comparative blameworthiness courts have considered such factors as:


3. The timing of the various negligent acts. For example, the party who first commits a negligent act will usually be more at fault than the party whose negligence comes as a result of the initial fault: Aynsley, supra.

4. The nature of the conduct held to amount to fault. For example, indifference to the results of the conduct may be more blameworthy: Chamberland v. Fleming (1984), 12
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5. The extent to which the conduct breaches statutory requirements. For example, in a motor vehicle collision, the driver of the vehicle with the right of way may be less blameworthy: *Crothers v. Northern Taxi Ltd.* (1957), 10 D.L.R. (2d) 87 (Man. C.A.), at 100; see also *Clyke v. Blenkhorn* (1958), 13 D.L.R. (2d) 293 (N.S. S.C.), at 304.

35. Fault may vary from extremely careless conduct, by which a party shows a reckless indifference or disregard for the safety of persons or property, to a momentary or minor lapse of care in conduct which, nevertheless, carries with it the risk of foreseeable harm. Degrees of contributory negligence are assessed accordingly: *Alberta Wheat Pool v. Northwest Pile Driving Ltd.* (2000), 80 B.C.L.R. (3d) 153 (B.C. C.A.) at 165-66; see also *Giuliani v. Saville* (1999), 133 B.C.A.C. 164 (B.C. C.A.) at 167. ***

18.2.4 British Columbia v. ICBC [2008] SCC 3

*Supreme Court of Canada – 2008 SCC 3*

**CROSS-REFERENCE:** §23.2.4.1

**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 [*§20.6.1*]. 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. ***

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. ***

18.2.5 Marcena v. Thomson [2019] BCSC 1287

*British Columbia Supreme Court – 2019 BCSC 1287*

**CROSS-REFERENCE:** §19.1.3.1

**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. ***

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. ***

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. ***

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. *** 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. ***

18.2.6 Hill v. Church of Scientology of Toronto [1995] CanLII 59 (SCC)

CROSS-REFERENCE: §5.1.1, §9.3.3, §9.4.2, §9.5.3, §24.1.1.1

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. ***

176. *** [B]oth 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. ***
§18.2.7 Cross-references

- Nelson (City) v. Marchi [2021] SCC 41, [100]: §19.5.2.2.

§18.2.8 Further material

- W. WhiteKnight, “Joint and Several Liability” Bergeron Clifford LLP (Jun 11, 2019).

18.3 Illegality

Kim v. Choi, 2020 BCCA 98

33. The doctrine of illegality as expressed in the Latin phrase ex turpi causa non oritur actio [“from a dishonourable cause, an action does not arise”] was developed to ensure that the judicial process not be used for abusive, illegal purposes. It is a doctrine founded in public policy. The doctrine has found expression primarily in relation to illegal contracts, but its application has been extended to tort claims as well in Hall v. Hebert, [1993] 2 S.C.R. 159. ***

43. In Hall, the plaintiff had been injured in an accident after losing control of a vehicle that he was driving while drunk. The defendant had given him the keys of the car to drive, knowing that the plaintiff was drunk. In an action by the plaintiff for compensation for the personal injuries suffered in the accident, the defendant set up the defence of illegality based on the plaintiff’s illegal conduct. The defence was successful in this Court but failed in the Supreme Court of Canada.

44. The lead judgment of the Court was written by McLachlin J. (as she then was). Justice McLachlan considered that to be justified, the power to invalidate claims on the ground of public policy must be “placed upon a firm doctrinal foundation and made subject to clear limits”: p. 169. The central theme emerging from her analysis is that the doctrine of illegality should be exercised only when it is necessary to preserve the integrity of the legal system by avoiding inconsistency in the Court’s treatment of the same conduct. Justice McLachlin expressed the scope of the illegality defence in this way (at p. 169):

My own view is that courts should be allowed to bar recovery in tort on the ground of the plaintiff’s immoral or illegal conduct only in very limited circumstances. The basis of this power, as I see it, lies in [the] duty of the courts to preserve the integrity of the legal system,

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and is exercisable only where this concern is in issue. This concern is in issue 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.
The idea common to these instances is that the law refuses to give by its right hand what
it takes away by its left hand…. [Emphasis added.]

45. Justice McLachlin then reviewed a series of decisions in which illegality had been addressed
in the tort context and came to this conclusion (at pp. 175—176):

The narrow principle illustrated by the foregoing examples of accepted application of the
maxim of ex turpi causa non oritur actio in tort, is that a plaintiff will not be allowed to profit
from his or her wrongdoing…. A more satisfactory explanation for these cases, I would
venture, is that to allow recovery in these cases would be to allow recovery for what is
illegal. It would put the courts in the position of saying that the same conduct is both legal,
in the sense of being capable of rectification by the court, and illegal. It would, in short,
introduce an inconsistency in the law. It is particularly important in this context that we
bear in mind that the law must aspire to be a unified institution, the parts of which—
contract, tort, the criminal law—must be in essential harmony. For the courts to punish
conduct with the one hand while rewarding it with the other, would be to “create an
intolerable fissure in the law’s conceptually seamless web”: Weinrib, supra, at p. 42. We
thus see that the concern, put at its most fundamental, is with the integrity of the legal
system. [Emphasis added.]

46. The remedial order sought by a plaintiff will influence the determination whether allowing a
claim will “introduce inconsistency into the fabric of the law” (p. 179). Justice McLachlin illustrates
this by distinguishing between tort claims that represent compensation for personal injuries and
tort claims that benefit the plaintiff in a manner akin to profit. The illegality defence will bar the
plaintiff from obtaining a profit from an illegal act, but not from compensation for personal injuries,
which are a proxy for the status quo ante. Justice McLachlin expressed the distinction in this way
(at pp. 176-177):

At this point it may be useful to consider in more depth the distinction between
compensatory damages and damages which amount to profit from an illegal act. The
foregoing comments indicate that compensatory damages are not properly awarded as
compensation for an illegal act, but only as compensation for personal injury. Such
damages accomplish nothing more than to put the plaintiff in the position he or she would
have been in had the tort not occurred. No part of the award which compensates injury
can be said to be the profit of, or the windfall from, an illegal act…. He or she gets only
the value of, or a substitute for, the injuries he or she has suffered by the fault of another.
He or she gets nothing for or by reason of the fact he or she was engaged in illegal
conduct. [Emphasis added.] ***

48. *** [A] claim will be barred when giving effect to the claim would undermine the policy that
creates the illegality. Justice McLachlin explained this refinement in the tort context (at p. 177):

There may be cases where the principle of ex turpi causa should be invoked to prevent
tort recovery which do not fall under the category of profit from illegality. Professor Weinrib,
supra, suggests that the defence of ex turpi causa may properly be invoked to prevent the
“stultification of the criminal law” or “evasion of the consequences of the criminal law”: at
pp. 52-53.
§18.3.1 • Illegality

49. Stultification is the term used to describe events that defeat or frustrate the underlying policy behind the illegality. A remedial order arising from an illegal act may frustrate the policy underlying the illegality to such an extent that to make the order would be seen as creating an inconsistency. In those circumstances, it may be appropriate to refuse the remedial order in order to preserve the integrity of the legal system, whether or not giving effect to the claim would enable the plaintiff to profit from the illegality. ***

18.3.1 Norberg v. Wynrib [1992] CanLII 65 (SCC)

CROSS-REFERENCE: §6.3.2.3, §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. ***

18.3.2 Rankin’s Garage & Sales v. J.J. [2018] SCC 19

**CROSS-REFERENCE: §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 ([§18.3](#)), 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. ***

### 18.3.3 Blaming the victim

K. Roach, “Blaming the Victim: Canadian Law, Causation, and Residential Schools” (2014) 64 *U Toronto LJ* 566, 579, 582-583

**CROSS-REFERENCE: §16.1.1, §17.3.2, §19.7.1**

The leading residential school case on the treatment of time spent in prison when assessing damages is *HL v. Canada*. It involved a plaintiff from the Gordon First Nation who established that as a fourteen-year-old he was sexually assaulted by William Starr, a repeat offender, while involved in a boxing club at the Gordon residential school in Saskatchewan. HL testified that after this time, ‘he felt ‘ashamed’ and ‘dirty,’ and was afraid to tell anyone what had happened, because he thought no one would believe him. He ‘tried to find a way to get out of going to school because [he] didn’t want to be around anybody.”

[410] He left school before graduating grade 8. He started drinking alcohol soon after the assaults and developed an addiction that adversely affected him throughout his life. ***

HL appealed to the Supreme Court and enjoyed success on the loss of future earnings issues, but not on the issues of deducting jail time from the damages for loss of past earnings. ***

Rather than engaging directly in the narrative of HL’s life which had convinced the trial judge that HL’s time in prison was connected to his alcohol addiction which was connected to his sexual abuse by Starr, Justice Fish focused on the expert evidence presented in the case and concluded that it ‘did not disclose a more general link between sexual abuse and criminality. Nor did the materials before the trial judge entitle him to conclude that those suffering from alcoholism were more inclined to commit crimes.’

[411] The Court relied on the logic of corrective justice to rebut what to the trial judge had seemed like the common-sense proposition that HL’s alcoholism had contributed to his crime, including convictions for driving while impaired. Justice Fish concluded, the chain of causation linking H.L.’s sexual abuse to his loss of income while incarcerated was interrupted by his intervening criminal conduct. During these periods, his lack of gainful employment was caused by his imprisonment, not by his alcoholism; and his imprisonment resulted from his criminal conduct, not from his abuse by Mr Starr nor from

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[411] *ibid* at para 141.
The Court’s approach attributed HL’s imprisonment to a single cause; namely, his ‘criminal conduct.’ It denied common sense linkages between his alcoholism and his criminal behaviour that were accepted by the trial judge. It minimized the trial judge’s finding that HL had become addicted to alcohol as a response to having been sexually abused by Starr. HL stopped being a victim of sexual abuse the moment he committed a crime and was imprisoned. The Court’s abstract and moralistic approach denied the possibility that one could be a victim and an offender at the same time.

The Court’s approach in HL also ignored its previous scepticism about applying the illegality defence in cases where plaintiffs were seeking compensatory damages. A decade earlier, the Court had warned that the illegality defence should be applied cautiously to defeat a plaintiff’s legitimate claims to compensation. A continuation of this approach should have resulted in HL’s being able to recover his lost earnings for the time he was imprisoned. It is important to recall that HL was not asking to be compensated for harms suffered while he was engaged in crime. He was only asking for compensation for the sexual abuse he had suffered as a child. Moreover, the trial judge had concluded that this sexual abuse caused HL to develop an alcohol addiction and the addiction, in turn, caused his crimes. HL was not seeking to profit from his criminal activity. He had already served his sentences for his crimes. It is difficult to escape the conclusion that the Supreme Court punished him again for the crimes by denying him compensation that was due under corrective justice principles.

18.3.5 Further material


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412 Ibid at para 142.  
413 Hall v. Hebert, [1993] 2 SCR 159. McLachlin J for the plurality held that the illegality defence should be applied with caution but could be justified in cases unlike HL where a plaintiff sought damages for being unable to engage in crime. Cory J argued more generally that the provision of compensation in tort law does not undermine the criminal law.  
414 For a critique of similar applications of the illegality defence from the perspective of corrective justice, see Ernest Weinrib, ‘Illegality as a Tort Defence’ (1976) 26 UTLJ 28.
19 DIFFICULT CATEGORIES OF NEGLIGENCE

LORD MACMILLAN, §13.1.1, [80]: The categories of negligence are never closed.

MCLACHLIN C.J.C., §19.5.2.1, [21]: 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.) §13.1.1 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.) §19.2.2, 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 Negligent infliction of mental injury

19.1.1 Floodgates concerns

19.1.1.1 Victorian Railways 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 2s., 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. ***

19.1.1.2 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. ***

19.1.2 Proximate mental injury

19.1.2.1 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.415 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 (§17.1.3), 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

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415 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. Feldhusen, 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”.

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illness. It follows that I would allow the appeal and restore the trial judge’s award. ***

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. ***

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. ***

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’Brien (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. ***

19. This Court has not, however, *** 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. ***
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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. ***

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. ***

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, 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 (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. ***

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. ***

41. I would allow the appeal, with costs in this Court and in the courts below. ***

19.1.3 Witnessing accidents

19.1.3.1 Marcena v. Thomson [2019] BCSC 1287

CROSS-REFERENCE: §18.2.5

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 [§19.1.2.1].

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. Heislet, 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. ***

19.1.4 Rescuing victims

CROSS-REFERENCE: §13.3

19.1.4.1 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.
§19.1.4 • Negligent infliction of mental injury

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. ***


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 *Hambrock 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.

19.1.5 Learning of traumatic events

19.1.5.1 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*\(^\text{416}\) 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.\(^\text{417}\) 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*.\(^\text{418}\)

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 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\(^\text{419}\) and I\(^\text{420}\) 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.\(^\text{421}\) The balance of their opinion was that it could be of significance on the issue of foreseeability. No clear consensus emerged

\(^{416}\) (2002) 191 ALR 449; 76 ALJR 1348 at ALR 456 [71]–[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.

\(^{417}\) [1932] AC 562 at 580.

\(^{418}\) (2002) 191 ALR 449 at 541–2 [366]; 76 ALJR 1348 at 1415.

\(^{419}\) (2002) 191 ALR 449 at 466 [71], 475–8 [109]–[119]; 76 ALJR 1348 at 1360–1, 1367–9.

\(^{420}\) (2002) 191 ALR 449 at 541 [366]; 76 ALJR 1348 at 1415.

\(^{421}\) (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.
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 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”. 423 *** 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. ***

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

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422 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.

423 cf Chester v. Waverley Corporation (1939) 62 CLR 1 at 10 per Latham CJ.
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”.[424] ***

92. The respondent owed the appellants a duty of care to take reasonable care to avoid causing

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[424] [1932] AC 562 at 580.
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 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. 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. ***

19.1.6 Cross-references


19.1.7 Further material

- B.B. Chatterjee, “Rethinking Alcock in the New Media Age” (2016) 7 J European Tort L 272.
- “Hillsborough” (VeryMuchSo Productions, 2016) 3.

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425 Kondis v. State Transport Authority (1984) 154 CLR 672 at 687–8; 55 ALR 225 at 235–6 per Mason J.
19.2 Negligent misrepresentation

19.2.1 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. ***

5. 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. ***
§19.2.2 • Negligent misrepresentation

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.

19.2.2 Hedley Byrne v. Heller [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, 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 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 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. *** [It 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. *** [In 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 on 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. ***

19.2.3 Deloitte & Touche v. Livent Inc. [2017] SCC 63

Supreme Court of Canada – 2017 SCC 63

GASCON AND BROWN JJ. (KARAKATSANIS AND ROWE JJ. concurring):

1. This appeal provides the Court with an opportunity to affirm the analytical framework by which liability may be imposed in cases of negligent misrepresentation or performance of a service by an auditor. ***

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, 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, 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). 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. ***

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 ***

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

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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
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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 [§17.1.3]; Saadati, at para. 13 [§19.1.2.1]). 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 [§17.1.2]). 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 decid[e] 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:
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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 [§16.2.2]) and in law (Mustapha, at paras. 12-13 [§17.1.3]). 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 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” (R.F., at para. 94). ***

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.

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(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 ***.

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. ***

MCLACHLIN C.J.C. (dissenting in part with WAGNER AND CÔTÉ JJ.): ***

118. I agree with the courts below that Deloitte owed a duty of care to Livent, which it breached when it failed to discover and expose Livent’s fraud in the audited statements it prepared. However, I do not agree that Deloitte is liable for virtually all the loss that befell Livent as it pursued its precipitous decline into insolvency through doomed investments. ***
176. *** [T]he 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. ***

19.2.4 Cross-references

- R v. Imperial Tobacco Canada Ltd [2011] SCC 42, [32]-[60]: §19.5.2.1.

19.2.5 Further material


19.3 Pure economic loss


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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. ***
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12. This case gives this Court the opportunity once again to address the question of recoverability in tort for economic loss. In Canadian National Railway v. Norsk Pacific Steamship Co., [1992] 1 S.C.R. 1021, 1049, I made reference to an article by Professor Feldthusen in which he outlined five different categories of cases where the question of recoverability in tort for economic loss has arisen (“Economic Loss in the Supreme Court of Canada: Yesterday and Tomorrow” (1990-91), 17 Can. Bus. L.J. 356, at pp. 357-58), namely:

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.

I stressed in Norsk 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 fourth category, although subject to an important caveat. The negligently supplied structure in this case was not merely shoddy; it was dangerous. ***

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.) [§19.2.2]. 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; second, to the extent that the *D. & F. Estates* decision formed part of a line of English cases leading ultimately to the rejection of *Anns v. Merton London Borough Council*, [1977] 2 All E.R. 492, it is inconsistent with this Court’s continued application of the principles established in *Anns*. ***

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. ***

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. ***
§19.3.2 • Pure economic loss

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’ thick Tyndal stone, and dropped nine storeys. Had this cladding landed on a person or on another 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. ***

19.3.2 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):
§19.3.2 • Pure economic loss

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 franchisees 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 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. ***

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 [§19.2.3]; see also *Childs*, at para. 15 [§13.4.2.1]; *Mustapha*, at para. 5) [§17.1.3]. ***

**The Appellant’s Claims ***

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(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 [*16.2.2*] ***).

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).*426* 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* is 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 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 (*M. Hasegawa & Co. v. Pepsi Bottling Group (Canada) Co.*, 2002 BCCA 324, 169 B.C.A.C. 261 (B.C. C.A.), at paras. 57-61). 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,

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*426* 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).
“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). ***

(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. ***

(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. ***

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
§19.3.2 • Pure economic loss

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 *** 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 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 franchise, 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. ***

19.3.3 Subway v. CBC & Trent University [2021] ONCA 25

Ontario Court of Appeal – 2021 ONCA 25, leave denied: 2021 CanLII 61401 (SCC)
ZARNETT J.A. (D. BROWN AND THORBURN JJ.A. concurring): ***

2. On February 24, 2017, the Canadian Broadcasting Corporation (“CBC”) aired an episode of its television show, “Marketplace”. It featured an investigative report comparing the contents of chicken sandwiches sold by five fast food chains in Canada. The chicken sandwiches sold by the respondents (“Subway”) were reported to be made of “only slightly more than 50% chicken”, substantially below the chicken content of sandwiches sold by the other chains.

3. Prior to the Marketplace broadcast, CBC contracted with a laboratory of the appellant, Trent University (“Trent”), to test the chicken content of the sandwiches. The results of that testing were, in part, the basis for the statements made on the broadcast. Trent personnel also participated in the broadcast.

4. Subway, alleging that the statements on the broadcast were false and that the testing by Trent was inaccurate and carelessly done, launched an action against CBC and Trent. The action against CBC is exclusively for defamation. As against Trent, the lawsuit asserts two causes of action—defamation and negligence. ***

The Duty of Care Issue ***

70. Subway contends that Trent, as a laboratory, owed it a duty of care in testing Subway’s products, even though Subway did not engage Trent to do the testing, and even though CBC and consumers, rather than Subway, relied on the results. Subway submits that there is a prima facie duty of care since the harm that occurred was a reasonably foreseeable consequence of Trent’s conduct, and a sufficient relationship of proximity existed between Subway and Trent, either by analogy to previously recognized proximate relationships, or as a novel proximate relationship by virtue of a full proximity analysis. Subway also argues that there is no policy reason to negate the prima facie duty. ***

73. Subway’s negligence claim is one for pure economic loss, that is, “economic loss that is unconnected to a physical or mental injury to the plaintiff’s person, or to physical damage to property”: 1688782 Ontario Inc. v. Maple Leaf Foods Inc., 2020 SCC 35, 450 D.L.R. (4th) 181 (S.C.C.), at para. 17. ***

(a) Subway’s Analogous Relationship Argument ***

106. Subway points to cases that have recognized that a medical laboratory owes a duty of care to an individual where it has performed medical tests on the individual at the request of the individual, their doctor, or another entity: see Cleveland v. Hamilton Health Sciences Corp., 2009 CanLII 70130, aff’d 2011 ONCA 244 (Ont. C.A.); Green v. The Hospital for Sick Children, 2017 ONSC 6545 (Ont. S.C.J.), aff’d 2018 ONSC 7058 (Ont. Div. Ct.); Bertin v. Kristofferson, 2000 CanLII 1109, rev’d 2001 NBCA 118 (N.B. C.A.); and Neufville v. Sobers, 1983 CarswellOnt 2621 (Ont. H.C.).

107. The bases on which a proximate relationship was found in these cases does not support the requisite analogy to the relationship at issue in this case. Significantly, none of these cases involved a claim for pure economic loss. In Cleveland, the claim for damages related to delayed diagnosis of a congenital order, which deprived the plaintiff of the opportunity to receive proper treatment: at para. 5. In Green, it related to, among other things, pain and suffering and loss of custody of the plaintiff’s child: at para. 111. In Bertin and Neufville, both of which pre-date the
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Supreme Court’s decision in Cooper v. Hobart, 2001 SCC 79, [2001] 3 S.C.R. 537 (S.C.C.) [§13.4.1.2], the claims were related to, respectively, pain and disfigurement, and death: Bertin, at para. 26; Neufville, at para. 1.

108. Distinguishing these cases based on the nature of the loss at issue is necessary, given the different framework for assessing proximity in claims of pure economic loss: “such claims warrant more rigorous examination than in other claims for negligence”: Lavender v. Miller Bernstein LLP, 2018 ONCA 729, 142 O.R. (3d) 401 (Ont. C.A.), at para. 72. ***

121. A further difficulty facing Subway’s attempt to analogize a relationship of proximity from prior cases is that it fails to account for an arguably more direct analogy that goes in the other direction. In Shtail v. Toronto Life Publishing Co., 2013 ONCA 405, 366 D.L.R. (4th) 82 (Ont. C.A.), this court rejected the notion that reporters investigating a story for publication were in a relationship of proximity with the subject of the story solely by reason of conducting the investigation. ***

123. In my view Subway’s claim in negligence does not have a real prospect of success of establishing a relationship of proximity analogous to any established category of proximity.

(b) Subway’s Novel Duty of Care Argument

124. Subway submits that even if a relationship of proximity cannot be established by analogy to a previously recognized one, a novel proximate relationship should be recognized based on a full proximity analysis. I am unable to accept that Subway has a real prospect of success on this contention.

125. Subway’s argument for proximity must establish a relationship that would take its case beyond an assertion that it was simply entitled to be protected from pure economic loss caused by negligence.

126. I reiterate what Subway points to in support of the argument that a full proximity analysis reveals a relationship of proximity. Trent was not doing academic research, but was hired by CBC to do testing and expected payment from CBC for it. Trent purchased Subway chicken sandwiches it tested from a Subway restaurant. Trent knew whose products it was testing. It knew CBC would report the results of Trent’s tests. Trent was provided with Subway’s response to the test results through CBC, and told CBC that Subway’s response—that disagreed with the results of Trent’s tests about the content of its product—was unreasonable. Trent placed no restrictions on how its test results could be used, and Trent representatives appeared on the Marketplace broadcast to discuss the test results.

127. In my view, these circumstances speak to the foreseeability of harm that would arise if Trent did its work, or reported on it, carelessly. But that is not the proximity question. Proximity is a “distinct and more demanding hurdle than reasonable foreseeability”: Maple Leaf, at para. 62. A novel duty of care cannot be established based on the foreseeability of harm alone.

128. The constellation of factors to which Subway points are primarily about foreseeability of harm, not proximity. They do not show a close and direct relationship. They do not show any expectations, representations, reliance, or statutory obligations as between Trent and Subway. They do not show anything that fulfils the purpose served by the requirement for an undertaking and reliance in a negligent misrepresentation or performance of services case, that is, something that shows a legally cognizable right of the plaintiff is affected. Nor do they show interests affected
akin to rights in person or property. Subway’s negligence claim is only about the pure economic harm it suffered.

129. The application of the principles relating to proximity in a claim for pure economic loss prevent the recognition of a novel proximate relationship in this case. ***

Conclusion on Duty of Care

130. In light of my conclusions, I need not address Trent’s argument that any prima facie duty of care that arose from the relationship of proximity and the reasonable foreseeability of loss is negated by residual policy concerns about the effect of recognizing the duty on other legal obligations, the legal system, or society generally: Livent, at para. 38.

131. The question of whether a duty of care is owed is a question of law, as are the components of the duty of care analysis, including the question of proximity: Maple Leaf, at para. 24. Subway’s negligence claim lacks a real prospect of success. It is not legally tenable. ***

19.3.4 Cross-references

- Deloitte & Touche v. Livent Inc. [2017] SCC 63, [23]-[45]: §19.2.3.
- R v. Imperial Tobacco Canada Ltd [2011] SCC 42, [42], [100]: §19.5.2.1.

19.3.5 Further material


19.4 Professionals

19.4.1 Lawyers and accountants

19.4.1.1 Gartside v. Sheffield [1983] NZCA 37

CROSS-REFERENCE: §14.1.3.1, §17.5.1

MCMULLIN J.: ***

66. A convenient starting point to the inquiry as to whether a solicitor owes a duty of care to a disappointed beneficiary (using that expression for a person who would, but for a solicitor’s negligence, have benefited under a will) is to be found in the well-known passage from the judgment of Lord Wilberforce in Anns v. Merton London Borough Council [1978] AC 728, 751 where he posed the two stage test. In the first stage 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 …”. ***

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67. *** 10 days before the death of the deceased the solicitor was instructed that he was to prepare a new will for the deceased, an aged and infirm lady, and seven days before her death he received her instructions to prepare a will in which the appellant was to be the residuary beneficiary of her estate. In those circumstances it was foreseeable that any negligence arising from his failure to prepare a will in favour of the appellant would be likely to cause loss to him. The identity of the appellant as a person who stood to benefit by the preparation and execution of the new will was known to the solicitor as was the fact that the appellant would lose if the will were not prepared and executed before her death. ***

71. I come then to the second of the Anns tests. This is the nub of the case. ***

75. A second matter put to Thorp J as a policy factor militating against acceptance of a duty of care in this kind of situation was that it would raise problems of confidentiality between solicitor and client involving not merely the instructions given originally by the testator to the solicitor but also possible subsequent instructions amending those given earlier. It was said that if an action of the present kind were allowed to be brought a solicitor might be called upon to breach the privilege imposed upon him by his client’s communications and that since the client had died any solicitor sued in circumstances such as the present would, the privilege not being his to waive, be unable to do justice to his own case.

76. *** [E]ven although the privilege is that of the client and not of the solicitor, in the Ross v. Caunters [1980] Ch 297 type of case, where the will has been executed, no question of privilege will be likely to arise as the will can speak for itself; and in a situation where the will has not been drafted before death, or having been drafted has not been executed, the privilege which was that of the deceased client will become that of the personal representatives of the estate: Biggs v. Head (1837) Sau & Sc 335. It seems unreasonable to deny this class of action by the supposition that a deceased’s personal representatives will not waive privilege in order to make available to all the interested parties, and the Court, information of a material kind. Moreover, privilege arises as a matter of public policy from the balancing of various matters and in the event that personal representatives were to adopt other than a neutral position by declining to waive privilege the Court would hesitate to uphold it. It is better that information of mutual and material interest should be revealed. ***

82. For these reasons I would allow the appeal and permit the claim to be brought. *** I would also limit my judgment to those cases of the Ross v. Caunters type where a beneficiary has been actually named in the will and to those where, as here, the beneficiary has been specifically identified in the instructions.

19.4.1.2 Salomon v. Matte-Thompson [2019] SCC 14

CROSS-REFERENCE: §16.1.6, §17.1.5, §17.2.5

GASCON J. (WAGNER C.J.C., ABELLA, MOLDAVER, KARAKATSANIS, BROWN, ROWE, MARTIN JJ. concurring): ***

2. By 2003, the first appellant, Kenneth F. Salomon, had been the lawyer of the respondents *** 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 loyalty[d] 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. ***

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. ***

19.4.1.3 Manchester Building Society v. Grant Thornton [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 [§19.4.2.1], 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.
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(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) [§19.2.3]:

"[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 foreseeable 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. ***

19.4.1.4 Cross-references

- Deloitte & Touche v. Livent Inc. [2017] SCC 63, [86]-[95]: §19.2.3.

19.4.1.5 Further material

19.4.2 • Professionals

Khan v. Meadows [2021] UKSC 21” (Jul 6, 2021)


19.4.2 Doctors

19.4.2.1 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.

19.4.2.2 White v. Turner [1981] CanLII 2874 (ON SC)

CROSS-REFERENCE: §14.1.3.5, §14.2.5.4, §16.1.4, §18.1.1.2

LINDEN J.: ***

60. The two expert plastic surgeons who testified agreed on several of the matters about which a patient had a right to know before consenting to breast reduction surgery. They both took care to point out that, contrary to popular misconception, plastic surgery was not scarless surgery. Plastic surgeons do emphasize the appearance of incisions more than general surgeons and have developed new techniques to keep scarring to a minimum. But they explained that there were still scars produced by all surgery, including that done by plastic surgeons. ***

66. Dr. Birch testified that 80 per cent of patients having Strombeck operations had some residual problem stigmatizing the breast as “deformed”. In one West German study of 100 patients, 51 of the patients had unacceptably broad scars, 18 had inverted nipples and 27 had loss of sensitivity. He said that 90 per cent of Strombeck patients had visible scars and that any scar was a “deformity”. The breast area, it was agreed, is an area of the body on which scars are difficult to conceal, so that scars are usually visible on the breast. Dr. Birch said that the broad scars are a complication that is not unusual, because of tension on the skin. The need for additional revision surgery, however, is not common. ***

67. In my view, Mrs. White had a right to know more than she was told by Dr. Turner about the potential complications of the mammoplasty. I find that Dr. Turner did, as he says he did, tell Mrs. White about the risks of fat necrosis, infection and hematoma. I find also that he indicated to her, in a general way, that there would be some scarring where the incisions would be made. However, he told her nothing about the possibility that the shape of the breasts after surgery might not be perfect, as was suggested by Dr. Robertson. In other words, no mention was made of the possible box-like appearance of the breasts, which frequently follows the Strombeck procedure. Nor did
he say anything about the possibility that her nipples might be asymmetrical, as was mentioned by Dr. Birch. More importantly, no information was given to Mrs. White that the width of the scars on her breasts might stretch to as much as 2 to 3 inches.

68. I must conclude that all of these possible risks were material risks and should have been disclosed to Mrs. White. They were all known to Dr. Turner, or should have been known to him, both from the literature and from his having done 15 to 20 operations like this annually. Dr. Turner himself admitted, upon cross-examination, that he should tell his patients that their relief from their perceived disability might be at the expense of a deformity.

69. Where an operation is elective, as this one was, even minimal risks must be disclosed to patients, since “the frequency of the risk becomes much less material when the operation is unnecessary for his medical welfare”. (See Grange J. in Videto v. Kennedy (1980), 27 O.R. (2d) 747 at 758, 107 D.L.R. (3d) 612 (H.C.)). A fortiori, in a case where the predominant aim is a cosmetic one, possible risks affecting the appearance of the breasts such as undue scarring, the box-like appearance and the poor position of the nipples, must be classified as material.

70. I have found that this procedure was done primarily for cosmetic purposes but with some functional benefits. Mrs. White was a healthy and intelligent person. Consequently, there was no reason to withhold any of this information from Mrs. White. For her to make a considered choice she, as a reasonable patient, was entitled to have information about the appearance of her breasts following the surgery. Because of the well-known public misconception that plastic surgery is scarless surgery, this was especially necessary. ***

72. I find also that, as a reasonable patient, Mrs. White should have been told about the possibility that her scars might open up and that there might be a need for corrective surgery to repair a bad result. These two risks, I find, may not be “material”, because they are so rare, but they must be classified as “special or unusual risks”, as this term is used in Reibl v. Hughes, supra. I would also classify in a similar way the risk of having a “z” scar below the bra line after such surgery. These matters would not normally be contemplated at all by a patient, since they are so out of the ordinary. Plastic surgeons, however, are aware of such complications. They do occur periodically and they are not insignificant. A reasonable patient would want to know about them. Hence, they are special or unusual risks that should be disclosed before proceeding with an operation such as this.

73. Consequently, I find, as an alternative ground of liability, that the defendant was negligent in failing to disclose, in contravention of the principles of Reibl v. Hughes. ***

19.4.2.3 Kohli v. Manchanda [2008] INSC 42

CROSS-REFERENCE: §2.2.2, §6.8.3.1, §18.1.1.1

RAVEENDRAN J.: ***

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
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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. They are passive, ignorant and uninvolved in treatment procedures. The poor and needy face a hostile medical environment—inadequacy in the number of hospitals and beds, non-availability of adequate treatment facilities, utter lack of qualitative treatment, corruption, callousness and apathy. Many poor patients with serious ailments (eg. heart patients and cancer patients) have to wait for months for their turn even for diagnosis, and due to limited treatment facilities, many die even before their turn comes for treatment. What choice do these poor patients have? Any treatment of whatever degree, is a boon or a favour, for them. The stark reality is that for a vast majority in the country, the concepts of informed consent or any form of consent, and choice in treatment, have no meaning or relevance. 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. The public feel that many doctors who have spent a crore or more for becoming a specialist, or nursing homes which have invested several crores on diagnostic and infrastructure facilities, would necessarily operate with a purely commercial and not service motive; that such doctors and hospitals would advise extensive costly treatment procedures and surgeries, where conservative or simple treatment may meet the need; and that what used to be a noble service oriented profession is slowly but steadily converting into a purely business.

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. Of course, some doctors, both in private practice or in government service, look at patients not as persons who should be relieved from pain and suffering by prompt and proper treatment at an affordable cost, but as potential income-providers/customers who can be exploited by prolonged or radical diagnostic and treatment procedures. It is this minority who bring a bad name to the entire profession. ***

19.4.2.4 Cross-references

19.4.2.5 Further material


19.5 Public authorities

19.5.1 Emergency services

19.5.1.1 Jane Doe v. Toronto Police Commissioners [1990] CanLII 6611 (ON CJ 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.


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
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(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 CanLII 5300, 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 [§17.2.2], 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
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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?**


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, supra. 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 implicitly 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

40. For all of these reasons, the claim in tort against all defendants must be allowed to proceed.

***

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
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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 owed Mrs Robinson such a duty, they had not acted in breach of it: [2014] EWCA Civ 15. ***

(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 [§17.2.2] ***. 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]). ***

35. *** [T]here 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
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*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* [*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 Dhurma, 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 Dhumera’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.


**Privy Council (on appeal from British Virgin Islands) – [2004] UKPC 12**

**CROSS-REFERENCE: §23.1.6**

LORD NICHOLLS OF BIRKENHEAD:

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. ***

**Police force negligence: duty of care**

18. The next and more 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
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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. ***

19.5.1.4 Cross-references


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.:

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. ***

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 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* [§19.2.2]. 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.), 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.). ***

### 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. ***

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. ***

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. *** 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.) [§17.2.2]. 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. ***

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. ***

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. ***

19.5.2.2 Nelson (City) v. Marchi [2021] SCC 41

CROSS-REFERENCE: §14.1.2.3, §17.1.4

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—
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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. 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. ***

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*, 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
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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, for example, the City of Abbotsford intervened to propose that only 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.) [§17.2.2], 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 ***.

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 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, 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] undertaking” (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
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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—to 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. *** 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. ***

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.
§19.5.2 • Public authorities

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. *** The trial judge’s conclusion that all of the City’s unwritten snow removal practices were “unwritten policies” improperly coloured his conclusion that all of the City’s snow removal practices were core policy.

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 [§18.2.3], 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). 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. ***

19.5.2.3 Francis v. Ontario [2021] ONCA 197

Ontario Court of Appeal – 2021 ONCA 197

CROSS-REFERENCE: §19.6.3, §23.2.2.2, §24.1.2.2

DOHERTY AND NORDHEIMER J.J.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, 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. We 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. The 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.

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 operational matters—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. ***

19.5.2.4 Jaipur Golden Gas Victims Association v. Union of India [2009]
INDLHC 4354

CROSS-REFERENCE: §16.2.3, §17.3.1, §22.1.5, §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 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.

19.5.2.5 Local Government Act, RSBC 2015, c 1

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 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
§19.5.3 • Public authorities

(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.

19.5.2.6 Cross-references


19.5.3 Further material

§19.6.1 • Class actions


19.6 Class actions

**Class action:** 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. *[OAG Glossary of Terms]*.

19.6.1 Class Proceedings Act, RSBC 1996

*Class Proceedings Act, RSBC 1996, c 50, ss 2(1), 4(1)*

2. Plaintiff’s class proceeding

(1) A resident of British Columbia who is a member of a class of persons may commence a proceeding in the court on behalf of the members of that class. ***

4. Class certification

(1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

   (a) the pleadings disclose a cause of action;

   (b) there is an identifiable class of 2 or more persons;

   (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;

   (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

   (e) there is a representative plaintiff who

      (i) would fairly and adequately represent the interests of the class,

      (ii) has produced 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 of the proceeding, and

      (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members. ***
§19.6.2 • Class actions

19.6.1.1 Other provincial class actions statutes

- Alberta: Class Proceedings Act, SA 2003, c C-16.5, ss 2(1), 5(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).
- 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).

19.6.2 Organigram Holdings Inc. v. Downton [2020] NSCA 38

* Nova Scotia Court of Appeal – 2020 NSCA 38, leave denied: 2020 CanLII 84092 (SCC) *

BRYSON J.A.:

1. Dawn Rae Downton successfully applied to certify an action against Organigram as a class proceeding arising out of her consumption of medical cannabis containing unauthorized pesticides she purchased from Organigram. Ms. Downton experienced symptoms of nausea and vomiting after first consuming Organigram’s cannabis, which only stopped after she discontinued that use.

2. Ms. Downton’s action comprises two general categories of claim, characterized by Organigram as “consumer claims” and “adverse health consequences claims”. ***

18. The Class Proceedings Act is procedural, not substantive. Pleadings survive judicial review unless it is “plain and obvious” the cause of action will fail. Assuming the pleaded facts to be true, do they disclose a cause of action? This is a question of law ***.

19. Pleadings must be read generously to allow for any inadequacies arising from drafting frailties and lack of access to documents or discovery. The pleaded facts must support the underlying cause of action. ***


22. Organigram challenges the pleadings regarding negligent design, development and testing; the Competition Act; and unjust enrichment. ***

51. Organigram argues that general causation is essential to Ms. Downton’s claims resulting in an adverse health effect. Organigram says no methodology for determining general causation has been or could be proposed, and so all claims for adverse health effects cannot be certified. ***

54. Organigram says that Ms. Downton has failed to demonstrate that there is a workable
methodology for determining whether the impugned substances can cause harm, what that harm might be, or how it could be assessed on a class-wide basis. Relying on *Charlton v. Abbott Laboratories Ltd.*, 2015 BCCA 26 (B.C. C.A.), Organigram reminds us that:

[67] ... “There can be no finding of negligence applicable to the class if there is no prior finding that [the impugned substances] can cause a health risk on a class wide basis”. ***

57. In order to establish general causation:

(a) The symptoms described cannot be so vague and generic that they lack a plausible common cause;

(b) The methodology proposed must relate to the symptoms pleaded and in evidence.

Vague symptoms ***

58. Ms. Downton’s pleading complains that Organigram’s cannabis is unsafe and harmful to her health and the health of class members. In her affidavit, Ms. Downton described experiencing nausea and vomiting which she attributed to her use of Organigram’s cannabis. ***

67. Ms. Downton is unable to say that exposure to the impugned substances can be linked to any specific illness. The best she can do is allege that it may cause the transient symptoms she describes. ***

70. The judge erred in principle in certifying a claim with a generic heading of damage of “adverse health consequences”, not susceptible to a common causation determination. The wide array of common, generic and transient symptoms described by Ms. Downton are not capable of a common cause determination.

Methodology ***

118. Having no workable methodology for establishing general causation compromises the claims for personal injuries. ***

119. Standard of care requires the consideration of reasonable foreseeability of harm or injury to the defendant. Because we don’t know whether the trace exposure in this case could harm the class plaintiffs, we cannot say that Organigram failed to reasonably foresee any harm. ***

121. Accordingly, the common issues of standard of care and breach of that standard dealing with negligent design, development and testing, negligent manufacturing, negligent distribution, marketing and sale all fail as common causes.

**Did the judge err in finding that a class action is the preferable procedure?***

126. Simply because there may be a number of individual claims requiring resolution following determination of a common issue, does not mean that a class action is not the preferable procedure. ***

135. The judge’s preferability finding assumed that general causation, standard of care, and
breach could all be established as common issues. Since she erred in her consideration of the evidence when making her common issue findings, her conclusion on preferability is similarly impaired. ***

19.6.3 Francis v. Ontario [2021] ONCA 197

**CROSS-REFERENCE: §**19.5.2.3, §23.2.2.2, §24.1.2.2

**DOHERTY AND NORDHEIMER JJ.A. (H. YOUNG J.A. concurring): ***

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. *** [In 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. ***

19.6.4 Cross-references


19.6.5 Further material

§19.7.1 Residential schools

19.7 Residential schools

19.7.1 Blaming the victim

K. Roach, “Blaming the Victim: Canadian Law, Causation, and Residential Schools” (2014) 64 U Toronto LJ 566, 566-570

CROSS-REFERENCE: §16.1.1, §17.3.2, §18.3.3

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. ***

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.

The Royal Commission on Aboriginal Peoples in 1996⁴²⁷ and the Law Commission of Canada in 2000⁴²⁸ recommended public inquiries, truth commissions, and redress programs as better alternatives to civil litigation, but the government refused to act. Instead, tens of thousands of lawsuits were brought on behalf of residential school survivors. ***

The civil claims were aggressively defended by the federal government and the churches. They used adversarial tactics that often re-victimized the survivors. Statute of limitations defences

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⁴²⁷ RCAP recommended compensating Aboriginal communities so that they could ‘design and administer programs that help the healing process and rebuild their community life’ and ‘funding for the treatment of affected individuals and families’ as opposed to the compensating individuals; Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Backward, vol I (Ottawa: Supply and Services, 1996) at 385.

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precluded most of the survivors’ claims for loss of Aboriginal language, culture, and familial attachment and generally only allowed claims based on sexual abuse.429 The Supreme Court of Canada has recently noted that a strict application of statutes of limitations may stand in the way of reconciliation and shield dishonourable conduct.430 With the important exception of allowing claims based on sexual abuse to proceed,431 however, the courts enforced limitation periods in the residential school litigation. The Supreme Court itself stressed in 2005 that it would be wrong to allow the survivors to collect any damages for statute-barred harms.432 This meant that the litigation often narrowly and artificially focused on the harms of sexual abuse as opposed to the many other harms caused to the children, including disparagement of family, culture, and language.

The civil claims eventually resulted in the largest national class action and settlement in Canadian history, approved by courts throughout the country. *** [T]he settlement was undoubtedly an improvement on adversarial litigation. Nevertheless, it also reflected the litigation. The modest nature of the common experience payments provided to all former students reflected the unwillingness of Canadian courts to recognize claims relating to treaty violations and to loss of language, culture, and family attachment. The federal government today presents the over $1.6 billion paid to survivors under the Common Experience Payment (CEP) and the over $2.275 billion paid under the Individual Assessment Process (IAP) as an indication of its willingness to make amends for residential schools. These figures look impressive. They fuel sentiments in many quarters that Aboriginal people should get over residential schools.433 Nevertheless, they discount the fact that the CEP payment received by close to 79,000 survivors averaged out to under $20,000, based on a formula of $10,000 plus $3,000 for every year proven to have been spent in a residential school. Even the average IAP payment for sexual and serious physical abuse amounts to just under $115,000 per person, including legal costs.434

The individual assessment process established by the settlement attempted to avoid adversarial excess, but it also incorporated Canadian causation law with respect to the most serious consequential harms.435 *** It is not likely that causation analysis under Aboriginal law or under

430 Manitoba Metis Federation Inc v Canada (Attorney General), 2013 SCC 14 at paras 141-4, while also noting that it would not apply a more flexible approach to statutes of limitations if the Metis sought personal remedies, such as damages, as opposed to a simple declaration.
431 On the courts’ more generous approach with respect to sexual abuse, see Mayo Moran, ‘The Role of Reparative Justice in Responding to the Legacy of Indian Residential Schools’ (2014) 64:4 UTLJ [present issue]. Even in this context, courts were sometimes not generous. In one case, the Manitoba legislature amended its statute of limitation to allow sexual abuse claims after the Manitoba Court of Appeal affirmed that it would bar even sexual abuse claims, regardless of whether it was reasonable to expect the plaintiffs to bring the claim, and concluded that limitation periods ensured that ‘claims are judged within the general legal and social context of the time in which the allegedly tortious or inequitable conduct is supposed to have taken place’: MM v Roman Catholic Church of Canada et al, 2001 MBCA 148 at para 63. The Ontario Court of Appeal also applied a short, two-year limitation period to preclude claims brought on behalf of estates: Bonaparte v Canada (2003) 64 OR (3d) 1.
432 Blackwater v Plint (2005) 3 SCR 3 [§19.7.3].
435 Indian Residential Schools Settlement Agreement (May 2006), Schedule D, Appendix IX, online: <http://www.residentialschoolssettlement.ca/settlement.html>, instructs adjudicators that ‘the amount awarded for actual income loss shall be determined using the legal analyses and amounts awarded in court decisions for like matters.’
law informed by Aboriginal perspectives would narrowly focus on the non-statute-barred harms of sexual abuse. The failure of Canadian law to appreciate the multi-generational and collective harms of residential schools underlines the need to provide greater room for Aboriginal justice. ***

19.7.2 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).

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.

This part of the settlement does not reflect the Assembly of First Nation’s rejection of the crumbling skull causation arguments that will be examined in this first part of this article as inherently discriminatory: Assembly of First Nations Report on Canada’s Dispute Resolution Plan to Compensate for Abuse in Indian Residential Schools (Ottawa: Assembly of First Nations, 2004) at 28, online: <http://epub.sub.uni-hamburg.de/epub/volltexte/2009/2889/pdf/Indian_Residential_Schools_Report.pdf>. 553
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 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. ***

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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. *** [At 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. ***

19.7.3 Blackwater v. Plint [2005] SCC 58

Supreme Court of Canada – 2005 SCC 58

CROSS-REFERENCE: §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 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).
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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*, 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. ***

19.7.4 Brown v. Canada [2017] ONSC 251

Ontario Superior Court – 2017 ONSC 251

CROSS-REFERENCE: §12.4.1

BELOBABA J.:

1. After eight years of protracted procedural litigation, 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” 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.” As a former Chief of the Chippewas Nawash put it: “[i]t was a tragedy. They just disappeared.”

7. The impact on the removed aboriginal children has been described as “horrendous, destructive, devastating and tragic.” 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. Some researchers argue

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436 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.).

437 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.

438 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 to this recent publication of the Osgoode Society to counsel because one of the chapters was directly on point.

439 Affidavit of former Chief Wilmer Nadjiwon (December 14, 2015) at para. 6.


441 Ibid., at para. 59. The loss of culture and identity is particularly devastating to an aboriginal person because Canada
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 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.  

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.”

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” that was driven by racial prejudice to “take the savage out of the Indian children.” 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?

has had a “particularly destructive relationship with it First Nations.” (Affidavit of psychiatrist Harvey Armstrong, May 28, 2009 at para. 10.)

Supra, note 4. Also see Brown v. Canada (Attorney General), 2013 ONSC 5637 at para. 12.


Brown v. Canada (Attorney General), 2013 ONSC 5637 (Ont. S.C.J.) at para. 11. Also see Chambers, supra, note 4, at 122 and 123.

Supra, note 5.

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.
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). 447

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

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447 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.”
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, 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

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448 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.
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.”

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”.

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

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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, 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. 

451 McCamus, The Law of Contracts (2nd ed.) at 315. And see Waddams, The Law of Contracts, (5th ed.) at 198 and
§19.7.4 • Residential schools

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”, the same should follow even more where there is not only a unique and pre-existing “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, 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, 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.”

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.” And there can be no doubt that the aboriginal peoples’


White v. Jones, ibid. at 276.

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, supra, note 30, at para. 77: “… an honourable interpretation of an obligation cannot be a legalistic one that divorces the words from their purpose.”

Cooper, supra, note 37, at para. 34.

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
§19.7.5 • Residential schools

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.” 456

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. 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. ***

19.7.5 Cross-references


“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.

§19.8.1 • Occupiers of premises

19.7.6 Further material

- Historica Canada Podcast, “Residential Schools” (Feb 21, 2020).

19.8 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....
§19.8.1 • Occupiers of 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. ***
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.
- Saskatchewan: The Trespass to Property Amendment Act, 2019, SS 2019, c 26, s 11.

19.8.3 Cross-references


19.8.4 Further material


19.9 Commercial and social hosts

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. ***

3. 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 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 invitator-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
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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 inquiries 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 invititor-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. ***


British Columbia Supreme Court – 2020 BCSC 881

HINKSON 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". ***

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. *** 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. ***
§19.9.2 • Commercial and social hosts

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].***

204. The first stage of the Anns/Cooper analysis 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.***

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. As I have discussed above the 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.

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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. ***

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. ***

19.9.3 Cross-references


19.9.4 Further material


19.10 Negligence concerning unborn children

19.10.1 Parent claim of wrongful conception

19.10.1.1 PP v. DD [2017] ONCA 180

CROSS-REFERENCE: §6.3.2.1
ROULEAU J.A.: ***

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, 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 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.) [§19.10.1.2]. 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

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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, 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 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. ***

**19.10.1.2 Rees v. Darlington Memorial Hospital [2003] UKHL 52**

*House of Lords – [2003] UKHL 52*

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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-
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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’Brien [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.

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 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.
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[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. ***

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.); Commissio 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 [§17.1.3]; 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].
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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. Dominigue (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”:
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• The primacy of maternal autonomy concerning choices made regarding preconception and pre-natal medical treatment: Winnipeg Child & Family Services at paras. 37-39.


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. ***

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 (collectively, the “Plaintiffs”) commenced this action in which they claim against Dr. Benzaquen (the “Respondent”) in negligence (the “Action”). 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 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

459 As minors, the Appellants’ claims are brought by their mother, in her role as their litigation guardian.
460 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.
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.


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 docto
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 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 *Bovington* 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 *Bovington* 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.

19.10.5 **Cross-references**


19.10.6 **Further material**


19.11 **Environmental pollution**

19.11.1 **Midwest Properties Ltd. v. Thordarson [2015] ONCA 819**

*Ontario Court of Appeal – 2015 ONCA 819, leave denied: 2016 CanLII 30455 (SCC)*

**CROSS-REFERENCE:** §21.1.8

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. ***

102. This situation is distinguishable from the facts in [Smith v. Inco Ltd., 2011 ONCA 628 [§21.1.6]] 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. ***

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 [§17.1.3].

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. ***

**19.11.2 Cross-references**


**19.11.3 Further material**

§19.12.1 • Climate change


19.12 Climate change

19.12.1 Smith v. Fonterra Co-operative Group Ltd [2021] NZCA 552


CROSS-REFERENCE: §21.2.3, §24.2.1

FRENCH J. (COOPER AND GODDARD JJ. concurring):

1. What should be the response of tort law to climate change? That starkly put is the key issue raised by this appeal.

2. Climate change is commonly described as the biggest challenge facing humanity in modern times. Its causes and its effects are now widely recognised, with scientists predicting that if greenhouse gas emissions keep increasing, the planet will eventually reach a point of no return.

3. The appellant Mr Smith is an elder of Ngāpuhi and Ngāti Kahu and the climate change spokesperson for the Iwi Chairs Forum. He contends that too little is being done in the political sphere and that the crisis calls for a bold response from the common law. To that end, he has issued proceedings in the High Court against seven New Zealand companies, the respondents. Each of them is either involved in an industry which releases greenhouse gases into the atmosphere or manufactures and supplies products which release greenhouse gases when they are burned.

4. Mr Smith alleges in the statement of claim that the release of greenhouse gases by the respondents is human activity that has contributed and will continue to contribute to dangerous anthropogenic interference with the climate system and to the adverse effects of climate change. These are particularised as increased temperatures, loss of biodiversity and biomass, loss of land, risks to food and water security, increasing extreme weather events, ocean acidification, geopolitical instability, population displacement, adverse health consequences, economic losses and an unacceptable risk of social and economic loss and mass loss of human life. It is also alleged that poor and minority communities will be disproportionately burdened by the adverse effects of climate change.

5. In a proposed amendment to the statement of claim, Mr Smith further alleges that each of the respondents knows or ought reasonably to know about the harmful impact of their continued emissions or their enabling of emissions on people in the same or similar position to him.

6. The statement of claim pleads three causes of action in tort: public nuisance, negligence and a proposed new tort described as breach of duty. The remedies sought in respect of each cause of action are declarations that each of the respondents has unlawfully caused or contributed to
the effects of climate change or breached duties said to be owed to Mr Smith. Mr Smith also seeks
injunctions requiring each respondent to produce or cause zero net emissions from their
respective activities by 2030. ***

10. The strike out application was heard by Wylie J. The Judge struck out the claims in nuisance
and negligence but declined to strike out the claim based on a proposed new tort.\textsuperscript{461}

11. Mr Smith now appeals that decision in relation to the nuisance and negligence causes of
action. The respondents cross-appeal the decision declining to strike out the novel tort claim.

12. For reasons we go on to explain, we have concluded that the appeal should be dismissed and
the cross-appeal allowed. ***

\textbf{Are common law tort proceedings an appropriate response?}

13. We begin our analysis by discussing at a general level whether common law tort claims are
as a matter of principle and policy an appropriate vehicle for addressing the problem of climate
change.

14. In support of the appeal, counsel Mr Salmon urged us to be bold. He submitted it was part of
the tradition and strength of the common law that it is responsive to changing times. He likened
the case to other watershed moments in the development of the law such as \textit{Donoghue v. Stevenson}\textsuperscript{462}
where courageous Judges were prepared to extend the existing law in order to
address a significant problem.

15. Mr Salmon’s plea was an eloquent one. However, we consider that to accede to it would in
fact be contrary to the common law tradition which is one of incremental development and not
one of radical change, especially when that change would involve such a major departure from
fundamental principles as to subvert doctrinal coherence.

16. In our view, the magnitude of the crisis which is climate change simply cannot be appropriately
or adequately addressed by common law tort claims pursued through the courts. It is
quintessentially a matter that calls for a sophisticated regulatory response at a national level
supported by international co-ordination.

17. We say that for the following reasons.

18. First, no other tort claim recognised by the courts has involved a scenario in which every
person in New Zealand—indeed, in the world—is (to varying degrees) both responsible for
causing the relevant harm, and the victim of that harm.

19. This claim is brought against a small subset of those responsible for the harm that is being
suffered by Mr Smith and those he represents. Mr Salmon was not able to identify any principled
basis for singling out the seven defendants in these proceedings. If their contribution to climate
change is an actionable wrong, the logic underpinning that finding would apply to every individual
and every business that has not achieved net zero emissions. Mr Salmon said that the defendants
had been selected as “major profit-seeking entities that emit or enable emissions”. But as he

\textsuperscript{461} \textit{Smith v. Fonterra Co-operative Group Ltd [2020] NZHC 419}, [2020] 2 NZLR 394 [High Court judgment].
\textsuperscript{462} \textit{Donoghue v. Stevenson} [1932] AC 562 (HL).
accepted, none of these defendants standing alone makes a material contribution to climate change. The scale of their businesses, and of their contribution to global warming, does not provide a principled distinction on which liability could turn. Nor does the fact that they are “profit-seeking” entities—the basis on which their activities are alleged to be wrongful does not turn on the reasons for which they engage in those activities. If the courts were to accept the argument that the emitting activities of the defendants amount to a tort, it would follow that every entity (and individual) in New Zealand that is responsible for net emissions is committing the same tort. That is, all of those individuals and entities would be acting unlawfully, and could presumably be restrained from continuing to do so. That would be a surprising conclusion to say the least, with sweeping social and economic consequences.

20. A second fundamental conceptual problem with the claim is reflected in the way in which it relies on the concept of “net zero” emissions by a defendant. Mr Smith pleads that it is possible for each of the defendants to achieve net zero emissions of greenhouse gases by 2030. The relief sought includes an injunction requiring each of the defendants:

… to produce (or contribute to, in the case of BT Mining, NZ Refining and Z Energy) zero net emissions by 2030, by linear reductions in net emissions each year until that time (to be supervised by the Court), or to otherwise cease their emissions creating activities immediately;

21. We explored with Mr Salmon whether the claim was that all emitting activity was wrongful, or only activity that results in net positive emissions.

22. Mr Salmon accepted that the focus of the claim was on requiring net zero emissions, rather than immediate cessation of all emitting activity. That concession was inevitable—it could not seriously be suggested that all activity in New Zealand that produces greenhouse gas emissions is tortious, and thus unlawful, and must stop. It would be nothing short of absurd for a court to find that the common law proscribes most economic activity, and many of the activities that form an integral part of every individual’s daily life.

23. However if the claim is that it is wrongful to engage in activities that produce emissions that are not fully offset, then this is a tort like no other. To say that a defendant’s activity is tortious is to say that it is unlawful, and can be (and usually will be) restrained by the grant of an injunction. But in this case, the claim is not that the activity is inherently unlawful, or even that it is unlawful unless carried on in a particular manner. Rather, that activity will be lawful provided the defendant engages in some other activity (such as planting trees) that offsets the harm: an offset that may be wholly unrelated to the activity that is alleged to be wrongful. And presumably (as Mr Salmon accepted in argument) a defendant could also avoid liability by purchasing offsets (carbon credits) from a third party to achieve net zero emissions.

24. In order to determine claims of this kind the courts would need to establish a mechanism for assessing the adequacy of offsets, and determining which offsets a defendant can claim as their own. That is, some sort of common law emissions offset and trading regime parallel to the statutory regime. We return to the workability of such a regime, and the capacity of the courts to develop it, below. But the more fundamental point is that tort law is concerned with activities that are unlawful, and should not be permitted to continue. It is implicit in the way this claim has been framed that the defendants’ activities may be lawful, and may continue, provided they offset their emissions. Their activities are not wrongful activities, to be prohibited by the common law—rather, they are activities which are lawful and may continue, provided the defendants comply with certain
conditions established by an appropriate regulatory framework (to be fashioned by the courts). This is not the domain of tort law.

25. Third—a closely related point—there is no remedy available to the Court in private civil proceedings which can meaningfully address the harm complained of. Mr Salmon accepted that this was true of a damages award against the respondents. But, in our view, the injunctive relief sought in this case also illustrates the ineffectiveness of orthodox tort remedies.

26. In effect Mr Smith is seeking a court-designed and court-supervised regulatory regime. The design of such a system requires a level of institutional expertise, democratic participation and democratic accountability that cannot be achieved through a court process. Courts do not have the expertise to address the social, economic and distributional implications of different regulatory design choices. The court process does not provide all affected stakeholders with an opportunity to be heard, and have their views taken into account. Climate change provides a striking example of a polycentric issue that is not amenable to judicial resolution.\textsuperscript{463}

27. Fourth, bringing proceedings against subsets of emitters is an inherently inefficient and ad hoc way of addressing climate change. It is likely to result in arbitrary outcomes and ongoing litigation that lasts many years. As the respondents submitted, regulation by the courts would not begin and end with this case. The courts would be drawn into an indefinite, and inevitably far-reaching, process of line drawing.

28. For these reasons, among others, the issue of climate change cannot be effectively addressed through tort law. Rather, this pressing issue calls for a sophisticated regulatory response at a national level, supported by international co-ordination.

29. As is well known, relevant international agreements include the United Nations Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement.

30. In New Zealand, the key regulatory instrument is the Climate Change Response Act 2002. It was amended in 2019 to establish the Climate Change Commission, and to provide for a process under which the Commission prepares a draft report on emissions, budgets and other matters, engages in consultation on the draft and then provides a final report to the Minister. The Minister is then required to set emission budgets.\textsuperscript{464}

31. In 2020, there was a further substantial amendment to the Act in the form of the Climate Change Response (Emissions Trading Reform) Amendment Act 2020. The amendment introduced detailed provisions regarding the reduction of emissions over time including mechanisms for the issue and surrender of emissions units.

32. As at the time of the hearing, the emissions trading regime was in operation and the Commission process underway.

33. Significantly for present purposes, the claims made in this proceeding are 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. Private litigation against a

\textsuperscript{463} Lon L Fuller “The Forms and Limits of Adjudication” (1978) 92(2) Harv L Rev 353. See also North Shore City Council v Body Corporate 188529 [2010] NZCA 64, [2010] 3 NZLR 486 per Arnold J at [211]–[212].

\textsuperscript{464} Climate Change Response (Zero Carbon) Amendment Act 2019.
small subset of emitters, requiring them to comply with requirements that are more stringent than those imposed by statute, will not be effective to address climate change at a national level, let alone globally. It will be costly and inefficient. And it will be arbitrary in its application and impact.

36. We would add that similar claims to those advanced by Mr Smith have been advanced in the United States but not upheld for essentially the same reasons as have led us to conclude that none of the three claims in tort pleaded by Mr Smith can succeed. They are not consistent with the fundamental conceptual framework of the common law of torts. It would be unprincipled and incoherent to extend the law of nuisance or negligence, or to recognise a new tort, in the manner contemplated by this proceeding. It should be struck out in its entirety.

**Negligence cause of action**

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. 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. Resolution of the second stage depends ultimately on judicial conceptions of desirable policy.

97. In this case, the Judge held that the claim failed at each stage and should be stricken. The harm was not reasonably foreseeable, proximity was lacking and there were compelling policy considerations militating against recognising a duty.

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

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466 High Court judgment, above n 1, at [76].


468 Todd, above n 11, at [5.4].

469 High Court judgment, above n 1, at [81], [92] and [98]–[99].

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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.\footnote{At [82].}

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 sense neighbours.\footnote{Todd, above n 11, at [5.3.02].}

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
ciausation. 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
ciausation 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
\textit{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:
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. 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. 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.

108. The second approach suggested by Mr Salmon is the Canadian formulation of the “material
genital contribution to risk test” as explained in Clements v. Clements. It applies where
although a plaintiff can establish their loss would not have occurred but for the negligence of one
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.
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.

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.

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.

473 Fairchild v. Glenhaven Funeral Services Ltd, above n 80, at [34] per Lord Bingham, [42] per Lord Nicholls, [47] per
Lord Hoffmann, [116] per Lord Hutton, and [168] per Lord Rodger.
474 Barker v. Corus UK Ltd, above n 80, 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).
475 At [62] per Lord Scott.
333.
478 At 612.
479 At 612.
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.\textsuperscript{480} We agree too that were the action allowed to proceed, Mr Smith would be unable to establish a duty of care in the terms alleged and that the negligence claim is clearly untenable.

**The proposed new tort—breach of duty**

118. The pleading of the proposed new tort consists of repeating all the previous paragraphs including those relating to public nuisance and negligence followed by a single paragraph:

The defendants owe a duty, cognisable at law, to cease contributing to damage to the climate system, dangerous anthropogenic interference with the climate system, and the adverse effects of climate change through their emission of Greenhouse Gases into the atmosphere (or their production or exportation of coal in the case of BT Mining; and their production and supply of Fuel Products in the case of NZ Refining and Z Energy).

119. The remedies sought in respect of this new tort are the same as sought in public nuisance and negligence.

120. As the Judge noted, the pleading makes no attempt to refer to existing legal obligations nor to incrementally identify a new obligation by analogy to an existing principle.\textsuperscript{481} This, the Judge suspected, was because such an attempt could not readily be made. The claimed duty was not in his view sufficiently analogous to any existing duty of care and he doubted its recognition could

\textsuperscript{480} High Court judgment, above n 1, at [99].

\textsuperscript{481} At [102].
be regarded as a gradual or step-by-step extension of negligence liability.\textsuperscript{482}

121. Despite this and the public policy concerns he had identified in discussing the negligence claim, the Judge went on to say that he was nevertheless reluctant to conclude that the recognition of a new tortious duty which makes corporates responsible to the public for their emissions is untenable.\textsuperscript{483} He considered that it “may be” a novel claim such as that filed by Mr Smith could result in the further evolution of the law of torts, stating:\textsuperscript{484}

It may, for example, be that the special damage rule in public nuisance could be modified: it may be that climate change science will lead to an increased ability to model the possible effects of emissions. These are issues which can only properly be explored at trial. I am not prepared to strike out the third cause of action and foreclose on the possibility of the law of tort recognising a new duty which might assist Mr Smith.

122. In this Court, Mr Salmon strongly supported the Judge’s conclusion on the third cause of action. He pointed to other cases where new torts have been recognised and submitted that the gravity of the climate change problem justified the development of a new tort.

123. The respondents who challenge the Judge’s conclusion by way of a cross-appeal contend the conclusion is irreconcilable with the Judge’s reasoning in relation to the other two causes of action.

124. We agree with the respondents. The bare assertion of the existence of a new tort without any attempt to delineate its scope cannot of itself be sufficient to withstand strike out on the basis of speculation that science may evolve by the time the matter gets to trial. Yet that is the effect of the decision. The purpose of the strike-out jurisdiction is to ensure that parties are not put to unnecessary expense and precious court resources are not squandered by claims that have no chance of success. It demands an element of rigour in the interests of justice. The mere fact of novelty cannot be enough. Otherwise any claimant would be able to proceed to trial simply by asserting a new tort.

125. In our view, the fundamental reasons set out above for not extending tort law to a claim of the kind pleaded by Mr Smith apply equally to the claims in nuisance and negligence and to the proposed new tort.

126. We therefore allow the cross-appeal and order that the third cause of action, “breach of duty”, is also struck out. ***


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 not 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. ***

19.12.3 Further material

- “Burgess v. Ontario Minister of Natural Resources and Forestry” Climate Change Litigation Databases (Sabin Center for Climate Change Law, 2022).
- International Justice and Human Rights Clinic, Guidebook on Remedies in International Climate Change Litigation (Vancouver: The University of British Columbia, 2022).

19.13 Defective products

Houser Henry & Syron LLP, “Canada: Product Liability” Mondaq (Jul 11, 2019)

This article deals with three sources of liability for a manufacturer: 1. Liability based on the product sale agreement; 2. Liability based on statutory obligations; and 3. Liability to an end user for negligence.

Contract

If your sale agreement promises that the equipment will perform certain functions or contain
specific materials and it does not, then the manufacturer or distributor can be held liable for damages to the purchaser for misrepresentation or breach of contract. ***

**Statute**

A second source of liability is statute law. In Ontario there are several implied warranties under the *Sale of Goods Act* (Ontario) (the “Act”). The Act provides implied warranties that goods will be fit for a particular purpose and that goods bought by description will be of a merchantable quality. If these warranties are breached, then liability for damages may arise. The Act is meant to protect purchasers who buy faulty products. Third parties injured by products are generally not entitled to a remedy for breach of an implied warranty. Most manufacturers and distributors exclude implied warranties by wording in their contracts. To do this, they must use clear and unambiguous language.485 These exclusions provide some protection but even when they are clearly written, courts may limit their effect.

There are other Ontario statutes which apply to specific products. Even if a manufacturer or distributor fails to comply with its statutory obligations, that alone does not create grounds for liability. However, a manufacturer or distributor can be liable for causing personal injuries even if it has complied with the appropriate statute.

**Tort**

A third source of liability for a vendor, manufacturer, distributor, installer or anyone in the relevant supply chain comes from tort (negligence) law. A manufacturer or distributor may have to defend a tort claim for *negligence* if its product causes someone personal injury or financial loss or if it damages property.

Under Ontario tort law, a manufacturer or distributor that sells products, knowing that without reasonable care in the manufacture or use of its products, it will cause injury to the life or property of third parties, owes a *duty of care* to the third parties. This duty of care extends to the ultimate consumer or user of product but includes any other person whose injury was reasonably foreseeable.

A claim that a manufacturer has been negligent may arise if there was a manufacturing defect; the products’ design was defective; or the manufacturer failed to warn that the product was dangerous. ***


**BACKGROUND:** Quimbee (2020), [https://youtu.be/YdWG-7wjKfs](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 \textit{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 \textit{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 to-day. The \textit{principle} of the distinction is for present purposes the important thing.

3. \textit{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 \textit{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. \textit{Devlin v. Smith} was decided in 1882. A year later a very similar case came before the Court of Appeal in England (\textit{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.
§19.13.1 • Defective products

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.


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. ***

19.13.2.1 Other provincial sale of goods statutes

- Québec: Consumer Protection Act, CQLR c P-40.1, ss 37-40.

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.

(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;
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. ***

19.13.3.1 Other provincial consumer protection statutes

- Manitoba: Consumer Protection Act, CCSM c C200; The Unconscionable Transactions Relief Act, CCSM c U20.
- 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.

19.13.4 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.
§19.13.6 • Defective products

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.

19.13.5 Cross-references


19.13.6 Further material

- “Hot Coffee” (If Not Now Productions & The Group Entertainment, 2011) 📺.
19.14 COVID-19 pandemic

19.14.1 Barriers to recovering for COVID-19 damages

K. Benson, “In Favour of Universal Design: The Argument for Continued Hybrid Online/In-Person Courses in the Wake of the COVID-19 Pandemic with a Focus on Students with Disabilities” (NEADS, 2021), 5-7

In July of 2020, the BC Government passed the COVID-19 Related Measures Act, SBC 2020, Chapter 8 [COVID-19 Act].\(^{486}\) Section 5 of this act states that “no legal proceeding for prescribed damages related to the COVID-19 pandemic lies or may be commenced or maintained against a prescribed person or a person in a prescribed class.” As of my June 17, 2021 writing of this paper, BC Regulation 204/2020\(^{487}\) section 3 describes the following acts as being prescribed for the purposes of section 5 (1) of the Act:

(a) the operation or provision of an essential service;
(b) an activity that has the purpose of benefiting the community or any aspect of the community, including in relation to
   (i) the relief of poverty,
   (ii) the advancement of education or religion, [Emphasis Added]
   (iii) the promotion of health,
   (iv) the protection of the environment,
   (v) the provision of services to a vulnerable or disadvantaged person or group, or
   (vi) the provision of community recreation or leisure activities;
(c) an activity, including a business, that is carried on for direct or indirect gain or profit.

This means, as of current writing, if a student contracts COVID-19 while taking an in-person, summer-semester class and they become critically ill, it will be very challenging for this student to recover monetary damages through a lawsuit. The above liability protection is only available where a university is following, or reasonably believes that it was following, the relevant public health guidelines, and where it was not being grossly negligent.

This sweeping liability protection is set to expire July 10, 2021, with the anticipated repeal of the COVID-19 Related Measures Act; however, there has also been a ministerial order passed under the authority of the Emergency Program Act, RSBC 1996, c 111\(^{488}\) which exempts universities from some liability for COVID-19 related injuries. Ministerial Order 120/2020\(^{489}\) section 3 outlines a number of essential services which are exempt from liability should their actions result in

\(^{486}\) COVID-19 Related Measures Act, SBC 2020, c 8.
\(^{488}\) BC Provincial Emergency Program Act, RSBC 1996, c 111.
\(^{489}\) Order of The Minister of the Public Safety and Solicitor General, Ministerial Order 120/2020.
someone contracting COVID-19. Educational institutions are amongst the services which were designated as “essential services.” The provision relevant to post-secondary institutions reads as follows:

11(e) Educational institutions—including [...] public post secondary institutions—for purposes of facilitating remote learning or performing essential functions [...]  

The above MO 120/2020 will expire forty-five days after the BC state of emergency declaration expires. The state of emergency was originally declared March 18, 2020, and remains in place as of this writing. In a recent press conference, the government of BC said that the earliest the declaration will be lifted is July 1, 2021, but the actual date remains unknown. These liability provisions may or may not be in place throughout the beginning of the 2021/2022 academic year; however, it should be noted that the BC Government has repeatedly, retroactively, implemented restrictions on torts suits related to COVID-19. BC Reg 204/2020—which implemented the most sweeping liability protections—was deposited August 6, 2020, but was effective retroactively starting January 1, 2020. ***

19.14.2 Further material

20 Remedies (II)

CROSS-REFERENCE: §9

20.1 Damages

20.1.1 BG Checo Int. Ltd v. BC Hydro and Power Authority [1993] CanLII 145 (SCC)

CROSS-REFERENCE: §17.5.2

LA FOREST AND MCLACHLIN JJ. (L'HEUREUX-DUBÉ AND GONTHIER JJ. concurring): ***

Damages in Tort and Contract in this Case

44. The measure of damages in contract and for the tort of negligent misrepresentation are:

\[ \text{Contract: the plaintiff is to be put in the position it would have been in had the contract been performed as agreed.} \]

\[ \text{Tort: the plaintiff is to be put in the position it would have been in had the misrepresentation not been made. ***} \]

52. In tort, Checo is entitled to be compensated for all reasonably foreseeable loss caused by the tort. The Court of Appeal was of the view that Checo, had it known the true facts (i.e., had the tort not been committed) would have increased its bid by an amount equal to the cost of the extra work made necessary by the improperly cleared worksite plus profit and overhead. Such loss was not too remote, being reasonably foreseeable. But to compensate only for the direct costs of clearing is to suggest that the only tort was the failure to clear. The real fault is that Hydro misrepresented the situation and Checo may have relied on that representation in performing its other obligations under the contract. For example, having to devote its resources to that extra work might have prevented Checo from meeting its original schedule, thereby resulting in Checo incurring acceleration costs in order to meet the contract completion date. Such costs would also arguably be reasonably foreseeable. In our view, the matter should be referred back to the trial division for determination of whether any such indirect losses were the foreseeable results of the misrepresentation. ***

20.1.2 Further material


20.2 Mitigation of loss

The vocabulary describing this concept varies and is at times imprecise (obligation to reduce/minimise/not to aggravate harm/loss, duty, mitigation of loss); as such an introductory clarification of terminology seems useful.

Obligation, rather than duty. Traditionally duty and obligation are set against each other. On a personal level, duty is universal: it refers to an expected standard of behaviour of all citizens, the breach of which may harm everyone. Obligation, meanwhile, only burdens the debtor, and its breach, in principle, only affects the creditor. In terms of sanctions, obligations are subject to specific performance, whereas breach of duty can only result in an award of damages. There is little doubt that mitigating loss is an obligation, and not simply a duty. It is not a question of abstract or impersonal behavioural standards, but an obligation to be fulfilled by one person in particular: the victim of a contractual breach [or a tort].

Loss, rather than harm. If the two terms are occasionally muddled in practice, it is useful to distinguish between them. “Harm refers to, strictly speaking, injury suffered, which is assessed when the injury occurs, whereas loss, is the consequence of this injury, arising from its effects or any future developments.” In other words, harm is a hard, objective fact (an infringement against the integrity of a thing or a person); loss has a subjective element: the consequence of harm to a particular person. Although an obligation to mitigate harm is frequently mentioned, it would seem more precise to speak of an obligation to mitigate loss. The victim of the breach [or tort] is not expected to reduce the objective infringement against its rights, but the resulting consequences of such infringement. ***

Why impose the obligation to mitigate loss upon the injured party of a breach of contract [or tort]? There are two reasons. Directly, the first relates to substantive law: the obligation to mitigate loss is firmly anchored in substantive law. Indirectly, and more thought provokingly, the second is of a theoretical nature: the obligation to mitigate loss is dictated by moral, economic and technical imperatives that transcend legislation. ***

Must the injured party achieve an actual result (the effective mitigation of loss) or simply use its best efforts? Assuming these efforts, although reasonable, fail, would the injured party be at fault? The question is whether or not the obligation to mitigate loss relates to the steps taken towards mitigation or the achievement of it. After deliberation, case law appears to favour the former view that the obligation applies to the steps taken towards mitigation. ***

In short, it can be considered that there are three possible degrees of diligence expected from the injured party. Minima, the injured party must not do anything to aggravate the loss. At a higher level, it is expected that the injured party will take steps to ensure that the loss is not aggravated. Maxima, the injured party will be required to reduce the loss already suffered. To illustrate this, consider an example: a roofer has badly repaired a roof. The roof is then blown off by the wind. What is then expected of the injured party? At the very least, it is expected that they wouldn’t make the hole in the roof any bigger. At an intermediate level, tarpaulin is used in an emergency to prevent rain from damaging the house. Maxima, the injured party might contract with another roofer in order to repair the roof faster.

There are therefore three differing degrees of action that can apply to the obligation to mitigate loss, and a clear distinction between the first two and the last of these. This distinction does not take into account the positive or negative nature of the intended behaviour (abstention vs. action) but the aim pursued: is this to avoid aggravating the loss or to reduce it? In the first case, the injured party is not acting “in the interest of the perpetrator of the damage”: the rationale with
§20.3.1 • Successive causes of damage

regards to causality. In the second, the injured party is required to reduce the extent of the damage already suffered.

Within this dichotomy some authors draw a distinction between the acceptable and the unacceptable: *** it is the party who permits a loss to worsen which will be sanctioned, rather than the party who takes no steps to reduce it. Other authors are in favour of an obligation to reduce loss, but require *a minima* an obligation not to aggravate the loss, so as to be satisfied that above all the victim is aware of its responsibilities. ***

The final question to ask regarding the object of the obligation: when must action be taken? The answer is complex: quickly, but not too quickly. In short, it is relevant to distinguish between speed and haste. ***

Failing preventative measures being taken, a sanction for failure to comply with the obligation to mitigate loss could take the form of a reduction in compensation to be paid to the injured party. The singularity of this sanction is that it rests upon a presumption. *** It is not about sanctioning the injured party, but only according compensation for the extent of the loss that was actually inevitable. ***

20.2.1 Cross-references

• 1688782 Ontario Inc. v. Maple Leaf Foods Inc. [2020] SCC 35, [17], [94]: §19.3.2.

20.3 Successive causes of damage

20.3.1 Supervening events

S. Beswick, “‘Losses in Any Event’ in the Case of Damage to Property” (2015) 35 Oxford J Legal Studies 755, 755-758

Do supervening events affect the question of damages? Consider the position of a homeowner who has a house constructed in Christchurch, New Zealand, only to discover that the materials and construction methods used were defective and that the house suffers from ‘leaky building syndrome’.491 The house requires substantial repairs and the discovery impairs its market value. Then, during the course of legal action against the negligent contractors, the devastating February 2011 Christchurch earthquake strikes, destroying the house along with many neighbouring properties.

Consider, also, the case of a ship that is negligently struck at sea by another, only to be sunk by a wartime naval mine before repairs can be effected. Or say that somebody scratches your car, but before it can be repaired the car is destroyed by the negligence of another.

Each of these scenarios describes, in the first instance, a straightforward case of negligent

491 A plight faced by the owners and occupiers of, collectively, an estimated 42,000 New Zealand dwellinghouses, carrying a projected cost of NZ$11.3 billion to the country: PricewaterhouseCoopers, ‘Weathertightness—Estimating the Cost’ (Department of Building and Housing, 29 July 2009) 3.
damage to property, for which the usual remedy against the tortfeasor is an award of damages equal to the cost of repairing the harm caused. The innocent owner is entitled to recoup the cost of restoring the home to a code-compliant state,\footnote{Hamlin v. Invercargill City Council [1994] 3 NZLR 513 (CA); Invercargill City Council v. Hamlin [1996] 1 NZLR 513 (PC) 526; Johnson v. Auckland Council [2013] NZCA 662 [110]. Note that in the United Kingdom and Canada, actionable negligence is that which causes physical damage, beyond pure economic loss: Murphy v. Brentwood District Council [1991] 1 AC 398 (HL); Winnipeg Condominium Corporation No.36 v. Bird Construction Co [1995] 1 SCR 85 [§19.3.1].} of repairing the injury to the ship to render it seaworthy,\footnote{The Glenfinlas [1918] P 363n.} and of fixing the scratch to the car.\footnote{Dimond v. Lovell [2002] 1 AC 384 (HL) 406.} That the proper measure of damages is the estimated cost of repair—as opposed to some other measure of loss, such as diminution in market value—is uncontroversial.\footnote{DA Thomas and H McGregor, McGregor on Damages (18th edn, Sweet & Maxwell 2009) paras 2–043, 32–003; A Tettenborn (ed), The Law of Damages (2nd edn, LexisNexis 2010) para 14.48.} The question that this paper ponders is the relevance—or irrelevance, as the case may be—of supervening events on the measure of direct loss in cases of damage to property. Should it influence the court’s reasoning that, following the earthquake, or the mine explosion, or the car crash, the prospect of repair is now impossible? The apparent position in law is ‘no’: in each case the first instance injury is a direct loss, one that ‘crystallizes at the moment of damage’. As damages are to be assessed as at the time of harm, unrelated subsequent events can make no difference to the assessment.\footnote{Burdis v. Livsey [2002] EWCA Civ 510, [2003] QB 36, 50 (Iain Milligan QC for the claimant).}

This paper challenges that conclusion. It contends that the proper and consistent position in law is that a court tasked with assessing damages should take into account the impact of relevant supervening events. It is suggested that recent court decisions to the contrary have proceeded on an erroneous understanding of past precedents. At the least, it is artificial for a court to award damages in the amount of the cost of repairing property that cannot in practice be repaired. The argument is not that the victim should have no remedy. Rather, the court’s task is to adopt a measure of loss that best places the claimant in the position he would have been in but for the injury. In circumstances where repair has become impossible, a measure of damages based on the diminution in market value suffered from the injury will often better achieve the aim of \textit{restitutio in integrum}\footnote{Thomas and McGregor (n 5) paras 32–007, 32–009; H Street, ‘Supervening Events and the Quantum of Damages’ (1962) 78 LQR 70, 70–71; R Stevens, \textit{Torts and Rights} (OUP 2007) 137–38. Note that the subsequent events concerned here are not novus actus interveniens, for which the question of a damages award against the initial tortfeasor would not arise.} than a ‘cost of cure’ remedy that cannot in reality be implemented. Indeed, diminution in value is the typical alternative measure adopted when a tortious act destroys, rather than simply damages, property.\footnote{Livingstone v. Rawwards Coal Co (1880) 5 App Cas 25, 39 (Lord Blackburn): the damages award should be ‘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 if he had not sustained the wrong for which he is now getting his compensation or reparation’. Thomas and McGregor (n 5) paras 1–022 and 19–003.} Accordingly, a repair-based measure in subsequent loss cases should at most be considered a rebuttable starting point for valuation.

The distinction between alternative measures of loss is not merely academic.\footnote{There are also other measures, such as ‘loss of amenity’ which was adopted in Ruxley Electronics and Construction Ltd v. Forsyth [1996] AC 344 (HL). This paper focuses only on the two most common measures of loss. See Dodd Properties Ltd v. Canterbury City Council [1980] 1 WLR 433 (CA) 456–57.} The award of damages that flows from each measure can often differ considerably. The cost of cure remedy
frequently leads to a greater award of damages to the plaintiff compared to the diminution in value measure. That may be because the cost of materials and labour required to repair property will often exceed the market value of the improvement made, whilst asset depreciation tends to suppress the impact of injury on a property’s market value.

This difference was exemplified during litigation over the destruction of the World Trade Center complex in New York. The complex’s owners sought, inter alia, the full cost of reconstructing the World Trade Center, estimated at US$8.4 billion, from the alleged negligent airlines. The Court, applying New York state law on the assessment of damages, instead limited potential recovery to the property’s estimated market valuation of approximately US$2.8 billion: a considerable difference. To invoke a less exceptional illustration, in Darbishire v. Warran the plaintiff car-owner sued for the cost of repairing collision damage to his vehicle, £192, even though the undamaged market value of the car was only £85.

The point is that when damages for cost of repair are, or will be, in fact spent on repairs, the plaintiff can typically be assumed to have been restored to her pre-injury position. But if the property is destroyed in an unrelated event before the repairs are carried out, the true measure of the loss caused by the tort is the difference in the property’s pre- and post-tort values. That is because what the supervening event has destroyed is property that was worth less than it would have been but for the tort. The plaintiff, who cannot possibly repair, ought to receive that diminution in value. Otherwise, to award a greater sum representing the cost of repairs would tend to place the claimant in a better position monetarily than he would have been had the tort not occurred.

20.3.2 Beam v. Pittman [1997] CanLII 14694 (NL CA)

Newfoundland and Labrador Court of Appeal – 1997 CanLII 14694

CAMERON J.A. (GUSHUE C.J. AND MAHONEY J.A. concurring): ***

2. Maura Beam, a nurse, was involved in three rear end collisions. In each case, she was the driver of the car hit from behind. In each case, the other party or parties has conceded liability. In each case, Beam suffered injuries.

3. The first accident occurred on September 1, 1989 when Lorraine Pittman drove an automobile owned by Alvin Pittman into the rear of Beam’s automobile. Within days of the accident, Beam visited her physician who recommended that she take time off work to recover. She was off work from September 8, 1989 to early November 1989 when she commenced to ease back to work, initially going to work for half days. After a short period of working half time, she returned to work full time.

501 Re September 11th Litigation 590 F Supp 2d 535 (SDNY 2008). Judge Hellerstein resolved the case, which is still on appeal, by applying a doctrine known as ‘the lesser-of-two rule’, which limits potential recovery in cases of property damage to the lesser of the cost of cure or the diminution in value suffered. See Hartshorn v. Chaddock 135 NY 116, 121 (1892); TS Tomasik, ‘The Lesser of Two Rule: The Application of the New York Collateral Set-Off Rule to Property Claims Brought in the September 11 Litigation’ (Chicago Daily Law Bulletin, 28 April 2012).

502 Darbishire v. Warran [1963] 1 WLR 1067 (CA) 1073. In that case, the Court awarded the lesser amount on the basis that the car was ‘a constructive total loss’ and a reasonable owner would not have repaired it in the circumstances. See n 35. See also Coles v. Hetherton [2013] EWCA Civ 1704, [2015] 1 WLR 160 [30]; Thomas and McGregor (n 5) para 32–003.

4. The second accident occurred on December 24, 1991. This time the other vehicle was driven by Frederick Mercer and owned by Parker Enterprises Limited who admitted liability for the collision. As a result of the injuries from the second accident, Beam, once again, was off work for a period of time. She commenced working one hour per day on March 24, 1992, planning to work up to full time status. On March 26, 1992, the third collision occurred.

5. Katherine Waterman, admitted liability for the third accident. Up to the time of the trial, approximately two years later, Beam had not returned to work. ***

15. The trial judge referred to two methods of apportioning damages between tortfeasors in cases where subsequent accidents further injure victims. These two approaches are illustrated by the decision of the New Brunswick Court of Appeal in *Bourque v. Wells* (1991), 82 D.L.R. (4th) 574 (N.B. C.A.); (leave to appeal to the Supreme Court of Canada refused (1992), 87 D.L.R. (4th) vii (S.C.C.)) and the decision of the British Columbia Court of Appeal in *Long v. Thiessen* (1968), 65 W.W.R. 577 (B.C. C.A.).

16. In *Long v. Thiessen*, the method was to assess the damages against the first tortfeasor as if the trial were held on the day before the second accident, then assess the global damages, that is, those which are the result of the two accidents. The second tortfeasor pays the difference between that assessed in respect of the first accident and the global amount. Applying this method to this case, there would be three assessments; the first as of the day before the second accident; the second as of the day before the third accident and the third, the global assessment. This approach, which applies a devaluation theory, was approved of in *Baker v. Willoughby*, [1969] 3 All E.R. 1528 (Eng. H.L.). The Pittmans argue that this approach is akin to the application of the thin skull doctrine and that Waterman must take Beam as she found her—more susceptible to injury as a result of the prior accidents. Under this analysis, the Pittmans argue, the person liable for the last accident (Waterman) would be responsible for any loss of future income as Beam was capable of returning to work after the first and second accidents. (In fact, Beam had just begun to ease back to work prior to the third accident. She was not working full time.)

17. In *Bourque*, the approach was to apportion damages on a percentage basis as both accidents were necessary to produce some of the loss. The *Bourque* decision followed the British Columbia Court of Appeal in *Pryor v. Bains* (1986), 69 B.C.L.R. 395 (B.C. C.A.). In *Pryor*, Carrothers J.A., said at p. 397:

> These two sources or causes of damages can be dealt with, either as a case of aggravated damages or as a “thin skull” case, depending on which of two factual circumstances are found to exist. In a case where a second source or cause of damages is found to aggravate an existing and active first source or cause, that is a case of aggravated damages and there may be an apportionment of damages as between the two sources or causes. On the other hand, in a case where a second source or cause of damages triggers the first source or cause which has been found immediately prior to the injury to be merely a latent weakness or susceptibility and not an active source or cause, that is a “thin skull” case and there can be no apportionment as between the two sources or causes and full damages must be awarded against the tortfeasor creating the second source or cause of damages which triggered the latent first source or cause.

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And at p. 399, he said:

I do not consider this to be a case for the application of the “thin skull” principle of assessing damages. The present case, where there was a pre-existing condition, as found by the trial judge, already manifest and presently disabling, must be distinguished from the “thin skull” cases where the weakness or latent susceptibility of the victim is quiescent but is activated into being as a result of the tortious conduct of another.

In Bourque, the plaintiff had been involved in two accidents. The first left her with soft tissue injury to her neck and shoulder and a badly bruised hip. She was off work for a period of time. Eventually, and though still in pain, she was able to return to work. The second accident left her unable to work. However, the trial judge found that the second accident by itself would not have caused the devastating consequences for Mrs. Bourque had she not had the first accident. The trial judge concluded that both accidents were responsible for her inability to work, although the injury from the first accident continued to be the major factor to her disabling condition. The majority of the New Brunswick Court of Appeal upheld the decision of the trial judge that this was not a case for the application of the thin skull doctrine but rather it was a case of aggravated damages and an appropriate case for apportionment of damages on a percentage basis.

18. Bourque was, in turn, followed in Seyfert v. Butler (September 27, 1993), Doc. Vancouver B913966 (B.C. S.C.). The point made in Seyfert, the same point made in Personal Injury Damages in Canada (1st ed.) and again in the second edition at pp. 782-4, is that while the devaluation method deals most effectively with injury in respect of which each accident was sufficient cause, it does not fairly apportion if both accidents were necessary to produce some of the loss.

19. Here, in adopting the Bourque approach, the trial judge found that it was the cumulative affect of the three accidents which prevented Beam from working full-time. Specifically he stated she “lost the ability to work full-time, primarily because of her neck and back injuries and her fibromyalgia…. the first accident should bear the greatest responsibility for the neck and back injuries. The third and, to a lesser degree, the second, aggravated these injuries…. the third accident was primarily responsible for the onset of fibromyalgia, but… this syndrome would not have developed without the increased vulnerability caused by the first and, to a lesser degree, the second.” The trial judge was not satisfied that the third accident of itself would have been sufficient to disable Beam from working. In those circumstances, the trial judge held it would be unfair to burden Waterman with full liability for lost income which would have been the result of the application of Long v. Thiessen, and that the proper approach would be to apportion liability among the three sets of defendants. ***

22. There is some difference of view among legal scholars regarding the best approach to the resolution of this problem. Professor Waddams in The Law of Damages (2nd ed.), 1993 at para 13.590 supports the devaluation approach. In Personal Injury Damages in Canada (2nd ed.) at p. 781-2, Professor Cooper-Stephenson identifies different causal patterns arising out of accidents which occur in succession:

(1) divisible harm solely caused by the first accident in a “but for” sense; (2) divisible harm caused solely by the second accident in the same sense; (3) harm that was caused by the combination of the two accidents, in the sense that that part of the loss would not have

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505 The loss would have occurred if either accident had occurred. See quotation from pp. 781-2 of Personal Injury Damages in Canada, infra.
§20.3.2 • Successive causes of damage

occurred but for both accidents (multiple necessary cause); and, (4) loss in respect of which each accident was a sufficient but not a necessary cause, in the sense that it would have occurred if either accident had occurred (multiple sufficient cause). If all the facts are known, the only genuinely problematic harm is type (4), where it is not clear whether the first, the second, or both accidents will be held responsible. The type (3) harm ought to be apportioned according to the relevant provincial legislation, unless the old “last clear chance rule” is held to be operative.

However, as Cooper-Stephenson goes on to point out, often causal relationships are not so evident and there may be combinations of the patterns. He outlines the two approaches described above for apportionment of responsibility for harm resulting from successive auto accidents in such cases. He illustrates the weakness of the Long v. Thiessen approach in some circumstances by the person who loses one eye in the first accident and as a result has a 10% disability. He loses the second eye in the second accident, causing total disability. If the devaluation approach is used, the first defendant is liable for 10% of the loss, which ignores the fact that both accidents were necessary for 90% of the loss. Cooper-Stephenson suggests that “joint and several liability surely follows for all the loss due to total blindness. This takes account of events that have transpired between the first accident and trial, and these events show that the increased susceptibility to total blindness created by the first accident became a reality, albeit one for which the second defendant is jointly the cause.” This, of course, was the point made by the trial judge. In cases, such as this one, it is improper, as Long v. Thiessen would have it, to ignore the knowledge of what occurred subsequent to the first and second accidents in determining the allocation of responsibility for damages.

23. In Athey v. Leonati, [1997] 1 W.W.R. 97 (S.C.C.) [§16.2.1] Major J. for the Court reviewed some basic principles in tort law. Among those are that “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.” The law does not permit apportionment between tortious causes and non tortious causes as it “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.” Of course, in the case of multiple tortious causes, “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.” ***

26. Here, for the most part, we are dealing with injury which is the result of all three accidents. If we were dealing with a single accident with three different defendants contributing to the cause, we would hold all three to be responsible and apportion damages in accordance with the degree of responsibility. If we were dealing with a single defendant and, prior to trial, an event which in the assessment of damages might usually be considered a possibility became a reality, such as the plaintiff’s health deteriorating to where she needed to use a wheelchair, then that would be considered to have happened when assessing damages (Corrie v. Gilbert, [1965] S.C.R. 457 (S.C.C.)).

27. Both approaches under consideration ensure that the Plaintiff is fully compensated for her injuries in circumstances such as those here. The Bourque approach attributes to each of the defendants his or her share of the responsibility in accordance with the trial judge’s assessment of causation based on the knowledge available at trial. The exception, stated in Bourque, is where the condition created by the earlier incident is quiet and non-symptomatic, in which circumstances
the case is treated as one of thin skull. The disadvantage of the Bourque approach arises because the cummulatve effect only becomes evident after a subsequent accident. In the event that the action arising out of the earlier accident has been settled or tried, there is a risk that if the third defendant takes only his share of the responsibility the plaintiff will be under compensated. The Long v. Thiessen approach, on the other hand, ensures full compensation, but ignores the reality of the situation, known at the time of trial, which is unfair, in this case, to the final defendant. 

28. Here, on the findings of the trial judge, the first accident is primarily responsible for the neck and back injuries while the second and third accident aggravated these injuries; the third accident is primarily responsible for the onset of fibromyalgia but that syndrome would not have developed without the increased vulnerability caused by the first, and to a lesser extent the second. As noted above, the loss of the ability to work full-time was attributed primarily to two sources—the neck and back injuries and the fibromyalgia. It is true that the symptoms of fibromyalgia were not evident prior to the third accident but the trial judge held the third accident, by itself, would not have been sufficient to disable Beam from working. Like the trial judge, I see no reason why this information should not be used just because the cause of the injury is three accidents not one, or three accidents in close proximity. Whatever the case where the parties may be tried separately, where all parties are before the court I see no compelling reason to ignore facts known at the time of trial. I agree with the approach taken by the trial judge. ***

20.3.3 Cross-references

- Athey v. Leonati [1996] CanLII 183 (SCC), [31]-[33]: §17.2.4.

20.4 Insurance

20.4.1 Nettleship v. Weston [1971] EWCA Civ 6

CROSS-REFERENCE: §14.1.1.2, §18.1.2.1

LORD DENNING M.R.: ***

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. 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. ***

20.4.2 Compensating advantages that are not deducted

IBM Canada Ltd v. Waterman, 2013 SCC 70

CROMWELL J. (LEBEL, FISH, ABELLA, MOLDAVER, KARAKATSANIS, WAGNER JJ. concurring): ***

36. Considerations other than the extent of the plaintiff’s actual loss shape the way the compensation principle is applied and there are well-established exceptions to it. ***

37. *** [T]here are well-recognized exceptions in which benefits flowing to plaintiffs are not taken into account even though the result is that they are better off, economically speaking, after the breach than they would have been had there been no breach. These exceptions are ultimately based on factors other than strict compensatory considerations. As Lord Reid put it in Parry [v. Cleaver, [1970] A.C. 1], “[t]he common law has treated [the deductibility of compensating advantages] as one depending on justice, reasonableness and public policy”: p. 13. Or, as McLachlin J. wrote, this issue raises a question of “basic policy”: Ratych [v. Bloomer, [1990] 1 S.C.R. 940], at p. 959.

38. What are some of these considerations of justice, reasonableness and policy? An answer may be found by looking at the two well-established situations in which compensating advantages are not deducted: charitable gifts and private insurance. ***

39. The first is the less controversial. The 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: see, e.g., Waddams, at ss. 3.1550-3.1560; Cassels and Adjin-Tettey, at pp. 420-21. ***

41. A second and more controversial exception relates to payments from the plaintiff’s private insurance. The core of the exception is well established: benefits received by a plaintiff through private insurance are not deductible from damage awards. However, both the precise scope and the rationale of the exception have been the subject of judicial and scholarly debate. Its practical importance is limited given the widespread use of subrogation, which avoids the compensating advantage issue altogether. ***

42. One area of controversy relates to the sorts of benefits which fall within the private insurance exception. Does it apply to both indemnity and non-indemnity insurance? Does it extend to disability benefits, employment insurance or pensions payable on retirement? The Court has held that the answer to all of these questions is yes, but not, as we shall see, without well-reasoned dissent. In short, the so-called private insurance exception has been applied by analogy to a variety of payments that do not originate in a contract of insurance.
43. In Gill v. Canadian Pacific Railway, [1973] S.C.R. 654 (S.C.C.), the Court applied the insurance exception to prevent deduction of the present value of Canada Pension Plan benefits available to surviving dependents from the damages awarded in a fatal injuries claim. Spence J., for the Court, held that the payments were “so much of the same nature as contracts of insurance that they also should be excluded from consideration when assessing damages under the provisions of that statute”: p. 670 ***.

44. In Guy v. Trizec Equities Ltd., [1979] 2 S.C.R. 756 (S.C.C.), Mr. Guy’s injury led to his retirement and receipt of pension benefits. They were not deducted from damages for loss of earnings. Ritchie J., for the Court, viewed pensions, whether contributory or non-contributory, as flowing from the employee’s work and part of what the employer was prepared to pay for the employee’s services. He agreed with Lord Reid’s conclusion, in Parry, as quoted by Spence J., in Gill, that “[t]he fact that they flow from past work equates them to rights which flow from an insurance privately effected by [the employee]”: Guy, at p. 763. Similarly, in Jack Cewe Ltd., the Court did not deduct a dismissed employee’s unemployment insurance benefits from his wrongful dismissal damages. The benefits, wrote Pigeon J., for the Court, were a consequence of the contract of employment making them similar to contributory pension benefits: p. 818. (The collateral benefit issue that arose in Jack Cewe Ltd. is now addressed by s. 45 of the Employment Insurance Act, S.C. 1996, c. 23, which states that a claimant who receives benefits and is subsequently awarded damages for the same period, “shall pay to the Receiver General as repayment of an overpayment of benefits an amount equal to the benefits that would not have been paid if the earnings had been paid or payable at the time the benefits were paid”.)

45. In Ratych, the Court found that sick leave benefits should be deducted from damages otherwise payable for loss of earning by the party whose negligence was responsible for the injuries. For the majority, McLachlin J. wrote that it may well be appropriate not to deduct benefits where the employee can show a contribution equivalent to payment of an insurance premium. In other words, benefits may not be deductible when they come about because the plaintiff has prudently obtained and paid for insurance. However, that was not the case in Ratych, making it a different situation than one in which the benefits flow from the employer/employee relationship: pp. 973-74. In Cunningham, disability insurance benefits payable under the terms of collective agreements were held not to be deductible because there was evidence that the plaintiffs had paid for these disability plans through reduced wages. The Court’s earlier decision in Ratych was distinguished on this basis.

46. Finally, in Sylvester [v. British Columbia, [1997] 2 S.C.R. 315], non-contributory disability benefits received during the notice period were deducted from wrongful dismissal damages otherwise payable. The benefits were intended to be an indemnity for lost wages while the plaintiff was unable to work, the plaintiff had not contributed to acquire the benefit, and policy considerations favoured deduction.

47. The two cases in which the private insurance exception was not applied (Ratych and Sylvester) involved benefits that were intended to be an indemnity for the type of loss that resulted from the defendant’s breach and to which the plaintiff had not contributed. Retirement pension benefits, which are not an indemnity for loss of wages resulting from inability to work and to which the employee contributes directly or indirectly, have been held by this Court and others to fall within the private insurance exception: Guy; Gill; Chandler v. Ball Packaging Products Canada Ltd. (1992), 2 C.C.P.B. 99 at 101 (Ont. Gen. Div.), aff’d (1993), 2 C.C.P.B. 99 (Ont. Div. Ct.) ***.
20.4.3 Modern obligations


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. 506

• 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. 507

• Medical liability: Again, it is taken for granted that individuals will not be held responsible, but rather will have taken out insurance. 508

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. 509 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

506 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.

507 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.

508 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.

509 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.
liability insurance is to be found.\footnote{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.}

### 20.4.4 Civil recourse in the modern world


[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 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.\footnote{Jules L. Coleman, Tort Law and the Demands of Corrective Justice, 67 Ind. L.J. 349, 370 (1992), Although civil recourse theory is often lumped together with corrective justice theory, they are in important respects different.***} 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.\footnote{512} ***

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.

### 20.4.5 Cross-references

- **1688782 Ontario Inc. v. Maple Leaf Foods Inc. [2020] SCC 35, [89]: $\S\ 19.3.2$.**
- **Transco Plc v. Stockport MBC [2003] UKHL 61, [29], [39], [46]-[49]: $\S\ 22.1.2$.**

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\footnote{510}
20.5.2 Further material


20.5 Claims by estate

20.5.1 Wills, Estates and Succession Act, SBC 2009

Wills, Estates and Succession Act, SBC 2009, c 13, s 150(1)-(4)

150.(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.

20.5.1.1 Other provincial estate proceedings statutes

- Manitoba: The Trustee Act, CCSM c T160, ss 53-54.

20.5.2 Further material

20.6 Claims by kin

20.6.1 Family Compensation Act, RSBC 1996

*Family Compensation Act, RSBC 1996, c 126, ss 2-3*

2. 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 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.(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;
20.6.1.1 Other provincial wrongful death statutes

- Newfoundland and Labrador: Fatal Accidents Act, RSNL 1990, c F-6, ss 2-6.
- Prince Edward Island: Fatal Accidents Act, RSPEI 1988, c F-5, ss 2, 6-8.

20.6.2 Cross-references


20.6.3 Further material

- T. Lovgreen, “Grieving Families Say their Lost Loved Ones are ‘Worthless’ under B.C. Law, Call for Changes” CBC News (Feb 15, 2021).

20.7 Apologies

20.7.1 Apology Act, SBC 2006

Apology Act, SBC 2006, c 19, ss 1-2

1. 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. (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. ***

20.7.2 The wrongful arrest of Hon. Mr. Selwyn Romilly


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. ***

20.7.2.1 Other provincial apology statutes

20.7.3 Caplan v. Atas [2021] ONSC 670

CROSS-REFERENCE: §5.1.4, §5.2.4, §6.7.6, §9.8.2.4

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.\(^{513}\) 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 media sources. ***

20.7.4 Further material


20.8 Legal costs

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).

OAG Glossary of Terms.

20.8.1 Bettel v. Yim [1978] CanLII 1580 (ON CC)

CROSS-REFERENCE: §2.2.1, §6.2.2.1, §9.2.1, §9.3.5

BORINS CO.CT.J.: ***

45. Counsel for the defendant indicated that in the event of judgment for the plaintiff he wished the opportunity to address the Court with respect to costs. He may, of course, do so. Counsel for the defendant has 10 days in which to arrange an appointment. Should he fail to do so, the plaintiffs will have their costs limited to a single bill of costs. ***

20.8.2 Anderson v. Alberta [2022] SCC 6

Supreme Court of Canada – 2022 SCC 6

CROSS-REFERENCE: §24.2.2

KARAKATSANIS AND BROWN JJ. (FOR THE COURT):

1. In British Columbia (Minister of Forests) v. Okanagan Indian Band, 2003 SCC 71, [2003] 3 S.C.R. 371, 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 (*Okanagan*, at para. 1). 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, [2011] 1 S.C.R. 78, 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, [2014] 3 S.C.R. 31, 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
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, [2013] 3 S.C.R. 3, 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, quoting New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 S.C.R. 319, at p. 389). 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. ***An 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. ***

### 20.8.3 Further material

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.\(^{514}\)

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.\(^{515}\)

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.\(^{516}\) In other instances, the courts have questioned whether in the circumstances it is reasonable to deny compensation to the aggrieved party.\(^{517}\) 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

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\(^{514}\) *Royal Anne Hotel Co. v. Ashcroft (Village)* (1979), 95 DLR (3d) 756 at 760 (BC CA), citing Street, *Law of Torts*, at 215.

\(^{515}\) 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.

\(^{516}\) *Canada (National Capital Commission) v. Pugliese* (1977), 17 OR (2d) 139 (Ont CA), aff’d [1979] 2 SCR 104.

\(^{517}\) *Tock v. St. John’s (City) Metropolitan Area Board*, [1989] 2 SCR 1181 (*Tock*).
benefits of raising pigs.\textsuperscript{518}

The Ontario Court of Appeal’s recent decision in \textit{Antrim Truck Centre}\textsuperscript{519} \textsuperscript{[\$21.1.7]} 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’”.\textsuperscript{520}

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.\textsuperscript{521}

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.\textsuperscript{522}

Nuisance is frequently described as a strict liability tort, on the basis that:

\textit{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}.\textsuperscript{523}

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.”\textsuperscript{524} Fault in this context has been interpreted

\begin{footnotesize}
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\item \textsuperscript{518} \textit{Aldred’s Case} (1610) 77 ER 816 [1558-1794] as cited in Gregory Pun & Margaret Hall, \textit{The Law of Nuisance in Canada} (Markham: Lexis Nexis, 2010) [Pun] at 24.
\item \textsuperscript{519} \textit{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).
\item \textsuperscript{520} \textit{Tock}, supra note 8, citing Knight Bruce V.C. in \textit{Walter v. Selle} (1851), 4 De G. & Sm. 315, 64 ER 849, and Bramwell B. in \textit{Bamford v. Turnel} (1862) 122 ER 27.
\item \textsuperscript{521} \textit{Antrim}, supra note 10 at para 83. Malice on the part of the defendant may also be a factor in some cases: see \textit{Christie v. Davey}, [1893] 1 Ch 316.
\item \textsuperscript{522} See discussion in Philip Osborne, \textit{The Law of Torts} 4th ed (Toronto: Irwin Law, 2011) at 378, 380.
\item \textsuperscript{523} \textit{ibid} at 378.
\item \textsuperscript{524} Fleming, supra note 3. See also the statement of the Judicial Committee of the Privy Council in \textit{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
\end{itemize}
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as a quite neutral concept, signifying the defendant’s involvement in the creation of an annoyance.  

The notion of fault in private nuisance analysis has led to some blurring of the line between nuisance and negligence. 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.

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. 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 and statutory authority.

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.

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.

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. 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

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525 Pun, supra note 9 at 8.
526 Pun, supra note 9 at 2.
527 Cullingham, supra note 1 at 17-13.
528 See Allen Linden & Bruce Feldthusen, Canadian Tort Law (Markham: LexisNexis, 2011) at 579.
529 The others are prescription and consent, both described in Osborne, supra note 13 at 394-395.
530 Ryan v. Victoria (City) [1999] 1 SCR 201 at para 55 [§ 21.2.1].
531 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.
the defendant or to the public in deciding whether to grant an injunction.\footnote{See discussion in Lewis Klar, \textit{Tort Law}, 4th ed (Scarborough: Thomson Carswell, 2008) at 744.} 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.”\footnote{Osborne, \textit{supra} note 13 at 396.}

**21.1.1 The Coase theorem**

*L. Solum, “The Coase Theorem” Legal Theory Blog (Feb 20, 2021)*

**Externalities**

To understand the Coase theorem,\footnote{R.H. Coase, “The Problem of Social Cost” (1960) \textit{3 J.L. & Econ.} 1.} we first need to introduce another idea, the \textit{externality}. Roughly speaking, an economic externality is cost imposed by an activity that is not accrued by the person or firm who engages in the activity. \textit{That’s a mouthful.} Here’s an example:

The Reading Railroad has track that goes by Farmer Jones’s farm. The locomotives cast off sparks that cause a fire that damages Farmer Jones’s crop, imposing a cost on Jones of $100. That cost is an externality.

If the Reading Railroad owned the farm, then it would bear the cost, and there wouldn’t be an externality. Before Coase, we thought that the existence of externalities justified some kind of government intervention. For example, we could create a liability rule that required the Reading Railroad to pay for the damage to his crops. Without a liability rule, the railroad wouldn’t have any incentive to prevent the damage if there was a cost-effective means of doing so. Let’s add a fact to our hypothetical:

The Reading Railroad can purchase and install a 100% effective spark arrestor for $50.

We want the railroad to install the spark arrestor for $50 to prevent $100 worth of damage.

Before Coase, we said, “internalize the external diseconomies!” \textit{Really!} That is, use tort law to transform the external cost imposed by the railroad into an internal cost. Tort law can do this by imposing damages equal to the external costs of the sparks.

**Transaction Costs**

This is where Coase came in. But to understand what Coase said, we need to add another bit of economic jargon. \textit{By transaction cost, we mean the cost of reaching a bargain.} In the real world, lawyers are frequently part of transaction costs, but the time and expense that it takes to strike a deal are transaction costs as well—even if you don’t actually lay out any cash. One more little move, if we assume that there are \textit{zero transaction costs}, we are simply assuming that it costs absolutely nothing to strike a deal—no time, no effort, no lawyers, not even any paper on which to write it up.

Coase said, “Let’s assume zero transaction costs!” \textit{Okay, what next!}
The Result

If we assume zero transaction costs, then when there are externalities, the market will reach the efficient outcome irrespective of how entitlements are assigned. *Another mouthful!* Let’s go back to our hypo:

Assuming zero transaction costs, it doesn’t matter whether the law assigns the right to generate sparks to the railroad or the right to be free from sparks to the farmer. *Why not?* Let’s work it out. There are two possibilities:

If we assign the entitlement to the farmer, the railroad will pay $100 in damages to the farmer for violating the farmer’s right to be spark free. The railroad will realize that it can save this $100 cost by investing $50 in a spark arrestor. So the railroad will buy the spark arrestor.

If we assign the entitlement to the railroad, the farmer will incur $100 in costs from the fire. The farmer will realize that he can save this $100 cost by entering into a contract whereby he pays $50 (plus some extra inducement, say $51 total) to the railroad in exchange for the railroad installing the spark arrestor. Since we have assumed zero transaction costs, the railroad and the farmer both benefit from this deal.

*That’s it! It doesn’t matter whether we assign the right to the farmer or the railroad. Either way, we get the efficient outcome.*

If you are a first year law student, the Coase theorem is a very powerful analytic tool for understanding the economics of tort law. When you study a new rule or problem, ask yourself, “How would this come out assuming zero transaction costs?” Then ask, “If we assume positive transaction costs, how does the problem change?”

**But what if there are positive transaction costs?**

Of course, in the real world, there will almost always be positive transaction costs. In some cases, when transaction costs are low, the assignment of the entitlement will not affect the outcome, because an efficient bargain can still be struck.

In other cases, however, the assignment of the entitlement will determine whether we can reach the efficient outcome. When transaction costs are high, there may be one allocation of the entitlement that will permit an efficient outcome, and another allocation that will not. A good deal of the action in law and economics concerns situations of this type. ***

### 21.1.2 Giles v. Walker (1890) 24 QBD 656

*England and Wales High Court (Queen’s Bench Division) – (1890) 24 QBD 656*

The defendant, a farmer, occupied land which had originally been forest land, but which had some years prior to the time when the defendant’s occupation of it commenced been brought into cultivation by the then occupier. The forest land prior to cultivation did not bear thistles; but as soon as it was brought into cultivation thistles sprang up all over it. The defendant neglected to cut down these thistles, so as to prevent them from seeding, and, consequently, in the years 1887...
and 1888 there was a large number of thistles on his land in full seed.

The plaintiff, who occupied land adjoining the defendant’s, suffered great damage by reason of the thistle seeds being carried by the wind in large quantities on to his land, and brought an action in the county court to recover damages against the defendant for the injury done to his land. The county court judge left to the jury the question whether the defendant, in not cutting the thistles, had been guilty of negligence. The jury found that he had shown negligence in the manner in which he had cultivated his land, and judgment was accordingly entered for the plaintiff. The defendant appealed.

LORD COLERIDGE C.J. (LORD ESHER M.R. concurring):

I never heard of such an action as this. There can be no duty as between adjoining occupiers to cut thistles, which are the natural growth of the soil. The verdict and judgment in the county court must be set aside, and this appeal must be allowed.


CROSS-REFERENCE: §14.2.1.3

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.

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 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. ***

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. *** [T]he 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.


CROSS-REFERENCE: §2.3.3, §5.2.1, §9.8.2.2

DEPUTY JUDGE LINDA CHAN SC: ***

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. ***

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 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 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.

535 Affirmed on appeal by the Court of Appeal [1950] 1 KB 201 and House of Lords [1951] AC 850 [§14.2.1.2].
§21.1.5 • Private nuisance

(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. ***


CROSS-REFERENCE: §14.2.3.2, §22.1.3

ILSLEY C.J.: ***

4. The plaintiff in his statement of claim pleads nuisance by alleging that the loss and damage sustained by the plaintiff was caused by the defendant “through its servants, agents or employees wrongfully creating a nuisance by dropping, discharging and loosing paint and paint particles from the property of the defendant, to wit the bridge, onto the property of the plaintiff”. I take this allegation as pleading not a public nuisance but a private nuisance. *** If this is so, the plaintiff cannot succeed on the grounds of nuisance because it seems to be clear—at least the weight of authority is—that only a person who is in possession or occupation of the land affected can sue for a nuisance and that a licensee without possession has no right of action: *Clerk & Lindsell on Torts*, 11th ed., 608, *Prosser on Torts*, pp. 576 and 577, and *Street on Torts*, 241. *** I think, therefore, that nuisance is not available to the plaintiff as a ground of recovery. ***
CURRIE J.: ***

19. In my opinion the doctrine of nuisance does not apply to the facts in this case. Nuisance is described by Prosser on Torts, 2nd ed., p. 401, as follows:

A public nuisance is an act or omission which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all. A private individual may maintain an action for a public nuisance only if he suffers special damage, distinct from that common to the public. ***

20. The defendant has authority under the Acts of 1950, c. 7, s. 9, to construct, maintain and operate a bridge and the necessary approaches thereto across Halifax Harbour. The plaintiff did not in any way become a member of the public within the meaning of Prosser’s definition when he parked his car in the parking area of H.M.C. Dockyard.

21. Nor does the doctrine of private nuisance apply. Street, 1st ed., p. 227-8, says:

The commission of a public nuisance is not tortious unless an individual proves that he has suffered particular damage beyond that suffered by the rest of the community. This tort is not, however, the same tort as that of private nuisance; one obvious distinction is that in private nuisance the plaintiff must prove interference with his enjoyment of land, whereas claims based on public nuisance are not necessarily linked with user of land. ***

§21.1.6 Smith v. Inco Ltd [2011] ONCA 628

Ontario Court of Appeal – 2011 ONCA 628, leave denied: 2012 CanLII 22100 (SCC)

CROSS-REFERENCE: §22.1.4, §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

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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. ***

21.1.7 Antrim Truck Centre Ltd v. Ontario [2013] SCC 13

Supreme Court of Canada – 2013 SCC 13

CROMWELL J.: ***

11. From 1978 until 2004, the appellant owned property on Highway 17 near the hamlet of Antrim. On that property, the appellant operated a truck stop that included a restaurant, bakery, gift shop, gas and diesel bar, offices and a truck sales, leasing and service centre. The business enjoyed the patronage of drivers travelling both east and west along the highway, which formed part of the Trans-Canada Highway system.

12. In September 2004, the respondent opened a new section of Highway 417 that runs parallel to Highway 17 at the point of the appellant’s property. Highway 17 was significantly altered to
§21.1.7 • Private nuisance

allow for the extension of Highway 417. Because of these changes, Highway 17 now effectively turns into a dirt road just two kilometres east of the appellant’s truck stop. *** According to the appellant, the construction of the new segment of Highway 417 resulted in the closure of Highway 17, effectively putting its truck stop out of business at that location. It brought a claim before the Ontario Municipal Board for compensation for injurious affection under the Expropriations Act. ***

13. Having heard the claim, the Ontario Municipal Board awarded the appellant $58,000 for business loss and $335,000 for loss in market value of the land. *** According to the Board, the change in access resulting from the construction constituted a “serious impairment in nuisance”: p. 115. ***

15. On the Province’s further appeal to the Court of Appeal, the Board’s decision was set aside and the appellant’s claim dismissed. The Court of Appeal found that the Board’s application of the law of private nuisance to the facts was unreasonable. ***

What Are the Elements of Private Nuisance? ***

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. ***

20. The two-part approach, it must be conceded, is open to criticism. It may sometimes introduce unnecessary complexity and duplication into the analysis. When it is applied, the gravity of the harm is, in a sense, considered twice: once in order to apply the substantial interference threshold and again in deciding whether the interference was unreasonable in all of the circumstances.

21. On balance, however, my view is that we ought to retain the two-part approach with its threshold of a certain seriousness of the interference. *** [T]he threshold requirement of the two-part approach has a practical advantage: it provides a means of screening out weak claims before having to confront the more complex analysis of reasonableness.

22. What does this threshold require? In Barrette c. Ciment du St-Laurent inc., 2008 SCC 64, [2008] 3 S.C.R. 392 (S.C.C.), the Court noted that the requirement of substantial harm “means that compensation will not be awarded for trivial annoyances”: para. 77. In St. Pierre v. Ontario (Minister of Transportation & Communications), [1987] 1 S.C.R. 906 (S.C.C.), 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). ***

23. *** 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 v. St. John’s (City) Metropolitan Area Board, [1989] 2 S.C.R. 1181 (S.C.C.), 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. ***

How Is Reasonableness Assessed in the Context of Interference Caused by Projects That
Further the Public Good? ***

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. *** 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 Co. v. Ashcroft (Village)* (1979), 95 D.L.R. (3d) 756 (B.C. C.A.), 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 ***. ***

27. The way in which the utility of the defendant’s conduct should be taken into account in the reasonableness analysis is particularly important in this case and would benefit from some explanation.

28. The first point is that there is a distinction between the utility of the conduct, which focuses on its purpose, such as construction of a highway, and the nature of the defendant’s conduct, which focuses on how that purpose is carried out. Generally, the focus in nuisance is on whether the interference suffered by the claimant is unreasonable, not on whether the nature of the defendant’s conduct is unreasonable. ***

29. The nature of the defendant’s conduct is not, however, an irrelevant consideration. Where the conduct is either malicious or careless, that will be a significant factor in the reasonableness analysis: see e.g. Linden and Feldthusen, at pp. 590-91; Fleming, at s. 21.110; *Street on Torts*, at p. 439. Moreover, where the defendant can establish that his or her conduct was reasonable, that can be a relevant consideration, particularly in cases where a claim is brought against a public authority. A finding of reasonable conduct will not, however, necessarily preclude a finding of liability. ***

30. The second point is that the utility of the defendant’s conduct is especially significant in claims against public authorities. Even where a public authority is involved, however, the utility of its conduct is always considered in light of the other relevant factors in the reasonableness analysis; it is not, by itself, an answer to the reasonableness inquiry. Moreover, in the reasonableness analysis, the severity of the harm and the public utility of the impugned activity are not equally weighted considerations. If they were, an important public purpose would always override even very significant harm caused by carrying it out. ***

31. *Loiselle v. R.*, [1962] S.C.R. 624 (S.C.C.), demonstrates that even a very important public purpose does not simply outweigh the individual harm to the claimant. Mr. Loiselle operated a garage and service station on the main Montréal-Valleyfield highway. His business ended up on a dead-end highway as a result of the construction of the St. Lawrence Seaway. This Court upheld an award of compensation for injurious affection, noting that the “statutory authority given to construct the works in question was ... expressly made subject to the obligation to pay compensation for damage to lands injuriously affected”: p. 627. In other words, the landowner was entitled to compensation even though construction of the Seaway served an important public objective. ***
40. Of course, not every substantial interference arising from a public work will be unreasonable. The reasonableness analysis should favour the public authority where the harm to property interests, considered in light of its severity, the nature of the neighbourhood, its duration, the sensitivity of the plaintiff and other relevant factors, is such that the harm cannot reasonably be viewed as more than the claimant’s fair share of the costs associated with providing a public benefit. This outcome is particularly appropriate where the public authority has made all reasonable efforts to reduce the impact of its works on neighbouring properties.

41. It is clear, for example, that everyone must put up with a certain amount of temporary disruption caused by essential construction. Although not a case involving a public authority, the judgment of Sir Wilfrid Greene M.R. in Andreae v. Selfridge & Co. (1937), [1938] Ch. 1 (Eng. C.A.), is instructive:

... when one is dealing with temporary operations, such as demolition and re-building, everybody has to put up with a certain amount of discomfort, because operations of that kind cannot be carried on at all without a certain amount of noise and a certain amount of dust. Therefore, the rule with regard to interference must be read subject to this qualification ... that in respect of operations of this character, such as demolition and building, if they are reasonably carried on and all proper and reasonable steps are taken to ensure that no undue inconvenience is caused to the neighbours, whether from noise, dust, or other reasons, the neighbours must put up with it. [pp. 5-6] ***

45. To sum up on this point, my view is that in considering the reasonableness of an interference that arises from an activity that furthers the public good, the question is whether, in light of all of the circumstances, it is unreasonable to expect the claimant to bear the interference without compensation.

**Does the Unreasonableness of an Interference Need to Be Considered When That Interference Is Physical or Material?***

51. *** [R]easonableness is to be assessed in all cases where private nuisance is alleged. Once a claimant passes the threshold test of showing harm that is substantial in the sense that it is non-trivial, there ought to be an inquiry into whether the interference is unreasonable, regardless of the type of harm involved.

**Did the Court of Appeal Err in Finding That the Board’s Application of the Law of Nuisance to the Facts Was Unreasonable?***

55. The Board’s task was to determine whether, having regard to all of the circumstances, it was unreasonable to require the appellant to suffer the interference without compensation. The Board considered the evidence and the leading cases. Although it did not refer to them by name, the Board took into account the relevant factors in this case. *** The Board concluded that the interference resulting from the construction of the highway was serious and would constitute nuisance but for the fact that the work was constructed pursuant to statutory authority: paras. 37-54. There was no reviewable error in this approach.

56. *** It was reasonable for the Board to conclude that in all of the circumstances, the appellant should not be expected to endure permanent interference with the use of its land that caused a significant diminution of its market value in order to serve the greater public good.
I would allow the appeal, set aside the order of the Court of Appeal and restore the order of the Ontario Municipal Board.

**21.1.8 Midwest Properties Ltd. v. Thordarson [2015] ONCA 819**

CROSS-REFERENCE: §19.11.1

HOURIGAN J.A. (FELDMAN AND BENOTTO JJ.A. concurring):

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.


[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.

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.

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. ***


*Ontario Court of Appeal – 2020 ONCA 699*

**HOY J.A. (DOHERTY J.A. AND JAMAL J.A. concurring):**

1. This appeal arises out of the construction of a dock at a waterfront property on Lake Simcoe.

2. Anna Garber, Michelle Garber and Susin Garber (collectively, “Garber”) hired Mike Nealon and Nealon Wood Products Ltd. (collectively, “Nealon”) to design and build a dock at their property. In August 2011, Nealon, on behalf of Garber, applied for the necessary permit from what is now Ontario’s Ministry of Natural Resources and Forestry (“the MNRF”).

3. On September 30, 2011, the MNRF issued the necessary permit (“the Permit”) and, in the spring of 2012, Nealon commenced construction of the new dock. But he did not situate the Garber’s dock in conformity with the Permit and it curtailed Shari and George Krieser (collectively, “Krieser”) in the use of their neighbouring waterfront and boat. In 2014, Shari Krieser commenced proceedings against Nealon and Garber. A trial was held in late 2018, and the trial judge ruled that the Garber dock, as constructed, constitutes a nuisance.

4. Among other things, he ordered that Garber and Nealon, jointly and severally, at their expense, remove the dock from its present location. He ordered that Nealon and Garber pay Shari Krieser, the owner of the Krieser property, punitive damages in the amount of $100,000. ***

5. Garber and Nealon (whom I will sometimes call the “appellants”) argue that the trial judge’s finding that the dock constitutes a nuisance, his grant of a mandatory injunction, and his award of punitive damages are all tainted by reviewable error. ***

**Nuisance**

18. In his reasons, [the trial judge] began by articulating the test for nuisance. He explained that nuisance is the interference with the use or enjoyment of land and that, in nuisance, the focus is on the harm suffered rather than fault or the nature of the conduct giving rise to the harm: *Barrette*
§21.1.9 • Private nuisance


19. To establish a claim in private nuisance, the interference with the owner's use or enjoyment of the land must be both substantial and unreasonable: Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation), 2013 SCC 13, [2013] 1 S.C.R. 594 (S.C.C.), at para. 19.

20. The trial judge noted that the phrase 'substantial' has been interpreted in the negative to mean something other than minimal such that "compensation will not be awarded for trivial annoyances," quoting St. Lawrence Cement, at para. 77. He observed that "this test applies whether the nuisance is physical injury to land or an interference with the amenities of the land," citing Antrim, at para. 23.

21. As for the reasonableness criterion, the trial judge noted that "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": Antrim, at para. 26. The trial judge also noted that "the severity of the interference and the character of the neighbourhood are important factors in assessing the gravity of the harm," citing Tock v. St. John's (City) Metropolitan Area Board, [1989] 2 S.C.R. 1181 (S.C.C.), at p. 1191.

22. Citing Antrim, at para. 38, the trial judge observed that while the acts of a public authority will generally be of significant utility, "acts that interfere with one person's property for the private good of another person's property will have a more difficult time establishing their 'utility' as understood in the law of nuisance."

23. The trial judge had no difficulty in finding that the interference with the Krieser property was substantial.

24. He found that, as constructed, the Garber dock "impede[s] access to the Krieser property, and consequentially deprives Krieser of an important amenity going to his and his family's use and enjoyment of the property." The dock sits squarely in front of the Krieser waterfront and amounts to a physical invasion of the Krieser's property. The trial judge rejected the appellants' argument that George Krieser's aversion to docking his boat at the Krieser waterfront was that of an unduly sensitive property owner. He found that "the risk of navigating around the Garber dock and boulders in the unpredictable waters of Lake Simcoe is a serious one." He accepted expert evidence that the approach was "unduly risky and beyond the expected capabilities of a weekend cottager/boater" such as George Krieser.

25. The trial judge also found that the actions of the appellants in building the dock were unreasonable. "After all, Nealon, the actual builder of the dock, was convicted of a criminal offence for ignoring the approved plans and building the dock in the wrong place."

26. He concluded:

The Garber dock is directly in front of the boat rails on the Krieser property’s lakefront, and impedes access to those rails and to the Krieser property. The Kriesers, as recreational boaters, can no longer dock their vessel at their own property. There is no sense in which this misplacement of the Garber dock can be said to be reasonable. I find that it is not reasonable and constitutes a nuisance. ***
28. I am not persuaded that there is any basis to interfere with the trial judge’s conclusion that the construction of the Garber dock resulted in a substantial and unreasonable interference with Shari Krieser’s use and enjoyment of her property. Indeed, I agree with his conclusion.

(1) The trial judge did not improperly focus on the appellants’ unreasonable conduct

29. Turning to the appellants’ first argument, in nuisance, unlike in negligence, the focus is generally on the harm suffered rather than fault or the nature of the conduct giving rise to the harm. ***

30. The trial judge was entitled to consider the appellants’ conduct in his reasonableness analysis. It was not the only factor the trial judge considered. The trial judge focussed on the fact that Krieser’s use of their boat was impeded by the Garber dock and the boulders which were installed as part of the dock are directly in front of Krieser’s marine rails.

(2) The trial judge did not fail to consider relevant factors ***

32. The trial judge considered the weather conditions on Lake Simcoe. He found that Lake Simcoe weather conditions are volatile and unpredictable. This finding is amply supported by the evidence. The trial judge noted the evidence of David Fingold, the Garber’s neighbour to the east, that the lake is windy and can change in a matter of moments. Mr. Fingold testified that he often goes out in nice weather and, by the time he returns to his dock, finds conditions to be much rougher.

33. As discussed, in assessing whether a private nuisance has been established, the focus is on the harm suffered by the plaintiff. The harm, in this case, is the interference with Krieser’s ability to use their boat. Whether that harm is caused by the shield of boulders installed in conjunction with, and arguably part of, the dock, or another part of the dock, does not impact the assessment of the harm suffered and the reasonableness of the interference.

34. In his review of the legal test for nuisance, the trial judge noted that the character of the neighbourhood is an important factor in assessing the gravity of the harm and he was alive to the fact that the Krieser property fronted on Lake Simcoe, where boating was common. ***

35. Referring to a colour-coded chart showing the water depths in the approach to the Krieser dock, the trial judge wrote as follows:

As Nealon explains it, Krieser could approach from the west or northwest rather from the north, veer away from or weave between the red coloured bands which are too shallow for his boat to navigate, cross the narrowest part of the orange band which is navigable but precarious, and turn his 33-foot boat to the south in time to avoid the boulders surrounding the Garber dock and line up evenly with the marine rails on the Krieser waterfront …. The feat of navigation proposed by Nealon might or might not be possible to accomplish; what is certain is that it is not easy. ***

(3) The trial judge did not err in his reasonableness analysis by failing to balance the greater benefit of the dock to Garber as built ***

38. Antrim, at para. 2, explains that “the reasonableness of the interference must be determined by balancing the competing interests”. As to how that balancing exercise should be carried out,
Cromwell J. wrote, at para 25, that “... the reasonableness of the interference must be assessed in light of all of the relevant circumstances.”

39. The court is neither bound nor limited by any specific list of factors when considering the reasonableness of an interference, but “should consider the substance of the balancing exercise in light of the factors relevant in the particular case”: Antrim, at para 26. The court will sometimes readily conclude that an interference is unreasonable without having to engage in a lengthy balancing exercise: Antrim, at para. 50.

40. It is hardly surprising that the trial judge did not refer to the benefits accruing to the Garbers. The appellants did not argue at trial that their interference with the Krieser property was reasonable because the Garbers needed to locate their dock where they did to use their boat in August. The appellants’ position, at trial, was that they intended to build the dock in accordance with the Permit and it was built where it was due to an error by Nealon. In other words, any additional benefit was not something they had intended. In the circumstances, I see no error in the trial judge’s conclusion that “there is little, if anything” by way of utility to balance against the interference with Krieser’s property.

41. Moreover, the trial judge engaged in the essence of the balancing question. He considered whether the interference was one that would not be tolerated by the ordinary occupier. He easily concluded that it would not.

42. I agree.

43. As noted above, reasonableness of the interference is to be considered “in light of all of the relevant circumstances”: Antrim, at para. 25. Here, it was highly relevant that the construction of the Garber dock was done contrary to the Permit to which Krieser consented. It was constructed exclusively for Garber’s benefit. And, as constructed, it significantly interferes with Krieser’s enjoyment of their waterfront home. In the circumstances, there is no reason why Krieser should bear the “cost” of this dock for Garber’s benefit.

(4) The trial judge did not otherwise ‘short circuit’ the reasonableness analysis

44. Finally, whether the interference in this case is characterized as the loss of amenity or physical interference is of no moment. In Antrim, at paras. 49-51, faced with conflicting case law, Cromwell J. addressed whether the reasonableness inquiry must be conducted where the interference is “material or physical,” or only with respect to other types of interference, such as loss of amenity. He concluded that reasonableness is to be assessed in all cases where private nuisance is alleged, regardless of the type of harm involved. He recognized that it will not always be easy to distinguish between damage that is “material or physical” and loss of amenity, particularly where the nuisance is interference with access to land.

45. Here, contrary to Nealon’s assertion, the trial judge did not short-circuit the reasonableness inquiry on the basis that the interference was physical. The trial judge clearly understood the nature of the interference and he assessed the reasonableness of that interference in light of the relevant circumstances.

The Injunction ***

78. Having regard to the evidence at trial, there is no reason to interfere with the trial judge’s
exercise of his discretion in granting the injunction ***. ***

Punitive Damages ***

94. The trial judge concluded:

It is clear to me that the protracted nature of the interference with Krieser’s use and enjoyment of property has everything to do with Garber’s and Nealon’s intentional conduct. It is hard to imagine a clearer case in need of a deterrent type of remedy. Krieser, as plaintiff, has offered to pay the full cost of remedying the interference with his property rights; Garber and Nealon, as defendants, are not interested in a remedy, even one fully funded by Krieser.

The harm inflicted by Garber and Nealon was aimed directly at Krieser. It aimed to expand the Garber waterfront and improve the aesthetics of the Garber waterfront, all at the expense of Krieser’s use and enjoyment of their property. The case calls for a punitive damages award proportionate to the value of the dock.

95. The trial judge ordered Nealon and Garber to pay Shari Krieser punitive damages in the amount of $100,000. ***

105. I agree with the appellants that the trial judge erred in treating Garber and Nealon “as one,” without assessing whether punitive damages were required against them separately. As Hill instructs, punitive damages must arise from the particular conduct of the defendant against whom they are awarded.

106. In my view, the misconduct of Nealon was not so outrageous that punitive damages were rationally required to punish, deter or denounce it.

107. The “protracted nature of the interference” and the failure to accept the Krieser Offer were significant—indeed, in my view, the most significant—factors in the trial judge’s decision to order punitive damages against Garber and Nealon.

108. However, the trial judge failed to consider that Nealon’s position was fundamentally different from Garber’s. Nealon was a contractor, not the owner. Once the dock was installed, he could not move it without Garber’s approval. His evidence was that he would have done so, had Garber approved it. Indeed, during a July 2012 telephone conversation, Nealon told George Krieser, “I guarantee you they’ll never move it.” Nor could Nealon accept or reject—or, presumably, cause Garber to accept or reject—the Krieser Offer. ***

116. I would not interfere with the trial judge’s award of punitive damages in the amount of $100,000 against Garber. ***

120. *** As I have said, the “protracted nature of the interference” and Garber’s failure to accept Krieser Offer were, in my view, the most significant factors in the trial judge’s decision to order punitive damages against Garber. I agree with the trial judge that punitive damages are required to punish and denounce Garber’s conduct and deter similar conduct. ***
21.2.1 Public nuisance


Private nuisance and public nuisance are separate concepts, and are generally thought to have quite distinct origins.\(^{536}\) 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 ***.

### 21.2.1 Ryan v. Victoria (City) [1999] CanLII 706 (SCC)

**CROSS-REFERENCE: §14.1.2.2, §14.2.6.2**

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\(^{536}\) For the prevailing view, see Lewis Klar, *Tort Law*, 4th ed (Scarborough: Thomson Carswell, 2008) at 716.
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.

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. ***

21.2.2 Overseas Tankship v. The Miller Steamship (The Wagon Mound No. 2) [1966] UKPC 10

CROSS-REFERENCE: §14.2.2.2

LORD REID: ***

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
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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) [§17.1.2] 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. ***

21.2.3 Smith v. Fonterra Co-operative Group Ltd [2021] NZCA 552

CROSS-REFERENCE: §19.12.1, §24.2.1

FRENCH J. (COOPER AND GODDARD JJ. concurring): ***

The tort of public nuisance ***

40. There are two types of nuisance actions: private nuisance and public nuisance, and although the same conduct can amount to both a public nuisance and private nuisance, they are distinct.\footnote{In re Corby Group Litigation [2008] EWCA Civ 463, [2009] QB 335 at [29]–[30]; and Colour Quest Ltd v. Total Downstream UK plc [2009] EWHC 540 (Comm), [2009] 2 Lloyd’s Rep 1. See generally Michael Jones (ed) Clerk & Lindsell on Torts (23rd ed, Sweet & Maxwell, London, 2020) at [19-03].} The key distinction between the two is the rights they are designed to protect. Private nuisance is concerned with protecting the right of an occupier or owner of land to the quiet use and enjoyment of their land free from unreasonable interference.\footnote{At [19-24]. Reaffirmed by the House of Lords in Hunter v. Canary Wharf Ltd [1997] AC 655 (HL).} In contrast, public nuisance is primarily concerned with the protection of public rights, that is to say with rights enjoyed by all members of the public, not specific individuals.\footnote{Stephen Todd (ed) Todd on Torts (8th ed, Thomson Reuters, Wellington, 2019) at [10.3.01]; and Attorney-General v. PYA Quarries Ltd [1957] 2 QB 169 (CA) at 184.}

41. In both private and public nuisance however, the interference with the right must be both substantial and unreasonable before it will be actionable.\footnote{Carolyn Sappideen and Prue Vines (eds) Fleming’s: The Law of Torts (10th ed, Thomson Reuters, Sydney, 2011) at [21.50], [21.80] and [21.90]. Private nuisance—Benjamin v. Storr (1874) LR 9 CP 400 (Comm Pleas) at 407; and for public nuisance—Harper v. G N Haden & Sons Ltd [1933] Ch 298 (CA) at 303–304.} That is to say the rights and obligations created by nuisance are not framed in absolute terms. Not every interference is actionable. An interference is unreasonable if in all the circumstances “an ordinary person could not reasonably be expected to put up with it”.\footnote{James Goudkamp and Donal Nolan Winfield & Jolowicz on Tort (20th ed, Sweet & Maxwell, London, 2020) at [15-016] citing Barry v. Biffa Waste Services Ltd [2012] EWCA Civ 312, [2013] QB 455 at [74].} There has to be an element of give and take, live and let live.\footnote{Harper v. G N Haden & Sons Ltd, above n 12; Trevett v. Lee [1955] 1 WLR 113 (CA); Maitland v. Raisbeck [1944] KB 689 (CA); and Bamford v. Turley (1862) 3 B & S 66, 122 ER 27 at 83–84 (B & S), 32–33 (ER).}

42. Public nuisance started off life in the 12th and 13th centuries as a common law crime consisting of conduct that “obstructs or causes inconvenience or damage to the public in the
exercise of rights common to all His Majesty’s subjects”. It was not necessary that all of the
King’s subjects be obstructed or inconvenienced. It was sufficient that some of them were. The
central feature was the suffering of common injury by members of the public as the result of
interference with the exercise of their rights as members of the public. Hence the terms “common
nuisance” and “public nuisance” were used interchangeably.\footnote{Sappideen and Vines, above n 12, at [21.20].}

43. Typically, the cases involved obstructions of the highway and navigable waterways which
constituted an interference with the right of the public to pass and repass. As well as detriment
to a public right, there were also cases involving detriment to a neighbourhood. The crime was
further held to encompass a miscellany of other behaviours seen as socially objectionable and
having adverse public effects such as keeping a disorderly house, being “a nightwalker” or “a
common scold”.\footnote{Cited in William Prosser “Private Action for Public Nuisance” (1966) 52(6) Va Law Rev 997 at 1005. See also \textit{R v. Rimmington}, above n 15, at [7].} The offence was commonly used as a catch all, invoked in order to prosecute
acts that were harmful to the community but would not otherwise have been punishable.\footnote{Goudkamp and Nolan, above n 13, at [15-007]; and Sappideen and Vines, above n 12, at [21.40].}

44. Redress for public nuisance by way of indictment or abatement at the instance of the
appropriate authority remained exclusively criminal until the 16th century when it was held that
conduct which could found a criminal prosecution for causing a common or public nuisance could
also found a civil action.\footnote{At [21.40]; and \textit{R v. Rimmington}, above n 15, at [7].} Since no member of the public had any better ground for action than
any other member, the Attorney-General assumed the role of plaintiff acting on the relation of the
community who had suffered from the interference with the public right.\footnote{Cited in William Prosser “Private Action for Public Nuisance” (1966) 52(6) Va Law Rev 997 at 1005. See also \textit{R v. Rimmington}, above n 15, at [7].}

45. However, as early as 1536, it was also held that an individual member of the public could sue
personally for common nuisance if they could show they suffered “greater hurt or inconvenience
than any other man had”, that is to say over and above the harm suffered by the general or local
public. This became known as the special damage rule.\footnote{Sappideen and Vines, above n 12, at [21.40]; and \textit{R v. Rimmington}, above n 15, at [7].}

46. Special damage in this context was not limited to special damages in the form of pecuniary
loss. It was held to consist of proved general damage such as inconvenience and delay, provided
it exceeded in degree what was suffered by the community at large.\footnote{Goudkamp and Nolan, above n 13, at [15-007]; and Sappideen and Vines, above n 12, at [21.40].} Absent special damage, a
claimant seeking civil redress in public nuisance was dependent on the Attorney-General
agreeing to bring a relator action.\footnote{Amanda Stickley \textit{Australian Torts Law} (4th ed, LexisNexis, Chatswood, 2016) at [25.79]; and Todd, above n 11, at [10.3.03].}

47. Over the years, public nuisance has continued to include a range of diverse activities such as
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blasting and quarrying near built-up areas, allowing land to be used as a dump creating a dangerous or noxious environment, exposing a person suffering from an infectious disease in the street, or obstructing a navigable river by lowering its depth.

48. In the United Kingdom, causing a public or common nuisance is still treated as both a crime and a tort, the ingredients of both being the same. For this reason, the tort of public nuisance is often described as a hybrid tort. In New Zealand all common law crimes were abolished in 1893, but the tort of public nuisance has survived as part of our law.

49. A decision of this Court in 1869 confirmed, following English authority, that in order to have standing to sue in public nuisance a private individual must have sustained damage that is “particular, direct and following upon the individual immediately from the [interference].” It was also said that the right of action did not depend on the quantum of damage.

50. The fact the English courts regard the ingredients of the crime and the tort as the same means that English authorities concerning the crime of public nuisance remain relevant in New Zealand tort law including the important 2004 House of Lords decision in R v. Rimmington and R v. Goldstein. In that decision, the Law Lords concluded that the most accurate definition of public nuisance and its elements was as follows:

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 act 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.

51. That definition (which we will call the Rimmington definition) was relied on by the High Court in this case and by all parties. It is the most authoritative modern definition.

52. Although the tort is one of strict liability in the sense of not being dependent on proof of

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553 Attorney-General v. PYA Quarries Ltd, above n 11.
554 Attorney-General v. Tod Heatley (1897) 1 Ch 560 (CA).
555 Managers of the Metropolitan Asylum District v. Hill (1881) 6 App Cas 193 (HL) at 204.
557 R v. Rimmington, above n 15, at [7] and [36].
558 Public nuisance as a tort has been recognised in New Zealand: Attorney-General v. Abraham and Williams Ltd [1949] NZLR 461 (CA); Hanks v. R (1905) 25 NZLR 787 (CA); Lower Hutt City Council v. Attorney-General ex rel Moulden [1977] 1 NZLR 184 (CA); and Darroch v. Carroll [1955] NZLR 997 (SC). See generally Todd, above n 11, at [10.3.01].
559 Mayor of Kaiapoi v. Beswick (1869) 1 NZCA 192 at 207.
560 At 208.
561 Above n 15. The conduct at issue in Rimmington involved a campaign of sending racially abusive hate mail and in Goldstein putting salt in a letter as a joke causing an anthrax scare at a post office. Neither was held to constitute public nuisance. In Rimmington that was because of the absence of injury to the public generally as opposed to an individual, and in Goldstein because the defendant did not reasonably foresee the consequences of his actions.
562 At [10] and [45].
563 The definition was derived from the 2005 edition of Archbold’s Criminal Pleading, Evidence and Practice with the deletion of the word “morals” which the House of Lords considered archaic.
564 High Court judgement, above n 1, at [58].
565 Jones, above n 9, at [19-03].
negligence, it is nevertheless well established under the rubric of remoteness of damage that a defendant can only be liable if the particular harm suffered by the claimant was reasonably foreseeable in the sense of there being a real risk of it occurring.\textsuperscript{566}

53. As to remedies, there are three private law remedies available for nuisance: a common law action for damages for past harm, equitable relief by injunction for continuing harm and abatement without recourse to legal process.\textsuperscript{567} Sometimes instead of granting an injunction, a court may issue a declaration that a defendant is not entitled to commit the act complained about.\textsuperscript{568}

54. Finally, for completeness in this brief exposition of public nuisance we note the existence of an affirmative defence of statutory authority [\textsection 6.6].\textsuperscript{569}

Mr Smith’s claim in public nuisance

55. In this case, the public rights alleged to have been interfered with by the respondents’ conduct are pleaded as rights to public health, safety, comfort, convenience and peace. Mr Smith who has brought the proceedings in his own name further contends that the interference with these public rights has caused or is likely to cause him special or particular damage. That is said to be because of his interest according to custom and tikanga in a block of land situated on the coast at Wainui Bay. The land and nearby land contain customary sites and resources (such as waka landing places, burial caves, pā sites, battle sites and seasonal food gathering camps) that are of customary, cultural, nutritional, historical and spiritual significance to Mr Smith. Most of these customary sites are situated in close proximity to the coast and other waterways. This, as Mr Salmon put it, makes Mr Smith more vulnerable to climate change than “the average person”. \textsuperscript{***}

Public nuisance: our analysis \textsuperscript{***}

(i) No actionable public right pleaded? \textsuperscript{***}

61. \textsuperscript{***} [T]he public rights that Mr Smith alleges to have been interfered with are pleaded as the right to public health, safety, comfort, convenience and peace. \textsuperscript{***}

67. \textsuperscript{***} [A] nuisance is public if either or both of the following conditions are satisfied:

(a) The nuisance must affect 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.

(b) The nuisance must infringe rights belonging to the public as such.

68. Seen in that light, the “rights” pleaded in the statement of claim appear to be consistent with


\textsuperscript{567} Sappideen and Vines, above n 12, at [21.250].

\textsuperscript{568} At [21.270] citing Batcheller \textit{v. Tunbridge Wells Gas Co} (1901) 84 LT 765 (Ch).

\textsuperscript{569} Jones, above n 9, at [19-87]; and Todd, above n 11, at [10.3.05].
(ii) No independent illegality?***

72. *** [I]t is not necessary for the act or omission to be in itself a legal wrong separate from nuisance. What matters is that the act or omission causes common injury. To put it another way, 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.***

74. For completeness we would add *** that the fact the respondents are acting in accordance with all applicable regulatory constraints does not of itself preclude the interference being held unreasonable. The reasonableness assessment is claimant-focused. As already mentioned, an interference is unreasonable if a person cannot be expected to tolerate it.

(iii) Inability to satisfy the special damage rule?

75. There does not appear to be one universally accepted formulation of the special damage rule. Some formulations say to qualify as special damage, the harm suffered by the individual must not only be appreciably different in degree but also different in kind from that shared by the general public. Other formulations say that all that matters is for the injury and inconvenience to be appreciably “more substantial, more direct and immediate” than that suffered by the general public without necessarily differing in its nature. The latter appears to have been the approach adopted by this Court in the 1869 decision quoted above at [49]. ***

82. For the purposes of a strike out, we are willing to adopt the most liberal formulation of the special damage rule and therefore only look to see whether the pleaded harm is capable of being viewed as appreciably exceeding that suffered by the general public. In our view the harm suffered by [Mr Smith’s] interests does 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. In very many places throughout New Zealand there will be sites of historical, nutritional, spiritual and cultural significance that are at risk or under threat. Their harm is substantially the same.***

(iv) The lack of a sufficient connection between the pleaded harm and the respondents’ activities ***

90. There are, we accept, a number of English authorities which are often cited in textbooks under the heading “Nuisance due to many.” These cases are authority for the proposition that a defendant will not be exempted from liability on the grounds that they were simply one of many causing a nuisance. This will be so even if the defendant’s actions in isolation would not amount to a nuisance or of itself cause any harm. The nuisance consists in the aggregation. The “but for”

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571 Goudkamp and Nolan, above n 13, at [15-017].
572 See Sappideen and Vines, above n 12, at [21.40].
573 At [21.40].
574 At [21.240(iii)]; Goudkamp and Nolan, above n 13, at [15-068]; and Jones, above n 9, at [19-111].
test is not applied. Each defendant is amenable to the remedy against the aggregate cause of complaint. According to one text, where damages are awarded, each defendant is held liable only to the extent of their contribution and if there is no satisfactory basis on which to apportion responsibility the liability is divided equally.\textsuperscript{575}***

92. We do not *** accept that applying those principles to the present case would be a natural and rational extension of them. Quite the contrary. All of the cases which have invoked this aggregation principle have involved a finite number of known contributors to the harm, all of whom were before the Court. That is no accident. It is a critical factor. None of the cases involved the sort of situation before us where there is in fact no identifiable group of defendants that can be brought before the Court to stop the pleaded harm. In none of the “Nuisance due to many” cases did the Court grant the claimant or the Attorney-General an injunction knowing it would do nothing to stop or even abate the nuisance. Indeed, we know of no public nuisance case where an injunction has been issued in those circumstances. And none was cited to us.

93. We therefore agree with the High Court that the claim in public nuisance is clearly untenable and should be struck out. To allow it to proceed would not extend the existing law but distort it.***

\textbf{21.2.4 Criminal Code, RSC 1985}

\textit{Criminal Code, RSC 1985, c C-46, s 180}

180.(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.

\textbf{21.2.5 Further material}


\textsuperscript{575} Goudkamp and Nolan, above n 13, at [15-068].
22  **Strict Liability Torts**


Suppose I make a mess on my property and present you with the bill for cleaning it up. Absent some prior agreement, this would seem rather odd. It is my mess, after all, not yours. Now suppose that instead of making a mess on my property and presenting you with the bill, I make a mess on your property and walk away, claiming that the mess is your problem. If it was inappropriate of me to present you with the bill for the mess I made on my property, it hardly seems that I have improved matters making my mess on your property. 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. In other words, it does not depend on whether I made the mess absentmindedly or carelessly. 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. This is a helpful way of capturing the underlying intuition expressed by the rule of strict liability. ***

22.1  **Non-natural use of land**


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.

22.1.1  **Rylands v. Fletcher [1868] UKHL 1**

**BACKGROUND:** Quimbee (2020), [https://youtu.be/Nj9qH9jIAlM](https://youtu.be/Nj9qH9jIAlM)

*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
§22.1.1 • Non-natural use of land

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 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 damned 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
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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 he 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. ***

22.1.2 Transco Plc v. Stockport MBC [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**
§22.1.2 • Non-natural use of land

(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”, i.e., 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
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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? ***

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.


CROSS-REFERENCE: §14.2.3.2, §21.1.5

ILSLEY C.J. (minority opinion): ***

5. *** [I]n my opinion the fact that the plaintiff did not have an interest in the parking lot sufficient to enable him to maintain an action on the ground of nuisance does not disable him from recovering on the ground of the rule in Rylands v. Fletcher (1868) L.R. 3 H.L. 330, which is formulated in Salmond on Torts, 12th ed., 553, as follows:
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The occupier of land who brings and keeps upon it anything likely to do damage if it escapes is bound at his peril to prevent its escape, and is liable for all the direct consequences of its escape, even if he has not been guilty of negligence. ***

7. I agree with the learned trial judge that the plaintiff is entitled to recover on the ground of Rylands v. Fletcher; the principle of which applies to “anything likely to do mischief if it escapes”: Clerk & Lindsell on Torts, 11th ed., 617. “The principle of the decision (in Rylands v. Fletcher) is not ‘confined to the invasion of a right of property in soil’, and is not limited to persons who keep or accumulate dangerous things on their own land. The person liable is the owner or controller of the dangerous thing. If he brings or collects it on land, he is liable although he is not the owner or occupier of the land, but has merely a license to use or enter upon it”: Clerk & Lindsell on Torts, 11th ed., pp. 619, 620.

8. However, “for damage caused by the natural or ordinary use of land there is no liability under the principle of Rylands v. Fletcher”: ibid., p. 618.

9. Was there a non-natural use of the land by the defendant? This question may be otherwise stated as this: had there been no statutory authorization, could it have been said that the defendant put the land on which the Halifax end of the bridge stood to a non-natural use when it erected a bridge thereon and applied paint to its maintenance? ***

11. From Clerk & Lindsell on Torts, 11th ed., s. 1054, and the cases there cited, it appears that the erection of a wall or building on land has been held to be a natural use of the land. But can the same be said about the erection on land of one end of a bridge across an arm of the sea, such as Halifax Harbour? Suppose it were impossible to paint a bridge without damaging cars lawfully placed on adjoining lands, even after all precautions were taken; would the car owners have to bear the loss inflicted, there being in that case no negligence on the part of the defendant? There can be no question but that the wind-blown paint particles constituted a danger to car owners lawfully using the parking lot in question, and that these particles escaped from land occupied by the defendant for the purpose of maintenance and operation of the bridge. In my opinion, it would be incorrect to say that there was not a non-natural use of the land for the purpose of the rule in Rylands v. Fletcher, and I would hold that there was; see Clerk & Lindsell on Torts, 11th ed., p. 619, s. 1055.

12. It is quite clear to me that the defendant has not discharged the onus which it was necessary for it to discharge in order to escape the consequences of the doctrine of Rylands v. Fletcher. It was not shown that in practical feasibility the defendant’s statutory right or obligation to keep the bridge painted could not have been performed in a way which did not involve damage to the plaintiff. “Even where there is a statutory obligation upon a person, that does not entitle him to invade the rights of others unless he can show that in practical feasibility the obligation could be performed in no way save one which involves damage to other persons.”: Dufferin Paving & Crushed Stone Ltd. v. Anger, [1940] S.C.R. 174 per Davis J. at p. 177.

13. Non constat but that the defendant could have given warning to, or in such a way that the warning would reach, those parking cars in the parking lot in question of the defendant’s intention to paint the bridge at the time and place in question and of the danger to parked cars that would be constituted thereby, and that such warning would have been effective to avert any damage. The responsible officers or employees of the defendant on several occasions called the “security officer” and had certain cars moved in certain parking lots during the season at different times. ***

The evidence shows that advance notice by the defendant to the security officer of the painting
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operations and of the danger to cars in the parking lot could have resulted in the plaintiff’s car being parked elsewhere on the occasion in question. *** The defendant could, in my opinion, undoubtedly have secured permission to post notices in the dockyard, but the defendant never sought such permission, nor is there any evidence that the defendant took any steps whatever to give advance notice through the security officer or otherwise of the painting operations at the time and place in question and the danger to cars from those operations.

14. And non constat but that the defendant could, within the range of practical feasibility, have procured permission to station and have stationed a sufficient number of men in the dockyard to keep any cars in the parking lot wiped clean of flecks of paint before they dried if any were deposited on the cars. ***

15. In my opinion, the learned judge was quite right in deciding that the onus devolving on the defendant as a result of the rule in Rylands v. Fletcher was not discharged and that therefore the defendant is liable for the damage done. ***

CURRIE J.: ***

22. The trial judge held that the doctrine of high liability of Rylands v. Fletcher (1868) L.R. 3 H.L. 330, applied to the benefit of the plaintiff. With respect I am unable to agree. The rule of law is commonly expressed as being that, if a 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 at his peril, and if he does not do so, is prima facie answerable for all damage which is the natural consequence of its escape.

23. *** It cannot be said that upon the facts the defendant applied its property to special uses or in an exceptional manner. Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co., [1921] 2 A.C. 465. The defendant used its property in an ordinary way when it engaged in the painting operation and this operation was for the natural purpose of preservation of the bridge structure. It is said in Rickards v. Lothian, [1913] A.C. 263 at 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 land or such a use as is proper for the general benefit of the community.

24. Lord Moulton quoted from Wright J. in Blake v. Woolf, [1898] 2 Q.B. 426:

The general rule as laid down in Rylands v. Fletcher is that prima facie a person occupying land has an absolute right not to have his premises invaded by injurious matter, such as large quantities of water, which his neighbour keeps on his land. The general rule is, however, qualified by some exceptions, one of which is that, where a person is using his land in the ordinary way and damage happens to the adjoining property without any default or negligence on his part, no liability attaches to him. ***

26. The erection of this bridge over the approaches and over the harbour is a natural user of the land. Modern transportation has brought about a revolution in the former uses of land. The great volume of traffic over this bridge testifies to its need and utility. It is vital to the preservation of this huge bridge that it be painted. It is notorious that the whole area of the bridge receives gales, heavy winds and breezes which may carry paint drops to distances up to 300-400 feet. In its general painting operations the defendant used the bridge in an ordinary way and for the general
benefit of the community. So far as these general operations are concerned, the defendant has not omitted anything which it should have done. What is meant here is that I think the defendant took all proper means to furnish proper equipment and applied the best methods that were known and available to it in the painting of the bridge. For example, it might be dangerous to life to use canopies, bosun’s chairs, and the huge spread of tarpaulin that would be needed. It is doubtful if on a windy day any of these methods would be effective to prevent the larger part of the paint drops from falling upon objects below. ***

MACDONALD J.: ***

42. In what has gone before, the action has been regarded by judge and counsel alike as one for nuisance or the escape of a dangerous thing, to either of which statutory authority is a valid defence. It seems to me that this manner of viewing the case may well be erroneous; for I cannot find that the plaintiff’s permitted use of the parking space allotted to him gave him any such interest in land as is necessary to entitle him to sue in either form of action for the injury to his car resulting from the bridge-painting operations.

43. The proper form of action would seem to be one of negligence. ***

22.1.4 Smith v. Inco Ltd [2011] ONCA 628

CROSS-REFERENCE: §21.1.6, §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. ***

22.1.5 Jaipur Golden Gas Victims Association v. Union of India [2009] INDLHC 4354

CROSS-REFERENCE: §16.2.3, §17.3.1, §19.5.2.4, §22.2.1

MANMOHAN J.: ***

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, vibratory, 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.
***

22.1.6 Balkrishnan Menon v. Subramanian [1968] AIR Ker. 151

*Kerala High Court – 1968 AIR Ker. 151*

T.C. RAGHAVAN J.: ***

2. The second appeal arises out of a suit for damages by the first respondent, a minor represented
by his father, for injuries caused to him by the explosion of a minnal gundu at the Trichur Pooram
in April 1959. *** [T]he appellants are some of the members of the Pooram Celebration
Committee. *** The trial court made the appellants *** liable: It held that it was the Celebration
Committee that was responsible for the conduct of the Pooram ***. ***

3. A minnal gundu is an explosive made out of a coconut shell by filling it with an explosive
substance. The coconut shell itself is placed in a bamboo tube with gun powder beneath; and the
tube is kept upright tied to an iron peg driven into the ground. When the gun powder in the tube
is ignited through a small hole on the side of the tube, the coconut shell is ejected vertically several
feet into the sky where it explodes producing a flash or lightning-like light and a loud report. Two
processions of elephants bearing the deity or Poorams *** meet at the southern gopuram of the
Vadakkunnatha Temple in the evening at about 5 or 5.30 in the Thekkumkad Maidan around the
temple; and just as the elephant of the Paramakkavu Devaswom bearing the deity emerges
through the southern gopuram before this important event, a few hundreds of olappadakkams
interspersed with about 20 or 25 minnal gundus are fired. (Ollappadakams are a type of fireworks
made with gun powder wrapped in small parcels of palm leaves.) The accident is said to have
happened when this was done.

4. The finding of both the lower courts is that the minnal gundu instead of rising into the sky and
exploding there, ran at a tangent, fell amidst the crowd and exploded causing serious injuries to
the first respondent. The further finding is that the accident was caused by the negligence of the
20th defendant in not properly securing the bamboo tube containing the coconut shell to the iron
peg and was also due to his negligence in not choosing strong tubes because the tube in question
burst. On the basis of these findings which cannot be questioned, the accident could have
happened in one of two ways: either the coconut shell containing the explosive substance was
not ejected sufficiently high into the sky due to the bursting of the bamboo tube, so that it fell
among the crowd before it burst: or it ran at a tangent due to the tilting of the tube and exploded
in the midst of the crowd. In either event, the negligence was of the 20th defendant, the
independent contractor. ***

6. The further question for consideration is whether the appellants, who engaged the independent
contractor, would also be liable. The minnal gundu is an explosive and is therefore an “extra
hazardous” object; and persons who use such an object, which, in its very nature, involves special
danger to others, must be liable for the negligence of their independent contractor. The duty to
keep such a substance without causing injury to others is a “non-delegable” duty: the appellants
could not have escaped liability for the breach of such a duty by engaging an independent
§22.1.7 • Non-natural use of land

contractor. The liability of the appellants can also be based on the rule enunciated by Blackburn J. in the famous case of Rylands v. Fletcher, (1868-3 HL 330). The rule is that: “the person who for his own purposes brings on his lands 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, is prima facie answerable for all the damage which is the natural consequence of its escape”. The person’s liability arising out of such “non-natural” user of the land is absolute, or strict as some decisions say.

7. Sri. V.K.K. Menon, on behalf of the appellants, argues that in this case there was no “non-natural” user of the land where the minnal gundus were exploded. His argument is that it is only a natural user of the Thekkumkad Maidan during the day of the Pooram festival to collect minnal gundus and explode them there. I do not agree, because under the Indian Explosives Act for making and storing explosive substances even on the Thekkumkad Maidan on the Pooram day licences have to be taken from the prescribed authorities. It is admitted that for exhibiting fireworks permission has to be obtained from the District Magistrate. The accident took place in this case at 5.30 pm when the two Poorami *** were about to meet before the southern gopuram of the temple. It is also admitted that for the exhibition of fireworks during the day no licence was taken, though a licence was taken for the night. It is therefore obvious that this argument of Mr. V.K.K. Menon has no substance.

8. The next contention urged by the counsel of the appellants is that the principle of volunti non fit injuria must apply to the case. The argument is that since the first respondent voluntarily came to witness the Pooram and the fireworks, he is a volunteer and therefore not entitled to damages. What the evidence discloses is that the volunteers who helped the 20th defendant kept a cordon round a particular area and the gundus were kept and exploded within that area. The gundu that caused injury to the first respondent fell outside this area and exploded. The counsel argues that even this would not have made the first respondent any the less a volunteer. I have asked Mr V.K.K. Menon whether every one in the big crowd of a few lakhs [100,000s] witnessing the fireworks anywhere in the Thekkumkad Maidan would be a volunteer, and he has answered in the affirmative. This answer alone is sufficient to reject this contention. If the first respondent entered the area within the cordon and sustained injuries, he might be considered to be a volunteer: but to argue that every one who stood anywhere in the Thekkumkad Maidan, a very extensive and large area open to the public, is a volunteer is to contend for something bordering on the preposterous. ***

12. The concurrent decision of the lower courts is confirmed ***.

22.1.7 Local Government Act, RSBC 2015

Local Government Act, RSBC 2015, c 1, s 744

744. 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,
22.2.1 Ultrahazardous activities

(c) a dike or a road.

### 22.1.7.1 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.
- 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.

### 22.1.8 Further material


### 22.2 Ultrahazardous activities

#### 22.2.1 Jaipur Golden Gas Victims Association v. Union of India [2009] INDLHC 4354

**CROSS-REFERENCE:** §16.2.3, §17.3.1, §19.5.2.4, §22.1.5

**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* 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*
22.2.2 Ultrahazardous activities

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). ***

22.2.2 Smith v. Inco Ltd [2011] ONCA 628

CROSS-REFERENCE: §21.1.6, §22.1.4

DOHERTY, MACFARLAND JJ.A. AND HOY J.: ***

75. The trial judge’s assessment of the Rylands v. Fletcher 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

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§22.2.2 • Ultrahazardous activities

_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 Feldthuven, 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*. ***

22.2.3 Further material

23  **Vicarious Liability**

23.1  **Common law vicarious liability**

23.1.1  **Turberville v. Stampe (1697) 91 ER 1072 (KB)**

*England Court of King’s Bench – (1697) 91 ER 1072*

[T]he defendant’s servant kindled this fire by way of husbandry, and a wind and tempest arose, and drove it into his neighbour’s field. ***

**HOLT C.J.:** ***

[[If a stranger set fire to my house, and it burns my neighbour’s house, no action will lie against me ***. But if my servant throws dirt into the highway, I am indictable. So in this case if the defendant’s servant kindled the fire in the way of husbandry and proper for his employment, though he had no express command of his master, yet his master shall be liable to an action for damage done to another by the fire; for it shall be intended, that the servant had authority from his master, it being for his master’s benefit.***

23.1.2  **Evolution of vicarious liability**

Y. Shao, “Evolution of Vicarious Liability: How the Independent Contractor Defence was Lost” (2019) 6 *NZ Pub Int LJ* 63

Traditionally, vicarious liability arises where a person, typically an employer, is held liable for another person’s tort. The tortfeasor is typically an employee, with the relevant act or omission carried out during the course of his or her employment. The employer–employee doctrine has come under increasing scrutiny in recent times and has been extended in significant ways. First, the existence or absence of an employment contract is no longer decisive, as vicarious liability has been extended to include relationships which are “akin to employment.” Secondly, the question of whether the act or omission was carried out within the course and scope of employment has evolved into a different test—that is, whether the conduct was “closely connected” with the relationship in question.

The orthodox employer-employee relationship (a contract of service) has traditionally been distinguished from an alternative contractual relationship of a principal and independent contractor (a contract for service). The general rule was that an employer may have been vicariously liable for his or her employee’s tort, but not for the tort of an independent contractor. In 2012, the Court of Appeal in *Ev. English Province of Our Lady of Charity* stated that “the law is clear: the employer is not vicariously liable for the torts of his independent contractor,” whilst

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576  D. acc. 1 Bl. Com. 431.
578  At 120.
also acknowledging “that the law of vicarious liability has moved beyond the confines of a contract of service”. ⁵⁸⁰

The law of vicarious liability has been evolving since English Province, notably through the decisions of the Supreme Court in Christian Brothers, Cox v. Ministry of Justice, Mohamud v. Wm Morrison Supermarkets plc and Armes v. Nottinghamshire County Council. ⁵⁸¹ The Court of Appeal in Barclays Bank plc v. Various Claimants upheld the lower court’s decision, strongly dismissing the claim that the law of vicarious liability does not extend to independent contractors. ⁵⁸² ²³.¹.²

Policy Background and Modern Developments

It is not easy to precisely pin down the policy basis of vicarious liability. It has been said that “[t]he doctrine of vicarious liability has not grown from any very clear, logical or legal principle but from social convenience and rough justice.” ⁵⁸³ Nonetheless, it is recognised as “a longstanding and vitally important part of the common law of tort”. ⁵⁸⁴ The Supreme Court of Canada in Bazley v. Curry referred to “the provision of a just and practical remedy for the harm” and “the deterrence of future harm” as the two fundamental policy concerns which underlie the imposition of vicarious liability. ⁵⁸⁵

Policies concerning the imposition of vicarious liability are sometimes expressed in terms of “enterprise risk” in that all forms of economic activity carry a risk of harm. ⁵⁸⁶ Lord Phillips in Christian Brothers commented that the underlying policy objective is to ensure, insofar as it is fair, just and reasonable, that liability for tortious wrong is borne by a defendant with the means to compensate the victim. ⁵⁸⁷ This is because “[s]uch defendants can usually be expected to insure against the risk of such liability, so that this risk is more widely spread.” ⁵⁸⁸

The pursuit of a fair and practical remedy has led to recent significant developments in the law of vicarious liability. Notably, liability can extend to unincorporated associations and criminal offences, including sexual assault. ⁵⁸⁹ It is also possible for two (or possibly more) defendants to be vicariously liable for the tort of a single wrongdoer. ⁵⁹⁰ Lord Phillips in Christian Brothers commented that these represented “logical incremental developments of the law”. ⁵⁹¹ At the same time, however, he acknowledged the difficulty in identifying a coherent set of criteria for determining vicarious liability in modern law. ⁵⁹² ²³.¹.²

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⁵⁸⁰ At [73].
⁵⁸³ Imperial Chemical Industries Ltd v. Shatwell [1965] AC 656 (HL) at 685.
⁵⁸⁴ Christian Brothers, above n 1, at [34].
⁵⁸⁵ Bazley v. Curry [1999] 2 SCR 534 at [29].
⁵⁸⁷ Christian Brothers, above n 1, at [34].
⁵⁸⁸ At [34].
⁵⁸⁹ At [20].
⁵⁹⁰ At [20].
⁵⁹¹ At [20]–[21].
⁵⁹² At [21].

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23.1.3 Blackwater v. Plint [2005] SCC 58

CROSS-REFERENCE: §19.7.3

MCLACHLIN C.J.C. (FOR THE COURT): ***

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

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 [§18.2.3] 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. ***


Newfoundland and Labrador Court of Appeal – 2020 NLCA 27, leave denied: 2021 CanLII 1097 (SCC)

FRY C.J., HOEGG J.A., O’BRIEN J.A.:

1. In a suit filed in December 1999, four plaintiffs, G.E.B. #25, G.E.B. #26, G.E.B. #33 and G.E.B. #50 (the plaintiffs or the appellants), claimed against the Roman Catholic Episcopal Corporation of St. John’s (the Diocese or Archdiocese) and the Christian Brothers Institute Inc. for damages resulting from the sexual abuse they suffered while they were boys living at Mount Cashel orphanage in St. John’s during the 1950s. ***
3. The plaintiffs' suit was tried over approximately 35 days during 2016. The plaintiffs alleged that the Archdiocese was vicariously liable for the Brothers’ sexual abuse of them, arguing that the Archdiocese had a sufficiently close relationship with the Brothers to justify it being found vicariously liable for their actions. ***

4. The evidence in this case implicated five Brothers at Mount Cashel who were there during the 1950s when the plaintiffs were residents. The Archdiocese did not dispute that the Brothers had abused the plaintiffs ***. However, the Archdiocese did dispute *** that it was vicariously liable for the Brothers’ *** actions ***. The Archdiocese also disputed the degree of causal connection between the sexual assaults and the damages claimed by the plaintiffs.

5. In a written judgment filed March 16, 2018, the judge dismissed the plaintiffs’ claims against the Archdiocese. ***

The Law

45. The doctrine of vicarious liability developed primarily during the nineteenth century as a means to compensate those who suffered losses at the hands of individuals whose actions caused the losses but whose ability to compensate their victims was minimal or non-existent. It has been described as a strict liability doctrine, for it is imposed on parties who have not committed tortious conduct, and accordingly is counter-intuitive to the well-entrenched principles of tort law that usually hold a person liable for loss only when he or she causes it and then only if he or she is at fault. ***

48. The common thread in vicarious liability cases is that it is relationship based, in that fairness dictates that liability ensues only if the relationship between an enterprise or entity and the wrongdoer is close enough to warrant it. The closeness of the relationship between the entity and the wrongdoer imports legal principle into the appropriateness of imposing vicarious liability, and provides a check on careless application of the doctrine. The doctrine of vicarious liability has been part of our common law for centuries. While resort to it is relatively rare, it can produce results that resonate intuitively with fairness and justice. ***

50. *** In Bazley v. Curry, [1999] 2 S.C.R. 534 (S.C.C.), the Supreme Court of Canada considered vicarious liability as a means of redress for the sexual assaults of residents in a home for emotionally troubled children. The assaults were committed by an employee of the home, which was operated by an entity called the Children’s Foundation (the “Foundation”). ***

55. McLachlin J. began by saying that courts grappling with vicarious liability claims respecting child abuse in institutional care should first look to whether there are precedents that would “unambiguously determine” whether vicarious liability exists in a given factual situation. If there are such precedents, courts need go no further than to apply those precedents to an instant case. But if prior cases are of no assistance, courts must go on to determine whether vicarious liability should be imposed in light of the broad policy rationales (Bazley, at para. 15).

56. McLachlin J. described the policy rationales at para. 29 of Bazley as (1) the provision of a just and practical remedy for the harm and (2) deterrence of future harm, and elaborated on them as follows:

[34] The policy grounds supporting the imposition of vicarious liability fair compensation and deterrence are related. The policy consideration of deterrence is linked to the policy
consideration of fair compensation based on the employer’s introduction or enhancement of a risk. The introduction of the enterprise into the community with its attendant risk, in turn, implies the possibility of managing the risk to minimize the costs of the harm that may flow from it.

In explaining why deterrence is a valid policy to ground liability, she quoted the trial judge in *T. (G.) v. Griffiths* [1995] B.C.W.L.D. 3081 (B.C. S.C.) at para. 69:

If the scourge of sexual predation is to be stamped out, or at least controlled, there must be powerful motivation acting upon those who control institutions engaged in the care, protection and nurturing of children. That motivation will not in my view be sufficiently supplied by the likelihood of liability in negligence. …

57. McLachlin J. went on to say that the two policy rationales can only be served where the wrongdoing is sufficiently close to the entity such that it can be said that the entity has introduced the risk of the wrong into the community and is thereby fairly and usefully charged with its management and minimization, and where there is a significant connection between the introduction of the risk and the wrong that accrues from it (*Bazley*, at paras. 37 and 41). She was careful to explain that the degree of connection between the entity’s introduction of the risk of wrong and the wrong itself must be more than just opportunity, emphasizing that it is the strength of the causal link between the opportunity to perform the wrongful act and the wrongful act itself that matters:

[40] … When the opportunity is nothing more than a but-for predicate, it provides no anchor for liability. When it plays a more specific role—for example, as permitting a peculiarly custody-based tort like embezzlement or child abuse—the opportunity provided by the employment situation becomes much more salient.

58. At paragraph 41, McLachlin J. summarized the principles to guide courts in determining whether the wrongful act is sufficiently related to the conduct authorized by the employer, which *B. (K.L.)* later characterized as the second step in a vicarious liability analysis:

(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.

59. McLachlin J. elaborated on the subsidiary considerations listed in item (3) above. She gave examples of factors that could enhance the risk of a wrongdoer sexually abusing a child in institutional care, such as the wrongdoer being permitted to be alone with the child for extended periods of time, the wrongdoer being expected to bathe or toilet the child (**Bazley**, at paras. 43-44), or the wrongdoer being placed in a position of intimacy or power over the child. She noted that when and where wrongs occur could also influence the assessment. She then summarized the test:

[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.

60. In the result, a unanimous Supreme Court imposed vicarious liability on the Foundation for its employee’s tortious conduct.

61. In **Bazley**, the wrongdoer was an employee of the entity. As a result, the principles set out in the decision are couched in employer/employee language. However, as noted in **Bromley** (at para. 46 above), it is not necessary that a wrongdoer be an employee in the traditional sense of drawing a pay cheque or following direct orders for liability to ensue. Similarly, in **Sagaz**, the Court explained that the issue was not whether the tortfeasor was an independent contractor but whether the tortfeasor was working on his own account or working on the account of **Sagaz**. The Court stated that “the total relationship of the parties” determined the issue (**Sagaz**, at para. 46).

63. A few years later the Supreme Court of Canada had occasion to revisit vicarious liability for the sexual abuse of children, this time for children in the care of foster parents. In **B. (K.L.)** the Court ruled that vicarious liability was not established because the relationship between the Government and the foster parents was not sufficiently close and the policy of deterrence was
not sufficiently engaged to justify its imposition. In so ruling, McLachlin C.J.C. stated this summary of the test:

[19] To make out a successful claim for vicarious liability, plaintiffs must demonstrate at least two things. First, they must show that the relationship between the tortfeasor and the person against whom liability is sought is sufficiently close as to make a claim for vicarious liability appropriate. *** Second, plaintiffs must demonstrate that the tort is sufficiently connected to the tortfeasor’s assigned tasks that the tort can be regarded as a materialization of the risks created by the enterprise. *** These two issues are of course related. A tort will only be sufficiently connected to an enterprise to constitute a materialization of the risks introduced by it if the tortfeasor is sufficiently closely related to the employer. (Emphasis added.)

64. In Bennett, the Supreme Court of Canada upheld this Court’s decision that a diocese was vicariously liable for sexual assaults perpetrated by one of its priests on young boys in his parish. McLachlin C.J.C. explained that vicarious liability can be imputed to a principal, in that case a diocese, which was not an employer in the traditional sense:

[17] … The doctrine of vicarious liability imputes liability to the employer or principal of a tortfeasor, not on the basis of the fault of the employer or principal, but on the ground that as the person responsible for the activity or enterprise in question, the employer or principal should be held responsible for loss to third parties that result from the activity or enterprise. ***

67. The Supreme Court of Canada addressed the doctrine of vicarious liability respecting abuse of children in institutional care in Broome v. Prince Edward Island, 2010 SCC 11, [2010] 1 S.C.R. 360 (S.C.C.). In a reference to the Prince Edward Island Court of Appeal, the parties sought determination of whether the province of Prince Edward Island had legal duties to children who were resident in a privately-operated home. One of the questions posed was whether the province was vicariously liable for the acts or omissions of the Board of Trustees and staff of the home.

68. The Prince Edward Island Court of Appeal ruled that the province was not vicariously liable. The Supreme Court of Canada agreed, saying that the appellants had not established a sufficiently close relationship between the province and the home to warrant a finding of vicarious liability. The Court stated that having legislative authority over children and placing them in the home did not give rise to vicarious liability. The Court highlighted the fact that the evidentiary record before them was quite limited and that as a consequence, the scope of the reference was limited.

69. A precedent that bears on the issue of whether two or more entities are in a sufficiently close relationship with the wrongdoer that could justify the imposition of vicarious liability on both entities is Blackwater v. Plint, 2005 SCC 58, [2005] 3 S.C.R. 3 (S.C.C.). ***

Is the Archdiocese Vicariously Liable for the Brothers’ Sexual Assaults of the Appellants?

125. This fundamental question is answered by two inquiries undertaken in consideration of the totality of the evidence in light of the twin policies. The first is whether the closeness of the relationship between the Archdiocese and the Brothers at Mount Cashel is sufficient to justify imposing vicarious liability on the Archdiocese. Consideration of this inquiry is informed by determining whether the Archdiocese created and maintained an ongoing relationship of authority
over the Brothers. The second inquiry is whether the Brothers’ sexual assaults of the appellants were sufficiently connected to the Brothers’ assigned task of caring for the appellants such that the assaults can be regarded as a materialization of the risks created by the Archdiocese (Bazley, at para. 41, and B. (K.L.), at para. 19). If these two inquiries are answered positively, vicarious liability can and should be imposed on the Archdiocese. If not, vicarious liability should not result.

The Relationship Between the Archdiocese and the Brothers at Mount Cashel ***

127. We restate that the Diocese invited Christian Brothers from Ireland to come to St. John’s to staff its denominational orphanage for poor and orphaned boys. The Brothers did not invite themselves here, nor is there any evidence supporting the notion that they had an independent idea to come to St. John’s to open an orphanage. In this regard, the Diocese (through Bishop Power, Bishop Howley’s predecessor) had been communicating with the Brother Superior of the Christian Brothers in Dublin on and off since 1892, and by 1897, Bishop Howley had a plan in place for Brothers to come to staff an orphanage. The evidence suggests that Brother Slatterly came in 1897, and Brothers Ennis, Murray and Brennan arrived the following year. ***

136. In short, the small group of individual Brothers at Mount Cashel, installed there initially and added to and subtracted from over time, was introduced into the community by the Archdiocese and entrusted with caring for the resident boys, and operated under the auspices of the Archdiocese to further the Archdiocese’s social and religious objectives. ***

143. In our view the evidence shows that the Archdiocese was the ultimate authority of the Catholic Church and that it exercised a degree of authority over the Brothers at Mount Cashel. ***

148. The judge acknowledged some of the documentary evidence respecting orphanage events showed that the Archdiocese was happy and proud that the Brothers were part of its church history and apostolates for Catholic education. The Archdiocese and the Brothers publicly showed they were proud affiliates of each other—until the abuse scandal broke. ***

151. We conclude that the public perceived a close relationship between the Archdiocese and the Brothers of Mount Cashel, and that this public perception lends inferential support to the imposition of vicarious liability on the Archdiocese. ***

154. *** The Brothers’ requests for permission to fundraise show that the Archdiocese had the authority to grant or deny permission. If the Brothers were operating Mount Cashel completely on their own, they would not have needed to seek permission for the fundraising, especially for fundraising like the Christmas raffle which generated one-fifth of the orphanage’s annual revenue. The necessity for permission shows that the Archdiocese exercised financial and administrative authority over Mount Cashel as an institution operating under its auspices. ***

159. The documentary evidence *** supports the fact that the Archdiocese had authority over government funding and child welfare policies for Mount Cashel orphanage.

160. In sum, the Archdiocese was the interface between the Brothers at Mount Cashel and the Government in regard to any and all matters which concerned admissions and child welfare policies. Accordingly, this interface shows a close and controlling relationship between the Archdiocese and the Brothers at Mount Cashel, and thereby supports the imposition of vicarious liability on the Archdiocese. ***
170. *** There was no evidence that the Brothers were soliciting applications for admission to Mount Cashel. Neither were the Brothers at Mount Cashel interacting with parishioners in the community like parish priests were.

171. All told, the involvement of the Archdiocese and its parish priests in admissions to Mount Cashel is well supported in the evidence and is a factor showing a close relationship between the Archdiocese and the Brothers at Mount Cashel.

172. The building of St. Raphael’s chapel on site in 1898 and Bishop Howley’s direct involvement and celebratory mass at the official opening show a close relationship between the Brothers and the Archdiocese from the beginning. ***

173. *** The evidence was also that the Sunday collections were split between the Archdiocese, to help pay the priest’s stipend, and the orphanage. This arrangement worked to the benefit of both the orphanage and the Archdiocese, and shows regular Archdiocesan financial support for Mount Cashel from the Sunday collections, which were doubtless the contributions of local parishioners as opposed to the orphanage residents. The arrangement between the parish and the Brothers shows not just a close, but an integrated, relationship between the Archdiocese and the Brothers at Mount Cashel.

174. Canon 1381(3) gave specific authority to the Archdiocese over education and morals and specifically empowered the Archdiocese to require a Brother from Mount Cashel to be removed for moral misconduct. Canon 1381(3) shows that the Archdiocese had specific authority over the conduct of the Brothers at Mount Cashel and support a finding of vicarious liability. ***

180. *** [I]ncidental expressions support the fact that Mount Cashel was acknowledged by both the Brothers and clergy to be under the authority and control of the Archdiocese. ***

183. Something more must be said about the relationship between the Archdiocese and the Brothers at Mount Cashel. It is not only that the Archdiocese exercised a measure of authority and control over the Brothers, but it had the authority and responsibility to exercise much more oversight over how the Brothers were caring for the appellants. This point is not a new concept. It is well made in the jurisprudence, and as already noted, goes directly to the policy of deterrence which underlies the doctrine.

184. The Archdiocese was in a position to reduce risk to the appellants but did not do so. It had the ability, through a Diocesan contract or otherwise to set up oversight systems to provide a check on how the Brothers were caring for the appellants. *** In this regard, the words of Wilkinson J. in Jacobi, to the effect that oversight by entities responsible for the institutional care of vulnerable children is required if abuse of these children is ever to be curtailed, are appropriate.

185. In summary, and considering the whole of the evidence, we conclude that the Brothers at Mount Cashel were working on the account of the Archdiocese when they were caring for the appellants, and that the relationship between the Brothers and the Archdiocese was sufficiently close to make the imposition of vicarious liability on the Archdiocese appropriate.

Connection Between the Brothers’ Assigned Tasks and their Wrongdoings

186. While the relationship between the Archdiocese and the Brothers at Mount Cashel is sufficiently close to justify imposition of vicarious liability on the Archdiocese, before liability can
be imposed it must be determined if the tasks assigned to the Brothers were sufficiently connected to their sexual assaults of the appellants to justify doing so. Put another way, were the Brothers’ sexual assaults of the appellants a materialization of the risk the Archdiocese placed in the community? (See *Bazley*, at para. 31, and *B. (K.L.)*, at paras. 18-20.)

187. The factors going to this line of inquiry were identified in *Bazley* at para. 41:

(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.

188. If the Archdiocese had not invited the Brothers to St. John’s to staff Mount Cashel, there would have been no opportunity for them to sexually abuse the appellants. However, opportunity is not to be evaluated on this simple “but for” basis because not all opportunities present the same degree of risk. That said, the opportunity for sexual abuse of children being cared for in a residential environment 24 hours a day is significant, for advantage can be taken while the children are showering or sleeping, where caregivers have the ability to isolate a child from others within the institution, and where activities take place away from the watchful eyes of any supervising authority. Such was the situation at Mount Cashel when the appellants lived there. ***

190. The Archdiocese’s aims were to provide care and education for poor and orphaned Roman Catholic boys within the Roman Catholic faith and culture. These laudable objectives of the Archdiocese cannot be said to have been endorsed or encouraged in any way by the wrongful conduct of the Brothers. There is no support in the record for such a finding and the appellants do not suggest it. Accordingly, the extent to which the sexual abuse could be said to have furthered the Archdiocese’s aims weighs against a finding of vicarious liability.

191. In *Bazley*, McLachlin J. explained that when an employer’s enterprise or objectives incidentally create a situation of friction and confrontation, such friction and confrontation may increase the chance of intentional misconduct and thereby give rise to the imposition of vicarious liability. It can also bring out the worst in people and thereby result in an increased risk of wrongful conduct. Support for the imposition of vicarious liability on this basis builds on the logic of risk and accident rather than implied authority. Orphanage rules, their enforcement, and potential resulting discipline easily give rise to friction and confrontation, and the evidence shows that this occurred at Mount Cashel. This is not to say that rules and discipline were unnecessary. However, the evidence discloses that physical discipline sometimes escalated into sexual abuse. ***

196. The Archdiocese vested the Brothers with power over the appellants within a structure requiring obedience to and respect for the Brothers. This set-up was ripe for the Brothers to exercise their unchecked power and authority over the appellants. ***
199. The Archdiocese’s delegation to the Brothers of unfettered power over the vulnerable child appellants warrants special attention in considering a power and dependency relationship in the context of vicarious liability (Bazley, at para. 46). This circumstance weighs heavily in favor of ascribing responsibility for the sexual abuse of the appellants to the Archdiocese. ***

201. In our view, the total relationship between the Brothers at Mount Cashel and the Archdiocese shows that the Brothers were working on the account of the Archdiocese’s social and religious mandate. Their relationship was sufficiently close, and the connection between the Brothers’ assigned tasks and their wrongdoing was sufficiently close, to justify the imposition of vicarious liability on the Archdiocese. Doing so in the circumstances of this case upholds the policy objectives of the doctrine. ***

Cross-Appeal on Damages ***

563. The Limitations Act [§6.7.3] in 1995 removed the limitation period for historical sexual misconduct, under certain conditions, which were statute-barred under the previous legislation. ***

564. The Limitations Act contemplates “reviving” causes of action. When read together, sections 8(3) and 24(2) would have the effect of reviving causes of action based on sexual misconduct that would have been statutorily barred under the former Limitation of Personal Actions Act, R.S.N. 1990, c. L-15. ***

567. Were the appellants’ causes of action revived with the introduction of the Limitations Act in 1995 in the circumstances in this case? An appropriate conclusion to be drawn from the facts of this litigation is that the causes of action must have been previously statutorily barred due to the operation of the limitation periods in place at the time. The causes of action were revived by the operation of the Limitation Act and the appellants were able to commence an action in 1999 for the historical sexual abuse but not for the physical abuse which had occurred at the same time. ***

578. Pre-judgment interest is to be calculated on the economic loss awards for G.E.B. #25 and G.E.B. #33 from December 29, 1999 to the date of judgment. ***

23.1.5 Barnett v. Chelsea & Kensington Hospital [1968] 2 WLR 422 (QB)

CROSS-REFERENCE: §14.1.3.4, §14.2.5.3, §16.1.3.1

NIELD J.: ***

16. I turn to consider the nature of the duty which the law imposes on persons in the position of the defendants and their servants and agents. The authorities deal in the main with the duties of doctors, surgeons, consultants, nurses and staff when a person is treated either by a doctor at his surgery or the patient’s home or when the patient is treated in or at a hospital. In Cassidy v. Ministry of Health ([1951] 1 All ER 574 at p 585; [1951] 2 KB 343 at p 360), Denning LJ dealt with the duties of hospital authorities and said:

“In my opinion, authorities who run a hospital, be they local authorities, government boards, or any other corporation, are in law under the self-same duty as the humblest
doctor. Whenever they accept a patient for treatment, they must use reasonable care and skill to cure him of his ailment. The hospital authorities cannot, of course, do it by themselves. They have no ears to listen through the stethoscope, and no hands to hold the knife. They must do it by the staff which they employ, and, if their staff are negligent in giving the treatment, they are just as liable for that negligence as is anyone else who employs others to do his duties for him. Is there any possible difference in law, I ask, can there be, between hospital authorities who accept a patient for treatment and railway or shipping authorities who accept a passenger for carriage? None whatever. Once they undertake the task, they come under a duty to use care in the doing of it, and that is so whether they do it for reward or not." ***


CROSS-REFERENCE: §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 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’. ***
23.1.7 Cross-references

- *Binsaris v. Northern Territory* [2020] HCA 22, [23], [43]-[44]: §2.2.4, §6.6.5.
- *Boucher v. Wal-Mart* [2014] ONCA 419, [3]: §3.2.3.

23.1.8 Further material


23.2 Statutory vicarious liability

23.2.1 Proceedings against the Crown in Victorian England


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.\(^{593}\) ***

### 23.2.2 Crown liability

_Crown Liability and Proceedings Act, RSC 1985, c C-50, s 3_

3. 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

- Manitoba: The Proceedings Against the Crown Act, CCSM c P140.

#### 23.2.2.2 Francis v. Ontario [2021] ONCA 197

**CROSS-REFERENCE: §19.5.2.3, §19.6.3, §24.1.2.2**

**DOHERTY AND NORDHEIMER JJ.A. (H. YOUNG J.A. concurring): ***

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

§23.2.3 • Statutory vicarious liability

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].\(^\text{594}\) 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 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. ***

23.2.2.3 Cross-references

• *Binsaris v. Northern Territory* [2020] HCA 22, [44]: §6.6.5.
• *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(2)-(4)*

738. *** (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

\(^{594}\) 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.
(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.

23.2.3.1 Other provincial local government liability statutes

- 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.
- Quebec: Civil Code of Québec, CQLR c CCQ-1991, art 1457, 1463, 1464; Fire Safety Act, CQLR c S-3.4, s 47.

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

(1) In this section, “police officer” means either of the following:

   (a) a person holding an appointment as a constable under this Act;

   (b) an IIO investigator.

(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 British Columbia v. ICBC [2008] SCC 3

CROSS-REFERENCE: §18.2.4

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 [§18.2.3]. 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.

### 23.2.4.2 Other provincial police liability statutes

- Alberta: Police Act, RSA 2000, c P-17, ss 39.
- Manitoba: The Police Services Act, CCSM c P94.5, ss 40, 44.
- Newfoundland and Labrador: Royal Newfoundland Constabulary Act, 1992, SNL 1992, c R-17, s 58.
- Saskatchewan: Police Act, 1990, SS 1990-91, c P-15.01, s 10(3).

### 23.2.5 Motor vehicle owner liability

*Motor Vehicle Act, RSBC 1996, c 318, s 86*
86.(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 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 vehicle owner liability 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.
- Saskatchewan: The Automobile Accident Insurance Act, RSS 1978, c A-35, s 42(1).

23.2.6 Parental liability

Parental Liability Act, SBC 2001, c 45, s 3

3. 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.

School Act, RSBC 1996, c 412, s 10

10. 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 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.

23.2.6.2 Other provincial parental liability statutes

- Manitoba: The Parental Responsibility Act, CCSM c P8, s 3.
24.1 Human rights instruments

24.1.1 Canadian Charter rights and values

24.1.1.1 Hill v. Church of Scientology of Toronto [1995] CanLII 59 (SCC)

CROSS-REFERENCE: §5.1.1, §9.3.3, §9.4.2, §9.5.3, §18.2.6

CORY J. (LA FOREST, GONTHIER, MCLACHLIN, IACOBUCCI, MAJOR JJ. concurring): 

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 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. ***

### 24.1.1.2 Jones v. Tsige [2012] ONCA 32

**CROSS-REFERENCE: §4.1.2, §9.3.7**

**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, Combined 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.


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. ***
§24.1.1.3 Cross-references

- *Grant v. Torstar Corp.* [2009] SCC 61, [1]-[3], [38]-[87]: §5.1.2.
- *Hill v. Hamilton-Wentworth Regional Police Services Board* [2007] SCC 41, [38]: §13.4.2.2.

24.1.1.4 Further material

- R. Ruparelia, “‘I Didn't Mean it that Way!’: Racial Discrimination as Negligence” (2009) 44 (2d) Supreme Court L Rev 81.

24.1.2 Public law damages

24.1.2.1 *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.
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.

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.

24.1.2.2 Francis v. Ontario [2021] ONCA 197

CROSS-REFERENCE: §19.5.2.3, §19.6.3, §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.

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 and s. 12 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 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 ***

58. The third step identified in Ward is the focus of this case. ***

(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.***

### 24.1.2.3 Canada v. Whaling [2022] FCA 37

*Federal Court of Appeal – 2022 FCA 37*
PELLETIER J.A. (RENNIE J.A. AND GLEASON J.A. concurring): ***

4. Both Ms. Whaling and Mr. Liang (the respondents) are former federal inmates who, in light of their status as first-time non-violent offenders, were eligible for accelerated parole review under the statutory scheme in place at the time they committed their offences. The coming into force of the Abolition of Early Parole Act, S.C. 2011, c. 11 (the Act) on March 28, 2011, as its name suggests, abolished the availability of early parole (or accelerated parole) review for those who had previously been eligible for it.

5. The respondents’ statements of claim seek damages pursuant to subsection 24(1) of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [Charter] because the retrospective application of the Act infringed their Charter rights. In Canada (Attorney General) v. Whaling, 2014 SCC 20, [2014] 1 S.C.R. 392, the Supreme Court ruled that the retrospective application of the Act was a violation of Ms. Whaling’s right to be free of double jeopardy pursuant to paragraph 11(h) of the Charter.

6. In Mr. Liang’s case, the British Columbia Court of Appeal held that the retrospective loss of the right to early parole review effectively increased the penalty for the offence for which he was convicted. This was held to be a violation of his right under paragraph 11(i) of the Charter to the benefit of the lower punishment where the punishment for an offence has been varied between the time of the commission of the offence and the time of sentencing: Liang v. Canada (Attorney General), 2014 BCCA 190, 311 C.C.C. (3d) 159, leave to appeal to SCC refused, 35972 (29 January 2015).

7. As is often the case in class proceedings, the progress of these actions has been tortuous, but they have now been certified as class proceedings by the orders which are the subject of these appeals. The statements of claim in the two actions are substantially the same.

8. As mentioned, both Ms. Whaling and Mr. Liang, as representative plaintiffs for the classes of former inmates who were similarly affected by the Act, seek damages under subsection 24(1) of the Charter for the violation of their Charter rights. They claim that “the Crown, and its employees, servants and/or agents” have a duty to ensure, or at least take good faith steps to ensure, that any legislation they pass or implement is in accordance with the Charter. In this case, the respondents claim, the Crown (and associated individuals) knew that the Act infringed the Charter and passed it anyway. They claim this shows bad faith such that the plaintiff classes are entitled to damages. ***

The context

22. On my reading of HMQ [Her Majesty the Queen]’s memorandum of fact and law, her position in the litigation rests on the following propositions:

Constitutional principles such as parliamentary privilege and the separation of powers, tell us that legislative processes and law-making are categorically not reviewable for damages ***.

The Motions Judge did not recognize that the conduct of state actors drives the potential for liability for Charter damages and that such questions are legal questions aimed at determining whether certain categories of conduct could ever lead to liability for Charter
damages, regardless of the underlying facts ***.

The second proposition sweeps in another proposition, which is that “[a] court will need to identify whose ‘fault’ it can assess if it is going to consider liability” ***. ***

25. *** The application of the principles established in Vancouver (City) v. Ward, 2010 SCC 27, [2010] 2 S.C.R. 28 to the facts alleged in the statements of claim is novel. The plaintiffs’ claims should not fail on that ground alone. Those seeking to extend the boundaries of the Ward principles are not entitled to succeed but they are entitled to try.

26. It may well be that liability for Charter damages cannot be assessed in the absence of misconduct by one or more state actors whose “fault” can be attributed to Canada “writ large”, but the Supreme Court’s statement in Ward [at para. 22] perhaps leaves that possibility open:

… 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.

27. In fairness, Ward [at para. 22] also leaves open the possibility that:

… 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.

28. But this does not necessarily mean that Charter damages are only available in circumstances in which private law damages would be available under the Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50 [§23.2.2], which explicitly deals with vicarious liability and requires both an identifiable state actor and an identifiable fault. ***

**HMQ’s Common Question**

41. HMQ’s Common Question reads as follows:

On the facts of this case, can the Crown, in its executive capacity, be held liable for government officials and Ministers implementing s. 10(1) of the [Abolition of Early Parole Act], a legislative provision which was subsequently declared invalid by a court pursuant to s. 52(1) of the Constitution Act, 1982? ***

45. In my view, the relevant question is whether the proposed Common Question adds anything to the common question certified by the Federal Court that asks “[i]f the s. 11(h) breach was not justified under s. 1 of the Charter, are damages pursuant to s. 24(1) a just and appropriate remedy ...”. On the understanding that this question is designed to identify the actors and the behaviour which the respondents say satisfies the test of clearly wrong, in bad faith or an abuse of power, then it is difficult to see how the Common Question adds anything to the existing common questions.

46. As a result, I have not been persuaded that the Federal Court committed a palpable and overriding error in failing to certify HMQ’s Common Question. ***
Conclusion

59. As a result, I would dismiss the appeals.

24.1.2.4 Slater v. Attorney-General (No. 2) [2006] NZHC 979

**CROSS-REFERENCE: §8.5.2, §9.3.4**

**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 [§12.1.4] ***. 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. ***

24.1.2.5 A Defence of Damages as a Public Law Remedy


Damages are frequently awarded as a remedy for human rights violations both in international and domestic law. The theoretical goal of such damages is often pitched high: undoing all of the effects of the violation and placing victims in the position they would have occupied but for the violation. Alas, the practical reality is that most damage awards are modest and disappointing. ***

5.3 A Defence of Damages as a Public Law Remedy

The low damage awards for violations of human rights has caused Jason Varuhas to question whether common law countries would be better off relying on intentional torts. 595 Although Professor Varuhas has done an important service in critiquing the low quantum of awards and arguing that intentional torts are a better analogy to human rights than negligence, 596 there are still a number of compelling advantages to continuing to conceive of damages as a public law remedy.

5.3.1 Holding States and Not Individuals Accountable


596 For an earlier recognition, see Cooper-Stephenson, Charter Damages, p.240.
The tort approach to damages generally imposes liability on individuals, often on the basis that they have acted beyond their legal powers and/or with fault. As Peter Schuck has argued, the traditional tort focus on the conduct of individual officials is at odds with the bureaucratic nature of the modern state, where many rights violations are the result of systems failures. The concern that damage awards against individual officials may over-deter their performance of legitimate public functions has led Americans courts to only award damages for the most clear and flagrant violations of human rights. Schuck imagined an ideal system where damages would be assessed directly against all levels of government and would be seen as just one of a range of remedies that would include declarations and injunctions.\(^{597}\) He imagined the public law system that now applies in New Zealand, Canada and many other countries.\(^{598}\)

Schuck’s ideal system has not taken root in the United States, where both state and federal governments enjoy immunity from constitutional damages. Nevertheless, his basic point remains valid: many human rights violations are caused by complex state systems. The imposition of liability for damages on the state avoids problems of over-deterrence of individual officials. It also allows the state to use its own expertise and knowledge to take a range of steps that can prevent future violations.\(^{599}\)

### 5.3.2 A Focus on Rights as Opposed to Absolute or Qualified Immunities

The idea that damages are a public law remedy against the state has the potential to avoid absolute immunities that render the state immune from damages and qualified immunities that require plaintiffs to establish some form of fault by the state and its officials in addition to the violation of rights.\(^{***}\) Qualified immunities are almost always over- and under-inclusive. As under the Canadian case of Ward\(^{600}\) they can be replaced with a more tailored inquiry into whether the award of damages would harm good governance.

### 5.3.3 Damages as One of Many Alternative Remedies

As Calabresi and Melamed famously observed, damages enforce liability rules that can be violated for a price, as opposed to property-type rules that are enforceable through injunctions.\(^{601}\) One of the disadvantages of taking a private law approach to damages as a remedy for violations of human rights is that it tends to conceive of damages as the prime, if not exclusive, remedy for a violation.\(^{***}\) Even when they order compensation, judges should not lose sight of the larger issue of compliance with human rights.

The alternative remedies to damages are not only more intrusive remedies such as injunctions, but also less drastic ones such as declarations. The United Nations Basic Principles on remedies contemplates both restitution and apologies as alternatives to damages.\(^{***}\) A private law approach would have the tendency to monetize all remedies for human rights and ignore other

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597 Peter Schuck, *Suing Government*.
598 See generally Cooper-Stephenson, *Constitutional Damages Worldwide*.
599 Daryl J. Levinson has criticized Schuck’s assumptions that governments will respond rationally to damage awards: Levinson, “Making Governments Pay”. Under my two-track approach, however, courts could escalate remedies beyond damages should the state not take reasonable measures to prevent repetitive violations.
potentially more meaningful remedies.

5.3.4 Recognizing the Equality of All Rights Holders

The public law approach to damages not only ensures the proper defendant in the form of the state, but it also stresses that all plaintiffs are equal to the extent that they possess human rights. In a leading New Zealand Bill of Rights damage case brought by prisoners, Justice Blanchard has argued that the “character of the victim” should not influence the damage award “in view of the public law purposes of the award”.602 Similarly, the Supreme Court of India has stressed that prisoners “are not denied of their fundamental rights under Article 21” of the Indian Constitution and that the “limited liberty” left to prisoners is “rather precious”.603 This public law focus on the equality of rights holders should preclude the government from arguing that damages for rights violations should be reduced because the person whose rights were violated had a so-called pre-existing “cracked skull” that makes the value of the right less valuable [§17.4].604

One of Canada’s largest ever award of Charter damages was Can$7.5 million. It was designed to vindicate Ivan Henry’s Charter right as an accused to disclosure of state held evidence critical to his defence, the non-disclosure of which contributed to his wrongful conviction and imprisonment for twenty-seven years.605 This figure was far larger than the Can$530,000 awarded for special and pecuniary damages. In assessing the latter damages, the trial judge employed causation and “cracked skull” analysis to conclude that Mr Henry’s pecuniary damages should be reduced because he was likely to have been incarcerated for half of the twenty-seven years in any event and unemployed for half the time he was out of jail.606 Such common law reasoning demonstrates how causation analysis can undermine the equality of all rights holders and fail to vindicate the importance of rights that have caused even serious violations.

The equality of all rights holders means that the causation analysis that is central to negligence-based torts should play less of a role under a public law approach. To be sure, causation analysis may still be relevant under a public law approach with respect to the determination of financial damages and even non-pecuniary harms caused by the violation, but it should not play a role with respect to the role of damages in vindicating and deterring human rights violations.607 This also recognizes that many rights violations are multi-causal given the complexity of the modern

602 Taunoa v. Attorney General, 2007 NZSC 70 at para 266. The Law Commission of New Zealand similarly disapproved of a NZ$20 damage award to a gang member’s whose freedom of movement had been violated on the basis that damages should vindicate rights and rights do “not depend upon the identity or the character of the plaintiff”. Law Commission, Te-Aka-Matua-o-te-Ture, Report 37: Crown Liability and Judicial Immunity (Wellington: Law Commission, 1997) at para 70. For persuasive criticisms of the tendency of English courts to deny human rights damages to prisoners, see Varuhas, Damages and Human Rights, pp.375–381.


604 For criticism of the use of such defences in tort litigation arising from Indigenous children being sent to residential schools, see Kent Roach, “Blaming the Victim: Canadian Law, Causation and Residential Schools” (2014) 64 U.T.L.J. 566 [§17.4.2]. But for findings that the ECtHR awards more damages for procedural violations to those of higher social status and those who are acquitted as opposed to convicted, see Shelton, Remedies in International Human Rights Law, pp.366–367. For a recent decision that suggests that only nominal damages of Can$500 for five illegal searches of a suspected gang member’s home should be granted, see Everett v. McCaskill, 2015 MBCA 107 leave to appeal refused: 2016 CanLII 32306 1 (SCC).


607 This was recognized by Chief Justice McLachlin in Ward v. Vancouver (City), 2010 SCC 27 at para 30 when she concluded that “the fact that the claimant has not suffered personal loss does not preclude damages when the objectives of vindication or deterrence clearly call for an award”.

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bureaucratic state.\textsuperscript{608}

5.3.5 Damages as a Judicial Remedy Protected from Legislative Curtailment

Damages are the quintessential judicial remedy. In principle, they should be based on the inherent powers of courts or authorized by general remedial provisions. This should prevent the use of ordinary legislation to place conditions on the manner that the independent courts employ this remedy.\textsuperscript{609} Alas, legislatures have placed conditions on the ability of prisoners to receive damage remedies in both the United States\textsuperscript{610} and New Zealand,\textsuperscript{611} two jurisdictions that lack a general remedial clause in their Bills of Rights. Both laws require exhaustion of administrative remedies which will often deprive prisoners of a damage award that can mark and publicize an injustice.\textsuperscript{612} Both laws have diminished prisoner litigation in the United States and New Zealand. If damages for violations of human rights are simply understood as a tort remedy, then there is nothing to preclude legislatures from restricting or replacing them. ***

5.6 Conclusion

If courts are only concerned with damages as an individual remedy, they may promote the idea that damages are a kind of tax that governments must pay when human rights violations are occasionally brought to their attention by courts. Such an approach will reveal damages as a disappointing remedy, one that often values rights quite cheaply. If, on the other hand, courts only order damages when they believe they are necessary to deter clear governmental misconduct, as in the United States, damages will also be disappointing because of the judicial reluctance to find governmental misconduct and perhaps exaggerated concerns about over-deterring governmental functions.

A two-track approach attempts to combine the need to award damages to respond to harm suffered by individuals, while also having courts be attentive to the risk of repetitive violations. Under the two-track approach, the core purpose of damages is to compensate for violations of human rights and to vindicate those interests for specific applicants. At the same time, courts can award increased damages if they conclude that the state has failed to take reasonable steps to

\begin{footnotes}
\item[608] Prison Litigation Reform Act of 1996, Pub. L. No. 104–134 110 Stat 1321 ss.802, 803, 804, 807 (required inmates to exhaust administrative forms of redress, limiting damages for pain and suffering, increasing filing fees and providing that an inmate who brought three unsuccessful lawsuits could be barred from subsequent litigation). On how this has reduced prisoner lawsuits, see Derek Borchardt, "The Iron Curtain Redrawn Between Prisoners and the Constitution" (2012) 43 Colum. H.R. L. Rev. 469, 480–482. For a Canadian case that rejects the need for prisoners to exhaust administrative remedies before seeking damages see Canada (Attorney General) v. McArthur, 2010 SCC 63.

\item[609] Prison Litigation Reform Act of 1996, Pub. L. No. 104–134 110 Stat 1321 ss.802, 803, 804, 807 (required inmates to exhaust administrative forms of redress, limiting damages for pain and suffering, increasing filing fees and providing that an inmate who brought three unsuccessful lawsuits could be barred from subsequent litigation). On how this has reduced prisoner lawsuits, see Derek Borchardt, "The Iron Curtain Redrawn Between Prisoners and the Constitution" (2012) 43 Colum. H.R. L. Rev. 469, 480–482. For a Canadian case that rejects the need for prisoners to exhaust administrative remedies before seeking damages see Canada (Attorney General) v. McArthur, 2010 SCC 63.

\item[610] Prisoner and Victims’ Claims Act 2005, No. 74 ss.3, 13, 14(2), (requiring exhaustion of administrative remedies; consideration of whether prisoner contributed to harm and providing that crime victims should have access to any damages prisoners may receive).

\item[611] The visibility of damage claims may be a key factor with respect to both civil society activism and bureaucratic reform: Charles Epp, Making Rights Real: Activists, Bureaucrats and the Creation of the Legalistic State (Chicago: University of Chicago Press, 2009).
\end{footnotes}

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prevent the repetition of similar violations. This allows the states to employ a wider variety of remedies than what is available to the court, including discipline and training. It also provides the state with an incentive to mitigate damages through apologies and other remedial measures. ***

The award of aggravated damages should be a signal of the court’s concern about future compliance more than a means of actual deterrence or punishment. *** Unlike in private law, damages are not an end in themselves in human rights law. They should be situated in the context of the state’s primary obligation to respect human rights including cessation and non-repetition. ***

The two-track approach could restore a sense of perspective to the use of damages. It affirms the importance of recognizing and attempting to remedy specific violations suffered by individuals in the past as a core judicial function that should not be subject to legislative curtailment. It also recognizes that damages may not ensure future compliance with human rights or provide satisfaction to those who have suffered serious rights violations. The two-track approach recognizes that additional remedies including aggravated damages may be necessary to ensure that similar rights violations are not repeated in the future.

24.1.2.6 Further material


24.2 Indigenous dispute resolution

24.2.1 Smith v. Fonterra Co-operative Group Ltd [2021] NZCA 552

CROSS-REFERENCE: §19.12.1, §21.2.3

FRENCH J. (COOPER AND GODDARD JJ. concurring): ***

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 is consistent with kaitiakitanga.

35. All of that is not to suggest the courts have no meaningful role in responding to the exigencies 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. ***

24.2.2 Anderson v. Alberta [2022] SCC 6

CROSS-REFERENCE: §20.8.2

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
24.2.3 The reasonable Cree person


Surely, the common-law’s best-loved mythical figure is the ‘Reasonable Person.’ 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.”

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, or “arcadians or barbarians.” At the same time, the reasonable

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615 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.
Cree person does not “require the wisdom of Solomon”, and thus falls well below the equally mythical creatures of the “wise old elder,” or “noble” selfless environmental stewards. 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.

Some legal theorists focus not on the more formal manifestations of law, but rather on the legal reasoning of ordinary actors ordering their affairs through law. Lon Fuller argues that law can be seen as a “language of interaction” that creates meaning and predictability in people’s social behaviour over time. Gerald Postema maintains systems of law actually depend, for their force, not on traditional notions of habituation and enforcement, but rather, whether they make sense as practical guides for self-directing agents … only when they are set in context of concrete practices, attitudes and patterns of social interaction. Fuller and Postema suggest that a vital site of legal reasoning is in the daily lives of citizens who use law as a practical guide to reason through and make decisions in their own specific social circumstances. The reasonable Cree person is just this—an ordinary legal actor who uses the Cree legal tradition as a practical guide to think through and make reasonable and principled decisions, when, like the rest of us, she is called to judgment.

A Logical Starting Point

The reasonable Cree person cannot time-travel, but begins at a logical starting point. The logic goes like this: For thousands of years prior to European contact or ‘effective control,’ Indigenous peoples lived here, in this place, in groups. We know that when groups of human beings live together, they have ways to manage themselves and all their affairs. This task of coordination is “the most common of common denominators in law.” As stated above, Indigenous societies must have faced the inevitable and universal issues of human violence and vulnerability for millennia. Therefore, as a matter of logic alone, the reasonable Cree person’s starting point for any inquiry is that, at some point, and for a very long time, Cree and other Indigenous peoples managed and responded to these universal human issues successfully enough to maintain civil societies.

The Cree Legal Tradition as a Reasoning Process

The Cree reasonable person knows that Indigenous and non-Indigenous human beings are reasoning, feeling, imagining, and seeking beings. She knows that we are also vulnerable beings. The reasonable Cree person is not a stand-in for all Cree people, nor does she speak for the Cree people as a whole. What makes the reasonable Cree person Cree is not physical location, biological identity, or blood quantum; rather, it is that she reasons with and through the Cree legal

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616 Stewart v Pettie, [1995] 1 SCR 131 at 150, 121 DLR (4th) 222 [§19.9.1].
617 Francis, supra note 30.
621 Lon Fuller describes law as “a direction of purposive human effort” consisting in “the enterprise of subjecting human conduct to the governance of rules”: Lon Fuller, The Morality of Law (New Haven: Yale University Press, 1964) at 130 [Fuller, Morality of Law].
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tradition. She is a mythological figure of Cree legal thinking. ***

When we speak about Cree, or other Indigenous legal traditions then, we are talking about more than social rules. We are speaking about the Cree narratives that give social rules meaning, that make them meaningful, and that make sense of the world around Cree individuals and communities. We are speaking about the languages through which this meaning-making occurs. Legal traditions are not only prescriptive, as norms that have “endured in different iterations in different times”, 623 but also descriptive. Martin Krygier says participation in any tradition, actually “shapes forms and in part envelops the thought of those who speak it and think through it.” 624 We not only turn to our legal traditions for information to solve present problems, we actually use them to think through the problem in the first place, to decide if it is a solvable problem or a problem at all. This is why legal meaning is actually world-making, why it becomes “the world in which we live.” 625

We are reasoning, feeling, imagining, and seeking beings; we crave meaning from our experiences. 626 White calls us “meaning-making creatures”. 627 MacIntyre says that we are “essentially […] story-telling animal[s]”. 628 Recent cognitive research has demonstrated these descriptions aren’t mere rhetoric. Our need for meaning is not secondary, but rather integral to our “know-how” and our reasoning processes themselves. Current cognitive research shows that stories actually are “a basic principle of the mind. Most of our experience, our knowledge, and our thinking are organized as stories.” 629 As well, logical and narrative thinking complement each other. Narrative thinking structures experience itself and makes experience communicable to others. 630 The complex, multi-vocal, living, evolving reasoning process that is a legal tradition gives us the necessary narratives to create and share meaning with each other. ***

The reasonable Cree person may disagree with other reasonable people about the applicability of certain Cree legal principles in certain cases. No complex tradition is ever univocal 631 or internally consistent. 632 Complex traditions such as law never stand alone. Not only are they made up of multiple traditions themselves, but they are also embedded in other traditions, within a broader culture, and ultimately within the material reality that includes the natural world. This means traditions are always facing external changes, bringing change in one way or the other. 633 Vitally, a legal tradition can also change by not responding to new circumstances. Bartlett points out that when a tradition “stops making sense under existing circumstances” it will not continue.

624 Krygier, supra note 47 at 244.
625 Cover, supra note 45 at 5.
626 James Boyd White, Living Speech: Resisting the Empire of Force (New Jersey: Princeton University Press, 2006) at 41, arguing: “This capacity is the deepest nerve of our life, and our instinct to protect it and its freedom at almost any cost is a right one.”
627 Ibid at 41.
630 Krygier, supra note 47 at 4.
631 Frederick L Will, “Reason and Tradition” (1983) 17:4 J Aesthetic Education 91 at 100. See also Bartlett, supra note 49 at 317: “Traditions are not unitary, coherent, or integrated wholes.”
632 Bartlett, ibid.
This means that “the strength of a legal tradition is not how closely it adheres to its original form but how well it is able to develop and remain relevant under changing circumstances.” In other words, legal traditions must change over time. In reference to her work regarding the Gitksan legal order, Napoleon points out:

the reality is that over time, implicit and explicit Gitksan law will reflect the world around it—including personal, political, economic, and legal relationships with other peoples. This does not mean, however, that Gitksan people will somehow cease to be Gitksan people, but rather that the Gitksan legal order now reflects the realities [of the present].

Tradition is never “fixed, stable, and unchanging”, but rather something that “evolves and builds on what preceded it much like the common law.”

Just as the Cree legal tradition, like the Gitksan legal tradition, reflects the realities of the present, so too does the reasonable Cree person’s legal reasoning. The reasonable Cree person’s thinking reflects a long history of Cree legal thought and experience, but also the current political, social, economic and natural realities of today and legal relationships with other peoples. She knows Cree laws hold no simple answers or silver bullets and implementing Cree legal principles is a lot of hard work. She considers, as all legal actors must, whether certain principles are applicable today, and what might need to be changed. She knows each case is different, and so is each community. She is keenly aware of the political context, realities, and resources around her.

The reasonable Cree person is a person of ordinary intelligence and prudence. However, her reasoning emerges from the Cree legal tradition, rather than the common law tradition. While this is the barest sketch of her resources for practical reason, it is enough, for our purposes, to proceed with the reasonable Cree person as a figurative representative of Cree legal thought. And so we can take our reasonable Cree person visiting through the narratives within Canadian popular, legal, and political thinking, and to the existing spaces for addressing the issues she and too many other Indigenous men, women, and children face daily in contemporary Canada. We must explore whether she could be welcome, or even imaginable within them.***

**Restarting the Conversation: Recovering Indigenous Legal Traditions***

Why aren’t Indigenous legal traditions taking root and growing in Canada? What is missing? Certainly, as we see with Aboriginal courts and community justice projects, more long term and secure resources are needed. However, I also think there is an intellectual deficit at play. If we want better answers, maybe we need to be asking better questions. In order to establish a firm foundation for accessing, understanding, and applying Indigenous laws today, opening up jurisdictional space and directing adequate resources is necessary, but not sufficient. We also need the kind of intellectual work within Indigenous legal traditions that I have demonstrated in my research engaging with the Cree legal tradition. We need to be able to imagine the reasonable Cree person, and we need narratives and resources for practical reason that would be tolerable for her to use to reason through life’s problems, instead of being useless or even harmful. ***

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634 Bartlett, supra note 49 at 331.
635 Napoleon, Ayook, supra note 8 at 49. Napoleon’s date of writing was 2008.
636 Bartlett, supra note 49 at 308. MacIntyre points out that traditions are also embedded in the “larger and longer history of the tradition” as well. These practices also make tradition “intelligible” to us in the present (MacIntyre, supra note 54 at 222).
24.2.4 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), 4-6, 15

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.637 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 communities non-Indigenous rules of governance and law-making.

Approaches to Indigenous Legal Orders

A key area of consensus across the works surveyed is that the legal orders that emanate from Indigenous peoples cannot be identified, described, or interpreted in the same manner as contemporary state law. Law students, lawyers, judges, and legislators whose work involves state law are accustomed to identifying law in statutes, regulations and court decisions. They categorise that law in accordance with categories (family law, administrative law, criminal law, etc.) that reflect the institutional framework of the modern state and the legal artifacts (corporations, marriage, property, intellectual property, etc.) decisions and jurisdictions recognized by the state’s legal system.***

In general,*** those who study or practise within state systems of law are trained to identify “law” through hierarchical institutions, written legal texts, and ultimately the threat of state-authorized

sanctions for the violation of a prescriptive rule.

All of the sources examined in preparing this Report explicitly or implicitly start from the premise that a departure is required from Euro-Canadian understandings of “law” and legal method when approaching the subject of Indigenous law. The function of law in Indigenous societies, its principles and the processes by which laws are developed and implemented reflect the values, needs and social norms of the societies that create them. An understanding of Indigenous legal orders, then, is possible only if one is sensitive to the internal perspectives of the Indigenous peoples involved. In the words of Anishinaabe scholar Aaron Mills (Waabishki Ma’iingan), “[w]ithout having begun to internalize our lifeworld, one has no hope of understanding our law”.  

The literature surveyed does not contain efforts to set out “universal” Indigenous legal principles. The Indigenous legal orders present in Canada are diverse; each stems from a particular vision of ecological order and, as we have seen, each is firmly rooted in a distinct language, tradition and worldview. Nonetheless, the works reviewed indicate that, in addition to the need for a general sensitivity to the cultural distinctiveness of Indigenous legal orders, four things must be kept in mind when approaching the legal traditions of Indigenous peoples on this land. First, those traditions tend to place a central focus on the maintenance of harmonious relationships between members of the community and between the community, the land and other life-forms. Second, each people’s language shapes their understanding of the world and the nature of their laws. Third, Indigenous legal orders derive from varied sources, distinct from the sources relied on by state-based law (spiritual teachings, traditional stories, principles derived from observing nature, custom, distinct deliberative processes for transmitting legal principles. Fourth, Indigenous legal orders continue to exist and evolve in Canada; and they remain relevant to the challenges faced by Indigenous peoples today.

### Conclusion: State of Knowledge and Implications of this Review

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 ways of understanding law? And, what can be done to better implement and recognize the legal systems of Indigenous peoples?  

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24.2.5 Indigenous constitutionalism and dispute resolution


From one perspective, the story of constitutionally protected Indigenous rights in Canada has been one of progress.\(^\text{640}\) Section 35(1) of the Constitution Act, 1982\(^\text{641}\) recognizes and affirms the Aboriginal rights (including Aboriginal title) and treaty rights of the Aboriginal peoples of Canada.\(^\text{642}\) A series of court victories mean that, as Indigenous peoples, we have greater ability to engage in our cultural practices,\(^\text{643}\) to use our territories\(^\text{644}\) and to exercise our rights protected by our treaties with the Crown.\(^\text{645}\) But from another perspective, the story is one of disappointment and distortions. Despite the promise of ‘reconciliation’\(^\text{646}\) the legal tests developed by the courts protect frozen rights instead of self-determination,\(^\text{647}\) and Aboriginal title is closer to a property interest in land than a power to exercise jurisdiction over territory.\(^\text{648}\) ***

 Attempts 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\(^\text{649}\) and which Gordon Christie describes as a liberal or colonial snare.\(^\text{650}\) As Christie demonstrates, the Supreme Court of Canada’s s. 35(1) jurisprudence is one immense liberal snare.\(^\text{651}\) From this perspective, the Court’s s. 35(1) jurisprudence is not the rejection of colonialism but rather the perfection of it.\(^\text{652}\) ***

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\(^\text{653}\) and the federal government’s Inherent Rights Policy (and the accompanying process for negotiating self-government agreements).\(^\text{654}\) It could also serve as an alternative to the

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\(^{640}\) Gordon Christie, Canadian Law and Indigenous Self-Determination (University of Toronto Press, 2019) 17, 130 \(\text{('Canadian Law').}\)

\(^{641}\) Canada Act 1982 (UK) c 11, sch 3 \(\text{('Constitution Act 1982').}\)

\(^{642}\) 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.


\(^{644}\) Tsilhqot’in Nation v. British Columbia [2014] 2 SCR 257 \(\text{('Tsilhqot’in Nation').}\)


\(^{646}\) R v. Poonkar [1996] 2 SCR 507 [31] \(\text{('Van der Peet').}\)


\(^{649}\) Aaron James (Waabisheki 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 \(\text{('Miinigowiziwin').}\)


\(^{651}\) Christie, ‘Culture’ (supra) 16–17; Christie, Canadian Law (supra) chs 7–8.


Specific Claims Tribunal. These existing dispute resolution mechanisms employ concepts and processes ‘drawn solely from the dominant settler legal system’ and thus exhibit the same constitutional capture produced by the s. 35 jurisprudence. 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. Although the Supreme Court of Canada has nudged the parties toward negotiation, the Crown still has 45,000 legal claims against it by First Nations. 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.

A new dispute resolution process using Indigenous procedures grounded in Indigenous lifeworlds and constitutional orders would help Indigenous peoples escape from the liberal snare.

To avoid the pitfalls of a pan-Indigenous approach, this article focuses on Anishinaabe constitutionalism as one example of Indigenous constitutionalism.

The next section provides a brief summary of the roots, trunk and branches of an Anishinaabe society (as articulated by Mills), which are contrasted with those of liberalism.

Anishinaabe Constitutionalism and Liberal Constitutionalism

The Roots: Lifeworlds

Beginning with the roots of an Anishinaabe society, Mills explains the concept of miinigowiziniwin includes all the gifts of creation—land, language, teachings, among others—given to us by a

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656 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’).

657 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).


659 Delgamuukw v. British Columbia [1997] 3 SCR 1010, [186]; Tsilhqot’in Nation (supra) [17].


higher power, Creator, to live. 662 Creation is imbued with an inherent normative order, according to which we have a responsibility to identify, develop and use our unique gifts, including both our sacred gifts and our ordinary gifts of knowledge, skill, labour, material goods and so on, just as the earth gives its gifts to us. 663 This inherent normative order is also known as sacred law, the great law, Creator’s law or the original instructions. 664 By complying with these original instructions, we live in harmony with creation. 665

None of us has all of the gifts (material, spiritual, emotional, intellectual) needed to be self-sustaining. 666 And so we are radically interdependent with other persons. 667 ***

I understand the entitlement of each individual human to define, pursue and revise our own conception of the good life, to be a foundational tenet of liberalism. 668 This is the heart of the incommensurability. This tenet is fundamentally at odds with the original instructions of Anishinaabe constitutionalism according to which we each have a responsibility to identify, develop and give our gifts. ***

The Trunk: Constitutional Orders

At the level of the trunk, Mills identifies the logic informing an Anishinaabe constitutional order: wiidookodaadiwin or mutual aid. 669 Giving a gift generates gratitude, which generates reciprocity, which generates the giving of further gifts and so on. 670 In other words, the logic of mutual aid is cyclical. 671 We each have a responsibility to identify, develop and use our own gifts to meet the needs of others, which entails responsibilities to identify the needs of others as well as their gifts, and to communicate our own needs. 672 This raises questions about the limits of our responsibilities: Whose needs should we prioritize? How much of our gifts should we give to others? The answer is our responsibilities are bounded by our kinship relationships. 673 ***

Anishinaabe constitutionalism is oriented toward harmony. 674 Harmony does not necessarily mean an absence of conflict. 675 Rather, harmony describes the operation of mutual aid; it is the connection between community members who give and accept gifts in accordance with their responsibilities within their relationships. 676

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663 Mills, Miinigowiziwin (supra) 69–72, 74.
665 Mills, Miinigowiziwin (supra) 75.
666 Ibid 82.
667 Ibid 78–9.
668 Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights (Oxford University Press, 1995)] 80.
669 Mills, Miinigowiziwin (supra) 96–7, 98.
670 Ibid 100–1, 102.
671 Ibid 98.
672 Ibid 88.
673 Ibid 114.
674 Ibid 125–6.
675 Ibid 126.
676 Ibid.
In contrast, liberalism’s normative architecture is structured not in terms of gifts and needs, but rights and duties. The logic underpinning rights and duties is not cyclical, but binary: if someone has a right, then some entity (some other person(s) and/or the state) has a corresponding duty not to violate that right. 677 ‘Duty’ is sometimes used interchangeably with ‘obligation’ or ‘responsibility’. I suspect the appearance of the term ‘responsibility’ here is what leads some to assume a rights discourse can be unproblematically imported into Anishinaabe constitutionalism. But as Aimée Craft explains, responsibilities within Anishinaabe constitutionalism are not one side of a binary with rights on the other. 678 Rather, responsibilities perform the function of correlating gifts and needs within relationships. Returning to liberalism, rights are held by, and duties owed to, not only those with whom we are in a relationship but also strangers. Finally, the end to which liberalism is oriented is not harmony, but justice, according to which rights are upheld and duties fulfilled. Justice does not generate a context of abundance as mutual aid does.***

**The Branches: Dispute Resolution Processes**

Unlike liberal societies where law is imposed by the state’s legitimate exercise of force, within an Anishinaabe constitutional society as described by Mills, law’s force comes from persuasive compliance, not coercion. 679 Persuasive compliance refers to the practice of community members being persuaded to accept a given legal norm and choosing to follow it. 680 In other words, the force of law is not external (imposed by an executive branch of government such as police, a sheriff’s office or other mechanism for enforcing legislation and court judgments) but rather internal: ‘[i]t is as though everybody is a “cop” and nobody is a “cop”’. 681 This conception of law’s force flows directly from the logic of mutual aid. ***

One might wonder what prevents members of a society governed by Anishinaabe constitutionalism from refusing to participate in persuasive compliance and exercising their judgment to make decisions that merely serve their self-interest. *** In a radically interdependent society where one’s freedom depends on the flourishing of one’s community members, ‘it only makes sense that I should be more motivated by the prospect of sustaining good relationships than I am by the prospect of constrained or diminished individual choice’. 682 *** In those rare circumstances when persuasive compliance is not effective, the community as a whole is entitled to exercise coercive force as long as it complies with accepted procedures for ensuring the legitimacy of the community’s decision. 683

Of the five sources of Indigenous law identified by John Borrows, the one that best coheres with mutual aid and persuasive compliance as a form of dispute resolution is deliberative law, which refers to ‘processes of persuasion, deliberation, council, and discussion’. 684 It ‘can occur in formal
24.2.6 Cross-references


24.2.7 Further material


customary law: ch 2.

685 ibid 36. For an account of the dispute resolution procedures of Muskrat Dam First Nation which reflect mutual aid and persuasive compliance remarkably clearly, see Lancaster (*supra*) 337–43.
25 EXAMINATION QUESTIONS (II)

25.1 Negligence and tort theory

25.1.1 S. Beswick, UBC LAW-241.003: Torts Exam (Apr 2022)

1. Shortly after midnight on 22 May 2021, Ms Tahani Al-Jamil woke to discover that there was a fire in the premises which she occupied in Marpole, Vancouver. Ms Al-Jamil succeeded in getting out of the premises. Part of the premises was a frozen yogurt shop and part was a residence. The entire premises were destroyed by the fire. The fire also spread to the circus décor shop next door owned by Ms Eleanor Shellstrop.

Ms Al-Jamil had leased the premises since January 2021 from its owner, Mr Jason Mendoza. The fire which destroyed the premises and damaged Ms Shellstrop’s shop escaped from a fireplace in which Ms Al-Jamil had lit a wood fire before she went to bed. Ms Al-Jamil had previously lit fires in the fireplace to warm the residential section of the premises during winter nights. The fireplace had a glass screen to prevent the escape of sparks. But the chimney of the fireplace was defective. The fire escaped because of defects in the chimney that had been found there in August 2019.

The defects had been found in August 2019 as the result of the summoning of the Vancouver Fire Department to the premises on 9 August when Mr Mendoza’s assistant Janet became alarmed by what she thought was a fire in the chimney. The fire or smoke was quickly doused by the Fire Department. The Fire Department officer who attended saw that there was some mortar missing from the bricks in the back and bottom of the fireplace. He advised Janet that the fireplace was unsafe to use. The Fire Department notified the Vancouver City Council (“the Council”) of the occurrence. The City Engineer, Mr Chidi Anagonye, then requested Mr Michael, a recently appointed building and scaffolding inspector, to inspect the premises. Both Mr Anagonye and Mr Michael were local public officials employed by the Council.

On the morning of 11 August 2019, Mr Michael inspected the premises and found that the back wall of the fireplace in the residence and the back wall of the fireplace in the shop were parallel, with a space between them. There was a hole connecting the two fireplaces within the premises, which allowed flame to enter the space between the two back walls. This defect created a substantial risk of fire. Mr Michael pointed out the defect to Mr Mendoza and told him he should not use the fireplace unless it was repaired.

This advice was followed by a letter written by Mr Michael on the instructions of the City Engineer to “J. Mendoza” at the address shown in the Council’s records. The letter read as follows:

“At the request of the Vancouver City Council, I inspected two open fire places at the above location on 11th August, 2019 at 10.15 a.m.

During the inspection I noted a possible fire hazard and unsafe structural condition has occurred on both fire places that are constructed back to back. The products of combustion can now enter the front fire place in the shop as well as enter into the wall cavity that is part of the dividing partition wall. It is therefore imperative that the abovementioned fireplaces not be used under any circumstances unless:
(a) Structurally sound repairs are made to make the chimneys and fireplaces safe.

(b) General repairs are made to mortar and brickwork to make the walls heat resistant and prevent smoke leakage.

(c) Alternatively, repair the fireplaces structurally and seal both fireplace openings permanently and discontinue use."

Mr Mendoza received the letter. When negotiating Ms Al-Jamil’s lease of the premises in January 2021, Mr Mendoza did not inform Ms Al-Jamil of either the contents of the letter or the warning which Mr Michael had earlier given him not to use the fireplace. Consequently, when Ms Al-Jamil lit the fire on 22 May, she had no knowledge of the defects in the fireplace. She would not have used it had she known it was defective.

Ms Al-Jamil and Ms Shellstrop both suffered property damage. Ms Al-Jamil lost plant, equipment and stock and, in consequence, loss of profits of her business, all totalling $220,000. Ms Shellstrop calculated the physical and financial loss she suffered in consequence of the damage to her whimsical shop as $80,000.

When confronted by Ms Al-Jamil, Mr Mendoza broke down with remorse. He apologised and confessed that he knew the fireplace was defective and that he had been negligent in failing to warn Ms Al-Jamil about it. He said he had thought the City inspector had been overreacting; he did not realise how dangerous the fireplace was. He told Ms Al-Jamil he would not dispute any legal claim she bought. However, he also told her that he had money problems and it would be difficult for him to pay her full compensation.

The Safe BC Buildings Act, RSBC 1958 ("the Act") contains provisions on taking action to prevent the risk of fires that might cause damage. Section 65(1) provides:

“For the purpose of preventing fires the owner or occupier of any land upon which is erected any chimney or fireplace which is constructed of inflammable material or which is not adequately protected so as to prevent the ignition of other adjacent material of an inflammable nature may by notice in writing be directed by the council of the city of which such land is situated to alter the fireplace or chimney so as to make it safe for use as a fireplace or chimney, as the case may be.”

When a notice is given under s. 65(1), the Act requires the person to whom it is given to comply with it. The Act provides that it is a criminal offence, punishable by a fine, to fail to comply with such a notice. If neither the owner nor the occupier complies with the notice requiring work to be done to prevent fire, s. 64(1) of the Act provides:

“The council of any city may carry out or cause to be carried out any works or take any other measures for the prevention of fires.”

Mr Anagonye’s department was downsized in 2020 due to budget cuts. Mr Michael left for a private sector job. The Council did not enquire whether Mr Mendoza had received Mr Michael’s letter of notice. The Council did not send a follow up notice requiring remedial work to be done. No further inspection of the premises was made. Nothing was done to check whether the directions contained in Mr Michael’s letter were carried out. No work on the premises for the prevention of fire was carried out or authorised to be carried out by the Council. The Council did
not bring the defect which Mr Michael had discovered to the attention of Ms Al-Jamil after she began to occupy the premises.

You are an associate at Wesbick & Associates. Ms Eleanor Shellstrop has come to you asking whether she can sue the City of Vancouver for her losses under the common law tort of negligence.

1A. Did the City of Vancouver owe Ms Shellstrop a duty of care that could found the basis of a claim in negligence?

1B. Regardless of the conclusion you reached on Question 1A, supposing that Ms Shellstrop was owed a duty of care: did the City of Vancouver’s conduct fall below the common law standard of reasonableness?

1C. Regardless of the conclusion you reached on Questions 1A and 1B, supposing that the City of Vancouver did breach a duty of care owed to Ms Shellstrop: what damage did the City of Vancouver cause to Ms Shellstrop in fact and law?

1D. Assume that both Ms Shellstrop’s and Ms Al-Jamil’s conduct was reasonable and not negligent. If Ms Shellstrop brings an action in negligence against both the City of Vancouver and Mr Mendoza as co-defendants, how should damages be apportioned between the three parties under the Negligence Act, RSBC 1996, c 333? (You can express your answer in terms of which party should bear the greater amount of damages, and which party should bear the lesser amount. You do not need to express your answer as a percentage or dollar figure.)

2A. In Jones v. Tsige [2012] ONCA 32, [25], Justice Sharpe observed that “[i]n 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,” and he turned to American, English, New Zealand, and Australian jurisprudence to find a tort of invasion of privacy in Ontario (§4.1.2). When, if at all, should Canadian judges treat foreign case law as persuasive in elucidating principles of provincial tort law?

2B. Do you agree with Professor John Gardner’s suggestion that public officials in Commonwealth common law systems are “citizens in uniform” (§6.6.1)?

2C. Do you agree with Professor (later, Justice) Allen Linden’s claim that Donoghue v. Stevenson [1932] UKHL 100 “furnishes a continuing invitation to tort courts to innovate if they are so inclined” and that “judicial lawmaking based on the neighbour principle … never should end” (§13.1.2)?
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