

A review of tort decisions in Manitoba, 1988

Philip H. Osborne*

La jurisprudence manitobaine sur la responsabilité délictueuse a résolu en 1988 un certain nombre de situations et de questions juridiques, y compris le délit d'abstention lorsqu'il y a obligation d'agir, la perte économique, l'immunité de la responsabilité, le concept du droit à la protection de la vie privée et la liberté d'expression, ainsi que les problèmes de l'intention du législateur. Bien plus que la Charte, le concept de la négligence a eu une influence énorme sur le développement d'autres aspects de la jurisprudences sur la responsabilité délictueuse, et cela, malgré le fait qu'on n'était pas certain qu'il soit habile ou désirable d'appliquer la loi sur la négligence lors des litiges à propos de blessures personnelles.

Manitoban tort law resolved in 1988 a diversity of factual situations and legal issues, including nonfeasance, economic loss, immunities from liability, concepts of privacy and freedom of expression, and problems of legislative intent. More than the Charter, negligence exerted an enormous influence upon the development of other areas of tort law, despite the doubted ability and desirability of negligence law to decide personal injury claims.

IN 1988, A NUMBER OF IMPORTANT and interesting tort cases were decided in Manitoba.¹ They illustrate the wide scope of tort law and the competing policies that tort law must reconcile. Each part of this article deals with an individual case or a group of related cases. An attempt has been made to place the cases in the context of tort doctrine, and a few constructive criticisms and comments are offered. Occasionally, links have been drawn between various parts, but they largely represent distinct aspects of this vibrant and eclectic part of the law. Some overall comments about tort law and judicial approach are offered in the conclusion.

I. BATTERY AND SEXUAL ABUSE: *J.L.N. v. A.M.L.*²

THERE CAN BE NO DOUBT that there is an increasing awareness of the plague of physical and sexual abuse within some families. This aware-

* Professor, Faculty of Law, and Director of the Legal Research Institute in the University of Manitoba.

1 Not all decisions are discussed in this article.

2 [1989] 1 W.W.R. 438 (Man. Q.B.).

ness has bred a greater societal response to assist the victims of abusive situations. Refuge is provided in shelter facilities. Victims are more willing to seek psychological treatment and counselling. The authorities are more willing to press criminal charges. And now, we are beginning to see resort to the law of torts to provide more generous compensation than that available from the Criminal Injuries Compensation Board. A good deal of publicity was given last year to the decision of Lockwood J. in *J.L.N. v. A.M.L.*,³ in which he imposed liability for the incestuous acts of a common-law stepfather.

In this case, the plaintiff, aged sixteen, was sexually assaulted by the common-law husband of her mother for a period of six years. The assaults, which began when she was six years old, not only caused her severe trauma and educational problems but also left her unable to develop trusting relationships with men and put her at risk of future sexual disfunction. Lockwood J. did not discuss the basis of liability, but it is obvious that battery is the tort that has been committed. Sexual assault satisfies the definition of an intentional interference with the person of another that is harmful or offensive to a reasonable sense of dignity. His Lordship gave fullest consideration to the assessment of damages. There was no debate on the propriety of compensatory damages. The key issues were aggravated damages and punitive damages. His Lordship awarded aggravated damages. Aggravated damages are essentially compensatory in nature. They are designed to provide balm for injured feelings caused by the manner in which the defendant's act was committed. There is little doubt that there were aggravating factors in this case, including the long duration of the sexual abuse. A global sum of \$65,000 was awarded to cover compensatory and aggravated damages. Lockwood J. refused to award punitive damages on two grounds. His Lordship correctly concluded that punitive damages are not to be awarded if the defendant has been punished under the criminal justice process. In this case, the defendant had been sentenced to imprisonment. His Lordship's second reason was that the House of Lords decision in *Rookes v. Barnard*⁴ had restricted the award of punitive damages to two narrow categories; namely, to the case of oppressive arbitrary or unconstitutional actions of the servants of government and to cases where the defendant's conduct has been calculated to make a profit that would exceed compensation payable to the plaintiff.⁵ This case did not fall within either category. From time to time, other

3 *Ibid.*

4 [1964] A.C. 1129 (H.L.).

5 It may be noted that, strictly speaking, there is a third category recognized by *Rookes v. Barnard* (*ibid.*): punitive damages are awarded when sanctioned by statute.

trial judges in Canada have applied *Rookes v. Barnard*.⁶ Nevertheless the overwhelming weight of authority in Canada is against the decision and in favour of a much wider discretion to award punitive damages.⁷ Punitive damages may be awarded whenever the defendant's actions are sufficiently outrageous, intolerable, vicious, pre-meditated, cruel, or contemptuous of the plaintiff's rights to be deserving of direct sanction. If the defendant had not already been punished, punitive damages were clearly warranted and justifiable.

In cases such as this, there are not likely to be many difficult conceptual problems. Clearly, battery will provide the basis of liability. One difficult issue that has arisen in cases involving illicit sexual relationships with older children is the defence of consent and the impact of coercion on that consent. A useful illustration is provided by the British Columbia Supreme Court decision in *M.M. v. K.K.*⁸ In that case, the defendant had a sexual relationship with his foster daughter over a two-and-a-half-year period beginning when she was fifteen. The defendant had been convicted and imprisoned in collateral criminal proceedings. A careful consideration of the evidence of the relationship between the defendant and his foster daughter raised the issue of consent. Clearly, consent is insufficient to defeat a criminal prosecution, but, as McKinnon J. pointed out, "liability in *tort* for sexual intercourse with a consenting minor is an issue that has not been raised in any English or Canadian authorities."⁹ His Lordship carefully evaluated the evidence to determine if the plaintiff had the mental capacity to understand the nature and consequences of sexual activity. He also considered the issue of coercion. He concluded:

On the whole of the evidence I am satisfied that sexual abuse occurred at a time when the plaintiff was possessed of a sufficient degree of intelligence and maturity to understand the nature and consequences of the sexual activity in which she was involved. She was mentally and physically capable of assessing the situation and able to make a free choice as to whether or not she would become part of the activity.... [T]he acts complained of were not against the will of the plaintiff but rather with her consent.¹⁰

The action was dismissed.

It seems clear that the courts will evaluate the evidence very carefully to determine the validity of consent. There is likely to be an

6 *Ibid.*

7 K.D. Cooper-Stevenson and I.B. Saunders, *Personal Injury Damages in Canada* (Toronto: Carswell Co. Ltd., 1981) at 690.

8 (1987), 39 C.C.L.T. 81 (B.S.S.C.).

9 *Ibid.* at 95.

10 *Ibid.* at 97.

overwhelming presumption in most cases that the emotional and psychological pressure is such as to invalidate consent.

Traditional principle suggests that only violence and threats of violence are sufficient to invalidate the defence of consent on the grounds of duress.¹¹ However, there is little authority in the area of sexual abuse, and the courts are likely to be sensitive to the more subtle pressures inherent in the family relationship.¹²

The significance of undue pressure and subtle coercion is indicated in *Lyth v. Dagg*,¹³ which deals with the relationship of teacher and student. The defendant teacher made sexual advances towards the plaintiff, who was a member of his music and drama class. A homosexual relationship began when the plaintiff was sixteen, and it continued from the spring of 1981 to the fall of 1982. Again, consent was the primary issue. Trainor J. noted that two concepts required careful consideration: the *capacity* to consent; and, whether one of the parties had such a greater amount of power and control over the other as to be in a position to *coerce* compliance. His Lordship based his judgment on the latter. He considered the nature of the relationship and concluded that in the initial sexual encounter:

he [the defendant] dominated and influenced [the plaintiff] who did not want to offend or do anything that would disrupt their relationship. It was into that kind of relationship... that... [the defendant] made the sexual advances.... [The plaintiff] knew what was happening and did not actively resist or even say no to the advances. However in the circumstances I am satisfied that there was not a genuine consent.¹⁴

However, after that first occasion, the plaintiff did not try to put an end to the association, and subsequent sexual encounters were found to be consensual. It is likely that this emphasis on the genuineness of consent will resolve many cases of apparent consent in favour of the plaintiff.¹⁵

11 *Latter v. Braddell* (1881), 50 L.J.Q.B. 448 (C.A.).

12 After this article was written, the decision in *M.M. v. K.K.* has been reversed (*Madalena v. Kuun* (23 August 1989), (B.C.C.A.) [unreported]). The Court held that, as a matter of public policy, the defence of consent could not be raised by a defendant whose conduct was analogous to incest, involving a breach of trust, criminal wrongdoing, and a breach of his duty to act in the best interests of the plaintiff and to protect her from harm.

13 (1988), 46 C.C.L.T. 25 (B.C.S.C.).

14 *Ibid.* at 32-3.

15 It should also be kept in mind that fraud as to the nature and character of the act may vitiate apparent consent: *R. v. Williams*, [1923] 1 K.B. 340 (C.A.). Fraud as to collateral matters probably does not impair the validity of the consent: *Papadimitropoulos v. R.* (1957), 98 C.L.R. 249 (Aust. H.C.).

This trend towards the use of tort law in areas of sexual abuse, of course, extends beyond family situations. Any sexual assault is a battery, and the recent Saskatchewan decision in *Wiebe v. Haroldson*¹⁶ is illustrative. The plaintiff was raped by the defendant. Criminal charges against the defendant had been dropped. Liability was imposed, and compensatory damages of \$10,000 were supplemented by punitive damages totalling \$40,000. The court's approach to punitive damages is much more reflective of Canadian practice than the decision of Lockwood J. in *J.N.L. v. A.M.L.*¹⁷ Many will see tort law as fulfilling very important functions in this kind of case. It provides a vehicle for deterring and punishing outrageous behaviour. It allows a victim to seek accountability from the perpetrator and a sense of vindication and revenge. It also provides a mechanism for more generous compensation than the Criminal Injuries Compensation Board can provide. It is unlikely, however, that tort law will provide a practical and realistic remedy for most victims of sexual assault. The fundamental end and aim of tort litigation is money, and studies show that people who sue criminals rarely get paid.¹⁸ Counsel in *Wiebe v. Haroldson*¹⁹ has stated that he did not know if the defendant had any money.²⁰

Tort liability without liability insurance is often a hollow shell, and the plaintiff may be left with emotional and financial costs and bitter disappointment. Of course, there may be cases where this kind of litigation will provide a therapeutic and emotional benefit to the plaintiff. To force accountability in a public forum may form part of the healing process and may be worth some expense. Only a client can determine the course of action that is most beneficial to him or her. The most a lawyer can do is ensure that a decision to litigate is an informed one based upon all relevant criteria.

16 [1989] S.J. No. 182 (Sask.Q.B.).

17 *Supra*, note 2.

18 A. Linden, *The Report of the Osgoode Hall Study on Compensation for Victims of Crime* (Toronto, 1968), which found that only 1.8 per cent of Ontario crime victims collected anything from their attackers; P. Burns and A.M. Ross, "A Comparative Study of Victims of Crime Indemnification in Canada: B.C. as Microcosm" (1973), 8 U.B.C.L. Rev. 105.

19 *Supra*, note 16.

20 *Ibid.*

II. THE EXTENT OF A LAWYER'S RESPONSIBILITY FOR BREACH OF FIDUCIARY DUTY: *BOWLES V. JOHNSTON*²¹

*BOWLES V. JOHNSTON*²² is a very unusual and interesting case that arose from a land-flipping scheme in rural Manitoba. The case involves a defendant lawyer who represented multiple parties in these transactions. The judgment reveals a subtle interplay between the fiduciary obligations of lawyers to their clients and obligations of care based upon relationships of proximity. To add to the intrigue, there are overtones of nonfeasance and pure economic loss, issues that have bedeviled tort law in recent years. However, before beginning a discussion of the case it is useful to refer briefly to the case of *Jacks v. Davis*.²³ It is a recent and important decision on a lawyer's breach of fiduciary obligation to his client, and it considered some of the issues that arose in *Bowles v. Johnston*.²⁴

The facts of *Jacks v. Davis*²⁵ are as follows. In April 1976, Abbott, a friend and financial advisor of the plaintiff Jacks, recommended that he purchase a new apartment block as a tax shelter and financial investment. Abbott did not disclose the fact that the block had recently been purchased by Blunden Developments Limited, a company of which he was president. It had been purchased from Jurome for \$853,304. The closing date of that agreement was 20 April 1976. With Abbott's encouragement, Jacks purchased the block for \$910,600. The closing date of that transaction was also 20 April 1976. At the suggestion of Abbott, the plaintiff engaged the defendant solicitor to act for him. The defendant solicitor had acted for Blunden Developments Ltd for some time, and he was also retained to look after Blunden's interests in the sale to the plaintiff.

The defendant solicitor did not disclose the intermediate sale to Blunden nor the profit of \$65,296 that Blunden Developments stood to gain from nothing more than payment of a \$30,000 deposit. Indeed, the deed reflected a direct transfer from Jurome to the plaintiff. Some time later, the plaintiff discovered the truth and, after some unwarranted delay, the apartment block, which proved to be an uneconomical proposition, was sold for \$700,000. The plaintiff had recovered \$60,000 from Abbott and Blunden Developments Ltd on a secret profit claim and \$25,000 on a similar basis from Jurome. He sought to recover fur-

21 (1988), 53 Man. R. (2d) 81 (Man. Q.B.).

22 *Ibid.*

23 (1980), 12 C.C.L.T. 298 (B.C.S.C.), *aff'd* (1982), 22 C.C.L.T. 266 (C.A.).

24 *Supra*, note 21.

25 *Supra*, note 23.

ther losses in the nature of capital losses and operating losses from the defendant solicitor. The claim was based on breach of fiduciary duty.

Anderson J., in a judgment affirmed on appeal, had no doubt that the defendant had breached his fiduciary duties to the plaintiff. The duty of a lawyer representing more than one client in the same transaction was put directly and succinctly:

(1) If a lawyer is desirous of representing multiple clients in the same transaction he may only do so if each of his clients consents to such representation after full disclosure of all relevant facts.

(2) In the event that a lawyer represents multiple clients in the same transaction he must adequately represent the interests of each and make known to all his clients all relevant facts. If he is unable by reason or conflict to make full disclosure to all he must decline employment.²⁶

The defendant was clearly in breach of these duties, and liability was established on that basis. The Court went on to hold, for the purposes of damage assessment, that breach of fiduciary duty is analogous to fraud and that all damages, whether reasonably foreseeable or not, are recoverable provided that they flow from the breach of fiduciary obligation. The capital losses and operating losses that could not have been avoided by reasonable acts in mitigation were recoverable. The *Jacks*²⁷ case is important and pertinent in our discussion of *Bowles v. Johnston*²⁸ for a number of reasons: it clearly reiterates the duty of a lawyer who represents multiple clients in the same transaction; it utilizes the notion of breach of fiduciary duty as a tort principle analogous to fraud or breach of an obligation of care; and, in so far as operating losses were recoverable, it extends the remedies for breach of equitable obligation to what amounts to damages at common law. Professor Irvine has discussed this latter point at some length elsewhere.²⁹

The situation that gave rise to the case of *Bowles v. Johnston*³⁰ began in late 1981. From that time until early 1982, Mr Barber, a real estate broker in Dauphin, Manitoba was involved in a large number of real estate transactions involving farm land. Sometimes Mr Barber pur-

26 *Supra*, note 23 at 308-309. For other cases discussing the liability of a lawyer acting for more than one client see, *Tracy v. Atkins* (1979), 11 C.C.L.T. 57 (B.C.C.A.), *Clarence Construction Ltd v. Lavall?e* (1980), 111 D.L.R. (3d) 582 (B.C.S.C.), and *Jacques v. Seabrook*, [1982] 4 W.W.R. 167 (B.C.Co.Ct).

27 *Supra*, note 23.

28 *Supra*, note 21.

29 Annotation to *Jacks v. Davis* (1980), 12 C.C.L.T. 299. This point is discussed further in the recent case of *Brady v. A.E. Le Page (B.C.) Ltd* (1989), 47 C.C.L.T. 259 (B.C.S.C.).

30 *Supra*, note 21.

chased and sold the land personally, and sometimes he acted as broker between sellers and purchasers. Barber's lawyer, Mr Deans, played a limited role in this series of transactions. He permitted Barber to use his name as solicitor for various of the purchasers and vendors, and he ensured that purchasers received their title. He was, therefore, representing more than one person in these transactions. However, he did not advise the participants in these transactions, and he did not act for them until after the deals were made and the money paid. It was only in February 1982 that it became clear to Deans that Barber was orchestrating a land-flipping scheme at unrealistically inflated values. Deans had serious reservations about the legality of the scheme. In spite of this, Deans did not sever his relationship with Barber or attempt to stop Barber's activities. He continued to process the real estate transactions. It is clear from *Jacks v. Davis*³¹ that he was in breach of his fiduciary obligations to those vendors and purchasers for whom he was shown to be acting. Not only should he have severed his relationship with Barber and prevented Barber from using his name as solicitor for the contracting parties, he should also have written to those for whom he was shown to be acting and told them of his concern about previous transfers and rapidly escalating prices and informed them that he could no longer act for them.

In mid-April, the plaintiff Bowles became involved in Barber's scheme. He purchased farmland, sight unseen, for \$100,000 in anticipation of a quick and profitable resale. Deans acted as solicitor and processed the transaction. However, before resale, Barber's scheme collapsed, and the plaintiff was left with land valued at \$29,500. The claim against the defendant was made on the basis of breach of fiduciary duty and negligence.

There is no doubt that Deans failed in his fiduciary duties to Bowles, but that breach probably did not cause his loss. The \$100,000 had already been paid before Deans began to act for him. Perhaps the money could have been recovered if Bowles had been alerted immediately to the scam, but an argument of this kind does not appear to have been made. Bowles suffered his loss because of Deans' failure to discharge his fiduciary duties to other clients between February and April 1982. If he had discharged those duties, the scam might have been discovered, and it might have ended before Bowles became entangled in it. On this analysis, the case raises a fascinating issue: where there is a fiduciary relationship between A and B, can A's failure to discharge a duty owed to B give rise to a cause of action in C who suffers loss from that breach? In essence, is there a doctrine of privity of fiduciary

31 *Supra*, note 23.

relationships? This is the added dimension which differentiates *Bowles v. Johnston*³² from *Jacks v. Davis*.³³ At the time of the defendant's impugned acts, Bowles was not in a fiduciary relationship with Deans. He was a "third party" (C). Morse J. did not however analyze the case on this basis. He adopted an analysis that would free him from the restraints of fiduciary relationship. He analyzed the case in terms of negligence doctrine.

In his analysis Morse J. concluded that the defendant was negligent. His Lordship decided that a reasonably prudent lawyer would have taken steps to "try and prevent Barber from continuing his land transfer scheme."³⁴ In particular, he ought to have severed his relationship with Barber, directed Barber to cease using his name as solicitor for vendors and purchasers, and written to those who had made offers and for whom he was shown to be acting, telling them that he could not act for them and expressing his concern about previous transactions and the rapidly increasing prices. These acts of "negligence" are, of course, the breaches of fiduciary duty owed to earlier clients. Thus, the fiduciary breach has been synthesized into the negligence framework.

His Lordship was equally persuaded that causation was established. This was supported on two bases. First, if Deans had severed his relationship with Barber and had prohibited him from using his name as solicitor in connection with the land transaction, the scheme would have terminated. Barber's aura of respectability would have been lost. His Lordship doubted that Barber could have got another lawyer to act for him in such circumstances. Secondly, if in February 1982 Deans had refused to act for the purchasers of unprocessed transactions and had told them of his reservations, it was highly likely that that information would have become well known in the tightly knit rural community, and the plaintiff and other potential investors would not have become involved with Barber.

This led to the most intriguing question which was whether Deans owed a duty of care to the plaintiff. Morse J. approached this question by relying on *Anns v. Merton London Borough Council*,³⁵ which calls for a two-tier approach to duty of care. The first is to determine if there is sufficient proximity between the parties such that carelessness on the part of the defendant can reasonably be foreseen to cause loss to the plaintiff. If this is satisfied, there must be a direct consideration of policy considerations to determine if there is good reason to restrict or deny a

32 *Supra*, note 21.

33 *Supra*, note 23.

34 *Supra*, note 21 at 245.

35 [1978] A.C. 728 (H.L.).

duty of care.³⁶ His Lordship concluded that there was sufficient proximity between Deans and "those purchasing land through Barber" and that it was just and reasonable that Deans owed a duty of care to the limited class of future purchasers who were unaware of Barber's scheme. There were in his view no policy considerations sufficient to contradict that conclusion. The defendant was held liable, although damages were reduced by fifty per cent because of the contributory negligence of the plaintiff.

The consequence of this decision is that it does extend a lawyer's responsibility for the breach of fiduciary duty owed to his client. This extension has been indirectly achieved through the vehicle of negligence and clearly does not depend upon the fact that, ultimately, the defendant entered into a lawyer-client relationship with Bowles. The duty arose prior to that relationship, and the case would have been decided in the same way if some other lawyer had acted for Bowles in the mid-April transaction. Thus, a breach of a lawyer's fiduciary duty to his client may lead to liability to third persons who suffer foreseeable loss as a consequence of that breach.

In terms of negligence doctrine, the case has further and more general ramifications. At one point, Morse J. states that the defendant had a duty to "try and prevent Barber from continuing with his land transfer scheme" and protect future innocent investors. This recognizes some obligation to act for the benefit of others, a duty to rescue. However, in negligence law, there normally is no responsibility to control others and to prevent them from injuring third parties. This is an aspect of the general proposition that there is no liability for nonfeasance. This rule is however subject to attack, and the courts are beginning to create exceptions, usually on the basis of some special relationship between the defendant and the unperilled plaintiff. The parameters of the concept of special relationships have yet to be authoritatively determined, but it is often based on commercial or family links, control, reliance, assumption of responsibility, or assurances of protection. It is difficult, however, to determine any special relationship in this case between the defendant and the plaintiff. At the time when the duty arose and the acts of negligence took place, Bowles was not his client. Indeed, he did not know the plaintiff, nor did the plaintiff rely in any way upon the defendant. The defendant had made no representations, express or im-

36 This approach has received the approval of the Supreme Court: *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2 and *B.D.C. Ltd v. Hofstrand Farms Ltd* (1986), 36 C.C.L.T. 87. Subsequent English courts have not fully supported the *Anns* principle on the grounds of its unduly expansionary nature: "Retreat from *Anns*" (1987), 103 L.Q. Rev. 320; and R. Kidner, "Resiling from the *Anns* Principle: The Variable Nature of Proximity in Negligence" (1987), 7 Legal Stud. 319.

plied, that he would act for the benefit of Bowles or any future investors. The duty appears to be based much less on special relationship than on knowledge on the part of the defendant that he was being utilized by an unscrupulous third party (Barber) to facilitate a fraudulent scheme. Once he had knowledge of the fraud, he was required to take reasonable steps to end it and protect future investors.³⁷ In this light, the case appears to straddle the border between nonfeasance and malfeasance, because the defendant is to some extent contributing to the risk by facilitating the scheme. The wider ramifications of this view of the case can be seen in the following hypothetical. Imagine that X is the sole seller of aluminum siding for home improvement. X sells to a home improvement contractor Y. It comes to X's attention that Y is perpetrating a home improvement scam. This case would seem to suggest that X may owe a duty to those who may be victimized by Y in the future, and that X must take steps to terminate the fraud by severing his relationship with Y? The only difference is that X is not in a fiduciary relationship with Y. Furthermore, imagine that Y finds an alternative supplier and is able to continue the scam. Is X under an obligation to alert the authorities to the fraudulent scheme? A strict interpretation of the decision would, of course, suggest not, because X is no longer facilitating the fraud. It is unlikely that the courts would be willing to take this next step, because it would logically lead to wide duties to inform of any wrongdoing that threatened a third person's safety or property. From the perspective of nonfeasance, this case is an important one and may extend the categories of duty to act for the benefit of others.

Two other issues, one of a factual nature and the other more a matter of policy, arise from this case, being perhaps worthy of mention. The first is to consider the consequence of an argument by Deans that, if he had not acted for Barber, some other lawyer would have and therefore the plaintiff would have still been injured. One might speculate that this would be the more normal circumstance. However, it is submitted that the defendant will not normally be permitted to excuse himself on this ground and to shrug off his legal obligation on the basis

37 In a recent decision, the English Court of Appeal took a much more restrictive and conservative approach in a similar kind of situation. In *La Banque Financière v. Westgate*, [1988] 2 Lloyd's Rep. 513, the defendant insurer actually knew to be dishonest the broker who was negotiating credit insurance between the defendant and the plaintiff insured. The Court held that the insurer was under no duty of care to tell the broker's employer or the insured of the broker's dishonesty. It was analyzed as a case of pure omission consisting of a failure to speak during the course of contractual negotiations, giving rise to pure economic loss. The case has been criticized: Trindade, "Commercial Morality and the Tort of Negligence" (1989), 105 L.Q.R. 191 at 197-198.

that, if he did not facilitate the fraud, someone else would. A somewhat analogous situation was considered in *Good-Wear Treaders v. D & B Holdings Ltd.*³⁸ In that case, the defendant sold tires to a purchaser in spite of knowledge that the purchaser was going to install the tires on the front wheels of his gravel truck. The tires in question were unsuitable for such a vehicle and created a danger that they would blow out. A warning was given to the purchaser, but he insisted on the purchase. Later, the tires burst and innocent third parties were killed in a highway accident. The Court of Appeal of Nova Scotia imposed liability on the defendant and held that the tires should not have been sold. It is, of course, clear that, if the defendant had refused to sell the tires to the defendant, he could have undoubtedly purchased them at another store. The court was obviously reluctant to speculate about future hypothetical conduct and was not willing to excuse the defendant on that ground.³⁹

The second issue is that this was a case where the plaintiff recovered pure economic loss in a negligence action. Not a great deal was made of this by Morse J., and one can sympathize with a desire to avoid the morass into which the law relating to economic loss has fallen. His decision is in line with cases that impose liability where a careful scrutiny of the facts suggests a strong foreseeability of economic loss to individual persons or to a very limited class of persons.⁴⁰ In essence, judicial fear of indeterminate liability was allayed. In *Bowles*,⁴¹ the duty was owed to future victims of Barbers' scheme, and this was sufficiently restricted to lead Morse J. to conclude that "this was not a case in which to award damages would be to open the floodgates to

38 (1979), 98 D.L.R. (3d) 59 (N.S.C.A.).

39 Some support can be drawn for this view from the attitude of the courts towards breach of fiduciary duty. In *Brickenden v. London Loan and Savings Co.* (1934), 3 D.L.R. 465 (P.C.), it was held that a solicitor could not escape responsibility for a breach of a fiduciary duty of disclosure of material facts on the basis of speculation that the client's actions would not have changed had the disclosure been made. The solicitor would have to prove that the failure to disclose had no effect on the client's conduct. The decision was recently followed by the Ontario Court of Appeal in *Capital Commerce Trust Company v. Berk*, [1989] O.J. No. 1763.

40 See *Haig v. Bamford*, [1977] 1 S.C.R. 466; *Whittingham v. Crease & Co.*, [1978] 5 W.W.R. 45 (B.C.S.C.); *Ross v. Caunters*, [1979] 3 All E.R. 580 (Ch.); *Minister of Housing and Local Govt. v. Sharp*, [1970] 2 Q.B. 23 (C.A.); *Rivtow Marine v. Washington Iron Works*, [1974] S.C.R. 1189; *Caltex Oil (Aust.) Property Ltd v. The Dredge Willemstad* (1976), 11 A.L.R. 227 (Aust. H.C.); and, *The Jervis Crown* (14 April 1989), T-552-88 (F.C.T.D.).

41 *Supra*, note 21.

innumerable claims."⁴² All in all, *Bowles v. Johnston*⁴³ is a very interesting case.

III. TORT LAW AND THE PROTECTION OF INTOXICATED PERSONS: *HOOEY v. MANCINI*⁴⁴

THERE IS NO DOUBT that the 1980s have witnessed a major change in societal attitudes towards alcohol abuse. This change is most clearly reflected in the treatment of drunk drivers. Criminal penalties have increased, enforcement measures are more energetic, and increased publicity is given to the hazards of alcohol and driving. Voluntary organizations have heightened public consciousness of these dangers and have lobbied hard for even tougher measures. It is, therefore, intriguing to find a collateral development in tort law that shows a great deal of compassion for intoxicated persons and imposes obligations on others to take steps to protect them from the consequences of their own foolishness. *Hooey v. Mancini*⁴⁵ is a recent addition to a line of cases of this nature and it raises in a very different context the issue of nonfeasance discussed in *Bowles v. Johnston*.⁴⁶

The seminal case is *Menow v. Honsberger*.⁴⁷ This decision of the Supreme Court is important for two reasons. It extended liability to those who supply alcohol to intoxicated persons, and it imposed a duty of care on a supplier of liquor to the intoxicated person himself. In that case, a bar owner served the plaintiff liquor beyond the point of intoxication. The defendant knew the plaintiff and his propensity to abuse liquor. He had taken steps in the past to control the supply of liquor to him. He also knew of the dangerous circumstances that the plaintiff would encounter when he was ejected from the bar. The combination of commercial and personal relationships led the Court to impose liability for injuries that the plaintiff suffered shortly after he was ejected from the bar.⁴⁸ The decision has a strong humanitarian theme. It imposes a duty to protect a person who some may feel was the author of his own misfortune. This is a duty to benefit another or to rescue. This

42 *Supra*, note 21 at 258.

43 *Ibid.*

44 [1988] 4 W.W.R. 149 (Man. Q.B.).

45 *Ibid.*

46 *Supra*, note 21.

47 [1974] S.C.R. 239 (S.C.C.).

48 Liability may also be imposed in favour of innocent third persons who may be injured by an intoxicated person. In *Schmidt v. Sharpe* (1984), 27 C.C.L.T. 1 (Ont. H.C.) a bar owner was held liable for injuries caused by a minor who had been served beyond the point of intoxication. See also *Hague v. Billings*, [1989] O.J. No. 1562, (Ont. H.C.).

aspect of the judgment has not been overlooked, and the decision has been extended to impose duties on those who did not contribute in any way to the intoxication. In *Hempler v. Todd*,⁴⁹ the defendant permitted an intoxicated person to drive his car. The car was driven into a ditch, and the driver was killed. Hall J. stated that "[the defendant] owed a duty to the deceased not to allow him to drive his vehicle when placing the deceased in a position of personal danger."⁵⁰ Moreover, there is strong authority that significantly predates *Menow*⁵¹ and holds that a railway company owes a duty of care in respect of the safety of intoxicated passengers.⁵² Most significant, however, is the recent Supreme Court decision in *Crocker v. Sundance Northwest Resorts Ltd*⁵³ In that case, the plaintiff took part in a tubing race held on a mogulled ski slope at the defendant's resort. The plaintiff, who was very intoxicated, was thrown out of the tube and was rendered a quadriplegic. The defendant supplied only a small portion of the alcohol consumed by the plaintiff, but its employees were aware of his intoxicated condition and of the heightened danger of the race to an intoxicated person. Furthermore, they had control and supervision of the race, and with relative ease they could have prevented the plaintiff from participating. The court imposed liability, holding that the ski resort was under a legal duty to protect Crocker from the consequences of his own foolishness. These decisions illustrate a gradual erosion of the nonfeasance immunity by basing duties to assist others on some special relationship between the defendant and the plaintiff. It is into this context that *Hooley v. Mancini*⁵⁴ most easily fits.

In *Hooley v. Mancini*,⁵⁵ the plaintiff spent an afternoon drinking with his friend Sjodin. In the evening, they purchased some liquor, and left Winnipeg for Bracken Falls. Sjodin was driving. In the course of the journey, the defendant police officers stopped the car. It was clear to the police officers that Sjodin had been drinking, and he was taken to Beausejour for a breathalyser test. The plaintiff, who was also intoxicated, told the police that he did not wish to leave the automobile. He did not want to leave his camping equipment and two dogs in the open convertible. The plaintiff told the police that he did not have a driver's licence, and that he did not intend to drive the car. He was going to

49 (1970), 14 D.L.R. 637 (Man. Q.B.). See also *Ontario Hospital Services Comm. v. Borsoski* (1973), 7 O.R. (2d) 83.

50 *Ibid.* at 639.

51 *Supra*, note 47.

52 *Dunn v. Dominion Atlantic Railway Co.* (1920), 52 D.L.R. 149 (S.C.C.).

53 (1988), 44 C.C.L.T. 225 (S.C.C.).

54 *Supra*, note 44.

55 *Ibid.*

wait for the tow truck summoned by the police officers. At the plaintiff's request, the police officers left the car flashers on. This necessitated the keys being left in the ignition. Shortly after the plaintiff was left alone, he went to sleep. He awoke a short time later and drove away. He overturned the car east of Beausejour and was injured. The plaintiff sued the police officers.

Simonsen J. was faced with an interesting issue. Did the defendant police officers owe a duty of care to protect the plaintiff from the consequences of his own voluntary intoxication? Simonsen J. expressed "no doubt" that the police owed such a duty. This duty was based neither on any special relationship between the police and the plaintiff nor on any assumption of responsibility for the plaintiff, but rather upon the general relationship of the police to the public. His Lordship cited no legislation. He relied upon

common law principles which have been mentioned in the authorities cited by counsel, which declare that police officers, *as representatives of the state* have a broad conventional and customary duty to protect life limb and property of the subject. The police should take reasonable steps to protect a motorist such as the plaintiff and should take reasonable precautions that he not injure himself.⁵⁶

The language indicates that his Lordship was relying on *Schacht v. R.*⁵⁷ and *R. v. Côté*.⁵⁸ In *Schacht v. R.*⁵⁹ the Ontario Court of Appeal in a judgment affirmed by the Supreme Court⁶⁰ held that the police were under a duty to warn oncoming traffic that a well-lit barrier marking a detour around some highway construction had been knocked down. The court explained that the duty arose partly from relevant legislation and partly from "the common law which recognizes the existence of a broad conventional and customary duty in the established constabulary as an arm of the state to protect life, limb and property of the subject."⁶¹ This view was confirmed in the similar case of *R. v. Côté*,⁶² which held that the police had a duty to warn the Department of Highways of a dangerous icy strip on a highway. Simonsen J. extended this principle by applying it in novel circumstances. His Lordship then considered the requisite standard of care and concluded that there was no breach. The plaintiff had successfully concealed his own intoxication and had

56 *Ibid.* at 155.

57 (1972), 30 D.L.R. (3d) 641 (Ont. C.A.).

58 (1974), 51 D.L.R. (3d) 244 (S.C.C.).

59 *Supra*, note 57.

60 *O'Rourke v. Schacht* (1974), 55 D.L.R. (3d) 96 (S.C.C.).

61 *Supra*, note 57 at 651-52.

62 *Supra*, note 58.

acted sensibly and reasonably. The police could not reasonably have anticipated that the plaintiff would drive the car.

The imposition of a duty of care on the basis of a broad, conventional, and customary duty to protect the life, limb, and property of the public raises questions about the extent of this duty. Few would be uncomfortable with a private law duty owed by the police to rescue the victim of rape or children playing on thin ice or to intervene in a mugging. But a moment's reflection will provide reasons for caution. The work of the police brings them into continual contact with imperilled persons and those in need of protection. Do the police owe a private law duty to rescue drug addicts, incapacitated drunks in city bars, prostitutes, runaways and abused spouses? Surely not. The primary task of the police is to enforce the criminal law, not to do the work of social workers and social services. It is clear that some limitation must be placed on the duty recognized in *Hooey v. Mancini*.⁶³ One possibility is to emphasize the fact that in *Hooey v. Mancini*⁶⁴ the police voluntarily assumed responsibility for the plaintiff and embarked on a course of conduct to look after him. Alternatively the duty could be restricted to those who are in imminent physical peril from a known source of danger. But it is doubtful if *Hooey v. Mancini*⁶⁵ or *Schacht v. R.*⁶⁶ are consistent with that view. Another way of limiting *Hooey v. Mancini*⁶⁷ is to portray it as an aspect of a special duty the police have in relation to the safety of travellers on the highways where alternative help is not often at hand. Perhaps the answer lies in a broad and principled approach to the civil liability of the police. The role and activities of the police often involve competing priorities and the exercise of discretion. There has been a great deal of authority relating to the reluctance of courts to impose a private duty of care when the exercise of statutory powers involves discretionary or planning decisions. This framework could be used to analyze more sensitively the broad range of police work and to determine the extent of the obligation of the police to members of the public who are in peril.⁶⁸

The broader question that arises from *Hooey v. Mancini*⁶⁹ and the line of cases of which it forms a part, is the possibility of further exten-

63 *Supra*, note 44.

64 *Ibid.*

65 *Ibid.*

66 *Supra*, note 57.

67 *Supra*, note 44.

68 See *Anns v. Merton London Borough Council*, *supra*, note 35; *Kamloops v. Nielsen*, *supra*, note 36; *Hill v. Chief Constable of West Yorkshire*, [1988] 2 All E.R. 238 (H.L.); and, *Doe v. Board of Commissioners of Police (Metropolitan Toronto)*, [1989] O.J. No. 471 (Ont. H.C.).

69 *Supra*, note 44.

sion of the duty to protect intoxicated persons. The courts have normally identified some sort of relationship between the defendant and plaintiff that distinguishes the defendant from membership of the general public, such as commercial supplier of liquor and well known patron, automobile owner and bailee, railway company and passenger, and resort owner and customer. The nature of the relationship has not been carefully analyzed, and the extent of duty has not been authoritatively defined. It is interesting to speculate on the liability of two other characters who played roles in the situation that gave rise to *Hooey v. Mancini*.⁷⁰ The first is Sjodin's landlord. The reason for driving to Bracken Falls was that Sjodin had been promised the use of his landlord's cottage. Just before leaving on the journey, Sjodin went to pick up the key. The evidence showed that the landlord was aware of Sjodin's intoxication and was reluctant to give him the key. He eventually relented. Was the landlord under a duty of care to Sjodin, the plaintiff-passenger or innocent third persons travelling on the highway to refuse to give Sjodin the key? There appears to be only marginal differences between providing an intoxicated person with one's automobile and providing what appears to have been the sole reason for a two-hour journey on a public highway leading to popular summer resorts. The other person who could have prevented the injury to the plaintiff was a neighbouring farmer. Earlier in the journey, Sjodin had driven his automobile into a ditch. The farmer had pulled the vehicle out of the ditch and had sent him on his way. If we assume that the farmer knew of Sjodin's intoxication, was he under a duty of care to Sjodin, the plaintiff-passenger, or innocent third persons? Should the farmer have left the car in the ditch? The issue is not as far-fetched as may first appear. The situation is analogous to a recent American case that imposed liability on a service station that refuelled the automobile of an intoxicated person who had run out of gas.⁷¹ These situations indicate the slippery slope that is created by abandonment of the strict nonfeasance immunity. Some certainty and predictability of the extent to which it has been eroded in respect of intoxicated persons will only be brought about by a more detailed analysis of the decided cases, competing policy concerns, and the nature of the special relationship concept.

70 Ibid.

71 *O'Toole v. Carlsbad Shell Service Station* 247 Cal. Rptr. 663 (1988), discussed in a "Note" (1988), 102 Harv. L. Rev. 544. Liability was imposed in respect of an innocent third person injured by the intoxicated person.

IV. PSYCHIATRIST'S RESPONSIBILITY FOR DANGEROUS PATIENTS: *MUSTAFIC V. SMITH*⁷²

THIS CASE MERITS BRIEF CONSIDERATION, because it only potentially raised a very interesting nonfeasance issue. The case is *Mustafic v. Smith*.⁷³ The case involved a voluntary psychiatric patient who was admitted to the psychiatric unit of the Victoria Hospital. The patient was under the care of Dr Gordon Smith. The hospital admission was largely for observation, and the preliminary diagnosis was mild depression and phobic anxiety. A few days later, the patient was issued a day pass to visit his family. He took his son and daughter for a drive, shot both in the head and then shot himself. Only his son survived.

An action was brought under the *Fatal Accidents Act*⁷⁴ for the benefit of the widow and the surviving child. After a careful examination of the evidence, Hirschfield J. concluded that Dr Smith had taken reasonable care in his examination and diagnosis of the deceased and could not be held responsible on the basis of a failure to determine that the patient was a danger to others. The patient had exhibited no suicidal or homicidal tendencies, and his tragic actions could not have been foreseen. This finding, of course, foreclosed the possibility of any recovery against the doctor. The judgment was upheld on appeal.⁷⁵

The interesting aspect of this case arises from the fact that the fatal accident suit contained a claim for general damages and loss of future earnings of the injured son. These losses are not recoverable in a fatal accident claim, where damages are restricted to the loss suffered by dependants as a consequence of the wrongful death. These losses were a consequence of the son's own personal injuries, and the appropriate cause of action was in battery against his father's estate or in negligence against Dr Smith. The negligence claim against Dr Smith would have raised a critical question. Did Dr Smith owe a duty of care to the son? As we have noted, one is not generally obligated to control the actions of third persons who may pose a danger to others. However, the psychiatrist has a special relationship with the patient, and it is an open question in Canada as to whether the psychiatrist owes a duty of care to an innocent third person when he knows or ought to know that a patient poses a danger to that person. The duty, if existing, would be discharged by giving a timely warning to the endangered person. This issue has been dealt with in the United States in the leading case of *Tara-*

72 (1988), 52 Man. R. (2d) 20, *aff'd* (1988), 55 Man. R. (2d) 188 (Man. C.A.).

73 *Supra*, note 71.

74 R.S.M. 1987, c. F50.

75 (1988), 55 Man. R. (2d) 188 (Man. C.A.).

soff v. Regents of the University of California.⁷⁶ In that case, the defendant psychotherapist was treating a young man, Prosenjit Poddar, who had a pathological attachment to Tatiana Tarasoff. The defendant was also aware that the patient intended to purchase a gun. The defendant alerted the police, but no warning was given to Tatiana or members of her family. Two months later, when Tatiana returned from abroad, Poddar shot and killed her. The California Supreme Court imposed liability on the grounds that the special relationship between psychotherapist and patient was such as to impose a duty on the former to warn third persons of danger posed by his patient. The Court favoured the interests of public safety over protection of the fiduciary and confidential nature of the relationship between doctor and patient. This, of course, raises difficult questions, not the least of which is the difficulty of predicting, clinically, the degree of danger that a patient poses to another. This point was made strongly by the expert witnesses in *Mustafic v. Smith*,⁷⁷ and it may lead psychotherapists to err on the side of safety to the detriment of clinical care.

It has also been argued that a legal duty to warn will ultimately increase the risk to society from dangerous psychiatric patients by inhibiting successful treatment. It has been suggested that fewer psychiatrists will be willing to treat these patients and that the duty is destructive of the psychotherapist-patient relationship. In particular, the legal obligation to warn endangered third persons, which ethically may have to be disclosed to the patient, may destroy trust and confidentiality and may either inhibit the full and open disclosure of intimate matters in the course of therapy or completely deter the patient from seeking help at all. It has been suggested that the law would balance the competing interests more sensitively if the obligation to warn was replaced by an obligation to take other reasonable protective measures, such as initiating involuntary commitment procedures or by contacting the police whose primary mandate and role is the protection of the public. These steps may be less destructive of the doctor-client relationship. This would also broaden the protection of the public, because steps would have to be taken when the public was foreseeably endangered not just some identifiable individual who would profit from a warning.⁷⁸ Recognition of such a duty would be very much in step with the gradual expansion of liability in the area of nonfeasance. The distinguishing characteristic from recent Canadian developments is that there is no special relationship between the psychiatrist and the

76 (1976), 551 P.(2d) 334.

77 *Supra*, note 72.

78 Many of these reservations are strongly argued by A.A. Stone, "The Tarasoff Decisions: Suing Psychotherapists to Safeguard Society" (1976), 90 Harv. L. Rev. 358.

victim. The American courts have relied heavily by way of analogy on cases requiring doctors to warn third persons who are threatened by contagious diseases suffered by their patient. The basis of the liability would appear to be a special obligation of doctors for society's well-being and that doctors acquire knowledge of danger which is not publicly available. Whether Canadian courts will follow the American lead remains to be seen.

V. THE OCCUPIERS LIABILITY ACT:⁷⁹ WOLF V. AIRLINER MOTOR HOTEL (1972) LTD;⁸⁰ STEVENSON V. WINNIPEG HOUSING CORP.;⁸¹ SELLWOOD V. MITCHELL FABRICS LTD;⁸² AND, MCKITTRICK V. AGASSIZ ENTERPRISES (1980) LTD⁸³

IN 1 OCTOBER 1983, the common law principles of occupier's liability were replaced in Manitoba by provisions of the *Occupier's Liability Act*.⁸⁴ The most significant aspect of the legislation was the replacement of a graduated scale of care based on the classification of visitors with a uniform obligation to take such care as in all the circumstances of the case is reasonable to see that the person, while on the property, is reasonably safe.⁸⁵ There were four occupiers' liability decisions in 1988. In *Wolf v. Airliner Motor Hotel (1972) Ltd*,⁸⁶ liability was imposed for a slip and fall on steps leading down to the defendant hotel's indoor swimming pool. In *McKittrick v. Agassiz Enterprises (1980) Ltd*,⁸⁷ the defendant occupier of a ski resort was found liable for a slip and fall on an icy parking lot. No liability was imposed in *Stevenson v. City of Winnipeg Housing Co. Ltd*⁸⁸ for a slip and fall on an icy sidewalk, nor in the unusual case of *Sellwood v. Mitchell Fabrics Ltd*⁸⁹ when a bolt of cloth fell from a high shelf onto the plaintiff customer. Evidence indicated that the immediate cause was the conduct of a third person.

It is clear from the judgments in these cases that, in applying the common standard of care, the courts are taking into account the same

79 R.S.M. 1987, c. O8.

80 (1989), 54 Man. R. (2d) 169 (Man. Q.B.).

81 (1988), 55 Man. R. (2d) 137 (Man. Q.B.).

82 (1988), 53 Man. R. (2d) 241; appeal dismissed without reasons (1988), 53 Man. R. (2d) 241 (Man. C.A.).

83 (2 June 1988) 86-01-16301 (Man. Q. B.).

84 *Supra*, note 79.

85 *Supra*, note 79, s. 3(1). For a discussion of the *Act*, see P. Osborne, "The *Occupier's Liability Act* of Manitoba" (1986), 15 Man. L.J. 177.

86 *Supra*, note 80.

87 *Supra*, note 83.

88 *Supra*, note 81.

89 *Supra*, note 82.

concepts as utilized in negligence actions. The key question is whether there is a foreseeable risk of injury that is sufficiently significant to prompt action from the reasonably prudent occupier.⁹⁰ There is also an obligation to make reasonable inspections to identify defects and dangers on the premises.⁹¹ The sufficiency of the care in light of the risk will depend upon the kind of premises,⁹² the gravity of the danger, the likelihood of injury, the burden of removing or mitigating the danger,⁹³ the weather conditions where relevant,⁹⁴ and the practice of other occupiers in similar circumstances.⁹⁵

On the question of standard of care, two cases are worthy of further comment. In *Wolf v. Airliner Motor Hotel (1972) Ltd*,⁹⁶ the plaintiff was, on common law principles, a contractual entrant. The standard of care owed to such a visitor at common law was to make the premises as safe as reasonable care and skill could make them. This standard is higher than the duty of common care and derives from an implied term in the contract. There was some doubt as to whether this special standard survived the legislation to the advantage of contractual entrants. Morse J. removes that doubt. His Lordship stated:

...the Manitoba Act does away with common law distinctions between all classes of persons entering on the premises, including in my opinion, any distinction involving a

90 In *Sellwood v. Mitchell Fabrics Ltd*, *supra*, note 82, Hirschfield J. refused to impose liability for the action of the third person, because those actions were "boorish, stupid, rude, impatient, careless and without warning." There was no foreseeability of such conduct and therefore no obligation to guard against such an unexpected act.

91 This duty to inspect is clearly recognized in *Wolf v. Airliner Motor Hotel (1972) Ltd*, *supra*, note 80, where the defendant failed to inspect stairs leading to an indoor swimming pool and was therefore unaware that portions of adhesive material running horizontally across each step needed replacement.

92 In *Wolf v. Airliner Motor Hotel (1972) Ltd*, *supra*, note 80, Morse J. was sensitive to the fact that the stairs led to the swimming pool and that there was no obligation to keep them dry.

93 In *Wolf v. Airliner Motor Hotel (1972) Ltd*, *supra*, note 80, Morse J. stressed that reasonable care must be taken, not extraordinary care. In *Stevenson v. The City of Winnipeg*, *supra*, note 81, Krindle J. stated that to keep a sidewalk clear of all snow would be "an unreasonably expensive and impractical response to Winnipeg winters."

94 This is particularly so in cases involving slips and falls on snow and ice: *McKittrick v. Agassiz Enterprises (1980) Ltd*, *supra*, note 83; and, *Stevenson v. City of Winnipeg*, *supra*, note 81.

95 Krindle J. in *Stevenson v. City of Winnipeg*, *supra*, note 81, noted that she did not have "any evidence before [her] that other housing complex occupiers follow a different or superior routine."

96 *Supra*, note 80.

person entering pursuant to a contractual relationship between the person and the occupier.⁹⁷

Section 3(5), which preserves acts or rules of law that impose special standards of care on particular classes of occupiers or in respect of classes of premises, was deemed inapplicable; and s.4(1), which provides for an extension of the standard of care was held to apply in circumstances of express agreement. This decision seems to be very much in the spirit of legislation designed to minimize technical variation of the standard of care according to the class of entrant.

*Sellwood v. Mitchell Fabrics Ltd*⁹⁸ dealt with the responsibility for the actions of a third party on occupied premises. This case reminds us that the old dichotomy between static defects and activities, which circumscribed the scope of occupier's liability rules at common law, have been dispensed with. Section 3(2) declares that the common duty of care applies in respect of the condition of the premises, the activities on the premises, and the conduct of third parties on the premises. In *Sellwood*,⁹⁹ a third party dislodged a bolt of cloth that fell on the plaintiff. Liability will only be imposed when one can foresee that a third party may create a danger to others or where one is aware or ought to be aware that a third party is creating a risk of injury to others. In *Sellwood*,¹⁰⁰ it was not foreseeable that a third party would act in such a way as to knock a bolt of cloth from the top storage shelf in the store.

The cases are less helpful in respect of other aspects of the Act¹⁰¹ but some guidance is given in respect of s.3(3), which states that no liability is owed in respect of any risks "willingly assumed by that person." It is becoming clear that this defence of consent will be construed as strictly as it has been in negligence doctrine. In negligence, one must prove that the plaintiff has expressly or impliedly agreed to accept both the physical and legal risk of the defendant's conduct; that is, a willingness to give up one's right of action for injuries caused by negligence. In *McKittrick v. Agassiz Enterprises (1980) Ltd*,¹⁰² the plaintiff walked across an icy parking lot. Schwartz J. held that knowledge of the physical risk was insufficient to bar the plaintiff. He cited Monnin J. in *Sandberg v. Steer Holdings Ltd*,¹⁰³ who cautioned that a wide interpretation of the section would substantially reduce the protection

97 *Ibid.* at 171.

98 *Supra*, note 82.

99 *Ibid.*

100 *Ibid.*

101 *Supra*, note 79.

102 *Supra*, note 83.

103 (1987), 45 Man. R. (2d) 264 (Q.B.).

provided by the *Act*. It seems likely that the courts will follow the lead of negligence doctrine and that contributory negligence will be used to apportion damages when the plaintiff is aware of the dangers and did not act reasonably. In *McKittrick v. Agassiz Enterprises (1980) Ltd.*,¹⁰⁴ damages were reduced by one third on account of contributory negligence. It is however difficult to see on the facts the reason for that reduction. Schwartz J. held that, in crossing the parking lot, she was properly attired and attempting to be careful. The negligence apparently lay in exposing herself to the dangerous condition, the distance walked, the general conditions, and the fact that she could have asked her husband to walk to their automobile to check it. When there is no choice but to walk on the icy parking lot, it seems harsh to reduce damages for reasons that have little to do with the degree of care taken. A more defensible application of contributory negligence theory is made in *Wolf v. Airliner Motor Hotel (1972) Ltd.*,¹⁰⁵ where a reduction of twenty-five per cent was made because the plaintiff was not holding on to the handrail.

VI. PRODUCT WARNINGS AND CONTRIBUTORY NEGLIGENCE: *SIEMENS V. PFIZAR C. & G INC.*¹⁰⁶

IN 1974, THE SUPREME COURT OF CANADA in *Lambert v. Lastoplex Chemicals Co.*¹⁰⁷ held that the duty of a manufacturer of products extended beyond careful manufacture and design to include an obligation to warn of known and inherent dangers in properly manufactured products. The obligation is to provide a sufficient warning to permit the product to be used with a reasonable degree of safety. The recent Manitoban Court of Appeal decision in *Siemens v. Pfizer C. & G. Inc.*¹⁰⁸ does not expand our understanding of the manufacturer's obligation, but it does make an important point about contributory negligence in these claims.

In *Siemens v. Pfizer C. & G. Inc.*,¹⁰⁹ the plaintiff farmer sued the manufacturer and distributor of a granular herbicide called "Amiben." The plaintiff purchased the product from Rosenort Agro Ltd, which was not a party to the action, and applied it to land seeded with sunflowers. The crop failed, because there was too great a concentration of Amiben in the seed zone. The defendants were clearly liable because

104 *Supra*, note 83.

105 *Supra*, note 80.

106 51 Man. R. (2d) 252 (Man. C.A.).

107 [1972] S.C.R. 569.

108 *Supra*, note 105.

109 *Ibid.*

not only had they failed to warn of the consequences of too great a concentration of the herbicide in the seed zone, but they had also made quite dogmatic representations that Amiben would not harm sunflowers in any way. The representations were unconditional and unequivocal. The issue for the Manitoban Court of Appeal was whether the plaintiff had been guilty of contributory negligence. The basis of that claim was that the plaintiff had not applied the granular herbicide in the manner recommended by the manufacturer, by the operator's manual of the planting machinery, and by another farmer whose methods the plaintiff had observed. If the plaintiff had complied with instructions, there would not have been the excessive concentration of the herbicide in the seed zone that caused the plaintiff's loss. The argument not only has a superficial plausibility to it, but there was also strong authority that appeared to support the defendant's proposition. In *Labrecque v. Saskatchewan Wheat Pool*,¹¹⁰ the Saskatchewan Court of Appeal had considered the same issue. In that case, the plaintiff's flax crop was damaged by the herbicide Treflan. The damage was caused because the plaintiff's crop had been seeded too deeply at approximately two inches. Clearly, the manufacturer was liable for failing to warn adequately that the crop could be damaged by the Treflan if the seeds were too deep. However, the defendant pointed to other information that was provided in respect of the use of Treflan and that recommended the flax should not be planted deeper than an inch or an inch-and-a-half. The Court of Appeal concluded that:

Negligence on the part of the defendant manufacturer in failing to warn of the dangers of deep planting constituted negligence but under all the circumstances the failure of the plaintiff... to take proper precautions in seeding resulted in an interaction of negligence and contributed to the damage.¹¹¹

The Manitoban Court of Appeal did not follow *Labrecque*¹¹² to the same conclusion. Speaking for the court on this point, Philp J.A. relied on first principles. There was no doubt that the herbicide was applied unwisely. Indeed, Philp J.A. characterized the plaintiff's actions as "foolish if not foolhardy." But actions, however unwise, cannot amount to operative contributory negligence unless the loss suffered is within the scope of foreseeable risk at the time of the plaintiff's actions. When the herbicide was applied, the plaintiff could not reasonably have foreseen that his crop would be damaged. He had reasonably assumed that the Amiben could not damage his sunflowers at all. At

110 [1980] 3 W.W.R. 558 (Sask. C.A.).

111 *Ibid.* at 563.

112 *Ibid.*

most, he would have foreseen that the herbicide would be less effective in controlling weeds if it was not applied according to instructions. This finding is probably not inconsistent with *Labrecque*.¹¹³ In that case, there was some evidence that the plaintiff was aware that the reason for shallow planting was to avoid an adverse effect on the flax from the Treflan. In essence, the plaintiff could reasonably foresee that failure to comply with planting instructions might damage the flax.

One more point about *Siemens*¹¹⁴ may be worth making. This was a case where liability might have been established more easily in contract. In particular, the case seems to fall neatly into the three-party collateral contract model developed in *Shanklin Pier, Ltd v. Detel Products Ltd*.¹¹⁵ In that case, the defendant manufacturer of paint made representations to the plaintiff about the quality of his paint for use on the plaintiff's pier. In reliance of these statements, the plaintiffs caused their painting contractors to buy and use the defendant's paint. The paint was unsuitable. The court had no reluctance in construing the representations as promissory in nature, and it imposed liability on the basis of a collateral contract between defendant and plaintiff. Canadian courts have proved equally willing to protect the reasonable reliance of a consumer upon promotional statements and materials of manufacturers and distributors. In *Murray v. Sperry Rand Corp.*,¹¹⁶ promises made by the manufacturer and distributor in respect of the performance of a forage harvester were found to be contractual in nature. In *Hallmark Pool Corp. v. Storey*,¹¹⁷ a manufacturer of swimming pools gave guarantees of durability in advertisements and brochures. The pool was purchased from, and installed by, a third party. The New Brunswick Court of Appeal nevertheless found a collateral contract. In *Siemens*, the manufacturer stated:

However you apply it, you don't have to worry about crop tolerance. Amiben is tough on mustard but easy on sunflowers; and Amiben herbicide, by itself, or with Treflan will give you top weed control that doesn't harm sunflowers. And you know from experience that's something not every herbicide can claim.¹¹⁸

The words are clear, unambiguous, and certain. The plaintiff reasonably and justifiably relied upon them. A reasonable person would believe that they were intended to be binding. Liability on a collateral contract seems appropriate.

113 *Ibid.*

114 *Supra*, note 105.

115 [1951] 2 All E.R. 471 (Q.B.).

116 (1979), 5 B.L.R. 284 (Ont. S.C.).

117 (1983), 144 D.L.R. (3d) 56 (N.B.C.A.).

118 *Supra*, note 105 at 589.

VII. THE FALSE LIGHT DOCTRINE AND OTHER ASPECTS OF THE PRIVACY ACT:¹¹⁹ *PARASUIK V. CANADIAN NEWSPAPERS CO. LTD*¹²⁰ AND *FERGUSON V. MCBEE TECHNOGRAPHICS*¹²¹

IN *PARASUIK v. Canadian Newspapers Co. Ltd.*,¹²² Scollin J. heard an appeal from the decision of the Referee to strike out paragraphs of a statement of claim, which alleged that the defendants were liable in tort for putting the plaintiffs in a false light in the public eye through the publication of certain income tax information submitted by the plaintiffs to the Department of National Revenue in support of scientific research tax credits. Scollin J. dismissed the appeal. He held that there was no foundation for such a claim either at common law or under the Manitoban *Privacy Act*.¹²³

Before examining His Lordship's judgment, a word or two of background information may be useful. There continue to be great similarities between the American and Canadian common law of tort, but the law relating to protection of privacy is one of those areas where the legal systems have parted company. The twentieth century has witnessed a significant American common law development in recognition and protection of privacy interests, a development that has not been mirrored in this country. American law has in fact developed four distinct and independent torts protecting privacy.¹²⁴

The first tort is concerned with intrusions into the plaintiff's private affairs or upon his seclusion or solitude. There must be an intentional intrusion upon the plaintiff's solitude that a reasonable person would regard as substantial and offensive. This tort protects against personal intrusion into private premises or offices, the use of long-distance listening devices and long-range photography, and examination of private mail and personal documents. The intrusion must be into something held private; no protection is provided if the plaintiff is in a public place or if information derives from the examination of public records and documents.

Secondly, the public disclosure of embarrassing private facts about a plaintiff attracts the operation of tort law.

119 R.S.M. 1987, c. P125.

120 (1988), 53 Man. R. (2d) 78 (Man. Q.B.).

121 55 Man. R. (2d) 130, with add'l reasons [1989] 2 W.W.R. 499 (Man. Q.B.).

122 *Supra*, note 120.

123 *Supra*, note 119.

124 The analysis of American law in terms of four torts is found in W.L. Prosser, "Privacy" (1960) 48 Calif. L. Rev. 383. His theory is accepted by most courts and by the American Law Institute's *Restatement of the Law of Torts (Second)*.

This category provides a remedy for the humiliation and embarrassment caused by publicity given to intimate and personal facts about the plaintiff's life. Few people have not done or said things in the past that they now regret and regard as private. The follies committed in one's youth, the intimate details of one's sexual relationships, and unpleasant illnesses would all qualify as private matters. The tort is hedged with numerous limitations and exceptions. The disclosure must be such as to be highly offensive to the reasonable person, and it must be a disclosure of private facts, not matters which are already part of the public record.

Thirdly, the law prevents the appropriation for the defendant's advantage of the plaintiff's name or likeness. This tort is primarily designed to protect a plaintiff from a defendant who intentionally and without consent exploits the plaintiff's personality in order to sell his products, advance his business, or serve other commercial or trade purposes. There is also liability where the appropriation of the plaintiff's name is for some non-commercial benefit or advantage. The defendant must intend to exploit the plaintiff's reputation or public standing. The mere use of a name similar to the plaintiff's is not sufficient, and there is no liability for the incidental use of the plaintiff's name in media news stories or nonfiction.

Finally, publicity that places the plaintiff in a false light in the public eye, amounts to tortious conduct. This tort is established by proof that the defendant has falsely and intentionally or recklessly attributed to the plaintiff beliefs, opinions, statements, or conduct that would be offensive to the reasonable person. Examples include the unauthorized use of a person's name on a petition or as a candidate for office, or entering an actor without his consent in a popularity contest of an embarrassing kind.¹²⁵ There may be an overlap with the tort of defamation, but the interests protected are conceptually different. Defamation protects the interest in reputation, while the false light tort protects a person's right to be left alone and lies where there has been highly offensive publicity.

It was this last tort that was clearly at issue in the *Parasuik*¹²⁶ case and was reflected in the impugned paragraphs of the statement of claim. One suspects that the gravamen of the Parasuiks' complaint is the unauthorized disclosure of embarrassing facts, but it is the "false light claim" that was at issue in the case under discussion. It is also clear that the plaintiff primarily relied on the Manitoban *Privacy*

125 These examples are drawn from W.L. Prosser and W.P. Keeton, *Torts*, 5th ed. (St. Paul, Minn.: West Publishing, 1984) at 863.

126 *Supra*, note 120.

*Act*¹²⁷ to support that claim. The *Privacy Act*¹²⁸ is a direct consequence of judicial inertia in the field of privacy in Canada. There has been very little judicial discussion of the *Privacy Act*,¹²⁹ so the judgment of Scollin J. is an important one, both on the general approach and interpretation of the legislation¹³⁰ and on the substantive point of false light doctrine. The salient points of the *Privacy Act*¹³¹ are reproduced here:

2(1) A person who substantially, unreasonably, and without claim of right, violates the privacy of another person, commits a tort against that other person.

2(2) An action for violation of privacy may be brought without proof of damage.

3 Without limiting the generality of section 2, privacy of a person may be violated

(a) by surveillance, auditory or visual, whether or not accomplished by trespass, of that person, his home or other place of residence, or of any vehicle, by any means including eavesdropping, watching, spying, besetting or following;

(b) by the listening to or recording of a conversation in which that person participates, or messages to or from that person, passing along, over or through any telephone lines, otherwise than as a lawful party thereto or under lawful authority conferred to that end;

(c) by the unauthorized use of the name or likeness or voice of that person for the purposes of advertising or promoting the sale of, or any other trading in, any property or services, or for any other purposes of gain to the user if, in the course of the use, that person is identified or identifiable and the user intended to exploit the name or likeness or voice of that person; or

(d) by the use of his letters, diaries and other personal documents without his consent or without the consent of any other person who is in possession of them with his consent.

First, there is the question of approach and interpretive technique used in respect of this *Act*. It is an unusual piece of legislation. Most legislation in the common law tradition is drafted in precise and specific language. It normally deals with closely defined factual situations. Drafters strive for a high degree of certainty. The centrepiece of the *Privacy Act*,¹³² however, is quite different. Section 2 contains a broad

127 *Supra*, note 119.

128 *Ibid.*

129 *Ibid.*

130 For a general discussion, see P. Osborne, "The Privacy Acts of British Columbia, Manitoba and Saskatchewan" in D. Gibson, ed., *Aspects of Privacy Law* (Toronto: Butterworths, 1980) 73.

131 *Supra*, note 119.

132 *Ibid.*

and general principle that has a high degree of uncertainty. This is the technique favoured by the civilian codifiers and is particularly appropriate when legislating new heads of tortious responsibility. Tort law must maintain flexibility to develop and meet new situations and adjust to changing conditions. This broad statement of legislative principle permits a liberal, expansive, and dynamic interpretation that can provide for a wide variety of abuses of privacy – both present and future, and both foreseen and unforeseen. Indeed, s. 2 is little more than a legislative directive to develop a body of jurisprudence to protect the privacy interest. This approach is carried over to s. 3. It provides some guidance as to the kind of circumstances that may amount to an invasion of privacy. These illustrations do not limit the generality of the privacy section. My own conclusion about the scope of the *Privacy Act*¹³³ was that “the protection is at least as wide as that offered in the United States, and that protection is offered without sacrificing flexibility and the inherent power to develop that protection as new social conditions demand.”¹³⁴ From this viewpoint, the approach of Scollin J. is disappointing. He interprets the *Act* as excluding the false light doctrine on grounds that have a very restrictive impact upon the scope of the *Act* as a whole. This approach is summed up in the following words:

Nothing in... the *Act* expressly makes it a tort either to put a person in a false light or to imply that he or she is improperly connected to “something”.... The proposed tort of “false light invasion of privacy” has been expressly rejected by law makers. Reading the specific rejected concept into the generality which is accompanied is as foolish as claiming that the apple you just ate is still on the tree.¹³⁵

This of course completely subverts the open-ended tenor of the legislation. His Lordship’s view is that, if it is not an invasion of privacy as outlined in s. 3, the legislature has expressly rejected protection. Such a view contradicts the plain words of the legislature and restricts the scope of the legislation substantially.

On the substantive issue, Scollin J. supports his conclusion by reference to and with approval for comments made by the Referee. The Referee had made a distinction between the end of being put in a bad light and the means to that end. If the means were the use of private and personal documents, then this, in the natural meaning of the word, was a breach of privacy. However, being put in a bad light was not a breach of privacy. This raises the essential issue, which is the very

133 *Ibid.*

134 *Supra*, note 130 at 110.

135 *Supra*, note 120 at 78 [emphasis added].

meaning of privacy and the scope of protection to be given. To publish private documents is perhaps more readily perceived as an invasion of privacy, but it is arguable that the right to be left alone should include freedom from being portrayed in a false light. The opportunity for a full discussion of the meaning of privacy and the kind of protection that ought to be provided was lost by the restrictive interpretative techniques used earlier and by Scollin J.'s view that false light claims are more properly dealt with in defamation and that additional protection is not needed. There certainly is room for overlap, but defamation does not cover the field. Take the case of an aspiring politician seeking election to office. Imagine that a rival makes it known that the candidate is a foreign-born Canadian, a confirmed bachelor, and the owner of a toxic waste disposal company. In fact, the candidate was born and raised in Winnipeg, is happily married with two children, and is a professor of environmental studies. The false description is not defamatory, but it does portray the candidate in a false light. It is offensive, because it attributes politically negative characteristics to a candidate. Conversely, imagine that the candidate is a foreign-born Canadian, a confirmed bachelor, and an owner of a toxic waste disposal company. An overzealous supporter persists in publishing descriptions of the candidate as born and raised in Winnipeg, happily married with two children, and a professor of environmental studies. Again, this is not defamatory, but it places the candidate in a false light and will be politically damaging, because people will know the truth to be otherwise. It does not seem unreasonable that a remedy be given in such circumstances. Indeed, the first situation is closely analogous to the tort of injurious falsehood, a well-entrenched field of tortious responsibility. Thus, on both interpretive technique and on the substantive point, the decision is very restrictive of privacy interests.

Moreover, there is a hint in the judgment that privacy law is an unwelcome American concept. Scollin J. portrays false light invasion of privacy rather acidly as a concept "fabricated in the markedly different social constitutional and legal framework of the United States."¹³⁶ Some might argue, however, that a privacy law reflective of Canadian values and community standards would be more generous than American doctrine.¹³⁷ Indeed, the source of the American false light doctrine is the 1816 decision in *Lord Byron v. Johnston*,¹³⁸ in which Lord Byron successfully sued for an injunction to prevent circulation of a bad poem that had been attributed to him. The decision is certainly part of

136 *Ibid.* at 80.

137 For a more generous approach to protection of the privacy interest in another context, see *R. v. Dyment* (1988) 55 D.L.R. (4th) 503 (S.C.C.).

138 (1816), 2 Mer. 29.

the law of Manitoba. All in all, there seems to be sufficient room for argument to have prevented the claim in *Parasuik*¹³⁹ from being struck out.

The *Privacy Act*¹⁴⁰ also featured in the case of *Ferguson v. McBee Technographics Inc.*¹⁴¹ The case involved a technical wrangle over the sufficiency of pleadings in a defamation action. Jewers J. had to determine the consequence of the plaintiff's admission that the defamatory words alleged in the statement of claim were not necessarily the precise words actually used by the defendant. His Lordship held that the statement of claim would be sufficient if the plaintiff could establish by affidavit evidence that the actual words used were substantially the same as those alleged. The plaintiff filed an affidavit in which he deposed that he was informed by a Mr Boyce in April and May that representatives of the defendant had called Boyce and made allegations similar to those set out in the statement of claim. He also deposed that he had been in Mr Boyce's office when the latter made a telephone call to a representative of the defendant and that he had listened to that conversation over the speaker telephone and had made a tape recording of the conversation, which contained similar allegations. A transcript of the conversation was attached by way of exhibit to the affidavit. At a subsequent hearing¹⁴² to consider the affidavit, the defendant moved to strike part of it out on the grounds that the evidence contained therein was obtained by means of a violation of privacy. Section 7 of the *Privacy Act*¹⁴³ states that all evidence obtained through a breach of that Act must be excluded from any civil proceedings. In the course of his judgment on this point, Jewers J. provided some useful guidance in respect of the scope and interpretation of the *Privacy Act*.¹⁴⁴

First, his Lordship found that the plaintiff had committed a breach of the kind set out in s. 3(b) of the Act.¹⁴⁵ It declares that it may be a breach of privacy to listen to or record a telephone conversation "otherwise than as a lawful party thereto or under lawful authority conferred to that end." His Lordship held that the plaintiff was not a party to the conversation. He was an eavesdropper on a conversation between others. Furthermore, the consent of one of the parties to the conversation would be insufficient to create a lawful authority. To hold

139 *Supra*, note 120.

140 *Supra*, note 119.

141 *Supra*, note 121.

142 *Ferguson v. McBee Technographics (No. 2)*, [1989] 2 W.W.R. 499 (Man. Q.B.).

143 *Supra*, note 119.

144 *Ibid.*

145 *Ibid.*

otherwise would be to frustrate the purpose of the legislation and to defeat the privacy interests of the non-consenting party.

Secondly, his Lordship rejected the defendant's claim that the evidence was admissible because the listening and tape-recording did not infringe s.184 (1) of the *Criminal Code*, which prohibits the "bugging" of certain private communications. Jewers J. declared that the *Privacy Act*¹⁴⁶ has nothing to do with the criminal law. The defendants could not find the lawful authority to breach a provision of the *Privacy Act*¹⁴⁷ in s. 184 of the *Criminal Code*.

Thirdly, his Lordship dealt with the defence contained in s. 5(c) of the *Privacy Act*¹⁴⁸ which protects invasions of privacy that are "reasonable, necessary for and incidental to the exercise or protection of a lawful right of defence of person, property or other interest of the defendant." In one sense, the defendant was protecting his interests, but he was unable to show why the recording was reasonable and necessary. Section 5(c) did not justify his act. Consequently, that part of the affidavit containing evidence secured by breach of privacy was struck out. There nevertheless was sufficient evidence of defamatory words similar to those alleged in the statement of claim in the remainder of the affidavit to support the pleadings.

Jewers J. also took a fairly traditional approach to his interpretation of the *Privacy Act*,¹⁴⁹ but it is much less restrictive than that of Scollin J. in *Parasuik*.¹⁵⁰ Jewers J. has sought the fundamental purpose of the legislation and adopted a liberal and generous interpretation in protection of privacy interests.

VIII. DEFAMATION AND THE CHARTER OF RIGHTS AND FREEDOMS: PANGILIAN V. CHAVES¹⁵¹

IN *PANGILIAN V. CHAVES*,¹⁵² the plaintiff complained that the married defendants had told his family and friends that he had sexually assaulted the female defendant. Such an allegation was clearly defamatory, and the only significant issue at trial was the defence of justification. The defendant pleaded the truth of the statement. Jewers J. very carefully considered the evidence and concluded that the defen-

146 *Ibid.*

147 *Ibid.*

148 *Ibid.*

149 *Ibid.*

150 *Supra*, note 120.

151 (1988), 54 Man. R. (2d) 163 (Man. Q.B.), *aff'd* (1 November 1988), 205-88 (Man. C.A.).

152 *Supra*, note 151.

dant had not proved the truth of the statement on the balance of probabilities. On appeal, defendant's counsel argued that the law of defamation must be re-evaluated in the light of the protection of freedom of expression contained in the *Canadian Charter of Rights and Freedoms*.¹⁵³ He sought to change the onus of proof in respect of justification where the defendant's defamatory statement was a reasonably held belief. It was argued that, in those circumstances, it should fall to the plaintiff to disprove the facts that the defendants believed to be true. The Court of Appeal summarily dismissed that view:

In our opinion the Charter does not apply to an action between private litigants, in which no public issue is raised: see *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*¹⁵⁴

Before the *Dolphin Delivery*¹⁵⁵ decision, there was a good deal of academic speculation about the extent to which the *Charter of Rights and Freedoms*¹⁵⁶ would lead to a rebalancing of interests between freedom of expression and protection of reputation.¹⁵⁷ Professor Dale Gibson¹⁵⁸ suggested that the defence of fair comment might be reconsidered to include protection for statements of fact on matters of public interest. He also raised the possibility of developing a defence of qualified privilege for the media and suggested reconsideration of the decisions in *Cherneskey v. Armadale Publishers Ltd*¹⁵⁹ and *Jones v. Bennett*.¹⁶⁰ Such a reorientation of defamation doctrine would clearly favour freedom of expression and diminish the protection of reputation.¹⁶¹

153 Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

154 *Supra*, note 151.

155 *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd* (1986), 33 D.L.R. (4th) 174 (S.C.C.).

156 *Supra*, note 152.

157 There has also been some inconclusive judicial discussion of the issue: *Pindling v. National Broadcasting Corp.* (1984), 31 C.C.L.T. 251 (Ont. H.C.); *Hill v. Church of Scientology of Toronto* (1985), 35 C.C.L.T. 72 (Ont. H.C.); and, *Christie v. Geiger* (1986), 38 C.C.L.T. 280 (Alta. Q.B.).

158 D. Gibson, "Tort Law and the Charter of Rights" (1986), 16 Man. L.J. 1.

159 (1978), 90 D.L.R. (3d) 321 (S.C.C.). This decision restricted the protection of the fair comment defence in respect of letters to the editor to those opinions that the newspaper management honestly believed in or where it could be proved that the letter writer had such an honest belief. In some jurisdictions, including Manitoba, this case led to legislative change; see *Defamation Act*, R.S.M. 1987 c. D20, s. 9(1).

160 (1968), 2 D.L.R. (3d) 291 (S.C.C.). In that case, a politician was unable to assert a privilege when speaking about the dismissal of a civil servant at a constituency meeting attended by the media.

161 For other commentary on the impact of the *Charter of Rights* on defamation law, see M.R. Doody, "Freedom of the Press, The *Canadian Charter of Rights and Freedoms*

However, the likelihood of any reformulation of principle was substantially reduced when the Supreme Court ruled in *Dolphin Delivery*¹⁶² that the *Charter*¹⁶³ was not directly relevant to common law actions between private litigants. There would need to be a substantial governmental nexus before the *Charter*¹⁶⁴ would be applicable. It could be argued that defamation law in Manitoba does have a sufficient governmental nexus, because it is an amalgam of common law principles and legislation.¹⁶⁵ It is not clear if this argument was made before the Court of Appeal. In any event, the decision in *Pangilian*¹⁶⁶ is a clear and dogmatic rejection of the applicability of the *Charter*¹⁶⁷ to defamation cases.

The only encouragement that can be offered to those who seek a reorientation of defamation law so as to emphasize the interest in free expression, is to alert them to an obiter statement of McIntyre J. in *Dolphin Delivery*.¹⁶⁸ He noted that, even though the *Charter*¹⁶⁹ may not be directly applicable, "the judiciary ought to apply and develop the principles of common law in a manner consistent with the fundamental values enshrined within the Constitution."¹⁷⁰ In this way, the *Charter*¹⁷¹ may be used to influence defamation law indirectly. However, it should be noted that the Canadian judiciary has shown little indication that the balance between freedom of speech and protection of reputation struck by the common law is in need of significant change. It will certainly be necessary to present an argument of more intrinsic merit than that made in the *Pangilian*¹⁷² case before any change is made.

and a New Category of Qualified Privilege" (1983), 61 Can. Bar Rev. 124; D. Madott, "Libel Law, Fiction and the Charter" (1983), 21 Osgoode Hall L.J. 741; A.R. Stein, "Libel Law and the Canadian Charter of Rights and Freedoms: Towards a Broader Protection for Media Defendants" (1988), 10 Fordham Intl L.J. 750.

162 *Supra*, note 155.

163 *Supra*, note 152.

164 *Ibid.*

165 *Defamation Act, supra*, note 159.

166 *Supra*, note 151.

167 *Supra*, note 152.

168 *Supra*, note 155.

169 *Supra*, note 152.

170 *Supra*, note 155 at 198.

171 *Supra*, note 152.

172 *Supra*, note 151.

IX. JUDICIAL IMMUNITY: *SHAW V. TRUDEL*¹⁷³

IN HIS LEADING ARTICLE on judicial immunity written in 1980, Professor Feldthusen noted:

Although tort actions against judges have been considered by the courts over a period of approximately four hundred years, prior to 1975 the English courts had failed to articulate any clear or generally accepted principles and the Canadian courts had scarcely considered the matter at all. The very age of the authorities cited by modern courts would call for a re-examination of the underlying principles.¹⁷⁴

In 1988 the Manitoban Court of Appeal had an opportunity to examine the concept of judicial immunity with respect to a provincial court judge. In *Shaw v. Trudel*,¹⁷⁵ the defendant judge had convicted the plaintiff of possession of a small amount of marijuana. The plaintiff was eighteen and had no previous criminal record. Nevertheless, he was sentenced to three months' imprisonment. On appeal the sentence of imprisonment was set aside, and the plaintiff received a suspended sentence. An action was brought against the defendant on the grounds that he had acted maliciously and without reasonable and probable cause. The Court of Appeal decided to resolve the case, not on whether the judge's actions were tortious, but squarely on the extent of judicial immunity for acts done in the execution of judicial function and within the jurisdiction of the provincial court.

Twaddle J.A. began with a careful consideration of the law of England before 1870 and concluded:

When the law of England was received in Manitoba, justices were immune from civil action for judicial acts done *within their jurisdiction*. Neither malice nor lack of reasonable and probable cause could alter that.¹⁷⁶

His Lordship then went on to determine if the judicial immunity had been weakened by s. 49 of the 1983 *Provincial Court Act*, which was in the same terms as s. 12 of the 1972 *Provincial Judges Act*,¹⁷⁷ which reads

Except as provided in this Act, no action shall lie or be instituted against a judge, magistrate or justice of the peace for any act done by him in the execution of his duty as such unless the act was done maliciously and without reasonable and probable cause.

173 55 Man. R. (2d) 192 (Man. C.A.).

174 B. Feldthusen, "Judicial Immunity: In Search of An Appropriate Limiting Formula" (1980), 29 U.N.B.L.J. 73 at 83.

175 *Supra*, note 173.

176 *Ibid.* at 383 [emphasis added].

177 *Provincial Judges Act*, S.M. 1972, c. 61.

In interpreting this provision, the Court followed authority interpreting the English legislation on which s. 49 was based. In the court's view, the legislation only permitted liability for administrative acts done maliciously and without reasonable and probable grounds. The conclusion drawn, therefore, was that the legislation did not in any way diminish or restrict the absolute common law immunity for judicial acts done within the court's jurisdiction.¹⁷⁸ This was sufficient to dispose of the appeal. The defendant was acting judicially and within his jurisdiction when he sentenced the plaintiff and was immune from civil liability even if the allegations were true.

The Court of Appeal has adopted a very strained interpretation of s. 49. The plain meaning of the section would indicate a contrary interpretation, particularly in the light of such a recent reenactment of the provision. That the plain meaning was not followed reveals just how important the Court of Appeal views judicial immunity from suit. The inarticulate premise is that it is essential for an independent, fair, and fearless judiciary.

It is a great pity that the court did not address that policy directly, making the case that the judicial immunity is a pre-requisite for the proper administration of justice. The twentieth century has witnessed the erosion of many immunities from civil suit. The duty of care is now owed by almost all persons in respect of all activities. Now under attack are the privileges of the legal profession, including the barrister's immunity from suit in negligence, the immunity of the Attorney General and crown prosecutors from liability for malicious prosecution, and the judicial immunity. The profession is vulnerable to charges of acting in its own self interest and of taking care of its own. In *Rondel v. Worsley*,¹⁷⁹ the House of Lords was called upon to consider a barrister's immunity from negligence actions. The historical reason for the principle was that barristers had no contract with their clients and could not sue for their fee. Their Lordships, however, recognized that it was no longer acceptable to uphold an immunity on the bases of historical fact and long standing authority. Their Lordships took much time in identifying current policy considerations that, in their view,

178 There perhaps is greater uncertainty about the extent of the common law judicial immunity for liability for acts done within the jurisdiction of the court than the Court of Appeal recognizes. Some English authorities both prior to 1848 and between 1848 and 1870 suggest a liability for malicious acts committed without reasonable and probable cause: *Salmon v. Percival* (1631), Cro. Car. 196; *Cave v. Mountain* (1840), 133 E.R. 330; *Linford v. Fitzroy* (1849), 13 Q.B. 240; and, *Kendall v. Wilkinson* (1855), 4 E. & B. 680. There also is Canadian authority that suggests that the immunity at common law may not extend to malicious acts: *McKenzie v. Martin*, [1954] S.C.R. 362.

179 [1969] 1 A.C. 191.

justified the immunity as in the public interest and for the public benefit. Subsequently, Krever J. in *Demarco v. Ungaro*¹⁸⁰ reassessed the liability of a barrister in Ontario. His Lordship reached the opposite conclusion in a judgment equally founded on policy considerations and the public's interest. This is the kind of re-examination of principle that Feldthusen has suggested.¹⁸¹ Immunities must now be justified with the authority of reason, not by reason of authority.

There are strong arguments both in favour of and against absolute judicial immunity, and there has been quite a robust academic debate on how best to serve the public interest.¹⁸² Those in favour of the immunity stress that it secures the independence of the judiciary by ensuring freedom of thought and actions without the distraction of potential harassment by vexatious litigants. It allows judges to exercise their judgment without fear or favour. It has been speculated that removal of the immunity would bring a flood of groundless litigation from dissatisfied litigants, involving a prodigious amount of time and expense to defend. Even unwarranted claims would reduce public respect and confidence in the judiciary and may make judicial appointment unacceptable to the best qualified people. It is suggested that finality of litigation is a laudable goal and that there are other avenues for recourse against corrupt and incompetent judges, such as the appeal process, discipline, and in extreme cases criminal prosecution and removal from office. Many conclude that the duty of a judge is owed to the administration of justice and to society as a whole, not to individual litigants.

The competing interest is the desirability of providing a remedy for an individual who has suffered loss because of the abuse of judicial power. Few opponents of the judicial immunity favour the imposition of a duty of care in the discharge of judicial functions. The concern most often expressed is about a system that protects judges who abuse their positions of trust by malicious actions. It is argued that they should be accountable to the consumers of the justice system. It is argued that respect for, and confidence in, the integrity of the judiciary will be increased if it refuses to shelter those who act maliciously and without reasonable and probable cause. Judicial immunity should not be used as a protective shield for those who abuse a position of trust.

180 (1979), 21 O.R. (2d) 673 (Ont. H.C.).

181 *Supra*, note 174.

182 Feldthusen, *supra*, note 174; D. Thompson, "Judicial Immunity and the Protection of Justices" (1958), 21 Mod. L. Rev. 517; A. Rubenstein, "Liability in Tort of Judicial Officers" (1964), 15 U. of T. L.J. 317; E.G. Jennings, "Tort Liability of Administrative Officers" (1937), 21 Minn. L.R. 263; and, M. Brazier, "Judicial Immunity and the Independence of the Judiciary" [1976] Pub. Law 397.

Indeed, some of the reasons for the immunity may be overstated. A flood of litigation is not likely. Meritorious claims are likely to be few and far between. A responsible legal profession will also be likely to provide an informal vetting process in the course of advising clients.¹⁸³ Furthermore, excellent people are unlikely to be deterred from accepting judicial appointment by potential liability for morally culpable conduct. Finally, the remedies of appeal and removal from office, criminal prosecution, and the judicial disciplinary process do not provide appropriate compensation for individuals who have suffered loss.

The ultimate decision is not an easy one. One has to determine if judicial immunity is so essential to the administration of justice that it is necessary to sacrifice the legitimate claims of innocent persons for loss caused by judicial abuse of power. The Court of Appeal unfortunately declined to make its case for judicial immunity on an assessment of these competing values. Their decision rests on an assumption of its merit; an assumption that is not shared by everyone.

There may, however, be a future opportunity to discuss these policy concerns, because the judicial immunity may yet be subject to *Charter*¹⁸⁴ scrutiny. Professor Gibson has noted:

Common law and statutory rules bestowing absolute or qualified immunity to judges... are well challengeable under the equality guarantee found in s. 15. Such immunities will survive *Charter* attack only to the extent that particular immunities can be demonstrated to be "reasonable limits in a free and democratic society."¹⁸⁵

Professor Gibson was writing before the *Dolphin Delivery*¹⁸⁶ decision, but on this issue there appears to be a sufficient governmental nexus to make the *Charter*¹⁸⁷ directly applicable. The Court of Appeal may be forced to confront and discuss the competing policy concerns and to justify its position that an absolute judicial immunity continues to be essential for the efficient administration of justice.¹⁸⁸

183 In extreme cases, counsel is under a duty not to act for clients whose claims are patently vexatious and frivolous.

184 *Supra*, note 152.

185 *Supra*, note 158 at 8.

186 *Supra*, note 155.

187 *Supra*, note 152.

188 The issue of judicial immunity is discussed in the Manitoba Law Reform Commission's *The Independence of Provincial Court Judges* (Report, no. 72) (Winnipeg: Queen's Printer, 1989).

X. AUTOMOBILE ACCIDENTS: *HINGTGEN v. EVERETT*¹⁸⁹ AND
*MAKSYMETZ v. PLAMONDON*¹⁹⁰

THE MOST FREQUENT AND COMMON of tort cases have been left to last. There were many decisions in Manitoba in 1988 involving automobile accidents and consequential death and personal injury. Few of them raise any interesting or significant legal issues. Most of them deal with the complexities of damage assessment in personal injury claims. These cases do, however, continue to raise fundamental questions about the fault system and the basis of compensation for personal injury. Automobile accidents continue to be the source of much political and legal debate and a flashpoint at which different theories of accident compensation collide.¹⁹¹ The *Report of the Autopac Review Commission*, or the Kopstein Report,¹⁹² is a useful and challenging addition to that debate. It criticized the fault system and recommended that compensation for personal injury and death be delivered on a no-fault basis by the Manitoba Public Insurance Corporation. This is not the place for a detailed critique of that report.¹⁹³ However, a consideration of two automobile accident decisions in Manitoba provides some useful insight into the operation of the current system, which adds meagre no-fault benefits to a traditional fault-based insurance system. The two cases, *Hingtgen v. Everett*¹⁹⁴ and *Maksymetz v. Plamandon*,¹⁹⁵ allow us to personalize and individualize the consequences of some of the most criticized aspects of the current system.

In *Hingtgen v. Everett*,¹⁹⁶ the defendant was driving from a social event in Winnipeg to his home in the township of St Anne's. It was a wet night, and he was accompanied by the plaintiff, his wife. As the defendant left the city, there were dark stretches of highway interrupted by well-lit intersections. The defendant was driving with his headlights on low beam, and he did not switch to high beam when he emerged from an intersection and entered a darkened stretch of highway. Because of this, he did not see a person walking down the middle of

189 (1988), 53 Man. R. (2d) 157 (Man. Q.B.).

190 53 Man. R. (2d) 304 (Man. C.A.).

191 For a useful discussion of the issues, see C.A. Osborne, *Report of Inquiry into Motor Vehicle Accident Compensation in Ontario* (Toronto: Ministry of the Attorney General, 1988).

192 Autopac Review Commission, *Report* (Winnipeg: Queen's Printer, 1988).

193 For an excellent critique of theories and schemes of compensation for automobile accidents, see L. Schwartz, "Compensation for Victims of Automobile Accidents: A Comparative Review" (LL.M. Thesis, University of Manitoba, 1989).

194 *Supra*, note 189.

195 *Supra*, note 190.

196 *Supra*, note 189.

the highway in sufficient time to avoid her safely. He swerved and missed the pedestrian but lost control of the automobile. It crashed into the ditch, injuring both defendant and plaintiff. Kennedy J. held that, if the defendant had his lights on full beam, he would have been able to avoid the pedestrian's safety. He was, therefore, held partially liable for the accident. In essence, the defendant was found liable for overdriving his headlights. In *Maksymetz v. Plamondon*,¹⁹⁷ the defendant was driving a tractor-trailer unit at night on an icy municipal highway in northern Manitoba. The defendant dimmed his lights for the plaintiff's incoming vehicle, but he did not reduce his speed. Suddenly, a moose appeared on the highway. The defendant could not avoid it. The impact caused the hood to lift, so that he could not see the road ahead. He lost control of his vehicle, and it crashed into the plaintiff's vehicle. A majority of the Court of Appeal held that the only way to have avoided the accident was for the defendant to have reduced his speed on dimming his lights in anticipation that a large animal might suddenly appear on the highway. This was held to be too high a standard of care for driving on Manitoba roads especially in remote areas of the Province. The action of the moose was the sole cause of the accident. The defendant was not liable. The facts of these cases are in reality very similar. A person walking down the centre of an unlit highway and a moose on a highway are both unusual perils. Indeed, the pedestrian in *Hingtgen*¹⁹⁸ may have been more unforeseeable, given a highway sign in *Maksymetz*¹⁹⁹ warning the defendant of the chance of crossing deer. Both defendants seem equally derelict in overdriving their headlights. This latter point was not lost on O'Sullivan J.A., who dissented in *Maksymetz*.²⁰⁰ His Lordship stated:

He came to a sign which warned of antlered animals for the next 36 km.... He did not reduce his speed... on this account. Shortly thereafter, he saw the plaintiff's approaching truck lights. The defendant dimmed his lights, thus reducing the area ahead visible to him. He did not further reduce his speed. Suddenly, a moose loomed up at the edge of the road opposite to the defendant. He did not have time to avoid hitting the moose, which caused him to lose control. *In my opinion, the defendant was guilty of over-driving his headlights. He should have been found negligent.*²⁰¹

These are cases that clearly involve lawyers' distinctions and provide a useful means by which to identify some of the significant problems

197 *Supra*, note 190.

198 *Supra*, note 189.

199 *Supra*, note 190.

200 *Ibid.*

201 *Ibid.* at 284-5.

within the current system of compensation for the victims of automobile accidents.

The most significant concern about the current system is that it distributes compensation on a fundamentally inequitable basis. The system may continue to exercise some marginal influence on driving safety, but the predominant function of the current system is to collect the public's money by way of premiums and to distribute that money by way of compensation to the victims of automobile accidents. That is the consequence of compulsory liability insurance. It would seem sensible to distribute that money on the basis of need, loss, or degree of injury. We choose none of these criteria. We distribute money on the basis of the cause of the injury. We give generous compensation to those who are injured by the fault of a well-insured defendant. To those who are unable to attribute their injuries to a well-insured defendant, we pay lesser amounts in the form of no-fault benefits. It is difficult to justify this in a system that has no significant impact on accident prevention or safe driving. This systemic unfairness is underlined by reference to *Hingtgen*²⁰² and *Maksymetz*.²⁰³ In these cases all parties – Maksymetz, Plamondon, and Mr and Mrs Hingtgen – were injured as a consequence of an unanticipated danger on the highway. In all likelihood, they all have paid some premium to the Manitoba Public Insurance Corporation, either in their capacity as licensed drivers or owners of automobiles. But they will receive very different treatment. Maksymetz, Plamondon and Mr Hingtgen will receive modest no-fault benefits; only Mrs. Hingtgen will receive generous court-assessed damages. To many, there does not seem to be a rational or fair reason to assess their compensation on the basis of different principles.

Special concern has also been expressed about the indeterminacy of the fault principle. The criticism is that compensation depends more on luck than upon the application of some neutral and defensible principle and that, at the margins, there is no consistency or predictability in adjudication. This point is illustrated by reference to *Hingtgen*²⁰⁴ and *Maksymetz*.²⁰⁵ In both cases, the accident was caused by the driver overdriving his headlights. However, the legal determination of liability is different. The judgment seems to suggest that moose are more unforeseeable on highways than pedestrians, but that is a highly speculative claim. Can the difference be elsewhere? Is it that it is acceptable to fail to reduce speed when you dim your headlights, but it is unacceptable to increase your speed without putting your lights on

202 *Supra*, note 189.

203 *Supra*, note 190.

204 *Supra*, note 189.

205 *Supra*, note 190.

high beam. Or is it that you may overdrive your lights in rural Manitoba but not on the outskirts of the city? Or is it that commercial vehicles are allowed greater speed in order to maintain economic efficiency than are persons coming home from a party after having a few beers? Or is it that the standard of care has been changed from the reasonably careful driver to the average driver? There is not much doubt that the defendants drove as most drivers would, but that has emphatically not been the traditional standard of care. Indeed, there does not seem to be a sensible distinction to be drawn between the two cases, and there may be some merit to the claim that the eligibility requirement of the fault system is unpredictable and erratic and that at the margins the fault system is a "forensic lottery."²⁰⁶

An additional concern about the current system is the delay that is a systemic feature of fault liability. Human compassion and successful rehabilitation demand prompt processing of claims and timely compensation. The fault system, with its individual assessment of fault and damages and its system of lump sum awards, is notoriously slow. Some of the harshness of the system is ameliorated by the add-on no-fault benefits and by the settlement process. Nevertheless, the time taken for the system to resolve relatively straightforward issues of eligibility and compensation is sometimes totally unjustifiable. In *Hinggen*,²⁰⁷ the system worked perhaps as efficiently as it ever does – and judgment was given approximately two years after the accident. However, in *Maksymetz*,²⁰⁸ there was a five-and-a-half year delay between the accident and the Court of Appeal's decision denying liability. In *Hooey v. Mancini*,²⁰⁹ the other automobile accident case discussed in this article, there was a ten-year delay between accident and trial. Furthermore, of nine 1988 trial decisions involving automobile accidents where liability was conceded, the average time period between accident and trial was six years.²¹⁰ Imagine the outcry against a governmental bureaucracy that took a similar time to process claims of comparable complexity.

206 T.G. Ison, *The Forensic Lottery* (London: Staple Press, 1967).

207 *Supra*, note 189.

208 *Supra*, note 190.

209 *Supra*, note 44.

210 *Neilands v. Hajzeris* (1988), 52 Man. R. (2d) 264 (3? years), *Marchak v. Nosaty* (1988), 52 Man. R. (2d) 150 (6 years), *Fischer v. Bouteiller* (1988), 54 Man. R. (2d) 291 (4 years), *Payjack v. Forkheim* (1988), 54 Man. R. (2d) 263 (7? years), *McDonald v. Kingsway Freightlines Co.* (1988), 56 Man. R. (2d) 5 (9 years), *Smith v. Grieve*, (1988), 52 Man. R. (2d) 81 (8 years), *Thomas v. Dombek* (1988), 55 Man. R. (2d) 134 (4 years), *Close v. McShane* (1988), 54 Man. R. 125 (4 years), *Masson v. Rowan*, 52 Man. R. (2d) 107 (a series of claims, 9 years having passed since earliest was filed).

Another consequence of individual determination of fault and individual assessment of loss is expense. Studies have indicated that in a fault or insurance system, it costs approximately a dollar to deliver a dollar in compensation. To this systemic cost must be added the personal cost to losing plaintiffs. Mr Maksymetz suffered injuries assessed at \$45,000. He lost his case and so must bear the costs of litigation at both trial and appeal levels and his own solicitor's fee.

The final point relates to the capacity of fault liability to play a positive role in accident prevention by providing a deterrent against bad driving. The widely accepted view is that much of the deterrent power of fault liability is negated by compulsory liability insurance, although there may be some residual impact.²¹¹ However, even if we assume some deterrent value, its application is erratic, uneven, and eventually distorted by the compensatory goals of tort law. This is illustrated by *Hingtgen*.²¹² In that case, the person who most deserved some punishment and who should, on the basis of fault, shoulder the loss is the pedestrian. She was a defendant, and an interlocutory judgment was awarded against her. She did not appear at trial. A reasonable conclusion is that she was judgment proof. And so, the search was on for the deep pocket. Thus, liability was imposed on the lesser wrongdoer, Mr Hingtgen. Whatever sting is left in tort liability will be felt by him and not by the really culpable person unless some attempt is made to recoup from the pedestrian. In practice, the real wrongdoer escapes. Furthermore, if the defendant driver had been found liable in *Maksymetz*,²¹³ the principles of vicarious liability would, in practice have shielded him from any tort responsibility. He was driving the truck in the course of employment for the second defendant, Sylmak Trucking Ltd. In addition, if the driver had been found liable, a majority of the Court of Appeal indicated that the plaintiff would have been found guilty of contributory negligence. It is in the field of contributory negligence that tort law wields a savage personal sanction that most defendants never suffer. Plaintiffs are almost never insured against the loss suffered by a reduction in damages. Perhaps this is why Mrs Hingtgen was not held guilty of contributory negligence for failing to prompt her husband to switch his lights to full beam! Overall, one may wonder if any of the parties to the litigation in both *Hingtgen*²¹⁴ and

211 The Osborne Report (*supra*, note 191) concluded that the deterrent impact of fault liability is modest and the Kopstein Report (*supra*, note 192) doubted the deterrent force of tort liability.

212 *Supra*, note 189.

213 *Supra*, note 190.

214 *Supra*, note 189.

*Maksymetz*²¹⁵ deserve a sanction by way of punishment or deterrence. These accidents have arisen from inherent dangers of highway driving rather than the fault, in any real sense, of the parties. Even on the assumption that fault continues to wield a deterrent power, its impact is erratic and uneven.²¹⁶

The discussion of these cases is not intended as an exhaustive or balanced critique of the current system, but rather to show how systemic defects affect actual decisions and individual people and to raise questions of fundamental fairness. It may be useful to end with judicial comment. In the field of accident compensation, judges combine freedom from personal interest, a concern for fairness, and an intimate knowledge of the system as a whole. Some years ago, in *McDonald v. Alderson*, Hall J.A. stated:

In my opinion it makes no sense at all to have in place a modest and predictable system of compensation for injured workers and victims of crime while, at the same time, tolerate a risky, difficult and wholly irrational system of Court sponsored assessments for persons injured by reason of a motor vehicle upon a highway. It is all the more nonsensical when such persons may receive no compensation at all or compensation away out of proportion to that received by injured workers and victims of crime.... The Legislature needs to address the broad question of accident and sickness compensation in Manitoba....²¹⁷

And, in his dissenting judgment in *Maksymetz*,²¹⁸ O'Sullivan J.A. expressed similar dissatisfaction with the current state of affairs:

This is the kind of case which provides ammunition for those who want to replace the existing law of negligence with a law which would establish no-fault liability in the case of accidents arising out of a dangerous activity such as driving vehicles on highways. The plaintiff was proceeding on his own side of a highway in a truck which was run into by the defendant's truck, which had been proceeding on its own side of the road until it hit a moose, the defendant then losing control of his truck. The plaintiff suffered damages which have been quantified at \$45,429.40. He sued. He lost his case. He is now faced with large costs of the suit. There is something wrong with a system which produces this result. All this has happened in a province where there is compulsory automobile insurance which covers property damage (above a certain deductible) without proof of fault, but which does not protect against substantial personal injury unless fault can be proved.²¹⁹

215 *Supra*, note 190.

216 It should be noted that deterrence is a concept which is not antithetical to a pure no-fault scheme. While eligibility would not depend on fault, premiums may in part depend on driving experience.

217 (1982), 20 C.C.L.T. 64 at 70.

218 *Supra*, note 190.

219 *Ibid.* at 284.

A useful starting point in addressing some of these problems would be the 1988 *Report of the Autopac Review Commission*.²²⁰

XI. CONCLUSION

IT IS A RISKY VENTURE TO DRAW CONCLUSIONS about either the state of tort law or judicial decision-making in Manitoba from so few tort decisions decided over such a short period of time. Nevertheless, a few tentative observations and comments are offered.

Tort law has always been a dynamic and vibrant area of the law that has involved itself with the current disputes and controversies of the day. Tort law in Manitoba is no exception. The diversity of factual situations and legal issues resolved in one year is remarkable. The cases deal with drunken driving, child abuse, judicial corruption, the privacy of a well known politician, the use of herbicides and the liability of professionals. The legal issues are equally diverse including nonfeasance, economic loss, immunities from liability, concepts of privacy and freedom of expression, as well as the standard components of negligence actions and the problems of legislative intent. Many of the decisions make useful contributions to the fabric of Canadian tort law.

If there is any theme among this diversity, it is the continuing expansive and rationalizing power of the tort of negligence within tort law. There is indeed an interesting juxtaposition of tensions within tort law. On one hand, doubt is being thrown on the ability and desirability of negligence law to continue to process mass personal injury claims. On the other hand the expansive and rationalizing forces released by *Donoghue v. Stevenson*²²¹ and *Hedley Byrne v. Heller*²²² exert enormous power in tort law. Many of the cases discussed are illustrative of the latter. The nonfeasance immunity is being eroded; the common law rules of occupiers' liability have fallen to legislative fiat; new categories of damage, such as economic loss, are now recoverable in certain circumstances; and, novel situations such as product warnings are easily incorporated within this ubiquitous obligation of care. Tort law continues to consolidate towards a broad and general obligation of care. This expansive nature of negligence law also spills over into other areas of tort law. It creates an atmosphere in which the expected boundaries of traditional torts are continually challenged. As *Parasuik v. Canadian Newspapers Co. Ltd*²²³ and *Shaw v. Trudel*²²⁴ show,

220 *Supra*, note 192.

221 [1932] A.C. 562 (H.L.).

222 [1964] A.C. 465 (H.L.).

223 *Supra*, note 120.

224 *Supra*, note 173.

the challenge is not always successful, but the fact that the litigation was brought indicates the volatile ethos of tort law in the eighties. It is likely that it will be some time before the pendulum swings, and we enter a period of stability.

Further instability is also threatened by the *Charter of Rights and Freedoms*.²²⁵ As noted earlier, the *Dolphin Delivery*²²⁶ decision excludes the direct application of the *Charter*²²⁷ to most tort litigation. However, it has also been indicated that the development of the common law ought to reflect the fundamental values and principles contained in the *Charter*.²²⁸ Few lawyers have relied on this kind of an argument, but it has the potential to influence a variety of tort doctrines and cases.

Finally, an observation on the judicial approach displayed in these decisions. Not unexpectedly, most judges restrict their focus to the particular dispute at hand. Their approach is careful, conscientious, efficient, and precedent-oriented. The judges show primary concern for the fairness and integrity of the particular decisions. Unfortunately, one rarely finds a discussion of the broader dimensions of the case. Only occasionally is there a full discussion of the background, context, and consequences of a decision. Rarely are the policies and values projected by a decision considered and evaluated. Little mention is made of the consistency and integrity of the decision in the context of tort law generally. Judges are custodians of the common law of tort, but there is little sense of system-building. The contribution of Manitoba's judges to the rationalization, modernization, and development of Canadian tort law would markedly increase if their focus was broadened beyond the individual case to the fabric and integrity of tort law as a whole.

225 *Supra*, note 152.

226 *Supra*, note 155.

227 *Supra*, note 152.

228 *Ibid.*