A Review of Tort Decisions in Manitoba, 1989

Philip H. Osborne[*]

I. INTRODUCTION

THE PURPOSE AND FORMAT of this article follows that of last year closely.[1] It discusses a number of useful and interesting tort cases which were decided in Manitoba in 1989. The cases will be discussed either individually or in groups where related issues are dealt with. They will be placed in the context of tort law generally and a few comments and constructive criticisms will be offered where it seems appropriate. In 1989 one important Manitoba case, *Watkins v. Olafson*[2] was decided by the Supreme Court but the primary focus of this year's review falls on the Manitoba Court of Appeal. The Court had a busy year in tort litigation, delivering written judgments in seven cases. All dealt with important issues including occupier's liability (*Fuerst v. St. Adolphe Co-op Park*[3] and *Tronrud v. French*[4]); the liability of players in contact sports (*Temple v. Hallem*[5]); causation (*Westco Storage Ltd. v. Inter-City Gas Utilities Ltd.*[6]); unlawful interference with economic interests (*Westfair v. Lippens*[7]), medical

[*] Professor of Law, University of Manitoba.

[1] Philip H. Osborne, "A Review of Tort Decisions in Manitoba, 1988" (1990), 19 Man. L.J. 92.

[2] (1989), 61 Man. R. 2d 81 (S.C.C.).

[3] [1990] 3 W.W.R. 446 (C.A.).

[4] (1989), 62 Man. R. (2d) 133 (C.A.).

[5] [1989] 5 W.W.R. 670 (Man. C.A.). Leave to appeal to S.C.C. refused 15th Feb. 1990, [1990] 2 W.W.R. lxii.

[6] [1989] 4 W.W.R. 289 (Man. C.A.). Leave to appeal to S.C.C. refused October 12, 1989, [1989] 6 W.W.R. lxviii.

[7] (1989), 61 Man. R. (2d) 282 (C.A.).

malpractice (*Robertshaw v. Grimshaw*[8]) and a motor vehicle accident (*Melnychuk v. Moore*[9]).

Mention will also be made of a selection of Queen's Bench decisions. Some are discussed in conjunction with the Court of Appeal decisions and two are given separate treatment. *Hunter v. Brière*[10] dealt with the rule of last clear chance and *Kirby v. Canadian Tire*[11] explored the diverse obligations of manufacturers to the users of their products. The review will conclude with some general comments on the continuing contribution of Manitoba's courts to the fabric of Canadian tort law.

II. SUPREME COURT OF CANADA

A. Assessment of Damage for Personal Injury: *Watkins v. Olafson*[12]

The litigation in *Watkins v. Olafson*[13] has been followed with great interest both by the legal profession and all who have an interest in accident compensation. The case dealt with the assessment of damages for quadriplegia suffered by the plaintiff in an automobile accident.

Of course the starting point in assessing damages in personal injury claims is the trilogy of cases decided by the Supreme Court in 1978.[14] In those cases the Supreme Court recognized that although it was locked into a system of non-reviewable lump sum awards, it was

---

[8] (1989), 57 Man. R. (2d) 140.

[9] [1989] 6 W.W.R. 367 (Man. C.A.). This case is not discussed in this article. The case dealt with an accident involving a truck and a cyclist. A majority of the Court held that the defendant trucker had failed to rebut the presumption of negligence created by s.153(1) *Highway Traffic Act* S.M. 1985-86 c.3. The case is a useful reminder that the reverse onus applies to automobile collisions with cyclists as well as pedestrians.

[10] [1989] 3 W.W.R. 528 (Man. Q.B.).

[11] (1989), 57 Man. R. (2d) 207 (Q.B.).

[12] *Supra*, note 2.

[13] *Ibid.*

[14] *Andrews v. Grand & Toy Alta. Ltd.*, [1978] 2 S.C.R. 229; *Arnold v. Teno*, [1978] 2 S.C.R. 287; *Thornton v. School Dist. No. 57 Bd. of School Trustees*, [1978] 2 S.C.R. 267.

possible to improve the accuracy and overall fairness of the assessment process. In particular the Court called for a carefully itemized assessment of losses under the separate heads of future care costs, loss of income and non-pecuniary losses. Special emphasis was also placed on the use of actuaries and economists to improve the accuracy of awards for long term injuries. There is no doubt that the assessment process has been greatly improved by the trilogy. The process is more accurate, more professional and consequently awards are higher. Nevertheless, more and more of the judiciary in Manitoba are voicing misgivings about the whole process of calculating damages in personal injury cases. These misgivings focus on two primary concerns - continuing skepticism about the accuracy of awards and the very large sums of money claimed in cases of serious physical injury. Three Queen's Bench judges expressed their concern in 1989. In *Fuerst v. St. Adolphe*[15] Scollin J. dismissed the plaintiff's action, but provisionally assessed damages at 1.25 million dollars. He confessed that the last line of Robert Burns' poem "To a mouse" summed up his frame of mind. "An' forward, tho I canna see, I guess an fear."[16] Elsewhere in his judgment he writes:[17]

> The actuarial combines with the astrological to produce the astronomical. Facing capital sums that would have awed many a Maharajah the court must arrive at a compensatory sum which is as sensible as possible in a weird world of gambling and sophistry.

In *Blatz v. Wong*[18] Lockwood J. stated:[19]

> It is perhaps trite to say that assessments of the kind which now have to be made are fraught with difficulty and necessarily involve a good deal of speculation as to what may or may not happen in the future. There are better ways of dealing with these matters but they are not available in this jurisdiction due to lack of appropriate legislation.

---

[15] (1989), 56 Man. R. (2d) 184 (Q.B.).

[16] *Ibid.* at p. 190.

[17] *Ibid.*

[18] (1989), 60 Man. R. (2d) 287 (Man. Q.B.).

[19] *Ibid.*, at p. 291.

In *Tronrud v. French*[20] the plaintiff claimed $4.6 million. Morse J. stated:[21]

> This case graphically illustrates the need so often expressed by the judiciary and others for some more rational system of assessing damages for personal injury. It makes no sense to go through the elaborate calculations ... if the plaintiff is only to receive a percentage of the award or if ... the plaintiff is required to pay in legal fees a substantial part of the award. If this occurs the whole purpose of the calculation is frustrated. And in any event, who can say whether the assumptions on which the award is based are correct; ... clearly it is in the financial interest of both ... to permit some form of structured settlement.

It was against this background of "the trilogy" and continuing disaffection with the lump sum assessment process that the *Watkins*[22] litigation took place.

As noted earlier the plaintiff in *Watkins*[23] suffered irreversible quadriplegia. He was 32 at the time of the accident and consequently would incur long term future care costs. It is in respect of this head of loss that the litigation is particularly interesting and noteworthy. At trial[24], Wright J. assessed damages at $2.1 M. Of this, fully $1,046,078.31 was allocated to future care costs. The learned trial judge calculated the future care costs on the basis of the plaintiff living independently in his own home and utilized the controversial process of 'gross up' of the future care award. This technique of 'gross up' was developed to deal with a lacuna in the law as propounded by "the trilogy." The Supreme Court overlooked the impact of taxation on the future care award. While the lump sum award is not taxable, the income earned on the lump sum is taxable. If that tax consequence is not taken into account, the plaintiff will not have sufficient money to cover future care costs. The process of grossing up the lump sum

---

[20] (1989), 56 Man. R. (2d) 284 (Man. Q.B.).

[21] *Ibid.* at p. 303.

[22] *Supra*, note 2.

[23] *Ibid.*

[24] (1986), 40 Man. R. (2d) 286 (Q.B.).

(normally by 30%) to cover tax liabilities was accepted in Ontario[25] but rejected in British Columbia.[26] The Manitoba position was not clear.

In the Court of Appeal[27] the key issue was the future care calculation and the propriety of the 'gross up.' The Court was clearly disturbed by the size of the award and the accuracy of calculating future care costs. An additional and critical factor was evidence that showed that although the plaintiff professed the desire to live independently in his own home, he had, in fact, spent six of the last nine years in hospital at the public's expense. Huband J.A. stated:[28]

> I think it is probable that in spite of his desire to live in an independent and non-institutional environment, the plaintiff will require hospital care for a very substantial part of his future years. It is manifestly unjust that he should be paid a very substantial sum of money by the defendants to cover future care costs only to have the plaintiff return to a hospital setting where his care has been and would continue to be provided without charge.

The Court's solution to this was innovative, bold and manifestly sensible. The Court imposed a judicially structured settlement. The Court calculated that the monthly sum required to permit the plaintiff to live independently in a fokus unit was $3,000 per month. It, therefore, ordered the defendant to pay to a trustee each year a sufficient amount to cover the annual costs of independent living. Such funds would be released monthly to the plaintiff upon proof that he was living independently. Unused funds would be credited back to the defendant. This structured settlement was feasible because the primary defendant was the Government of Manitoba. There was, therefore, no concern with security of future payments. This solution avoided the need for the 'gross up'. Nevertheless, the Court expressed

---

[25] *Fenn v. Peterborough* (1979), 25 O.R. (2d) 399 affirmed (sub. nom. *Consumer's Gas Co. v. Peterborough*), [1981] 2 S.C.R. 613; *Julian v. Northern & Central Gas Corp.* (1979), 31 O.R. (2d) 388, supplementary reasons at 31 O.R. (2d) 413 (C.A.).

[26] *Leischner v. West Kootenay Power and Light Co.*, [1986] 3 W.W.R. 97 (B.C.C.A.); *Scarff v. Wilson* [1989] 3 W.W.R. 259 rev'd. in part [1989] 6 W.W.R. 500 (S.C.C.).

[27] (1987), 48 Man. R. (2d) 81 (C.A.).

[28] *Ibid.* at pp. 98-99.

the view that future tax liabilities were too speculative to permit any 'gross up' of a lump sum award.

Voluntary structured settlements of personal injury claims and fatal accident claims are increasingly common in Canada. They have many advantages over the lump sum award, including periodic payments, tax advantages, the possibility of review and increased accuracy of compensation.[29] However, no court in Canada had before *imposed* a structured settlement on the parties.[30] An appeal to the Supreme Court was not surprising.

The Supreme Court was unanimous in allowing the appeal.[31] The judgment of the trial judge was restored. McLachlin J. wrote for the Court. The two key issues were the power of the court to mandate a system of periodic payments for future care costs and, alternatively, whether in a lump sum calculation of future care costs the effect of taxation is to be taken into account, i.e. the 'gross up' issue. The Court recognized that in certain cases it is clearly desirable to award damages by installments and that the Court did have the power to depart from or vary existing common law rules. The Court, however, confessed to a great reluctance to make revisions in the law which would have major and far reaching consequences. Small extensions of existing rules to meet new cases and circumstances were acceptable and proper but major law reform must be left to the legislature. On this premise McLachlin J. built a strong case *against* judicial reform in the area of periodic awards. The difficulties that would arise in a system of periodic damages would include the procedure and scope of review, the issue of security of the award, the class of case and heads of damage that should be subject to periodic awards and the impact of such awards on defendants and plaintiffs. Her Ladyship concluded:[32]

---

[29] See L. Todd, "Structured Settlements and Structured Judgments: Do They Work and Do We Want Them" (1989), 12 Dalhousie L.J. 445.

[30] The Ontario Court of Appeal had clearly rejected such a power. In *McErlean v. Sarel* (1987), 61 O.R. (2d) 396 at p. 433 the Court unanimously stated "whether or not a better system of compensation could be devised, and we are aware of various reform proposals in this regard, the respondent is legally entitled to a lump sum judgment and is not legally obliged to accept periodic payments."

[31] (1989), 61 Man. R. (2d) 81.

[32] *Supra*, note 30 at p. 96.

I raise these issues not to suggest that schemes for periodic payments should not be attempted but rather to indicate some of the many complex considerations raised by the implementation of such schemes. A review of legislation in jurisdictions where periodic payments have been adopted reveals many different models premised on different answers to questions such as these. In my opinion the Legislatures are better equipped than the courts to deal with the complexities involved in the implementation of the notion of periodic payments into our law of tort.

This finding of course directly raised the propriety of the 'gross up.' On this issue the court endorsed the approach of the Ontario Court of Appeal and approved the $230,000 'gross up' calculated by the trial judge. The Court held that the 'gross up' was not excessively speculative and it was consistent with the principles in the trilogy calling for full and complete compensation of future case losses.[33]

It is clear that the responsibility for reform of the damage assessment process has been passed to the legislature. Much of the work has already been done. In 1987, the Manitoba Law Reform Commission issued its *Report on Periodic Payment of Damages for Personal Injury and Death*.[34] It recommended that the Courts be given a broad discretion to award periodic damages in respect of any or all heads of damage. The Commission addressed the many difficult issues that must be resolved in a system of periodic payments. However, until the legislature acts, Manitoba's judges will continue to be faced with a very difficult task. As one study of the assessment process concluded:

No matter how scientific the evidence, how educated the experts, how judicious and fair the trier of fact, the [lump sum] award will not mirror the plaintiff's actual future losses.[35]

---

[33] See also *Scarff v. Wilson* (1989), 100 N.R. 189 (S.C.C.).

[34] Manitoba Law Reform Commission, *Periodic Payment of Damages for Personal Injury and Death* (Report No. 68) 1987.

[35] Manitoba Law Reform Commission, *A Study of Damage Awards in Personal Injury and Death Cases*, Working Paper 3, prepared by Professor P. Carlson, 1984 at p. 19.

III. COURT OF APPEAL

A. Occupier's Liability and Recreational Accidents: *Fuerst v. St. Adolphe Co-op Park*[36] and *Tronrud v. French*[37]

Neither of the two occupier's liability cases decided by the Court of Appeal dealt with the typical 'slip and fall' fact pattern of so many occupier's liability cases. Both *Fuerst v. St. Adolphe Co-op Park*[38] and *Tronrud v. French*[39] dealt with what can be classified as recreational accidents. In *Fuerst*[40] the plaintiff was injured in a diving accident, while *Tronrud*[41] dealt with a snowmobiling accident. Both plaintiffs were rendered permanently quadriplegic by the accidents. In both cases the *trial* judges dismissed the actions. In both cases the Court of Appeal upheld the plaintiff's appeal and apportioned the losses one third to the defendants and two thirds to the plaintiff. Each will be considered in turn.

Some of the most tragic cases in the law reports are those involving diving accidents. *Fuerst v. St. Adolphe Co-op Park*[42] is a paradigm of these cases. The plaintiff, a 27 year old man, was admitted upon payment of a fee to the defendant's park to play in a baseball tournament. The park complex included a swimming pool and beer garden, along with the baseball facilities. During the course of the day the plaintiff played baseball and drank nine bottles of beer in a six hour period. Late in the afternoon the plaintiff went to the pool. He noted that there was a rope across the pool and the adults were at one end and the children at the other. He assumed correctly that the adults were in the deep end and he dived into the pool. Unfortunately, even in the deep end the pool sloped gradually from the sides in a dish-like configuration and the plaintiff struck his head on the bottom

---

[36] [1990] 3 W.W.R. 466 (C.A.).

[37] (1989), 62 Man. R. (2d) 133 (C.A.).

[38] *Supra*, note 36.

[39] *Supra*, note 37.

[40] *Supra*, note 36.

[41] *Supra*, note 37.

[42] *Supra*, note 36.

of the pool. The accident occurred in July, 1983, three months before the *Occupiers Liability Act*[43] came into force. Scollin J. at trial[44] did not analyze the case on common law occupier's liability principles. He chose, either deliberately or through oversight, to apply negligence principles. A careful examination of the facts led him to the conclusion that the plaintiff was to blame for the accident and that "it would be irresponsible to weave a pattern of fault on the part of anyone else."[45] That comment recognizes the unavoidable tension in decision making in cases of catastrophic personal injury. The tension is between a judge's duty to apply the law neutrally as he or she believes it to be and the temptation to exploit the inherent flexibility of tort principles in order to engineer a remedy. That temptation is particularly strong in cases of recreational, household and sporting accidents where plaintiffs are more heavily reliant on the tort system for adequate compensation than many other accident victims. Those injured in work place accidents, automobile accidents and by criminal violence have alternative sources of reasonable compensation. Victims of recreational accidents may be supported in the short term by unemployment insurance, but in the long term they must rely on personal wealth, first party disability insurance or social allowance programmes.

In this case it was not beyond the capacity of the learned trial judge to "weave a pattern of responsibility." A finding of negligence could be supported by the dangerous design of the pool, the lack of appropriate warnings against diving, the reasonable expectations of swimmers that the deep end was safe for diving and the proximity of the beer garden to the pool. The loss could have been apportioned. However, Scollin J. preferred to stress the irresponsibility of the plaintiff's actions. In his Lordship's view the plaintiff's faculties, judgment and discretion were significantly impaired by alcohol and he failed to "exercise even minimal judgment and care for his own safety in plunging headlong into waters of unknown depth."[46] He was deemed fully responsible for his own injuries.

---

[43] C.C.S.M. c.08.

[44] (1989), 56 Man. R. (2d) 184 (Q.B.).

[45] *Ibid.*, at p. 186.

[46] *Supra*, note 44 at p. 187.

In the Court of Appeal the case took an interesting turn. The Court applied the traditional common law principles of occupier's liability. Philp J.A., speaking for the Court, pointed out that the plaintiff was a *contractual entrant*. This permitted the Court to elevate the applicable standard of care by implying a warranty that the pool was as safe as reasonable skill and care could make it. In his Lordship's view the difference in the standard of care was material and was sufficient to impose liability. Philp J.A. stated:[47]

> The Co-op knew or ought to have known that diving from the deck was unsafe. It knew or ought to have known that many persons like Fuerst and his companions would be using the pool for the first time. The Co-op did not communicate its 'No Diving' policy. It did not post signs to warn the public of the sloping bottom of the pool and of the fact that diving was dangerous and prohibited. It did not even inform its head lifeguard of the 'No Diving' policy. In my view, the Co-op breached the implied warranty in its contract with Fuerst that the swimming pool would be as safe for the purposes as reasonable care and skill could make it and is liable to him.

His Lordship went on to find contributory negligence on the grounds that the alcohol had clearly affected the plaintiff's powers of observation, judgment and discretion. The reduction of damages for contributory negligence is important because the defendant's liability was in *contract*. Such a view is very much in tune with current thinking[48] but careful consideration was not given to the language of the Manitoba apportionment legislation nor existing authority.

This is probably the last we will hear of contractual entrants in occupier's liability cases. In 1988 Morse J. confirmed that s.3(1) *Occupiers Liability Act* removes all distinctions among classes of entrant including the contractual entrant.[49] The statutory duty to take reasonable care to ensure that all visitors are reasonably safe while on the premises is now applicable. However, as noted earlier

---

[47] *Supra*, note 36 at p. 472.

[48] *Doiron v. La Caisse Populaire D'Inkerman Ltee.* (1985), 32 C.C.L.T. 73 (N.B.C.A.); *Vesta v. Butcher*, [1986] 2 All E.R. 488 affirmed [1988] 2 All E.R. 43 (C.A.); J. Swanton, "Contributory Negligence as a Defence to Actions for Breach of Contract" (1981), 55 Aust. L.J. 278; N. Palmer and P. Davies, "Contributory Negligence and Breach of Contract: English and Australasian Attitudes Compared" (1980), 29 I.C.L.Q. 415, University of Alberta, Institute of Law Research and Reform, *Contributory Negligence and Concurrent Wrongdoers* (Rep. No. 31) 1979, The Law Commission (England), *Contributory Negligence as a Defence in Contract* Working Paper No. 101 (1990).

[49] *Wolf v. Airliner Motor Hotel (1972) Ltd.* (1989), 54 Man. R. (2d) 169 at p. 171.

there is probably sufficient flexibility in negligence principles to justify a similar pattern of responsibility to that reached by the Court of Appeal.

The case of *Tronrud v. French*[50] was decided under the *Occupier's Liability Act 1983*.[51] The legislation has received consideration by the Queen's Bench[52] but there has been little opportunity for comment by the Court of Appeal. The occupier in the case was the provincial government and the premises was the frozen surface of Brereton Lake. The plaintiff snowmobiler with a group of friends left Rennie at the south of Brereton Lake on the morning of February 9 and followed a 'designated snowmobile trail' north across the Lake. In the course of their journey they crossed Mantario Road which ran east to west across the lake. It intersected with the 'designated trail.' Mantario road had no exit and it terminated at its western end in a loop. The road was ploughed to facilitate public access to the Mantario Snowmo-

---

[50] *Supra*, note 37.

[51] *Supra*, note 49.

[52] For a discussion of the legislation and Queen's Bench authority see Philip H. Osborne, "The Occupier's Liability Act of Manitoba" (1986), 15 Man. L.J. 177 and Philip H. Osborne, "A Review of Tort Decisions in Manitoba 1988" (1990), 19 Man. L.J. 92 at pp. 111-114. The Queen's Bench also decided two occupier's liability cases in 1989, *Bonneteau v. Gauthier* (1989), 62 Man. R. (2d) 225 (Q.B.) and *Kobs v. Merchants Hotel* (1989), 62 Man. R. (2d) 210 (Q.B.). The cases contain no significant point of law. Both turned on whether the defendant had taken reasonable care for the safety of the visitor under s.3 of the *Occupier's Liability Act*, C.C.S.M. c.08. In *Bonneteau* the plaintiff was injured by an explosion and fire in the defendant's home garage. The garage, which had been constructed by the defendant, contained a pit which facilitated the repair of automobiles. The fire occurred while the defendant and plaintiff were draining gasoline from the tank of an automobile. The garage sump pump which had been improperly installed in contravention of the Manitoba Building Code went on automatically and a spark ignited the gasoline vapours. Barkman J. imposed liability on the basis of the unsafe installation. No *volenti* or contributory negligence was found because the plaintiff was unaware of the sump pump and its inherent danger. In *Kobs* the plaintiff, a patron of the defendant's hotel, fell down stairs leading to the basement. The door leading to the basement was unlatched because the second defendant, a repair person, was working there. The plaintiff, who was walking along a corridor, leaned against the door and fell through the doorway and down the stairs. The defendant hotel owner was liable for failing to make sure that the door was locked and for failing to advise the repair person to make sure it was locked. The second defendant was also held liable for failing to lock the door. The requirement that the door be locked was deemed reasonable in light of the physical layout of the hotel and that it was a drinking establishment. Damages were reduced by 50% on the grounds that the plaintiff's intoxication contributed to the accident.

bile Rally which took place later in the month. The centre of the loop was intended to serve as a parking area. Where the 'designated trail' intersected with Mantario road the snow banks caused by the ploughing were flattened and tapered to ease the passage of the snowmobiles and "Stop" and "Danger" signs were positioned on each side of the road. In the early evening the plaintiff did not return along the 'designated trail.' He and his friends took a well travelled short cut back to Rennie. This short cut intersected the 'loop' at the end of Mantario Road. The accident occurred when the plaintiff's snowmobile hit the snow bank on the north side of the loop. The bank had not been flattened and tapered and there were no signs and warnings of the danger. When the plaintiff hit the bank at high speed, his snowmobile flew into the air and crashed rendering him a quadriplegic.

The key issue was whether or not the provincial government had discharged its duty under s.3(1) of the *Occupier's Liability Act* to take such care as in all the circumstances of the case is reasonable to see that the plaintiff was reasonably safe while on the premises. At trial, Morse J.[53] was less impressed with the degree of danger created by the snowbank than with the plaintiff's failings as a snowmobile driver. His Lordship chose to emphasize the plaintiff's failure to keep a proper look out for the snowbank when he knew of the existence of the road, his excessive speed and his consumption of alcohol. His Lordship concluded:[54]

> The snowbanks did not constitute any danger or hazard to a person exercising proper and reasonable care ... the failure of the defendants to mark the parking area did not, in all the circumstances constitute a failure to exercise reasonable care to see that those operating snowmobiles on the lake would be reasonably safe ... he [the plaintiff] was the author of his own misfortune ... his negligence was the cause of the accident.

The troublesome part of that passage is the first sentence which construes s.3(1) as restricting an occupier's duty to making premises safe *"for careful and prudent people."* This approach telescopes the issues of primary negligence and contributory negligence. A failure to distinguish these elements of liability leads to the danger of restoring contributory negligence as a complete bar to recovery. This would

---

[53] (1989), 56 Man. R. (2d) 284 (Q.B.).

[54] *Supra*, note 53 at p. 291.

render s.7 of the *Occupiers Liability Act*,[55] which expressly makes the *Tortfeasors and Contributory Negligence Act*[56] applicable to occupier's liability cases, of no effect.

The Court of Appeal did not fall into this trap. The Court reversed the trial judgment and apportioned the loss. Helper J.A. speaking for the Court was quick to expand the duty of occupiers beyond that suggested by the trial judge. Her Ladyship stated:[57]

> ... it is reasonable to foresee not all snowmobilers, at all times drive at a reasonable rate of speed, maintain a reasonable outlook [sic, look out] exercise proper caution in all circumstances given the conditions of the lake in winter and observe all safety precautions that would constitute model driving ... the learned trial judge used too narrow a test in stating the defendants owed a duty to use reasonable care only to persons exercising proper and reasonable care. The duty was, *in all the circumstances of the case* to take reasonable care knowing of the activities upon the lake that persons upon the lake would be reasonably safe.

In applying s.3(1) to the defendants' conduct, Helper J.A. took a classic negligence approach suggesting that reasonable foreseeability of risk was an essential criterion of liability and that the degree of risk, the gravity of the harm and the cost of preventative measures must be weighed in determining the standard of reasonable care. In her view the snowbank created a significant hazard or trap to all snowmobilers travelling on a well travelled, hazard free shortcut. The snowbank had not been groomed to minimize its danger and no warnings had been given. The manner and circumstances in which the plaintiff drove his snowmobile were entirely foreseeable. The defendant had not taken reasonable care for the plaintiff's safety. However, the Court of Appeal did not disagree with the trial judge's view that the plaintiff had not acted with reasonable care for his own safety for the reasons discussed earlier. The plaintiff was held to be two thirds contributorily negligent.

The decision is an important and welcome one. It commits the Court to a negligence approach in interpreting the *Occupiers Liability Act*.[58] This was clearly the intention of the legislation and the Court

---

[55] C.C.S.M. c.08.

[56] C.C.S.M. c.T90.

[57] *Supra*, note 37 at p. 139.

[58] C.C.S.M. 08.

is unlikely to be receptive to arguments that the legislative language is inconsistent with negligence law. This is consistent with the Manitoba Queen's Bench decisions to date[59] and with a recent Ontario Court of Appeal decision[60] which interpreted the volenti section of the Ontario *Occupiers Liability Act*[61] as entirely consistent with common law principles. It is also an important case in underlining the importance in separating the primary negligence and contributory negligence concepts. Again, consistency in apportionment rules is achieved.

B. Sporting Injuries Caused by Other Players: *Temple v. Hallem*[62]

Not long ago sporting activities were the predominant preserve of young men. That has changed dramatically in the last two decades. More and more girls and young women are attracted to the enjoyment and competition to be found in the sporting arena. The fast growth of ringette, girls' softball and soccer is reflective of this trend. Even in the adult population there is a much broader participation in sports and recreational activities. There is a much greater awareness of the benefits of health and fitness and this is promoted by private sector advertising and public sector exhortation. There are women's leagues and old-timer's leagues and sports for the mentally and physically disabled. There are also mixed leagues where men play with women, boys with girls, the fit with the unfit, the old with the young and the skilled with the unskilled. Allied to this growth in sports has been an increasing sensitivity to issues of safety. Rules of play have been adjusted to reduce injury. Great advances have been made in the area of protective equipment and use of such equipment is often mandatory in organized sport. Violence in sport is becoming increasingly unacceptable and even the National Hockey League has taken some steps to control fighting and dangerous use of hockey sticks. It is

---

[59] Philip H. Osborne, "A Review of Tort Decisions in Manitoba, 1988" (1990), 19 Man. L.J. 92 at pp. 111-114. See also *supra* note 52.

[60] *Waldick v. Malcolm* (1989), 70 O.R. (2d) 717 at pp. 726-731. See also *Sauve v. Provost* (1990), 71 O.R. (2d) 774 where the Ontario Court of Appeal confirmed that there is a positive duty to inspect premises to see that they remain reasonably safe.

[61] R.S.O. 1980, c.322.

[62] [1989] 5 W.W.R. 669 (Man. C.A.).

perhaps surprising given this kaleidoscope of modern sporting activity that we have so little Canadian appellate authority on the legal obligations that players owe to each other. The last time the Manitoba Court of Appeal ruled on such a question was twenty-five years ago when it approved the decision of Bastin J. in *Agar v. Canning*.[63] It is for this reason that the Court's decision in *Temple v. Hallem*[64] is important and interesting. The decision dealt with litigation between two players who were involved in a collision in a softball game. The facts of the case reflect the current diversity of sporting activity in Manitoba, and gave the Court a splendid opportunity to define the nature and extent of a player's obligations to other players.

The game in which the accident took place was between teams in the Southend Mixed League. As the name suggests the teams were made up of men and women and there were some special rules which reflected this. The pitcher had to be female and all pitches were to be at a moderate pace. The plaintiff, a 112 pound woman, was playing catcher. The defendant, a 180 pound man, was already on base. The ball was hit to the outfield. The defendant ran for home. The ball was fielded and thrown to home plate where the plaintiff caught the ball and advanced a few feet up the third base line to try to tag the defendant. As the defendant approached home plate he went into a slide and collided violently with the plaintiff who, to her credit, tagged him out. The collision knocked the plaintiff back some four to five feet and she was injured. Two of the League's rules were of particular relevance to this accident. One stated that sliding was allowed and the other stated that if the runner was blocked from reaching a base it would be automatically awarded to the runner.

Even on a visceral level there is likely to be some ambivalence about whether liability should be imposed in a case like this. The accident may be seen as one of the risks inherent in the game for which no legal recourse should arise. On the other hand, the defendant's conduct may be seen as excessive, dangerous and unacceptable in the circumstances of the particular game. There lies some of the dilemma of judicial-decision making in this case.

---

[63] (1965), 54 W.W.R. 302 affirmed 55 W.W.R. 384 (Man. C.A.).

[64] *Supra*, note 62.

The learned trial judge took the latter view. In evocative language he portrayed the situation as one demanding accountability. He stated:[65]

> The action of a 180 pound young man, hurtling down the baseline towards a 117 pound woman and going into what is virtually, a professional slide, and violently colliding with the plaintiff, in my view goes beyond the rules of good conduct and fair play demanded by the league.

These words indicate that the trial judge was taking what is essentially a negligence approach to the question. There is much support in the cases[66] and the books for the imposition of a duty of care in sports.[67] There is a clear conceptual distinction between *negligent* injury and truly *accidental* injury. Only the latter is normally accepted as part of the game. Fridman states:[68]

> A participant in a sport or game is considered to have consented to run the risk of accidental harm which might occur in the game or sport ... Those who willingly participate must accept the consequences of those risks. ... However every player does owe others in the game or sport a duty to take reasonable care for their safety. If he is negligent he cannot escape liability by saying that the game or sport was inherently dangerous. Hence if negligence is established, no plea of volenti will protect the negligent player.

---

[65] *Supra*, note 62 at p. 671.

[66] Cases clearly recognizing a duty of care among players in *contact* sports include: *King v. Redlich*, [1984] 6 W.W.R. 705 (B.C.S.C.) where Spencer J. in dismissing an action for an injury caused to a player when he was hit by a puck which was shot by the defendant and ricocheted off the goal post stated "the question then to be decided is whether during a warm up at this level of recreational hockey it was negligent of the defendant to shoot on the empty goal when the plaintiff was in that position" and *Colby v. Schmidt*, [1986] 6 W.W.R. 65 (B.C.S.C.) where Oppal J. after imposing liability in battery for a deliberate injury caused by an elbow after a stoppage in play of a rugby game, added: "Moreover the degree of care that was exercised by Mr. Schmidt fell below that of the reasonable man." Courts in other jurisdictions have also imposed a duty of care in contact sports. See *Condon v. Basi*, [1985] 2 All E.R. 453 (C.A.). For a useful discussion of the issue see *Rootes v. Shelton*, [1988] A.L.R. 33 (H.C. Aust.).

[67] For other cases recognizing a duty of care between participants, see *Ratcliffe v. Whitehead*, [1933] 3 W.W.R. 447 (Man. K.B.) (plaintiff hit with golf ball on golf course); *Fink* v *Greeniaus* (1973), 2 O.R. (2d) 541 (collision between skiers); *Finnie v. Repponen* (1987) 40 C.C.L.T. 155 (plaintiff hit with a golf ball); *Poirier v. Murphy* (1986), 36 C.C.L.T. 160 (B.C.S.C.) (dangerous stunt involving automobile).

[68] Fridman, *The Law of Torts in Canada* Vol. 1 1989 at pp. 364-5.

Barnes in his leading text, *Sports and the Law*, takes a similar position. He writes:[69]

> Where it is alleged that one participant has negligently injured another a Court considers the factors of duty, due care and foreseeability in the ordinary way. Since sports necessarily involve some risk of injury the standard of care is modified according to the circumstances and inherent practices (including rule violations) of the game.

The Atkinian duty of care is not inconsistent with robust and energetic competition. As the trial judge pointed out, it is a question of setting an appropriate standard of care by determining limits of fair play and reasonable conduct which are consistent with the nature of the game. Of course great care must be taken in applying the standard of care to the facts of the case. Account must be taken of the nature of the sport, the usual degree of body contact, the rules of the game, the expectations of the players and all other surrounding circumstances.[70] Common sense would indicate some latitude for the heat and passion of close competition. This sort of approach was adopted by the Quebec Court of Appeal in *Savard v. Urbano*.[71] In that case a group of friends decided to play an impromptu ball game in a city park. The plaintiff was a sixteen year old woman and the defendant was a twenty-three year old man. The plaintiff, who had never played the game before, was pitching. When the defendant hit the first pitch very hard she expressed concern for her safety. The second pitch was hit directly back to her and hit her in the mouth.

---

[69] Barnes, *Sports and the Law* (2nd ed.) at p. 258.

[70] There is a useful passage in the judgment of Barwick C.J. in *Rootes v. Shelton* [1968] A.L.R. 33 at 34 on the application of negligence principles to sporting injuries. His Lordship stated:

> By engaging in a sport or pasttime the participants may be held to have accepted risks which are inherent in that sport or pasttime ... but this does not eliminate all duty of care of the one participant to the other. Whether or not such a duty arises and if it does its extent must necessarily depend in each case upon its own circumstances. In this connexion, the rules of the sport or game may constitute one of those circumstances but in my opinion they are neither definitive of the existence nor of the extent of the duty; nor does their breach or non observance necessarily constitute a breach of a duty found to exist.

[71] *Savard v. Urbano* (1977), 85 D.L.R. (3d) 33 (Que. C.A.).

The Court unanimously held the defendant two-thirds liable. Kauffman J.A. stated:[72]

> While it is true ... that in games of this kind, there is tacit acceptance of the risks involved, a distinction must be made in cases where the parties are unequal in age, experience and skill. Here ... the appellant knew much more about the game than the respondent. He played it better and certainly with greater strength. This was observed by the respondent, who cautioned him before he struck again...

Similarly, the trial judge's finding in *Temple v. Hallem* that the defendant's conduct was unreasonably dangerous can be supported by reference to the gender and size differential of the players, the nature of the League, the special rules of the League, the expectation of social and recreational players, the magnitude of the risk of injury and the risk of serious injury.

This approach did not however commend itself to the Court of Appeal. In a strongly pro defendant decision the Court of Appeal rejected a negligence approach to the issue and reversed the trial judge. The Court held that the situation was governed by its own decision in *Agar v. Canning*.[73] That case involved a *battery* action brought by a hockey player against another player who had deliberately slashed the plaintiff across his face with his hockey stick. The Court imposed liability on the grounds that the defendant's actions were calculated to cause serious injury in violation of the rules.[74] Huband J.A. appears to view this as the *exclusive* basis of liability for all sports involving some degree of contact.[75] His Lordship summed up his understanding of the applicable principles in the following words:[76]

---

[72] *Ibid.* at pp. 34-35.

[73] *Supra*, note 63.

[74] A number of cases have applied *Agar v. Canning* and held that deliberate injury in violation of the rules supports liability, see *Martin v. Daigle* (1969), 6 D.L.R. (3d) 634 (punch in hockey game) and *Pettis v. McNeil* (1979), 8 C.C.L.T. 299 (N.S.S.C.) (plaintiff struck with stick in course of a hockey game). See also *McNamara v. Duncan* (1971), 26 A.L.R. 586 (S.C. Aust. Cap. Terr.) (player intentionally struck on the head by defendant's elbow in the course of Australian Rules Football).

[75] A similar view was taken by MacIntosh J. in *Matheson v. Dalhousie College* (1983), 25 C.C.L.T. 91 (N.S.S.C.).

[76] *Supra*, note 62 at p. 672.

... *Agar v. Canning* ... suggests that only a deliberate violation of the rules calculated to do injury will give rise to civil liability. Otherwise people who engage in sport are assumed to accept the risk of accidental harm. The ... decision involved hockey but the principles apply equally to other sports where contact is involved. ... Under other circumstances, outside game conditions, the collision by the defendant into the plaintiff would constitute a serious assault. But game conditions prevailed under which the plaintiff assumes the risk of injury so long as the rules are not violated with an intention to do injury.

Little consideration was given to whether the defendant intended to cause injury.[77] Huband J.A. preferred to decide the case on more technical grounds, namely, whether or not there had been a violation of League rules. By means of a very narrow and strained interpretation he came to the conclusion that no rules were violated and consequently no liability could be imposed.

His Lordship's analysis of the League rules is interesting. He began with a discussion of the rule permitting sliding. He pointed out that the League rule was unconditional and unqualified. It did not seek to discriminate between head first and feet first sliding, slow and fast sliding, sliding by heavy and light people or sliding by men and women. In essence there was in his view a blanket approval of "sliding" and therefore "one could only conclude that the defendant was entitled to proceed as he did."[78] With respect, it is not the *only* conclusion available. It may be argued that the rules of all games are implicitly qualified by concepts of safety, reasonableness and common sense. Rules are rarely intended by their drafters to be absolute and definitive in all circumstances. The point can be made by posing a few questions. Does the rule permit a player to slide into an injured catcher lying on the ground? Is a slide into a baseman who has tripped and fallen permissible? Is it permissible to slide into home base after hitting a home run? The answer is almost certainly "no." Clearly the "sliding" rule must be subject to some qualifications and exceptions and it was open to the Court to conclude that the permission to slide did not cover the unusual, dangerous and professional slide under consideration.

---

[77] Huband J.A. seems to doubt that intent had been proved but he did not give careful consideration to the issue and did not discuss imputed intent.

[78] *Supra*, note 62 at p. 671.

Huband J.A. then proceeded to support his view that the defendant was entitled to slide as he had by relying on the second League rule relating to the issue. Rule 24 states:

> The runner blocked or interfered with in trying to reach a base or homeplate will be automatically awarded the base they (sic) were trying to reach. This is to try to prevent injuries.

Surprisingly Huband J.A. interpreted these words as giving to the base runner a right of way which required the *plaintiff* to move out of the base path. In his Lordship's view the runner was *entitled* to slide into her. Thus if anyone was in breach of the rules it was the plaintiff. With respect, a more reasonable interpretation of the rule is that it is designed to qualify the sliding rule by *preventing* sliding into a base which is blocked by another player. The appropriate and directed course of action is for the player to pull up or run to one side and *avoid* a collision. The runner may then appeal to the umpire that the base was blocked and it must be awarded to him or her. In essence the rule states that sliding is unnecessary to secure the base and is therefore implicitly unauthorized. This interpretation of the rule is much more consistent with its avowed purpose 'to avoid injuries.' There is much to be said for the trial judge's view that the defendant's slide was prohibited in this particular League.

This strained interpretation of the rules illustrates the Court's determination to protect the defendant from liability.

It is not clear why the Court of Appeal overlooked or ignored negligence liability and sought to restrict the liability of players to such narrow compass. There are certainly conflicting policy factors operating in this area and although they are not discussed in the judgment they may have influenced the Court. The Court may have been persuaded that the application of negligence principles and a more extensive liability in the sporting arena would have a variety of adverse social consequences. First, the Court may have assumed that many players would have no liability insurance. Such an assumption would raise serious concerns on two grounds. A Court might be reluctant to place long term and large financial burdens on young uninsured defendants who, as in *Temple v. Hallem*,[79] are often more foolish and thoughtless than evil. Furthermore, a court may assume that a judgment may go unsatisfied because of the lack of insurance.

---

[79] *Supra*, note 62.

Thus liability may be perceived as resulting in over-deterrence and under-compensation. Secondly, fear of negligence liability and its attendant delay, frustration, and unwanted publicity (whether or not there is liability insurance) may reduce participation in sporting events. Adults may be unwilling to run the risk of being sued and they may also dissuade their children from participating in sport. This would be unfortunate. Sport is an integral and important element in society. It plays a significant role in the health and fitness of the community. It involves children in activities which promote social co-operation and build character and social responsibility. It assists in building a sense of community and social cohesion. Clearly the legal system should promote and encourage sporting activity and not inhibit participation. Thirdly, the spectre of negligence liability may diminish the number of people who are involved as coaches, volunteers and organizers in the vast network of community clubs and voluntary associations. The reluctance of the Manitoba Court of Appeal to impose liability on a player in this case is mirrored by cases involving officials and voluntary associations. A popular explanation of *Dyck v. Manitoba Snowmobile Association*[80] is that the waiver of liability was upheld because one defendant was a volunteer official and the other was a voluntary association. At least one judge has spoken openly of these policy concerns. In *Smith v. Horizon Aero Sports Ltd.*[81] Spencer J. stated:[82]

> I think there is a policy reason for exacting a lower standard of care from a voluntary non-profit organization like this defendant - than from any other person. That reason is that it is in the interest of society that voluntary efforts directed towards promoting exellence and safety in any field of endeavour are to be encouraged. If the standard

---

[80] (1981), 15 Man. R. (2d) 22 affirmed (1985), 35 Man. R. (2d) (S.C.C.). In that case the defendant official was responsible for waving the chequered flag to indicate the finish of a snowmobile race in which the plaintiff was a participant. The defendant was clearly negligent in moving far out into the track and into the path of the onrushing snowmobilers. The plaintiff, in an attempt to avoid the defendant, lost control of his snowmobile and crashed. He suffered serious injuries. His claim was defeated by a boiler plate waiver clause in the competition application form. It was held to protect the Snowmobile Association and its officials. For a spirited attack on the judgment see D. Vaver, "Developments in Contract Law: The 1984-85 Term" (1986), 8 Supreme Court L.R. 109 at pp. 124-162.

[81] (1981), 130 D.L.R. (3d) 91 (B.C.S.C.).

[82] *Ibid.* at p. 110.

expected from a non profit organization is put too high, such organizations may depart the field.

Thus it may be argued that volunteer organizations, officials and players, indeed all the actors in the amateur sporting arena should be free from liability in all but the egregious case. The egregious case would, of course, be deliberate violence in violation of the rules. Finally, there are pragmatic reasons for refusing to apply negligence principles. There is, among sporting leagues in Manitoba, a widespread use of boiler-plate waivers of liability. The Court may have believed imposition of liability was a fruitless exercise because it would lead to the further use of waivers among participants. The policy goals of tort law would thereby be defeated. All these factors may explain the Court of Appeal's decision that broadly speaking in all but exceptional circumstances the loss caused in sporting events must lie where it falls.

However, there are strong policy factors which support the application of a general duty of care. The policies are those which underlie tort law generally; compensation, deterrence and education. The fundamental proposition of negligence law is that people who are injured by unreasonably risky conduct ought to be compensated and there is no reason why an athlete should be immune from this ubiquitous obligation. Sometimes compensation will not be achieved because of a lack of liability insurance but any assumption that most players are uninsured is probably ill founded. The liability insurance component of the standard homeowner's insurance policy or tenant's insurance will provide coverage for adults and children alike. Thus liability insurance is probably much more extensive than is commonly believed. In any event the history of negligence law is that insurance follows liability. If the Court had imposed liability in *Temple v. Hallem*[83] it may have encouraged sporting leagues to secure appropriate insurance coverage for the League and players. Fair and adequate compensation would then be available to those injured by irresponsible and reckless behaviour. As was noted in the discussion of *Fuerst v. St. Adolphe Co-op Park*[84] and *Tronrud v. French*,[85] victims of sporting and recreational accidents place heavy reliance on the tort

[83] *Supra*, note 62.

[84] *Supra*, note 36.

[85] *Supra*, note 37.

system to secure adequate compensation. Some will argue that special liability insurance would raise the cost of participation in sport and would consequently reduce participation and prevent some people from playing the sport altogether. On the other hand, it can be argued that the price of an activity should incorporate its full social cost. It may provide an incentive for safety or channel people to safer and less costly sports. This raises the notion of deterrence. Negligence law has long aspired to play a role in deterrence or accident prevention. Barnes makes the point:[86]

> In theory tort law operates to deter dangerous and unreasonable conduct. The possibility of civil liability may be seen, therefore, as one legal device to promote safety in sport; the individual cases are supposed to warn and educate both the parties and the public.

The deterrent role of tort law is diminished in the face of widespread and sufficient liability insurance. However, in the field of sports, given the perception of inadequate insurance coverage, negligence liability could create a strong incentive for safety. The Court could also have played a role as public educator. This case received more publicity from the Winnipeg media than most civil actions. It provided an opportunity for the Court to declare the need for common sense, and prudence in this modern era of diverse sporting and recreational activities.

Thus there were competing policies leading the Court in different directions and it is a pity that the Court did not address these issues fully. This explains the degree of ambivalence this case is likely to create. Ambivalence on a visceral level of corrective justice, ambivalence about the Court's reasoning and ambivalence about how appropriate social policy goals are to be achieved.

C. The Burden of Proof of Causation in the Negligence Action: *Westco Storage Ltd. v. Inter-City Gas Utilities Ltd.*[87]

The Court of Appeal decision in *Westco Storage Ltd. v. Inter-City Gas Utilities Ltd.*[88] raised some interesting issues relating to causation principles in the tort of negligence. The case involved an explosion and fire in the plaintiff's warehouse. Some months before the fire additions

---

[86] *Supra*, note 69 at p. 250.

[87] [1989] 4 W.W.R. 289 (Man. C.A.).

[88] *Ibid.*

were made to the warehouse. This required a re-routing of a gas service line to the building. It entailed welding a 90 degree elbow to existing piping. The weld was done negligently and gas leaked from it in small quantities. The defendant did not contest the trial judge's finding of negligence. The issue was one of causation. The plaintiff argued that the fire was caused by an explosion of gas that had accumulated under the concrete floor of the warehouse. The main difficulty in the plaintiff's case was in showing how gas leaking from a faulty weld outside the warehouse had travelled through the soil and under or through a deep concrete foundation. The Court of Appeal reversed the trial judge and held that causation had not been proved. Philp J.A., who wrote the main judgment,[89] recognized that causation is seldom established by direct testimony of an observed causal link. More often causation is established by legitimate and reasonable inferences drawn from facts proved on a balance of probabilities. Nevertheless, after a painstaking examination of a wealth of conflicting and technical evidence, his Lordship was led to the conclusion that "the plaintiff's theory of causation was not proved"[90] and that the gaps in causation could not be "bridged by reasonable deductions from the observed and proven facts so as to have the validity of legal proof."[91] The plaintiff had not discharged the burden of proof.

Indeed, the only real hope of success for the plaintiff in this case was to persuade the Court of Appeal to reverse the burden of proof and force the defendant to show that the leaky weld was unrelated to the fire and explosion. The plaintiff made that argument to the Court on the basis of *McGhee v. National Coal Board*.[92] That decision has been productive of a great deal of uncertainty, unpredictability and vacillation in both England and Canada since it was decided in 1973. It is, therefore, useful to briefly discuss the decision and to track its subsequent development before discussing the Court of Appeal's rejection of it in *Westco*.[93]

---

[89] Both Huband and Lyon JJ.A. wrote brief supporting judgments.

[90] *Supra*, note 87 at p. 317.

[91] *Ibid.*

[92] [1972] 3 All E.R. 1008 (H.L.).

[93] *Supra*, note 87.

In *McGhee v. National Coal Board*[94] the plaintiff was employed by the defendant as a labourer. One of his tasks was to clean brick kilns. The working conditions were hot, dry and dusty, and a few days after beginning the work he developed dermatitis. The only negligence that the employer had been guilty of was a failure to provide shower facilities so that the plaintiff could remove the sweat and grime at the end of his shift. Because of this the plaintiff was forced to ride home on his bicycle before washing. The key difficulty in the plaintiff's case was causation. The plaintiff could not prove on the balance of probabilities that the defendant's negligence 'caused or materially contributed to his loss'. There was an evidentiary gap. It was proved that hot and dusty conditions cause dermatitis but the medical expert was unable to testify that the failure to wash (the culpable cause) was an operative factor in producing the dermatitis or whether it was produced solely through the exposure to dust during the shift (the nonculpable cause). At most the lack of washing facilities materially increased the risk of dermatitis. It could not be proved that it was operative in producing or worsening the plaintiff's condition. Nevertheless, the House of Lords unanimously found that causation was established.

The clearest and most forthright judgment was that of Lord Wilberforce. He reversed the burden of proof. It was his view that where (1) the defendant has created an unreasonable risk of injury; (2) the plaintiff suffered a loss within the scope of that risk; (3) there was an evidentiary gap which the plaintiff was unable to close, the defendant was liable unless he was able to show on the balance of probabilities that his negligence was not a cause of the damage.[95] In his Lordship's opinion it was fair and just that a negligent defendant who created the risk and reasonably foresaw consequences of the kind suffered by the plaintiff should bear the loss. There were four other judgments,[96] of which Lord Reid's is most representative. He did not suggest that any technical reversal of the burden of proof was appropriate. His approach was to reject strict, logical and theoretical analyses of causation and to encourage a broad generous and practical approach to the evidence. He was unwilling to draw a distinction

---

[94] *Supra*, note 92.

[95] *Supra*, note 92 at p. 1012.

[96] Lords Reid, Simon of Glaisdale, Kilbrandon and Salmon also wrote judgments.

between materially contributing to loss and materially increasing the risk of loss and he called for a practical approach based on how "the ordinary man's mind works in everyday affairs in life."[97] On this basis Lord Reid was willing to conclude that the defendant's negligence caused the loss. It can be argued that Lord Reid did not go beyond traditional principle and that he merely drew a legitimate and reasonable inference from proved facts. It should be pointed out, however, that the medical expert was not willing to make such an inference and further that a material increase in risk *is* conceptually distinct from a material contribution to the loss. The latter requires one to be persuaded that the risk was operative in producing the damage. If a material increase in risk is to be sufficient to *prima facie* establish causation, the gulf between Lord Wilberforce's judgment and the balance of the Court is more apparent than real.

In the circumstances of the case the decision relaxing causation rules was not surprising. It was entirely consistent with the general pro plaintiff drift of tort law in respect of personal injury claims. Moreover, English courts have been very sympathetic to plaintiffs who suffer losses in the workplace and have adopted a generous approach to similar cases involving illness caused by a cumulation of culpable and non culpable causes.[98] It is true that *McGhee*[99] was technically a case of *alternative* rather than *cumulative* risks but that difference is narrowed by the fact that the alternative risks were both under the control of the defendant.

Initially *McGhee*[100] found a warm reception among Canadian Courts of Appeal. The Manitoba Court of Appeal was the first Canadian appeal court to consider the *McGhee*[101] doctrine. In *Powell v. Guttman*,[102] the Court approved and applied *McGhee*[103] in a

---

[97] *Supra*, note 92 at p. 1011.

[98] *Bonington Castings Ltd. v. Wardlaw* [1956] 1 All E.R. 615. See also J. Stapleton, "Re Gist of Negligence Pt. II" (1988), Law Quart. R. 388.

[99] *Supra*, note 92.

[100] *Ibid.*

[101] *Ibid.*

[102] [1978] 5 W.W.R. 228 (Man. C.A.).

[103] *Supra*, note 92.

medical malpractice case. O'Sullivan J.A. summed up the situation:[104]

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

Subsequently other Courts of Appeal adopted the *McGhee* principle in a wide variety of cases involving both personal injury and property losses.[105] Although the doctrine lacked the imprimatur of the Supreme Court, it was fair to say that the principle was well incorporated in Canadian tort law by the late 1980s.[106]

There was, however, some evidence that the Canadian courts were adding their own gloss to the *McGhee*[107] doctrine. Generally they have favoured the Wilberforce formulation of the principle but they have been increasingly cautious about accepting the notion that proof of negligence (material increase in the risk) and satisfaction of the remoteness rules (damage within the scope of the risk) would, in themselves, be sufficient to reverse the onus of proof. Some Courts of Appeal appear to require that the negligence and the damage are at least *plausibly* connected so that fairness and justice are served by placing the burden on the defendant. The decisions of Bayda J.A. in *Nowsco Well Service Ltd. v. Canadian Propane Gas and Oil*[108] and McGuigan J.A. in *Letnik v. Metro Toronto*[109] are good examples of

---

[104] *Supra*, note 102 at p. 241.

[105] *Nowsco Well Service Ltd. v.* Canadian Propane Gas and Oil Ltd. (1981), 16 C.C.L.T. 23 (Sask. C.A.); *Delaney v.* Cascade River Holidays Ltd. (1983), 24 C.C.L.T. 6 (B.C.C.A.); *Dalpe v.* Edmunston (1979), 25 N.B.R. (2d) 102 (N.B.C.A.); *Re W.C.A.B. & Penney* (1980), 112 D.L.R. (3d) 95 (N.S.C.A.) and *Letnik v.* Toronto (1988), 44 C.C.L.T. 69 (Fed. C.A.).

[106] For a useful discussion of the doctrine see Weinrib, "A Step Forward in Factual Causation" (1975), 38 Mod. L.R. 518.

[107] *Supra*, note 102.

[108] (1981), 16 C.C.L.T. 23 (Sask. C.A.).

[109] (1988), 44 C.C.L.T. 69 (Fed. C.A.).

this. In *Nowsco Well Service*[110] an explosion took place in the plaintiff's garage. At the time the defendant's propane supply truck was in the garage for repairs. It was suggested that propane must have leaked from the truck and have been ignited by the overhead heating system used in the garage. Bayda J.A., speaking for the majority of the Saskatchewan Court of Appeal, found the defendant negligent and applied *McGhee* to establish cause. His Lordship cited Lord Wilberforce with approval but pointed out that evidence of negligence and damage within the scope of the risk will not in itself bring the presumption into play. He stated:[111]

> Lord Wilberforce's first principle focuses upon the breach of duty of care. For the principle to apply, that breach must create a risk and there must occur an injury within the area of the risk. But, it may be asked, does not every breach of duty create a risk? For example, does not a careless driver create the risk of a collision with another motor vehicle? If injury occurs within the area of risk - that is, if a collision with another vehicle occurs - does the law place the onus of disproving causation on the offending driver? To be sure, it does not. But that is not the situation contemplated by the principle under examination here. Rather the breach of duty contemplated must be such that the risk it creates is of a magnitude that would prompt one to say about that risk "it is so unreasonable that injury is more likely to occur than not". In the parlance of the ordinary man one must be able to say that the creator of the risk was "certainly asking for trouble."
>
> At first glance, it may appear that to engage this principle is to relieve the plaintiff from proving causation. Not at all. To engage the principle is to find that the proof, by the plaintiff, of a breach of duty (by the defendant), that creates an unreasonable risk followed by an injury in the area of the risk is to provide prima facie proof of causation.
> ...
>
> I turn now to the second "consideration of importance" stated by Lord Wilberforce - the inherent difficulty from the evidential point of view of proving causation. Briefly put, if causation is overwhelmingly difficult to prove or impossible to prove then it is a matter of public policy or justice that it is the creator of the risk who should be put to the trouble of hurdling the difficulty or bearing the consequences.

This point was underlined in *Letnik v. Toronto*.[112] The defendant's paddle steamer collided with the plaintiff's vessel "Normac." Two weeks later the Normac, which was operated as a floating restaurant,

---

[110] *Supra*, note 108.

[111] *Supra*, note 108 at p. 27.

[112] *Supra*, note 109.

sank. The negligence of the defendant was established but the issue of causation was not capable of proof by direct evidence. The respondents argued that the *McGhee* doctrine should not be applied solely on the grounds that the sinking was within the risk created by the defendant's negligence. The risk must be defined in terms of time as well as place. McGuigan J.A. cited both Lord Wilberforce's views and the passage from *Nowsco Well Service* cited above with approval and remarked that:[113]

> [E]veryone must agree that there could be periods of time after which it would be unreasonable to place the burden of proof on a tortfeasor with respect to possible consequences of his negligence. ... Where the danger at stake, for instance, is of an environmental kind as time increases it might become increasingly difficult to infer that newly-observed deterioration was probably caused by the initial negligence.

Nevertheless, on the facts under review his Lordship encountered no such difficulties and he found that the sudden sinking of a ship which had been at the same berth without problems for 12 years just two weeks after a collision made it overwhelmingly "probable at a practical level that the colliding ship was responsible unless its owners can show otherwise."[114]

Thus Canadian courts appeared to be striving for a controlled and moderate application of the *McGhee*[115] doctrine. The Canadian position was far from clear but emphasis was being placed on the significance and seriousness of the risk, a clear evidentiary gap,[116] the plausibility of a causal link between the actions and the loss, and the overall demands of fairness and justice between the parties. Only then would the burden of proof be shifted to the defendant.

However, in 1988 in *Wilsher v. Essex Area Health Authority*[117], the House of Lords reconsidered the *McGhee* doctrine. The case was one of medical malpractice. The plaintiff was born prematurely and required immediate medical attention. Subsequently it was discovered that he was suffering from retrolental fibroplasia, a condition of

---

[113] *Supra*, note 109 at p. 95.

[114] *Ibid.*

[115] *Supra*, note 92.

[116] See *Torrison v. Colwill* (1988), 47 C.C.L.T. 198 (B.C.C.A.).

[117] [1988] 1 All E.R. 871 (H.L.).

almost total blindness. It was the cause of this condition that was at issue. It may have been caused by a series of non-culpable conditions associated with premature birth or it may have been a result of the defendant's *negligence* in administering excessive amounts of oxygen to the plaintiff after birth. The evidence could only establish that excessive administration of oxygen created an increased risk of retrolental fibrosplasia. The Court of Appeal applied *McGhee* and placed the burden of proof in respect of causation on the defendant. Liability was imposed. However, the House of Lords upheld the appeal and ordered a new trial on the issue. The House of Lords repudiated Lord Wilberforce's views and explained the judgment of Lord Reid and that of the other members of the Court as being entirely consistent with traditional theory. Lord Bridge reviewed the judgments in *McGhee* and stated:[118]

> The conclusion I draw from these passages is that *McGhee v. National Coal Board* laid down no principles of law whatever. On the contrary, it affirmed the principle that the onus of proving causation lies on the pursuer or plaintiff. Adopting a robust and pragmatic approach to the undisputed primary facts of the case the majority concluded that it was a legitimate inference of fact that the defenders' negligence had materially contributed to the pursuer's injury. The decision in my opinion is of no greater significance than that and the attempt to extract from it some esoteric principle which in some way modifies as a matter of law the nature of the burden of proof of causation which a plaintiff or pursuer must discharge once he has established a relevant breach of duty is a fruitless one.

Thus the *McGhee* decision was explained away as involving no more than a robust and pragmatic inference drawn from primary facts, even though the medical experts in *McGhee*[119] refused to draw such an inference.

Like *McGhee*,[120] the *Wilsher*[121] decision is a product of time, place and circumstance. In recent years the House of Lords has been notoriously protective of the medical profession and has avoided any change in the law which would lead to greater recovery by injured

---

[118] *Supra*, note 117 at pp. 881-882.

[119] *Supra*, note 92.

[120] *Ibid.*

[121] *Supra*, note 117.

patients.[122] Thus the House of Lords would not be sympathetic to a pro plaintiff doctrine of dubious precision being applied in medical malpractice cases. Furthermore, the decision in *Wilsher* is entirely consistent with the current conservative trend in tort decision-making in the House of Lords.[123] This of course speaks to the desirability of Canadian courts evaluating the *McGhee* doctrine in terms of Canadian negligence law, in the light of Canadian interpretation of the principle reflected in *Nowsco Well Service*[124] and *Letnik*,[125] and on the general desirability of relieving some of the burden of proving causation from plaintiffs.

There was an uneven response to the *McGhee* doctrine after the *Wilsher* decision. It was ruled to be inapplicable in cases of informed consent by the New Brunswick Court of Appeal in *Kitchen v. McMullin*[126] and the British Columbia Court of Appeal expressed no enthusiasm for it in *Rendall v. Ewert*.[127] However in the later decision of the British Columbia Court of Appeal in *Haag v. Marshall*,[128] Lambert J.A. supported and contributed to the developing Canadian interpretation of *McGhee*. In that case the Court considered the issue of causation in the context of a solicitor's negligence. Lambert J.A., in a judgment in which Carrothers J.A. concurred, rejected the view that mere proof of an increase in the magnitude of the risk and damage within the scope of the risk reversed the legal onus of proof. He adopted the Canadian version of

---

[122] *Whitehouse v.* Jordan, [1981] 1 W.L.R. 246 (H.L.); *Sidaway v.* Bethlem Hospital, [1985] 1 All E.R. 643 (H.C.). See also Grubb, "A Survey of Medical Malpractice Law in England: Crisis? What Crisis?" (1985), 1 Jo. of Contem. Health Law and Policy 75; Grubb, "Medical Law - Doctor's Advice and the Reasonable Man: Do We Need a Second Opinion?" [1984] C.L.J. 240; Grubb, *Contraceptive Advice and Doctors. A Law Unto Themselves* [1988] C.C.J. 12.

[123] See "Retreat from *Anns*" (1987), 103 L.Q. Rev. 320 and R. Kidner, "Retreat from the *Anns* Principle: The Variable Nature of Proximity in Negligence" (1987), 7 Legal Stud. 319.

[124] *Supra*, note 108.

[125] *Supra*, note 109.

[126] (1989), 62 D.L.R. (4th) 481 (N.B.C.A.).

[127] (1989), 60 D.L.R. (4th) 513 at pp. 516-517.

[128] (1989), 61 D.L.R. (4th) 317 (B.C.C.A.).

McGhee as developed in *Nowsco Well Service Ltd. v. Canadian Gas and Oil Ltd.*[129] and *Letnik v. Metropolitan Toronto*,[130] describing it as a more cautious inference principle. His Lordship stated:[131]

> The 'inference' principle derived from McGhee and from the three Canadian cases to which I have referred is this: Where a breach of duty has occurred and damage is shown to have arisen within the area of risk which brought the duty into being, and where the breach of duty materially increased the risk that damage of that type would occur, and where it is impossible in a practical sense for either party to lead evidence which would establish either that the breach of duty caused the loss or that it did not, then it is permissible to infer, as a matter of legal, though not necessarily logical, inference, that the material increase in risk arising from the breach of duty constituted a material contributing cause of the loss and as such a foundation for a finding of liability.
>
> The legal inference permitted by the principle may be prodded along by the concept that as between an innocent plaintiff and a defendant who has committed a breach of duty to the plaintiff and by so doing materially increased the risk of loss to the plaintiff in a situation where it is impossible, as a practical matter, to prove whether the breach of duty caused the loss, it is more in keeping with a common sense approach to causation as a tool of justice to let liability fall on the defendant.

In the particular case Lambert J.A. felt that the facts could not support the application of the principle outlined above. There has been some support for Lambert J.A.'s view. The passage quoted above has been cited without disapproval in *Belknap v. Meakes*[132] and *Keraift v. Grunerud*,[133] both decisions of the British Columbia Court of Appeal.

It was in the context of this uncertainty that the Court of Appeal decided *Westco Storage Ltd. v. Inter-City Gas*.[134] The Court could have applied or distinguished *McGhee*. It could have been applied on the grounds that the faulty weld created a material risk of fire and explosion and the plaintiff suffered damage within the scope of that risk. On the other hand, the Court could have relied on the recent

---

[129] *Supra*, note 108.

[130] *Supra*, note 109.

[131] *Supra*, note 130 at p. 379.

[132] (1989), 64 D.L.R. (4th) 452 (B.C.C.A.).

[133] (1990), 67 D.L.R. (4th) 475 (B.C.C.A.).

[134] *Supra*, note 87.

Canadian interpretation of the doctrine and distinguished the case on the grounds that the magnitude of the risk was small and the plaintiff's theory of causation was so implausible, speculative and unsupported by the evidence that it would not be just nor reasonable to make any inference of causation and thereby reverse the burden of proof.

The Court of Appeal took a more categorical approach. It summarily rejected the *McGhee* case without discussion of any Canadian decision including its own decision in *Powell v. Guttmann*.[135] The Court followed the *Wilsher* decision. Philp J.A. stated:[136]

> In my view the onus was upon the plaintiffs to prove that I.C.G.'s negligence was the cause of the plaintiff's loss. Some authors and judges have expressed the view that a new principle emerged from *McGhee v. Nat. Coal Bd.* ... which shifts the onus of proof of causation from the plaintiff to the defendant where the defendant is negligent and his negligence materially increases the risk of injury ... That view has been put to rest by the recent decision of the House of Lords.

His Lordship then cited the passage from *Wilsher* that has been quoted earlier in this article and concluded:[137]

> The crucial question on this appeal is whether the inferences drawn by the trial judge to bridge the gaps in the direct evidence separating cause and effect are reasonable ones. Do they find a degree of reasonable probability from a 'robust and pragmatic approach to the undisputed primary facts of the case'? In my view they do not.

Thus the Manitoba Court of Appeal was the first Canadian appellate court to adopt *McGhee* and is the first to categorically reject it. The Court has reasserted traditional causation principles.

It is a pity that the Court did not discuss the *McGhee* doctrine at greater length. Causation is an issue of broad importance. It is a difficult hurdle for plaintiffs in a variety of cases including those of medical malpractice and nervous shock. In cases involving personal injury there are strong arguments in terms of fairness, compensation and accident prevention for some relaxation of causation principles. In cases involving property losses patterns of first party insurance make the arguments less compelling. Furthermore, much of the future

---

[135] *Supra*, note 102.

[136] *Supra*, note 87 at p. 301-302.

[137] *Supra*, note 87 at p. 302.

development of Canadian tort law will centre on causation principles. In the United States there have been significant developments in the area known as the 'toxic torts.' They deal with the liability of manufacturers, retailers, controllers and users of toxic chemicals and products. There has been a great deal of American litigation relating to agent orange, asbestos, D.E.S., the Dalkon Shield, cigarettes and other carcinogenic and toxic substances. This litigation has led many courts to reassess and modify causation doctrine to facilitate the recovery of those who are injured or become ill as a result of the toxic substances.[138] There are increasing scientific data and statistical information relating to the risks of various chemical and environmental hazards and no less an authority than Linden has noted that the *McGhee* decision "has much to commend it."[139]

Nevertheless, in a very recent decision the Supreme Court has indicated that the Manitoba Court of Appeal was correct in preferring *Wilsher* decision to that of *McGhee*. The case is *Farrell v. Snell*.[140] The defendant, Dr. Farrell, performed cataract surgery on Mrs. Snell, a seventy year old woman. In the course of injecting an anaesthetic into the retrobulbar muscles behind her right eye some bleeding occurred. Pressure caused by such bleeding can threaten the optic nerve and lead to blindness. The prudent course of action is to discontinue the surgery, since the operation may exacerbate the bleeding and consequently increase the danger to the optic nerve. The defendant, however, continued and completed the procedure. Much later it was discovered that the plaintiff's optic nerve had atrophied resulting in a loss of sight. The plaintiff sued Dr. Farrell. He was clearly negligent but the evidence of causation was equivocal. The medical experts testified that although the nerve damage had been caused by a stroke in the eye, it was not clear if it was caused by excessive bleeding or by natural causes such as the plaintiff's cardiovascular disease. The experts were unable to conclude which was the

---

[138] For a good discussion of some of these issues see R. Rabin, "Tort Law in Transition: Tracing the Patterns of Sociological Change" (1988), 23 Valparaiso University Law Rev. 1 at pp. 15-24; J. Fleming, "Probabilistic Causation in Tort Law" (1989), 68 Can. Bar Rev. 661.

[139] Linden, *Canadian Tort Law* (4th ed.) 1987 at p. 103.

[140] Unreported Decision, Supreme Court of Canada [1990] S.C.J. No. 73. This decision was perhaps foreshadowed by the Supreme Court's refusal to give leave to appeal in *Westco Storage Ltd. v.* Inter-City Gas Utilities Ltd., [1989] 6 W.W.R. ixviii.

operative cause. The New Brunswick courts used the *McGhee* doctrine to hold the defendant liable. The defendant appealed.

The judgment of the Supreme Court was delivered by Sopinka J. His Lordship noted that Canadian courts had tended to follow *McGhee*[141] before *Wilsher*[142] was decided and to follow *Wilsher* after it was decided. In his Lordship's view the correct path for Canadian courts is to follow *Wilsher*. His Lordship clearly rejected Lord Wilberforce's view that proof of negligence (an increase in risk) and damage within the scope of that risk is sufficient to reverse the legal burden of proof. Sopinka J. declined to make any theoretical change in the traditional causation rules relating to burden of proof. His Lordship gave two main reasons for refusing to change the law. First, his Lordship stated that traditional principles were adequate to the task and that he was not convinced that "defendants who have a substantial connection with the injury were escaping liability because plaintiffs could not prove causation under existing rules."[143] Secondly, his Lordship expressed a concern that the liberalisation of rules for recovery in medical malpractice cases may spark a flurry of claims and a consequential liability insurance crisis. Thus in his view change in the law was neither necessary nor desirable.

However his Lordship did recognize some warranted dissatisfaction with the way in which traditional principles have been *applied* in some cases. He called for a much more liberal, generous and pragmatic approach. He made the following points.

(i) The allocation of the burden of proof is a flexible concept and where, as in medical malpractice cases, the facts lie particularly within the knowledge of the defendant very little affirmative evidence on the part of the plaintiff will justify the drawing of an inference of causation.

(ii) In the absence of evidence to the contrary adduced by the defendant an inference of causation may be drawn although positive or scientific proof of causation has not been adduced.

(iii) It is not essential that medical experts provide a firm opinion supporting the plaintiff's theory of causation. This is because the

---

[141] *Supra*, note 92.

[142] *Supra*, note 117.

[143] *Supra*, note 140 at p. 11.

medical world speaks of cause in terms of certainties. The law contents itself with lesser standards of probability.

(iv) Drawing an inference was a matter of weighing the evidence and applying common sense.

In light of these factors Mrs. Snell had established cause on traditional principles. The lack of scientific proof and a positive medical opinion in support of her theory of causation did not prevent the drawing of an inference that the bleeding had caused the loss of eyesight. Sopinka J. did not analyse nor comment on Canadian cases since *McGhee* but it is doubtful that the approach in *Farrell* differs greatly in *result* from cases such as *Nowsco*,[144] *Letnik*[145] or *Haag*.[146] Indeed, in commenting broadly on Canadian authorities his Lordship stated:

> in the circumstances in which *McGhee* had been previously interpreted to support a reversal in the burden, an inference was now permissible to find causation notwithstanding that causation was not proved by positive evidence.[147]

That result, however, is now to be reached by a liberalized practice rather than a liberalization of rules. It does appear, however, that the rather tortuous evolution of the *McGhee* doctrine has made it easier for Canadian plaintiffs to establish causation.

It is also noteworthy that *Farrell v. Snell* does not completely foreclose the development of new liberal *rules* relating to the burden of proof in causation. Sopinka J. noted that the Court had on occasion altered the incidence of the burden of proof and would not hesitate to do so if causation principle prevented plaintiffs from proving their case against defendants who had a substantial connection to their injury. In particular his Lordship alluded to the toxic torts and American developments which challenged traditional approaches to causation. His Lordship noted that there has been little impact as yet on Canadian law but experience and fairness are the determinants of legal principle and current allocations of the burden of proof are not immutable. No doors have been irreversibly closed.

---

[144] *Supra*, note 108.

[145] *Supra*, note 112.

[146] *Supra*, note 129.

[147] *Supra*, note 140 at p. 11-12.

D. The Competition Act and Unlawful Interference with Economic Interests: *Westfair Foods v. Lippens Inc.*[148]

Westfair Foods v. Lippens Inc.[149] dealt with the relationship between the civil damages remedy under the *Competition Act*[150] and the common law economic torts. The case involved a dispute between a retailer, Westfair Foods, and one of its suppliers, Lippens. Westfair had sold products supplied by Lippens below the suggested retail price. In retaliation Lippens refused to continue supplying the product. This was alleged to be in contravention of the *Competition Act*. Westfair commenced an action relying on alternative bases of liability.

The first and most obvious cause of action was contained in s.36(1) of the *Competition Act*.[151] Under that section an action for damages may be brought by any person who has suffered loss as a result of conduct that is contrary to any provision of Part V of the Act. However s.36 restricts recovery of damages to special damages and costs. Westfair attempted to avoid the restrictive nature of the statutory remedy by suing in the common law torts of conspiracy and unlawful interference with economic interests. On this basis it hoped to expand its remedy to include general damages, exemplary damages and a mandatory injunction. The intriguing aspect of the case flows from the fact that the refusal to sell a product to another to control the price and restrain competition was not actionable at common law. It was necessary, therefore, to use the breach of the *Competition Act*[152] to supply the element of unlawful conduct which is essential in the common law torts of conspiracy and unlawful interference with economic interests.

Lippens brought a motion seeking a declaration that the civil remedy embodied in s.36(1) of the *Competition Act*[153] was unconstitutional or in the alternative that the plaintiff's remedy was restricted

---

[148] (1989), 61 Man. R. (2d) 282 (C.A.).

[149] *Supra*, note 148.

[150] R.S.C. 1985, c.C-34.

[151] *Ibid.*

[152] *Ibid.*

[153] *Ibid.*

to that outlined in the section and that the plaintiff was restricted to special damages and costs. The trial judge dismissed the motion. Before the appeal was heard the Supreme Court upheld the constitutionality of s.36(1) in *General Motors of Canada Ltd. v. City National Leasing*.[154] This left two significant remaining issues. The first was whether the plaintiff was restricted to the remedial scheme set out in the legislation. Secondly, whether the statutory breach could be used to satisfy the element of illegality in the named economic torts.

The Court of Appeal held that the plaintiff could seek to amplify its remedies by resorting to the common law. It was held that the legislation did not establish an exclusive remedial code for violation of the *Competition Act*[155] and a broader remedy could be sought from the vehicle of tort law. It was the Court's view that this was essentially a matter of statutory construction and the court concluded that Parliament did not intend to foreclose common law remedies. The *Competition Act*[156] was held to be a partial code which provided a limited remedy without intruding upon supplementary provincial remedies.[157]

The Court began its consideration of the second issue by assuming the existence of the torts of conspiracy and unlawful interference with business. Both torts require the proof of unlawful acts. The key question was whether this element could be supported by proof of statutory breach. The Court pointed out correctly that the plaintiff was not relying on the *tort* of breach of statutory duty. The Supreme Court has recently denied the existence of a separate tort of breach of statutory duty in Canada[158] and in any event a civil action for breach of statute is *expressly* provided under the *Competition Act* in

---

[154] [1989] 1 S.C.R. 641.

[155] *Supra*, note 150.

[156] *Supra*, note 150.

[157] A different approach was taken in Australia in respect of a civil damages remedy under their *Trade Practices Act 1974* (Cth). In *Broadlex Pty. Ltd. v.* Computer Co. Pty. Ltd. (1983), 50 A.L.R. 92 (N.S.W.S.C.) Clarke J. stated, "The case which it seeks to advance is a case of conduct breaching provisions of the *Trade Practices Act* for which specific remedies are provided ... [there can be no] reliance upon a cause of action separate and distinct from the cause of action specifically provided by the legislation for particular breaches of the legislation."

[158] *The Queen v.* Saskatchewan Wheat Pool (1983), 143 D.L.R. (3d) 9 (S.C.C.).

s.36. The plaintiff was relying on existing heads of tortious responsibility. Its use of the statute was restricted to supplying the essential element of illegality. The Court found this to be "intellectually acceptable."[159] The decision that a breach of statute is an unlawful act for the purposes of the economic torts was consistent with authority.[160] There has been some uncertainty about the meaning of 'unlawful means' in the economic torts[161] and breach of statute has not consistently been viewed as satisfying the tort requirement[162] but the breach here was actionable on behalf of the plaintiff[163] and the legislation is related to the limits of acceptable behaviour in the Canadian marketplace. Moreover, the decision is supported by the Supreme Court decision in *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*.[164] The plaintiff did not succeed in that case but the Court did not object to the use of breaches of the *Competition Act*[165] to satisfy the element of illegality in establishing the tort of conspiracy.

Most will welcome the Court of Appeal's decision that tort law can be used to strengthen the economic policies contained within the *Competition Act*.[166] It provides further incentive for private 'enforcement' of the Act and may, therefore, strengthen the deterrent function of the legislation. The wider scope of remedies available in tort law

---

[159] *Supra*, note 148 at p. 285.

[160] *Hargraves v.* Bretheron, [1958] 1 Q.B. 45, *O'Connor v.* Isaacs [1956] 2 Q.B. 288 cited in P. Burns, "Tort Injury to Economic Interests: Some Facets of Legal Response" (1980) 58 Can. Bar Rev. 103 at p. 141. See also *Daily Mirror Newspapers Ltd. v.* Gardner, [1968] 2 Q.B. 762.

[161] H. Carty, "Intentional Violation of Economic Interests: The Limits of Common Law Liability" (1988), 104 L.Q.R. 250 at pp. 265-273; M. Berry, "Intentionally Causing Economic Loss by Unlawful Means: A Consideration of the Innominate Tort" (1988), 6 Otago L.R. 533 at pp. 544-547; Dias and Markesinis, *Tort Law* (2nd ed.) 1989 at pp. 264-267.

[162] *Lonrho Ltd. v.* Shell Petroleum Co. Ltd., [1982] A.C. 173 (H.L.).

[163] *Ibid.*

[164] (1983), 145 D.L.R. (3d) 385 (S.C.C.).

[165] *Supra*, note 150.

[166] *Ibid.*

will provide greater protection for those suffering loss and may assist in preventing any unjust enrichment of defendants. In future, lawyers will have to weigh carefully the advantages of relying on the economic torts. It is important to note however that the economic torts do not duplicate nor fully displace the statutory remedy under the *Competition Act*.[167] In particular instances it may be more difficult to establish the elements of the nominate torts than the elements of a claim under s.36(1). This can be illustrated by brief consideration of the two nominate torts relied on in *Westfair v. Lippens*,[168] conspiracy and unlawful interference with economic interests.

The tort of conspiracy was recently considered by the Supreme Court in *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*[169] The case involved a conspiracy to restrict competition in contravention of the *Competition Act*.[170] Traditionally there have been two forms of conspiracy, conspiracy to injure and conspiracy to perform unlawful acts.[171] Conspiracy to injure is found where two or more parties have conspired for the primary purpose of injuring the plaintiff. It is purely the weight of numbers *and* the motive of the combination which makes the conduct tortious. The second type of conspiracy is conspiracy to perform unlawful acts. Given the illegality the purpose of the combination is of lesser significance. It was of course this branch of conspiracy on which the plaintiffs in *Westfair v. Lippens*[172] were relying. The decision in *Canada Cement*[173] was an important one on this dichotomy because

---

[167] *Ibid.*

[168] *Supra*, note 148.

[169] *Supra*, note 164.

[170] *Supra*, note 150.

[171] For a good discussion of conspiracy see P. Burns, "Civil Conspiracy: An Unwieldy Vessel Rides a Judicial Tempest" (1984), 16 U.B.C.L.R. 229; P. Burns, "Tort Injury to Economic Interests: Some Facets of Legal Response" (1980), 58 Can. Bar Rev. 103.

[172] *Supra*, note 140.

[173] *Supra*, note 156. A very useful comment on the case can be found in L. Klar, "Developments in Tort Law: The 1982-83 Term" (1984), 6 Supreme Court L.R. 309 at pp. 329-333.

the recent House of Lords decision in *Lonrho Ltd. v. Shell Petroleum*[174] had restricted the tort of conspiracy in England to the first category. The Supreme Court refused to follow its lead and maintained the second category of conspiracy. It recognized conspiracy to commit an unlawful act and set out its requirements in the following passage:[175]

> When the conduct of the defendants is unlawful, the conduct is directed to the plaintiff (alone or together with others) and the defendants should know in the circumstances that injury to the plaintiff is likely and does result.

Thus the plaintiffs in *Westfair* must establish: (i) a combination of two or more persons; (ii) the commission of unlawful acts; (iii) that the combination was directed towards the plaintiff; (iv) that damage to the plaintiff was likely; and (v) that the action of the defendants caused the damage in order to establish the conspiracy.

The tort of unlawful interference with economic interests has only recently been recognized by the Courts.[176] It has been referred to as a 'genus' tort of which all nominate economic torts depending upon unlawful means are but examples. Conspiracy to commit unlawful acts, intimidation and *indirect* inducement to breach of contract are all based upon intentional violation of economic interests by unlawful means. Complete amalgamation and rationalization of the individual torts has yet to occur but that is likely to take place in the future. In order to establish this tort the following matters must be established: (i) intention to harm the plaintiff; (ii) unlawful means; (iii) causation; (iv) damage to economic interest or trade and (v) lack of justification.

Thus it can be seen that these economic torts will not always replicate the action available under s.36. Much will depend upon the particular facts and the requisite components of the economic torts on

---

[174] [1982] A.C. 173.

[175] *Supra*, note 156 at p. 399.

[176] *International Brotherhood of Teamsters etc. Local 21 v.* Therien (1960), 22 D.L.R. (2d) 1 (S.C.C.); *Gershman v.* Manitoba Vegetable Producers' Marketing Board, [1976] 4 W.W.R. 406 (Man. C.A.); *Mintuck v.* Valley River Band No. 63A (1977), 75 D.L.R. (3d) 589 (Man. C.A.). See also P. Burns, "Tort Injury to Economic Interests: Some Facets of Legal Response" (1980), 58 Can. Bar Rev. 103; M. Berry, "Intentionally Causing Economic Loss by Unlawful Means: A Consideration of the Innominate Tort" (1988), 6 Otago Law Rev. 533; H. Carty "Intentional Violation of Economic Interests: The Limits of Common Law Liability" (1988), 104 L.Q.R. 250.

which reliance is placed. In many cases, however, it will be possible to overcome the restrictive nature of s.36(1).

E. Medical Malpractice: *Robertshaw v. Grimshaw*;[177] *Horbal v. Smith*[178] and *Monkman v. Singh*[179]

There were three medical malpractice cases reported in 1989. The Court of Appeal decided *Robertshaw v. Grimshaw*[180], while *Horbal v. Smith*[181] and *Monkman v. Singh*[182] were decided by the Queen's Bench. Individually the cases do not warrant extensive comment. They illustrate the application of standard principle to a variety of medical accidents.

Robertshaw v. Grimshaw[183] dealt with the failure of eight physicians to diagnose a brain aneurysm before it ruptured leading to the death of the patient. The deceased's symptoms were not typical of the condition and the Court agreed with the trial judge that none of the defendants was negligent. In *Horbal v. Smith*[184] the patient was admitted to hospital for treatment of manic depression. The patient had been heavily sedated and was lying on his back in a state of unconsciousness. The patient aspirated on his own blood and died. DeGraves J. found no negligence on the part of attending doctors or nurses in spite of the fact that simple measure such as placing the patient in the 'recovery position' might have avoided the tragedy. Only in *Monkman v. Singh*[185] did the plaintiff recover a modest judgment. In 1982 the plaintiff developed cancer in her left breast and she underwent a radical mastectomy. Subsequently, the defendant plastic

---

[177] (1989), 57 Man. R. (2d) 140 (C.A.).

[178] (1989), 60 Man. R. (2d) 105 (Q.B.).

[179] (1989), 62 Man. R. 277 (C.A.).

[180] *Supra*, note 177.

[181] *Supra*, note 178.

[182] *Supra*, note 179.

[183] *Supra*, note 177.

[184] *Supra*, note 178.

[185] *Supra*, note 179.

surgeon performed a reduction mammoplasty of her right breast prior to planned reconstructive surgery on the left breast. A pathology report indicating cancerous tissue in the right breast was misplaced and the defendant did not receive it. There was a period of one year before renewed concerns about her right breast led the defendant to realize he had not received the pathology report. He sought a copy of it from the hospital. Soon after the patient had her right breast removed and underwent chemotherapy with apparent success. Morse J. imposed liability on the ground that the defendant ought to have ensured that he obtained and read the pathology report. He had no system to check receipt of pathology reports in connection with cases and he should not have assumed that he had seen it and that it required no action. In making this decision the learned judge rejected expert testimony to the effect that a plastic surgeon who deals primarily with remodelling normal tissue is not expected to search out a pathology report unless there is some reason for suspicion. He relied on the well known decision of *Anderson v. Chasney*[186] that expert evidence of standard practice is not conclusive on the issue of due care. This is particularly so when the issue does not relate to expert knowledge, skill and experience. The Court was in as good a position as the expert to determine what should have been done. The weakest point of the plaintiff's case was causation. The Court found that chemotherapy could not have been avoided by an earlier diagnosis and the patient's long term prognosis was unaffected. However she would have avoided two minor operations on her right breast during the course of the year and she did suffer a great deal of frustration and anger as a consequence of the whole episode. An award of $10,000 was made.

Although these cases warrant little attention individually, they do raise broader concerns about the way the tort system deals with victims of medical accidents. Patients face enormous hurdles in pressing medical malpractice claims in Canada. The *Robertshaw v. Grimshaw*[187] litigation is a showcase of the difficulties and frustration of medical malpractice litigation. It is well to remember that the central issue in the litigation was a relatively simple one. Mrs. Robertshaw wanted to know if the death of her husband was caused by anybody's fault. It took the legal system seven years to give her an

---

[186] [1949] 4 D.L.R. 71 (Man. C.A.) affirmed [1950] 4 D.L.R. 233 (S.C.C.).

[187] *Supra*, note 177.

answer. The litigation was unusually complex and expensive. Eleven defendants including two hospitals, eight doctors and a medical group were sued. Eight counsel argued the case at trial for a total of thirty-five days. The Court was faced with a voluminous amount of conflicting testimony and expert evidence. The transcript of the trial ran to 5,310 pages and Barkman J. needed one year to deliberate before rendering judgment. As is so often the case the decision ultimately turned upon a narrow issue of credibility. Mrs. Robertshaw claimed that the deceased exhibited the classic symptoms of a bleeding brain aneurysm and that the doctors knew of these symptoms. The doctors uniformly claimed that the deceased did not have any symptoms of that kind. The trial judge preferred the doctor's evidence and on that basis found no negligence. Nine counsel appeared before the Court of Appeal for three more days before the appeal was dismissed.

Needless to say the cost of this litigation was far beyond the financial resources of the Robertshaw family. The family is in dire financial straits and Mrs. Robertshaw is a social assistance recipient. However the cost of such litigation is more profound than money. There has been a prodigious expenditure of legal and judicial talent. Doctors and nurses have devoted too much of their time and energy to the forensic process as witnesses, experts and parties. The defendant doctors have suffered the stress and anxiety of the adversary process and the fear of stained reputations. The plaintiffs have had the loss of a loved one compounded by seven years of expensive and ultimately fruitless litigation. Monnin C.J.M. delivered the Court of Appeal judgment. He displayed great sensitivity to the human dimension of the case. He left the recovery of costs to the discretion and compassion of each defendant. In his view the family had suffered "immeasurably" and had "suffered enough."[188] No *one* is responsible for this episode of human misery. If blame is to be found it is in the *system* of loss allocation.

There is probably a fairly broad consensus about the appropriate policy goals of the law in the area of medical accidents. They are to provide fair and reasonable compensation to patients who suffer avoidable injury as a result of medical treatment and to promote and maintain high standards of medical treatment. It is increasingly doubtful that the malpractice action is achieving either goal adequate-

[188] *Supra*, note 177 at p. 150.

ly. The Pritchard Report[189] when it is released to the public may point to better ways to achieve these goals.

IV. Court of Queen's Bench

A. Contributory Negligence and the Rule of Last Clear Chance: *Hunter v. Briere*[190]

Hunter v. Briere[191] dealt with a collision between a motorcycle and an automobile on a four lane bridge in Winnipeg. The defendant ran out of gasoline on the bridge. She left her car with the hood up and the emergency lights flashing, while she went to buy more fuel. Shortly thereafter, the plaintiff, who was riding a motorcycle, failed to see the defendant's car in time to avoid it safely. He was seriously injured. Wright J. found both defendant and plaintiff to be negligent. The defendant was held to be negligent on the ground that she knew her car was low on gas and that running out while on the highway could be reasonably anticipated. The reason for the finding of fault is, presumably, that a stalled car on a busy city bridge creates an unreasonable and foreseeable risk of injury to other motorists. In essence stalled cars are dangerous. This conclusion may surprise the average motorist who might well regard a stalled car as only causing inconvenience, delay and frustration. However the decision is consistent with the high standard of care required of drivers of automobiles.

The plaintiff was also found to have been negligent. His Lordship carefully considered all the relevant evidence relating to the accident and concluded "the defendant's vehicle was clearly visible for a considerable distance to any driver traveling ... towards it. That distance was ample to allow a driver operating his or her vehicle with due care and attention to pass the stalled vehicle without difficulty."[192] This was a clear case of contributory negligence. Many

---

[189] *Federal/Provincial/Territorial Review Committee on Liability and Compensation Issues in Health Care*, Chair J.R.S. Pritchard.

[190] [1989] 3 W.W.R. 528 (Man. Q.B.).

[191] *Ibid.*

[192] *Supra*, note 190 at p. 534.

would anticipate that the loss would be apportioned between the parties. However Wright J. drew a different conclusion:[193]

> In my view the plaintiff's negligence can be separated from the defendant's negligence. The plaintiff's negligence can be identified as the ultimate negligence causing the accident. This is not a case for an apportionment on the basis of contributory negligence. The circumstances here offer a classic example of a situation where the *Davies (Davis) v. Mann* (1842), 10 M & W 546, 152 E.R. 588 doctrine applies. The plaintiff had ample opportunity to avoid the effect of any negligence on the part of the defendant.

The "*Davies v. Mann*[194] doctrine" is of course the common law rule of last clear chance. A brief reminder of the development of contributory negligence rules may be useful in assessing Wright J.'s application of that rule in *Hunter v. Briere*.[195] It will be remembered that at common law contributory negligence was a complete bar to the plaintiff's case.[196] This rule was entirely consistent with the pro defendant bias of negligence liability in the nineteenth century. Nevertheless, the harshness of its effect in cases where the defendant's negligence was disproportionately greater than that of the plaintiff was difficult to ignore. The unfairness of the rule was avoided by development of the rule of last clear chance. The rule stated that if the defendant had the last clear chance of avoiding the accident and because of negligence failed to take that opportunity the loss was allocated totally to the *defendant*. It was a *device* to reverse the allocation of loss when the defendant's negligence was greater than the plaintiff's. However, only apportionment of loss could address the situation of mutual fault with an appropriate degree of flexibility and fairness. Just such a regime was implemented in Manitoba in 1934. The current provision of the *Tortfeasors and Contributory Negligence Act*[197] reads:

> Contributory negligence by a plaintiff is not a bar to the recovery of damages by him and in any action for damages that is founded on the negligence of the defendant, if

---

[193] *Supra*, note 190 at p. 536.

[194] (1842), 10 M & W 546, 152 E.R. 588.

[195] *Supra*, note 190.

[196] *Butterfield v.* Forrester (1809), 11 East 60, 103 E.R. 927.

[197] S.4 *Tortfeasors and Contributory Negligence Act*, C.C.S.M. c.T-90.

negligence is found on the part of the plaintiff which contributed to the damages, the court shall apportion the damages in proportion to the degree of negligence found against the plaintiff and defendant respectively.

This provision robbed the rule of last clear chance of its sole justification - to evade the rule that contributory negligence is a complete bar. Unfortunately, while the policy thrust of the legislation was clear, technical arguments favouring the survival of the last clear chance were made. These arguments and judicial affinity with and nostalgia for common law rules led some judges to assert that when the rule of last clear chance was applicable, apportionment was inappropriate and the full loss should continue to be allocated to the defendant. This view has been savagely criticized by academics and some members of the judiciary. This criticism has persuaded most judges to apportion in all but extreme situations but a stake has not yet been driven through the heart of the doctrine.[198]

It is therefore disappointing to find the rule of last clear chance given fresh life at the threshold of the 1990s. Even more troublesome are the circumstances in which Wright J. has applied the rule. It will be remembered that Wright J. decided that the *plaintiff* had the last clear chance to avoid the accident and that the loss should be fully allocated to him. But as we have noted the rule of last clear chance was developed to saddle the *defendant* with the full loss. The result produced in *Hunter v. Briere*[199] is consistent with the rule that contributory negligence is a complete bar to a claim. Thus the rule of last clear chance, which was developed to *evade* the "complete bar rule" has been used to create a complete bar to the plaintiff's claim. We have come full circle.

In *Hunter v. Briere*[200] both the defendant and the plaintiff were negligent and both acts of negligence were causes in fact of the damage. The loss ought to have been apportioned. It is difficult to find any rationale for imposing nineteenth century tort law to a case involving a compulsorily insured automobile owner in 1989.

---

[198] The history and current status of the rule of last clear chance is described in A. Linden, *Canadian Tort Law* (4th ed.) 1987 at pp. 425-438. See also M. MacIntyre, "Last Clear Chance after Thirty Years" (1955), 33 Can. Bar Rev. 257 and M. MacIntyre, "The Rationale of Last Clear Chance" (1940), 53 Harv. L. Rev. 1225.

[199] *Supra*, note 190.

[200] *Ibid.*

B. Products Liability: *Kirby v. Canadian Tire*[201]

The case of *Kirby v. Canadian Tire*[202] considered the extent of a manufacturer's liability for products. The plaintiff suffered a serious laceration to his wrist when removing a Moulinex food processor from its packaging. The plaintiff was cut by the metal S blade. There of course could be no claim for negligent manufacture of a *defective* product. The S blade was not defective, but it was dangerous in the same way as a knife or razor is dangerous. However, the manufacturer's obligation is broader than one of careful manufacture and certainly extends to an obligation to design, package and warn to a reasonable standard of prudence.

Some evidence was presented on the issue of negligent design. It was suggested that a permanent collar or ring device could be placed around the blades, thereby reducing the chance of injury. However, it was conceded that this might reduce the effectiveness of the machine. Clearly the Court was unable to impose liability for negligent design on such tentative and speculative evidence.

A stronger case was made for negligent packaging on the grounds that there should have been some protective covering on the edges of the blades so that a consumer could remove the product safely from the package. Some models did have a loose plastic covering. However the degree of risk involved here was small. No previous injuries had occurred in spite of sales of similar products totaling 600,000. The blade was not concealed and could be safely handled by means of a knob. On balance Jewers J. was unwilling to impose liability for failing to use a protective covering in packaging.

The final claim was made on the basis of inadequate warnings. It was argued that the warning of the dangers of the S blade given in the manual ought to have been repeated on the box containing the food processor. The Supreme Court in *Lambert v. Lastoplex*[203] has recognized that a manufacturer is obliged to provide sufficient warning to permit the safe use of an inherently dangerous product. However, there are certain common sense qualifications to this duty to warn. First, one is not obliged to warn of dangers which are obvious and well known to the reasonable consumer. The sale of knives, razor

---

[201] (1989), 57 Man. R. (2d) 207 (Q.B.).

[202] *Ibid.*

[203] (1971), 25 D.L.R. (3d) 121 (S.C.C.).

blades, pins and needles do not have to be accompanied by warnings that they may injure. Whether or not food processors have become so common that their dangers are fully absorbed into the consciousness of the consuming public is not clear. Jewers J. was able to base his judgment in another qualification. In this case the plaintiff had actual knowledge of food processors and their dangers. He was well aware of the danger of the S blade and there was consequently no need to warn him. In the words of Jewers J. the warning would have been "redundant." "He knew all about the dangers."[204] Nevertheless the case is a useful reminder of the growing diversity of obligations on manufacturers.

V. CONCLUSION

IN THE COURSE OF THIS ARTICLE fifteen Manitoba tort decisions decided in 1989 have been discussed in the text or mentioned in footnotes. Emphasis has been placed on the *Watkins*[205] litigation which reached the Supreme Court and six of the seven Court of Appeal judgments. Fully thirteen of the cases dealt with personal injury and fatal accident claims. Consequently, it is appropriate to concentrate on Manitoba's Court of Appeal and on accident compensation in a concluding section.

It is particularly difficult to draw reliable conclusions from the six disparate decisions of the Court of Appeal. Nevertheless, some themes emerge. The cases are all carefully analyzed and the decision making is competent and conscientious. Decision-making is on the whole cautious, conservative and precedent oriented. In this respect the Court of Appeal's judgment in *Watkins*,[206] a decision which not only flew in the face of established principle but also introduced potentially revolutionary changes in the field of damage assessment, was out of character. The Court is not reluctant to reverse the trial judge when its view of applicable law does not coincide with that of the Court below, but it is appropriately reluctant to do so on questions of fact and credibility. There is, however, a tendency in the Court to decide cases on narrow technical grounds and to avoid some of the larger

---

[204] *Supra*, note 201 at p. 213.

[205] *Watkins v.* Olafson, *supra*, note 2.

[206] *Supra*, note 27.

issues and concerns that cases raise. In a number of cases there were opportunities for the Court to contribute to the continuing evolution of tort law and influence its future development. The Court chose not to take advantage of those opportunities. Both *Temple v. Hallem*[207] and *Westco Storage Ltd. v. Inter-City Gas Utilities Ltd.*[208] provide good examples. In *Temple* there was a splendid opportunity to survey existing authority and academic writing and to consider how a just and reasonable accommodation can be reached between society's interests in promoting sporting activities and each player's interest in personal safety and security. In its result the Court clearly favoured society's interest in sport but it declined to discuss the issue fully. *Westco* was another 'opportunity lost.' Relaxation of causation requirements in negligence is an important current issue in tort law, and much of the future development of tort hinges upon judicial attitudes and creativity on this question. There was a growing Canadian jurisprudence based on the *McGhee*[209] case and to disregard it all on the grounds that the House of Lords has changed its mind is disappointing. In recent years the Supreme Court, in areas as diverse as limitations, liability of public authorities, informed consent and economic loss, has forged uniquely Canadian principles some of which are based on English cases which were subsequently narrowed or discredited by the House of Lords.[210] It is a pity that the Court did not take more time to comment on and evaluate on its own merits the developing Canadian principles of causation. Fortunately the Supreme Court in *Farrell v. Snell*[211] has since clarified the law relating to causation. Nevertheless, provincial courts of appeal have a growing responsibility in the development of private law and a more extensive analysis of pertinent authority, academic writing and policy

---

[207] *Supra*, note 62.

[208] *Supra*, note 87.

[209] *Supra*, note 92.

[210] See for example the Supreme Court's refusal to follow *Pirelli Gen. Cable Works Ltd. v.* Oscar Faber & Partners, [1983] 1 All E.R. 65 (H.L.) in *Kamloops v.* Nielson (1984) 29 C.C.C.T. 97 (S.C.C.) and the more robust Canadian development of *Anns v.* Merton London Borough Council, [1978] A.C. 728 in the field of negligence liability of municipalities in *Just v.* British Columbia (1990), 1 C.C.L.T. (2d) 1 (S.C.C.).

[211] *Supra*, note 140.

factors would improve immeasurably the contribution of Manitoba's Court of Appeal to tort law across Canada.

A final observation relates to the process of damage assessment in personal injury cases. This article began with a comment on the *Watkins*[212] litigation and it has been noted that thirteen of the fifteen cases were personal injury or fatal accident claims. Greater accuracy in assessment of damages and larger awards have been the legacy of "the trilogy" and yet the new era of damage assessment is not universally welcomed. In particular some of Manitoba's judges have serious reservations about the very large awards made possible under the new assessment process. Scollin J. in *Fuerst v. St. Adolphe Co-op* expressed his concern in these words:[213]

> ... as long as legislators shrink from providing an honorable and sensible system of periodic support for those who are seriously injured, whether by their own fault or not, the courts will be faced with claims such as this for staggering and almost incomprehensible capital sums for future care and potential earnings.

Furthermore, the Court of Appeal's decision in *Watkins*[214] was a reaction to the large award made for future care losses. There are three troublesome aspects of very large awards. First, the liability insurance crisis of the early 1980s drew attention to the fact that the liability insurance system is not a bottomless well from which limitless money may be taken without economic pain and adverse social consequences. Inflated awards can have significant systemic ramifications. Secondly, large awards exacerbate the gulf between successful litigants in the tort process and those who receive no compensation or less generous benefits from public compensatory schemes. This increases the sense of disproportion and inequity in the treatment of similarly disabled accident victims. Thirdly, in the cases decided in 1989, one begins to sense, on a purely intuitive and impressionistic level, that liberal compensation principles may be affecting *liability* determination. A concern for the future survival and integrity of the tort system may be leading some judges to a more pro defendant bias at the margins. Tort principles are susceptible to significant manipulation in adjudicated cases and it may be more than

---

[212] *Supra*, note 2.

[213] *Supra*, note 44 at p. 189.

[214] *Supra*, note 27.

coincidence that in only four cases of the thirteen did the plaintiff recover full damages. Five plaintiffs lost and four faced reductions for contributory negligence of 50% or more. Indeed in the trial judgements in *Fuerst v. St. Adolphe*[215] and *Tronrud v. French*[216] the spectre of contributory negligence as a bar hovered and it was applied in *Hunter v. Briere*.[217] Of course none of this amounts to proof and one is acutely aware that this is speculation on an unreliable sample. Nevertheless, it does invite us to consider the impact of the trilogy, not only upon assessment principles but on the whole tort/insurance system.

[215] *Supra*, note 15.

[216] *Supra*, note 20.

[217] *Supra*, note 10.