

A Review of Tort Decisions in Manitoba 1990-1993

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I. INTRODUCTION

THIS REVIEW WAS PRECEDED by two annual reviews of Manitoba tort law in 1988 and 1989.¹ This article covers a wider time frame, from 1990 to July 1, 1993. Consequently, much greater selectivity has been exercised among the many Manitoban tort decisions in that three-and-one-half-year period. Special emphasis has been given to decisions of the Manitoba Court of Appeal, but Queen's Bench decisions have been included on the basis of interest or importance. The purpose of such a review remains unaltered. An attempt has been made to highlight some of Manitoba's tort decisions, to place them in the context of tort doctrine, and to offer a few comments and occasional criticism.

Six Court of Appeal decisions are discussed. *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co. Ltd.*² deals with the extent of a builder's duty of care in respect of poor quality construction. It is perhaps the most important decision among the six. *Granville Savings and Mortgage Co. v. Slevin*³ explores the extent of the purchaser's solicitor's duty to an unrepresented mortgage lender. *Cabral v. Gupta*⁴ looks at causation issues while *Gerrard v. Manitoba*⁵ deals with the little known tort of misfeasance of public office.

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¹ P. H. Osborne, "A Review of Tort Decisions in Manitoba, 1988" (1990) 19 Man. L.J. 92 and P. H. Osborne, "A Review of Tort Decisions in Manitoba, 1989" (1990) 19 Man. L.J. 419.

² (1993), 15 C.C.L.T. (2d) 1.

³ (1993), 12 C.C.L.T. (2d) 275. The Supreme Court reversed this decision after this article was submitted for publication. A brief addendum has been added to the text recognizing this fact.

⁴ (1993), 13 C.C.L.T. (2d) 323.

⁵ (1993), 13 C.C.L.T. (2d) 256.

Finally *Fehr v. Jacob*⁶ and *Justice v. Cairnie Estate*⁷ deal with interesting limitation questions.

Seven cases have also been chosen from the Queen's Bench. *Witman v. Johnson*⁸ deals with the liability of owners for injuries caused by their dogs. It also provides an opportunity to consider the Manitoba Law Reform Commission Report on *Tort Liability for Animals 1992*. *MacGregor v. Penner*⁹ deals with nuisance and, in relationship to that case, mention is made of the recent *Farm Practices Protection Act*.¹⁰ *Desjardin v. Penner*¹¹ deals with the liability of a drunk driver to an injured passenger. Three cases *Silva v. Winnipeg*¹², *Anderson v. Anderson*¹³ and *Peters v. Reimer*¹⁴ are considered together. They all deal with the *Occupiers' Liability Act*¹⁵ and its interpretation. Finally, *De Groot v. St. Boniface Hospital*¹⁶ is discussed. It contains an interesting application of negligent misrepresentation principles in relation to a physician's application for surgical privileges.

II. COURT OF APPEAL

A. Liability for Defective Buildings: *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co. Ltd.*¹⁷

The Manitoba Court of Appeal decision in *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co. Ltd.*¹⁸ raises an issue which has recently vexed courts in all Commonwealth jurisdictions. The central issue can be portrayed in a simple hypothetical. A negligently builds a house. It contains a latent defect which is not

⁶ (1993), 14 C.C.L.T. (2d) 200.

⁷ (1993), 88 Man. R. (2d) 43.

⁸ (1990), 74 D.L.R. (4th) 428.

⁹ [1993] 1 W.W.R. 245 (Man. Q.B.). aff'd (3 December 1993), (Man. C.A.) [unreported].

¹⁰ S.M. 1992, c.41

¹¹ (1993), 80 Man. R. (2d) 85.

¹² [1993] 1 W.W.R. 691 (Man. Q.B.).

¹³ (7 July 1993), (Man. Q.B.) [unreported].

¹⁴ (1993), 86 Man. R. (2d) 295.

¹⁵ R.S.M. 1987, c. O8.

¹⁶ (1993), 15 C.C.L.T. (2d) 287.

¹⁷ *Supra* note 2.

¹⁸ *Ibid.*

discovered by the first owner, B. B sells the house to C who subsequently discovers the deficiencies and incurs repair costs. C seeks to recover her expenses. Normally, because there is no implied warranty of quality in a contract for 'second hand' houses, there is no effective claim in contract against B. Consequently, an action is brought in negligence against A. Conventional wisdom holds that such a tort claim is misconceived. While a negligence action may be appropriate for damage caused *by* the building, as in the event of property damage or personal injury caused by the collapse of all or part of it, it is inappropriate for damage *to* the building itself. Such a claim sounds only in contract, being by its nature a complaint arising from the quality of the building. To allow recovery in tort would circumvent privity rules and allow a person who is not a party to the contract, C, to sue for the benefit of a contract between A and B. Such tort claims are often identified as claims for economic loss and that reason is given for their failure. The real contest, however, is over the boundaries between tort and contract in relation to the quality of realty. As we shall see, the decision of the Court of Appeal in *Winnipeg Condominium Corporation No. 36 v. Bird Construction* is a very conventional decision and is accepting of traditional wisdom.

The case involved a high rise apartment block which was built in 1972 for Tuxedo Properties Co.. In 1978 it was converted to condominiums and sold to the plaintiff, Winnipeg Condominium Corp. No. 36. In 1982 there were concerns about the state of the stone cladding on the exterior of the building. Modest remedial work proved insufficient and, when in 1989 a large section of the cladding fell off the wall, a decision was made to replace the entire cladding at a cost of 1.5 million dollars. This cost was met ultimately by the individual condominium owners. In this action the plaintiff sought to recover the loss by way of an action in negligence against the general contractor (Bird), the sub-contractor who installed the cladding (Kornovski and Keller) and the architect (Smith Carter Partners). The defendants sought to have the statement of claim dismissed as disclosing no cause of action. At first instance they were unsuccessful. Bird appealed. A unanimous Court of Appeal (Scott C.J.M., Huband and Philp J.J.A.) allowed the appeal and struck out the claim against Bird.

Huband J.A. wrote for the Court. His Lordship could find no point of distinction and no good reason not to follow the House of Lords decision in *D & F Estates Ltd. v. Church Commissioners for England*¹⁹. His Lordship's claim that *D & F Estates* was indistinguish-

¹⁹ [1988] 2 All E.R. 992 (H.L.).

able on the facts is plausible. He relied on the following passage from the judgment of Lord Bridge:

It seems to me clear that the cost of replacing the defective plaster itself ... was not an item of damage for which the builder ... could possibly be made liable in negligence under the principle of *Donoghue v. Stevenson* ... or any legitimate development of that principle. To make him so liable would be to impose on him for the benefit of those with whom he had no contractual relationship the obligation of one who warranted the quality of the plaster as regards materials, workmanship and fitness for purpose²⁰

Since the damage in *Bird* was to the building itself and not distinct property damage or personal injury caused by the collapse of the stone cladding, no tort claim was available.

Huband J.A. then distinguished three lines of authority which appeared to support the plaintiff's claim. First, there were the cases holding municipal authorities liable to first and subsequent purchasers for the cost of repairs where negligent inspections pursuant to statutory powers had failed to identify structural problems in the premises.²¹ At first glance it is difficult to determine why the municipality (public money) should be responsible for such loss when the original wrongdoer, the builder (private money) is immune from responsibility.²² These cases were distinguished on the grounds that they constitute a "discrete classification" of cases which recognize that the "local government should be held liable for economic loss where the purpose of the by-law or ordinance can be said to include protection against economic loss."²³ This point is summarized in the following passage:

Where the policy is cast in terms of a by-law or ordinance, the purpose of which is to protect against economic loss, it should not come as a surprise that damages under this head are awarded. But these cases constitute a discrete classification and do not constitute a valid precedent to resolve claims by subsequent owners against the

²⁰ *Ibid.* at 1007.

²¹ *Anns v. Merton London Borough*, [1977] 2 All E.R. 492 (H.L.); *City of Kamloops v. Nielson*, [1984] 2 S.C.R. 2; *Dutton v. Bognor Regis Building Co.*, [1972] 1 All E.R. 462 (C.A.); *Rothfield v. Manolagos*, [1989] 2 S.C.R. 1259; *Contra, Murphy v. Brentwood District Council*, [1991] 1 A.C. 398 (H.L.).

²² In England there is now some consistency. It is clear from *Murphy v. Brentwood District Council*, [1991] 1 A.C. 398 (H.L.) that neither builder nor municipal authority will be liable for latent defects in realty. *Anns v. Merton London Borough*, [1977] 2 All E.R. 492 (H.L.) was overruled.

²³ *Supra* note 17 at 10.

contractor at the time of construction as in the *D & F Estates* case or the present action.²⁴

The second line of cases included *Smith & Smith v. Melancon*²⁵ and *Ordog v. District of Mission*.²⁶ These decisions, which were inconsistent with *D & F Estates*, were distinguished on the basis that the plaintiffs had a contractual link with the builder and could therefore be explained on the basis of very strong proximity. The final authority which caused more difficulty was *F. Fentiman & Sons Ltd. v. University of Regina*.²⁷ The case imposed liability on both the designer and fabricator of a roof on a gymnasium at the University of Regina. The roof had to be replaced at a cost of \$800,000 because of inherent deficiencies. Huband J.A. distinguished the case on the grounds that the plaintiff placed reliance on the special skills of the defendants and that the plaintiff was in substance, if not in name, the same entity as the original owner.²⁸ Clearly much effort was expended by his Lordship to portray *Winnipeg Condominium Corp. No. 36 v. Bird* as in a distinct class of cases where no duty of care is owed. The authorities that he distinguished could have been used to portray Canadian law as uncomfortable with the law portrayed by *D. & F. Estates* and illustrative of a willingness to create a variety of exceptions which undermine the rule and threaten its continued vitality.

Huband J.A. does, however, seek to persuade us with more than authority. In his view, it is inappropriate for the plaintiff to place reliance on the fact that reputable contractors were involved in the construction of the building and from that assume the integrity of it. In the absence of special factors, *caveat emptor* indicated that purchasers must rely on their own inspections and investigations, appropriate contractual provisions or insurance coverage against anticipated risks. Clearly for Huband J.A. the conventional wisdom is appropriate in Manitoba in the 1990s.

²⁴ *Supra* note 17 at 10.

²⁵ [1976] 4 W.W.R. 9 (B.C.S.C.).

²⁶ (1980), 110 D.L.R. (3d) 718 (B.C.S.C.).

²⁷ (1991), 6 C.C.L.T. (2d) 1 (Sask. C.A.).

²⁸ There are similarities with the much maligned decision in the House of Lords in *Junior Books Ltd. v. Veitch Co. Ltd.*, [1983] 1 A.C. 520 which permitted a building quality claim on the ground of special proximity and reliance between the builder and the plaintiff. The case was restrictively distinguished but not overruled in *Murphy v. Brentwood District Council*, *supra* note 21.

As in every case, there is another side to this issue, one which understandably does not receive a great deal of sympathetic consideration from the Court. It may be argued that it is appropriate to dispense with the arbitrary and conventional citadel of privity doctrine and impose a duty of care on builders to subsequent purchasers. Such a development would result in a transmissible warranty of reasonable quality running with the property.²⁹ The reasons given for such a position are set out in summary form.³⁰

- (i) Builders by use of their knowledge, skill and expertise are in the best position to ensure the reasonable structural integrity of buildings and their freedom from latent defect.
- (ii) Imposition of liability on builders will provide an added incentive for care and a deterrent against poor workmanship.
- (iii) It may be extremely difficult for a purchaser to detect latent defects in real estate even with expert assistance.
- (iv) Current patterns of insurance would indicate that the builder is in the best position to spread the loss. Most builders carry liability insurance. Few purchasers have insurance that will cover the quality of construction.
- (v) The builder is a wrongdoer who *vis à vis* an innocent sub-purchaser ought to bear the loss.
- (vi) In a mobile society in which houses are brought and sold frequently a builder will receive undue protection from a rule limiting accountability to the first purchaser. It could encourage 'sham' sales to provide legal immunity for structural defects.

²⁹ New Zealand courts have been willing to fashion a judicial, transmissible warranty of reasonable care in the construction of realty. See *Bowen v. Paramount Builders (Hamilton) Ltd.*, [1977] 1 N.Z.L.R. 394 (C.A.).

³⁰ Many of these reasons are canvassed in *Bowen v. Paramount Builders (Hamilton) Ltd.* (*supra* note 29) and by Sir Robin Cooke in "An Impossible Distinction" (1991) 107 L.Q. Rev. 46.

- (vii) Any obligation owed to the subpurchaser would be tied to the obligation of reasonable care and skill in construction owed to the first purchaser. The nature of the *obligation* will remain unchanged.
- (viii) Residential realty is the most onerous and expensive transaction incurred by many people in their lifetime. Greater protection should be provided by the law against shoddy construction practices.

These are plausible arguments in favour of a duty of care and they explain the equivocal nature of the authorities. The issue at stake in *Bird* required a value judgment between protecting builders from more extensive liability for structural defects and protecting purchasers against poor construction practices by developing a mandatory warranty of reasonable quality running with the property. The Court chose the first interest over the latter.

Interestingly, the facts of *Bird* permitted the kind of gradualism which is so appealing to judges. A cautious and incremental development in the protection of owners of realty could have been achieved by stressing the nature of the defect. *Bird* was not a mere quality defect case. It involved an extremely dangerous defect which threatened death and serious personal injury to tenants and visitors and property damage. A seven metre length of stone, one storey high had plunged nine storeys to the ground below. This was quite dramatically different from the plaster peeling off interior walls in *D & F Estates*. Here the plaintiff, as an occupier of the property, was legally obliged to remedy such a dangerous defect. Furthermore, if the builder was negligent and persons or property were damaged by a similar collapse, there would be little doubt of their liability. It seems difficult to perceive the policy reason which would deny the plaintiff the cost of repairs incurred to abort the danger, and protect the builder from liability. There is, however, authority of the Supreme Court which refused to recognise a distinction between dangerous and non-dangerous quality defects, but that case, *Rivtow Marine v. Washington Iron Works*,³¹ dealt with a defective *chattel* and contains a much cited and respected dissent by Laskin C.J. The Court of Appeal, however, declined to draw a new classification of cases on this narrow basis. The members of the Court set their collective face against a broader protection for the owners of residential real estate. *Caveat emptor*

³¹ (1973), 40 D.L.R. (3d) 530.

triumphed and the loss was held to lie, like the stone cladding, where it fell.

B. The Duty of Solicitors to Unrepresented Third Parties: *Granville Savings and Mortgage Co. v. Slevin*³²

*Granville Savings and Mortgage Co. v. Slevin*³³ dealt with an important and contentious issue relating to the extent of a solicitor's duty to an unrepresented third party who is dealing with her client. In this case the unrepresented third party was a mortgage company which was lending money to a purchaser of property who was represented by the defendant solicitor.

In this case the plaintiff, Granville Savings and Mortgage Corporation, agreed to loan \$45,000 to Stewart Roderick Smith. It was intended by Granville that the loan would be secured by a mortgage on real property owned by Smith and that the mortgage would be a first charge on the property. The mortgagee, Granville, did not retain solicitors to protect its interests in this transaction. Granville was content to hand the money over to the mortgagor's solicitors on the understanding that the transaction would be carried out according to the contractual arrangement between Granville and Smith and that the mortgage would be a first charge on the property. In due course Granville received a mortgage from Smith and a guarantee from a third party. Granville's concerns about the priority of the mortgage were satisfied when the mortgagor's solicitors supplied a certificate of charge signed by the District Registrar indicating that the mortgage was a first charge. However, notwithstanding the certificate of charge, the mortgage was in fact a sixth charge on the property ranking behind five registered judgments against Smith. The explanation of this was that as a consequence of a 1983 amendment to the *Real Property Act*³⁴ the District Registrar only assumes responsibility for an *exact name search* of the General Register and such a search had not disclosed judgments against S.R. Smith or Stewart R. Smith (Cf. Stewart Roderick Smith). The responsibility for a *broad search* is left with the mortgage lender or its solicitors.

When the mortgagor defaulted, Granville began a series of actions to recoup its losses. A default judgment against Smith went unsatisfied. Actions were then brought against the guarantor and Smith's

³² *Supra* note 3.

³³ *Ibid.*

³⁴ R.S.M. 1970, c. R30, as am. by S.M. 1982-83-84 c.7.

solicitors. The point of particular interest in a review of tort law is, of course, the action by Granville against the defendant solicitors. It tests the extent of a solicitor's duty to an unrepresented mortgage lender. The discussion will be restricted to that aspect of the case.

At trial Dureault J. imposed liability on the basis of negligence and on breach of an implied retainer between the defendants and Granville. The defendants appealed to the Court of Appeal. The Court did not agree on the negligence liability of the defendants. The majority of Huband and O'Sullivan JJ.A. allowed the appeal. Helper J.A. dissented. O'Sullivan J.A. was content, in the main, to agree with the judgment of Huband J.A..

Huband J.A. began by accepting that the defendants were guilty of negligent conduct. Their negligence was in believing that only charges disclosed in the exact name search would take priority over Granville's mortgage. This was incorrect. The intent of the 1983 amendment was merely to protect the assurance fund and the District Registrar from any liability for a failure to disclose registered charges in a name different from that in the instrument to be registered. It did not affect the priority of registered instruments. The duty to check more broadly was on the lender or the lender's solicitors. This misunderstanding of the law, was in Huband J.A.'s view, careless. Carelessness, of course, is insufficient to impose liability. The key issue was one of duty of care.

On this point Huband J.A. began by recognizing that it is possible for a solicitor to owe a duty of care to a person who is not her client. His Lordship examined two situations, where both parties are represented by lawyers and where only one party is represented. In his Lordship's view no duty of care could arise in the first situation. Where both parties to a transaction are represented each solicitor owes a duty of care solely to her own client and not to the other party to the transaction. Huband J.A. stated: "The kind of relationship which would give rise to a duty of care is negated by the duty to one's own client and the clash of interests between the parties."³⁵

His Lordship then turned to the situation at hand where only one of the parties is represented. In his view the situation, at least in this case, remained the same. He noted that Granville knew that the solicitors were employed to protect Smith's interests, not theirs. They knew that a conflict of interest might arise between a desperate borrower and a cautious lender. He concluded:

³⁵ *Supra* note 3 at 287.

These are not the circumstances where a special relationship arises by which the solicitors owe a duty of care to the party to the transaction whose interests they do not represent ... the circumstances negate rather than affirm the existence of that special relationship where Granville might be expected to rely on the solicitors.³⁶

In summary, his view is that Granville placed no trust or reliance on the solicitors and the solicitors had no reason to anticipate that Granville would rely on them. Without reliance no special relationship capable of breeding a duty of care could arise.³⁷

Helper J.A. agreed that the defendant solicitors were negligent. She emphasized that the defendant knew of the outstanding judgments and failed to either ascertain their status and priority appropriately or to warn Granville that the certificate of charge might be unreliable. Unlike Huband J.A. however, her Ladyship imposed a duty of care on the defendants. She portrayed the relationship between Granville and the solicitors as a special relationship given the knowledge of the solicitors that Granville was relying on them to protect their interests. The solicitors undertook to do the conveyancing work knowing that Granville would be relying on them. In her Ladyship's view *reliance* and *voluntary assumption of responsibility* are the key criteria to a special relationship giving rise to a duty of care. Each criterion was found on the facts and consequently the defendants were obliged to fulfil their contractual obligations to Smith in a way which was consistent with an obligation of care to Granville.

There are some points of agreement between Huband and Helper J.J.A.. Reliance is clearly a concept which both see as relevant in the determination of a duty of care. However, given their ultimate disagreement, this case invites further consideration of the general issue of a solicitors' liability to third parties. A useful framework of analysis is that utilized by Huband J.A.. He identified two situations: the liability of a solicitor where the third party is legally represented and the liability where the third party is not legally represented.

³⁶ *Ibid.* at 289.

³⁷ Huband J.A. went on to discuss an alternative argument that the solicitors had given an undertaking and had agreed to conditions Granville requested — that the mortgage would be a first charge on the property. His Lordship recognized that liability could be imposed where a solicitor gave a specific undertaking and had failed to abide by it. Such liability, however, would be based, not in tort or fiduciary duty, but on warranty. On the facts of the case his Lordship found that the solicitor did not warrant that the mortgage would be a first charge. There was rather an *understanding* that the solicitors would provide a certificate of charge indicating that the mortgage was a first charge; an understanding which they in fact fulfilled.

Huband J.A.'s view is that in the first situation "the duty not to injure one's neighbour simply does not apply where there are two parties with conflicting interests represented by their own solicitors."³⁸ This view is consistent with the concept of reliance. In most cases each party to the transaction will rely on her own solicitor to protect her interests and will not rely on the other party's lawyer. Equally, the other lawyer will not foresee reliance by the non-client and will not assume any responsibility to her. Huband J.A. found support for this view in *Wynston v. McDonald*³⁹ where Grange J. emphasized that the plaintiff relied on and trusted his own lawyer not the defendant's solicitor. However, Huband J.A. may have overstated the position. There may be special circumstances giving rise to a degree of reliance and a duty of care. An interesting case in this respect is *Allied Finance & Investments Ltd. v. Haddow & Co.*⁴⁰ Huband J.A. cited the New Zealand High Court decision in support of his position. That decision however was reversed by a unanimous Court of Appeal.⁴¹ This does not seem to have been drawn to his Lordship's attention. In that case the plaintiff finance company gave a \$25,000 loan to Roger Hill on the security of a yacht he intended to buy. Both the plaintiff and Hill were represented by solicitors. The plaintiff's solicitors requested that Hill's solicitors supply a security instrument binding on Hill and a certificate that there were no other charges against the yacht. These assurances were contained in a letter from Hill's solicitors. The money was provided. When Hill defaulted on the loan, it was discovered that the yacht was acquired not by Hill personally but by a company controlled by him. The solicitors of Hill were aware of this. The plaintiff sought to recoup its losses from Hill's solicitors. The Court of Appeal imposed liability on the solicitors in negligence. The Court alluded to a possible claim in contract on the basis of an undertaking by the defendant solicitors to provide the requisite assurances. The Court, however, declined to pursue such an analysis in part because of the difficulty in finding consideration for such promises.⁴² In separate judgments each of the three judges

³⁸ *Supra* note 3 at 287.

³⁹ (1979), 104 D.L.R. (3d) 527 *aff'd.* (1981), 119 D.L.R. (3d) 256 (C.A.).

⁴⁰ [1980] 2 N.Z.L.R. 428.

⁴¹ [1983] N.Z.L.R. 22 (N.Z.C.A.).

⁴² Cook J. stated:

In the present case it seems artificial to regard the [solicitors] to have requested the [lender] to make the loan to Hill. Without such a request by the [solicitors] it is

imposed a duty of care in negligence. Each recognized that as a general proposition a duty of care is owed only to one's client when each party to the transaction is represented but that special situations of reliance may repel such a conclusion. The following passages illustrate the Court's approach.

Cooke J. stated:

... the relationship between two solicitors acting for their respective clients does not normally of itself impose a duty of care on one solicitor to the client of another. Normally the relationship is not sufficiently proximate. Each solicitor is entitled to expect that the other party will look to his own solicitor for advice protection

But surely the result of established principles is different when on request a solicitor gives a certificate on which the other party must naturally be expected to act. ... The proximity is almost as close as it could be short of contract. ... [N]or are there any sufficient negating considerations. Far from disclaiming responsibility, the solicitor has virtually in terms accepted it. It would be strange if the law failed to impose a duty.⁴³

The theme of reliance is echoed by Richardson J.:

This is not the case of two solicitors simply acting for different parties in a commercial transaction. The special feature attracting the *prima facie* duty of care is the giving of a certificate in circumstances where the [solicitors] must have known it was likely to be relied on by the [lender].⁴⁴

McMullin J. took the same view:

... where a special reliance is placed on the solicitor by a client of another there seems no reason why a liability in tort should not arise. But before the proximity relationship is established to make the solicitor liable there must be some degree of reliance.⁴⁵

difficult to see that as between them and the lender there was consideration enabling the undertakings given by the [solicitors] to be binding in court. [*Ibid.* at 24].

Richardson J. made a similar point:

[T]here are obvious difficulties in spelling out of the exchange of letters by the solicitors an implied request by the [solicitors of Hill] that the advance be made which when acceded to constituted consideration for giving the certificate." [*Ibid.* at 28].

⁴³ *Supra* note 41 at 24–25.

⁴⁴ *Ibid.* at 30.

⁴⁵ *Ibid.* at 35.

A full bench of the New Zealand Court of Appeal in the recent case of *Connell v. Odlum*⁴⁶ took a similar approach. The defendant in *Connell v. Odlum* was a solicitor who represented Mrs. Odlum in respect of a pre-marital agreement made between his client and her future spouse. Both spouses were represented. New Zealand law required the defendant solicitor to explain the nature and consequences of the agreement to his client and to certify that he had carried out these obligations. The agreement, which was proposed by Mr. Odlum's solicitor was duly signed and the defendant certified that he had given the requisite explanation to his client. In due course, the marriage failed. Mrs. Odlum succeeded in getting the agreement declared void on the grounds that the defendant had not in fact given an appropriate explanation of the agreement and that it would be unjust to enforce it. Mr. Odlum consequently made a settlement of his wife's claim in respect of the matrimonial property and then sued the defendant to recover the amount he had paid her. The defendant applied to have the statement of claim struck out on the grounds that he owed no duty of care to his client's spouse, only to his client. The Court of Appeal agreed with the High Court judge that the statement of claim should not be struck out. The leading judgment was delivered by Thomas J.. His Lordship began by noting the general rule that a solicitor does not owe a duty of care to a third party who is legally advised. However, the legislation which was designed to give an assurance to the other spouse that the agreement was procedurally unimpeachable gave rise to a relationship of proximity. The defendant in giving such a certification ought to foresee the consequences to the other spouse if the agreement was later struck down. Furthermore, the plaintiff spouse had *relied* on the assurance that the defendant had given and the recognition of such a duty would not involve the defendant in a conflict of interest. His Lordship stated:

I have therefore concluded that in all the circumstances of this case it is just and reasonable to impose a duty of care on [the defendant] and that he may be properly exposed to liability to Mr. Odlum for his carelessness in certifying that he independently advised Mrs. Odlum and explained the effect and implications of the agreement to her. Having regard to the fact that, although required of him by the statute, the giving of the certificate is his personal act and that he must have foreseen that the husband *would rely upon it*, I do not consider that he should be immune from a suit in negligence.⁴⁷

⁴⁶ [1993] 2 N.Z.L.R. 257.

⁴⁷ *Ibid.* at 271–272.

It is clear that these cases dealing as they do with assurances given by a defendant solicitor to a represented third party give quite considerable support to the dissenting view of Helper J.A. in *Granville*.

However, the decision in *Allied Finance & Investments v. Haddow* was distinguished in the recent English decision of *Gran Gelato Ltd. v. Richcliff (Group) Ltd.*⁴⁸ That case dealt with a conveyancing transaction between parties who were both legally represented. The plaintiffs took an assignment of a commercial sub-lease and spent a considerable amount of money developing the property. The vendor's solicitors were asked if there were any unusual provisions in the head lease. They replied to this inquiry in the negative. There was in fact a redevelopment break clause and this diminished the value of the assigned interest substantially. Nicholls V.C. held that the defendant owed no duty of care. Among the reasons given⁴⁹ was that it was contrary to principle to impose a duty on the vendor's solicitors to protect the interests of the purchaser. The vendor's solicitor was paid to look after the vendor's interests, not those of third parties. The *Allied Finance* case was explained as a special case where "the solicitors had stepped outside their role as solicitors for their client and had accepted a direct responsibility to the lender."⁵⁰ This case is more supportive of Huband J.A.'s view but it has been subjected to criticism. Andrew Tetterborn has stated:

[T]he court's ... reluctance to make solicitors acting for one party directly liable in negligence to the other one is all very well. But this principle ... should not be taken too far. The only situation where its application is justified is, ... where the prospect of liability to a third party would actually tend to dissuade the solicitor from looking to the best interests of his own client. But this was patently not the case in *Gran Gelato*; there is nothing inconsistent in demanding that a vendor's solicitor protect the interests of his client and yet also take care in providing answers to the purchaser.⁵¹

There does, therefore, seem to be room for debate in respect of the proposition that a duty of care does not arise between a solicitor representing one party to a commercial transaction to the other party

⁴⁸ [1992] 1 All E.R. 865 (Ch.).

⁴⁹ It appears that the Court was heavily influenced by the fact that the plaintiff buyer had an adequate remedy against the seller.

⁵⁰ *Supra* note 48 at 874.

⁵¹ Tetterborn, "Enquiries Before Contract: The Wrong Answer" (1992) 51 Cambridge L.J. 415 at 417.

to the transaction where that other party has legal advisers. As a general proposition it may be true, but it would be unfortunate to build it into an inflexible rule. Circumstances are ever variable and foreseeability of reliance, assumption of responsibility, actual reasonable and justifiable reliance, the giving of assurances and a lack of conflict of interest may assist in fashioning a powerful case to the contrary. More than a few of these concepts are found in *Granville*.

The second situation occurs, where the third party has no legal adviser. It will be remembered that Huband J.A.'s view was that "the situation would [not] change by reason of one of the parties electing to represent its own interests."⁵² Some would disagree with that view. It is substantially more foreseeable that an unrepresented party may rely on the other party's solicitor. This is particularly so when there has been some communication between the two and the solicitor has provided some information, answered some questions or given some assurance in respect of the deal. The status of a professional legal adviser dealing with matters within the range of her professional expertise heightens the foreseeability of reliance and enhances the reasonableness and justification of that reliance. Any indication of an assumption of responsibility by the solicitor to the party makes the case for a duty of care even more powerful.

Some support for a generous approach to duty in this class of case is found in the British Columbia Court of Appeal decision in *Tracy v. Atkins*⁵³ a decision on which Helper J.A. relied. That case involved the sale and purchase of a house which was to be financed in part by a mortgage back to the vendors. Only the purchaser engaged a solicitor. Later the purchaser advised his solicitor that the financing had fallen through and the deal was off. Shortly after this the purchaser presented his lawyer with a letter from the vendors which contained some unusual provisions. It purported to authorize (i) an extension in the completion date, (ii) a further mortgage with priority over that of the vendor, (iii) a disbursement of funds from this additional mortgage to the purchaser after payment of the down payment. The letter was a forgery. In spite of the odd nature of the letter the solicitor for the purchaser, without verification from the vendors, completed the transaction and carried out the instructions in the letter. The purchaser disappeared with most of the proceeds from the additional mortgage. The plaintiff vendors sued the solicitor. The

⁵² *Supra* note 3 at 289.

⁵³ (1979), 11 C.C.L.T. 57 (B.C.C.A.).

British Columbia Court of Appeal unanimously imposed a duty of care on the defendant solicitors. Nemetz C.J.B.C. relied on some familiar concepts in coming to this conclusion. His Lordship stated:

Not in every case will a solicitor be in a relationship of such proximity with an opposing party as was the case here. In the circumstances of this case the solicitor undertook to carry out all the conveyancing including work that would ordinarily be done by the vendor's solicitor.... By undertaking to do so he placed himself in a position of dealing with the plaintiff's interests at a time when he knew or ought to have known that the plaintiffs were or might be relying on him to protect those interests. In the circumstances of this case he placed himself in "a sufficient relationship of proximity that he incurred a duty of care towards the plaintiffs."⁵⁴

Having established a duty, his Lordship had little difficulty in establishing a breach of the standard of reasonable care. A reasonably careful solicitor would have been alerted to the possibility of harm to the plaintiff and would have contacted the vendors to verify their wishes. In some ways this is a stronger case than *Granville*. Here the solicitor was alerted to the possibility of impropriety by an abnormal letter produced by a client involved earlier in a similar shady transaction. On the other hand, there does not appear to have been any direct communication between the vendors and the solicitor that might have been productive of specific assurances or a more explicit assumption of responsibility.

This recognition of solicitors' duties to unrepresented third parties is also consistent with other less closely analogous cases involving solicitors and unrepresented third parties. Solicitors have been held liable to disappointed beneficiaries when a will has been poorly executed⁵⁵ where the instructions of a testator have not been carried out,⁵⁶ to family members who were affected by the failure to probate an estate of a sibling with reasonable competence,⁵⁷ and to members of the public who may be injured by a client's fraudulent conduct.⁵⁸

In the light of all these authorities it is submitted that the judgment of Helper J.A. is the more persuasive. Many of the building blocks of duty of care are found in *Granville*. The solicitors had

⁵⁴ *Ibid.* at 62-63.

⁵⁵ *Whittingham v. Crease & Co.*, [1978] 5 W.W.R. 45 (B.C.S.C.), *Ross v. Caunters*, [1979] A.C. 193.

⁵⁶ *Gartside v. Sheffield Young and Ellis*, [1983] N.Z.L.R. 37 (C.A.).

⁵⁷ *Heath v. Ivens* (1991), 6 C.C.L.T. (2d) 311 (B.C.S.C.).

⁵⁸ *Bowles v. Johnson* (1988), 53 Man. L.R. (2d) 81 (Man. Q.B.).

knowledge that Granville expected to obtain a first charge on the property. The solicitors had knowledge that Granville was relying on them to secure a first charge. The solicitors agreed to carry out the transaction and protect Granville's best interests. Granville's reliance was reasonable and justifiable. There was no conflict between the discharge of the solicitors' contractual duties to the borrower and an obligation of care to Granville. More general support for the decision can be gathered from the general functions of tort law that can be furthered by an imposition of liability. Richardson J. in *Allied Finance & Investment Ltd. v. Haddow & Co.* spoke of compensation and loss distribution principles. He said:

...to the extent that the action in negligence is a loss allocation mechanism there is much to be said for the view that where in relationships of proximity laymen rely on the advice of professionals the costs of that professional advice should be borne by the professional advisers who are in a position to protect themselves by professional negligence insurance and in that way spread the risk.⁵⁹

Notions of deterrence and the minimization of transaction costs also support her Ladyship. Liability may provide an incentive for care and it will also encourage the efficient use of legal services by reducing the need of both parties to be represented.

It is not clear from his judgment why Huband J.A. found Helper's J.A. view to be unattractive. His claim that reliance was not to be expected and that Granville knew the solicitors would only look after Smith's interests and not theirs seems on the evidence less persuasive. Giving advice on the priority of a registered instrument does not appear to involve the solicitor in a position of conflict of interest with his client. One suspects that sympathy for the defendants, whose fault after all, was less than egregious, and some impatience at a powerful commercial entity failing to take available measures to better protect its own interests was enough to tip the balance.

Addendum

After this article was submitted for publication, this decision was reversed by the Supreme Court.⁶⁰ In a very brief oral judgment delivered by Cory J., the Court (La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.), held that there was clearly a special relationship existing between the appellant and respondents

⁵⁹ *Supra* note 3 at 31.

⁶⁰ *Granville Savings and Mortgage Co. v. Slevin* (2 November 1993), No. 23210.

and that it was equally clear that the appellant relied on the respondents to ensure that its mortgage was a first charge on the property. Given their failure to exercise care, the respondents were liable in damages to the appellants.

C. Causation in Negligence: *Cabral v. Gupta*⁶¹

For many decades causation (cause in fact) was a sleepy backwater of negligence doctrine. It was perceived as essentially a factual inquiry dominated by the grammatically awkward but usually efficient 'but for' test. If the damage would not have happened but for the defendant's negligence, that negligence was a cause of the loss. The burden of proof rested on the plaintiff to establish cause on the balance of probabilities. Much of the focus and academic interest in negligence law was on 'duty' and 'remoteness' which are much more obviously 'control devices' reflecting current judicial policy.

In recent years, however, more attention has been paid to causation issues. This has been due in part to difficulties encountered by plaintiffs establishing cause in a range of situations including medical malpractice, product liability and the contribution of wrongdoing to illness and disease. Much work on causation theory has taken place in the United States in the area of 'toxic' torts where illness is ascribed to various chemicals, products and compounds. There is a growing realisation that causation theory also involves policy choices and that the rules of causation can be fashioned so as to be more or less generous to plaintiffs as the judicial evaluation of societal needs evolves.

Two House of Lords decisions on causation which have produced considerable comment and interest in the last while are *McGhee v. National Coal Board*⁶² and *Hotson v. East Berkshire Area Health Authority*.⁶³ In an earlier review I discussed *McGhee*⁶⁴ and its subsequent uneven interpretation culminating in the Supreme Court of Canada decision in *Snell v. Farrell*⁶⁵. The recent Manitoba Court

⁶¹ *Supra* note 4.

⁶² [1973] 1 W.L.R. 1.

⁶³ [1987] A.C. 750.

⁶⁴ Osborne, *supra* note 1 at 441-454.

⁶⁵ [1990] 2 S.C.R. 311.

of Appeal decision in *Cabral v. Gupta*⁶⁶ provides an opportunity to consider the *Hotson* decision.

In *Cabral v. Gupta* the plaintiff sued the defendant ophthalmologist for the loss of sight in his right eye. In 1981 the plaintiff suffered an injury to his right eye. A small piece of metal became embedded in his eye while he was carrying on his work in an auto-body repair shop. The defendant was consulted but he negligently failed to detect the metal fragment. Two years later the plaintiff's vision in his right eye deteriorated rapidly. He was examined by another ophthalmologist who discovered the fragment and diagnosed siderosis of the right eye. Corrective surgery was unsuccessful and eventually the eye was removed. The key issue was the extent of the defendant's responsibility for the plaintiff's loss of sight. Expert evidence suggested that the probabilities were that the plaintiff would have had useful sight if the metal particle had been detected and removed in 1981. However, the evidence also suggested that even if timely surgery had taken place in 1981 there would still have been a 30 per cent chance that the defendant would have lost the vision in that eye. On this basis the trial judge made a 30 per cent reduction in the damages awarded to the plaintiff. The Court of Appeal allowed the appeal and held that no deduction should be made for the unavoidable risk to sight caused by the initial accident.⁶⁷ The Court cited *Hotson* with approval although as we shall see *Hotson* was a much more difficult case for the plaintiff than *Cabral v. Gupta*.

*Hotson v. East Berkshire Health Authority*⁶⁸ dealt with the consequences of a school accident. Stephen Hotson, aged 13, was swinging on a rope when he dropped twelve feet onto his seat. He suffered severe injuries which developed into avascular necrosis in his hips. The trial judge estimated that there was a 75 per cent chance of developing necrosis even if medical treatment had been timely and competent. Unfortunately the medical care was negligent. Diagnosis was delayed. The negligence robbed the plaintiff of a 25 per cent chance of avoiding the necrosis and he was permanently and seriously disabled. In cases such as *Hotson* when the non-culpable background risk (the initial fall) is greater than the risk created by the defendant's negligence, causation principles operate disadvantageously for plaintiffs. A plaintiff must prove on the balance of probabilities that

⁶⁶ *Supra* note 4.

⁶⁷ A smaller reduction was made on other grounds to be discussed later.

⁶⁸ *Supra* note 63.

the defendant's risk caused the loss. Where risks are assessable, the burden of proof requires a 51 per cent probability that the fault caused the loss. In *Hotson* there was only a 25 per cent chance that the defendant caused the necrosis. Consequently, conventional wisdom holds that cause in fact is not proved and all the loss is allocated to the plaintiff. If the probabilities were more than 50 per cent all the loss would be allocated to the defendant. The trial judge tried to escape this 'all or nothing' approach. He preferred to allocate the proportion of loss caused by the defendant to the defendant. Consequently, he awarded the plaintiff 25 per cent of the overall damage award. The Court of Appeal approved of this argument. Donaldson L.J. identified the difficulties with the conventional position. He stated:

As a matter of common sense it is unjust that there should be no liability for failure to treat a patient, simply because the chances of a successful cure by that treatment were less than 50 per cent. Nor, by the same token, can it be just that if the chances of a successful cure only marginally exceed 50 per cent the doctor ... should be liable to the same extent as if the treatment could be guaranteed to cure. If this is the law it is high time it was changed⁶⁹

He sought to avoid the niceties of conventional causation principles by identifying the loss suffered by the plaintiff, not as the necrosis, but as the loss of a chance to avoid the necrosis. Once the damage has been re-classified in this way it is easy to find the defendant fully responsible for causing that loss. The Court of Appeal held that just as the categories of negligence are never closed, so too, the categories of loss are never closed.⁷⁰ Loss of a chance was held to be a category of identifiable loss which could be valued on assessment principles.

The House of Lords chose not to entertain the 'loss of a chance' theory and decided the case on traditional causation principles. The question was whether the defendant had caused the necrosis. On that basis the Court held that the plaintiff had not established causation.

It is not difficult to have some sympathy for the Court of Appeal's approach in *Hotson*. It provides a proportionate amount of compensation and a proportionate degree of deterrence and in that way furthers the primary goals of tort law. On the other hand, the House of Lords may have been concerned that, the 'loss of a chance' theory was too speculative, albeit that speculation is inherent in much of tort theory

⁶⁹ *Ibid.* at 759-760.

⁷⁰ *Ibid.* at 761 *per* Donaldson L.J.

and practice. Indeed, the whole damage assessment process is intimately bound up with chances of future earnings and expenses and possibilities of physical injuries ameliorating or deteriorating. Nevertheless the House of Lords does seem to have allies in the Supreme Court of Canada. While lower Canadian courts have differed on loss of a chance theory,⁷¹ the Supreme Court in the case of *Laferrière v. Lawson*⁷² has ruled that the civil law of Quebec does not allow a claim for loss of a chance where the injury has in fact occurred.

This discussion may bring the case of *Cabral v. Gupta* into context. In terms of background and culpable risks *Cabral v. Gupta* was almost the converse of *Hotson*. The non-culpable risk of the plaintiff losing sight in the right eye was 30 per cent. There was a 70 per cent chance of a successful result given timely and competent medical care. The Court of Appeal followed the conventional 'all or nothing' approach to causation. The defendant created a 70 per cent risk of blindness to the eye and this was more than sufficient to establish cause in fact and so render him 100 per cent liable.

The defendant's alternative argument was based on assessment of loss principles. Even if causation was established the Court must assess the loss that the plaintiff has suffered. There are two distinct issues. Causation relates to the cause and effect relationship between the defendant's act and the plaintiff's loss. Valuation is the process of identifying and assessing the loss caused by the tortious act. King has noted: "What caused a loss ... should be a separate question from what the nature and extent of the loss are."⁷³

It was on this basis that the defendant pressed the Court to reduce the damages awarded, to take into account the fact that timely removal of the splinter from the plaintiff's eye would still have left him with a 30 per cent chance of losing the sight in his eye. The defendant had consequently not deprived the plaintiff of the sight in a normal healthy eye. His eye had already been damaged and there was a significant risk of loss of sight from non-culpable causes. Although not cited to the Court there is authority for such a view. In

⁷¹ *Pro: Seyfert v. Burnaby Hosp. Soc.* (1986), 36 C.C.L.T. 224 (B.C.S.C.). *Con: Smith v. Moscovich* (1989), 40 B.C.L.R. (2d) 49 (B.C.C.A.).

⁷² (1991), 6 C.C.L.T. (2d) 119.

⁷³ Joseph H. King, "Causation, Valuation, and Chance in Personal Injury Torts Involving Pre-existing Conditions and Future Consequences" (1981) 90 Yale L.J. 1353 at 1363. See also Jane Stapleton, "The Gist of Negligence" Parts I & II (1988) 104 L.Q. Rev. 213 and 389.

*Smith v. Leech Brain & Co. Ltd.*⁷⁴ the defendant's act caused a burn on the deceased's lip. Because of a pre-cancerous condition the lesion became malignant and some years later the victim died of cancer. In an action brought by the dependants it was found that the burn caused the cancer and the subsequent death. Nevertheless, damages were reduced substantially because the deceased might have developed cancer even if he had not suffered the burn. In *Malec v. J.C. Hutton*⁷⁵ the High Court of Australia came to a similar conclusion. In that case the plaintiff had contracted brucellosis as a result of the defendant's negligence. Spinal degeneration and a neurotic condition are possible consequences of brucellosis. The plaintiff suffered the disease from 1977–1983. In 1979 he suffered a neurotic condition and in 1982 he developed spinal problems. It was found that the neurotic condition was a consequence of the brucellosis but the spinal problems were unrelated to the disease. Furthermore, and crucially, it was found that it was likely that the spinal condition, *in itself*, would have produced the neurotic condition. The full court of the Supreme Court of Queensland refused to award damages for the neurotic condition after 1982 on the grounds that he would have suffered such loss in any event given the unrelated spinal problems. The High Court disagreed and held that damages should be awarded but should be discounted by the degree of likelihood that the back injury would have produced the neurotic condition. In the leading judgment of Deane, Gaudron and McHugh JJ. the issues of causation and evaluation were alluded to:

“in the case of an event which is alleged would or would not have occurred or might or might not yet occur the approach of the court is different [from the all or nothing approach to causation].” The future may be predicted and the hypothetical effect of physical injury or degeneration are not commonly susceptible of scientific demonstration or proof. If the law is to take account of future or hypothetical events in assessing damages, it can only do so in terms of the degree of probability of those events occurring. The probability may be very high — 99.9 per cent — or very low — 0.1 per cent. But unless the chance is so low as to be regarded as speculative — say less than 1 per cent — or so high as to be practically certain — say over 90 per cent — the court will take that chance into account in assessing the damages. Where proof is necessarily unattainable, it would be unfair to treat as certain a prediction which has a 51 per cent probability of occurring, but to ignore altogether a prediction which has a 49 per cent probability of occurring. Thus, the court assesses the degree of probability that an event

⁷⁴ [1962] 2 Q.B. 405 at 416. Jane Stapleton discusses this point in “The Gist of Negligence” Part II (1988) 104 L.Q. Rev. 389 at 397.

⁷⁵ (1990), 92 A.L.R. 545 (H.C.A.).

would have occurred, or might occur, and adjusts its award of damages to reflect the degree of probability.⁷⁶

A similar approach seems to be at the heart of *Janiak v. Ippolito*⁷⁷ which was cited to the Court in *Cabral*. In that case the Supreme Court of Canada reduced damages to reflect the fact that surgery offered a high chance of improving the plaintiff's back injury. The plaintiff's refusal to undergo such surgery was unreasonable and consequently should be taken into account in assessing the loss which was a consequence of the negligent act.⁷⁸

The Court of Appeal in *Cabral*, however, was not receptive to such an approach. The Court preferred to rely on a dictum of Lord Bridge in *Hotson v. East Berkshire Health Authority*,⁷⁹ and held that to take into account the non-culpable risk of blindness in the assessment process was entirely inconsistent with the trial judge's finding on causation and that no deduction should be made on this ground. With respect this conclusion does not do justice to the plaintiff's argument based, as it was, on the distinction between causation and valuation. Because this issue was not examined at any great length it may be unwise to draw any final conclusions from the case.

Nevertheless, the Court of Appeal did find a way of reducing damages, albeit to a lesser extent than that favoured by the trial judge. The Court awarded 100 per cent of the plaintiff's loss of income prior to trial but only 70 per cent of his loss of future income on the grounds that such a deduction could be defended as an appropriate contingency deduction. However, it is not clear how the concept of contingency differs in result from the kind of approach to assessment which the defendant pressed in argument, other than to permit a more arbitrary reduction.

⁷⁶ *Ibid.* at 548–549.

⁷⁷ [1985] 1 S.C.R. 146.

⁷⁸ This case has been applied in Manitoba in *Yphantides v. McDowell* (1984), 30 C.C.L.T. 264. It has also been discussed in *Engel v. Kam-Ppelle Holdings Ltd.* (1993), 15 C.C.L.T. 245 (S.C.C.).

⁷⁹ Lord Bridge stated, "As I have said there was an inescapable issue of causation first to be resolved. But if the plaintiff had proved on the balance of probabilities that the authorities' negligent failure to diagnose and treat his injury promptly had materially contributed to the development of avascular necrosis, I know of no principle of English law which would have either the authority to a discount from the full measure of damages to reflect the chance that, even given prompt treatment, avascular necrosis might still have developed." [*Supra* note 63 at 783].

D. Business Torts and Misfeasance in Public Office: *Gerrard v. Manitoba*⁸⁰

*Gerrard v. Manitoba*⁸¹ is an interesting case. It takes us into the world of agricultural land sales and immigrant farmers. Land purchase by immigrant farmers has produced important litigation on other occasions. The limited knowledge of some immigrant farmers about Canadian agricultural land and operations and the comparatively low cost of rural land in Manitoba is a recipe for occasional sharp dealing and misapprehension. *Andronyk v. Williams*⁸² was a case in point. A significant misrepresentation about the amount of land under cultivation was made to an immigrant purchaser who made an inadequate inspection of the property in winter months. Unfortunately the Court of Appeal felt unable to fashion a remedy and the plaintiff received a severe lesson on the meaning of *caveat emptor*. Much of the defendant's conduct in *Gerrard v. Manitoba* is explicable if one keeps in mind the socio-economic context of the litigation. The case is also of interest from a purely legal standpoint. Not only does it deal with business torts, but perhaps most importantly, it also deals with the very rare tort of misfeasance in public office. First, however, the facts.

The plaintiff Gerrard was an immigrant farmer from England. The defendant Muirhead was the executive director of the Agricultural Lands Protection Board (A.L.P.B.). In November 1979 Gerrard sought and received the permission of the A.L.P.B. to purchase 2,220 acres of Interlake farm land at a cost of \$345,000. This permission was subject to Gerrard becoming a landed immigrant by the end of 1981. It might be noted here that Muirhead interpreted his role as executive director of the A.L.P.B. as extending to confidentially advising Employment and Immigration Canada of the suitability of proposed self-employed immigrant farmers for permanent resident status. In due course Gerrard became a landed immigrant and purchased an additional 900-acre farm in Eriksdale for \$55,000.

In May 1981 Gerrard decided to move to Holland, Manitoba and he sold his Interlake property to another immigrant farmer, Wainwright. The purchase price was two and one half times what Gerrard paid in 1979. Wainwright was already a landed immigrant so the transaction did not receive the scrutiny of the A.L.P.B. or Muirhead. However, Muirhead knew of the transaction and he believed that Gerrard had

⁸⁰ *Supra* note 5.

⁸¹ *Ibid.*

⁸² [1986] 1 W.W.R. 225 (Man. C.A.).

cheated Wainwright into a very bad deal. The conflict between Gerrard and Muirhead began when Gerrard attempted to sell the remainder of his land, the 900-acre Eriksdale farm, to foreign buyers. He sold 600 acres to Galpin and 300 acres to Liptrot. Both deals were subject to the approval of the A.L.P.B. Both sales were at approximately two and a half times the current value of the land. Both deals were never consummated. This was due in part to the failure of Muirhead to make a favourable recommendation to Employment and Immigration Canada on the economic viability of the transactions. Both purchasers were eventually refused landed immigrant status. Not surprisingly, Gerrard blamed Muirhead for the failure of these deals. His view, that Muirhead had acted wrongfully, was confirmed in his eyes when a subsequent sale to another immigrant farmer, Broadhead, fell through for the same reasons. Gerrard alleged that the failure of these deals led to a great deal of economic distress and ultimately to his financial collapse.

Gerrard's claim failed at trial. In the Court of Appeal Scott C.J.M. delivered the judgment of the Court (Scott C.J.M., O'Sullivan and Helper J.J.A.) dismissing the appeal. The Court drew a variety of conclusions on the facts that damaged Gerrard's ability to establish tortious conduct. The Court held that evidence that Muirhead was determined to frustrate the transactions by improper motivation or excess of authority was "far from convincing." It also held that there was a lack of convincing evidence that Muirhead had improperly intruded into the transactions for the purpose of causing injury to Gerrard. Finally, the Court found that Muirhead honestly believed that the properties were not commercially viable. Muirhead's intention was not to penalise Gerrard but to save Galpin and Liptrot from ill-advised transactions.

The Court began its judgment by analyzing whether the tort of malicious interference in economic and trade relations had been committed. The Court concluded that it had not been committed because the conduct was not targeted at the plaintiff. On this issue the judgment suffers to a degree from a failure to analyze the precise business tort alleged and its requisite elements. *Malicious* interference with contractual relations is not the name of any conventional tort. It appears that the Court had in mind two possible business torts — procuring breach of contract by indirect means and interference with economic interests by unlawful means. Inducing breach of contract is divided into two categories: direct inducement to breach, which is in itself unlawful, and indirect inducement to breach. Muirhead could only possibly be guilty of indirect inducement to breach a contract.

The requisite elements of this tort are that the defendant must be aware of the contractual relationship, he must intend to disrupt the plaintiff's contractual relationship with another and the means employed must be *unlawful*. Clearly, Muirhead knew of the contractual relationship between Gerrard and Liptrot and Galpin. However, the other two requirements are problematic. The Court negated intention in so far as a desire to injure Gerrard was concerned. No consideration, however, was given to constructive intent. Constructive intent is found where it is substantially certain that damage will flow from the defendant's conduct. Motive is *not* a relevant factor. However, even if constructive intent could be established there is difficulty in respect of the third criterion of an illegal act. The Court did not examine the source or extent of Muirhead's authority to provide advice to Employment and Immigration Canada in any detail, but its finding that there was little evidence that he had acted "improperly" concluded the point in Muirhead's favour.

The second possible business tort is interference with economic interests by unlawful means. The existence of this cause of action has been accepted by the Court of Appeal on earlier occasions.⁸³ However, the gravamen of this tort is illegal activity and as noted above the Court found no illegality on Muirhead's part. It is not surprising that the requirements of these business torts were not met. The common law has been reluctant to exercise too close a control on the free market. As a general rule intentional conduct causing economic loss is an aspect of robust capitalism. It is only when a defendant seeks to injure through unlawful means, (as in the torts discussed) by combination (conspiracy), by threats (intimidation), by dishonesty (deceit) or by a direct attack on a contractual link (direct inducement to breach a contract), that the law protects the injured party. The real substance of the complaint by Gerrard involved the manner in which he exercised his power as a holder of public office. Consequently, the plaintiff pressed the tort of misfeasance in public office.

This seldom used tort has a relatively narrow range.⁸⁴ The law has been influenced by concerns that public officials should be able to make *bona fide* decisions free of the constant anxiety of being sued. The mere fact that an administrative act is unlawful does not in itself

⁸³ *Gershman v. Manitoba (Vegetable Producers Marketing Board)*, [1976] 4 W.W.R. 406 (Man. C.A.); *Mintuck v. Valley River Band No. 63A* (1977), 2 C.C.L.T. 1 (Man. C.A.).

⁸⁴ For a good discussion of this tort see J. McBride, "Damages as a Remedy for Unlawful Administrative Action" (1979) 38 Cambridge L.J. 323; L.D. Raindall, ed., *Remedies in Tort* (Calgary: Carswell, 1987) c.24 at 43ff.

result in liability under this tort. There are only two situations covered by the tort of misfeasance in public office. The first deals with the *abuse of power* that the defendant actually possesses, the second with actions in *excess of authority* or beyond one's jurisdiction. In the first category malice is the key. To exercise public powers to injure another through spite, ill will or for some other improper purpose is actionable. The classic Canadian example of this is *Roncarelli v. Duplessis*⁸⁵ where the plaintiff's liquor license was cancelled at the direction of the Premier of Quebec in order to punish the plaintiff for providing bail to fellow members of the Jehovah's Witness sect who had been charged with offences relating to bylaws governing the distribution of literature. The second category does not require malice.⁸⁶ It arises where a public official *knows* that she is acting in excess of jurisdiction and beyond authority and knows that the plaintiff will likely be injured as a result of this. This aspect of the tort focuses on the knowing usurpation of power rather than the abuse of power. The Court in *Gerrard* recognised both these heads of liability. However, the Court's conclusions on the facts undercut Gerrard's claims. The Court found no compelling evidence of improper motivation or an excess of authority. While there will likely be ready agreement on Muirhead's lack of malice, and improper motivation, it is perhaps a pity that the nature of Muirhead's relationship with Employment and Immigration Canada and the basis and scope of his authority went unexplored.

Finally, it should be noted that Gerrard's claim also failed on two grounds applicable to both areas of potential tort liability. It was not proved that it was Muirhead's actions which caused the plaintiff's loss. The buyers may have been refused permanent resident status on other grounds. Furthermore, Gerrard could not establish that the failure of the two transactions caused his economic collapse.

Overall, in spite of some reservations about the way the judgment was crafted (particularly in respect of the economic torts) the result seems sound. Immigrant farmers are vulnerable to exploitation and it would be too bad if a holder of a public office was mulcted in damages for keeping an eye out for them.

⁸⁵ [1959] S.C.R. 121.

⁸⁶ *Bourgoin S.A. v. Ministry of Agriculture Fisheries and Food*, [1985] 3 All E.R. 585 (C.A.).

E. Limitations: Medical Malpractice and Sexual Abuse: *Fehr v. Jacob*⁸⁷ and *Justice v. Cairnie Estate*⁸⁸

1. *Fehr v. Jacob*⁸⁹

The lot of plaintiffs in medical malpractice litigation is often not a happy one. Such litigation is notoriously expensive, difficult and time consuming. The plaintiff is often stymied initially by a lack of information and money. This may be followed by difficulties in securing cogent evidence, including the testimony of experts, and in convincing a judge that there was negligence rather than medical misadventure or an error in judgment. Proving causation may also be difficult.⁹⁰ Added to these woes is the specially protective limitation period in the *Medical Act*⁹¹ which declares that no action may be brought against a physician later than two years from the date when in the matter complained of, those professional services terminated. This limitation period, which also applies to many other health care professionals,⁹² contrasts poorly with the general limitation period for personal injury claims which runs for two years from the date when the cause of action arose. The recent decision of the Manitoba Court of Appeal in *Fehr v. Jacob* dealt with an argument designed to overcome this inconsistency.

In *Fehr v. Jacob* the defendant doctor performed bladder surgery on the plaintiff in April 1976. It was agreed that the defendant's professional services in regard to that surgery ended, after post operative care, in June 1976. Unfortunately that surgery did not remedy the plaintiffs condition and she continued to suffer pain for a decade. In June 1987, the plaintiff had further surgery during which an old calcified suture at the dome of the bladder was discovered. The plaintiff, believing that this was the source of her difficulties, and that it indicated the defendant's negligence filed suit in September 1988. At first impression the plaintiff appears to be clearly out of time. Under s. 61 of the *Medical Act* time lapsed in June 1978, ten years

⁸⁷ *Supra* note 6.

⁸⁸ *Supra* note 7.

⁸⁹ *Supra* note 6.

⁹⁰ See P. H. Osborne, "A Review of Tort Decisions in Manitoba, 1989" (1990) 19 Man. L.J. 419 at 460-463 and the discussion of medical malpractice cases contained therein.

⁹¹ R.S.M. 1987, c. M90, s.61.

⁹² See *Chiropractic Act* R.S.M. 1987, c. C100, s.52; *Dental Association Act* R.S.M. 1987, c. D30, s.44; *Naturopathic Act* R.S.M. 1987, c. N80, s.20; *Occupational Therapists Act* R.S.M. 1987, c. 05, s.48; *Physiotherapists Act* R.S.M. 1987, c. P65, s.49.

before the action was filed. The plaintiff initially sought relief from s. 14(1) of the *Limitation of Actions Act*.⁹³ The provision provides relief to a plaintiff who was unaware of the facts that form the basis of a claim. A court may grant leave to commence an action, which is otherwise out of time, if leave is sought no longer than twelve months after knowledge of the material facts was acquired. However, that knowledge was acquired, either in June 1987, when the second surgery was performed, or when a medical report ordered by the plaintiff's solicitors was received in November 1987. Since an application for leave was not sought until December 1991 it was rejected.

The plaintiff's main argument in the Court of Appeal was based on the 'discoverability rule' adopted by the Supreme Court in *Nielson v. Kamloops (City)*⁹⁴ and reaffirmed in *Central Trust Co. v. Rafuse*⁹⁵. In those cases the Court held that a cause of action did not accrue for the purposes of limitations until all the material facts are known to the plaintiff or were capable of discovery by the exercise of reasonable diligence.⁹⁶ This strong pro-plaintiff interpretation was referred to in *Rafuse* as a rule of "general application."⁹⁷ Consequently the plaintiff in *Fehr v. Jacob* argued that it should be applied to the *Medical Act* and that time should not expire until two years had elapsed after discovery of material facts. This would bring the plaintiff within time since discovery was either April or November of 1979. The obvious answer, which Twaddle J.A. speaking for the Court (Scott C.J.M., Philp and Twaddle J.J.A.) finally arrived at, is that time under the *Medical Act* does not run from "accrual of the cause of action" but from "termination of the professional services."⁹⁸ Consequently the

⁹³ R.S.M. 1987, c. L150.

⁹⁴ [1984] 2 S.C.R. 2.

⁹⁵ [1986] 2 S.C.R. 147.

⁹⁶ In *Weselak v. Beausejour District Hospital No.29* (1986), 45 Man. R. (2d) 196 aff'd. (1987), 49 Man. R. (2d) 86 (C.A.), Hansen J. doubted the applicability of the discoverability rule to limitation periods running from accrual of the cause of action. His Lordship based this on an interpretation of the Manitoba *Limitations of Actions Act* R.S.M. 1987, c. L150 which specifically defines some limitation periods as running from the date of discovery and contains in s. 14(1) a statutory discoverability rule. Unfortunately the point was not raised in *Fehr v. Jacob* [*supra* note 6]. *Weselak* was not discussed.

⁹⁷ *Supra* note 95 at 224.

⁹⁸ *Supra* note 6 at 205

Supreme Court cases mentioned earlier, and the discoverability rule contained therein, are not applicable.

However Twaddle J.A. had to contend with *Desormeau v. Holy Family Hospital, Prince Albert*⁹⁹ where the Saskatchewan Court of Appeal applied the discoverability principle to different statutory language. In Saskatchewan under the *Hospital Standards Act*¹⁰⁰ an action must be brought against a hospital within three months from the date on which "the damages are sustained." Sherstobitoff J.A. speaking for the Court saw no reason to limit the discoverability principle to limitation periods running from the 'accrual of the cause of action'. In his view it was "absurd" and "unjust" for an action to be barred before a plaintiff knows or with reasonable diligence might know of a right of action. Twaddle J.A. expressed some reservations about *Desormeau* but was able to distinguish it. He held that both "accrual of a cause of action" and "the date on which damages are sustained" were capable of being construed as occurring only when the plaintiff has knowledge of the injury sustained. In his Lordship's view such a construction was not possible when the event from which time runs is "the termination of professional services," an event which occurs without regard to the injured party's knowledge.¹⁰¹ Twaddle J.A. was reassured in his decision by the fact that s. 14(1) of the *Limitation of Actions Act*¹⁰² contains a statutory discoverability rule which would have avoided injustice to Mrs. Fehr if she had received appropriate advice from her first solicitors (she had changed solicitors before the litigation in the Court of Appeal). This is, of course, cold comfort to Mrs. Fehr. Not only was she let down by her medical professional but also, it seems, by her legal advisers who failed to take advantage of s. 14(1) *Limitation of Actions Act* in a timely fashion. The case spotlights one aspect of the inconsistency in the law relating to limitations. Those professionals who are governed by the general provisions of the *Limitation of Actions Act* such as lawyers, accountants and architects may face very long periods of potential liability through the operation of the common law discoverability rule. Many health care professionals are covered by narrower profession-specific rules and the more limited statutory discoverability principle. There

⁹⁹ [1989] 5 W.W.R. 186 (Sask. C.A.).

¹⁰⁰ R.S.S. 1978, c. H-10, s. 15.

¹⁰¹ *Supra* note 6 at 206.

¹⁰² *Supra* note 92.

seems to be no principled reason for this distinction. Indeed one might expect greater protection of our physical integrity than our wealth or property.

Of course Mrs. Fehr may now sue her original solicitors alleging legal malpractice in missing the s. 14(1) *Limitations of Actions Act* provision. However not only will she have to prove the negligence of those solicitors but also that the negligence caused her damage. This latter issue will necessitate a determination of the merit of her malpractice action; a trial within a trial. If she does soldier on with this black comedy of errors she has more fortitude and determination than most of us. She is much more likely to give it away and join the ranks of disappointed medical malpractice plaintiffs who have found the path to justice too difficult, expensive and exhausting.

2. *Justice v. Cairnie Estate*¹⁰³

In *Justice v. Cairnie Estate*¹⁰⁴ the Court of Appeal dealt with an appeal from a judgment of Scollin J. in which he declined to grant an order under s. 14(1) of the *Limitation of Actions Act* to enable the applicant to commence an action, otherwise out of time against the respondents. The applicant, a 32-year old woman sought to bring an action in respect of sexual abuse suffered by her in 1975 and 1976 when she was 14–15 years old. In August 1975, the applicant told psychiatrists at the Brandon Medical Health Centre that she had been sexually abused by her stepfather Doucet. Doucet admitted his misconduct to the psychiatrists and underwent counselling at the centre. After several sessions Doucet declared himself cured and discontinued further therapy. In October 1975, the applicant also disclosed the abuse to Ms. Cairnie, a social worker. She chose not to believe the applicant and informed the applicant's parents of the complaints made against them. Subsequently, the applicant suffered further serious sexual abuse for nine months, ending in June 1976. While the applicant always had recollection of abuse up to October 1975 the abuse during the subsequent nine-month period was repressed beyond recall. Those memories were not unlocked until she received extensive counselling in 1991. Those recollections produced great psychological pain and suffering. Within one year of these painful recollections, an application was made to enable her to sue not only Doucet, but also the social worker Cairnie and the psychiatrists,

¹⁰³ *Supra* note 7.

¹⁰⁴ *Ibid.*

for their failure to protect her from the sexual abuse which followed upon their knowledge of Doucet's conduct. The applicant also sought leave to sue the Provincial Government for the vicarious liability for the torts of the social worker and psychiatrists. Doucet did not oppose the application. Consequently, the focus was on the other claims.

In a judgment written by Scott C.J.M. the Court of Appeal (Scott C.J.M., Kroft, Philp JJ.A.) began by considering the relevance of the 'discoverability rule' discussed earlier. Reference was made to *M.(K.) v. M.(H.)*¹⁰⁵ a very important application of the discoverability rule in the field of sexual abuse. In that case the plaintiff had for many years suffered depression and other psychological problems. It was not until she received psychotherapy that she was able to recall the serious childhood abuse that she had suffered and to understand that the abuse was the real cause of her continuing medical and emotional problems. The Supreme Court held that the cause of action against the abuser did not accrue until she had undergone the psychotherapy. The cause of action could not arise until the abused person understood the causal link between past abuse and later psychological and emotional damage. However the Court of Appeal pointed out, following *Fehr v. Jacob*,¹⁰⁶ that the 'discoverability rule' did not apply where the limitation period runs from a specific defined date rather than from a circumstance which can reasonably be seen as depending on knowledge of the potential litigant. Since the limitation periods in respect of the defendants ran from defined dates the discoverability rule was inapplicable.

The limitation period in respect of the psychiatrists was controlled by s.61 of the *Medical Act*¹⁰⁷ (two years from termination of professional services) and had clearly expired. Any personal claim against Ms. Cairnie the social worker was completely barred because she had died in January 1990. Section 53 of the *Trustee Act*¹⁰⁸ extinguished the liability of the personal representative of the estate for the torts of the deceased two years after the death. However, there remained the question of whether the extension provision in s. 14 of the *Limitation of Actions Act* could be used to permit actions against the psychiatrists and the government for the vicarious liability of Ms. Cairnie and the psychiatrists. Section 14 of the *Limitation of Actions*

¹⁰⁵ [1992] 3 S.C.R. 6.

¹⁰⁶ *Supra* note 6.

¹⁰⁷ *Supra* note 91.

¹⁰⁸ R.S.M. 1987, c. T160.

Act, as was noted earlier, gives to the Court a discretion to allow an action to proceed notwithstanding that the normal limitation period has expired. The application must be made within twelve months of the date upon which the applicant first knew or ought to have known of all the material facts of a decisive character on which the action is based. Leave should not be given unless the evidence is sufficient to establish the cause of action.¹⁰⁹ This latter point raised the interesting substantive question of whether the applicant had a reasonable prospect of success in establishing tortious conduct on the part of Ms. Cairnie and the psychiatrists. The contentious issues were the existence of a duty of care to assist and protect the applicant and whether a breach of that duty could be established.

The issue of duty of care raises issues of nonfeasance and the state of tort law in 1975. Even today, there is no general duty to assist persons in peril so long as the peril is not of your creation. The law has, however, recognized a widening body of exceptions to that principle. The key to imposing a 'duty to rescue' or a duty to assist others is to find a factor which isolates the defendant from the general public and provides a justification for imposing a positive obligation. Special relationships, whether personal, economic, or family, power of supervision or control, assumptions of responsibility and reliance have all been used to generate such a duty. A seminal case was *Jordan House v. Menow*¹¹⁰ where the Supreme Court imposed an obligation on a bar owner to take responsibility for an intoxicated patron. The duty was based on personal and economic relationships. Since that case was decided in 1974, it is fair to conclude that by late 1975 the law had turned away from its policy of isolated individualism to recognize some responsibility for the plight of others put in harm's way by bad luck, their own failures or the fault of third parties. Scott C.J.M. found the source of the duties owed by both the social worker and the psychiatrist in the notion of 'fiduciary relationship' between a professional person and a young person seeking their assistance and protection. Scott C.J.M. stated:

... one may be more inclined to impose a duty to intervene where the relationship between the victim and the defendant gives rise to a reliance upon the special training of the defendant. Liability may therefore follow where a third party owes a fiduciary duty to the child victim. Social workers and doctors may be classified as within the scope of this relationship ... a court should be more ready to find a fiduciary relationship

¹⁰⁹ See *Limitation of Actions Act*, *supra* note 93, s. 15(2).

¹¹⁰ [1974] S.C.R. 239.

and impose a positive obligation to promote and defend the interests of the beneficiary where the child is incapable of formulating her own course of action and must rely on the fiduciary's judgment.¹¹¹

His Lordship then turned to whether or not the applicant had a reasonable chance of proving the breach of the standard of care of each. His Lordship concluded that there was a reasonable chance of success against Ms. Cairnie. Her inaction could not be excused as a mere error of judgment.

Not only did the applicant's complaints go unheeded, but Ms. Cairnie reported the complaints to Doucet and accused the applicant of fabrication. ... [W]hen Ms. Cairnie was replaced by another social worker the applicant was immediately removed from the Doucet household, never to return. ... [T]he applicant has demonstrated that there is a reasonable prospect of her action succeeding against the government for its vicarious liability as the employer of the late Ms. Cairnie.¹¹²

However, leave was not given to sue the psychiatrists. In his Lordship's view the only evidence against them was that Doucet had admitted his wrongdoing, had been given treatment and, having determined that he was cured, discontinued further sessions. This was insufficient to show more than an error of judgment on the part of the psychiatrists and was not actionable.

In conclusion, it might be noted that much greater resort is being made to civil courts in respect of sexual abuse. Conventional tort principles are in the main sufficient to provide a sufficient and appropriate remedy. However, the courts have displayed a willingness to make appropriate and necessary modifications of principle to accommodate these claims and to ensure the public accountability of defendants and the just recognition and compensation of the plaintiff's claims. Changes have been made in the Supreme Court in the area of limitations (*M.(K.) v. M.(H.)*)¹¹³ (mentioned earlier) and in restricting defences (*Norberg v. Wynrib*).¹¹⁴ Now the Court of Appeal has placed beyond doubt the civil liability of professionals alerted to a pattern of abuse. There is little doubt that courts will continue to expand the protection of victims of sexual abuse. Indeed the Court of Appeal raised the question of potential civil liability for breach of s. 18 of the

¹¹¹ *Supra* note 7 at 13-14.

¹¹² *Ibid.* at 18.

¹¹³ *Supra* note 105.

¹¹⁴ [1992] 2 S.C.R. 226.

*Child and Family Services Act*¹¹⁵ which now creates a positive duty on *all persons* to report a child in need of protection. Given the extent of the problem of sexual abuse and the judicial policy reflected in recent decisions the answer is likely to be in the positive.

III. COURT OF QUEEN'S BENCH

A. Liability for Dog Bites: *Witman v. Johnson*¹¹⁶

In the past few years substantial publicity has been given to incidents where people have suffered injuries from dog bites. The combination of an urban environment, dangerous dogs, irresponsible dog owners and inquisitive children is a very dangerous one. In the City of Winnipeg stringent bylaws have been passed to control dangerous dogs. Happily, city statistics show that bites from pit bulls dropped from 111 in 1990 to only 1 in 1991.¹¹⁷ While the case of *Witman v. Johnson*¹¹⁸ does not present the stereotypical situation of dangerous dog, irresponsible owner and child victim, it does present an opportunity to explore the civil responsibility for injuries caused by dogs.¹¹⁹

In *Witman v. Johnson* the defendant owned a dog inaptly named Amigo. It had received some training and was normally obedient unless it perceived some threat to the defendant. The defendant had the dog on a leash when the plaintiff approached. The defendant and plaintiff stopped some three feet from each other and engaged in conversation. Amigo growled and pileated.¹²⁰ The defendant lowered his grip on the leash to 18 inches to control the dog and warned the plaintiff to stay back and not to pat him. With misplaced confidence the plaintiff crouched down, expressed belief that the dog would not bite him, snapped his fingers at the dog and extended his hand to pat its head. The dog bit his hand.

¹¹⁵ R.S.M. 1987, c. C80.

¹¹⁶ *Supra* note 8.

¹¹⁷ Winnipeg Free Press, Thursday, 11 March 1993.

¹¹⁸ *Supra* note 8.

¹¹⁹ There was one other case on injuries caused by dogs in the review period, *Duke v. Reis* (1990), 64 Man. R. (2d) 238 (Q.B.).

¹²⁰ The hair on the neck and shoulder of the dog stood up.

At common law the liability for damage caused by animals was controlled in large part by the *scienter* action.¹²¹ It may be remembered that the *scienter* action requires that animals be classified into two categories, those that are dangerous by nature '*ferae naturae*' and those which are by nature harmless '*mansuetae naturae*.' In respect of the first category, the owner is presumed to know that the animal is dangerous and strict liability is imposed for injuries caused by it. No strict liability is imposed in respect of those animals generally deemed to be harmless unless the plaintiff proves that the animal has on earlier occasion displayed some mischievous or dangerous propensity to cause harm and the owner knows of this characteristic or propensity. Since dogs fell into this latter category an owner could not be held liable unless the dog was dangerous and the owner knew it. This gave rise to the common, if inaccurate¹²² adage that at common law "every dog was allowed one free bite."

The common law position in respect of dogs has, however, been changed in Manitoba by s. 26 of the *Animal Husbandry Act*.¹²³ It reads:

In an action brought to recover damages caused by a dog it is not necessary for the plaintiff to show or prove

- (a) that the dog was or is; or
- (b) that the owner or keeper or any person who harbours the dog knew that the dog was or is

vicious or mischievous or is accustomed to causing injury.

Such a provision is not likely to win the applause of plain language enthusiasts. Nevertheless the intent seems reasonably clear. It is to allocate dogs to the 'dangerous' category. Proof of *scienter* is no longer required. A strict liability for injuries caused by dogs is imposed. Some judges in Manitoba have referred to s. 26 as creating an absolute¹²⁴

¹²¹ The companion tort of Cattle Trespass compensated for damage caused by the escape of domesticated livestock and poultry from the owner's land.

¹²² It is inaccurate because *scienter* may be established by proof that the owner knew of attempts to bite or other dangerous propensities.

¹²³ R.S.M. 1987, c. A90.

¹²⁴ See *Lupu v. Rabinovitch* (1975), 60 D.L.R. (3d) 641 (Man. Q.B.); *Stubler v. Mattias* (23 November 1973), (Man. Q.B.) [unreported]; *Duke v. Reis* (1990), 64 Man. R. (2d) 238 (Q.B.).

liability on the owner of dogs. This is not so. Absolute liability suggests that there are no defences available to the defendant. There are, in fact, a number of defences available to the *scienter* action¹²⁵ and s. 26 of the *Animal Husbandry Act* does not speak to that issue. It is indeed likely that those judges who have used the word ‘absolute’ were using language loosely and assumed the word to be synonymous with strict.¹²⁶ Certainly nothing turned on the distinction in the particular cases.

It would seem, that the plaintiff in *Witman v. Johnson* had a strong case. The defendant owned the dog and it bit the plaintiff. However, Morse J. had resort to the principle that under the *scienter* action a defendant is not liable unless the animal has escaped from the control of the owner. The ‘escape from control’ criterion is a relatively modern one and its development is likely due in part to some judicial discomfort with strict liability. It is of particular significance in respect of damage caused by caged or tethered animals which cause injury to persons who either enter the cage or who come too close to the animal.¹²⁷ In many circumstances such a requirement dissipates the impact of strict liability by introducing the consideration of the sufficiency of control and the reasonableness of the defendant’s conduct. Consequently issues of fault are raised. Nevertheless the ‘escape from control’ requirement appears to be the dominant view¹²⁸ and it was accepted by Morse J.. His Lordship stated:

It is difficult for me to see what more he could have done to control it in the circumstances. I am satisfied that the dog could not have bitten the plaintiff’s hand if the plaintiff had not extended his hand towards the dog’s head as he did. It was the action of the plaintiff and not any lack of control of the dog by the defendant which led to the injuries sustained by the plaintiff.¹²⁹

Consequently there was no liability under the *scienter* action.

His Lordship then turned to the issue of negligence. One may be forgiven from assuming that negligence is a non-starter if strict

¹²⁵ Defences include default of the plaintiff, consent, act of a third party, act of God, and possibly the trespass of the plaintiff.

¹²⁶ There appears to be no example of absolute liability in the history of the common law of torts.

¹²⁷ *Maynes v. Galicz* (1975), 62 D.L.R. (3d) 385 (B.C.S.C.); *Lewis v. Oeming* (1983), 24 C.C.L.T. 81 (Alta. Q.B.).

¹²⁸ J. Irvine, “Annotation to *Lewis v. Oeming*” (1983), 24 C.C.L.T. 82.

¹²⁹ *Supra* note 8 at 434.

liability cannot be established. However, that such is not the case, attests to the mischief of the 'loss of control' rule. In negligence the focus is on the defendant and his conduct and Morse J. held that the defendant was careless. The defendant knew the disposition of Amigo. The dog had bitten the defendant and his wife before under provocative circumstances. It had shown aggressive behaviour on a leash and was on occasion very defensive. His Lordship concluded:

I am persuaded that the defendant could and should have moved away with his dog, particularly when it became apparent that the plaintiff was not going to heed the warning he had received. To move away with the dog or at least to have pulled the dog back and once again to have warned the plaintiff when he started to snap his fingers and then to crouch down would probably have avoided the accident. In the circumstances of this case it was not in my view sufficient for the defendant merely to have shortened his grip and to have warned the plaintiff to keep away.¹³⁰

Consequently the defendant was held 25 per cent negligent with 75 per cent being allocated to the plaintiff on contributory negligence principles.

It may be argued that the finding in negligence is incompatible with the ruling, for the purposes of *scienter*, that there was no escape from the control of the defendant. It would not have been difficult to conclude that in not pulling the dog well away from the plaintiff the defendant failed to control it sufficiently. However, his Lordship clearly wished to apportion the loss and this was most easily accomplished under the malleable principles of negligence. The 'default of the plaintiff' is a relevant factor in the *scienter* action but it is a complete defence, allocating all the loss to the plaintiff. There is no room for apportionment under the *Tortfeasors and Contributory Negligence Act*.¹³¹ Consequently, negligence was in this situation the tort of choice, permitting as it did the allocation of loss that Morse J. found to be appropriate.

It is interesting to note that the result of this case is entirely consistent with the approach recently recommended by the Manitoba Law Reform Commission *Report on Tort Liability for Animals 1992*. The Report recommends a sweeping rationalisation and simplification of the law relating to liability for damage caused by animals. The Commission recommended that the *scienter* action, cattle trespass and s. 26 of the *Animal Husbandry Act* be abolished. In its place a new tort would be created by statute. That tort would impose strict

¹³⁰ *Supra* note 8 at 436.

¹³¹ R.S.M. 1987, c. T90.

liability on the owner or harbourer of an animal for damage to real or personal property or physical injuries caused by the animal. The retention of strict liability for animals is perhaps surprising at a time when fault liability dominates the landscape of tort liability. Indeed, as we have seen, the *scienter* action has succumbed to some intrusion of fault concepts. The Commission, however, rejected fault liability on persuasive grounds. First, there is an inherent unpredictability in the behaviour of animals which may result in unforeseeable damage. Secondly, animals are not amenable to total control by the defendant. Consequently a fault-based tort which focused exclusively on the conduct of the defendant may permit defendants, too easily, to avoid liability. The Commission accepted the view that the keeper of an animal creates a risk and should, therefore, assume responsibility for losses generated by the animal. In a circumstance where both the defendant and plaintiff are innocent of fault the defendant should bear the loss. Such a fundamental principle it was argued is supported by centuries of legal history, fairness and by loss distribution and deterrence principles. The central principle of strict liability is, however, balanced by the recommendation that the liability of the defendant be reduced in proportion to the degree to which the fault of the plaintiff caused or contributed to the harm. Consequently apportionment is made available in a strict liability tort.

Such an approach would have reduced the difficulties that Morse J. faced in *Witman v. Johnson*.¹³² He would not have been forced to resort to negligence principles to achieve the result he desired. As the law and the case now stand we are reminded of John Irvine's comments on a similar *scienter* case, "Well that's a pretty kettle of fish in itself — with the law of negligence seemingly exacting a higher standard of responsibility than the strict liability tort."¹³³

B. The Ancient Tort of Nuisance in Rural Manitoba:

***MacGregor v. Penner*¹³⁴**

The really hard cases in nuisance law involve disputes between parties who are putting their land to lawful but totally incompatible and unreconcilable uses. In those cases there is little room for compromise or adjustment. Awards of damages and conditional injunctions do not resolve the problem. One land use must give way

¹³² *Supra* note 8.

¹³³ *Supra* note 128 at 83.

¹³⁴ *Supra* note 9.

to another. The decision is often not easy. Such a situation can arise when a city dweller moves to a rural 'hobby farm' or residence in quest of a peaceful, comfortable life far from the "madding crowd." Sometimes, however, country living does not meet these expectations. Smoke from stubble burning, dust from summer fallow, drifting herbicide and pesticide and smells from livestock operations may create a substantial interference with the enjoyment of residential and recreational property. Good land use planning should avoid such conflicts but disputes of this kind continue to arise. With the growing attraction of rural hobby farms and residences this kind of rural/urban clash can be expected to continue in the future.

The agricultural use that has been most productive of such disputes in the past has been hog farming and the accompanying odour created by the use of effluent lagoons. This was the case in *MacGregor v. Penner*.¹³⁵ However, it is useful to return to a much earlier hog farming case and its aftermath to place *MacGregor v. Penner* in perspective. That earlier case is *Lissoway v. Springfield Hog Ranch*.¹³⁶ In that case Wilson J. issued an injunction and awarded \$10,000 in damages against the defendant hog farm. The action had been brought by a residential neighbour in respect of odour produced by an open sewage lagoon. The government of the day disapproved of this decision. It was pointed out that the defendant had not breached any legislation or by-law and that it was inappropriate that in the late twentieth century the ancient tort of nuisance could be called upon to control a lawful agricultural operation. The response of the government was passage of the *Nuisance Act*.¹³⁷ Section 2 of that Act declares that any *business*, not in breach of land use control laws or the *Clean Environment Act*,¹³⁸ or orders or regulations thereto is not liable in nuisance in respect of any odour. Section 3 places the onus of proof on the plaintiff to show a breach of the aforementioned legislation. It is clear that the legislation was tailored to prevent successful nuisance actions in situations like *Lissoway*. It might be noted, however, that the legislation is wider than necessary to remedy the perceived mischief. It protects all businesses, both urban and

¹³⁵ *Ibid.*

¹³⁶ This decision of Wilson J. is not reported. It is referred to in the legislative debates on the *Nuisance Act* R.S.M. 1987, c. N120. It has not been possible to verify the precise facts or remedy given.

¹³⁷ R.S.M. 1987, c. N120.

¹³⁸ S.M. 1972, c. C130.

rural. It is not restricted either to agricultural businesses or to livestock operations.

This Act did not, however, prevent litigation similar to *Lissoway* from arising. In 1992 *MacGregor v. Penner* came before Dureault J. In that case the plaintiff moved from Winnipeg to a residence on a five acre lot in the Rural Municipality of Hanover. Across the road was a hog farm operated by Penner. The alleged nuisance arose from a large open sewage lagoon which produced very offensive odours and flies which interfered with the plaintiff's use and enjoyment of land. It is submitted that there is a short answer to this case. It is that the hog operation is a *business*. The gravamen of the complaint is *odour*. The defendant was in breach of no legislation rule or regulation. No action in nuisance is permissible under the *Nuisance Act*. Dureault J., however, preferred to go on something of a judicial safari. He chose to focus on what for him was the pivotal question; had the defendant committed a nuisance? His Lordship reviewed the authorities and pointed out, correctly, that the standard of comfort and enjoyment of land protected by the law of nuisance is a relative one. Consideration must be given to the intensity, duration and location of the interference. Furthermore, the defendants' motives, the social utility of the competing activities, patterns of land use, the sensitivity of the plaintiff and all other relevant factors must be considered. On the basis of these factors the judge must determine if there has been an unreasonable interference with the plaintiff's enjoyment of land. If one perceives 'unreasonable interference' as a factual question there seems little doubt that there was a nuisance in *MacGregor v. Penner*. Listen to the disruption of the plaintiff's 'life in the country':

[A]ll outdoor social activities, such as barbecuing and entertaining family or friends in their yard had to be curtailed ... because of the strong odours the windows and doors to their residence had to remain closed, ... they had to endure heat unnecessarily, and even their clothing had been permeated with the strong odours. They became anxious, depressed and short tempered. Frequent arguments arose and they suffered from stress. Returning home became a nightmare and so they brooded, argued and became miserable. They no longer could entertain friends and enjoy evening and weekend outdoor activities.¹³⁹

However "unreasonable interference" is not a factual question, it is a legal question under cover of which judges must choose among competing land uses. In favour of the defendant was the fact that his was a lawful agricultural business located in an agricultural area. If

¹³⁹ *Supra* note 9 at 250.

the plaintiffs had made appropriate inquiries before purchase of their acreage they would have understood that this was a hog producing area. Overall His Lordship concluded that the operation did not amount to an unreasonable interference with the plaintiffs use of land. The defendant had committed no nuisance. Having so held, his Lordship pointed out that there was no need to consider the *Nuisance Act*.

Interestingly, in the same year that *MacGregor v. Penner* was decided, the Manitoba legislature was working on a more comprehensive solution to agricultural nuisance and the role of nuisance law. It passed the *Farm Practices Protection Act*.¹⁴⁰ In part, the Act controls the availability of a nuisance action in respect of all agricultural operations. Section 2, which provides protection from nuisance claims, is modelled on the *Nuisance Act*. It states that where a person who carries on an agricultural operation, uses normal farm practices and does not violate either land use control laws, or the *Clean Environment Act*, regulations or orders thereunder or the *Public Health Act*,¹⁴¹ or regulations thereunder, she cannot be held liable in nuisance for any odour, noise, dust, smoke or other disturbance and cannot be prevented by injunction from continuing the operation. Section 2(2) confirms the breadth of the protection. It is available even where a land use bylaw changes causing the agricultural operation to become a non-conforming use and where there has been a change in surrounding land use. The burden is on the plaintiff to show a breach of land use control laws or legislation. A consequential amendment excludes agricultural operations from the *Nuisance Act*. There is some irony, given the genesis of the *Nuisance Act* that it now applies *only* to non-agricultural business.

The second part of the Act establishes the Farm Protection Board which has an important role in determining 'normal farm practices' and in mediating disputes arising from agricultural 'nuisances.' No action in nuisance can be commenced until the Board rules on whether or not an agricultural operation is a 'normal farm practice.' Furthermore, having received an application for such a determination the Board is directed to investigate and endeavour to resolve the dispute between the aggrieved person and the agricultural operation. If the Board cannot resolve the dispute it must either conclude that the agricultural operation is a 'normal farm practice' protected by the

¹⁴⁰ S.M. 1992, c. 41.

¹⁴¹ R.S.M. 1987, c. P210.

Act or it must order the cessation of the agricultural operation or its modification so that it will accord with 'normal farm practice.'

In order to assess the scope of this legislation it is necessary to remind ourselves of the range of nuisance actions. The first great divide in nuisance is between public and private nuisance. Public nuisance calls for public remedies¹⁴² unless an individual has suffered special damage, in which case a private action for damages may be brought. Private nuisance incorporates two sub-classes. Interference with land which causes actual property damage is normally actionable without a delicate balancing of all the surrounding circumstances. To cause actual property damage is normally an unreasonable interference with the land use of another. The other subclass involves interference with the enjoyment and comfort of land use. It is in this situation that the consideration of relevant factors is an essential step in striking a reasonable balance between competing land uses. It is useful to examine the Act in the light of the three situations.

First, it is not clear that the Act deals with public nuisance at all. Nuisance is not defined by the Act but the legislation does seem to have in mind the private dispute of which both *Lissoway v. Springfield Hog Ranch* and *MacGregor v. Penner* are exemplary. It is unlikely that such an Act would limit the powers of the Crown in respect of public nuisances. However, the private action for special damage may be covered.

Secondly, the Act does not seem to cover nuisances which cause physical damage to the plaintiff's property. Nuisances of this kind arising from agricultural operations would include run-off after manure spreading, polluting a neighbour's well, the escape of a stubble or weed burning fire, the drift of herbicide causing damage to a neighbour's crop, the escape of sewage from a lagoon onto a neighbour's farm and the spread of noxious weeds. The nuisances listed in s. 2 are of a kind which normally produce interference with comfort and enjoyment (odour, noise, dust, smoke and other disturbances) rather than create actual property damage.

Consequently the focus of the legislation is on the second class of private nuisance. In this category of agricultural nuisance the ancient tort now has very little role to play. It will be remembered that if the

¹⁴² A criminal prosecution may be brought or the Attorney General may, on behalf of the public, seek damages or an injunction. The Attorney General may also consent to a relator action which enables a private citizen to seek injunctive relief in the Attorney General's name.

Board finds that the agricultural operation is lawful and a normal farm practice no action is available. If it decides that it is not a normal farm practice the Board must make an order to remedy the situation. In this latter circumstance the only reason to institute a nuisance action would be to recover damages for past interference. Some scope for the nuisance action may also be found where the agricultural operation is a 'normal farm practice' but there has been associated illegalities. The protection of the Act is only extended to normal farm practices where there has been no breach of land use law. Overall, however, the Act appears to be quite successful in protecting farmers from nuisance claims relating to enjoyment and comfort which are the kind most likely to be brought by urban interlopers.

Whether this Act reflects good legal policy depends, of course, on one's point of view. The law of nuisance is not an entirely satisfactory device with which to resolve these kinds of disputes. The standard of unreasonable interference is an elusive one which is capable of being applied harshly against farmers. The common law remedies lack sensitivity and flexibility. Litigation creates considerable costs in time, money and energy. Furthermore, it is the policy of most governments to support and protect the agricultural sector as a vital element of the provincial economy. On the other hand there is little evidence that courts have been blind to the interests of farmers. Indeed, there is some judicial authority in the stubble burning cases for a defence of normal farm husbandry.¹⁴³ Furthermore, the difference between the concepts of normalcy and reasonableness would seem to be marginal particularly given the elusive nature of each. The real change here is in process. It is a move away from Courts to administrative tribunals and is consequently part of a twentieth century trend. The enormous diversity of land use in the twentieth century is now controlled largely by legislation, regulation, municipal planning and zoning by-laws. The law of nuisance has been progressively marginalized and the *Farm Practices Protection Act* is compatible with that trend.

¹⁴³ *Lickoch v. Madu*, [1973] 2 W.W.R. 127 (Alta. C.A.); *Zaruk v. Schroderus* (1976), 71 D.L.R. (3d) 216 (Alta. T.D.) discussed in J. Irvine, "Case Comment *Metson v. R.W. DeWolfe Ltd.*; The Changing Face of Nuisance and *Rylands v. Fletcher*" (1980), 14 C.C.L.T. 225.

C. Willing Passenger v. Intoxicated Driver: *Desjardin v. Penner*¹⁴⁴

There are many sad cases in the law reports involving passengers who have been injured because the driver of the car in which they were travelling was intoxicated. The visceral sympathy evoked by victims of these automobile accidents is, however, sometimes tempered by annoyance at plaintiffs who have knowingly put themselves in harm's way. Travelling with an intoxicated driver is a high risk enterprise and serious injury is a very foreseeable consequence. A demand for full and complete compensation in such circumstances is sometimes not greeted with unbridled judicial enthusiasm. A number of legal doctrines are asserted by defendants to defeat the action partially or completely. *Volenti non fit injuria*, *ex turpi causa non oritur actio* and contributory negligence are likely to be raised.

This was the situation in *Desjardin v. Penner*.¹⁴⁵ The litigation arose out of a single vehicle accident involving the defendant Penner, who was the owner/driver of the vehicle, the female plaintiff Desjardin and another passenger, McKinney. The three friends had driven to Maida, North Dakota to continue an afternoon of drinking. The accident occurred in the course of the return journey. At the outset McKinney was driving because Penner's licence was suspended. However McKinney's driving was extremely erratic and Desjardin eventually took over the driving. Subsequently a stop was made on the highway to allow the occupants to relieve themselves. They were interrupted by an oncoming vehicle. In their rush to return to the automobile and resume their journey Penner, who was intoxicated, took over the driving. The plaintiff only just had time to jump into the passenger seat before the vehicle pulled away. In spite of the plaintiff's protestations, Penner drove at excessive speed. Eventually the automobile failed to take a bend in the road and the accident occurred. The plaintiff suffered a broken leg.

The most common judicial approach to this kind of a case is to apply in turn the doctrines of *volenti non fit injuria* and contributory negligence. *Volenti* which is a complete defence has not found favour in the drunk driver/willing passenger cases since a series of Supreme

¹⁴⁴ *Supra* note 11.

¹⁴⁵ *Ibid.*

Court decisions in the 1950s and 60s.¹⁴⁶ These cases, which restricted the defence to a very narrow compass, were recently affirmed in *Dubé v. Labar*.¹⁴⁷ The following words of Glowacki J., the trial judge in *Desjardin v. Penner* reflect the current scope of *volenti*:

The defence applies only if the circumstances are such that the plaintiff knowing of the virtually certain risk of harm agrees expressly or by necessary implication to exempt the defendant from liability. It is not sufficient that the plaintiff merely knew of, and chose to undergo, the risk. The plaintiff accepts this risk only where there has been understanding on the part of both parties that the defendant did not assume any responsibility to take due care for the safety of the plaintiff and the plaintiff accepted the risk of harm, expressly or by necessary implication, without recourse to the law. The burden of proof lies upon the driver who alleges the defence and in most cases the factual foundation for the defence will not be present.¹⁴⁸

His Lordship had little difficulty in concluding that the plaintiff had not consented to the risk of the defendant's drunk driving. He stressed that Penner took over the driving on a country road and the plaintiff did not know exactly where she was. To expect her to leave her friends and get a ride with a passing vehicle was not reasonable. When in the car she repeatedly asked Penner to slow down, all to no avail. She did not consent to the defendant's negligence.

Contributory negligence is a partial defence. A finding reduces the defendant's liability in proportion to the plaintiff's degree of responsibility. It recognises the failure of the plaintiff to take care for her own safety without releasing the defendant from all responsibility. Perhaps surprisingly, however, his Lordship did not find contributory negligence. For some judges it would have been sufficient that the plaintiff went out for an afternoon's drinking and knew that both Penner and McKinney were intoxicated. Even though the precise concatenation of events may not have been foreseeable, she had placed herself in a position of peril and the injury was of a kind that was clearly foreseeable. However, his Lordship chose to focus on her relationship with Penner and that portion of the trip which began when Penner took over the driving. He concluded:

¹⁴⁶ *Car & General Insurance Cor Ltd. v. Seymour* (1956), 2 D.L.R. (2d) 369; *Miller v. Decker* (1957), 9 D.L.R. (2d) 1; *Lehnert v. Stein* (1962), 36 D.L.R. (2d) 159; *Eid v. Dumas* (1969), 5 D.L.R. (3d) 561.

¹⁴⁷ (1986), 27 D.L.R. (4th) 653 (S.C.C.).

¹⁴⁸ *Supra* note 11 at 88.

She never encouraged the defendant to consume the amount of alcohol he drank. She never consented to the defendant driving the motor vehicle and she protested his manner of driving. The cause of the accident was the defendant's reckless driving. Under the circumstances I find that she was not contributorily negligent.¹⁴⁹

By far the most interesting issue raised in this case, however, is that of *ex turpi causa non oritur actio*. There has been considerable judicial divergence in respect of this defence in recent years. The basic idea of this defence is that the court should not assist a plaintiff, who has suffered an injury in the course of criminal activity, to recover damages. Traditionally, *ex turpi* has not found favour among judges in drunk driver/willing passenger cases because it is a complete defence and would shield a defendant from all responsibility for the accident. This has been achieved by limiting the scope of the *ex turpi* defence. The general view, followed in Manitoba,¹⁵⁰ has been that *ex turpi* can only be applied when both parties are involved in a joint criminal venture and the injury is a direct consequence of that criminal activity. In such circumstances to assist the plaintiff is to undermine the integrity of the legal system and bring the courts into disrepute.¹⁵¹

However, in recent years some courts, particularly in British Columbia, have sought to broaden and consequently to revitalize the *ex turpi* defence. This trend has corresponded to hardening societal attitudes in respect of drunk driving escapades. One senses that some judges saw *ex turpi* as a way of making an end run around the *volenti* rule in order to deny the claims of undeserving plaintiffs. The primary proponent of such an approach was the British Columbia Court of Appeal. Its view was expressed clearly in *Hall v. Hebert*.¹⁵² This decision at the British Columbia Court of Appeal level was available to Glowacki J. in *Desjardin v. Penner*. Subsequently, in a very important, decision the Supreme Court heard the appeal.

In *Hall v. Hebert*¹⁵³ the owner of a powerful automobile and his friend had spent the evening drinking and driving. Both were intoxicated. The defendant owner was held to be negligent in

¹⁴⁹ *Ibid.* at 90.

¹⁵⁰ *Rondos v. Wawrin* (1968), 68 D.L.R. (2d) 658 (Man. C.A.); *Bond v. Loutit (Noonen)*, [1979] 2 W.W.R. 154 (Man Q.B.).

¹⁵¹ *Tallow v. Tailfeathers*, [1973] 6 W.W.R. 732 (Alta C.A.).

¹⁵² (1993), 15 C.C.L.T. (2d) 93 (S.C.C.), rev'g (1991), 6 C.C.L.T. (2d) 294 (B.C.C.A.).

¹⁵³ (1991), 6 C.C.L.T. (2d) 294 (B.C.C.A.).

permitting his intoxicated friend to roll start the standard transmission automobile after it had stalled. The friend lost control of the automobile and suffered serious injuries when it crashed. The central issue was whether the plaintiff's claim was defeated by *ex turpi causa non oritur actio* on the grounds that the plaintiff had driven the car while intoxicated. The British Columbia Court of Appeal held that the claim was barred. The majority of the Court interpreted *ex turpi* very broadly. A joint criminal enterprise was not necessary. It is available whenever the conduct of the plaintiff giving rise to the claim is so tainted with criminality or culpable immorality that as a matter of public policy the Court should not assist him to recover damages.¹⁵⁴ In the view of Gibbs J.A. who spoke for the majority, "fair minded, right thinking people would be outraged if the Court lent its assistance to this drunk driver to recover damages from his drunk passenger."¹⁵⁵

The abandonment of the "joint enterprise" requirement and the expansion to "culpable immorality" heralded a much more robust role for *ex turpi* in single auto accidents involving alcohol. Such a development appears inconsistent with the policy underlying the *volenti* cases in the Supreme Court which clearly favoured an apportionment of responsibility. Nevertheless, the approach was reaffirmed by the British Columbia Court of Appeal in *Anderson v. Regan*.¹⁵⁶

In *Desjardin v. Penner* the defendant argued *ex turpi* on a number of factors including:

- (i) the plaintiff was guilty of under-age drinking in the United States;
- (ii) the plaintiff drove the motor vehicle herself;
- (iii) the plaintiff was in the motor vehicle when the Defendant was driving;
- (iv) the plaintiff attempted to cover up the accident.

Glowacki J. was alive to the controversy over the scope of the *ex turpi* defence but he did not feel compelled to choose between the two views.

¹⁵⁴ *Ibid.* at 302.

¹⁵⁵ *Ibid.* at 306.

¹⁵⁶ (1993), 76 B.C.L.R. (2d) 346 (B.C.C.A.).

He concluded, "I do not find the conduct of Desjardin to be so manifestly unacceptable that a Court should not lend assistance to her and I find that this defence fails."¹⁵⁷

Subsequently, the Supreme Court allowed the appeal in *Hall v. Hebert*¹⁵⁸ and it seems an opportune moment to briefly outline the Court's view on *ex turpi* in the law of torts. The leading judgment was delivered by McLachlin J., La Forest, L'Heureux-Dubé and Iacobucci JJ. agreed with her providing a clear majority. McLachlin J. recognized that the case was the first opportunity for the court to definitively determine the scope of the *ex turpi* defence in the law of torts. In her view the defence plays a minimal but vital role in tort law. Its role is to protect the integrity and consistency of the legal system by rejecting claims in two situations. The first situation is where a tort claim, if allowed, would permit the plaintiff to profit from her wrongful act. The meaning of profit in this context means a direct pecuniary reward for the wrongdoing. This would include claims for financial loss consequent on an illegal activity, claims for loss of future illegal earnings consequent on personal injury, claims for fraud or misrepresentation brought by one thief against a co-conspirator and claims for exemplary damages by a wrongdoer. It does not, however, include a claim for compensation for personal injuries caused by negligence. In such circumstances the plaintiff is not receiving profit from an illegal act, she is receiving compensation for personal injuries. The second and narrower situation includes tort claims which seek to evade the sanctions or consequences of the criminal law. The example given by McLachlin J. is that of a burglar who, having been convicted and fined under the criminal justice system, attempts to recover the amount of the fine by suing his partner in crime. In both of these situations, the integrity and internal consistency of the legal system would be subverted and such claims should not be permitted. Since the facts of *Hall v. Hebert* fall within neither of these two situations, the *ex turpi* defence failed and the loss was apportioned fifty-fifty.¹⁵⁹

¹⁵⁷ *Supra* note 11 at 88.

¹⁵⁸ (1993), 15 C.C.L.T. (2d) 93.

¹⁵⁹ Of the other judges Cory and Gonthier JJ. agreed with the *result* reached by McLachlin J.. Cory J., however, called for the abolition of *ex turpi causa non oritur actio* as a defence in tort cases. He agreed that concerns traditionally dealt with by the defence would be better resolved by denying a duty of care on policy grounds. McLachlin J. specifically rejected such an approach. Sopinka J. dissented on the grounds that the defendant owed no duty of care to the plaintiff.

The exclusion of *ex turpi* from routine personal injury litigation will be welcomed by many who favour apportionment as the appropriate legal device to deal with these situations. The Court has reaffirmed the general policy that lies within the *volenti* cases and has extended it to *ex turpi*. Consent to the physical risk and involvement in illicit, immoral or criminal activities will not bar recovery for personal injury. In essence, both plaintiff and defendant are wrongdoers and loss will be apportioned so that both compensatory and deterrent goals are partially achieved. A complete defence provides only excess deterrence against the *plaintiff*. Overall the decision of Glowacki J. seems closely attuned to the approach of the Supreme Court. While some judges may have made some deduction for contributory negligence, *volenti* and *ex turpi* were clearly non-starters.

D. Occupiers' Liability: *Silva v. Winnipeg (City)*¹⁶⁰, *Anderson v. Anderson*¹⁶¹ and *Peters v. Reimer*¹⁶²

In previous reviews of Manitoba tort law a close watch has been kept on the unfolding interpretation of the *Occupiers' Liability Act*.¹⁶³ The cases in the 1990s have in the main been consistent with earlier ones in perceiving the Act as one which in essence requires basic negligence concepts to be applied to the relationship of occupier and visitor. Three are, nevertheless, worthy of brief note. *Silva v. Winnipeg* is a useful example of the application of the standard of reasonable care in s. 3(1). *Anderson v. Anderson* dealt, *inter alia*, with an interesting point on the meaning of 'occupier.' *Peters v. Reimer* applies the very important decision of the Supreme Court in *Waldick v. Malcolm*¹⁶⁴ on the scope of the defence of "willing assumption of risk" in the *Occupiers' Liability Act*.¹⁶⁵

Silva v. Winnipeg dealt with a slip and fall on an icy sidewalk adjacent to the Winnipeg Arena. The occupier of the sidewalk was Winnipeg Enterprises Corporation. Technically speaking it was a public sidewalk under the City's responsibility. However, since 1980 the Corporation has assumed full responsibility and control of it and

¹⁶⁰ *Supra* note 12.

¹⁶¹ *Supra* note 13.

¹⁶² *Supra* note 14.

¹⁶³ *Supra* note 15.

¹⁶⁴ (1991), 83 D.L.R. (4th) 114.

¹⁶⁵ *Supra* note 15 s. 3(3).

in the winter had inspected, cleared, salted and sanded the area at its own expense. This amounted to a sufficient degree of control and responsibility to attach the obligations of an occupier. The plaintiff slipped on a patch of snow covered ice at 5:30 p.m., January 6, 1989, while walking to the box office at the arena to purchase tickets for that evening's game between the Winnipeg Jets and the Los Angeles Kings. The plaintiff broke his leg. The evidence of the Corporation suggested that their normal practice was to make an inspection of the sidewalk at 8:00 a.m. and to take such action as conditions demanded by way of sanding, salting or clearing. There was, however, no evidence of what was done on the day of the accident. The plaintiff's evidence, that there was no salt, sand or "Ice Foe" on the patch of ice on that day was accepted. Ferg, J. accepted that the situation on the sidewalk was "hazardous or dangerous"¹⁶⁶ and sought to apply s.3(1) requiring that reasonable care be taken to make the premises reasonably safe. His Lordship stressed the importance of taking into account "all the circumstances of the case" and the notion of 'reasonableness.' "It is not extraordinary but reasonable care that is required."¹⁶⁷

He concluded:

It would not be unreasonable or extraordinary to demand that the Arena Corporation take the necessary steps to insure that there were no snow covered patches of ice on its sidewalk particularly when it expects thousands of hockey fans to come to the Arena property! My finding, on the evidence is that it did not take such care It is not enough in my opinion to rely solely on the Corporation's general practices to absolve it of liability in these circumstances.¹⁶⁸

This analysis is virtually indistinguishable from one resting on conventional negligence doctrine and seems utterly consistent with the spirit and letter of s. 3(1).¹⁶⁹ It is only in his Lordship's dealing with contributory negligence that an eye brow or two might be raised. Ferg J. found the plaintiff, a healthy 46-year old man, to be guilty of

¹⁶⁶ *Supra* note 12 at 699.

¹⁶⁷ *Supra* note 11 at 8.

¹⁶⁸ *Ibid.*

¹⁶⁹ For another example of the application of s. 3(1) see *Herzog v. Winnipeg*, [1990] 2 W.W.R. 177 (Man. Q.B.). In that case the plaintiff was injured in a city park. She stepped into a concealed hole in the field. It was held that the hole was a hazard that could have been removed. The City had failed to inspect the field adequately and consequently had not discovered or dealt with the danger. Reasonable care to make the premises reasonably safe had not been taken.

contributory negligence in the degree of one third. His Lordship noted the importance of walking carefully on Winnipeg streets in the winter but he does not alert us to the plaintiff's failings in that regard, other than, that he fell. There was no suggestion that he was walking too quickly, or that he was inattentive. His footwear was found to be appropriate. It seems the fall is *res ipsa loquitur*. Ferg J. is not the first Manitoba judge to take this view¹⁷⁰ but we should note that the Supreme Court in *Waldick v. Malcolm*,¹⁷¹ to be discussed in a moment, made no deduction in respect of a fall on an icy patch on a driveway.

*Anderson v. Anderson*¹⁷² dealt with a slip and fall in the chicken barn on a farm in Rosser. The plaintiff was assisting her husband, the first defendant, to clean the chicken barn. The chicken manure was shovelled and washed into a U shaped trough in which there was a cross auger. The plaintiff slipped and caught her foot in the auger causing great damage and subsequently, an amputation. No liability was imposed in this case because Nurgitz J. found that the premises were reasonably safe and no negligence could be established. The only point of interest in the case is the determination of who were occupiers.

The action was brought not only against the plaintiff's husband but also against the second defendant, his mother. It appears that the farm business was a team operation. The mother, Margaret Anderson, was an owner in possession. However, she was aged and suffering from Alzheimer's disease. She played little or no role in the operation of the business. The farm was managed and operated by her son. He was also an owner of the farm but it appears that he was resident in Winnipeg. The *Occupiers' Liability Act*¹⁷³ defines 'occupier' in the following way.

S. 1(1) 'occupier' means an occupier at common law and may include:

(a) a person who is in physical possession of premises

or

¹⁷⁰ See *McKittrick v. Agassiz Enterprises (1980) Ltd.* (2 June 1988), (Man. Q.B.) [unreported]. Commented on in P.H. Osborne, "A Review of Tort Decisions in Manitoba, 1988" (1990) 19 Man. L.J. 92 at 114.

¹⁷¹ *Supra* note 164.

¹⁷² *Supra* note 13.

¹⁷³ *Supra* note 15.

(b) a person who has responsibility for and control over the condition of the premises, the activities conducted on those premises or the persons allowed to enter those premises.

Clearly, the son was an occupier. Although not resident on the property he was an owner exercising full control and responsibility for the property. The more interesting question was the status of his mother. Nurgitz J. held that she was not an occupier. His Lordship focused on the concept of “control” set out in (b) of the definition. He declared:

... Margaret was unable and did not provide any management direction or control over the farm operation. .. [She is] a very elderly and confused person unable to manage any business or personal affairs ... ownership by itself does not create occupancy. She is not an occupier.¹⁷⁴

It is not difficult to have a great deal of sympathy for such an elderly and ill person as the second defendant but care must be taken with this judgment. The concept of *control* is utilized in the Act to *extend* the conventional common law meaning of occupier and to increase the range of obligation. The paradigm of an occupier at common law is the owner in possession, the person who in Denning L.J.’s words can say “come in.”¹⁷⁵ Margaret Anderson in spite of her frailties appears to be an owner in possession and such a person is an occupier at common law whether or not she exercises control and management of the property on a day-to-day basis. To hold otherwise creates considerable difficulties. There are many mentally and physically disabled persons who are not able to control and manage their property but continue to live at home with the assistance of nursing or home help. These are owners in possession and are occupiers. Injured visitors may look to them and beyond them to their homeowners’ liability insurance for protection.

In *Peters v. Reimer*¹⁷⁶ the plaintiff fell when exiting a house that was in the course of construction. He was a real estate agent who had been showing the house to some prospective buyers. His complaint was that there were no stairs to the doorway and he was required to jump down some 19–30 inches on to the ground causing an injury to his back. His case was weakened by a finding of fact that the distance

¹⁷⁴ *Supra* note 13 at 3–4.

¹⁷⁵ *Wheat v. Lacon*, [1966] 1 All E.R. 582 at 594 (H.L.).

¹⁷⁶ *Supra* note 14.

between the door sill and the ground was only 12–19 inches and that he fell awkwardly because he was pulling the door behind him to lock it as he jumped to the ground. In light of the nature of the site, the plaintiff's knowledge of the site, the small drop involved and that other agents and prospective buyers had no trouble negotiating the entrance, Glowacki J. concluded that the premises were reasonably safe. His Lordship pinned the blame for the accident on the manner in which the plaintiff jumped down rather than the condition of the premises. The only notable point in this case was his Lordship's reference to s. 3(3) of the Act. It was argued that even if the defendant was found to be in breach of the requisite standard of care, no liability could be imposed in the light of s. 3(3). Section 3(3) reads: "Notwithstanding ss.(1), an occupier of premises owes no duty of care to a person entering on the premises ... in respect of any risks willingly assumed by that person."

It was argued that since the plaintiff had been in and out of the property with different clients, without objection or injury, he had willingly assumed the risk of the lack of stairs. There has been some difference of opinion about the meaning of s. 3(3). At its widest interpretation, it would apply where there is, as in this case, *knowledge* of the risk and the plaintiff has exposed himself to that risk without protest or objection. At its narrowest interpretation, it can be viewed as a legislative adoption of the *volenti non fit injuria* defence found in the tort of negligence. On that interpretation, mere knowledge and acceptance of the physical risk of injury is not enough to bar the plaintiff. It must be shown that the plaintiff further agreed to accept the legal risk, i.e. to give up all right of action in respect of injuries caused by a breach of s. 3(1). This debate was settled by the Supreme Court in *Waldick v. Malcolm*¹⁷⁷ dealing with similar wording in the Ontario Act. The Supreme Court held that the words "willingly accepted the risk" incorporated the strict negligence doctrine of *volenti* into the legislative scheme of occupiers' liability. Glowacki J. applied *Waldick*. He said:

In this case the plaintiff was well aware of the dangers of entering and leaving the dwelling house which was under construction. However, it cannot be said that he had bargained away his right to sue for injuries incurred as a result of negligence.¹⁷⁸

¹⁷⁷ *Supra* note 164.

¹⁷⁸ *Supra* note 14 at 297.

Once again it is clear that the Act is being interpreted in a manner which is consistent with negligence principles.

E. Misrepresentation of Employment Prospects: *De Groot v. St. Boniface Hospital*¹⁷⁹

It is now almost thirty years since the House of Lords decision in *Hedley Byrne v. Heller and Partners*.¹⁸⁰ The metes and boundaries of that decision have yet to be fully worked through. Recently, however, Iacobucci J. in *Queen v. Cognos*¹⁸¹ gave a useful statement of general principle. He stated:

The required elements for a successful *Hedley Byrne*, *supra*, claim have been stated in many authorities, sometimes in varying forms. The decisions of this court cited above suggest five general requirements: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said representation; (4) the representee must have relied, in a reasonable manner, on said negligent representation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.¹⁸²

In that case the Supreme Court imposed liability on an employer who in the course of negotiations misled a prospective employee as to the security and prospects of a position for which he successfully applied. Scollin J. resorted to this statement of principles in the recent case of *De Groot v. St. Boniface Hospital*.¹⁸³ In this case the plaintiff De Groot, in the course of completing his surgical residency at the defendant hospital, had impressed both Dr. Danzinger with whom he trained and Dr. Kirkpatrick. Dr. Kirkpatrick hoped that when De Groot had finished further training overseas he would return to St. Boniface Hospital as a surgeon in a proposed non-cardiac thoracic surgery unit. Before leaving Winnipeg to continue his training, De Groot formally applied to the hospital for full surgical privileges including non-cardiac thoracic surgery privileges. Although he intended ultimately to specialize in non-cardiac thoracic surgery, privileges in general surgery were important to supplement his income

¹⁷⁹ *Supra* note 16.

¹⁸⁰ [1965] A.C. 465.

¹⁸¹ [1993] 147 N. R. 169 at 193.

¹⁸² *Ibid.* at 171.

¹⁸³ *Supra* note 16 at 294.

until he became established in his specialty. If he was unable to secure these privileges he would have sought a position elsewhere.

Initially, his application was supported by the general surgery section of the hospital and this was communicated to De Groot by Dr. Danzinger. Dr. Danzinger, at that time, was head of the Department of Surgery and was responsible for communicating with De Groot. Later, however, problems arose and the general surgery section reversed its recommendation that De Groot receive general surgical privileges. This eventually led to De Groot receiving privileges in only non-cardiac thoracic and trauma surgery. De Groot, however, was never told of the change in the recommendations of the general surgery section and subsequent communications with Dr. Danzinger did not alert him to any problems with his application. It was only when he arrived back in Winnipeg that he learned to his shock and dismay that his privileges were restricted. A year later, De Groot returned to a position in South Africa. He sued Kirkpatrick, Danzinger and the hospital. Scollin J. imposed liability on Danzinger and the hospital. Kirkpatrick was not found liable. At the pertinent time he had no official relationship with De Groot.

Scollin J. found all of Iacobucci J's principles in *Cognos* satisfied. In his view, the relationship between De Groot and Danzinger was "special." As a senior colleague, Danzinger was something of a father figure to De Groot and De Groot relied upon him for advice and assistance. It was almost a dependant relationship of which Danzinger was fully aware and as such obligations of special care and frankness arose. De Groot was clearly misled. Initially, he received information which led him to believe in the ultimate success of his application. The failure to tell De Groot of the change in the recommendation of the general surgery section left him with "a substantially false picture of his prospects on return."¹⁸⁴ The failure to inform De Groot was negligent. De Groot's belief and reliance on gaining full privileges was reasonable. Finally, he suffered damage. The hospital and Danzinger were liable to place the plaintiff in the position he would have been in if the misrepresentation had not been made. Damages included travelling expenses to and from Winnipeg and loss of income.

This is an interesting and important case. There has not been a great deal of litigation applying *Hedley Byrne* to pre-contractual employment negotiations. *Cognos* indicates that information about the nature, security and prospects of the position applied for must not be misleading. Now, in *De Groot*, Scollin J. indicates that there may be

¹⁸⁴ *Ibid.*

obligations on the part of senior colleagues and administrators not to mislead candidates on the prospects of success of applications. However, one should be careful not to read too much into this case. The relationship between Danzinger and De Groot appears to have been very strong, and to have fiduciary overtones. Scollin J. noted the degree of dependence of De Groot on Danzinger. Danzinger was an adviser, counsellor and senior colleague who was encouraging a young colleague in his career path. He was also a hospital administrator whose task it was to communicate with applicants. De Groot reasonably expected Danzinger to act, in some degree, in De Groot's best interests. It was also of significance that De Groot's geographical location made it difficult for him to more fully monitor the progress of his application. His reliance on Danzinger to keep him apprised of the situation left him in a vulnerable position. These factors of trust, confidence and vulnerability are building blocks towards fiduciary duty and even if the relationship did not qualify for that description, it was sufficient to require Danzinger to protect De Groot from injury. However, it would be dangerous to assume too broad a duty in less analogous situations.

The only reservation one might have in respect of this case is on the question of reliance. Scollin J. indicates that there was no suggestion that Danzinger had ostensible authority to bind the hospital. It was well known that only the Board of Directors of the St. Boniface General Hospital had authority to make appointments to the medical staff. However, De Groot did not wait until the formal procedures had been fully carried out. He chose to move half way around the world on the assumption that his application was being processed to an ultimately successful conclusion. A more prudent person may not have taken such a major step until all the 'i's were dotted and the 't's crossed. The case, at least, raises an issue of the reasonableness of the reliance. That Scollin J. did not take issue with this point perhaps indicates how close the relationship between De Groot and Danzinger was to being fiduciary in nature. After all, "it is the fiduciary's responsibility to look out for my welfare even in the face of my own careless behaviour."¹⁸⁵

¹⁸⁵ C. Massey, "American Fiduciary Duty in an Age of Narcissism" (1990) 54 Sask. L.R. 101 at 103.

IV. CONCLUSION

THE OVERALL CONCLUSION TO be drawn from these cases is that the decision-making is competent and careful and that most decisions appeal to an inherent sense of fairness and justice. Occasionally courts have held to conventional boundaries of liability when incremental expansion of liability was arguably appropriate. Sometimes judges did not explore issues or policy considerations as fully as one might find useful. The clarity and structure of some judgments could be improved. None of this warrants significant criticism. This review should not, however, end without recognition of an imminent and fundamental change to tort law in Manitoba. Beginning on March 1, 1994 injuries and death resulting from automobile accidents will no longer be controlled by the tort system. The Manitoba Public Insurance Corporation will administer a no-fault compensation system for all victims of automobile accidents. Manitoba joins Quebec as the only two Canadian jurisdictions in North America to introduce a pure no-fault system. Not since 1917, when workplace injuries and diseases were surrendered to the Workers' Compensation System has such a significant category of accidents been removed from the control of tort law.

However, as this Review indicates, tort will continue to be an interesting and important area of law in Manitoba. Indeed, only one of the cases reviewed, *Desjardin v. Penner*,¹⁸⁶ involved an automobile accident. The cases indicate the continuing control of tort law of a wide range of personal injuries including those caused by health care professionals, occupiers and animals. Other of the cases such as *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co. Ltd.*,¹⁸⁷ *Granville Savings and Mortgage Co. v. Slevin*,¹⁸⁸ *Gerrard v. Manitoba*¹⁸⁹ and *De Groot v. St. Boniface Hospital*¹⁹⁰ indicate areas of expansion and growth in the law of torts. Governmental liability, economic losses caused by both words and conduct and notions of fiduciary duty represent the cutting edge of tort law and further development of those areas is likely. Moreover, we will continue to see the novel and interesting application of traditional

¹⁸⁶ *Supra* note 11.

¹⁸⁷ *Supra* note 2.

¹⁸⁸ *Supra* note 3.

¹⁸⁹ *Supra* note 5.

¹⁹⁰ *Supra* note 16.

torts such as nuisance in *MacGregor v. Penner*,¹⁹¹ the economic torts in *Gerrard v. Manitoba*.¹⁹²

Nevertheless, it is worth noting that the two most productive sources of personal injury, the workplace and automobiles, are no longer subject to tort liability, and the practical impact of tort law is reduced substantially. We are one large step closer to William Pedrick's prediction in 1978 that: "by the middle of next century the future of tort law controlling mass physical claims is no future at all."¹⁹³

¹⁹¹ *Supra* note 9.

¹⁹² *Supra* note 5.

¹⁹³ W. Pedrick, "Does Tort Have a Future?" (1978) 39 Ohio St. L.J. 782 at 788.