

A Review of Tort Decisions in Manitoba, 1993–1995

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I. INTRODUCTION

THIS IS THE FOURTH OF A SERIES of reviews on Manitoba tort law.¹ This article covers the period from 1 July 1993 to 1 July 1995. As in the past, a selection of the more interesting or important decisions are reviewed. Again, emphasis is given to appeal decisions but a number of first instance cases are included. The cases are described, placed in the wider context of tort law and policy and some observations and a few criticisms are offered.

We begin with the very important decision of the Supreme Court in *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co. Ltd.*² It deals with product quality claims in respect of real property. Consideration is then given to four Court of Appeal decisions and one Queen's Bench decision dealing with economic losses allegedly flowing from negligent statements. *Reid v. Marr's Leisure Holding Inc.*,³ *Grant v. Oracle Corp. of Canada Inc.*⁴ and *Jacks v. U & R Tax Services Ltd.*⁵ consider whether or not the *Hedley Byrne and Company v. Heller & Partners*⁶ doctrine of liability for negligent statements extends to statements of opinion and forecast or is restricted to statements of fact. *Hercules Managements Ltd. v. Ernst & Young*⁷ deals with the duty of care owed by accountants to third parties in respect of financial

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¹ P.H. Osborne "A Review of Tort Decisions in Manitoba, 1988" (1990) 19 Man. L.J. 92; P.H. Osborne "A Review of Tort Decisions in Manitoba, 1989" (1990) 19 Man. L.J. 419; and P.H. Osborne "A Review of Tort Decisions in Manitoba 1990–1993" (1993) 22 Man. L.J. 191.

² (1995) 100 Man. R. (2d) 241 (S.C.C.).

³ (1994) 95 Man. R. (2d) 36 (C.A.).

⁴ (1995) 100 Man. R. (2d) 28 (C.A.).

⁵ (1995) 99 Man. R. (2d) 60 (C.A.).

⁶ [1964] A.C. 465 (H.L.).

⁷ (18 April 1995), Winnipeg 95-13423 (C.A.).

information prepared primarily for clients. *Vita Health Co. v. Toronto Dominion Bank*⁸ raises the topical and important question of the interplay of fiduciary obligations and duties of care owed by a bank to its clients. Other Court of Appeal decisions considered include *Heaman v. Isaac and Eden Mental Health Centre*⁹ which deals with limitation periods in cases of sexual abuse and a number of occupiers' liability cases — *Peters v. Reimer*,¹⁰ *Anderson v. Anderson*,¹¹ *Portree v. Woodsmill Homes Ltd.*,¹² *Shewfelt v. Robin's Supermarket*,¹³ *Lorenz v. Winnipeg (City)*,¹⁴ and *Galts v. Ultra Care Inc.*¹⁵ — are covered together with one Queen's Bench decision, *McChesnie v. Tourond and Delta Hotels Ltd.*¹⁶

The Queen's Bench decisions considered include *Norman v. Stranc*¹⁷ on the doctrine of informed consent to medical treatment, *Kaban v. Sett*¹⁸ on the standard of care in negligence law as it applies to physicians and *Werbeniuk v. Maynard*¹⁹ on the liability of a negligent owner of an automobile for damage caused after it is stolen.²⁰

⁸ [1994] 9 W.W.R. 360 (Man. C.A.); leave to appeal to the Supreme Court of Canada refused [1995] 5 W.W.R. 1 xiii.

⁹ (1994) 95 Man. R. (2d) 59 (C.A.).

¹⁰ (1994) 95 Man. R. (2d) 286 (C.A.).

¹¹ (1994) 92 Man. R. (2d) 150 (C.A.); leave to appeal to the Supreme Court of Canada refused 11 August 1994.

¹² (1994) 95 Man. R. (2d) 283 (C.A.); leave to appeal to the Supreme Court of Canada refused 12 January 1995.

¹³ (1994) 97 Man. R. (2d) 228 (C.A.).

¹⁴ (1993) 88 Man. R. (2d) 193 (C.A.).

¹⁵ (1995) 100 Man. R. (2d) 19 (C.A.).

¹⁶ (1995) 99 Man. R. (2d) 209 (Q.B.).

¹⁷ (1994) 96 Man. R. (2d) 127 (Q.B.). After this article was submitted the Court of Appeal dismissed the appeal, 11 September 1995.

¹⁸ (1993) 90 Man. R. (2d) 26, appeal dismissed (1994) 97 Man. R. (2d) 185 (C.A.).

¹⁹ (14 June 1994), Winnipeg 94-12065 (Q.B.).

²⁰ In Osborne, "Review of Tort Decisions 1990-1993," *supra* note 1, the decision of Scollin J. in *DeGroot v. St. Boniface General Hospital* (1993), 15 C.C.L.T. (2d) 287 was discussed. The Court of Appeal upheld the finding of liability but reduced damages: see *DeGroot v. St. Boniface General Hospital* (1995), 22 C.C.L.T. (2d) 163. The case is not reconsidered in this article.

II. SUPREME COURT OF CANADA

A. Liability for Defective Buildings: *Winnipeg Condominium Corporation No. 36 v. Bird Construction Company Ltd.*²¹

In the last "Review of Tort Decisions"²² I began my comment on the Court of Appeal's decision in *Winnipeg Condominium Corporation No. 36 v. Bird Construction Ltd.*²³ with a simple hypothetical. The purpose of the hypothetical was to identify the issue of product quality claims in negligence law. Before turning to the Supreme Court's decision reversing the Court of Appeal, I will restate that hypothetical. "A" negligently builds a house. The negligence causes a latent defect which is not discovered by the first owner, "B." "B" then sells the house to "C" who subsequently discovers the defect and incurs repair costs and/or a diminution in the value of the property. "C" seeks to recover her losses. 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." It should be noted that the claim is brought for damage *in* the building itself. It is not brought for damage, whether personal injury or property damage, caused by the building which might arise, for example, if the building collapsed. This claim has been classified as one for economic loss but the real contest is over the boundaries of tort and contract in relation to product quality. The House of Lords in *D & F Estates Ltd. v. Church Commissioners for England*²⁴ and *Murphy v. Brentwood District Council*²⁵ has taken the view that the cost of repairs and the diminution in value of the premises are not recoverable in tort law. The claim is, in essence, a contractual one for a breach of a warranty of quality and as such can only be made against the person with whom you have contracted. The claim is controlled by the terms of the contract. Privity rules cannot be subverted by tort claims brought by non-contracting parties. For the House of Lords it is of no concern that the defect is dangerous or non-dangerous. Until the building causes damage to person or property external to itself no tort action is available. The Court of Appeal in *Bird*²⁶ essentially adopted the English view and rejected the product quality claim that was made in that case.

²¹ *Supra* note 2.

²² Osborne, "A Review of Tort Decisions 1990–1993," *supra* note 1 at 192.

²³ *Supra* note 2.

²⁴ [1989] A.C. 177 (H.L.).

²⁵ [1991] 1 A.C. 398 (H.L.).

²⁶ (1993) 15 C.C.L.T. (2d) 1 (Man. C.A.).

The facts of *Bird* are not complex. In 1972 Tuxedo Properties contracted with the general contractor Bird Construction Co. Ltd. for the construction of a 15 storey 94 unit apartment building. The architect, Smith Carter, was retained by Tuxedo Properties. Bird entered into a sub-contract with Kornovski and Keller for the masonry work. In 1978 the property was converted to condominiums and Winnipeg Condominium Corporation No. 36 became the registered owner of the building. In 1982 there were concerns about the state of the stone cladding on the exterior of the building. Modest remedial work proved insufficient and in 1989 a storey high section of four inch cladding, approximately twenty feet in length, fell from the ninth storey. This led to the entire cladding being replaced at a cost of 1.5 million dollars. Winnipeg Condominium Corporation No. 36 sought to recover that cost from Bird, Smith Carter and Kornovski. Bird and Kornovski filed a notice of motion for summary judgment and a motion to strike out the statement of claim as disclosing no reasonable cause of action. The trial judge dismissed both motions. Bird appealed to the Court of Appeal. The appeal was dismissed with respect to the motion for summary judgment but allowed in respect of the motion to strike.

In the Supreme Court La Forest J. wrote a unanimous opinion reversing the Manitoba Court of Appeal. La Forest J. chose not to decide the case on the broad basis of product quality claims in general. He drew a distinction between latent defects which create a "real and substantial danger" and structures which are merely shoddy and of poor quality. This distinction, which was rejected in *Murphy v. Brentwood District Council*,²⁷ is central to the Supreme Court's decision. In *Bird* the defective cladding presented a very serious danger to persons, both occupants and visitors, and to property such as automobiles positioned below. In this way La Forest J. narrowed the issue and concluded:

where a contractor (or any other person) is negligent in planning or constructing a building, and where the building is found to contain defects resulting from that negligence which pose a real and substantial threat to the occupants of the building, the reasonable costs of repairing the defects and putting the building back into a non-dangerous state are recoverable in tort by the occupants.²⁸

The Court pointed out that the duty postulated in the *Bird* case, being one to take reasonable care to ensure safe construction, was independent of contractual relationships and was owed to both the original and subsequent owners. The Court then proceeded to consider the twin pillars of duty of care identified by Lord Wilberforce in *Anns v. London Borough of Merton*²⁹ — proximity and policy considerations. The Court noted that it is clearly foreseeable that a permanent structure

²⁷ *Supra* note 25.

²⁸ *Supra* note 2 at 259.

²⁹ [1978] A.C. 728 (H.L.).

such as a building will be occupied by different people who may suffer injury as a result of a dangerous defect. This foreseeability was sufficient to find proximity and ground the responsibility to pay for repairs undertaken to abate the danger. This provides an incentive to prevent loss before it occurs. Since the builder would clearly be liable for the ultimate damage he should be liable for the cost of repairs designed to avoid, abate or mitigate that loss.

The second branch of *Anns* demands consideration of policy factors which might tend to negate or restrict the *prima facie* duty created by a finding of proximity. The compelling factor in economic loss cases is the apprehension of liability in an “indeterminate amount for an indeterminate time to an indeterminate class.”³⁰ The Court, however, noted that the class was restricted to the owners of the building, the amount was limited to the cost of repairing dangerous defects and while time may be extensive, being the useful life of the building, it will become increasingly difficult for the plaintiff to establish that it was the builder’s fault, as opposed to wear and tear which caused the damage. La Forest J. also commented that the purchaser is not in the best position to bear the loss generated by the emergence of latent dangerous defects. He concluded that there were no sufficient policy reasons to negate a duty to the future occupants of the building that it is reasonably safe.

The decision, which will be applauded by many as pragmatic, sensible and fair, will produce its share of interesting questions. The first involves the interpretation of “real and substantial” danger. The obligation of the builder is restricted to the cost of repairing defects which have this degree of danger. This was clearly met in *Bird*. The danger was extreme. People could have been killed. Moreover, the danger was imminent, one section of the stone cladding having already fallen off the building. This is, however, not a typical case. The typical case is the house with inadequate and poorly constructed foundations which sags, cracks and leans. At some future indeterminable time it might collapse and injure an occupant. Are repair costs recoverable or is this merely shoddy or poor workmanship? What of negligently designed or constructed stairs which create a risk of slip and fall? What about the installation of slippery tiles around a swimming pool? When subsequent owners abate these dangers they may seek to recover their costs from the builder. My suspicion is that courts will interpret “real and substantial” dangers quite broadly. The policy of accident prevention and the lack of a realistic alternative remedy for the owner makes the negligent and insured builder an appealing target. Secondly, the damages recoverable are the cost of repairs necessary to make the structure safe. This may create some difficulty. In *Bird*, for example, all the cladding, was replaced at the cost of 1.5 million dollars. This amount may not be recoverable

³⁰ *Ultramares Corp. v. Touche* (1931), 174 N.E. 441 (N.Y.C.A.) at 444.

if there were cheaper ways of securing the existing cladding thereby abating the danger. One might also note that it is not clear if there can be recovery for any diminution in value of the repaired premises. Thirdly, it is unclear if the decision extends to negligently manufactured or designed chattels which threaten property or personal injury.

La Forest J. did rely on the dissenting judgment of Laskin J., as he then was, in *Rivtow Marine Ltd. v. Washington Iron Works*³¹ which would have allowed a non-contracting party to recover the cost of repairs of a defective crane. In that case, the damage was extreme and imminent since another crane of the same design and manufacture had collapsed and killed a man. It is a much more contentious issue, however, to extend this decision to the wide range of consumer products. Nevertheless, it is difficult to draw a principled distinction. Pragmatic distinctions include the permanence, value and unusual repair costs of buildings and the increased likelihood of subsequent ownership.

These points are, however, merely a prelude to the "big question" about the *Bird* case. That question is whether this case is but one step in a longer journey towards a liability on the part of a manufacturer or builder for *non-dangerous defects*, i.e., to allow all product quality claims in tort. La Forest J. noted that such a step had been taken in New Zealand, Australia, some of the United States of America and in Quebec. He preferred, however, to leave the question open and to wait for a case which more clearly focused on this issue. Before ending this comment, however, it may be useful to draw attention to a recent decision of the High Court of Australia where the ultimate issue was squarely faced. The facts of *Bryan v. Maloney*³² presented the issue perfectly. In 1979 Mrs. Manion entered into a contract with the defendant builder Bryan for the construction of a new home. The contract was unremarkable. It contained no special terms or exemption clauses. The plaintiff, Mrs. Maloney, was the third owner of the house. Before she purchased the house she inspected it carefully and found no sign of defect. Six months after she bought the house in 1986, cracks began to appear in the walls of the house. The reason for the cracks and subsequent damage was that the house had been built with insufficient foundations to withstand seasonal changes in the clay soil. There was no suggestion that the defect was in any way dangerous to person or property. The trial judge allowed the recovery of \$34,464.88, being the amount needed to remedy both the inadequate footings and the consequential damage to the fabric of the house. The defendant's appeal to the Full Court of the Supreme Court of Tasmania was dismissed. The High Court of Australia by majority dismissed the further appeal

³¹ [1974] S.C.R. 1189.

³² (1995) 69 A.L.J.R. 375 (H.C.A.).

of Bryan. The leading judgment was that of Mason C.J.A., Deane and Gaudron JJ. They presented the issue clearly as:

whether, under the law of negligence, a professional builder who constructs a house for the then owner of the land owes a *prima facie* duty to a subsequent owner of the house to exercise reasonable care to avoid the kind of foreseeable damage which Mrs. Maloney sustained in the present case, that is to say the diminution in value of the house when a latent and previously unknown defect in its footings or structure first becomes manifest.³³

For the majority this question was to be determined on the fundamental concept of proximity between the defendant and the plaintiff. Some factors did not support such a relationship. The plaintiff had no knowledge of the builder and had received no representations or assurances from him. Nevertheless there was the connecting link of the house. It was a permanent structure, which was likely to be used indefinitely by a succession of owners each of whom were making perhaps the most substantial investment of their life. In a case like *Bryan* where there was no intervening negligence or other causative event, foreseeability of loss was compelling. There was, of course, the issue of economic loss but the majority found no cogent reasons to negate a duty of care on that basis. There was no question of inconsistency with the builder's legitimate pursuit of his own financial interests since he owed the same obligation of care to the first owner. There was no significant danger of indeterminate liability on the part of the builder. Furthermore, this relationship between the builder and the plaintiff was marked by the conventional hallmarks of liability for pure economic loss; assumption of responsibility on the part of the builder and reliance on the part of the owner. All of this supported the wisdom of imposing a duty of care to construct the house in a reasonably careful and workmanlike manner. Having failed in that duty the builder was liable for the "diminution in value of a house when the inadequacy of its footings first became manifest by reason of consequent damage to the fabric of the house."³⁴

The majority was uninfluenced by the concerns for doctrinal purity favoured by the House of Lords. The Court felt that the English view

rested on a narrower view of the scope of the modern law of negligence and more rigid compartmentalisation of contract and tort than is acceptable under the law of this country.³⁵

³³ *Ibid.* at 376.

³⁴ *Ibid.* at 383.

³⁵ *Ibid.*

There is much to be said for the High Court decision. The builder is better able to bear the loss through liability insurance than the ultimate purchaser. If there is no liability in tort the ultimate purchaser has no effective remedy. Liability imposes an incentive for careful construction practices. On loss distribution and deterrence principles the loss should be borne by the wrongdoer.

The decision has however dramatically altered the conventional wisdom in respect of the scope of tort liability. The Court has created a transmissible warranty of quality issued by the builder to successive owners of the premises that construction meets a professional standard of reasonable workmanship and quality. This will, of course, give rise to a series of issues in subsequent cases. One can anticipate arguments relating to limitations and the discoverability rule, causation, intervening culpable and non-culpable acts and contributory negligence. The more difficult issues however, relate to the standard of care (reasonable quality) and the assessment of damages.

The tort system is familiar with setting standards of care to protect the safety and security of persons and property on the basis of foreseeable danger. This can be achieved without reference to contractual relationships. The creation of norms of *quality* will lead tort law into uncharted territory. The point was made by Brennan J. in his dissenting judgment in *Bryan v. Maloney*.

The doing of work for reward is a matter governed by the agreement between the party doing the work and the party requesting that the work be done. They fix their own rights and liabilities on issues of purely economic significance. The work to be performed, the quality and value of that work and the cost of repairing defects in work ill done are thus properly the concerns of the law of contract...

It would be anomalous to have claims relating to the condition of the building by an original owner against the builder determined by the law of contract if the relief claimed by the remote purchaser against the builder would be determined by the law of tort. Such a situation would expose the builder to a liability for pure economic loss different from that which he undertook in constructing the building and would confer a corresponding right on the remote purchaser which the purchaser had not sought to acquire from the vendor.³⁶

The problem is apparent in as simple a case as *Bryan v. Maloney*. Brennan J. pointed out that it was not clear that the arrangement between Bryan and the first owner provided for the resources to investigate the soil or to take the special precautions necessary to avoid future problems. One solution is to set the standard of care with reference to the contract. The successive owner would be in the position of a third party beneficiary to the contract whose rights would be defined by the terms of the original contract. This would amount to a true transmissible warranty of quality. Remote purchasers would secure no greater protection in respect of quality than the original owner. The extent of that warranty would

³⁶ *Ibid.* at 391.

depend on the terms of the contract, the cost of construction and any exemption clauses in the contract. Alternatively, a standard may be set without reference to the contract. This would require some kind of quality standard such as the reasonable expectations of the purchasers of residential or commercial realty. This would provide a reasonable and attainable standard which could be assessed in part by consideration of building codes and customary practice. More problematic is the fact that the contractual obligation to the first owner might be higher or lower than that owed to subsequent purchasers and, furthermore, the court would in essence be demanding a reasonable standard of construction from all builders. Construction of low cost, low quality premises would expose builders to the risk of liability.

The second area of difficulty is in the assessment of damages. The High Court did not spend a great deal of time on this issue. The assessment principle adopted was the diminution in value of the premises when the latent defect becomes manifest through damage to the fabric of the building. The court calculated the diminution in value as the cost of repairing the house. Future cases are likely, however, to present greater difficulties. The cost of repairs may not be the same as the initial diminution in value of the house. They may be considerably more or less depending on the circumstances. In those circumstances a choice will have to be made between the two methods of calculation. Furthermore, a repaired building may be worth less than one that did not need repair. Is such a diminution in value recoverable in addition to the repair cost? Problems will also arise when the second owner becomes aware of the defect and sells to a purchaser who does not discover the defect until a later time. Can the new owner claim against the builder? These issues and many more will have to be sorted out.

It will be interesting to see if this new slate of questions will be sufficient to give the Supreme Court pause before embracing the principle in *Bryan v. Maloney* or whether the court will continue in the direction indicated in *Bird* and will perceive the outstanding issues as no more than the inevitable by-product of further development of the tort of negligence.³⁷

³⁷ For further commentary on both *Bird* and *Bryan* see J. Fleming, "Once More: Tort Liability for Structural Defects" (1995) 111 Law Q.R. 362.

III. COURT OF APPEAL

A. Negligent Misrepresentation — Fact, Opinion and Forecast: *Reid v. Marr's Leisure Holding Inc.*,³⁸ *Grant v. Oracle Corp of Canada Inc.*,³⁹ *Jacks v. U & R Tax Services Ltd.*⁴⁰

In a long line of cases the Manitoba Court of Appeal has taken the consistent position that liability for negligent misrepresentation under the *Hedley Byrne and Company v. Heller & Partners*⁴¹ doctrine can attach only to statements of *fact*. Statements of opinion, forecast and prediction are not within the ambit of tortious liability. The origins of this view can be found in the dissenting decision of Freedman C.J.M. in *Campbell v. B. Leslie Real Estate & Development Co.*⁴² However, its most vigorous proponent was O'Sullivan J.A. in *Andronyk v. Williams*.⁴³ His Lordship declared categorically that opinion and forecasting are not matters of fact and do not come within *Hedley Byrne* principles.⁴⁴ In that case an erroneous statement relating to the number of "improved acres" to be found on the vendor's rural property was held to be, at most a statement of opinion. The Court reaffirmed this view in *Foster Advertising Ltd. v. Keenberg*.⁴⁵ In that case a representation by the head of the racing commission that an investigation had "not disclosed any reasons why the track [would] not operate in a totally normal fashion"⁴⁶ during the coming season, was categorized as a "forecast as to the future"⁴⁷ and as such could not be treated as a negligent misrepresentation. This principle is one of some importance, not only because it narrows the applicability of the *Hedley Byrne*⁴⁸ doctrine, but also because the Supreme Court has not yet ruled on the issue. In *Queen v. Cognos*⁴⁹

³⁸ *Supra* note 3.

³⁹ *Supra* note 4.

⁴⁰ *Supra* note 5. This Queen's Bench decision is included here because it raises similar issues.

⁴¹ [1965] A.C. 465 (H.L.).

⁴² (1973) 1 N.R. 90 (Man. C.A.) reversed 1 N.R. 89 (S.C.C.).

⁴³ (1985) 35 C.C.L.T. 38 (Man. C.A.).

⁴⁴ *Ibid.* at 57.

⁴⁵ (1987) 38 C.C.L.T. 309 (Man. C.A.).

⁴⁶ *Ibid.* at 313.

⁴⁷ *Ibid.* at 326 *per* Huband J.A.

⁴⁸ *Supra* note 6.

⁴⁹ (1993) 14 C.C.L.T. (2d) 113 (S.C.C.).

the Supreme Court assumed without deciding the correctness of the point. However, since the representation in that case was one of fact no ruling was required. This issue arose again in three recent Manitoba decisions. *Reid v. Marr's Leisure Holdings Inc.*⁵⁰ and *Grant v. Oracle Corporation of Canada Ltd.* are decisions of the Court of Appeal. *Jacks v. U & R Services Ltd.*⁵¹ is a decision of the Queen's Bench.

In *Reid v. Marr's Leisure Holding Inc.*⁵² the plaintiff abandoned his own successful business and went to work for the corporate defendant as a salesperson. He alleged that he made this move because the defendant officers and employees of the defendant company assured him that his position of salesperson would be secure. The plaintiff's position with the corporate defendant was terminated only a few months after he began work. The Master dismissed the action against the personal defendants on the basis that there was nothing in the pleadings to assist the Court in finding a special relationship between the personal defendants and the plaintiff. Nurgitz J. upheld that decision and the plaintiff appealed to the Court of Appeal. The Court allowed the case to proceed to trial to determine whether a sufficient relationship of proximity, foreseeability, and reliance existed to support the conclusion that a special relationships arose between the personal defendants and the plaintiff. The Court also considered the nature of the representation.

Scott C.J.M. stated that at trial:

there is the matter as to how much of the representation, if any, related to anticipated future events as opposed to the state of affairs, that existed at the time of the representation.⁵³

Kroft J.A. was a little more direct. He stated:

[the plaintiff] will have to establish that the simple representation "that his position would be secure" ... was a representation as to a material and existing fact rather than simply an opinion as to future prospects. If these words constitute a representation at all, then it seems to me that it may well be a representation about anticipated future prospects and not about existing facts."⁵⁴

Nevertheless, as noted earlier, the Court allowed the matter to proceed to trial.

⁵⁰ *Supra* note 3.

⁵¹ *Supra* note 4.

⁵² *Supra* note 3.

⁵³ *Supra* note 3 at 40.

⁵⁴ *Supra* note 3 at 41.

The facts in *Grant v. Oracle Corporation of Canada Ltd.*⁵⁵ were similar to the *Reid* case. The plaintiff was a salesperson in the field of computer supplies and services. He was persuaded to leave his existing employment and join the defendant. In the course of employment he was required to attain certain sales quotas. When it became apparent that he would not be able to attain those targets he resigned to avoid being fired. He then brought an action alleging that the defendant made certain misrepresentations as to existing and projected sales which persuaded him to join the defendant. The trial judge found that the defendant had not been negligent. The Court of Appeal dismissed the appeal, agreeing with the trial judge's assessment of the defendant's conduct. Helper J.A. supported her decision on two other grounds. There was no evidence that the plaintiff relied on the sales projections and in any event the projections were not statements of existing fact. Helper J.A. stated:

... *Queen v. Cognos* ... makes it clear that a claimant is entitled to claim only for negligently made statements of fact. The factored Q figures were mere projections or forecasts which are excluded from the ambit of tortious liability in the event that they prove to be erroneous.⁵⁶

This statement may overstate the effect of *Queen v. Cognos*⁵⁷ but it is certainly consistent with prior authority.

The third case is a decision of Jewers J., *Jacks v. U & R Tax Services Ltd.*⁵⁸ This case dealt most directly with the nature of the misstatements and whether they related to future rather than past or present events and were, therefore, not actionable. The representations were made in the course of the sale of a business by the plaintiff, who was a majority shareholder, to the defendant. The plaintiff alleged that, in the course of negotiations, the defendant agreed to continue the plaintiff in a management role under a three year employment contract. The defendant acquired the shares and then reneged on the agreement. The Master had struck out the statement of claim as disclosing no reasonable cause of action. Jewers J. accepted the general proposition that statements of intent relating to future events are not actionable. However, his Lordship pointed out that in saying that the plaintiff "would get" employment there was "implicit in that statement certain representations of present fact (for example that the defendant's then existing plans genuinely included a position which she could occupy for the term

⁵⁵ *Supra* note 4.

⁵⁶ *Ibid.* at 32.

⁵⁷ *Supra* note 49.

⁵⁸ *Supra* note 5.

of three years on the terms outlined in the statement of claim).”⁵⁹ On this basis the Court allowed the case to proceed to trial.

There is a certain similarity to these cases. All involve employment opportunities. All involve disappointed employees or prospective employees. All involve statements which on their face relate to future events or intent. All statements might have been negotiated as terms of an employment contract. Consequently the plaintiffs’ reliance may be seen as unreasonable and unjustified and it would not be surprising if ultimately all the plaintiffs fail. This does not, however, allay a sense of discomfort about the primary proposition that statements of intent, opinion and forecast are not actionable under *Hedley Byrne*. There are a number of reasons to have reservations about this proposition.

First, the authority for this view is not strong. As noted earlier the proposition makes its first appearance in a dissenting judgment of Freedman C.J.M. in *Campbell v. B. Leslie Real Estate and Development Co.*⁶⁰ In a very short judgment that case was reversed by the Supreme Court. Martland J. speaking for the Court expressed agreement with Freedman C.J.M. O’Sullivan J.A. in *Andronyk v. Williams*⁶¹ interpreted this as clear authority that the Court adopted the position of Freedman C.J.M. that only misrepresentations of fact are actionable. I will not revisit the controversy surrounding the interpretation of Martland J.’s nine line judgment, but Professor Irvine⁶² has made a strong argument that the Supreme Court’s decision turned more on the absence of a special relationship than on the nature of the representation. Consequently, the *Campbell* case is not strong authority for confining *Hedley Byrne* liability to statements of fact.

Secondly, a close reading of *Andronyk v. Williams*⁶³ and *Foster Advertising Ltd. v. Keenberg*⁶⁴ indicates that the Court of Appeal relied substantially on the law of contract to define the nature of a misrepresentation which is actionable under tort law. A fundamental premise to these decisions is that the nature of a misrepresentation which gives rise to an action in tort is identical to the kind of misrepresentation that gives rise to rescission of a voidable contract at equity. However, a brief excursion into contract law will identify cogent reasons for the narrow definition of misrepresentation in that realm of contract law which do not speak with the same force in tort law. It will be remembered that the remedy for a misrepresenta-

⁵⁹ *Supra* note 5 at 65.

⁶⁰ *Supra* note 42.

⁶¹ *Supra* note 43.

⁶² J. Irvine, “Annotation to *Andronyk v. Williams*” (1985), 35 C.C.L.T. 38.

⁶³ *Ibid.* at 43.

⁶⁴ *Supra* note 45.

tion inducing a contract is rescission at equity. This is a drastic remedy essentially cancelling the contractual link. Moreover, contract law conventionally does not require that the misrepresentation be fundamental, nor does it require any finding of fault on the part of the misrepresenter. Any misrepresentation inducing the contract gives rise to a right of rescission. A broad remedy of this nature, however, would threaten commercial stability and certainty and unduly favour the misrepresentee. Consequently, controls were worked into the law which would provide an appropriate balance between the parties. This was achieved in two ways. First, and of greatest relevance to this discussion, is that "misrepresentation" was defined strictly to exclude statements of intention, opinion, forecast and puffs. A statement of fact was required to narrow the range of the rescission remedy. Secondly, a number of bars to rescission prevent rescission where, broadly speaking, there has been some reliance on the contract by the parties or third parties. In this way contract law balanced the competing interests of preventing misrepresentors from gaining an unjust enrichment and the need for certainty and stability in commercial relationships. Clearly, the policy concerns in tort law are different and tort law has developed its own range of control devices to restrain liability within appropriate boundaries. Liability is fault based. A special relationship arising from proximity, foreseeability, and reliance must be established. Damages are the sole remedy and apportionment of losses through contributory negligence is available. It is not, therefore, immediately apparent why further restrictions drawn from contract law are necessary or desirable.

Thirdly, as the three Manitoba cases discussed show, the line between fact and opinion or forecast is not easy to draw. The statements in the three cases are essentially similar. In *Reid*⁶⁵ the plaintiff's case was permitted to proceed, in *Grant*⁶⁶ the plaintiff lost, and in *Jacks*⁶⁷ the plaintiff was encouraged to proceed to determine if some implicit statements of fact could be found concealed within future words.

Fourthly, the notion that *Hedley Byrne* liability is restricted to statements of fact is inconsistent with some leading cases. *Hedley Byrne and Company v. Heller & Partners*⁶⁸ itself dealt with a report on the credit worthiness of a company. Such a report would seem largely to be one of *opinion*. Indeed, Lord Reid framed the issue as one involving the seeking of "information, opinion or advice."⁶⁹ In *J. Nunes*

⁶⁵ *Supra* note 3.

⁶⁶ *Supra* note 4.

⁶⁷ *Supra* note 5.

⁶⁸ *Supra* note 41.

⁶⁹ *Ibid.* at 482.

*Diamonds v. Dom Elect Protection Co.*⁷⁰ the defendant's employees expressed opinions about the efficacy of a security alarm system. The court refused to impose liability for a number of reasons, but the nature of the misrepresentation was not included among them. In *Esso Petroleum Co. v. Mardon*⁷¹ the defendants were held liable for an erroneous forecast of potential sales of gasoline at a service station. One could add many other cases where liability has been imposed on a wide range of professionals giving advice, opinions, and projections.

Perhaps enough has been said to question the wisdom of maintaining the view that liability can only attach to statements of fact and to encourage us to re-think the issue.

The *Hedley Byrne*⁷² principle was developed to provide protection in a society where the extraordinary complexity of modern life leads us to place increasing reliance on the skill and knowledge of a wide range of experts and specialists. We do not in the main, however, rely on these persons for the collection and transmission of facts. Our need is for specialists and professionals who apply their skill and knowledge, to analyze facts and to provide advice, opinions and projections based upon that professional process. This is the work of many professionals such as real estate appraisers, engineers, lawyers, doctors, financial planners, and many others. A person who holds herself out as having the skill and knowledge to give reliable advice, opinion, or forecast should be liable if the plaintiff can prove that it is erroneous because of negligence. It is not likely that this would create any significant problems. There is within the *Hedley Byrne* doctrine sufficient control devices to confine liability within sensible boundaries. Concepts such as assumption of responsibility, special relationships, proximity and the seriousness of the occasion all control the extent of liability. It is perhaps reliance which most aptly controls the extent of liability for opinion and statements of future events. The plaintiff's reliance must be reasonable and justifiable and it is suggested that this is a direct and open way to rule out liability for imprecise, general, extravagant or inherently unbelievable opinion, advice, or forecasts. It is not suggested that many cases would be decided differently if such an approach was taken. Liability would be very difficult to establish in the three cases under review. In *Reid* the promise of security seems vague and general and more in the nature of casual optimism than a reliable assurance of long term employment. In *Grant*, Helper J.A. specifically found no reliance by the plaintiff. *Jacks* is perhaps the strongest case which may explain the nice distinction *Jewers J.* used to allow it to proceed. Of the earlier Manitoba cases only *Andronyk v. Williams* is contentious. In that case the owner of a farm property

⁷⁰ (1972) 26 D.L.R. (3d) 699 (S.C.C.).

⁷¹ [1975] Q.B. 819 (C.A.).

⁷² *Supra* note 41.

misrepresented the nature of the land to a foreign purchaser in the middle of winter when independent investigation was not possible. Reliance was foreseeable, justifiable, and reasonable. Tort liability presented an excellent opportunity to prevent the unjust enrichment of the seller without overturning the contract of sale. It is unfortunate that the opportunity was missed.

In conclusion, it is submitted that there is every reason to have trust in the established control devices on the extent of liability for erroneous statements. A dichotomy between factual statements and opinions and forecasts is neither good law nor good policy.

B. The Extent of Liability for Negligent Misrepresentations: *Hercules Managements Ltd. v. Ernst & Young*⁷³

One of the issues that was left unsettled by the House of Lords in *Hedley Byrne and Company v. Heller & Partners*⁷⁴ was the extent of liability for negligent misrepresentations. It has been, however, a pressing concern for numerous subsequent courts in all parts of the common law world. It is generally accepted that a control device must be found which is more limiting than the foreseeable plaintiff and foreseeable damage rules applied to personal injury and property damage claims. The danger of liability in an "indeterminate amount for an indeterminate time to and indeterminate class"⁷⁵ is too great under that rule. There has, however, been some debate about the appropriate rule to govern the situation. *Hercules Management Ltd. v. Ernst & Young* makes a useful and important contribution to the debate. The defendants were chartered accountants. For several years they were employed by Northguard Acceptance Corporation (Acceptance) and Northguard Holdings Ltd. (Holdings) to audit their financial statements. The plaintiffs were existing shareholders who alleged that, on the faith of these financial statements, they made further investments in the companies. When the companies went into receivership the plaintiffs' shareholdings and investments were rendered worthless. They sought to recoup their losses alleging that the defendant had negligently prepared the financial statements. The defendant moved for summary judgment on the grounds that there was no genuine issue for trial. Dureault J. granted the motion. The plaintiff appealed. The central issue was the responsibility of the accountants to the investors and shareholders of a client company.

Two approaches to the limitation of liability to third parties have competed for recognition. The first, represented by the Supreme Court decision in *Haig v.*

⁷³ *Supra* note 7.

⁷⁴ *Supra* note 41.

⁷⁵ *Supra* note 30.

Bamford,⁷⁶ relies on closely defining the class of plaintiffs to whom the duty is owed. Under this view the duty is owed to a limited class of persons that the defendant knows will rely on the information. The second is represented by the House of Lords' decision in *Caparo v. Dickman*⁷⁷ which confines liability to situations where the defendant knows the purpose to which the information will be put. This "known use" rule is sometimes referred to as the "end and aim" limitation. A brief summary of each of these authorities will clarify the choice that was open to the Court of Appeal.

In *Haig v. Bamford*⁷⁸ the defendant accountants were asked to prepare audited financial statements for their client Scholler Bros. Scholler Bros. had applied for a \$20,000 loan from a provincial agency and among the terms for that loan was a requirement that Scholler provide satisfactory audited financial statements and secure a matching \$20,000 in equity capital from a private investor. The defendants knew that the financial statements would also be used to secure this capital. Ultimately Haig, relied on the financial statements and put up the capital. The financial statements, however, were prepared negligently and shortly thereafter Scholler failed. Haig sought to recoup his losses from the defendants. The case presented the issue of liability to non-privity third parties well. When the financial statements were prepared Haig was not identified even as a potential source of equity capital.

Dickson J., as he then was, wrote the leading judgment. He clearly recognized the danger of indeterminate liability and sought to craft a limitation by defining the class of plaintiffs who could recover. He stated:

[f]rom the authorities, it appears that several possible tests could be applied to invoke a duty of care on the part of accountants vis-a-vis third parties: (i) foreseeability of the use of the financial statements and the auditor's report thereon by the plaintiff and reliance thereon; (ii) actual knowledge of the limited class that will use and rely on the statement. (iii) actual knowledge of the specific plaintiff who will use and rely on the statement. It is unnecessary for the purposes of the present case to decide whether test (i), the test of foreseeability, is or is not, a proper test to apply in determining the full extent of the duty owed by accountants to third parties. The choice in the present case, it seems to me, is between test (ii) and test (iii), actual knowledge of the limited class or actual knowledge of the specific plaintiff. I have concluded on the authorities that test (iii) is too narrow and that test (ii), actual knowledge of the limited class, is the proper test to apply in this case.⁷⁹

Clearly Haig, though not identified by name, was a member of a limited class that the defendant knew would rely on the information. This test is open to

⁷⁶ (1977) 72 D.L.R. (3d) 68 (S.C.C.).

⁷⁷ [1990] 2 A.C. 605 (H.L.)

⁷⁸ *Supra* note 76.

⁷⁹ *Ibid.* at 75.

criticism on the grounds that it does not reliably define the risk that a representor is exposed to when the information is provided and it does not directly deal with the risk of liability in an indeterminate amount. There is, for example, a good deal of vagueness in the word "limited" (the Saskatchewan *Companies Act* limited equity investment to 50 people, in *Haig*) and liability to each member of the class may be very substantial.

Caparo v. Dickman,⁸⁰ which adopts the 'known use' rule is factually much closer to *Hercules Management*.⁸¹ In *Caparo*,⁸² the plaintiff was the owner of shares in a public corporation. In 1984 public audited accounts negligently prepared by the defendant accountants painted a false picture of the financial health of the company. In reliance on the audited statements the plaintiff purchased more shares and later in the year made a successful takeover bid of the company. The plaintiffs claimed in respect of their losses as shareholders and potential investors. The House of Lords held that the defendants did not owe a duty of care to the plaintiffs in either capacity.

Lord Bridge set out the important elements of liability. He stated:

[t]he salient feature ... is that the defendant giving advice or information was fully aware of the nature of the transaction which the plaintiff had in contemplation, knew that the advice or information would be communicated to him directly or indirectly and knew that it was very likely that the plaintiff would rely on that advice or information in deciding whether or not to engage in the transaction in contemplation."⁸³

Lord Oliver spoke in similar terms. He outlined the following requirements:

(1)... where the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the advisor at the time when the advice is given, (2) the advisor knows, either actually or inferentially, that his advice will be communicated to the advisee for that purpose (3) it is known, either actually or inferentially, that the advice so communicated is likely to be acted on by the advisee for that purpose without independent inquiry...⁸⁴

The court held that these requirements had not been satisfied. In the Court's view its decision was consistent with the policy behind the statutory obligation to prepare public audited statements which is simply to allow shareholders to judge and control the management of the company. They are not prepared for the use of

⁸⁰ *Supra* note 77.

⁸¹ *Supra* note 7.

⁸² *Supra* note 77.

⁸³ *Ibid.* at 620-21.

⁸⁴ *Ibid.* at 638.

those purchasing shares or making takeover bids. This can be criticised as a narrow view of legislative policy. After all the public can only judge the financial health of a corporation through its audited financial statements. The legislature may well have desired to protect not only existing shareholders in evaluating the corporation management but also creditors, investors and takeover bidders, suppliers, prospective employees and others who deal with the corporation. The Court was not, however, persuaded of this view.

It will be seen from this brief examination of *Haig* and *Caparo* that the plaintiffs in *Hercules* were unlikely to succeed under either the “limited class” test or the “known transaction” test. Their claim was really much bolder. The essence of their claim was that they *foreseeably* and reasonably relied on the defendants’ statement to their loss.

Helper J.A. wrote the unanimous decision of the Court of Appeal dismissing the appeal. She followed *Caparo*, adopted the “known transaction” test and concluded on the evidence that:

... the auditors had prepared the annual reports to comply with their statutory obligations. There was a total absence of evidence to indicate the respondents knew the appellants would rely upon the reports for any specific purpose or that the appellants did rely on the reports before infusing more capital into their companies.⁸⁵

Helper J.A. distinguished *Haig v. Bamford* on the facts and also pointed out, correctly, that *Haig* was compatible with *Caparo* because in *Haig* the defendants *knew* the use to which the information would be put, i.e. to secure private investment. She also undertook an exhaustive review of Canadian decisions since *Caparo* which indicated that the trend of authority was clearly in favour of that decision.

There is no doubt that this issue will return to the Supreme Court sooner rather than later and the Court will have an opportunity to review the issue of non-privity third parties relying on advice and information. It is possible that the Court may push the law beyond both *Haig* and *Caparo* and adopt a broader scope of responsibility. Professor Feldthusen⁸⁶ has drawn attention to the view that liability can be extended to any foreseeable plaintiff for any foreseeable loss suffered in reliance on negligent misstatements. He reviews decisions in New Zealand⁸⁷ and New Jersey⁸⁸ which support “a profession specific” liability of accountants under the general rules of foreseeability. This can be supported on the basis of the importance and general

⁸⁵ *Supra* note 7 at 9.

⁸⁶ B. Feldthusen, *Economic Negligence*, 3d ed. (Scarborough: Carswell, 1994) at 117.

⁸⁷ *Scott Group Ltd. v. McFarlane*, [1978] 1 N.Z.L.R. 553 (C.A.).

⁸⁸ *H. Rosenblum Inc. v. Adler* (1983), 461 A. 2d. 138 (S.C.N.J.).

reliance on public accounts by a wide range of third parties such as stockholders, prospective stockholders, creditors, suppliers, and prospective employees. Accountants know that these public accounts will be used in the market place and there may be no alternative source to secure such information. Furthermore, it can be argued that loss distribution principles and deterrence principles dictate that losses caused by negligent financial information be allocated to the defendant accountants. It is likely that the resolution of this issue will be influenced greatly by the Supreme Court's evaluation of the spectre of unlimited liability and the impact that various rules are likely to have on the accounting profession and the cost of accounting services.

In conclusion it may be noted that even an expansive foreseeable plaintiff / foreseeable reliance test would appear not to assist the plaintiffs in *Hercules*. Helper J.A. as quoted earlier also found "a total absence of evidence to indicate that the appellants *did rely* upon the reports before infusing more capital into their companies."⁸⁹ In the absence of reliance, a case based on *Hedley Byrne* is simply a non-starter.

C. Negligent Omissions and Fiduciary Duties: *Vita Health Co. v. Toronto Dominion Bank*⁹⁰

This case provides a useful opportunity to consider the relationship between the obligation under *Hedley Byrne* to take care in giving information and the obligation of loyalty flowing from a fiduciary relationship. The defendant bank provided credit reports on one customer (G.N.C.) to another, the plaintiff, Vita Health Co. Vita Health argued that the failure to provide full and frank information about the credit worthiness of G.N.C. encouraged the plaintiff to continue supplying product to G.N.C. until its financial collapse in September 1989. It was argued that if Vita knew the true state of G.N.C.'s finances it would have terminated supply as early as March 1989 and avoided the \$400,000 loss suffered by them on the bankruptcy. The situation was complicated by the fact that G.N.C. was also indebted to the defendant bank by way of a line of credit secured by G.N.C.'s inventory. Consequently the bank had an interest in keeping G.N.C. in business. The defendant had made it clear to Vita that in giving credit reports it might have to withhold confidential information relating to its customers but the plaintiff could in such circumstances assume that an incomplete report would amount to a negative report.

Towards the end of 1988 the plaintiff became concerned about its accounts receivable in respect of G.N.C. and it took a number of steps including requesting that the defendant do a credit verification of the company. In fact, three credit

⁸⁹ *Supra* note 7 at 9.

⁹⁰ *Supra* note 8.

reports were provided in March, June, and August 1989. In these reports the bank may not have given any erroneous information but it omitted to give a frank assessment of G.N.C.'s financial situation and failed to disclose unfavourable information within its knowledge which would have led the plaintiff to have cut off supply as early as March. The bank did not, for example, disclose that as early as March it was threatening to reduce G.N.C.'s line of credit. It did not disclose that authorization had been given to G.N.C. to exceed its line of credit on more than one occasion. The bank had not disclosed its fear that G.N.C. would not be able to repay its indebtedness to the bank. Moreover, there was nothing in the reports to indicate that they were incomplete. As Twaddle J.A. put it, the bank neither blew the whistle nor rang the bell.

The plaintiff brought an action in negligent misrepresentation and for breach of fiduciary duty against the bank claiming the value of the product supplied to G.N.C. after March 1989 for which it had not been paid. The trial judge imposed liability on both grounds. Twaddle J.A., speaking for the Court of Appeal, dismissed the appeal holding that the bank had breached its fiduciary duty to Vita Health.

This case is a very important one given the revitalization of fiduciary law, its relationship to tort law, and its application in the context of commercial relationships. However, before examining the concept of fiduciary relationships it is useful to comment on the two other bases of obligation — contract and tort law. Contract law was neither pleaded, argued nor discussed. Normally one would expect the obligation of a credit reporter to be found in contract and to be defined by the express and implied terms of that contract. It appears from the judgment of Twaddle J.A. that the credit reports were paid for.⁹¹ Consequently it is not clear why a contractual claim was not pursued. Negligent misrepresentation was argued and it appears that if the Court could have crafted a remedy in tort that would have been its preference. The Court, however, concluded that a consideration of fiduciary law was necessary because tort liability was problematic. First, apart from a statement in the August report the case involved a failure to disclose information rather than positive misrepresentations. Secondly, the issue of contributory negligence which must be addressed in a negligent misrepresentation claim does not inconvenience a plaintiff in a claim founded on breach of a fiduciary duty. Both these points however are contentious. While the case is one of non-disclosure of material facts that non-disclosure may ground an imposition of tort liability if that failure to speak causes other words and statements to be misleading. Arguably the non-disclosure in *Vita* resulted in the credit reports painting a false picture of G.N.C.'s financial health. Professor Feldthusen has made the point:

⁹¹ *Ibid.* at 370 (reference is made to the bank's service charge for providing the credit check).

[t]he terms "speech" and "misrepresentation" suggest that liability will attach only to positive direct statements. This is not precisely correct. Provided the other duty requirements have been satisfied, the courts have recognized misrepresentation by silence or implied misrepresentation. Typically this occurs when the defendant's silence distorts the meaning of something else that has been represented.⁹²

There is high authority to support that position⁹³ and it could have been utilized in the *Vita* case. The second point is more debatable, but there is authority that contributory negligence may be used to apportion loss between a fiduciary and a beneficiary. Quite independently of legislation the New Zealand Court of Appeal in *Day v. Mead*⁹⁴ apportioned loss caused by a breach of a solicitor's fiduciary duty to his client. Extra judicially, La Forest J. has expressed his sympathy with such a view.

It will be obvious from my favourable comments in *Canson* on the New Zealand case of *Day v. Mead* that I think this intermingling of law and equity even extends to applying the doctrine of contributory negligence in calculating compensation for fiduciary duties.⁹⁵

The Court, however, preferred to determine if there were circumstances which could be seen as converting the normal arms-length commercial relationship of customer and banker to a fiduciary relationship. As Twaddle J.A. noted, this is "no easy task."⁹⁶

There is, of course, a chasm between the intensity of obligations arising from the special relationship under *Hedley Byrne*⁹⁷ and the fiduciary relationship at equity. Under the *Hedley Byrne* doctrine you must take care not to tell lies. A fiduciary must set aside all self interest and act in the best interests and to the advantage of the beneficiary. It is not surprising, therefore, that between actors in a free market economy fiduciary relationships will be very much the exception. It is not easy to define the factors and circumstances which identify such an exceptional relationship.

Twaddle J.A. relied heavily on the judgment of Sachs L.J. in *Lloyds Bank v. Bundy*⁹⁸ where his Lordship identified certain building block concepts which support

⁹² *Supra* note 86 at 75.

⁹³ *Queen v. Cognos* (1993), 14 C.C.L.T. (2d) 113 and *Fletcher v. Manitoba Public Insurance Corp.* (1990), 5 C.C.L.T. (2d) 1 (S.C.C.).

⁹⁴ [1987] 2 N.Z.L.R. 443 (C.A.).

⁹⁵ G. LaForest, "Overview of Fiduciary Duties" in *Pitblado Lectures 1990* [unpublished].

⁹⁶ *Supra* note 8 at 368-69.

⁹⁷ *Supra* note 6.

⁹⁸ [1975] Q.B. 326.

a finding of a fiduciary relationship. Reliance on the advice or guidance of another, awareness of that reliance, the attainment of some benefit or the advancement of some interest by the person on whom reliance is placed arising from the transaction and confidentiality all point to fiduciary duty. Confidentiality normally connotes privacy or secrecy as in the “confidentiality of documents.” Sachs L.J., however, appears to use it in the sense of confidence being placed by the beneficiary in the fiduciary. Confidence breeds a degree of dependency and vulnerability which allows influence to grow. Twaddle J.A. found that these factors were present in the *Vita* case. Clearly the defendant bank was aware of the plaintiff’s reliance on its advice. The bank also had an interest in the plaintiff continuing to supply G.N.C. since G.N.C.’s inventory was pledged as security for its indebtedness to the bank. His Lordship concluded:

I have no doubt that in the particular circumstances of this case, a state of confidentiality and a resulting dependency existed. If it did not arise from the advice given by the bank that it could provide better information on which more reliance could be placed where the company being enquired about was also a customer of the bank — as it may well have done — it most certainly arose from the assurance that if the bank was forced to withhold information on account of confidentiality, its failure to provide a full report would amount to a negative one. As a result of this assurance the plaintiff was surely induced to place undue confidence in the bank’s report and was vulnerable to any shortage of pertinent information.⁹⁹

The Court held that in these circumstances the bank’s fiduciary duty required it to do one of these things:

- i) to disclose unfavourable information
- ii) to warn the plaintiffs that there were facts affecting G.N.C.’s credit-worthiness that it could not disclose, or
- iii) to issue no report.

The Court concluded that the fiduciary duty had been breached and the breach caused the plaintiff’s losses.

Just three weeks after the Court of Appeal issued its judgment in this case the Supreme Court delivered its judgment in *Hodgkinson v. Simms*.¹⁰⁰ A majority of the Court found a breach of a fiduciary relationship between a chartered accountant specializing in real estate tax shelter investments and his client. No attempt will be made here to analyze that case in detail but La Forest J., speaking for the majority, considered when fiduciary duties may be found outside of the well recognized fiduciary relationships such as solicitor-client, or doctor-patient. He spoke of “situations in which fiduciary obligations, though not innate to a given relation-

⁹⁹ *Supra* note 8 at 371.

¹⁰⁰ (1995) 22 C.C.L.T. (2d) 1 (S.C.C.).

ship arise as a matter of fact out of the specific circumstances of that particular relationship.”¹⁰¹ This would seem to be the kind of situation that arose in *Vita*. La Forest J. noted that in these cases discretion, influence, vulnerability and trust are non-exhaustive, material, evidential factors in determining if fiduciary obligations arise. The fundamental test, however, is whether:

given all the surrounding circumstances could one party reasonably have expected that the other party would act in the former’s best interests with respect to the subject matter at issue.¹⁰²

He continued:

... what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.¹⁰³

This “reasonable expectation doctrine,” when applied to *Vita*, would require a mutual understanding between *Vita* and the bank that the bank had relinquished its own self-interest and agreed to act solely for *Vita*. There could be some debate about how that question should be answered. *Vita* knew that G.N.C. was a customer, that G.N.C. was indebted to the bank, and the bank had warned that it might be unable to disclose confidential information. The bank was in a difficult position balancing its own interests and the interests of two customers and this would be known to *Vita*. In such circumstances it is at least arguable that the bank’s obligation was not to completely put aside self interest and to act solely to the advantage of *Vita* but merely to take reasonable care that *Vita* was not given a false picture of G.N.C.’s financial health. As I noted earlier this was probably sufficient to impose liability for the loss suffered in tort law. These arguments will not, however, be put to the test. Leave to appeal to the Supreme Court was refused.¹⁰⁴

This case is a useful reminder that obligations arise from a variety of relationships including contractual, tortious (duty of care) and fiduciary. These regimes of responsibility are not mutually exclusive and plaintiffs may pursue a remedy whenever they are able to satisfy the requirements of the particular cause of action. We can expect that encouraged by *Vita* and *Hodgkinson* fiduciary obligation will be asserted more often in the future and that courts will have ample opportunity to pursue further the difficult task of deciding when commercial relationships give rise to fiduciary duties.

¹⁰¹ *Ibid.* at 28.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ [1995] 5 W.W.R. 1xiii.

D. Sexual Abuse and Limitation Periods: *Heaman v. Isaac and Eden Mental Health Centre*¹⁰⁵

The leading case dealing with limitation of actions in cases of sexual abuse is the Supreme Court decision in *M.(K.) v. H.(K.)*.¹⁰⁶ It dealt with a 28 year old survivor of childhood incest who brought an action for damages against her father. The Court applied the reasonable discoverability principle and held that the cause of action in battery did not accrue until the plaintiff fully appreciated the wrongful nature of the defendant's actions and the causal nexus between his wrongful acts and the plaintiff's mental suffering. The Court also held that it was appropriate to apply a rebuttable presumption that a full realization of the wrongful nature of the act and the causal connection to the harm suffered by the plaintiff will not ordinarily occur before the plaintiff has undergone psychotherapy. The scientific evidence supported this position by indicating that a complete understanding and acceptance that it is the defendant who is responsible for the wrongful acts and that there is a causal link between the acts and the latent psychological damage suffered by the plaintiff is not likely to occur without professional help. Clearly justice demands the relaxation of limitation periods to allow survivors to hold their abusers accountable for their actions and to provide an avenue for appropriate compensation. A similar issue arose in the recent case of *Heaman v. Isaac and Eden Mental Health Centre*.¹⁰⁷ The Court of Appeal followed similar reasoning to that of the Supreme Court in its interpretation of s. 14(1) of the *Limitation of Actions Act*.¹⁰⁸

In *Isaac v. Eden Mental Health Centre* the plaintiff was a client of the defendant Isaac who was a pastoral counsellor at the defendant health centre. She alleged that he had abused his position of trust and confidence by engaging in a sexual relationship with her between 1975 and 1980 when she was his patient. As a consequence of this illicit relationship she suffered mental health problems including depression. In 1988 she began to see another therapist who told the plaintiff that Mr. Isaac's actions were unprofessional and perhaps illegal. In September 1990 the plaintiff's mental health deteriorated when she was told that other women had similar experiences with Isaac. The plaintiff was further informed in March 1991 that her depression was the result of the sexual abuse by Isaac. There was, however, evidence that it was not until September 1991 that the plaintiff came to a full realization that her depression was linked to the sexual abuse.

¹⁰⁵ *Supra* note 9.

¹⁰⁶ (1993) 14 C.C.L.T. (2d) 1 (S.C.C.).

¹⁰⁷ *Supra* note 9.

¹⁰⁸ R.S.M. 1987, c.L 150.

The plaintiff brought an application under s.14 of the *Limitation of Actions Act*¹⁰⁹ to commence an action otherwise out of time on the grounds that the application was made within twelve months of the plaintiff acquiring material facts of a decisive nature; namely, that her current mental health problems stemmed from the defendant's wrongful acts. The trial judge chose September 1991 as the date on which the plaintiff received material facts. Consequently the application to extend the limitation period, made on 8 June 1992 (10 months later) was granted. The defendant appealed to the Court of Appeal.

A number of aspects of this case are worthy of note. First, this is not a case of sexual abuse in childhood. Secondly, this is not a case of blocked or repressed memory of the wrongful acts. The lack of knowledge and understanding related to the link between the abuse and the plaintiff's mental health problems. Thirdly, an *intellectual* knowledge of the relationship of abuse and illness was reached earlier than twelve months before the application in March of 1991.

The Court of Appeal upheld the trial judge without extensive reasons and without reference to a decision of *M.(K.) v. M.(K.)*.¹¹⁰ In the Court's view there was sufficient evidentiary basis for the order. The case is nevertheless important in that it applied the policies of *M.(K.) v. M.(H.)*¹¹¹ beyond the situation of childhood incest and also took a generous approach as to when material facts were acquired. It is the latter point which is more notable. The Supreme Court did not directly address the issue of divergence between intellectual knowledge which was achieved in *Isaac* in March 1991 and full emotional realization in September 1991.

La Forest J.A., in *M.(K.) v. M.(H.)*, did note:

[t]here was conflicting evidence as to whether the plaintiff could have an intellectual, but not an emotional awareness of the abuse. To my mind no useful purpose is served by engaging in this metaphysical debate on epistemology of discovery ... the issue properly turns on the question of when the victim becomes fully cognizant of who bears the responsibility for her childhood abuse for it is then she realizes the nature of the wrong done to her.¹¹²

The *Isaac* case is one where the dichotomy between intellectual and emotional knowledge was established. It is submitted that the choice of the later date was correct. It is very consistent with the tenor of the Supreme Court decision that the process of discovery is a gradual one, achieved step by step through the course of therapy. Neither the process of revelation nor the therapy itself was completed

¹⁰⁹ *Ibid.*

¹¹⁰ *Supra* note 106.

¹¹¹ *Ibid.*

¹¹² *Ibid.* at 29-30.

before September 1991. *Isaac* adds further support to the proposition that the Courts intend to apply limitation rules with generosity and sensitivity to facilitate the claims of those who have suffered sexual abuse.

E. Occupiers' Liability: *Peters v. Reimer*,¹¹³ *Anderson v. Anderson*,¹¹⁴ *Portree v. Woodsmill Homes Ltd.*,¹¹⁵ *Shewfelt v. Robin's Supermarket*,¹¹⁶ *Lorenz v. Winnipeg*,¹¹⁷ *Galts v. Ultra Care Inc.*,¹¹⁸ and *McChesnie v. Tourond*¹¹⁹

In earlier reviews¹²⁰ of Manitoba tort law consideration has been given to the application and interpretation of the *Occupiers' Liability Act*.¹²¹ In the last two years no significant changes have become apparent from past trends which indicated great compatibility between the provisions of the *Act* and basic negligence principles. The Court of Appeal dismissed two appeals from decisions discussed in the last review of Manitoba tort decisions.¹²² In *Peters v. Reimer*¹²³ the Court expressed complete agreement with the trial judge that reasonable care had been taken by the occupier. The Court also found no grounds to interfere with the conclusion of the trial judge that care had been taken in *Anderson v. Anderson*.¹²⁴ The Court also had reason to assess the degree of care taken by the occupier in *Portree v. Woodsmill Homes Ltd.*¹²⁵ and *Shewfelt v. Robin's Supermarket*.¹²⁶ In *Portree* the respondent was injured when the heel of her shoe caught in a gap between the sidewalk and a concrete slab near the parking area at the back of an apartment block. The trial

¹¹³ *Supra* note 10.

¹¹⁴ *Supra* note 11.

¹¹⁵ *Supra* note 12.

¹¹⁶ *Supra* note 13.

¹¹⁷ *Supra* note 14.

¹¹⁸ *Supra* note 15.

¹¹⁹ *Supra* note 16.

¹²⁰ *Supra* note 1.

¹²¹ R.S.M. 1987, c.08.

¹²² *Supra* note 1.

¹²³ *Supra* note 10.

¹²⁴ *Supra* note 11.

¹²⁵ *Supra* note 12.

¹²⁶ *Supra* note 13.

judge was reversed. The Court held that the premises were reasonably safe considering the respondent's knowledge of the area, the lack of complaints about the condition of the premises, the lack of anything unusual about the condition of the premises and the small risk involved. However, liability was upheld in *Shewfelt v. Robin's Supermarket*.¹²⁷ It was a slip and fall case involving icy conditions outside the appellant's premises. The Court held that there was ample evidence that ice had formed at the base of a downspout near the entranceway on the morning in question. This had been an on going problem which, because of a haphazard system of inspection, had not been dealt with adequately.¹²⁸ These decisions continue to reflect the utilization of basic negligence principles to determine if the premises are reasonably safe for visitors. Three cases are of greater interest. They all, in some way, raise issues of the boundary and inter-relationship between occupiers' liability law and negligence.

In *Lorenz v. Winnipeg (City)*¹²⁹ the plaintiff was walking on a walkway running along a river bank. The park belonged to the defendant City. The walkway was elevated being built on a dyke. It dropped off steeply on the river side. The plaintiff decided to scramble down from the walkway to be near the river edge. Unfortunately she fell from the dyke and was injured. The plaintiff alleged that her fall was caused by the failure to install guard rails, or to build stairs down to the river or to erect warning signs. Lockwood J. held that the defendant was negligent in failing to provide guard rails or put in steps. He found the plaintiff 30 percent contributorily negligent. The defendant appealed. There was in this case an initial question of whether liability was controlled by the *Occupiers' Liability Act*,¹³⁰ the *City of Winnipeg Act*,¹³¹ or the common law because it involved a municipality and a public walkway. Kroft J.A., speaking for the Court of Appeal, felt that the trial judge was probably correct in applying the common law but he did not think that much turned on that issue. His Lordship then undertook a classic duty of care analysis and concluded that the defendant could not have reasonably foreseen that the plaintiff would act in this way and the City could not be made liable for her injuries.

¹²⁷ *Ibid.*

¹²⁸ There were two other cases dealing with slip and fall on dangerous icy areas which are not discussed here. In *De Meyer v. National Trust Co.*, (2 August 1995), Winnipeg 95-16936 (Q.B.), liability was imposed because of a failure to carry out an otherwise reasonable system of inspection and maintenance. In *Still v. St. James Assiniboia School Division No. 2*, (12 May 1995), Winnipeg 95-13420 (Q.B.), liability was imposed because of poor lighting at a school combined with the failure to sand and/or salt a dangerous grassy area which was commonly used as a pathway.

¹²⁹ *Supra* note 14.

¹³⁰ *Supra* note 121.

¹³¹ S.M. 1989-90 c.10.

In his decision on this point his Lordship cited both negligence and occupiers' liability cases. On the *duty* issue however, it does matter as to whether this is a negligence case or an occupiers' liability case. In negligence it is indeed of central importance to establish a duty of care on the basis of foreseeability of damage to the plaintiff. In occupiers' liability the *Act* establishes a *duty* on all occupiers to all entrants. There is no need to undertake an independent duty inquiry. This does not mean that foreseeability is irrelevant. It is essential to show foreseeability of loss to establish a breach of both the negligence standard of care and the standard set out in s. 3 of the *Occupiers' Liability Act*.¹³² Indeed, this case is perhaps best analysed as one where there was no breach of the standard of care because the walkway was not foreseeably dangerous. Guard rails and stairways were for that reason not required. His Lordship supported his judgment by declaring that the plaintiff's injuries were caused solely to her own intervening intentional act. The lack of causation is of course fatal in both regimes of liability. Perhaps we can conclude that the decision is one which is grounded solely in negligence principles. Then the duty discussion while, perhaps unneeded, was technically unobjectionable.

*Galts v. Ultra Care Inc.*¹³³ is an unusual decision. The plaintiff was injured when she fell when attempting to mount a cosmetic chair or table in the defendant's skin care salon. The primary allegation of the plaintiff was that the defendant's employee failed to provide appropriate supervision of and assistance to her and, as a consequence, she fell. The trial judge imposed liability. The defendant appealed. Philp J.A. spoke for the Court of Appeal. He began by reflecting upon whether negligence or occupiers' liability principles should be applied. He noted that the obligation of reasonable care under the *Occupiers' Liability Act* extended not only to the condition of the premises but also to the conduct of third parties on the premises and, of potential relevance in this case, to "activities on the premises." Could the accident be portrayed as one resulting from the occupier's activities? It may be remembered that under the common law, occupiers' liability law was confined to "static defects in the premises" such as dangers present for some time in the physical structure of the premises. If injuries arose out of the occupier's current operations and activities the law of negligence applied. This was made clear in *Dunster v. Abbot*.¹³⁴ Under the old law this was clearly not an occupiers' liability case. However, the *Act* extended the reach of the new legislated occupiers' liability rules and applied it to the activities of the occupier thereby blurring the old distinction. Philp J.A. held, nevertheless, that the case was governed by negligence principles. In so doing his Lordship made a puzzling use of the old law. He stated:

¹³² *Supra* note 15.

¹³³ *Ibid.*

¹³⁴ [1953] 2 All E.R. 1572 (C.A.).

[w]ith respect, this duty of care is not one that was owed to the plaintiff by the defendants as the occupiers of premises. There simply was no evidence that the premises were unsafe, or that the defendants breached a duty of care to the plaintiff in respect of the condition of the premises. Nor do the circumstances of the plaintiff's injury raise a duty of care in respect of activities on the premises. Her injuries are not related "to current operations, that is, to things being done on the premises, to dangers which are brought about by the contemporaneous activities of the occupier or his servants or anyone else." Those are the words used by Denning L.J. in *Dunster v. Abbott*, [1953] 2 All E.R. 1572 (C.A.) in describing activities that are conducted on premises, as distinct from the "static condition" of premises.¹³⁵

These words of Denning L.J., used by him to describe circumstances to which negligence principles would apply, are turned on their head to describe the kind of activities to which the new *Occupiers' Liability Act*¹³⁶ does apply. One suspects that the point that is being made is that in order to have the *Occupiers' Liability Act*¹³⁷ apply, the activities of the occupier must create dangers to the visitor in the capacity as visitor not in some other capacity such as client or patient. This would seem to be a sensible view but the court is not clear on the point and problems of categorisation may continue in respect of the kind of activities within the scope of the Act. The Court went on to find no liability under negligence principles. The chair was not dangerous. The plaintiff had received treatment at the clinic before and, on occasion, had asked for assistance. On the day of the accident she decided to get up on it herself and had slipped and fallen as a result of her own negligence or bad luck.

The third case is *McChesnie v. Tourond and Delta Hotels Ltd.*¹³⁸ The second defendant was a hotel owner, the plaintiff a guest. The plaintiff was sexually assaulted by the first defendant in a public washroom in the hotel late at night. The plaintiff alleged that insufficient security precautions were responsible for the attack. Simonsen J. reviewed the security system of the hotel. He found it to be reasonable and that the patrols had been carried out with reasonable care on the night in question. It is not clear from the judgment whether this is an occupiers' liability case or a negligence case. No mention was made of the Act but the Court's conclusion echoed back to the old common law of occupiers' liability. Simonsen J. stated:

[t]he Delta [hotel] is not an insurer of the safety of its guests. However, there is a recognized implied warranty that a hotel will make its premises reasonably safe for guests ... Nevertheless, I am of the view

¹³⁵ *Supra* note 14 at 24.

¹³⁶ *Supra* note 121.

¹³⁷ *Ibid.*

¹³⁸ *Supra* note 16.

that the system in place and the individuals conducting the patrol provided a standard of safety which meets the legal requirement.¹³⁹

The mention of implied warranty suggests the standard of care the common law fixed on occupiers in respect of contractual entrants. The standard was, however, higher than his Lordship suggests. The implied warranty was that the premises be as safe as reasonable care and skill on the part of anyone can make them.¹⁴⁰ However, the *Occupiers' Liability Act*¹⁴¹ makes it clear that *all* the common law rules respecting the liability of an occupier are abolished other than for the purpose of deciding who is an occupier. It would seem appropriate to apply the Act in this case. The duty of care under the Act applies also "to the conduct of third parties."¹⁴² Consequently the standard is as suggested by his Lordship. It is, however, found in the Act.

These cases indicate a few of the problems of the inter-relationship between the *Occupiers' Liability Act*¹⁴³ and negligence. Because the standard of care is so similar these issues are more of an irritation than of profound importance. They do however lead to an observation about the manner in which the very unsatisfactory state of common law occupiers' liability law was reformed. The nature and form of the legislation was set by the English *Occupiers' Liability Act*.¹⁴⁴ Most Canadian provinces have followed with their own variations and additions. Consequently the legislation is largely of a single genre. In retrospect it may all have been a mistake. It may have been better to simply abolish the old common law and declare that negligence principles apply to injuries caused to the visitors of premises. Questions of statutory interpretation and inter-relationships would thereby be avoided and the law would be made simpler. Ironically this is now the position in jurisdictions such as California¹⁴⁵ and Australia¹⁴⁶ which did not pass reform legislation but waited for judicial reform which finally brought occupiers' liability law under the umbrella of negligence.

¹³⁹ *Ibid.* at 212.

¹⁴⁰ *Maclean v. Segar*, [1917] 2 K.B. 325.

¹⁴¹ *Supra* note 121 at s. 2.

¹⁴² *Ibid.*, s. 3(2)(c).

¹⁴³ *Ibid.*

¹⁴⁴ *Occupiers' Liability Act* 1957.

¹⁴⁵ *Rowland v. Christian*, 443 P 2d. 561 (1968).

¹⁴⁶ *Australian Safeway Stores Pty. v. Zaluzha* (1987), 162 C.L.R. 479 (H.C.A.).

IV. QUEEN'S BENCH

A. Informed Consent Fifteen Years after *Reibl v. Hughes*:¹⁴⁷

*Normand v. Stranc*¹⁴⁸

Fifteen years ago the Supreme Court in *Hopp v. Lepp*¹⁴⁹ and *Reibl v. Hughes*¹⁵⁰ set out the basic principles relating to the obligation of physicians to provide information to patients in order to allow them to make medical decisions in their own best interests. The Court chose negligence as the legal vehicle to define the obligations of physicians and the rights of their patients. Three components of the negligence action are central to defining the patient's right to informed self-determination in respect of health care: duty of care, breach of the standard of care, and causation. The Supreme Court, in general terms, addressed each of these points.

The concept of duty encompasses a broad obligation on the part of the physician to discuss the nature of the illness and the proposed treatment, the significant risks and side effects of the treatment, the expected benefits of the treatment, any alternative treatment and its accompanying risks and benefits and the consequence of inaction. This obligation is captured by the term "informed consent" which has become well known in the medical community.

The definition of the appropriate standard of care presented a clear conceptual choice between the professional standard of care and the full disclosure standard. The professional standard requires disclosure of information to the extent that a reasonably competent physician would provide it. Expert evidence is essential and great reliance must be made on professional practice and custom. The Supreme Court believed that this standard of care might prove insufficient to protect the patient's need of, and right to, information. The alternative full disclosure standard was preferred. Full disclosure is something of a misnomer. It does not require the disclosure of every risk. It does require sufficient information to allow a patient to exercise his or her right of self-determination in his or her own best interests. The principle requires that the physician disclose information that a reasonable person in the patient's circumstances would wish to have in making the health care decision.

Since negligence is the basis of a physician's liability causation is a critical issue. It is insufficient to find a breach of duty. It must be established that the patient would have refused the treatment or chosen an alternative procedure if sufficient

¹⁴⁷ (1980) 14 C.C.L.T. 1 (S.C.C.).

¹⁴⁸ *Supra* note 17.

¹⁴⁹ (1980) 13 C.C.L.T. 66 (S.C.C.).

¹⁵⁰ *Supra* note 17.

information had been given. Once again a clear conceptual choice presented itself to the Supreme Court. A subjective test would focus on what the particular patient would have done. An objective test questions the decision of a reasonable person. Each has its weakness. A subjective test focuses on the patient and his or her testimony. That testimony may be coloured by regret, bitterness, and hindsight. An objective test runs the risk of concluding that reasonable people normally do what their physicians suggest. Personal autonomy may thereby be sacrificed. The court was acutely aware of the conundrum and resolved it by choosing a modified objective approach — that of the reasonable person in the particular circumstances of the patient.

MacInnes J. applied these principles in the case of *Normand v. Stranc*.¹⁵¹ It provides a useful illustration of the current attitudes and application of the informed consent doctrine. Some useful comparisons can be drawn with two other recent cases with very similar facts, *Wilson v. MacKay*¹⁵² and *Pettit v. Samuel*.¹⁵³ In all of these cases the plaintiff sued in respect of scarring which was larger and more excessive than normally resulted from surgery.

In *Normand v. Stranc*¹⁵⁴ the plaintiff agreed to breast reduction surgery. The surgery was primarily therapeutic but there were cosmetic concerns. The defendant surgeon discussed the surgery with the patient, disclosed some of the risks but did not tell her that wound breakdown as a result of infection or fat necrosis could lead to large unsightly scars. MacInnes J. recognized the overall obligation on the defendant to secure an informed consent and then considered the standard of disclosure and whether or not the risk of excessive scarring should have been discussed. Interestingly, the expert evidence was unanimous. It was *not* the practice of the experts to disclose this risk. Under the professional standard there would be no breach. His Lordship however recognized that:

while the evidence of medical experts is relevant and useful, indeed necessary, in assisting the Court in determining the issue in any given case, the Court will also want to consider the evidence of the patient so as to be able to assess what a reasonable patient would like to know in the circumstances of the surgery in question, and whether the information given by the physician to the patient in the circumstances was sufficient.¹⁵⁵

¹⁵¹ *Supra* note 17.

¹⁵² (31 March 1993), Victoria 90/0385 (B.C. S.C.).

¹⁵³ (25 March 1994), Toronto 95-04400 (Ont. C.J. Gen. Div.).

¹⁵⁴ *Supra* note 17.

¹⁵⁵ *Ibid.* at 135.

Although his Lordship described the risk as “unpredictable” and “uncommon”¹⁵⁶ he held that it should have been disclosed. He took into account the cosmetic concerns relating to breast surgery and the fact that the surgery was elective. Moreover, the neck and back pain and general discomfort and fatigue from which the plaintiff sought relief was neither life threatening nor affecting her day-to-day life. He held that she needed the information to make a truly informed consent.¹⁵⁷

Dorgan J. in the similar case of *Wilson v. McKay*¹⁵⁸ reached the same conclusion on this issue. It was also a case of breast reduction surgery which was in large part therapeutic but was also to address cosmetic concerns. One of the claims related to the failure to disclose the minor risk of hypertrophic scarring. One additional factor in this case was the fact that the plaintiff’s racial and colouring characteristics gave rise to a slightly elevated risk of such scarring. *Petit v. Samuel*,¹⁵⁹ however, provides a contrast. The surgery there was a purely cosmetic bilateral mastopexy. In this case the risk of unsightly scarring was again relatively small, estimated at less than 5 percent. Roberts J. held that the defendant was not required to disclose this risk. He stated¹⁶⁰ that “it was not necessary for Dr. Samuel ... to show pictures of the worst cases.”

Overall the decisions in *Normand* and *McKay* seem more consistent with general judicial attitudes which have been quite generous to plaintiffs on the disclosure issue. This is particularly so in entirely elective procedures of this nature.

Causation has proved to be a much more significant hurdle for plaintiffs. Studies have shown that most informed consent actions fail and most fail on the issue of causation.¹⁶¹ The objective standard has proved to be very favourable to physicians and that is no surprise. Most physicians only recommend health care which is justified, reasonable, and consistent with medical and common practice.

¹⁵⁶ *Ibid.*

¹⁵⁷ MacInnes J. used the words “material” and “special” or “unusual” to describe the risks that must be disclosed to the patient. The terminology is drawn from Linden J.’s judgment in *White v. Turner* (1981), 120 D.L.R. (3d) 269 at 284 aff’d. 12 D.L.R. (4th) 319 (Ont. C.A.). “Material” risks are those which pose a real threat to the patient’s life, health or comfort. “Special” or “unusual” risks are not common, ordinary or everyday matters but do occur occasionally. MacInnes J. held that the risk of excessive scarring was a “special or unusual risk.” This classification system may be of value occasionally but the bottom line is that the doctor must disclose all information that a reasonable patient in the circumstances would want to know. In that sense the word “material” may be sufficiently descriptive in itself.

¹⁵⁸ *Supra* note 152.

¹⁵⁹ *Supra* note 153.

¹⁶⁰ *Ibid.* at 9.

¹⁶¹ See, for example, G. Robertson, “Informed Consent Ten Years Later: The Impact of *Reibl v. Hughes*” (1991) 70 Can. Bar. Rev. 423.

The patient has difficulty in proving that a reasonable and informed person would have repudiated the conventional medical advice and pursued a different course. There is, of course, a good deal of discretion in the objective test. It requires that the *special circumstances* of the patient be included for consideration. As I noted elsewhere there is a great deal of unevenness in respect of the extent and nature of the personal considerations considered by the courts. This allows the test to be more or less “objective” depending on the judicial approach.¹⁶² In *Normand v. Stranc*¹⁶³ MacInnes J. accepted the objective test but introduced a number of personal considerations. He noted that the plaintiff patient was suffering from fatigue, back pain and discomfort from her condition, that she was committed to having the surgery, and that she lost weight and reduced smoking in preparation for the surgery. A reasonable person in these circumstances would have consented to the surgery even if the low risk of excessive scarring was known. Dorgan J. in *Wilson v. McKay*¹⁶⁴ came to the opposite conclusion. Her Ladyship took account of the plaintiff’s cautious, anxious nature, her particular concerns about scarring, and the fact that she was not significantly bothered by the size of her breasts. Her Ladyship concluded “without hesitation” that a reasonable person in her position would not have had the procedure. In *Petit v. Samuel*¹⁶⁵ Roberts J. noted that the plaintiff had had cosmetic surgery before, she was very concerned about her appearance, and she wanted to have it as soon as possible. He concluded that the plaintiff “was doing everything to maintain a youthful appearance.” A reasonable person in her position would not have been deterred by the chance of excessive scarring. These three cases clearly show the difficulties on the causation issue. The choice of an objective standard may have been a mistake. A subjective test would be simpler and would better protect the patients’ autonomy. The plaintiff’s testimony would face the usual test of credibility and these cases show that even when ample personal factors are considered causation is not easily established. MacInnes J. made the point in *Normand*¹⁶⁶ that a subjective approach would not in fact have changed his decision on the causation point.

The Supreme Court may in the near future reconsider the modified objective test. That is certainly the hope of the British Columbia Court of Appeal expressed

¹⁶² P.H. Osborne, “Causation and the Emerging Canadian Doctrine of Informed Consent to Medical Treatment” (1985), 33 C.C.L.T. 131. The term *modified* objective approach was used because of the variety of factors that could be taken into account. The term was designed to indicate the uneasy compromise between the subjective/objective dichotomy.

¹⁶³ *Supra* note 17.

¹⁶⁴ *Supra* note 152.

¹⁶⁵ *Supra* note 153.

¹⁶⁶ *Supra* note 17.

in *Arndt v. Smith*.¹⁶⁷ The case dealt with the failure to tell a pregnant woman of the most serious risks her unborn child was exposed to as a consequence of her contracting chicken pox early in her pregnancy. The child was seriously incapacitated as a result of her exposure to the virus. The Court of Appeal agreed with the trial judge that the risk was material but a majority of the court (Wood and Hollinrake J.J.A.) ordered a new trial on the grounds that the modified objective approach, which the trial judge found had not been satisfied, had been misapplied. In an *obiter* statement Wood J.A. expressed sympathy with a subjective test. Lambert J.A. sought to reformulate the modified objective test in circumstances where reasonable informed persons might take either of two reasonable courses of action. Such was the case in *Arndt*¹⁶⁸ where reasonable informed persons might either terminate or continue the pregnancy. Lambert J.A., drawing on fiduciary law, held that when the modified objective approach could not produce a single clear answer it is sufficient to establish that *some* reasonable and informed persons in the plaintiff's circumstance would have terminated the pregnancy in order to establish causation. In his opinion there was enough evidence to satisfy that test and a new trial was not necessary. For the first time the modified objective causation test has been challenged and it will be interesting to see how the Supreme Court responds. The Court may well take the opportunity to formulate a more effective principle to protect the patient's right of informed choice.

B. Medical Malpractice — The Standard of Care: *Kaban v. Sett*¹⁶⁹

*Kaban v. Sett*¹⁷⁰ is a medical malpractice case. The plaintiff was unsuccessful both at trial and in the Court of Appeal. She was not able to establish the defendant doctor had been negligent. In an earlier review¹⁷¹ comment was made on some of the obstacles and impediments encountered by plaintiffs in medical malpractice cases. The trial judgment in this case provides a good opportunity to focus on a notable aspect of the standard of care and its application in medical malpractice cases.

In *Kaban*¹⁷² the plaintiff underwent uneventful abdominal surgery. After surgery, however, the plaintiff's incision opened and her intestines protruded. Further surgery was required to repair her abdominal wall. The issues narrowed to whether

¹⁶⁷ (28 June 1995), Vancouver CA 018989 (B.C. C.A.).

¹⁶⁸ *Ibid.*

¹⁶⁹ *Supra* note 18.

¹⁷⁰ *Ibid.*

¹⁷¹ Osborne, "A Review of Tort Decisions in Manitoba, 1989," *supra* note 1 at 460–63.

¹⁷² *Supra* note 18.

the plaintiff's symptoms were such as to lead a reasonably competent physician to diagnose dehiscence (separation) of the lower layers of the abdominal tissue such as to require measures to prevent a subsequent evisceration. The difficulty faced at trial by Beard J. was that the expert testimony was contradictory. She stated:

[t]he expert testimony as to whether the symptoms that preceded the dehiscence were such that a surgeon exercising "the skill, knowledge and judgment of the generality or average of the special group or class of technicians" (*Wilson v. Swanson*, cited above) would have diagnosed the treatment for a dehiscence was completely at odds.¹⁷³

In declining to find negligence her Ladyship resorted to the principle in *Maynard v. West Midlands Regional Health Authority*.¹⁷⁴ In that case Lord Scarman stated a rule which has its origins in the earlier English case of *Bolam v. Friern Hospital Committee*.¹⁷⁵ He said:

[a] case which is based on an allegation that a fully considered decision of two consultants in the field of their special skill was negligent clearly presents certain difficulties of proof. It is not enough to show that there is a body of competent professional opinion which considers that theirs was a wrong decision, if there also exists a body of professional opinion, equally competent, which supports the decision as reasonable in the circumstances. It is not enough to show that subsequent events show that the operation need never have been performed, if at the time the decision to operate was taken it was reasonable in the sense that a responsible body of medical opinion would have accepted it as proper.¹⁷⁶

In *Kaban* Beard J. concluded:

I find this matter resolves itself into a difference of opinion as to the interpretation of the symptoms ... While some eminent doctors testified that ... they would have had concerns about a possible dehiscence, and taken steps to prevent it, other equally-qualified and eminent doctors disagreed with that opinion and supported the diagnosis and treatment followed by the defendant. This does not amount to negligence but rather a difference of opinion.¹⁷⁷

There is no doubt that the principle in *Maynard*¹⁷⁸ is somewhat of an exception to the general run of negligence law. Normally, a defendant can not clear her feet of negligence by proof that she has attained the care of the average person. In a

¹⁷³ *Ibid.* at 38.

¹⁷⁴ [1975] 1 All E.R. 635 (H.L.).

¹⁷⁵ [1957] 2 All E.R. 118 (Q.B.).

¹⁷⁶ *Supra* note 175 at 638.

¹⁷⁷ *Supra* note 18 at 38.

¹⁷⁸ *Supra* note 175.

comment on *Bolam v. Friern Hospital Committee*¹⁷⁹ J.L. Montrose¹⁸⁰ pointed out that negligence is an ethical concept not a sociological concept. Judges determine the degree of care a reasonable person *ought* in the circumstances to exercise. Judges ought not to set the standard of care on the basis of what people routinely do. Automobiles are routinely driven too close to the automobile which precedes them. However, hit the car in front of you and you will routinely be found liable in negligence.

What is dangerous about *Maynard*¹⁸¹ is that it threatens to take the standard of care away from the judges and give it to responsible segments of the medical profession. The further danger is that judges may adopt what has been described by an English commentator as:

the English courts' regrettable tendency to apply the *Bolam* test in such a way as automatically to acquit of negligence any practitioner who can find colleagues to condone what he or she did or did not do.¹⁸²

Clearly, this is how defendants would *like* the *Maynard* principle to be applied and it appears that it is asserted routinely in Canadian medical malpractice cases. A computer search of "Canadian judgments" indicates that *Maynard* has been cited in 44 cases.

It is submitted, however, that properly understood the *Maynard* principle is a narrow one to be applied with great circumspection. John Irvine has spoken of the appropriate role of *Maynard*. He suggests that it is applicable when there is "a genuine academic controversy dividing experts in another discipline."¹⁸³ Later in the same note he talks about "genuine rifts of respectable professional opinion."¹⁸⁴ These words suggest genuine controversies in the field of medicine such as a debate about whether surgery or chemotherapy is a better alternative for treating a particular form of cancer. This is where *Maynard* is applicable. It should not be used where expert witnesses disagree in the course of a trial. That will be the normal course of events. Klar makes a similar point. He states:

¹⁷⁹ *Supra* note 175.

¹⁸⁰ J.L. Montrose, "Is Negligence an Ethical or Sociological Concept?" (1958) 21 Mod. L.R. 260.

¹⁸¹ *Supra* note 175.

¹⁸² J. Keown, "Easing the Burdens of Medical Plaintiffs?" (1995) 54 C.L.J. 30 at 31.

¹⁸³ J. Irvine, "Annotation to *Brain v. Mador*" (1985), 32 C.C.L.T. 158 at 159.

¹⁸⁴ *Ibid.*

[a] court may not actually be convinced that there is a commonly accepted practice. Mere evidence that, in the opinion of some experts, the defendant's conduct was reasonable does not necessarily establish a sufficiently authoritative practice.¹⁸⁵

On this approach the *Maynard* principle will not be easily satisfied. The expert witnesses will need to establish that a substantial segment of respectable and reputable physicians adopt the practice and procedures of the defendant. In those circumstances a court will be unlikely to find negligence even where a responsible body of physicians take another view. In these circumstances *Maynard* is indeed a "sensible doctrine"¹⁸⁶ and "a trial judge will not find a negligence case stultified just because the defendant doctor has found an expert to testify that he would have done the same thing."¹⁸⁷

In this light it is arguable that *Kaban* was not a case to which the *Maynard* doctrine was applicable. There was no genuine rift among responsible medical opinion. The accepted view among all the experts was that there is a small risk of wound dehiscence and subsequent evisceration and that there was a need for both vigilance and appropriate preventative steps if the patient's symptoms indicated such a likelihood. The difference of opinion in the case was among individual experts on the proper interpretation of symptoms and the steps to be taken. The case required a careful evaluation of all relevant testimony to determine the ultimate question of whether the defendant had acted with reasonable care. That question is for the judge.

This is not to suggest that the decision of the trial judge in *Kaban* was wrong. Indeed, to the contrary, the Court of Appeal unanimously dismissed the appeal.¹⁸⁸ But Scott C.J.M., in a brief judgment, found no need to rely on the *Maynard* doctrine. It was not in fact mentioned at all. The Court relied on first principles and suggested that the weight and credibility of evidence was within the province of the trial judge and since there was evidence to support her finding of due care no over riding and palpable error had been established. Nevertheless, the trial judgment prompts a cautionary tale to warn of the potential dangers of *Maynard*.

¹⁸⁵ L.N. Klar, *Tort Law* (Toronto: Thompson Professional Publishing, 1991) at 236.

¹⁸⁶ *Supra* note 183 at 160.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Supra* note 18.

C. Damage Caused by Stolen Motor Vehicles: *Werbeniuk v. Maynard*¹⁸⁹

In the law of torts a considerable degree of certainty and predictability is achieved by the consistent resolution of recurring fact situations in a uniform manner. As time goes by courts become less fact sensitive and more comfortable with imposing precedent directed answers to broadly similar fact patterns. This would seem to be the situation in respect of the liability for damage caused by the drivers of stolen automobiles. The consistent and conventional view in Canada is that an owner of a vehicle that is left unlocked, unattended and with keys in the ignition is not liable for damages to person¹⁹⁰ or property caused by the negligence of the person who steals the automobile. The judicial response, with few exceptions, has been that while the owner can foresee the theft, the owner cannot be expected to foresee that the thief will drive negligently. Consequently, the defendant owner incurs no liability to the person whose property has been damaged.¹⁹¹ This approach was followed by Jewers J. in *Werbeniuk v. Maynard*.¹⁹²

In *Werbeniuk* the defendant left her car unattended outside a doughnut store in Steinbach. The car was unlocked, the keys were in the ignition, the engine was running and her child was in the car asleep. The defendant left the car running to avoid difficulties in starting it and to keep her child warm. Some unknown person stole the car and drove it to an adjacent parking lot where it struck and damaged the plaintiff's vehicle. Jewers J. held that the defendant was negligent but noted correctly that liability to the plaintiff depended upon the reasonable foreseeability not merely of the theft but of the subsequent negligent driving by the thief. The weight of Canadian authority is clearly against the plaintiff on the latter point. Jewers J. cited three decisions against the plaintiff. In *A.G. v. LaFlamme*¹⁹³ a 14 year old girl stole a car which the defendant had left unlocked with the engine running. The defendant was not held liable for the damage caused to a police car when it

¹⁸⁹ *Supra* note 19.

¹⁹⁰ Liability for personal injury is no longer at issue in Manitoba. Personal injury caused by automobile accidents now falls within the no-fault automobile compensation scheme — see *Manitoba Public Insurance Corporation Act* C.C.S.M. c. P 125 and Regulations.

¹⁹¹ *Hewson v. Red Deer* (1976), 63 D.L.R. (3d) 168 reversed (1983), 146 D.L.R. (3d) 32 (Alta. C.A.); *O'Reilly v. C.* [1978] 3 W.W.R. 145 affmd. (1979), 8 C.C.L.T. 188 (Man. C.A.); *Hollett v. Coca-Cola Ltd.* (1980), 11 C.C.L.T. 281 (N.S.T.D.); *Attorney General of Canada v. LaFlamme*, [1993] 3 W.W.R. 350; *Spagnolo v. Margesson's Sports Ltd.* (1983), 145 D.L.R. (3d) 381 (Ont. C.A.); *Moore v. Flanning* (1987), 41 C.C.L.T. 67 (Ont. S.C.).

¹⁹² *Supra* note 19.

¹⁹³ *Supra* note 191.

overtook the thief and forced her off the road. In *Hollett v. Coca-Cola Ltd.*¹⁹⁴ the defendant left its truck unlocked with keys in the ignition in a lot surrounded by a chain link fence. It was not liable when a 15 year old drove the truck off the lot and collided with the plaintiffs' automobiles. In the Manitoba case of *O'Reilly v. C.*¹⁹⁵ a juvenile stole keys from the defendant car dealership and came back later and stole an automobile. The defendant was not held liable for damage caused by the juvenile in the course of a high speed police chase. In these and other cases¹⁹⁶ the courts denied a duty of care on the basis that it was not foreseeable that the thief would drive in a negligent manner.

Jewers J. identified two decisions in favour of the plaintiff. In 1976 in *Stavast v. Ludwar*¹⁹⁷ a British Columbia County Court judge had come to the opposite conclusion. However, that case had been overtaken by the later and consistent stream of authority aforementioned. His Lordship also noted *Hewson v. Red Deer*.¹⁹⁸ In that case the defendant left a bulldozer unlocked and with the key in the ignition. Unknown persons set it in motion down an incline and it damaged the plaintiff's house. It was not, however, drawn to his Lordship's attention that the Court of Appeal had reversed the trial decision holding that the conduct of the intermeddlers was not a foreseeable consequence of the negligence.

There was therefore, apart from *Stavast*, a consistent stream of Canadian authority against the plaintiff and Jewers J. followed it. He stated:

... the defendant was not obliged to have foreseen the fact that the thief would carelessly (or even deliberately) drive the car into the plaintiff's vehicle. Such an eventuality would not ordinarily follow from the theft and would not be the natural and probable result of the theft.¹⁹⁹

The plaintiff's claim was dismissed.²⁰⁰

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ See *Spagnolo v. Margesson's Sports Ltd.*, *supra* note 191 and *Moore v. Fanning*, *supra* note 191.

¹⁹⁷ [1974] 5 W.W.R. 380.

¹⁹⁸ *Supra* note 191.

¹⁹⁹ *Supra* note 19.

²⁰⁰ The issue under discussion has of course arisen in other jurisdictions. Fleming in "Injury Caused by Stolen Motor Vehicles" (1994) 110 L.Q. Rev. 187 has drawn attention to three English Court of Appeal decisions which deal with damage caused by stolen buses. The weight of authority on a variety of reasoning is against imposing liability against the negligent defendant bus company. The cases are *Hyman v. London Transport Executive* 4 March 1982 (liability imposed), *Denton v. United Counties Omnibus Co.*, 1 May 1986 (no liability) and *Topps v. London Country Bus Ltd.*, [1993] 1 W.L.R. 977 (no liability). The issue has also vexed no less a judge than Traynor C.J. of the Supreme Court of California. White, in his *Tort Law in America*, has discussed two decisions decided by the

There can be little doubt that the judgment of *Jewers J.* reflects the conventional judicial wisdom that the owner of a stolen car owes no duty of care to third parties. However, that conventional wisdom was established in a line of cases in the 1980s and the interpretation of foreseeability in those cases is increasingly at odds with statistical data and common experience. It seems increasingly implausible to claim that reasonable people do not foresee the likelihood of damage to third persons when their automobile is stolen. One American study has found that a stolen vehicle is 200 times more likely to be involved in an accident than a legally driven car and 63 percent of arrests for automobile theft involve persons under 18.²⁰¹ Furthermore, the incidence of auto theft in Manitoba has risen dramatically in the past few years. In 1993 alone the theft of motor vehicles rose 170 percent in the City of Winnipeg²⁰² and the media has played a large role in covering the recent epidemic of automobile theft by incompetent drivers.²⁰³ Common experience appears to suggest that it is highly foreseeable that if a car is stolen it will generate losses whether in the course of immediate flight from the scene of the crime, police chases, joy riding, or the negligent driving of the thief. And yet the courts persist in declaring that it is not foreseeable that a thief will drive with a lack of care.

To explain this inconsistency it is important to remember that the foreseeability element of the negligence action is not solely a factual issue. To some degree it is a policy conclusion dictated by a number of values, attitudes and influences. The real issue in these cases is the allocation of losses generated by the theft of motor vehicles when owners have not taken reasonable steps to secure them. The thief is almost always either not apprehended or is a person of straw. The practical choice is to assign the loss either to the owner or to the third party.

There are good reasons for allocating the loss in the traditional way. First, there is a strong current of individualism in the law of torts which disfavors the concept of responsibility for the wrongful acts of others. Unless there is a special relationship

Court in the same year; *Richards v. Stanley* 271 P.2d. 23 and *Richardson v. Ham* 285 P.2d. 269. In the former case a motorcyclist who was struck by a thief driving the defendant's car was unsuccessful in a claim based in the fact that the car had been left in a public street with the keys in the door. In the latter case liability was imposed on the owner of a bulldozer who left it unlocked on top of a mesa. Intermeddlers started it in motion and it caused substantial personal injury and property damage. *Richards* was distinguished on the basis of the unusual and attractive nature of bulldozers, the enormous potential for harm once the bulldozer was put in motion, the difficulty of controlling the bulldozer once in motion and the ease with which it could be made secure.

²⁰¹ C.J. Peck, "An Exercise Based on Empirical Data: Liability for Harm Caused by Stolen Automobiles" [1969] Wis. L. Rev. 910 at 918.

²⁰² 1993 *Statistical Report*, Winnipeg Police Department at 30.

²⁰³ On 24 May 1995, the first sentence of the lead story on page 1 of the *Winnipeg Sun* read "[a]n urban demolition derby involving punks in stolen cars pinballing off parked cars racked up tens of thousands of dollars in damaged property."

between the defendant and the wrongdoer immunity for nonfeasance is a powerful idea. Secondly, it may be seen as unfair and unjust not only to suffer the temporary or permanent loss of your car, but also to be responsible for losses generated by the wrongdoer. Thirdly, it may be difficult to control the scope of the owner's liability. The thief may cause losses to many persons over a large geographic area for long periods of time. Fourthly, the *Highway Traffic Act*²⁰⁴ imposes liability on owners for the negligence of those who drive their car *with* their consent. The implied message is that there is no liability where the car is driven *without* consent. Fifthly, the negligence of the owner may appear trivial and understandable, and consequently, disproportionate to the losses generated.

There are of course a set of competing reasons for allocating the loss to the owner of the automobile. First, although the owner and third party suffer at the hands of the thief the equities favour the third party. The owner has been negligent and that negligence was a cause of the loss. The plaintiff is normally totally innocent of all fault. Secondly, in most cases losses are not burdensome. Now that personal injury is not controlled by the fault system, most of the losses will flow from property damage to the owners of other motor vehicles. In practice, therefore, we are talking about that owner's deductible. Thirdly, the imposition of liability may prove to be some incentive to take care for the security of motor vehicles. Auto theft has become a significant societal problem generating huge losses. It may be appropriate to impose some sanction on those who through 'their negligence facilitate the theft. Fourthly, the *Highway Traffic Act*²⁰⁵ makes it an offence to leave a motor vehicle unattended on a highway without first stopping the engine, locking the ignition and removing the key. Finally, though foresight is not the sole criterion of a duty of care it is an essential component and the integrity of the law is enhanced when there is some compatibility between lay and judicial foresight. There is clearly much to debate in these cases and it is perhaps a pity that the decision making in these cases tends to conceal that debate behind the mask of precedent and conventional conclusions about foresight.

V. CONCLUSION

THE SECOND MOST IMPORTANT CASE in the history of tort law is *Hedley Byrne and Company v. Heller & Partners*²⁰⁶ where it was recognised that there might in certain special circumstances be liability for negligent misrepresentations causing economic

²⁰⁴ C.C.S.M. c. H60, s. 153(3).

²⁰⁵ *Ibid.* at s. 221(1).

²⁰⁶ *Supra* note 6. The number one position is reserved for *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.).

loss. That case has had a profound effect on tort law well beyond its specific focus on negligent words. It has encouraged the exploration of new notions of responsibility for economic losses including those caused by the negligent performance of services,²⁰⁷ by negligent damage to property owned by a third party,²⁰⁸ and by a failure of product quality.²⁰⁹ It has sparked and continues to fuel the expanding area of governmental liability for negligent operational activities.²¹⁰ It has forced us to re-examine relationships between contractual, tortious and fiduciary obligations.²¹¹ It is, therefore, a happy coincidence that we can mark passage of the thirtieth anniversary of *Hedley Byrne* with an article that reviews so many cases directly or ultimately linked to it. Some of the cases reviewed deal with the extent of liability for negligent words. *Reid v. Marr's Leisure Holding Inc.*,²¹² *Grant v. Oracle Corp. of Canada Ltd.*²¹³ and *Jacks v. U & R Tax Services Ltd.*²¹⁴ focused on the meaning of misrepresentation; fact, opinion or forecast. *Hercules Managements Ltd. v. Ernst & Young*²¹⁵ dealt with the extent of the speakers liability to non-privity third parties. *Vita Health Co. v. Toronto Dominion Bank*²¹⁶ obliquely raises the issue of a negligent failure to speak. As these cases indicate, however, there is still much work to be done on the central issue of negligent misrepresentation. Product quality claims were not seriously considered as within the realm of tort law before *Hedley Byrne*.²¹⁷ *Winnipeg Condominium Corporation No.36 v. Bird Construction*²¹⁸ undermines traditional privity concerns and allows ultimate purchasers to recover economic losses generated by the need to repair defective premises. *Vita Health Co. v. Toronto Dominion Bank*²¹⁹ underscores the point that concurrent liability among regimes of

²⁰⁷ *White v. Jones*, [1995] 1 All E.R. 691 (H.L.).

²⁰⁸ *C.N.R. v. Norsk* (1992), 11 C.C.L.T. (2d) 1 (S.C.C.).

²⁰⁹ *Winnipeg Condominium Corporation No.36 v. Bird Construction Co. Ltd.*, *supra* note 2.

²¹⁰ *Kamloops v. Nielson*, [1984] 2 S.C.R. 2.

²¹¹ *B.G. Checo International Ltd. v. B.C. Hydro and Power Authority* (1993), 14 C.C.L.T. (2d) 233 (S.C.C.); *Hodgkinson v. Simms* (1995), 22 C.C.L.T. (2d) 1 (S.C.C.).

²¹² *Supra* note 3.

²¹³ *Supra* note 4.

²¹⁴ *Supra* note 5.

²¹⁵ *Supra* note 7.

²¹⁶ *Supra* note 8.

²¹⁷ *Supra* note 6.

²¹⁸ *Supra* note 2.

²¹⁹ *Supra* note 8.

private law is fully accepted and that relationships may generate obligations in tort, contract and fiduciary law. These cases allow us a glimpse at the unfolding vistas of liability. To a lesser degree even a case like *Norman v. Stranc*²²⁰ and the doctrine of informed consent is influenced by *Hedley Byrne*. *Hedley Byrne* at some level introduced tort law into the information age, underlining the blossoming importance of accurate and reliable information, advice and opinion. It is hard to imagine information being more essential than in the making of health care decisions.

It is likely that the future development of *Hedley Byrne* will be just as vibrant as that which flowed from *Donoghue v. Stevenson*. Manitoba courts are not, however, likely to be in the vanguard of that development. The Manitoban attitude to *Hedley Byrne* and its aftermath has been consistently cautious, if not conservative. As these cases indicate, however, the issues are inescapable and Manitoba's judges will be forced to play a role in the continuing story of the tort of negligence in the remainder of the twentieth century and beyond.

²²⁰ *Supra* note 17.

