Manitoba Tort Cases Since the Turn of the Century

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I. INTRODUCTION

This article comments on some of the tort cases decided in Manitoba between 1 January 2000 and 1 July 2004[1] and on an important tort-related amendment of the *Limitation of Actions Act*.[2] The cases discussed have been selected on the basis of the importance and interest of the issues involved rather than the level of the Court. The article begins with an analysis of a line of Court of Appeal decisions dealing with the applicability of the limitation of actions legislation to economic negligence actions. This is followed by a consideration of a Court of Appeal decision that led to an amendment of the limitation legislation in the field of sexual and physical abuse claims. A series of cases dealing with the application of the tort of negligence to pure economic loss, to psychiatric harm, to school accidents and to a number of medically related issues are then discussed. The article ends by reviewing a case dealing with the rejuvenated tort of misfeasance in public office and a case that teaches an important lesson about the tort of defamation.

II. ECONOMIC NEGLIGENCE AND THE LIMITATION OF ACTIONS

In 1964 the decision of the House of Lords in *Hedley Byrne & Co., Ltd. v. Heller & Partners, Ltd.*[3] established that liability may be imposed for a negligent mis-

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1 Two earlier cases are included because of their importance to a number of the post-2000 cases: *Rarie v. Maxwell* (1998), 131 Man. R. (2d) 184 (C.A.) and *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.* (1999), 131 Man. R. (2d) 283 (C.A.).

2 S.M. 2002, c. 5, s. 2.

3 [1964] A.C. 495 (H.L.).

representation causing pure economic loss. Since then, a much wider scope of responsibility for negligently inflicted pure economic loss has been recognized. It is now established that there are at least five categories of cases where pure economic loss may be recoverable. They are *negligent misrepresentation, negligent performance of a service, defective products or buildings, relational economic loss* and the *negligent exercise of governmental powers*. A great deal of judicial time and effort has been spent defining the legal requirements of liability in each of these categories and there is still much to be done. Less attention has been paid to the attendant practical and procedural issues that inevitably arise in any expansion of tortious liability. One important issue that the Court of Appeal has spent considerable amount of time addressing is the application of Manitoba's *Limitation of Actions Act*[4] to economic negligence claims. Some of the issues have arisen because of disagreements about the application of first principles to economic negligence cases. Others have arisen because of the unusual nature of the pertinent provisions of the *Limitation of Actions Act*.

A. The Cause of Action in Negligence

In order to appreciate fully the issues that have arisen in respect of the interpretation of the *Limitation of Actions Act* it is useful to recall some common law principles relating to the completion of the cause of action in negligence and limitation periods.

In the tort of negligence, the cause of action is not complete until the plaintiff has suffered *harm*. This is in contrast to the position in the law of contract where the cause of action is complete on breach of the contractual obligation, whether or not harm has been suffered. One consequence of this rule is that there may be a significant time lag between the negligent act or omission and the completion of the tortious cause of action. Thus, the negligent design of an aircraft may cause an aircraft to crash with a consequent loss of life many years after its manufacture; the negligent exposure of persons to carcinogenic substances may cause illness decades later. In these situations the cause of action is not complete until the adverse consequences caused by the negligent conduct have occurred.

This rule is of special significance in the context of limitations of actions because many provisions of limitation statutes, including those of Manitoba, use the *completion of the cause of action* as the moment from which time runs. There are good reasons for this. A plaintiff should not lose a compensatory remedy before the need for compensation has arisen. Furthermore, the quantum of damages can only be calculated with some certainty when the harm has occurred.

Some situations present an additional complication. The plaintiff may not be aware of the harm and, furthermore, may not have been in a position to dis-

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[4] R.S.M. 1987, c. L-150.

cover the harm through the exercise of reasonable diligence before the limitation period expired. The loss of a right of action before the plaintiff is aware of its existence is an injustice that courts seek to avoid. The common law solution in those jurisdictions where there is no legislative guidance on the point has been found in the development of a judicial rule of interpretation known as the "discoverability" principle. In Canada it was established by the Supreme Court in *Kamloops (City of) v. Nielsen*[5] (*Kamloops*) and confirmed in *Central Trust Co. v. Rafuse*.[6] In the latter case Le Dain J., speaking for the Court, held that for the purposes of the limitations of actions the cause of action is deemed to arise "when the material facts on which it is based have been *discovered or ought to have been discovered* by the plaintiff by the exercise of reasonable diligence". This rule sometimes results in a very significant time lag between the negligent act and the completion of the cause of action.

B. The Manitoba *Limitation of Actions Act*

The limitation period for economic negligence claims in Manitoba is not immediately apparent from a reading of the *Limitation of Actions Act*. The limitation period for actions in negligence depends upon whether the harm suffered is personal injury,[7] damage to land, [8] or damage to chattels.[9] Time runs in each case from the completion of the cause of action. There is no reference to actions in negligence for pure economic loss since such actions were not recognized when the Act was drafted. Consequently resort must be had to s. 2 (1)(n) of the Act which states that where no statutory provision is made for the action under consideration the limitation period is six years after the *cause of action arose*.

This provision is complemented by statutory discoverability rules which are applicable where the plaintiff has missed the limitation period because of a lack of knowledge of the harm. The rules are found in Part II of the *Limitation of Actions Act*. This Part contains a very detailed slate of provisions but its central proposition is that a plaintiff may make an *ex parte application* to the court for leave to commence an action if not more than twelve months have elapsed be-

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5 [1984] 2 S.C.R. 2.

6 [1986] 2 S.C.R. 147.

7 *Limitation of Actions Act*, s. 2(1)(e) actions for malicious prosecution, seduction, false imprisonment, trespass to the person, assault, battery, wounding or other injuries to the person, whether caused by misfeasance or nonfeasance and whether the action be founded on a tort or on a breach of contract or any breach of duty, within two years after the *cause of action arose* [emphasis added].

8 *Ibid.*, s. 2(1)(f) actions for trespass or injury to real property, whether direct or indirect, within six years after *the cause of action arose* [emphasis added].

9 *Ibid.*, s. (2)(1)(g) actions for trespass or injury to chattels, whether direct or indirect, within two years after *the cause of action arose* [emphasis added].

tween the date on which the applicant first knew or ought to have known of all the material facts of a decisive character upon which the action is based, and the bringing of the application to extend time.[10] The applicant must support this application with evidence that in the absence of any evidence to the contrary is sufficient to establish the cause of action on which the action is to be founded.[11] There is also a final long-stop provision: leave to commence an action cannot be given more than 30 years after the occurrence of the *acts or omissions* that gave rise to the cause of action.[12]

In a series of cases the Court of Appeal has addressed two contentious issues that arise in the context of economic negligence claims. The first is the relationship between the common law discoverability rule and the statutory discoverability rule. The second is when does "harm" arise for the purpose of completing the cause of action in the various categories of economic negligence claims.

C. The Relationship between the Statutory and Common Law Discoverability Rules: *Rarie v. Maxwell*

In *Rarie v. Maxwell*[13] (*Rarie*) the Court of Appeal (Scott C.J.M., Philp J.A. and Twaddle J.A.) considered the statutory discoverability rule and its relationship to the common law discoverability rule. The case dealt with a lawyer's *negligent performance of services* which caused pure economic loss to the plaintiff. The plaintiff had two complaints. First the defendant lawyer missed a limitation period for an action in damages for injuries to the plaintiff arising out of a motor vehicle accident that took place on 21 January 1985. Secondly, the defendant failed to carry out instructions given by the plaintiff in April 1986 to secure the transfer of title to land owned by a debtor of the plaintiff to the plaintiff. It was intended that the land would be sold and the debt repaid to the plaintiff with the balance of the proceeds to be shared between the debtor and the plaintiff. After some delay the transfer of title was submitted for registration in July 1987. It was not accepted because another creditor had registered a certificate of judgment against the land in question on 5 September 1986.The property was ultimately sold under a judicial sale of which the plaintiff was informed on 24 September 1987. The plaintiff failed to recover the amount of the debt and other associated costs. The plaintiff alleged that the defendant had failed to protect his interest by not filing a caveat against the title to the property and not registering a transfer of the property prior to the registration of the certifi-

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10 *Ibid.*, s. 14(1).

11 *Ibid.*, s. 15(3).The evidentiary burden on the applicant is discussed in *Johnson v. Johnson*, [2001] M.J. No. 542. (C.A.).

12 *Ibid.*, s. 14(4).

13 *Supra* note 1.

cate of judgment. The action against the defendant lawyer was commenced on 16 August 1993. The trial judge held that both actions were brought within the limitation period.

The Court of Appeal allowed the appeal. Philp and Twaddle JJ.A. wrote concurring judgments. They held that the cause of action in respect of the defendant's failure to bring the action for damages for personal injuries was complete on 21 January 1987, the date on which the two-year limitation period expired. At that date the claim was barred and economic harm equal to the value of the claim was suffered. The cause of action against the defendant expired six years later on 21 January 1993 eight months before the action under consideration was brought. The cause of action in respect of the real estate transaction was held to be complete on 5 September 1986 when the certificate of judgment was registered against the property by another creditor. The plaintiff's claim, which was brought more than six years later on 16 August 1993, was also out of time.[14]

The Court considered the applicability of the common law "discoverability" rule which, it will be remembered, affects the date upon which the *cause of action* arises. Under that rule it was argued that the plaintiff was not aware the defendant had failed to institute the personal injury action until October 1987 (within six years of commencing an action against the defendant lawyer). In respect of the land transaction it was argued that the plaintiff was not aware, and could not reasonably be expected to be aware, of the judicial sale proceedings until 24 September 1987 (less than six years before the action against the defendant lawyer was commenced). The Court, however, held unanimously that in light of the "comprehensive and detailed code" of statutory discoverability provisions found in Part II of the *Limitation of Actions Act*, the common law rule of discoverability in *Kamloops* was *inapplicable* in Manitoba. In support of that conclusion the Court opined that the statutory provisions provide a reasonable solution to the potential injustice arising from the plaintiff's lack of knowledge of harm before the limitation period expires. In the Court's view the provisions of Part II of the *Limitation of Actions Act* address the certainty, evidentiary and diligence rationales that underline limitation legislation and provide an appropriate balance between the conflicting interests of plaintiffs and defendants. While *leave* to commence an action is required, the evidentiary burden, in the Court's opinion, is not severe. There was, consequently, every reason to defer to the supremacy of the legislature and recognize that Part II is an exclusive code. The correct course of action, therefore, was for the plaintiff to make a s. 14(1) application to extend time within twelve months of becom-

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[14] One could argue that the harm was not suffered until the completion of the judicial sale that irreversibly thwarted the plaintiff's plans for debt repayment but that issue was not explored by the Court.

ing aware of the harm he had suffered as a consequence of the defendant's negligence.

D. Economic Harm and the Completion of the Cause of Action

The second issue, which takes on added importance given the inapplicability of the common law discoverability principle in Manitoba, is when, in the variety of economic negligence cases, does harm arise for the purpose of completing the cause of action? There is no suggestion in *Rarie* that this created any particular difficulty or called for any special consideration. Twaddle J.A. in his judgment merely referred to the conventional rule.

> In the present case, as my brother Philp so well points out, the legislature has made it clear by enacting Part II of the Limitation of Actions Act ... that the words "cause of action accrues" used in Part I were intended to refer to *the completion of the cause of action by the occurrence of damage.*[15]

Since *Rarie*, however, there has been a line of decisions of the Court of Appeal indicating that there is considerable difficulty in resolving this question in the economic negligence cases. The result has been some uneven decision making and a degree of confusion. A consideration of the cases in chronological order will identify the contentious issues and the evolution of the Court's thinking on this important matter.

The first case, *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*,[16] (*Winnipeg Condo II*) dealt with a limitation issue arising after the well-known decision of the Supreme Court of Canada,[17] who refused to strike out an action in negligence brought by the second owner of a high-rise apartment block against a builder for the cost of repairing defects in the building which gave rise to a real and substantial danger to its occupants. The claim was characterized as one for *economic loss arising in a dangerous or shoddy building.*

In subsequent pre-trial proceedings the defendant argued that the claim was out of time. There were a number of critical dates. The building was completed in 1974. In 1982, some minor flaws in the exterior stone cladding arose and some remedial work was done. A large piece of the cladding fell off the premises on 8 May 1989. The statement of claim was issued in April 1990. The motion, seeking to have the action dismissed on the grounds that the limitation period had expired, was brought in July 1998.

The defendant asserted that the cause of action was complete in 1974 because the premises contained a dangerous latent defect at that time. The limitation period consequently expired in 1980. The appropriate course of action, in

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15 *Supra* note 1 at 7 [emphasis added].

16 (1998), 131 Man. R. (2d) 283 (C.A.).

17 *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85.

the defendant's view, would have been for the plaintiff to apply for leave to bring an action under s. 14(1) of the *Limitation of Actions Act* within 12 months of either 1982 (the discovery of minor flaws) or 1989 (the discovery of a more serious problem).

Oliphant A.C.J.Q.B. rejected this argument.[18] He held that the cause of action was not complete until 8 May 1989 when the piece of cladding fell off. That was when the damage occurred and the claim was clearly in time.

The Court of Appeal was unwilling to subscribe fully to the view of either the defendant or the motions judge. Huband J.A., speaking for the Court (Huband, Twaddle and Monnin JJ.A.), stated:

> At this stage we do not know the nature of the flaws in the wall or who was responsible for them. We do not know who knew what when. We do not know if the work done in 1982 was of significance or not.[19]

Consequently the Court dismissed the appeal leaving the question to be resolved on a full consideration of proved facts at trial. It may be argued that the Court implicitly rejected 1974 as the date when the cause of action was complete since further evidence would not be needed if the critical date was the completion of a building with a latent dangerous defect.[20] This interpretation would avoid a further complication that would arise if the cause of action was complete in 1974. On that date the plaintiff corporation was not in existence; it was created to take title to the condominium in 1978. This might suggest that the choice left to the trial judge was between when the initial problems with the cladding arose in 1982, in which case the action was brought out of time, or when a portion of the cladding fell off in 1989, in which case the action was brought in time. That question was not resolved before the case was settled.

The second case is *Burke v. Greenberg*[21] (*Burke*). This case was characterized by the Court (Kroft, Monnin and Steele JJ.A.) as one involving the *negligent performance of a service causing economic loss*. The defendant lawyer was retained in 1979 to plan, advise, structure and prepare legal documents to allow plaintiffs to secure title to investment properties in Florida. The faulty manner in which the transactions were structured permitted a third party to commit a fraud which led to the loss of their investments. The legal work was completed by 31

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[18] *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.* (1998), 130 Man. R. (2d) 203 (Q.B.).

[19] *Supra* note 16 at para. 13.

[20] See also the subsequent decision of Wright J. in *Winnipeg Condominium Corp. No. 266 v. 3333 Silver Developments Ltd.*, [2000] M.J. No. 600 (Q.B.) at para. 11. The Court clearly rejected the date of completion of the defective building as the time when the cause of action was complete. It was necessary to determine at trial when it could be said that a level or degree of damage had been reached that was more than minimal or nominal.

[21] (2003), 177 Man. R. (2d) 213 (C.A.).

December 1981. The fraudulent mortgage of the Florida properties engineered by the third party and his receipt of the fraudulently obtained proceeds occurred on December 1984. Title to the properties was lost when the Florida mortgagee foreclosed on the properties on 14 October 1986. The action against the defendant was commenced on 19 July 1988.[22] The issue is clear. If the cause of action was complete in December 1981 the cause of action expired six months before the action was commenced. If, on the other hand, the cause of action was not complete until the harm occurred, at either the time of the fraudulent mortgage or at the time of the foreclosure, the action against the lawyer was in time. The defendant brought a motion to have the action dismissed as being statute-barred. The decision of the Master[23] allowing the motion was reversed by the motions judge[24] who took the intuitively correct position that the cause of action was complete when the properties were foreclosed in 1984.

The Court of Appeal, however, in a judgment written by Monnin J.A., allowed the appeal and held that the loss to the plaintiffs occurred not when the fraud occurred nor when the foreclosure took place but at the time when the legal services were provided.[25] The cause of action arose at the end of 1981.The correct course of action was for the plaintiff to make an application under s. 14(1) of the *Limitation of Actions Act* when the fraud was discovered.

The next case, *Sentinel Self-Storage Corp. v. Dyregrov*, [26] (*Sentinel*) dealt with negligent advice of a professional soils consultant and a structural engineer in relation to the proposed construction of a self-storage facility. The advice was given in 1987. The work was substantially completed by 15 December 1988. It was alleged that the professional services provided by the defendants were deficient and caused instability in the foundations. The statement of claim was filed on 31 May 1996. On 8 December 2000 the Master granted a motion to dismiss the statement of claim on the ground that the limitation period had expired before the statement of claim was issued. Ironically, the plaintiff failed to file a notice of appeal within the appointed time period. An application to extend time to file an appeal raised, inter alia, the question of whether there was "an arguable ground of appeal." The defendant argued that there was no arguable ground of appeal because the original claim was clearly statute-barred. A mo-

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22 The action was solely in negligence. Claims for breach of contract and breach of fiduciary duty were abandoned.

23 *Burke v. Heaton*, [2001] M.J. No 318 (Q.B.).

24 *Burke v. Heaton*, (2002) 180 Man. R. (2d) 85 (Q.B.).

25 If the action had been brought within six years following the provision of the services the plaintiff would have recovered nominal damages, a very unusual remedy in the tort of negligence.

26 (2003), 180 Man. R (2d) 85 (C.A.).

tions judge dismissed the application[27] and the Court of Appeal dismissed the appeal.

The judgment of the majority (Monnin and Freedman JJ.A.) was delivered by Monnin J.A. He treated the claim as one for the *negligent performance of a service causing economic loss* and, following *Burke*, held that the cause of action was complete at the time the service was provided.[28] When the plaintiff realized that there was a problem with the foundations an application should have been made under s. 14(1) of the *Limitation of Actions Act* for leave to bring an action. Steele J.A. persuasively characterized the claim as a one for economic loss arising in a dangerous or shoddy product calling for an application of the principles in *Winnipeg Condominium*. She held that in the absence of proof that the defect caused a real and substantial danger to its occupants no liability could arise. Consequently, the limitation issue need not be addressed. Nevertheless, she made the point that *if* the case were analyzed as one involving the *negligent performance of a service causing economic loss* she would agree with the majority that the cause of action arose on the completion of the services and, furthermore *if* it were analyzed as a negligent advice (negligent misrepresentation) case the cause of action would be complete "when the construction work itself was executed".[29] Her Ladyship continued, "The damage is inflicted when the negligent design is *relied* upon to its detriment by the plaintiff".[30] The *obiter* statement of Steele J.A. in respect of the completion of the cause of action for negligent misrepresentation is significant. Her Ladyship's words suggest, for example, that time will run as soon as an investor acts in reliance on negligent financial advice not when the investment turns sour.

The final case is *Valley Agricultural Society v. Behlen Industries Inc.*[31] (*Valley Agriculture*). This was a case of economic loss arising from a shoddy or defective building which all parties agreed called for the application of the principles in *Winnipeg Condominium*. The defendants were the designers of the Morris curling club and exhibition hall. The two buildings were joined at a concrete block firewall. The construction was complete in 1987. The roof of the exhibition hall collapsed in 1996. There was no discernible weakness of the roof before its collapse. The collapse was caused by the uneven elevations of the roofs of the two

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27 [2001] M.J. No. 490 (Q.B.).

28 *Supra* note 26 at para. 18.

29 *Ibid.* at para. 40.

30 *Ibid.* [emphasis added]. MacInnes J. who heard the motion to extend time categorized the case as a *negligent misrepresentation* case and held that the cause of action was complete when the plaintiff relied on the advice to its detriment which on the facts was when the building was constructed.

31 [2004] M.J. 204 (C.A.).

buildings, an unusually large accumulation of snow on the roof of the exhibition hall, and the use of inadequate pin-bolts securing the roof of the hall to the firewall. The defendants Behlen Industries Inc, who designed and provided the components for the building, and Deniset, a professional engineer who certified the plans, sought summary judgment on the grounds that the claim was barred under s. 2(1)(n) of the *Limitation of Actions Act*. The central issue was, once again, when did the harm that completed the cause of action arise? Was it on completion of the building with a latent dangerous defect, on its collapse or at some intermediate point? The Courts at all levels agreed that the cause of action was complete when the dangerous defect "manifested itself".

The Master held that the dangerous defect became *manifest* when there was some external indication of the defect. [32] Since there was no evidence that the defect in the building was manifest before its collapse the defendant's motion for summary judgment was dismissed.

Justice Schulman reversed the Master.[33] He held that the dangerous defect was *manifest* as soon as the building was completed, not when the defect became apparent nor when it collapsed. The action was out of time. An application under s. 14(1) of the *Limitation of Actions Act* to extend time should have been brought within twelve months of the building collapsing.

These competing views presented the Court of Appeal with an opportunity to resolve not only when a defect becomes "manifest" for the purposes of *shoddy and defective buildings* cases but also to provide some explanation and synthesis of its recent decision making determining when the cause of action is complete in other economic negligence cases.

The Court (Scott C.J.M., Twaddle and Steele JJ.A.) chose not to take advantage of these opportunities. Scott C.J.M. delivered a short judgment for the Court. His Lordship acknowledged the difference of opinion in the Courts below on the meaning of the word "manifest" but he did not offer an opinion on the point. He chose to follow *Winnipeg Condominium II* holding that this was not an appropriate case for summary judgment because of "a lack of evidence to establish the essential background to decide the *complex and unresolved point of law* that this case raises".[34] The Court noted that there was no evidence of the state of the building between the time it was built until its collapse and there was no evidence as to when the building could be considered dangerous. Jurisprudence in other Commonwealth jurisdictions suggesting that the cause of action arises when defects become known and apparent was not adopted because

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32 (2002), 164 Man R. (2d) 156 (Q.B.).

33 (2003), 172 Man R. (2d) 248 (Q.B.).

34 *Supra* note 31 at para. 12 [emphasis added].

of the "uniqueness" of the decision in *Winnipeg Condominium*.[35] No reference was made to the judgments of Monnin J.A. in *Burke* or the judgments of Monnin and Steele JJ.A. in *Sentinel*.[36]

This judgment must have been a considerable disappointment to the litigants in particular and civil litigators in general. Both the Master and Schulman J. had provided clear reasons for their competing views on what was in the express opinion of the Court of Appeal a question of law. After four months of deliberation the Court concluded that the matter must be resolved by the trial judge. Expensive and time consuming pre-trial procedures left the parties where they began.

There are a number of conclusions that may be drawn from this line of cases.

First, the interpretation of the concept of harm or loss sufficient to complete a cause of action in a negligence action for pure economic loss is, in Manitoba, in a state of great uncertainty and is often counter-intuitive. In claims for negligent performance of a service causing economic loss the cause of action is complete when the services have been performed (*Burke* and *Sentinel*). In claims for economic loss arising from a negligent misrepresentation the cause of action *may* be complete on reliance albeit that actual loss may arise in the future (*Sentinel* per Steele J.A.). The cause of action for dangerous premises causing economic loss is complete when the dangerous defect "manifests itself". On two occasions (*Winnipeg Condominium* and *Valley Agriculture*) the Court has declined to provide guidance on the meaning of that phrase. The cause of action may be complete on the completion of the building, at the first sign of some dangerous defect or when such a defect has manifested itself in tangible adverse consequences. This creates severe difficulties for any practitioner whose client seeks a remedy for economic loss suffered more than six years after the negligent conduct of the defendant. In some situations the loss will complete the cause of action from which time runs. In other cases a s. 14(1) application is called for. This uncertainty is exacerbated by a lack of consistency in the classification of economic negligence cases. *Winnipeg Condo II*, *Sentinel* and *Valley Agriculture*

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[35] The Court also observed without comment that the danger or loss may need to be imminent to establish a claim under *Winnipeg Condominium*. There is, however, little support for that view in the Supreme Court decision and the authorities relied upon declare that "it is only where a defect poses a real and substantial danger *or* there is an imminent possibility of such danger that the cause of action is complete".

[36] Of particular relevance was the following passage of Steele J.A.'s judgment in *Sentinel* at para.70: "If this action is characterized as one of economic loss due to defective structure, the damage is not inflicted until the building is found to contain defects which pose a real and substantial danger to the occupants of the building or other property. It is only when a defect poses a real and substantial danger or there is an imminent possibility of such danger that the cause of action is complete."

would appear to be the same kind of cases (defective buildings). *Sentinel*, was, however, treated by a majority of the Court as a case of negligent performance of a service.

Secondly, the recent decisions of the Court of Appeal, particularly in *Burke* and *Sentinel* and possibly in *Winnipeg Condo II* and *Valley Agriculture*, have diluted the conventional view that there is a significant difference between the time when the cause of action arises in contract and when it arises in negligence. It is difficult to discern the policy foundations for this trend other than a judicial distaste for the long-tail actions that may arise in economic negligence cases. Such a concern, however, would appear to be met by the need to prove that the loss was caused by a wrongful act and by the long stop provisions of the *Limitation of Actions Act*.

Thirdly, the interpretation of when the harm arises in these cases suggests that it will not be uncommon in economic negligence cases for the cause of action to have lapsed before the plaintiff is aware of the consequences of the negligent conduct. In these cases recourse must be made to the statutory discoverability rules found in Part II of the *Limitation of Actions Act*. This need for reliance on applications to extend time under Part II of the *Limitation of Actions Act* gives rise to a number of problems. It will be remembered that the one-year period will begin when the *applicant* – not his or her lawyer – knows or ought to know of the material facts upon which the action is based. It may be assumed that a plaintiff will not seek legal advice immediately but will attempt to resolve the matter informally with the defendant, who will have an incentive to drag his feet and consume some of the twelve months. If so, the plaintiff's lawyer will have much less than twelve months to investigate the claim, evaluate its merit (which may require the services of professional consultants) and prepare legal strategy, evidence and legal arguments sufficient to satisfy the burden under s. 15(2) to bring evidence which is, in the absence of evidence to the contrary, sufficient to establish the cause of action on which the action is to be founded.[37] This situation is fraught with risk for even the most conscientious of busy legal practitioners unless they are ever mindful of the unexpected time constraints of this kind of litigation. An increase in s. 14 applications also adds to the delay, complexity and expense of a litigation system that is already subject to criticism on all of those grounds.

In the absence of legislative reform these difficulties can only be lessened by a return to first principles. The cause of action in *Donoghue v. Stevenson*[38] did not arise when the ginger beer was manufactured. It arose when the plaintiff became ill as a consequence of drinking it. Harm arises when there are tangible

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[37] See *Johnson v. Johnson*, *supra* note 11, for the burden resting on the applicant.

[38] [1932] A.C. 562 (H.L.).

adverse consequences arising from the negligent conduct. There is no reason to question or depart from that rule in economic negligence cases.

It is submitted that the cause of action in *Winnipeg Condo II* was complete when the large section of cladding fell off the building, in *Burke* when the bank foreclosed on the investment properties, in *Sentinel* when the foundations became unstable and in *Valley Agriculture* when the building fell down. The plaintiff then had six years to file their statements of claim. A s. 14(1) application should be required only when the plaintiff was unaware of such adverse consequences for more than six years.

III. Residential School Claims and the Limitation of Actions

The decision of the Court of Appeal in M.M. *v. Roman Catholic Church of Canada*[39] is of particular significance because it triggered an important legislative amendment to the *Limitation of Actions Act*.[40] In that case the respondents alleged that they had suffered physical and emotional harm as a consequence of tortious conduct when they were students at a Indian Residential School run by the appellants. The appellants sought to have the various actions dismissed on the grounds that they were barred by the long stop provision of the *Limitation of Actions* legislation. The alleged abuse ended when the respondents left the school which was well over thirty years before the Statement of Claim was filed. The Court of Appeal undertook an exhaustive and comparative analysis of the 1931 *Limitation of Actions Act*,[41] which was in force at the time of the tortious conduct, and the current legislation. The Court concluded that the actions were barred by the long stop provision of the 1931 Act. Under that Act no action may be brought more than thirty years after the right to take proceedings accrued. Since the right to take proceedings arose prior to the respondents leaving school,[42] the claims were barred.

This decision negated a significant number of potential claims for historic abuse in the residential school system in Manitoba. The government responded quickly. It amended the current Act to insure the continued viability of these claims and others arising from similar circumstances. The amendment is set out in full here.

> s. 2.1(1) In this section "assault" includes trespass to the person and battery.

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39 (2001), 160 Man. R. (2d) 265 (C.A.).

40 *Supra* note 4.

41 S.M. 1931, c. 30, as am. by S.M. 1932, c. 24.

42 The language of the thirty-year long stop provision of the current Act is somewhat different but the result would be no different.

s. 2.1(2) An action for assault is not governed by a limitation period and may be commenced at any time if

(a) the assault was of a sexual nature; or

(b) at the time of the assault, the person commencing the action

(i) had an intimate relationship with the person or one of the persons alleged to have committed the assault, or

(ii) was financially, emotionally, physically, or otherwise dependent on the person or one of the persons alleged to have committed the assault.

s. 2.1(3) Subject to subsection (4), subsection 2 applies

(a) notwithstanding any other provision of this Act, including, for greater certainty, the ultimate limitation periods set out in subsections 7 (5) and 14(4); and

(b) whether or not the person's right to commence the action was at any time governed by a limitation period under this or any other Act.

s. 2.1(4) Subsection (2) is subject to subsection 53(2) of the *Trustee Act*.[43]

It may be noted that the provisions remove limitation periods for all sexual assaults and some non-sexual assaults. In respect of the latter a careful reading of s. 2.1(2)(b)(i) and (ii) is required. The notion of an "intimate relationship" between the parties would appear to be primarily targeted at spousal abuse and child abuse of a non-sexual nature. The concept of "financial, emotional and physical dependency" appears to be most pertinent to non-sexual assaults by religious leaders, coaches, teachers, caregivers and the like. If there is a unifying concept that provides a policy rationale for the negation of normally applicable limitation periods to both sexual and non-sexual assaults within the terms of the sub-section, it may be found in the notion of "vulnerability". These claimants were not only vulnerable to these tortious acts because of age and immaturity but they are also vulnerable to falling afoul of limitation periods either because of a reluctance to press claims in a public forum and or, in some cases, because of a significant time lag in associating long-term psychological and emotional harm with the tortious conduct. Most people will recognize the case for special treatment.

It is also significant that the amending provision is retroactive and revives all claims that fall within the scope of the statutory language. This will not, however, ensure the success of these claims. There is a host of further problems associated with old claims, including the availability of witnesses, the fallibility of memories of long past events and the difficulty of proving a causal link be-

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[43] *Supra* note 2.

tween the tortious conduct and the alleged harm. Nevertheless one obstacle to justice has been removed.

IV. NEGLIGENCE AND PSYCHIATRIC HARM

There have been two cases of particular interest in the field of psychiatric harm. The first is *Morris v. Johnston Controls Ltd.*,[44](*Morris*) dealing with pre-trial proceedings in a "fear of future illness" claim. The second, *Sant v. Jack Andrews Kirkfield Pharmacy Ltd.*,[45] is a very unusual case dealing with the responsibility of the defendant for a largely psychosomatic illness suffered by the plaintiff.

A. Fear of Future Illness

In the United States there has been a great deal of jurisprudence and an extensive legal literature on "fear of the future illness" claims. The term refers to situations in which the defendant's negligence causes a person to be exposed to either a *toxic substance* such as asbestos, UFFI, Agent Orange, fibre-glass or vermiculite, or to a *disease causing micro-organism* such as HIV or the Hepatitis C virus, any of which *may* cause future illness. The harm complained of is not that the plaintiff has contracted the illness, but the psychiatric harm arising from the fear of developing the illness.[46] These cases are also referred to as disease-phobia cases, cancer-phobia cases, AIDS-phobia cases or more generally as "fear for the future"[47] cases. There are only a handful of Canadian cases on point[48] and little academic commentary on the issue in the Commonwealth.[49] That is likely to change given the advance in scientific knowledge linking products, chemicals and compounds to illness and the emergence of very serious and contagious viral illnesses such as HIV and SARS.

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44 [2002] M.J. No. 520 (Q.B.).

45 (2002), 161 Man. R. (2d) 121 (Q.B.).

46 Those who have been exposed to the risk of future illness may have to undergo periodic testing and monitoring of their health to increase the chance of early detection and treatment if the disease occurs. The health care costs of monitoring are an important head of loss in the United States. This loss is in itself unlikely to warrant litigation in Canada and other countries with socialized medical services.

47 See N.J. Mullany, "Fear for the Future: Liability for Infliction of Psychiatric Disorder", in N.J. Mullany ed., *Torts in the Nineties*, (Sydney: LBC Information Services, 1997) at 101.

48 *Garner v. Blue and White Taxi Co-operative Ltd.*,[1995] O.J. No. 2636 (Gen. Div.); *Anderson v. Wilson* (1999), 175 D.L.R. (4th) 409 (Ont. C.A.) ; *Fitzgerald v. Tin*,(2003), 11 B.C.L.R. (4th) 375(S.C.).

49 An exhaustive and excellent discussion of the issue is found in N.J. Mullany, "Fear for the Future: Liability for Infliction of Psychiatric Disorder" *supra* note 47. See also J. Fleming, "Preventive Damages" in *Torts in the Nineties*, *supra* note 47 at 56.

Morris v. Johnson Controls Ltd.[50] is a classic cancer-phobia case and, consequently it warrants our attention even though the litigation is at an early stage.[51] *Morris* came before Master Harrison on a motion to strike out the statement of claim as disclosing no reasonable cause of action. The plaintiffs were employed at Canadian Forces Base, Shilo. The defendant independent contractor was employed to perform work in the Central Steam Plant at the Base. It involved the removal of asbestos. It was alleged that proper asbestos abatement procedures had not been adopted and that the plaintiffs were exposed to asbestos fibres for a two-week period. The plaintiffs were not ill but they feared that they would develop illness, including cancer, in the future.

The Master decided to allow the case to proceed. He relied on *Anderson v. Wilson*,[52] (*Anderson*) where the Court of Appeal in Ontario dealt with the certification of a class action by plaintiffs who had received notice from the public health authorities of a possible link between clinics run by the defendant physician and infection with Hepatitis B. The primary issue was whether the class should include only infected patients or if uninfected patients should be included as well. The claim of the latter was for the psychiatric harm suffered during the period of intense anxiety between being notified of the danger and receiving the negative test results. The Court held that the uninfected plaintiffs should be included in the class. In the opinion of the Court the state of the law on nervous shock was too uncertain to exclude them at this early stage. The Master also referred to two American cancerphobia cases[53] where liability was imposed on the grounds that the fear of developing cancer was reasonable and causally related to the defendant's negligence. The alleged facts in *Morris* fell

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50 *Supra* note 44.

51 There have been two other recent fear of future illness cases in Manitoba. There has, however, been little discussion of the substantive liability issues in either of them. In *Scott v. St. Boniface General Hospital* (2002), 165 Man. R. (2d) 181 appeal dismissed (2003), 177 Man. R. (2d) 159 (C.A.) MacInnes J. refused to allow a class action to proceed under Queen's Bench Rule 12 brought by persons who had been exposed to potential Hepatitis B & C and HIV infection during medical testing at the defendant hospital. A fear of future illness claim was also made in *Taves v. Pfizer Inc.*, [2000] M.J. No. 359. In that case the plaintiff had an artificial heart valve surgically implanted in 1982. The plaintiff's health returned to normal and the heart valve has operated well ever since. The plaintiff, however, learned from media accounts that a small percentage of the valves were defective and could fracture, threatening the recipient's health. The plaintiff sued the manufacturer of the valve, the surgeon who implanted it and the hospital where the surgery took place for the anxiety and emotional distress created by the fear that his valve might be defective and might fracture. The substantive liability issues were not explored because the claims were held to be barred under the *Limitation of Actions Act*.

52 (1999), 44 O.R. (3d) 673 (C.A.).

53 *Smith v. AC&S Inc.* 863 F. 2d 854 (5th Circ.05/02 /1988); *Cantrell v. GAF Corp.* 999 F. 2d 1007 (6th Cir. 07/26/1993).

comfortably within the scope of *Anderson* and the American decisions. The fault alleged by the plaintiffs created an actual risk of serious illness. Any exposure to asbestos fibres is dangerous. The plaintiffs' fears of illness were consequently reasonable. The Master addressed the issue of the seriousness of the harm necessary to support an action for nervous shock by noting that there was a heavy burden on the defendant in a striking out motion, that this was a case of direct and primary psychiatric harm and that the boundaries of recovery for psychiatric harm in tort law were uncertain.

The reliance on both Canadian and American authorities by the Master is not uncommon in the handful of Canadian "fear of future illness cases". It does, however, tend to conceal that there are quite sharp differences between the conventional Canadian and Commonwealth approach to psychiatric harm and the American jurisprudence on fear of future illness claims.[54]

The Canadian approach calls for the application of the conventional principles applicable to the negligent infliction of nervous shock.[55] This uses the familiar notions of duty of care (foreseeability and proximity), causation and nervous shock defined as a "recognizable psychiatric illness". Proof of severe anxiety, serious mental distress or acute fear is conventionally insufficient to warrant recovery of damages. The need to prove nervous shock is a very significant hurdle for fear of future illness litigants. In both *Anderson* and *Morris* the issue was alluded to but deferred to trial.

The American courts tend not to draw as sharp a distinction between nervous shock (recognizable psychiatric illness) and serious mental distress. They treat the fear of future illness cases as a discrete category of cases where serious mental distress is a recognized compensable injury. The wider definition of compensable harm has, however, led the American courts to adopt additional control devices to keep liability within reasonable boundaries. Two concepts perform that task. First, the plaintiff must prove an *exposure* to the disease promoting agent and secondly that the fear of future illness is objectively *reasonable* in all the circumstances.

There is some disagreement among American courts on the first point. Some courts have held that there must be an *actual* exposure to the disease-promoting agent. Others have taken the view that proof of a possible exposure is sufficient. The contrast can be illustrated by reference to the facts of a number of cases. The alleged facts of *Morris* are illustrative of an *actual exposure* to asbestos. Two Canadian decisions that relied more fully on the American approach illustrate the more generous concept of a possible exposure to the disease-promoting agent. In both *Garner v. Blue and White Taxi Co-operative Ltd.*[56]

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[54] Mullany, *supra* note 47 describes this disparity in detail.

[55] Mullany, *supra* note 47 at 167–173 appears to favour the traditional approach.

[56] *Supra* note 48.

(*Garner*) and *Fitzgerald v. Tin*[57] (*Fitzgerald*) the plaintiff was pricked by a used syringe needle that had been left by an unknown passenger in the back seat of the defendant's taxi. Each plaintiff feared an HIV infection. In *Garner* the plaintiff suffered acute mental anxiety during four years of medical testing before he was conclusively pronounced HIV negative. In hindsight there was probably no actual exposure to HIV. Nevertheless, if the plaintiff had been able to establish a breach of the standard of care, liability for the mental anxiety would have been imposed. In *Fitzgerald*, the Court directly addressed the actual exposure/possible exposure dichotomy and adopted the latter rule. Liability was imposed in respect of the seven-month window of anxiety between the needle prick and the final determination that the plaintiff had not contracted HIV.

The second requirement is that the fear of illness must in all the circumstances be *reasonable*. This element is particularly significant in those jurisdictions that have adopted a "possible exposure" rule. Reasonableness calls for a scrupulous examination of all the circumstances including the extent of the exposure, the likelihood of future illness,[58] the seriousness of the illness and the knowledge of the plaintiff. *Fitzgerald* is illustrative: the Court noted that a syringe is a medically viable channel of transmission of HIV and that until the plaintiff received confirmation to the contrary, standard medical practice required her to act as if she were HIV positive. In such circumstances it was not "unreasonable, speculative or fanciful ... to have a real and intense fear that ... she was HIV positive."

As noted earlier it is not uncommon in the "fear of future illness" cases for Canadian courts to refer to the American jurisprudence. This may be explained by the fact that in many of these cases the need to prove a *recognizable psychiatric illness* is perceived as an unduly severe burden on deserving plaintiffs. The American approach which emphasizes the nature of the exposure and the reasonableness of the fear and de-emphasizes the seriousness of the harm is attractive. This is best illustrated by *Garner* and *Fitzgerald* where the Court was willing to provide a remedy in spite of the fact that the harm did not seem to satisfy the conventional Canadian requirement.[59]

The future shape of the law of fear of future illness cases will likely be determined by a choice as to whether to pursue conventional Canadian tort doctrine or to follow the less restrictive American lead.

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[57] *Ibid.*

[58] Some states have a more specific rule requiring the plaintiff to establish that there is a greater than 50% chance of developing the illness. See, *Potter v. Firestone Tire and Rubber Co.* 863 P. 2d 795.

[59] In *Garner* the plaintiff became "isolated from his family" and suffered "nervous upset" and in *Fitzgerald* the plaintiff suffered "mental anguish".

B. Liability for Psychosomatic Illness

Sant v. Jack Andrews Kirkfield Pharmacy Ltd.[60] (*Sant*) dealt with the liability of the defendant for an illness that was largely psychosomatic. In that case the plaintiff's brother was a courier. He picked up a package for delivery from the defendant pharmacist; unknown to him the package contained a bottle of phenol, an extremely toxic chemical. The bottle was insecurely sealed and it leaked into his car. It gave off a very strong smell and gave him a headache. He contacted the defendant who identified the product and gave him directions to avoid contact with the phenol, wash his hands thoroughly and clean his car, all of which he did. A few days later he bought a new car and transferred some articles from his old car to the new car. The plaintiff, who lived with her brother, was not directly involved in this incident. Nonetheless, some days later, after her first ride in her brother's new car, she suffered a tingling and burning sensation. She attributed these symptoms to phenol vapour emanating from various contaminated objects that had been transferred from the old car. She further alleged that she was exposed to phenol vapour from her brother's contaminated clothing and other objects he had brought into the apartment they shared. Her position was that cumulatively this exposure to phenol vapour led to a variety of severe symptoms, some of which were consistent with phenol poisoning. These symptoms began a few days after her exposure to the phenol vapour and persisted for eight years to the time of the trial.

Justice Jewers did not doubt that the plaintiff was genuinely experiencing the symptoms of which she complained. The more difficult issue was that of causation. His Lordship noted that the plaintiff's exposure to phenol was "relatively low": she did not get any liquid phenol on her skin, she was never in the presence of liquid phenol and she never smelled phenol. She was, however, exposed to some phenol vapour. His Lordship was willing to accept that some of the plaintiff's early physical symptoms were caused by the phenol but he concluded that "the plaintiff had not shown that the phenol exposure ... affected her *physically* (as opposed to psychologically) in any significant way".[61] Nonetheless, Jewers J. found that the phenol spill had caused her *psychological* harm including fear, anxiety, depression and post traumatic stress disorder. His Lordship stated:

> I am persuaded that the plaintiff has absolutely convinced herself that she has been and is poisoned by phenol and that this has pre-occupied and dominated her life for the last eight years. In my view, her problems are largely—if not entirely—psychological.[62]

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60 *Supra* note 45.

61 *Ibid.* at para. 70.

62 *Ibid.* at para. 86.

The plaintiff's claim was, therefore, essentially one for nervous shock[63] and it was treated as such by Jewers J.

His Lordship began his analysis by noting that this was not a case of *relational* nervous shock which arises where the plaintiff witnesses an horrific and traumatic accident which kills or seriously injures a loved one. This was a case where the defendant's actions of exposing the plaintiff to phenol *directly* caused the psychological harm to her. In non-relational nervous shock cases the existence of a duty of care depends largely on the question of the reasonable foreseeability of shock to a person of ordinary mental fortitude. Justice Jewers severed the two aspects of the test: he dealt with foreseeability of nervous shock and then dealt with the issue of the mental fortitude of the plaintiff.

The technical question on the foreseeability point is whether a reasonable person in the position of the defendant pharmacist would reasonably foresee that the sister of a courier might suffer psychiatric harm if an insecurely sealed bottle of phenol was entrusted to the courier for transport in the ordinary course of his business. His Lordship answered that question in the affirmative. He stated that there was no need to forecast the precise series of events which followed the spill. It was foreseeable that someone in close association with the courier (such as a sibling) would be exposed to phenol vapour and it was foreseeable that a person who was temporarily affected by the exposure could become distraught and anxious about potential phenol poisoning. The lapse of several days between the incident and the exposure did not remove the harm beyond "the realm of the reasonably possible".[64]

Justice Jewers resorted to a well-established rhetorical device to support his finding of reasonable foreseeability. It is a reasoning process which leads the reader from one readily foreseeable consequence of the negligence—the extreme danger arising from a phenol spill—to a series of discrete foreseeable events, ultimately leading to foreseeability of harm to the plaintiff. In *Sant* these steps include foreseeability of physical danger to the courier, foreseeability of an inadequate clean up, foreseeability of physical danger to close associates such as the plaintiff, foreseeability of the plaintiff's anxiety and apprehension about poi-

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63 Clinical depression and post-traumatic stress disorder are recognizable psychiatric illnesses and satisfy the requirements of conventional negligence doctrine.

64 *Supra* note 45 at para. 88. The Court also relied on *Holian v. United Grain Growers Ltd.* (1980), 2 Man.R. (2d) 374. In that case the plaintiff believed he was poisoned by gas escaping from insecticide tablets. The tablets had been improperly stored and stolen by some children who subsequently put them in the plaintiff's car. His symptoms after a brief initial illness were entirely psychosomatic and led to a chronic depression resulting in a sincere belief that he was severely and incurably debilitated. Morse J. imposed liability. Morse J. found an initial physical illness and applied the thin skull rule. The case was not analysed as one of pure psychiatric harm.

soning—to foreseeability of her psychiatric harm.[65] This reasoning process is not uncommon in tort cases.

His Lordship then turned to the issue of the mental robustness of the plaintiff. The defendant argued that the plaintiff had a frail psyche and his conduct was not such as to cause shock to a person of ordinary mental fortitude. There is authority to suggest that the conduct of the defendant must be such as to have a foreseeable adverse psychological impact on the ordinary person.[66] This argument, however, was dismissed by Jewers J. on the grounds that this rule applied only to *relational* nervous shock cases. It is true that this requirement is, today, not strictly applied and an assumption of mental fortitude will be assumed unless there is compelling evidence of special idiosyncrasies or predispositions to shock, but there appears to be little authority or reason to differentiate plaintiffs on a relational / non-relational nervous shock dichotomy.

It is clear that the plaintiff garnered a great deal of judicial sympathy. All of the contentious issues were resolved in her favour. Some will applaud the decision as another step towards equal treatment of psychiatric harm and personal injury. Others will have some reservations about the decision. They may feel some sympathy for the defendant who was held responsible for an eight-year psychosomatic illness arising from the obsessive reaction of a person indirectly involved in a relatively minor act of negligence.

V. POLLUTION AND ECONOMIC LOSS

In *66295 Manitoba Ltd v. Imperial Oil Ltd.*[67] (*Imperial Oil*), Schulman J. heard an application under s. 14(1) *Limitation of Actions Act* for leave to bring an action in negligence for pure economic loss arising from the historic pollution of land by a previous owner. Section 15(2) requires the Court to determine, *inter alia*, if the applicant has *a reasonable chance of success in the proposed action*. This was the central issue in *Imperial Oil* and it provided an opportunity for Schulman J. to canvass recent developments in the area of economic negligence law and assess the prospects of success of a novel economic loss claim.

The case involved commercial land in Winnipeg located at corner of Pembina Highway and McGillivray Boulevard. From 1951–1977 it was owned and operated as a gas station by the respondent Imperial Oil Ltd. (Imperial). In 1977 Imperial removed the underground gas tanks, leaving some petroleum chemicals in the soil. The land was then leased to an oil change and lube business. It was sold to Wail Investments Ltd. (Wail) in 1983 and then to the applicant

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65 *Ibid.* at para. 88.

66 *Vanek* v *Great Atlantic and Pacific Co. of Canada* (1999), 180 D.L.R. (4th) 748 (Ont.C.A.).

67 (2002), 165 Man. R. (2d) 29.

Curtis Carpets Ltd. (Curtis) in 1984.[68] At the time of the sale Curtis was aware of the land use of Imperial's tenant, but was not aware of Imperial's use.

In 1999 Curtis obtained an environmental assessment report of the land in order to secure bank financing for a construction project. That report disclosed for the first time the presence of petroleum chemicals in the soil. The chemicals posed no danger to persons on or off the property and the land could not be described as contaminated. Nevertheless, the land was not in pristine condition and by reason of regulations under the under the *Contamination Sites Remediation and Consequential Amendments Act* a stigma or stain would henceforth attach to the land. That stigma might discourage future purchasers and/or lower the value of the land.

Curtis sought leave to sue Imperial for the economic loss caused by its negligent cleanup of the land as required by environmental legislation, when they removed the tanks. Curtis sought leave to sue Wail on the grounds that it ought to have known of the chemical content of the land and ought to have disclosed it in the course of their pre-contractual negotiations. The claims were for the diminution of the value of the land and were solely in tort. No cleanup had been done by Curtis; none was required by governmental environmental regulation; and none was planned in the future.

Curtis' first claim against Imperial was presented as one for *contractual relational economic loss*. Contractual relational economic loss arises where a tort has been committed by A which causes damage to the property of B who is bound by contract to allow C to use the property. C suffers financial loss because his right to use the property is interfered with.[69] The scope of recovery for such claims has, however, been severely restricted by the Supreme Court in *Bow Valley Husky (Bermuda) Ltd. v. St John Shipbuilding Ltd.*[70] In that case the Court adopted an exclusionary rule which denies recovery for all contractual relational economic loss claims which do not fall within recognized exceptional categories of cases.[71] The Court took this position for a number of reasons: the severe indeterminacy problems in contractual relational economic loss claims, the limited need for deterrence (given the likelihood of a claim made by the

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[68] Title was transferred to an allied corporation 66295 Manitoba Ltd. the following year. The applicants included Curtis Carpets Ltd., 66295 Manitoba Ltd. and Wayne Curtis. No point of distinction was drawn between them and they are referred to as "Curtis" here.

[69] Non-contractual relational economic loss arises when C has a non-contractual right or privilege to the use of the property of B.

[70] [1997] 3 S.C.R. 1210.

[71] The categories include cases where the plaintiff has a possessory or proprietary interest in the property, joint ventures, general averaging and transferred loss. Additional categories may be added in the future but the Court warned that such a course should not be "assiduously" pursued.

property owner) and the availability of alternative means for plaintiffs to protect themselves from contractual relational economic loss, including redirecting the loss to the property owner by appropriate contractual provisions and by first-party insurance instruments.

Curtis faced a difficult task. It had to prove not only that the case could be characterized as one of contractual relational economic loss but also that it fit within one of the exceptional categories where recovery was permitted. On the first point Curtis argued that the defendant Imperial damaged the property of Wail which caused contractual relational economic loss to Curtis. As Schulman J. pointed out, however, Imperial did not cause any damage to the land when it was owned by Wail (the harm arose when Imperial owned the land) and Wail was not under any contract to provide Curtis with the use of the land since the only contract was one of sale concluded long after the alleged negligence. In any event the case was clearly not within any of the exceptional categories.

The second line of argument against Imperial was based on *Winnipeg Condominium Corp. No. 36 v. Bird Construction Company*,[72] which held that a builder or designer of premises is under a duty of care to the future occupants of the building to prevent latent defects which pose a real and substantial danger to those occupants. The builder's liability is to pay for the cost of repairs necessary to restore the premises to a safe state. There are, however, a number of points of distinction. *Imperial Oil* dealt with the state of land rather than premises on the land, the land did not pose a real and substantial danger to anyone[73] and Curtis was not seeking the cost of restoration of the land to its pristine condition. The plaintiff had sought to overcome the lack of a real and substantial danger by pointing to *Bryan v. Maloney*[74] (*Bryan*) where the High Court of Australia recognized a duty of care in respect of *non-dangerous* defects in residential dwellings. Justice Schulman declined to follow it noting that *Imperial Oil* dealt with commercial property and thus lacked the consumer protection rationale of *Bryan*.[75]

The plaintiff's argument against Wail based on *negligent misrepresentation* was also problematic. This is not a case where the purchaser was induced to purchase the land because of false statements made by the seller. The argument was that the seller ought to have known of the condition of the land and ought to have voluntarily disclosed the information to Curtis. *Caveat emptor* is, how-

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72 (1995), 121 D.L.R. (4th) 193.

73 The importance of this element is emphasized by Steele J.A. in her judgment in *Sentinel Self-Storage Corp. v. Dyregrov*, *supra* note 26.

74 (1995), 182 C.L.R. 609.

75 Subsequently the High Court of Australia has taken a similar approach to *Bryan* in *Woolcock Street Investments Pty Ltd. v. CDG Pty Ltd.*, [2004] H.C.A. No. 16. The Court declined to extend *Bryan* to commercial realty.

ever, still a force in real estate transactions and a duty to disclose information about the subject matter of the transaction is very limited.[76] Not surprisingly, Schulman J. held that there was no duty of care on Wail. They had no knowledge of the presence of petro-chemicals on the land and they were in no better position than Curtis to discover the truth.

All of this led inexorably to the gravamen of the case: whether or not it was desirable in the circumstances of *Imperial Oil* to recognize a novel duty of care on either Imperial or Wail to Curtis. Curtis may have taken comfort from the fact that the case was close to a number of the recognized categories of economic negligence actions and although it could not be squeezed into any one of them there was a chance that a novel duty would be recognized. The current framework for dealing with novel cases is found in *Cooper v. Hobart,*[77] *Edwards v. Law Society of Upper Canada*[78] and, since Curtis, *Odhavji Estate v. Woodhouse*[79] in all of which the Supreme Court has used a modified *Anns*[80] test. In order to establish a *prima facie duty of care* the plaintiff must establish that the defendant ought reasonably to have *foreseen* harm to the plaintiff or a class of persons to which the plaintiff belongs *and* that there is sufficient proximity between the parties. That *prima facie* duty may be negated if there are *residual policy factors* that lead to the conclusion that the imposition of a duty of care on the defendant would be socially undesirable or unwise.

The Court held that Imperial owed a *prima facie* duty of care to Curtis but negated the duty on policy grounds. There were, in Schulman J.'s view, several weighty policy considerations which supported that conclusion. First, there were indeterminacy problems. Since Curtis had no intention of restoring the land to its pristine condition there was a possibility that over the years each of the subsequent owners might sue not only Imperial but also other previous owners. Secondly, there is a need for stability and finality in commercial dealings. Thirdly, there had been an opportunity for Curtis to make a more thorough investigation of the property before purchasing it. Fourthly, there was at the time in question no statutory duty on Imperial to restore the land to its pristine condition. Fifthly, the Manitoba legislature had *subsequently* adopted a regulatory regime that could be applied if contaminated land posed a risk to health or the environment. Finally the case turned largely on the price paid for the land and there was no net loss to society.

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[76] J. Irvine, "Annotation to *Sevidal v. Chopra*" (1987), 41 C.C.L.T. 181.

[77] [2001] 3 S.C.R. 537.

[78] [2001] 3 S.C.R. 562.

[79] [2003] 3 S.C.R. 263.

[80] *Anns v. Merton London Borough Council,* [1978] A.C. 728. (H.L.).

The court did not canvass the competing policy factors supporting the establishment of a duty of care including a heightened public concern for the environment, the increasing range of statutory regulation evidencing that concern and the attraction of "the polluter pays" approach. His Lordship does appear to have been heavily influenced by the fact that the land was not contaminated in the sense that it posed a danger to persons, property or the environment. He might have recognized a duty of care to subsequent owners if the land was seriously contaminated. Nevertheless, pollution does not always present a clear and present danger; it insidiously degrades the environment, contributing to an unquantifiable but cumulative impact on our ecological welfare. The punitive and deterrent functions of tort law offer a rationale for the recognition of a duty of care to subsequent owners of the land. Concerns about the degree of the pollution and the danger to health could be more sensitively resolved at the standard of care stage that is sensitive to the surrounding circumstances of the case.

The Court also declined to recognize a novel duty of care on the part of Wail. The issue had largely been resolved by the negligent misrepresentation claim. The finding there that there was insufficient proximity between the parties to support a duty of care in that context was equally applicable to the 'novel' duty analysis. There were, moreover, residual policy considerations that supported this conclusion. The Court noted that *caveat emptor* was applicable to real estate transactions. Furthermore, Wail had no knowledge of the pollution, the contract of sale denied any responsibility of the vendor for misrepresentation and a duty of care of the kind suggested was incompatible with the commercial nature of the deal.

Since none of the claims had a reasonable prospect of success the application to extend time was denied.

VI. School Accidents

The Court of Appeal dealt with two cases of personal injury involving teachers in high schools. In the first a teacher was sued by a student and in the second a student was sued by a teacher.

The facts of *Michaluk (Litigation guardian of) v. Rolling River School Division No. 39* [81] could not be simpler. The plaintiff was a grade eight student who lost the sight of an eye while participating in art class. He was bending wire coat hangers into mobiles when the wire slipped out of his hand and punctured his eye. A conventional analysis of the facts indicates that the teacher had not met the applicable standard of care, that of the "careful or prudent parent." An eye injury was a reasonably foreseeable risk of the art project and while the chance of an injury to an eye was low, the potential severity of the harm was high and

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[81] (2001), 153 Man. R. (2d) 300.

the cost of preventive measures was minimal. The teacher could have given better instructions on the danger, he could have insured that the students wore safety goggles which were readily available or he could have instructed the students to cover the ends of the wire with masking tape. Predictably, the trial judge held for the plaintiff and the Court of Appeal (Scott C.J.M. , Helper and Steele JJ.A.) dismissed the appeal.

The unusual aspect of this case is the analysis adopted by the Court of Appeal. Scott C.J.M. wrote the only judgment. He posed two distinct and independent questions: "Were the injuries sustained by the plaintiff reasonably foreseeable?"[82] and the "real issue ... whether a puncture wound or other injury to the eye was reasonably foreseeable".[83] At first sight it seems that the same question is being posed in different language because the only "injury" suffered was the eye injury. What emerges from the judgment is that the first question is targeted at the foreseeable risk of some harm, such as a scratch or puncture of the skin, and is relevant to the *standard of care* issue. Judging by the authorities cited, the second inquiry focuses on the foreseeability of an eye injury and raises a *remoteness of damage* issue. Both questions were ultimately answered in favour of the plaintiff.[84]

It is unusual in a modern personal injury case to undertake this kind of analysis. The landmark decision of the House of Lords in *Paris v. Stepney Borough Council*[85] provides contrast. In that case the plaintiff suffered a loss of sight in an eye when he was removing bolts from the chassis of a motor vehicle by hitting them with a hammer. A splinter of steel flew off the bolt and into his eye. The Court did not embark on a two-part standard of care/remoteness analysis and determine if some hypothetical harm such as lacerations to his body was foreseeable before considering the foreseeability of the injury to the eye. The case was resolved on a standard of care analysis. Most Canadian cases dealing with eye injuries, including *Lebourque v. Thibeault*,[86] *Pon v. Cannell Films Ltd.*[87] and *LeBlanc v. Marson Canada Inc.*,[88] are consistent with this approach. The remoteness of damage analysis is normally reserved for those cases where

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82 *Ibid.* at para. 9.

83 *Ibid.* at para. 26.

84 The cautious and guarded approach of the Court to the issue of foreseeability in *Michaluk* provides an interesting contrast to the more robust interpretation found in *Sant v. Jack Andrews Kirkfield Pharmacy Ltd.*, *supra* note 45 discussed above at Part D. 1.

85 [1951] A.C. 367.

86 (1976), 15 N.B.R (2d) 348.

87 [1992] B.C.J. No. 797.

88 (1995), 139 N.S.R. (2d) 309 appeal dismissed 146 N.S.R. (2d) 392 (C.A.).

the harm suffered is categorically different from that which was foreseen rather than merely one manifestation of a particular kind or category of harm (personal injury).

It is not clear why this dual analysis was adopted. Some loose language by the trial judge seems to have suggested the remoteness analysis and undue attention may have been paid to two English cases[89] that were decided in the immediate aftermath of *Wagon Mound No. 1*[90] before the remoteness of damage principle established in that case was fully developed. It should not be overlooked, of course, that the Court arrived at the correct result albeit by a rather circuitous route. Nevertheless, structural clarity of the tort of negligence has not been enhanced and defendants are encouraged to dance the "standard/remoteness two-step" in order to confuse proceedings and possibly lead a court to the wrong result.

Johnson v. Webb[91] dealt with a serious injury to the plaintiff teacher arising out of an extra-curricular activity. The plaintiff participated in an annual staff/student hockey game at Fisher Branch Collegiate. The unwritten but well-known rules of the game prohibited intentional physical contact. A student player collided with the plaintiff in the course of the game and the plaintiff was injured. At trial, the plaintiff was unsuccessful against both the defendant student and the defendant school board. The Court of Appeal (Scott C.J.M., Monnin and Hamilton JJ.A.) dismissed the teacher's appeal against the decision in favour of the student. Speaking for the Court, Monnin J.A. held that a participant in contact sports could only be held liable where the injury was the result of an intent to injure in breach of the rules of the game. Since there was no intent to injure the test was not satisfied. This decision is consistent with two earlier Court of Appeal authorities[92] where a battery analysis was adopted to resolve cases involving injuries caused by one player to another. The collision with another player is *prima facie* a battery and the task is then to determine the scope of the plaintiff's consent. Normally consent does not extend to conduct evincing an intent to injure in breach of the rules. This approach is in contrast to the Courts of British Columbia, which decided these cases on a negligence basis.[93] The standard of care is adjusted to take into account the nature and

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89 *Doughty v. Turner Manufacturing Co. Ltd.*, [1964] 1 Q.B. 518 (C.A.) and *Tremain v. Pike*, [1969] 3 All E.R. 1303.

90 *Overseas Tankship (U.K.) Ltd. v. Morts Dock and Engineering Co. Ltd.*, [1961] A.C. 388.(P.C.).

91 (2002), 170 Man. R. (2d) 58.

92 *Agar v. Canning* (1965), 55 W.W.R. 384; *Temple v. Hallem* (1989), 58 Man.R. (2d) 54.

93 *Zapf v. Muckalt* (1996), 142 D.L.R. (4th) 438 (B.C.C.A.); *Unruh (Guardian ad litem of) v. Webber* (1994) 112 D.L.R. (4th) 83 (B.C.C.A.).

rules of the game and the expectations of the players. The Court alluded to this alternative approach which is potentially more advantageous to plaintiffs[94] but did not give it any detailed consideration because the Court was of the view that the defendant's conduct was, in the circumstances, neither reckless nor careless.

The appeal against the decision in favour of the school board was also dismissed. The game was appropriately supervised and refereed and the school board was not a guarantor of the plaintiff's safety.

VII. MEDICAL LIABILITY

A. Medical Malpractice

Since 2000 the Court of Appeal has dealt with six appeals from judgments in medical malpractice cases:[95] *Braun Estate v. Vaughan*[96] (*Braun*), *Lacroix (Litigation guardian of) v. Dominique*[97] (*Lacroix*), *Gros v. Victoria General Hospital*[98] (*Gros*), *Kovalik Estate v. Griffin*[99] (*Kovalik*), *Lyne v. McClarty*[100] (*Lyne*), and *Jaglowska* v. *Kreml*[101] (*Jaglowska*).

Other than *Lacroix* (which dealt with "wrongful life" and is discussed in that context below) these cases involved the application of conventional negligence principles and warrant little comment on the substantive law contained therein. The cases do, however, provide further evidence of some of the deficiencies of the tort system as it pertains to medical accidents. I have recently canvassed some of those issues in the context of the Jaman litigation that twice reached the Court of Appeal on separate pre-trial motions.[102] The six cases listed above

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94 For a fuller discussion of this point and a comparison between the battery model of liability and the negligence model see Philip H. Osborne, "Sporting Injuries Caused by Other Players: *Temple v. Hallem*" in "A Review of Tort Decisions: 1989" (1990) 19 Man. L.J. 419 at 432.

95 This does not include appeals on pre-trial motions.

96 (2000), 145 Man. R. (2d) 35.

97 (2001), 156 Man. R. (2d) 262.

98 (2001), 160 Man. R. (2d) 7.

99 (2002), 166 Man.R. (2d) 111.

100 (2003) 170 Man. R. (2d) 161.

101 (2003), 177 Man. R. (2d) 280.

102 Philip H. Osborne, "The *Jaman* Litigation: The Liabilities of Tort Liability" (2002) 13 C.C.L.T. (3d) 247.

offer further evidence of the delay and uncertainty inherent in the tort system and the need for a better system of compensation for those who suffer from serious medical accidents.

The *delay* in many malpractice cases is unreasonably long. The time period between the medical accident and disposition by the Court of Appeal was in *Braun* eight years, *Lacroix* ten years,[103] *Gros* ten years, *Kovalik* ten years, *Jaglowska* twelve years, and *Lyne* thirteen years.[104] The uncertainty arises in part because of the complexity of issues at the crossroads of medicine and law. It is evidenced to some degree by the fact that in the six pieces of litigation four appeals (*Braun*, *Kovalik*, *Lyne*, and *Jaglowska*) were allowed in whole or in part indicating serious errors in liability assessment or the calculation of compensation at the trial level. The need for a better system of medical accident compensation is also apparent from these cases. In *Lacroix*, *Gros*, *Kovalik* and *Jaglowska* the patient either suffered serious injury or died as a consequence of an avoidable medical accident. In each case the plaintiff failed to establish liability. Not only are the plaintiffs uncompensated but they also bear the additional burden of expense, time, stress and anxiety exacted by the tort process. No fault-based system of compensation can, of course, compensate all those who suffer loss as a consequence of serious avoidable medical accidents. This does not excuse us from developing a more efficient and inexpensive compensation system to secure that just goal. The Prichard Report,[105] which makes the case for an alternative no-fault compensation system is a good starting point.

B. Wrongful Life

One of the issues in *Lacroix (Litigation guardian of) v. Dominique*[106] was the recognition of the action for "wrongful life". The paradigmatic wrongful life claim arises where a physician has negligently failed to alert parents of a risk of fetal abnormality in an unborn child. Consequently, the mother does not have the opportunity to terminate her pregnancy and the child is born with serious mental and/or physical disabilities. The mother claims that she would have terminated her pregnancy if she had been given the information about the risk of abnormality. The physician, of course, has not caused the child's disability—he has failed to prevent a birth. The action brought by the *parents* is referred to as a

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[103] Time is calculated from 1991, when the litigant had enough knowledge to file a statement of claim.

[104] Time is calculated from 1991 when the litigant became aware of a mis-diagnosis made in 1986.

[105] J.R.S. Prichard, *Liability and Compensation in Health Care: A Report to the Conference of Deputy Ministers of Health of the Federal/Provincial/Territorial Review on Liability and Compensation Issues in Health Care*, (Toronto: University of Toronto Press, 1990).

[106] *Supra* note 97.

wrongful birth claim. The action brought by the *child* is referred to as a wrongful life claim. The child's argument is that but for the negligence of the defendant physician her mother would have terminated the pregnancy and she would not have been born.

In *Lacroix* the defendant physician failed to warn the parents of the risk to the fetus posed by the continuation of medications prescribed to control the mother's epilepsy. The mother alleged that she would have avoided pregnancy if advised of the risks. The child was born with severe disabilities. The wrongful birth claim of the parents was ruled out of time. This left the wrongful life claim of the child. The Court of Appeal (Huband, Twaddle and Steele JJ.A.) noted that such a claim had not been recognized by Canadian courts and agreed with the trial judge's dismissal of the action. Justice Twaddle, who delivered the only judgment, held that the assessment of damages presented insoluble difficulties, requiring a comparison between the plaintiff's current situation and the state of "non-existence" that would have been the consequence of due care on the part of the defendant. Although the Court did not discuss them at length there are a also number of compelling policy grounds for rejecting the wrongful life action including the importance of valuing all life and the avoidance of any suggestion that the plaintiff's life is some form of "harm" or "loss". It is very likely that other appeal courts will follow *Lacroix* when the occasion arises. This is one situation where the evident need for deterrence and the desirability of providing compensation for a severely disabled child are not likely to trump the profound judicial distaste of declaring any life to be "wrongful".

The continual attempts to establish wrongful life actions are indicative of the lack of governmental financial support for persons with congenital disabilities. The solution, however, is more likely to be found in changed governmental policy rather than in the courts.

C. Injury to the Fetus: Mothers and Physicians

In *Dobson (Litigation guardian of) v. Dobson*[107] (*Dobson*) the Supreme Court held that a mother is not under a duty of care to her own fetus. The plaintiff in *Dobson* was a child injured *en ventre sa mere* by his mother's negligent driving. He was born with serious disabilities as a result of the negligent conduct. The Court held that the recognition of such a duty would not only unduly infringe upon the autonomy and privacy rights of women and their chosen lifestyle, it would also create difficulties in determining the appropriate standard of care for pregnant women. The Court was not attracted to the argument that a duty of care might be owed in circumstances where the posited duty to the child (to drive carefully) is the same as that owed to a member of the public. The Court preferred the clarity and specificity of a complete immunity.

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[107] [1999] 2 S.C.R. 753.

One of the consequences of that decision was explored by the Court of Appeal in *Preston v. Chow*.[108] The litigation arose from the pregnancy and delivery of the infant plaintiff. During the course of her pregnancy, the plaintiff's mother engaged in unprotected sexual intercourse and she suspected, correctly, that she had been exposed to genital herpes. This created a significant risk to her fetus because a genital herpes infection can be contracted during the course of a vaginal delivery. At the time of delivery the plaintiff's mother had an active genital herpes infection and the plaintiff contracted herpes and suffered significant brain damage.

It was alleged that during the course of her pregnancy the plaintiff's mother had communicated her fears of possible exposure to genital herpes to her physician, a social worker and to the physician's receptionist, all of whom had failed to act on the information. In particular the physician had not determined if she suffered from genital herpes and, consequently, had not prevented harm to the fetus by recommending a Caesarean section. The social worker and the receptionist allegedly had not passed on information of a possible herpes infection to the physician.[109]

In pre-trial proceedings the defendants sought to hold the mother liable to make contribution under the *Tortfeasors and Contributory Negligence Act* [110] in respect of any damages that might be awarded against them. They no doubt felt that her irresponsible conduct had contributed to the harm and she should bear some of the legal responsibility, though it seems unlikely that a single mother with a seriously disabled child would be able to make any significant payment in contribution to the award of damages even if they succeeded.

The motions judge held that the plaintiff's mother was not liable to make contribution.[111] Speaking on behalf of the Court of Appeal (Huband, Kroft and Steele JJ.A.) Steele J.A. agreed. She held that contribution under the Act depended upon a finding that the contributor would be liable to the plaintiff; *Dobson*, however, categorically denied any liability of a mother to her fetus and this attempt to make an end run around that decision was rejected. There is no surprise in this decision—the words of the statute are clear. It may be unfair to impose all the loss on the defendants, assuming they are ultimately held to be liable, but, as the motions judge observed, that "cannot be helped".[112] Moreover, this case dealt with an unwise lifestyle choice by a pregnant woman, the very

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[108] (2002), 163 Man. R. (2d) 134.

[109] There was some lack of clarity on the facts as to who was told what when and what the response of each defendant was.

[110] R.S.M. 1987, T90.

[111] *Preston v. Chow* (2001), 152 Man. R. (2d) 266.

[112] *Ibid.* at para. 17.

conduct that the Supreme Court most ardently refused to subject to legal scrutiny.

D. Automobile Injuries and Medical Care

The litigation in *Mitchell v. Rahman*[113] (*Mitchell*) arose out of a motor vehicle accident on 16 October 1996, in which the plaintiff dislocated his right acromiclavicular joint. The defendant physicians failed to diagnose the shoulder dislocation. In their opinion the shoulder was bruised and a course of physiotherapy was recommended. A correct diagnosis was not made until January 1997, by which time the plaintiff had suffered a permanent shoulder disability. A medical malpractice action was brought against the defendant physicians. The defendants brought a pre-trial motion asserting that the actions in negligence against the physicians were barred by reason of the provisions of the *Manitoba Public Insurance Corporation Act*.[114] The pertinent provision of the Act declares that no action in tort is available in respect of a "bodily injury *caused by* an automobile".[115] Those injured by an automobile are eligible in lieu of a tort claim to no-fault benefits under the Personal Injury Protection Plan.

The correct interpretation of the statutory language was at issue in two earlier Manitoba cases; *McMillan v. Thompson (Rural Municipality)*[116] (*McMillan*) and *Guiboche v. Ford Motor Company of Canada Ltd.*[117] (*Guiboche*). In *McMillan*, the plaintiffs were injured in a single motor vehicle accident. Part of a bridge had washed out and they crashed into the gap in the road . They sought to sue the municipality for failure to maintain the bridge or warn them of the danger. The Court of Appeal held that the claims were barred. Their injuries were *caused by* an automobile. This decision was followed in another single motor vehicle accident case. In *Guiboche* the injured driver sought to bring a products liability claim against the manufacturer of his seat belt on the grounds that it was defective. It was held that his injuries were *caused by* an automobile and the claim was barred. In these cases the language of the legislation was given a broad interpretation; consequently, a wide range of non-motorist third parties including highway designers and repairers, commercial suppliers of alcohol and automobile repairers are protected from negligence liability.[118]

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[113] (2002), 163 Man. R. (2d) 87.

[114] R.S.M. 1987, c. P215.

[115] *Ibid.*, s. 71 [emphasis added].

[116] (1997), 115 Man R. (2d) 2.

[117] (1998), 131 Man. R (2d) 99.

[118] In the summer of 2004 there was a discussion of this issue in the Winnipeg Free Press July 7, 2004, "Mother Paralysed by Van Can't Sue: Autopac bars going after Chrysler.

The issue in *Mitchell* was whether the permanent shoulder disability that was the subject of the negligence action was caused by an automobile or by the negligence of the physicians. The motions judge held that the claim was barred. The Court of Appeal, however, allowed the appeal. Speaking for the Court (Philp, Kroft and Steele JJ.A.), Philp J.A. applied the test set out in *Amos v. Insurance Corp. of British Columbia*[119] (*Amos*) where the Supreme Court of Canada interpreted similar statutory language. It has two parts:

> 1. Did the accident result from the ordinary and well-known activities to which automobiles are put. [the *purpose* test]
>
> 2. Is there some nexus or causal relationship (not necessarily a direct or proximate causal relationship) between the appellant's injuries and the ownership, use or operation of his vehicle or is the connection between the injuries and the ownership, use or operation of the vehicle merely incidental or fortuitous. [the *causation* test]

His Lordship expressed no doubt that the test was met in both *McMillan* and *Guiboche*. Nevertheless Philp J.A. concluded that neither branch of the test was met in *Mitchell*. He held that the "accident" referred to in the *purpose* test was not the automobile accident itself but rather the occurrence at the hospital following the motor vehicle accident—the alleged medical negligence—that led to the permanent injuries which were the subject of the action. This characterization of the "accident" permitted the conclusion that the purpose test was not met. The injuries did not result from the "ordinary and well-known activities to which automobiles are put." The *causation* test was not satisfied because in the Court's view the injury at issue in the case was not the dislocation of the right acromiclavicular joint suffered in the automobile accident, but the permanent right shoulder impairment and disability that arose subsequent to the motor vehicle accident. The latter was caused by the physicians' alleged negligence. In the Court's view the injuries that were subject to the tort claim had no nexus or causal link to the use of an automobile. They were "separated by time and by circumstances in which they occurred from the injuries he had suffered in the automobile accident".[120]

This decision is well reasoned and is consistent with an insurance approach to such an issue. It does, however, raise some interesting practical and policy issues. The primary practical problem will be to differentiate the automobile accident injuries from the medical injuries caused by the negligence or *errors* of health care professionals. That dichotomy was reasonably straightforward in *Mitchell* but there will be other cases where the line is much more difficult to draw. There are competing policy views in respect of the decision. On one hand, the tort rights of the plaintiff are preserved which may result in increased

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[119] [1995] 3 S.C.R. 405.

[120] *Supra* note 113 at para. 64.

compensation for the plaintiff and a degree of deterrence against the physicians. On the other hand, the decision will not be welcomed by those whose injuries are *exacerbated* by medical errors or hospital infections who will now find themselves without a tort claim, because they cannot prove negligence on the part of a health care provider, and without no-fault benefits because the harm at issue is deemed to be a medical rather than an automobile injury. Even those with tort claims may prefer no-fault coverage given the difficulties of suing physicians.

It was open to the Court to distinguish *Amos*, on the grounds that the statutory language interpreted in that case was not the same as that at issue in *Mitchell*, and apply a more robust interpretation of the Manitoba statute. The injuries to the plaintiff would not have happened but for the automobile accident and it is probably counter-intuitive to the ordinary person to draw a technical line based on the classification of his injuries as either automobile injuries or medical injuries. Indeed if asked today how he hurt his shoulder the plaintiff would probably reply "in an automobile accident", the original source of his problems. A broader interpretation might be justified on the grounds that the coverage in a public compensation scheme designed to replace tort law should be construed more generously than private insurance vehicles and that all the consequences of medical treatment arising from motor vehicle accidents should fall within the scheme.

The general policy question of the extent to which losses, caused in part by the fault of non-motorist third parties such as the defendants in *McMillan*, *Guiboche* and *Mitchell*, should be transferred to the automobile no-fault plan remains a controversial one.[121]

VIII. MISFEASANCE IN PUBLIC OFFICE

In *Uni-Jet Industrial Pipe Ltd.* v *Canada (Attorney General)*[122] (*Uni-Jet*) the Court of Appeal found the R.C.M.P. vicariously liable for *misfeasance in public office* committed by its media relations officer. Misfeasance in public office is a tort of increasing importance and one which the Supreme Court has, subsequently to *Uni-Jet*, discussed at length in *Odhavji Estate v. Woodhouse*[123] (*Odhavji*). The conventional view has been that the tort arises where there has been an abusive exercise of *statutory powers* by a public officer. This may occur where a public officer exercises a statutory power with the intention of harming the plaintiff

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[121] For a discussion of and a proposed solution to this problem see, Jeffrey O Connell and Craig Brown, "Non-Motorist Defendants: No-Fault Insurance: *McMillan v. Thompson*" (1999) 78 Can. Bar Rev. 255.

[122] (2001), 156 Man. R (2d) 14.

[123] [2003] 3 S.C.R. 263.

(targeted malice) or for another improper purpose *or* by the purported exercise of a power which the public official is aware he does not have in circumstances where harm to the plaintiff is either known or very likely to result.

In *Uni-Jet* the media relations officer, Jennings, tipped off the media about the execution of search warrants on the premises of the plaintiffs Uni-Jet and Baziuk. The warrants related to possible fraud in the sewer contracting business. The premature release of information to the media about the execution of the warrants was in breach of provisions of both the *RCMP Act* and *Criminal Code*. It was done to curry favour with and enhance the media relations officer's relationship with the working press. Predictably, the print and television media were on hand and reported extensively on the conduct of the search. This included both television and still photographs of police officers taking boxes out of the plaintiff's premises. No charges were ever brought against the plaintiff. He sued the R.C.M.P. for the harmful repercussions of the media exposure including humiliation and embarrassment.

The Court of Appeal (Kroft, Monnin and Steele JJ.A.) held that the trial judge who had imposed liability in negligence was in error. Nevertheless it concluded that the requirements of the tort of misfeasance in public office were established. Speaking for the Court, Kroft J.A. expressed no doubt that Jennings was a public officer. He then dealt with the two other elements of the tort, the nature of the wrongful actions and the mental element of the tort.

As noted above, misfeasance in public office traditionally has applied to the wrongful exercise of statutory powers. The unusual aspect of *Uni-Jet* was that the conduct of Jennings was in breach of statutory *duties*. The Court, however, did not consider this dichotomy between powers and duties to be of any great significance. Justice Kroft treated the exercise of statutory authority (power) and the breach of statutory duty as largely interchangeable concepts. He stated:

> Jennings held a public office; he had statutory *authority*; and the manner in which he conducted himself amounts to a failure to carry out the *duties* attached to his public office and constitutes a breach of statutory *authority* [emphasis added].[124]

Earlier in the judgment he wrote:

> He violated the Code and breached the statutory *authority* given in respect to his public *duties* under the R.C.M.P. Act [emphasis added]. [125]

The Court thus recognized that a breach of statutory *duty* is sufficient misconduct to support an action in misfeasance in public office.

Justice Kroft then went on to consider the necessary "mental element" of the tort. He quoted extensively from the recent cases on the point but did not follow any one of them nor formulate any generally applicable rule. He had

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[124] *Supra* note 122 at para. 33.

[125] *Supra* note 122 at para. 27.

noted earlier that Jennings "knew what he was doing and knew what results would probably ensue"[126] and that was sufficient to satisfy the mental element of the tort.

The decision of the Court of Appeal in *Uni-Jet* foreshadowed that of the Supreme Court of Canada in *Odhavji*. The case dealt, *inter alia*, with a motion to strike a statement of claim against police officers and the Chief of Police on the grounds that it disclosed no reasonable cause of action in misfeasance in public office. The police officers had been involved in a shooting in Toronto which caused the death of a family member of the plaintiffs. Immediately after the shooting the Special Investigation Unit commenced an investigation. The police officers were under statutory *duties* to co-operate with the investigation and the Chief was *obligated* to ensure compliance by his officers. The investigation was hampered by the failure of the officers and the Chief to perform their obligations and no charges were filed against any of the officers. The plaintiffs alleged that they had suffered nervous shock as a consequence of the breach of those duties.

The Supreme Court recognized that liability for misfeasance in public office may arise where public officials have abused their statutory powers in the two conventional scenarios referred to above. It gave careful consideration to whether the tort is restricted to those categories. It concluded that it is not. The tort is "broadly based on *unlawful conduct* in the exercise of public functions generally." In particular it is not limited to the exercise of statutory powers. As anticipated by the Manitoba Court of Appeal in *Uni-Jet* it extends to a breach of statutory duties and other unlawful conduct.

The Supreme Court held that there are two elements of the tort. The public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer *and* the public officer must have been aware that his or her conduct was unlawful and that it was likely to harm the plaintiff.[127] In *Odhavji*, the police officers and the Chief had deliberately acted unlawfully and that they were aware of the illegality of their conduct and knew it was likely to cause the plaintiff harm. The facts of *Uni-Jet* also fall comfortably within the Supreme Court's template of liability. The media officer was a public officer who deliberately and knowingly committed an illegal act which he knew was likely to harm the plaintiff.

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[126] *Supra* note 122 at para. 8.

[127] The tort of misfeasance in public office is described by the Supreme Court as an intentional tort. This recognizes that the illegal conduct must be intentional but not the *consequences* of the act which is the defining nature of conventional intentional torts. Intention in tort law generally refers to conduct where the actor desires the adverse consequences or those consequences are substantially certain to result. Misfeasance in public office only requires proof that the defendant is subjectively aware that harm to the plaintiff is a *likely* consequence of the illegal act.

Odhavji has clearly rationalized and generalized the law relating to misfeasance in public office. Although it is restricted to the conduct of public officers it focuses on two very general ideas, advertent illegality and knowledge that harm to the plaintiff is likely. Any evolution in the law from narrowly circumscribed liabilities to liabilities defined by principles of greater generality[128] is likely to invite some critical assessment.[129] In particular there may be concern that the general principle is too vague and indefinite *(uncertainty)*, that the principle is inconsistent with conventional doctrine *(inconsistency)*, that the principle is redundant since the field of liability is already covered by established torts *(redundancy)*, that the principle dislocates the traditional pattern of tort liability *(dislocation)* or that the principle is unduly expansionary in nature *(floodgates)*.[130] It may be useful to measure the rule in *Odhavji* against these markers.

There is a degree of uncertainty in the *Odhavji* formulation. There has always been some elusiveness in the concept of 'public officer' and that remains unresolved. There is also little discussion in *Odhavji* of the meaning of *unlawful* in this context. Clearly the wrongful exercise of statutory powers and the breach of statutory duty is covered. Illegality is, however, a broad term which may include all acts forbidden by law without regard to the significance of the obligation. This could include breaches of contract, tortious duty and other civil obligations. It is unlikely, however, to extend to actions that are merely void, unauthorized or *ultra vires*. There is additionally some difficulty with the concept of knowledge as it pertains to both the illegality of the act and the potential harm to the plaintiff. Actual knowledge is likely to be supplemented by "reckless disregard" and "turning a blind eye" to the matter at issue. Constructive knowledge will probably be insufficient. These uncertainties are, however, no more severe than those found in other areas of tortious liability.

The *Odhavji* principle is consistent with modern elements of Canadian tort doctrine. The building blocks of tort liability include the establishment of a wrongful act by the defendant such as intentional, negligent, malicious or dis-

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[128] The experience of tort law with the introduction of general principles of liability has been uneven. The neighbour principle in *Donoghue v. Stevenson*,[1932] A.C. 562 has been a great success. The rule in *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330 has been severely limited in its scope. The rule in *Wilkinson v. Downton*, [1897] Q.B. 57 has failed to fulfill its potential. The rule in *Beaudesert Shire Council v. Smith* (1966), 120 C.L.R. 145 (H.C.A.) was so heavily criticized it was abrogated by the very Court that created it in *Northern Territory of Australia v. Mengel* (1996), 185 C.L.R. 307 (H.C.A.).It is too early to judge the nascent tort of intentional interference with economic interests by an unlawful act.

[129] See *e.g.* Michael Bodner, "The *Odhavji* Decision: Old Ghosts and New Confusion in Canadian Couts" (2005) 42(4) Alberta L.R.

[130] Some of these criticisms were discussed by the High Court of Australia in *Northern Territory of Australia v. Mengel*, *supra* note 128.

honest conduct, sufficient harm to warrant the imposition of liability and a causal link between the conduct and the harm suffered by the plaintiff. The *Odhavji* principle requiring an advertent illegal act and knowledge of the harm that is likely to result falls comfortably within the concept of a wrongful act and a causal link between such conduct and harm which is of a kind that is generally recoverable in Canadian tort law. It is, therefore, clearly compatible with modern tort doctrine.

It is true that there was no pressing need to extend the tort of misfeasance in public office in order to secure a remedy against the police officers and the Chief of Police. The Supreme Court recognized that the defendants owed a duty of care to the plaintiffs and the breach of statutory duty provides compelling evidence that there has been a failure to meet the standard of the reasonably competent police chief and officers.[131] This does not, however, make the principle *redundant*. The illegal actions of public officials may in certain circumstances be beyond the scope of traditional heads of tort liability. There may, for example, be no duty of care in the circumstances of the case and it should be remembered that there is no discrete tort of breach of statutory duty. The principle in *Odhavji* may secure a remedy where one would not otherwise be available and where practical justice demands one.

The *Odhavji* principle does threaten to dislocate the conventional pattern of tort liability. That is one of the consequences of developing general principles. Public officials have been subject to potential liability under a number of discrete torts including *negligence, fraud, intimidation, conspiracy, inducement to breach a contract and intentional interference with economic interests by unlawful means*. Each tort has its own elements of liability, its own list of defenses and its own slate of available remedies. The *Odhavji* principle encourages counsel to evade these technicalities whenever there is advertent illegal conduct combined with knowledge that harm is likely to result from that conduct. Insofar as the liability of public officials is concerned there is, therefore, the potential for the principle to subsume discrete torts in the same way as the generalized obligation of care subsumed discrete categories of negligence liability in the course of the twentieth century. Not everyone will perceive this as a problem. It permits the law to abandon historic restrictions on liability and focus on the essential elements which justify providing a remedy.

Most general principles do contain the potential for a substantial extension of liability. The rule in *Odhavji* is no exception. Comment has already been made on the open-ended concepts of "illegality" and "knowledge" that lie at the heart of *Odhavji*. The more intriguing possibility is the potential for its extension to the private sector. When the tort was based on the abuse of statutory *powers* there was a comfortable fit with its exclusive application solely to public offi-

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[131] *Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205.

cials. Governmental bureaucracies at the federal, provincial and municipal levels typically exercise powers that are not commonly entrusted to actors in the private sector. Legislation directed at private actors more commonly imposes *duties*. The question that will arise is whether there is a good reason to restrict the tort to public officials or whether it should extend to private sector actors who knowingly breach a statutory duty in circumstances where they know that it is likely to cause harm to the plaintiff. Imagine, for example, that both a government social worker acting in the course of his employment and a private person gain actual knowledge that a child is being sexually abused. Both persons are *aware* that child welfare legislation imposes a duty on *every* person to report the matter to the Director of Child Welfare. Each person chooses not to report the matter. Each person knows that the child will suffer further abuse because of their failure to act. It may be argued that a system based on corrective justice should not draw a distinction between these two persons. They have both knowingly breached their legal duty and know that further harm to the child is likely. This is a situation where there may not be a remedy against the private person under current tort principles. Misfeasance in public office is inapplicable to a private person and there may be no liability in negligence because it calls for the recognition of a duty of affirmative action (a duty to rescue) to a child with whom that person may have no relationship other than knowledge of her perilous circumstances.

The logic of an extension to the private sector will, however, likely be resisted because of the fear of a flood of claims. Society is so heavily regulated that a responsibility for advertent illegalities which are known to be likely to cause harm may be considered to be too burdensome to private actors. This is particularly so if no account is taken of the seriousness of the illegality involved. On the other hand, in some situations courts may exhibit little sympathy for a person who has actual knowledge of the illegality of his conduct and is proved to have actual knowledge that harm is likely to be suffered by the plaintiff.

IX. DEFAMATION

In *Makow v. Winnipeg Sun*[132] the appellant newspaper published an article that was critical of the respondent Dr. Makow, a lecturer at the University of Winnipeg. The article related to conflict between Dr. Makow and some of his students. The students believed that Dr. Makow had conducted himself in a politically incorrect and professionally inappropriate manner in the classroom. The administration of the University had become involved in the dispute and his appointment was not renewed. The newspaper article at issue was written in response to an earlier piece that portrayed Dr. Makow in a positive light, sug-

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[132] [2004] M.J. No. 119.

gesting that he was the victim of radical feminist students and an unsympathetic university administration. Much of the article at issue was factual but it contained unsubstantiated assertions the most serious of which was that Dr. Makow discussed sexual issues with some female students outside the classroom. This was linked to a suggestion that such conduct was comparable to that of a salacious physician acting inappropriately with a young patient. The implication was that Dr. Makow was some kind of sexual predator ready to take advantage of his young female students. In the view of both the trial judge and the Court of Appeal (Scott C.J.M., Huband and Steele) this assertion was clearly defamatory and no defense was available to the appellant. The appellant could not justify this implication and the defense of fair comment on a matter of public interest could not succeed because the opinion did not rest on a substratum of proved facts.

Dr. Makow cross-appealed on the quantum of damages. The trial judge had awarded $5000. These are not contemptuous damages[133] but they are very low given the seriousness of such a defamatory assertion about a university teacher. The Court of Appeal, nevertheless, refused to increase the award. The Court observed that his reputation was already diminished by his controversial classroom behaviour; he advanced no claim of special or consequential damages; he had co-operated with the author of the initial sympathetic newspaper report and the article at issue was motivated by a desire to bring balance to the story rather than to do injury. As this case illustrates, an action in defamation can be a two-edged sword. One may win the battle but lose the war.

X. CONCLUSION

Most of the cases reviewed here are decisions of the Court of Appeal. It is appropriate, therefore, to end with some observations about the performance of the Court in these tort cases. Needless to say the Court was conscientious and careful in its analysis and decision making in the individual cases. Its focus tended to be on the particular doctrinal issue involved and the written judgments were generally restricted to the narrow point at issue. This is a perfectly defensible approach but it has its costs. Undue attention to the specifics without similar attention to the broader fabric of tort law and the policies that underlie it can create confusion and difficulty. This is evident in the cases dealing with limitation periods and economic negligence cases and the categorization of economic negligence claims. Each decision is internally coherent but as a series of decisions they are problematic.

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[133] Contemptuous or derisory damages are very low sums which indicate that the plaintiff has established the liability of the defendant but the plaintiff, as a consequence of other conduct, has no reputation of any value.

A narrow focus on the specific doctrinal point at issue also diminishes the role of the Court as custodian of Manitoba tort law. There is a constant need in the common law to rationalize, explicate and modernize the law and to articulate the policies and goals that tort law should reflect. This is not a role that the Court has assiduously pursued. Judgments tend to be short and to the point, pedestrian, precedent-oriented and without a full discussion of the background, context and consequences of the decision and how it contributes to the continuing evolution of tort law. Consequently, the decisions of the Court are generally unenlightening beyond the disposal of the appeal at hand. There is little of the insight, innovation, inspiration, energy, perspective, flair for language and broad-ranging analysis that is typical of powerful and influential judicial writing.