CONFLICT OF LAWS - DISCRETIONARY PRINCIPLES - FORUM NON CONVENIENS - ANTI-SUIT INJUNCTIONS: *Amchem Products Inc.* v. *British Columbia (Workers Compensation Board)*

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Amchem Products Inc. v. *British Columbia (Workers Compensation Board)*[1] is destined to join *Morguard Investments Ltd.* v. *De Savoye*[2] on the short list of most regularly cited Supreme Court of Canada decisions on the conflict of laws for two reasons.

First, *Amchem* modifies the English principles governing discretion both to stay local actions and to prohibit commencement or continuation of foreign actions. Whether *Amchem* will merely supplement or will completely supplant *Spiliada Maritime Corporation Ltd.* v. *Cansulex Ltd.*[3] and *S.N.I. Aerospatiale* v. *Lee Kui Jak*[4] will be discussed in this comment. In either case, future litigants will have to cite *Amchem* whenever an application is made in a common law court in Canada for a stay of the local action or for an anti-suit injunction.

Second, it is possible that *Amchem* sheds some light on the proper formulation of the new *Morguard* rule for recognition and enforcement of foreign judgments.[5] If this is so, *Amchem* will have to be read with and cited as a companion case to *Morguard* on all occasions when the new recognition rule is in issue.

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[1] [1993] 3 W.W.R. 441, (1993), 77 B.C.L.R. (2d) 62 (S.C.C.). (Hereafter *Amchem*).

[2] [1990] 3 S.C.R. 1077, (1990), 76 D.L.R. (4th) 256. (Hereafter *Morguard*).

[3] [1987] A.C. 460 (H.L.). (Hereafter *Spiliada*).

[4] [1987] A.C. 871, [1987] 3 All E.R. 510 (P.C.). (Hereafter *Aerospatiale*). Although *Aerospatiale* was decided by the Privy Council it asserted that it was setting out the law of England as well as that of Brunei and it has consistently been treated as having done so.

[5] There is consensus that some ambiguity attaches to the formulation of the *Morguard* rule. There must be a real and substantial connection between the forum in which the judgment was obtained and something, but that something is described in varying ways throughout the reasons for judgment. For discussion of *Morguard* on this point and generally, see: J. Blom, Conflict of Laws--Enforcement of Extra-Provincial Default Judgment--Real and Substantial Connection (1991), 70 Can. Bar Rev. 733; V. Black and J. Swan, New Rules for the Enforcement of Foreign Judgments: Morguard Investments v De Savoye (1991), 12 The Advocates Quarterly 489; H.P. Glenn, Foreign Judgments, the Common Law and the Constitution: De Savoye v Morguard Investments Ltd. (1992), 37 McGill L.J. 537; C. Walsh, Canadian Private International Law After De Savoye v Morguard Investments (1992), 8 Sol.Jo. (N.B.) 1; J.G. Castel, Recognition and Enforcement of a Sister Province Default Money Judgment (1991), 7 B.F.L.R. 111; P. Finkle and

The Decision

The appellants in the Supreme Court of Canada were seeking to set aside an injunction granted by the British Columbia Supreme Court and continued by the British Columbia Court of Appeal, prohibiting them from continuing a tort action commenced in the state of Texas.[6] Most of the plaintiffs in the Texas action, appellants in the Supreme Court of Canada, were residents of British Columbia. Most of the defendants in the Texas action were American companies but none had been incorporated in Texas. New evidence, supplied to the Supreme Court at its request, established that many of the companies were carrying on business in the state of Texas or had done so.[7] No parallel action had ever been commenced in British Columbia but the corporate defendants were willing to attorn to the jurisdiction of the British Columbia courts if the plaintiffs could be induced somehow to sue there instead of in Texas.

Uncertain as to a right to an injunction as an independent remedy, they commenced an action claiming damages for abuse of process, seeking a declaration that British Columbia was the appropriate forum for the action and requesting anti-suit and anti-anti-suit injunctions[8] as ancillary relief. At trial and on appeal, it was held that an anti-suit injunction could be applied for independently, that the principles enunciated by the Privy Council in *Aerospatiale* for the granting of anti-suit injunctions should be adopted in British Columbia and, applying those principles, that continuation of the tort action in Texas constituted oppression and vexation within the meaning of the *Aerospatiale* principle. Some difference of opinion existed among the British

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S. Coakeley, Morguard Investments Ltd: Reforming Federalism from the Top (1991), 14 Dal. L.J. 340. See also (1993), 21 Canadian Business Law Journal, for the revised papers on *Morguard* by V. Black. E. Edinger and J. Wood presented at the 22nd Annual Workshop on Commercial and Consumer Law held at McGill University on October 16-17, 1992. *Morguard* was expressly limited to the recognition of judgments interprovincially but the rule has been extended by the lower courts very quickly to non-Canadian judgments. See *Clarke* v. *Lo Bianco* (1991), 84 D.L.R. (4th) 244 (B.C.S.C.); *Minkler and Kirschbaum* v. *Sheppard*, unreported, Vancouver Registry C903031, November 8, 1991 (B.C.S.C.); *Federal Deposit Insurance Corp.* v. *Vanstone* (1992), 88 D.L.R. (4th) 448 (B.C.S.C.); *McMickle* v. *Van Straaten* (1992), 93 D.L.R. (4th) 74 (B.C.S.C.); *Moses* v. *Shore Boat Builders* (1992), 68 B.C.L.R. (2d) 394 (B.C.S.C.); *Fabrelle Wallcoverings and Textiles* v. *North American Decorative Products* (1992), 6 C.P.C. (3d) 170 (Ont. Gen. Div.).

[6] The case was complicated at the trial and appeal levels in British Columbia by anti-anti-suit injunctions sought by the Texas plaintiffs in Texas and the Texas defendants in British Columbia. An anti-anti-suit injunction is an order prohibiting the other party from seeking an anti-suit injunction in another forum. It amounts to a pre-emptive strike. This tactical manoeuvring, while a fascinating study in itself, became virtually irrelevant in the Supreme Court of Canada and so details of it are omitted in this account of the case. For a full discussion see the reports of the trial and appeal decisions in British Columbia (1989), 42 B.C.L.R. (2d) 77, 65 D.L.R. (4th) 567, [1990] 2 W.W.R. 601 (B.C.S.C.), and (1990), 50 B.C.L.R. (2d) 218, 75 D.L.R. (4th) 1, [1991] 1 W.W.R. 243 (B.C.C.A.) respectively, and a comment by this author (1992), 71 Can. Bar Rev. 117.

[7] Past connections with a forum should have no bearing on jurisdiction unless the connection existed at the time the cause of action arose.

[8] See *supra*, footnote 6.

Columbia judges at trial and on appeal as to what constituted the oppression and vexation in *Amchem* itself. The trial judge was primarily concerned with the granting of an anti-anti-suit injunction by the Texas court in the face of the anti-suit and the anti-anti-suit injunction proceedings in British Columbia. The majority of the Court of Appeal considered that the apparent failure of the Texas court to consider the doctrine of *forum non conveniens* amounted to oppression and vexation.

The Supreme Court of Canada, in a unanimous decision written by Sopinka J.,[9] allowed the appeal and set aside the injunction. The British Columbia courts were not held to have applied the wrong principles, but to have applied those principles incorrectly: Texas was the natural forum and, even if it were not, oppression and vexation had been found where none could properly be held to exist.

Anti-Suit Injunctions: The Amchem Test

Amchem holds that the general principle applicable when a defendant or potential defendant in a foreign action seeks an anti-suit injunction in a Canadian common law court is based on *Aerospatiale*:[10]

> In my view, the principles outlined in *SNI* should be the foundation for the test applied in our courts. These principles should be applied having due regard for the Canadian approach to private international law. This approach is exemplified by the judgment of this Court in *Morguard*, supra, in which La Forest J. stressed the role of comity and the need to adjust its content in the light of changing order.

It is not self-evident that the *Morguard* view of comity differs in any way from the English view. The definition or description adopted by La Forest J. in that case was, in fact, drawn from an 1895 decision of the United States Supreme Court, *Hilton* v. *Guyot*.[11] Nor can the response of the Supreme Court of Canada in *Morguard* to comity concerns be distinguished from that of the English courts. *Morguard* fashioned a new rule for recognition and enforcement of judgments just as the English courts had revised the principles governing stays of local actions. Indeed, the new *Morguard* rule, limited as it was to the interprovincial context of recognition and enforcement, probably owes as much to the federal principle as to the comity principle. Nevertheless, whether or not there is a distinctive Canadian approach to private international law which depends on our appreciation of the comity principle, there can be no doubt that *Amchem* effected significant alterations to and modifications of the English principles in issue.

Like the *Aerospatiale* test, the Canadian version consists of two steps or stages. That test is not reached, however, unless certain preconditions are satisfied. These preconditions are not set out as absolutes, but Sopinka J. indicates that they would ordinarily be applicable.

The first precondition requires that as a general rule an action must actually have been commenced in another jurisdiction. Injunctions should not be sought

[9] The other members of the court were La Forest, Gonthier, Cory and McLachlin JJ.

[10] *Supra*, footnote 1, at pp. 464 (W.W.R.), 85 (B.C.L.R.).

[11] 159 U.S. 113 (1895).

to prevent commencement of an action. Tactical manoeuvring is to be limited. The only example in the judgment of a circumstance which might qualify as an exception to this general rule is the case where the commencement of a foreign action might constitute an actionable wrong.[12]

Secondly, the defendant in the foreign action should request the foreign court to refrain from exercising the jurisdiction it has assumed before seeking an anti-suit injunction from a Canadian court. This precondition is described as a "preference".[13] Again, it is unclear when it would be proper to waive this precondition. A possible circumstance might be when application to the foreign court for such purpose would be futile because it has no discretion to exercise on this issue.

It is questionable whether anything can be made of the fact that Sopinka J. describes the first precondition as a general rule and the second as a preference. The exercise would seem to be about as useful as attempting to distinguish between a constitutional convention and a constitutional practice. The point is that neither precondition is absolute, a status that accords perfectly with the origin and nature of the remedy sought.

No precondition was imposed requiring the existence of a local action in Canada. The decision at trial, upheld on appeal in British Columbia, that an anti-suit injunction may be applied for as independent relief, is thus upheld. The Supreme Court of Canada decision does attach one express qualification to the British Columbia decisions, however, by holding that a Canadian court may consider an application for an anti-suit injunction only if it is asserted by the applicant to be the natural forum[14] or, at least, an appropriate forum. In other words, Canadian courts are not to assume jurisdiction to police forum shopping and assertions of exorbitant jurisdiction simply as disinterested, uninvolved arbiters or even, as McEachern C.J.B.C. suggested, as policemen of the citizens of their own provinces. This qualification is implicit in *Aerospatiale* and in the British Columbia decisions in *Amchem* but the express enunciation of it by the Supreme Court of Canada contributes valuable certainty. Satisfaction of this qualification is not necessarily satisfaction of the first stage of the anti-suit injunction test as formulated by the Supreme Court, however.

Using the principles enunciated in *Aerospatiale* as the acknowledged foundation, the Supreme Court of Canada sets out and discusses a two part test for the granting of anti-suit injunctions. The parts are cumulative, not alternative. The first stage requires assessment of the relative appropriateness of the forum and the foreign court for the action. The second stage requires identification of the consequences to the plaintiff in the foreign action of an injunction prohibiting continuation of that action and evaluation of the justice of an anti-suit injunction in the circumstances.

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[12] *Supra*, footnote 1, at pp. 464 (W.W.R.), 85 (B.C.L.R.).

[13] *Ibid.*, at pp. 64-65.

[14] *Supra*, footnote 1, at pp. 465 (W.W.R.), 86 (B.C.L.R.): "... the forum that on the basis of relevant factors has the closest connection with the action and the parties."

Some confusion attaches to the proper question to be asked on the first step of the test. The critical passage in Sopinka J.'s judgment reads as follows:[15]

> The first step in applying the *SNI* analysis is to determine whether the domestic [Canadian] forum is the natural forum, that is the forum that on the basis of relevant factors has the closest connection with the action and the parties. I would modify this slightly to conform with the test relating to forum non conveniens. Under this test the court must determine whether there is another forum that is clearly more appropriate. The result of this change in stay applications is that where there is no one forum that is the most appropriate, the domestic forum wins out by default and refuses a stay, provided it is an appropriate forum. In this step of the analysis, the domestic court as a matter of comity must take cognizance of the fact that the foreign court has assumed jurisdiction. If, applying the principles relating to forum non conveniens outlined above, the foreign court could reasonably have concluded that there was no alternative forum that was clearly more appropriate, the domestic court should respect that decision and the application should be dismissed. When there is a genuine disagreement between the courts of our country and another, the courts of this country should not arrogate to themselves the decision for both jurisdictions. In most cases it will appear from the decision of the foreign court whether it acted on principles similar to those that obtain here, but, if not, then the domestic court must consider whether the result is consistent with those principles.
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> In a case in which the domestic court concludes that the foreign court assumed jurisdiction on a basis that is inconsistent with principles relating to forum non conveniens and that the foreign court's conclusion could not reasonably have been reached had it applied those principles, it must go then to the second step of the *SNI* test.

In this passage Sopinka J. slips from asserting in the first sentence that the question is whether the Canadian court is *forum conveniens* to an examination of whether the foreign court in which the action has been commenced is *forum conveniens* - or at least, could reasonably have concluded that it is. Identification of the "asking" court is highly significant because where neither forum is *clearly* more appropriate, the "asking" court will be the natural forum " by default". If the Canadian court asks if it is the natural forum and decides that it is because it is not persuaded that there is another more clearly appropriate forum elsewhere it will move on to step two of the test more often than if it asks whether the foreign court, where the action is pending, could reasonably have held itself to be the natural forum applying the same test. More often than not, no one forum clearly is more appropriate than another.[16]

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[15] *Ibid.*, at pp. 465 (W.W.R.), 86 (B.C.L.R.).

[16] That this is the case is recognized by Sopinka J., *ibid.*, at pp. 450 (W.W.R.), 72 (B.C.L.R.), in an earlier part of the judgment where he sets out the nature of the problem to be resolved:

> ... the business of litigation, like commerce itself, has become increasingly international. With the increase of free trade and the rapid growth of multi-national corporations it has become difficult to identify one clearly appropriate forum for this type of litigation. The defendant may not be identified with only one jurisdiction. Moreover, there are frequently multiple defendants carrying on business in a number of jurisdictions and distributing their products or services world wide. As well, the plaintiffs may be a large class residing in different jurisdictions. It is often difficult to pinpoint the place where the transaction giving rise to the action took place. Frequently there is no single forum that is clearly the most convenient or appropriate for the trial of the action but rather several which are equally suitable alternatives.

Four elements in the reasons for judgment arguably lead to the conclusion that, despite the first sentence in the passage quoted above, the Supreme Court decided that the question to be asked as the first step in deciding whether to grant an anti-suit injunction is whether the foreign court could with reasonable justification have concluded that no other clearly more appropriate forum for the action existed. Those four elements are the emphasis on comity, the imposition of the preconditions, the discussion of the right to evaluate the foreign decision and the actual application of the test to the circumstances of the *Amchem* case itself.

The emphasis on greater deference to the comity principle would be highly persuasive even standing alone. Letting the foreign court be the "asking" court will resolve the injunction application in favour of the foreign court more often than if the Canadian court is the "asking" court. Therefore, there will be greater deference to other legal systems, such deference being the essence of the comity principle.

The imposition of the preconditions requiring that an action actually have been commenced elsewhere and that the foreign court have been asked to decline jurisdiction are also persuasive. The intended objective in imposing these preconditions must be to reduce applications for anti-suit injunctions by fixing other legal systems with the opportunity and the responsibility of declining to hear cases inappropriately brought (and, possibly, by exhausting litigants' resources). Having imposed on the foreign court the primary responsibility of allocating the action to the proper forum it would be inconsistent and anomalous to refuse to recognize its decision, provided only that decision is reasonably justifiable. Proper deference can be paid to that decision only if the Canadian court asks whether the foreign court could reasonably have concluded that no clearly more appropriate forum exists elsewhere.

The *Amchem* case itself is one in which no single jurisdiction could be said to be clearly most appropriate. Texas and British Columbia both had connections to the action so both could and were said to be appropriate. Nevertheless, the Supreme Court held that Esson C.J. should never have proceeded to the second step. The question asked, therefore, must have been whether the *Texas court* could reasonably have concluded that no other more clearly appropriate forum existed elsewhere.

Finally, the assertion that the Canadian court is both entitled and obliged to review the decision of the foreign court and to measure it against Canadian principles (as enunciated in *Amchem*) would be redundant if the foreign court were not the "asking court". Neither the absence of any reference to a doctrine of *forum non conveniens* nor an ostensible adherence to it is to be conclusive:[17]

> ... the principle of comity to which I have referred does not require that the decision of the foreign court be based on the doctrine of forum non conveniens. Many states in the United States and other countries do not apply that principle. Indeed, until comparatively recent times, it was not applied in England. Does this mean that a decision of the courts of one of these countries which, in the result, is consistent with

[17] *Ibid.*, at pp. 469 (W.W.R.), 90 (B.C.L.R.). (Emphasis added).

> the application of our rules would not be entitled to respect? The response must be in the negative. *It is the result of the decision when measured against our principles that is important and not necessarily the reasoning that leads to that decision.*

If this is the correct reading of *Amchem*, the first stage of the Canadian test differs significantly from the English *Aerospatiale* version. The Privy Council in *Aerospatiale* clearly asked whether Brunei, the court to which the application for an anti-suit injunction was made, was the natural forum for the action.[18] Because it concluded that Brunei was the natural forum, it had to proceed to the second stage of the test and ask whether continuation of the Texas action would constitute injustice in that it amounted to oppression or vexation.[19] Had the Privy Council asked whether the Texas court could reasonably have concluded that it was the natural forum, it is likely (or at least possible) that it would have had to answer that question affirmatively. The question of oppression and vexation could not then have arisen because the Texas assumption of jurisdiction would have deserved respect and recognition.

Amchem varies the second step of the *Aerospatiale* test also. Whether the difference between the English and Canadian second stages of the test is as marked as that between the English and Canadian first stages will be determined only by the application of the tests in their respective jurisdictions. At the second stage a Canadian court is instructed by *Amchem* to omit all reference to oppression and vexation and to ask simply whether continuation of the foreign action would constitute an injustice. The terms oppression and vexation are to be excluded from the lexicon of anti-suit injunction terminology because "they add nothing to the analysis" and "have never been satisfactorily defined".[20] Continued reference to oppression and vexation will, moreover, reduce flexibility:[21]

> If flexibility is the desired objective, it is achieved by the use of the term "injustice" which, in addition, is more in keeping with the language of the statutes which provide for injunctive relief.

It is somewhat startling to learn that flexibility is an objective. The essence of *Aerospatiale* was reduction of flexibility and the tenor of the *Amchem* decision with its emphasis on comity and respect for the decisions of courts in other jurisdictions is otherwise completely consistent with *Aerospatiale*. Omission of all reference to oppression and vexation will undoubtedly reintroduce an element of flexibility into the test. Some flexibility is necessary in granting anti-suit injunctions. The question is how much flexibility is desirable.

Finally, *Amchem* expressly addresses the relationship between the *forum non conveniens* principle and the principles governing the granting of anti-suit injunctions. Application of the *forum non conveniens* principle constitutes the first stage of the anti-suit injunction test and entails a weighing of personal and juridical advantages. Personal and juridical advantages must again be considered and weighed at the second stage of the anti-suit injunction test in order for

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[18] *Supra*, footnote 4, at pp. 897-899 (H.L.), 522-524 (All E.R.).

[19] *Ibid.*, at pp. 899 (H.L.), 524 (All E.R.).

[20] *Supra*, footnote 1, at pp. 465 (W.W.R.), 87 (B.C.L.R.).

[21] *Ibid.*, at pp. 465-466 (W.W.R.), 87 (B.C.L.R.).

the Canadian court to decide whether continuation of the foreign action will constitute an injustice.

In result, *Amchem* enunciates a test for the granting of anti-suit injunctions which apparently closely resembles the *Aerospatiale* test but which, on closer examination, differs from the English test in significant ways. First, its invocation is limited by the imposition of preconditions. Second, it asks a different question at both the first and second stages. The first question is one that is more likely than its *Aerospatiale* counterpart to short-circuit the process and preclude advancement to the second stage of the test because it makes the foreign court the "asking" court and reviews the decision of that court only to ascertain whether it was reasonable. Conversely, the second question is more likely than its *Aerospatiale* counterpart to produce an anti-suit injunction because it asks only whether pursuit of the foreign action would be unjust, not whether pursuit would be oppressive and vexatious:[22]

> The result of the application of these principles is that when a foreign court assumes jurisdiction on a basis that generally conforms to our rule of private international law relating to forum non conveniens, that decision will be respected and a Canadian court will not purport to make the decision for the foreign court. The policy of our courts with respect to comity demands no less. If, however, a foreign court assumes jurisdiction on a basis that is inconsistent with our rules of private international law and an injustice results to a litigant or "would-be" litigant in our courts, then the assumption of jurisdiction is inequitable and the party invoking the foreign jurisdiction can be restrained. The foreign court, not having itself observed the rules of comity, cannot expect its decision to be respected on the basis of comity.

Declining Jurisdiction: Staying Local Actions

Because the *forum non conveniens* principle is integral to the test for granting anti-suit injunctions and because that principle has been evolving rapidly in its country of origin and at different rates within Canada, the Supreme Court of Canada was compelled to discuss that principle, if only in order to ensure that consistency prevails in the granting of anti-suit injunctions. However, since applications to stay local actions far outnumber applications for anti-suit injunctions, it is the discussion of *forum non conveniens* for which *Amchem* will undoubtedly become known. What is not so certain is whether *Amchem* will come to be regarded as the sole source of the Canadian principles or whether it will simply be another necessary citation.

There are two reasons for this uncertainty. First, in contrast to the discussion concerning anti-suit injunctions, there is no express statement that the *Spiliada* constitutes the foundation of the Canadian principle. There is instead a brief review of the development of the principle in England and of the approaches in Australia, New Zealand, the United States and Canada coupled with a conclusion that:[23]

> ... the law in common law jurisdictions is, as observed by Lord Goff in *Spiliada*, remarkably uniform. While there are differences in the language used, each jurisdiction applies principles designed to identify the most appropriate or appropriate forum

[22] *Ibid.*, at pp. 466-467 (W.W.R.), 88 (B.C.L.R.).

[23] *Ibid.*, at pp. 458 (W.W.R.), 79 (B.C.L.R.).

> for the litigation based on factors which connect the litigation and the parties to the competing form.

Second, in spite of recognising the fact that the jurisdictions employ different language in describing the relevant discretionary principle, *Amchem* never provides a Canadian formulation though it makes modifications to something. It is a reasonable inference that the modifications are to the principle as set out in the *Spiliada*, but they could equally well be intended to apply to the test in *MacShannon* v. *Rockware Glass Ltd.*,[24] an earlier version of the English principle and one much cited in Canadian litigation. *Spiliada* added a statement of the fundamental principle governing the granting of stays but it left intact the *MacShannon* analysis which consisted of a two part test followed by a balancing of the results. The fundamental principle is that the court must be "satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice".[25] The *Spiliada* formulation of the two part test is that to justify a stay the defendant must show, first, that there is another court which is the natural forum for the action to whose jurisdiction the parties are amenable and, second, that justice does not require that the action should nevertheless be allowed to proceed in the local court. *Spiliada* also affirmed that the burden of proof rests on the defendant when service has been effected in England, but it rests on the plaintiff when service has been effected *ex juris*.

On grounds that the two part test is simply the vestigial skeleton of the *St. Pierre* v. *South American Stores (Gath and Chaves) Ltd.*[26] abuse of the process test with no principled justification, *Amchem* merges the two parts of the test into one: personal and juridical advantages should be considered and weighed with all the other relevant connections between the action and the forum in one operation:[27]

> In my view there is no reason in principle why the loss of juridical advantage should be treated as a separate and distinct condition rather than being weighed with the other factors which are considered in identifying the appropriate forum. The existence of the two conditions is based on the historical development of the rule in England ... When the first condition moved to an examination of all factors that are designed to identify the natural forum, it seems to me that any juridical advantages to the plaintiff or defendant should have been considered one of the factors to be taken into account.

This merging of the two conditions clearly offends no principle but it may be that there was a valid practical reason for maintaining a two part test even as the contents of each part changed over the years. It may be that the separation of the factors assisted judicial analysis in the same way that section 1 of the Constitution Act, 1982 was intended to assist in the analysis and application of rights enunciated in the Charter of Rights and Freedoms. The existence of a local juridical advantage was never meant to be conclusive: a balancing process

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[24] [1978] A.C. 795, [1978] 1 All E.R. 625 (H.L.).

[25] *Supra*, footnote 3, at pp. 474 (H.L.), 853 (All E.R.), adopting the "classic statement" of the Scottish principle from *Sim* v. *Robinow* (1892), 19 R. 665.

[26] [1936] 1 K.B. 382 (C.A.).

[27] *Supra*, footnote 1, at p. 456-457 (W.W.R.), 78 (B.C.L.R.).

was required if the defendant established that there was another clearly more appropriate forum for the action elsewhere and the plaintiff established local juridical advantages. The two part test simply created a sequenced approach. No necessity for consideration of local juridical advantages could ever arise *unless* the defendant established the existence of a clearly more appropriate forum elsewhere. What *Amchem* does is jettison the sequential analysis. In every case now, the plaintiff will be able to throw juridical advantages into the scale from the outset. Whether this will make any difference in the application of the test remains to be seen.

It is not possible to be quite so sanguine about the second modification to *Spiliada* (assuming it is the *Spiliada* restatement of the principles that the Supreme Court of Canada is working from). *Amchem* rejects the distinction between cases commenced by service within the jurisdiction and cases commenced by service *ex juris* which *Spiliada* had maintained as determinative of the burden of proof. Most puzzling is the fact that the rejection of the distinction occurs in a case dominated by an emphasis on comity. The explanation appears to be that the Supreme Court of Canada believed that the distinction emanated entirely from the process of statutory interpretation and was without a foundation in principle:[28]

> The special treatment which the English courts have accorded to ex juris cases appears to be based on the dictates of O. 11 of the English rules which imposes a heavy burden on the plaintiff to justify assertion of jurisdiction over a foreigner.

The imposition of a "heavy burden" on the plaintiff by Order 11 was not a matter of mere caprice or convenience and it is not anachronistic. The burden was placed on the plaintiff deliberately as a matter of principle. Calling a defendant from abroad to appear in an English court was believed to be an infringement of the sovereignty of the foreign state where the defendant was served with English process. That infringement of foreign sovereignty was justifiable only if the plaintiff could persuade the court not only that one of the circumstances described in Order 11 applied but also that there were sufficient other substantial connections to render England *forum conveniens*. The imposition of the burden of proof on the plaintiff is, therefore, a particularly good example of the content of the rules being determined by the comity principle.

Nothing has changed with respect to sovereignty concerns since the English courts commenced interpreting and applying the predecessors of Order 11 in 1852.[29] In light of the discussion in the judgment about how often there is more than one appropriate forum it is incomprehensible that the court could state that "[t]he burden of proof should not play a significant role in these matters as it only applies in cases in which the judge cannot come to a determinate decision on the basis of the material presented by the parties".[30] It is precisely in those cases that the burden of proof is critical and it is precisely those cases that occur with

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[28] *Ibid.*, at pp. 457 (W.W.R.), 78-79 (B.C.L.R.).

[29] The Common Law Procedure Act, 1852 was the legislation first permitting process to be served abroad.

[30] *Supra*, footnote 1, at pp. 457 (W.W.R.), 79 (B.C.L.R.).

distressing regularity. The burden of proof will determine whether a stay will be granted and, if the burden of proof rests on the defendant in all cases, the Canadian court will be retaining jurisdiction more frequently than not and will be respecting foreign sovereignty less often than it would if the burden of justification rested on the plaintiff whenever process had to be served abroad. To say that residence abroad may be artificial is to miss the point. In circumstances where it is fortuitous that process cannot be served locally within the jurisdiction it will be as easy for the plaintiff to discharge the burden of proof as it is for the defendant to discharge the burden of proof after service within the jurisdiction when his or her presence is merely transitory and that presence is the only connection.

Amchem does not, of course, as it could not, override provincial legislative jurisdiction with respect to burdens of proof on service *ex juris*. Sopinka J. states that "[w]hether the burden of proof should be on the plaintiff in *ex juris* cases will depend on the rule that permits service out of the jurisdiction".[31] Thus cases which have so interpreted their rules of court, *Bushell* v. *T. & N. Plc.*,[32] *United Oilseed Products Ltd.* v. *Royal Bank of Canada*[33] and *Frymer* v. *Brettschneider and Schectman*,[34] are unaffected, though the latter case is subject to reversal by the Court of Appeal in Ontario.

The court appears to rely on the decision of the High Court of Australia in *Voth* v. *Manildra Flour Mills Pty Ltd.*[35] to support its decision as to the burden of proof:[36]

> This phenomenon was considered by the High Court of Australia in *Voth*, supra, in reaching its conclusion that the test should be the same for service ex juris cases and others.

What the court appears to have overlooked is that *Voth* accepted the distinction between service *ex juris* cases and cases commenced by service within the jurisdiction, and held that the burden should be on the plaintiff in cases commenced by service *ex juris*, unless state rules of court dictated otherwise.[37] In result, therefore, Canada stands alone on this issue. The House of Lords and the High Court of Australia concur in imposing the burden of proof on the plaintiff in service *ex juris* cases.

Finally, in connection with *forum non conveniens*, *Amchem* affirms that the quantum or standard of proof resting on the plaintiff is the civil standard and defines what that means in the context of applications for stays of Canadian actions: "... the existence of a more appropriate forum must be *clearly* established to displace the forum selected by the plaintiff."[38]

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[31] *Ibid.*

[32] (1992), 67 B.C.L.R. (2d) 330, 92 D.L.R. (4th) 228 (B.C.C.A.).

[33] [1988] 5 W.W.R. 181, (1988), 60 Alta. L.R. (2d) 73 (Alta. C.A.).

[34] (1992), 10 O.R. (2d) 157 (Ont. Gen. Div.).

[35] (1990), 65 A.L.J.R. 83 (H.C.Aust.).

[36] *Supra*, footnote 1, at pp. 457 (W.W.R.), 79 (B.C.L.R.).

[37] For a comment on *Voth*, see M. Pryles (1991), 65 A.L.J.R. 442.

[38] *Supra*, footnote 1, at pp. 457 (W.W.R.), 79 (B.C.L.R.). (Emphasis in the original).

The Undertakings

In *Spiliada*, Lord Goff pointed out that juridical advantages could be accommodated and the tension between the two potential fora reduced or eliminated by the imposition of conditions or undertakings. In *Amchem*, the British Columbia court imposed conditions when it granted the anti-suit injunction.[39] Because the Supreme Court of Canada allowed the appeal and discharged the injunction there was no necessity for the undertakings to be discussed. Drawing inferences from an absence of discussion is fraught with peril but, arguably, an inference can be drawn that at least the Supreme Court of Canada does not disapprove of the technique. It would have been helpful, nevertheless, if it had expressly endorsed it.

Amchem and Morguard

Morguard Investments Ltd. v. *De Savoye*[40] is a recognition and enforcement case. As such, it too is concerned with the appropriateness of the jurisdiction assumed by the foreign court. *Morguard*, however, described or defined the circumstances in which jurisdiction would be considered to have been properly and appropriately assumed in more than one passage and more than one way. The choice appears to lie between the existence of some minimal connection such as the location of one of the parties or one element of the cause of action in the originating jurisdiction and the existence of an appropriately assumed jurisdiction in the sense in which that phrase is used in *Amchem*: a jurisdiction which in all the circumstances of the case it is appropriate to assume and exercise.[41]

Arguably, *Amchem* supports the view that *Morguard* mandates a recognition rule that evaluates the appropriateness of the jurisdiction of the originating court in the *forum conveniens* sense. The support is derived from two sources. The first is, perhaps, more substantial and convincing than the second but together they are quite persuasive.

The first source consists of the fact that both *Amchem* and *Morguard* focus on the jurisdiction of the foreign court. Admittedly, *Morguard* was concerned only with Canadian courts, but the nature of the inquiry is unaffected by that limitation. Both devise, adopt or modify tests for determining whether the assumption of jurisdiction by that foreign court is deserving of recognition. Only the purposes for which the recognition is sought differ. In *Morguard* the purpose of recognition is enforcement of the foreign court's judgment. In *Amchem*, the purpose of recognition is withdrawal from competition with the foreign court for jurisdiction over the action. There is no reason to distinguish between foreign assumptions of jurisdiction for these two purposes. On the contrary, both principle and convenience support identical tests.

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[39] For a discussion of the undertakings imposed, see Edinger, *loc. cit.*, footnote 6, at pp. 138-139.

[40] *Supra*, footnote 2.

[41] For discussion by this author, see Morguard v. De Savoye: Subsequent Developments (1993), 22 Can. Bus. Law J. 29. See also Blom, *loc. cit.*, footnote 5.

The second source of support in *Amchem* for the proposition that *Morguard* must be read as requiring a real and substantial connection between the foreign jurisdiction and *the action* in the *forum conveniens* sense is the recurrent use of phrasing and terminology in the injunction case almost identical with that employed in *Morguard*. When such similar terminology is found in two consecutive Supreme Court of Canada cases, separated in time by a very short space, both of which deal with the same issue, there is a strong inference that the same meaning should be ascribed to that phrasing and terminology.[42]

If *Morguard* should be read as requiring a real and substantial connection between the originating court and the action, probably the rest of the *Amchem* analysis is equally applicable to the process for recognition and enforcement. The defendant in the foreign action should have invited the originating court to decline jurisdiction and given it an opportunity, thereby, to exercise discretion and to determine whether it was the appropriate forum. The Canadian court, applying *Morguard* in an action by the foreign judgment creditor, will evaluate the appropriateness of the assumption of jurisdiction as determined by *Amchem*, by applying the *Amchem/Morguard* principles of appropriateness which require a real and substantial connection between the action and the forum. As in *Amchem*, the foreign court will be the "asking" court and it will be irrelevant what basis the foreign court actually advanced for the exercise of jurisdiction in the action.

Conclusion

Insofar as *Amchem* deals with the discretionary principles employed by Canadian common law courts when determining whether they should exercise jurisdiction in a particular case, it merely supplements the line of English cases which culminates in the *Spiliada*. Nevertheless, *Amchem* does modify that line of cases in such a way that *Amchem* and *Spiliada* are not interchangeable. There is a recognizable Canadian variation of the English test. It is doubtful that the Canadian variation will make the exercise of discretion easier for Canadian judges and it is regrettable that *Amchem* failed to perceive the implications for the burden of proof in stay cases that the emphasis on the new Canadian comity principle ought to have had.

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[42] Examples of phrasing and terminology in *Amchem* similar or identical to that in *Morguard*:

> The choice of the appropriate forum is still to be made on the basis of factors designed to ensure, if possible, that the action is tried in *the jurisdiction that has the closest connection with the action and the parties* ... (*supra*, footnote 1, at pp. 451 (W.W.R.), 72 (B.C.L.R.)). (Emphasis added).
>
> If a party seeks out a jurisdiction simply to gain a juridical advantage *rather than by reason of a real and substantial connection of the case of the jurisdiction*, that is ordinarily condemned as "forum shopping". On the other hand, *a party whose case has a real and substantial connection with a forum* has a legitimate claim to the advantages that that forum provides. (*ibid.*, at pp. 457 (W.W.R.), 78 (B.C.L.R.)). (Emphasis added).

Insofar as applications for anti-suit injunctions are concerned, on the other hand, nothing is left of *Aerospatiale*: the *Amchem* test replaces the *Aerospatiale* test completely. The imposition of preconditions by *Amchem* may reduce even further the already small number of applications for anti-suit injunctions and this is desirable because the anti-suit injunction is, as noted in *Amchem*, an "aggressive" remedy likely to create feelings of hostility in the foreign court affected. Whether the *Amchem* test, once reached, will permit fewer or more anti-suit injunctions to be granted is difficult to say. The first branch of the *Amchem* test defers more to the foreign legal system than does the first branch of the *Aerospatiale* test, but the omission from the second branch of any reference to oppression or vexation is a little worrying. Those terms were reintroduced by *Aerospatiale* for the purpose of imposing a very heavy burden on the applicant. The point was not that they had a precise meaning but that they imported a standard. It is hoped that Canadian courts will exercise appropriate restraint in the granting of anti-suit injunctions without having the warning flags of oppression and vexation to signal caution.

Amchem reads as if it is only non-Canadian courts which assume and exercise an exorbitant jurisdiction:[43]

> Courts of other jurisdictions do occasionally accept jurisdiction over cases that do not satisfy the basic requirements of the forum non conveniens test. Comity is not universally respected. In some cases a serious injustice will be occasioned as a result of the failure of a foreign court to decline jurisdiction. It is only in such circumstances that a court should entertain an application for an anti-suit injunction. This then indicates the general tenor of the principles that underlie the granting of this form of relief. In order to arrive at more specific criteria it is necessary to consider when a foreign court has departed from our own test of forum non conveniens to such an extent as to justify our courts in refusing to respect the assumption of jurisdiction by the foreign court and in what circumstances such assumption amounts to a serious injustice. The former requires an examination of the current state of the law relating to stay of proceedings on the ground of forum non conveniens, while the latter, the law with respect to injunctions and specifically anti-suit injunctions.

Unfortunately, as a matter of historical fact, Canadian courts cannot be said to be free from sin in this respect. Whether or not the Supreme Court in *Amchem* thought the contest was between Canada and the rest of the world, there is nothing in *Amchem* that precludes its application interprovincially.[44] If, however, Canadian courts take the *Amchem* discussion of *forum non conveniens* seriously there should be few occasions on which the test for an anti-suit injunction will actually have to be applied to prohibit continuation of another Canadian action.

* * *

[43] *Supra*, footnote 1, at pp. 452-453 (W.W.R.), 74 (B.C.L.R.).

[44] Just as there was nothing in *Morguard* prohibiting extension of the new recognition rule to non-Canadian judgments.

COMPANIES - LIABILITY OF DIRECTORS FOR PAY IN LIEU OF NOTICE OF DISMISSAL: CANADA BUSINESS CORPORATIONS ACT, S.C. 1974-75-76, C.33, s. 114(1) (NOW CANADIAN BUSINESS CORPORATIONS ACT, R.S.C., c. C-44, s. 11.9(1)): *Barrette* v. *Crabtree*.

Kenneth Wm. Thornicroft*

A seminal company law principle is that corporate officers and directors should not be held personally liable for corporate debts. Over time, common law[1] and statutory exceptions[2] have evolved, but the basic principle remains substantially intact. Even so, a frequently-voiced concern is that directors are increasingly unwilling to serve because of the potential for personal liability for corporate debts. If indeed there was such a trend developing perhaps the Supreme Court of Canada's recent decision in *Barrette* v. *Crabtree*[3] stands as a harbinger (at least for directors) of calmer waters ahead. In short, the court held that directors are *not* personally liable under section 114(1) of the Canada Business Corporations Act[4] (CBCA) when the corporation fails to pay severance pay in lieu of notice to former employees. As similar provisions are contained in many provincial company or employment standards acts,[5] the case may well have a significant impact for all directors, not merely those of federally incorporated companies.

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I wish to acknowledge the constructive comments of my colleague Andrew A. Luchak.

[1] Directors are likely to face personal liability in one of two scenarios: first, where the corporation is a mere "cloak" for the director's personal dealings; second, where the director has breached a fiduciary obligation to a creditor of the corporation.

[2] *Cf.*, for example, Employment Standards Act, S.B.C. 1980, c. 10, section 19.

[3] (1993), 101 D.L.R. (4th) 66 (S.C.C.); L'Heureux-Dubé J. (concurred in by Lamer C.J.C., Sopinka, Gonthier and Iacobucci JJ.).

[4] S.C. 1974-75-76, c. 33 (now s. 119(1) of the Canada Business Corporations Act, R.S.C. 1985, c. C-44).

[5] *Cf. supra*, footnote 2, and L'Heureux-Dubé J., *supra*, footnote 3, at p. 82. Statutory language essentially identical to s. 114(1) of the CBCA is contained in s. 114 of the Saskatchewan Business Corporations Act, R.S.S. 1978, c. B-10. The Saskatchewan Court of Appeal held, in *Meyers* v. *Walters Cycle Co.* (1990), 85 Sask. R. 222, that directors were liable for severance pay in lieu of notice as specified in a collective bargaining agreement. L'Heureux-Dubé J. distinguished *Meyers* on the ground that the Saskatchewan law specifically defined "wages" in rather wider terms whereas no definition of "wages" appears in the CBCA. In light of the position I take later on in this comment, I would submit that the question of whether or not "wages" are defined in the governing legislation is irrelevant, particularly when L'Heureux-Dubé J., at p. 81, was prepared to assume, and properly so in my opinion, that a judgment for severance pay in lieu of notice was a "debt" within s. 114(1) of the CBCA.

Facts and Lower Court Judgments

The situation in *Barrette* v. *Crabtree*, unfortunately, is all too common nowadays.[6] A group of twenty-nine former managerial employees brought a wrongful dismissal action against their employer, Wabasso Inc., following their termination due to the closure of the company's Trois-Rivières plant.

The Quebec Superior Court[7] awarded the plaintiffs about $300,000 as severance pay in lieu of notice of termination. Six weeks later, in light of their former employer's insolvency, the plaintiffs sought to enforce their judgments against the directors of the insolvent corporation pursuant to section 114(1) of the Canada Business Corporations Act, which provides as follows:

> **114.** (1) Directors of a corporation are jointly and severally liable to employees of the corporation for all debts not exceeding six months wages payable to each such employee for services performed for the corporation while they are such directors respectively.

At trial, Gagnon J. held that the plaintiffs were entitled to succeed against the directors personally because:[8]

> The notice period is ... not comparable to damages since its purpose is to minimize the impact of the job loss by allowing the employee to make reasonable advance provision for the effects of dismissal. Reasonable notice of dismissal is ... an integral part of the employment contract for an indefinite term ... Accordingly, this debt is associated with the performance of services for the corporation.

On appeal, the Quebec Court of Appeal held[9] that the plaintiffs' claims were for "unliquidated damages" for breach of their employment contracts, and not for "debt". So characterized, the plaintiffs' claims fell outside the purview of section 114(1) of the CBCA. The appeal court suggested that section 114(1) contemplated "debts ... for due and unpaid wages, due and unpaid vacation leave, overtime worked and not yet paid for" and other claims where "the amount ... is known because the rates are specified in the employment contract (individual or collective as the case may be) or by law".[10]

The Supreme Court of Canada

The Supreme Court of Canada agreed that the former employees' claims were not caught by section 114(1) of the CBCA. However, L'Heureux-Dubé J. (for the court) took a somewhat different approach from the Quebec Court of Appeal. L'Heureux-Dubé J. was prepared to assume that the former employees' judgments for damages for wrongful dismissal were "debts" under section

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[6] According to the Ontario Ministry of Labour, over 26,000 Ontario workers suffered a permanent job loss in 1990; plant closures resulted in the permanent loss of 13,363 full-time jobs; see Job Loss Statistics Indicate Recession Toll for Ontario in Canadian Industrial Relations and Personnel Developments, January 16, 1991, p. 522 (CCH Canadian Limited).

[7] J.E. 88-416, December 14, 1987 (Laroche J.).

[8] Court of Quebec, Trois-Rivières, No. 400-02-000129-880, May 25, 1989, J.E. 89-1311, at p. 12.

[9] [1991] R.J.Q. 1193.

[10] *Ibid.*, at pp. 1195-1196.

114(1) of the CBCA.[11] Even so, the plaintiffs' claims were rejected because such debts did not result from "services performed for the corporation":[12]

> An amount payable in lieu of notice does not flow from services performed for the corporation, but rather from the damage arising from non-performance of a contractual obligation to give sufficient notice. The wrongful breach of the employment relationship by the employer is the cause and basis for the amounts awarded by the Superior Court as pay in lieu of notice ... In the absence of additional legislative indicia, the performance of services by the employee remains the cornerstone of the directors' personal liability for debts assumed by the corporation.

Discussion

While corporate directors (at least those potentially liable under section 114 of the CBCA) are no doubt relieved by the Supreme Court of Canada's judgment in *Barrette* v. *Crabtree*, unpaid former employees will probably express a less sanguine view. However, the relative merit of the Supreme Court of Canada's judgment should not rest on one's view concerning the normative question of which party should have prevailed as a matter of public policy. The policy question should be left, in my view, to Parliament and the various provincial legislatures. The court's function should be to implement the public policy choice as expressed by Parliament or a legislature in a particular statutory provision. By that criterion, *Barrette* v. *Crabtree* is open to challenge. To state baldly, as L'Heureux-Dubé J. does, that severance pay "does not flow from services performed for the corporation"[13] is, at best, an overstatement.

The employer's obligation to give notice of termination, or equivalent severance pay in lieu of notice, may be embodied in an employment or labour standards law, a collective bargaining agreement, or in an individual contract of employment.[14] In the latter event, the notice/severance pay obligation may be fixed by the contract, or failing an express contractual provision, will be determined on an *ex post* basis in a civil action for wrongful dismissal. Whether the notice/severance pay obligation is express (that is, a "liquidated damages" claim) or implied (that is, an "unliquidated damages" claim), it represents an "employment benefit" and as such forms part of the overall compensation package. The fact that this benefit may never be realized is irrelevant to the issue of whether or not it *is* a benefit - the same could be said about other components of an employee's compensation package such as group life and health insurance, a dental plan, post-secondary scholarships for dependent children and so forth.

To the extent that the notice/severance pay package is negotiated "up front" and incorporated into the employee's individual employment contract, it represents deferred contingent compensation. As such, the notice/severance pay obligation is part of the *quid pro quo* given by the employer in exchange for the employee's services.

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[11] *Supra*, footnote 3, at p. 81.

[12] *Ibid.*

[13] *Ibid.*

[14] *Cf.* K.Wm. Thornicroft, Sources of Protection Against "Wrongful Discharge" in Canada, J. of Individual Employment Rights 1(4) (1993), at pp. 273-291.

If there is no express agreement between the employee and employer regarding notice/severance pay, the civil courts will award damages based on the doctrine of "reasonable notice". In this latter case, "reasonable notice" of termination is assumed to form an integral part of the employment bargain. The classic statement regarding the determination of reasonable notice is that of McRuer C.J.H.C. in *Bardal* v. *The Globe & Mail Ltd.*:[15]

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, *the length of service of the servant*, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

Past service to the employer is, therefore, *one* factor that judges are directed to consider in assessing "reasonable notice", but how relatively important is this particular component?[16] In the overwhelming majority of cases, judges will simply make a "global assessment" based on those factors delineated in *Bardal* that are relevant. Thus, it is difficult to say, with certainty, to what extent judges are influenced by the plaintiff's past service *vis-à-vis* other factors.

However, advances in social science research methodologies, especially in the area of multivariate data analysis, can assist us in this regard. Professors Steven McShane and David McPhillips, using a statistical technique known as multiple linear regression, analyzed 138 wrongful dismissal cases decided in British Columbia between January 1980 and April 1986.[17] Their results suggested that on average (and independent of other factors such as the plaintiff's age, job status or the state of the labour market), judges awarded about 3.5 months' notice for each ten years of service.

Accordingly, the quantum of notice (or severance pay in lieu thereof) appears to be based, at least in part, to use the wording of section 114(1) of the CBCA, on the employee's past "services performed for the corporation". That being so, the plaintiffs' claims in *Barrette* v. *Crabtree* did fall within the purview of section 114(1) and the directors should have been found liable.

Barrette v. *Crabtree* is also troubling from a public policy perspective. As matters apparently now stand (at least with respect to section 114 of the CBCA), if employees receive notice but not their pay, the directors will be personally liable. However, if the requisite notice is *not* given to the employees, the directors will *not* be personally liable for severance pay in lieu of notice. Thus, corporate directors otherwise subject to section 114(1) may now have an

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[15] (1960), 24 D.L.R. (2d) 140, at p. 145, [1960] O.W.N. 253, at p. 255 (Ont. H.C.). (Emphasis added). This passage was recently cited with approval by the Supreme Court of Canada in *Machtinger* v. *HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at pp. 998-999 (1992), 91 D.L.R. (4th) 491, at p. 504.

[16] I am, at this point, restricting the discussion to severance pay in lieu of notice under the common law. In the case of minimum severance pay in lieu of notice mandated by employment standards legislation, past service is, by and large, the *only* factor that is relevant; see Thornicroft, *loc. cit.*, footnote 14, at pp. 279-280.

[17] S.L. McShane and D.C. McPhillips, Predicting Reasonable Notice in Canadian Wrongful Dismissal Cases, Industrial and Labor Relations Review 41(4), October 1987, at pp. 108-117.

incentive to *withhold* the giving of notice to employees, especially if the corporation is in a precarious financial position. If employees are to lose their jobs in any event, should not the public policy choice favour early notification to the employees rather than holding matters in abeyance until the termination (and the attendant failure to pay severance pay in lieu of notice) is a *fait accompli*? Surely it is not sound public employment policy, on the one hand, to encourage the withholding of notice to employees who are undoubtedly going to lose their jobs and, on the other, to frustrate those same employees' legitimate efforts to collect the severance pay in lieu of notice to which the law says they are entitled.

To those who argue that directors should not be held responsible for claims such as those advanced by the plaintiffs in *Barrette* v. *Crabtree*, I can only offer the following comments. First, that policy choice should fall to Parliament and the legislatures, not to the courts.[18] Second, if it is (and I have argued that it *is*) the policy choice of the legislators to hold directors personally liable in the event of a default by the corporation, directors can protect themselves by either prudent management, or failing that, by way of indemnity insurance obtained on their behalf by, and at the expense of, the corporation.

* * *

[18] One curious aspect about the court's judgment in *Barrette* v. *Crabtree* is that under the guise of respecting Parliament's will (see *supra*, footnote 3, at p. 83), it has ignored it. I should add, at this point, that I am not endorsing the *principle* of granting employees a special remedy such as that found in section 114(1). Indeed, I believe that many of the arguments advanced in favour of such a provision are open to challenge. However, given that Parliament has seen fit, as a matter of public policy, to legislate as it has, the courts must respect and enforce that public policy choice unless it is unconstitutional.

CONTRACTS - THIRD PARTY BENEFICIARIES - CONTRACT BETWEEN OWNER AND DEFENDANT FOR STORAGE LIMITING LIABILITY FOR DAMAGE - GOODS DAMAGED THROUGH NEGLIGENCE OF DEFENDANT'S EMPLOYEES - EXTENT OF EMPLOYEES'S LIABILITY: *London Drugs* v. *Kuehne & Nagel International Ltd.*

Marvin G. Baer*

The unusual and seemingly impractical attempt by commercial contractors to avoid the allocation of risk under their contracts by claiming against individual employees in tort has occasionally challenged Canadian courts in recent years.[1] The challenge has been to combine doctrine and common sense - an exercise in which the appellate courts have had mixed success.[2] The claims raise issues of fundamental importance in contract and tort law and their confluence. So, for that reason, the judgments have attracted much attention by academic commentators.[3] They do not, however, seem to have raised much concern amongst employees.[4]

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[1] See, for example, *Sealand of the Pacific* v. *Robert C. McHaffie Ltd.* (1974), 51 D.L.R. (3d) 702, [1974] 6 W.W.R. 724 (B.C.C.A.); *Moss* v. *Richardson Greenshields of Canada Ltd.*, [1989] 3 W.W.R. 50, (1989), 56 Man. R. (2d) 230, (Man. C.A.); *Summitville Consolidated Mining Co.* v. *Klohn Leonoff Ltd.*, B.C.S.C., Vancouver Registry No. C880756, June 6, 1989; *R.M. & R. Log Ltd.* v. *Texada Towing Co. Ltd.* (1967), 62 D.L.R. (2d) 744, [1968] 1 Ex. C.R. 84 (Ex. Ct.); *Northwestern Mutual Insurance Co.* v. *J.T. O'Bryan & Co.* (1974), 51 D.L.R. (3d) 693, [1974] 5 W.W.R. 322 (B.C.C.A.); *Toronto-Dominion Bank* v. *Guest* (1979), 105 D.L.R. (3d) 347, 10 C.C.L.T. 256 (B.C.S.C.); *East Kootenay Community College* v. *Nixon & Browning* (1988), 28 C.L.R. 189 (B.C.S.C.); *Ataya* v. *Mutual of Omaha Insurance Co.* (1988), 34 C.C.L.I. 307, [1988] I.L.R. 1-2316.

[2] Compare *Greenwood Shopping Plaza Ltd.* v. *Beattie*, [1980] 2 S.C.R. 228, (1980), 111 D.L.R.(3d) 257 with *ITO - International Terminal Operators Ltd.* v. *Miida Electronics Inc.*, [1986] 1 S.C.R. 752, (1986), 28 D.L.R. (4th) 641. The fact that the stevedore was a corporation in the latter case makes the different results even harder to justify.

[3] The older comments on the so-called "Himalaya clause" cases are referred to by McIntyre J. in *ITO - International Terminal Operators* v. *Miida Electronics Inc.*, *ibid.* Other comments are referred to by Iacobucci J. in *London Drugs* v. *Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R., at p. 421, (1992), 97 D.L.R. (4th) 261, at p. 347.

[4] The public reaction to *Greenwood Shopping Plaza Ltd.* v. *Beattie*, *supra*, footnote 2, is in marked contrast to the reaction to the growing liability of corporate directors. There seems to be little public concern that the "chilling" effect of the decision in *Greenwood Shopping Plaza* will make it harder to get good employees to serve. In fact, La Forest J.'s observation in *London Drugs* v. *Kuehne & Nagel International Ltd.*, *ibid.*, at pp. 353 (S.C.R.), 293 (D.L.R.), that "[i]t is hardly necessary to refer to any elaborate theory regarding negotiating agendas to recognize that actual employee liability occurs infrequently enough that it is unlikely to get on the collective bargaining agenda" not only seems apt, but seems to be confirmed by recent experience.

The latest example of this type of claim in *London Drugs* v. *Kuehne & Nagel Int. Ltd.*[5] has already been discussed in this Review[6] and elsewhere[7] after the judgments in the British Columbia Court of Appeal[8] used a variety of approaches to limit the employees' liability. On appeal to the Supreme Court of Canada,[9] a seemingly divided court at least agreed that the employees should not be liable for more than a trifling sum.

The facts of *London Drugs* v. *Kuehne & Nagel Int. Ltd.* are not unusual. London Drugs purchased a large transformer for installation in a new warehouse facility. While the warehouse was being built, London Drugs delivered the transformer to Kuehne & Nagel for storage pursuant to the terms of a standard form contract of storage. The contract of storage included a limitation of liability clause limiting Kuehne & Nagel's liability to $40 unless a higher value was declared in writing and an additional charge was paid to cover warehouse liability. With full knowledge and understanding of this clause, London Drugs chose not to obtain additional insurance from Kuehne & Nagel and instead arranged for its own all-risk coverage. While the transformer was in Kuehne & Nagel's possession, two of its employees improperly lifted the transformer with two forklift vehicles causing it to fall over and causing damage in the amount of $33,955.41.

London Drugs sought to recover the damages from both Kuehne & Nagel and its employees. Its judgment against both was limited by the British Columbia Court of Appeal to $40. London Drugs appealed to the Supreme Court of Canada seeking to recover its loss from the employees, while the employees cross-appealed from the judgment against them for $40.

In these circumstances, the Supreme Court addressed three main issues: (1) did the employees owe a duty of care to their employer's customer; (2) did the customer voluntarily assume the risk of the employees' negligence; and (3) did the contract limiting the employer's liability serve to protect the employees as well? Each of these issues was thoroughly examined in judgments that extend to over 100 pages and the judgments are bound to become (at least for a time) a favourite source for both academic scholars and practitioners.[10] However, whether the judgments will have any particular impact on the activities of others in similar situations may be more doubtful.

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[5] *Supra*, footnote 3, aff'g (1990), 70 D.L.R. (4th) 51, [1990] 4 W.W.R. 289 (B.C.C.A.), allowing an appeal from Trainor J., [1986] 4 W.W.R. 183, (1986), 2 B.C.L.R. (2d) 181 (B.C.S.C.).

[6] Joost Blom, Case Comment, *London Drugs Ltd.* v. *Kuehne & Nagel International Ltd.* (1991), 70 Can. Bar Rev. 156.

[7] W.J. Swadling, Privity, Tort and Contract: Exempting the Careless Employee (1991), 4 J. of Contract Law 208; J. Swan, Privity of Contract and Third Party Beneficiaries: The Selective Use of Precedent (1991), 4 J. of Contract Law 129.

[8] *Supra*, footnote 6.

[9] *Supra*, footnote 3.

[10] The extensive review of prior authority makes the judgments difficult to read at one sitting, and occasionally (for all but the most attentive readers) it is difficult to sustain the thread of the argument. I suspect that much of the scholarship will be excised by harried casebook editors and the profession will largely rely on summaries.

All of the judges came to a similar result, but did so by three different routes. La Forest J. found that in the circumstances there was no duty of care owed by the employees to the customer. McLachlin J. found that there was a duty of care, but that the customer had voluntarily assumed the risk. Iacobucci J., in a judgment concurred in by the rest of the court, found that the employees were clearly under a duty to take reasonable care but that they were, in the circumstances, entitled to rely on the limitation of liability found in the contract between their employer and its customer.

While the three judgments suggest widely different approaches, there is in fact much commonality. All agree that in the absence of fraud or unconscionable overreaching, parties should be free to assign the risk of this type of loss as they see fit. They also all seem to agree about the need for a presumptive rule concerning the assignment of the risk which matches the parties' expectations and facilitates their insurance planning. However, they seem to disagree significantly about where the presumptive rule should be found and what should be needed to displace it.

For the majority of the court, the presumptive rule is based on a general assumed liability for carelessness. This can be replaced by the victim expressly granting an immunity which will be implicitly extended to the employees. For the other two judges, the presumptive rule is more carefully drawn to meet the likely expectations of the parties in the particular context.

These differences are not based expressly on a sophisticated analysis of how to promote efficient bargaining in the shadow of the law. Nor do they seem based on different perceptions of the need for tort and liability insurance as a back-stop position for this type of loss. Instead, they seem driven by different perceptions of the relevant doctrines and a misconceived notion that one approach may be bolder than another.

While all three judgments come to much the same result on the facts of this case, I doubt that most commentators will be indifferent about which approach ultimately prevails. There are, perhaps, several ways to think about these judgments, including which seems to be more compatible with accepted theories and concepts, which seems to describe a more coherent and logically consistent principle or policy, which is more likely to do justice in other similar cases, and what impact is each likely to have in the community. These tasks can best be done by examining each judgment in turn. But first there is a preliminary puzzle.

We are told by the majority judgment that "[t]he facts are not complicated".[11] Yet, after reading all 100 pages the reader is left wondering what is really going on here. What is the point of this litigation and whose conduct is it likely to affect? We know (or suspect) that the plaintiff is only a nominal party and that the action is a subrogated one brought by the owner's insurer (no doubt in part enforcing a contract to which it is not a party). We know (or suspect) that the defendant is probably also only a nominal defendant and that the action is

[11] *Supra*, footnote 3, at pp. 392 (S.C.R.), 326 (D.L.R.).

defended by the warehouseman's liability insurer (no doubt relying in part on an immunity created by an agreement or understanding to which it is not a party).[12] The reader is left wondering whether any sensible social policy can be developed without a clear understanding of the real parties in interest. I do not mean to suggest that the cloistered world of the Supreme Court prevents its members from appreciating the world of commerce. In fact, the judgments of both La Forest J. and Iacobucci J. contain admirable attempts to explain the social context of this dispute. There are several references in both judgments to the role played by both first party and liability insurance. However, the fact that the real dispute is between two insurers attempting to sort out their overlapping coverage is not the central focus of either judgment. This distortion forces members of the court to speculate about matters in a hypothetical way, to write judgments not for the immediate interested parties, but for the sake of others, quite differently situated. For instance, a common theme in all three judgments is a concern about the capacity of employees to anticipate, assess, minimize or meet the risk.[13]

Of course, this distortion is primarily the responsibility of the parties. They have chosen the grounds on which to argue their dispute. In a sense, that perhaps puts the matter too strongly. They may have been advised that their rights were entirely derivative from, and identical with, their insureds. They are forced to pretend (or are deemed in law) to have identical interests with their insureds. This pattern of legal thought may be too firmly imbedded to allow a court to ask the parties "why are you pretending to be someone other than you are?" Nor is there any other legal concept which would seem to provide the mechanism to arbitrate a dispute involving overlapping insurance coverage of this type. The concept of contribution only seems to apply when there is the same interest and the same insureds under both policies.[14] Moreover, even this historical concept seems poorly understood by modern Canadian courts who, in the context of overlapping obligations to defend in liability insurance, have felt the need to grasp for American concepts and terminology to determine the rights between the insurers.[15]

Being forced to put their dispute in such derivative terms, the insurers may not have the opportunity to present arguments or evidence of those factors that would or should influence reasonable insurers in devising co-insurance settlements.[16] Insurance underwriting is an esoteric and complex matter - part actuarial science, but largely impressionistic or experiential judgment. Hence,

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[12] See Blom, *loc. cit.*, footnote 6.

[13] All of which is quite irrelevant if, in fact, they are not personally involved in the litigation.

[14] The leading case is still *North British and Mercantile Ins. Co.* v. *London, Liverpool and Globe Ins. Co.* (1877), 5 Ch. D. 569 (C.A.).

[15] *Broadhurst & Ball* v. *American Home Assurance Co.* (1990), 76 D.L.R. (4th) 80, 1 O.R. (3d) 225 (Ont. C.A.); leave to appeal to S.C.C. refused (1991), 79 D.L.R. (4th) vi (note), 3 O.R. (3d) xii (note).

[16] For a discussion of what factors are relevant, see K. Abraham, Distributing Risk (1986).

judicial deference to industry practices is probably wise - not because of any neo-conservative notion that market forces will intrinsically promote good social policy and that any attempt at public or state control is bound to be ineffectual or misguided, but, more pragmatically, because of the industry's greater training and expertise.

All of this might explain why the arguments took the form that they did, but it does not explain why the industry thought this litigation would be helpful. While it is true that bankruptcy and suspicion of wrongdoing (fraud or arson) often lead to "technical" defences in insurance litigation, there is no suggestion that such factors exist here. Nor is there any apparent explanation of why the insurers thought this judgment would help them to bargain in the shadow of the law.[17]

The Judgment of La Forest J.: Reliance and the Duty of Care

For La Forest J. it was necessary to consider the difficult issue of whether the employees had any duty of care to the customer. This approach had the advantage of being more comprehensive since it was not dependent on the specific terms of the employer's contract with the customer. For him, the contract was an incidental aspect of the matter and the underlying issue was "whether it is appropriate to impose a duty on employees to compensate their employers or those who contract with them for the employees' negligence in carrying out an activity the contracting parties have set in motion".[18]

Examining the question of duty of care may seem like a logical place to start. However, it would be misleading to say that La Forest J. did this apart from the particular contract between the employer and the customer. The examination of the duty of care is very much a contextual one and, in the end, the employees' immunity is related to activity that the contracting parties have set in motion. So, what La Forest J. had in mind is not a generalized abstract definition of the duty of care, but one determined by the particular context, including the type of contract between the customer and the employer. All La Forest J. may have had in mind is that the employees' immunity may not depend on the specific term in the contract limiting liability, but may be found in the broader contractual matrix or setting. In examining this broader contractual context, the judge was very much concerned about the parties' reasonable expectations.

In determining whether the employees owed the customers a duty of care, La Forest J. started with the proposition that two questions must be asked: (1) was the damage in question reasonably foreseeable; and (2) are there any considerations which ought to negative or limit (a) the scope of the duty, (b) the

[17] Part of the industry has had a longstanding agreement with respect to property insurance entitled "Agreement of Guiding Principles With Respect to Overlappping Coverages Relating to Property Insurance". In the automobile insurance field, the industry also has experience in co-ordinating first-party property and third-party liability insurance. In the Insurance Bureau of Canada it has also an organization with experience in fostering industry cooperation.

[18] *Supra*, footnote 3, at pp. 315 (S.C.C.), 267 (D.L.R.).

class of persons to whom it is owed, and (c) the damages to which a breach of it may give rise?[19]

La Forest J. agreed with his colleagues that the damages were reasonably foreseeable and that as a result, the first branch of the test was satisfied. He then had to determine whether there were any policy considerations which would negate the existence of the duty.

(1) *The Scope for Policy Concerns*

That duty of care must involve policy questions beyond the factual inquiry of foresight has long been recognized in academic writing. Otherwise, duty is really a "fifth wheel on the wagon" which just duplicates the test of remoteness of damage.[20] This insight has been accepted by modern courts in both England and Canada. As La Forest J. observed, the factors that the English courts have considered in the context of their just and reasonable test are the same as those that would (or should) be considered in Canada.[21]

Having accepted that policy considerations are relevant, La Forest J. then proceeded to try to articulate them in some detail. Before attempting to summarize this discussion, it may be useful to note his colleagues' reactions. McLachlin J. confessed "great admiration for the scholarship and good sense [the judge's reasons] displayed".[22] Yet she was prevented from agreeing with them because of the magnitude of change they would introduce to the Canadian law of tort and the difficult questions they raised. It is not clear whether she thought the whole exercise of examining policy considerations was too great a change in tort law or only the particular expression of policy found in La Forest J.'s judgment. I suspect the latter, although, since she expressed much the same ideas under the concept of voluntary assumption of risk, I cannot be sure.

The attitude of the majority judges was also somewhat ambiguous. There is no doubt that they found a duty of care. In fact Iacobucci J.'s judgment indicated an impatient certainty on the matter. But as with all displays of "adamantine logic",[23] there are few clues about the source of this certainty. In places, the judgment seemed to collapse the test for determining whether there is a duty into a simple factual inquiry of whether damage was reasonably foreseeable. For Iacobucci J., this simple test was enough to explain the seemingly divergent Canadian case law, and made it unnecessary "to consider the numerous English authorities which have, according to some, given 'fresh consideration' to what is involved in determining whether a duty of care exists in a particular situation".[24] However, since other parts of the judgment stress the

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[19] He relies on the summary of Wilson J. speaking for the majority in *Kamloops (City)* v. *Nielsen*, [1984] 2 S.C.R. 2, (1984), 10 D.L.R. (4th) 641.

[20] W.W. Buckland, Duty to Take Care (1935), 51 Law Q.Rev. 637.

[21] *Supra*, footnote 3, at pp. 319 (S.C.R.), 269 (D.L.R.).

[22] *Ibid.*, at p. 320 (D.L.R.).

[23] The phrase comes from La Forest J.'s characterization of the majority judgment in *Scott* v. *Wawanesa Mutual Insurance Co.*, [1989] 1 S.C.R. 1445, at p. 1451, (1989), 59 D.L.R. (4th) 660, at p. 664.

[24] *Supra*, footnote 3, at pp. 406 (S.C.R.), 335 (D.L.R.).

need to preserve orthodox and fundamental principles and change the law only by incremental steps, such a radical implosion of tort law may not be contemplated.

There are, in fact, some indications in the judgment that Iacobucci J. had a more temperate attitude than the above passage suggests. He elsewhere observed "[w]e are not here dealing with the type of factual situation in which concerns about the breadth of traditional principles have arisen. A conclusion that the ... [employees] owed no duty of care to the ... [customer] would clearly be recognizing a new immunity where none existed before".[25] This suggests that policy considerations play a limited role in certain factual situations, but for most cases a simple factual test of reasonable foresight will do.

At yet another point in his judgment, Iacobucci J. indicated his preference for avoiding a complex and somewhat uncertain "tort analysis" when a modest adjustment in "contract analysis" will protect the employees.[26] This preference also seems to presuppose a duty of care based on simple reasonable foresight which then can be limited either by complex "tort analysis" or simple "contract analysis".

I have tried to find as much agreement as possible amongst the three judgments in the above analysis, and to soften the bold assertion by Iacobucci J. that reasonable foresight of harm alone is enough to give rise to a duty of care. My task would have been easier if Iacobucci J. had just assumed a duty of care existed, leaving open the possibility that in some future case a complex "tort analysis" might be necessary. For instance, such an analysis might be necessary or desirable if there were no specific disclaimer in the contract between customer and employer.

Of course, even in such a case, it would be possible to imply a term limiting liability. And in deciding whether to imply a term, many of the factors that go into the now somewhat less simple "contract analysis" would be the same as those that go into a complex "tort analysis". However, if the employer expressly undertook a significant part of the risk in the contract with the customer, the compatibility of tort and contract analysis might break down. Whether this would encourage the majority of the court to use a tort analysis to protect the employee is impossible to tell, but there is at least some indication in Iacobucci J.'s judgment that in some situations tort analysis might require an examination of policy consideration, or as the English courts have put it, what is just and reasonable. There is also a passage in his judgment[27] which suggests that the tort analysis might be along the lines of McLachlin J.'s voluntary assumption of the risk.

La Forest J., having recognized that policy considerations are relevant in determining whether there was a duty of care, proceeded to describe them in some detail. He started with a detailed examination of the difference between cases involving property damage and economic loss. He recognized that policy

[25] *Ibid.*, at pp. 406 (S.C.R.), 336 (D.L.R.).

[26] *Ibid.*, at pp. 413-414 (S.C.R.), 341 (D.L.R.).

[27] *Ibid.*, at pp. 412-413 (S.C.R.), 340-341 (D.L.R.).

considerations first came into play in determining how far liability should be extended for pure economic loss. He also recognized that there may be some reasons for distinguishing between personal injury and property damage and pure economic loss. However, in this case where the loss is suffered by a corporation, he saw little reason to distinguish in social importance between the two types of loss from the perspective of compensation. Instead, he suggested that "certain of the policy concerns most evidenced in some economic loss cases may not really have much to do with the specific nature of economic loss; it may just be that the concern is present with particular force in such cases and less often in cases involving physical damage to property".[28] He went on to agree with Professor Blom[29] that "one reason why property damage cases are generally unproblematic from a policy perspective is that they are much less likely than economic loss cases to be associated with planned transactions and contractual expectations".[30]

La Forest J. then surveyed a number of English and Canadian authorities in the context of parties in a direct contractual relationship and parties linked by a chain of contracts. This analysis was designed to illustrate that concern about extending tort liability to cases of economic loss has only been a proxy for other policy concerns. He concluded that the mere fact that this case involves property damage rather than economic loss cannot be sufficient to eliminate inquiry into whether the recognition of a duty of care in these cases is justified on policy grounds.

One does not need to find this analysis of the authorities to be entirely convincing to recognize that tort liability in a contractual setting does give rise to different considerations from tort liability between unexpected neighbours and that these differences cut across the type of damages suffered.[31] However, our experience with a wide range of common risks suggests that many of them are anticipated, that arrangements are made to provide reparation if the risk occurs, and that sometimes, as in the case of automobile accidents, these arrangements can be quite elaborate. This suggests to me that there are not two distinct categories of cases - the planned transaction and the unexpected accident. Instead, there may be various degrees of planning in relation to all risks in society. This planning should not be thwarted in the absence of fraud or unconscionable behaviour. In fact, it probably should be encouraged. However, it may no longer be easy to devise tort law which encourages planning (or at least does not thwart it). I think it requires an informed view of whether the risk was anticipated, whether any mechanism is in place to cover it and which of the parties is better placed to develop further mechanisms to cover the risk.

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[28] *Ibid.*, at pp. 323 (S.C.R.), 272 (D.L.R.). (Underlining in the original).

[29] J. Blom, Fictions and Frictions on the Interface Between Tort and Contract, in P.T. Burns and S.J. Lyons (eds.), Donoghue v. Stephenson and the Modern Law of Negligence (1990), p. 181.

[30] *Supra*, footnote 3, at pp. 324 (S.C.R.), 273 (D.L.R.). (Underlining in the original).

[31] These differences may also cut across the type of tort committed. The significance of an express or implied assignment of the risk in a contractual matrix may apply to both negligent misstatement and negligent acts.

La Forest J. adopted this type of analysis only in part. He indicated that the distinctions between property damage and economic loss, and between contractual and non-contractual context continue to have usefulness in devising clear workable rules. He observed:[32]

> Many property damage cases occur outside of a contractual context, and as I noted, a duty of care is justified in those cases based on foreseeability. Even in property damage cases with contractual overtones, it undoubtedly makes sense in almost all cases to allow the risk of damage to accompany the property in the absence of some express contractual stipulation. In most contractual contexts, all parties are able to plan for potential tort liability for property damage based on foreseeability. For the reasons set out below, I am of the opinion that in general employees are not realistically in a position to so plan.

He concluded: "In sum, a return to first principles will rarely be necessary in property damages cases."[33]

These are very important qualifications which severely limit the scope of La Forest J.'s judgment and suggest that in the end, his "tort analysis" may leave the employees as much at the mercy of their employer's contract as the "contract analysis " of Iacobucci J.

(2) *Vicarious Liability*

Having established the limited context in which policy concerns might be brought to bear, La Forest J. turned to what, for the rest of the court, is probably the biggest obstacle to adopting a tort analysis. This obstacle is how to find the employer vicariously liable for the employee's negligence in the absence of the employee's personal liability. Much of the analysis is an attempt to examine the purposes of vicarious liability which are said to be linked, in torts' traditional domain, to compensation, deterrence and internalization; and, in the context of a contractual matrix, to planning and agreed risk allocation.

La Forest J. demonstrated that these policy concerns can best be met without holding the employees personally liable. For some, this analysis may be very hard to reconcile with our traditional image of vicarious liability as derivative in nature.[34] There seems nothing to support the liability of the employer, if the employee has no personal liability. Perhaps, for some, La Forest J.'s analysis will also suggest liability without fault. How can the employer be liable without personal fault and how can it be responsible for the actions of its employees if they are not at fault? Yet few would disagree with the basic thrust of La Forest J.'s analysis, that none of the parties concerned actually expect the employees to compensate for the loss and that it would be ill-advised to place the onus on employees to contract out of their tort liability.[35]

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[32] *Supra*, footnote 3, at pp. 333 (S.C.R.), 279 (D.L.R.).

[33] *Ibid.*, at pp. 334 (S.C.R.), 279 (D.L.R.).

[34] Although La Forest J. attempts to meet this view by arguing that it gives too much weight to the word "vicarious"; it implies that that word connotes a particular set of logical consequences whereas the doctrine is not primarily a logical construction.

[35] *Supra*, footnote 3, at pp. 353 (S.C.R.), 293 (D.L.R.).

No fundamental change would occur from defining vicarious liability as including liability based on the carelessness (rather than the liability) of others. There might, on occasion, be a problem of determining how far vicarious liability should extend, absent personal liability, but that should depend on the contractual matrix between the parties. Once you recognize that reliance and contractual setting, as well as foresight should affect the determination of a duty of care, there is no particular reason why employer and employees should have precisely the same duty. Whether the duties are different or similar will depend on the expectations of the parties. Discovering what these expectations really are and deciding what the presumptive rule should be may be difficult issues - but they will be much the same issues whether the analysis is an alternative "tort analysis" of voluntary assumption of risk or a "contract analysis".

(3) *The Role of Reliance in Defining the Duty of Care*

After an extensive discussion of vicarious liability, La Forest J. turned to a consideration of the Canadian cases which the customer, London Drugs, contended clearly established a duty of care. This survey attempted to demonstrate that reliance has played an important role in the determination of a duty of care and led to La Forest J.'s summary of when employees should be liable in cases of this kind. He suggested an approach which starts with the question of whether the tort alleged against the employees is an independent tort or a tort related to a contract between the employer and the customer. If the tort is related to the contract, the next question to be resolved is whether any reliance by the customer on the employee is reasonable.

Even though La Forest J. put the questions in this order in his summary, most of his judgment emphasized that the key question is whether there has been reasonable reliance. He suggested that reliance on an ordinary employee will rarely, if ever, be reasonable in the absence of an express or implied undertaking by the employee. However, he left open the question of the appropriate presumptive rule in cases involving professional, skilled or principal employees. In those cases, he recognized that much will depend on the available insurance arrangements and "whether in effect requiring double insurance by both the firm and the employee makes sense in that context".[36]

La Forest J. also made it clear that the reasonable reliance he had in mind is reliance on the employee to provide compensation. He observed that the obvious truth that the customers naturally hope that the employees will do the job right is insufficient to constitute reasonable reliance and a duty of care. This view is in sharp contrast with that of Iacobucci J. who, relying on comments by Professor Blom,[37] adopts the view that reliance on the employee to be careful is enough to establish a duty of care.[38] The two views can be expressed in the following way. For Iacobucci J., the plaintiff's position is: "I don't expect you to pay, but you should pay because I expect you to be careful." For La Forest

[36] *Ibid.*, at pp. 387 (S.C.R.), 316 (D.L.R.).

[37] *Loc. cit.*, footnote 6, at p. 168.

[38] *Supra*, footnote 3, at pp. 407 (S.C.R.), 336 (D.L.R.).

J., the plaintiff's position is: "I expect you to be careful, but I recognize that sometimes you may not be and if that happens, I don't expect you to pay." I suspect that the majority does not recognize the anomalous nature of its view on reliance and therefore risk allocation, because on the facts of the case they are able to use a "contract analysis" to deny recovery.

The Judgment of McLachlin J.: The Voluntary Assumption of Risk

In a briefer concurring judgment, McLachlin J. reached the conclusion that the "concatenation of circumstances giving rise to the tort duty, of which the contract with its exemption of liability is one, are such that they limit the duty of care the employees owed to the plaintiff".[39] She based this conclusion on the notion of voluntary assumption of risk rather than on La Forest J.'s determination of a duty of care. She preferred to approach the matter in this way because "[t]he rule proposed by my colleague La Forest J. would introduce a change in the common law of tort of major significance".[40] In addition, she observed "[the change] ... would introduce collateral questions the answers to which are not immediately apparent, at least to me".[41]

With the utmost respect, none of the concerns mentioned by McLachlin J. disappear by glossing over them as a "concatenation of events" under the notion of voluntary assumption of risk. In fact La Forest J.'s judgment involved a lengthy exploration of what factors are relevant in finding a duty of care and his conclusion is carefully limited. Many of these factors could just as easily be discussed under the notion of voluntary assumption of risk since they are fundamentally concerned with the parties' expectations or what should reasonably be their expectations given what La Forest J. knows about the available mechanisms for coping with the risks. As Professor John Fleming notes it has been argued that "one could of course do without the defence [of voluntary assumption of risk] *eo nomine* by employing instead the 'duty' concept"; but, he asks: "*sed cui bono*? It is safer to confront a known than a disguised devil!"[42] With respect, McLachlin J. managed to illustrate the converse, that employing the independent concept of the voluntary assumption of risk does not necessarily lead to a more complete uncloaking of the devil. More can be hidden behind a facile examination of that concept than a more complete examination of the duty of care.

In the end, the choice is not between substantial far-reaching change and modest adjustment to the law. Both judges tried to restrict their judgments to a narrow range of cases, but La Forest J. explored more fully those factors in the contractual matrix that influenced his decision.

McLachlin J.'s judgment is disappointing because it hides more than it reveals, and annoying because it claims virtues that it does not really possess. Nevertheless, the concept of voluntary assumption of risk does have some

[39] *Ibid.*, at pp. 457-458 (S.C.R.), 322 (D.L.R.).

[40] *Ibid.*, at pp. 460 (S.C.R.), 324 (D.L.R.).

[41] *Ibid.*, at pp. 461 (S.C.R.), 325 (D.L.R.).

[42] J. Fleming, The Law of Torts (7th ed., 1987), p. 265, fn. 2.

advantages over the analysis of duty adopted by La Forest J. or the relaxation of the privity doctrine proposed by Iacobucci J. First, it probably fits more comfortably with traditional notions of the employer's vicarious liability than a "duty" analysis. It preserves the notion that there is some underlying liability of the employees to support the employer's vicarious liability. Second, the notion of voluntary assumption of risk probably answers the Blom conundrum if that is thought necessary. It may seem more satisfactory to say that a duty arises whenever the customer relies on the employees to be careful, but there is a voluntary assumption of risk if the customer does not rely on the employees to be responsible for their carelessness. Third, the notion allows the court to adopt a realistic presumptive rule without regard to the particular contract between customer and employer, in fact even in the face of a positive assumption of the risk by the employer.[43]

The concept may, however, have the disadvantage compared with a "duty" analysis of putting too much emphasis on the expectations of the customer and not enough on the expectations of the employees. But this possible bias can be overcome if the problem is seen in all its rich context of representative actors. Such a wider or more penetrating view also suggests that the concept has a further advantage of allowing different results depending on whether the problem is really one of overlapping insurance coverage - or is truly a rare case concerned with the allocation of an uninsured risk.

The Judgment of Iacobucci J.: The Relaxation of the Privity Doctrine

The majority judgment held in emphatic terms that there was a duty of care, stopping just short of dramatically collapsing the law of negligence into a single issue of the remoteness of damage. This may have reflected the argument of counsel, the fact that the court has in a number of recent cases examined the vexing question of the scope of the duty of care and felt it had no new or fresh insights to add, or a desire to tackle the more straightforward issue of the privity doctrine. At the same time, the majority declined to follow the approach of McLachlin J. and to find there was a voluntary assumption of risk by the customer. They felt no compelling reason to embark upon a complex and somewhat uncertain "tort analysis" in order to allow third parties such as the employees to obtain the benefit of a contractual limitation of liability clause. Instead they embarked on a thorough review of the privity doctrine, including its history, justification and application by Canadian courts.

This preference for a "contractual analysis" might suggest one more closely tied with what the parties actually agreed concerning the allocation of the risk, with less need to search for a presumptive role based on the surrounding circumstances. The only matter that the majority needed to imply is that the limitation of liability was intended to protect the employees even though the clause does not expressly say so. This may seem like a more modest role for the court than to presume that the customer was not relying on the employees to indemnify.

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[43] Although this possibility does not seem to be recognized in McLachlin J.'s judgment.

Judges and academic commentators have an ambiguous attitude towards the privity doctrine which is accurately captured by La Forest J.'s derisive "pestilential nuisance".[44] All agree that the doctrine has little, if any, social purpose. However, their attitudes are more doubtful as to its doctrinal essentialness and the magnitude of its possible mischief. On the one hand, the doctrine is regarded as an aspect of the central question of which promises will be enforced. Privity is seen as being connected to the fundamental doctrine of consideration which forms the basis of the modern law of contracts. Hence, whatever its particular social utility, the doctrine is an inevitable or logical part of all contracts.[45] On the other hand, the doctrine is seen as a doctrinal mutation, incompatible with any theory of contract law.[46] Yet, it survives because of judicial restraint - even in the face of unorthodox precedent.

A similar ambiguous attitude is shown towards the doctrine's potential harm. Much judicial language suggests that the doctrine has a dangerous capacity to frustrate legitimate commercial activity. Yet, the case law is surprisingly sparse and an enormous amount of multi-party contracting occurs in modern society. Judges and academic commentators often suggest that this division between theory and practice is the result of extensive legislative intervention, or because there are ameliorating devices which are easy to use. Hence, it is not clear whether the phenomenon should be regarded as pestilence or nuisance.

However, there remains a significant difference between the way these ameliorating devices are seen by judges and commentators. Most judges regard agency, trust or assignment as exceptions to the privity doctrine, as referring to a sub set of cases with different or unique facts. However, most commentators recognize that the ameliorating devices are really alternative ways of describing the same facts. The courts' view may have more to do with a mistaken belief about which pretences or mysteries must be preserved to promote fidelity to the law rather than any lesser capacity to be masters rather than the servants of these concepts.

Much of this ambiguity about the importance of the privity doctrine remains after the Supreme Court of Canada's decision. The language of La Forest J. was largely scornful, but he did not consider the doctrine in detail. Iacobucci J. is more respectful, seemingly reluctant to "relax" the doctrine any more than is strictly or absolutely necessary. There are several possible explanations for Iacobucci J.'s approach. First, and perhaps the most obvious on the face of the judgment, is that the doctrine does play some important conceptual or doctrinal role in the law of contracts and its removal might have significant and

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[44] *Supra*, footnote 3, at pp. 315 (S.C.R.), 266 (D.L.R.). I do not know whether La Forest J. deliberately chose a (legal) noun and (medical) adjective that have decayed in potency at different rates. He also employs, *ibid.*, at pp. 359 (S.C.R.), 297 (D.L.R.), the religious expression "avatar" to characterize the doctrine.

[45] See, for example, M.P. Furmston (ed.), Cheshire, Fifoot and Furmston's Law of Contract (11th ed., 1986), pp. 437-455.

[46] See, for example, R. Flannigan, Privity - The End of an Era (Error) (1987), 103 Law Q.Rev. 564.

undesirable consequences. What these might be are not suggested. But the doctrine cannot be a minor nuisance if its removal "would represent a major change to the common law involving complex and uncertain ramifications".[47] These comments seem somewhat fustian, given the thin justification and elaborate criticism of the doctrine that Iacobucci J. catalogued. Moreover, they may be based on a failure to realize just how far the "exceptions" have nullified the doctrine. At one point in his judgment, Iacobucci J. observed: "Few would argue that complete strangers to a contract should have the right to enforce its provisions."[48] At another point he refers to a principle of *jus tertii* or *jus quaesitim tertio* as foreign ideas.[49] All of this overlooks the modern law of assignment, which does treat a contract as a form of property which can be transferred to complete strangers. At the same time, Iacobucci J.'s treatment of agency and trust indicates that he did not recognize them as alternative theories to describe the same facts. He wrote as if there was some essential element needed to establish an agency relationship, but did not indicate what it might be. If it is a matter of recital (a need to have a Himalayan clause in the contract), the doctrine indeed may be a trivial nuisance. If it is a matter of intention, what precise evidence of intention is missing?

The second possible explanation of Iacobucci J.'s approach may have nothing much to do with the privity doctrine *per se*. There are many passages in his judgment concerning the appropriate law-making role of the court that seem to be of a boiler plate variety. These passages are mildly puzzling since they do not seem to be particularly apposite. It is true that the issues are complex and it is difficult to foresee where any particular theory might lead. But do the majority judges really believe that any legislative committee would be able to devote any more time and wisdom to the issue than they have? Or that this is a case where contract makers have been reasonably relying on the privity doctrine so that it would be unfair to hold them to their word?

The third explanation for Iacobucci J.'s approach may be that he wanted the best of both worlds, to be academically progressive in seeing the weakness of the privity doctrine and wanting to eschew the need for such shams as agency and trust, and judicially conservative in wanting to take only incremental steps in modifying (or relaxing) the doctrine. The judge was too acute not to realize that his relaxation of the doctrine is inherently unstable; that immunity will have to be extended to an employee who is intended to be protected even while performing tasks that are not related to the service provided by the contract with the customer.[50] There is no principled reason why the customer should be bound by some of his promises and not others. And no principled or practical reason

[47] *Supra*, footnote 3, at pp. 437 (S.C.R.), 358 (D.L.R.).

[48] *Ibid.*, at pp. 418 (S.C.R.), 345 (D.L.R.).

[49] *Ibid.*, at pp. 426-428 (S.C.R.), 350-352 (D.L.R.).

[50] The learned judge's attempt to distinguish *Greenwood Shopping Plaza Ltd.* v. *Beattie*, *supra*, footnote 2, on the grounds that in that case the employees were third-party strangers to the lease is particularly unconvincing. While it may be admirable to try to preserve the shelf-life of Supreme Court of Canada decisions, this should not be done by claiming that the court said something different and narrower than it did. Moreover, any

why the employees' conduct should be divided in this way. So the judgment is not about finding the appropriate balance between competing values or principles in contract law, but about a continuing process of swarming of an undesirable virus with multiple antibodies.

There are, however, several difficulties with this analysis. First, while intended to be incremental, it will seem to some to be revolutionary, and to others, incoherent or unstable. For some, the relaxation of the privity doctrine will seem to be revolutionary because, in effect, not much of the doctrine survives. For others, having identified that the doctrine was an historical error with no social or policy justification, the desire to preserve some vestigial form of it seems based on a perverse notion of judicial responsibility. Second, the attempt to change the law incrementally has resulted in distinguishing cases which cannot, as a matter of function or the parties' expectations (apart from specific contract doctrine), be distinguished. I have in mind situations where the employees have committed an independent tort - even where their employer and the customer have expressly agreed to grant the employees immunity. Third, this approach ignores too much of the contractual context, and starts with a presumptive rule that places an unrealistic burden on the employees. Fourth, and most important, it draws a line to mark the extent of relaxation that has no logical or coherent relationship to the doctrine itself or to any known principle that does or should govern agreements to coordinate overlapping insurance coverage.

The majority's unseemly scramble to adopt a minimalist position - even at the expense of a coherent principle - demonstrates a remarkably crude theory of liberal legalism or the rule of law. The crudeness is remarkable because the introduction of the Charter of Rights and Freedoms[51] has stimulated a spate of thoughtful writing on the courts' role in developing social policy[52] and because the private rights of the individual litigants play such a small part in this particular litigation. No one seriously imagines a dispute about $40 or even $35,000 can be the driving force in this litigation. So concerns about the unfairness of submerging individual rights in considerations of wider social consequences seem particularly weak. Moreover, even the competency arguments which are more fully developed by McLachlin J. and referred to by the majority, seem to ignore the fact that the court is largely engaged in designing a presumptive rule for the allocation of risk rather than mandating social behaviour.

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attempt to distinguish *Greenwood Shopping Plaza* on its facts is bound to fail because it is an *a fortiori* case for drawing a reasonable inference that the employees were intended to benefit from the insurance provisions in the lease. While the parties might have expected the employees in London Drugs to pay for damage to the transformers personally, there could be no reasonable expectation in *Greenwood Shopping Plaza* that the employees would pay for a shopping centre - the action had to be a mechanism for getting at the employer's liability insurance. In other words, the only way the employer (and its insurer) could derive much benefit from the insurance provision in the lease was to infer that these provisions were also intended for the benefit of the employees.

[51] Constitution Act, 1982, Part I.

[52] See, for example, L.E. Trakman, Reasoning with the Charter (1991).

I do not mean to suggest that there is no advantage to an incremental approach in a case such as this - either in relation to the facts or legal theories. For instance, in devising a presumptive rule, it may make sense to start with the limited case of immunity for employees performing services contemplated by the contract. The rule might be further limited to cases involving property damage rather than personal injury and to case where the employees are not the principals behind small corporations. All of these limitations are contained in La Forest J.'s judgment so he has approached the problem in an incremental way. He has also explained why - that is, what other factors might make a difference in other cases. Not all of his explanations are entirely convincing since they ignore other factors (such as the way liability insurance is underwritten), but at least the analysis is attuned to what the parties might reasonably have expected. This analysis should satisfy any concern that the courts will suddenly be pressed to recognize implied immunities or implied contractual rights in a wide range of circumstances - where the evidence of actual intention is very speculative or thin. But with the majority judgment we are left with a theory that in some context the parties cannot rely on an express immunity or contract right. The difficulty with the majority judgment is that they have adopted judicial restraint as a justification for arbitrariness. This seems unfortunate, since there seems several ways in which their judgment could have been modified to harmonize principle and restraint. First, they could have said there never has been any justification for applying the privity doctrine to a third-party claiming a contract immunity.[53] Second, they could have said that the courts' treatment of the doctrine and its exceptions demonstrates a central concern about the difficulty in determining the parties' intentions, so any relaxation should be restricted to *expressly* intended third parties and only those *impliedly* intended in limited and compelling circumstances.

The Employees' Liability for "Independent Torts"

All of the judges limited the protection granted to the employees to situations where the employees are performing the services contracted for. The employees may well be liable for "independent torts" for which they may owe a duty of care (La Forest J.), for which the customer may not voluntarily assume the risk (McLachlin J.), or for which the privity doctrine will not be relaxed (Iacobucci J.). Yet there are indications, at least in the judgments of La Forest and McLachlin JJ. that, even in the case of independent torts, the employees may be entitled to protection. Surprisingly, there seems to be less support for extending the protection (by further relaxing the privity doctrine) in the majority

[53] None of the reasons given by Professor Trietel and cited by Iacobucci J., *supra*, footnote 3, at pp. 417-418 (S.C.R.), 344 (D.L.R.), apply to third parties claiming an immunity. The economic explanation given by Professor Atiyah, which is also cited by Iacobucci J., *ibid.*, at pp. 418 (S.C.R.), 344-345 (D.L.R.), might apply to third-parties claiming an immunity, depending on what is meant by encouraging "the development of a more market-based concept of enterprise liability". Professor Atiyah's explanation is puzzling because it is not clear why allowing parties to ignore their promises encourages a market-based concept of enterprise liability.

judgment. Not only is the result surprising, but it is anomalous in two ways. First, it seems anomalous to give effect to the parties' *implied* intentions in a case like *London Drugs* but refuse to give effect to their *express* intentions in other situations. Nothing in the explanation of the privity doctrine would explain such a curious result. Second, the distinction between torts committed while performing the contract and independent torts probably makes very little commercial sense in terms of the available insurance coverage and the parties' intentions.

If one thinks of the welders in *Greenwood Shopping Plaza Ltd.* v. *Beattie*,[54] what significance should attach to whether they were welding shelves pursuant to the obligation under the lease to keep the premises in good repair, pursuant to a contract of service with a particular customer of Canadian Tire, or pursuant to Canadian Tire's long-term plans to improve its capital equipment? Is it seriously imagined that the insurers of the customers but not the landlord should have a claim against them in the first case, the insurers of the landlord but not the customers in the second, and the insurers of both in the third? How would employees cope with such a complex pattern of liability for negligence during the course of their employment? The only existing mechanism seems to be through an omnibus clause of their employer's liability policy. Such insurance may distinguish between different types of damages and different types of liability - perhaps in a way that is more likely to provide coverage for property damage and liability for independent torts.[55] However, several factors suggest this coincidence of liability and insurance coverage might not lead to a coherent approach.

First, there is the obvious problem that the employees are dependent upon insurance coverage that they cannot really control. Even if liability coverage was promised by their employment contract, the employees' coverage may be adversely affected by the conduct of their employer - in circumstances that make it less likely that any claim for indemnity against the employer itself would be effective.[56]

Second, assuming that the employees' liability is recognized as simply a step in distributing the loss, there is no general pattern of underwriting liability insurance in a way that precisely matches this distinction between independent torts and torts committed in the performance of a contract. Nor, if one did develop, could we predict with any confidence that courts interpreting the insurance policies would match the insurance coverage with the case law applying the tort distinction.

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[54] *Supra*, footnote 2.

[55] Most liability insurance contracts are limited to liability for damage caused by personal injury and property damage and do not cover liability for consequential damage claims. Moreover some liability policies exclude liability assumed by contract.

[56] See *Scott* v. *Wawanesa Mutual Insurance Co.*, *supra*, footnote 23, which illustrates the courts' willingness to interpret the policy in such a way that the conduct of one insured affects the interest of all insureds under an omnibus clause.

Third, there is very little evidence that first party property insurers would use their subrogation rights in a way that internalized the costs of risky activity or effectively placed the costs on the best risk avoider. There is little evidence that subrogation rights play a significant role in underwriting practice and any recoveries are unlikely to be passed on to specific groups of insureds.[57]

Fourth, once it is recognized the parties should be free to allocate the risk as they see fit, and that the only difficult issue is what should be the presumptive rule when their intentions are unclear, the distinction between independent torts and torts committed while performing the contract makes little sense since none of the parties can or wants to act on the distinction.

[57] One of the few published studies in the United States indicates that less than one per cent of fire and other personal lines claims were recovered by subrogation by one major American insurer. See E. Dolden, Practical and Substantive Aspects of Subrogation (1993), 4 Can. Ins. Law Rev. 121, at p. 122.