

Case Comments

Commentaires d'arrêt

The Interpretation of Tax Legislation and the Rule of Law — REJOINDER
— J.E. (Ted) Fulcher — (1995) 74 Can. Bar Rev. 563.

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In the December 1995 issue of the *Review*,¹ J.E. Fulcher exhorted judges charged with the duty of interpreting the *Income Tax Act*² to seek greater intellectual rewards by abandoning the easy path of statutory interpretation, adopting instead an approach favouring imagination over literalness. Never mind the right answer, says he, find the best answer.³ While I doubt that judges will be tempted to try a novel approach to statutory interpretation merely to enhance their level of job satisfaction, I am troubled that statutory purpose should override the words of the *Income Tax Act*.⁴

Fulcher's thesis may be summarized as follows.⁵ When interpreting a provision in the *Income Tax Act*, a judge should first categorize the provision based on its intended function. A provision in the *Income Tax Act* may be intended to (1) raise government revenue, (2) achieve equity among taxpayers in the raising of revenue, or (3) achieve a policy objective that is not related to the raising of revenue. For example, a provision for a personal tax credit available to an individual whose income is below a certain threshold would fall under (2), and should be interpreted in a spirit of generosity because equity among taxpayers is a good thing. On the other hand, incentive provisions for activities such as research or resource development would fall under (3), and should be interpreted literally because it is hard to identify the legislative purpose for such a provision. Provisions falling under (1) should be interpreted primarily on the basis of the

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¹ J.E. (Ted) Fulcher, "The Income Tax Act: The Rules of Interpretation and Tax Avoidance. Purpose v. Plain Meaning: Which, When and Why?" (1995) 74 Can. Bar Rev. 563.

² Income Tax Act, R.S.C. 1985 (5th supp.) c. 1, as amended.

³ This is from the title of Fulcher's companion piece: "Using a Contextual Methodology to Accommodate Equality Protections Along with the Other Objectives of Government (With Particular Reference to the *Income Tax Act*): "Not the Right Answer, Stupid. The Best Answer" (1996) 34 Alberta Law Review 416.

⁴ *Notre Dame de Bon Secours v. Communauté Urbaine de Québec*, [1994] 3 S.C.R. 3 stands for the proposition that the teleological or purposive approach should be applied to the interpretation of taxing statutes.

⁵ I am restating Fulcher's proposal from my own point of view and in oversimplified terms. A reader who wishes to appreciate the nuances of Fulcher's argument should read his article. His approach is *not* the teleological or purposive approach adopted by the Supreme Court of Canada in *Notre Dame de Bon Secours*.

object and purpose of the provision within the wider context of the object and purpose of the tax structure as a whole.⁶ If the primary consideration is statutory purpose, the words must be secondary and must be made to fit the purpose.

While there is much to criticize in Fulcher's approach, I will focus on the last point. Judges will be respected as arbiters of the *Income Tax Act* only if taxpayers can depend on them to interpret and apply the law based solely on a reasoned interpretation of the words of the statute, disregarding esoteric considerations. That is not to say that the purpose of a statute is irrelevant. There are times when it must be considered. But using statutory purpose to distort the meaning of the words used in the *Income Tax Act* is unsettling. It undermines the rule of law, ultimately jeopardizing the integrity of the tax system.

The tax system is self-assessing. Taxpayers are obliged to determine their own tax liability. As a practical matter, they plan their affairs in advance and certainty is critical. Taxpayers have no guide to their liability except the *Income Tax Act*, and they need no other guide if the rule of law prevails.⁷ Taxpayers cannot know the purpose of particular provisions unless the purpose is stated in the words used by Parliament, and they should not be required to guess.

In practice, when a taxpayer challenges the official interpretation of a provision of the *Income Tax Act*, the Crown will always argue that the taxpayer's interpretation is inconsistent with the statutory purpose, especially if the words of the statute tend to support the taxpayer's position. But the statutory purpose the Crown proposes may be nothing more than a rationalization based on some mystery of public policy that has not been adopted by Parliament, or even disclosed publicly except in explanations written by the Crown in anticipation of a taxpayer challenge. If judges are seen to manipulate the words of the *Income Tax Act* at the Crown's behest to meet some objective claimed by the Crown that is not stated in the *Income Tax Act* itself, ultimately there would be no point in having recourse to the court on an issue of statutory interpretation. If that happens, the rule of law will have failed and the self-assessing system will fall with it.⁸

⁶ For guidance on the object and purpose of the *Income Tax Act*, Fulcher suggests referring to the *Report of the Royal Commission on Taxation* (Ottawa: Queen's Printer, 1967) and the *White Paper on Tax Reform* published in 1987, though he acknowledges that many of the basic propositions in the Carter Report have yet to be adopted by Parliament. In fact there is no publication that even purports to state the object and purpose of the *Income Tax Act*.

⁷ The Supreme Court of Canada has said, "The 'rule of law' is a highly textured expression . . . conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority." *Repatriation Reference*, [1981] 1 S.C.R. 753.

⁸ I believe, though I cannot prove, that compliance will decline unless the tax laws are administered in a manner that is and is seen to be fair. One commentator attributes the rumoured growth of the "underground economy" to perceived inequities in the tax system: Peter S. Spiro, "Estimating the Underground Economy: A Critical Evaluation of the Monetary Approach" (1994), 42 *Canadian Tax Journal* 1059.

What is the source of this notion that statutory purpose should rank ahead of the words of the statute in interpreting the *Income Tax Act*? In part, it is based on an unstated premise that one can discern from the general scheme of the *Income Tax Act* the normal amount of tax for each taxpayer. It would follow that any interpretation of a particular provision that holds a taxpayer liable for less must be rejected. But that premise is in error. There is no "normal" amount of tax. There is only tax imposed by words deliberately chosen by Parliament to create a scheme that is complex and replete with distinctions, some rational and others not so. It has proven impossible to enact a tax law without loopholes, and so it has always been possible for some taxpayers to arrange their affairs to attract a smaller tax liability than if they had chosen another way. Should the court impose a greater tax because of some extra-statutory standard? Not if they respect the rule of law. Lord Simon put it this way:⁹

It may seem hard that a cunningly advised taxpayer should be able to avoid what appears to be his equitable share of the fiscal burden and cast it on the shoulders of his fellow citizens. But for the Courts to try to stretch the law to meet hard cases (whether the hardship appears to bear on the individual taxpayer or on the general body of taxpayers as represented by the Inland Revenue) is not merely to make bad law but to run the risk of subverting the rule of law itself.

Perhaps a source of error in Fulcher's thesis is the idea that interpretative techniques evolved by the courts to deal with the *Charter of Rights and Freedoms* can properly be applied to income tax cases.¹⁰ It is difficult to imagine a more bizarre proposition. The function of the Charter is to limit the power of Parliament to pass laws that infringe fundamental constitutional rights. Interpreting a statute to decide the validity of a Charter challenge requires a balancing of individual rights against legitimate state interests. That is a value-laden exercise, and properly so. But value judgments of that kind have no place in tax cases. Tax laws are confiscatory; their function is to authorize the taking of property without compensation. By definition they infringe property rights. Although property rights have no constitutional protection, it does not follow that they are up for grabs. There is no legal principle that justifies a court in enhancing the Crown's taxation power by applying extra-legal considerations to the interpretation of tax laws.

What then is the proper role of statutory purpose? The recent decision of the Supreme Court of Canada in *Tennant v. The Queen*¹¹ affords a convenient example. The issue was the deductibility of interest, which is governed by paragraph 20(1)(c) of the *Income Tax Act*:

... in computing a taxpayer's income from a business or property, there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto:

(c) an amount paid in the year ... pursuant to a legal obligation to pay interest on ... borrowed money used for the purpose of earning income from a business or property
....

⁹ *Ransom v. Higgs* (1974), 50 T.C. 1, 94 (H.L.).

¹⁰ This is evident from Fulcher's companion article, *supra* footnote 3.

¹¹ (1996) 192 N.R. 365 (S.C.C.).

Clearly, a taxpayer claiming an interest deduction must establish that the borrowed money was used for the purpose of earning income, but the *Income Tax Act* is silent as to how that should be done. Is the use established when the borrowed money is first spent? If not, and property is exchanged from time to time, how should borrowed money be traced to the new use? What if the value of the property declines? Faced with this legislative gap, the Supreme Court of Canada in *Bronfman Trust v. The Queen*¹² answered some of these questions, starting with an analysis of the purpose of paragraph 20(1)(c) based on its language and statutory context. The Court concluded that paragraph 20(1)(c) is intended to encourage the accumulation of capital that will earn taxable income, and that the deduction should survive the replacement of one income earning property for another as long as the borrowed money can be traced to the replacement property.

Bronfman Trust did not answer all the questions left open by paragraph 20(1)(c), and in particular did not deal with the problem faced by Mr. Tennant. He had borrowed \$1 million to buy shares of a company. Four years later, after his shares had fallen in value to \$1,000, he exchanged them for shares of another company of equal value. Because the second company owned his old shares, he still had an economic interest in the old company through his new shareholding. The Crown agreed that at the time he borrowed the money, the entire \$1 million was used for the purpose specified in paragraph 20(1)(c), and so the interest was deductible as long as he owned those shares despite their decline in value. However, the Crown argued that once he exchanged those shares for other shares worth \$1,000, only \$1,000 was used for the purpose of earning income, with the result that his interest deduction was limited to interest on \$1,000. The Supreme Court of Canada disagreed with the Crown. Reviewing again the purpose of paragraph 20(1)(c) in its statutory context, the Court concluded that the entire \$1 million loan could properly be traced to the replacement investment, notwithstanding its value at the time of the exchange. Therefore, interest on the full \$1 million loan continued to be deductible.

In both *Bronfman Trust* and *Tennant*, the Supreme Court of Canada answered a question left open in the *Income Tax Act* by inferring from the words of the relevant provision a purpose that it could use as a guide to the correct application of the provision. That is the proper use of statutory purpose, and it is a long way from using statutory purpose to override the words. The invitation Fulcher extends to judges should be rejected without more.

¹² [1987] 1 S.C.R. 32.

Implied Warranties In New Home Purchases: *Strata Plan NW 2294 v. Oak Tree Construction Inc.*¹

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Consumer protection law has often been criticized as unduly selective about whom it chooses to protect, unduly selective, that is, about what situations are best left to the doctrine of *caveat emptor*. Commercial transactions, for instance, have been almost entirely exempted from consumer protection² because there has been a presumption that even a small business owner knows how to guard its own interests. Similarly, the buyer of land is not treated as a buyer of goods.³ With a large transaction, such as the purchase of a home, we assume the purchaser will seek independent legal advice. As a result, consumer protection law extends to the buyer of a new home in a very limited way, and the position of many new home buyers is not much improved from what it was in the 19th century.

For many years, the common law has distinguished between the sale of a home which was *complete* at the time of the sale, and the sale of a home which was *incomplete* at the time of the sale. If the vendor was also the builder, the common law, has implied a warranty that a home which was incomplete when it was sold would be built in an efficient, workmanlike manner, that it would be of proper materials, and that it would be fit for habitation. By contrast, the common law has implied no warranty if the home was complete when it was sold. Instead, the doctrine of *caveat emptor* has applied: if there were deficiencies in a new home which was complete when it was purchased, the common law has said that the purchaser had no relief, unless the deficiencies were expressly covered by the contract of sale or the tort of fraud.

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¹ (1994), 93 B.C.L.R. (2d) 50, 8 W.W.R. 49 (C.A.).

² E.g. the B.C. *Consumer Protection Act*, R.S. 1979, c. 65, s. 1, defines the "individual" it protects as "a natural person" not to include "a natural person with respect to buying or borrowing in the course of business."

The B.C. *Trade Practice Act*, R.S. 1979, c. 406, prohibits deceptive (s. 3) and unconscionable (s. 4) acts or practices in relation to "consumer transactions" which are defined (s. 1) as transactions with "individuals... for purposes which are primarily personal, family or household..." (The *Act* does deal with a limited number of business transactions as well.)

The B.C. *Sale of Goods Act*, R.S. 1979, c. 370, s. 20 provides that certain implied warranties may not be waived in a "retail sales" which: "does not include a sale of goods

(a) to a purchaser for resale;

(b) to a purchaser who intends to use the goods primarily in his business;

(c) to a corporation or an industrial or commercial enterprise....."

³ Under the B.C. *Sale of Goods Act*, R.S. 1979, c. 370 s. 1, "goods" are defined as "all chattels personal."

Many home purchasers who feel they have been victims of a bad deal will think the dichotomy between complete and incomplete homes serves no purpose except to deny them relief. A surprise judgment delivered recently by Taylor J.A. of the British Columbia Court of Appeal may change the way the common law deals with consumer protection in the area of private housing. His concurring judgment in *Strata Plan NW 2294 v. Oak Tree Construction Inc.* defines structures that are so defective as to be uninhabitable to be necessarily incomplete, whether or not the transaction between vendor and purchaser was based on completed construction, and whether or not the purchaser was to take possession without any more having to be done by the vendor. If this view is adopted, all new housing would be impliedly warranted to be at least suitable for habitation.

The Common Law

Since *Miller v. Cannon Hill Estates Ltd.*, the English courts have recognized that, in the sale of an unfinished home, there is an implied warranty of fitness for habitation if the vendor is also the builder.⁴ The warranty further implies that the house shall be built in an efficient and workmanlike manner and be of proper materials. The American courts have extended this warranty to include finished homes, at least where the defect was latent.⁵ This development has not reached Canada.

This does not mean that the purchaser of a completed home is totally without recourse if the home turns out to be defective in some way. The purchaser may seek a remedy under any express warranties it has thought to obtain after a stringent inspection of the property. It may sue in tort (for fraud) or in contract (for a breach, when what was initially bargained for turns out to be different from that delivered.) The purchaser of a new home may also have rights because of *Anns v. London Borough of Merton*.⁶ In that case, the House of Lords gave judgment against a builder for breach of a statutory duty imposed by a building by-law. This means that a further action on a statutory footing may be available at the instance of any person for whose benefit a construction by-law was passed.

Legislation

Few provinces in Canada have given legislative recognition to the shortcomings of the common law. Only Ontario has made specific enactments in this area. The *Ontario New Home Warranties Plan Act*⁷ is administered by

⁴ [1931] 2 K.B. 113.

⁵ See *Carpenter v. Donohoe*, 388 P. 2d 399 (S.C. Col. 1964); *Loraso v. Custom Built Homes, Inc.*, 144 So. 2d 459 (C.A. La. 1962); *Bethlahmy v. Bechtel*, 415 P. 2d 698 (S.C. Idaho 1966); *Rothberg v. Olenik*, 262 A. 2d 461 (S.C. Vermont 1970).

⁶ [1977] 2 All E.R. 492 (H.L.).

⁷ S.O. 1976, (2d Sess.), c. 52.

a public corporation and applies to all vendor-builders who must register and take part in the plan. Section 13 creates a warranty to the extent that

- (1) Every vendor of a home warrants to the owner,
 - (a) that the home
 - (i) is constructed in a workmanlike manner and is free from defects in material,
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code;
 - (b) that the home is free of major structural defects as defined by the regulations; and
 - (c) such other warranties as are prescribed by the regulations.

Warranty coverage is subject to twelve exceptions under section 13(2):

A warranty under subsection (1) does not apply in respect of

- (a) defects in materials, design and work supplied by the owner;
- (b) secondary damage caused by defects, such as property damage and personal injury;
- (c) normal wear and tear;
- (d) normal shrinkage of materials caused by drying after construction;
- (e) damage caused by dampness or condensation due to failure by the owner to maintain adequate ventilation;
- (f) damage resulting from improper maintenance;
- (g) alterations, deletions or additions made by the owner;
- (h) subsidence of the land around the building or along utility lines, other than subsidence beneath the footings of the building;
- (i) damage resulting from an act of God;
- (j) damage caused by insects and rodents, except where construction is in Contravention of the Ontario Building Code;
- (k) damage caused by municipal services or other utilities;
- (l) surface defects in work and materials specified And accepted in writing by the owner at the date of possession.

The warranty extends to claims “made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed”.⁸ The statutory warranty may not be excluded.⁹ Moreover, section 13(5) provides that “a warranty is enforceable even though there is no privity of contract between the owner and the vendor.” Hence a subsequent purchaser is also eligible for compensation, subject to the limitations of the *Act*.

⁸ Section 13(4).

⁹ Section 13(6).

Section 14 provides for compensation as follows:

(1) Where,

(a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or

(c) the owner suffers damage because of a major structural defect as defined in the regulations for the purposes of section 13, and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed,

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the Regulations.

It is clear that provincial legislatures have authority to legislate such comprehensive statutory warranty schemes. Yet despite a recognized need for protection in an area of considerable consumer vulnerability, such legislation has not been introduced in British Columbia.

The Posture of Recent Case Law

In *Fraser Reid v. Droumtsekas*,¹⁰ the Supreme Court of Canada expressed considerable sympathy for protection of the home purchaser. The appellants had purchased a newly completed house directly from the its builder. A year later, serious flooding of the basement occurred due to the builder's failure to install drainage tile as was required under the city building by-law. The agreement of purchase and sale contained the following provision:

The Vendor has disclosed to the Purchaser all outstanding infractions and orders requiring work to be done on the premises issued by any Municipal or Provincial or Federal Authority in respect to the premises referred to herein.¹¹

The agreement also contained an exclusion clause:

It is agreed that there is no representation, warranty, collateral agreement or condition affecting this agreement or the real property or supported hereby other than as expressed herein in writing.¹²

At trial, the Ontario High Court denied the purchasers' claim on the ground that no implied warranty of fitness was available in the purchase of a completed house.¹³ The Ontario Court of Appeal dismissed the purchasers' appeal, whereupon further appeal was taken to the Supreme Court of Canada. Before the Supreme Court, the appellants' first submission was one of implied warranty resting upon a "novel proposition" that American jurisprudence had already

¹⁰ [1980] 1 S.C.R. 720.

¹¹ *Ibid.* at 724.

¹² *Ibid.*

¹³ The *Ontario New Home Warranties Act* did not come into force until after the purchase of the house involved in this case. *Ibid.* at 730.

endorsed — that “there is implied by law, in the sale of a new home, where the vendor is also the builder with special knowledge of the method of construction, that the home: (1) was built in compliance with all applicable building by-laws, (2) was built in a good and workmanlike manner, (3) would be fit for human habitation.”¹⁴

The Supreme Court of Canada did not accept this contention. It ruled that, as the house purchased was a completed house, there was no implied warranty as to construction or fitness for habitation. The Supreme Court did however reverse the Ontario Court of Appeal and the trial court on the basis that the clause in the agreement constituted an express warranty which the builder had knowingly breached. The court said the by-law applied to a vital part of the building (the foundation) and the breach was one which could not have been discovered by ordinary inspection, (the foundation having been covered up and the defect hidden before the agreement was entered into.)

Although the judgment awarded damages to the appellants, it was a meagre contribution to the area of consumer protection, leaving several questions unanswered whether effect on a vital part of the building is an essential ingredient to the action; whether the intentional breach would have been forgivable if the defect could have been discovered by ordinary inspection; whether the Court would have allowed any recourse in the absence of an express contractual provision. The Court, in relying on the express warranty, was merely re-affirming the *Anns* rationale of a statutory duty. If the contract had not contained an express undertaking to disclose (which the vendor-building had foolishly volunteered) and if the defect had not been one specifically addressed by statute, the appellant might not have had a remedy.¹⁵

In *Rawson v. Hammer* the purchasers had three possible grounds for suit: implied warranty, fraudulent misrepresentation, and breach of statute.¹⁶ The incomplete dwelling house in question was one which the defendant had constructed. After closing, the purchasers discovered serious structural defects and failures on the part of the defendant to comply with building by-laws. Though judgment was given in favour of the purchasers, the Court rejected their claim of an implied warranty which would normally be applicable to the purchase of a house still under construction. Here the unfinished home was to be completed by the purchaser rather than by the vendor. The Court ruled that the doctrine of *caveat emptor* would apply in full force, even though the vendor had deliberately concealed latent defects.

The facts of *Rawson* are unique. The purchasers fully knew that they were buying a partially completed house. They knew, for instance, that the fireplace

¹⁴ *Ibid.* at 728.

¹⁵ The quantum of the suit was a mere \$4,412.78 (before costs). The purchaser, a medical doctor, must have been motivated by principle because no ordinary consumer would take a case to court at all, let alone all the way to the Supreme Court of Canada, for a few thousand dollars.

¹⁶ (1982), 23 R.P.R. 239 (Q.B.).

was not finished; that the baseboards had not been installed; that the closets had no shelves; that even the exterior door had no lock or handle and was kept closed by a mere nail. When the plaintiffs offered to purchase the property, "[i]t was their intention to do these things themselves."¹⁷ They realized their mistake shortly after they took possession, when the Buildings Standards Branch condemned the building as "unfit for human habitation"¹⁸ owing to dangerous defects in the plumbing, wiring, electrical systems and natural gas installations that the vendor had rigged up himself.

The Court, however, reasoned that, where the vendor-builder covenants to finish the house, he has the ability to maintain "control over the materials and workmanship not only as to what has been done but also as to what remains to be done"¹⁹ and can thus be expected to correct faulty work. On the other hand, "where the house is sold as [only] partially completed"²⁰ with the purchaser assuming the responsibility for finishing the construction, the total responsibility is accordingly shifted. Ergo, the doctrine of *caveat emptor* applies to houses purchased in an incomplete condition to be finished by the purchaser and no implied warranty is available.

The Court found for the purchaser, however, via his second and third submissions. It held that the vendor's "suppression of the truth"²¹ amounted to a fraudulent misrepresentation, owing to his failure to tell the purchasers of the hidden deficiencies. Given fraud, the Court then refused to allow the exculpatory clause in the agreement to limit the vendor's liability. Separately, the Court also found for the purchasers on the ground of breach of specific building by-laws.

The Manitoba Queen's Bench demonstrated its own initiative in *Kowcun v. Manitoba Housing & Renewal Corp.*²² by extending the common law protection to include completed houses that were being renovated. The house in question was purchased while work was in progress. The only express warranty in the agreement (which was typically drawn up by the vendor) provided that the renovation of the unit would be "carried out in a good and workmanlike manner;" the price was to include a "furnace upgrade." The agreement further contained a clause that the purchaser did not rely on any representations by the vendor.

Four years later, the furnace failed due to an inherent defect. It was expected to last fifteen to twenty years. The Court held that, although there was not necessarily any implied warranty as to fitness respecting the premises in their existing state before the renovations, a warranty was applicable to the renovations including the furnace upgrading. The warranty was breached by the defective furnace. Unlike *Fraser Reid*, the Court did not contend with the complete/

¹⁷ *Ibid.* at 245.

¹⁸ *Ibid.* at 243.

¹⁹ *Ibid.* at 245.

²⁰ *Ibid.*

²¹ *Ibid.* at 247.

²² [1993] 6 W.W.R. 486 (Man.Q.B.).

incomplete dichotomy posed by the common law. Here the issue was whether the limitation clause related to representations in the sense of pre-contractual statements or in the sense of warranties or conditions.

The vendor-builder's defence was that he did not warrant the fitness of the furnace, which had been approved by the Canadian Gas Association. Unlike *Fraser Reid*, no fault or fraud of the builder was involved. In fact, the defect was discovered after a furnace serviceman noticed a crack in the heat exchanger. Its condition was only potentially dangerous, in that noxious fumes were liable to escape. Replacement of the entire unit was necessary.

The Court found that the defect was present when the furnace was originally installed. It was subject to a written warranty issued by Flamemaster which had gone out of business. Hence the home-owner's only recourse was against the builder. The sole relevant express warranty in the contract required the builder to carry out the renovation in a good and workmanlike manner. Under the common law, that would extend to materials, but only where they contained obvious defects. The court struggled to find an exception to the general rule of *caveat emptor* as it applied to the sale of completed premises and implied a warranty on the ground that the purchaser had left the design and specifications of the furnace itself to the builder, such warranty fitting into the builder's warranty of "proper and workmanlike manner with proper materials."²³

The limitation clause (that "in making this offer, the purchaser relies solely on his own personal inspection and knowledge of the property and not on any representations made by or on behalf of the vendor, except such as are expressly contained herein"²⁴) was dismissed by the Court. Quoting from contract law principles, the Court held that, because the exemption clause did not specifically mention warranties, the implied warranty was not validly excluded:

[I]f a person is under a legal liability and wishes to get rid of it, he can only do so by using clear words. The words of the exemption clause must therefore exactly cover the liability which it is sought to exclude. An exemption clause in a contract excluding liability for "latent defects" will not exclude the condition as to fitness for purpose implied by the Sale of Goods Act; exclusion of implied conditions and warranties will not exclude a term which is actually expressed; and a clause excluding liability for breach of warranty will not exclude liability for breach of condition.²⁵

The Manitoba Court of Appeal affirmed the conclusion arrived at by the trial judge, but expressly refused to concur with his application of the law respecting the implied warranty.²⁶

The struggle which a court must go through to avoid the rule that there is no implied warranty on housing which is complete when it is sold can be seen very clearly in a case from New Brunswick, *Spencer v. Villarreal*.²⁷ In that case

²³ *Ibid.* at 489.

²⁴ *Ibid.* at 490.

²⁵ *Ibid.*

²⁶ [1994] 6 W.W.R. 153 (Man. C.A.).

²⁷ (1992), 123 N.B.R. (2d) 44, (1993), 137 N.B.R. (2d) (C.A.).

the plaintiffs bought a very badly built home. Among other defects, the builders had failed to take the rudimentary step of putting vents in the attic. This meant that moisture condensed in the attic and dripped through the ceilings like "rain."²⁸ This house was so badly built that there should have been no trouble granting relief, but, while both the trial court and the majority in the appellate court did ultimately decide in favour of the plaintiffs, they had to go a very long way around to do so.

The trial court could not find any basis for holding the builders liable. It was bound, it said, by *Thomas and Thomas v. Whitehouse*,²⁹ which held that there was no implied warranty on a house that was sold complete and that there was no liability for negligent construction causing damage in the thing constructed. But, somebody had to be liable for this awful house, so unable to find liability against the builders, the trial court found the real estate agents liable on the basis of negligent misrepresentation. The agents had told the buyers that the house had been built by a contractor, when it had not been, and had failed to disclose that the foundation, which had been poured improperly, had been ripped out and repoured.

The Court of Appeal gave a 2-1 decision, sustaining the liability of the agents for negligent misrepresentation and extending liability to the builders. Like the trial court, however, the majority in the Court of Appeal did not feel it could base the builders' liability on how badly the house was built, so it held that the builders were also liable for negligent misrepresentation, since it was they who had told the agents that the house was being built by contractors. With respect, this decision is problematical. The builders' misrepresentations were made to the agents not to the buyers and, while the builders could be liable if their misrepresentations were passed on by the agents, the agents must either have had reason to think the builders' representations were true, in which case, they should not have been liable for negligent misrepresentation, or reason to think the representations were false, in which case, they should have been liable for deceit not negligent misrepresentation.³⁰

The dissenting judge in the Court of Appeal, Rice J.A., could not find liability against anyone on any basis. As regards the builder, he agreed with the trial judge that *Thomas and Thomas v. Whitehouse* precluded liability for the negligent construction in either tort or contract. He made the most explicit reference in the case to the complete/incomplete distinction.

It has been established that there is no implied warranty in the sale of a completed house. (citations omitted)³¹

²⁸ *Ibid.* at 51.

²⁹ (1979), 24 N.B.R. (2d) 485. (C.A.)

³⁰ I think the Court of Appeal actually felt that there had been deceit here, but it noted that the trial court had "stopped short of finding [the agents] liable in deceit." (*op. cit. supra* footnote 27 at 20) and apparently, it did not feel it could overreach the trial court on this question of fact.

³¹ *Ibid.* at 10.

As regards the negligent misrepresentations, Rice would have held that they were not causally related to the injuries the plaintiffs sustained. The failure to mention that the foundation had been mispoured, ripped out and repoured could not have hurt the plaintiff, he said, because "repouring and reconstructing a foundation," rather than showing that there was something wrong with the house, "would rather show that it had been erected properly the second time around."³² In other words, if the plaintiffs had known the true facts, they could only have been more likely to buy.

As far as the representation that the house had been constructed by a contractor was concerned, Rice said: "...there is no evidence in this case to even suggest that the [agents] ought to have been aware of the faulty construction,"³³ so:

[f]rom the standpoint of foreseeability, how can it be said that [the agents] ought to have foreseen the possibility of damages in the nature and kind claimed?³⁴

With respect, this is a totally wrong way to approach the problem. The question is not whether the agents could foresee that the house would need repairs, but whether they could foresee that their misrepresentation might induce the plaintiffs to buy the house. As the majority said:

But for this misinformation, the [plaintiffs] would not have bought the house and thus been put to the expense of repairs ...³⁵

All the judges seem to have gotten confused in *Spencer*. I think this was because they were dissatisfied with the state of the law. Partly, that dissatisfaction was with the complete/incomplete distinction, but that distinction was in the background of the case. The foreground focus of the judges' dissatisfaction was on the tort rule, expressed in *Rivtow Marine Ltd. v. Washington Iron Works*, that, in negligence, relief cannot be granted for damage in the negligently constructed thing itself.³⁶ The Court of Appeal, in a section of its judgment, entitled "Authoritative Chaos"³⁷ went so far as to say:

[T]he Supreme Court of Canada has failed to lead the way and has sent out mixed signals. This has led to confusion and misinterpretation in applying unclear principles by the lower courts.³⁸

³² *Ibid.* at 16.

³³ *Ibid.* at 17.

³⁴ *Ibid.*

³⁵ *Ibid.* at 24.

³⁶ [1974] S.C.R. 1189. In *Rivtow*, the Supreme Court said that if the manufacturers of a defective crane had warned the plaintiffs that the crane needed to be repaired as soon as they knew of the defect, the plaintiff's would not have lost as much as they did when they took the crane out of service to have it repaired. The court awarded damages to the plaintiff for the extra loss the plaintiff's suffered as a result of having to repair the crane during a season of peak use, but not for the cost of repairing the crane itself. This, the court said, was not recoverable.

³⁷ *Ibid.* at 27.

³⁸ *Ibid.* at 28.

Responding to this and other criticism, the Supreme Court of Canada has now changed the law in this area. In *Winnipeg Condominium v. Bird Construction*,³⁹ the court adopted Laskin's dissent in *Rivtow* and held that where, as a result of its negligent construction or manufacture, an object is dangerous to health or safety, the purchaser can recover damages in negligence for such repairs as are necessary to make the object safe. Even under this new rule, however, damages can still not be recovered in negligence for repairs which are not necessary for the sake of safety, but only for the sake of quality. Most plaintiffs who buy houses which are defective, but not unsafe, will not be able to convince the courts to find liability, as the court in *Spencer* did, on the grounds of negligent misrepresentation. They will still face the complete/incomplete dichotomy and we turn now to a recent B.C. case which may have moved the law on this point.

Strata Plan NW 2294 v. Oak Tree Construction Inc.

Strata Plan NW 2294 v. Oak Tree Construction Inc. may change the common law's approach to consumer problems with new housing and may give the purchaser presumptive preference in the form of an implied warranty. Here the defendant was the vendor-builder of a housing complex called "The Juliana". From the beginning, The Juliana leaked water whenever it rained, eventually giving rise to staining and other damage to the inside walls. After undertaking four years of futile remedial measures, the defendant refused to do any further work. The plaintiffs thereupon obtained an engineering report which indicated that the problems arose from a failure to apply caulking and sealant in key places. The strata corporation which represented the owners of the residential complex then sued on the basis of an implied contractual warranty. In the alternative, it raised a claim of negligence.

Up to this point, the case law in relation to latent defects in an unfinished building intended for habitation had imputed to the builder an implied warranty that both the work already done and the work not yet done would be completed in a good and workmanlike manner; that the materials would be suitable; and that the building would be fit for its purpose (habitation). This warranty, implied by operation of law, could not be excluded except by clear contractual terms. Here, the original prospectus which preceded the sale contained the term: "There is no warranty by or on behalf of the Developer in respect of the Development."⁴⁰

At trial, Leggatt J.A. found that there was an implied warranty of habitability which was violated by the structural leaks and that there was negligence in the inadequate application of sealant. On the basis of these findings, he rendered judgment for the plaintiffs in both contract and tort.⁴¹ With respect, this

³⁹ [1995] 1 S.C.R. 85.

⁴⁰ *Supra* footnote 1 at 56.

⁴¹ (1991) 47 C.L.R. 1 (B.C.S.C.).

decision is extraordinary for two reasons: first, Leggatt J.A. never even mentioned the distinction the common law draws between housing which is complete when it is purchased and housing which is incomplete when it is purchased and second, Leggatt J.A. did not advert to, let alone explain how he was able to avoid the *Rivtow* rule (then still the law) that recovery in negligence would not be allowed to rectify a defect in the thing purchased.⁴²

Despite these omissions, the B.C. Court of Appeal (Lambert, Prowse and Taylor, J.J.A.) was unanimous in upholding the trial judgment in favour of the purchasers. There are two judgments in the Court of Appeal. Both are as remarkable different way to avoid an absurdity in the law. Prowse J.A. joined Lambert J.A. in a short judgment which completely ignored the negligence point, but sustained Leggatt J.A.'s finding of an implied warranty. It also held that the exclusion clause in the contract was not specific enough to exclude this warranty.

The difference between Leggatt's judgment and Lambert's judgment is striking. Leggatt J.A. ignored the distinction between housing which is complete at the time of purchase and housing which is incomplete at the time of purchase. He found there was an implied warranty as if the complete/incomplete distinction did not exist. Lambert J.A.'s judgment did the opposite. Instead of ignoring the complete/incomplete distinction, as Leggatt had, Lambert dealt with it ... twice, in slightly contradictory ways. As Shakespeare said, he protested "too much."⁴³

First, Lambert J.A. reasoned by deduction. He noted the complete/incomplete distinction and said that an implied warranty could only be in effect if the building was incomplete. Then he said:

The question of whether completion has occurred is a question of fact. The trial judge in this case decided that the warranty was in effect. There is nothing in his reasons to indicate that he misunderstood the law⁴⁴

Ergo, though Leggatt J.A. never said anything about whether the building was complete or incomplete, Lambert J.A. concluded that Leggatt J.A. *must* have found that the building was incomplete, and went on to hold that there was enough evidence to sustain that finding of fact.

Technically, this is the *ratio* of the case. But if this is the *ratio*, there was no need for any further discussion of the complete/incomplete distinction. And yet, Lambert J.A. went on to provide one. Saying that he had read Taylor J.A.'s judgment, Lambert J.A. talked about the problems with the common law distinction and then, like Dickson J. in *Fraser Reid*, he expressly abstained from making any attempt to remedy those problems. Lambert J.A. cited potential

⁴² *Op. cit. Supra* footnote 36. There is no suggestion in *Strata Plan NW 2294 v. Oak Tree Construction Inc.* that the defects in the Juliana went to safety. Therefore, even under the new rule enunciated in *Winnipeg Condominium v. Bird Construction (op. cit. supra* footnote 39), they would still not be recoverable in negligence.

⁴³ *Hamlet*, III, ii, 242.

⁴⁴ *Supra* footnote 1 at 52.

harmful consequences to the home building industry and concluded that gaps in the law would be better suited to legislative rather than judicial reform.⁴⁵

The irrational distinction the common law has drawn between housing which is complete when it is sold and housing which is incomplete when it is sold forced Leggatt J.A. to say too little and Lambert J.A. to say too much. Taylor J.A.'s concurring judgment in the Court of Appeal took yet another tack. Taylor J.A. expressly noted the "irrationality of the distinction between 'completed' and 'incompleted' on which the existence of a common-law warranty depends"⁴⁶ and rejected as "manifestly unacceptable that the vendor of newly-built residential accommodation can be relieved of responsibility for construction deficiencies simply because a municipal inspector or the vendor itself has determined to treat construction as 'complete', or 'substantially complete', prior to the date of sale."⁴⁷ According to Taylor J.A., since the deficiencies in construction permitted water to penetrate the exterior wall and enter the units starting the first wet season, the premises were clearly not reasonably fit for habitation even at the time of sale. Then, redefining what "completion" means, Taylor J.A. said that premises which were unfit for habitation were not "complete."

A new residence which in fact requires further work before it will be reasonably fit for habitation cannot, in my view, properly be described as "complete" simply because its incompleteness was not recognized, or not apparent on normal inspection, unless the parties agreed to accept the house as "complete", or agreed that any further work required to be done will be done by the purchaser. That must surely be so where there is further work to be done before the place will be habitable, that is to say where there is "deficiency" — a term plainly implying incompleteness. If there is work remaining on done at the date of sale, and the new residence will not be reasonably fit for habitation until that work is done, the building must, in my view, be regarded for the present purpose as *in fact* "incomplete." (emphasis in the original)

While proof of incompleteness may give rise to difficulty where the premises are poorly constructed but reasonably fit for habitation, that problem does not arise here.⁴⁸

Notice that, though Taylor J.A.'s judgment is, and was meant to be, very bold,⁴⁹ even he did not *directly* attack the complete/incomplete distinction. His attack is *indirect*. The distinction is left standing, but, if Taylor J.A.'s judgment is followed, there will be what amounts to an implied warranty of habitability on housing which is complete at the date it is sold. This is not what Taylor J.A. says. He says housing which is not habitable is incomplete, but this amounts to

⁴⁵ *Ibid.* at 53-4.

⁴⁶ *Ibid.* at 58.

⁴⁷ *Ibid.* at 59.

⁴⁸ *Ibid.*

⁴⁹ He says, for instance, "Whatever may be the case in England or other parts of Canada, it is not in this Province to be expected that a new wood-frame residential building of this sort will require no further work when ready for occupation. *Ibid.* at 62. Since wood frame buildings in England and in other parts of Canada would require at least as much work as they require in B.C., it seems that Taylor J.A. was really saying: 'Regardless of what the law is in England or in other parts of Canada, this is going to be the law in B.C.'"

saying that *different* warranties are to be implied for incompleting and completed housing. When housing is sold incompleting, the law says it carries an implied warranty that it is suitable for habitation and that it has been built in an efficient and workmanlike manner and is of proper materials. When housing is sold completed, Taylor J.A. can be taken to say it carries an implied warranty that it is suitable for habitation.

Conclusion

If Taylor J.A.'s judgment in *Strata Plan NW 2294 v. Oak Tree Construction Inc.* is followed, case law will move in a progressive direction: courts will begin to protect purchasers of completed homes in the same way they would protect purchasers of any other consumer articles. There are two things that must be noticed, however. The first is that to move in this progressive direction, the courts will have to ignore the reservations Lambert J.A. voiced and the question Dickson J. raised in *Fraser Reid*.

The only real question for debate is whether removal of the irrational distinction between completed and incomplete houses is better left to legislative intervention. One can argue that caveat emptor was a judicial creation and what the courts created, the courts can delimit. But the complexities of the problem, the difficulties of spelling out the ambit of a court-imposed warranty, the major cost impact upon the construction industry and, in due course, upon consumers through increased house prices, all counsel judicial restraint.⁵⁰

I would be inclined to reject the proposition advanced on behalf of the appellants for an extended implied warranty. It appears to me at this time that if the sale of a completed house by a vendor-builder is to carry a non-contractual warranty, it should be of statutory origin, and spelled out in detail.⁵¹

Even if one approves of the direction in which Taylor J.A.'s judgment moves the law, one may still wonder whether the British Columbia legislature may not have been deliberate in not extending the implied warranty to completed homes. The *Ontario New Home Warranties Plan Act* has been available as a model since 1976. That it has not been adopted in British Columbia must indicate either that the legislature is more concerned for the protection of the building industry than for the protection of consumers, or more charitably, that it sees the preservation of the industry's welfare as indirectly accruing to the general advantage of consumers. If every new home carries an implied warranty, that will increase the price of new homes; if the price of housing escalates, that will affect everyone in the province. Whether decisions of this sort should be made by the courts or the legislatures is, obviously, a very difficult question. We will certainly see it at the Supreme Court of Canada again soon.⁵²

⁵⁰ *Supra* footnote 10 at 730.

⁵¹ *Ibid.* at 731.

⁵² Appellant's counsel in *Strata Plan NW 2294 v. Oak Tree Construction Inc.* says that, because of the amount involved, this case will probably not go to the Supreme Court on appeal. He also says that he is about to litigate a similar case where a great deal more is involved.

The second thing to notice about the warranty Taylor J.A. implies on housing which is complete when it is sold is that this warranty can be excluded by sufficiently precise language. This is a critical difference between implying this warranty at common law and establishing it by statute. As pointed out above, section 13(6) of the *Ontario New Home Warranties Plan Act* provides that the warranties it creates may not be excluded. Because of the theory of contract law, warranties implied by common law are rarely, if ever, non-excludable.⁵³ A warranty implied by a court might be non-excludable if excluding it were found to be unconscionable, but in the absence of unconscionability or statute, the parties to a contract can expressly say that there are no implied warranties. It may embarrass a builder to have to tell a buyer that a new house is not warranted to be fit for habitation, but if other courts start to imply the warranty Taylor J.A. did, builders will undoubtedly start to exclude it, and, as Taylor J.A. himself makes clear, their exclusion, if sufficiently precise, would be effective.

In the absence of some clear provision to the contrary clearly brought to the purchaser's attention, and there is none in this case, such a residence will not be "complete" until the deficiencies which can be expected to come to light on occupation and exposure to all the elements have been made good, and it will therefore necessarily be "incomplete" until that time.⁵⁴ (emphasis added)

⁵³ The reluctance of courts to imply terms that would override express contractual provisions is discussed in Dolding and Fawlk, *Judicial Understanding of the Contract of Employment*, (1992) 55 M.L.R. 562, 565-7.

⁵⁴ *Supra* footnote 1 at 62.

Liability for the Sale of Alcohol:

Stewart v. Pettie

R.W. Kostal*

Introduction

The Supreme Court of Canada's decision in *Stewart v. Pettie*¹ is unremarkable for its (apparent) conclusions regarding the duty of care. Few will be surprised that the commercial provider of alcohol bears some legal responsibility to third parties foreseeably imperilled by its intoxicated patrons. In the current jurisprudential climate, this was a predictable and defensible development of law and policy, one strongly encouraged by a plethora of lower court decisions.²

Although its conclusions on duty are unremarkable, *Stewart v. Pettie* is noteworthy for the Supreme Court's inexact legal reasoning on the duty issue, an inexactness which ultimately casts doubt on the decision's meaning and significance. Major J.'s judgment, which received the unanimous support of six other Justices,³ is further evidence of the current Supreme Court's inability to formulate a coherent approach to the duty of care in negligence. Major J.'s judgment in *Stewart*, together with several other decisions on the duty of care,⁴ raises an important question of law: does the duty concept remain viable as a means of controlling the scope of liability in negligence?

1. *The Case*

At Christmas of 1985 the plaintiff Gillian Stewart attended an Edmonton dinner theatre with her husband, sister-in-law, and brother, Stuart Pettie. The party arrived in a car owned and driven by Pettie. The dinner theatre was owned and operated by Mayfield Investments Ltd. The two couples remained together at the dinner theatre for approximately five hours. Although Stuart Pettie had consumed between 10 and 14 ounces of liquor in that period, he was said to have exhibited no obvious signs of intoxication when he left the theatre with his companions. The women were licensed drivers and were not intoxicated. They nonetheless acquiesced to Stuart Pettie's desire to drive. The weather was frosty and the roads icy.

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¹ (1995), 23 C.C.L.T. (2d) 89.

² See e.g. *Schmidt v. Sharpe* (1983), 27 C.C.L.T. 1 (Ont. H.C.J.); *Hague v. Billings* (1989), 48 C.C.L.T. 192, 68 O.R. (2d) 321 (H.C.J.), aff'd in part, (1993), 13 O.R. (3d) 298 (C.A.); *Sambell v. Hudago Enterprise Ltd.*, [1990] O.J. No. 2494 (Ont. Gen. Div.) (QL).

³ La Forest, Sopinka, Gonthier, Cory, McLachlin, and Iacobucci JJ.

⁴ See exx: *Just v. British Columbia*, [1989] 2 S.C.R. 1228; *C.N.R. Co. v. Norsk Pacific Steamship Co.* [1992] 1 S.C.R. 1021.; *Hall v. Hebert*, [1993] 2 S.C.R. 159; *Winnipeg Condominium Corp. No.36 v. Bird Construction Co.* [1995] 1 S.C.R. 85.

Although he attempted to drive cautiously, Stuart Pettie lost control of the vehicle and slammed into a light pole. His sister, sitting unbuckled in the back seat, "was thrown across the car, hit her head, and was rendered a quadriplegic".⁵ Gillian Stewart brought an action in negligence against her brother, Mayfield Investments Ltd., and the City of Edmonton.⁶

The trial centred on the issues of liability and contributory negligence.⁷ The trial judge found that Pettie was very impaired by alcohol at the time of the accident, and that his impairment was a component of his negligence. The plaintiff was found to have made a 25% negligent contribution to her own loss due to her failure to have worn a seat-belt. The trial judge dismissed the plaintiff's claim against Mayfield Investments Ltd. Gillian Stewart appealed this dismissal.

In the Alberta Court of Appeal,⁸ it was argued that Mayfield, as a commercial provider of alcoholic beverages, had owed the appellant *two* distinct duties of care.⁹ The first was the legal duty to "ensure that Mr. Pettie was not served so much liquor that he became a danger to himself and others."¹⁰ This duty was said to be supported by a number of alcohol-vendor cases.¹¹ Counsel for the appellant argued for the existence of a second duty of care: that as the commercial host of an intoxicated patron, Mayfield had been under a positive duty to have taken affirmative steps to prevent Pettie from driving. Counsel contended that the existence of this affirmative duty was supported by *Jordan House*¹² (and lower court decisions¹³). Counsel did not attempt to explain how, from the point of view of this plaintiff, the first and second duties were to be distinguished.

While the Alberta Court of Appeal appears to have been persuaded that Mayfield had in fact owed *both* legal duties to Gillian Stewart, neither of the two justices who wrote decisions provided a detailed explanation.¹⁴ Although Hetherington J.A. cited both *Jordan House* and *Hague v. Billings* as authorities for her conclusions, the specific relevance of these cases to the facts was not explored. Kerans J.A. was similarly disinclined to use *Stewart v. Pettie* to

⁵ *Supra* footnote 1 at 95.

⁶ Stewart's action against the City was settled prior to trial.

⁷ The parties settled the issue of quantum of damages prior to trial. For the report of the trial decision see (1991), 2 Alta. L.R. (3d) 97 (Q.B.).

⁸ (1993), 141 A.R. 4.

⁹ *Ibid.* at 8.

¹⁰ *Ibid.*

¹¹ See *supra* footnote 2, and *Gouge v. Three Top Investment Holdings*, (1995), 22 C.C.L.T. (2d) 281 (Ont. Gen. Div.).

¹² *Menow v. Honsberger*, (sub nom. *Jordan House v. Menow*, [1974] S.C.R. 239).

¹³ In particular, *Hague v. Billings*, *supra* footnote 2.

¹⁴ With regard to Mayfield's alleged affirmative duty to control, Hetherington J.A. tersely alluded to the fact that "it was foreseeable that if Mr. Pettie became intoxicated, he would drive a vehicle and cause injury to himself or to others using the highway." *Ibid.* at 10.

elaborate on the legal duties of commercial alcohol providers.¹⁵ All three Justices agreed that Stewart's appeal ought to be allowed, and that Mayfield was liable to the plaintiff in the degree of 10%. Mayfield appealed these findings to the Supreme Court.

2. *The Supreme Court Decision*

Major J.'s legal analysis in *Stewart* begins by acknowledging that the Supreme Court "[had] not previously considered a case involving the liability of a commercial host where the plaintiff was not the person who became inebriated in the defendant's establishment."¹⁶ It was recognized that *Stewart* raised issues of great importance.¹⁷ Major J.'s examination of these issues is sub-divided under three headings: Duty of Care, Standard of Care, and Causation. Although this is a conventional analytical framework in negligence actions, Major J.'s decision contains a number of unconventional analytical moves, particularly under the rubrics of Duty and Standard of Care.

Major J.'s duty analysis commences with what has become the Supreme Court's ritualized incantation in negligence cases: a declaration of faith in *Anns*.¹⁸ Once again we are told that the Supreme Court has adopted Lord Wilberforce's "modern approach" to duty questions. The familiar "two stage" test is trotted out, and a long list of Canadian applications¹⁹ recent and old is recited.²⁰ Disconcertingly, however, Major J.'s analysis then sets a new tack. Without pausing to explain either how or why the *Anns* approach to duty applies to the facts of *Stewart*, the Justice launches into a fresh paragraph on *Jordan House*, a case which predates *Anns* by three years, and *Kamloops* by ten.

Major J. was right to abandon *Anns-Kamloops* for the line of cases that began with *Jordan House*. Major J. was right for a reason which the Justice himself eventually mentions (oddly enough, in the Standard of Care section of his analysis). The *Jordan House* line of cases fits *Stewart* because it concerns the actionable non-feasance of a commercial provider of alcohol i.e. its failure to have taken positive steps to control an intoxicated patron's exposure to peril. Similarly, and as Major J. correctly stated, the liability of Mayfield, "if it is to be found, must be in their failure to take any affirmative action to prevent the reasonably foreseeable risk to Gillian Stewart."²¹

¹⁵ Kerans J.A. expressed doubt "that this [the *Pettie*] case offers any fruitful ground for any new clarification of the present state of the law." His judgment focused mainly on the trial judge's "muddles" concerning his jury charge on negligence, causation and remoteness. *Ibid* at 12.

¹⁶ *Supra* footnote 1 at 98.

¹⁷ Interestingly, Major J. did not consider Mayfield's duty of care to be one of the "main" issues raised by the case, at 97.

¹⁸ *Anns v. Borough of Merton*, [1977] 2 All E.R. 429 (H.L.).

¹⁹ E.g. *Neilson v. Kamloops (City)*, [1984] 2 S.C.R. 2.

²⁰ *Supra* footnote 1 at 98-99.

²¹ *Ibid.* at 102.

This is an important point, one that warrants a brief digression.

It is commonplace that the classic common law of liability in negligence recognized a distinction between actions (or omissions) which worsen the position of the plaintiff (misfeasance), and failures to take positive steps to improve the position of another (nonfeasance). The duty of care in the first instance was a consequence of foreseeable harm to a foreseeable plaintiff. The duty of care in the second instance, however, involved a crucial third element: some "special" legal relationship or "nexus" between plaintiff and defendant.²² Even if the logic of *Anns* tends to undermine the timeworn distinction between general and affirmative duties of care (an arguable proposition), the Supreme Court of Canada, as recently as 1988, has indicated that the distinction between misfeasance and nonfeasance still is part of Canadian negligence law.²³

The Supreme Court has also taken the position that there will be cases in which the "special relationship" category will need to be expanded.²⁴ *Jordan House* is an early and noteworthy example. In that case the Court recognized a special relationship, and affirmative duties of care, between commercial alcohol providers and intoxicated patrons. A central issue of *Stewart v. Pettie*, the resolution of which was only hindered by Major J.'s ritualised allusion to *Anns*, is whether the facts of this case support the *expansion* of these affirmative duties to the protection of third parties.

The principal source of confusion in the Supreme Court of Canada's decision in *Stewart v. Pettie* is Major J.'s needlessly complicated and self-contradictory discussion of the third party issue. In the context of his Duty of Care section, Major J. provided an incomplete analysis of Mayfield's affirmative duty of care. Having described the Court's findings in the 1974 *Jordan House* decision, the Justice was content to state that it was a "logical step" to extend the commercial host's duty from the intoxicated patron to those "who might reasonably be expected to come into contact with the patron, and to whom the patron may pose some risk."²⁵ When the intoxicated patron leaves the premises of the commercial host to drive home, the host's duty extends to users of the highway. A duty was owed Gillian Stewart by Mayfield because she was "a member of a class of persons who could be expected to be on the highway."²⁶

These findings, in themselves, are neither surprising nor unclear. The problem is that they were made outside their proper analytical framework. If Mayfield

²² Wilson J. used the term "nexus" in *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186 at 1195.

²³ In *Crocker*, Wilson J. cited Fleming's standard explanation of the philosophical basis of the distinction. Wilson J. further stated that the categories of special relationship might be expanded. Significantly, however, she did **not** state that the legal distinction between "negligent conduct" and "failures to take positive steps to protect others" was no longer good law. *Ibid.* at 1193.

²⁴ *Ibid.*

²⁵ *Supra* footnote 1 at 99.

²⁶ *Supra* at 100.

owed Gillian Stewart a legal duty to have controlled its intoxicated patron, the duty was not a result *only* of the fact that (applying stage one of *Anns*) Stewart ought to have been in Mayfield's "reasonable contemplation".²⁷ As we have established, there must also have been some "special" legal relationship or "nexus" supporting the affirmative obligation. Indeed, Major J. himself recognized this requirement. Confusingly, however, he chose to discuss it under the heading Standard of Care.²⁸ This unfortunate choice not only blurs the duty analysis, but also the important distinction between duty of care and its breach.

In the Standard of Care section of his judgment, Major J. underlined the traditional reluctance of the common law courts "to impose liability for a failure to take positive action."²⁹ The Justice reviewed the alcohol cases (*Jordan House, Sundance Resorts*, for example) in which the finding of "special relationship" has supported exceptions. Only then did the Justice broach the subject of whether Mayfield had been under a positive duty to control its intoxicated patron's ability to expose Stewart to peril. Having examined a line of third party liability cases, notably *Hague v. Billings* and *Sambell v. Hudago Enterprises*,³⁰ Major J. plausibly concluded that "the necessary 'special relationship' exists between vendors of alcohol and members of the motoring public."³¹ In the last of a series of unexpected analytical moves, however, Major J. concluded that the existence of the special relationship between Mayfield and Stewart did *not* permit "the imposition of positive obligation to act."³²

Here Major J. conflated two issues which, for the sake of analytical clarity, needed to be kept distinct: i) the legal relationship of plaintiff and defendant (the duty issue); and, ii) the *conduct* of the defendant (the negligence issue). Mayfield had served Pettie beyond the point of intoxication. This action generated foreseeable harm to users of the highway. Mayfield stood in a "special relationship" with users of the highway i.e. the plaintiff. It is clear then that Mayfield had in fact been under a positive legal duty to act. The only (and different) issue still unresolved was whether Mayfield had been negligent in its *failure* to act. By revisiting the duty issue at the standard of care stage of his analysis, Major J. managed to run these issues together.

The conceptual confusion in Major J.'s judgment appears to have arisen from two factors. First, regarding Mayfield's liability, *Stewart v. Pettie* was an affirmative duty case. By its nature this kind of case always raises the prospect of marrying the duty and negligence issues. Second, prior to its formal analysis of duty, the Court had already come to the conclusion that Mayfield had not breached the standard of care. Major J. then appears to have become stuck on

²⁷ *Ibid.* at 101.

²⁸ Ironically, Major J. warned against the danger of conflating the duty and standard of care analyses. *Ibid.* at 99.

²⁹ *Ibid.* at 103.

³⁰ *Supra* footnote 2.

³¹ *Supra* footnote 1 at 104.

³² *Ibid.*

the (apparent) logical problem of having found: 1) that Mayfield had been under a duty of affirmative conduct; and 2) that there had been no negligence. As plain language, the phrase "positive obligation to act" implies that a defendant either fulfilled his obligation or was liable.

This formulation of the question, however, is based on a fundamental misunderstanding of "positive obligation" as a legal principle. The duty of care, general or affirmative, merely establishes the possibility, the legal threshold, of liability. When a court finds duty, it finds that the defendant stood in a legal relationship with the plaintiff from which, in the presence of other factors, liability *might* flow. Although the Court seems to have lost sight of this point, it would have been analytically sound to have held that Mayfield had had a positive duty to act, but was not liable for having failed to act.

Stewart's negligence action against Mayfield was dismissed. Although the structure of Major J.'s judgment obscured this point, this action failed because the plaintiff did not demonstrate that Mayfield had been negligent. The Court found that on the facts of the case it was reasonable that Mayfield's employees had done nothing to prevent Pettie from driving home.³³ Major J. also clearly stated that Stewart's case would have failed on the issue of causation. The plaintiff had not adduced sufficient evidence that Mayfield's failure to act would have prevented her loss.³⁴

The single point that the *Stewart* decision fails clearly to resolve is whether the relationship between a vendor of alcohol, an intoxicated patron, and third parties within a reasonable scope of harm, created a legal duty of affirmative action. Instead of providing definitive guidance on this question, the Court settled for what amounts to tautology: vendors of alcohol bear positive duties to third parties, but only when they bear them positive duties.

Because the Court failed to maintain analytical distance between the duty and standard issues of the *Stewart* case, the general principles of the decision are ambiguous. Some conclusions on this score will have to be based not on what the Court actually said, but on what it meant to say. It appears that the Court meant for the *Stewart* decision to establish, or reinforce, three propositions: 1) that the commercial vendor of alcohol operates under a legal duty not to permit its patrons to be served beyond intoxication; 2) that the vendor has positive legal duties to those who are served beyond intoxication; and 3) that these duties extend to those who might foreseeably be injured by the intoxicated patron. Whether a particular commercial host's failure to act amounts to a negligent failure, or whether the negligent failure to act caused the plaintiff's loss, are the questions of fact on the evidence.

³³ It had been established at trial that Pettie was in "the charge" of two sober adults when he left the Stage West theatre. On the basis of this finding, Major J. ruled that "it was reasonable for Mayfield to assume that one of the two sober people [...] would either drive or find alternative transportation." *Ibid.* at 106.

³⁴ *Ibid.* at 108.

3. Conclusion

The Supreme Court's decision in *Stewart v. Pettie* is one of its most recent in a long line of decisions pertaining to the nature and analysis of the legal duty to take care.³⁵ This line of judgments has entrenched the most aggressively pro-plaintiff doctrinal position in the Commonwealth.³⁶ It is now exceedingly rare, almost unheard of in cases that reach the courts in common law provinces, for a plaintiff in a negligence action to lose on the duty issue.

While the highest courts of Britain and Australia have explicitly renounced *Anns* and the liability-friendly approach to duty that underscored it,³⁷ our Supreme Court has seized every opportunity to reaffirm Lord Wilberforce's 1977 speech. In the same period, the Court has firmly rejected every invitation to imitate the retrenchment of other appellate courts.³⁸ This bold, increasingly isolated, stance on the duty element of the negligence tort may, or may not, be desirable as a matter of public policy. That is a question too large in scope for a case comment. More germane here is the confused, legal reasoning, the judgment of Major J. in *Stewart v. Pettie* being but one example that has been employed to achieve this position.

At the crux of the problem is the degree to which the reflexive application of *Anns* has displaced what I would term the "classical" approach to the duty element of the negligence tort. The first premise of this approach, a premise not displaced by Lord Atkin's famous speech in *Donoghue v. Stevenson*, is that the duty of care concept is a sieve through which all negligence actions must pass. The second premise is that some actions will fail to pass through it.³⁹ The third premise of the classical approach is that there is a crucial distinction between actions that cause harm (misfeasance) and pure omissions (nonfeasance). This distinction emerged from a background of liberal ideological conviction in the notion that the citizen bears responsibility for the harmful exercise of will, but not (except in rare instances), for its non-exercise. In Canada this conviction

³⁵ *Supra* footnote 4.

³⁶ For more exhaustive analysis of this point, see R.W. Kostal, "Currents in the Counter-Reformation: Illegality and the Duty of Care in Negligence" (1995) 3 Tort L. Rev., 100.

³⁷ See David Howarth, "Negligence after *Murphy*: Time to Rethink" (1991) 50 Camb. L.R. 58-99; I.N. Duncan-Wallace, "Anns Beyond Repair" (1991) L.Q.R. 228-248. But see now the rapprochement with *Anns* as seen both the House of Lords and the Privy Council respectively in *Marc Rich & Co. AG v. Bishop Rock Marine Co. Ltd.* (1995) 3 All E.R. 307 and *Invercargill C.C. v. Hamlin*, judgment 12th February 1996 on appeal from New Zealand.

³⁸ For a recent example, see *Winnipeg Condominium*, *supra* footnote 2, La Forest J. at 11-12.

³⁹ These cases will fail for one (or some combination) of three basic reasons: i) because of the absence of case authority describing the defendant's conduct as having given rise to a legal duty of care; ii) because the defendant's conduct did not give rise to a foreseeable risk to a foreseeable plaintiff; iii) because there is no compelling reason of public policy that should cause judges to create a new category of legal duty.

would appear still to underpin much of the popular, if not the judicial, conception of moral and legal responsibility.

The Supreme Court's embrace of *Anns* has been accompanied by the steady erosion of all three main premises of the classical tradition. If recent duty decisions can be taken as a guide, the Court no longer operates on the assumption that the duty concept can be used to limit the scope of recovery in negligence. Moreover, the absence either of obvious doctrinal support or, more commonly, clearly established bases of public policy (policy, particularly, that should trump the traditional liberal theory of liability in tort), will not deter the Court from expansive findings on the duty issue.

These trends are not the product simply of the Supreme Court's enthusiasm for *Anns*, but of a blinkered reading of Lord Wilberforce's approach to the duty issue. It will be recalled that Lord Wilberforce contended that the duty question be analyzed in two stages: i) the relationship between plaintiff and defendant as a matter mainly of reasonable foresight of harm; ii) considerations (viz. public policy) which ought to "negative or limit" the scope of the duty.⁴⁰ In *Kamloops* the Court adopted this two-stage approach with only trivial amendment. In many subsequent cases (unlike *Stewart v. Pettie*), the Supreme Court has devoted considerable text to the analysis of the first stage of Lord Wilberforce's test.⁴¹ Only in the exceptional case, however, has the Court made more than scant reference to the second, duty limiting, stage of the analysis. This, unmistakably, is not a Court that is interested in why the scope of liability in negligence ought to be constrained at a preliminary, and "all or nothing", phase of litigation.

Stewart v. Pettie, unremarkable in its specific duty findings, exemplifies the woolliness of the Supreme Court's contemporary approach to this, once pivotal, element of the negligence tort. Too often the Court has been satisfied to treat *Anns* like a doctrinal magic wand, casting the spell of legal duty over all before it. Although Lord Wilberforce himself exhorted judges to give due consideration to the factors that might limit the scope of the duty of care in negligence, this entreaty has been either forgotten or ignored.

⁴⁰ *Anns v. Borough of Merton*, *supra* footnote 18 at 498.

⁴¹ Analysis which, almost invariably, has ended in a positive finding for the plaintiff.