

JUDICIAL ACTIVISM IN PRIVATE LAW

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"More importantly, at the end of the day, judicial policy must yield to legal principle".¹

"A focus on policy is not to diminish the importance of legal principle. It is vital that the courts attempt to articulate general legal principles to lend certainty to the law and to guide future applications. However, in areas of jurisprudence where changes have been occurring in response to policy considerations, the best route to enduring principle may well lie through policy."²

While private law is generally not subject to the Charter of Rights and Freedoms, the decision by the Supreme Court of Canada to consider policy issues when determining whether or not a duty of care in tort should exist has had important implications for the development of the law. Rather than simply focussing on legal precedent and principle in deciding cases, the Supreme Court has placed great emphasis on the policy implications of tort law judgments. Although broad policy issues must be considered by the Court in developing the common law, more narrow social, economic, or political considerations ought not to be. The Supreme Court must consider how far it wants to go into the area of policy even in the private law sphere.

Bien que généralement la Charte des droits et libertés ne s'applique pas au droit privé, la décision de la Cour suprême du Canada, lorsqu'elle déterminait si un devoir de prudence devait exister, de considérer des questions de politique a eu d'importantes implications dans le développement du droit. Au lieu de simplement se concentrer sur le principe et sur les précédents en disposant des affaires, la Cour suprême a accordé beaucoup d'importance aux implications politiques dans ses jugements en droit de la responsabilité délictuelle. Bien que la Cour doive prendre en considération les grandes questions de politique dans le développement de la common law, il ne devrait pas en être ainsi des questions plus étroites de nature sociale, économique ou proprement politique. La Cour suprême doit se demander jusqu'où elle veut aller dans le domaine de la politique même dans la sphère du droit privé.

I.	<i>Introduction</i>	216
II.	<i>Policy and Principle in Tort Law</i>	217
III.	<i>The Duty of Care: in Reality a One Stage Test?</i>	221
IV.	<i>Dobson v. Dobson : Duty of Mother to Child</i>	222

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¹ Binnie J., in *Jacobi v. Griffiths* (1999), 174 D.L.R. (4th) 71 at 89.

² McLachlin J., in *Bazley v. Curry* (1999), 174 D.L.R. (4th) 45 at 58.

V.	<i>The Pure Economic Loss Cases</i>	224
A.	<i>Hercules Management Ltd. v. Ernst & Young</i>	228
B.	<i>Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.</i>	231
VI.	<i>Tort Liability for Sexual Wrongdoing</i>	234
VII.	<i>Conclusion</i>	240

I. Introduction

In the age of the Canadian *Charter of Rights and Freedoms*, the concept of "judicial activism" has become somewhat of a controversial topic. It generally is raised by those who are opposed to what they see as an overly aggressive judiciary making decisions, "political" decisions, which in their opinion are best left to our elected legislators. By their nature, actions based on the *Charter* are frequently directed against legislatures and their laws.

To speak of judicial activism in private law, or judge made law areas, thus might seem bizarre. The common law is made by judges. It is the essence of judicial activism. How then can judges be anything other than judicial activists in formulating the private law?

In reviewing the contributions made to the area of private law and tort law, in particular by our Supreme Court of Canada, this writer has been absolutely struck by the magnitude of the changes which the Court has made to this area in a rather short period of time. There is little doubt that the Supreme Court of Canada has been the most bold, imaginative and adventuresome high court in the Common Law world. In terms of judicial activism, it has been very energetic indeed.

Have the steps which it has taken, however, been too dramatic, too radical? Has the Court moved too far away from a traditional mode of decision-making which carefully analyses precedent and legal principle and embraced too enthusiastically the notion that policy should guide the common law? Have changes to the common law in Canada been incremental or have they been too far-reaching?

This paper will look at this theme by reference to some of the recent Supreme Court of Canada decisions in tort law. As the judgments of the Court themselves indicate, the debate about the appropriate balance between the use of judicial precedent and legal principle on the one hand, and social and economic policy on the other, in the formulation of decisions by Canada's highest court, is an issue very much alive to our Justices. The author's own opinion is one that favours the use of judicial precedent and legal principle in the development of the common law, leaving matters of the social and economic consequences of the common law to our legislatures.

II. Policy and Principle in Tort Law

When the Supreme Court of Canada rendered its judgment in *R. W.D.S. v. Local 580 v. Dolphin Delivery Ltd.*,³ it became clear that private law areas not involving legislation or governmental connection would be immune from the scrutiny of the Canadian *Charter of Rights and Freedoms*.⁴ Despite the concession from the Court that the common law would be "interpreted in a manner which is consistent with *Charter* principles",⁵ it would be fair to say that the *Charter* has not played much of a role in tort law judgments. On the rare occasion in which it has been raised, the Court has not used *Charter* values to alter the common law. This is particularly evident in defamation law where the Court's strong commitment to protecting reputation has not been shaken by the *Charter*'s countervailing commitment to "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."⁶ In fact, if anything, the Court has been luke warm to the idea of *Charter* values informing tort law developments, particularly in libel law. In *Hill v. Church of Scientology of Toronto*,⁷ Cory J. cautioned against amending the common law to reflect *Charter* values, preferring instead to leave "far-reaching changes to the common law ...to the legislature".⁸

Shielded from the *Charter*, private law lawyers might therefore have thought that tort law would develop in Canada along traditional lines. New cases would be decided based primarily on the basis of judicial precedent and legal principle. Issues of social and economic policy, although obviously relevant to tort law, would not occupy centre stage. Tort law would develop according to its principles and precedents and if this resulted in serious implications for society it would be the legislatures' responsibility to take up these matters. Cory J.'s admonition that far-reaching changes in the common law should be left to the legislatures would assure an incremental, rather than radical, development of tort law.

This, however, has not been the case. What was unanticipated was the dramatic effect that Lord Wilberforce's duty of care formula articulated in *Anns v. Merton London Borough Council*⁹ would have on the development of Canadian negligence law. The Supreme Court of Canada's decision, first

³ (1986), 38 C.C.L.T. 184.

⁴ Pt. 1 of the *Constitution Act, 1982, being Sched. B of the Canada Act 1982, c. 11 (U.K.)*.

⁵ Per Cory J. in *Hill v. Church of Scientology* (1995), 126 D.L.R. (4th) 129 at 156. McIntyre J. stated this in *Dolphin Delivery* as well, affirming that although the *Charter* did not apply to private actions at common law "this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values in the Constitution", at 38 C.C.L.T. 214. Iacobucci J. expressed a similar sentiment in *R. v. Salituro* (1990), 68 C.C.C. (3d) 289 at 304-305.

⁶ Section 2 (b) of the *Charter*.

⁷ (1995), 126 D.L.R. (4th) 129.

⁸ *Ibid.* at 157.

⁹ [1978] A.C. 728 (H.L.).

articulated in *Kamloops v. City of Nielsen*,¹⁰ and reaffirmed in numerous subsequent cases,¹¹ to wholeheartedly embrace the two stage duty formula has given to the law of torts what the *Charter of Rights and Freedoms* gave to public law. Issues of social policy and instrumentalist goals would feature prominently in the development of tort law.

A brief historical digression is in order. Prior to *Donoghue v. Stevenson*¹² there was no generally recognized formula or principle which imposed upon one person a duty to take reasonable care not to injure another. Tort law duties depended more upon specific relationships than a general one, and tort and contract were seen as mutually exclusive. What Lord Atkin did in *Donoghue* was to articulate a formula which created a duty of care emanating from a general relationship, a relationship of proximity based upon foreseeability of harm. Harm meant very much physical harm, either to persons or property, resulting from positive acts of negligence. The fact that the misconduct occurred within the context of a contractual relationship in which the tortfeasor was a party would no longer be fatal to the tort claim,¹³ although the tort claim was not seen as an alternative to the contract one. The victim was outside of the contractual relationship, and tort was the victim's only recourse.

It was not envisioned by Lord Atkin that foreseeability of harm was a sufficient reason to impose a duty of care in all circumstances. The case itself concerned personal injury caused by negligent conduct. Legal principles and precedent were still expected to be used to control the undue extension of this new duty of care formula, although how this would be so was not explained.¹⁴ One would imagine that judicial precedent would be called upon to defeat undue extensions of negligence law. In addition, the concept of proximity itself was so undefined, that a conservative approach resisting dramatic extensions of negligence law could easily be sheltered therein.

There were in fact many judicially recognized restrictions to the negligence action. Pure economic losses resulting from negligent conduct, outside of contractual or fiduciary relationship, were not recoverable. A tort claim was not available where there was a contractual relationship between the parties.

¹⁰ [1984] 2 S.C.R. 2.

¹¹ Every Supreme Court of Canada negligence case since *City of Kamloops v. Nielsen* has affirmed the two stage approach. The list includes *Just v. British Columbia* (1989), 1 C.C.L.T. (2d) 1, *Manolacos v. Gohmann* (1989), 1 C.C.L.T. (2d) 233, *C.N.R. v. Norsk* (1992), 11 C.C.L.T. (2d) 1, *London Drugs v. Kuehne & Nagel* (1993), 97 D.L.R. (4th) 261, *Hall v. Hebert* (1993), 15 C.C.L.T. (2d) 93; *Ryan v. City of Victoria* (1999), 168 D.L.R. (4th) 513, *Dobson v. Dobson* (1997), 35 C.C.L.T. (2d) 233, *Hercules Management Ltd. v. Ernst & Young* (1997), 146 D.L.R. (4th) 577, and *Bow Valley Husky (Bermuda) Ltd. v. St. John Shipbuilding Ltd.* (1997), 40 C.C.L.T. (2d) 236.

¹² [1932] A.C. 562 (H.L.).

¹³ Thus ending the influence of *Winterbottom v. Wright* (1842), 152 E.R. 402 (Exch.).

¹⁴ This was in fact the fear of the dissenting Law Lords, that no obvious restrictions seemed to be in place. Lord Buckmaster worried that if the duty was applied in this case, why would it not apply to the construction of every article, and even every house. "If one step, why not fifty?"

Governments and certainly the Crown were generally immune from tort suit. Certain types of claims, such as for nervous shock, were restricted. Claims against professionals were generally available only to clients, and not to third parties. Vicarious liability for the illegal actions of employees was very rarely successful. In short, actions which are now available and frequently successful did not exist. What happened?

The barrier against recovery for pure economic losses resulting from negligent conduct came down in *Hedley Byrne v. Heller*.¹⁵ The more interesting decision, however, from the perspective of the extension of negligence law and the roles that foreseeability, precedent and policy would play in its development, is *Home Office v. Dorset Yacht Co.*¹⁶ As will be recalled, the case concerned the liability of the Home Office for property damage caused to the plaintiff by "borstal" trainees under its supervision. Counsel for the Home Office argued that even if damage was foreseeable in the circumstances both precedent and policy were against the imposition of a duty of care upon the public authority. Counsel for the plaintiffs, on the other hand, argued that once a relationship of proximity based upon foreseeability is found to have existed between the parties there is a "presumption that a duty of care is owed in the particular case", a presumption which must be rebutted by those arguing against its imposition. Lord Reid accepted the plaintiffs' submission and stated that "the time has come when we can and should say that [Lord Atkin's passage in *Donoghue v. Stevenson*] ought to apply unless there is some justification or valid explanation for its exclusion".¹⁷ The presumptive duty or *prima facie* duty approach was thereby born.¹⁸

Viscount Dilhorne dissented and rejected this approach. According to his judgment, the principle of *Donoghue v. Stevenson* created no presumptive duty. More interesting was this following statement:

No doubt very powerful arguments can be advanced that there should be such a duty. It can be argued that it is wrong that those who suffer loss or damage at the hands of those who have escaped from custody as a result of the negligence on the part of the custodians should have no redress save against the persons who inflicted the loss or damage who are unlikely to be able to pay; that they should not have to bear the loss themselves, whereas, if there is such a duty, liability might fall on the Home Office and the burden on the general body of taxpayers.

However this may be, we are concerned not with what the law should be but with what it is. The absence of authority shows that no such duty now exists. If there should be one, that is, in my view, a matter for the legislatures and not for the courts.¹⁹

¹⁵ [1964] A.C. 465 (H.L.).

¹⁶ [1970] A.C. 1004 (H.L.).

¹⁷ *Ibid.* 1027.

¹⁸ Lord Pearson also stated that the case did come within the *Donoghue v. Stevenson* principle "unless there is some sufficient reason for not applying the principle to it", at *Ibid.* 1054.

¹⁹ *Ibid.* 1045.

The two sides of the debate were put clearly. Should tort law develop incrementally with due regard to precedent and legal principles, or should courts be more activist and consider social policy objectives resulting in more radical change to tort law?

Lord Wilberforce affirmed the presumptive duty approach in *Anns v. London Borough Council*²⁰ and the “two stage test” of duty was born. Lord Wilberforce stated:

...the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise...

There are two important points in Lord Wilberforce's declaration. The first is the acceptance of the view that *all* instances of damage caused by negligent conduct are *prima facie* actionable. One can legitimately take from this that historical barriers to recovery, for example, with respect to economic losses, actions against public authorities, no longer existed merely as a matter of judicial policy or precedent.²¹ The approach articulated by Lord Diplock in *Home Office v. Dorset Yacht* that the common law develops by analysing previous decisions and comparing their elements with the elements of the case before the court (the “incremental” approach) was thereby implicitly rejected.²²

The second point is that policy considerations should be overtly considered in tort cases as legitimate legal arguments to negate, reduce or limit the presumptive duty. This ended another debate, that is the role that principles as opposed to politics should properly have in the formulating of tort judgments. One might usefully refer for example to the interesting judgments in the nervous shock case of *McLoughlin v. O'Brian*²³ as illustrative of this debate. In deciding where to draw the line for recovery in nervous shock cases, Lord Bridge and Lord Wilberforce considered the various policy considerations involved in this determination; matters such as fairness to defendants, uncertainty in the law, proliferation of claims, difficulty in adjudication, and costs of insurance. Lord

²⁰ *Supra* note 9 at 751.

²¹ This is even more clear when one considers that *Anns* was dealing with pure economic loss and public tort liability.

²² Lord Diplock was critical of the plaintiff's argument in *Home Office* which treated Lord Atkin's neighbour principle as a universal formula. Lord Diplock considered this as a “manifestly false” “misuse” of the principle. This is however the approach of Lord Wilberforce in *Anns*.

²³ [1982] 2 All E.R. 298.

Scarman, on the other hand, rejected this type of judicial decision making, stating that:

...the objective of the judges is the formulation of principle. And, if principle inexorably requires a decision which entails a degree of policy risk, the court's function is to adjudicate according to principle, leaving policy curtailment to the judgment of Parliament. Here lies the true role of the two law-making institutions in our constitution. By concentrating on principle the judges can keep the common law alive, flexible and consistent, and can keep the legal system clear of policy problems which neither they, nor the forensic process which it is their duty to operate, are equipped to resolve. *If principle leads to results which are thought to be socially unacceptable, Parliament can legislate to draw a line or map out a new path.*²⁴

The importance of *Anns* is that it rejected the Lord Scarman approach. Policy considerations will be explicitly considered in the duty formulation to curtail a presumptive duty where courts, not legislatures, think that the results of liability, or no liability, would be socially unacceptable.

III. *The Duty of Care: in Reality a One Stage Test?*

Although, as noted above, the Supreme Court of Canada has consistently affirmed the *Anns v. Merton* two stage test for the establishment of a duty of care, in actual fact courts at all levels have employed only a one stage test. Whether a duty of care should exist in any particular case inevitably comes down to whether or not there are any policy considerations which ought to negate or limit a presumed duty. This is because the foreseeability of the plaintiff as a potential victim of harm from negligent conduct is easily established. There have been no Supreme Court of Canada cases, or in fact any reported recent cases from any court, where a plaintiff has failed on the foreseeability test. Injured plaintiffs, even those whose damages are not physical injuries but financial losses, are invariably regarded as having been foreseeable. One must go back in time to *pre-Anns* jurisprudence to find unforeseeable plaintiffs, the most famous ones being Helen Palsgraf²⁵ and Jennie Bourhill.²⁶ Thus if plaintiffs are always foreseeable, there is always a presumptive duty of care, and the only real issue in negligence actions in so far as the existence of a duty of care is concerned is policy.

In considering policy as the test for duty, one must distinguish between what I would term judicial policies or legal principles on the one hand and social or economic policy considerations on the other. The common law is of course at its essence about precedent and legal principles. Whether a court should recognize a duty in tort in any particular case always depends upon precedent and judicial principles. By principles I refer to broad brush issues, questions which relate to such matters as the purposes of tort, the respective boundaries between tort, contract, and trusts, and the appropriate limits of each. Questions

²⁴ *Ibid.*

²⁵ *Palsgraf v. Long Island Railway Co.* (1928), 248 N.Y. 339, 162 N.E. 99.

²⁶ *Hay (or Bourhill) v. Young*, [1943] A.C. 92 (H.L.).

such as should the common law recognize a positive duty to rescue or assist others?, should a tort action be available to parties who have concurrent contractual remedies?, should the political decisions of governmental authorities be subject to private rights of action?, or is the foetus a legal person for the purposes of a tort claim?, raise fundamental issues of judicial policy and legal principle. These are important issues of principle, and are entirely within the competence and the mandate of the judiciary. It is the responsibility of judges to determine these questions.

The social and economic consequences, on the other hand, which will flow from the application of precedent and legal principles to disputes before the Court in particular cases also raise matters of policy, but in a much narrower sense. These relate to things such as the potential economic consequences of judicial decisions, or their social implications. Questions such as what will be the effect of liability in this case on the insurance premiums of this class of defendants?, will the decision affect the availability of insurance?, will liability in this instance over-deter a useful activity?, or will a duty lead to a proliferation of claims?, deal with matters of social or economic concerns. These are important issues, but whether these are the types of issues which should concern courts and dictate the existence of a duty of care in any particular case in stage two of the duty formula is the question which I am presently raising. It is in fact my submission that they should not. If judicial policy, in the broader sense, which includes legal principle and precedent, leads either to the recognition of a duty of care, or to its denial, courts should follow and apply that principle. And as Lord Scarman stated in *McLoughlin v. O'Brian*, "if principle leads to results which are thought to be socially unacceptable, Parliament can legislate to draw a line or map out a new path".²⁷

The Supreme Court of Canada's enthusiastic embracement of the *Anns* test has thus given to Canadian tort law what the *Charter* has given to public law. The Court regularly considers policy - in both senses of that word as noted above - in arriving at tort decisions. Judicial policies as well as the social consequences of liability have prominently featured in leading Supreme Court of Canada judgments, although, as the two quotes at the beginning of this paper indicate, there is a debate within the Court as to the appropriate balancing of policy and legal principle. This has had a profound effect on tort law, not only in negligence areas but in general, even where the negligence duty is not in issue. The following judgments illustrate this point.

IV. *Dobson v. Dobson : Duty of Mother to Child*

In *Dobson (Litigation Guardian of) v. Dobson*,²⁸ a child disabled due to prenatal injuries caused by his pregnant mother's negligent driving sued her. The Supreme Court of Canada had many years before recognized the right of a child born with disabilities as a result of prenatal injuries to sue the party whose

²⁷ *Supra* note 24.

²⁸ (1999), 45 C.C.L.T. (2d) 217 (S.C.C.).

negligence caused the injuries.²⁹ As quoted by Cory J. in *Dobson*, Lamont J.'s rationale in *Montreal Tramways Co. v. Leveille* for affording the child a right of action was that it is "but natural justice that a child, if born alive and viable, should be allowed to maintain an action in court for injuries wrongfully committed upon its person while in the womb of its mother".. But what if the person who wrongfully injured it was its mother?

Cory J., writing for the majority, applied the two stage duty test discussed above. Foreseeability by a pregnant woman that her negligent acts could injure her foetus and result in post-natal disabilities was accepted virtually without question.³⁰ Having determined that there was a *prima facie* duty, the majority of the Court relied on policy arguments to negate it. These policy concerns related to the personal autonomy of the pregnant woman in terms of her right to make whatever life-style choices she chose without regard to her potential liability to her future child, as well as the difficulties involved in developing a reasonable pregnant woman standard of care, on the one side, balanced by the desire to use insurance funds to compensate a disabled child, on the other. The majority came down on the side of the mother, the dissent on the side of the child.

The *Dobson* case is an excellent example of the difficulty of the debate raised in this paper. Was the decision of the Supreme Court to provide an immunity from suit to mothers for actions brought against them by their children in the circumstances of the case consistent with judicial precedents and legal principle, or did social policy trump legal principle?

Although the *Dobson* case required the Court to break new ground no matter what it decided, since the issue before it was a novel one, it is my assessment that in several respects judicial precedents and legal principles were more supportive of and consistent with the dissenting approach than with the majority's.³¹

These precedents and principles include the following considerations. First, the common law already recognizes the liability of negligent parties to children disabled as a result of prenatal accidents. Thus, the extension to mothers can be seen as a logical and incremental extension of these precedents.

²⁹ *Montreal Tramways Co. v. Leveille*, [1933] S.C.R. 456.

³⁰ This is of course illustrative of the point that plaintiffs never fail on foreseeability. Cory J. did accept for this purpose the idea that a foetus is a legal entity separate from its mother, although it would seem that this was unnecessary to this finding at any event. For one thing, whether a foetus is a separate "legal" entity or not, all would agree that it is a physical entity. More significantly, the presumptive duty in this case was not one owed to a foetus but to a disabled child, who certainly is a foreseeable and legal entity separate from its mother.

³¹ This is clearly not the majority's opinion. Cory J. expressed this most forcefully: "There is as well a need for judicial restraint in the development of the law as it pertains to sensitive and far-reaching issues of social policy. The imposition of a legal duty of care upon a pregnant woman towards her foetus or subsequently born child cannot be characterized as the simple application of existing tort rules to meet the requirements of a specific case. Rather, it constitutes a severe intrusion into the lives of pregnant women with potentially damaging effects on the family unit", at 45 C.C.L.T. 250.

Second, the common law also recognizes the rights of children to sue their parents, including their mothers, for injuries caused to them by post-natal negligent acts, for example, negligent driving. Liability in these cases would also raise, although granted not to the same degree, some of the difficult social policy implications for mothers identified by the majority.³² Third, the common law, as well as legislation, is generally opposed to granting immunities based on the status of individuals.³³ One can, for example, regard the elimination of the immunity from suit which spouses had as illustrative of this proposition. This was an immunity which was based upon the perceived negative social implications for the family unit if spouses could sue each other. Applying these same principles and precedents to actions brought by children against mothers for pre-natal negligence would have been an extension of the law, but one consistent with it.

Providing a blanket immunity to mothers for their pre-natal acts of negligence which injured their children was in my opinion the more radical step for the Court from the perspective of legal principle and judicial precedent. It was based on the Court's assessment that a duty of care imposed upon pregnant women would have serious social implications for them. This may be so, but it is legitimate to ask whether in this case it would not have been better left to the legislature to intervene to "draw the line" by providing the immunity.³⁴ This has been done for example in other areas, where applications of legal principles have resulted in negative social consequences.³⁵ It is also important to ask what the underlying legal principle coming out of *Dobson* is? Is it a decision based on the unique position of pregnant mothers or does it entail a wider legal principle, and if so, what is that wider legal principle? It will be interesting to see how the Supreme Court and other courts interpret the *Dobson* judgment and its *ratio* for application to other cases.

V. *The Pure Economic Loss Cases*

When the House of Lords accepted the proposition that a person who obtains misleading information upon which he relies to his economic detriment could sue the provider of that information in tort, it opened up a vast new territory in

³² Matters of life style choices, and reasonable parent standards, are in issue in these cases, perhaps not to the same degree, but certainly to some degree. For example, issues which confront single parents, working parents, or parents who drive cars in terms of the effect that their choices have on the safety of their children arise constantly.

³³ This was a point raised by McLachlin J. in *Bazley v. Curry* (1999), 174 D.L.R. (4th) 45 (S.C.C.), in relation to the non-profit status of the defendant as a factor in holding it vicariously liable for sexual assaults committed by its employees. See discussion below.

³⁴ Let us recall that there are serious social implications involved in not only a finding of liability, but in establishing an immunity. Children disabled by the negligence of their mothers in a prenatal incident are deprived of compensation from insurance funds designed specifically to assist automobile accident victims.

³⁵ One can think of legislated immunities for municipalities, or legislated caps on damages.

which the law of tort could operate.³⁶ Recovery for purely economic losses has received considerable attention from the Supreme Court of Canada, and the case law which the Court has developed is its most significant legacy.

The consequences of *Hedley Byrne* have been far-reaching and have upset several traditional apple-carts. This area is best illustrative of the dramatic demise of long established judicial policies and precedents. Contract and tort actions are no longer mutually exclusive;³⁷ a lawyer's duty, which for over one hundred years was based in contract and owed only to the client,³⁸ is now owed to third parties in tort;³⁹ builders of poor quality structures may owe a duty in tort to subsequent purchasers and users of these structures for the economic costs of repair;⁴⁰ third parties who are financially affected by negligence which damages the property of others can recover;⁴¹ and individuals can sue their governments when the latter negligently carry out their statutory functions.⁴² These are remarkable and rapid developments, each of which can form the subject of an entire paper and discussion.

One may also see in the pure economic loss judgments the themes which I have been attempting to develop in this paper. First has been the Supreme Court's extensive reliance on the two stage test for the establishment of a duty of care. Second there has been the inevitability of the establishment of foreseeability between the parties and hence the existence of a presumptive duty of care. Third there has been consideration of policy, occasionally in the broad sense of judicial policy, but more frequently in the narrow sense of social and economic policy, to ultimately resolve the duty issue.

There are important legal issues raised by the pure economic loss disputes which transcend the more narrow issues of what the social or economic implications of liability (or no liability) may be in any particular case. The development of these principles are what should be of primary concern to the Supreme Court of Canada in this area. In light of historical precedents and judicial policies which severely restricted tort law in the area of pure economic losses, it is incumbent upon the Supreme Court to articulate why these precedents ought no longer to be followed and why tort law ought now to be used aggressively to resolve economic loss dispute cases in the same manner in which tort has been utilized to provide compensation to accident victims suffering personal injury or property damage.

³⁶ *Hedley Byrne v. Heller*, [1964] A.C. 465.

³⁷ *Central & Eastern Trust Co. v. Rafuse* (1986), 37 C.C.L.T. 117 (S.C.C.); *BG Checo v. BC Hydro* (1993), 14 C.C.L.T. (2d) 233 (S.C.C.).

³⁸ *Robertson v. Fleming* (1861), 4 Macq. 167.

³⁹ *Whittingham v. Crease* (1977), 88 D.L.R. (3d) 353 (B.C.); *Ross v. Caunters*, [1980] Ch. 297; *White v. Jones*, [1995] 1 All E.R. 691 (H.L.).

⁴⁰ *Winnipeg Condominium v. Bird Construction Ltd.* (1995), 23 C.C.L.T. (2d) 1 (S.C.C.).

⁴¹ *C.N.R. v. The Norsk* (1992), 11 C.C.L.T. (2d) 1 (S.C.C.).

⁴² *City of Kamloops v. Nielsen*, [1984] *supra* note 2; *Just v. British Columbia* (1989), 1 C.C.L.T. (2d) 10 (S.C.C.).

Broad legal principles are raised in the economic loss cases. The Supreme Court, for example, has adopted the position that a tort remedy ought to be available to a party even where there is an identical, concurrent contractual remedy.⁴³ Why should this be so? Tort remedies have been made available to parties who are in commercial or business relationships where their risks of loss were anticipated and were (or could have been) allocated contractually.⁴⁴ Is this a necessary, desirable or efficient use of tort? Tort remedies have been made available to purchasers of defective and dangerous structures to repair these structures, even before damage to persons or property has occurred and notwithstanding contractual terms which may already have allocated the responsibility for the repair of these structures.⁴⁵ In view of the fact that only twenty-five years earlier the Supreme Court of Canada denied an essentially similar type of claim dealing with the repair costs of a defective and dangerous chattel,⁴⁶ what now justified this departure from judicial precedent?

One must credit the Supreme Court of Canada for its boldness and willingness to take up these matters and to chart new paths for Canadian tort law. If there is any criticism to be made, it is that these fundamental policy issues relating to the role of tort, its interaction with other areas of private law, and the need for its active intervention in the types of disputes raised by pure economic loss cases, have not been more fully articulated.⁴⁷

One might respond to these type of fundamental issues which underline the pure economic loss cases by asserting that if negligent behaviour is involved, as defined by foreseeability of harm and unreasonable conduct, the principle of corrective justice requires the wrongdoer to restore the victim to its pre-accident position. Those who assert this view would argue that this should be so even if other remedies are available to the victim, for example in contract, or other remedies could have been available to the victim had there been more appropriate planning. Thus, even though contractual arrangements or insurance might provide a more efficient and economical solution to the victim's losses, the argument would be that the tort principle of corrective justice should afford the victim a remedy. One could argue that the same reasoning and goals which

⁴³ *Supra* note 37.

⁴⁴ *Supra* note 41.

⁴⁵ *Supra* note 40.

⁴⁶ *Rivtow Marine Ltd. v. Washington Iron Works*, [1973] 40 D.L.R. (3d) 530 (S.C.C.).

⁴⁷ Which is not to say that the Court has ignored these fundamental policy issues in these cases. For example, the need to encourage the repair of a defective and dangerous structure was a policy consideration used to justify the decision in *Winnipeg Condominium*. As well, implicit in these judgments are the values of corrective justice and compensation which might justify the extension of tort into the commercial area notwithstanding the qualitative differences between personal injury and economic losses and the differential ability of the parties to allocate their own losses without the necessity of tort intervention. My comment is that these are the important policy issues at stake in these cases which are the legitimate pre-occupation of the Supreme Court.

apply to tort cases involving personal injury, death, or damaged property, that is, justice, deterrence, education, compensation and so on, would equally apply to the economic loss cases.

A different response is one that has been well articulated by Professor Feldthusen in his numerous writings on this topic.⁴⁸ His analysis leads to the conclusion that economic losses are qualitatively different than personal injuries or damages to property, and that accordingly tort law's role in adjusting these losses should be different. The objectives of justice, deterrence, safety, and compensation which feature so dominantly in the former cases are not, according to this view, important in the economic loss cases. What is critical in the pure economic loss cases is the efficient and economic allocation of losses which occur in commercial and business disputes. This allocation frequently can be done more sensibly by contract or insurance, and if this is the case tort should be ousted.

The tendency for the Supreme Court of Canada in the pure economic loss area has been to accept the legitimate role of tort law in dealing with these types of disputes, to acknowledge the existence of a presumptive duty of care based on foreseeability but to utilize policy concerns relating to the social, administrative or economic implications of a decision in favour of the establishment of a tort duty to limit or negate a duty on a case by case basis. The policy concern has invariably been the spectre of "indeterminate liability" if a duty were to be recognized. Where indeterminate liability has not been seen to be a problem because, for example, of the unique nature of the plaintiff and its losses,⁴⁹ the legitimacy of the tort claim has been accepted and the duty of care recognized.

The questions of what exactly courts mean by "indeterminate liability" and why "indeterminate liability" is a problem have never been fully explored. The assumption is that recognizing a duty in some types of cases may result in "too much" liability⁵⁰ for the defendant. Whether this would actually be so if a duty were recognized in a specific case, and why this would necessarily be such a bad thing, are questions generally never fully addressed. Relating this question to the theme of this paper, i.e. that the social and economic implications of judgments arrived at by the application of precedents and judicial principles ought not to preoccupy the attention of courts, leads me to the following conclusion. The spectre of indeterminate liability ought not to trump judicial precedent and legal principle. If the principles of the common law justify the imposition of a duty of care in a specific type of case, the duty should be imposed, notwithstanding the spectre of indeterminate liability. Legislatures and regulators can concern themselves over indeterminate liability.

⁴⁸ Primarily in his book *Economic Negligence*, 3rd ed. (Carswell: Toronto, 1994), but as well in numerous articles.

⁴⁹ As in *C.N.R. v. The Norks*, *supra* note 41.

⁵⁰ This generally is taken to mean that the defendant will be liable to too many claimants, for too great a period of time, and for too much money.

Let me examine two leading pure economic loss cases to illustrate these points.

A. *Hercules Management Ltd. v. Ernst & Young*⁵¹

Disappointed shareholders sued a firm of accountants. They alleged that they suffered financial losses as a result of their bad investments and reduced prices of shares which they owned. According to the plaintiffs, this consequence was brought about by the negligence of the accountants in auditing the corporation's financial statements. In other words, they relied on the misleading audits in making their decisions to invest or hold shares in the corporation.

The Supreme Court of Canada applied the two stage duty approach to resolve the preliminary issue - was there a duty of care owed in tort by the auditors to the shareholders with respect to the negligent audit?

The first stage is that of proximity, as defined by reasonable foreseeability of harm. In an effort to explain the nature of this concept, La Forest J. noted that it is a test which is "intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs".⁵² In other words, the plaintiff must be within the foreseeable risk of harm created by the defendant's negligence. Adapting this test to the circumstances of this case, La Forest J. explained that proximity exists if it was reasonably foreseeable to the auditors that the investors would rely on the representation, i.e. the audit, and if the investors' reliance would be reasonable. On the facts of this case, La Forest J. concluded that based on this test the plaintiffs were owed a *prima facie* duty of care since they were reasonably foreseeable and their reliance was reasonable.⁵³

A few comments on this test are in order. First, the test of proximity, as defined in the preceding paragraph, is the "special relationship" formula which was prior to the decision in *Hercules Management* the determinative test for a duty of care in negligent statement cases. If there was a special relationship between the parties, based on foreseeable and reasonable reliance, a duty of care existed; not merely a "presumptive" duty. That is, before *Hercules Management*, courts had employed a one stage test for the existence of a duty, that of a special relationship. This was intended to take care of the policy concern of indeterminate

⁵¹ *Supra* note 11.

⁵² *Ibid* at 589.

⁵³ As I will discuss, the Court held that although the reliance was reasonable and foreseeable, there was no liability because the investors used the financial statements for a purpose for which they were not intended nor produced. If the first stage of the test, that of proximity, is ever to have any practical application, this might have been a good time for the Court to have used it. In my opinion, a finding that it was neither foreseeable nor reasonable for investors to base investment decisions on financial statements which were produced not for the benefit of their investment decisions but for an entirely different purpose would have been very defensible.

liability, which in *Hercules Management* the Supreme Court moved to the second stage of the duty issue, only after the special relationship has been established.

Second, the requirement that the reliance be reasonable, as well as reasonably foreseeable, has always struck me as a curious appendage. One might ordinarily assume that if reliance is reasonably foreseeable, it is precisely because reliance in the circumstances would be reasonable. It would indeed be a odd event where one could reasonably foresee that a person would unreasonably rely on advice, and in the unlikely event that this did happen, one would be hard pressed to justify why the court should impose any duty of care on the defendant in favour of this plaintiff in any event. This condition that the reliance be reasonable becomes even more suspect when one realizes that contributory negligence is an accepted part of a negligent statement action, which creates the bizarre result that a plaintiff's reliance can be both reasonable and unreasonable at the same time for different parts of the action.

The test of proximity was satisfied in *Hercules Management* and La Forest J. accordingly moved on to the second stage of the test, that of policy. La Forest J. noted that the fundamental policy concern in negligent statement cases is that of indeterminate liability. Simply put, the auditor could be held liable for an indeterminate amount of money, for an indeterminate period of time, and to an indeterminate class of claimants if everyone who could reasonably have been foreseen as persons reasonably relying on the advice could successfully sue. According to La Forest J., this spectre of indeterminate liability would result in "socially undesirable consequences", namely, potentially "limitless" liability,⁵⁴ resulting in increased insurance costs to auditors, and costs expended to hire lawyers to draft exclusion clauses. In addition, opportunities for auditors to engage in other productive activities would be lost due to time spent to prepare for litigation, which would result in a reduction in accounting services, as well as other negative impacts.⁵⁵ Even if the auditor's actual liability would not be limitless since a successful defendant would still have to prove negligence, actual reliance and damages resulting from that reliance in order to succeed, La Forest J. concluded that allowing a duty to arise as "a matter of course" would encourage "indeterminate litigation".⁵⁶ La Forest J. conceded that where

⁵⁴ La Forest J. saw this as a something "problematic in and of itself", although it is not clear why. Further, to say that the liability would be "limitless" is to concede that the first stage of the test, that of "reasonably foreseeable and reasonable reliance" is not much of a limiting test at all. Is the class of persons who would reasonably and foreseeably rely on these audited statements for the purpose of their investment decisions truly limitless?

⁵⁵ La Forest J. referred to articles by Cheffins, "Auditors' Liability in the House of Lords: A Signal Canadian Courts Should Follow" (1991), 18 C.B.L.J. 118 and Ivankovitch, "Accountants and Third Party Liability - Back to the Future" (1991), Ottawa L. Rev. 505, where these negative impacts were raised.

⁵⁶ I must admit to having some difficulty with this point as well. If plaintiffs would have difficulty proving negligence or reliance, even if they could prove duty, why would they sue? It seems to me that if an action is not likely to be successful, for whatever reason, litigation would not be a desirable option.

“indeterminate liability” is not a problem in a case, there will be no policy concerns to negate the duty of care and it will be imposed. Such cases arise for example where the auditors knew the specific person or class who would rely on the statement and where the statement was used for the purpose for which it was prepared.

Applying this analysis to the facts of *Hercules Management*, La Forest J. concluded that the auditors reasonably foresaw that the shareholders would rely on the statement for their investment decision, that this reliance was indeed reasonable, and that the auditors knew “the very identity of all the appellant shareholders who claim to have relied on the audited financial statements”. However, La Forest J. concluded that the audits had not been used for the specific purpose for which they were prepared.⁵⁷ This being the case, allowing a duty of care to be imposed would be to expose the auditors to indeterminate liability and hence the presumptive duty was negated.

The *Hercules Management* mode of analysis employed by La Forest J. well illustrates the principle points I make in this paper. The judgment did not analyse judicial precedent and legal principles developed in relation to recovery for pure economic losses, but focussed more on the more narrow social and financial policy implications of liability for auditors. There are precedents which are very close to the facts of *Hercules Management*.⁵⁸ The Supreme Court’s concerns with the potentially undesirable policy consequences of holding auditors liable raise the question as to whether this is the type of analysis courts should be employing or can even employ with confidence. The potential effect on insurance premiums, the time and costs which auditors would spend in either preparing for litigation or taking steps to avoid it, and the other socially undesirable consequences of holding auditors liable are in my respectful opinion speculative matters which, in the absence of convincing empirical or other evidence, are unproven, and maybe even unprovable. If the principle of the common law leads to undesirable social consequences for auditors, this might best be a matter taken up by auditors and legislators.

There are indeed important legal principles relating to the role of tort law and the need for it to intervene in this type of economic loss dispute. The question of why tort law should intervene at all in resolving a dispute between disappointed investors and negligent auditors, even if indeterminate liability is not a problem, was not addressed by the Court. In the Court’s written judgment is the implicit, if not the explicit, acceptance of the view that the protection of

⁵⁷ The purpose of the audit was determined to be to allow shareholders to evaluate and oversee the management of the company, and not to allow them to make personal investment decisions.

⁵⁸ In *Haig v. Bamford* (1976), 72 D.L.R. (3d) 68 (S.C.C.), audited financial statements were prepared for a specific loan of \$20,000 from a government development company. The auditor knew that this statement would be shown to other potential investors as well. They were liable to this class, even though they did not know the identity of the investors. More recent is *Kripps v. Touch Ross* (1997), 35 C.C.L.T. (2d) 60 (B.C.C.A.). Auditors were held liable to debenture holders for negligence in producing financial statements. Debenture holders relied on these statements in making investment decisions.

the economic interests of disappointed investors are worthy of the same type of legal response as is the protection of the bodily security and property safety interests of persons. Implicit in *Hercules Management* is the view that justice requires that anyone who suffers economic detriment as a result of the negligence of another person be compensated for it, subject only to practical policy considerations which might limit the compensation. It is acceptance of the view that negligence law is not only about preventing accidents, protecting safety concerns, and compensating the injured but also about allocating business losses.⁵⁹ These are important conclusions about the purposes and mandate of tort law which are worthy of full exploration and refinement.

B. *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*⁶⁰

The plaintiffs had leased the use of an oil rig from its owner. The oil rig had been constructed by Saint John Shipbuilding under a contract with an offshore company incorporated for this purpose. The lease gave the plaintiffs the exclusive use of the rig and required the plaintiffs to pay for the rig even if it was out of service. The rig was damaged by a fire. This was caused by a heat trace system installed on the rig to prevent freezing of pipes. The heat trace system was supplied by Raychem. It used a Thermo-clad insulating wrap. A ground fault circuit breaker ought to have been installed with this system to cut off power in case of an electrical fire. A suitable system had not been installed.

At trial, responsibility for the fire was attributed to several parties, although for the purposes of this discussion the issue is the liability of the manufacturer of the rig and the supplier of the heat tracing system to the users/lessees of the rig. There was no contractual nexus between these parties and the duty, if owed, was a tort duty. Further if there was a tort duty, it was a duty to warn the owner of the rig of the need to install an adequate ground fault circuit breaker and of the risk of fire presented by an insulator which was flammable in the event of an electrical fire occurring.

The Supreme Court of Canada held that the defendants did owe a duty to warn the owner of the rig of the danger of fire.⁶¹ The more interesting issue, however, concerned the liability of the defendants to the users of the rig. In this respect there are two important differences between their position and that of the rig's owner. First, their loss was purely economic. They had to continue to pay for and service a rig which they could not use, but none of their own property

⁵⁹ Professor Feldthusen raises these issues in his writings and comes to the same conclusion about the Court's approach. The Court's determination "to force-fit commercial tort into a mould designed to deal with personal injury" is one with which Feldthusen does not agree.

⁶⁰ *Supra* note 11.

⁶¹ There were several issues involved in this finding including the terms of the contract and their effect on this tort duty, the learned intermediary defence raised by the supplier of the system, and cause. These were all resolved in the plaintiff's favour.

was damaged. Second, they were, at least theoretically, not involved with the construction of the rig and the decisions taken with respect to the installation of appropriate ground fault circuit breakers and the use of inflammable insulation.

Applying the two stage test for duty, McLachlin J. held that there was a relationship of proximity between the defendants and the plaintiffs to support a presumptive duty. That is, the defendants' duty to warn the owner of the rig concerning the inflammability of the insulation was extended for the protection of the plaintiff users since they were within the foreseeable risk of harm.⁶²

Having established the presumptive duty, McLachlin J. then moved on to the consideration of policy. The policy concern was one of indeterminate liability. This was explained as follows by McLachlin J.:

If the defendants owed a duty to warn the plaintiffs, it is difficult to see why they would not owe a similar duty to a host of other persons who would foreseeably lose money if the rig was shut down as a result of being damaged. Other investors in the project are the most obvious persons who would also be owed a duty, although the list could arguably be extended to additional classes of persons. What has been referred to as the ripple effect is present in this case. A number of other investment companies which contracted with HOOL are making claims against it, as has BVI.⁶³

As stated above, characterizing the presumptive duty as a duty to warn the plaintiffs creates confusion, especially as it relates to the problem of indeterminate liability. It is difficult to understand why the manufacturers of a product would owe a duty to warn anyone other than the owner and builder of the product about its hazards, especially if these hazards relate to safety precautions which the owner, and only the owner, should be taking. If, as I suggest, the duty is re-characterized as a duty to warn only the owners and builder of the rig so that a safe rig would be constructed, the issue as to whom *the benefits of this duty* should extend becomes clearer. Should this duty extend to the plaintiffs/users of the rig?

Phrased in this way, and using the Supreme Court of Canada's traditional analysis of duty, one would conclude that the plaintiffs were a foreseeable victim of an unsafe rig and thus were owed a *prima facie* duty of care. Should this presumptive duty be displaced by policy?

I would suggest that there are two types of policy considerations which could have been examined. The first is a consideration of precedent and judicial policy, which would have engaged the Court in examining the fundamental issues of the use of tort to resolve contractual relational economic loss claims.

⁶² McLachlin J. describes the duty as a duty to warn the plaintiff users. In my opinion, this characterization of the duty is puzzling. Since the lessees had no role in the construction of the rig, warning them would not have been a useful exercise, or one that the builder would normally assume. The finding of a presumptive duty would have been better based on the reasoning that the failure to warn the owner of the danger of fire resulted in an unsafe product and the lessees were foreseeable victims of this unsafe product. That being the case, the duty is a duty to take reasonable care to protect the lessee's interests *by warning the owners*.

⁶³ *Supra* note 11 at 260.

Questions relating to the purposes and mandate of tort, its interaction with contract, and why applying it to contractual relational economic loss disputes is a good thing to do would need to be examined.

The second type of policy considerations are the social and economic implications of holding the defendants liable to the plaintiffs on these facts. As with other pure economic loss cases considered by the Court, the concern raised was the spectre of "indeterminate liability". McLachlin J addressed this issue and was of the view that indeterminate liability was a sufficient policy concern to negate the presumptive duty. Put more specifically, the concerns were that liability would be overly burdensome for the defendants, and that drawing the line at some arbitrary point to counteract this indeterminacy would be to create uncertainty for potential plaintiffs. According to McLachlin J. there was no logical place to draw the line, the plaintiffs were not more worthy claimants than other potential claimants, liability to the plaintiff would not promote the social objective of deterrence, and the plaintiffs were in a position to allocate their losses without the use of tort. For all of these reasons, the duty was denied.

Using indeterminate liability as the rationale for negating the duty of care in relational economic loss cases, and the absence of indeterminate liability as a justification for imposing a duty of care, is unsatisfactory. One can compare the Court's judgment in *C.N.R. v. The Norsk*.⁶⁴ with the Court's judgment in this case to see this point. As will be recalled, a host of very specific factors were utilized in *Norsk* to make the argument that a duty owed to the plaintiff users of a damaged bridge was justified and would not lead to indeterminate liability. No principles of liability or the role of tort in allocating economic losses were articulated in that case, on which principles subsequent judgments could be based. This left the Supreme Court with the task of looking at the specific circumstances of the *Bow Valley* dispute to identify whether there were any specific factors which existed in that case which would justify the imposition of a duty of care without creating indeterminate liability. The Court was not satisfied that there were any such factors, and accordingly the duty was denied.

It is respectfully suggested that a more useful approach in the earlier judgment in *C.N.R. v. The Norsk*, and its more recent judgment in *Bow Valley* would have been to articulate the broader legal principles which underlie relational economic loss disputes. The issue of the existence of a duty should depend on a consideration of these principles and valuable judicial precedents and guidelines would be created for future cases. It is submitted that deciding pure economic loss disputes on their factual basis as to whether liability in the specific case would result in a situation of indeterminate liability, does in fact do what McLachlin J. specifically was attempting to avoid. It draws the line at some arbitrary point which creates uncertainty for potential plaintiffs.

⁶⁴ *Supra* note 41.

VI. Tort Liability for Sexual Wrongdoing

An area in which the Supreme Court has been particularly creative and proactive in utilizing the tort remedy to assist plaintiffs has been the sexual wrongdoing cases. While there is nothing new in declaring unconsented to sexual contact to be a wrongful battery, some traditional obstacles to success in these cases recently have been removed.

The first important case indicating the Supreme Court's desire to assist victims of sexual misconduct in obtaining a tort remedy was *Norberg v. Wynrib*.⁶⁵ The case concerned sexual conduct which occurred between a male doctor and his adult female patient. It is important to note that at both the trial and Court of Appeal levels the plaintiff's action against the doctor failed. The trial judge found as a matter of fact that the plaintiff had consented to the sexual activity which occurred,⁶⁶ and this finding was upheld by the Court of Appeal.⁶⁷ The lower courts also held that as a matter of law the plaintiff's action should fail based on the doctrine of illegality. As will be recalled, the plaintiff and defendant had agreed to an arrangement whereby in exchange for drugs the plaintiff would engage in sexual acts with her doctor.

The Supreme Court of Canada reversed these decisions and found in favour of the plaintiff. While the judgment is extremely interesting from several important legal perspectives, namely, the defence of consent, the scope of the illegality defence, and the application of fiduciary law to the relationship between the parties, it is the Court's treatment of the defence of consent which I think was the case's most important legacy. The majority of the Supreme Court effectively held that a person in the plaintiff's position vis-a-vis the defendant's position *cannot legally consent* to activities which in the absence of this consent are tortious. Mr. Justice La Forest, speaking for three of the justices, stated that where two parties are in a relationship of inequality and where the dominant party exploits that inequality for his own advantage, the weaker party's apparent consent is invalid. While findings that the parties are in an unequal relationship and that the dominant party exploited that relationship are findings of fact, once these two facts have been established, the capacity of the weaker party to consent becomes impossible as a matter of law. The weaker party in effect becomes deprived of her autonomy or capacity to choose.⁶⁸

⁶⁵ (1992), 12 C.C.L.T.(2d) 1. (S.C.C.)

⁶⁶ [1988] 6 W.W.R. 305, (B.C.S.C.). The trial judge was aware that as a matter of law consent to be valid must be genuine, must be freely given, cannot be extorted by force or threats of force, and cannot be given while a person is under the influence of drugs. Having stated this, the trial judge found that the evidence indicated that the plaintiff's consent satisfied all of these criteria and was voluntary.

⁶⁷ [1990] 4 W.W.R. 193, (B.C.C.A.).

⁶⁸ McLachlin J., writing for herself and L'Heureux-Dube J. analysed the case from the perspective of fiduciary law. Sopinka J. dissented on the question of consent. It was Sopinka J.'s view that "the question of consent in relation to a battery claim is ultimately a factual one that must be determined on all of the circumstances of a particular case", and that in this case it was so examined and found to have existed.

As conceded by La Forest J., the doctrine employed in *Norberg v. Wynrib* is one of "public policy" - "the law will not always hold weaker parties to the bargains they make."⁶⁹ This is the sort of judicial policy and legal principle which is entirely within the mandate and responsibility of our highest Court to make. It provides a principle which other courts can and now must apply. The difficult issue will be to determine when a power imbalance arises and whether the dominant party exploited that position of power.⁷⁰

The next important case was *M.(K.) v. M.(H.)*.⁷¹ The plaintiff sued her father for sexual abuse which occurred when she was a child. The suit was brought when the plaintiff was twenty-eight years old, some eighteen years after the occurrence of the incidents, and twelve years after the plaintiff reached the age of majority. The *Limitations Act*⁷² of Ontario provided that an action for assault, battery, wounding or imprisonment must be brought within and not after four years after the cause of action arose. The trial judge dismissed the action on the basis that it was statute barred and this judgment was upheld by the Ontario Court of Appeal.

In reversing these decisions and allowing the plaintiff's action to succeed, La Forest J. made several interesting points which illustrate the themes of this paper. It was clear that as a matter of public policy, La Forest J. was opposed to the existence of any limitation period with respect to cases involving incest. In responding to the suggestion that in certain circumstances statutes of repose serve the public interest by limiting the period of time in which defendants can be sued, La Forest J. stated that "there is absolutely no corresponding public benefit in protecting individuals who perpetrate incest from the consequences of their wrongful actions. The patent inequity of allowing these individuals to go on with their life without liability, while the victim continues to suffer the consequences, clearly militates against any guarantee of repose".⁷³

Applying the "reasonable discoverability" rule which the Court had earlier formulated in the professional negligence case of *Central & Eastern Trust Co. v. Rafuse*,⁷⁴ La Forest J. held that the cause of action for incest begins to run only when the plaintiff has a substantial awareness of the harm which she is suffering and that the likely cause of this harm were the sexual wrongs which had been inflicted upon her. Knowledge of this connection will "presumptively" occur

⁶⁹ *Supra* note 65 at 16.

⁷⁰ For example, will it be presumed as a matter of law that a power imbalance exists in the relationship of doctor and patient and whenever a sexual activity occurs between these parties it will be as a result of exploitation of that power? In *Norberg v. Wynrib*, the Supreme Court did not question that this was the case, at least on the particular facts before it.

⁷¹ (1992), 14 C.C.L.T. (2d) 1 (S.C.C.).

⁷² R.S.O. 1980, c. 240, s. 45 (1).

⁷³ 14 C.C.L.T. (2d) 19. Although this may be so, legislatures have not, until recently, exempted sexual batteries from limitations statutes. The question is whether the Supreme Court of Canada should be doing so.

⁷⁴ *Supra* note 37.

when the plaintiff receives therapeutic assistance, although this presumption can be rebutted by defendants.

Notwithstanding *La Forest J.*'s arguments against the imposition of a limitation period in a case of incest, the question which I raise is whether this decision of the Court was consistent with judicial precedent in this area or the findings of the trial judge. A battery is actionable without proof of damage; the cause of action normally arises when the wrongful contact occurs. The "reasonable discoverability" of damage rule developed in the context of a negligence action, where damage is required before a cause of action arises. Even accepting the proposition that a wrongful contact does not occur until the victim realizes or discovers the wrongful nature of the contact, the trial judge in the case, according to *La Forest J.*, did find as a matter of fact "that from the age of sixteen the appellant was aware that she had been wronged and had suffered adverse effects". *La Forest J.* held, however, that the trial judge failed to make the specific finding as to when the plaintiff made the necessary connection between the harms which she was experiencing and their likely cause. Both as a matter of presumption and based on the evidence, *La Forest* found that awareness of this connection only occurred when the plaintiff received therapeutic assistance. The cause of action arose then and the plaintiff's claim was accordingly not statute barred.⁷⁵

The recent vicarious liability cases also indicate the Supreme's Court's emphasis on social policy considerations in developing tort law. In *Bazley v. Curry*⁷⁶ and *Jacobi v. Griffiths*,⁷⁷ employees of non-profit organizations sexually assaulted children who were in their care. In *Bazley* the assaults occurred at a residential care facility by an employee who was hired to supervise children in the context of activities such as bathing and putting them to bed. In *Jacobi*, the context was a recreational facility which provided day programs for children. In this latter case, one of the assaults occurred in the course of one of the programs, but the others occurred away from the club, at the employee's home and outside of working hours.

In *Bazley*, *McLachlin J.* wrote the unanimous judgment for the Court. *McLachlin J.* analysed earlier precedents dealing with vicarious liability in this type of case; namely, where an employee performs an illegal or intentionally wrongful act. *McLachlin J.* concluded that there was no precedents which were helpful in deciding the issue presented by the case, and turned to the question of the policy which underlies vicarious liability.⁷⁸

⁷⁵ There were other issues discussed as well. Fraudulent concealment, and breach of fiduciary duty were also reasons for rejecting the limitation of actions defence.

⁷⁶ *Supra* note 2.

⁷⁷ *Supra* note 1.

⁷⁸ It is interesting to note that in the companion case of *Jacobi v. Griffiths*, *Binnie J.* noted that "Canadian courts have in fact examined a variety of circumstances in which it has been sought to make employers liable for sexual assaults committed by employees", at 174 D.L.R. (4th) 91. Numerous of these cases were reviewed in the *Jacobi* judgment.

Assuming the absence of any fault on an employer's part in terms of its decision to hire a wrongdoing employee, or in the manner in which it trained or supervised that employee, what are the policy objectives underlying vicarious liability? Why should an employer be held financially responsible for the outrageous acts committed by its employee, especially when these acts not only do not further the aims of the employer, but in fact work against those aims? Sexual assaults committed by employees against children in residential care facilities are antithetical to the very essence of these facilities. They destroy the trust and confidence between the child and the facility, upon which trust the very success of the facility's mission depends.⁷⁹

McLachlin J. recognized that semantics will not provide an answer to the policy question underlying the vicarious liability cases. She rejected the traditional "Salmond" test which distinguishes between unauthorized modes of doing authorized acts (for which there is vicarious liability) and entirely independent unauthorized acts (for which there is no vicarious liability).

Two fundamental policy concerns were identified as underlying vicarious liability. First, is the concern for a "just and practical remedy for the harm". Second, is the concern for the "deterrence of future harm".

Let me first focus on the justice argument. While one would readily concede that it is just for a victim of sexual assault to recover compensation from the wrongdoer, why justice would require that the compensation come from a morally blameless employer is a difficult question to answer. McLachlin J. noted that "the idea that the person who introduces a risk incurs a duty to those who may be injured lies at the heart of tort law."⁸⁰ This, however, is true only with regard to those who are negligent. Tort law does not, as a general rule, subscribe to a theory of strict liability. It is only when a person introduces an *unreasonable* risk that liability attaches. Thus, more explanation would be required to justify vicarious liability for non-negligent behaviour.

McLachlin J. further reasoned that it is fair to require employers of wrongdoers to compensate their victims since this will provide "effective compensation" to victims. As McLachlin J. concedes, however, the desire to provide compensation to victims of sexual assaults does not at all explain why the source of that compensation should be the wrongdoer's employer, as opposed, for example, to the public at large through a compensation scheme.⁸¹

The justification for requiring the employer to provide compensation to the victim of the sexual assault was ultimately McLachlin J.'s "risk introduction" theory. According to McLachlin J., since "the employer puts in the community an enterprise which carries certain risks....when those risks materialize and cause injury to a member of the public despite the employer's reasonable efforts,

⁷⁹ Note that in the companion case of *Jacobi v. Griffiths*, Binnie J. noted that numerous American cases have rejected vicarious liability for acts done by employees which did not only not further the employers' aims, but were antithetical to it.

⁸⁰ *Supra* note 2 at 59.

⁸¹ Such as victims of crime compensation schemes.

it is fair that the person or organization that creates the enterprise and hence the risk should bear the loss".⁸² McLachlin J. added that the ability of the employer to transfer and distribute the loss through insurance and higher prices provided further support for imposing vicarious liability on the employer.

An extremely important and broad question for tort law is raised by McLachlin J.'s reasoning. If it is just that an employer who introduces a risk should bear the costs of injury if that risk materializes, even in the absence of fault, and if it is efficient to place a loss on the party who can best absorb and redistribute it, why would this not be true for tort losses in general?⁸³ Why should this not apply to everyone whose enterprise or activity introduces a risk into the community and who is in a good position to absorb or redistribute the loss? Would this not be a strong rationale for the introduction of strict liability in product liability cases, for example? Is McLachlin J. signalling a willingness on the part of the Supreme Court to rethink Canadian tort law's commitment to negligence law and to move aggressively towards strict liability as the better rationale for liability in a wider range of cases?

Deterrence of future harm was the second policy objective recognized by the Court as underlying vicarious liability. Normally the goal of deterrence is identified with negligence law since it is unreasonable behaviour which can be avoided and thereby deterred. Strictly speaking, unforeseeable accidents cannot be deterred; nor would the law wish to deter reasonable behaviour. Ultimately, however, McLachlin J. considered negligence law not to be up the task of encouraging employers to reduce accidents and intentional wrongs by their employees by more efficient organization and supervision for a variety of reasons. She considered difficulties of proof, and insufficiently rigorous standards of care imposed by courts, as reasons to move away from negligence to strict liability. This again raises the question as to whether this signals a wider shift away from negligence law to strict liability in future cases by the Court.

The two policy goals of justice and deterrence led the Supreme Court to the legal principle that where there is a sufficiently strong connection between the employment and the wrong, vicarious liability ought to be imposed upon the employer. The connection must be material or significant, and not merely causal. In determining the sufficiency of the strength of the connection, McLachlin J. identified some guiding principles. These included: (i) the opportunity that the job gave to the employee to commit the tort; (ii) the extent to which the tort furthered the employer's aims; (iii) the extent to which the tort

⁸² *Supra* note 2 at 60.

⁸³ In the context of the *Jacobi* facts, the "risk introduction" theory may be even more questionable. One could in fact argue that the establishment of nonprofit residential care facilities for the treatment of emotionally troubled children not only did not create the risk that these children could be abused, emotionally, physically and sexually, but decreased the risk by providing them with an environment which is ordinarily safe and secure. As well, the argument that the enterprise was best able to absorb or redistribute the loss also is weak in relation to nonprofit enterprises.

was related to friction, confrontation or intimacy inherent in the enterprise; (iv) the extent of the power which the employment gave to the employee in relation to the victim; and (v) the vulnerability of the victim.

That these guidelines will not be easy to apply is evident from the decisions of the Supreme Court in the two cases before it. In the lead case, *Bazley*, a unanimous Court agreed that there was a sufficiently strong connection between the employee's job, which involved intimacy with children, and the sexual assaults which he committed, to impose vicarious liability. In the second case, *Jacobi v. Griffiths*, the Court split 4 - 3 on whether the defendant should be held vicariously liable, with the majority saying "no", and the dissent "yes".⁸⁴

There were important factual differences between the two cases, especially as these relate to the type of facility and the type of service which was being offered.⁸⁵ What is interesting however is the apparent difference of opinion within the Court concerning some vital principles of vicarious liability as well as a reflection by the Court on the theme of this paper; namely the role that legal principle and precedent should play, as opposed to policy, in arriving at tort judgments.

The majority of the Court in *Jacobi*, per Binnie J., noted that "much as the Court may wish to take advantage of the deeper pockets of the respondent to see the appellants compensated, we have no jurisdiction *ex aequo et bono* to practise distributive justice. On the facts of this case, legal principle and precedents favour the respondent."⁸⁶ One of these precedents was, of course, the test for vicarious liability which the Court had just formulated in the companion case of *Bazley*. In addition, Binnie J. noted that there was "case law, reflecting policy judgments by various courts over many years and across many jurisdictions."⁸⁷ Based on his analysis of many of these cases, Binnie J. ruled that the existing case law did not support the imposition of vicarious liability in this case.

Turning to policy considerations, Binnie J. connected the two goals of compensation and deterrence to the status of the defendant, a non-profit corporation.⁸⁸ In respect to compensation, the inability of non-profit corporations such as the respondent in this case to either absorb or redistribute losses was seen as undermining the compensation goal of vicarious liability. In relation to

⁸⁴ It is interesting to note that McLachlin J. who wrote the judgment in *Bazley* was one of the justices who dissented.

⁸⁵ *Bazley* involved a residential care facility, where the employees were closely and intimately involved with children. *Jacobi* involved a recreational day program. In addition, in *Jacobi* all the assaults but one took place outside of the club and outside club hours.

⁸⁶ *Supra* note 2 at 86.

⁸⁷ *Ibid.* This is an interesting observation considering that in *Bazley*, the Court determined that there were no precedents which governed this type of case.

⁸⁸ This of course is interesting in view of the fact that the unanimous Court in *Bazley* refused to exempt non-profit organizations from vicarious liability

deterrence, Binnie J. noted the following factors which made deterrence a weak rationale to support the imposition of vicarious liability in this type of case:

- (i) the recognition that if criminal law sanctions cannot deter employees from committing the crime of sexual assault, actions taken by employers to deter these wrongdoers are unlikely to be effective;
- (ii) the deterrence goal is more appropriate with respect to direct actions for negligence; not to strict liability; and
- (iii) vicarious liability might result in non-profit groups abandoning their activities entirely.⁸⁹

Since policy considerations did not, in Binnie J.'s view, support the imposition of vicarious liability in this type of case, his Lordship was more insistent on the requirement of a strong connection between the enterprise risk and the sexual assault before vicarious liability would be imposed. The majority view was that this strong connection did not exist. Unlike the *Bazley* case, the enterprise did not materially enhance the risk of sexual assault.⁹⁰ The dissenting judges were of the opposite view and utilized the five factors enumerated in *Bazley* to justify the imposition of vicarious liability.

VII. Conclusion

In relation to private law matters, the Supreme Court of Canada has been a creative and pro-active court. The fact that private law disputes are generally not subject to the *Charter of Rights and Freedoms* has not resulted in a dry and technical jurisprudence. Policy considerations have played an important role in the development of tort law by the Supreme Court of Canada.

Balancing considerations of judicial precedent and legal principle on the one hand, and the need for the Supreme Court to take into account the social and economic implications of their decisions on the other, is a difficult task. The common law must grow and reflect current societal needs. It also however must be relatively certain and predictable. Courts must be aware of the limitations which exist on their abilities and responsibilities in the area of policy making. This is an issue of which the Supreme Court of Canada is fully aware. It has been a courageous and adventurous court, which at times has, in this author's respectful view, gone too far in ignoring judicial precedent and legal principles in deference to achieving policy objectives.

⁸⁹ Binnie J. put this point this way:

"In an understandable desire to help victims of child abuse, courts ought not to be oblivious to the societal ramifications of the proposed solution", *Supra* note at 106.

⁹⁰ There was for example no element of intimacy in the relationship envisaged by the employment, and the employee was not conferred with any meaningful power over the children.