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Who's zoomin' who? Comments on liability for pharmaceutical products in Canada

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During the twentieth century, the doctrinal basis of products liability has shifted from contractual privity to tortious liability. The causes, mechanics and effects of that transformation are still a matter of acute concern and perplexity. In practical terms, the task is to thread a way through the patchwork quilt of private law, legislative controls, regulatory schemes, private insurance arrangements and social welfare schemes that exist to compensate injured people and deter harmful activities. On the scholarly front, tort law has become 'the battleground of social theory'[1] on which the potent forces of politics, precedents, personalities and production patterns vie for control. In this short chapter we intend to offer a glimpse at the Canadian corner of this practical and scholarly encounter. In particular, our focus will be on recent developments and future challenges in the area of liability for pharmaceutical products. There is now a considerable and sophisticated literature on the doctrinal state of Canadian products liability law.[2] Accordingly, our ambition is to take a more critical tack and be more suggestive and prescriptive than comprehensive and descriptive.

I

A central question for modern social theory has been to understand and explain the nature and dynamic of the relation between the economic conditions of social life and the realm of politics. Without some plausible explanation, the validity of social knowledge remains suspect and the status of social theorising is deeply problematic. As a branch of social

theory, jurisprudence has been obliged to engage in that explanatory task and to run similar risks. Although its efforts at understanding have been less self-conscious and more indirect, the hallmark of legal scholarship is its inability to provide a convincing account of the relationship between socioeconomic conditions and legal doctrine. Is the law a repository of transcendent principles? Is the law the result of a patriarchal or capitalist conspiracy? Can we know the judgment from the judge? The failure to establish a cogent set of answers to these troubling questions puts the truth of legal knowledge in doubt and undermines the authority of law and lawyers.

In contemporary debate, there is almost complete agreement that law is neither fully beholden to socio-economic conditions nor fully independent from them. That law might not possess any autonomy or distinctiveness as a mode of thinking and acting is never taken seriously. Conversely, the belief that law can be thought about as an entirely autonomous field of human activity is rare. Rather than make a futile Kelsenian attempt to free the science of law from alien elements, the present concern is to reveal the formal and substantive connections between law and these alien elements. Indeed, contemporary jurisprudence seems to find an otherwise elusive intellectual and political unity in the notion that legal doctrine is 'relatively autonomous' from the political formation of social life.[3]

Unfortunately, this unity is more apparent and superficial than real and constitutive. The notion of 'relative autonomy' is so ample that it can accommodate almost all theorising about law. As such, it can offer little guidance or comfort to those seriously committed to explicating the law-and-politics conundrum. There is a vast and intellectually significant difference between those scholars who maintain the law is primarily separate from society, but is partly determined by it, and those who hold that law is primarily determined by society, but is partly separate from it.

By and large, the contributors to this symposium seem to take the distinct view that law is largely autonomous of social and political life: that it somehow stands to the side or above the battleground of social theory and action. The unarticulated assumption seems to be that law exists in a political vacuum, with some ethereal hand at work in the effecting of legal change. The laws of Canada, the United States, and England are treated as though they were historically fungible entities that can be talked about without reference to their social and political context. The idea seems to be that the law develops according to a purely internal logic and because intrinsically 'right' arguments were made and accepted by judges. The law is a kingdom unto itself and the judges are

its advisers and diplomats. Within this scenario, the lawyer is cast as an unimaginative mandarin who simply marshalls and presents available legal materials. If the economic arrangements for manufacturing pharmaceutical products and the public schemes for regulation have anything to do with doctrinal development, it is only in a very distant, indirect and unimportant way.

Contrary to this view, we want to suggest that law cannot be understood as a separable mode of activity or discourse: it loses almost all real meaning and significance when it is detached from the extra-legal and social forces that gave rise to it. Although there is room for differences over the extent and impact of such forces, it is surely the case that the developmental identity of legal regimes is inextricably connected to the kind of society in which law arises and serves. While the relation between law and society might be more complex and interactive than some instrumental or one-dimensional theories suggest, law and society are implicated in each other and incomprehensible in isolation from one another.

The law is as it is because of the arguments lawyers choose to make and the way they choose to bring cases. The fact that modern corporations still pull enormous weight in the political and economic scheme of things is not without considerable significance. The continuing injustice in distributing legal resources and talent on the basis of the ability to pay manages to exacerbate the inequality of wealth that still characterises society in Canada, the United States and Britain. The liability rules for pharmaceutical products cannot be untouched by the fact that the societies from which it develops continue to treat health as a commodity and health care as (big) business.

Accordingly, to understand Canadian law and its differences from American and British law, it is necessary to have some nodding acquaintance with how Canadian society differs from American and British society. It is not simply happenstance that Canadian law stands somewhere between American and English law. Canada stands in a cultural, social and economic position between the United States and Britain. The institutional structure of the Canadian legal system is very English and its common law heritage is also distinctly English in orientation: great attention is still paid to English developments and deference is still accorded to English decisions.[4] However, Canada lives in a social and cultural milieu that is substantially American in nature. The economic pressures brought to bear on the Canadian legal system are primarily American. With the advent of the Free Trade Agreement, the ultimate economic infiltration of Canada is well-advanced. Divided by

a common (law) culture, the United States and Canada seem determined to misunderstand each other and, therefore, themselves. Beneath the misleading stereotypes, Canada and the United States are less different and less the same than either think. Whereas Canada is more like the United States than Canadians care to admit, Canada is less like the United States than Americans seem to imagine.

With regard to product liability, the most important institutional factor is the existence of a public health care system. To be blunt, the United States hardly has one. Between 30 per cent and 40 per cent of Americans do not carry health care insurance. And, of course, that proportion is not evenly distributed throughout society; lack of proper health care is a fact of life for the American 'have-nots'. Nevertheless, there is a very good private health care structure in the United States and the standard of care is very high. The problem is the distribution and availability of those benefits, not its existence or quality. In Canada, there is a public health care system. All the provinces have a very high standard of health care that is similar, at least in practice, if not theory, to the United Kingdom. There is no doubt that this has a considerable effect upon the nature and extent of recovery in products liability cases. What happens to people who are injured and not able to recover through the courts is very different in the United States than in Canada and England. Indeed, that fact may begin to explain some of the pro-plaintiff arguments and decisions that occur in the United States. The courts begin to operate as a weak surrogate for a fully-functioning public health care system. In this sense, the work of plaintiffs' lawyers in the United States, while a very lucrative practice and by no means carried out in the uniform spirit of social solidarity, does serve some social function in seeking to make good the shortfall in the provision of social services. Certain developments in American legal doctrine may appear much less bizarre to English eyes when they are understood in this broader social context.[5]

As the existence of different health care shows, the attitude to health and public provision in the United States is very different from that in Canada. This reflects an important underlying difference in the general ideologies that pervade American and Canadian society. Exacerbated by the Reagan era, the American mentality is much more robustly individualistic and entrepreneurial. Canada takes a more communitarian response. Individuals are not left to make or break it themselves, but social progress is thought more likely when people work together than leave it to the push-and-pull of the market place. Indeed, recent changes in English law may be ascribable to the changing political and economic

climate in the Thatcher years. As the mood of the country becomes more American in its I'm-all-right-Jack attitude, it would be surprising if the legal system did not begin to reflect some of that misanthropic spirit.[6]

Nevertheless, in all three jurisdictions, pharmaceutical companies occupy a similar place and role in the overall economy. Their primary *raison d'être* is to make money. That they do this by making drugs and helping people should not blind observers to the fact that this is a secondary effect of their activities. Drug manufacturers are some of the wealthiest corporations in society.[7] As medicine becomes as much an entrepreneurial opportunity as a social calling, a mutually sustaining medical-industrial complex thrives. In some sense, the expansion of public health care programs has provided increased opportunities for private drug companies to maximise the possibility for increased revenues. Yet surely profiteering from ill-health reflects 'exploitation in its most egregious form'.[8] Consequently, in order to place litigation on questions of pharmaceutical products in their proper context, it is important not to forget that these are not actions between two unnamed and interchangeable litigants. They involve real injured people pitting their limited resources against large economic organisations. While these large economic organisations do have employees, management and shareholders, it must not be forgotten that the pharmaceutical industry exists primarily as an industry and not as a health care institution.

Along with differences in the social and political context, there are some important differences in the procedural aspects of the Canadian legal regime that impacts upon the development of product liability law. While these factors are themselves a response to the broader social and political context, they do have a considerable marginal affect on the development of the substantive law.[9] First of all, Canada has to be understood as not having one national law on products liability, but ten different systems of law on products liability. In the Canadian constitutional scheme of things, civil liability is a provincial concern. There is no necessarily uniform set of substantive laws and there is no uniform set of procedural rules, as with the US Federal Rules of Procedure. This is particularly significant in Quebec where there is a Civil Code rather than a common law regime. Also, the availability of class actions in Canada is extremely limited. Except for Quebec, it is almost impossible to bring them in actions involving personal injuries.[10] While there are a slew of reform proposals, the clout of the manufacturers' lobby, of which the pharmaceutical companies are a part, has stymied such efforts to date.

Juries are available in civil actions, but they are not used extensively. This has some effect upon not only the types of decisions made, but also

the kinds and amounts of damages awarded. In general, damages are much more modest than in the United States, although perhaps higher than in the United Kingdom. A major control on damages in Canada is a cap on the amount that can be awarded for pain and suffering. At present, this is around $100,000 to $125,000. Contingent fees are allowed in most Canadian provinces, although they are tightly regulated and they do not seem to have had any appreciable effect upon the incidence of cases or the amount of damages awarded. There are moves afoot within Canada to introduce a variety of no-fault schemes. Recently, an automobile no-fault insurance scheme was introduced in Ontario; variations already exist in British Columbia and Saskatchewan. As regards the substantive law, Canadian law remains an essentially fault-based scheme: strict liability is confined to isolated pockets of liability. However, along with a developing law on 'state of the art' defence, duty to warn, contributory negligence, intervening third parties, negligence has the malleability to be used in a tough (or weak) way against manufacturers. Indeed, it has been suggested that a shift from negligence to strict liability for defective products would be a comparatively minor modification and 'less radical a step than ... *Donoghue* v. *Stevenson*'.[11]

II

In order to understand recent developments in products liability law, it is important to articulate a critical framework within which to work. We live in an increasingly complex industrial and technological world. Although this has led to an improved standard of living, our ability to wreak havoc has also increased in both scale and gravity. It is a world of considerable risk. As well as direct threats to people's health and welfare, there are a whole host of risks that work separately, cumulatively and in tandem to produce a very threatening environment. Of course, the extent of risk is not only a function of its general incidence, but the gravity of consequences must be factored into any relevant equation; a one in ten chance of cutting a finger is far less hazardous than a one in a hundred chance of breaking my leg.

Our society consists of much more than risk - it is defined as much by the actual injuries that those risks give rise to. There is an overwhelming body of data that catalogues in precise detail the litigation lottery. The cost of accidents in human and monetary terms is astronomical. In Canada, for instance, out of a population of 25 million, 3.5 million sustain product-related injuries annually, 4,000 are killed and 11,000 permanently disabled. Losses are over $2 billion in product-related injuries

alone. Of these victims, forty-five per cent never recover anything. Further, only one per cent reach the courts and most of those are settled on the courthouse steps. Over fifty per cent of the compensation ultimately paid out is lost in administering and financing its recovery, mainly to lawyers.[12]

Against this backdrop, a central question to be decided by a society is whether there is to be any necessary analytical or institutional connection between efforts to deal with the worlds of risk and harm. Like the British and American systems, Canada has opted to treat the regulation of risk and the compensation of injury as flip sides of the same troublesome coin. Indeed, a leading Canadian theorist insists that the crowning achievement of tort law is its capacity to craft a symmetrical response to the existence of risk and harm. Contending that the life of the law is the logic of its own experience, he develops a theory of corrective justice which argues that 'the function of the court is to preserve the initial equality between plaintiff and defendant by transferring from one party to the other the fixed quantity that marks the deviation from the transaction's implicit rationality'.[13] It is the unenviable task of those harmed to pinpoint the particular and discrete sources of risk that gave rise to their harm or else they will be ineligible for compensation.

Notwithstanding this very narrow and restrictive view, there is no need to treat the regulation of risk and the compensation of harm as giving rise to a mutually reinforcing set of questions and, in particular, to a series of all-encompassing answers. How and whether we connect the two enquiries is clearly going to be controlled by why we connect them. While there may be some overlap, it is surely the case that the regulation/deterrence issue gives rise to a different range of considerations from the compensation issue. To ask two questions and to expect that the same answer will be appropriate to each is a serious error. There will be clear instances in which society will wish to deter conduct that creates unacceptable risk, even if it does not result in actual injury. Similarly, there will be clear circumstances in which society will wish injured people to receive compensation, even if there has been no creation of unacceptable risk.[14] To try and use the same blunt instrument to effect a process of fair compensation and a scheme of appropriate regulation is a doomed enterprise.

The Quebec case of *Lapierre* provides a telling illustration of the problem.[15] The plaintiff's five-year-old daughter had been vaccinated as part of a province-wide measles vaccination programme. She suffered a severe case of encephalitis caused by the vaccination which resulted in permanent, almost total disablement. While there was no negligence on

the part of the doctor, manufacturer or province, it was argued that there existed a general principle obliging the community to bear costs incurred by an individual for the benefit of the community. The argument failed in the Supreme Court of Canada and the province was found not to be at fault in any way. With obvious reluctance, Justice Chouinard concluded that 'an obligation independent of any fault in circumstances such as those of the case at bar would be an excellent thing, but it does not exist in our law at present'.[16]

In conjunction with the 'two-questions/one-answer' approach, products liability law also assumes that there is one general approach that should be applied to all situations: the same doctrine of causation, standard of care, defences and the like should be suitable for all manner of risk-creation and harm-sufferance. For instance, it is not obvious why it is appropriate to treat injuries that result from the use and manufacture of ginger beer, cars, vaccines, cigarettes, guns, hairdryers, nuclear reactors, furniture and clothing in the same way. Nor is it obvious why it is appropriate to treat different kinds of harm, such as long-term cancers and broken limbs, in the same way. There are often very different factors and forces in play among these situations and outcomes. Also, the identity of the different actors in the changing legal drama might have a significant effect on their relative responsibilities and duties.

In the case of drug-related injuries, the fact that the plaintiff is most often an ailing individual and the defendant is a large, often multinational and usually hugely profitably corporation ought to be relevant in anything but the most formalistic of legal regimes. Conversely, the fact that the pharmaceutical company is engaged, for the large part, in a socially useful activity that contributes to the improved health of society is not without significance. Unlike with some products, the development and distribution of health care products is something that ought not to be discouraged. Indeed, it may well be, as in *Lapierre,* that the continued production and marketing of certain drugs will be encouraged, even when the likelihood of severe damage is unavoidable.

Finally, it is important to understand that the individualised focus of the common law is ill-suited to the world of contemporary risks and accidents.[17] Most serious illnesses, as opposed to injuries, are attributable to a whole host of interactive conditions and circumstances. Rather than being unique and dichotomous, the modern world of risk and accidents is probabilistic and continuous. Agent Orange, Bhopal, DES, Chernobyl, the Dalkon Sheild, and Three Mile Island create situations in which the traditional 'but-for' causation test is hopelessly inadequate. The unfathomable interaction of different causes prevents the isolation

of particular causes for particular injuries: the best that can be achieved is a general correlation of acts and consequences in terms of their statistical aggregation. The attribution of responsibility is simply a conclusion based on a rebuttable hypothesis of a probabilistic generality. Against such an understanding, it is grossly unfair to maintain the customary individualised rules and procedures for recovery. A recognition of the collective and group-based nature of risk demands a system of compensation and deterrence that integrates and is responsive to such facts: a continuing attachment to traditional doctrine is inimical to social justice and is much too partial to defendants' interests over plaintiffs' concerns.

III

Rather than provide a chef's tour of Canadian law on liability for pharmaceutical products, we will look at two recent cases. The first is one of the only instances in which a case involving a drug has actually gone to trial, the plaintiff has won, an appeal has failed and a pharmaceutical company has paid substantial damages. That case touches on some of the more salient doctrinal issues and is, therefore, a convenient microcosm of contemporary law. The second case is more controversial and deals with one of the most troubling challenges to the efficacy and equity of the developing law of products liability - the appropriate test and standard of proof for causation in circumstances of scientific uncertainty. Together, these two cases capture the strengths and weaknesses of not only the Canadian response to modern product liability litigation, but the challenge that is facing courts in designing a legal regime that can deal effectively and fairly with both the therapeutic and harmful potential of pharmaceutical products.

In *Buchan,* a twenty-three-year-old plaintiff suffered a stroke, which left her partially paralysed. This occurred shortly after she started taking oral contraceptives which were prescribed by her physician and manufactured and distributed by the defendant company. The Ontario Court of Appeal met the problem of liability for pharmaceutical products head on:

> In the present state of human knowledge, many drugs are clearly incapable of being made totally safe for their intended or ordinary use, even though they have been properly manufactured and are not impure or defective. Notwithstanding a medically recognisable risk, their marketing may be justified by their utility.[18]

The case gave rise to a series of important doctrinal issues. A preliminary question was whether the drug had in fact caused the injury. The trial judge concluded that, although the exact mechanism by which the chemicals in oral contraceptives increase the risk of a stroke was unknown, there was a proven association between the stroke and oral contraceptive use. Accordingly, he held that Mrs Buchan's use of oral contraceptives probably caused or, at the very least, materially contributed to her stroke. The Court of Appeal refused to review this finding of a causative link; an important recognition of the legal significance of evidence which can never hope to show more than the existence of a statistical correlation between the alleged agent and the damage in question.

The decision is also important for the contextual relevance acknowledged in the Court of Appeal's discussion of the duty to warn. There are two points. First, the court concluded that warnings to physicians in the United States made by the defendant's sister company showed that the defendant was aware or should have been aware of the association between oral contraceptive use and strokes. This evidence was admissible and pertinent in a Canadian action. Secondly, the duty to warn is a continuous one, requiring that the manufacturer warn, not only of the dangers known at the time of sale, but also of dangers discovered after the product has been sold and delivered.

Clearly the court was influenced by the less stringent warning given to Canadian than American consumers: 'why the medical profession in this country, and through it consumers in this country, should be given a less explicit and meaningful warning...is a question that has not been answered'.[19] The question might not have been answered in court, but the answer is clear. Drugs which may not pass the FDA requirements in the United States find their way to Canada where there is a civil regime which makes recovery more difficult for the plaintiff. Not only are there drugs on the Canadian pharmaceutical market which do not meet American standards, there are also drugs which are marketed with less explicit warnings. Whilst the law works to encourage manufacturers to give detailed and thorough warnings of the dangers of using the product, warnings which are too explicit and extensive will have adverse consequences on the drugs' sales. The consumers' ability to make an informed choice (be it of birth-control method or whether to vaccinate one's children against diseases) is weighed against profit margins in a balancing process to which the consumer is not privy.

Whereas *Buchan* highlights the bright side of the Canadian law of products liability, the second case demonstrates the huge obstacles that

still face drug-injured plaintiffs. The case of *Rothwell* illustrates those difficulties.[20] Three-month old Patrick Rothwell was given a three course injection of pertussis vaccine as part of a quadrigen vaccine DPTP. He suffered severe brain damage and brought actions against the doctors who administered the vaccine, the manufacturers of the vaccine for failing in its duty to warn of the relevant dangers, and the province for negligent distribution of the vaccine.

After a seventy-three day trial of bewildering scientific and statistical complexity, Justice Osler held none of the defendants liable. Although the manufacturers had breached its duty to warn, there was a lack of conclusive evidence that the pertussis vaccine caused Patrick's injuries. The Judge's closing remarks express his uneasiness and reluctance in reaching such a conclusion:

> It is too much to hope however that this decision and my judgment will set the matter to rest for all time. The slightest difference in the evidence, or a new scientific advance on any one of several fronts, or even the different intellectual make-up of a different trial judge, might easily ensure a different result. By the nature of the problem there can be no certain or permanent answer.[21]

Justice Osler points up the infernal lottery that comprises the litigation system for personal injuries. However, he also emphasises the profound difficulties to be faced by any good-faith judge in grappling with the complexities of scientific causation and medical proof. Yet, the judges seem to forget that the courts are in the business of justice and are not a philosophical forum nor a scientific colloquium. In an important sense, the judges have allowed themselves to be put in a position where they cannot see the equitable wood for the factual trees; this can only work to the defendants' advantage.

In deciding *Rothwell*,[22] Osler conflated two very different issues - whether pertussis vaccine can cause brain damage in infants and whether it did cause such damage in Patrick's case. For the first issue, all Patrick should have had to show was that, even if in only extremely rare cases, pertussis vaccine can cause brain damage. Faced with study after study concluding that it can, he concluded that it cannot. Such a perverse result suggests that Osler, having correctly identified the first question that he should have been asking himself, allowed himself to be swayed by the evidence that, in Patrick's case, the brain damage was not in fact so caused. *Rothwell* is now on its way to the Court of Appeal in Ontario. The question of whether it will fare any better there is open to considerable doubt, especially in the light of the English decision in *Loveday* which

influenced Osler greatly in his decision and which can be expected to exert similar suasion on the Ontario Court of Appeal.

Nevertheless, even if Patrick is successful in his appeal on the first issue of whether pertussis vaccine can cause brain damage, he must still satisfy the court on the second matter of whether it did in his particular circumstances. The applicable doctrinal test on such an issue is presently the subject of heated controversy. At the heart of the matter is the recent decision of the House of Lords in *Wilsher*.[23] This is the latest in a string of causation cases to go to the House Of Lords in the last three years; the importance of the factual situations in each of them should not be underplayed as the factual weaknesses of each threatens to stultify and confuse the development of the law of causation. The controversy centres around the meaning and scope of the ruling in *McGhee*[24] in which many courts and commentators thought that the House of Lords had decided that causation amounted to proof of a substantial increase in risk of injury by the defendant's act and that, in certain circumstances of uncertainty, the burden of disproving causation might fall on the defendant.

The first case was *Kay*.[25] Lord Griffiths defined the question on appeal as whether, when there are two competing causes of deafness, namely meningitis and penicillin overdose, the law should presume in favour of the plaintiffs, so that the cause involving negligence is held to be responsible for the damage. A unanimous House of Lords decided that, if it was not first proved that the negligent cause was capable of causing or aggravating such damage, the answer must be in the negative. While the plaintiff's case foundered on its failure to prove that the tortious act in question could ever cause the type of damage complained of, the court left open the possibility that, if the chance of such damage had been proven, it might be willing to presume in favour of the plaintiff.

In the second case of *Hotson*,[26] not only did the House Of Lords decline to reach any final decision on the status of *McGhee* as *Wilsher* was known to be waiting in the wings, but it failed to take a promising opportunity to make an important contribution to the law of causation. The plaintiff argued that he should be able to recover compensation where he proves that, as a result of a negligent misdiagnosis, he has lost a less than 50 per cent chance of recovery and where, but for the doctor's failure, it would have become clear by the date of the trial whether he would or would not have obtained the benefit in question. The House of Lords decided that, on strict legal reasoning, he never had such a chance and that his claim should fail. Lord Mackay dismissed the argument that the plaintiff had an asset in the form of a 25 per cent chance that he would not develop the condition before an incorrect diagnosis: such an argument cannot be made if it has been accepted that it is more probable than not that the condition would have occurred anyway.[27] Although this case failed on its facts, the House of Lords left open the door for arguments based on the statistical chance of a condition occurring or not occurring in negligence cases.

Finally, there is the decision in *Wilsher*. In another medical negligence case, the plaintiff, a premature infant, was negligently given an excess amount of oxygen. The plaintiff was later found to be suffering from retrolental fibroplasia (RLF), which had rendered him almost totally blind. The condition could have been caused by excess oxygen, but it is not uncommon for premature babies to suffer RLF where no tortious cause exists. In finding a failure to prove causation, Lord Bridge considered in some detail the effect of *McGhee*. In effect, he held that *McGhee* cannot be taken to have made any major changes to the law of causation. In particular, he disapproved of Wilberforce's proposal to allow the shifting of the burden of proof from the plaintiff to the defendant. It is for the plaintiff to prove on a balance of probabilities that there exists a causative link between the defendant's breach of duty and the plaintiff's injury. It is worth noting that the decision in *Wilsher* has not swept away entirely the principles established in *McGhee*; this broad conclusion fails to take account of the different strands of *McGhee*. Despite the confusion and misunderstanding in some quarters, the House of Lords did not disturb the doctrinal fact that proof of a substantial increase of risk does not only lead to evidence of causation, but actually amounts to proof of causation. The question remains, however, of what increase in risk will be considered 'substantial', in particular whether a finding of a less than 50 per cent increase in risk will be sufficient.[28]

IV

Until very recently, Canadian commentators were very supportive and welcoming of the two-pronged ruling in *McGhee* and urged its acceptance on the courts.[29] However, the courts have been ambivalent in their response. Whereas some have embraced the ruling enthusiastically,[30] others have been much more circumspect.[31] The Supreme Court of Canada has yet to give its opinion on the matter. But, since the decision in *Wilsher*, the courts have succumbed to the traditional colonial posture of giving almost unquestioning authority to decisions of the House of Lords for no other reason than they are decisions of that supposedly august body.[32] This lack of selfconfidence and imagination is unneces-

sary. It demeans the ability and sophistication of many of Canada's leading jurists.

While it is a little much to suggest that it provides 'the benevolent principle which smiles on ... factual uncertainties and melts them all away',[33] it is true that the *McGhee* ruling can be defended as a just and appropriate response to the difficulties of proving causation in products liability cases. Mindful that judges are 'not engaged in ascertaining ultimate verities,'[34] but in administering justice, the more controversial shifting of the burden of proof in situations in which the plaintiff's injury is consistent with and falls within the area of risk created by the defendant is fully justified. In unresolvable circumstances of causal uncertainty, it is surely correct that a negligent actor should carry the burden of non-persuasion as against a blameless and injured person. Provided that some *prima facie* evidence is led about the creation of risk, the existence of a duty of care by the defendant to the plaintiff and the occurrence of a predicted harm to the plaintiff, plaintiffs should be entitled to recover and defendants should not be permitted to escape liability through lack of any definitive finding of causation. Any other rule would mean that plaintiffs would *always* lose whenever there was doubt, as there inevitably will be, about the causal link between the defendant's act and the plaintiff's injury. Under the *McGhee* rule, the plaintiff would occasionally, but by no means always, win.

The larger equities of the situation also point to an upholding of the *McGhee* principle. The socio-economic status of the parties to an action are not without significance. Apart from being the creator of the risk, a pharmaceutical company is engaged in a profit-making enterprise and is better able to carry and re-distribute the costs of accidents than an injured user of the product. In a leading Canadian judgment, the court made astute and fitting reference to these considerations: 'briefly put, if causation is overwhelmingly difficult to prove or impossible to prove then it is a matter of public policy or justice that it is the creator of the risk who should be put to the trouble of hurdling the difficulty or bearing the consequences'.[35]

Notwithstanding these considerations, it would be disingenuous to pretend that a zero-sum approach to claims is not without difficulty; a more nuanced and less all-or-nothing solution might be preferable. For instance, in *Rothwell*, even if Osler had been persuaded that the vaccine had materially increased the risk of injury, it might be thought unfair to expect Connaught Laboratories to shoulder the whole of Patrick's costs. Consequently, one response would be for the courts to explore the possibility of awarding plaintiffs a proportion of their damages that is

equal to the extent to which a negligent defendant increased the risk; a 25 per cent increase in risk would lead to an award of 25 per cent of the plaintiff's damages. While this would be a novel response, it does suggest an attractive and workable framework for using existing tort structures to deal with scientific uncertainty.

Although *Wilsher* failed to take the radical opportunities presented to answer the question which the House of Lords left open in *Kay*, the doctrinal basis for such reasoning already exists. It stems from the recognition in *McGhee* that material increase in risk is sufficient to prove material contribution to the injury for the tort of negligence. For instance, Stapleton sees *McGhee* as 'abandoning a traditional element of the one-to-one corrective justice model, namely that the defendant be proved to be more probably than not the party who caused the plaintiff's damage, and allowing recovery against a defendant who had merely been shown to have negligently added one of a number of possible risk sources'.[36] Moreover, the courts have shown a willingness to discount damages in contract law and in other areas of torts.[37] In *Janiak* v. *Ippolito*,[38] the question was whether a plaintiff who had refused to undergo surgery in order to mitigate his loss could nevertheless recover for the possibility (not probability) that the surgery would have been unsuccessful. The Supreme Court of Canada allowed recovery for the 25 per cent to 30 per cent chance that surgery would not have restored his ability to work.

McGhee can still be taken as authority for the proposition that the courts must accept that, in some cases, the plaintiff can recover in spite of the fact that a direct causal link between negligence and damage cannot be conclusively established. This fact, combined with the American courts' willingness to accept fractional liability,[39] offers a reasonable foundation for building such a doctrinal extension. Of course, there are difficulties inherent in such an approach, but the risk of over-penalising the defendant or over-compensating the plaintiff can be ruled out if the logic of the proportionality argument is carried through; the plaintiff can only recover a proportion of the damages commensurate with their position as a statistical harm. That such an approach would be facilitated by the development of class actions is plain; the amassed strength of many plaintiffs may be necessary for the courts to perceive that this is the direction in which the common law should and can be developed.

V

The question of products liability goes to the very nub of the human and

political condition. There are few more important or fundamental issues in society than the way it handles the definition and protection of bodily security. Accident law involves decisions about the number of people who will be required to die or be maimed for the benefit of others. Every society must make such tragic choices. However, the lesson of the intellectual and judicial history of products liability is that tort and contract are actually defective products. The repeated attempts to renovate the traditional common law in line with the modern world of accidents are misguided. The time for tinkering is well past. Indeed, modern tort law 'constitutes a desperate rearguard action to preserve a traditional system of individualism in a changing world'.[40] Academic debate is confined to the same tired set of improbable solutions. There is a lack of imagination, vision and commitment. There is an urgent need to escape the constraints imposed by our own modes of discourse and to create a more sensitive and dramatic response to death, injury and power in society. Pharmaceutical liability is one place to begin.

NOTES

1 *Prosser and Keeton on Torts*, p. 15. West Publishing Co., St Paul, Minn., 5th edn, 1984. For a succinct survey of the major normative perspectives on tort law, see Trebilcock, 'The Future of Tort Law: Mapping the Contours of the Debate' (1989), 15 *Can. Bus. L. J.* p. 471.
2 See A. M. Linden, *Canadian Tort Law*, Butterworths, Toronto, 4th edn 1988 and S. Waddams, *Products Liability*, Carswell, Toronto, 2nd edn 1980.
3 For an extended analysis of this problem and a proposed solution, see A. Hutchinson, *Dwelling on the Threshold: Critical Essays on Modern Legal Thought*, Carswell, Toronto, 1988.
4 See Laskin, *The British Tradition in Canadian Law*, Stevens and Sons, London, 1969.
5 See *Sindell* v. *Abbott Laboratories*, 607 P.2d 924 (1980) (market share liability).
6 See below.
7 The private nature of the ownership of companies involved in drug manufacture makes it difficult to find a figure to put on this wealth. However, the *Report of The Commission of Inquiry on the Pharmaceutical Industry* (1985) gives figures of after tax profits and sales for parent and subsidiary firms in Canada in 1982. To take a striking example, after tax profits of American Home Products were $560,100,000, and those of its subsidiary Wyeth were $14,259,545 (sales totalled $4,852,100,000 and $62,988,986 respectively).
8 See H.Waitzkin and B. Waterman, *The Exploitation of Illness in Capatalist Society*, Bobbs-Merrill, Indianapolis, Minn., 1974 and Relman, 'The New Medical-Industrial Complex' (1980), 303 *New Eng. J. Med.*, 963.
9 See Prichard, 'A Systematic Approach to Comparative Law: The Effect of Cost, Fee and Financing Rules on the Development of Substantive Law' (1988), 17 *J. Leg. Stud.* 451.
10 See *Nakin* v. *General Motor of Canada Ltd.* (1983), 144 D.L.R. (3d) 385 (S.C.C.).

11 S . Waddams, *supra*, note 2 at 260.
12 See E.P. Belobaba, *Products Liability and Personal Injury Compensation in Canada: Toward Integration and Rationalization*, Ministry of Consumer and Corporate Affairs, Ottawa, 1983.
13 Weinrib, 'Legal Formalism' (1988), 97 *Yale L.J.* 949 at 980. For a criticism of this approach see Hutchinson, 'The Importance of Not Being Ernest' (1989), 34 *McGill L.J.* 233.
14 This is not to suggest that the funding of compensation schemes might not involve a recognition and weighting of certain kinds of risky behaviour in determining the identity and extent of contributions. See Trebilcock, *supra*, note 1.
15 *Lapierre* v. *Attorney-General for Quebec* (1985), 16 D.L.R. (4th) 554.
16 *Id* at 576
17 See Bush, 'Between Two Worlds: The Shift From Individual to Group Responsibility in the Law of Causation of Injury' (1986) 33 *U.C.L.A.L. Rev.* 1473.
18 *Buchan* v. *Ortho Pharmaceutical (Canada) Ltd* (1986), 25 DLR (4th) 658 at 668.
19 *Id.* at 679.
20 See *Rothwell* v. *Raes* (1989), 54 D.L.R. (4th) 193.
21 *Id.* at 354.
22 Given the territory which has to be crossed by the whooping cough cases in Canada, *Rothwell* would seem too weak to be a 'test' case. Patrick Rothwell is the survivor of identical twins, the other twin was stillborn and macerated. The defendants' medical evidence suggests that Patrick's awful injuries could in fact have been sustained *in utero* and there is a good deal of conflict in the case about whether medical science can in fact pinpoint with any accuracy ante-natal encephalopathies.
23 *Wilsher* v. *Essex Area Health Authority*, [1988] 1 All E.R. 871.
24 *Mc Ghee* v. *National Coal Board*, [1972] 3 All E.R. 1008.
25 *Kay* v. *Ayrshire and Arran Health Board*, [1987] 2 All E.R. 417.
26 *Hotson* v. *East Berkshire Area Health Authority*, [1987] 2 All E.R. 909.
27 It is interesting to note Mackay's discussion of the US case of *Herskavits* v. *Group Health Cooperation of Paget Sound* (1983), 664 P 2d 474, where Dore J. envisaged cases which might be able to go before the jury on less than the normal threshold of proof. Also notable, however, is the dissent of Brachtenbach J. in which he warned against the danger of using statistics as a basis on which to prove proximate cause and indicated that it was necessary at the minimum to produce evidence connecting the statistics to the facts of the case.
28 For further discussion of this and a related suggestion, see below.
29 See, for example, Linden, *supra*, note 2 at 2.
30 *Powell* v. *Guttman et al.* (1978), 89 D.L.R. (3d) 180 (Man. C.A.): *Dalpe* v. *City of Edmunston* (1979), 25 N.B.R. (2d) 102 (N.B.S.C., App. Div.): *Re Workers' Compensation Appeal Board and Penney* (1981), 122 D.L.R. (3d) 95 (N.S.C.A.): *Nowsco Well Service* v. *Canadian Propane Gas & Oil Ltd.* (1981), 122 D.L.R. (3d) 228 (Sask. C.A.): *Meyer et al.* v. *Gordon et al.* (1981), 17 C.C.L.T. 1 (B.C.S.C., Legg J.): *Deacon et al.* v. *Heichert et al: Township of Langley et al., Third Parties* (1984), 9 D.L.R. (4th) 680 (B.C.S.C., Spencer J.): *Lomax* v. *Arsenault and Government of Saskatchewan* [1986] 1 W.W.R. 68 (Sask. Q.B., Wright J.): *Ivan Letnick and Captain Normac's Riverboat Inn Limited* v. *Municipality of Metropolitan Toronto et al.* [1988] 2 F.C. 399 (Fed. C.A.)
31 *Delaney* v. *Cascade River Holidays Ltd. et al.* (1983), 24 C.C.L.T. 6 (B.C.C.A.):

Wipfli v. *Britten* [1984] 5 W.W.R. 385 (B.C.C.A.): *Seyfert* v. *Burnaby Hospital Society et al.* (1986), 36 C.C.L.T. 224 (B.C.S.C., McEachern C.J.S.C.): *Wilkinson Estate* v. *Shannon* (1986), 37 C.C.L.T. 181 (Ont. H.C., Anderson J.): *Torrison* v. *Colwill* (1987), 42 C.C.L.T. 51 (B.C.S.C.): *Rahn* v. *McNeill* (1987), 19 B.C.L.R. (2d) 384 (B.C.S.C.): *Quintal* v. *Datta* [1988] 6 W.W.R. 481 (Sask. C.A.): *Kersey* v. *Wellesley Hospital* (1989) 46 C.C.L.T. 271 (S.C.O. Eberle J.): *Sigouin* v. *Wong* (1989) 46 C.C.L.T. 159 (B.C.S.C., MacKinnon J.)

32 See, for example, *Couillard* v. *Waschulewski Estate* [1988] 4 W.W.R. 642 (Alta. Q.B.) and *Rayner* v. *Knickle* (1988), 47 C.C.L.T. 113 (P.E.I.S.C.).

33 *Fitzgerald* v. *Lane* [1987] 2 All E.R. 455 at 464 per Nourse L.J.

34 *Hickman* v. *Peacey* [1945] A.C. 304 at 318 per Viscount Simon V.C.

35 *Nowsco Well Service Ltd* v. *Canadian Propane Gas and Oil Ltd* (1981), 122 D.L.R. (3d) 228 at 246 per Bayda J.A. See also *Letnik* v. *Municipality of Metropolitan Toronto* (1988), 49 D.L.R. 707 at 723-4 per MacGuigan, J.

36 *Disease and the Compensation Debate* (1986) 48-9. See, also, Rosenberg, 'The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of The Tort System', 97 *Harv. L. Rev.* 853 (1984). He argues for a system of proportional liability which would hold the manufacturers of proven toxic agents liable for the proportion of total injuries attributable to their products. Under the standard of proportional liability, 'courts would impose liability and distribute compensation in proportion to the probability of causation assigned to the excess disease risk in the exposed population, regardless whether that probability fell above or below the 50 per cent threshold and despite the absence of individualised proof of the causal connection'. *Id.* at 859.

37 See *Chaplin* v. *Hicks* [1911-1913] All E.R. 224 and *Kitchen* v. *Royal Air Force Association* [1958] 2 All E.R. 241.

38 (1985) 16 D.L.R. 4th 1.

39 See *Sindell*, *supra*, note 5.

40 Englard, 'The System Builders: a Critical Appraisal of Modern American Tort Theory', 9 *J. Leg. Stud. 27* (1980).