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## Resolving Dilemmas in Canadian Class Actions by Reconsidering Private Law Principles

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## **Abstract**

Class actions cases illuminate the theoretical underpinnings of private law in a way that traditional two-party litigation does not. Many class actions deal with plaintiffs who have not suffered a large loss (or a quantifiable monetary loss at all), or the defendant has made profits that are disproportionately greater than the plaintiffs' compensable loss (if any). Applying orthodox principles of private law and negligence to these cases results in barring plaintiffs from recovery despite their rights being violated and defendants not disgorging profits made from wrongdoing. The solution resolving these dilemmas should not be to create separate law only applicable to class actions. Rather, the traditional interpretations of damage and disgorgement must be reconsidered generally. By refocusing on a view of negligence as serving to vindicate litigants' rights and reconsidering orthodox principles, class actions dilemmas can be resolved in a way that is consistent with, and clarifies, the private law.

## **Keywords**

Law; Private law; Rights; Torts; Negligence; Obligations; Remedies; Disgorgement; Damages; Civil Procedure; Class Actions; Statutes

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## **Chapter 1**

### **1. Introduction**

#### **1.1 Overview**

The purpose of enacting class proceedings legislation in Canada was to create a mass remedy for mass wrongs. The stated goals of class actions are to provide access to justice, enhance judicial economy, and prompt behaviour modification.<sup>1</sup> As class actions have proceeded through the stages of litigation in Canada, it has become apparent that certain problems create barriers preventing these goals from being meaningfully achieved. Thus far, courts have attempted to solve these problems in a way that is sometimes inconsistent with principles of private law and results in confusion and arguably incorrect modifications to the substantive law.

Class actions cases illuminate the theoretical underpinnings and goals of the private law in a way that decisions in traditional two-party litigation do not. Many class actions deal with individual litigants who have not suffered a large loss (or an immediately quantifiable monetary loss at all) but the aggregate injury or loss of the entire class is sizeable, the defendant has made a profit that is disproportionately larger than the class's compensable loss (if the class has suffered a quantifiable monetary loss at all), the alleged wrongdoing is a result of institutional or systemic practices, or the facts of the case combine more than one of these circumstances. Orthodox principles dictate that a plaintiff must prove loss in order to maintain a claim in negligence and disgorgement of profit is not a generally available remedy

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<sup>1</sup> *Hollick v Toronto (City)*, 2001 SCC 68 [*Hollick*] at para 27.

if negligence is established. Applying these orthodox principles to many class actions cases results in barring plaintiffs from recovery if they cannot show loss, even if their rights have been violated, and barring disgorgement and gain-based remedies thereby allowing defendants to retain profits from wrongdoing.

Individuals in two-party procedure do not typically litigate cases with facts that test the boundaries of orthodoxy because the loss (if any) does not justify the expense of litigation, the defendant is too large a corporate entity for an individual to challenge in court, or the plaintiff is in some other way marginalized. When these types of cases go forward as a class action, in the aggregate, the group is more empowered, the loss is more substantial, and a single individual does not shoulder the entire economic risk of litigation. However, a class action, in theory, is nothing more than an aggregation of individual claims. Analysis of what the boundaries of orthodoxy are should not proceed on the basis of considering the plaintiffs' aggregate loss or the defendants' aggregate gain. Class actions judges are therefore driven to question critically the limits, purpose, and theoretical foundations of the private law when deciding these cases. To this point, however, judges often analyze these issues in a way that impliedly confines the legal questions to class actions. The answers ought not be crafted through the lens of, or be applicable only to, class actions; rather, the answers ought to be consistent with and applicable to private law generally.

This dissertation advances the thesis that certain dilemmas presented by class actions can be resolved if certain principles of the private law are re-conceptualized. There is no need to confuse, alter, or otherwise misinterpret the private law in order to properly analyze class actions cases. If the private law is viewed in a way that is consistent with its underlying principles and functions but re-conceptualized as being focused on rights rather

than loss, then the problems in class actions can be resolved in a more coherent fashion that is in line rather than in conflict with the private law.

The focus here will be on cases of negligence, both because it is an area of the private law that has been described as being a “modern mess”<sup>2</sup> as well as because it is the cause of action most frequently pleaded in class actions. This dissertation advances the argument that the fundamental concepts underlying claims in negligence (injury, damage, harm and loss) can be reconsidered and are best understood as defined in relation to the content of litigants’ rights and duties as opposed to in relation to physical or economic loss. Further, if the focus of negligence is viewed as a principled understanding of litigants’ rights, the remedies available to vindicate plaintiffs’ violated rights can be similarly reconsidered. While quantification of the measure of damages required to vindicate a violated right may best or oftentimes be calculated in reference to the plaintiff’s compensable loss, it is equally justifiable to measure the remedy with respect to the defendant’s gain. This dissertation will argue that loss is not necessarily required to maintain a cause of action. That is, a rights violation can occur without necessarily resulting in physical or economic detriment. If the focus is on rights rather than simply determination of economic loss, the analysis of whether there has been sufficient damage to indicate the plaintiff’s right is violated can be understood in a more consistent and principled way. While it may seem that the argument presents a radical departure from the orthodox view, analysis of the case law reveals that focusing on loss as determinative of damage is problematic and leads to arbitrary, policy-based decisions. If damage is reconsidered, and viewed as conceptually distinct from loss, the measure of the

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<sup>2</sup> Allan Beever, *Rediscovering the Law of Negligence* (Oxford: Hart Publishing, 2007) at 18-19.



remedy available to vindicate the violated right can similarly be more properly analyzed if it is not limited to or circumscribed by loss.

When the underpinnings of negligence are reconsidered and viewed in this way, the problems that manifest in class actions can be answered in a manner that is consistent with a principled view of the private law. Class actions can therefore be defended as a procedural vehicle that does not require modification of the substantive law or litigants' rights in order to meaningfully achieve the stated goals. The aim of this dissertation is to construct an interpretive framework within which class actions can be analyzed as a subset of private law cases rather than as a separate category. First, Chapter 1 will set out the dilemmas class actions in Canada illuminate. These dilemmas create the framework that defines the scope of the discussion. The primary focus of the argument is negligence and, as will be discussed in Chapter 1, the crucial issues are the damage required to maintain an action in negligence and the nature of remedies available once a claim is established. Chapter 2 will focus on reconsidering damage and will argue that the concept of actionable damage ought not be defined in relation to physical or economic loss. Requiring loss as necessarily entailed in the definition of actionable damage is arbitrarily restrictive and does not conform to a consistent and principled view of the nature of litigants' rights and duties. Following logically from, but not necessarily dependent on, the conclusions in Chapter 2, Chapter 3 will argue that disgorgement is available as a remedy for claims of negligence. The historical development of disgorgement confines gain-based remedies to property-based torts. However, there is no principled reason why violations of some rights (property rights) should give rise to a gain-based remedy while violations of other rights (personal rights) do not. Further, as case law demonstrates disgorgement has historically been available regardless of the defendant's

intention to cause harm. There is no principled reason why the intentional violation of rights should give rise to gain-based remedies while negligent violations do not. As Chapter 4 concludes, if the underlying nature of negligence is reconsidered as being concerned with defining and vindicating plaintiffs' rights, these conclusions can be applied to class actions. We can then begin to construct legal and principled answers to the questions set out in Chapter 1 that do not require or depend on arbitrary or inconsistent policies. Though the conclusions reached throughout will help advance class actions' goals by resolving these dilemmas, the overarching aim is to achieve a better understanding of the private law as a whole.

## 1.2 Dilemmas Illuminated by Canadian Class Actions

We are in an age where the evolution of technology and the trend of commoditization seemingly dictate how we live our lives. Modes of construction, commercialization, and consumption that were once inconceivable are now commonplace. As society evolves, so must the law, but how should it evolve and to what extent? The story of class actions in Canada is exemplary of such an evolutionary struggle:

Trite as the observation necessarily is, it bears emphasizing that we live in a corporate society, characterized by mass manufacturing, mass promotion, and mass consumption. The production and dissemination of goods and services is now largely the concern of major corporations, international conglomerates, and big government, whose many and diverse activities necessarily affect large numbers of persons in virtually all aspects of their lives.<sup>3</sup>

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<sup>3</sup> Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982) Vols. I-III [OLRC Report], Vol. I at 3. Similar reports were commissioned in other common law provinces: Alberta Law Reform Institute, *Class Actions* (Memorandum No 9, 2000); Alberta Law Reform Institute, *Class Actions* (Report No 85, 2000); Manitoba Law Reform Commission, *Class Proceedings* (Report No 100, 1999).

Seeing that existing civil procedure was simply inadequate to accommodate the new and burgeoning age of mass production that would inevitably lead to mass litigation, lawmakers in Canada were called upon to provide a solution.

The Ontario Law Reform Commission billed class proceedings legislation as a mass remedy for mass wrongs.<sup>4</sup> The goals of class proceedings legislation are to promote access to justice, behaviour modification, and judicial economy.<sup>5</sup> In crafting class proceedings legislation,<sup>6</sup> lawmakers envisioned a mechanism enabling litigants to bring a claim as a group in circumstances in which they otherwise, as individuals, “would not be able to bring the Defendant to the seat of justice”.<sup>7</sup>

However, latent in the policy rationales articulated as underpinning the impetus for class proceedings legislation is the notion that this evolving landscape only exacerbated existing problems with the legal system rather than created wholly new ones. Long and drawn-out proceedings weighing expense on the court system, economically forceful defendants overwhelming financially precarious plaintiffs, and wrongs committed with the knowledge that certain types of affected people cannot or will not sue are not problems

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<sup>4</sup> OLRC Report, *supra* note 3, Vol. I at 29.

<sup>5</sup> *Hollick*, *supra* note 1 at para 27.

<sup>6</sup> Quebec was the first province to introduce legislation in 1978 (*An Act Respecting the Class Action*, SQ 1978, c 8). Ontario was the second, in 1992 (*Class Proceedings Act, 1992*, SO 1992, c 6 [*Class Proceedings Act*]) with the other common law provinces following shortly thereafter. The focus here is on cases from the common law provinces: Alberta: *Class Proceedings Act*, SA 2003, c C-16.5; British Columbia: *Class Proceedings Act*, RSBC 1996, c 50; Manitoba: *The Class Proceedings Act*, CCSM, c C130; New Brunswick: *Class Proceedings Act*, RSNB 1996, c 50; Newfoundland and Labrador: *Class Actions Act*, SNL 2001, c C-18.1; Nova Scotia: *Class Proceedings Act*, SNS 2007, c 28; Saskatchewan: *The Class Actions Act*, SS 2001, c C-12.01.

<sup>7</sup> *Excalibur Special Opportunities LP v Schwartz Levitsky Feldman LLP*, 2014 ONSC 4118 at para 204. Justice Perell describes the quintessential case in which an individual claim would not be economically viable because the cost of a proceeding greatly outweighs the individual’s loss.

unique to an expanded corporate globalization. Though these problems may have long existed, it is arguably because certain cases gained media attention,<sup>8</sup> and lawmakers realized that the effect of mass production could lead to injuring hundreds or thousands of people at once, these procedural problems could no longer be ignored.

The Ontario Law Reform Commission recommended and encouraged explicitly creating or modifying litigants' rights via class proceedings legislation in order to effect more substantive solutions.<sup>9</sup> No such modifications were introduced in any of the common law provinces' statutes, and the Supreme Court of Canada maintains that "class actions overcome barriers to litigation by providing a procedural means to a substantive end".<sup>10</sup> In theory, the procedure does not change the substantive law or litigants' rights: "[T]he substantive law continues to apply as it would in a traditional individual proceeding".<sup>11</sup>

Viewed in one way this principle – that the substantive law applies as it otherwise would in two-party litigation – makes sense in that it ensures that class actions are consistent with the rest of private law and do not create a separate system of justice. Viewed in another way, however, in application it seems the principle is perhaps forcing a square peg into a round hole. That is, if there was something about the substantive law that was proving prohibitive for litigation of these types of claims, creating a different kind of procedure is not

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<sup>8</sup> See, e.g., OLRC Report, *supra* note 3, Vol. I at 90-100 discussing the widely publicized cases of the Mississauga Train derailment, reconstruction of houses due to the installation of formaldehyde foam insulation, the collapse of a major public trust, and faulty Firenzis.

<sup>9</sup> OLRC Report, *supra* note 3, Vol. II at Ch 14. The report suggests, for example, that cases where the plaintiff is only seeking monetary relief ought to admit of relaxed evidentiary standards for proving loss on both a common and individual basis.

<sup>10</sup> *AIC Limited v Fischer*, 2013 SCC 69 at para 34.

<sup>11</sup> *Bisaillon v Concordia University*, 2006 SCC 19 at para 18. This point was recently debated and ultimately re-emphasized in *Canadian Imperial Bank of Commerce v Green*, 2015 SCC 60 at para 62.

an adequate solution. As class actions proceeded to work their way through the stages of litigation various problems began to arise, primarily in the context of initial certification motions, which require satisfaction of statutory procedural tests in order to maintain the action as a class claim.<sup>12</sup> Three dilemmas in particular present barriers to class actions being able to meaningfully achieve the three stated goals; these are first briefly outlined and then discussed in detail below. First, the *problem of loss*: courts face the question of whether to certify actions that include plaintiffs that have not suffered any demonstrable compensable loss but the circumstances of the case make it clear that the defendant (by admission or otherwise) breached a duty and standard of care owed to the class. Second, the *problem of profits*: courts face cases in which the amount of compensable loss suffered, if any, by the plaintiff class is far less than the profits made by the defendant's wrongdoing such that remedies limited to compensable loss fail to achieve justice or behaviour modification in the

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<sup>12</sup> The statutory framework outlining the test that must be met in order to certify an action in Canada is slightly different, but fundamentally similar, in each of the common law provinces: see statutes as listed *supra* note 6. Generally, courts must certify a case as a class action if there is a properly pleaded cause of action, a class that is identifiable and definable by objective and sufficiently specific criteria, common issues that would advance the litigation and can be answered in relation to every member of the defined class, an appropriate representative plaintiff, and a litigation plan for resolving issues and evaluation of damages after the common issues trial. The Supreme Court of Canada discussed and developed the tests for the certification criteria in the first class actions trilogy of decisions in 2001 (*Western Canadian Shopping Centers v Dutton*, 2001 SCC 46; *Hollick v Toronto (City)*, *supra* note 1; and *Rumley v British Columbia*, 2001 SCC 69). These decisions were all unanimous, written by Chief Justice McLachlin, and continue to be the touchstone for class actions law in Canada. The first Ontario Court of Appeal trilogy interpreting the Supreme Court of Canada's trilogy was the cases of *Cloud v Canada (Attorney General)* (2004), 73 OR (3d) 401 (CA); *Markson v MBNA Canada Bank*, 2007 ONCA 334; and *Cassano v The Toronto-Dominion Bank*, 2007 ONCA 781. The most recent 2013 Supreme Court of Canada trilogy affirmed the original trilogy, and clarified certain questions about the availability of class actions for indirect purchasers, and the scope of the test for preferable procedure: *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57 [*Pro-Sys*]; *Sun-Rype Products Ltd. v Archer Daniels Midland Company*, 2013 SCC 58; and *AIC Limited v Fischer*, *supra* note 10.

circumstances. Third, the *problem of individual issues*: in order to achieve the goals of access to justice, behaviour modification and judicial efficiency, courts face the difficulty of deciding whether or how to certify cases that require significant individual issues to be determined in order to find liability. It is an error to view these problems as confined to class actions. At the heart of each of these issues are questions about how the fundamental principles of private law ought to operate or be reconsidered.

### ***1.2.1 The problem of loss and the need to reconsider the concept of damage***

It is axiomatic that to maintain a claim in negligence the plaintiff must prove actionable damage: “[T]he cause of action is not complete without proof of damage” and damage is, therefore, the “gist” of the action.<sup>13</sup> If a car hits you, it is uncontroversial that you have been damaged. But what if an enthusiastic driver turns a corner too quickly and narrowly misses you, causing you to jump back in order to avoid injury? What does it actually mean to suffer damage? Though stated unquestionably in the positive law that the plaintiff must prove actionable damage in negligence, the law is confused and convoluted as to what this requires in substance. Most of the courts’ attention in the development of negligence law focused on determining when a duty of care is owed and to whom.<sup>14</sup> Equally important, however, is determining what exactly it means to be injured. We can understand injury in colloquial terms as, for example, the physical injury you suffer when hit by the car.

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<sup>13</sup> *Nicholls v Ely Beet Sugar Factory, Limited*, [1936] 1 Ch 343 (CA) at 350-351.

<sup>14</sup> Kumaralingam Amirthalingam, “The Changing Face of the Gist of Negligence” in Jason W Neyers, Erika Chamberlain & Stephen GA Pitel, eds, *Emerging Issues in Tort Law* (Oxford: Hart Publishing, 2007) 467 at 468. Amirthalingam refers to the duty of care analysis as “over-worked” and suggests the first shift away from the focus on duty was to determine issues of causation. The discussion here agrees with Amirthalingam’s overall suggestion that the locus of advancement in the law of negligence ought to be analysis of actionable damage.

However, we can also understand injury more technically as the violation of a legal right.

The question then becomes, what is the content of that legal right and which understanding of injury ought to prevail?

The concept of damage is perhaps most simply and most often equated with the plaintiff suffering identifiable financial or compensable loss. In the majority of cases the question of what constitutes damage is not in issue because plaintiffs usually sue when they have easily demonstrable compensable loss. Judges do not frequently set out to determine whether the issue is about vindicating a plaintiff's rights, compensating for his or her financial loss, or rectifying the damage that has been done. Generally, when courts award whatever damages the plaintiff claims that award succeeds in serving all these functions: vindication, compensation, and rectification. However, in certain kinds of two-party cases, and more frequently in class actions, the concept of damage is pulled apart and uniquely illuminated because, for example, some or all class members have not suffered any clearly identifiable loss that could be compensated but the overall claim presents a potential aggregate value that makes the case worth litigating.

The problem of loss is created in cases in which some or all class members have not suffered any cognizable loss or injury. For example, each of a group of consumers buys a washing machine. The washing machine is defectively manufactured or designed and in some cases causes flooding in some consumers' homes or retains water and causes some consumers' clothes to become mouldy. However, not every member of the group experiences flooding or mould, perhaps some only experience an occasional foul odour coming from the machine or minor water leakage when the machine is running. But, each consumer has the same make and model of washing machine that has proven in some cases to completely

break and cause substantial loss. If consumers have not yet suffered any injury or loss, should they be included as members of the class that claims negligence against the manufacturer? To slightly change the example, say that the defendant admits that the washing machine was designed and manufactured in violation of certain industry or other standards. Despite this admission the defendant maintains it does not have any liability to the class members who have not been injured. The result is that the defendant (assuming all other elements of the claim are proven) has put a defective product on the market and is liable to some consumers of that product but others who bought and continue to use the same sub-standard washing machine have no cause of action. The problem of loss is not unique to class actions, but is brought to the forefront of the analysis because it is not an issue that typically arises in two-party litigation. Absent a loss that is worth the cost of litigation a plaintiff is unlikely to sue. The price of claiming over a foul odour or a small puddle on the laundry room floor is hardly worth the effort.

If we shift the lens away from a traditional view of negligence as only concerned with compensating financial loss and understand the function of private law as vindicating rights, the problem of loss can be analyzed and the definition of damage reconsidered. Jane Stapleton argues that the focus of the damage that is required in order to maintain a cause of action and prove a wrong ought not be muddled by a concept of damage that is blended with or dependent on monetary loss:

The modern law of torts is in need of a coherent doctrine about the notion of ‘damage’. The word is bandied about in a number of different contexts, usually without clear definition yet equally without apparent awareness of the importance of precision in its use.<sup>15</sup>

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<sup>15</sup> Jane Stapleton, “The Gist of Negligence: Part I – Minimum Actionable Damage” (1988) 104 Law Q Rev 213 at 213.



Similarly, Donal Nolan argues, “one consequence of the academic neglect of the actionable damage issue is the absence of an established framework of governing principles”.<sup>16</sup>

Seemingly over-looked, but what Nolan calls a rather elementary point, is that “the issue of the damage sufficient to establish a cause of action should not be confused with the harms for which recovery is permitted once the cause of action has been established.”<sup>17</sup> That is, once the cause of action in negligence is established, the issue of determining the value of perhaps a trivial inconvenience is merely an exercise of quantification. If the washing machine leaked, caused substantial flooding requiring significant repair to the consumer’s house, there is no question that this would constitute sufficient injury and loss to maintain a negligence claim. The loss to the plaintiff in having mouldy smelling clothes that need to be dry cleaned in addition to the cost of structural repairs is recoverable as consequent damage if liability is established. Any issues of whether that damage is too trivial are questions of valuation. But the real heart of the problem is determining whether the actionable damage sufficient to maintain a claim is the flooding and loss or the fact that the plaintiff bought a sub-standard washing machine. Though Nolan’s point is indeed elementary, the inquiry is perhaps not as simple as his argument suggests.

Chapter 2 will aim to build on the arguments Stapleton and Nolan set up and attempt to offer a comparison of two views of actionable damage drawn from Canadian and English common law. The discussion will consider what courts have defined actionable damage as for certain cases and argue that a broad conception of damage not focused on loss can better reconcile controversial cases and better account for the nature of litigants’ rights.

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<sup>16</sup> Donal Nolan, “New Forms of Damage in Negligence” (2007) 70 *Modern Law Review* 59 at 60.

<sup>17</sup> *Ibid* at 61.

### ***1.2.2 The problem of profits and the need to reconsider disgorgement***

The orthodox view of damages in tort, and the orthodox view of the “essential purpose of tort law”, is to compensate plaintiffs by returning them to the position they were in but for the wrong.<sup>18</sup> However, there is an equally well-established principle that a person ought not profit from wrongdoing.<sup>19</sup> One of the goals of class actions is to promote behaviour modification and the problem of profits is the pressing concern that in some cases even if plaintiffs are compensated, damages award that are limited to the measure of compensable loss pale in comparison to the defendant’s profits and thus behaviour modification is not achieved. The problem of loss is in some ways tied up with the problem of profits because courts focus on what in explicit practical terms both the policy rationale underlying class actions and the judicial decisions analyzing the cases imply: ensuring defendants do not retain profits made from wrongdoing. While a causal relationship between wrong and profit or a policy-based reason may ground a decision that a defendant should be made to disgorge its profits, such reasoning does not provide a principled answer as to why the plaintiff has a right to receive those profits.<sup>20</sup> The counterpart conclusion is that a principled answer as to why a defendant is obligated to disgorge profits is similarly absent.

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<sup>18</sup> *Athey v Leonati*, [1996] 3 SCR 458 at para 20. See also, *Livingstone v Rawyards Coal Company* (1880), 5 App Cas 25 (HL).

<sup>19</sup> The Latin maxim is variously stated as *commodum ex iniuria aua nemo habere debet* (Edelman, *supra* note 21 at 81); *ex turpi causa non oritur actio* (*Blackwater v Plint*, [2005] 3 SCR 3 at para 83); and *nullus commodum capere protest de injuria sua propria* (*Lundy v Lundy* (1895), 24 SCR 650 at 653, citing *Cleaver v Mutual Fund Life Assn.* (1891), [1892] 1 QB 147). The principle applies equally to criminal as well as private law.

<sup>20</sup> Ernest J Weinrib, “Restitutionary Damages as Corrective Justice” (2000) 1 *Theor Inq L* 1 at 1. There are different arguments about the justification and reason for awarding restitution, disgorgement, or gain-based remedies (as they are variously referred to) in cases of wrongs (as distinct from cases of unjust enrichment). The

The problem of profits contributes to heavier reliance on arbitrary policy-based decision-making. It has been established by the Supreme Court of Canada that civil damages can serve a prophylactic and deterrent function<sup>21</sup> and it could be argued that this rationale justifies disgorgement awards. However, the concept of disgorgement as a remedy that arises by right because of a wrong needs to be separated from the concept of disgorgement as a category of discretionary damages (akin to punitive damages) awarded to serve a deterrent function. It will be argued, though contrary to the orthodoxy but supported by the historical development of the common law, that the remedies available for rights violations ought not be limited or categorized by either the loss suffered or by the type of tort alleged. If the private law is understood as functioning to vindicate rights, compensation is but one measure of remedy. If a right has no inherent value, the measure of its value can be equally focused on the defendant (the value of the profits) as on the plaintiff (the value of the loss). Further, if disgorgement is recognized as an available remedy for the negligent violation of some types of rights, it ought to be available for claims of negligence generally.

The orthodox view is that cases of negligence cannot ground gain-based remedies because the “wrongfulness consists in creating the prospect of a loss...the fact that the defendant has realized a gain as well adds nothing to the plaintiff’s case.”<sup>22</sup> As Ernest Weinrib argues, the fact that loss is the locus of the injustice means “[t]he parties do and

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contention here is that the orthodox view that such remedies are only available for specific proprietary torts, fraud, or breach of fiduciary duty is generally agreed to across these theories, even if the justification differs. See, e.g., Peter Birks, *Unjust Enrichment*, 2nd ed (Oxford: Oxford University Press, 2005) at Part IV “The Right to Restitution”; IM Jackman, “Restitution for Wrongs” (1989) 48 CLJ 302; JM Martin, “Waiver of Tort: An Historical and Practical Survey” (2012) 52 Can Bus LJ 473 at 545-548.

<sup>21</sup> *Strother v 3464920 Canada Inc.*, [2007] 2 SCR 177 at paras 75-77.

<sup>22</sup> Weinrib, *supra* note 20 at 11.

suffer injustice only with respect to the loss, not the gain; the gain remains external to their relationship.”<sup>23</sup> The kinds of cases that permit gain-based remedies are those where “the defendant’s gain is of something that lies within the right of the plaintiff.”<sup>24</sup> Thus, torts dealing with another’s property give rise to restitutionary damages but torts dealing with personal injury do not.<sup>25</sup> Though the historical application of disgorgement is limited to violations of property-based rights, there is no principled reason that the rationale of the law seeking to vindicate violated rights generally should not equally apply to make disgorgement available for all rights violations as opposed to only a restricted category.

In theory, if there is a compensable loss resulting from some wrongdoing, compensating each member of the class for that loss should equal some amount that renders the wrongful activity unprofitable. Consider the defendant’s sale of each negligently designed and manufactured washing machine for \$100. The sale price includes \$50 profit to the defendant per unit. If each member of the class has a cause of action based on at least a \$100 loss, compensating the class by \$100 per person at a minimum (perhaps there is additional compensation for having to replace floors damaged by flooding) should result in the defendant paying back to the class all of the profits made on the sale of the washing machines included as part of that compensation. It could be the case, however, that because the plaintiffs have no provable monetary loss, they cannot recover and the defendant retains its profits despite a finding the machine is defective and negligently manufactured. Or it could be the case that because of the sale of the washing machines the defendant realizes another kind of profit. For example, the defendant could be a public company that set out in

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<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid* at 12-13.

its circular to shareholders that it would manufacture and sell one million washing machines and in so doing would be the leading manufacturer and distributor in the country, thus guaranteeing greater market share. Achieving the sale of the one million washing machines secures this market share making the company more profitable, and perhaps results in a contract to produce an additional ten million machines. Even if the defendant is made to pay back ten million dollars to the class, some greater profit could have been achieved such that the defendant is still financially better off than it would be never having sold negligently manufactured washing machines.

The tone throughout some class actions decisions is indicative of criticism towards this latter type of scenario. In some cases there is a prima facie or proven case of wrongdoing and the class has either no prospect of compensation or compensation of a sum that pales in comparison to the defendant's profits. Behaviour modification is not achieved and the result is arguably that justice is not done.

Some cases suggest that the answer to the problem of profits is to create new causes of action or modify existing private law principles.<sup>26</sup> This strategy only obfuscates the real question: why are certain remedies limited or defined by the violation of certain rights and bounded by compensable loss? The orthodox view is that certain remedies are not available

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<sup>26</sup> See, e.g., *Serhan (Trustee of) v Johnson & Johnson*, [2004] OJ No 2904 (SC), aff'd [2006] OJ No 2421 (Div Ct) [*Serhan*] in which Justice Cullity held that the plaintiffs' pleadings supported a claim of waiver of tort as an independent cause of action and consequently the plaintiffs would have an advantage in not being required to prove loss. After certification the case settled (2011 ONSC 128) and the issues were therefore not resolved on the merits. Cases contemporary with and following *Serhan* compounded the confusion both about the status or availability of waiver of tort as an independent cause of action or a remedy and the requirement that these questions needed to be decided on a full factual record. See, e.g., *Amertek Inc. v Canadian Commercial Corp.* (2003), 229 DLR (4th) 419 (ON SC); *Reid v Ford Motor Co.*, 2006 BCSC 712; *Heward v Eli Lilly & Co* (2007), 39 CPC (6th) 153 (ON SC).

for certain kinds of wrongs or wrongs committed in certain kinds of ways. The tension in the case law arguably leads to the conclusions that the orthodoxy is unsatisfactory. The solution, however, should not be a finding that certain remedies are only available for class actions or interpreting the discretion judges are afforded vis-à-vis class procedure so broadly as to permit a departure from private law principles. This would be both unfair and in violation of the principle that class procedure does not alter the substantive law. The solution is to view disgorgement-based remedies as available for all types of rights violations. There is no principled reason to exclude cases of negligence. As with the arguments reconsidering damage, it may seem at the outset that the view presented here is similarly a radical departure from orthodoxy. However, it will be argued that the solution is consistent with underlying principles, is equally applicable to two-party litigation, and provides a more coherent view of the law.

### ***1.2.3 The problem of individual issues as motivating impermissible changes to the requirements of negligence***

The purpose of a class proceeding is to decide the case on a common basis and answer questions that will resolve all of the issues for the entire class. However, a class action is in substance still an aggregation of individual claims despite being a more procedurally efficient vehicle. Liability, then, is still ultimately a question dependent on the individual circumstances of each person in the class. This presents the problem of individual issues – having to determine liability on an individual basis to ensure the procedure does not alter litigants’ substantive rights is a barrier to being able to resolve issues on a common basis and consequently a barrier to achieving class actions’ three goals. The problem is unique to class actions but is an outgrowth of the requirements of proving certain causes of action equally applicable to two-party litigation. The problem is best illuminated by

negligence. For a claim in negligence to succeed, the plaintiff must show the defendant owed him or her a duty of care, breached that duty by failing to act in accordance with the standard of care, and caused the plaintiff damage thereby, and that the damage caused was reasonably foreseeable or not otherwise too remote.<sup>27</sup> Though for class actions there may be some procedural flexibility in the mechanisms or evidence required to assess individual damages,<sup>28</sup> for claims such as negligence to succeed there are critical elements of the cause of action that require individual proof. There is no flexibility built into the statutes regarding the substantive elements which the plaintiff has the burden of proving to establish liability.

The problem of individual issues manifests in two different ways. First, if the individual issues are overwhelming in that there are few, if any, issues that can be resolved on a common basis, the class action will not be certified.<sup>29</sup> Second, even if the action is certified, questions of damages, for example, are not certified as common issues if they are dependent on the idiosyncrasies of each plaintiff's loss. That is, Mr. Smith's house may have been totally destroyed by water damage because his washing machine broke while he was on vacation and caused flooding for two weeks, but Ms. Jones may have only had to replace the

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<sup>27</sup> GHL Fridman et al, *The Law of Torts in Canada*, 3rd ed (Toronto, Carswell: 2010) at 295; cf *M'Alister (or Donoghue) v Stevenson*, [1932] AC 562 (HL).

<sup>28</sup> For example, Ontario's *Class Proceedings Act*, *supra* note 6 at s. 24 provides for monetary damages to be calculated in the aggregate based on statistical or sampling information. As the Supreme Court of Canada recently re-clarified, these provisions cannot be used to establish liability by showing proof of loss. Such sections are only to aid procedural efficiency once all the elements of liability have been independently established: *Pro-Sys*, *supra* note 12 at paras 127-135.

<sup>29</sup> For example, in *McCracken v Canadian National Railway Company*, 2012 ONCA 445 the Ontario Court of Appeal upheld the motion judge's denial of certification on the basis that common issues litigation of the plaintiffs' claim, that employees had been misclassified as managers and therefore denied the protection of relevant employment standards legislation, could not resolve "the fundamental issue of misclassification on a class-wide basis" (para 7). The court found that individualized assessments and evidence would be required to establish the fundamental features of the claim.

flooring in one room because of water damage. The measure of compensation for Mr. Smith and Ms. Jones is very different and based on individual circumstances. After a common issues trial, individual issues of damages and causation, which are essential to liability, remain to be proven.

If, as in the first instance of the problem, certification is denied, none of the three goals can be met. If, as in the second instance, each individual must prove some element of the cause of action in order to establish liability, then class actions more or less break down to nothing more than single two-party claims and present all the hardships of individualized litigation. The statutes provide for some streamlining of procedure for litigation of individual issues that are not merely matters of assessment or quantification of damages. For example, s. 25 of Ontario's *Class Proceedings Act* provides the court has discretion to determine the procedure to hear the individual issues, appoint a referee, and dispense with unnecessary procedural steps.<sup>30</sup> Research thus far reveals this section, and similar sections in other

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<sup>30</sup> Ontario's *Class Proceedings Act*, *supra* note 6 at s. 25 (1):

25(1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,

- (a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;
- (b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and
- (c) with the consent of the parties, direct that the issues be determined in any other manner.

Plaintiffs frequently set out in their litigation plan that a referee will decide individual issues, but this approach has been criticized. For example, in *Keatley Surveying Ltd. v Teranet Inc.*, 2012 ONSC 7120, Justice Horkins questioned the propriety of having a referee decide main issues of liability: "In this case individual issues are numerous and they go to the heart of the action. In my view, a reference is an inappropriate mechanism to resolve the complex individual issues that arise in this case" (para 246). The case was not certified, in part because of the issue of the litigation plan, but this decision was reversed on appeal for other reasons: 2014 ONSC 1677 (Div Ct), *aff'd* 2015 ONCA 248.



provinces' statutes, has not been invoked or judicially analyzed because any trial or summary judgment decisions make liability findings on a common basis or the matters settle.

Even if the procedure is streamlined, the three goals cannot be meaningfully achieved if at some stage individual class members are still required to go up against the defendant to prove an element of liability. Access to justice is denied if defendants can still overwhelm plaintiffs in individual proceedings. Judicial efficiency is undermined if in essence some form of individual trial is still required after the common issues trial. If defendants are never found liable or made to pay damages for wrongdoing (as in the example of the admittedly defective but profitable washing machine), their behaviour is not modified.

The answer to the problem of individual issues, however, cannot be to relax the process or modify the litigants' rights to make it easier for plaintiffs to overcome these obstacles or to certify cases based on a finding that the process will be relaxed. If defendants are forced to pay for individual trials, or if their opportunity to present a full answer and defence is in anyway curtailed, then the result is unfair. If courts assume from the outset that large corporate defendants are likely liable for some wrongdoing and proceed on the basis that the plaintiffs need procedural favours or protection, then this leads to denying defendants due process and defies the foundation of fairness and justice on which the Canadian legal system is built. Proceeding in this way gives credence to the criticisms that class actions are procedural blackmail<sup>31</sup> or covertly morph the private law into a system of strict liability.<sup>32</sup>

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<sup>31</sup> See, e.g., OLRC Report, *supra* note 3, Vol. 1 at 146. For a take on these criticisms in relation to the system in the United States, see Bruce Hay & David Rosenberg, "'Sweetheart' and 'Blackmail' Settlements in Class Actions: Reality and Remedy" (2000) 75 Notre Dame L Rev 1377.

<sup>32</sup> See, e.g., *Serhan*, *supra* note 26 in which the defendants appealed the certification decision to the Divisional Court. In dissent, Justice Chapnik was critical of the motions judge having certified the action which was

### ***1.2.4 Convergence of the three dilemmas resulting in the waiver of tort problem***

Waiver of tort has been described as “an archaic legal doctrine” and enables the plaintiff, after a wrong has been proven, to “relinquish the right to compensation for damages and instead receive disgorgement of the defendant’s wrongful gains.”<sup>33</sup> Canada’s class actions judges and lawyers are all too familiar with the ‘waiver of tort problem’ – confusion that is driving an incorrect application and development of waiver of tort that results from judges and lawyers alike being unsure of what waiver of tort is, how it ought to apply, and what the status of the law is in Canada. The problem is not with the doctrine of waiver of tort itself, though the doctrine is recognized as confusing and difficult to understand. The problem is that judges are seeking to answer the dilemmas of the problems of loss, profits, and individual issues, by using or interpreting waiver of tort incorrectly rather than parsing out the dilemmas individually and tackling them directly. Familiarity with the debate about waiver of tort and the problem it is creating has not resulted in clarification of the law or a better understanding of the doctrine. Class counsel began pleading waiver of tort framed both as a remedy and as an independent cause of action in cases in which the defendants made a large profit from their alleged wrongdoing or it was difficult to identify or quantify a compensable loss for class members. The most clear, and perhaps most cited, example of the

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clearly in part motivated by a finding that the defendants had committed some wrongdoing because they had been prosecuted in the United States:

Though procedural reforms may have unleashed class actions “as potent judicial weapons” to regulate conduct in the commercial sphere, in my view, the principles inherent therein should be subject to close judicial scrutiny at an early stage. The new trend need not import holus-bolus the principle of strict liability into products liability cases, exemplified by the plethora of claims against various industries in the United States. Clearly, the mere assertion of injustice cannot be sufficient to avoid scrutiny of the restitutionary elements of a claim for damages. In the instant case, the plaintiffs’ claim based on waiver of tort as a cause of action cannot be sustained on the facts pleaded. It is plain and obvious that such an action would fail (para 258).

<sup>33</sup> Greg Weber, “Waiver of Tort: Disgorgement *Ex Nihilo*” (2014) 40 Queen’s LJ 389 at 389.

waiver of tort problem is the certification decisions at first instance and on appeal to the Divisional Court in *Serhan v Johnson & Johnson*.<sup>34</sup> *Serhan* was about allegedly defective “SureStep” blood glucose meters and blood measuring strips manufactured by the defendants, a LifeScan group of corporations, ultimately wholly-owned subsidiaries of Johnson & Johnson. The plaintiffs claimed negligence, negligent and fraudulent misrepresentation, breach of the federal *Competition Act*<sup>35</sup> and conspiracy.<sup>36</sup> The defendants admitted the meters were defective. In some cases the meters displayed an error message rather than indicating the existence of a high blood glucose level reading. The strips were defective in that by not being fully inserted (to a measure of a 15 thousandth of an inch) users were given erroneously low readings.<sup>37</sup>

Federal agencies in the United States investigated LifeScan’s United States’ entities, leading ultimately to LifeScan paying almost \$29.5 million in fines for offences relating to “false and misleading reports” provided to federal agencies, and the “delivery of an ‘adulterated and misbranded medical device’ into interstate commerce”.<sup>38</sup> Plea agreements were based on admissions that LifeScan had learned of the defects of the strips and the meters as early as four years before they were distributed on the Canadian market.<sup>39</sup>

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<sup>34</sup> *Serhan*, *supra* note 26.

<sup>35</sup> RSC, 1985, c C-34, s 52: “(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.”

<sup>36</sup> *Serhan*, *supra* note 26 at para 1.

<sup>37</sup> *Ibid* at paras 6-7.

<sup>38</sup> *Ibid* at para 8.

<sup>39</sup> *Ibid* at para 8.

As Justice Cullity noted in the certification decision, the plaintiffs' largest hurdle was "virtually no evidence that either of the representative plaintiffs, or any other members of the putative class, suffered any injurious effects to their health by using the meter or the Strips".<sup>40</sup> Almost half of the allegedly defective meters sold or distributed in Canada were replaced with corrected meters, and the meters provided to the proposed representative plaintiffs, as well as putative class members, were supplied through the Ontario Drug Benefit Program with no cost to the user.<sup>41</sup>

On the motion for certification the defendants conceded the plaintiffs had properly pled causes of action, and only contested the s. 5(1)(a) criterion<sup>42</sup> insofar as submitting that even if proven, the facts and the causes of action pled would not entitle the plaintiffs to any remedy. Justice Cullity in effect reinterpreted the pleadings to conclude the plaintiffs could proceed on the basis of an independent cause of action of waiver of tort:

Waiver of tort, by that name, has not been pleaded but...I believe, [the statement of claim alleges] material facts that if proven, could entitle the plaintiffs to a remedy on the basis of that doctrine. Such facts would constitute a cause of action for which the remedies of a constructive trust or, alternatively, an accounting of revenues, are claimed. Claims based on waiver of tort seek 'restitution' of benefits received by the defendants, as a consequence of their tortious conduct rather than damages to compensate the plaintiffs for a loss.<sup>43</sup>

Justice Cullity certified the proceeding as a class action, grounding the decision in "the flexibility that now exists in the court's choice of remedies"<sup>44</sup> and a hesitancy to determine

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<sup>40</sup> *Ibid* at para 12. The statement of claim alleged damages for the amounts paid for the meters, personal injuries including pain and suffering from "repuncturing fingers to draw additional blood samples", diabetic shock, and loss of income.

<sup>41</sup> *Ibid* at paras 16-17.

<sup>42</sup> Section 5 of the Ontario *Class Proceedings Act*, *supra* note 6, is the test for certification and s. 5(1)(a) requires that "the pleadings or notice of application discloses a cause of action."

<sup>43</sup> *Serhan*, *supra* note 26 at para 34.

<sup>44</sup> *Ibid* at para 25.

contested issues at the pleadings stage.<sup>45</sup> It was held that if the plaintiffs could proceed with waiver of tort as an independent cause of action, the plaintiffs would have an advantage in not being required to prove loss.<sup>46</sup> Cases contemporary with and following *Serhan* compounded the confusion both about the status or availability of waiver of tort as an independent cause of action or a remedy and the requirement that these questions needed to be decided on a full factual record.<sup>47</sup>

The debate continues as to whether waiver of tort is an electable remedy, a parasitic form of damages, or an independent theory of liability.<sup>48</sup> How waiver of tort has evolved and how the problem and debate continues in the case law is not the focus here and has been excellently dealt with elsewhere.<sup>49</sup> For the purposes of this discussion, the waiver of tort problem is defined as an example of how judges are trying to answer each of the problem of loss, the problem of profits, and the problem of individual issues combined in a class actions case. First, judges suggest that waiver of tort can solve the problem of loss if used as an independent cause of action that does not require loss. They thus attempt to subvert the damage requirement in negligence.<sup>50</sup> Second, there is a suggestions that waiver of tort can be

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<sup>45</sup> *Ibid* at para 38: “[A]lthough there are many cases in which remedies have been granted on the basis of the ‘doctrine’ of waiver of tort, its scope, and the extent to which it reflects general principles, have not, as far as I am aware, received authoritative analysis in Canadian appellate courts.”

<sup>46</sup> *Ibid* at paras 35.

<sup>47</sup> *Cf supra* note 26. In *Pro-Sys*, *supra* note 12, Justice Rothstein affirmed the conclusion that the issue should not be dealt with at the pleadings stage and held that appeal was “not the proper place to resolve the details of the law of waiver of tort, nor the particular circumstances in which it can be pleaded” (at para 96).

<sup>48</sup> See John D McCamus, “Waiver of Tort: Is there a Limiting Principle?” (2014) 55 Can Bus LJ 333.

<sup>49</sup> See Weber, *supra* note 33; Martin, *supra* note 20; H Michael Rosenberg, “Waiving Goodbye: The Rise and Imminent Fall of Waiver of Tort in Class Proceedings” (2010) 6 Can Class Action Rev 37.

<sup>50</sup> The Ontario Court of Appeal suggests it has closed the issue on waiver of tort being an independent cause of action that does not require proof of wrongdoing or loss at all. In *Aronowicz v Emtwo Properties Inc*, 2010

used to solve the problem of profits because its purpose is to permit a disgorgement remedy. However, plaintiffs often plead waiver of tort indiscriminately as both a remedy and independent cause of action and the issues are not thoroughly analyzed in contemporary case law.<sup>51</sup> Finally, if, as was suggested in *Serhan*, the plaintiffs' claim in negligence does not require proof of loss and the remedy is entirely focused on the defendant, then the problem of individual issues is solved because no plaintiff-by-plaintiff inquiry is required.

The waiver of tort problem is rooted in class actions judges trying to achieve the three goals of access to justice, judicial economy and behaviour modification, and ensure meritorious claims are certified, by analyzing the problems posed by the orthodox conceptions of damage and disgorgement in a backward fashion. That is, judges analyze the issues within the framework of a class proceeding and an aggregation of claims rather than focusing on how the issues ought to be resolved first on an individual basis and then applied to the class action. By considering the issues only as in relation to waiver of tort and only within the scope of class actions, the resulting decisions imply potential outcomes that would impermissibly alter the substantive law.<sup>52</sup> As class actions procedure is not meant to create or

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ONCA 96 the court held “[w]hile waiver of tort appears to be developing new legs in the class action field ... it is of no assistance to the appellants here. Whether the claim exists as an independent cause of action or whether it requires proof of all the elements of an underlying tort aside, at the very least, waiver of tort requires some form of wrongdoing” (at para 82). Courts are still, however, debating the issue (e.g. *Malak v Hanna*, 2016 BCSC 315 at para 12) and some scholars continue to argue waiver of tort should be considered a separate theory of liability (e.g. McCamus, *supra* note 48).

<sup>51</sup> The reason for this, as noted above, is courts' reluctance to decide substantive issues on procedural motions.

<sup>52</sup> It is said that the alteration of the substantive law is implied because many of these decisions are in the context of certification. That is, judges are suggesting what the result or analysis could be in a future examination of the merits but the issues are not being decided on procedural motions. If it is the case that a decision on the merits follows the analysis that is suggested in many certification decisions, then the substantive law would indeed be altered. To this point, however, such changes and analysis is only theoretical.

alter litigants' substantive rights, the discussion must begin by looking at the private law generally not work outward from class actions specifically. The biggest hurdle the waiver of tort problem has created is the notion that "uncertainty about the scope of the wrongdoing that will come within the doctrine" precludes the issue from being dealt with outside the "context of a complete record after trial."<sup>53</sup> The questions posed by traditional principles of negligence, how damage and disgorgement are to be defined, and whether the orthodoxy ought to be reconsidered should not be answered in a contingent manner based on fact-specific circumstances. The answers should not be developed only within the class action context. While the issues have arisen and been dealt with recently only in class actions, the questions apply to, and should be answered for, all of private law.

The dissertation concludes that class actions need not modify the substantive law or alter litigants' rights and are therefore a defensible procedural mechanism. The answer to the problems posed by class actions is not to create a separate legal system but to properly understand and articulate how these problems are bringing to the surface issues that are latent in the orthodox conceptions of the private law generally. It is because class actions pull apart the elements of private law in a unique way that rarely, if ever, occurs in two-party litigation that there are tensions in the interpretation and application of the law. If the function of the private law is viewed not as focused on compensating loss but on vindicating rights, the law can be more coherently interpreted and consistently applied across both class actions and two-party litigation. The consequences of taking this view prompt reconsideration of foundational principles but not a wholesale alteration.

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<sup>53</sup> *Griffin v Dell*, [2009] OJ No 418 (SC) at para 63 (citing *Haddad v Kaitlin Group*, [2008] OJ No 5127 (SC)); cf *Pro-Sys*, *supra* note 47.

### 1.3 Methodology

#### *1.3.1 An interpretive, rights-based theory of private law*

The dissertation mainly relies on primary legal sources. Cases and fact patterns will be interpreted within the framework of precedential jurisprudence, statutes and relevant government documents. In order to develop a view that is internally consistent with the positive law, a doctrinal and descriptive approach is necessary to articulate the orthodox view of the principles both of private law and of class actions.

The discussion engages with descriptive, interpretive and prescriptive aspects of legal theory.<sup>54</sup> Building on a descriptive analysis of current and precedential case law from Canada and the United Kingdom, the main project is to offer a view of the private law that best accounts for how to understand its function, and in so doing deals with class actions to enable judges to solve problems in a way that is consistent with this function. The aim is to show the positive law makes better sense if private law is viewed as functioning to vindicate rights rather than compensate loss. Prescriptive elements are blended with the interpretive theory by advancing the argument that in deciding cases judges ought to consider issues within the framework and using the definitions proposed here. In challenging orthodox views and arguing that damage and disgorgement ought to be re-conceptualized, the conclusions necessarily contain prescriptive aspects. These arguments are, however, an extension of the descriptive and interpretive elements of the discussion. By viewing the private law as focused on the vindication of rights it is necessary to understand the content of those rights both philosophically and as informed by analysis of case law.

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<sup>54</sup> The distinction, function, and importance of each of these types of accounts is discussed in further detail in Allan Beever & Charles Rickett, “Interpretive Legal Theory and the Academic Lawyer” (2005) 68 MLR 320.



The project is therefore best described as one focused on developing part of an interpretive legal theory of the private law: “The best explanations are produced by examining and reflective on the law...They are attempts to provide coherent and compelling conceptual accounts of the basis and scope of liability; they are attempts to reveal ‘an *intelligible order* in the law’.”<sup>55</sup> Limitations in scope necessarily dictate that the discussion cannot engage with all aspects of the private law and thus the focus is claims in negligence.

Though a foundational point, it is not uncontested that the private law is concerned with litigants’ rights and is, at least in part, an institution concerned with defining what constitutes a violation of one’s rights and, once violated, what recourse is available or dictated by the fact of that violation.<sup>56</sup> It is beyond the scope of this discussion to advance a justification for a rights-based view, or to advance arguments seeking to define the content of people’s rights generally. In large part the argument adopts the starting position articulated

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<sup>55</sup> *Ibid* at 327-328.

<sup>56</sup> See Donal Nolan & Andrew Robertson, “Rights and Private Law” in *Rights and Private Law*, Donal Nolan & Andrew Robertson, eds, (Oxford: Hart Publishing, 2012) 1 at 1: “[Rights-based analysis] seeks to develop an understanding of private law obligations which is driven, primarily or exclusively, by the recognition of the rights we have against each other, rather than by other influences on private law, such as the pursuit of community welfare goals.” Stephen Perry sets up a categorization between two competing camps, which he labels broadly rights-based theories and instrumentalist theories. He includes in what he broadly labels “instrumentalist” theories as including “instrumentalist, economic, functionalist, pragmatist, welfarist, utilitarian, and consequentialist...Such theories hold that the point or purpose of tort law as a whole is to achieve certain kinds of moral goals, such as the maximization or welfare or the promotion of economic efficiency” (Stephen Perry, “Torts, Rights, and Risk” in John Oberdiek, ed, *Philosophical Foundations of the Law of Torts* (Oxford: Oxford University Press, 2014) 38 at 38). Perry argues that instrumentalist views dominate American scholarship. See also Heidi Hurd & Michael S Moore, “Negligence in the Air” (2002) 3 *Theo Inq in Law* Article 3 for arguments that the principles underlying a rights-based view lead to an incoherent understanding of negligence.

by Allan Beever in his work *Rediscovering the Law of Negligence*.<sup>57</sup> Beever undertakes the project of ‘rediscovering’ negligence by working from what he argues are the foundational cases establishing the law of negligence<sup>58</sup> and maintains that one underlying principle of the positive law is that it “defines the scope of an actionable injury in terms of the parties’ rights.”<sup>59</sup> Beever’s argument defending a rights-based approach is in part based on dismantling the assumption that the common law is only focused on remedies: “If focusing on rights enables the academic better to explain the law than the courts with their focus on remedies are able to do, then she must adopt that methodology.”<sup>60</sup> The use of rights language,

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<sup>57</sup> Beever, *supra* note 2. The discussion will advance and rely on a rights-based theory, however, as noted there are many proponents of rights-based views with each having a different theory and conception about how to understand rights and the consequences of rights violations (Nolan & Robertson, *supra* note 56, cite Allan Beever, Robert Stevens, Ernest Weinrib, Nicholas McBride, Jason Neyers, and Stephen Smith as some of the forerunning rights-based theorists, each with a different theory about the implications of private law being concerned with rights). Beever’s work is one that offers a holistic conception of negligence, as opposed to other works which tackle issues through the view of certain types of claims or certain categories of duties of care. Beever’s position is ultimately to develop and defend a theory of the private law as a system based on corrective justice in congruence with Ernest Weinrib’s theory in *The Idea of Private Law* (Cambridge, Massachusetts: Harvard University Press, 1995). I do not take a position as to whether their theories of private law as corrective justice are correct or necessarily implied in interpersonal legal relationships, and in fact disagree in Chapter 3 with a contention that can be ascribed to corrective justice theories that the only entitlement that a plaintiff has once a violation of his or her right is proven is to compensation for loss. However, it is not necessary that one adopt or endorse a corrective justice view in order to agree with Beever’s overall argument that the most principled understanding of the law is based on a view of negligence as concerned with litigants’ rights.

<sup>58</sup> Beever argues the foundational cases are *Donoghue*, *supra* note 27; *Palsgraf v Long Island R. Co.* (1928), 162 NE 99 (NY CA) [*Palsgraf*]; *Bolton v Stone*, [1951] AC 850 (HL); *Overseas Tankship (U.K.), Ltd. v Morts Dock & Engineering Co., Ltd. (sub nom ‘Wagon Mound 1’)*, [1961] 1 All ER 404 (PC); *Overseas Tankship (U.K.), Ltd. v Miller Steamship Propriety Ltd. (sub nom ‘Wagon Mound 2’)*, [1966] 2 All ER 709 (PC).

<sup>59</sup> Beever, *supra* note 2 at 120 citing to Lord Atkin, “Law as an Educational Subject” (1932) *Journal of the Society of Public Teachers of Law* 27 at 30, and JC Smith & Peter Burns, “Donoghue v Stevenson: The Not so Golden Anniversary” (1983) 46 *Mod L Rev* 147 at 147-148.

<sup>60</sup> Beever, *supra* note 2 at 215.

then, is not advancing a different or adverse approach to the way cases are decided. Rather it is a “translation not a replacement” of the language of remedies used by the courts. Further, the use of rights language does not imply that the analysis is wholly abstracted from how courts decide cases nor does it “involve the adoption of a radical, abstract-theoretical approach to lawyering.”<sup>61</sup> Though the language of rights may be a helpful way to translate the analytical approach taken by the courts, the concern still remains with identifying what rights are “as they exist in the substantive law” and not what rights are with reference to abstract normative moral philosophy.<sup>62</sup> Thus, analyzing the problems of negligence through a rights-based approach, “even though it is unfamiliar, is perfectly consistent with the traditional common law approach”.<sup>63</sup> Beever goes further to conclude that “although the law gets by in practice without much reference to primary rights, the law cannot be adequately analysed without them.”<sup>64</sup>

That private law is concerned with rights is perhaps not a radical notion. As Cardozo CJ held in *Palsgraf v Long Island Rail Co.*, “[n]egligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right”.<sup>65</sup> From an overarching perspective it is perhaps simple to articulate the function of the law as defining and determining a system of rights, and it is similarly simple and perhaps easy to

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<sup>61</sup> *Ibid* at 216.

<sup>62</sup> *Ibid*.

<sup>63</sup> *Ibid* at 216.

<sup>64</sup> *Ibid* at 216-217.

<sup>65</sup> *Palsgraf*, *supra* note 58 at 101. As Beever argues, “a wrong is the violation of a right. Hence, a remedy without the invasion of a right is a remedy without a wrong. But without a wrong, what is one remedying? Remedies without rights are incoherent” (Beever, *supra* note 2 at 220).

accept that “at least in private law, a wrong is the violation of a right.”<sup>66</sup> The thornier issues are found by attempting to determine what precisely is the content of one’s rights.<sup>67</sup> It is on this point that the limits of Beever’s view are arguably reached as he identifies the aim of his project as understanding the structure of negligence defined in relation to corrective justice not to articulate what the content of one’s rights are.<sup>68</sup> His aim is to understand as a structural matter against what sorts of behaviour rights protect litigants against and how the law should respond when a right has been violated.<sup>69</sup>

Undoubtedly this discussion cannot begin to conclusively or completely determine these issues. The focus here is largely on the way in which courts have defined and

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<sup>66</sup> Beever, *supra* note 2 at 220.

<sup>67</sup> While it may be easy to say that the violation of a right gives rise to a remedy, the justification and reasoning for why this is so is by no means settled. Does one have a right to a remedy? Are there distinct rights that are necessarily determined and circumscribed by the violation of one’s rights? Are remedies, though based on wrongs, something that the court simply grants by order or is the court necessarily bound in justice to grant a remedy? Civil recourse theory, for example, argues there is a Hohfeldian “power conferred on tort victims [that] is a power to hold to account a person who has committed a relational legal wrong against the victim” but the theory does not argue that remedies are limited to, for example, the plaintiff’s compensable loss (John CP Goldberg & Benjamin C Zipursky, “Rights and Responsibility in the Law of Torts” in Donal Nolan & Andrew Robertson, eds, *Rights and Private Law* (Oxford: Hart Publishing, 2012) 251 at 265; cf Benjamin C Zipursky, “Rights, Wrongs, and Recourse in the Law of Torts” (1998) 51 Vand L Rev 1 at 63-65). Civil recourse theory perhaps fits the best with the arguments advanced here, but though Goldberg and Zipursky identify how it is we conceive of what the violation of a right entitles someone to, they do not necessarily claim how this determines what the content of one’s rights are. Their focus is more on the structural features of the relationship: “The primary claim rights enjoyed by individuals are defined by relational directives – legal norms of non-injury. Responsibility or accountability exists for those who have invaded rights because of the law’s recognition of a right to a means of redressing wrongs” (Goldberg & Zipursky at 273).

<sup>68</sup> Similarly, many other rights-based theories focus on the structure of the relationship rather than determining the content of litigants’ rights.

<sup>69</sup> Beever, *supra* note 2 at 56 and 60-61; cf Beever at 45 n 9 where he accepts a broad definition of a right as the correlative of a wrong.

circumscribed litigants' rights as opposed to advancing a broader philosophical theory. As is quickly evident, any interpretation of the law and of negligence is inextricably determined by how the content of rights are defined. The difficulty, however, is that courts often fail to explicitly recognize that this is the project they are (or by necessity must be) undertaking and consequently conflicting definitions create a mischief that needs remedying.

### ***1.3.2 Limitations in scope***

Though the conclusions purport to be applicable to all of private law, and a critical element of the argument is that the application of principles and modes of interpretation ought not differ based on the cause of action at issue, the scope of the investigation is limited. There is insufficient space to cover in comprehensive detail each type of cause of action or to undertake an investigation into the content of litigants' private law rights and duties generally. Claims in negligence offer the most fertile ground for investigating the relevant issues because there is greater debate about what litigants' rights and duties are. For other types of claims the identification of a violation of a right is more clear-cut because most claims do not depend on a theoretical examination of damage or loss as a critical element in order to maintain the cause of action. If, for example, a defendant commits a trespass to land or intentional bodily injury, these types of claims are not necessarily contingent on the plaintiff showing some damage in order to bring a claim.<sup>70</sup> Whether the plaintiff's right has been violated can be analyzed independently of the plaintiff showing loss. In negligence, loss

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<sup>70</sup> Fridman, *supra* note 27 at 25: "Trespass in all its forms is actionable *per se*, i.e., without the need for the plaintiff to prove he has sustained actual damage. The mere infringement of the plaintiff's right not to be interfered with in respect of his body, his goods, or his land is wrongful and actionable" (citing *Logan v Levy* (1975), 20 NSR (2d) 500 (TD); *Baldry v Dixon*, [1931] 1 WWR 21 (Man CA)).

is tied up with the determination of whether the plaintiff's right has been violated and this complicates the analysis in interesting ways that are central to this investigation.

Similarly, while the scope deals with common law cases generally, the focus is in places on class actions specifically. In two-party litigation the issues of damage, loss, harm, and rights violations are not usually analyzed separately. Because of the structure of class actions judges are oftentimes required to analyze these issues separately and class actions cases therefore illuminate the problems differently. The scope will also be limited to deal more particularly with class actions in Canadian common law provinces. Though Quebec has a more developed jurisprudence, as it was nearly twenty years ahead of the common law provinces in enacting class proceedings legislation, the application of the Civil Code differentiates Quebec courts' analysis of the private law in general. While some cases are helpful with respect to interpreting and articulating the application and operation of class actions procedure, the application of the substantive law with respect to class actions is of limited assistance.

### ***1.3.3 Jurisdictional focus***

The scope of primary legal sources is common law from Canada (including in a limited fashion Quebec, as mentioned above) and the United Kingdom. Though the United Kingdom does not have class proceedings legislation, many of the controversial English cases that will be discussed are aggregated claims and therefore uniquely highlight particularly the issue of loss similar to Canadian class actions. Of the Canadian common law jurisdictions, Ontario and British Columbia are the provinces that litigate the most class actions. There is little analysis of class action cases from the United States as the procedural requirements are fundamentally quite different from Canada and each state has interpreted

the substantive law as it applies in certain controversial class actions cases to arrive at different conclusions. While some American case law and scholarship is helpful, in general there is broad ideological and procedural divergence from the Canadian understanding both of negligence and class actions.

Discussion of the development and application of orthodox principles therefore focuses on Canadian and English law and jurisprudence. As we negotiate the investigation it is quickly evident that even though the common law has been developing for nearly one thousand years there are still very fundamental questions about the nature and purpose of the law that have yet to be settled. This tension gives rise to the problems to which we now turn to consider.

## Chapter 2

### 2. Reconsidering Damage in Negligence

#### 2.1 Introduction

Though it may be “hornbook law that damage is the gist of the action in negligence”,<sup>1</sup> the concept of actionable damage is much more complex and normatively significant than a factual requirement meant only to distinguish negligence from other types of torts. Damage as the gist of negligence can be understood as identifying a particular conceptual view about the relational nature of litigants’ rights and duties. It can be understood as requiring a plaintiff to suffer and prove a particular kind of loss in order to maintain an action. It can be understood as expressing the boundaries of the types of harms the law will identify as legal wrongs. But what exactly is damage? Though seemingly the most effortless and factually based part of the negligence inquiry, damage is not simply factual loss. Different interpretations of damage result in different conceptions of negligence.

The term ‘actionable damage’ is not used in Canada as often as it is in the United Kingdom. Rigorous analysis of what constitutes actionable damage has not been taken up as frequently in Canada as in the United Kingdom with the result that questions such as whether a risk of future injury is sufficient or whether actionable damage requires proof of loss, have not been dealt with as squarely. One of the reasons for confusion in the law, such as is present in the waiver of tort debate, is the dearth of analysis by the Supreme Court of Canada of these issues. The uncertainty of the law in Canada is evidenced by, for example, Justice

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<sup>1</sup> *Gregg v Scott*, [2005] 2 WLR 268 (HL) [*Gregg*] at para 193 per Baroness Hale.



Perell's somewhat startling conclusion in *Goodridge v Pfizer Canada Inc.* that, "increased risk of [harm]...is a materialized actual harm".<sup>2</sup> Justice Perell, well known for his careful and in-depth legal analysis, cites no cases to support this conclusion, but only analogizes to other similar certified class actions. His lack of analysis illustrates that Canadian courts have not sufficiently tackled the problem of determining what constitutes actionable damage.

Conversely, in the United Kingdom the House of Lords has taken up the task of clarifying and defining actionable damage in a series of cases in the last ten years.

As Lord Atkin established in *Donoghue v Stevenson*, "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour."<sup>3</sup> In order to maintain a cause of action in negligence, one element the plaintiff must prove is that he or she has suffered injury that falls within the ambit of the type of reasonably foreseeable harm the defendant has a duty to take care to avoid.<sup>4</sup> Equally important to the negligence inquiry as asking, "[w]ho, then, in law is my neighbour" (the question that tends to dominate<sup>5</sup>) is determining what, then, constitutes injury?

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<sup>2</sup> 2010 ONSC 1095 [*Goodridge*] at para 58. The judgment certified the case as a class action. One of the plaintiff's allegations was that a side effect of the defendant's drug caused a risk of suicidal behaviour.

<sup>3</sup> [1932] AC 562 (HL) [*Donoghue*] at 580.

<sup>4</sup> The articulation of how the elements of negligence work together and what precisely is the duty the defendant owes the plaintiff is the subject of debate and necessarily intertwines issues of the standard of care, remoteness and causation. As will be discussed further, the argument here will rely in large part on Allan Beever's articulation of duty and standard, extrapolated from a reconsideration of what he argues are the foundational negligence cases: Allan Beever, *Rediscovering the Law of Negligence* (Oxford: Hart Publishing, 2007). See also the discussion in Chapter 1 at Part 1.3.1.

<sup>5</sup> Kumaralingam Amirthalingam, "The Changing Face of the Gist of Negligence" in Jason W Neyers, Erika Chamberlain & Stephen GA Pitel, eds, *Emerging Issues in Tort Law* (Oxford: Hart Publishing, 2007) 467 at 468.

A simple starting point for crafting a definition of actionable damage is to understand its purpose as distinguishing different types of torts. That is, distinguishing between actions *per se* (causes of action standing alone without any reference to consequent damage) and actions *per quod* (causes of action requiring allegation and proof of loss).<sup>6</sup> Actions that are *per se* are intentional torts<sup>7</sup> based on direct violations of a plaintiff's right and do not require the plaintiff to establish consequent loss. Identifying the type of action with reference to loss, however, does not define the difference, if any, between the rights at issue. Loss does not meaningfully illuminate why the two types of actions are normatively distinct.

As Jane Stapleton proposed, “[t]he modern law of torts is in need of a coherent doctrine about the notion of ‘damage’.”<sup>8</sup> Stapleton began by describing how we could embark on such a project by suggesting that the outer limit, or minimum actionable damage, ought to be determined for four categories of negligence cases.<sup>9</sup> In order to understand the

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<sup>6</sup> *Black's Law Dictionary*, 9th ed., *sub verbo* “*per se*” and “*per quod*”.

<sup>7</sup> The intention need not be to harm or violate the plaintiff's right; the intention need only be to intentionally act. See, e.g., *Turner v Thorne*, [1959] OJ No 416 (HCJ) at para 8 (citing *Kopka v Bell Telephone Co. of Pennsylvania*, 91 A.2d 232 at 235 (PA SC)):

Before considering the question of the liability of a trespasser for personal injuries suffered by the possessor of land as an indirect result of the trespass, there are two relevant legal principles to be borne in mind. The first is that the fact that a trespass results from an innocent mistake and, in that sense, is not deliberate or wilful, does not relieve the trespasser of liability therefor or for any of the results thereof.

<sup>8</sup> Jane Stapleton, “The Gist of Negligence: Part I – Minimum Actionable Damage” (1988) 104 *Law Q Rev* 213 [Gist Part I] at 213; see also Jane Stapleton “The Gist of Negligence: Part II – The Relationship Between ‘Damage’ and Causation” (1988) 104 *Law Q Rev* 389.

<sup>9</sup> Stapleton, Gist Part I, *ibid* at 218: “Class A claims where the outcome is personal injuries, Class B claims where the effect is physical changes to property owned by the plaintiff at all relevant times, and Class C claims where the defendant's action has produced a deleterious condition in property supplied to or occupied by the plaintiff, ... [and] Class D claims [which partially overlap with the last two classes] where the focus is on the inroad made into the plaintiff's economic interests.”

definition of actionable damage, she argued, the principal focus should be on courts' "overt formulation of what damage is necessary" for each category of case.<sup>10</sup> Stapleton's challenge has still not been comprehensively answered. The discussion that follows cannot begin to tackle all of the issues implicated in attempting to define actionable damage. However, what we discover is that a coherent doctrine about damage cannot be based on a taxonomy of types of negligence cases. Though seemingly conceding defeat before beginning, a generally applicable definition of what damage is in substance cannot be formulated.

If negligence is viewed as relational,<sup>11</sup> then the content of litigants' rights and duties are defined with reference to the duty and standard of care. The argument advanced here

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<sup>10</sup> *Ibid* at 217.

<sup>11</sup> This conception of negligence is in line with Beever's articulation and is the view relied on here (Beever, *supra* note 4, esp Ch 4). As set out by Ripstein and Zipursky, negligence can be seen as concerned with relational, qualified duties of non-injury (Arthur Ripstein & Benjamin C Zipursky, "Corrective Justice in an Age of Mass Torts" in Gerald J Postema, ed, *Philosophy and the Law of Torts* (Cambridge: Cambridge University Press, 2001) 214). The distinction between a relational and non-relational view identifies what relationship is of concern in the negligence inquiry. If negligence is relational, the relevant scope is only the relationship as between the plaintiff and defendant. It is not, as with the non-relational view, concerned with only the defendant's actions without any reference to the defendant owing a particular duty of care to a particular class of people. The duty the defendant owes can be qualified or unqualified. Ripstein and Zipursky cite the example of a qualified duty as being a duty not to cause harmful or offensive touching through harmful conduct, and contrast this to an unqualified duty of, for example, a duty not to cause another to die. A duty of non-injury is one that the defendant does not breach unless the defendant in fact injures the plaintiff, which is contrasted with a duty of non-injuriousness, which can be breached objectively and without reference to the plaintiff's injury by generally falling below the standard of care. The relevant duty in negligence, then, is a relational, qualified duty of non-injury. The relational view of negligence is also discussed by Hurd and Moore and labelled a fully relational view or a strong harm within the risk (HWR) theory. Hurd and Moore articulate the position as harm within the risk because on a fully relational view negligence is only made out if the plaintiff suffers the particular harm that is within the ambit of the risk that the defendant is under a duty to avoid. Hurd and Moore argue, contra Ripstein and Zipursky, that the HWR view of negligence is indefensible and adopt what can be called a non-relational view of negligence (Heidi Hurd & Michael S Moore, "Negligence in the Air" (2002) 3 *Theor Inq in Law* 333). It may be that the view of negligence as non-relational and not

contends that in order to maintain a relational view of negligence, the duty and standard of care must also be defined in reference to the actionable damage. That is, the plaintiff's relevant right in negligence is a right to not suffer a particular kind of damage that the defendant is under a duty to take care to avoid. In order to craft a complete coherent doctrine of damage, as Stapleton rightly argued is needed, the categorization must be dealt with at a granular level on a duty-by-duty basis.

Analysis by English and Canadian courts about what constitutes actionable damage leads to two alternative definitions: one narrow and one broad. The narrow definition of damage requires that a plaintiff suffer a loss, that is, be worse off physically or financially. The broad definition requires no such detriment. The narrow definition causes problems in practice, leads to inconsistent and arbitrary, policy-based decisions, and ultimately is not the approach that provides a coherent and principled view of the law. If damage, and its function as determining the content of a legal wrong, is reconsidered and the broad approach adopted, then the tensions and inconsistencies resulting from a focus on loss can be resolved. To say

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focused on the content of the duty of care is the prevailing view of American tort scholars. Stephen Perry, for example, argues that what he calls the instrumentalist theories (instrumentalist, economic, functionalist, pragmatist, welfarist, utilitarian and consequentialist theories) "represent the dominant strand of theorizing about torts in the United States." This view, he contends, has resulted in the concept and analysis of duty of care (which he maintains is foundational to a rights-based understanding) as vanishing from American law and theory. Perry undertakes the project of trying to revive what he calls the view of the rights-based camp within American scholarship (Stephen Perry, "Torts, Rights, and Risk" in John Oberdiek, ed, *Philosophical Foundations of the Law of Torts* (Oxford: Oxford University Press, 2014) 38 at 38). Conversely, Heidi Hurd, for example, forcefully argues for an instrumentalist view of negligence and represents a line of thinking that does not see negligence as rights-based and argues "negligence is best defined in consequentialist terms...[which] is fully compatible with, and indeed demanded by, an uncompromising deontological moral theory" (Heidi M Hurd, "The Deontology of Negligence" (1996) 76 BUL Rev 249 at 251-252). The instrumentalist view, however, is not the dominant analysis or understanding of negligence in Canada and the United Kingdom, where, among other things, duty of care still plays an important analytical and conceptual role in determining liability.

that a plaintiff must not prove loss is not to say that a plaintiff need not prove damage, and therefore taking a broad approach to damage does not fundamentally change the nature of negligence. Rather, it refocuses the issue on determining litigants' rights and duties in a different way.

Saying proof of damage is required to maintain a negligence claim is colloquially a clear enough benchmark. Consequently, relatively few cases are brought before the courts in which negligence is alleged without demonstrable financially compensable loss. Whether a plaintiff's damage is too trivial to constitute the minimum actionable damage required to maintain a claim is therefore not often analyzed: "Because people do not often go to the trouble of bringing actions to recover damages for trivial injuries, the question of how trivial is trivial has seldom arisen directly."<sup>12</sup> This question does arise more frequently in class actions because the aggregation of trivial claims makes the action more economically viable.<sup>13</sup> For example, if one plaintiff loses \$1 as a result of the defendant's negligence, litigation about whether the dollar is recoverable is not likely to arise. If there are one million people in the alleged class, recovery of \$1 million makes the litigation more worthwhile. However, determining what constitutes minimum actionable damage should not be done through a class actions lens despite the fact that resolution of this issue may impact class actions more than other cases. That is, whether there are two, twenty, or twenty million

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<sup>12</sup> *Rothwell v Chemical & Insulating Co Ltd* (2007), [2008] 1 AC 281 (HL) [*Rothwell*] at 289.

<sup>13</sup> This is one of the reasons that class proceedings were introduced in Canada (Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982) Vols. I-III [OLRC Report] Vol. I at 1-5 and Ch. 4). It is not necessary that there be a class proceedings regime in order for these issues to be dealt with on a class or aggregate basis. The United Kingdom does not have a class proceedings regime but cases are still brought as aggregate claims and have similar features and raise the same kinds of issues as class actions in Canada.

people in the putative class, the question is still whether \$1 is sufficient damage to maintain each individual claim. Though there may be legitimate policy concerns if courts conclude a defendant is not liable despite having injured one million people because the \$1 per person is insufficient to maintain a claim, it should not be these kinds of facts or outcomes driving the development and interpretation of the law. The aggregation of claims ought not give plaintiffs rights as members of a class that they otherwise would not have as individuals.<sup>14</sup> Perhaps because this type of problematic outcome is possible, class actions decisions in Canada contribute to confusion rather than clarity in the law. Questions about who can be a part of the class (for example, whether it can only include certain plaintiffs who have actually suffered an injury), what causes of action can be certified (for example, whether certain defendants owe duties of care to certain classes of plaintiffs) and how common issues are to be resolved (for example, whether questions of causation can be answered on a class wide-basis) are only narrowly dealt with in the context of certification. Judges do not deal with crucial substantive questions at the threshold procedural stage.<sup>15</sup> The solution is not to turn certification into a merits-based inquiry. However, many of the underlying questions are legal questions that do not in principle require a fact or merits-based inquiry to be solved.<sup>16</sup>

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<sup>14</sup> The Supreme Court of Canada continues to reiterate this proposition: *Bisailon v Concordia University*, 2006 SCC 19 at para 18; *Canadian Imperial Bank of Commerce v Green*, 2015 SCC 60 at para 62.

<sup>15</sup> For example, as discussed in Chapter 1 both lower courts and the Supreme Court of Canada continue to suggest the questions raised by the waiver of tort debate require a merits-based inquiry that is inappropriate at the procedural certification stage: Chapter 1 at Part 1.2.4.

<sup>16</sup> A helpful approach that courts could take in resolving these issues is advocated by Stephen GA Pitel & Matthew B Lerner, “Resolving Questions of Law: A Modern Approach to Rule 21” (2014) 43 *Advocates’ Q* 344. Pitel and Lerner argue that many of these difficult legal questions are properly dealt with in the context of Rule 21 motions (which the authors note is akin to the s. 5(1)(a) cause of action inquiry) and the current “plain and obvious” test is too high a threshold to achieve the purposes of Rule 21. An overly restrictive view, and

The waiver of tort problem – the misapplication and distortion of waiver of tort motivated by an effort to circumvent the requirement that the plaintiff prove loss – is the clearest example of how courts’ failure to wrestle with the law clouds the issues. If the waiver of tort debate is resolved by class actions judges in a way that ultimately eliminates damage entirely as an element of negligence, then this leads to ultimately incorrect alterations of the substantive law. One of the central questions of negligence is a principled understanding of the damage a plaintiff is required to prove in order to maintain an action. Does damage require loss? Is risk of injury a harm? Must a plaintiff wait until he or she suffers significant physical or financial detriment before bringing a negligence claim? Though class actions judges dealing with waiver of tort have alluded to these questions, they have been asked only in relation to waiver of tort and, implicitly, only in relation to class actions. Reverting to the position that a full trial is required before these questions can be answered is not only incorrect it is evasive.

Therefore, the argument begins by setting out some controversial types of cases and aims to determine whether in any of these cases the requirement of minimum actionable damage is met. In order to accomplish this goal the first step is to set out a definitional framework and defend a reconsideration of the terms used to define actionable damage. Through examination of leading case law from the United Kingdom and Canada, the argument will turn to analyzing the two different conceptions of damage developed in each jurisdiction. Application of a narrow definition of damage to controversial cases in the

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reliance on the notion that difficult questions of law require a full trial record, is contributing to unnecessary delays in the civil system. The authors argue that particularly with the Supreme Court of Canada’s recent dictate in *Hryniak v Mauldin*, 2014 SCC 7, courts should deal with issues more summarily; the time is ripe for reconsidering unworkable and ultimately unnecessarily high thresholds for determining issues of law on pre-trial motions.

United Kingdom proves problematic and the argument will explore whether a broader conception of damage, one that does not require or focus on loss, is workable and defensible. Debate about the definition of damage strikes at the foundational principles of negligence. The argument here aims to propose a different way in which these principles can be considered that clarifies and unifies the case law rather than contributes to further confusion.

## **2.2 Controversial Cases**

Recent cases that are at the center of the damage debate can be categorized as (1) exposure cases, where the allegation is that because of the inhalation of whatever the toxic substance, the plaintiff is put at risk of disease in the future; (2) failure to diagnose or failure to inform cases, where the allegation is that the defendant incorrectly diagnosed the plaintiff's condition or failed to warn of some side effect or danger and as a result the plaintiff was put at an increased risk of death or disease; (3) pharmaceutical cases, where the allegation (usually in conjunction with a claim for failure to warn) is that the drug is defective and has dangerous side effects that could cause future injury; and (4) medical device cases, where the allegation is that the implanted device is defective and there is an increased risk of failure in future that could cause some injury, death or complication. In these kinds of cases the controversial plaintiffs are those who, for example, have not contracted mesothelioma from exposure to asbestos, not suffered any further injury because of a delay in beginning cancer treatment, or experienced no heart attack or permanent heart damage as a result of taking an allegedly defective medication or having a faulty pacemaker implanted. Though the traditional principle that a plaintiff must first prove damage to have a claim in negligence would seem to operate as summarily dismissing these claims, the facts of



each type of case suggest that a restrictive interpretation of the traditional principle may require reconsideration.

### 2.2.1 *Exposure cases*

*Rothwell v Chemical & Insulating Co Ltd.*<sup>17</sup> and *Ring v Canada (Attorney General)*<sup>18</sup> are two examples of exposure cases; *Rothwell* is a decision of the House of Lords and *Ring* is a decision of the Nova Scotia Court of Appeal. In *Rothwell* the plaintiffs had been exposed to asbestos by their defendant employers and as a result developed pleural plaques. The pleura is a membrane that enfolds the lungs and pleural plaques are “areas of fibrous thickening of the pleural membrane”.<sup>19</sup> In *Rothwell* it was accepted as a fact that pleural plaques are asymptomatic, do not cause asbestos related disease such as asbestosis or mesothelioma, and do not result on their own in some kind of disease or disability.<sup>20</sup> Each of the employer defendants accepted the “exposure represented a breach of the duty each owed to its

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<sup>17</sup> *Supra* note 12, dealt with four cases, *Rothwell v Chemical & Insulating Co Ltd.*, *Topping v Benchtown Ltd (formerly Jones Bros Preston Ltd.)*, *Johnston v NEI International Combustion Ltd.*, and *Grieves v F T Everard & Sons Ltd*. Ten test cases were selected for trial in which Holland J found in favour of the plaintiffs ([2005] EWHC 88 (QB)). Seven cases were appealed to the Court of Appeal, which reversed the decision of the trial judge ([2006] EWCA Civ 27) and four of the plaintiffs appealed to the House of Lords.

<sup>18</sup> 2010 NLCA 20 [*Ring*]. The case was certified as a class action at first instance (2007 NLTD 146) and was reversed on appeal to the Nova Scotia Court of Appeal. Similar claims regarding the same alleged damage (spraying of herbicides at CFB Gagetown, discussed further below) were started in seven other provinces but the only other case that went to the certification stage was *Bryson and Murrin v Canada*, 2009 NBQB 2004 in which certification was denied (appeal to the New Brunswick Court of Appeal was adjourned *sine die* on consent: [2009] NBJ No 309 (CA)).

<sup>19</sup> *Taber's Cyclopedic Medical Dictionary*, 15th ed, *sub verbo* “pleura”; *Rothwell*, *supra* note 12 at para 1.

<sup>20</sup> *Ibid* at paras 1, 2 and 11.

employees.”<sup>21</sup> The plaintiffs were claiming for, *inter alia*, damages for having contracted asbestos-related conditions and damages for emotional distress, depression and anxiety due to having contracted pleural plaques and facing a risk of developing long-term asbestos-related diseases.<sup>22</sup> The court held that the plaintiffs could not recover because plaques are “injuries that are harmless” and therefore the plaintiffs’ case “is a claim which has no value at all.”<sup>23</sup>

In *Ring* the plaintiffs claimed they had been exposed to herbicides sprayed in and around Canadian Forces Base Gagetown in New Brunswick. The chemical sprayed was widely known as Agent Orange,<sup>24</sup> which was used during the Vietnam War.<sup>25</sup> The plaintiffs claimed on behalf of all people who were present at CFB Gagetown from 1956 to the present (2007) that the spraying of the herbicides “caused, materially contributed to or materially

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<sup>21</sup> *Ibid* at para 64. The question of whether there was a duty owed to Mr. Grieves, one of the plaintiffs, to not cause emotional distress (he was one of the only claimants who had developed diagnosable depression and was not just claiming for anxiety about having been exposed) was a separate and contested issue.

<sup>22</sup> *Ibid* at 281-282.

<sup>23</sup> *Ibid* at paras 47 and 49.

<sup>24</sup> As set out in the statement of claim there were various chemical compounds allegedly used but most contained the chemicals, particularly hexachlorobenzene, found in Agent Orange. In submissions to the Court of Appeal “Agent Orange” was used to describe all herbicides sprayed at CFB Gagetown (*Ring, supra* note 18 at para 30).

<sup>25</sup> Vietnam veterans alleging injury from exposure to Agent Orange brought several cases in the United States. In some of these cases the claims were denied because scientific evidence at the time did not establish injury from exposure to the substance (see, e.g., *In re “Agent Orange” Product Liability Litigation* (1982), 534 F Supp 1046 (ED NY)) or on the basis of a Government’s contractor defence (see, e.g., *In re “Agent Orange” Product Liability Litigation* (2004), 304 F Supp 2d 404 (ED NY) which also sets out a helpful summary of the history of litigation to that point at 410-421). The history of the many cases in the United States, the resulting decisions, and the various settlements reached is complex and beyond the scope of the discussion here.

contributed to the risk of causing”<sup>26</sup> both Hodgkins and non-Hodgkins lymphoma, and chronic lymphatic leukemia.<sup>27</sup> Two subclasses were proposed, the first composed of people like Mr. Ring who had developed lymphoma and the second composed of people who had experienced no known effect from exposure. The second class of plaintiffs claimed for, *inter alia*, the cost of testing for certain chemicals in their bodies and monitoring for future diseases.<sup>28</sup> Importantly, however, the plaintiffs abandoned the medical monitoring claim on appeal.<sup>29</sup> The difference between the asbestos-type case and the Agent Orange-type case is that pleural plaques are a sign that the plaintiff has been exposed to asbestos and there is no equivalent to evidence exposure to Agent Orange. Though in *Ring* the second class impliedly claimed that upon testing there may be the presence of certain chemicals in their system, the plaintiffs argued on appeal, and the court ultimately held, that “members of the class who have not been diagnosed with lymphoma would not prove that they had absorbed toxic chemicals.”<sup>30</sup> Therefore the only way the plaintiffs would have been able to show evidence of exposure to Agent Orange would be to show a diagnosis of lymphoma (such a diagnosis being uncontroversial sufficient actionable damage). The court denied certification on the basis that the class definition was unworkably broad: the time frame of over 50 years and the fact that the class would include people who may never have been present at the base when the spraying was happening rendered the overall claim impermissibly unlimited.<sup>31</sup> With respect to the second class of people the court held that the damage element was “absent

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<sup>26</sup> *Ring*, *supra* note 18 at para 1.

<sup>27</sup> *Ibid* at para 30.

<sup>28</sup> *Ibid* at para 51-52.

<sup>29</sup> *Ibid* at para 58.

<sup>30</sup> *Ibid* at para 57.

<sup>31</sup> *Ibid* at paras 76-77.

from the pleadings” and, relying on *Rothwell*, held “the risk of a future disease is not actionable in the absence of a present injury”.<sup>32</sup>

### 2.2.2 *Failure to diagnose or inform cases*

*Gregg v Scott*,<sup>33</sup> a decision of the House of Lords, is an example of a failure to diagnose case and *Laferrière v Lawson*,<sup>34</sup> a decision of the Supreme Court of Canada, is an example of a failure to inform case. In *Gregg* the plaintiff developed a lump under his left arm and consulted the defendant physician to have it examined. The defendant told the plaintiff the lump was a benign collection of tissue and no further action was required. About nine months later the plaintiff consulted another physician who referred him for further examination whereupon the plaintiff was diagnosed with non-Hodgkin’s lymphoma and it was found the tumour had by that time spread into the plaintiff’s chest. The plaintiff brought a claim in negligence against the defendant physician who had failed to initially diagnose him. Mr. Gregg formulated the case to plead that the damage he suffered was a loss of years of life by losing a chance to live for ten years beyond the date of diagnosis. He alleged that had he been treated nine months earlier, his chances of living to or beyond ten years would have been 17% better. However, his chances of living for ten years or more even with earlier treatment were less than 50%. Mr. Gregg’s claim was therefore denied on the basis that the doctor’s negligence did not in fact cause the loss of years of life he was claiming for on a balance of probabilities.

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<sup>32</sup> *Ibid* at para 58.

<sup>33</sup> *Supra* note 1.

<sup>34</sup> [1991] 1 SCR 541 [*Laferrière*].

In *Lafferrière* the claim was similarly that the defendant doctor failed to diagnose the plaintiff's breast cancer.<sup>35</sup> Mrs. Dupuis was concerned about an abnormal lump in her right breast and despite a negative mammogram consulted Dr. Lawson, a noted international authority on breast cancer, for a second opinion.<sup>36</sup> Mrs. Dupuis underwent further testing and Dr. Lawson then recommended an excisional biopsy of the mass, which was performed. The pathology report detailing the results of the tests of the removed mass indicated that the growth was breast cancer but Mrs. Dupuis was not informed of the test results and no follow-up treatment or monitoring was arranged.<sup>37</sup> It was not until almost four years after the excision that Mrs. Dupuis' health began to deteriorate. While undergoing testing and diagnosis of another disorder (ultimately suspected to have been caused by the cancer) a subsequent physician looked more closely into her medical records and she was then informed of the initial biopsy results. Mrs. Dupuis immediately had surgery to remove new nodules that had appeared, required further surgery for removal of her ovaries upon discovery of the cancer's metastases, underwent chemotherapy, and died three years later.<sup>38</sup> Mrs. Dupuis' estate claimed, *inter alia*, that the defendant's failure to inform about the cancer resulted in Mrs. Dupuis' death. At trial the judge held that unfortunately the type of cancer the plaintiff had was so pernicious that even earlier treatment would not have prevented her death. However, the Quebec Court of Appeal held the defendant's negligence "resulted in the loss of a real and serious chance [for Mrs. Dupuis] to benefit from proper

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<sup>35</sup> The claim was advanced by Nicole Laferrière as testamentary executrix of Mrs. Mireille Fortier-Dupuis who died before the proceedings were completed: *ibid* at 546.

<sup>36</sup> *Lafferrière*, *supra* note 34 at 546.

<sup>37</sup> *Ibid* at 547.

<sup>38</sup> *Ibid* at 547-548.

medical care.”<sup>39</sup> The Supreme Court of Canada agreed with the trial judge that the doctor’s fault could not have been said to cause Mrs. Dupuis’ death because of the nature of the disease, which was similar to the finding in *Gregg*. However, the court agreed with the Court of Appeal and held that she had suffered psychological damage from the misdiagnosis and was denied earlier treatment that would have improved the quality of the last years of her life. For these latter two reasons the Supreme Court of Canada awarded \$17,500 in damages.

### 2.2.3 *Pharmaceutical cases*

Usually alongside a claim for a failure to warn, pharmaceutical cases center around plaintiffs’ claims that the defendant’s drug causes some side effect that the defendant did not adequately test for, did not warn about, or is a result of a defect in the drug.<sup>40</sup> A number of these cases have been certified in Canada but none have been determined on the merits either at trial or summary judgment. For example, in *Goodridge v Pfizer Canada* the plaintiffs claimed, *inter alia*, that the epilepsy treatment drug Neurontin caused a propensity for suicidal behaviour.<sup>41</sup> One of the originally named proposed representative plaintiffs, Ms. Burgess, actually committed suicide. But the claim was brought on behalf of all people who

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<sup>39</sup> *Ibid* at 550, affirming the analysis of Justice Jacques’ concurring majority opinion from the Quebec Court of Appeal ([1989] RJQ 27).

<sup>40</sup> Each of these causes of action are separate and have separate legal tests that are not fully set out here (see, e.g., *Goodridge*, *supra* note 2 at para 5 for a list of the types of claims typically advanced in pharmaceutical cases and *Martin v Astrazeneca Pharmaceuticals Plc*, 2012 ONSC 2744 (certification denied) at paras 110-192 for Justice Horkins’ detailed analysis of what is required to properly plead each particular negligence claim). For the purposes of the discussion here the issue about whether a plaintiff can claim for a side effect that has not yet manifested as an injury does not turn on the differences between the pleadings or merits-based requirements for each cause of action.

<sup>41</sup> *Supra* note 2. The claim also included allegations about the generic version of the drug gabapentin. The claim was certified in part, but the case ultimately settled (2013 ONSC 2686).

had consumed the drug regardless of having committed suicide or having experienced suicidal behaviour or ideations.

In *Wilson v Servier Canada Inc.* the plaintiffs claimed, *inter alia*, that the weight loss drugs Redux and Ponderal caused primary pulmonary hypertension and valvular heart disease.<sup>42</sup> The plaintiffs' experts proposed that once a person has contracted primary pulmonary hypertension, 50-60% of those patients die. The certified class was defined as all people who were prescribed and ingested the drug, regardless of having contracted a disease. Justice Cumming held the class definition was "not excessively inclusive and improper" even though it included plaintiffs seeking return of money paid for the drug who suffered no disease and plaintiffs seeking to recover medical expenses for medical screening and diagnosis.<sup>43</sup>

In *Tiboni v Merck Frosst Canada Ltd.* the plaintiffs claimed, *inter alia*, that the cholesterol treatment drug Vioxx caused an increased risk of heart attacks and strokes.<sup>44</sup> Though Justice Cullity certified the *Tiboni* claim in Ontario for all people who had ingested Vioxx, he suggested that only "those who claim to have suffered harm...will have any possibility of obtaining relief for Merck's negligence".<sup>45</sup> Part of the plaintiffs' claim, however, was for "loss of quality and enjoyment of life, and reduction in life expectancy"

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<sup>42</sup> [2000] OJ No 3392 (SC) [*Wilson*]. The case was certified, leave to appeal the certification order was denied ([2000] OJ No 4735 (SC) (Div Ct)). The case ultimately settled three days before trial was set to begin as a result of court ordered mediation ([2005] OJ No 1039 (SC) [*Wilson Settlement*]).

<sup>43</sup> *Wilson, ibid* at para 56.

<sup>44</sup> [2008] OJ No 2996 (SC) (certification granted) [*Tiboni*], aff'd [2008] OJ No 4731 (SC) (leave to appeal certification to the Divisional Court denied). The sister case brought in Manitoba was also certified, but this decision was overturned on appeal (*Wuttunee v Merck Frost Canada Ltd.*, 2008 SKQB 229, rev'd 2009 SKCA 43).

<sup>45</sup> *Tiboni, supra* note 44 at para 77.

which could equally apply to people who did not suffer a heart attack as those who had. *Goodridge*, *Wilson*, and *Tiboni* all settled and how each of the plaintiffs' claims would have fared on a merits-based inquiry is unknown. However, each settlement was only made in relation to people who had ingested the drugs and suffered one of the alleged side effects.<sup>46</sup>

#### **2.2.4 Medical device cases**

In medical device cases plaintiffs similarly plead that the manufacturer failed to warn of potential effects,<sup>47</sup> but the thrust of the action is that the product implanted in the plaintiffs is defective and the defect has potential to cause future injury. For example, in *Nantais v Telectronics Proprietary (Canada) Ltd.*<sup>48</sup> the plaintiffs had been implanted with pacemakers manufactured by the defendants which were alleged to have faulty lead wires that over time could become jagged, cut through the wiring insulation, and slice into the heart. One of the proposed common issues was determination of whether a person with a normally functioning pacemaker could have a cause of action. Evidence was put before the court that 16-25% of the leads showed breaks and medical experts concluded that there was a greater medical risk to plaintiffs who had not experienced breakage in undergoing surgery to remove the leads.<sup>49</sup> The plaintiffs' expert predicted that all of the leads would eventually fail.

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<sup>46</sup> *Goodridge v Pfizer Canada Inc.*, 2013 ONSC 2686 at paras 26-27; *Wilson Settlement*, *supra* note 42 at para 31; *Mignacca v Merck Frosst Canada Ltd.*, 2012 ONSC 4931 at para 34.

<sup>47</sup> For example, *Harrington v Dow Corning Corp.*, [1996] BCJ No 734 (SC), *aff'd* 2000 BCCA 605 was a case alleging failure to warn about certain diseases caused by rupture or leakage from the silicone breast implants manufactured by the defendants. The class action claim was bolstered by, but not related to, *Hollis v Dow Corning Corp.*, [1995] 4 SCR 634, one of the Supreme Court of Canada's leading decisions on the duty to warn.

<sup>48</sup> [1995] OJ No 2592 (Gen Div).

<sup>49</sup> *Ibid* at 4-5.



The case was certified on behalf of all people who had been implanted with the devices. In denying the motion for leave to appeal the certification decision Justice Zuber held that the relevant point in time for liability was when the faulty lead was implanted; the plaintiffs' taking the risk of either failure or removal was a matter of damages.<sup>50</sup> The case ultimately settled without a reported decision on the merits.<sup>51</sup>

In *Andersen v St Jude*,<sup>52</sup> one of the few class actions to go to trial,<sup>53</sup> the plaintiffs were implanted with the defendant's mechanical heart valves coated with its proprietary product Silizone, a silver, palladium and titanium compound intended to inhibit inflammation of the heart tissue and reduce other post-operative complications. The plaintiffs alleged that Silizone had an adverse effect on tissue healing and caused a risk of other complications. Justice Lax decided in favour of the defendants at trial because, among other reasons, she found the defendants did not fall below a standard of reasonable care and the plaintiffs did not make out general causation that Silizone increases adverse effects on tissue healing or materially increases the risk of medical complications.<sup>54</sup> Whether plaintiffs who did not experience injury were entitled to a remedy for medical monitoring was moot in light of the

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<sup>50</sup> [1995] OJ No 3069 (Gen Div) at para 6.

<sup>51</sup> There is no reported decision approving settlement, but Sutts Strosberg LLP, counsel for the plaintiffs, reportedly settled the case for \$24 million (see Julius MeInitzer, "Class Actions Come of Age", *Canadian Lawyer Magazine* (March 2005), online: <http://investorvoice.ca/PI/1741A.htm>.)

<sup>52</sup> [2003] OJ No 3556 (SC) (certification).

<sup>53</sup> 2012 ONSC 3660 [*Andersen* Trial]. The defendants won the trial and there is no reported decision about an appeal or leave to appeal. There are actually more class actions that go to trial than is commonly thought (see Jon Foreman & Genevieve Meisenheimer, "The Evolution of the Class Action Trial in Ontario" (2014) 2 *Western Journal of Legal Studies* Article 3). *Andersen* is one of note in part because it took 138 days.

<sup>54</sup> *Ibid* at para 594, summarized in "Answers to Common Issues". See also para 6 for a summary of the issues and conclusions and paras 56-575 for the detailed analysis of the answer to the first three, and ultimately the only relevant, common issues.

finding that Silizone patients did not require any further monitoring than post-operative patients generally. In her *obiter* discussion regarding waiver of tort, Justice Lax opined that had she found the defendants breached the standard of care their negligence would have exposed Silizone patients to an increased risk of a serious medical condition.<sup>55</sup> Whether this ought to lead to liability, however, was a question “as fundamental as what exactly it is that directs the law to deem certain conduct wrongful”; a question she therefore declined to answer.<sup>56</sup>

As was argued by certain experts in *Andersen* with regard to the waiver of tort debate,<sup>57</sup> it is often said that compensating plaintiffs in any of the above categories of cases where the risk has not yet materialized into injury leads to the conclusion that “proof of injury” is no longer required.<sup>58</sup> As Justice Lax rightly stated, these issues touch on the fundamental nature of tort law; therefore answering whether plaintiffs in these kinds of cases can or should recover is not a class action-specific inquiry. The fact patterns in these categories of cases are a helpful guide for the discussion. The goal is to understand and justify conclusions about whether in any of these categories of cases plaintiffs have sufficient actionable damage to maintain an action in negligence.

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<sup>55</sup> *Ibid* at para 589.

<sup>56</sup> *Ibid* at para 593.

<sup>57</sup> *Ibid* at paras 588-593; cf Edward M Iacobucci & Michael J Trebilcock, “An Economic Analysis of Waiver of Tort in Negligence Actions” (2016) 66 UTLJ 173. Professor Trebilcock testified as an expert in *Andersen* and the article is in part based on that case and the expert evidence culled for the trial.

<sup>58</sup> See, e.g., David Hamer, “Medical Monitoring in North America: Does this Horse Have Legs?” (2010) 1 Defence Counsel Journal 50 at 50: “In the beginning, the tort of negligence required proof of injury before requiring compensation: ‘Proof of negligence in the air, so to speak, will not do.’”

## 2.3 Reconsidering the Definitional Framework

### 2.3.1 *Separating injury, damage, and loss*

Part of the difficulty in defining actionable damage is that the terms used in discussing negligence blend together distinct ideas. It is important to distinguish both conceptually and terminologically the concepts of injury, harm, damage, and loss – terms that are often used interchangeably and defined with reference to each other. Multiple, colloquial, or common sense meanings of these terms make it difficult to analytically parse out their underlying concepts and normative implications. Injury, for example, is rightly used to describe a broken leg. But injury also takes on a different meaning when used as a term to define a ‘wrong’. The distinction between injury and harm, or between *injuria* and *damnum*, is said to express the distinction between a wrong and its consequences and is “central to understanding the law of torts.”<sup>59</sup> *Injuria* is defined as a ‘wrong’, being the “breach of one’s legal duty” or the “violation of another’s legal right”.<sup>60</sup> *Damnum* or ‘damage’ is defined both as a “loss” and as “damage suffered”.<sup>61</sup> *Injuria sine damno*<sup>62</sup> or ‘injury without damage’ is defined as “a legal wrong that will not sustain a lawsuit because no harm resulted from it.”<sup>63</sup> Problematically, however, ‘harm’ is also defined as “injury, loss, damage; material or tangible detriment”.<sup>64</sup> The primary difficulty arising from each of these concepts being

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<sup>59</sup> Robert Stevens, “Rights and Other Things” in Donal Nolan & Andrew Robertson, eds, *Rights and Private Law* (Oxford: Hart Publishing, 2012) 115 at 117. Stevens equates this distinction as being between injury and harm.

<sup>60</sup> *Black’s Law Dictionary*, 9th ed, *sub verbo* “*injuria*” and “wrong”.

<sup>61</sup> *Ibid sub verbo* “*damnum*”.

<sup>62</sup> Or, “*injuria abseque damnum*”.

<sup>63</sup> *Black’s Law Dictionary*, 9th ed, *sub verbo* “*injuria abseque damno*”.

<sup>64</sup> *Ibid sub verbo* “harm”.

circularly defined is determining whether actionable damage requires monetary or compensable loss. As Donal Nolan argues, it is “rather elementary...that the issue of the damage sufficient to establish a cause of action should not be confused with the harms for which recovery is permitted once the cause of action has been established.”<sup>65</sup> However elementary, the point is not terminologically or analytically clear.

The aim here is to substantively define “damage suffered”. To separate the concepts and attempt to achieve a measure of precision the key terms will be defined as follows: (1) “Actionable damage” or “damage” is equated with *damnum* and defined as the damage suffered which the plaintiff is required to prove in order to maintain an action in negligence.<sup>66</sup> (2) *Injuria* or “injury” is equated with and defined as a “wrong”; that is, the violation of the plaintiff’s legal right by the defendant is an injury. (3) “Harm” is equated with and defined as a “loss”, which is a demonstrably worse off state of affairs for the plaintiff, either physical or economic.<sup>67</sup> Each of these definitions will be discussed further. Analysis and defence of these concepts as defined is in large part the heart of the matter.

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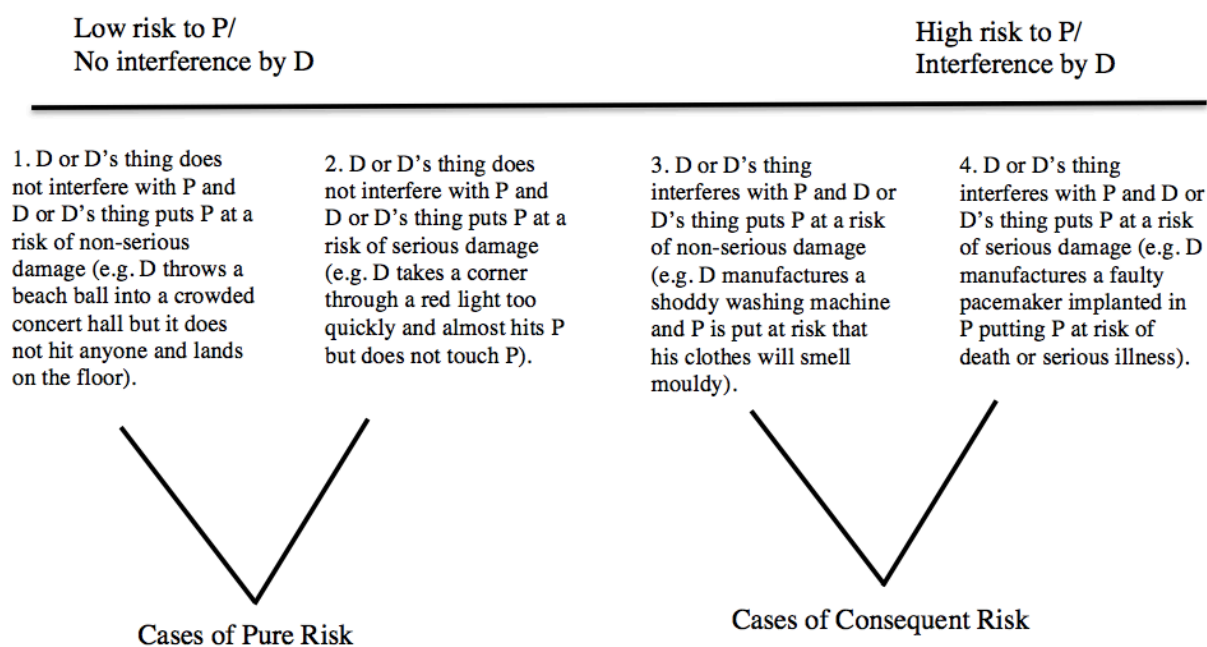
<sup>65</sup> Donal Nolan, “New Forms of Damage in Negligence” (2007) 70 Mod L Rev 59 at 61; cf Stapleton, *supra* note 8.

<sup>66</sup> Though the implication is that the definition of “actionable damage” ought to apply to all actions that are not actionable *per se*, the scope of this discussion is focused only on negligence. Consideration of the requisite actionable damage for other *per quod* actions (e.g. nuisance, libel) is beyond this scope though these types of cases are helpful for understanding how courts have defined actionable damage.

<sup>67</sup> It is the harm or loss that is considered as the subject of an award of ‘damages’ but the remedial concept of damages must be considered terminologically and conceptually distinct from actionable damage. The terminology here identifies harm/loss as separate from damage and as will be discussed in Part 2.5 the narrow definition of actionable damage substantively and conceptually requires resulting harm. Quantification of the loss is the subject of a compensatory award, and as will be argued further in Chapter 3, the measure of the remedy a plaintiff is entitled to vis-à-vis damages should not necessarily be limited to compensation for loss.

### 2.3.2 *Two categories of risk*

Further analytic difficulty arises by using the term ‘risk’ indiscriminately. A range of cases conflated under a generalized umbrella definition does not adequately identify categories of risk. There is a difference between, for example, the defendant driving recklessly, taking a corner too quickly and narrowly missing the plaintiff and the defendant exposing the plaintiff to some material that results in the plaintiff being physically changed. In each instance it can be said that the defendant is putting the plaintiff at risk, but the implications and consequences of one scenario are quite different from the other. We can attempt to segregate categories of risk by plotting the cases on a spectrum:



In each of categories (1) to (4) the plaintiff is put at some risk, but the categories are differentiated by both the kind of risk and the relationship between the parties. The kind of risk can be either one of non-serious or serious damage, and the relationship can be either one of non-interference or interference. Interference is defined as a material change in the

plaintiff or the plaintiff's circumstances. Instances where there is no interference with the plaintiff by the defendant can be understood as cases of 'pure risk'; that is, while the resultant risk can be causally linked to the defendant's action, it is not the consequence of the defendant's direct interference with the plaintiff. In cases of pure risk there is no change in the plaintiff as a result of the defendant's interference that contributes to or is linked to the risk. The risk is defined entirely in relation to the defendant's action. Instances where the defendant directly interferes with the plaintiff can be understood as cases of 'consequent risk'; that is, the risk is the result of the defendant's interference with the plaintiff and there is some change in the plaintiff that contributes to or is linked to the risk. The risk is defined in relation to both the defendant's action and the plaintiff's position. These two features of kind and relation are normatively significant for determining whether any of these categories of risk can support a claim in negligence.

There is significant debate about whether putting someone at risk is a wrong and whether in any of these categories of cases the plaintiff's right is violated from a moral standpoint.<sup>68</sup> Adequately engaging in this debate is beyond the scope of this discussion in part because the question about whether a person has a right not to be put at risk is morally complex and cannot be fully dealt with here. More importantly, however, is that save an exceptional few, none of the cases at the center of the controversy are in fact category (1) or (2) cases. They are not cases of non-interference and therefore they are not cases of pure risk.

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<sup>68</sup> See, e.g., Jules Coleman, *Risk and Wrongs* (Cambridge: Cambridge University Press, 1992); Tony Honoré, *Responsibility and Fault* (Oxford: Hart Publishing, 1999); John CP Goldberg & Benjamin C Zipursky, "Unrealized Torts" (2002) 88 Va L Rev 1625; Jenny Steele, *Risks and Legal Theory* (Oxford: Hart Publishing, 2004); Perry, *supra* note 11. The question is whether the defendant's duty is to not put someone at risk such that the risk is the damage.

Though the broader debate about the moral nature of risking is important, the focus cases here are of consequent risk and not pure risk.

An example of a pure risk case is *Healey v Lakeridge Health Corp.*<sup>69</sup> in which the plaintiffs alleged emotional distress from having been notified that they might have been exposed to tuberculosis (TB) at the defendant's hospital. In one of the few class actions to be fully determined on the merits, the Ontario Court of Appeal upheld the decision granting summary judgment in favour of the defendant hospital.<sup>70</sup> The appeal was brought on behalf of a class of uninfected persons: people who were present at the hospital and could have been exposed to TB, were subsequently notified of the possible exposure, were tested, and tested negative therefore indicating they had not come in contact with TB. The Court of Appeal held that while the defendant hospital owed the uninfected persons a duty of care not to cause injury, none of the claims met the threshold of being a recognized psychiatric illness and many plaintiffs had not in fact even consulted a doctor about their complaints.<sup>71</sup> *Healey* can be categorized as a pure risk case because the uninfected class of plaintiffs were only ever at risk of exposure and there was not in fact any interference as a result of exposure.

If each of the exposure, loss of chance, pharmaceutical, and medical device cases are examined more closely, or perhaps in a different way, it becomes clear that they are not in fact cases of pure risk. The central allegations are that the plaintiffs have been interfered with by the defendant or the defendant's thing, been physically changed in some way, and because of that change there is a future risk that they will be put in some physically or

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<sup>69</sup> [2006] OJ No 4277 (SC) (certification); (2010), 72 CCLT (3d) 361 (ONSC) with supplemental reasons at 2010 ONSC 725 (summary judgment).

<sup>70</sup> 2011 ONCA 55.

<sup>71</sup> *Ibid* at para 42.

economically worse off position. The way a plaintiff pleads the action can frame the issue as pure risk, which perhaps contributes to confusion about how the case ought to be analyzed. For example, in *Gregg*, the plaintiff pled his damage was that but-for the defendant's negligence he would have had a 17% better chance of surviving. The damage, then, was the loss of chance to live for ten or more years or, inversely, an increased risk of dying within ten years. In *Lafferrière* the claim was recast by the Quebec Court of Appeal as the damage being increased pain and suffering of undergoing more painful treatment and living with more advanced cancer as a result of untimely treatment. The damages were not, as the plaintiff had cast them, awarded for a loss of chance of survival. In *Gregg*, though the plaintiff's claim was ultimately denied, the reasons of the majority suggest that had Mr. Gregg framed the case akin to *Lafferrière*'s reformulation, he would have recovered. A fact scenario can be reframed as a case of pure risk. But if the claim centers on the consequence of the defendant's interference with the plaintiff causing some change in the plaintiff that is a part of the risk at issue, on the categorization here the claim is one of consequent risk.

Whether a case is pled as a claim for damages for an increased risk has no bearing on whether it is properly categorized as a case of pure risk or a case of consequent risk. The controversial cases and examples discussed throughout are all considered cases of consequent risk.

#### **2.4 Reconsidering the Relationship Between Damage and Injury**

In *Palsgraf v Long Island Rail Co.*, Cardozo CJ articulated the now oft-quoted maxim: "Negligence is not actionable unless it involves the invasion of a legally protected



interest, the violation of a right. ‘Proof of negligence in the air, so to speak, will not do.’”<sup>72</sup>

This principle can be understood as maintaining that determining liability in negligence is not an inquiry into only the defendant’s behaviour as measured against a non-relational standard of care. Rather, negligence is only made concrete as a relation between the plaintiff and the defendant and the principle therefore sets out what is called the relational view.<sup>73</sup> The right that is violated by the defendant is a right the particular plaintiff holds against the defendant, not a generalized right held by the world (with the plaintiff as part of this group) that the defendant act in a certain way.<sup>74</sup>

The right the plaintiff holds against the defendant can be limited or qualified in a further way. If we understand the plaintiff’s right as being general, for example, a right to bodily integrity, then any invasion of the plaintiff’s bodily integrity could ground the defendant’s liability in negligence. If a person pushes you, your right to bodily integrity is violated. Though this grounds a cause of action in battery, without some kind of damage you have no cause of action in negligence. Actionable damage is the “gist” of negligence because the action is “not maintainable without [it]”; that is “the cause of action is not complete

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<sup>72</sup> (1928), 162 NE 99 (NY CA) [*Palsgraf*] at 99, citing to Frederick Pollock, *The Law of Torts*, 11th ed (London: Stevens & Sons, 1920) at 455.

<sup>73</sup> See the discussion *supra* note 11.

<sup>74</sup> This is another way of saying, as Cardozo CJ held, that the defendant’s duty is not one owed to the world that the defendant act non-negligently. The view that the defendant’s duty is owed to the world, and the relevant inquiry is one without reference to the plaintiff in determining whether the defendant’s action fell below the standard of care and was therefore negligent regardless of damage, is the non-relational view. The debate about whether negligence is relational or non-relational is part of the debate about whether the defendant’s relevant duty is owed only to the plaintiff in particular or to the world generally. For a helpful overview of the current state of the debate and a defence of a duty of care to the world see Peter Choi, “The Duty of Care as a Duty in Rem” (2014) 4 *Journal of Law* 307.

without proof of damage”.<sup>75</sup> Therefore, if the right to bodily integrity is insufficient to ground a claim in negligence, the “legally protected interest” Cardozo CJ is referring to cannot be this broad or general type of right. Though the plaintiff may have suffered an *injuria* in that he or she suffered the violation of some other right, the right to bodily integrity, the plaintiff has not suffered whatever right it is that he or she has in negligence as against the defendant.

In *Nicholls v Ely Beet Sugar Factory, Limited*, Lord Wright MR discussed the concept of actionable damage as the gist of negligence at some length. He concluded that the actionable damage was required in order to show a rights violation:

In all these cases [of negligence, malicious prosecution, conspiracy to injury and deceit] there is no actionable wrong unless damage has been caused to the plaintiff by what has been done or omitted. **Thus, in the case of negligence, the plaintiff is not entitled to complain unless he is injured by the negligence;** otherwise the negligence does not interest or concern him...there is in those cases no interference with a right, no disturbance or invasion of a right of property or any other right; **thus, e.g., the cause of action is not merely that the defendant was negligent, but he was negligent in such a way as to damage the plaintiff.**<sup>76</sup>

If actionable damage is understood in this way the damage is considered as a necessary condition for the violation of the plaintiff’s right. That is, there is no rights violation unless some damage has been made out. There are two subtly distinct ways that the relationship between *injuria* and *damnum* can be understood. It can be said that the plaintiff must show the violation of a legal right and additionally that the violation of that right caused damage.

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<sup>75</sup> *Nicholls v Ely Beet Sugar Factory, Limited*, [1936] 1 Ch 343 (CA) [*Nicholls*] at 350-351 per Lord Wright. The plaintiff brought an action in nuisance for an injunction and damages against a neighbouring beet sugar manufacturing operation claiming damage to his fishery as a result of the defendant’s dumping of refuse into the river. The issue on appeal was whether the plaintiff had established the requisite pecuniary damage in order to maintain the action. The lower court’s decision was overturned on the basis that the plaintiff had a property right that was violated and no proof of pecuniary loss was required. Though this case is in nuisance and not in negligence Lord Wright’s analysis has been considered an applied in negligence cases (see, e.g., *Pfeifer v Morrison*, [1973] BCJ No 573 (SC)) and, though *obiter*, explicitly analyzes the relevant right in negligence; cf Stapleton, *supra* note 8.

<sup>76</sup> *Nicholls, ibid* at 351 [emphasis added].

Or it can be said that the plaintiff must show that the defendant caused damage in order to prove the violation of a legal right.

If the first articulation is correct, then the defendant's duty to the plaintiff is to act in accordance with a particular standard of care. If the defendant's act falls below the standard of care, the plaintiff's right has been violated. If damage is considered as an additional factor and not entailed in the definition of the duty, then any damage suffered by the plaintiff that is caused by the defendant's act is sufficient. For example, a pharmaceutical manufacturer has a duty of care to test properly and warn patients about the side effects of its drugs. Say the defendant falls below the standard of care and does not adequately test for or warn about the potential side effect of an increased risk of heart attacks. If the first articulation is correct the plaintiff's right is violated and *injuria* is suffered. If the plaintiff takes the negligently manufactured drug and has a one in a million adverse allergic reaction that the defendants could not have tested for or foreseen, a reaction based on the idiosyncrasies of the plaintiff's biology, the plaintiff still suffers damage because of taking the drug. The plaintiff can therefore recover. On this view of the relationship between *injuria* and *damnum* the only requirement is a causal connection between the failure to meet the standard and the damage.

However, this is not how negligence in the common law is understood. As established in *Wagon Mound (No. 1)*<sup>77</sup> and *Wagon Mound (No. 2)*<sup>78</sup> the Privy Council circumscribed the kind of damage that a plaintiff can claim for as that which is reasonably

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<sup>77</sup> *Overseas Tankship (U.K.), Ltd. v Morts Dock & Engineering Co., Ltd. (sub nom 'Wagon Mound 1')*, [1961] 1 All ER 404 (PC).

<sup>78</sup> *Overseas Tankship (U.K.), Ltd. v Miller Steamship Propriety Ltd. (sub nom 'Wagon Mound 2')*, [1966] 2 All ER 709 (PC).

foreseeable.<sup>79</sup> It is not the case that any damage is sufficient, rather, it must be that the damage is something that is reasonably foreseeable to the defendant. The content of the defendant's duty owed to the plaintiff is therefore qualified by risk of damage that is foreseeable and not unbounded so as to include any damage that could be factually caused.<sup>80</sup> For example, the defendant owes a duty to the plaintiff not to make negligent misrepresentations that lure the plaintiff into investing in a ponzi scheme. The defendant does not owe the plaintiff a duty to ensure that other people the plaintiff might convince to participate do not harm the plaintiff. Therefore if the plaintiff loses ten thousand dollars investing, this is the kind of actionable damage to ground a claim in negligence, but the pain and suffering from the plaintiff being punched in the nose by his or her sister-in-law who also lost all of her money is not.

Whether the fact that the defendant can foresee his or her actions may cause harm to the plaintiff is sufficient to give rise to a duty of care is a separate debate and one with which courts continue to grapple.<sup>81</sup> What is clear, however, is that the duty is defined in relation to, and circumscribed by, reasonably foreseeable damage. The plaintiff's right, then, as correlative to the defendant's duty, is a right not to suffer a certain kind of damage as a result of certain kinds of the defendant's behaviour. The first articulation of damage as anything

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<sup>79</sup> GHL Fridman et al, *The Law of Torts in Canada*, 3rd ed (Toronto, Carswell: 2010) at 421-422; Beever, *supra* note 4 at 128-129, 142, and 162-163.

<sup>80</sup> Fridman, *ibid* at 301-302; *Childs v Desormeaux*, [2006] 1 SCR 643 [*Childs*] at paras 27-30; *Cooper v Hobart*, [2001] 3 SCR 537 at para 21:

[*Donoghue*] introduced the principle that a person could be held liable only for reasonably foreseeable harm. But it also anticipated that not all reasonably foreseeable harm might be caught. This posed the issue with which courts still struggle today: to what situations does the law of negligence extend? This case, like so many of its predecessors, may thus be seen as but a gloss on the case of *Donoghue v. Stevenson*.

<sup>81</sup> Fridman, *ibid* at 301; *Childs*, *ibid* at para 31.

factually caused by the defendant's breach of the standard, while perhaps independently defensible, does not reflect the way the duty of care requirement is understood in Canadian and English positive law. Therefore the second articulation is the better way to understand the relationship between *injuria* and *damnum* and arguably aligns more closely with doctrine. Actionable damage is not separate from the relevant legal right the plaintiff has against the defendant. Therefore there can be no *injuria* without *damnum* – the damage is a necessary condition for the violation of the plaintiff's right in negligence.<sup>82</sup>

Conceiving of injury in this way clarifies the relationship between injury and damage and furthers the inquiry about what the substance of actionable damage is. If the plaintiff's right in negligence is defined in relation to the actionable damage, then the concept of damage is broadened beyond simply being defined as harm or loss. Recall that harm or loss is defined as a physically or economically worse state of affairs than the plaintiff's original position. As Robert Stevens argues, it is “meaningless to talk of a right not to be caused loss. If loss is suffered, it is a consequence of a breach of a duty; it cannot go to the definition of what D is under a duty to do or not do.”<sup>83</sup> If the concept of actionable damage is considered distinct from harm or loss then the plaintiff's right is defined independent of whatever consequent loss may result from the damage. The plaintiff's right, then, is not a right to not be caused loss, but a right to not be damaged. It follows that injury does not

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<sup>82</sup> The damage is a necessary but not a sufficient condition because it is not only that the plaintiff suffered the relevant damage but that the defendant fell below the standard of care and because of that failure the damage was factually caused.

<sup>83</sup> Stevens, *supra* note 59 at 119; cf Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007) at 338.

necessarily require loss, but it could be that the definition of actionable damage in substance requires loss.<sup>84</sup> It is to answering this query that we now turn.

## 2.5 A Narrow Definition of Damage

Perhaps the most simple and intuitively attractive view of actionable damage is to define it as something that leaves the plaintiff worse off. Actionable damage, then, is whatever has caused the plaintiff physical or economic detriment in a way that is “not insignificant” and “beyond what can be regarded as negligible.”<sup>85</sup> In *Rothwell* the House of Lords took up the analysis of defining actionable damage in this way.<sup>86</sup> In the leading speech Lord Hoffmann articulated the definition as:

an abstract concept of being worse off, physically or economically, so that compensation is an appropriate remedy. It does not mean simply a physical change, which is consistent with

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<sup>84</sup> However, if Stevens’ argument is correctly understood it seems that he conceives of proof of loss as an essential requirement for an action in negligence:

When thinking about libel, or trespass to land, or false imprisonment, or private nuisance, lawyers naturally see the essence of the claim as being the right which has been violated. In the area of liability for negligence, however, I suspect that this is no longer the way many (most?) lawyers think. It is tempting, indeed I think it is common, to see the negligent damage of another’s property or the negligent injuring of another’s person as a species of loss. Surely, so the thinking goes, what is important is that when these things occur the victim is, as a matter of fact, worse off as a result. What then requires explanation is why other forms of loss, ‘pure’ economic loss for example, are not actionable (*supra* note 59 at 119).

Stevens goes on to argue that damages should not be assessed on the basis of vindicating rights and reaches the somewhat flawed conclusion that on a substitutive or vindicatory view of damages that there would be a right to substantial damages for every wrong, which he argues is incorrect (*ibid* at 128; *Torts and Rights*, *supra* note 83 at 88-91). The argument here does not agree with the notion that damages assessed on a vindicatory basis must always be substantial. If Stevens is in fact arguing that loss must result in order to justify vindication, it is not suggested that his position is consistent with or supporting the argument here.

<sup>85</sup> *Rothwell*, *supra* note 12 at para 9, citing *Cartledge v E Jopling & Sons Ltd.*, [1963] AC 758 (HL).

<sup>86</sup> The approach in *Rothwell* was recently affirmed in *Greenway v Johnson Matthey PLC*, [2016] EWCA Civ 408 in which it was held that the plaintiffs who had been exposed to platinum salts and had become sensitized to these salts could not recover unless the exposure had resulted in a platinum allergy.

making one better, as in the case of a successful operation, or with being neutral, having no perceptible effect upon one's health or capability.<sup>87</sup>

The existence of pleural plaques was considered of “evidential” rather than “substantive” significance in that the plaques signified the plaintiff had been exposed to asbestos, but the resulting change was insufficient to be considered in substance actionable damage.<sup>88</sup>

Lord Hoffmann maintained that bodily change is not enough absent some proof that the plaintiff is materially and recognizably worse off: “[S]ymptomless bodily changes with no foreseeable consequences, the risk of a disease which is not consequent upon those changes and anxiety about that risk are not, individually or collectively, damage giving rise to a cause of action.”<sup>89</sup> Lord Scott added that because the plaques “are not visible or disfiguring”, the appellants did not consequently suffer from “any disability or impairment of physical condition”, and because the inhalation of the asbestos fibres “involved no pain or physical discomfort” the pleural plaques “could not per se suffice to complete a tortious cause of action.”<sup>90</sup> The court recognized that the requisite detriment need not be financial loss in comparing the case to *Cartledge v E Jopling & Sons Ltd.*<sup>91</sup> In *Cartledge* the plaintiffs had inhaled silica dust in the course of their employment but their claim differed from *Rothwell*

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<sup>87</sup> *Rothwell*, *supra* note 12 at para 7.

<sup>88</sup> *Ibid* at para 11 citing to the trial decision, *supra* note 17.

<sup>89</sup> *Ibid* at para 17. One argument advanced by the plaintiffs was an “aggregation theory” in that the plaintiffs claimed the aggregation of perhaps trivial things made up sufficient actionable damage. The court rejected this argument and, as Lord Hope held, “two or even three zeros, when added together, equal no more than zero. It is not possible, by adding together two or more components, none of which in itself is actionable, to arrive at something which is actionable” (at para 42). This analysis is correct and analogous to the proposition maintained here that there cannot be recovery in a class action because of the aggregation of claims if it is not possible that each individual could also recover independently.

<sup>90</sup> *Ibid* at para 68.

<sup>91</sup> *Supra* note 85; *Rothwell*, *supra* note 12 at paras 8 (per Lord Hoffmann), 37-38 (per Lord Hope), 65 (per Lord Scott), 85-88 (per Lord Rodger).

in that the inhalation of the dust had caused the onset of pneumoconiosis (a respiratory disease), pain in their lungs and trouble breathing when exerted. *Cartledge* was distinguished by the fact that there the plaintiffs were considered to have suffered sufficiently serious injury to be considered actionable damage.

*Rothwell* sets out a definition of damage that can be called the narrow approach. That is, damage is first qualified as being something that is reasonably foreseeable to the defendant (drawing from the discussion above), and further qualified in that the damage must result in a detriment or loss to the plaintiff. There is therefore no damage without loss; loss is not some separate thing that the plaintiff must prove. Further, the concept of loss is understood as being one of degree and must rise above that which is non-negligible: “It is for a judge or jury to decide whether a man has suffered any actionable harm and in borderline cases it is a question of degree.”<sup>92</sup> The narrow definition accepted by the court in *Rothwell* is also implied in scholarship. For example, Stephen Perry argues that the definition of harm (what is here referred to as damage) is “a relatively specific moral concept which requires that a person have suffered serious interference with one or more interests that are particularly important to human wellbeing”.<sup>93</sup> Similarly, Peter Benson argues that the definition of misfeasance depends on there being a “foreseeable risk of sufficiently significant damage”, the defendant acting in light of that risk without taking proper precaution, and the result of the action being an interference with the plaintiff that

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<sup>92</sup> *Cartledge*, *supra* note 85 at 779 per Lord Pearce, cited with approval by Lord Hoffmann in *Rothwell*, *supra* note 12 at para 9.

<sup>93</sup> Perry, *supra* note 11 at 54 and n 47. If Perry’s argument is here properly understood it is not unfair to equate his view of harm with damage as defined here because, for Perry, it is the harm that operates to show the violation of the right.



“materializes as a loss”.<sup>94</sup> It is only when the plaintiff suffers loss that it can be said the defendant exercises a sufficient degree of control over the plaintiff and consequently subordinates the plaintiff’s interests to the defendant’s own.<sup>95</sup> Both of these articulations of what constitutes a rights violation can support a normative justification for the narrow definition of damage. While the narrow definition seems to be accepted, and is perhaps morally and normatively defensible, it is clear through the court’s reasoning in *Rothwell* (as well as the court noting decisions turning on this definition are delivered with regrets)<sup>96</sup> that the narrow definition presents difficult analytic hurdles and arguably produces incorrect results.

### ***2.5.1 Challenging the narrow approach***

In *Rothwell* Lord Hope nicely alludes to one problematic issue with the narrow definition at the beginning of his reasons: “I do not think that it is an abuse of language to describe pleural plaques as an injury.”<sup>97</sup> Lord Hope’s discussion goes on to struggle with the difficulty in stating that the pleural plaques were of no consequence to the plaintiffs or could not constitute an interference with the plaintiffs’ bodily integrity. Because of the exposure to asbestos the plaintiffs’ bodies had been changed. Similar to a medical device case, where there is a potentially defective foreign object implanted in the plaintiff’s body, it seems simply incorrect to say that the plaintiffs’ bodies in *Rothwell* had not at least been compromised by the exposure. By calling the interference an injury it is at least implied there

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<sup>94</sup> Peter Benson, “Misfeasance as an Organizing Normative Idea in Private Law” (2010) 60 UTLJ 731 at 770-771.

<sup>95</sup> *Ibid* at 771 and 778-785.

<sup>96</sup> See, e.g., *Gregg*, *supra* note 1 at para 226; *Rothwell*, *supra* note 12 at para 59; *Nicholls*, *supra* note 75 at 356.

<sup>97</sup> *Supra* note 12 at para 39.

was the violation of some right. In saying it is not an abuse to identify the plaques as an injury, it can be inferred that the crux of the issue was not determining whether there had been any interference with the plaintiffs. Lord Hope's comments can be read as identifying the difference between cases of pure and consequent risk. That is, the issue the court was contending with was not determining whether the plaintiffs could claim for pure risk in that it was recognized there was some interference. The difficulty then turned to determining why the interference experienced by the plaintiffs was insufficient to constitute actionable damage.

Similar to Lord Worth MR's analytic approach in *Gregg*, in which he opened by labeling the problem as "an important issue of policy",<sup>98</sup> Lord Hope turned to the principle *de minimis non curat lex* – the law does not concern itself with trifles – as the mode to determine actionable damage. The problem was framed as a need to define the limit of the degree of triviality of damage required to conclude the plaintiff has in fact suffered a detriment. However, as Lord Hope himself struggled with, reliance on this principle is also problematic:

It is not right to say that the law does not concern itself with matters of small moment or which are trivial in amount. The dishonest taking of an item of trivial value – a bun from the bakery, for example – is just as much theft as it is when the item taken is of high value. And in strict legal theory every wrong, however slight, attracts a remedy. Every right, of whatever value, may be enforced.<sup>99</sup>

Lord Hope went on to analyze the *de minimis* principle in part on the basis of policy considerations and implied that it is a claim of legal policy rather than the application of strict legal theory that leads to the conclusion that "the law is not to entertain a claim for damages

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<sup>98</sup> *Supra* note 1 at para 125.

<sup>99</sup> *Rothwell, supra* note 12 at para 44.

where the physical effects of the injury are no more than negligible.”<sup>100</sup> Lord Hope’s example intending to incite caution is instructive: If actionable damage is not bounded by the *de minimis* principle “the smallest cut, or the lightest bruise, might give rise to litigation the costs of which were out of all proportion to what was in issue”.<sup>101</sup> However, a small cut or a light bruise is a violation of bodily integrity. What is problematic about introducing the *de minimis* principle to determine actionable damage is that the content of litigants’ rights is a case-by-case determination of degree rather than kind.<sup>102</sup>

Though, as discussed above, a plaintiff’s right in negligence is not to something as broad as bodily integrity generally, if the damage falls within the ambit of that which the defendant ought to reasonably foresee and take care to avoid the degree is irrelevant if the damages is of the requisite kind. For example, we can articulate a surgeon’s duty of care to perform operations with skill and ensure that he or she does not violate the bodily integrity of his or her patient in a manner that the patient did not consent to or is outside the scope of what is required in order to adequately complete the surgery. A cut, however small, is a piercing of the skin and on a common sense view a violation of one’s bodily integrity. In the course of surgery the surgeon is not paying attention and not taking sufficient care with the

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<sup>100</sup> *Ibid* at para 47.

<sup>101</sup> *Ibid*.

<sup>102</sup> The argument here advances and supports an interpretation of the *de minimis* principle as setting a threshold best understood in terms of a bar for degree of harm that the law will recognize. There is at least one alternative, and slightly different understanding that sets up the *de minimis* principle as determining that trivial damage is not the kind of damage that is actionable precisely because it is not of sufficient degree. That is, that people are expected to exhibit some level of fortitude and small bumps or bruises fall within the reasonable limits of interference that people are expected to endure. Fully developing an answer as to whether rights are necessarily qualified by such limitations of reasonableness is beyond this scope and, as the argument here suggests, this different interpretation is answered in short by contending that it is arbitrary to distinguish the content of rights based on degree of damage.

tools and because of the lack of attention drops a scalpel; as it fall it cuts the patient on the operating table. What difference does it make if the cut is large or small? There may be an evidentiary difference between a large gash that compromises other organs and seriously injures the plaintiff or leaves an unsightly scar and a small nick that bleeds but does not require stitches and heals without scarring, but what is the normative difference?

Similarly, in a pharmaceutical case it is perhaps accepted that causing the side effect of a heart attack is sufficiently serious to constitute actionable damage. But if a heart attack is seen at the most serious end of a scale of adverse effects to the heart generally, what about creating a heart murmur that itself is perhaps harmless but is still a change in how the heart's valves operate?<sup>103</sup> The problem with using the *de minimis* principle to introduce a concept of degree permits policy to have the effect of circumscribing the content of litigants' rights in an arbitrary way. Where is the line? Is what amounts to change between couch cushions a sufficient loss? One dollar? Ten dollars? On what principled basis can a benchmark be formulated? If the plaintiff has a right that the defendant does not misrepresent and induce the plaintiff into a fraudulent investment, the actionable damage is losing any money to the scheme. Be it 10¢ or \$10 million, the *injuria* has been made out if the plaintiff suffers damage of the kind the defendant has a duty to avoid. Introducing policy principles that are not capable of bright line definitions or justification contributes to what has been referred to

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<sup>103</sup> A murmur is a “soft blowing or rasping sound” that “results from vibrations produced by movement of the blood within the heart and adjacent large blood vessels...A murmur does not necessarily indicate organic pathology, and heart disease may not result in any murmur” (*Taber’s Cyclopedic Medical Dictionary*, 15th ed, *sub verbo* “murmur”). A murmur can be indicative of, for example, the heart valves not sealing properly when closing but is not necessarily on its own the cause of a heart attack or other condition.

as “the modern mess” of negligence because the implication is that litigants’ rights are not determined by principled or consistent rules.<sup>104</sup>

However, taking a more principled path can still arrive at the same end. Though it may be that for policy reasons the institution of the law will not entertain a claim for damages because small claims should not be clogging up the courts, dismissing a case on these grounds is different from concluding that as a result of the application of the *de minimis* policy a person’s legal right has not been infringed. If we recognize damage is separate from loss, we can propose that the *de minimis* principle apply to the determination of whether something will count as a loss rather than whether something will count as damage. That is, the damage that indicates a rights violation can be, as Lord Hope suggests, trivial. A bruise or a cut is indeed a violation of bodily integrity and if one has a right not to have his or her bodily integrity interfered with in a way they did not consent to as a result of the defendant’s failure to act in accordance with the standard of care, then the fact of it being a small injury does not negate the rights violation. However, we can differentiate the rights that the plaintiff has as against the defendant (defined by the damage) and when it is that the institution of law will become involved (defined by the loss).<sup>105</sup> The *de minimis* principle,

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<sup>104</sup> Beever, *supra* note 4 at 18-19.

<sup>105</sup> This suggestion invites a much broader debate about the function of the law. If we view the law as an institution demanded by justice in order to underwrite and legitimize the authority of the state, or as a mechanism of civil recourse, for example, the implications of differing views of the law lead to complex questions about whether there is a moral and normative justification for the state to refuse to open its doors, so to speak, for trivial claims. See, e.g., Jacob Weinrib, “Authority, Justice and Public Law: A Unified Theory” (2014) 64 UTLJ 703 arguing that “The ‘principle of justice’ relates the right of persons to just governance to the corresponding duty incumbent on government in the exercise of its authority” (at 706). Weinrib contends, in agreement with Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Cambridge: Harvard University Press, 2009), that the right to exercise the public authority of the state is justified by the

then, could be viewed as a limiting policy principle about a threshold to invoke the institutional mechanism of the courts rather than modifying the substance of the plaintiff's rights.<sup>106</sup>

If we view damage in this way, and are concerned with keeping this second policy issue separate, then we must view loss as an entirely separate requirement that is not connected to the right that the plaintiff has. That is, there is a difference in saying that the plaintiff has a right not to be damaged and entailed in the definition of damage is a requirement of suffering loss, as opposed to saying that in order to maintain a cause of action the plaintiff must prove damage and then there is an additional requirement that the plaintiff prove resulting loss from that damage. Though it may sound like the second iteration is what negligence already requires, and the distinction may be of little practical consequence, it in fact adds conceptually and analytically an extra element to the negligence inquiry. If we are concerned with not letting policy dictate the content of rights, as many rights-based theorists seem to be,<sup>107</sup> then perhaps we ought to understand negligence as requiring this second extra

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duty incumbent on the state to rule justly. This includes, *inter alia*, ensuring the mechanism of private recourse through the courts is available and permits litigants to invoke their private individual rights when harmed.

<sup>106</sup> Contending fully with the implications of this proposition is beyond this scope. It raises interesting questions, such as if courts are justified and in fact do limit the claims one can bring, then what is the remedy for people who do not meet that threshold? Is this impliedly (or by necessity) an institutional or moral permission that plaintiffs can enforce some other self-help remedy? If, in justice, one is entitled to a remedy if there has been a wrong, then are there certain circumstances when plaintiffs must take matters into their own hands?

<sup>107</sup> See, e.g., Beever, *supra* note 4 at 3 and 16-19; Donal Nolan & Andrew Robertson, "Rights and Private Law" in *Rights and Private Law*, Donal Nolan & Andrew Robertson, eds, (Oxford: Hart Publishing, 2012) 1 at 6:

The work of rights theorists of private law can also be described as *formalist*. We mean by this that rights theorists believe that 'the general, structural concepts of private law...determine the result (or the rule) to be applied in particular (types of) cases'. In this sense, formalism can be contrasted with the realist view that private law cases are entirely or largely determined by policy determinations, for which general, structural concepts merely provide a foil.

step. It may be that this is what courts are doing, but the analysis is silent. If these distinctions and different analytical positions are made explicit then we can reconcile the types of issues that suggest courts are deciding cases on the basis of policy.

Because of the interchangeable use of the terms injury, damage, and harm, it is not clear whether the court's conclusions in *Rothwell* instantiated the distinction between damage and loss in this way. But it is clear, particularly in Lord Hope's reasons, that the court did consider that there had been some injury done, whether equated with the physical change in the plaintiffs or the employers' admission of breaching a duty they owed to their employees. Though *Rothwell* seems to confuse rather than clarify the analysis, the decision does assist to sharpen the problem. If *Rothwell* is correct either (1) loss is part of the definition of damage or (2) loss is a separate requirement the plaintiff must prove in order to maintain a cause of action. If the first conclusion is true, then this is conclusive acceptance of a narrow definition of damage in the United Kingdom. The plaintiff's right is to not be put at unreasonable risk of reasonably foreseeable damage that causes the plaintiff non-negligible physical or economic loss. If the second conclusion is true, then actionable damage does not require loss but the plaintiff must nonetheless prove separately he or she is left physically or financially worse off.

If either conclusion about the function of loss is correct, it should follow that any plaintiff who does not suffer detriment cannot sustain a claim in negligence either because the plaintiff's right has not been violated (there has been no loss, therefore no actionable damage, and therefore no injury) or because the plaintiff has not satisfied the separate, secondary requirement of proving non-*de minimis* loss. This supposition, however, does not always hold true.

In *The Mediana*, Lord Halsbury set out the leading definition of nominal damages:

‘Nominal damages’ is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed.<sup>108</sup>

The plaintiff can recover nominal damages for *per se* actions regardless of any loss suffered, that is, for a violation of the plaintiff’s right, which is broadly construed. Take trespass to land, for example. If the defendant walks over the plaintiff’s lawn the plaintiff may not have suffered any recognizable harm but the plaintiff’s right to property has been infringed by the trespass. The plaintiff is therefore entitled to nominal damages to signify and vindicate the violated right. Similarly, a person has a right that others not interfere with his or her bodily integrity and if the defendant pushes the plaintiff the defendant commits a battery regardless of the plaintiff suffering any harm as a result of the push.

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<sup>108</sup> *The Owners of the Steamship ‘Mediana’ v The Owners, Master and Crew of the Lightship ‘Comet’ (sub nom ‘The Mediana’)*, [1900] AC 113 (HL) at 116. Lord Halsbury goes on to say that ‘nominal damages’ ought not be defined as a merely small or trivial sum. As set out by Waddams, “Nominal damages are awarded if the plaintiff establishes a breach of contract or a tort of the kind that is said to be ‘actionable *per se*’ but fails to establish a loss caused by the wrong. In the case of...negligence, if the plaintiff fails to establish a loss, the action will be dismissed” (SM Waddams, *The Law of Damages*, 5th ed (Toronto: Canada Law Book, 2012) at §10.10). The concept of nominal damages as defined in *The Mediana* is applied in negligence cases though not analyzed with reference to these above noted definitions. In part, detailed analysis or sourcing of the principle of nominal damages is not found in negligence cases because, as will be argued here, they ought not be awarded on a traditional conception of damage. Though there are many examples of cases in which the term ‘nominal damages’ is used incorrectly, or not in accordance with this principle, these types of cases are not considered as part of the analysis (see, e.g., *Schnurr v Insurance Corp. of British Columbia*, 2015 BCSC 1630 where the damages were called merely small in amount and therefore nominal, or *Allen Farms Ltd. v Oliver Industrial Supply Ltd.*, [1992] AJ No 70 (QB) [*Allen Farms*] which introduced the concept of “enhanced nominal damages” as an “amount that recognizes that something more than nominal damages have been proved an are fairly deserved” (at para 39). The Alberta Court of Appeal subsequently rejected the *Allen Farms* analysis and enhanced nominal damages in *Hi-Way Services v Olson (c.o.b Moose Mountain Buffalo Ranch)*, 2000 ABCA 294).



With the definition of nominal damages in mind, if actionable damage is equated with or requires loss then absent such loss all decisions should follow the line of analysis holding nominal damages are not available for cases of negligence: “Such damages are available only where a plaintiff establishes a tort which is actionable *per se* but fails to establish loss caused by the wrong.”<sup>109</sup> However, there are many instances of courts doing just the opposite.

In cases of solicitor’s negligence, for example, the plaintiff alleges that because of his or her solicitor’s negligence, perhaps missing a limitation period, the plaintiff was unable to bring the claim the solicitor was hired to prosecute. In these types of cases the court undertakes a ‘trial within a trial’ or an ‘action within an action’ to determine whether the underlying claim the solicitor allegedly fouled up would have succeeded. In *Kitchen v Royal Air Force Association* Lord Evershed MR analyzed how to deal with these cases:

If, in this kind of action, it is plain that an action could have been brought, and if it had been brought that it must have succeeded, of course the answer is easy. The damaged plaintiff then would recover the full amount of the damages lost by the failure to bring the action originally. On the other hand, if it be made clear that the plaintiff never had a cause of action, that there was no case which the plaintiff could reasonably ever have formulated, then it is equally plain that the answer is that she can get nothing save nominal damages for the solicitors’ negligence.<sup>110</sup>

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<sup>109</sup> *Van De Geer Estate v Penner*, 2006 SKCA 12 at para 93. The plaintiff sought to have the sale of her farm to the defendants set aside on the basis that she lacked capacity, had been subject to undue influence and the agreement was unconscionable. The plaintiff also claimed against the lawyer brokering the transaction for negligence and breach of fiduciary duty. The Court of Appeal held that the trial judges finding of facts supported no claim in negligence as the plaintiff had not proved any damage. It was an error to award \$1000 as nominal damages the plaintiff’s estate suffered no loss as a result of the defendant’s actions.

<sup>110</sup> [1958] 1 WLR 563 (CA) [*Kitchen*] at 574-575

*Kitchen* has been followed in Canada and continues to be followed in the United Kingdom.<sup>111</sup> Though the analysis establishes that damage suffered need not be financial loss, it makes it difficult to understand what the courts see as the actionable damage. As Lord Evershed continued, “what the court has to do (assuming that the plaintiff has established negligence) ... is to determine what the plaintiff has by that negligence lost. The question is, has the plaintiff lost some right of value, some chose in action of reality and substance?”<sup>112</sup> If the claim could not have succeeded the plaintiff has lost nothing; arguably the plaintiff did not even lose a chance to win (if it is ever that outcomes of trials could be conclusively determined). It could even be said that the plaintiff benefitted from saving the expense of litigation or avoiding a potential adverse cost award. Despite the plaintiff not having lost, it has been repeatedly held that if the underlying claim could not have succeeded the plaintiff is entitled to nominal damages.

If *Kitchen* is understood as justifying nominal damages for the injury alone, then this is to recognize that the plaintiff has a claim in something that is not negligence or that the plaintiff has right as against the defendant that does not bear relation to the damage. That is, it is enough that the defendant owed a duty of care and breached the standard to claim the plaintiff’s right is violated. This view alters negligence as understood in Canadian and English common law because it supports a broadly instrumentalist conception.<sup>113</sup> If this is correct, then we should be seeing nominal damages awarded in every case in which the

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<sup>111</sup> See *Melanson v Cochrane, Sargeant, Nicholdson & Patterson* (1985), 63 NBR (2d) 91 (QB Trial Div); *Fisher v Knibbe*, 1992 ABCA 121; *Harrison v Skapinker*, [2002] OJ No 2279 (SC) at para 59 per Stinson J: “I have found no Ontario case which disputes the *Kitchen* analysis and it appears to be good law in Ontario.” See also *Pilote v Gilbert*, 2016 ONSC 494 at paras 374-77; *Dixon v Clement Jones Solicitors*, [2004] EWCA 1005.

<sup>112</sup> *Kitchen*, *supra* note 110 at 575.

<sup>113</sup> See *supra* note 11.

plaintiff establishes a breach of the duty and standard of care but does not establish damage. Indeed, a plaintiff could bring a claim without ever even alleging damage. Such conclusions, as Justice Lax rightly pointed out in *Andersen*, fundamentally change the way that negligence is understood.<sup>114</sup>

Awards of nominal damages in cases where no loss is proven are not limited to solicitor's negligence cases. In *Boase v Paul*<sup>115</sup> the plaintiff's dentist had recommended that the plaintiff have almost all of his upper teeth removed because of the poor state of tooth decay. The plaintiff, wary and not wanting to remove any teeth at all, finally agreed to have the worst tooth removed. The plaintiff's dentist referred him to the defendant dentist for the procedure and there was apparently some confusion as to what the referral entailed. The plaintiff claimed that he made clear to the defendant dentist he wanted only the one tooth removed, but believing it was the plaintiff's wish to have all his teeth removed, the defendant dentist extracted twelve of the plaintiff's upper teeth rather than just one. The plaintiff's claim in negligence ultimately failed on the basis of a statutory limitation period.<sup>116</sup> It was also found as a fact by the trial judge that the plaintiff was in a better state of health due to the removal of his decaying teeth. Had the action proceeded on its merits the trial judge would have awarded damages of \$800 for the wrong suffered, any pain, and expenses for the false teeth. On appeal Mulock CJO held that the defendant's action "caused no damage to the

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<sup>114</sup> *Supra* note 53 at paras 593-594.

<sup>115</sup> (1930), 66 OLR 237 (HCJ), aff'd [1931] OR 625 (CA) [*Boase*]. The case is admittedly old, but it is contemporaneous with *Palsgraf*, decided after *The Mediana*, and illustrates an example that can be an analogue for other more contemporary cases.

<sup>116</sup> *Dentistry Act*, RSO 1927, c 198 at s. 28 establishing a six-month limitation period that the plaintiff had missed for bringing claims of negligence or malpractice against dentists. The court found unanimously that the defendant's actions were negligent and at the least technically a case of malpractice and therefore fell within the statute.

plaintiff, but on the contrary was a benefit to him, and if he were entitled to maintain this action he would... be entitled to merely nominal damages.”<sup>117</sup> Each of the justices held that it was negligent to have removed the further eleven teeth,<sup>118</sup> and the only appropriate award on the merits was nominal damages. As in *Kitchen*, the Ontario Court of Appeal’s analysis in *Boase* implies a conception of negligence as being determined only with reference to a failure to meet the standard of care (and thus sufficient to demonstrate a violation of the plaintiff’s right) and not requiring loss to be proven in order to conclude either that the plaintiff’s right had been violated or that he could maintain a claim in negligence.

There are too many cases decided with similar analysis to conclude that in each instance the case is wrongly decided, or the judges are misapprehending the purpose or definition of nominal damages or are not understanding the requirements of negligence generally.<sup>119</sup> What is clear from all of these cases is that the courts consider what was done to

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<sup>117</sup> *Boase* (CA), *supra* note 115 at 627.

<sup>118</sup> As Justice Hodgins briefly discussed, the defendant’s action was not an assault or battery because it was motivated by a misunderstanding, was non-intentional, and therefore was properly considered as negligence.

<sup>119</sup> See, e.g., *Blais v Royal Bank of Canada*, [1997] OJ No 228 (Gen Div) and *Green v Royal Bank of Canada*, [1996] OJ No 1454 (Gen Div) as cases of negligent misrepresentation in informing the plaintiffs that they had life insurance when they in fact did not and awarding nominal damages despite the fact that it was shown the plaintiffs would not have been insured had they had the opportunity to seek out another carrier. See also *Joslyn & Olsen Contractors Ltd. v East Smoky School Division 54* (1976), 2 AR 18 (SC App Div) which was a claim against architects for negligent plans that resulted in an increased expense to the school for extra work to be paid to the contractors. Despite the architects being ultimately liable and ordered to pay the school back for the incurred losses, the school was nonetheless awarded nominal damages. See also *Kerr & Richard Sports Inc. v Fulton* (1993), 13 Alta LR (3d) 254 (QB):

Recent case law has established that a nominal award can be made for negligence that does not cause damage: [*Fisher v Knibbe*, 1991 ABCA 121]. *Fisher* has been quoted with approval in *Riggins*. Both *Fisher* and *Riggins* rely on *Kitchen*. ... All of those cases deal with a ‘trial within a trial’ situation; that is not the case here. However, the principle of those cases, that negligence which does not cause damage is compensated by an award of nominal damages, does apply here. In both situations, the material elements are the same: the negligence of a lawyer coupled with the fortunate result that the

the plaintiff a violation of some right and vis-à-vis that violation the plaintiff suffered sufficient actionable damage regardless of the consequences being a loss, neutral, or a benefit. The only way that these cases can be reconciled as examples of a completed claim in negligence, with the principle *injuria sino damnum* governing, is if the *injuria* and the *damnum* can be considered as distinct elements of the claim and that the definition of actionable damage does not require loss. If we say the plaintiff's right as against the solicitor is to have the claim prosecuted properly, the actionable damage is the solicitor failing to bring the claim. If we say the plaintiff's right is one to bodily integrity such that the defendant is under a duty not to inadvertently do something to the plaintiff's body without consent, or even more specifically a right that the defendant dentist only perform procedures the plaintiff understands and consents to, the actionable damage is removing more than one of the plaintiff's teeth.

These kinds of cases imply either that the recovery of nominal damages signifies the violation of a non-relational right against the defendant that he or she not act negligently, or that actionable damage does not require loss. If we accept the former interpretation then the

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client suffered no loss. That is the appropriate disposition here. The plaintiff is entitled to an award of \$100.

Another line of applicable cases are those in which because of the plaintiff's failure to put evidence before the court, there is no evidence establishing a loss though factual loss is alleged (which is not the same as cases in which the assessment of damages is difficult for scientific or other evidentiary reasons). In these cases despite there being in theory no damages proven to the court because there is no evidence properly before the court, nominal damages are still awarded: e.g. *Poulain v Iannetti*, 2015 NSSC 181; *Everatt v Elgin Electric Ltd et al*, [1973] 3 OR 691 (HCJ). Analogously there are many cases that do not deal with awards for nominal damages but are awards of damages based on circumstances in which there is arguably no loss. For an excellent discussion and analysis of these types of cases in search for a definition of 'loss' see Andrew Tettenborn, "What is a Loss?" in Jason W Neyers, Erika Chamberlain & Stephen GA Pitel, eds, *Emerging Issues in Tort Law* (Oxford: Hart Publishing, 2007) 441. Any circumstance in which courts have made an award of damages where the plaintiff has arguably benefitted or not suffered physical or economic detriment is one that would have to be considered wrongly decided if the narrow definition of damage is correct.

defendant's duty is a broad, non-relational duty to act in accordance with the relevant standard of care. If we accept the latter interpretation then we can maintain the litigants' rights are relational. Proving actionable damage, however, does not require proving loss.

## **2.6 Arguing for a Broad Definition of Damage**

As Andrew Tettenborn argues, "the idea that there is some unitary concept of 'loss' waiting out there for the finding is unhelpful and ultimately unworkable."<sup>120</sup> If the narrow definition of damage is accepted, then it must follow that many cases must be decided as an exception to the rule, which quickly devolves into arbitrary and inconsistent analysis. Further, and more normatively significant, the narrow definition of damage cannot adequately account for all the circumstances that are rights violations. However, if we adopt a broad definition of damage the problems caused by the narrow definition fall away.

As proposed above in the discussion about reconsidering the relationship between damage and injury,<sup>121</sup> if the defendant's duty in negligence is defined as a duty to act in accordance with the standard of care and not put the plaintiff at an unreasonable risk of reasonably foreseeable damage, the plaintiff's right is defined as a right not to suffer that damage as a result of the defendant's failure to meet the standard. Loss is separated from damage and the actionable damage required in order to maintain the claim is to suffer any degree of the kind of damage the defendant is under a duty to avoid. This is the broad definition. As stated at the outset, however, articulating the definition of actionable damage in this way does not fully answer the question about what the substantive content of

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<sup>120</sup> Tettenborn, *ibid* at 465.

<sup>121</sup> See Part 2.4.

plaintiffs' rights are. There still remains a determination on a duty-by-duty basis in order to determine the kind of damage that falls within the ambit of each category of duty of care.

A comparison of the narrow and broad approaches is well-illustrated by the Supreme Court of Canada's decision in *Winnipeg Condominium Corporation No. 36 v Bird Construction Co.*<sup>122</sup> In *Winnipeg Condominium* the court considered the question of whether a contractor was liable in tort to a subsequent purchaser of a building, who had no relationship of contractual privity with the contractor, for the cost of repairing defects in the building created by the contractor's negligent construction. Though the court held that the case was an opportunity to "address the question of recoverability in tort for economic loss",<sup>123</sup> the decision is based on an analysis of the duty of care and the concept of actionable damage that has broader implications beyond the debate about pure economic loss.

Justice LaForest, for a unanimous court, ultimately rejected the line of cases relied on by the lower courts (mostly from the United Kingdom) that a subsequent purchaser can only recover in negligence where the "negligence causes physical injury to the purchasers, damage to their other property, or where a special relationship of reliance has developed between the contractor and the purchaser".<sup>124</sup> This can be read as a rejection of the narrow definition requiring loss as necessary in order for there to be actionable damage. Justice LaForest concluded that the divergence of the Canadian approach from the English approach

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<sup>122</sup> [1995] 1 SCR 85 [*Winnipeg Condominium*].

<sup>123</sup> *Ibid* at para 12.

<sup>124</sup> *Ibid* at para 19. This was the approach taken in the United Kingdom as set out in *D & F Estates Ltd. v Church Commissioners for England*, [1988] 2 All ER 992 (HL) [*D & F Estates*].

was due in part to the development of the conception of duty of care and how the two jurisdictions had applied *Anns v Merton London Borough Council*.<sup>125</sup>

Justice LaForest observed that *Anns* “was the high water mark for recovery of economic loss in tort in England” and subsequently English courts had repudiated *Anns* and “retreated from the broad approach to recoverability in tort” the case had established.<sup>126</sup> Subsequent English decisions reverted to the limitation that liability in negligence requires that the plaintiff suffer actual harm or loss.<sup>127</sup> Justice LaForest explicitly rejected this retreating formulation and attributed the divergence in view to the Supreme Court of Canada’s position about the duty of care test as formulated in *Anns*. The court affirmed the *Anns* approach in several cases and ultimately concluded that it would not revert to the narrow definition.<sup>128</sup> The court in *Winnipeg Condominium* ultimately held that if liability in negligence could be established where the negligent construction of a building in fact caused harm to persons or property, it follows that there is also liability “where the dangerous defect is discovered and the owner of the building wishes to mitigate the danger by fixing the defect and putting the building back into a non-dangerous state.”<sup>129</sup> Justice LaForest reasoned that

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<sup>125</sup> [1978] AC 728 (HL) [*Anns*].

<sup>126</sup> *Winnipeg Condominium*, *supra* note 122 at paras 30 and 32. In *Murphy v Brentwood District Council*, [1991] 1 AC 398 (HL) the House of Lords affirmed the decision in *D & F Estates* and pulled back from the ruling in *Anns*.

<sup>127</sup> *D & F Estates*, *supra* note 124 at 1011-1012; *Winnipeg Condominium*, *supra* note 122 at para 30.

<sup>128</sup> *Kamloops v Nielsen*, [1984] 2 SCR 2; *Canadian National Railway Co. v Norsk Pacific Steamship Co.*, [1992] 1 SCR 1021; *Winnipeg Condominium*, *supra* 122 note at paras 32-33.

<sup>129</sup> *Ibid* at para 36.



“[i]n both cases, the duty in tort serves to protect the bodily integrity and property interests of the inhabitants of the building.”<sup>130</sup>

The analysis implies that if a defect is discovered and harm to people or property could result, such circumstances can ground liability. The actionable damage is either the risk of future injury or the defect. It makes sense that the actionable damage is the defect and this is what circumscribes the extent to which recovery is limited to the cost of remedying that defect. The way that all of these issues of duty, injury and damage are brought together is neatly illustrated by Justice LaForest’s conclusion: the contractor had a “duty in tort to subsequent purchasers of a building to take reasonable care in constructing the building, and to ensure that the building does not contain defects that pose foreseeable and substantial danger to the health and safety of the occupants.”<sup>131</sup>

The actionable damage, then, is the defect that poses foreseeable and substantial danger to the health and safety of people, not the risk of future injury. While the actionable damage is concrete, it is defined in relation to a risk of loss and does not require actual harm or detriment to have resulted or to ever result. If we understand the content of the duty in this way, in an exposure case, for example, the defendant’s duty is articulated as running its business in accordance with the expected standard of care to ensure that the occupants or employees on its premises are not exposed to dangerous substances or hazards that could pose a substantial danger to their health and safety. If the duty is viewed in this way, the actionable damage is the evidence of the interference with the plaintiff demonstrating that there has been exposure; evidence of exposure is then sufficient to demonstrate actionable

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<sup>130</sup> *Ibid* at para 36.

<sup>131</sup> *Ibid* at para 54.

damage regardless of the manifestation of any injury. Similarly, in a pharmaceutical or medical device case, as in *Winnipeg Condominium*, if the defendant's duty is understood as a duty to take reasonable care in manufacturing products to ensure its products do not contain defects that pose foreseeable and substantial danger to the health and safety of its consumers then the existence of the defect is the actionable damage. Therefore, the plaintiff consuming a drug that changes his or her body and is now biologically prone to heart attacks, or living with an implanted pacemaker that has faulty leads that could slice his or her heart, is analogous to living in a building that has a cracked foundation and could collapse tomorrow. The violation of the right does not happen at some future date only if loss results. The defendant's duty is based on protecting the plaintiff's and therefore it is not necessary to show injury in order to demonstrate that the plaintiff has been interfered with in a legally relevant way.

To say, as Justice LaForest did, that the duty serves to protect bodily integrity, for example, is not to say that the plaintiff's relevant right in negligence is broadly construed as a right to bodily integrity generally. Rather, this can be understood as articulating the source from which litigants' rights are derived. Recall Perry and Benson's definitions of rights violations as being an act by the defendant that interferes with one of the plaintiff's fundamental interests.<sup>132</sup> Though each conception of an interference turned on terms of loss and harm, we can see in the cases discussed above that loss and harm are not necessarily required for there to be a normatively relevant interference with the plaintiff. That is, a rights violation can be established in some cases regardless of loss. If we conceive of the morally

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<sup>132</sup> *Supra* notes 93 and 94.

relevant interference with the plaintiff's fundamental interests as that which is demonstrated by the damage, the justification applies to the broad as well as the narrow approach.

If a plaintiff's rights are grounded in and derive from the conception of people as being free, equal, and entitled to pursue their interests without interference from others, a broad definition of damage better encapsulates what a violation of these interests are.<sup>133</sup> The conception of people as being entitled to be free from interference need not require loss in order to show this right of non-interference or the plaintiff's ability to exercise autonomy in fulfilling his or her fundamental interests has been compromised. In *Laferrière*, for example, at the moment Dr. Lawson negligently failed to inform Mrs. Dupuis of her situation, her right that her doctor take care to properly diagnose and treat her was violated. Her fundamental interest in making choices about her life and health were interfered with. At that point the damage crystalized though she had not yet suffered loss or harm. In *Boase*, the plaintiff's fundamental interest in bodily integrity was compromised. In both these cases the plaintiffs had a right of non-interference against the defendant, and the defendants had a correlative duty not to damage the plaintiffs in a particular way. That the damage is or is not physical contact of some kind is not determinative of an interference with a fundamental interest.

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<sup>133</sup> There is debate about how this notion ought to be conceptualized or analytically formulated. As Nicholas McBride argues the notion that tort law "protects rights like [the right in bodily integrity or property] by imposing duties on us not to do things that will infringe on these rights" is "totally upside down", which is not to say it is without merit. Rather McBride says that "the truth is completely the other way round" in that we "have rights to bodily integrity, and to our reputations, and to our property, because tort law does what it does". That is, tort law determines what rights we have under the law and a tort is committed if "someone violates a coercive right that someone else enjoys under the law, when that right does not arise under the law of contract, or the law of equity, or the law of restitution" (Nicholas J McBride, "Rights and the Basis of Tort Law" in *Rights and Private Law*, Donal Nolan & Andrew Robertson eds, (Oxford: Hart Publishing, 2012) 331 at 350-352). On either formulation about the function and operation of tort law, however, the principle remains consistent that rights are connected with and derived from a right to non-interference.

The broad approach can better account for the kinds of rights that tort law protects. That is, rights not to be interfered with in certain kinds of ways. Whatever the result of the interference, it is possible to violate one's right without consequent loss resulting. The tension in requiring loss as a condition of finding a rights violation is evident in certain cases in which the narrow approach is applied. Dispensing with loss as entailed in the concept of actionable damage can provide a more coherent and principled view of negligence law.

### ***2.6.1 Answering objections to the broad approach***

There is a divergence between Canadian and English law insofar as the Supreme Court of Canada has not stated as clearly as the House of Lords that actionable damage requires loss. This divergence may be based on differing views of the articulation of the duty of care or based on differing views of what rights the duty is meant to protect. However, it is not the case that they represent incompatible views of negligence. That is, both the narrow and broad definitions are based on a relational view of negligence and the relevant duty is one of non-injury. Neither account leads necessarily to the conclusion that negligence is determined non-relationally or is 'in the air'. The primary objection to the narrow approach is that it is not applied consistently across all cases of negligence and it leads to arbitrary, policy-based reasoning that causes tension in the law. Objections can be similarly launched against applying the broad approach, namely that instances of liability will explode and (or because) the nature of negligence will be fundamentally changed.

No simpler answer to the first objection is needed other than Lord Nicholls' poignant conclusions in *Gregg*: "This approach would represent a development of the law. So be it. If the common law is to retain its legitimacy it must remain capable of development... 'Floodgates' is not a convincing reason for letting injustice stand

unremedied.”<sup>134</sup> The narrow definition inevitably devolves into a mass of exceptions and shifting requirements of degree and it is contingent on an elusive definition of loss. The broad approach is more principled and coherent because it is not contingent on a sliding scale of degree defined by typically lawyerly but practically unhelpful terms like ‘non-negligible’, ‘more than trivial’, and ‘not insubstantial’. The *de minimis* principle is policy-based and it ought not normatively determine the content of litigants’ rights. If the defendant’s negligent misrepresentation causes the plaintiff to lose \$1, is this not a legitimate and compensable loss? Does the plaintiff somehow not have a right to that dollar because it is so small a sum? No. Whether \$1 or \$1 million, if the defendant is under a duty not to cause the plaintiff loss as a result of negligent misstatements any amount more than zero counts as the kind of damage that shows the plaintiff’s right has been violated. It may be the case that liability explodes, but in practicality the conclusion here is not to say that as a result of increased findings of negligence defendants are therefore going to be liable to pay more in damages. If the damage to the plaintiff is trivial then nominal damages are appropriate. If the concern is that cases for trivial sums ought not be brought because they clog up courts, then the *de minimis* principle can be introduced as an extra step in the negligence inquiry to set a threshold under which a claim will not succeed. This approach, however, is a policy decision that must be made explicit through legislation because it is a limitation on access to the civil system.

If the concern is that the *de minimis* principle and reliance on loss as a limiting factor is in place, and should be retained, for the types of policy reasons articulated above, then elimination of loss is indeed a fundamental change to negligence. However, it is

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<sup>134</sup> *Supra* note 1 at paras 45 and 48 per Lord Nicholls (dissenting).

somewhat disingenuous to say that the negligence inquiry is not being changed in this kind of way already. In many cases proof of loss is not required and in others lack of compensable harm is a bar to maintaining the action. The foundational feature of loss is already on shifting sands. Proposing to differently describe the oscillation of the waves is not a drastic change.

However, the more pointed concern is that the broad approach fundamentally alters the relational nature of negligence and morphs it into a scheme of strict (or non-relational) liability. The proposal that actionable damage does not require loss does not eliminate or alter the relational, qualified nature of the duty of care. Practically, if a plaintiff is seeking the highest amount of damages possible, then he or she will formulate the claim in order to maximally describe the recoverable damages. In *Gregg*, the consequence of a finding that the plaintiff's damage was in fact lost years of life would have meant that all annual income and many other amounts would be recoverable. In his dissent Lord Hope agreed with plaintiff's counsel that the doctor's "duty was to prevent that happening which did happen – a reduction in the appellant's prospects of a successful recovery."<sup>135</sup> Had the plaintiff in fact pled the case in this way, and consequently pled that the recoverable damages he was seeking were compensation for whatever additional pain and suffering or additional time off work that was required because of the delay in treatment, the claim may have succeeded. Baroness Hale for the majority reiterated that "it matters how the claimant, and the law, define the damage which is the gist of the action."<sup>136</sup> She went on to discuss ways that the case could have been framed and some recovery awarded. However, "none of [these options] appears to have been

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<sup>135</sup> *Gregg*, *supra* note 1 at para 102 per Lord Hope (dissenting).

<sup>136</sup> *Ibid* at para 196.

explored before the judge. This was presumably because the focus before him had been on establishing that the claimant would otherwise have achieved a complete ‘cure’.”<sup>137</sup>

*Gregg* is but one example of a claim being formulated in a way that obscures the real damage at issue in order to seek the maximum compensation. The majority’s decision in *Gregg* implies that if the claim had been formulated as seeking damages flowing from delay of treatment, and not for several years of income based on a claim that the doctor’s negligence made it more likely than not that he would die, he could have recovered. However, the recovery would be limited. This outcome is precisely the conclusion the Supreme Court of Canada reached in *Laferrière*.<sup>138</sup> Viewing the amount of compensation available as limited to the actionable damage pled, as the court implied was a necessary consequence of not requiring loss to have materialized in *Winnipeg Condominium* by limiting the recoverable amount to the cost of repair, courts are perhaps unwittingly supporting a corrective justice position. If the content of the plaintiff’s right determines the measure of the remedy, plaintiffs will inevitably draft the pleadings to claim as broad a remedy as possible. Consequently, plaintiffs are more likely to plead the defendant owes an overly broad duty. As taken up in the next chapter, there is vigorous debate about whether remedies must be limited to the compensable value of the pled damage or loss. Taking a position in that debate, however, is not required in order to accede to the conclusion suggested here that actionable damage does not require loss.

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<sup>137</sup> *Ibid* at para 208.

<sup>138</sup> *Supra* note 34. This case was considered by Lord Hoffmann in *Gregg* (cf para 81) and he appears to agree with the approach taken there, thus supporting the idea that it comes down to how the case is formulated.

### 2.6.2 *A note about loss of chance and risk of harm*

Aside from the question about whether actionable damage requires harm or loss, there is a separate but related debate that was alluded to earlier – namely can a risk of future damage or risk of future harm (loss) be actionable damage? The inverse of risk of future harm is loss of chance.<sup>139</sup> A doctor fails to diagnose the patient’s cancer and as a result treatment is delayed by six months, and if treated earlier the patient would have had a 90% chance the cancer could have been dealt with fully. Because of the delay the cancer spreads and the chance for full recovery is reduced by half. It can be articulated that the patient has been put at an increased risk of death or that the patient lost a chance of being cured. There is a deep well of scholarship on issues such as whether putting someone at risk is a wrong, whether a loss of a chance is in fact a loss, and whether loss of chance cases irreparably confuse the causation requirements of tort law.<sup>140</sup> It is not within the scope here to engage with that debate, but the implications of this argument for the risk and chance debates should be briefly noted.

Within the terminological framework defended here we can answer the question of whether risk of damage is sufficient to constitute actionable damage in the negative as a matter of logic: it is tautological. Risk of the actionable damage cannot itself be actionable damage. If the plaintiff must show damage in order to prove there has been *injuria* of the relevant right in negligence, then risk of damage by definition means the actionable damage

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<sup>139</sup> See, e.g., Claire Finkelstein, “Is Risk a Harm?” (2003) U Pa L Rev 963 at 967-974.

<sup>140</sup> See, e.g., *Laferrière*, *supra* note 34 at 559-609 for Justice Gonthier’s extensive review of the various iterations of theories of loss of chance in Canada and internationally; Goldberg & Zipursky, *supra* note 68; Perry, *supra* note 11; SM Waddams, “The Valuation of Chances” (1998) 30 Can Bus LJ 86; Vaughan Black, “Not a Chance: Comments on Waddams, The Valuation of Chances” (1998) 30 Can Bus LJ 96; JG Fleming, “Probabilistic Causation in Tort Law” (1989) 68 Can Bar Rev 661.



has not been made out and there has been no injury. If the risk of damage were sufficient, then, as discussed in arguments above, this would support a view of negligence that is based on a non-relational determination of the defendant's failure to act in accordance with a standard of care and not based on a relational duty. This argument aligns with but is very different from arguments of the type that maintain that there cannot be a duty not to put someone at risk, and therefore one cannot hold a right to not be risked. The logic still prevails even if the duty is described in terms of risk. If the defendant's duty is framed as a duty to not put the plaintiff at risk, the plaintiff's correlative right is a right not to be put at risk and such risk is the relevant actionable damage. If the duty is articulated in this way it cannot not be that risk of the actionable damage is sufficient because then the requisite damage is defined as being put at a risk of being put at a risk. It is logically incoherent to say that the risk of damage is sufficient to be the damage. Therefore, the relevant risk at issue must be exposure to a risk of harm or loss.

If the analysis proceeds based on the terminological and conceptual framework developed here, the controversy shifts and is better understood as determining whether increased risk or loss of a chance is sufficient to constitute loss and not as whether a risk or deprivation of a chance are wrongs. In the cases discussed here, arguably the real question of whether loss of chance or increased risk of harm count as a sufficient detriment has not been grappled with squarely because the courts tend to view these cases as claiming risk is damage rather than asking whether risk is loss. Sufficient analysis of the cases that do explicitly deal with this issue is beyond this dissertation's scope, but it is important to note that for the purposes of the argument advanced here in favour of a broad view of damage that all of the controversial cases dealing with risk are not cases seeking to define the damage as a risk.

They are all cases of consequent risk (or consequent loss of chance) and therefore not pure risk or chance cases. Recovery for consequent risk is accepted as non-controversial and any difficulties of analyzing the value of a loss of chance or increased risk therefore fall within the scope of analyzing quantification of damages.<sup>141</sup>

## 2.7 Reconciling Controversial Cases with a Broad Approach to Damage

If the broad approach is accepted, determining whether there has been actionable damage is an inquiry into whether the plaintiff has been interfered with in the relevant way to show that he or she has suffered damage of the kind that falls within the ambit of what the defendant is under a duty not to do. In exposure cases, the pleural plaques, for example, were of evidential importance in showing the plaintiffs had been exposed and therefore had been interfered with. If the defendants' duty is understood as being a duty to ensure in the course of running their business that their actions do not expose employees or occupants of their buildings to dangerous substances or hazards that could pose a substantial danger to their health and safety, the existence of pleural plaques in *Rothwell* satisfies both the evidentiary and substantial requirement of proving the actionable damage. In *Ring* the plaintiffs rightly could not maintain the cause of action because there was no similar evidentiary proof of exposure.

In cases like *Goodridge*, Justice Perell's conclusion about the risk of harm being a materialized actual harm can be better understood as a conclusion that consequent risk is

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<sup>141</sup> See, e.g., *Athey v Leonati*, [1996] 3 SCR 458 at para 27:

Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood...For example, if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation.

recoverable. The actionable damage in each of *Goodridge*, *Tiboni*, and *Wilson* is the physiological interference with the plaintiffs in having ingested the allegedly defective drug. Justice Lax's implication in *Andersen* that had it been found that the defendants fell below the standard of care that the consequent risk of increased likelihood of cardiovascular complications would have been considered a material harm can be justified on the view that the actionable damage was the implantation of a defective device.

If the broad approach is accepted then it is not necessary to excise cases as wrongly decided or exceptional. Cases like *Boase* and *Kitchen* reflect the correct view that there can be interference and violation of a right without consequent loss. By shifting the inquiry about loss away from the definition of damage the issues of what is recoverable and how to properly quantify harms like loss of chance can be more properly analyzed as separate from the inquiry of determining rights violations. How to go about that quantification and determining what remedies are available once actionable damage is established and liability proven is the focus of the next chapter.

## **Chapter 3**

### **3. Reconsidering Disgorgement and its Availability in Negligence**

#### **3.1 Introduction**

Limiting the remedies available for the tort of negligence to the traditional principle of compensating loss does not always achieve justice. Tort law serves multiple functions and compensating plaintiffs, while an orthodox and accepted goal, is not the only purpose courts focus on when determining the type or quantum of damages. Certain cases require a remedy defined in relation to a defendant's gain. Similarly, deterrence has been held by courts to be a justifiable and legitimate purpose and function of tort law, and awards seeking to strip defendants of gains made from wrongdoing are often held to further this purpose. However, two distinct concepts of disgorgement, one as a remedy and one as a method of deterring behaviour, are conflated in case law and scholarship. This confusion, combined with the debate about the scope and application of waiver of tort, is inimical to a principled and consistent understanding of the law.

The most prevalent example of this confusion is evident in the 'waiver of tort problem'. As discussed at the outset, the problem is not with the doctrine of waiver of tort itself, although there is significant debate about how the doctrine should be properly understood. The problem is that judges and lawyers alike are unsure of what waiver of tort is, how it ought to apply, and what the status of the law is in Canada. Waiver of tort is being used as a solution to the dilemmas of loss, profits, and individual issues. This approach, however, obfuscates what the proper methodological focus should be; that is, parsing out and separately analyzing the underlying issues of the definition of damage and the availability of

gain-based remedies. The first question was dealt with in Chapter 2, and this chapter will aim to answer the second question – what scope of wrongdoing gives rise to gain-based remedies?

Awards focused on the defendant's gain disgorge benefits obtained as a result of wrongdoing. "Disgorgement ought to play a more prominent and principled role within tort law"<sup>1</sup> and this discussion will aim to define and analyze disgorgement in order to contribute to a more clear and principled understanding. The discussion will begin in Part 3.2 by situating the argument as separate from, though ultimately related to, the debate about the doctrine of waiver of tort. The focus here is to develop an analysis of disgorgement as a remedy. To accomplish this, a definitional framework is established first in Part 3.3 and from this framework the discussion will develop the primary argument that disgorgement is available as a remedial measure, in the form of 'disgorgement damages', that is available as of right as an alternative to compensation. The discussion in Part 3.4 will trace awards of disgorgement damages through the common law to demonstrate an expansion of the rationales underlying disgorgement remedies beyond mere limitation to property-based torts. By extension, it will be argued there is no justifiable reason that the violations of some rights should give rise to disgorgement damages while violations of others do not, and further that disgorgement damages are in principle available for negligence.

It is important to note at the outset that the focus of the discussion in this chapter assumes that all elements of the negligence claim have been made out and liability has been

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<sup>1</sup> Mitchell McInnes, "Account of Profits for Common Law Wrongs" in Simone Degeling & James Edelman, eds, *Equity in Commercial Law* (Sydney: Lawbook Co., 2005) 405 at 430. McInnes' comment is preceded by the argument that disgorgement should not be available as a response to "every wrongful enrichment" which, it should be noted, is contrary to the argument presented here.

established. Regardless of agreement or opposition to how the definition of damage ought to be articulated, questions in this chapter dealing with how to approach disgorgement as a remedy assumes that the damage at issue is sufficient to maintain a claim. There are still examples that are not controversial in terms of the definition of damage that turn on the plaintiff suffering a small harm for which the compensation may be very minimal. For example, a pharmaceutical case in which the plaintiff pleads negligent design, manufacture, or failure to warn of side effects. Imagine the plaintiff suffers from the side effect of headaches. If the drug were properly designed or tested, use of the drug would not have caused this side effect or it would have been discovered in testing such that the plaintiff could have been warned and perhaps the plaintiff would not have taken the drug had such a warning been given. The headache, though perhaps minor, is a physical injury and a recognizable harm.<sup>2</sup> If the plaintiff did not take any time off work, or the headaches did not manifest in such a debilitating way as to substantially impact the plaintiff's life, there is no identifiable financial damage. The defendant drug manufacturer may have made significant profits from the sale of the drug but a traditional application of the principle of compensation and restriction on gain-based remedies for negligence would result in any damages awards to the plaintiffs being minimal while the defendant retains the profits from their wrong.

Developing an answer justifying whether plaintiffs can recover a remedy based on the defendant's profits in this type of case is the goal of this chapter. It is important to note at the outset that the argument works off the starting point of the plaintiff establishing liability

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<sup>2</sup> As in many of the cases discussed in Chapter 2, the injury need not result in a large loss in order to qualify as damage. In *Greenway v Johnson Matthey PLC*, [2016] EWCA Civ 408, for example, it was accepted as uncontroversial that the plaintiffs who had been exposed to platinum salts and consequently developed an allergy had sufficient actionable damage. Similar to a headache, an allergy is a relatively minor injury and compensation for pain and suffering from the injury would not objectively be valued as very high.

and therefore establishing a rights violation. The argument here does not advance the position that disgorgement is available without proof of damage or without a completed cause of action. As discussed in Chapter 1, and briefly discussed further below, part of the waiver of tort problem is that it has spawned arguments that suggest disgorgement of profits may be available without proof of an underlying tort. As analyzed in Chapter 2, dispensing with the requirement that a plaintiff prove monetary loss is not the same as dispensing with the requirement that a plaintiff prove actionable damage. The arguments advanced in this chapter, that disgorgement is available generally as a remedy, are predicated on the plaintiff first proving a rights violation including, where required, proving actionable damage.

### **3.2 Separating Disgorgement and Waiver of Tort**

What has been described throughout as the waiver of tort problem refers to how the three dilemmas of loss, profits, and individual issues converge and lead to the misapplication or misinterpretation of the law as judges are seeking to find a solution to these problems. The waiver of tort problem, that is, the misunderstanding or incorrect use of waiver of tort in class actions cases, is not a problem with the doctrine of waiver of tort itself. Rather, the problem is that the debate about the scope and application of waiver of tort has broadened beyond simply an analysis of the historical doctrine. As Jeremy Martin argues, the confusion about waiver of tort and the revival of its use in class actions, particularly “at a time when class actions are growing in popularity and geographical scope, is contagious and damaging.”<sup>3</sup> Martin undertakes the project of tracing the historical development of waiver of tort through the common law and his analysis provides immense clarity of the issues, particularly by

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<sup>3</sup> JM Martin, “Waiver of Tort: An Historical and Practical Survey” (2012) 52 Can Bus LJ 473.

illuminating the points throughout the law and in scholarship that the definition and discussion of waiver of tort have incorrectly confused the doctrine.

The purpose of the discussion here is not to reiterate the scholarly and judicial debate about waiver of tort.<sup>4</sup> However, the conclusions that Martin draws are a starting point and form the foundation of the arguments developed in this chapter. First, waiver of tort is an election of remedies.<sup>5</sup> Waiver of tort is not based in equity and the plaintiff's entitlement to the remedy is not discretionary:

Waiver of tort is not and never has been an originating process; it is the election the plaintiff makes after having established the defendant's liability in tort and her own entitlement to the profits from the goods wrongfully possessed by the tortfeasor. Having proven the tort and the proprietary interest, the plaintiff chooses to treat those facts either as a tort, claiming compensation; or as a quasi-contract, claiming disgorgement in *assumpsit*.<sup>6</sup>

Martin argues that the part of the current debate about whether waiver of tort can be pled as an independent cause of action is answered entirely in the negative as an historical fact about the law. As an election of remedies, waiver of tort was not borne from equity<sup>7</sup> and has always been predicated on an action in *assumpsit* "or a cause of action demonstrating an entitlement to both a compensatory remedy in tort and a proprietary remedy", and "has never been anything more than the term of art used to describe the binding election to take the proprietary remedy".<sup>8</sup> Building on this conception, this chapter argues that a plaintiff's entitlement to disgorgement is similarly non-discretionary. If disgorgement is understood as a remedy that is an alternative measure to compensation, then the plaintiff is similarly entitled as of right to elect a measure based on the defendant's profit as to a measure based on his or

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<sup>4</sup> See discussion and references at Part 1.2.4.

<sup>5</sup> *Ibid* at 492, 501-504, 516-517 and 534.

<sup>6</sup> *Ibid* at 535.

<sup>7</sup> *Ibid* at 481.

<sup>8</sup> *Ibid* at 535-536.



her compensable loss. Part 3.5 discussed, as an *alternative* argument and conception, discretionary damages based on the fact that a defendant has profited from wrongdoing may be awarded on the basis of equitable principle. However, the primary argument is that a plaintiff is entitled to disgorgement as a remedy as of right and not because of the application of judicial discretion or equity.

Second, as the definition above indicates, the limit of the historical doctrine of waiver of tort is an application to proprietary interests and not personal torts. As Martin notes, this fact was not developed or determined in the common law as a result of a moral or normative debate about the nature of litigants' rights:<sup>9</sup> "What little normative guidance history may provide on the subject amounts to this: the normative basis for waiver of tort has always been that a plaintiff should be entitled to the vindication of his or her *established* rights."<sup>10</sup> Arguments about whether disgorgement ought to be available for personal torts are therefore beyond the historical scope and application of waiver of tort and, perhaps more important to note, are not supported historically through the common law:

In order to argue that disgorgement should be available by waiving a personal tort, one must establish that there is another remedy to which the plaintiff is entitled, and that the plaintiff may elect to claim instead of compensatory damages: that the plaintiff was *already* entitled to those profits by virtue of suffering tortious injury. That is not, and never has been the law. It is, of course, open to the courts to determine that the measure of a plaintiff's damages generally *should be* the profit accruing to the defendant in some degree of connection to a tortious injury it inflicted, rather than compensatory damages. Nothing short of that, however, will permit the doctrine of waiver of tort as it has historically been understood to entitle the plaintiff to a disgorgement of profits. In order for that result to be reached the concept of waiver of tort would have to be re-imagined wholesale.<sup>11</sup>

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<sup>9</sup> The article presents a detailed discussion of the historical development of waiver of tort as a legal fiction crafted by courts in response to procedural limitations.

<sup>10</sup> *Ibid* at 532.

<sup>11</sup> *Ibid* at 534.

Taking up the discussion about whether the measure of the plaintiff's damages should be the defendant's profit is the aim of this chapter. Arguments about the availability, definition, and scope of disgorgement should not be confused with or necessarily confined to the debate about waiver of tort. As Greg Weber argues, the way forward is to leave the waiver of tort debate behind and develop "a principled approach to the availability of disgorgement."<sup>12</sup>

While that is the focus of this chapter, the conclusions here should not be read as calling for abandonment or supplanting of the doctrine of waiver of tort. As Martin notes, though there may be "sound and pragmatic arguments for the discontinuation of waiver of tort", the doctrine does have useful features that are not duplicated by other remedies or causes of action.<sup>13</sup> The discussion here engages with a debate about the question of whether disgorgement of profits should be available for non-proprietary torts: "This is a normative question that an historical and practical survey is not competent to answer".<sup>14</sup> We thus venture beyond, but keep in mind, the debate about the proper interpretation and application of waiver of tort.

Though the argument here engages with waiver of tort, and this dissertation has defined the waiver of tort problem as one impetus for the discussion, the issues and analysis are broader than how the doctrine should be interpreted and applied. Answering the question of whether disgorgement is an appropriate remedy should not be developed through the lens

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<sup>12</sup> Greg Weber, "Waiver of Tort: Disgorgement *Ex Nihilo*" (2014) 40 Queen's LJ 389 at 424.

<sup>13</sup> For example, Martin notes waiver of tort is more advantageous to the plaintiff in respect of claiming a proprietary remedy than the doctrines of unjust enrichment or constructive trust because (1) unjust enrichment and constructive trust are equitable doctrines which disadvantages the plaintiffs; (2) waiver of tort does not entirely overlap with conversion; and (3) historically the doctrine has provided rights to the plaintiff that would be eliminated and not retained by other areas of the law (*supra* note 3 at 528-531).

<sup>14</sup> *Ibid* at 545.

of class actions alone or considered only in the context of the waiver of tort debate. If the underlying general principles of remedies and the private law are reconsidered and clarified, the dilemmas posed for class actions can be resolved. As Weber suggests, the “waiver of tort experiment [in class actions] underscores the need to refocus on the fundamentals of our common law legal system.”<sup>15</sup> Taking this way forward is the aim of this chapter.

### 3.3 Definitional and Conceptual Framework

Of foremost importance is clarifying the terminology used in deciding these issues and particularizing what is entailed in the concept of a remedy. One part of the current confusion about gain-based remedies, as well as the confusion created by waiver of tort, is that the concept of disgorging profits is lumped together with and referred to as a type of restitution or as a restitutionary remedy.<sup>16</sup> It is difficult to analyze gain-based damages independently when they are frequently described alongside other conceptually distinct remedies and labeled as being sought for “unjust enrichment for restitution or as an election of disgorgement over compensatory damages”.<sup>17</sup> Sometimes disgorgement is wrongly blended with unjust enrichment. One categorization that has been set up forces all gain-based remedies within the rubric of unjust enrichment: referring to either unjust enrichment by subtraction (the defendant has been enriched by subtracting from the plaintiff something of

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<sup>15</sup> Weber, *supra* note 12 at 424.

<sup>16</sup> See, e.g., *Serhan (Trustee of) v Johnson & Johnson*, [2004] OJ No 2904 (SC), aff’d [2006] OJ No 2421 (Div Ct) [*Serhan*] at para 34: “Claims based on waiver of tort seek ‘restitution’ of benefits received by the defendants, as a consequence of their tortious conduct rather than damages to compensate the plaintiffs for a loss.” This type of analysis is confusing in that it defines waiver of tort as restitution when there has been in fact no loss from the plaintiff that can be restored.

<sup>17</sup> Weber, *supra* note 12 at 395.

value) or unjust enrichment by wrongs (where the defendant has been enriched by a wrongdoing but the enrichment does not equate with the plaintiff's loss).<sup>18</sup>

Another part of the confusion about gain-based remedies is that they are seen as something wholly different from compensatory remedies. It is for this reason that using the language of rights, and considering private law as being concerned with remedying or vindicating violated rights, provides a clearer framework for analysis. If a wrong is defined as the violation of a plaintiff's right, a remedy can be understood as a measure or mode of vindicating the violated right.<sup>19</sup> The traditional compensation principle then can be understood as a measure by which the amount that is required to vindicate a violated right is determined; that is, an amount equaling the plaintiff's loss. If this language is adopted, then the analysis is more amenable to accepting disgorgement similarly as a measure by which rights are vindicated rather than viewing gain-based remedies as doing something wholly different from compensation.

Gain-based remedies are here defined as remedies that are measured with reference to the gain of some value that the defendant has made as a result of his or her allegedly

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<sup>18</sup> See Anthony Duggan, "Gains-based Remedies and the Place of Deterrence in the Law of Fiduciary Obligations" in Andrew Robertson & Tang Hang Wu, eds, *The Goals of Private Law* (Oxford: Hart Publishing, 2009) 365 at 365-66; cf Peter Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1989) at 6.

<sup>19</sup> This argument and interpretation is not meant to establish that this understanding is uncontested – there are many theories and arguments about what is a right and what is a remedy: e.g., Donal Nolan and Andrew Robertson, eds, *Rights and Private Law* (Oxford: Hart Publishing, 2012); Peter Birks, "Rights, Wrongs, and Remedies" (2000) 20 OJLS 1; Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007); Ernest J Weinrib, "Two Conceptions of Remedies" in Charles EF Rickett, ed, *Justifying Private Law Remedies* (Oxford: Hart Publishing, 2008) 3; Arthur Ripstein, "As if It had Never Happened" (2007) 48 Wm & Mary L Rev 1957; Benjamin C Zipursky, "Civil Recourse, Not Corrective Justice" (2003) 91 Georgetown Law Journal 695; John CP Goldberg & Benjamin C Zipursky, "Tort Law and Responsibility" in John Oberdiek, ed, *Philosophical Foundations of the Law of Torts* (Oxford: Oxford University Press, 2014) 17.

wrongful act; a gain which otherwise would not have been made but for violating the plaintiff's right. The outcome of granting a remedy that is gain-based is that the defendant is made to disgorge some or all of that benefit or profit. Though the concept of a profit obtained by wrongful action fits a literal interpretation of unjust enrichment, in that the defendant has been enriched unjustly, unjust enrichment is now a developed, separate cause of action<sup>20</sup> and is analyzed independently of its generalized literal definition. The test for whether unjust enrichment has been made out as a cause of action should remain distinct from a determination of whether a gain-based remedy is available.

The framework set out by James Edelman will be relied on here, as his definitions clearly separate the concept of disgorgement from restitution and unjust enrichment. Part of the problem, as Edelman identifies, is that restitutionary damages and disgorgement damages are often run together. Breaking up the conceptualization of damages to separate restitutionary and disgorgement damages “paves the way for a straightforward and principled approach”.<sup>21</sup> Edelman defines disgorgement damages based on a gain “which has accrued to the defendant as a result of the wrong” irrespective of whether that gain is a transfer from the plaintiff or matches the loss of the plaintiff.<sup>22</sup> Separately, restitutionary damages are defined as damages based on a “gain received by the defendant which has been wrongfully transferred from the claimant”.<sup>23</sup> The main purpose the distinction serves is to highlight that restitutionary damages focus their measure on the plaintiff's loss that has accrued to the

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<sup>20</sup> *Degelman v Guaranty Trust Co of Canada*, [1954] SCR 725; *Garland v Consumers' Gas Co.*, [2004] 1 SCR 629.

<sup>21</sup> James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Oxford: Hart Publishing, 2002) at 65.

<sup>22</sup> *Ibid* at 1.

<sup>23</sup> *Ibid*.

defendant as a gain and disgorgement damages focus their measure on the defendant's gain regardless of the source or matching the gain to the plaintiff's loss.

For the purposes of this discussion Edelman's definition of "disgorgement damages" will be adopted, defined as remedy that is an award of damages quantified based on the profit or benefit from any source that has accrued to the defendant as a result of the wrong.<sup>24</sup> The distinction between disgorgement and restitution is not novel and has been recognized by the Supreme Court of Canada: "Usually an accounting [of profits] is not a restitutionary measure of damages. Thus, while it is measured according to the defendant's gain, it is not measured by the defendant's gain at the plaintiff's expense."<sup>25</sup> The legal distinction having been established, all that remains is the adoption of a consistent definitional framework.

Another point Edelman discusses is that the use of the word "damages" is often thought to apply only to monetary awards that compensate for loss. He challenges this notion and shows that "'damages' means nothing more specific than a monetary award for a

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<sup>24</sup> Though not discussed by Edelman, it is important to highlight that the profit is to be considered as a benefit or gain *from any source* is meant to address the situation in which a defendant's profits may include profits that can be traced to having come from the plaintiff, but are to be distinguished from restitutionary damages. The problem with restitutionary and disgorgement damages blending together crops up despite Edelman's distinction. If, for example, the case is one of products liability what can be called 'primary profits' (those direct profits made by the sale of the product as being the purchase price less cost of production) will be encompassed in the cost of the product to the consumer. Therefore a compensatory award for either the cost of the product, or some part thereof, could technically be considered restitution because it is the transferring back to the plaintiff all or part of the defendant's wrongful gain. The definitions ought not be parsed so finely and thus the concept of disgorgement damages is meant to focus on the defendant's gain, not the plaintiff's loss, and encapsulate the concept of profit from any source (the defendant's 'secondary profits', see the discussion, *infra* at Part 3.4.3) to make clear the distinction between disgorgement and restitution. This distinction ought to stand despite the practical reality that in some cases that the defendant's profits will be made up in whole or in part of some value transferred from the plaintiff.

<sup>25</sup> *Lac Minerals v International Corona Resources*, [1989] 2 SCR 574 [*Lac Minerals*] at 671 per LaForest J for the majority.

wrong.”<sup>26</sup> We can see in the courts awarding punitive damages,<sup>27</sup> aggravated damages,<sup>28</sup> and nominal damages<sup>29</sup> that there are ‘damages’ awards that are not limited to or measured by compensation for the plaintiff’s financial loss. In many cases courts recognize that damages awards are not solely limited to compensation.<sup>30</sup> ‘Damages’ is therefore still an appropriate label for awards measured by the defendant’s gain.<sup>31</sup>

What must be distinguished, however, is that the types of damages awards Edelman relies on to support the argument that there is no objection to using the term ‘damages’ are not necessarily remedies awarded as of right that are akin to compensatory damages. Similar

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<sup>26</sup> *Supra* note 21 at 5.

<sup>27</sup> *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 [*Hill*] at para 196; *Whiten v Pilot Insurance Co.*, [2002] 1 SCR 595 [*Whiten*] at para 36-37:

Punitive damages are awarded against a defendant in exceptional cases for ‘malicious, oppressive and high-handed’ misconduct that ‘offends the court’s sense of decency’... Because their objective is to punish the defendant rather than compensate a plaintiff... punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment). Punishment is a legitimate objective not only of the criminal law but of the civil law as well.

<sup>28</sup> *Whiten, ibid* at para 116: “Aggravated damages are the proper vehicle to take into account the additional harm caused to the plaintiff’s feelings by the reprehensible or outrageous conduct on the part of the defendant.” As held by the Supreme Court of Canada in *Vorvis v Insurance Corp. of British Columbia*, [1989] 1 SCR 1085 [*Vorvis*] at 1099, “Aggravated damages will frequently cover conduct which could also be the subject of punitive damages, the but role of aggravated damages remains compensatory.” Though compensatory in nature, the quantum of an aggravated damages award is not directly related to an identifiable monetary loss suffered, and the quantification of the award is still discretionary.

<sup>29</sup> “Nominal damages is a sum awarded where the plaintiff’s legal right has been invaded, but no damage has been proved”: SM Waddams, *The Law of Damages*, 5th ed (Toronto: Canada Law Book, 2012) at 10.10. See also *The “Mediana”*, [1900] AC 113 (HL) at 116.

<sup>30</sup> As Edelman discusses, *supra* note 21 at 5-6, even in *Livingstone v Rawyards Coal Company* (1880), 5 App Cas 25 (HL) [*Livingstone*], a foundational case that establishes damages are for compensation and should put the plaintiff in the position he or she would have been but for the wrong, the court acknowledged “further damages might have been awarded in different circumstances” (at 39). The damages awarded were compensatory but it was acknowledged that compensatory damages were not the only damages available.

<sup>31</sup> Edelman, *supra* note 21 at 21-22.

to the problem created by labeling a defendant's wrongful gain an unjust enrichment because it fits a literal definition, punitive or other kinds of damages fit within a literal interpretation as part of remedying the wrong done to the plaintiff. As Peter Birks rightly identifies, "All meanings of 'remedy' have one thing in common, namely, [that] which is referred to as a remedy is represented as a cure for something nasty. To remedy is to cure or make better."<sup>32</sup> However, labeling all types of non-compensation-based damages awards as remedies stretches the conception of a remedy in a way that many scholars may not agree to.<sup>33</sup> The interpretations offered here are not meant to suggest that there is a conclusive theory about the nature of a remedy that is obviously correct or uncontested. What the argument here suggests, to be discussed further in the following parts, is that courts understand compensation for loss as a remedy that arises as of right when a cause of action establishing a

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<sup>32</sup> Birks, *supra* note 19 at 9.

<sup>33</sup> Civil recourse theory, for example, can be understood as more flexible in defining remedies in that injured individuals have "a legal power to exact a remedy from the wrongdoer" and this remedy is not necessarily bounded by a duty to repair, thus not necessarily limited to compensating the plaintiff's monetary loss (see, e.g., Goldberg & Zipursky, *supra* note 19 at 28-29). Civil recourse theory, as being focused on the defendant's responsibility and accountability to others for wrongdoing, more readily accepts, for example, punitive damages. On the other hand, corrective justice theories, for example, do not accept that supra-compensatory awards such as punitive damages are a legitimate remedy as the defendant's only obligation is to make whole the plaintiff's loss and awards amounting to more than that loss are an affront to justice. As Weinrib argues punishment is a one-sided consideration and one that is outside of the correlative relationship between the plaintiff and defendant as the sufferer and doer of injustice. Punitive damages, then, are not justified within corrective justice theory and "in effect, function as a reward [to the plaintiff] for providing the socially useful service of acting as a private prosecutor" (Ernest J Weinrib, "Punishment and Disgorgement as Contract Remedies" (2003) 78 Chicago-Kent L Rev 55 at 86). An understanding of a remedy as the compensation the plaintiff is entitled to as of right is much less contested than, for example, understanding punitive damages as a remedy the plaintiff has similarly as of right.



wrong has been proven.<sup>34</sup> While issues such as the measure of compensation, what losses for which the plaintiff can claim compensation, and the remoteness of the loss from the wrong are debated in the case law, it is not the case that courts debate the fact of entitlement to compensation once liability is established.

To use punitive damages as a counterexample, it is not the case that if a plaintiff is wronged he or she is automatically entitled to punitive damages as a remedy though the courts are always at liberty to award them. Even if the plaintiff is wronged in the requisite way and the defendant's behaviour is "malicious" or "high-handed" and meets the threshold for being deserving of punishment, it is still within the court's discretion to determine the appropriateness and proper quantum of punitive damages.<sup>35</sup> Compensatory damages are not discretionary in the same way punitive damages are. If a defendant is found liable in negligence, for example, it is of no moment that the amount of the plaintiff's loss is disproportionately high to the wrong suffered.<sup>36</sup> If liable, the defendant must compensate the plaintiff. The concept of using the defendant's profits as the measure of a remedy, that is, the concept of disgorgement damages as a gain-based remedy, must be conceptually

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<sup>34</sup> "[A] tort or delict instantaneously gives rise to the right to compensation": *Dikranian v Quebec (Attorney General)*, [2005] 3 SCR 530 at para 40; "Fault as the basis of liability is grounded on the fundamental proposition that a person who is injured due to the fault of another person has the right to compensation from the wrongdoer. Tort law is based on individual responsibility": *Peixeiro v Haberman*, [1997] 3 SCR 549 at para 20.

<sup>35</sup> See *Whiten*, *supra* note 27 and *Hill*, *supra* note 27.

<sup>36</sup> See, e.g., *Andrews v Grand & Toy Alberta Ltd*, [1978] 2 SCR 229 at 238-248. In the discussion about calculation and consideration of damages for personal injury specifically and tort law generally, Justice Dickson established that fairness is determined not by whether the amount sought by the plaintiff is disproportionate, high, or would be a burden on the defendant. Rather, the "focus should be on the injuries of the innocent party" and fairness to the defendant is established by determining that the plaintiff's claims are "legitimate and justifiable" (at 243-244).

distinguished from disgorgement as a discretionary or additional type of damages award akin to punitive damages. Using disgorgement to serve a different function than remedying a wrong<sup>37</sup> must therefore be distinguished both conceptually and terminologically from disgorgement damages as a gain-based remedy. Discussion of using disgorgement to serve a deterrent function will be taken up in Part 3.5 and will present an alternative argument to the main focus of the chapter.

The primary focus, and the argument to which we now turn, is justifying disgorgement damages as a gain-based remedy that is available in cases of negligence.

### **3.4 The Availability of Disgorgement Damages as a Remedy to Vindicate Rights**

#### ***3.4.1 Re-interpreting the orthodox rationale for disgorgement damages***

Disgorgement damages have traditionally been available for violations of certain kinds of rights, or violations of rights in certain kinds of ways. Violations of property rights, including actions for trespass, conversion, or patent infringement, have historically given rise to disgorgement damages.<sup>38</sup> Disgorgement of profits made from the expropriation or

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<sup>37</sup> Understood as compensating for and vindicating the violation of a right.

<sup>38</sup> McInnes, *supra* note 1 at 405-409. For example, in the case of *Edwards v Lee's Administrator* (1936) 96 SW 2d 1028 (Ken Ct App), the defendant was made to disgorge the profits from selling admissions into a cave as a tourist attraction because part of the cave was on the plaintiff's land and the profits were obtained as a result of trespass. As detailed in the excellent discussion in Martin, *supra* note 3, the historical foundation traces back to 17th century decisions in which courts "began to fashion fictitious undertakings on the part of a defendant". Where an interference with a plaintiff's property "enriched the defendant without injuring the plaintiff or giving him an action in tort, and in the absence of the doctrine of unjust enrichment, the courts implied undertakings in *assumpsit* in order to justify the vindication of the plaintiff's property rights" (at 490). As Martin explains, the development of actions in *assumpsit* implied an agreement between the parties in order to circumvent the strict procedural requirements having to have contracts under seal, the particularities of forms of writs, and the fact that courts would not recognize personal torts where the parties were not strangers to each other (at 493-495 and 506-507). In cases where there was a proprietary basis for "bringing the implied ("*indebitatus*") *assumpsit*"

violation of one's property have been justified on the basis that the profit is linked to the property and the plaintiff as the owner of the property is entitled to any benefit the property produces. It is not necessary that the plaintiff show he or she would have made the same use of the property to generate the profit or that he or she suffered any loss as a result of the defendant making that profit in violation of the plaintiff's rights.<sup>39</sup>

The principle of the right-holding plaintiff deserving profits made off his or her property conceptually extends to cases of trustees' breach of fiduciary duty, another category of case in which disgorgement damages are routinely awarded.<sup>40</sup> For example, a trustee dealing with a beneficiary's trust fund inappropriately and making a personal profit is an extension of the principle that profits a defendant has made on something that the plaintiff owned ought to be disgorged.<sup>41</sup> The traditionally named remedy in breach of fiduciary duty cases is the *in personam* remedy of an account of profits.<sup>42</sup> Cases dealing with accounts of profits moved from the remedy being *in rem* in respect of a constructive trust over property to *in personam* being a claim as against the accounts of the fiduciary personally.<sup>43</sup> This shift is an important extension away from gain-based remedies being confined only to property-

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these cases would admit of a disgorgement remedy and plaintiffs were entitled to elect to waive the tort and receive disgorgement of the defendant's profits as a restitutionary remedy (at 508).

<sup>39</sup> *Strand Electric and Engineering Co. Ltd. v Brisford Entertainments Ltd.*, [1952] 2 QB 246.

<sup>40</sup> The claim for breach of fiduciary duty is rooted in equity and the remedy of disgorgement is therefore equitable and subject to the court's discretion *Strother v 3464920 Canada Inc.*, [2007] 2 SCR 177 [*Strother*] at paras 74-77.

<sup>41</sup> *Boardman v Phipps*, [1967] 2 AC 46 (HL).

<sup>42</sup> *McInnes*, *supra* note 1.

<sup>43</sup> The debate about whether the remedy should be proprietary or personal is infused with considerations that somewhat confuse the analysis about broader policy concerns dealing with putting the plaintiff ahead in line of other creditors if the defendant were to become insolvent. See, e.g., Duggan, *supra* note 18 at 375-377 and the Supreme Court of Canada's analysis in *Soulos v Korkontzilas*, [1997] 2 SCR 217.

based wrongs. Equally important is the shift extending the availability of an accounting of profits to breaches of fiduciary duties generally and not limited to certain types of fiduciary relationships.<sup>44</sup> The case law establishes courts moving away from limiting disgorgement remedies only to infringements of plaintiffs' property rights and focusing on broader rationales underpinning liability.

Though it has been argued that some of the Supreme Court of Canada's decisions "reveal a deep-seated ambivalence about the appropriateness of gains-based remedies for breach of fiduciary duty and other wrongs",<sup>45</sup> there is, on the other hand, an equally clear line of cases that expresses no such ambivalence. The Supreme Court of Canada has long maintained its concern with ensuring a fiduciary "must not be allowed to use his position as such to make a profit."<sup>46</sup> Abuse of a particular type of relationship or violating a right in a certain kind of way underlies the court's rationale in recognizing categories of cases in which disgorgement damages are awarded to include breaches of confidence and deceit.<sup>47</sup> The

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<sup>44</sup> See, e.g., *Guerin v The Queen*, [1984] 2 SCR 335 at 384, in which the court held that the categories of fiduciary relationships ought not be considered closed cited, and referred to by the court in later cases determining that disgorgement of profits is an available remedy for breaches of fiduciary duties (e.g., *Hodgkinson v Simms*, [1994] 3 SCR 377).

<sup>45</sup> Duggan, *supra* note 18 at 386 discussing the court's rationale through the line of unjust enrichment cases from *Pettkus v Becker*, [1980] 2 SCR 834. The ambivalence is perhaps more attributable to the form of the remedy, that is the concerns arising about using the constructive trust (e.g., policy considerations like the position of creditors or potentially bankrupting entities).

<sup>46</sup> *Canadian Aero Service Limited v O'Malley*, [1974] SCR 592 at 609 in the context of directors and officers of a company pursuing an opportunity as representatives of that company but wrongfully taking the benefits themselves.

<sup>47</sup> *Cadbury Schweppes v FBI Foods*, [1999] 1 SCR 142. Similarly, as Martin details, *supra* note 3 in the development of waiver of tort courts were willing to waive the tort of deceit. There was still a requirement, however that the plaintiff show some link to the "defendant [being] in possession of the plaintiff's property, or profits resulting therefrom" (494-496).

court's reasoning throughout the line of cases in which disgorgement damages are awarded breaks from a closed view of requiring a link to a property-based tort and refocuses the foundation of disgorgement on the relationship between the plaintiff and defendant and the nature of the defendant's conduct.

Similarly, the Supreme Court of Canada incrementally shifts further from a narrow view that disgorgement is always and only an equitable remedy.<sup>48</sup> As debated at length between Justice McLachlin and Justice LaForest in *Canson Enterprises Ltd. v Boughton & Co.*,<sup>49</sup> how and whether common law principles limiting damages ought to be applied to equity-based remedies are unsettled issues in the private law.<sup>50</sup> *Canson* dealt with a solicitor's breach of fiduciary duty in failing to disclose a secret profit he made buying a property and selling it to his clients. Justice LaForest, for the majority, held that where the same underlying principle applies to the circumstances giving rise to a cause of action in both equity and at common law there is no reason to apply different principles in determining the measure of damages: "The truth is that barring the different policy considerations underlying one action or the other I see no reason why the same basic claim, whether framed in terms of a common law action or an equitable remedy, should give rise to different levels of

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<sup>48</sup> As Martin notes, *supra* note 3 at 481, disgorgement based in *assumpsit* and waiver of tort was never equitable and he argues "modern academics and jurists have wrongfully categorized the doctrine of waiver of tort as an equitable doctrine or as sharing an affinity with equitable arguments or considerations, probably because its disgorging effect is similar to the more familiar equitable action in unjust enrichment. As the early cases show, however, waiver of tort unquestionably originated in the courts of common law."

<sup>49</sup> [1991] 3 SCR 534 [*Canson*].

<sup>50</sup> The debate in the case centered primarily on whether principles of remoteness, mitigation, causation and contributory negligence apply to equitable remedies, but the discussion about the nature of remedies being linked to the cause of action is generally applicable.

redress.”<sup>51</sup> Justice McLachlin advocated that while the measure of a remedy in equity is not unlimited, damages for equitable claims should not be measured by analogy to common law claims because different fundamental principles underlie each type of claim.<sup>52</sup> Justice LaForest does seem to rely throughout his judgment on the controversial view that the merging of the courts of law and equity by the *Judicature Act*<sup>53</sup> implied a partial or substantive fusion of the common law and equity, a view that is argued by many to be incorrect.<sup>54</sup> However, the view that “the courts have tended to merge the principles of law and equity to meet the ends of justice as it is perceived in our time” is one that underlies the court’s remedial flexibility.<sup>55</sup>

The rationale underlying Justice La Forest’s analysis, that the courts and the common law are sufficiently flexible and will adapt to refine an approach to what the circumstances of justice require, is sound and recognized as part of the fabric of the law. In a further and more dramatic shift, but similarly relying on the evolutionary capability of the

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<sup>51</sup> *Ibid* at para 78.

<sup>52</sup> *Ibid* at paras 1-77 (concurring in the result for different reasons).

<sup>53</sup> *Supreme Court of Judicature Act*, 1873 (UK), 36 & 37 Vict, c 66.

<sup>54</sup> As evidenced by Justice McLachlin’s opinion, concurring in the result dismissing the appeal but rejecting the majority’s reliance on the application of common law principles, there is debate about proceeding with analogy to tort in considering remedies for equitable claims. Particularly with respect to disgorgement, Justice McLachlin argued that “it is clear that tort law is incompatible with the well developed doctrine that a fiduciary must disgorge profits gained through a breach of a duty, even though such profits are not made at the expense of the person to whom the duty is owed” (at para 8). Though the argument here disagrees with Justice McLachlin’s conclusion that tort law is incompatible with disgorgement, the interpretation advanced is not meant to suggest that the basis for the court’s ability to award disgorgement for tort is based on equity and the common law being fused. For further discussion about the fusion debate see, e.g., Simone Degeling & James Edelman, eds, *Equity in Commercial Law* (Sydney: Lawbook Co., 2005) at Part I: The Fusion Debate.

<sup>55</sup> *Canson*, *supra* note 49 at para 83.

common law the House of Lords' watershed analysis in *Attorney General v Blake* expanded the use of disgorgement damages:

Damages are measured by the plaintiff's loss, not the defendant's gain. But the common law, pragmatic as ever, has long recognised that there are many commonplace situations where a strict application of this principle would not do justice between the parties.<sup>56</sup>

In awarding disgorgement damages for breach of contract, Lord Nicholls supported the Court of Appeal's view that "the law of contract would be seriously defective" if the court were limited and unable to award disgorgement as the most appropriate remedy.<sup>57</sup> Though the circumstances of the case were akin to a breach of confidence, the action was a claim for breach of contract and the general propositions set out by the court analyzing the court's ability to award remedies in order to achieve justice were not curtailed or limited to a particular cause of action. The reasoning in *Blake* that the common law is sufficiently flexible to adapt in order to "do justice between the parties" has been taken up by the Supreme Court of Canada seemingly as an extension of well-established Canadian law: "The rule that damages are measured by the plaintiff's actual loss, while the general rule, does not cover all cases."<sup>58</sup> Whether disgorgement damages are appropriate or justified for breach of contract has generated much academic debate.<sup>59</sup> While the availability of gain-based remedies in every type of case is not an accepted extension of *Blake*'s rationale, Canadian

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<sup>56</sup> [2001] 1 AC 268 (HL) [*Blake*] at 278.

<sup>57</sup> *Ibid* at 277.

<sup>58</sup> *IBM Canada Limited v Waterman*, [2013] 3 SCR 985 at para 36.

<sup>59</sup> See, e.g., Anthony Robert Sangiuliano, "A Corrective Justice Account of Disgorgement for Breach of Contract by Analogy to Fiduciary Remedies" (2016) 29 Can JL & Jur 149, and articles cited therein at n. 11; Caprice L Roberts, "A Commonwealth of Perspective on Restitutionary Disgorgement for Breach of Contract" (2008) 65 Wash & Lee L Rev 945; Mitchell McInnes, "Gain-Based Relief for Breach of Contract: *Attorney General v Blake*" (2001) 35 Can Bus LJ 72.

courts are becoming more comfortable recognizing compensation is not always adequate and disgorgement damages can be considered.<sup>60</sup>

Several conclusions can be drawn from the rationales throughout case law in which disgorgement damages are awarded:

- 1) Intentional harm ought to be prevented: disgorgement is awarded in cases where wrongs are committed deliberately or are cases of bad faith, breaches of confidence, conspiracy and fraud;<sup>61</sup>
- 2) Important institutions should not be undermined: disgorgement is awarded in cases of breach of fiduciary duty, cases about property and about “institutions which require such a degree of protection that the prospect of gain for even inadvertent wrongdoing should be removed”;<sup>62</sup>
- 3) Intentional, malicious or otherwise exceptional conduct is not required: disgorgement is awarded where the tortfeasor is innocent, for example an innocent trespass or innocent breach of fiduciary duty;<sup>63</sup>

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<sup>60</sup> Since *Blake* and the Supreme Court of Canada’s decision in *Bank of America v Mutual Trust Co.*, [2002] 2 SCR 601 (which is cited by the court in *Waterman* as standing for the proposition that disgorgement damages are available for cases of breach of contract), it is no longer the case that disgorgement damages are *prima facie* controversial or not available despite still being cited as exceptional: e.g. *Indutech Canada Ltd. v Gibbs Pipe Distributors Ltd.*, 2011 ABQB 38, aff’d 2013 ABCA 111; *Huttonville Acres Ltd. (c.o.b. Forest Homes) v Archer*, [2009] OJ No 4139 (SC) at paras 26-32; *Stewart Estate v TAQA North Ltd.*, 2013 ABQB 691 at paras 636-643, aff’d 2015 ABCA 357 [*Stewart Estate*].

<sup>61</sup> Edelman, *supra* note 21 at 84-86. As was held by Lord Nicholls in *Blake*, *supra* note 56 at 286, cynical breaches, understood as efficient breaches, would not be a sufficient basis to depart from the traditional basis on which damages are awarded. The type of conduct suggested is akin to that of fraud or conspiracy.

<sup>62</sup> Edelman, *supra* note 21 at 85, *Lac Minerals*, *supra* note 25 at 672.

<sup>63</sup> *Stewart Estate (CA)*, *supra* note 60 at para 207, *Canson*, *supra* note 49 at 584.



- 4) It is not required that the plaintiff suffer any loss in order for disgorgement damages to be an available remedy;<sup>64</sup>
- 5) Disgorgement damages have been historically awarded based on claims both in equity and common law for both personal and proprietary torts;<sup>65</sup> and
- 6) The measure of disgorgement damages, when awarded, is the entirety of the defendant's profit, not some portion or an amount determined on a discretionary basis.<sup>66</sup>

The traditional view of the underlying features that tie these rationales together is that disgorgement is appropriate in cases when certain kinds of profit-bearing rights are violated and certain types of wrongs or behaviour should be deterred. Reconsideration of this traditional position also leads to an interpretation that what is fundamental to each of these cases is first, the plaintiff's right is violated, and second, there is no compensatory measure to rely on in order to vindicate the plaintiff's right. Though disgorgement damages can be seen as serving a deterrent function or protecting certain institutions, the rationales throughout the cases can be reinterpreted and understood as highlighting courts' endorsement of the fact that rights are worthy of protection. A right to one's property, a right not to be intentionally harmed, a right not to be deceived in transactions – each of these rights ought to be protected

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<sup>64</sup> *Strand Electric*, *supra* note 39; *Strother*, *supra* note 40 at para 77; John D McCamus, "Waiver of Tort: Is there a Limiting Principle?" (2014) 55 Can Bus LJ 333 at 343.

<sup>65</sup> McCamus, *ibid* at 345-346; Martin, *supra* note 3.

<sup>66</sup> Subject to the debate about other issues of quantification, such as whether the defendant can deduct expenses or whether other limiting principles (e.g. mitigation) apply (see, e.g., *Canson*, *supra* note 49 and the brief discussion *infra* at s. 3.4.3). Even when disgorgement of profits is awarded based on equitable claims (e.g. fiduciary duty), though the courts continue to recognize the form of remedy as discretionary they refer to the plaintiff as being entitled to the defendant's profits and do not analyze the issues or quantum through the lens of a wholly discretionary analysis (see, e.g., *Strother*, *supra* note 40 at paras 84-87).

and vindicated regardless of the violation resulting in a financial loss. Absent loss there is no measure by which the compensation principle can properly apply or operate. The gain that the defendant has made can then be understood as an alternative remedial measure and one the plaintiff is entitled to by virtue of the fact that his or her right has been violated. While the compensation principle generally works as perhaps a primary or default measure of valuation, application of the principle will not ensure adequate vindication of the rights violation in all circumstances.

It is therefore not the case that the fact a defendant profits that is doing the analytical work in determining when disgorgement damages are available. Nor is it the case that all awards of disgorgement damages invoke equitable principles that render all of these awards discretionary. As Martin notes with respect to awards of disgorgement based on waiver of tort, the plaintiff has a right to elect a remedy based on the defendant's profits that is not based on an exercise of the court's discretion.<sup>67</sup> Rather, the questions courts are concerned with ask what measure of damages will vindicate the violated right, and what should that measure be? Though the orthodox and historical view limits disgorgement damages to certain types of cases, the evolution of the orthodoxy is an example of the "organic capacity of the common law".<sup>68</sup> We can view the expansion of the availability of disgorgement beyond the historical categories as another step towards improving and developing the law.

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<sup>67</sup> As noted above, it is recognized that these case are confined to, and grounded in, actions involving the wrongful acquisition of property. See *supra* note 5 and the discussion at Part 3.2.

<sup>68</sup> Martin, *supra* note 3 at 507.

### 3.4.2 *Extending the availability of disgorgement damages to negligence*

Part of the current debate about the availability and scope of disgorgement damages centers around trying to formulate limiting principles or normative justifications because arguing that disgorgement should be routinely awarded seems like a radical departure from the settled law. Though it is no doubt a departure from settled law to consider disgorgement available for every kind of tort, disgorgement itself is arguably not as rare or radical a remedy as the liveliness of the current debate might suggest: “It is not immediately clear to the modern reader from cases cited in treatises why it is that on the facts of a tort plaintiffs have apparently been entitled to claim the defendant’s profits for centuries.”<sup>69</sup> As Martin notes, without understanding the history of the cases in that the plaintiff’s entitlement was based on title to the property at issue, “normative explanations necessarily begin to develop in place of historical ones.”<sup>70</sup> We can view a plaintiff’s entitlement to disgorgement damages as a product of history and not rooted in the common law having come to a definitive and normative conclusion about the nature of the rights at issue. As a matter of history, Martin argues that “20th century courts did come to contemplate that personal torts could be waived”<sup>71</sup> and it is perhaps not as wholly radical as it seems at first blush to suggest that disgorgement damages are available in principle, as of right, as an electable remedy for the violation of a plaintiff’s rights. The next step in the development is to answer whether disgorgement damages are available for any type of wrong.

There is some attraction to the argument that certain types of rights are of a different order and therefore disgorgement damages should be limited to violations of certain types of

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<sup>69</sup> Martin, *supra* note 3 at 506.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid* at 507.

rights. For example, property rights have been treated as different from other types of rights for a number of reasons including: property rights are *in rem* and survive the plaintiff;<sup>72</sup> the institution of property must be protected and owners of property given security of exclusive enjoyment of what they own;<sup>73</sup> and that property “enshrines the freedom and equality of juridical persons.”<sup>74</sup> Similarly, the argument that disgorgement ought to be limited to intentional or fraudulent rights violations is attractive because it is acceptable to argue that such behaviour ought to be deterred. However, as Lord Nicholls questioned in *Blake*, “it is not clear why it should be any more permissible to expropriate personal rights than it is permissible to expropriate property rights.”<sup>75</sup> His comments hint towards the conclusion that it is not the type of right at issue that is driving the availability of disgorgement remedies.

Though property rights may be considered different from other rights, it seems at least antithetical to an understanding of the genesis of the legal system and legal rights that violation of a certain right attracts a higher or different degree of attention by the courts such that disgorgement damages are available but that no such remedy is available for the violation of all rights. Aside from arguing that perhaps we should take property rights less seriously,<sup>76</sup> it seems there is little basis in the case law that can maintain the view that all

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<sup>72</sup> *Blake*, *supra* note 56 at 283; *Wrotham Park Estate Co. Ltd. v Parkside Homes Ltd.*, [1974] 1 WLR 798 (Ch Div).

<sup>73</sup> IM Jackman, “Restitution for Wrongs” (1989) 48 CLJ 302 at 305.

<sup>74</sup> Peter Benson, “Misfeasance as an Organizing Normative Idea in Private Law” (2010) 60 UTLJ 731 at 786.

<sup>75</sup> *Supra* note 56 at 283.

<sup>76</sup> Craig Rotherham, “The Normative Foundations of Restitution for Wrongs: Justifying Gain-based Relief for Nuisance” in Andrew Robertson & Tang Hang Wu, eds, *The Goals of Private Law* (Oxford: Hart Publishing, 2009) 389 at 407.

rights (of property, person, and contract) are not worthy of protection or that violations of all these rights are not equally worthy of vindication.<sup>77</sup>

The orthodox view is that the kinds of wrongs that lead to gain-based remedies are violations of a right such that “the defendant’s gain is of something that lies within the right of the plaintiff.”<sup>78</sup> Thus, torts dealing with another’s property give rise to disgorgement damages, but torts dealing with personal injury do not.<sup>79</sup> The rationale for this conclusion is based on the plaintiff’s entitlement to a gain-based remedy only if the right that has been violated could equally have been the source of profit in the plaintiff’s hands as in the defendant’s. It has been argued that because people cannot be bought and sold as things, we do not have the ability to sell and commoditize ourselves in the same way that we can do with our things.<sup>80</sup> The measure of our right to bodily integrity therefore is not profit-bearing in the same way our rights to things are (or, the rights created through contracts).

Exceptions, however, are easily admitted and examples are easily constructed, such as Birks’ well-known example of the thug hired to hurt someone.<sup>81</sup> It cannot lie in the thug’s mouth to say that the victim is not entitled to the thug’s profits because “having treated the plaintiff’s bodily integrity as an item that the thug is in effect selling for a price...the thug’s

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<sup>77</sup> As McCamus argues, *supra* note 64 at 344-345, limiting the availability of disgorgement to certain types of rights is a “false start” and “deeply flawed” partly because there is no historical foundation supporting such a limitation and partly because there is no coherent policy reason for restricting disgorgement claims to violations of property rights. Additionally, and in particular with the advent of the *Charter of Rights and Freedoms*, Part 1 to the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982*, 1982, c. 11 (UK), it is simply not reflective of courts’ respect for all individuals and individual rights to subordinate personal rights to property or other types of rights.

<sup>78</sup> Ernest J Weinrib, “Restitutionary Damages as Corrective Justice” (2000) 1 *Theor Inq L* 1 at 11.

<sup>79</sup> *Ibid* at 12-13.

<sup>80</sup> *Ibid*.

<sup>81</sup> *Ibid* at 35. The example is taken from Birks, *supra* note at 319.

relationship to the [plaintiff's] bodily integrity has become property-like through the thug's conduct."<sup>82</sup> Admitting this exception, however, shows that bodily integrity can be valued and profit bearing in the requisite way.<sup>83</sup> Further, as McCamus argues, "there is simply no historical foundation for the notion that waiver of tort claims must be restricted to the context of the proprietary torts" and ultimately concludes that limiting the availability of disgorgement to property torts is a "clear non-starter".<sup>84</sup> If a defendant's profit cannot be made but for the violation of the plaintiff's rights, then all rights can be profit-bearing in the requisite way.

Similarly, there is no principled reason to limit disgorgement to intentional torts or only to cases such as fraud. If the courts are concerned with vindicating rights violations, then there is no distinction in remedying a negligently violated right as opposed to an intentionally or fraudulently violated right. One approach to the definition of a rights violation is Peter Benson's proposed definition of misfeasance. For Benson, the plaintiff has rights to exclude the defendant from exercising control over the plaintiff's person or property and this right of exclusion "enshrines the freedom and equality of juridical persons".<sup>85</sup> This

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<sup>82</sup> Weinrib, *supra* note 78 at 34-35.

<sup>83</sup> As Edelman notes "to the extent that Professor Birks was concerned with limits on *profit-stripping* as opposed to restitutionary damages, it is shown below that these awards of disgorgement damages should be available for nuisance, negligence and assault" (*supra* note 21 at 130 and n. 111). Similarly, as McCamus notes, to the extent that denying disgorgement of the thug's profits is based on a strict adherence to the distinction between anti-harm torts and anti-enrichment torts, denying disgorgement categorically in the thug example is not a proposition Birks and others ultimately support: "As Birks himself conceded, not every tort will 'fall neatly on one side or other of the line' between anti-enrichment and anti-harm. To solve this problem, Birks suggested that one should ascertain the dominant purpose of the tort in question" (McCamus, *supra* note 64 at 346-347).

<sup>84</sup> *Ibid* at 344.

<sup>85</sup> Benson, *supra* note 74 at 786.

definition relies on what was discussed in Chapter 2 as distinguishing damage by kind in terms of interference and non-interference. Where the defendant or the defendant's thing materially changes or alters the plaintiff or the plaintiff's circumstance, the result is demonstrative of interference with the plaintiff in a normatively significant way. Benson articulates the right of a plaintiff in a general way as based on a right of exclusion. He argues the sources of rights are the "irreducibly basic modes of entitlements that specify the content of the private-law relation": bodily integrity, property, or contract.<sup>86</sup> Misfeasance is an act by the defendant that amounts to the defendant taking control over the plaintiff's person or an object that has the effect of "subordinat[ing] the other person or property to the pursuit of one's own purposes".<sup>87</sup> We can understand the content of the plaintiff's right to exclusion being qualified in certain ways depending on the nature of the source – that is, in contract, for example, the content of the plaintiff's rights and correlative duties are derived from the agreement between the parties. In negligence, the content of the rights and duties within a particular relationship are circumscribed and defined by the damage, duty and standard of care.

Benson's definition is clear and provides a principled basis for understanding the notion of a rights violation that goes beyond the principle of liability being based on a factual distinction between action and omission. A rights violation does not depend on a concept of intention that requires intention to harm, but requires "conduct that externally manifests a certain kind of exercise of control".<sup>88</sup> Within this framework, what demonstrates liability in negligence, that is what demonstrates the defendant acting in the requisite way so as to

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<sup>86</sup> *Ibid* at 786 and 754.

<sup>87</sup> *Ibid* at 770.

<sup>88</sup> *Ibid* at 768-769.

exercise control over the plaintiff's person or property, is the actionable damage. As discussed in Chapter 2, the issue of what degree or type of damage is required as sufficient to maintain a cause of action in negligence is contested. Within the scope of this chapter, however, it is not necessary to take a position on the issues surrounding actionable damage in order to accept the premise that determining whether damage has been suffered is a distinct inquiry from determining the quantum of the financial loss flowing from that damage.

For example, a plaintiff is negligently run off the road by the defendant's car while riding a bicycle and is consequently hurt because the defendant was not paying attention to the merging of the bicycle and car lanes. That damage is sufficient to demonstrate a rights violation and the plaintiff is entitled to a remedy. The orthodox understanding of negligence is that the plaintiff is compensated for the loss arising from the injury. Let us assume that the plaintiff did not suffer much financial loss as a consequence of being hit – perhaps only a few minor bruises – and general damages would amount to very little. Though an identifiable financial loss is indicative of the fact of the defendant's taking control over the plaintiff's body or property in the relevant way, the financial loss is not the operative harm indicating the violation of the plaintiff's right; the bruises and bodily injury are. Let us assume further that the defendant was in a race and won a prize in the race as a result of driving recklessly, too fast, and in disregard of cyclists. Is the cyclist not entitled to that gain as the measure of the value of his violated right?

If we change the example slightly we could assume that the bicycle lane was privately owned. Travelling in the bicycle lane was the shortest path through a certain block of the city, and because of taking this short cut the driver won the race and received the gain of the winnings. An application of the traditional principles would result in a conclusion that



because the right violated was a right to property, and trespass ought to give rise to disgorgement, the owner of the property on which the bicycle lane is situated is entitled to the driver's winnings. The act of driving negligently, crossing over a line, and violating someone's right as a result of crossing that line applies equally in both iterations of the example. The behaviour was equally wrongful, equally worth of deterrence, and equally profit-bearing in each case. Why in one case can we conclude that the plaintiff is entitled to the defendant's gain but not in the other?

If the source of the right that the plaintiff has as against the defendant is the same for wrongs against both person and property, that is, that the plaintiff has a right to his or her person and property to the exclusion of the defendant,<sup>89</sup> then the violation of that right, negligently or otherwise, is worthy of vindication. On what basis can we maintain that a violation of a property right is worthy of vindication despite identifiable financial loss but the violation of a right to bodily integrity is not? It is sometimes argued that a distinguishing feature underlying disgorgement damages is that the defendant's conduct was intentional or objectively blameworthy. One line of argument differentiating intentional torts from negligence-based torts is that the former invokes a degree of moral culpability that ought not be attributed to a negligent tortfeasor.<sup>90</sup> It is also sometimes argued that because negligence does not result from an intentional action or an intention to harm that it does not meet the

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<sup>89</sup> As discussed in Chapter 2, in negligence this right is qualified and defined in relation to the damage. See discussion *supra* Part 2.1.

<sup>90</sup> See James Goudkamp, "The Spurious Relationship Between Moral Blameworthiness and Liability for Negligence" (2004) 28 *Melb U L Rev* 343 for an evaluation and ultimate rejection of these types of arguments; Weber, *supra* note 12 at 401.

required threshold of exceptional conduct that can trigger disgorgement damages.<sup>91</sup> However, courts have adopted the notion that negligence entails moral culpability: “[L]iability for negligence...is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay.”<sup>92</sup> And, as repeatedly demonstrated in case law, it is accepted that disgorgement damages are awarded in the case of an innocent tortfeasor.<sup>93</sup> There is no reason the availability of disgorgement damages ought not be extended to negligent tortfeasors.

Another objection against extending disgorgement damages to cases of negligence is that negligent behaviour cannot be deterred because of the nature of negligent wrongs and the lack of intentional action. One possible argument is that disgorgement damages should be limited to cases where there was intention to profit from the violation of the plaintiff’s rights. However, a limitation to cases where the enterprise is in pursuit of profit is no limitation at all. Any corporation is presumably running a business to make a profit, and therefore any claim against a corporate actor would always open up the possibility of disgorgement damages. This broad conception gives rise to concerns of over-deterrence and perhaps unbounded liability.

Motivation to profit is not by itself sufficient to trigger disgorgement damages, but it does further an answer to the objection that negligent behaviour cannot be deterred. If we

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<sup>91</sup> See, e.g., *McCamus*, *supra* note 64 at 350-353. This argument is based on deterrence as the rationale for or function of disgorgement damages and negligence perhaps not rising to the requisite level of intentionality or exceptionality that triggers the deterrence rationale. “Restitutionary claims are not made in negligence and nuisance because they are in the main ‘anti-harm wrongs’ in relation to which it is impossible, even if they lead to an enrichment of the wrongdoer, to elevate the prevention of enrichment to the level of a primary purpose”: *Reid v Ford Motor Company et al*, 2006 BCSC 712 at para 29.

<sup>92</sup> *M’Alister (or Donoghue) v Stevenson*, [1932] AC 562 (HL) [*Donoghue*] at 580.

<sup>93</sup> See n. 49 and discussion above.

admit that the subjective valuation of plaintiffs' rights by the defendant, as in the hired thug example, is a case in which disgorgement damages are appropriate, the rationale in this case depends on the defendant valuing the right such that the contemplated profit depends on the rights violation. The profit could not have been made without violating the plaintiff's right. Similarly, as in the case of the negligent driver, regardless of any intention to cause harm, the driver still intentionally chose to drive recklessly and as a result of failing to act in accordance with an appropriate standard of care caused injury. Simply because there was no intention to harm does not mean that the resultant injury was caused completely by accident. The driver was still willful and having acted in a careless way made a gain as a result of that action.

It is not the type of right or the manner of violation that triggers the right to a remedy of compensatory damages. If a plaintiff is wronged, he or she is entitled as of right to that remedy. The nature of the remedy or the type of right is not the trigger – the rights violation is. If we dispel the notions that disgorgement damages are awarded only for certain types of rights, or are only awarded if rights are violated in a certain type of way, are only awarded for behaviour that is capable of being deterred, then there is nothing that prevents the extension of the application of disgorgement damages in principle to cases of negligence.

### ***3.4.3 Justifying the valuation of a right based on the defendant's gain***

Even if the availability of disgorgement damages can be justified on the basis that all violated rights are deserving of vindication, there remains the objection that plaintiffs are not entitled to an amount that is more than what is required to compensate their loss. It is argued that disgorgement damages are an impermissible windfall to plaintiffs and on that basis should be rarely awarded. As discussed above, one goal underlying each theory of

remedies can be understood as attempting to articulate a principle of limitation.

Compensation is a rational limit for the extent of a defendant's liability and is perhaps quite consistent with many theories of remedies. For example, the theory of corrective justice holds that the purpose of damages is to rectify the injustice as between the two parties to the litigation and the measure of the injustice is what the plaintiff has lost.<sup>94</sup> This and other views of remedies suggest the plaintiff is only entitled to claim damages based on a compensatory measure, and any amount higher than what the plaintiff has lost is an inappropriate windfall.

What is being proposed here, however, is not a position that disgorgement damages are unlimited or do not sufficiently limit remedies in the same way as compensation. Rather, what is being proposed is that within the confines of the relationship between the plaintiff and defendant disgorgement is an equally legitimate measure of damages. The amount of a defendant's gain is an equally justified limiting principle as the amount of a plaintiff's loss.

If the only relationship of concern is as between the plaintiff and the defendant, and the valuation of the injustice must not be entirely one-sided to focus on only the defendant's conduct, why is the appropriate valuation only concerned with the loss as reflected by what the violation of the right is worth to the plaintiff? It is equally appropriate to focus on the defendant's position both pre and post-wrong as it is to focus on the plaintiff's position.

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<sup>94</sup> As Weinrib contends, and is the notion at the core of his theory of corrective justice: *The Idea of Private Law* (Cambridge: Harvard University Press, 1995). Similarly, Ripstein's argument that the purpose of remedies is to put the plaintiff in a position as if the wrong had never happened are based on a corrective and remedial measure that limits the remedy to the amount of compensable loss (*supra* note 19). As noted in the discussion above (see discussion *supra* Part 3.3 and notes 19 and 33) there are different and contested theories about the nature of remedies and what the measure of a remedy is or ought to be. Though the argument here perhaps fits more naturally with civil recourse theory, it is not in principle incompatible with corrective justice theories because the measure of the damages is still calculated with reference only to the relationship as between the plaintiff and defendant and therefore the bi-lateral structural nature of the corrective justice relation is not offended.

Compensation functions as a method of valuing the plaintiff's rights. Though compensation is perhaps a good measure and one that is often available and appropriate, it is not the only potential measure available.

A right does not have an inherent monetary value.<sup>95</sup> Rights are ascribed value when the quantum of vindication is determined vis-à-vis damages. If the defendant chooses to disregard the risk of foreseeable damage and nonetheless acts, the defendant is necessarily valuing the right of the plaintiff not to be interfered with as less than or subordinate to whatever the defendant sees as the value in achieving his or her purpose. Therefore, prior to the wrong, there is some measurement of the value of the plaintiff's right that has no relation to the loss the plaintiff has suffered. If the defendant understands a risk, takes into account what the cost of that risk will be, and nonetheless decides that economically the reward of the profits is worth the risk that the plaintiff will or may be harmed, is this not commoditizing the plaintiff and the plaintiff's rights in the relevant way? If a defendant's gains depend on violating the plaintiff's rights, then this means the plaintiff's right is worth something to the defendant. In deciding to act, in having that action harm the plaintiff, and knowing the profit is dependent on that harm, the defendant is valuing the plaintiff's right not to be harmed by reference to the profit the harm creates. This is no different than the thug who values the person he is hired to hurt. Therefore, in the same way that the plaintiff is entitled to the thug's commissions, the plaintiff is entitled to the portion of the profits the defendant made as a consequence of violating his or her rights.

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<sup>95</sup> For example, in *Daniels v Thompson*, [1998] 3 NZLR 22 (CA) the court noted "Compensation recognizes the value attaching to the plaintiff's interest or right which is infringed, but it does not place a value on the fact that the interest or right ought not to have been infringed at all" (at para 70). There is no objective value of a right. Remedies are a reflection of the court ascribing rights a value.

However, for the same reasons that the intention of the defendant to profit does not matter in determining the measure of damages a fiduciary owes, the prior or intentional valuation by the defendant of a plaintiff's right does not matter either. The amount of profit a defendant makes from a tortious use of the plaintiff's property is not objectively valued prior to the commission of the tort. It is not required that the tortfeasor monetize the plaintiff's right to property by placing some value on it by determining the amount of profit the defendant is seeking prior to committing the tort. There is simply recognition that the plaintiff's right is potentially profit-bearing.

The relevant consideration is the result of a gain being made at the expense of the plaintiff's right. Thus the manner in which the right is violated, negligently or otherwise, does not alter the possibility of valuing that right *ex post facto* in relation to either the plaintiff's loss or the defendant's gain. Disgorgement is still a limiting principle in the same way compensation is a limiting principle in that the referent used to value the right is still something that is contained within the plaintiff-defendant relationship. When viewed this way an award of disgorgement damages is not in fact a windfall to the plaintiff. The defendant's profits can be viewed as the measure of a valuation of the plaintiff's right and, in the same line of reasoning that plaintiffs are entitled to profits they otherwise would not have made off of their own property, the plaintiff is entitled to the profit the defendant made off whatever right was violated, be it contractual or a right to bodily integrity.

The measure of the damages should not be broader based on an unbounded policy or some number that bears no relation to any relevant amount as determined by the position of either party. As with the application of the compensation principle, there are a several issues that courts must consider in quantifying disgorgement damages. These will not be discussed

at length here, but rather outlined only briefly. Whether the exercise of quantification is in practice difficult on a case-by-case basis ought not impact or otherwise affect the underlying conclusion that disgorgement damages are an available remedy.

The first problem of quantification is whether the courts ought to measure disgorgement damages by the so-called ‘harsh rule’ or ‘mild rule’. The harsh rule holds that revenues should be disgorged with “no set-off for expenses incurred in earning that revenue”.<sup>96</sup> The mild rule conversely allows for the gain to be calculated net of expenses.<sup>97</sup> Quantification of these measurements is rooted in cases of conversion and the distinguishing factor determining which rule ought to apply is whether the defendant knowingly committed the tort or acted in bad faith.<sup>98</sup> The same principles can be applied to any case in which the defendant benefited and either rule could be applied to account for whether costs, for example of manufacturing, marketing, or overhead, should be deducted. Application of the harsh rule, however, “does more than award disgorgement of the tortfeasor’s gain; it imposes a punitive sanction.”<sup>99</sup> While it is permissible for punitive damages to “relieve a wrongdoer of its profit where compensatory damages would amount to nothing more than a licence fee to earn greater profits”,<sup>100</sup> awarding disgorgement in an amount beyond calculation in accordance with the mild rule is punitive and ought to be recognized as such. The practical difficulties that remain for courts in determining quantification are in answering the more nuanced questions of what types of expenses ought to be deducted, and in what amount.

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<sup>96</sup> *Stewart Estate*, *supra* note 60 at para 207

<sup>97</sup> *Ibid*; see also *Freyberg v Fletcher Challenge Oil & Gas Inc.*, 2007 ABQB 353 at paras 98-99.

<sup>98</sup> *Ibid*.

<sup>99</sup> *Stewart Estate*, *supra* note 60 at para 219.

<sup>100</sup> *Whiten*, *supra* note 27 at para 72.

These questions will vary on a case-by-case basis, but the problems such issues of quantification may pose are not otherwise a limiting factor that undermines the conclusion that disgorgement damages of only the defendant's net benefit is not a punitive sanction.

The second problem of quantification is dealing with issues that are argued as problems for the determination of remedies generally, such as remoteness, causation and mitigation. As discussed above, the Supreme Court of Canada engaged in extensive debate in *Canson* about the application of these principles to limit damages on claims that were based equally in equity as well as in tort. *Canson* was divided on the issue but subsequently in *Hodgkinson v Simms*, another case about breach of fiduciary duty, Justice LaForest reiterated that “a court exercising its equitable jurisdiction is not precluded from considering principles of remoteness, causation, and intervening act where necessary to reach a just and fair result.”<sup>101</sup>

How the principles of remoteness, causation and mitigation ought to apply is not necessarily clear, settled, or subject to bright line rules. This debate, however, is one about remedies generally and ought not otherwise be interpreted as applying differently to disgorgement damages. There may be difficulties in determining to what extent various levels or types of profit are considered as appropriately falling within a disgorgement award.<sup>102</sup> These difficulties and determinations of fact, however, are the mainstay of the

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<sup>101</sup> *Supra* note 44 at 443.

<sup>102</sup> For example, the difficulty determining whether secondary profits, being those profits made as a result of the investment of primary profits, should be encompassed in an award of disgorgement damages. As was held by the Privy Council in *A-G for Hong Kong v Reid*, [1994] 1 AC 324 (PC), secondary profits, in that case the increase of value in property bought with money received as a bribe in breach of a fiduciary duty, should be disgorged on the principle that the excess of profits should not be retained because equity does not allow any profit to be made from the breach of a fiduciary duty.



common law. Nothing about the practicality of analytical challenges undermines the conclusions about the availability of a disgorgement remedy.

### **3.5 The Availability of Disgorgement as Deterrence Damages for Negligence**

Much of the current debate about the availability and justification for disgorgement damages is based on deterrence theory. As McCamus argues, “the answer to the question should be fashioned by considering whether the tortious misconduct in question is of such a nature that the deterrence or disincentive rationale is engaged and disgorgement of the profit secured through the wrongful conduct is an appropriate form of relief.”<sup>103</sup> Setting aside the primary argument that disgorgement damages are a remedy the plaintiff is entitled to as of right, this section briefly outlines an alternative argument that the court can award discretionary damages – ‘deterrence damages’ – based on the fact that a defendant has profited from a wrong.

An award of this type, however, should not be conflated with disgorgement damages as defined above. That is, the primary argument does not depend on the justification that disgorgement serves a deterrent function in order to legitimate a gain-based remedy. If courts are going to award damages aimed at disgorging defendants’ profits, but for the purpose of deterring certain behaviour, then analysis of these damages should be distinguished and not conflated with disgorgement damages as a remedy.

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<sup>103</sup> McCamus, *supra* note 64 at 352. McCamus’ argument is focused through the lens of determining when the doctrine of waiver of tort can be used for non-proprietary torts.

### 3.5.1 *A hierarchy of purposes served by damages*

The orthodox view of damages in tort, and the orthodox view of the “essential purpose of tort law”, is to compensate plaintiffs by returning them to the position they were in but for the wrong.<sup>104</sup> However, courts have long recognized that civil damages can serve more than one purpose, the most clearly accepted of which is to punish certain types of defendants’ behaviour with the awarding of punitive damages.<sup>105</sup> Similarly, the Supreme Court of Canada has established that civil damages equally and legitimately function to serve a prophylactic purpose of deterring certain behaviour.<sup>106</sup> The questions about whether damages should serve a purpose other than compensation or whether tort law ought to have distinct goals are by no means settled and are not here taken for granted as being conclusively answered from a theoretical perspective.<sup>107</sup> However, the Supreme Court of Canada has in practice clearly established that private law damages serve multiple functions.

Whatever other function damages and tort law may serve, compensation for loss is undeniably paramount. The Supreme Court of Canada has held that the purposes of damages awards are always meant to be more than compensatory but that typically the compensatory measure will achieve other goals such as deterrence.<sup>108</sup> If the various purposes of damages are viewed as being hierarchical, it can be said compensation is primary with other purposes

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<sup>104</sup> *Athey v Leonati*, [1996] 3 SCR 458 at para 20; cf *Livingstone*, *supra* note 30.

<sup>105</sup> See, *supra* n. 27. This is not to say that punitive damages are not theoretically objectionable. As was discussed by Justice LeBel in dissent in *Whiten* (esp. paras 154-158), objections to punitive damages are often based on criticisms that they invoke ‘palm tree justice’. They are however, established in practice as legitimate.

<sup>106</sup> *Strother*, *supra* note 40 at paras 75-77.

<sup>107</sup> See, for example, the collection of essays in Andrew Robertson & Tang Hang Wu, eds, *The Goals of Private Law* (Oxford: Hart Publishing, 2009).

<sup>108</sup> *Whiten*, *supra* note 27 at para 129; *Hill*, *supra* note 27 at para 196; *Canada Life Assurance Co v Stewart*, [1994] NSJ No 345 (CA) at para 100.

such as punishment or deterrence being secondary.<sup>109</sup> The primary purpose of compensation cannot be displaced by a secondary purpose, but damages may be awarded focused on a secondary purpose as an additional consideration after the compensatory purpose is satisfied.

### 3.5.2 *Disgorgement as deterrence damages*

Disgorgement has roots in the well-established equitable principle that a person ought not profit from wrongdoing.<sup>110</sup> Awards that are considered to complement compensatory damages in order to serve a deterrent function and ensure a defendant does not profit from wrongdoing are typically analyzed under the rubric of punitive damages. It will be argued in this part that the analysis and awarding of damages serving a deterrent function ought to be kept separate from consideration of whether punishment is warranted. Damages awarded to serve prophylactic purposes and deter certain types of behaviour that are considered wrongful conduct and result in a gain accruing to the defendant are here defined as “deterrence damages”. Just as the court always has a discretion to award punitive damages to serve a legitimate punitive function, the court always ought to be free to award deterrence damages to serve a legitimate prophylactic and deterrent function. Disgorgement awards

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<sup>109</sup> See *Cassell & Co Ltd v Broome*, [1972] AC 1027 (HL) at 1089:

So the tribunal will fix in their minds what sum would be proper as compensatory damages. Then if it has been determined that the case is a proper one for punitive damages the tribunal must turn its attention to the defendant and ask itself whether the sum which it has already fixed as compensatory damages is or is not adequate to serve the second purpose of punishment or deterrence. If they think that that sum is adequate for the second purpose as well as for the first they must not add anything to it. It is sufficient both as compensatory and as punitive damages. But if they think that sum is insufficient as a punishment then they must add to it enough to bring it up to a sum sufficient as punishment. The one thing which they must not do is to fix sums as compensatory and as punitive damages and add them together. They must realise that the compensatory damages are always part of the total punishment.

<sup>110</sup> See discussion and notes *supra* at Part 1.2.2.

have long been recognized as serving to deter certain types of behaviour and do not focus or depend on a determination of the plaintiff's loss.<sup>111</sup>

Despite the primacy of the compensation principle, Canadian courts are willing in a variety of circumstances to recognize that the application of this principle is not always sufficient to achieve the goals of tort law or to do justice in the circumstances. If courts were only limited to awarding damages confined by the plaintiff's identifiable, monetary loss, "the law would say to the rich and powerful, 'Do what you like, you will only have to make good the plaintiff's actual financial loss, which compared to your budget is negligible'".<sup>112</sup> A perhaps unprincipled approach that engenders confusion is failing to separate out the cases in which awarding compensatory damages is insufficient to serve other functions of tort law from cases in which defining the measure of compensation as determined by the plaintiff's identifiable loss will not adequately vindicate the plaintiff's right.

If courts do not adopt a principled view of disgorgement damages as a remedy (as outlined in the primary argument above), then the concept as articulated in cases like *Blake*, that the concept of "doing justice between the parties" is the rationale for fashioning discretionary awards seeking to strip defendants of profits, can be seen as far too nebulous and arbitrary. Where there is no clear link or test applied as to when damages can be quantified based on a defendant's gain there is cause to be wary of simply invoking a broad deterrent function in an unprincipled way. As discussed above, it is not the case that disgorgement damages as a remedy should either be arbitrarily applied or should require

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<sup>111</sup> *Strother*, *supra* note 40 at paras 75-77; *Hodgkinson*, *supra* note 44 at 453; *Duggan*, *supra* note 18 at 383: "In Canada, as matters presently stand post-*Strother*, an account of profits can be awarded for deterrence reasons alone and without proof of corresponding loss to the plaintiff."

<sup>112</sup> *Nantel v Parisien*, [1981] OJ No 2248 (HJ) [*Nantel*] at para 25, cited with approval by the Supreme Court of Canada in *Whiten*, *supra* note 27 at para 124, and *Vorvis*, *supra* note 28 at 1126.

extremely exceptional behaviour. However, certain behaviour is worthy of deterrence regardless of whether it is done in such a manner as to trigger punitive damages. Rather than either changing the standard for punitive damages or confusing the principles on which disgorgement damages are available as a remedy, deterrence damages should be recognized as their own category.

In many circumstances the prospect of having to compensate for a plaintiff's loss, and any eventual compensatory award, is a sufficient deterrent. Litigation is expensive and the potential compensation for serious injuries resulting from a defendant's negligence can amount to hundreds of thousands or millions of dollars. For most defendants the prospect of a finding of liability and a large judgment against them does the job of deterring negligent behaviour. For other types of defendants, for example large corporations or the rich and powerful, damages awards that would bankrupt an ordinary citizen or business have no deterrent impact.<sup>113</sup> The function of a deterrence award is not punitive, nor should it be arbitrary or based on the fact of a defendant's wealth in general. Rather, deterrence damages should be awarded in circumstances in which the defendant has profited from his or her wrong, and the incentive to continue this type of behaviour is not at all curtailed by having to pay a comparatively small compensatory award.

In addition to the traditionally recognized categories of cases in which damages focused on deterrence may be warranted,<sup>114</sup> the rationales throughout the case law supporting

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<sup>113</sup> *Ibid.* As discussed in *Nantel* and *Whiten* compensatory awards that have little or no impact on large or rich defendants leads to the result that payment of compensatory damages is nothing more than a license fee for wrongdoing.

<sup>114</sup> As discussed above, the two recognized categories giving rise to disgorgement based generally on a deterrence rationale are cases of a wrong committed in a certain type of way (intentional harm, fraud or conspiracy), and cases of a certain type of wrong (proprietary wrongs or breaches of fiduciary duty).

damages serving a deterrent function can be interpreted as defining a broad category: cases in which a compensatory award alone is insufficient to satisfy the deterrence function because, for example, the plaintiff's loss is negligible compared to the defendant's profit. Though perhaps a broadly formulated test, it is no broader than the test underlying punitive damages as determining in which circumstances compensatory damages will be insufficient to satisfy the purpose of punishment. Harkening back to the foundational principle that a person ought not profit from wrongdoing, it is as appropriate to evaluate how the defendant's position has been changed and determine to what extent the defendant ought to remain enriched.

One objection could suggest that deterrence damages ought not be separated from punitive damages, and the two purposes can be analyzed together. However, not all circumstances requiring deterrence are sufficient to meet the threshold of behaviour deserving of punishment. For example, in *Keeton v Bank of Nova Scotia* the Ontario Court of Appeal reiterated that punitive damages "are awarded only in extreme cases to address misconduct that represents a marked departure from ordinary standards of decent behaviour" and the court went on to hold that even fraud is insufficient by itself to warrant an award of punitive damages.<sup>115</sup> A disgorgement remedy was granted at trial in *Keeton* and the plaintiff was successful in proving the defendants had committed fraud in making personal profits from a kick-back scheme of billing for services that were not performed in order to draw money from a line of credit that had been extended to the plaintiff for the purposes of setting up a medical clinic. At trial it was held the defendants' conduct amounted to fraud but was "not the type of nefarious fraud that warrants an award of punitive damages".<sup>116</sup> This type of

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<sup>115</sup> 2009 ONCA 662 [*Keeton*] at paras 101-102.

<sup>116</sup> *Ibid*, aff'g *Dynamic Medical Concepts Inc. v DiBenedetto*, [2007] OJ No 2707 (SC) at para 859.

example and analysis confirms an award disgorging profits need not be conflated with punitive damages, and does not necessarily require the defendant's conduct to meet the high standard of reprehensible conduct.<sup>117</sup> While the fact a defendant profits from the wrong may be part of the consideration in determining whether punitive damages are warranted,<sup>118</sup> the assessment of these damages is and ought to be separated “for the purpose of making the analytical process used for calculating damages more explicit.”<sup>119</sup>

One familiar objection to extending the cases in which supra-compensatory damages are awarded is centered on how to reconcile the principles underlying deterrence damages with the traditional function of tort law as being compensation:

The broad proposition that a wrongdoer should not be allowed to profit from his wrong has an obvious attraction. The corollary is that the person wronged may recover the amount of this profit when he has suffered no financially measurable loss... [T]he corollary is not so obviously persuasive.<sup>120</sup>

In cases where punitive damages are awarded, the paramount concern is not whether the plaintiff will receive a windfall but whether the court sufficiently punishes and condemns the

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<sup>117</sup> The case is an example of an award of what are here argued as disgorgement damages, and is not intended to be an example of the court awarding what are here argued as deterrence damages. Contrary to arguments such as those made by McCamus that some kind of “heinous or unusually wrongful breach” is required to justify disgorgement damages, the point here is to argue that the standards of conduct giving rise to punitive damages are not necessary in order for disgorgement to be awarded. Therefore the rationale is extended in that there may be circumstances in which deterrence is warranted or the facts of the case suggest that the defendant should disgorge some profits but the facts of the case do not rise to the level required by punitive damages. See John D McCamus, *The Law of Contracts* (Toronto: Irwin Law Inc., 2005) at 974 arguing that an award for disgorgement damages for breach of contract requires “something more” and otherwise clearly exceptional circumstances. McCamus is cited with approval in *Indutech Canada Ltd. v Gibbs Pipe Distributors Ltd.*, 2011 ABQB 38, aff'd 2013 ABCA 111 at para 518; *Community Credit Union Ltd. v Ast*, [2007] AJ No 1255 (QB) at para 8.

<sup>118</sup> *Whiten*, *supra* note 27 at para 72.

<sup>119</sup> *Stewart Estate*, *supra* note 49 para 221.

<sup>120</sup> *Blake*, *supra* note 56 at 278.

defendant's behaviour. However, there is a well-established history of awarding damages in amounts greater than what is required to compensate plaintiffs. As discussed at length in *Whiten*, the notion that a defendant ought to be condemned to pay "a multiple of what is required for compensation... reache[s] back to the Code of Hammurabi, Babylonian Law, Hittite law (1400 B.C.), the Hindu Code of Manu (200 B.C.), ancient Greek codes, the Ptolemaic law in Egypt and the Hebrew Covenant Code of Mosaic law".<sup>121</sup> There is nothing radical in the notion that courts can, do, and should, focus on the conduct of the defendant; the measure of compensation is not always the central concern. Though perhaps not in line with the general compensation principle, the common law does not preclude plaintiffs from being the beneficiary of awards aimed at condemning and deterring defendants' behaviour.

The argument here is simply that deterrence and punishment are separate purposes, and accordingly should be distinctly analyzed as giving rise to two separate forms of damages. There are some instances in which behaviour is worthy of deterrence, but that behaviour does not rise to the level of conduct required such that punitive damages are appropriate. The benefit of separating the analysis in this way is that courts are not necessarily confined to an all or nothing approach and can fashion an award of deterrence damages that is based on but not necessarily equivalent to the total amount of the defendant's profits.

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<sup>121</sup> *Whiten*, *supra* note 27 at para 41.



### 3.5.3 *The availability of deterrence damages for negligence*

It is suggested that only cases of gross negligence are appropriate circumstances for supra-compensatory damages awards.<sup>122</sup> This argument is based on a rationale akin to the conclusion that disgorgement is only appropriate in cases of intentional wrongdoing. Thus only negligent behaviour that falls very seriously below the requisite standard of care ought to be worthy of deterrence. As argued above, the factor of intention should not be determinative of whether disgorgement is appropriate in the circumstances. Rather, the focus should be on determining whether a right has been violated, and determining what measure of damages is required for vindication. Negligent behaviour is equally worthy of deterrence regardless of whether it rises to the level of gross negligence or is otherwise deserving of punitive sanctions.

Another objection to permitting deterrence damages for negligence is that this type of award could result in over-deterrence and have the result of halting otherwise socially useful practices. As discussed by Justice Lax in *Andersen v St Jude Medical Inc.*<sup>123</sup> there is concern that deterrence damages “will have a negative impact on product innovation and will over deter socially desirable behaviour.”<sup>124</sup> Law and economics theories suggest that limiting and linking remedies to losses actually suffered best achieves the deterrence function of tort law.<sup>125</sup> However, these arguments depend on the notion that defendants are in fact valuing the cost of potentially wrongful behaviour and measuring it against potential profits. To return to

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<sup>122</sup> See, e.g., *McCamus supra* note 64 at 350-352. See, e.g., *Robitaille v Vancouver Hockey Club Ltd.* (1981), 124 DLR (3d) 228 (BCCA).

<sup>123</sup> 2012 ONSC 3660.

<sup>124</sup> *Ibid* at para 591. See Edward M Iacobucci & Michael J Trebilcock, “An Economic Analysis of Waiver of Tort in Negligence Actions” (2016) 66 UTLJ 173.

<sup>125</sup> *Ibid.*

the pharmaceutical example, we can imagine a case in which the potential harm or side effect is minor, such as a headache. It is difficult to determine conclusively how defendants are evaluating what a risk like this is worth and how that valuation is factoring into the assessment of determining the scope of acceptably risky behaviour. If a current calculation factoring in the cost of testing or improving the product so, for example, that there is no side effect of headaches, is based on knowing this type of injury will not result in any compensatory award, then there is no deterrent effect being achieved because the cost of taking the risk will be negligible, if anything.

While there is merit to the concern that socially useful behaviour should not be over-deterred, if the calculus is changed, such that courts recognize harms amounting to violations of rights should be vindicated with an amount that is greater than zero, this is a better state of affairs than effectively licensing certain kinds of wrongs by contending that some harms are not worthy of compensation. Though recognizing that all violations of rights are *prima facie* worth some amount may necessitate a re-evaluation of a cost-benefit analysis on behalf of defendants, this is an improvement not a drawback. Additionally, an award of deterrence damages, as distinct from disgorgement damages as a remedy, would be discretionary in terms of quantification in the same way punitive damages are. That is, deterrence damages are not required to amount to the entirety of the defendant's profits but are based on and limited to the amount of the defendant's gain.

### **3.6 Conclusion**

Though an orthodox interpretation of the common law sees compensation as being private law's main focus or function, the common law has a well-established history of awarding damages based on a defendant's profits rather than a plaintiff's loss. While

disgorgement may be widely considered as a rare or radical remedy, a reconsideration of the rationales underlying the development of the common law show that the courts' primary concern is with ensuring the vindication of violated rights. In the common law disgorgement damages have traditionally been awarded for claims based on infringement of property rights, but there is no principled reason that the rationale permitting plaintiffs to elect a gain-based rather than a compensation-based remedy for proprietary torts should not be extended to cases of negligence. If it is the violation of a right that is giving rise to a remedy, then it is of no moment whether the plaintiff's right is based in property, contract, or bodily integrity, and it matters not whether the right is violated intentionally or negligently. Measuring the value of the violated right in relation to the defendant's gain is equally legitimate to a measure in relation to the plaintiff's loss, and disgorgement damages are therefore not an affront to the relational nature or structure of private law.

When courts award disgorgement damages based on principles of equity, this is because the underlying claims are equitable and not because the nature of disgorgement as a remedy is inherently or necessarily discretionary. Disgorgement damages as a remedy ought not be justified on the basis of remedial flexibility or as serving a deterrence function. Analysis of whether an award aimed at deterring a defendant's behaviour, while based on the fact that a defendant has profited from wrongdoing, should be kept distinct from analysis of the plaintiff's entitlement to a remedy. As the argument here suggests, deterrence and punishment are distinct purposes and functions of civil damages, and perhaps disgorging a defendant's profits based on deterrence is warranted in certain cases even if the bar for punitive damages has not been met. The purpose of the argument here is not to conclusively determine every circumstance in which deterrence damages will be appropriate. Rather, the

hope is that a sufficient basis has been presented to show that case law and theoretical perspectives do not prevent extending the conclusions that there is behaviour worthy of deterrence and courts are permitted to fashion damages awards in order to achieve this purpose to cases of negligence.

The history of disgorgement and waiver of tort is confusing. The modern debates about the scope and limits of application of these remedies are fuelled by uncertainty in the law and the lack of clear appellate authority dealing with the contemporary views of these issues. As suggested by Weber, Martin, and others, rather than be constricted and limited by history, we should aim to understand the historical underpinnings of disgorgement and waiver of tort but then recognize that the way forward is a departure from orthodoxy: “It is not only open to the common law to ‘repurpose’ arcane rules to fit modern needs – it is occasionally to its great and especial credit that it does so.”<sup>126</sup> As the current debate in class actions suggests, there is a modern need for the common law to evolve once again. The hope is that some basis has been presented here to show that the time is ripe, and it is justifiable, to reconsider disgorgement and support its availability in negligence.

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<sup>126</sup> Martin, *supra* note 3.

## **Chapter 4**

### **4. Resolving Class Actions Dilemmas**

Armed with a reconsidered view about damage and disgorgement, we can revisit the problems of loss, profits, and individual issues and propose principled solutions. If a broad approach to damage is taken, then the plaintiffs' relevant right in negligence is a right not to suffer a kind of damage that falls within the ambit of that which is reasonably foreseeable to the defendant as a result of the defendant's failure to live up to the standard of care. Loss is not required in order to prove damage, and the task instead in solving the problem of loss is to determine whether the damage the plaintiff class suffered falls within the scope of the defendant's duty to avoid. As concluded in Chapter 2, the investigation into the substance of actionable damage in each case must be on a duty-by-duty basis.

As one example, drawing from the Supreme Court of Canada's articulation of a builder's duty of care in *Winnipeg Condominium Corporation No. 36 v Bird Construction Co.*,<sup>1</sup> the defendant's duty with respect to manufacturing dangerous products can be articulated as a duty to take reasonable care that the manufactured products do not contain dangerous defects that pose foreseeable and substantial danger to the health and safety of its consumers.<sup>2</sup> Cases such as *Serhan v Johnson & Johnson*,<sup>3</sup> and the controversial medical and pharmaceutical cases<sup>4</sup> can be analyzed within this articulation of the duty of care. The

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<sup>1</sup> [1995] 1 SCR 85 [*Winnipeg Condominium*].

<sup>2</sup> *Ibid* at para 54, articulating the constructor's duty in tort to subsequent purchasers of a building.

<sup>3</sup> [2004] OJ No 2904 (SC), aff'd [2006] OJ No 2421 (Div Ct) [*Serhan*].

<sup>4</sup> See Chapter 2 at Part 2.2.

actionable damage as defined by the duty is consuming or using the defective product. Each plaintiff in a pharmaceutical case ingests and is biologically changed by the defendant's products. Each plaintiff in a medical device case is either implanted and physiologically fused with or relies on the defendant's products in order to maintain his or her health. Whether plaintiffs in any of these cases suffer a stroke, commit suicide, have their heart sliced by a lead, or experience diabetic shock, the actionable damage of being interfered with or altered by a dangerously defective product is made out and sufficient to maintain the claim. Losses flowing as a consequence of that damage are not required.

In order to analyze cases like the example of the faulty washing machines, we can now view the question the courts must ask as one that is legal and not fact dependent. That is, the question in the case is not whether plaintiffs who have not experienced flooding should be included in the class or could ultimately recover. Rather, the question is, as a matter of law that is determinable at the pre-trial stage, does a defendant manufacturer owe a duty of care to its consumers to make non-defective products? If that is answered and the content of the duty defined, then the question of actionable damage can be resolved on a class wide basis independent of loss.

The problem of individual issues can be resolved in whole or in part in some cases by proving damage without detailed inquiry into each individual case. Each member of the class must only prove he or she took the drug or was implanted with the device and this kind of information is readily available in the records of the defendants or health authorities. In other cases the evidence to show the actionable damage is still a particularized inquiry. In exposure cases, for example, each plaintiff must show evidence of pleural plaques to establish exposure to asbestos or evidence of a diagnosis of lymphoma to establish exposure

to Agent Orange.<sup>5</sup> Individual issues determinations are still required in order to prove the actionable damage has been suffered and defining damage as not requiring loss does not eliminate this burden for the plaintiffs in the class.

Similarly, concluding that actionable damage does not require loss does not eliminate the plaintiffs' requirement to prove causation, both general and specific. As in *Andersen v St. Jude*<sup>6</sup> it was found that the defendant's heart valves, and more specifically the coating on the valves, did not in fact cause tissue damage and the defendant had not fallen below the standard of care in manufacturing the product, therefore the valves were not in fact defective. Defining actionable damage without reference to loss does not eliminate the plaintiffs having to prove each of the elements of negligence.

In some cases – many pharmaceutical cases for example – the element of causation is highly dependent on individual factors of age, weight, prior existing medical conditions, and lifestyle. In *Wilson v Servier Canada Inc.*,<sup>7</sup> for example, the plaintiffs claimed the defendants' weight loss drugs caused pulmonary hypertension and other diseases. Despite the actionable damage being proven if each member of the class can prove he or she took the allegedly defective drug, the defendants rightly argued that individual circumstances such as whether any given plaintiff smoked, had pre-existing medical conditions or received adequate information from their physician would have to be resolved in order to make out causation.<sup>8</sup> Reconsidering the definition of actionable damage does not eliminate any defendant's ability to launch an affirmative defence as against each individual in the class.

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<sup>5</sup> See the discussion and cases in Chapter 2 at Part 2.2.1.

<sup>6</sup> 2012 ONSC 3660 [*Andersen*].

<sup>7</sup> [2000] OJ No 3392 (SC).

<sup>8</sup> *Ibid* at paras 108-113.

Though individual issues are not a bar to certification, and can be dealt with in a more expedited way through the class procedure, in many cases the problem of individual issues cannot be, and should not be, overcome by a reconsideration of the definition of damage.

If in a certain case causation can be determined on a class wide basis and the damage is proven for the class, turning to the discussion of quantifying the remedies for each member need not devolve into individual inquiries. As set out in Chapter 3, if it is accepted that violations of rights in any way, negligently or otherwise, can give rise to disgorgement then the problem of profits can be answered by the reconsideration of the availability of disgorgement damages. If it has been proven there is a rights violation and liability is established, and if the defendant's profits were dependent on violating the plaintiffs' rights, then the measure of the remedy can be justifiably quantified based on the defendant's gain. Disgorgement damages can be determined without reference to individual circumstances and the damages inquiry can be answered as a common issue. In theory, the class represents all of the rights violated that comprise and were necessary for all of the defendant's profits. The measure of damages is not a windfall to the plaintiffs, but the proportionate share of the profits that represents the rights of the plaintiffs that were violated. Distribution of the profits among all the class members can be determined as a common issue because the quantification of the right can be determined without reference to individual circumstances.

Class actions are *prima facie* the type of case in which disgorgement damages will be the most appropriate remedy. The quintessential class action is one in which the plaintiffs' measurable financial loss is small and compensation will be inadequate to do justice in the circumstances. Class actions' three goals of access to justice, judicial economy and behaviour modification may then be best achieved by an award of disgorgement damages which will at



the same time ensure the rights of class members are vindicated, be more efficient in not requiring individual assessment in order to determine a remedy if liability is established, and better deter defendants' behaviour by ensuring they cannot profit from their wrongdoing. Judges will no longer be required to stretch the conception of a remedy beyond rational limits or be forced to alter the substantive law in such a way as to suggest that plaintiffs need not prove loss. Measuring the amount required to vindicate class members' rights by reference to the defendant's gain does not uncouple or eliminate the rational link between the wrong and the remedy. As long as the inquiry is confined to the facts of the relationship as between the class members and the defendant, quantification based on the defendant's gain is justifiable. Though difficulties may arise in determining certain questions about valuation such as the application of mitigation, remoteness or causation principles, these types of legal questions are often discussed and well-established in private law generally and there is no need to otherwise alter the substantive law in order to fit class actions cases.

Finally, for cases in which compensation can be awarded to the plaintiffs but is still insufficient to achieve deterrence or behaviour modification, judges can determine whether deterrence damages are appropriate in the circumstances and award them in addition to compensation. If deterrence damages are viewed as a separate type of award, and discretionary in the same way that punitive damages are, judges are free to determine a proportionate amount of damages that is rational in the circumstances and can achieve deterrence without necessarily over-detering. Viewing deterrence damages as being based on the defendant's gain but not defined as the entirety of the defendant's gain provides more flexibility. Not all cases present circumstances that are deserving of a punitive award but it may be that certain behaviour requires deterrence without meriting punishment. If the

analysis of punitive and deterrence damages are separated a more principled approach can be developed in order to determine more precisely what types of behaviour ought to be deterred. When deterrence damages are seen as complementary to compensatory damages a clearer analysis of damages awards serving all of the functions of tort law and of class actions can proceed.

#### **4.1 Conclusion**

Though the issues underlying the waiver of tort problem may be uniquely highlighted in class actions, these issues are relevant to all private law and answers ought not be developed only through the class actions lens. Resolving questions about the definitions of damage and disgorgement has the ancillary effect of resolving some of the dilemmas class actions judges face. A definition of damage that does not require loss is supported in the case law, is normatively justifiable, and brings coherence and certainty to analysis of difficult fact patterns. A definition of disgorgement as both a remedy and a non-compensatory form of damages can be justified and applied to all violations of rights, even in cases of negligence.

The task that remains is to have further judicial debate and clarification about how the substantive law ought to advance in respect of the use of the concepts of damage and disgorgement in private law generally. In order to answer the challenge of developing a complete and coherent doctrine of damage, the investigation must continue on a duty-by-duty basis to determine the kind, rather than the degree, of requisite damage required to maintain a claim. In order to move away from the confusion and history of waiver of tort and develop a principled approach to the availability of disgorgement, these questions must be tackled directly by judges and not held over to be determined after trial.

Class actions are the type of case in which these issues are perhaps most common and the class actions bench and bar is the vanguard developing the law. If the issues raised here are clearly pled and argued these questions can be brought squarely before the courts and decided as a matter of law generally, not only applicable to class actions specifically. Confusing damage with loss and muddling disgorgement with waiver of tort ought to be abandoned in favour of adopting a more analytically rigorous path forward that identifies and conceptualizes the fundamental elements of negligence. Rather than remain in a cloud of uncertainty, we must move forward to improve the law with clarity.

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