THE AMERICAN INFLUENCE ON CANADIAN TORT LAW

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This Article pays tribute to Gary Schwartz and other American tort scholars and judges for their contribution to the development of a distinctive Canadian tort law. Several examples of the direct influence of American tort law on Canadian jurisprudence are described as well as some instances where Canadian tort law has resisted the allure of U.S. developments.

INTRODUCTION

The first time I met Gary Schwartz was about fifteen years ago. I had read the many learned articles he had written and had been very much impressed by them. On one of my visits to California, I therefore telephoned him to invite him to lunch. He graciously accepted. Our conversation was at first almost exclusively about the law of torts, for that is why I had called him. I was captivated by his high intelligence, his deep knowledge of the law, and his commitment to understanding and improving tort law. Thereafter, we became friends. We often had lunch together. We corresponded. We exchanged articles.

It might seem surprising that we should enjoy such a close professional relationship, for Gary was an American scholar dedicated to improving American law and I am a Canadian jurist dedicated to administering and advancing Canadian law. However, our relationship simply mirrored the

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broader relationship that has existed between American tort law and Canadian tort law over the past fifty years. Ever since Canada began to develop its own law of torts in the 1950s, the work and ideas of American tort scholars have had a profound impact on the development of Canadian tort law. As an American scholar, Gary participated fully in this international exchange of ideas. And I, as a Canadian judge, was delighted that he did.

Gary came to Canada to speak on several occasions at various conferences and universities. I was also able to hear him lecture at the Pepperdine School of Law, where I am an Adjunct Professor. The last time we were in contact was in May 2001. He had been invited to come to Montreal, Quebec, to speak at a Seminar on Torts for Canadian Judges in May 2002. Although already seriously ill, Gary indicated his willingness to participate, if he got better. Alas, he did not get better. And so we are here today to honor his memory, his work, his contribution to tort law.

I have come here today as a Canadian to pay tribute to Gary Schwartz. As a scholar, Gary stood in a long line of eminent American tort scholars whose work has had a significant impact in my country as well as in theirs. In this Article, I wish to acknowledge these scholars and their works, and in so doing, honor the scholar I was privileged to call my friend.

I. THE SCHOLARS WHO BROUGHT AMERICAN IDEAS TO CANADA

Canadian tort law did not exist until well into the 1950s. The Privy Council of the United Kingdom was Canada's final Court of Appeal until 1948 (when that right was abolished), so that the British law of torts was also the Canadian law of torts. There was no room for independent Canadian development except, of course, by legislation. If a Canadian judge departed from U.K. precedent, he or she would soon be "set right" by an appeal to the Privy Council, either after an appeal to the Supreme Court of Canada, or directly, *per saltem*, from the provincial Court of Appeal. Now, of course, the Privy Council allows for differences among the Commonwealth Courts,[1] but until relatively recently, the common law of torts—as it was declared to be in Britain—ruled the Commonwealth, including Canada. For some of us entering the legal teaching profession in the late 1950s and early 1960s, this was a challenge, for, understandably, we wanted to fashion our own Canadian law of torts to reflect our own Canadian values and to respond to our own Canadian needs.

As far as I know, the idea of a distinctive Canadian tort law first appeared in 1968 in the title of a book of essays written by Canadian tort teachers as a tribute to the late Cecil A. Wright—*Studies in Canadian Tort*

1. *See* Invercargill City Council v. Hamlin, [1996] 1 N.Z.L.R. 513.

Law.[2] In the dedication, we called Wright "the father of Canadian tort law,"[3] although I doubt that he would have thought of himself as that. In 1975, the sixth edition of Wright's great *Cases on the Law of Torts*, originally published in 1954, was retitled *Canadian Tort Law: Cases, Notes and Materials*,[4] by the new editor. In 1972, the first torts textbook published in Canada was called *Canadian Tort Law*,[5] a book which is now in its seventh edition. There are now three other general textbooks on tort law published in Canada[6] as well as a dozen or so books on particular aspects of tort law: *Liability in Negligence*,[7] by Joseph Smith; *Products Liability*,[8] by Stephen Waddams; *Economic Negligence*,[9] by Bruce Feldthusen; *The Canadian Law of Nuisance*,[10] by Elizabeth Bilson; *The Law of Defamation in Canada*,[11] by Raymond Brown; *Charter Damages Claims*,[12] by Kenneth Cooper-Stephenson; *Legal Liability of Doctors and Hospitals in Canada*,[13] by Ellen Picard and Gerald Robertson; *Civil Liability for Sexual Abuse and Violence in Canada*,[14] by Elizabeth Grace and Susan Vella; *The Forensic Lottery*,[15] by Terence Ison; *Criminal Injuries Compensation*,[16] by Peter Burns; *The Canadian Law of Architecture & Engineering*,[17] by Beverley McLachlin and Wilfred Wallace; *The Law of Damages*,[18] by Stephen Waddams; *Personal Injury Damages in Canada*,[19] by Kenneth Cooper-Stephenson; *Remedies: The Law of Damages*,[20] by Jamie

2. STUDIES IN CANADIAN TORT LAW (Allen M. Linden ed., 1968).

3. *Id.* at v.

4. CECIL A. WRIGHT & ALLEN M. LINDEN, CANADIAN TORT LAW: CASES, NOTES AND MATERIALS (6th ed. 1975).

5. ALLEN M. LINDEN, CANADIAN TORT LAW (7th ed. 2001).

6. G.H.L. FRIDMAN, THE LAW OF TORTS IN CANADA (1989); LEWIS N. KLAR, TORT LAW (2d ed. 1996); PHILIP H. OSBORNE, THE LAW OF TORTS (1999).

7. JOSEPH CARMAN SMITH, LIABILITY IN NEGLIGENCE (1984).

8. STEPHEN M. WADDAMS, PRODUCTS LIABILITY (2d ed. 1980).

9. BRUCE P. FELDTHUSEN, ECONOMIC NEGLIGENCE: THE RECOVERY OF PURE ECONOMIC LOSS (2d ed. 1989).

10. ELIZABETH BILSON, THE CANADIAN LAW OF NUISANCE (1991).

11. RAYMOND E. BROWN, THE LAW OF DEFAMATION IN CANADA (2d ed. 1994).

12. KENNETH D. COOPER-STEPHENSON, CHARTER DAMAGES CLAIMS (1990).

13. ELLEN T. PICARD & GERALD B. ROBERTSON, LEGAL LIABILITY OF DOCTORS AND HOSPITALS (3d ed. 1996).

14. ELIZABETH K.P. GRACE & SUSAN M. VELLA, CIVIL LIABILITY FOR SEXUAL ABUSE AND VIOLENCE IN CANADA (2000).

15. TERENCE G. ISON, THE FORENSIC LOTTERY: A CRITIQUE ON TORT LIABILITY AS A SYSTEM OF PERSONAL INJURY COMPENSATION (1967).

16. PETER BURNS, CRIMINAL INJURIES COMPENSATION (2d ed. 1992).

17. BEVERLEY M. MCLACHLIN & WILFRED J. WALLACE, THE CANADIAN LAW OF ARCHITECTURE AND ENGINEERING (1987).

18. S.M. WADDAMS, THE LAW OF DAMAGES (2000).

19. KENNETH D. COOPER-STEPHENSON, PERSONAL INJURY DAMAGES IN CANADA (2d ed. 1996).

20. JAMIE CASSELS, REMEDIES: THE LAW OF DAMAGES (2000).

Cassels; *The Idea of Private Law*,[21] by Ernest J. Weinrib; and many collections of essays and lectures as well as several casebooks.

However, once Canadian tort law was emancipated from the grip of British tort law, Canadian courts began deciding cases according to Canadian authorities, using Canadian literature, and reflecting Canadian values and needs. Particularly since the 1970s, our court of last resort in tort cases, as well as in all other cases, the Supreme Court of Canada—led by Chief Justices Bora Laskin, Brian Dickson, Antonio Lamer, and now by Chief Justice Beverley McLachlin—has sought to decide cases independently, often continuing to rely on British authority by choice, not by obligation, but also relying on authority from the United States and other Commonwealth countries, again by choice, not by obligation.

American tort law and American tort literature had a great influence on the development of a distinctive Canadian tort law. In the past, Canadian tort courts had relied almost exclusively on U.K. decisions, and on the English texts by John Salmond,[22] Percy Winfield,[23] Frederick Pollock,[24] and J.F. Clerk and W.H.B. Lindsell.[25] While references to U.S. tort cases and texts—particularly *Prosser on Torts*[26]—were not uncommon, they became increasingly frequent during the 1970s. Part of the reason for this was that so many of our newer tort law teachers had studied in the United States, becoming familiar with the American textbooks, casebooks, literature, and teaching methods. Some of us studied with William Prosser or John Fleming at Berkeley, others with Guido Calabresi at Yale, some with Robert Keeton at Harvard, or Harry Kalven at Chicago. The *Restatement (Second) of Torts*[27] was studied, admired, and often became part of our teaching materials. The book by Keeton and Jeffrey O'Connell, *Basic Protection for the Traffic Victim*,[28] transported the United States' no-fault debate into Canada in the 1960s and 1970s. (Of course, Keeton and O'Connell were inspired by the Province of Saskatchewan, which had introduced the first no-fault auto insurance plan in 1946). The outstanding text of the late John Fleming of

21. ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995).

22. SIR JOHN WILLIAM SALMOND, SALMOND ON THE LAW OF TORTS (R.F.V. Heuston ed., 1965).

23. SIR PERCY HENRY WINFIELD, WINFIELD ON TORT (J.A. Jolowicz & Tom Ellis Lewis eds., 8th ed. 1967).

24. SIR FREDERICK POLLOCK, LAW OF TORTS (Philip Landon ed., 15th ed. 1951).

25. J.F. CLERK & W.H.B. LINDSELL, CLERK & LINDSELL ON TORTS (Anthony M. Dugdale ed., 18th ed. 2000).

26. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS (W. Page Keeton ed., 5th ed. 1998).

27. RESTATEMENT (SECOND) OF TORTS (1965).

28. ROBERT E. KEETON & JEFFREY O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1965).

Berkeley, *The Law of Torts*[29]—which described not only Commonwealth tort law but also much of U.S. tort law—became a leading authority in Canada. Some Canadian torts teachers studied in England as well, so that the British tradition also survived in our law schools and in our courts, providing healthy debates in our literature.

Another reason for the growing influence of American tort law and literature in Canada was that our law students were increasingly introduced to the American case method of studying law. More and more, all cases were analyzed critically. U.K. authorities were compared and contrasted with American authorities and with other possible solutions to the same problems, and students were asked to consider what they thought would be best for Canada. As advocates, Canadian tort lawyers began to approach tort issues freshly, and eventually, as they became judges, this openness to new ideas was reflected in the product of Canadian courts—independent, policy-oriented, well-reasoned decisions that sought to serve our particular needs and values. As a result of this openness, Canadian tort law has become a hybrid with U.K. roots, U.S. branches, and Canadian leaves sprouting on every branch.

One of the most important U.S. influences on Canadian tort law was the adoption of the structure and approach of the *Restatement (First) of Torts*[30] by Dean C.A. Wright in organizing his first *Casebook on the Law of Torts*[31] published in 1954. Dean Wright's decision tore us away from the U.K.'s traditional structure of tort law and moved us toward the U.S. culture of tort law. Wright had studied torts at Harvard in the late 1920s with Francis Bohlen, who had been the Reporter for the *Restatement (First) of Torts*. Bohlen's technique, involving formal analysis of the reasoning in cases, inspired Wright in his teaching and in his writing. Wright's work in turn was "an inspiration" to Canadians, stressing fidelity to principle and the need for tort law to be a dynamic institution dedicated to the service of society.[32] The Wright casebook was used to teach torts in almost all Canadian law schools in the 1950s, 1960s and even into the 1970s. The eleventh edition,[33] kept alive by other authors, is still being used in most Canadian law schools, although there are now several other Canadian casebooks available.

29. JOHN FLEMING, THE LAW OF TORTS (9th ed. 1998).

30. RESTATEMENT OF TORTS (1934).

31. CECIL A. WRIGHT, CASES ON THE LAW OF TORTS (1954).

32. *See* R. Blake Brown, *Cecil A. Wright and the Foundations of Canadian Tort Law Scholarship*, 64 SASK. L. REV. 169 (2001).

33. CECIL A. WRIGHT ET AL., CANADIAN TORTS LAW: CASES, NOTES AND MATERIALS (11th ed. 1999).

The Wright casebook contained cases from the United Kingdom, the United States, Australia, and, of course, increasingly from Canada. The notes and questions in the casebook constantly made students think about the logic of the analysis as well as its social effects. The case method of teaching, imported to Canada mainly from Harvard Law School, fostered a renaissance of Canadian legal education. Cases with conflicting analyses from different jurisdictions were often juxtaposed, and students were invited to choose among them and to explain why their choice was preferable. When I took over as editor of the Wright casebook in 1970, I added many more excerpts from articles and texts by U.S. authors, reflecting new developments in U.S. jurisprudence. Both in its contents and in its approach, the Wright casebook has played a major role in bringing American ideas regarding the law of torts into Canadian legal thought.

One cannot neglect the influence on Canadian tort law of another early pioneer in tort law, who had also been deeply influenced by American scholarship, Malcolm M. MacIntyre. Professor MacIntyre taught torts at the University of British Columbia for many years after graduating from Harvard Law School in the 1930s, where he studied under Warren Seavey and wrote his thesis on the doctrine of last clear chance. MacIntyre's work was later published and helped to end the use of that disingenuous doctrine in Canadian tort cases, following the adoption of comparative negligence legislation in the 1920s and 1930s.[34]

Canadian tort law has changed radically in recent years. When I first met Dean William Prosser, as a graduate student in his 1960 torts class, studying out of his great casebook, I asked him why he had not included any Canadian cases in the book. He looked apologetic and invited me to find him some interesting examples of Canadian tort cases, which he said he would consider including in the next edition. I searched diligently but could not then find any cases that I thought worthy of inclusion. Nowadays, there are dozens of outstanding decisions by the Supreme Court of Canada and other Canadian courts, founded on British roots, sprinkled with U.S. fertilizer, and occasionally adorned with Quebec learning, which would serve as excellent specimens for study in U.S. law schools, as my poor students at Pepperdine are discovering these days.

I must also pay tribute to my former teacher, John Fleming, who taught at the University of California at Berkeley from 1961 on, after teaching at Australian National University in Canberra and Oxford University before that. Fleming was a disciple of both Prosser and Wright, whose work he often cited in his writings. Although Fleming's work, in my view, was not

34. *See* Malcolm A. MacIntyre, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225 (1940).

fully appreciated in the United States, his textbook, *The Law of Torts*, became the Bible of Canadian tort judges. Fleming not only synthesized the Commonwealth's tort law, he incorporated much of the American tort law in his analysis, often praising the American solutions to tort issues. In this way, U.S. tort law, or at least the positive aspects of it, was brought into the consciousness of Canadian lawyers and judges, who could then decide whether to challenge it or to adopt it.

Our growing interest in American tort scholars and scholarship led many of us young Canadian law teachers to start attending the American Association of Law Schools' (AALS') annual meetings, where we would hear and meet the great U.S. tort scholars. From the 1960s on, the Torts Roundtable Council always found in its audience an eager group of Canadian torts teachers, wanting to learn from Bill Prosser, Leon Green, Page and Robert Keeton, Sam Thurman, Wex Malone, Willard Pedrick, John Wade, Marshal Shapo, and Gary Schwartz, and from the debates among Walter Blum and Harry Kalven, Jr., Keeton and O'Connell, Richard Posner, Guido Calabresi and Richard Epstein. One year, a Canadian torts teacher even got to be the chair of that wonderful group. Eventually, copying the AALS, we started our own Canadian Association of Law Teachers (CALT) torts subsection, we held our own meetings to learn from each other, and we published several books of essays on Canadian tort law. The fact that many of us kept in touch not only with the U.S. literature, but personally with American torts teachers at the AALS, had an impact on our teaching and writing. Our best students became law clerks to Canadian judges, so that existing, relevant U.S. jurisprudence and literature would often be brought to the attention of their judges, as they undertook to write opinions.

Canadian law teachers were not the only ones to take interest in developments in U.S. tort law. Canadian tort lawyers discovered the American Trial Lawyers Association (or National Association of Claimants Compensation Attorneys, as it was first called). They attended conferences where they learned about the latest ideas from the United States. They received the newsletter written largely by Professor Tom Lambert, extolling the virtues of pro-plaintiff decisions and condemning the short-sightedness of the pro-defendant decisions. Canadians established similar associations in Ontario (OTLA), British Columbia (BCTLA), and other places, which helped them keep up with U.S. developments in tort law and trial practice. Canadian judges were invited annually to attend the New York University Seminars for Appellate Judges run by the Institute for Judicial Administration, where many of our leading jurists were exposed to U.S. thinking. U.S. scholars and practitioners were often invited to attend Canadian confer-

ences and frequently lectured at Canadian law schools.[35] One of those who came was the man we remember today.

All of these U.S. influences have affected the flavor and content of Canadian tort law, the advocates practicing in Canadian tort courts, and the teachers teaching the future lawyers and judges of Canada in Canadian law schools. I, for one, am grateful for the contributions of Gary Schwartz, his colleagues, and predecessors in the enterprise of U.S. tort scholarship, although some of my compatriots, as you might guess, are less enthusiastic about the impact of some of the aspects of U.S. tort law on Canadian tort law and rightly resist some of the more controversial developments in U.S. law. Nonetheless, I think it is fair to say that all of us recognize that our contacts with American scholars like Gary have enriched our discussions and stimulated healthy debates.

II. EARLY EXAMPLES OF THE IMPACT OF U.S. TORT LAW IN CANADA

A. Products Liability

Let me now give you some early examples of U.S. cases and analysis incorporated into Canadian tort law in days gone by. Take products liability. Everyone recalls *MacPherson v. Buick Motor Co.*,[36] where the great then-Judge Benjamin Cardozo allowed a plaintiff, who did not have any contractual relation with the manufacturer of the car, to recover for an injury caused by the manufacturer's negligence. The theory propounded by Judge Cardozo, who was most influential in Canada, was swiftly but imperceptibly adopted in two Canadian cases, *Ross v. Dunstall*[37] and *Buckley v. Mott*.[38]

It took several more years for Cardozo's reasoning to find its way into British tort law. However, in the landmark case of *Donoghue v. Stevenson*,[39] the House of Lords adopted it with eloquence and enthusiasm, ensuring its future growth. Every Canadian and Commonwealth lawyer is intimately familiar with the facts of *Donoghue v. Stevenson*. It was alleged that a woman bought a bottle of ginger beer at a restaurant in Paisley, Scotland for a friend, May Donoghue, who drank the contents of the opaque bottle, discov-

35. Dean William Prosser received an honorary degree in 1964 at Osgoode Hall. John Fleming received one in 1966. Mel Belli came to lecture at the Canadian Bar Association's annual meeting and other meetings several times. Jeffrey O'Connell and Robert Keeton came to my torts class in 1966. Tom Lambert came often as well.

36. 217 N.Y.S. 382 (1916).

37. [1921] S.C.R. 393.

38. [1920] D.L.R. 408.

39. [1932] 2 A.C. 562 (appeal taken from Scot.).

ered the remains of a decomposed snail in it, and suffered damages as a result.[40] May Donoghue sued the bottler, even though there was no contract between her and the bottler. The case was never actually tried on the facts, but on the pleadings, the House of Lords ultimately held that the bottler (and other manufacturers) owed a duty to use reasonable care to third-person consumers, their "neighbours," if it was reasonably foreseeable that they would be affected by the product.[41] The court stated the principle as follows:

> A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation of putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.[42]

Upon this ruling, an entirely new structure of products liability for negligence has been erected in the Commonwealth countries and is still being elaborated to this day. In Canada, the doctrine was extended from food products to household products, automobiles, and ultimately even buildings. All defendants were subjected to the rule—not just manufacturers, but also distributors, bottlers, assemblers, builders, repairers, and appliers were affected. In addition, all plaintiffs, as long as they were reasonably foreseeable, were protected. Not only purchasers, but relatives, users, donees, and bystanders were all considered to be "neighbours" and entitled to the protection of the *Donoghue v. Stevenson* principle.

As for warnings, Canadian law, like American law, requires a manufacturer to give reasonable warnings about the dangerous properties of its products. A consumer, of course, has a corresponding duty to read and to heed these warnings. If she fails to do so, she risks being denied compensation or having her award reduced. These warnings may have to be very explicit—sometimes even more explicit than those mandated by the legislature. In several cases involving volatile substances (like lacquer-sealer, drain-cleaning material, and certain corrosive substances), courts found the warnings inadequate because they lacked sufficient particularity in light of the extreme danger posed by the products.[43] In a recent birth control pill case,[44] liability was imposed—on the basis of negligent warning—for a stroke

40. *Id.* at 562–63.

41. *See id.* at 580–81.

42. *Id.* at 599.

43. Lambert v. Lastoplex Chems. Co., [1972] S.C.R. 569; Smithson v. Saskem Chem. [1986] 1 W.W.R. 145 (Sask. Q.B. 1985); Meilleur v. U.N.I.-Crete Canada Ltd., 1985 A.C.W.S.J. LEXIS 19992 (Ont. High Ct. J. 1985).

44. Buchan v. Ortho Pharm. (Can.) Ltd., [1986] O.R.2d 92.

caused to a woman, even though the governmentally mandated text was used and even though the pills could not be obtained without a prescription. In Canadian law, therefore, legislative guidelines about warnings are relevant but not controlling. In its most recent declaration on the issue, the Supreme Court of Canada explained as follows:

> The rationale for the manufacturer's duty to warn can be traced to the "neighbour principle," which lies at the heart of the law of negligence, and was set down in its classic form by Lord Atkin in *Donoghue v. Stevenson*. When manufacturers place products into the flow of commerce they create a relationship of reliance with consumers, who have far less knowledge than the manufacturers concerning the dangers inherent in the use of the products, and are therefore put at risk if the product is not safe. The duty to warn serves to correct the knowledge imbalance between manufacturers and consumers by alerting consumers to any dangers and allowing them to make informed decisions concerning the safe use of the product.
>
> The nature and scope of the manufacturer's duty to warn varies with the level of danger entailed by the ordinary use of the product. Where significant dangers are entailed by the ordinary use of the product, it will rarely be sufficient for manufacturers to give general warnings concerning those dangers; the warnings must be sufficiently detailed to give the consumer a full indication of each of the specific dangers arising from the use of the product.[45]

There are situations, however, when no warning is required, as where everyone is expected to be aware of the danger, to know, for example, that matches will burn or that a knife will cut. In such cases no warning is necessary, because the risk is apparent to all.

As for negligence in design, Canadian law, again like American law, creates liability for negligently designing a product,[46] including liability for negligence in failing to design a crashworthy vehicle.[47]

But that is as far as Canadian law has gone. Canadian courts have refused to adopt the American doctrine of strict products liability, except in two provinces (Saskatchewan and New Brunswick) that have done so by legislation.[48] Despite the *Fall of the Citadel*,[49] the seminal article in which strict liability was called by Dean Prosser the "most rapid and altogether

45. Hollis v. Dow Corning Corp., [1995] 2 S.C.R. 634, 653–54.

46. *See* Phillips v. Ford Motor Co. of Can. Ltd., [1970] 2 O.R. 714, 741, *rev'd on other grounds*, [1971] 2 O.R. 637.

47. *See* Gallant v. Beitz, [1983] O.R.2d 86, 90.

48. Consumer Product Warranty and Liability Act, R.S.N.B. 1978, ch. C-18.1, § 12 (1978) (Can.); Consumer Protection Act, S.S. 1996, ch. C-30.1, § 14 (1996) (Can.).

49. William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

spectacular overturn of an established rule in the entire history of the law of torts,"[50] strict products liability caused nary a ripple on our placid Canadian waters, even though the products at issue are similar, the manufacturers are mainly U.S. subsidiaries, and Canadian academics and law reform bodies strongly supported adopting the doctrine.

Strangely, to this day, there has been little products liability litigation in Canada, although that has been changing with the advent of class actions in recent years. I have often wondered why there are so many auto products liability cases in the U.S. and so few in Canada. Part of the reason must be that government Medicare automatically compensates all Canadians injured in car accidents for all their medical and hospital expenses. Canadian accident victims also receive, if they are working, compensation for their lost wages and, if they are unable to return to work, pensions for life if necessary. Another reason for the paucity of products liability litigation in Canada is that there is seldom any need to sue the car manufacturers in order to compensate for the defendant auto driver's inadequate liability insurance. Amazingly, in the United States, many states only require drivers to carry $10,000 of liability insurance. In Canada, where damage awards are uniformly less than they are in the United States, the compulsory insurance limits are generally $200,000 per claim. Hence, there is rarely any need in Canada to sue in order to adequately supplement the available insurance coverage, whereas in the United States this need is commonplace.

Thus, U.S. tort law helped Canada to move into the twentieth century even before the British law did, but Canadian courts withstood the strict products liability invasion. There has been not only adoption of U.S. tort law, but also avoidance of U.S. tort law. While many of us in Canada were disappointed that strict products liability was rejected, subsequent history and the *Restatement (Third) of Torts: Products Liability*[51] seem to indicate that, at least with respect to design and warning defects, it may have been wiser for us to do so. As for ordinary product defects, most Canadian scholars think that we have achieved virtual "strict liability in negligence clothing," so that the strict liability in tort principle was unnecessary.

B. Rescue

Another area where U.S. tort law has influenced Canadian tort law is the issue of liability to rescuers. In the early years, the British courts had great difficulty with this issue, denying liability to rescuers on the basis of lack of causation and voluntary assumption of risk.[52] But the rationality and

50. *Id.* 793–94.
51. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998).
52. *See* Cutler v. United Dairies (London) Ltd., [1933] 2 K.B. 297 (C.A.).

the poetic prose of Judge Cardozo in *Wagner v. International Railway*[53] finally held sway. It was impossible for anyone to resist the power of these words:

> Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer. . . . The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had.[54]

The British courts succumbed in *Haynes v. Harwood*,[55] a case involving a policeman who was injured trying to push a woman out of the way of a runaway horse. In *Haynes*, the trial judge had quoted the famous passage from *Wagner* by the "well known American judge Cardozo,"[56] something not ordinarily done in Britain, especially in those days. The plaintiff's counsel relied on *Wagner* in his argument to the U.K. Court of Appeal, two of the judges cited it in their opinions, and the third cited a law review article referring to it. Lord Justice Frederick Greer cited an article by Arthur L. Goodhart, an expatriate American working in England;[57] the article criticized the *Cutler* case, which denied liability, and quoted the famous passage in *Wagner*.[58] Lord Justice Frederic Maugham cited the "eminent American judge, Cardozo['s]" words in *Wagner*,[59] as did Lord Justice Alexander Roche.[60] The earlier cases were distinguished and the court declared, "It would be a little surprising if a rational system of law . . . denied any remedy to a brave man."[61] The courts in Canada[62] and Australia[63] followed suit. Nowadays, the rescuer, thanks to Judge Cardozo in *Wagner*, is the darling of tort law everywhere and is able to recover not only from negligent third parties, but also from the individuals being rescued. The rescuer may recover for nervous shock suffered and may even recover when contributorily negligent or when merely rescuing property.[64]

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53. 133 N.E. 437 (N.Y. 1921).
54. *Id.* at 437–38.
55. [1934] 2 K.B. 240, *aff'd.*, [1935] 1 K.B. 146 (C.A.).
56. *Haynes*, [1934] 2 K.B. at 247.
57. *Haynes*, [1935] 1 K.B. at 156–57 (quoting A.L. Goodhart, *Rescue and Voluntary Assumption of Risk*, 5 CAMBRIDGE L.J. 192, 196 (1934)).
58. Goodhart, *supra* note 57, at 192–97.
59. *Haynes*, [1935] 1 K.B. at 163.
60. *Id.* at 167.
61. *Id.* at 152.
62. *See* Horsley v. MacLaren, [1972] D.L.R. 545.
63. *See* Chester v. Waverley Mun. Council (1939) 62 C.L.R. 1, 38.
64. *See* LINDEN, *supra* note 5, at 357.

It is incumbent upon me, however, as a Canadian patriot, to point out that a Canadian court got there first, even before *Wagner*. In 1910, eleven years before Judge Cardozo decided *Wagner*, a court in Manitoba decided on demurrer that a rescuer could recover from a negligent wrongdoer.[65] Foreshadowing what was to emerge later in the United States and England, the Manitoba court refused to follow earlier contrary authority and declared that a rescuer could recover from a defendant who, by her negligence, had created the danger which prompted the rescuer to act.[66] Mr. Justice Albert Richards, after recognizing that "[t]he promptings of humanity towards the saving of life are amongst the noblest instincts of mankind,"[67] asserted that "[t]he trend of modern legal thought is toward holding that those who risk their safety in attempting to rescue others who are put in peril by the negligence from third persons are entitled to claim such compensation from such third persons for injuries they may receive in such attempts."[68] This is particularly the case if "those whom they sought to rescue are infirm or helpless."[69] As an afterthought, Mr. Justice Richards added that the company had "notice" that "some brave man is likely to risk his own life to save the helpless," which indicated that the idea of notice or knowledge (or foresight if you will) was a relevant consideration even in those days.[70] Great jurist that he was, Judge Cardozo neglected even to cite the obscure Canadian judge, Justice Richards, who had led the way.

III. Some Recent Examples of the Impact of U.S. Tort Law in Canada

A. Punitive Damages

In recent years, discussion of U.S. authorities in Canadian decisions has been commonplace; full reliance on them has been less common, but still relatively frequent. Take, for example, our recent Supreme Court of Canada decision on punitive damages, *Whiten v. Pilot Insurance Co.*,[71] in which one million dollars Canadian were awarded as punitive damages against an insurance company who, as a settlement tactic, accused the insured of arson after his home burned down. The American treatment of punitive damages was fully canvassed by the Supreme Court of Canada, including the American

65. *See* Seymour v. Winnipeg Elec. Ry. Co., [1910] Man. L.R. 412.
66. *Id.* at 414–15.
67. *Id.* at 414.
68. *Id.* at 414–15.
69. *Id.* at 415.
70. *Id.*
71. [2002] D.L.R 257.

deterrence rationale for punitive damages, along with the Canadian denunciation and retribution rationales.[72]

It is clear that Canadian courts award punitive damages in a broad range of situations, just as American courts do, not only in limited situations, as the British courts do. Generally, as in the United States, punitive damages can be obtained for intentional wrongdoing or when the conduct is reprehensible, malicious, outrageous, etc.[73] Further, punitive damages were allowed in a Canadian negligence case, something that, as in the United States, is still very rare.[74] Finally, the Supreme Court of Canada has expressly adopted the U.S. doctrine of allowing punitive damages for wrongful dismissal where the conduct constituting the breach is also an independent basis for liability.[75]

Canadian judges and authors have evinced concern over the escalating punitive damages figures in the United States, but so far seem willing to continue along the path they have chosen. This is justified by the expectation that Canadian courts will be less generous than American ones because 1) our awards have always been relatively modest; 2) the U.S. economic deterrence rationale for punitive damages is less prominent in Canada; 3) unlike in the United States, the jury is seldom used in these cases in Canada; 4) also unlike in the United States, product liability cases rarely yield punitive damages; and 5) Canadian courts seek to base the punitive damages on the behavior which victimized the plaintiff, not society generally.[76]

In *Whiten v. Pilot Insurance Co.*, the Supreme Court of Canada discussed the American cases fully, as well as the "guideposts" laid down in the United States to prevent awards from becoming excessive, including 1) degree of culpability; 2) proportionality to compensatory damages; and 3) proportionality to civil or criminal penalties for comparable conduct.[77] The Supreme Court of Canada incorporated these criteria into its new "ten proposition summary" of the field.[78] Once again, we see Canadian courts blending together American authorities and distinctively Canadian elements to resolve common tort issues.

72. *Id.* at 275–76.

73. *See* LINDEN, *supra* note 5, at 60–65.

74. *See* Robitaille, v. Vancouver Hockey Club Ltd., [1981] D.L.R. 228, *aff'g*, 19 B.C.L.R. 158.

75. *See* Vorvis v. Ins. Co. of B.C. [1989] 1 S.C.R. 1085, 1106.

76. *See* Bruce Feldthusen, *Recent Developments in the Canadian Law of Punitive Damages*, 16 CAN. BUS. L.J. 241 (1990).

77. Whiten v. Pilot Ins. Corp., [2002] D.L.R. 257, 285–87.

78. *See id.* at 299–305.

B. Pure Economic Loss

In the area of pure economic losses, the American influence has been powerful, especially the much-quoted phrase of Judge Cardozo from *Ultramares Corp. v. Touche*[79] warning against "liability in an indeterminate amount for an indeterminate time to an indeterminate class" of people suffering pure economic loss.[80] That phrase still haunts Canadian cases, or inspires them, depending on your point of view. For example in the case of *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*,[81] where a ship crashed into a bridge causing economic loss to the bridge's users, the Supreme Court Justices discussed in great detail the U.S. cases on economic losses and relied particularly on the Cardozo phrase. The majority concluded that indeterminacy was not present, while the minority took the contrary view.

Writing for the majority, Madam Justice Beverly McLachlin pointed out that U.S. courts recognized exceptions to the rule of *Ultramares* where the interests of justice demanded it, and relied ultimately on the joint venture exception in U.S. law to ground liability.[82] Writing for the minority, Mr. Justice Gerald LaForest cited Justice Oliver Wendell Holmes in *Robins Dry Dock & Repair Co. v. Flint*,[83] articulating the traditional exclusionary rule, and subparagraph 766(c) of the *Restatement (Second) of Torts*,[84] denying recovery for negligent interference with contractual relations.[85] He also offered some additional policy arguments—based on the indeterminacy problem—for denying liability, such as lack of deterrence and the need to forecast loss for insurance purposes.[86] In a later case, the minority view of Mr. Justice Gerald LaForest, reflecting the more conservative trend visible in the U.S. cases in the last two decades, ultimately prevailed.[87]

In a recent auditor's negligent misrepresentation case,[88] the Supreme Court of Canada relied, inter alia, on an article from the *San Diego Law Review*,[89] the case of *Glanzer v. Shepherd*,[90] and the oft-cited phrase from *Ultramares* to limit the liability in such situations—a decision which also

79. 255 N.Y. 170 (1931).
80. *Id.* at 179.
81. [1992] D.L.R. 289.
82. *Id.* at 359, 365, 376.
83. 275 U.S. 303 (1927).
84. RESTATEMENT (SECOND) OF TORTS (1965).
85. *Norsk*, [1992] D.L.R. at 316–19 (citing *Flint*, 275 U.S. at 309).
86. *Id.* at 336–39.
87. *See* Bow Valley Indus. v. St. John Shipbuilding, [1997] 3 S.C.R. 1210.
88. Hercules Mgmt. v. Ernst & Young [1997] 2 S.C.R. 165.
89. Howard B. Weiner, *Common Law Liability of the Certified Public Accountant for Negligent Misrepresentation*, 20 SAN DIEGO L. REV. 233 (1983).
90. 135 N.E. 275 (N.Y. 1922).

reflects the more conservative trend in recent cases from the United States and the United Kingdom.

C. Other Cases

The U.S. influence is apparent in many other tort cases that have gone to higher Canadian courts. For example, in deciding how much weight to give to a violation of a penal statute, the Supreme Court of Canada discussed, in addition to Canadian and U.K. material, Ezra Thayer's 1913 article,[91] Clarence Morris's 1932 article,[92] and the *Restatement (Second) of Torts*[93] before adopting the minority view (in the United States) that violation of a penal statute is evidence of negligence.[94] In deciding the issue of informed consent in medical cases, the Supreme Court of Canada cited articles from the *Nebraska Law Review*,[95] the *N.Y.U. Law Review*,[96] *Canterbury v. Spence*,[97] and, once again, the opinions of Judge Cardozo[98] before adopting the reasonable patient standard and the objective theory of causation.[99] In a leading rescue case decided by the Supreme Court of Canada, one member of the Court, Justice Bora Laskin, adopted the reasoning in *Wagner v. International* and quoted Cardozo's words that a rescuer was "within the range of the natural and probable."[100] Finally, in a recent breast implant case, Mr. Justice Gerald LaForest thoroughly canvassed many of the U.S. cases on the "learned intermediary doctrine,"[101] before holding that a negligent failure to inform a learned intermediary was sufficient proof of the cause of the injury, even if the plaintiff could not prove that the intermediary would have informed the plaintiff.[102]

And how American, at least pre-1980 American, is the decision of the Supreme Court of Canada holding an automobile driver partly responsible

91. Ezra Ripley Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1913).

92. Clarence Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453 (1932).

93. RESTATEMENT (SECOND) OF TORTS § 288B (1965).

94. *See* The Queen v. Sask. Wheat Pool, [1983] 1 S.C.R. 205, 219–22, 227.

95. Linda Babbitt Jaeckel, *New Trends in Informed Consent*, 54 NEB. L. REV. 66 (1975).

96. Note, *Informed Consent—A Proposed Standard for Medical Disclosure*, 48 N.Y.U. L. REV. 548 (1973).

97. 464 F.2d 772 (D.C. Cir. 1972).

98. Schloendorff v. Soc'y of N.Y. Hosp., 105 N.E. 92 (N.Y. 1914).

99. *See* Reibl v. Hughes, [1980] 2 S.C.R. 880, 895–99.

100. *See* Horsley v. MacLaren, [1972] S.C.R. 441, 468 (Laskin, J., dissenting) (quoting Wagner v. Int'l Ry. 133 N.E. 437, 437 (N.Y. 1921)); *see also* Moddejonge v. Huron County Bd. of Educ., [1972] 2 O.R. 437, 444 (citing *Wagner*).

101. *See, e.g.*, Sterling Drug v. Cornish, 370 F.2d 82 (8th Cir. 1966); Reyes v. Wyeth Laboratories, 498 F.2d 1264 (5th Cir. 1974).

102. *See* Hollis v. Dow Corning Corp., [1995] 4 S.C.R. 634.

for an injury to a child passenger who was not strapped into a seat belt![103] Writing for the Court, Mr. Justice Peter Cory explained:

> There is therefore a duty of care owed by an occupant of a car to wear a seat-belt. This duty is based upon the sensible recognition of the safety provided by seat-belts and the foreseeability of harm resulting from the failure to wear them. What then of children in a car? Children under 16, although they may contest it, do require guidance and direction from parents and older persons. This has always been recognized by society. That guidance and protection must extend to ensuring that those under 16 properly wear their seat belts. To the question of who should assume that duty, the answer must be that there may be two or more people who bear that responsibility. However, one of those responsible must always be the driver of the car.
>
> A driver taking children as passengers must accept some responsibility for the safety of those children. The driving of a motor vehicle is neither a God-given nor a constitutional right. It is a licensed activity that is subject to a number of conditions, including the demonstration of a minimum standard of skill and knowledge pertaining to driving. Obligations and responsibilities flow from the right to drive. Those responsibilities must include some regard for the safety of young passengers. Children, as a result of their immaturity, may be unable to properly consider and provide for their own safety. The driver must take reasonable steps to see that young passengers wear their seat belts. This is so since it is foreseeable that harm can result from the failure to wear a seat-belt, and since frequently, a child will, for any number of reasons, fail to secure the seat-belt.
>
> The driver of a car is in a position of control. The control may not be quite as great as that of the master of a vessel or the pilot of an aircraft. Nevertheless, it exists. Coexistent with the right to drive and control a car is the responsibility of the driver to take reasonable steps to provide for the safety of passengers. Those reasonable steps must include not only the duty to drive carefully but also to see that seat-belts are worn by young passengers who may not be responsible for ensuring their own safety.
>
> In my view, quite apart from any statutory provisions, drivers must accept the responsibility of taking all reasonable steps to ensure that passengers under 16 years of age are in fact wearing their seat-belts. The general public knowledge of the vital importance of seat-belts as a safety factor requires a driver to ensure that young people make use of them.[104]

103. *See* Galaske v. O'Donnell [1994] 1 S.C.R. 670.
104. *Id.* at 685–86.

There are, of course, times when the Canadian courts refuse to follow U.S. jurisprudence. One notable example is in the field of libel law, where, following the enactment of our Charter of Rights and Freedoms[105] in 1982, it was contended that the fault doctrine, espoused in the U.S. case of *New York Times v. Sullivan*,[106] should be adopted in Canada. That idea, however, was resoundingly rejected in *Hill v. Church of Scientology of Toronto*:[107]

> The law of defamation is essentially aimed at the prohibition of the publication of injurious false statements. It is the means by which the individual may protect his or her reputation which may well be the most distinguishing feature of his or her character, personality and, perhaps, identity. I simply cannot see that the law of defamation is unduly restrictive or inhibiting. Surely it is not requiring too much of individuals that they ascertain the truth of the allegations they publish. The law of defamation provides for the defences of fair comment and of qualified privilege in appropriate cases. Those who publish statements should assume a reasonable level of responsibility.[108]

I could go on with many further examples of the welcome influence of American tort law on Canadian tort law, but they would simply underscore what we have already seen—that we in Canada are deeply indebted to all the American scholars and judges who have dedicated themselves to developing and improving the law of torts.

CONCLUSION

The last time I saw Gary Schwartz was about one year ago in Malibu. He joined my wife, Marjorie, and me for lunch one Saturday afternoon in April at Geoffrey's on the Pacific Coast Highway. It was one of those perfect California spring days—brilliant sun, sparkling Pacific below, flowers all around us, and dolphins frolicking in the surf. The food was great, the conversation bubbled with talk of law, theater, music, and movies. Just then a squadron of twenty or so brown pelicans flew by, all in a row, like Her Majesty's Royal Guards on parade, hovering in the air above us, observing us closely before they flew on. Gary rose in unison with the rest of us and applauded the remarkable performance of those once almost-extinct creatures. Gary, delighted and smiling broadly, spoke for all of us lucky enough to be living in California on that glorious day, when he exclaimed, "This is as good as it gets." Yes it was.

105. Constitution Act, R.S.C., app. II, sched. B, pt. I, § 1 (1982) (Can.).
106. 376 U.S. 254 (1969).
107. [1995] D.L.R. 129.
108. *Id.* at 169.