In the Court of Appeal of the Northwest Territories

Citation: Fullowka v. Royal Oak Ventures Inc., 2008 NWTCA 04

Date: 2008 05 22
Docket: A-0001-AP2005000021
Registry: Yellowknife, N.W.T.

Between:

Pinkerton's of Canada Limited, The Government of the Northwest Territories as Represented by the Commissioner of the Northwest Territories, National Automobile, Aerospace, Transportation and General Workers Union of Canada, Timothy Alexander Bettger

Appellants/Respondents by Cross-Appeal

\- and -

Sheila Fullowka, Doreen Shauna Hourie, Tracey Neill, Judit Pandev, Ella May Carol Riggs, Doreen Vodnoski, Carlene Dawn Rowsell, Karen Russell, Bonnie Lou Sawler

Respondents/Appellants by Cross-Appeal

\- and -

James O'Neil

Respondent/Appellant by Cross-Appeal

\- and -

Harry Seeton, Allan Raymond Shearing and Roger Wallace Warren

Respondents/Respondents by Cross-Appeal

\- and -

Royal Oak Ventures Inc. (formerly Royal Oak Mines Inc.)

Respondent

The Court:

The Honourable Mr. Justice Peter Costigan
The Honourable Madam Justice Marina Paperny
The Honourable Mr. Justice Frans Slatter

Memorandum of Judgment

Appeal from the Judgment of
The Honourable Mr. Justice A.M. Lutz
Dated the 16th day of December, 2004 (Trial)
Dated the 25th day of July, 2005 (Costs)
(2004 NWTSC 66, 2005 NWTSC 60; Docket: CV 05408; CV 07028)

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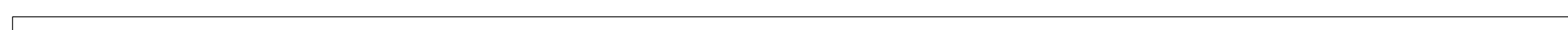

Memorandum of Judgment

The Court:

[1] On September 18th, 1992, during a labour dispute at the Giant Mine in Yellowknife, a man car carrying nine miners detonated a bomb deliberately set by a striking miner, the defendant Roger Warren. Warren was convicted of nine counts of second degree murder. These appeals concern the civil liability of the other defendants for the deaths of those nine miners, and for the injuries suffered by a tenth miner who witnessed the immediate aftermath of the explosion. The central issues are the circumstances in which one defendant can be found liable for damage caused by the intentional tort of another defendant, and what test should be applied to determine causation.

[2] For the reasons that follow, we have concluded that the appellants (defendants) did not owe a duty of care in negligence to the respondents (plaintiffs). In addition, the trial judge did not use the test for determining causation as it was subsequently clarified by the Supreme Court. In the result, the appeals are allowed and the cross-appeals dismissed.

The Parties

[3] The trial of these two actions lasted eight months, and the trial judge gave extensive and detailed written reasons reported as ***Fullowka v. Royal Oak VenturesInc***.[1] The parties are described in full by the trial judge[2], and a brief summary follows.

[4] The plaintiffs in the main action (the "Fullowka action") are survivingfamily membersof the nine miners who were killed in the blast.[3] Three of the deceased were replacement workers hired by Royal Oak to operate the mine when the union went on strike. The other six were union members who crossed the picket line and returned to work after the strike had lingered for many months.

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1 2004 NWTSC 66, [2005] 5 W.W.R. 420.

2 Trial Reasons paras. 9-10, 1092.

3 Trial Reasons paras. 9-10.

[5] The plaintiff James O'Neil (in the second "O'Neil action") was the person who first came across the scene of the explosion, and witnessed the bodies of the nine miners who had been blown apart,[4] including one of his close friends. He commenced a separate action claiming damages for Post Traumatic Stress Disorder that arose from discovering the bodies.

[6] O'Neil, and the survivors of the six striking miners who had crossed the picket line and returned to work, received benefits from the Northwest Territories Workers' Compensation Board, so their claims are partly subrogated to the Board.

[7] The Giant Mine in Yellowknife is an underground gold mine which at the relevant times was owned by Royal Oak Ventures Inc. Royal Oak was a defendant only with respect to the three replacement workers who were not covered by the workers' compensation scheme.

4 Trial Reasons paras. 14-15, 1085-94.

[8] The defendant Pinkerton's of Canada Limited is a security firm that was retained by Royal Oak to provide security at the Giant Mine during the strike.[5] Pinkerton's replacedCambrian Alliance Protection Service which was driven out of town by union members' threats of death and violence.[6]
[9] The Giant Mine was unionized. The workers were represented by the Canadian Association of Smelter and Allied Workers, Local 4. Local 4 was a local of the Canadian Association of Smelter and Allied Workers ("CASAW National"). In 1994, after the explosion, CASAW National merged with the National Automobile, Aerospace, Transportation and General Workers Union of Canada ("CAW National")[7]. As a result CASAW Local 4 became CAW Local 2304. CAW National (as successor to CASAW National) is the only union entity named as a defendantin the Fullowkaaction. CASAW National, CAW National, Local 4 and Local 2304 are all named as defendants in the O'Neil action.

[10] The defendants Roger Warren, Timothy Bettger, Allan Shearing and Harry Seeton were all members of Local 4. Seeton was a shop steward, Vice-President and later President of Local 4, and he played a leadership role in setting the tone of the strike.[8] Shearing and Bettger were radicals who incited others and were eventually imprisoned for unlawful acts relating to the strikes.[9] Shearingwas a member of the Local 4 executive who made routine incursions onto the Giant Mine property.[10]

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5 Trial Reasons paras. 85-89.

6 Trial Reasons paras. 16, 85, 691, 710.

7 Trial Reasons paras. 28-36, and see paras. 135 ff., *infra*.

8 Trial Reasons paras. 27, 39, 264-5, 275, 279, 924-6.

9 ***R. v. Shearing***, [1993] N.W.T.R. 270 (C.A); ***R. v. Bettger and Shearing***, [1996] N.W.T.R. 161; Trial Reasons para. 278.

10 Trial Reasons paras. 37, 272, 938.

Bettger also regularly trespassed, often with Shearing.[11] Bettger and Shearing frequently sabotaged the power supply.[12]

11 Trial Reasons paras. 272, 944, 952.

12 Trial Reasons para. 273.

[11] The Government of the Northwest Territories ("GNWT") is a defendant as a result of its involvement in the statutory regulation of occupational health and safety at the mine, through the Mine Safety Division of the Department of Safety and Public Services.[13]

Facts

[12] Royal Oak obtained control of the Giant Mine in 1990. The mine was marginal from an economic point of view, and Royal Oak wanted to make some changes to the mine operations.[14]

[13] In early 1992 renegotiation of the collective agreement commenced. Those negotiations were unsuccessful, and Royal Oak locked out Local 4 on May 22nd, 1992. Local 4 went on strike on May 23rd, 1992 . CASAW National and the Canadian labour movement in general provided financial and moral support to the strikers.[15]

[14] Royal Oak concluded that it was uneconomic simply to mothball the mine during the strike. Abandoning the mine would result in it flooding, which would create economic and environmental concerns if the mine were ever reactivated. Royal Oak therefore decided to operate the mine with replacement workers.[16] Procon Miners Inc. was retained to provide the replacement workers.

[15] The trial judge provided an extensive and detailed narrative of the strike. The following central themes emerge from his reasons:

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[13] *Mining Safety Act*, R.S.N.W.T. 1988, c. M-13 and *Mining Safety Regulations*, R.R.N.W.T. 1990, c. M-16.

[14] Trial Reasons paras. 19, 22.

[15] Trial Reasons paras. 4, 36, 107, 179-80, 190, 194.

[16] Trial Reasons paras. 47-49.

(a) The management of Royal Oak had no experience in using replacement workers to operate a mine, and underestimated what the reaction of Local 4 and the larger union movement would be.[17]

(b) The union leaders were unprepared to run a strike of this type. The union leaders were inept at labour negotiations and unable to control the union members.[18]

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17 Trial Reasons paras. 50, 52, 205.

18 Trial Reasons paras. 97, 113, 154, 183, 205, 275, 882.

(c) Neither party made good faith attempts to resume negotiations and reach a new collective agreement.[19]

(d) The strike was very violent.[20]

(e) The Giant Mine premises, and the mine itself, are very large with 23 points of entry to the underground.[21] The mine is bisected by a public highway. Royal Oak could not or did not seal off the mine, and striking workers were able to infiltrate the mine virtually at will.[22]

(f) The striking workers had ready access to explosives and knew how to use them.[23]

(g) From time to time warnings were received by the defendants about potential acts of violence or sabotage.[24]

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19 Trial Reasons paras. 68, 77, 185, 207, 883-8, 971.

20 See *infra*, para. 16.

21 Trial Reasons para. 177.

22 Trial Reasons paras. 17, 93, 116, 122, 147, 155-6, 163, 244.

23 Trial Reasons paras. 118, 135-7, 271, 274.

24 Trial reasons, paras. 44, 63, 98, 115, 123, 262.

[16] The many acts of violence and sabotage during the strike are set out in great detail by the trial judge. In order to appreciate fully the atmosphere during the strike, the following details can be highlighted:

(a) There were numerous threats of bodily harm, including threats of gang rape and death.[25]

(b) Replacement workers and their families were stalked, harassed and threatened in town, and also while they were attempting to enter and leave the mine site.[26]

(c) There were numerous assaults on the Pinkerton guards and the RCMP task force that had been assigned to try to maintain order.[27]

(d) On at least two occasions the RCMP had to fire warning shots into the air.[28]

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25 Trial Reasons paras. 97, 100, 115, 148.

26 Trial Reasons paras. 71, 73, 76, 82, 94, 100, 101, 108, 143, 270.

27 Trial Reasons paras. 96, 102, 103, 112, 149, 163.

28 Trial Reasons paras. 96, 103.

(e) There was wholesale disobedience of injunctions granted by the Court to try to control the violence.[29] An atmosphere developed that the union members were entitled to use violence to achieve their objectives.[30]

(f) On several occasions property was destroyed by explosions.[31]

(g) On several occasions the power supply to the mine was interrupted. On at least one occasion the power supply to the entire city, including the operating rooms at the hospital, was disrupted.[32]

(h) The numerous acts of vandalism included power outages, arson, environmental spills, and damage to mine property.[33]

(i) Organized teams of striking workers (sometimes dressed all in black) would infiltrate the mine site from time to time to commit acts of sabotage or to threaten the replacement workers.[34]

(j) There were at least two major trespasses of the property: "Black Tuesday" on May 26th, 1992,[35] and the "graffiti run" on June 29th, 1992.[36]

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29 Trial Reasons paras. 97, 101, 149, 266.

30 Trial Reasons paras. 263 ff, 650, 652, 655, 887, 892.

31 Trial Reasons paras. 96, 135, 155, 231, 274.

32 Trial Reasons paras. 94, 96, 113, 148, 273.

33 Trial Reasons paras. 72, 75, 78, 80, 83, 94, 97, 99, 127, 132, 159, 160.

34 Trial Reasons paras. 93, 112, 116, 155.

35 Trial Reasons para. 82.

[17] At a Local 4 meeting on June 7th, 1992, a striker named Conrad Lisoway yelled out "Does somebody have to die here before we get rid of these fucking scabs?" Warren then made what the trial judge described as a "notorious comment": "They do - and we better soon get it done!"[37] Later during the strike Warren warned John Quirke (then Deputy Minister of Safety and Public Services) that the mine should be shut down "before something happened".[38]

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36 Trial Reasons para. 116.

37 Trial Reasons paras. 5, 97, 652.

38 Trial Reasons para. 123.

[18] The trial judge found that the union acquiesced in or endorsed much of this illegal activity.[39] The motivation of the local and national unions was not only to achieve a favourable collective agreement with Royal Oak, but to stimulate the enactment of legislation that would prohibit the use of replacement workers, not only in the Northwest Territories but in Ontario and Quebec.[40] The violence in Yellowknife served this purpose, because preventing such violence was said to be the main objective of anti-replacement worker legislation.[41]

[19] Warren, whose employment had been terminated as a result of his participation in the riot of June 14th, 1992,[42] obtained access to the mine through the Akaitcho headframe, which was a remote and unguarded entrance to the underground. Warren knew that entrance to the mine could be obtained through this route, because he had been scouting the area. The Akaitcho access point had also to Warren's knowledge been used by Bettger, Shearing and others on the "graffiti run", something that was not discovered by the defendants until after the explosion.[43] Warren entered through a window at the Akaitcho headframe. He descended the ladder system to about the 750 foot level. He walked almost one mile underground, and then used a front-end loader to transport explosives to a small electrical locomotive, which he then used to carry the materials to the location of the bomb blast. He set the bomb so that it would be detonated when a man car passed over it.

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39 Trial Reasons paras. 102, 103, 116, 119, 187, 263, 268, 276-7, 971.

40 Trial Reasons paras. 92, 105, 193-7, 200, 823, 851, 889.

41 Trial Reasons paras. 105, 193-97.

42 Trial Reasons para. 110.

43 Trial Reasons paras. 116-7, 120, 123, 167-8.

Warren spent about four hours in the mine. At approximately 8:45 a.m. on September 18th, 1992, the bomb detonated when a man car carrying the nine deceased miners triggered it. Their bodies were blown apart and were mostly unrecognizable.[44] The plaintiff O'Neil discovered the bodies.[45]

[20] The trial judge found that Warren was encouraged to commit his crime by others, including Seeton, Shearing, Bettger and the union.[46]

[21] Warren eventually confessed to his crime, and was convicted by a jury of nine counts of second degree murder.[47]

The Trial Judgment

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44 Trial Reasons paras. 168-170.

45 Trial Reasons paras. 1118-9.

46 Trial Reasons paras. 651-7, 923-29, 935, 954-61, 1090.

47 ***R. v. Warren***, [1998] N.W.T.R. 190, 117 C.C.C. (3d) 418 (CA), leave to appeal refused [1998] 1 S.C.R. xv; ***R. v. Warren***, [1995] N.W.T.J. No. 22 (sentencing).

[22] The trial judge found that all of the appellants (though not the defendants Sheridan and Basil Hargrove) were either sufficiently proximate to the respondents to qualify as "neighbours" under the general principles of negligence, or were "occupiers" under the common law of occupier's liability, and therefore owed the respondents a duty of care.[48] He found that Warren's act in setting the bomb was merely an escalation or a continuation of the previous acts of violence that occurred during the strike, and therefore it was foreseeable. The trial judge found no policy reasons to negate the existence of a duty of care in tort, although he did not examine in detail the implications of holding some defendants responsible in tort for failing to prevent the tort of another defendant (i.e., Warren).

[23] The trial judge concluded that all of the appellants did not meet the standard of care expected of them in the circumstances, although he did not state precisely what the standard of care was for each appellant. He held that Royal Oak failed to protect the miners adequately, negligentlykept the mine open using replacement workers when it should have known that would lead to violence, and failed to bargain in good faith.[49] Pinkerton's was liable for failing to take reasonable steps to keep Warren from entering the mine and planting the bomb.[50] The GNWT was liable because of the conduct of its mining inspectors, because they should have used their powers to shut down the mine in the face of the unsafe conditions created by the violent strike.[51]

[24] Implicit in the trial judge's reasons is the assumption that the defendants were under a legal obligation to take reasonable steps to stop violence resulting from their operating the mine with replacement workers, because threats of violence and bodily injury had been made if the use of replacement workers continued, and those threats were actually being carried out. Royal Oak had a

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48 Trial Reasons paras. 668, 678, 698, 750, 762, 810, 872, 878-79, 923, 935, 946-47.

49 Trial Reasons paras. 706, 708, 719, 735, 741, 744.

50 Trial Reasons paras. 750-61.

51 Trial Reasons para. 798-838.

duty to stop using replacement workers and shut down the mine, or take reasonable measures to prevent the threats of violence being carried out. For example, the trial judge held:[52]

> . . .Royal Oak owed this special [occupier's] duty to the miners because: . . . 3. They controlled the risk (for their own economic benefit, Royal Oak and Witte *increased* the risk, by taking unreasonable bargaining positions and by bringing in replacement workers to continue production during the strike) . . . Royal Oak could be expected to ensure that the highest standard of care was met to make certain the known risk did not materialize. It did not and its degree of blameworthiness was high because of the nature of the duty owed for the safety of miners who would work underground during the expected strike. According to Fleming, *supra*, the main blame must fall on the person who created the danger and brought to the accident the dangerous subject matter since that person was, in a sense, the master of the situation.

This assumption that the appellants had a duty to take reasonable steps to prevent the violence threatened by the strikers is key to the trial judge's findings on duty, negligence and causation.

[25] The finding of the trial judge that there was a duty in tort to take reasonable steps to prevent violence by the strikers led to the trial judge concluding that Royal Oak's efforts to do so were wanting. He concluded that Royal Oak's hiring of Pinkerton's was an inadequate response. He concluded that Pinkerton's, having been retained to control the violence and having not taken reasonable steps to do so, was also liable.

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52 Trial Reasons paras. 706-7.

[26] The trial judge found that the union and its defendant officers and members were also liable to the plaintiffs.[53] He held that the national unions and the local unions were all one entity, so he did not distinguish between their liability as if they were separate defendants. The trial judge was very critical of the conduct of the unions and their representatives, holding that they incited, acquiesced in, or at least did nothing to stop the violence on the picket line. He held that CAW National was vicariously liable for the torts of its officers and members. He held that some of the individual union defendants had incited Warren to set the bomb.

[27] The trial judge found that the conduct of all of the appellants had "materially contributed" to the damage suffered by the plaintiffs.[54] He found that the conduct of Warren was foreseeable in that it was neither too remote, nor an intervening act that foreclosed recovery from the defendants. The trial judge apportioned liability to the various defendants based on their relative degrees of fault.

[28] Having found liability, the trial judge proceeded to quantify the damages of each of the plaintiffs. He awarded the Fullowka plaintiffs collectively the sum of $10,731,672.94. He awarded O'Neil $586,736.47.

[29] The defendants Pinkerton's, GNWT, CAW National, Royal Oak, Seeton and Bettger appealed the findings of liability and quantum against them. The plaintiffs cross-appealed on a few discrete issues relating to the quantification of their damages. After the appeals were commenced, Royal Oak settled with the plaintiffs and abandoned its appeals, and remains a party only with respect to cross-claims by other defendants. Seeton's appeal was abandoned. Warren and Shearing did not appeal.

Standard of Review

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[53] Trial Reasons paras. 859, 875-96.

[54] See *infra*, paras. 182 ff.

[30] The findings of fact and the inferences drawn by the trial judge will only be disturbed by an appellate court if they disclose palpable and overriding error. Questions of mixed fact and law are also only reviewable for palpable and overriding error. Questions of law are reviewed for correctness.[55] The determination of whether the conduct of a defendant in any particular situation is negligent is a question of mixed fact and law.[56] Whether a defendant owes a duty in tort is a question of law,[57] as is the selection of the legal test for determining if causation has been proven.[58]

Issues to be Decided

[31] Two basic questions govern these appeals:

a) Did any of the appellants owe the respondents a duty in tort, specifically did they owe a duty to take reasonable care to prevent Warren's intentional criminal act?[59], and

b) If the answer to the first question is affirmative, was any breach of the duty owed by the appellants a cause of the respondents' damage or loss?

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55 See ***Housen v. Nikolaisen***, 2002 SCC 33, [2002] 2 S.C.R. 235.

56 ***Housen*** at paras. 29-31.

57 ***Galaske v. O'Donnell***, [1994] 1 S.C.R. 670 at pp. 690-91; ***Holtslag v. Alberta***, 2006 ABCA 51, 55 Alta. L.R. (4th) 214 at para. 9.

58 See para. 200 *infra*.

59 The liability of the unions is partly removed from this question, as they are also alleged to have incited Warren to commit his criminal act, not merely to have failed to prevent it. The liability of the unions on this basis will be addressed separately.

[32] These appeals raises the issue of the circumstances under which one defendant can be responsible for the torts of another. In order to establish a principled foundation for resolving these questions, some general discussion about liability in tort for damage caused by other parties is called for.[60] The particular issue engaged is whether or when one person owes a duty in tort to prevent the intentional criminal tort of another person (in this case Warren). Determining whether such a duty of care exists calls for the application of the test in ***Cooper v. Hobart***.[61] Following the discussion of the general principles governing the existence of a duty of care, the liability of each of the appellants is canvassed, with consideration of their particular circumstances.[62]

[33] There is also an issue relating to the status of the parties that must be resolved:are the various unions one entity in law, or are they separate entities?[63]

[34] The final issue is whether the trial judge correctly selected and applied the legal test for determining causation.[64]

The Duty of Care

[35] There are a number of different ways that torts can be committed, and a number of ways that particular defendants might be liable. The circumstances in which one defendantwill be liable for the tort of another, or duty bound to prevent the tort of another are, however, limited.

[36] The starting point is that tort liability is primarily individual and personal.[65] As a generalrule everybody is responsible for his or her own torts, but no person is responsible for the torts of others.[66] As was stated in ***Smith v. Leurs***:[67]

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60 See *infra*, paras. 35-41.

61 2001 SCC 79, [2001] 3 S.C.R. 537. See *infra*, paras. 47-96.

62 See *infra*, paras. 103 ff.

63 See *infra*, paras. 134-43.

64 See *infra*, paras. 181-206.

65 ***Decock v. Alberta***, 2000 ABCA 122, 79 Alta. L.R. (3d) 11 at paras. 22-23; ***Tottrup v. Alberta (Minister of Environmental Protection)***, 2000 ABCA 121, 81 Alta. L.R. (3d) 27 at paras. 36, 64, 78, 93, 98, 100; ***National Harbours Board v. Langelier***, [1969] S.C.R. 60, 2 D.L.R. (3d) 81 at pg. 72; ***Bank of British Columbia v. Canadian Broadcasting Corp.*** (1992), 64 B.C.L.R. (2d) 166, [1992] 3 W.W.R. 183 (C.A.).

66 See also ***Weld-Blundell v. Stephens***, [1920] A.C. 956 at pg. 986; L.C. Klar, Tort Law (3d) (Toronto: Carswell, 2003) at pg. 439; ***P. Perl (Exporters) v. Camden London Borough Council***, [1984] Q.B. 342 (C.A.) at pp.354-5, 359-60; ***Smith v. Littlewoods Organisation Ltd.*** [1987] A.C. 241 at pp. 270-72, 278 quoting H.L.A. Hart and T. Honoré, Causation in the Law (2nd),(Oxford: Clarendon Press, 1985) at pp. 196-7; ***Graves v. Warner Bros***., 253 Mich.App. 486, 656 N.W.2d 195 (2002) at paras. 9-10; ***James v. Meow Media, Inc.***, 90 F.Supp.2d 798 (W.D.Ky. 2000), affm'd 300 F.3d 683, 2002 FED

> It is, however, exceptional to find in the law a duty to control another's actions to prevent harm to strangers. The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third.

Thus the individual appellants are liable for their own torts. A central question in these appeals is whether they had and breached a personal duty to prevent Warren's tort.

[37] It is possible for two or more persons to be responsible for the same tort, but this is generally on the basis that each of them has individually committed a tort which resulted in the same accident or the same damage. Each is still only responsible for his or her own tort. Such liability can be joint or concurrent. Thus, if in this case any of the appellants assisted Warren in committing his tort, they would be jointly liable. If any of the appellants committed torts (including breaching any duty to prevent Warren's tort), and that tort caused the damage caused by Warren's tort, they would be concurrently liable with Warren.

App. 0270P (6th Cir.); ***Modbury Triangle Shopping Centre Pty. Ltd. v Anzil,*** [2000] HCA 61, 205 C.L.R. 254 at para. 29.

[67] (1945), 70 C.L.R. 256 at pp. 261-2 (H.C.A.).

[38] Individual parties can be joint tortfeasors when they act collectively in committing a tort.[68] Joint liability in torts generally only arises with intentional torts, and generally only where there has been some element of conspiracy or agreement to commit the tort.

[39] A particular manifestation of joint liability arises when a number of tortfeasors act in concert, and the plaintiff suffers damage, although it is impossible to tell exactly which tortfeasor caused the damage. In such circumstances all of the tortfeasors are held liable.[69] In ***Thorpe v. Brumfitt***[70] a number of persons had blocked a right of way, but no one of them could be shown to have caused damage to the plaintiff. The Court held:

> Then it was said that the Plaintiff alleges an obstruction caused by several persons acting independently of each other, and does not shew what share each had in causing it. It is probably impossible for a person in the Plaintiff's position to shew this. Nor do I think it necessary that he should shew it. The amount of obstruction caused by any one of them might not, if it stood alone, be sufficient to give any ground of complaint, though the amount caused by them all may be a serious injury. Suppose one person leaves a wheelbarrow standing on a way, that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent, and it is no

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68 ***The Koursk***, [1924] P. 140, [1924] All E.R. Rep. 168; ***Martin v. Martin***, (1996) 176 N.B.R. (2d) 178 (C.A.) at paras. 40-43: ***Mainland Sawmills Ltd. v. United Steel, Paper etc. Workers International Union Local 1-3567***, 2007 BCSC 1433, 62 C.C.E.L. (3d) 66 at paras. 167 ff.

69 ***Cook v. Lewis***, [1951] S.C.R. 830, [1952] 1 D.L.R. 1; ***Hanke v. Resurfice Corp.***, [2007] 1 S.C.R. 333, 2007 SCC 7 at para. 27; ***Fairchild v. Glenhaven Funeral Services Ltd.***, [2003] 1 A.C. 32, [2002] UKHL 22 at paras. 38, 39, 158; ***Raywalt Construction Co. v. Bencic***, 2005 ABQB 989, 58 Alta. L.R. (4th) 266, 386 A.R. 230 at paras. 331-64. ***Mainland Sawmills Ltd. v. United Steel, Paper etc. Workers International Union Local 1-3567***, 2007 BCSC 1433 at para. 186.

70 (1873), 8 Ch. App. 650.

> defence to any one person among the hundred to say that what he does causes of itself no damage to the complainant.

Likewise if a number of persons act so as to incite a tort by some of them, they may all be liable. Thus if a large group of people cause a nuisance, or engage in an intentional trespass, no individual in the group can avoid responsibility; the anonymity of the mob does not provide immunity from tort liability.

[40] Multiple parties can also be liable for the same accident or damage when their separate torts concurrently combine to create one accident or one body of damage. This can happen, for example, when two parties contemporaneously or sequentially commit independent torts, and those two torts combine to cause a single accident.[71]

[41] These appeals, however, raise a different and discrete issue: whether one party can be liable for the intentional tort of another outside these traditional categories. It will be seen that the appellants were held liable, in one way or another, for failing to take reasonable steps to prevent Warren from committing his tort. This in turn depends on the existence of a legal duty of care on those appellants to take reasonable care to prevent Warren from committing that tort. This liability is based on what might be called "layered torts": the tort of one tortfeasor (the ancillary or secondary tortfeasor) is in failing to prevent the tort of another tortfeasor (the immediate or primary tortfeasor, in this case Warren).[72] The immediate tortfeasor is the one who committed the primary or immediate tort, and the ancillary tortfeasor is liable for having failed to take reasonable steps to prevent it. Even where the immediate tort is intentional, the ancillary tort will almost invariably sound in negligence.

The Proper Approach to Responsibility for the Torts of Others

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[71] For example, if one motorist is speeding, and another motorist makes an unsafe left turn, resulting in an accident that injures a passenger, the two drivers may be concurrent tortfeasors. It is also possible for two concurrent torts to cause the same damage, even if there is no common accident, although this situation is rare. See for example ***Dow v. Hutchings***, 2007 BCCA 148, 66 B.C.L.R. (4th) 78 at paras. 22-25, leave to appeal refused [2007] 3 S.C.R. ix.

[72] The immediate tortfeasor is referred to as a "third party" in C. McIvor, Third Party Liability in Tort, (Oxford: Hart Publishing, 2006), but the term "third party" has another meaning in law and confusion in terminology should be avoided.

[42] What general principles underlie holding one person responsible for the tort of another? The law has taken many different approaches in its struggle to deal with the responsibility of one party for the torts of another. On some occasions the issue is dealt with as a matter of the existence of a duty in tort. Sometimes it is dealt with by enhancing the standard of care.[73] On other occasions the matter is dealt with as a question of causation, including use of the concept of *novus actus interveniens*.[74] Sometimes the concept of *novus actus interveniens* is described as a "defence".[75] In yet other cases the problem is dealt with based on whether the resulting damage was foreseeable or too remote. Few cases discuss any policy implications of holding one tortfeasor responsible for the intentional torts of another. Few conduct a full ***Cooper*** analysis.[76]

[43] In our view, the proper approach is to deal with responsibility of the ancillary tortfeasor for the immediate tort as a matter of the existence of a duty of care. This is because the duty analysis specifically considers the policy implications of finding liability for the torts of others, something not required in the alternative approaches. The duty analysis incorporates any issues of foreseeability. When, for example, the issue is dealt with as one of causation, the discussion often centers on whether the conduct of the immediate tortfeasor "broke the chain of causation". The issue becomes whether as a matter of law the degree of causation that exists between the act or omission of the ancillary tortfeasor and the damage is sufficiently proximate to be recognized in the law. Whether that is the case involves important questions of policy concerning whether the ancillary tortfeasor should be responsible for the torts of the immediate tortfeasor, particularly if the immediate tortfeasor is not under the moral, legal, or physical control of the ancillary tortfeasor. Under the causation analysis, however, the policy discussion is not explicit. The duty analysis, on the other hand, specifically considers policy issues at several levels.

[44] Professor Klar[77] draws a distinction between two situations:

> In the first, the defendant breaches a duty of care and injures the plaintiff. Subsequently, the act of a stranger, or even the plaintiff, exacerbates the initial injury. In this case, a true remoteness issue

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[73] ***Smith v. Littlewoods Organisation*** at pg. 273; ***Stewart v. Pettie***, [1995] 1 S.C.R. 131 at paras. 50-56.

[74] See for example ***Lamb v. Camden London Borough Council***, [1981] Q.B. 625 at pg. 642 (C.A.); ***P. Perl (Exporters) Ltd. v. Camden London Borough Council***, [1984] Q.B. 342 (C.A.) at pp. 350-52; ***Jones v. Shafer Estate***, [1948] S.C.R. 166.

[75] See the Trial Reasons at para. 640.

[76] Set out in ***Cooper v. Hobart***, [2001] 3 S.C.R. 537, 2001 SCC 79, discussed *infra*, paras. 47-98.

[77] L.N. Klar, Tort Law (3d) (Toronto: Carswell, 2003), at pg. 439.

> arises. The question for the court is whether the second act, with its injurious results, should be considered to be within the risk set into motion by the defendant, and thus remain the defendant's responsibility, or whether the act should be seen as a *novus actus interveniens* severing the causal connection.
>
> A second type of problem, which is incorrectly seen as a *novus actus* problem, is entirely different. It goes to the heart of the defendant's duty itself, and asks whether a defendant can be responsible for the misconduct of third parties, based on a duty to take reasonable care to have prevented this misconduct from occurring. *This issue is initially not one of remoteness, but of duty.* Having determined the duty question, the issue of liability for the acts of the third-party will be resolved based on whether the duty was breached and whether this breach, i.e., failing to control the third party, was both the factual and proximate cause of the plaintiff's injury. (emphasis added)

These appeals raise the second type of problem identified by Professor Klar, namely whether one defendant should be liable for the tort of another (Warren), and that calls for a duty analysis.

[45] Attempts to deal with the responsibility of the ancillary tortfeasor for the acts of the immediate tortfeasor as a matter of causation (by considering whether a *novus actus interveniens* has caused a break in the chain of causation) are circular. This can be seen by the proviso in some of the cases discussing the issue, that *novus actus interveniens* is no answer when the act of the immediate tortfeasor was "the very kind of thing" that the ancillary tortfeasor should have anticipated.[78] As the respondents succinctly put it in their factum (at para.161):

> A third person's act cannot be *both* a foreseeable risk which imposes a duty of care on the defendant *and at the same time* a defence to a claim for a breach of that very duty.[79] (emphasis in original)

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[78] For example, ***Dorset Yacht Co. Ltd. v. Home Office***, [1970] A.C. 1004 at pp. 1028, 1030, 1037-8.

[79] This very point was made by Oliver L. J. in ***P. Perl (Exporters) v. Camden LBC***, [1984] Q.B. 342 (C.A.) at pg. 353, and Lord Goff in ***Smith v. Littlewoods Organisation*** at pg. 272. See also C.

Where the duty of care extends to "the very thing" of preventing the deliberate acts of others, *novus actus interveniens* is not an answer, and where the duty of care does not extend that far, *novus actus interveniens* and similar issues of causation are irrelevant. In cases where a party is alleged to owe a duty of care to prevent the deliberate acts of another tortfeasor, it is appropriate to deal with the resulting issues during the ***Cooper*** duty analysis, not as a matter of causation.

McIvor, Third Party Liability in Tort, (Oxford: Hart Publishing, 2006) at pg. 19.

[46] The issue can be illustrated by cases such as ***Stansbie v. Troman***,[80] where a decorator was held liable for a housebreaking when he negligently left the house unlockedfor a few hours, although this case was actually decided as a matter of contract. The argument of the defendant was that the act of the thief was a *novus actus interveniens.* The reply was that the conduct of the thief was the "very kind of thing" that should have been foreseen. The more helpful approach is to examine whether the duty of the decorator extended to taking reasonable steps to exclude thieves, by locking the door. What must be the "very kind of thing" is the scope of the duty, not the causative effect of the negligence. Once it is determined that the duty in question extends to taking reasonable steps to prevent intentional torts of others, the foreseeability analysis is largely exhausted. Implicit in the finding of liability is a finding that the thief would not have gained entry if the door had been locked. Apart from that, little further causative analysis is required once it is accepted that the duty extended to taking reasonable steps to prevent thefts. If the immediate tortfeasor did more than just steal while in the house, further analysis might be required.

The Test for Duty

[47] In Canada the test for determining whether a duty of care in negligenceexists is known as the ***Cooper*** test, or the modified ***Anns*** test, derived from ***Anns v. Merton London Borough Council***,[81] which itself built on ***Donoghue v. Stevenson***,[82]: see ***Cooper v. Hobart***.[83] Duty may for this purpose be defined as "an obligation, recognised by law, to take reasonable care to avoid conduct that entails an unreasonable risk of harm to others".[84]

[48] Recognizing a duty of care in tort requires that the plaintiff establish each of the following:[85]

(i) that the harm complained of is a reasonably *foreseeable* consequence of the alleged breach;

(ii) that there is sufficient *proximity* between the parties that it would not be unjust or unfair to impose a duty of care on the defendants:

(a) "Proximity" describes the type of relationship in which a duty of care to guard against foreseeable harm may rightly be imposed.

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80 [1948] 2 K.B. 48 (C.A.). Since the duty to protect against the acts of third parties was found in the covenants in the contract accepted by the decorator, ***Stansbie*** is not a case about "duty" at the common law.

81 [1978] A.C. 728.

82 [1932] A.C. 562.

83 [2001] 3 S.C.R. 537, 2001 SCC 79, at paras. 21 ff.

84 ***Odhavji Estate v. Woodhouse***, 2003 SCC 69, [2003] 3 S.C.R. 263 at para. 45.

85 See ***Odhavji Estate*** at paras. 45-52; ***Cooper*** at paras. 21 ff.

(b) In performing the analysis the court looks at categories of relationships that have previously been recognized as creating a duty in tort, and analogies to them;

and

(iii) that there exist no *policy reasons* that would make the imposition of the duty unwise or unfair, so as to negative or otherwise restrict that duty. Since at this stage of the analysis one is generally dealing with a situation outside establishedcategories, policy factors will play an especially important role once they are reached.

[49] The duty that must be located is a duty in tort. A duty in contract[86] or on some other legal basis is not sufficient, nor is a mere moral or social duty.[87] A statutory duty does not necessarily create a duty in tort.[88] In this case, the duty must be a duty in tort to answer in damages to the respondents that is wide enough to cover the damage caused by the tort of an independent person (Warren). Unless such a duty can be found to exist, the appellants are not liable for the consequences of Warren's acts.

[50] The first part of the duty analysis raises two questions. The first is whether the harm that occurred was a reasonably foreseeable consequence of the defendant's act.[89] The second examines features of the relationship (other than foreseeability) to see whether there are reasons, notwithstanding forseeability, that tort liability should not be recognized.[90] Proximityfactors tending to negate liability could arise from the relationship between the plaintiff and the defendant, or more likely because of the lack of a relationship between the two.[91] The essential question is whether it is just and fair to impose a duty of care on the defendant, given the nature of the relationship.[92]

[51] It is not necessary to conduct a fresh proximityanalysis if previous decisionshave recognized a duty in the type of case presently before the Court. The ***Cooper*** analysis therefore includes

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86 Pinkerton's contractual obligations to Royal Oak are not automatically coextensive with its duty in tort to others: see paras. 111-2, *infra*.

87 ***Childs v. Desormeaux***, 2006 SCC 18, [2006] 1 S.C.R. 643 at para. 10.

88 ***Canada v. Saskatchewan Wheat Pool***, [1983] 1 S.C.R. 205; ***Stewart v. Pettie***, [1995] 1 S.C.R. 131 at para. 36; ***Stovin v. Wise***, [1996] A.C. 923 at pp. 952-3, 954-5.

89 Discussed *infra*, paras. 53-55.

90 ***Cooper*** at para. 30; ***Childs*** at para. 12.

91 Discussed *infra*, paras. 56-59.

92 ***Odhavji Estate*** at para. 50; ***Hill v. Hamilton-Wentworth Regional Police Services Board***, 2007 SCC 41, [2007] 3 S.C.R. 129 at para. 23.

considering whether there are any established categories of cases where ancillarytortfeasors are held liable for the torts of other tortfeasors. If so, then a *prima facie* duty of care arises. The categories of cases relevant to these appeals are discussed *infra*, paras. 60-75.

[52] If the first stage of the ***Cooper*** analysis leads to the conclusion that a *prima facie* duty of care exists, then one moves on to the second stage: an examination of policy considerations negating the imposition of a duty on one defendant for the torts of another. Those policy considerations are discussed *infra*, paras. 78-89.

Foreseeability

[53] The first stage of the test requires foreseeability. In law, "foreseeable" does not mean "imaginable". The human mind is capable of imagining all sorts of fantastic and bizarre situations, but that does not make them "foreseeable" in law. The legal concept of foreseeability incorporates the idea that the event is not only imaginable, but that there is some reasonable prospect or expectation that it will arise. As Oliver L.J. said:[93]

> Few things are less certainly predictable than human behaviour,and if one is asked whether in any given situation a human being may behave idiotically, irrationally or even criminally the answer must always be that that is a possibility, for every society has its proportion of idiots and criminals. It cannot be said that you cannot foresee the possibility that people will do stupid or criminal acts, because people are constantly doing stupid or criminal acts. But the question is not what is foreseeable merely as a possibility but what would the reasonable man actually foresee if he thought about it, and all that Lord Reid seems to me to be saying[94] is that the hypothetical reasonable man in the position of the tortfeasor cannot be said to foresee the behaviour of another person unless that behaviour is such as would, viewed objectively, be very likely to occur.

The legal concept of foreseeability, as one component of the duty analysis, engages the boundaries of the events for which the law feels the defendant should properly be held responsible.

[54] As noted, all sorts of bizarre conduct by humans can be imagined, although not necessarily foreseen in the legal sense. In recognition of the problems of holding one defendant responsible for the torts of another, some cases have required an enhanced level of foreseeability in these situations. It is sometimes said that the act of the immediate tortfeasor must have been "very likely to occur"

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93 In ***Lamb v. Camden LBC***, [1981] Q.B. 625 at 642 (C.A.). See also ***Modbury Triangle Shopping Centre Pty. Ltd. v. Anzil,*** [2000] HCA 61, 205 C.L.R. 254 at paras. 99, 135.

94 In ***Dorset Yacht Co. Ltd. v. Home Office***, [1970] A.C. 1004.

before the law will consider it to have been foreseeable.[95] The higher test proposed reflects the disinclination of the law to hold the ancillary tortfeasor liable for the actions of the immediate tortfeasor.

95 ***Dorset Yacht*** at pg. 1030; ***Smith v. Littlewoods Organisation Ltd.***, [1987] A.C. 241 at pp. 257-9; ***Lamb v. Camden LBC***, [1981] Q.B. 625 at pg. 642 (C.A.).

[55] The trial judge held that Warren's act was just an extension of the other bombings and the threats of violence that occurred during the strike and was therefore foreseeable. It is of course imaginable that if a person operated a mine, and had explosives in that mine, that someone would break into the mine, steal explosives, and deliberately set a bomb that would go off when a man car drove over it. The scenario is more likely in the midst of a violent strike. The law does not require that the exact way that the damage materialized be foreseeable, so long as it arises within the scope of the foreseeable risk. But even so, Warren's act was not necessarily foreseeable in law as a result. The improbability of the scenario, combined with the intervention of an intentional act of another party (Warren), pushes the legal concept of foreseeability to the edge, and overlaps with the policy reasons why one defendant should not be liable for the intentional tort of another.[96] Forseeability in this context is a mixed question of fact and law, the decision of the trial judge does not disclose palpable and overriding error, and the finding of foreseeability should therefore underlie this duty analysis.

Proximity

[56] The next issue is whether there is proximity between the ancillary tortfeasor and the plaintiffs. Proximity measures the relationship between the parties, that is, between each defendant or class of defendants and each plaintiff or class of plaintiffs. As previously noted, the proximity must be with respect to the risks that have materialized. It is, for example, easier to see proximity (respecting the risks created by immediate tortfeasors) between Pinkerton's or the RCMP and the respondents, than it is to see proximity between the GNWT and the respondents. This is because the mandate of Pinkerton's and the RCMP extended to the conduct of other persons, whereas the primary mandate of the GNWT related to workplace safety issues. Thus, the proximity of each appellant to the respondents is subject to separate analysis.

[57] In law "proximity" is not just a matter of physical or temporal juxtaposition.[97] Proximity denotes the type of relationships that the law recognizes as giving rise to a duty of care, and

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[96] See *infra*, paras. 78-89, and ***James v. Meow Media, Inc.***, 90 F.Supp.2d 798 (W.D.Ky. 2000) at pp. 803-5, affm'd 300 F.3d 683; 2002 Fed. App. 0270P (6th Cir.).

[97] ***Hill v. Hamilton-Wentworth Regional Police Services Board***, 2007 SCC 41, [2007] 3 S.C.R. 129 at para. 29.

accordingly determining whether "proximity" exists between a plaintiff and the defendant also involves considerations of policy internal to the relationship between the parties.[98] Policy considerations also come into play in the second stage of the duty analysis, but they relate to matters external to the relationship between the parties, namely the effect of recognizing a duty of care on other legal obligations, the legal system, and society generally.[99]

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98 ***Cooper*** at paras. 25, 30.

99 ***Cooper*** at paras. 28, 37.

[58] Generic descriptions of the type of relationships that create sufficient proximity are difficult to apply. For example, it has been said that the relationship must be "close and direct".[100] Factors to consider include "expectations, representations, reliance, and the property or other interests involved".[101] To create more certainty in tort law than these general descriptions permit, the law identifies categories of cases in which proximity exists.[102] New categories are identified, in part, by analogy to existing categories.

[59] Finding sufficient proximity does not necessarily define the scope of the duty that the defendant owes to the plaintiff.[103] It is possible for the defendant to be proximateto the plaintiffwith respect to some risks, but not others. In ***Cooper***[104] the Court recognized one established category of proximity as being "where the defendant's act foreseeably causes physical harm to the plaintiff". It does not necessarily follow that proximity also exists "where the defendant fails to prevent the foreseeable, deliberate criminal act of another party that causes physical harm to the plaintiff". For example, an inspector of mines may be proximate to the miners with respect to unsafe working conditions, but not with respect to risks arising from labour relations, or risks from the criminal acts of other parties. While the status of "an occupier" is an accepted category of duty, the existenceof an occupier's duty of care does not define its scope, or, particularly, the risks it engages. The proximity

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100 ***Cooper*** at para. 32.

101 ***Cooper*** at para. 34.

102 ***Cooper*** at paras. 31, 36; ***Childs*** at para. 15; ***Hill v. Hamilton-Wentworth Regional Police Services Board***, 2007 SCC 41, [2007] 3 S.C.R. 129 at para. 25.

103 ***Modbury Triangle Shopping Centre Pty. Ltd. v. Anzil,*** [2000] HCA 61, 205 C.L.R. 254 at paras. 102-6.

104 At para. 36.

analysis therefore involves not only identifying whether the respondents were proximate (requiring an examination of the relationship between the appellants and the respondents), but also involvesan examination of whether the risk in question was engaged by the proximity between the parties. The scope of any duty that the appellants owed the respondents only emerges from the full application of the ***Cooper*** test.

Recognized Categories of Responsibility for the Torts of Others

[60] A part of the ***Cooper*** duty analysis is to see whether the case in question falls into a category of case where a duty of care has previously been recognized.[105] If so, a fresh proximity analysis may not be required. There are a few such categories where an ancillary tortfeasor has been held to owe a duty with respect to the immediate tort, but they are not easy to define, and the results of the duty analyses are sometimes inconsistent.

[61] In this case, the survivors of the nine miners pleaded that Warren's act of setting the bomb was "negligent". It is pleaded in the Fullowka action that he negligently placed a bomb in such a way that when it went off, it was foreseeable that someone would get injured. He having been convicted of nine counts of murder, Warren's act was clearly a battery, and this pleading is entirely artificial. O'Neil's pleading is more direct. There are cases where the ancillary tortfeasor is alleged to be responsible for the *negligence* of the immediate tortfeasor. This case should, however, be treated as a situation where the ancillary tortfeasors are charged with liability for the *intentional* tort of the immediate tortfeasor (Warren). The analysis must, therefore, focus on whether there are categories of cases where liability of that type has been imposed on ancillary tortfeasors.

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[105] ***Hill v. Hamilton-Wentworth Regional Police Services Board***, 2007 SCC 41, [2007] 3 S.C.R. 129 at para. 25; ***Childs*** at para. 15; ***Caparo Industries plc v. Dickman***, [1990] 2 A.C. 605 at pp. 618, 628, 635; ***J.D. v. East Berkshire Community Health NHS Trust***, [2005] UKHL 23, [2005] 2 A.C. 373 at para. 100.

[62] In what circumstances have ancillary tortfeasors been held liable for the torts of immediate tortfeasors? Unsuccessful attempts have been made to hold *regulators* liable for the intentional torts of the persons they regulate: ***Edwards v. Law Society***.[106] Even attempts to make regulators liable for the *negligence* of the regulated parties have generally been unsuccessful, making it highly unlikely they would be liable for *intentional* acts.[107]

[106] 2001 SCC 80, [2001] 3 S.C.R. 562 (Law Society not liable for thefts by member). See also ***Yuen Kun-Yeu v. Attorney-General of Hong Kong***, [1988] A.C. 175.

[107] ***Cooper v. Hobart*** (regulator of mortgage brokers not liable for bankruptcy); ***Rogers v. Faught*** (2002), 212 D.L.R. (4th) 366 (Ont. C.A.) (College of Dentists not liable for negligence of member or "inadequate risk management"); ***Holtslag v. Alberta***, 2006 ABCA 51, 55 Alta. L.R. (4th) 214 (regulator not liable for approved but deficient products); ***Burgess (Litigation Guardian of) v. Canadian National Railway Co.*** (2006), 85 O.R. (3d) 798 (C.A.), leave to appeal refused [2007] 1 S.C.R. vii (Transport Canada not liable for train wreck); ***Street v. Ontario Racing Commission***, 2008 ONCA 10, 88 O.R. (3d) 563 at para. 17 (Commission not liable for default of trainer).

[63] In ***Devloo v. Canada***[108] (a pre-***Cooper*** decision) a regulator was found liable for allowing a grain merchant to operate with insufficient security, but that case did not involve an intentional tort by the merchant. In ***Finney v. Barreau du Québec***,[109] the Barreau was found liable for failing to discipline a lawyer. This was not a case of the regulator failing to anticipate and prevent a tort, but rather a case where there was actual knowledge of what the lawyer was presently doing, coupled with a failure to respond and a "clearly identified victim". The result in ***Finney*** is based on a finding of gross negligence amounting to bad faith, and it is an extreme case. In ***McClelland v. Stewart***,[110] the Court refused to strike a claim that the College of Physicians was liable for sexual assaults by a doctor, although the issue of actual liability was not adjudicated. The respondents relied on ***Swanson Estate v. Canada***,[111] where Transport Canada was held liable for a plane crash resulting from a failure to inspect and poor maintenance. The result would likely have been different if the plane had crashed because there was a bomb on board.[112]

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108 (1991), 129 N.R. 39 (F.C.A.).

109 2004 SCC 36, [2004] 2 S.C.R. 17.

110 2004 BCCA 458, 31 B.C.L.R. (4th) 203.

111 [1992] 1 F.C. 408, 80 D.L.R. (4th) 741 (C.A.).

112 ***Swanson Estate*** was decided before ***Cooper***, and it is unclear if the result would be the same under the ***Cooper*** analysis. See ***Burgess v. Canadian National Railway Co.*** (2006), 85 O.R. (3d) 798 (C.A.), leave to appeal refused [2007] 1 S.C.R. vii.

[64] *Corrections officials* have sometimes been held liable for assaults by one prisoner on another.[113] Liability sometimes attaches not just because of the background risks of the prison, but because of particular knowledge or warnings that the plaintiff was exposed to an enhanced risk. The degree of control that the prison has over prisoners, which far exceeds the control the ancillary tortfeasor usually has over the immediate tortfeasor, is obviously a factor in these cases. Also relevant is the lack of freedom and autonomy of the plaintiff, who has a dependent relationship with the corrections officials.

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113 ***Guitare v. Canada***, 2002 FCT 1170, 224 F.T.R. 272; ***Miclash v. Canada,*** 2003 FCT 113, 227 F.T.R. 116; ***McLellan v. Canada (Attorney General)***, 2005 ABQB 486, 382 A.R. 287; ***Williams v. St. John (City)*** (1985), 66 N.B.R. (2d) 10 (C.A.) (police liable when 21 prisoners die in a fire started by a prisoner); ***Pete v. Axworthy,*** 2005 BCCA 449, 45 B.C.L.R. (4th) 311, leave to appeal refused [2006] 1 S.C.R. xiii, (no liability for assault on facts); ***Wiebe v. Canada (Attorney General)***, 2006 MBCA 159, 212 Man. R. (2d) 99, leave to appeal refused [2007] 1 S.C.R. xvi (no liability as assault not foreseeable); C. McIvor, Third Party Liability in Tort, (Oxford: Hart Publishing, 2006) at pp. 131-2.

[65] Corrections officials have sometimes been held liable for damage caused by *escaping prisoners*: ***Dorset Yacht Co. Ltd. v. Home Office***,[114] again a case decided before ***Anns*** and ***Cooper***. It is one thing to hold corrections officials responsible for the torts of prisoners under their control, and quite another thing to hold them responsible for torts of the prisoners once those prisoners have left their control. Once the prisoner has escaped the control of the prison, to hold the prison liable potentially makes the prison an insurer of whatever the escapee might do. ***Dorset Yacht*** held that the subsequent tort of the escaped prisoners was "the very kind of thing that is foreseeable". Presumably the very thing that is foreseeable with an escaping prisoner is that he will attempt to put as much distance between himself and the prison as possible. The prisoners in the ***Dorset Yacht*** case were being held on an island, and they stole a yacht to escape. What was found foreseeable was that the prisoners would seek a method of leaving the island, not that they would commit torts in general.[115] The immediate tort was directly related to the escape itself. Lord Diplock, thought the duty of the corrections officials would not extend to torts of the prisoner after the escape was complete.[116] The ratio of the case is not that prison officials are liable for every tort of an escaping prisoner.[117]

[66] The escaped prisoner cases invite the question of whether the prison is liable for the torts of prisoners who have been released on *parole*.[118] Assume two identically situated prisoners, one of whom is released on parole, and the other of whom escapes one week before he is eligiblefor release on parole. Assume they both commit an intentional tort within 24 hours of obtainingtheir freedom. If the granting of parole, and the escape, can both be traced to negligence of the corrections officials, are they liable for the tort? In both cases the immediate tortfeasor was once under the control of the ancillary tortfeasor, but is now no longer under his control. Holding the ancillary tortfeasor responsible for the intentional torts of immediate tortfeasors who are no longer under their control appears extreme.

[67] A *hospital* was found to be liable when a demented patient assaulted another patient.[119] A hospital was not liable when it discharged a voluntary psychiatric patient who subsequently was

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114 [1970] A.C. 1004.

115 See ***Lamb v. Camden LBC***, [1981] Q.B. 625 (C.A.) at pp. 634-5, 643; ***Smith v. Littlewoods Organisation*** at pp. 261-2; ***Toews and Snesar v. MacKenzie***, [1980] 4 W.W.R. 108, 18 B.C.L.R. 157 (C.A.) at pp. 132-3.

116 At pp. 1062, 1070-71.

117 Cases like ***J.S. v. Clement*** (1995), 22 O.R. (3d) 495, 122 D.L.R. (4th) 449, (where the prison was held liable for a sexual assault by an escapee) are of doubtful authority.

118 See for example ***Toews and Snesar v. MacKenzie***, [1980] 4 W.W.R. 108 (B.C.C.A.) at pp. 132-3; ***Swan v. South Australia*** (1994), 62 S.A.S.R. 532.

119 ***Wellesley Hospital v. Lawson***, [1978] 1 S.C.R. 893 at pg. 896. See also ***C. (C.L.) v. Lions Gate Hospital***, 2001 BCSC 1505, 95 B.C.L.R. (3d) 347; ***Robertson v. Adigbite***, 2000 BCSC 1189, 2 C.C.L.T. (3d) 120; C. McIvor, Third Party Liability in Tort, (Oxford: Hart Publishing, 2006) at pp.

involved in an accident.[120] A school was not liable for an assault by a troubled student.[121] These are also cases where the ancillary tortfeasor had some element of control over the immediate tortfeasor, but that was not sufficient to found liability.

133-4.

120 ***Wenden v. Trikha*** (1991), 116 A.R. 81, aff'd 135 A.R. 382, leave to appeal refused [1993] 3 S.C.R. ix; but compare ***Ahmed v. Stefaniu*** (2006), 275 D.L.R. (4th) 101, 216 O.A.C. 323, leave to appeal refused [2007] 1 S.C.R. xv, where a jury found such liability.

121 ***Kendal v. St. Paul's R.C.S.S. Div. No. 20.***, 2004 SKCA 86, 25 C.C.L.T. (3d) 25.

[68] As a general rule, *parents* are not liable for the torts of their children.[122] However in ***Yelle v. Children's Aid Society of Ottawa-Carleton***[123] the Society was held responsible for an arson by a child in the care of foster parents.

[69] Commercial *hosts* have been found liable for the torts of intoxicated persons, subject to the proof of causation. A commercial host owes a duty to the driving public with respect to the risk created by drivers who become intoxicated at the host's premises,but not necessarily to the point that the commercial host has to take positive steps to prevent the intoxicated driver from driving.[124] Social hosts are not similarly liable. In these cases the tort of the immediate tortfeasor (the intoxicated person) is usually negligence, not an intentional tort.[125]

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122 ***Shannon v. T.W. (Litigation Guardian of)***, [2002] C.I.L.R. G-1570 (Ont. S.C.); ***Smith v. Leurs*** (1945), 70 C.L.R. 256; ***Snaak (Litigation Guardian) v. Dominion of Can. Gen. Ins.*** (2002), 61 O.R. (3d) 230 (C.A.); C. McIvor, Third Party Liability in Tort, (Oxford: Hart Publishing, 2006) at pg. 25. Cases where the damage is caused by a child who is too young to form an intention to act fall into a different category, e.g. ***Carmarthenshire County Council v. Lewis***, [1955] A.C. 549.

123 (2002), 218 D.L.R. (4th) 168 (Ont. S.C.J.).

124 ***Stewart v. Pettie***, [1995] 1 S.C.R. 131.

125 See ***Childs v. Desormeaux***; ***Stewart v. Pettie***, [1995] 1 S.C.R. 131; ***Calliou Estate (Trustee of) v. Calliou Estate***, 2002 ABQB 68, 99 Alta. L.R. (3d) 390; ***Hunt v. Sutton Group Incentive Realty Inc.*** (2002), 60 O.R. (3d) 665 (C.A.).

[70] *Owners of motor vehicles* are not liable for torts committed by persons who steal their vehicles, even if the owner was allegedly negligent in allowing the theft. The owner has no control over the thief after the theft takes place.[126]

[71] The cases considering the liability of *occupiers* of property for the torts of other persons who happen to be on the premises generate mixed results. There are cases where occupiers have been found liable for the intentional criminal acts of such persons. Examples include:

> ***Okanagan Exteriors Inc. v. Perth Developments Inc.***[127]- owner liable for fire probably caused by trespassing vagrants.
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> ***Truong v. Saskatoon (City)***[128] **-** contractor liable when unknown person removes safety fence.

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126 ***Tong v. Bedwell***, 2002 ABQB 213, [2002] 6 W.W.R. 327; ***Campiou (Estate) v. Gladue***, 2002 ABQB 1037, [2003] 4 W.W.R. 536; ***Moore v. Fanning*** (1987), 60 O.R. (2d) 225, 41 C.C.L.T. 67 (Ont. H.C.); ***Canadian Pacific Ltd. v. Swift Current*** (1991), 88 Sask. R. 281.

127 2002 BCCA 45, 98 B.C.L.R. (3d) 274.

128 2001 SKQB 419, 211 Sask. R. 115.

Q. v. Minto Management Ltd.[129] - apartment owner liable for assault by employee who had a master key.

Allison v. Rank City Wall Canada Ltd.[130] - apartment owner liable for assault in the parkade.

McGinty v. Cook[131] - campground operator liable for failing to provide protection against unruly campers.

Dufault v. Excelsior Mortgage Corp.[132] - hotel liable for "badly behaved and aggressive youths" who assaulted hotel guest.

[72] On the other hand, there are also cases where the occupier has been held not to be liable for the intentional acts of other persons on the premises:

Johnson v. Webb[133] **-** school not liable for injury during a hockey game which became more aggressive.

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[129] (1985), 49 O.R. (2d) 531 affm'd (1986), 57 O.R. (2d) 781 (C.A.).

[130] (1984), 45 O.R. (2d) 141, 6 D.L.R. (4th) 144.

[131] (1989), 68 O.R. (2d) 650, 59 D.L.R. (4th) 94, affm'd (1991), 2 O.R. (3d) 283 (C.A.).

[132] (2002), 14 Alta. L.R. (4th) 343, 310 A.R. 117 affm'd 2003 ABCA 147, 20 Alta. L.R. (4th) 220, leave to appeal refused [2003] 3 S.C.R. vi.

[133] 2002 MBCA 159, [2003] 1 W.W.R. 415.

Modbury Triangle Shopping Centre Pty. Ltd. v. Anzil[134]**-** shopping centre not liable for assault in parking lot.

G. (E.D.) v. Hammer[135] **-** school not liable for assaults by janitor on school premises.

Ortega v. 1005640 Ontario Inc.[136]- nightclub not liable for murder in its parking lot.

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134 (2000), 176 A.L.R. 411 (H.C. Aust.).

135 2003 SCC 52, [2003] 2 S.C.R. 459.

136 (2004), 187 O.A.C. 281 (C.A.), leave to appeal refused [2005] 1 S.C.R. xiv.

P. Perl (Exporters) v. Camden LBC[137] and ***Smith v. Littlewoods Organisation Ltd.***[138] (discussed *infra*, paras. 74-5).

[73] Some of the cases holding that the occupier is liable for the torts of others may be the result of the wording of the occupier's liability statutes in question. Others may depend on their particular facts. For example, in ***Minto*** the immediate tortfeasor was an employee of the occupier who had gained access using a master key. The defendant clearly had "control" over the master keys. There had been several earlier incidents involving a master key, but no warning was given nor steps taken. In ***McGinty v. Cook*** the immediate tortfeasors had a history of misconduct, and consideration had been given to banning them from the campground. Absent some special factor like this, imposing liability on the occupier for the acts of persons beyond their control seems unfair.

[74] ***P. Perl (Exporters) v. Camden LBC*** was a case where the occupier of property was sued for not preventing the unknown immediate tortfeasor from breaking into its premises and thereby obtaining access to the plaintiff's premises. A similar case is ***Smith v. Littlewoods Organisation Ltd.***, where the defendants were sued for a fire started by vandals in their vacant premisesthat spread to the plaintiff's premises. Lord Mackay of Clashfern concluded that liability would only follow if the conduct of the vandals (the immediate tortfeasors) was not just possible, but probable.He treated the issue as one of foreseeablity, while noting the lack of control that the defendant had over the vandals, stating: "Control signifies, to my mind, a more extended relationship than would be involved in simply keeping another off my property".[139] Lord Goff saw the issue as one of holding one tortfeasor liable for not preventing the torts of another tortfeasor, holding that such liability was "very rare" in the common law.[140] One exceptional circumstance he recognized is where the

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137 [1984] Q.B. 342 (C.A.).

138 [1987] A.C. 241.

139 At pg. 265.

140 At pg. 274.

defendant negligently creates a "source of danger", and it is foreseeable that another party will trigger that danger.[141]

[75] The essence of the respondents' claim based on occupation of the mine is that by failing to protect its own premises from Warren, Royal Oak (and Pinkerton's by accepting the security assignment) incurred liability to the respondents for the tort that Warren committed against them on those premises. As was said by Oliver L.J.:[142]

> The proposition that because I have failed adequately to protect myself against X's wrongdoing, I therefore become responsible for the further wrong which X chooses to do to Y is one which is, on the face of it, startling.

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[141] At pp. 272-3.

[142] In ***P. Perl (Exporters) v. Camden LBC***, [1984] Q.B. 342 (C.A.) at pg. 356.

Goff L.J. said:[143]

> It is of course true that in the present case the plaintiffs do not allege that the defendants should have controlled the thieves who broke into their store room [and thereby gained access to the plaintiff's store room]. But they do allege that the defendants should have exercised reasonable care to prevent them from gaining access through their own premises; and in my judgment the statement of principle by Dixon J.[144] is equally apposite in such a case. I know of no case where it has been held, in the absence of a special relationship, that the defendant was liable in negligence for having failed to prevent a third party from wrongfully causing damage to the plaintiff.

Even accepting the relationship that Royal Oak and Pinkerton's had with the respondents, it is "startling" to impose a duty in tort on them to prevent Warren's intentional criminal conduct, or to prevent Warren from having access to the premises so that he could commit his tort.

Policy Considerations

[76] If forseeability and proximity are found, a *prima facie* duty of care is established, and one moves to the second stage of the analysis, in which "residual policy considerations" come into play:

> These are not concerned with the relationship between the parties,but with the effect of recognizing a duty of care on other legal obligations, the legal system and societymore generally. Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized?[145]

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143 At pp. 359-60.

144 In ***Smith v. Leurs*** (1945), 70 C.L.R. 256, quoted *supra*, para. 36.

145 ***Cooper*** at para. 37.

The policy analysis is particularly important where one person is being held responsible for the torts of others.

[77] The policy portion of the ***Cooper*** analysis is not an open-ended consideration of the policy reasons for or against finding a duty of care in the particular case. The primary policy considerations in support of a duty are proximity and foreseeability; once they are found there is a *prima facie* duty. The policy portion of the analysis is therefore primarily negative in nature; it is a search for policy considerations that would negate that *prima facie* duty.

[78] There are several overlapping policy considerations that bear on whether one person should be held responsible for the torts of others, especially when the immediate tort is a crime:

(a) It is contrary to the principle of individual autonomy that underlies the common law.[146]

(b) It is contrary to the general principle that tort liability is personal, and that some exceptional reason should be shown for making one person responsible for the torts of another.[147]

(c) It is unfair to hold one person responsible for the acts of someone else that they do not control.[148] Deterrence of unsafe conduct is one objective of tort law, but liability without control cannot enhance safety in any meaningful way. Control of the immediate tortfeasor is therefore a key consideration.

(d) It undermines the general principle that tort liability is fault based, in those cases where the immediate tortfeasor has deliberately evaded the efforts of the ancillary tortfeasor.

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146 ***Childs*** at paras. 31, 39; L.C. Klar, Tort Law (3d) (Toronto: Carswell, 2003) at pp. 439-40.

147 *Supra*, para. 36.

148 L.C. Klar, Tort Law (3d) (Toronto: Carswell, 2003) at pp. 439-41; ***Lamb v. Camden LBC***, [1981] Q.B. 625 (C.A.) at pg. 644; ***Smith v. Littlewoods Organisation*** at pg. 280; ***Modbury Triangle Shopping Centre Pty Ltd v. Anzil,*** [2000] HCA 61, 205 C.L.R. 254 at para. 115.

(e) It is contrary to the general principle that a person has no duty to intervene just because he or she is aware that the plaintiff is exposed to a risk.[149] Some principled exception must be identified to warrant imposing a duty.

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149 ***Childs*** at paras. 31, 39; ***Graves v. Warner Bros***., 253 Mich. App. 486, 656 N.W. 2d 195 (2002) at paras. 9-10; ***Modbury Triangle Shopping Centre Pty Ltd v. Anzil,*** [2000] HCA 61, 205 CLR 254 at para. 34.

(f) Historically, the courts have been reluctant to impose liability for a failure by an individual to take some positive action.[150] Even the definition of "duty" is to "avoid conduct", not to "take action".[151] Preventing the intentional act of another person will generally require a positive act.

(g) It undermines the responsibility of the immediate tortfeasor for his crime, which is contrary to public policy.[152]

These policy considerations negate the imposition of a duty of care in this case.

[79] There is one other policy consideration that may inform the analysis in this case. It was not identified by the trial judge, nor was it argued by counsel, and therefore we raise it to identify the issue and to outline some of the factors that may be relevant to its analysis in other cases. That issue relates to the effect that threats may have on the duty of care in a situation where the damage that resulted arose out of the carrying out of those threats.

[80] An undercurrent of the whole of the statements of claim and the trial decision is that the appellants had a duty to yield or react to the threats of violence that had been made by the strikers. The "risk" that was foreseeable, and that the appellants were alleged to have a duty to take

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150 ***Stewart v. Pettie***, [1995] 1 S.C.R. 131 at para. 37; ***Childs*** at para. 31; ***Modbury Triangle Shopping Centre Pty Ltd v. Anzil,*** [2000] HCA 61, 205 CLR 254 at paras. 26-8; ***Smith v. Littlewoods Organisation*** at pg. 271; ***Stovin v. Wise***, [1996] A.C. 923 at pp. 943-3; C. McIvor, Third Party Liability in Tort, (Oxford: Hart Publishing, 2006) at pp. 9 ff.; G.H.L. Fridman, "Non-vicarious Liability for the Acts of Others" (1997), 5 Tort L. Rev. 102 at pg. 116.

151 ***Odhavji Estate v. Woodhouse***, [2003] 3 S.C.R. 263, 2003 SCC 69 at para. 45.

152 ***British Columbia v. Zastowny***, 2008 SCC 4, 53 C.C.L.T. (3d) 161 at para. 30; ***H.L. v. Canada (Attorney General)***, 2005 SCC 25, [2005] 1 S.C.R. 401, at paras. 142-3; ***James v. Meow Media, Inc.***, 300 F.3d 683; 2002 FED App. 0270P (6th Cir.) at pg. 694; ***Clunis v. Camden and Islington Health Authority***, [1998] Q.B. 978 (C.A.).

reasonable steps to prevent or mitigate, was the risk that these threats would be acted upon. One obvious way to eliminate the risk was to give in to the threats. Does the law of negligence require a defendant to give in to such threats? Is the failure to capitulate to threats of this particular type a potential source of liability in tort?

[81] Probably no universal answer can be given to these questions. Threats come in many forms. For greater precision, the scenario contemplated here is that A has threatened to harm C unless B does something, or refrains from doing something. If B does not do as told, and A follows through with the threat and harms C, the argument is that B is liable in tort to C. This precise scenario must be distinguished from some other situations that appear on the surface to be similar.

[82] Some of the cases on occupier's liability speak of the background risk of crime that might exist in the community at large as being a "threat", although in that context the word is a synonym for "risk".

[83] To illustrate, in ***Jane Doe v. Toronto (Metropolitan) Commissioners of Police***[153] the Police were aware of a serial rapist who was targeting a particular class of victim. The plaintiff was a member of that class, and was assaulted. She pleaded that the Police had intentionally kept the activities of the rapist secret, in order to enhance their ability to catch him. A motion to strike the action was dismissed, the court holding that the class of potential victims was sufficiently narrow to support a finding of proximity under the ***Cooper*** analysis. If it was proven that the Police had a superior level of information about the risk, and there was sufficient proximity to the plaintiff, then a duty to warn could arise on the facts.[154] This kind of targeted risk might be termed a "threat" (although it was not so described by the court) but it is not the type of "threat" being considered here. No one threatened: "If you do not do what I say, I will assault Jane Doe". ***Jane Doe*** is a duty to warn case, and while we do not question the reasoning in it, it is not the type of situation present in this appeal.[155]

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[153] (1990), 74 O.R. (2d) 225, 72 D.L.R. (4th) 580 (Div. Ct.) leave to appeal refused (1991), 1 O.R. (3d) 416 (C.A.)

[154] See para. 95 *infra*.

[155] A similar case is ***Q. v. Minto Management Ltd.*** (1985), 49 O.R. (2d) 531 affm'd (1986), 57 O.R. (2d) 781 (C.A.).

[84] A different issue is also raised by ***B.M. v. British Columbia (Attorney General)***.[156] This was a case of domestic violence, where the perpetrator was assaulting, threatening, and harassing his former partner. It was alleged that the police failed to take any positive action when this conduct was reported to them, and thus it was argued that the police were liable for damage he eventually caused to the family. This was not a duty to warn case (because the victims were well aware of the risk), but rather it was alleged that there was a duty to protect the potential victims. The existence of the duty was accepted, but the action was dismissed because causation was not proven. Again, this is not a case where the perpetrator threatened: "If you do not do as I say, I will assault the family".

[156] 2004 BCCA 402, 31 B.C.L.R. (4th) 61(C.A).

[85] Another type of threat is a specific warning about an immediate and localized danger. An example would be an anonymous warning that a bomb had been placed in a building. The issue is whether those in charge of the building would have any duty in tort to respond, for example by evacuating the building for a short time. It is likely that a combination of knowledge of the threat, proximity to the potential victims, and responsibility for safety would give rise to a duty. For example, a school principal advised of a bomb threat at the school may well have a duty to respond to that threat, and failure to take any steps could conceivably attract damages in tort. The question that would follow is whether the response or lack therefore was reasonable, essentially engaging a consideration of the standard of care. No such threats are in issue here, as it is clear there was no forewarning of Warren's act.[157]

[86] The threat in this case was of a different kind. It was a targeted threat, made by a specific group (some of the strikers) and directed at these specific appellants and a specific lawful activity (the use of replacement workers, combined with aggressive labour negotiations). The implied threat was that if the mine was not shut down, acts of violence would continue, and bodily harm was a possibility. The position of the striking Local 4, CASAW National, and the larger labour movement was that replacement workers should be banned, in part because the use of replacement workers resulted in violence. In other words, the threat or "warning" was "If you use replacement workers, there will be violence, and if there is violence, it will be your fault because you used replacement workers in the face of our warnings or threats of violence".

[87] The trial judge found Warren's motivation to be to "do something significant to shut the mine".[158] He found that "killing by an unlawful act is but an elevation or extension of the threats to kill".[159] The trial judge found that Royal Oak had created, increased or could manage the risk arising from using replacement workers,[160] but the only sense in which it "created the risk" was that it continued to use replacement workers in the face of the threats. Royal Oak was liable because it was "wilfully blind to the clear and present dangers underground",and failed "to secure and warn",[161] but the only need to "secure" arose because of the deliberate threats of violence. He held that the mining inspectors should have used their powers to shut down the mine because it was unsafe,[162] where the

[157] In the ***Air India*** case the police had apparently developed some intelligence that a bomb may have been planned, but there was no discreet threat made respecting Air India Flight 182, no warning was received, and no discrete "demand" for action that would eliminate the threat was made: ***Air India Flight 182 Disaster Claimants v. Air India*** (1987), 62 O.R. (2d) 130.

[158] Trial Reasons para. 812.

[159] Trial Reasons para. 811

[160] Trial Reasons paras. 706-7.

[161] Trial Reasons paras. 710, 719.

[162] Trial Reasons paras. 825, 833, 836.

only source of that unsafe condition was the threats that had been made. He implied that by continuing to allow operation of the mine with replacement workers in the face of these threats, in circumstances where the appellants could not or did not seal off the mine from intrusions, the appellants were in breach of a duty in tort.

[88] As a matter of policy, what effect should threats like this have on the existence of a duty of care in negligence? Threats of bodily harm create extremely difficult situations for the police, security officials, governments, and others who must deal with them. Agonizing decisions must be made. Should one give in to the threats, thereby undermining the rule of law, and encouraging further such acts? On the other hand, how can one stand by and watch the loss of innocent human life? As Lord Phillips, MR said:[163]

> In this case the Tribunal is proposing to carry out in Londonderry a peaceful activity that is not merely lawful but in the public interest in that it is designed to be part of an effective inquiry into the deaths that were caused on Bloody Sunday. The soldier witnesses' application raises the issue of whether, and in what circumstances, Article 2[164] can require a public authority to desist from a lawful and peaceful activity because of a terrorist threat. We are not aware of any Strasbourg jurisprudence that bears directly on this question, but we think that its answer must turn on matters of fact and degree. If, for example, a credible bomb threat is received in relation to a building where a court is sitting, we think that Article 2 would normally require the court to be cleared while the threat was investigated. At the same time, the desirability of carrying on lawful activities in a democracy can constitute compelling justification for continuing to do so despite terrorist threats, leaving it to the security agencies to do their best to provide protection in conformity with their *Osman* duty.

These situations create difficult political and tactical decisions, for which the law of negligence may not provide answers. Public officials must obviously be accountable for the way that they respond to threats; the issue is whether they should be accountable through the law of torts. It is arguable that imposing a duty in tort could actually increase the leverage that the threatener has. For policy reasons it may be that there should be no duty in tort to yield to threats. On the other hand, knowledge of threats made against a class like the replacement workers could be seen as one of the factors giving

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[163] ***R. (A.) v. Lord Saville of Newdigate***, [2001] EWCA Civ 2048, [2002] 1 W.L.R. 1249 at para. 17

[164] *The Convention for the Protection of Human Rights and Fundamental Freedoms*, s. 2(1) reads in part: "Everyone's right to life shall be protected by law."

rise to the proximity needed to found a duty of care toward those workers. Whether the response to those threats was appropriate would then be dealt with as an issue of standard of care.

[89] In ***Childs***[165] the Court identified some exceptional situations where the defendant is required to take positive steps to prevent damage to the plaintiff:

> Running through all of these situations is the defendant's material implication in the creation of risk or his or her control of a risk to which others have been invited. The operator of a dangerous sporting competition creates or enhances the risk by inviting and enabling people to participate in an inherently risky activity.

This principle does not, however, extend to making the defendantliable for everyrisk that is inherent in a public activity. The defendant is only liable for those risks within its control, or that it has created, and the law does not require the defendant to completely shut down the public activity to eliminate the possibility of intentional criminal acts of other persons. Threats of criminal activity would appear to engage similar considerations.

[90] However, as noted above the issue was neither raised before us by counsel, nor identified in the court below. It is one of many policy considerations at play on these facts, and it is unnecessary for us to reach any final conclusions on it to dispose of the appeals.

Conclusion on Duty to Prevent the Torts of Others

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[165] At para. 38.

[91] It is difficult to find in the case law a unified test to use in determining if one person (the ancillary torfeasor) has a duty in tort to prevent the torts of another (the immediate tortfeasor).[166] The analysis of foreseeability, proximity, and residualpolicy considerations does not yielda clear answer. There is no readily discernable pattern in the previously identified categories where one defendant has been found liable for failing to prevent the tort of another. The issue arises in relatively few cases, and few courts have attempted to set out the general principles to be followed. Two themes however emerge from the cases finding an ancillary tortfeasor liable for the torts of others: a special relationship with the plaintiff, or an element of control over the immediate tortfeasor.

[92] In ***Childs***, McLachlin C.J.C. wrote for the whole Court:

> 31. . . . Duties to take positive action in the face of risk or danger are not free-standing. Generally, the mere fact that a *person faces danger*, or has *become a danger to others*, does not itself impose any kind of duty on those in a position to become involved. . . .
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> 39. . . . The law does not impose a duty to eliminate risk. It accepts that competent people have the right to engage in risky activities. Conversely, it permits third parties witnessing risk to decide not to become rescuers or otherwise intervene. It is only when these third parties have *a special relationship to the person in danger or a material role in the creation or management of the risk* that the law may impinge on autonomy. . . . (emphasis added)

In these quotes the "person facing danger" is the potential plaintiff to whom the duty would be owed. The person who has "become a danger" is the immediate tortfeasor. In the context of responsibility for the torts of others, the persons who "might become involved" are the potential ancillary tortfeasors, who might owe a duty to the plaintiff to stop the immediate tortfeasor.

[93] The second sentence in this extract from para. 31 of the judgment in ***Childs*** discusses the issue from two perspectives. Firstly, it takes the perspective of the plaintiff as someone "facing danger". Next, it views the issue from the perspective of the immediate tortfeasor as someone who "has become a danger". While the two paragraphs are not directly linked, a similar dichotomy is found in para. 39. It also first approaches the issue from the perspective of the potential plaintiff, by

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166 The law is described as "unstructured, unprincipled and incoherent" in C. McIvor, Third Party Liability in Tort, (Oxford: Hart Publishing, 2006) at pg. 1. See also G.H.L. Fridman, "Non-vicarious Liability for the Acts of Others" (1997), 5 Tort L. Rev. 102.

positing that the potential ancillary tortfeasor might have a "special relationship" with the plaintiff that would found the duty. Next it views the situation from the perspective of the ancillary tortfeasor having had a "material role in the creation or management of the risk" posed by the immediate tortfeasor. In other cases, this role in the creation or management of the risk is often put in terms of the ancillary tortfeasor having "control" over the immediate tortfeasor or the situation.

[94] One can therefore say that in most (if not all) cases where one defendant (the ancillary tortfeasor) is held to owe a duty to prevent the tort of another defendant (the immediate tortfeasor), there is either a *special relationship* between the ancillary tortfeasor and the plaintiff, or an element of *control by the ancillary tortfeasor over the immediate tortfeasor*, or some combination of the two. To quote Prof. Fleming:[167]

> Ordinarily, it is true, the law does not demand that one interfere with the activities of another for the purpose of preventing harm to him or strangers, but certain relations call for special assurances of safety in accordance with prevailing assumptions of social responsibility. Such a special relation may subsist either between the defendant and the injured person who is entitled to rely upon him for protection or between the defendant and the third party who is subject to the former's control. (emphasis added)

While an element of control between the ancillary and immediate tortfeasor can also be described in terms of a "special relationship", it is less confusing if this terminology is reserved for relationships between the plaintiff and the ancillary tortfeasor. Describing both of two quite different things as "special relationships" is unhelpful. The link between the ancillary and immediate tortfeasor is better described simply as "control".

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[167] The Law of Torts (9th ed.) (Sydney: Law Book Company, 1998) at pg. 168, and see Joachim Dietrich, "Liability in Negligence for Harm Resulting from Third Parties' Criminal Acts: *Modbury Triangle Shopping Centre Pty Ltd. v. Anzil*" (2001), 9 Torts L.J. 152 at pp. 161-63; M.I. Hall, "Duty to Protect, Duty to Control, and the Duty to Warn" (2003), 82 Can. Bar Rev. 645 at pp. 646-7.

[95] While there appears to be no comprehensive statement of what type of "special relationship" between the ancillary tortfeasor and the plaintiff will support a duty to prevent the torts of others, it logically requires more than the mere "proximity" that will otherwise support a duty in tort. If mere proximity were a "special relationship", then liability for the torts of others would not be a special category. The "special relationship" contemplates something more, where the plaintiff is particularly vulnerable and dependent on the ancillary tortfeasor for protection from the immediate tortfeasor.[168] Since the law "accepts that competent people have the right to engage in risky activities", the "special relationship" will usually contemplate a situation where the plaintiff is "not competent", or cannot withdraw from the danger created by the immediate tortfeasor, or where the ancillary tortfeasor has both a relationship with the plaintiff and knowledge of the danger, but the plaintiff does not have that knowledge.

[96] Some instances of "special relationships" supporting a duty to prevent the torts of others can be seen in the case law. For example, one type of case is where one parent is held liable for the sexual assault of a child by the other parent.[169] These cases engage both the "competence" of the child plaintiff and the inability of the child to withdraw from the danger created by the immediate tortfeasor parent. The child plaintiff is particularly reliant on the ancillary tortfeasor parent for protection. Another category is the prison assault cases.[170] Again the plaintiff has no ability to withdraw from the danger, because of his confinement in the prison. The prisoner assault cases have a dual aspect, because they are also situations where the corrections officials (the ancillary tortfeasors) have a significant amount of control over the immediate tortfeasor and the whole environment in which the torts occur. There is both a "special relationship" and "control". The ability to control the risk may well be a factor in all cases, because absent an ability to withdraw the plaintiff from that risk, the mere existence of a special relationship would not be sufficient to found a duty.

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[168] ***Leichhardt Municipal Council v. Montgomery***, [2007] HCA 6, 233 ALR 200 at paras. 124-5.

[169] See for example ***J. (L.A.) v. J.(H.)*** (1993), 13 O.R. (3d) 306, 102 D.L.R. (4th) 177; ***K.K. v. K.W.G.*** (2006), 40 C.C.L.T. (3d) 139 (Ont. S.C.J.); ***Hockley v. Riley***, 2007 ONCA 804, 88 O.R. (3d) 1 (C.A.) at paras. 17-8. A similar case involving a public authority is ***X. v. Bedfordshire County Council***, [1995] 2 A.C. 633, where no duty of care was found. See also M.I. Hall, "Duty to Protect, Duty of Control, and the Duty to Warn" (2003), 82 Can. Bar Rev. 645 at pp. 658-9.

[170] *Supra*, para. 64.

[97] The other fundamental characteristic of many of the cases exceptionally finding a duty to prevent the torts of others is "control"; this factor is emphasized in many of the leading cases that consider the issue.[171] The cases look for not only a legal right to control, but control in fact. These cases stress in addition the need for a high degree of foreseeablity, and a strong causal connection between the negligence of the ancillary tortfeasor and the tort. This is especially so when the legal right to control is not accompanied by actual control, as in the escaped prisoner cases; only torts that are immediately proximate to the negligence of the ancillary tortfeasor will found liability. It must be acknowledged that there are individual cases that are inconsistent with all these propositions.

Summary on Duty

[98] The essential issue on these appeals is which of the appellants (all ancillary tortfeasors) are liable for the intentional tort of Warren (the immediate tortfeasor). The traditions of the common law are inconsistent with any general rule that one person is liable for the torts of another; liability is exceptional. The policy behind the law of tort is against such liability. Simply being able to foresee the torts of another is not enough.[172] Liability is exceptionally found to exist when there is a "special relationship" between the plaintiff and the ancillary tortfeasor, or where the ancillary tortfeasor has some control over the immediate tortfeasor.

[99] There are potentially three relationships in these appeals that might be "special" enough to support a duty of the appellants to be responsible for the torts of Warren: employer and employee, regulator and worker, and occupier and invitee. None is sufficient. The existence of the strike and the resulting violence were notorious, as were the frequent trespasses onto the mine property; the appellants had no superior knowledge of these risks. The deceased miners were not particularly vulnerable or dependant on the appellants for protection; they could have exercised their autonomy and withdrawn from the danger at any time. As "competent people" they had "the right to engage in risky activities". While these relationships are sufficient to create "proximity" with respect to some risks, they do not extend far enough to qualify as a "special relationship" in this context.

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171 Such as ***Dorset Yacht***; ***P. Perl (Exporters)***, ***Lamb v. Camden LBC*** at pg. 644; ***Modbury Triangle Shopping Centre Pty Ltd v. Anzil,*** [2000] HCA 61, 205 C.L.R. 254 at paras. 107-113; see also L.C. Klar, Tort Law (3d) (Toronto: Carswell, 2003) at pp. 439-41.

172 ***P. Perl (Exporters) v. Camden LBC***, [1984] Q.B. 342 (C.A.).

[100] The second potential source of a duty is control. None of the appellants had any legal right to control Warren. None of them had control of him in fact; indeed Warren did all he could to avoid any control by the appellants. Arguments that the appellants could have "controlled the risk" by closing the mine assume an obligation to cease engaging in a lawful activity in order to eliminate all risk of injury. Absent any special relationship or control, there is no basis on these facts to find a general duty of care on any of the appellants to answer for Warren's intentional tort.

Duty to O'Neil

[101] For the reasons given above with respect to the Fullowka action, none of the appellants owed a general duty in tort to prevent Warren's intentional criminal act, either to the nine miners or to O'Neil. Even if a duty in tort were found to be owed to those who were actually injured, it would have required an even further extension of the duty to cover plaintiffs like O'Neil.[173] A duty of care between the immediate tortfeasor (in this case Warren) and potential rescuers (in this case O'Neil) would not necessarily require a similar duty of care between the ancillary tortfeasors (in this case the appellants) and the rescuer. The relationship is neither "close"nor "direct".[174] O'Neil's claim against all of the appellants must fail.

[102] In addition to finding a duty under the general ***Cooper*** analysis, the trial judge also found individualized circumstances that he held imposed a duty on particular appellants. Therefore, while we have concluded that generally no duty was owed in the circumstances, some more specific comments about the liability of the individual appellants is warranted.

Liability of Pinkerton's

[103] The trial judge found that Pinkerton's (like Royal Oak) was an occupier of the mine and therefore owed duties to the deceased miners. He did not inquire whether an occupier's duty extends to responsibility for the criminal acts of trespassers, and indeed he held that the finding that Pinkerton's was an occupier made it "unnecessary to apply the modified ***Anns*** test".[175] The trial judge also held that Pinkerton's was liable to the respondents for havinggiven assurances of safetyto the miners. An issue specific to the liability of Pinkerton's is whether a duty can arise from these factors, apart from an application of the ***Cooper*** test.

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173 ***Alcock v. Chief Constable of South Yorkshire Police,*** [1992] 1 A.C. 310; ***White v. Chief Constable of South Yorkshire***, [1998] UKHL 45, [1999] 2 A.C. 455, at pp. 484-5.

174 ***Hill v. Hamilton-Wentworth Regional Police Services Board***, 2007 SCC 41, [2007] 3 S.C.R. 129 at para. 29; ***Joudrey v. Swissair Transport Co.***, 2004 NSSC 130, 225 N.S.R. (2d) 156; ***White v. Chief Constable of South Yorkshire***, [1998] UKHL 45, [1999] 2 A.C. 455 at pp. 472-3, 493-4.

175 Trial Reasons para. 750.

[104] The respondents argue that Pinkerton's conceded it owed a duty and cannot resile from that concession on appeal. During oral argument at the trial, counsel for Pinkerton's said:

> My Statement of Defence says I have no obligation whatsoever, but, sir, I say to you my clients, Pinkerton's, in relation to what they were contractually bound to do and able to do pursuant to the terms of their contract and agreement, obviously had a Donoghue and Stevenson, Lord Atkin duty of care to their neighbours, and the miners who were there working were certainly neighbours within that. I do not suggest otherwise but we were not insurers. We had to take reasonable care to ensure that they were not harmed by foreseeable risks created by my client or anybody else. . . .

By this statement counsel obviously did not intend to concede liability. Earlier in his submissions counsel had argued strenuously that Warren's acts were *not* foreseeable, and he argued:

> In that scenario, sir, I submit to you that the Court is going to have to look long and hard at whether or not it ought to be making findings that people who had nothing specifically to do with the murder or murderer ought in some way to be found liable for those types of actions. I submit it goes against all that we have seen before.

During oral argument counsel are not able to measure their words with precision, and it would be unfair to interpret counsel's general words, taken out of context, as a formal admission that any duty owed by Pinkerton's extended to a duty to take reasonable steps to prevent Warren's tort.

Occupier's Liability

[105] The respondents argued, and the trial judge found, that Pinkerton's owed a duty to the miners, because Pinkerton's was an "occupier" of the mine. It was also recognized that Royal Oak was an "occupier".

[106] The Northwest Territories has not enacted occupier's liability legislation, so the liability of occupiers must be determined in accordance with the common law.[176]

[107] The common law generally recognizes that an occupier owes a duty to persons who enter onto the property. Some examples were previously discussed.[177] This is arguably nothing

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[176] Reliance on cases from jurisdictions which do have occupier's liability statutes is problematic, because some decisions may depend on particular definitions and provisions of the statute being interpreted.

[177] *Supra*, paras. 71-75.

more than a recognition of the proximity and foreseeability principles that underlie liability in negligence. The common law however identified different obligations of the occupier depending on the characterization of the plaintiff. Initially the duty to invitees extended to risks of which the occupier knew or should have known, while the duty to licensees extended only to risks of which the occupier had actual knowledge. Over time the duty to both classes of plaintiffs evolved to being close to the usual duty to take reasonable care.[178] Trespassers, on the other hand, were entitled to virtually no protection above what was termed "common humanity".[179]

[178] ***Slater v. Clay Cross Co. Ltd.***, [1956] 2 Q.B. 264 (C.A.) at pg 269; ***Preston v. The Canadian Legion*** (1981), 29 A.R. 532 (C.A.) at pg. 536.

[179] ***Veinot v. Kerr-Addison Mines Ltd.***, [1975] 2 S.C.R. 311.

[108] Rather than being seen as an adjunct or exception to the ***Cooper*** test, the category of "occupier's liability" can fairly be regarded as one manifestation of the analysis in that test.[180] Under the ***Cooper*** analysis, it is relevant to examine whether the common law has recognized the particular category of case as triggering a duty of care. Clearly the status of "occupier" is such a category. But holding that an occupier owes a duty of care to those on the premises does not define the scope of that duty, or particularly the risks it engages.

[109] The key to occupier's status at common law is to find "control over the premises".[181] One consequence of occupier status may be liability with respect to risks created by persons on the property. However, the discussion of "control" and "created risks" in the cases arises primarily with respect to the state of repair of, and other matters related directly to the physical premises; it is not generally directed at intentional acts that are unrelated to the premises *per se.* "Control" is not a homogeneous condition, and must be related to the type of risk in question. If the occupier is to be held liable for the acts of persons on the premises, particularly criminal acts, there must be this key element of "control" with respect to the acts of those persons. In many cases the occupier will not have control over tortfeasors on the premises, even though the occupiermay have control in a general sense over entry to or the state of repair of the premises. Even though the occupier can control who may enter the property, it may be unreasonable to impose liability on the occupier if someone enters not only without the consent, but against the express wishes of the occupier. Liability after that point may depend not on a duty to keep the immediate tortfeasor off the premises, but on a duty to control the immediate tortfeasor who has secretly entered the premises and who is beyond the actual control of the occupier.

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180 ***Stacey v. Anglican Churches of Canada*** (1999) 182 Nfld. & P.E.I.R. 1 (Nfld. C.A.); ***Wheat v. E. Lacon & Co. Ltd.***, [1966] A.C. 552 at pg. 578.

181 ***Wheat*** at pp. 578-9.

[110] The trial judge held that Pinkerton's and Royal Oak were co-occupiers of the mine. There is no rule that only one person can be an occupier at any one time, although the presence of more than one occupier will affect the scope of the duty that each owes to the plaintiff.[182] But for there to be two co-occupiers requires that each of the occupiers is acting in its own right, and that one is not simply the agent of the other.[183] For example, if the owner of property hires a watchman to stand by the gate, the watchman is not an occupier just because he can control entry to some extent. The watchman has no independent right or mandate with respect to the property, and is there merely as a part of the occupation of the owner.[184] In ***Wheat,*** the wife of the owner's manager was assumed to be a co-occupier because she was taking in paying boarders on her own account, and independently of the manager's employment by his owner-employer.[185] In contrast, Pinkerton's had no property interest in the mine, no separate mandate about the premises, and no occupationor control other than as the agent of Royal Oak.[186] Pinkerton's presence on the land was totally derivative of the possession of its principal. Pinkerton's was not an occupier. Any duty owed by Pinkerton's must be derived from an application of the ***Cooper*** test, and not simply by labeling it an "occupier".

[111] Pinkerton's clearly owed one duty to secure the mine, but it was a duty in contract, and it was owed to Royal Oak. The suggestions by the trial judge that Pinkerton's did not comply with its own internal policies, or discharge its obligations to Royal Oak under the contract to secure the mine properly, are somewhat beside the point. While the existence of a contract will often be relevant to the proximity analysis, the existence of a contract does not necessarily create a duty in tort. Pinkerton's was able to negotiate certain limitations on its liability in the contract with Royal Oak.[187] Pinkerton's was unable to negotiate any limitations on its liability with the miners that Royal Oak employed to work in the mine. The proximity between Pinkerton's and the respondents arose because of that

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[182] ***Wheat*** at pp. 585-6.

[183] ***Bennett v. Kailua Estates Ltd.*** (1997), 29 B.C.L.R. (3d) 281, 32 C.C.L.T. (2d) 217 (C.A.) at paras. 9-11, 16.

[184] ***Wheat*** at pg. 573-5.

[185] ***Wheat*** at pp. 573-5 per Viscount Dilhorne, Lord Pearce concurring. (Lord Morris of Borth-y-Gest distinguished "vicarious occupation" by a principal through an agent with occupation on the agent's own account at pp. 584-5).

[186] The contract between Pinkerton's and Royal Oak confirms that the former had no independent mandate, and that it had no set assignment, but was just to "provide security services requested by" the latter on a *per diem* basis: Exhibit 824.

[187] The contract between Pinkerton's and Royal Oak specifically stated: "It is understood that Pinkerton's *is not an insurer*; that any insurance will be obtained and paid by the client and that if any piece of equipment as per listed above is damaged or lost, the client will reimburse same accordingly to Pinkerton's. *Pinkerton's makes no guarantee implied or otherwise that no loss or damage will occur or that the services provided will avert or prevent occurrences or losses.*": Exhibits 822, 824.

contract, and the respondents allege that their damage arose out of the performance of that contract by Pinkerton's. Whether Pinkerton's should be exposed to a greater liability towards the workers than it was towards their employer raises an important issue of policy.[188]

[112] One objective of the ***Cooper*** analysis is to ensure that it is "just and fair having regard to that relationship to impose a duty of care in law upon the defendant".[189] It is contrary to reasonable expectations to suggest that a security company, by accepting an assignment to protect premises, thereby potentially becomes responsible for all risks that materialize on the premises. This conclusion is particularly acute where the risk arises from the deliberate acts of a trespasser, especially one who has purposely set out to evade the security cordon.

[113] In the alternative, even if Pinkerton's was an occupier of the Giant Mine, its level of control over the premises, and therefore its "degree" of occupation, was very limited. Pinkerton's had little control over what was happening on the mine site and whether or how the mine itself would be operated. It did not make the decision to continue mining with replacement workers and had no ability to countermand Royal Oak's decision to do so. Its ability to control the mine site, and therefore its responsibility, was limited by the terms of its contract with Royal Oak and by Royal Oak's refusal to dedicate more resources to security. Pinkerton's primary assignment was to prevent certain persons from entering on the mine site, and to evict any of the prohibited class who managed to evade the perimeter security. Pinkerton's did not even have the authority to determine what that class of persons was; Royal Oak indicated which persons were not welcome on the mine site. If Pinkerton's did have any "control" over persons on the site, it was limited to screening people at the perimeter, to determine if they were within the prohibited class. Everything that Pinkerton's did or recommended with respect to the physical condition of the mine site was directed at this fundamental task. Even if this does to some extent make Pinkerton's an "occupier", whatever duties it owed must be limited by the very restricted type of control it had.

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[188] By analogy, the miners would not owe a greater duty to Pinkerton's than they would to their employer. See ***London Drugs Ltd. v. Kuehne & Nagel International Ltd.***, [1992] 3 S.C.R. 299.

[189] ***Cooper*** at para. 34.

[114] The suggestion that, absent some special factor, an occupier of land is liable for crimes committed on its land by others cannot be supported in principle or as a matter of practicality. As was said in ***Goldberg v. Housing Authority of the City of Newark***:[190]

> Everyone can foresee the commission of crime virtually anywhere and at any time. If foreseeability itself gave rise to a duty to provide 'police' protection for others, every residential curtilage, every shop, every store, every manufacturing plant would have to be patrolled by the private arms of the owner. And since hijacking and attack upon occupants of motor vehicles are also foreseeable, it would be the duty of every motorist to provide armed protection for his passengers and the property of others. Of course, none of this is at all palatable.

Generally speaking, absent some element of control, some special relationship between the occupier and the plaintiff, or some exceptional factor, the duty of the occupier does not extend to preventing the intentional criminal acts of persons on the premises. If a crime is committed on the sidewalk the law does not hold the municipality or the police liable to pay damages,[191] yet the proposition here is that if the crime takes place in the parking lot next to the sidewalk, the private owner is liable as occupier. In each case the crime is equally foreseeable, proximity is but a matter of slight degree,and the lack of control over the criminal is the same. It is anomalous to impose liability on the private owner.

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190 186 A. 2d 291 at 293 (1962, N.J. S.C.).

191 ***Hill v. Hamilton-Wentworth Regional Police Services Board***, 2007 SCC 41, [2007] 3 S.C.R. 129 at paras. 27, 120-21, 130-31; ***Hill v. Chief Constable of West Yorkshire***, [1989] A.C. 53.

[115] While we have concluded that Pinkerton's owed no duty, in the alternative we are satisfied that it met any standard of care that might be imposed. Pinkerton's was focussing all its resources on keeping trespassers like Warren out of the mine. Warren, on the other hand, was doing everything he could to circumvent Pinkerton's efforts. It was essentially a cat and mouse game, and Warren won because of a combination of the limited resources available to Pinkerton's, Warren's superior knowledge of the mine, and because he had control of when, where and how he would attempt his intrusion. Warren was not under the control of Pinkerton's. In these circumstances it is inherently unrealistic to expect that a security company like Pinkerton's should be responsible for Warren's conduct, simply because Warren was eventually successful in defeating Pinkerton's defences. Significantly, there is no Canadian case imposing liability on a security company in these circumstances. In ***Raywalt Construction Co. v. Bencic***,[192] it was argued that the plaintiff was contributorily negligent in not keeping the arsonist defendants out of its own property. The Court held:[193] "it is unrealistic to expect that potential victims could establish impenetrable shields around their property". The Court noted that this was akin to arguing "that the victim of that crime was at least partially 'the author of his own misfortune' or, worse, 'had it coming'." As discussed,[194] there are strong policy reasons, based in fairness, for not expecting one person to be responsible for the acts of another person who is not under the former's control and indeed is doing everything he can to avoid that control, but even assuming such a duty, Pinkerton's was not in breach of it.

[116] The trial judge implied that Pinkerton's should have withdrawn its services.[195] This suggests that Pinkerton's had a practical monopoly on suppling security services, which is an artificial assumption. The trial judge also found Pinkerton's liable because its presence on the site was insufficient.[196] But Royal Oak had decided to retain Pinkerton's only to a certain limited extent,

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192 2005 ABQB 989, 58 Alta. L.R. (4th) 266, 386 A.R. 230.

193 At para. 324.

194 *Supra*, paras. 78-89.

195 Trial Reasons para. 760.

196 Trial Reasons para. 758.

which, in the trial judge's view, left Pinkerton's as "a group of scheduled rovers whose schedulesthe strikers easily and quickly identified". Pinkerton's did recommend against cutting back the security force, but it could not force Royal Oak to spend more on its services than Royal Oak wanted to. Pinkerton's can therefore hardly be held liable because it did not have enough personnel on site.[197] The only alternative open to Pinkerton's would appear to have been to resign, which is not a reasonable basis upon which to make it liable for the acts of every trespasser who managed to pierce the security perimeter. That is particularly so when Pinkerton's actually sought out a replacement security company without success. This reasoning would turn everysecurity companyinto an insurer for the damage suffered by anyone on the premises.

Assurances of Safety and Assumption of Risk

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[197] ***Cross v. Wells Fargo Alarm Services***, 82 Ill. 2d 313, 412 N.E. 2d 472, (S.C. 1980) at pp. 475-6.

[117] The trial judge found that "assurances of safety" had been given by Pinkerton's to the respondents.[198] The trial judge also held[199] that Pinkerton's "assumed responsibility for safety and care for those to whom it was in close proximity, namely, persons in and about the mine site". He appears to have seen these as separate sources of duty.

[118] ***Cooper*** indicated that the proximity analysis is guided by a number of factors, including expectations, representations, reliance, and the property or other interests involved. Any expectations or reliance must be objectively reasonable; one party cannot impose a duty of care on another by unreasonable, subjective expectations or reliance.[200]

[119] Obviously, if the defendant and the plaintiff are closely enough connected that the defendant is in a position to give "assurances", it is likely that the plaintiff is "foreseeable" and a "neighbour" for the purposes of the duty analysis. Assurances given are relevant to the ***Cooper*** analysis. But, unless the assurance amounts to a "guarantee" or a covenant to indemnify, it does not itself form a cause of action. Just because the defendant has reassured the plaintiff that the situation is "safe", does not make the defendant an insurer for any damage that might result, absent a duty and negligence by the defendant. For example, assume that the defendant offers the plaintiff a ride on a slippery and icy day. When the plaintiff protests that the roads might be dangerous, the defendant reassures the plaintiff that "everything will be okay". If an accident subsequently happens, without negligence on the part of the defendant, the plaintiff cannot succeed simply because some "assurance" was given.

[120] This is analogous to the rule that the plaintiff does not give up any claim just because he or she voluntarily got into the car knowing of the risk. Words or actions about or surrounding the risk do not necessarily translate into legal obligations if the risk materializes. There is a difference between "assurances" of safety and "assumption of liability" for safety.[201] The situation might be

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198 Trial Reasons paras. 712-14, 758, 1245.

199 Trial Reasons paras. 756, 762.

200 ***McGauley v. British Columbia*** (1990), 44 B.C.L.R. (2d) 217 at pg. 232 rev'd other grounds (1991), 56 B.C.L.R. (2d) 1 (C.A.).

201 ***Dube v. Labar***, [1986] 1 S.C.R. 649 at pg. 658; ***Murray v. Bitango*** (1996), 38 Alta. L.R. (3d) 408, 184 A.R. 68 (C.A.) at para. 15, leave to appeal refused [1996] 3 S.C.R. vi.

different if the defendant had significantly more information than the plaintiff, or was holding back information, but that was not the case here. All knew that there was a violent strike on, with frequent intrusions into the mine. There also cannot be any breach of a duty to warn in these circumstances, because the respondents were obviously aware of the risks without a warning.

[121] Another factor at play here is the law's respect for the autonomy of individuals. Individuals are entitled to participate in risky activities if they so choose.[202] As these appeals show, this respect for the autonomy of individuals can lead to tragic consequences. The nine miners who crossed the picket line to return to work must have been aware that there was a strike underway, that there had been past acts of violence, and that there had been threats of future violence. The trial judge held that the circumstances were notorious and overt. While it was reasonable for the miners to expect that Pinkerton's would do what it could to mitigate the risks, they must have been aware that there had been incursions into the mine because of the graffiti that had been left. Notwithstanding any assurances of Pinkerton's and Royal Oak that they were "safe", they must have realized that they were still exposed to some residual risk. If they believed that they had an unconditional guarantee of safety, that belief was unreasonable. While "expectations, representations and reliance" form a part of the duty analysis, any expectations must be realistic and objectively reasonable. The nine miners could not have reasonably expected that the appellants could guarantee their safety from criminal acts of trespassers.

[122] In summary, there is no basis for imposing a duty on Pinkerton's to answer in damages for failing to take reasonable steps to prevent Warren's deliberate criminal act. There was no "special relationship" of vulnerability between the mine workers and Pinkerton's. Whatever control it had over the premises, Pinkerton's had no control over Warren, and Warren was doing everything he could to evade Pinkerton's. In any event, any duty that might apply did not extend to requiring Pinkerton's to provide greater resources or services than its principal was prepared to pay for and had contracted for.

Liability of the Government of the Northwest Territories

[123] The trial judge found that the GNWT owed a duty to the respondents because of the obligations of the mining inspectors under the *Mining Safety Act*. The trial judge found that the use of replacement workers during the strike created an unreasonable risk of violence to the miners and triggered a duty in the GNWT to shut down the mine. The trial judge also found that criminal acts, such as Warren's act in setting the bomb, were foreseeable, and that too triggered a duty in the

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[202] ***Childs*** at paras. 39, 45, quoted *supra*, para. 92.

GNWT to shut down the mine or take other steps to mitigate those risks.[203] The GNWT undoubtedly took on a duty to promote the safety of mines, but that was a statutory duty arising from its role as a regulator. The trial judge assumed that because there was a statutory duty to ensure the safety of the mine, there was a parallel duty in tort to answer for damages if anyone was injured in the mine. That is not necessarily the case. In order to determine if there was a duty in tort, the court must conduct the ***Cooper*** analysis.

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203 Trial Reasons paras. 796 - 839.

[124] Since the regulatory scheme is entirely statutory, whether tort liability arises from it must be largely a function of statutory interpretation. The proximate relationship between the respondents and the GNWT is created by the statute, and the statute is the primary source of the scope of the risks engaged by that proximity.[204] At the very least, tort liability cannot be inconsistent with the statutory scheme. For example, there is no provision in the Mining Safety enactments for the compensation of injured miners, which is an indication that it was not intended that compensation for injuries would arise from the operation of the mining safety regime.[205] It is true that the statute contains no provision granting the inspectors immunity from liability for damage arising from their acts, but this is at best a neutral consideration; such provisions in statutes are often inserted for clarity and in an abundance of caution only.

[125] While the existence of a statutory duty is relevant to the existence of a duty in tort, a threshold requirement is that the risk that materializes must be within the ambit of the statute. The principle is illustrated by ***Gorris v. Scott***,[206] which concerned a claim for the value of some sheep that were washed overboard. It was alleged that the sheep had not been confined in secure pens as required by the *Contagious Diseases (Animals) Act*, whereas if they had been so confined they would not have been lost. The Court noted that the purpose of the statute was obviously to contain contagious diseases, and it had nothing to do with sheep being washed overboard. As a result, the risk that materialized was completely extraneous to the statutory scheme, making the statute irrelevant to the duty analysis. In this case the trial judge placed great reliance on the provisions of the *Mining Safety Act*, and concluded that risks caused by intentional criminal acts were within the scope of the statute. A reading of the statute discloses, however, that it is concerned with accidents and workplace safety, and not with labour relations, crime prevention or criminal acts. The risk that materialized was completely outside the scope of the statute. Consequently, the *Mining Safety Act* did not fix the GNWT and its mining inspectors with the responsibility to reduce the risk of intentional criminal conduct. In the circumstances of this case, therefore, the statute does not create a relationship of proximity between the respondents and the GNWT that encompasses the risk that arose.

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[204] ***Cooper*** at para. 43; ***Syl Apps Secure Treatment Centre v. B.D.***, 2007 SCC 38, [2007] 3 S.C.R. 83 at para. 27; ***Stovin v. Wise***, [1996] A.C. 923 at pp. 952-3, 954-5.

[205] Such a scheme was present in ***Edwards v. Law Society of Upper Canada***, 2001 SCC 80, [2001] 3 S.C.R. 562 at paras. 15-17. See ***Cooper*** at para. 55.

[206] (1874), L.R. 9 Ex. 125.

[126] It is also apparent that the *Mining Safety Act* is not concerned with labour relations. When it was suggested during the strike that the mining inspectors should shut down the mine because of risks created by the use of replacement workers during the strike, they sought legal advice. They were advised that their jurisdiction did not permit them to get involved in labour relations issues. Labour relations were within the jurisdiction of the labour board, just as the prevention of crime was within the jurisdiction of the RCMP. The inspectors (as they were entitled to) decided to follow that advice, and thus declined to exercise their powers to close the mine. The trial judge was dismissive of their decision, calling it "buck passing".[207] The underlying assumption, that the inspectors not only had but were required to use their powers to solve labour relations problems, is erroneous. Moreover, it is difficult to conclude that liability should attach to the inspectors in these circumstances for seeking and relying on legal advice in good faith.

[127] Even if it could be argued successfully that the GNWT owed the miners a *prima facie* duty of care in respect of the injuries Warren caused, the reasons previously outlined[208] demonstrating why one person should not owe a duty in tort to prevent the intentional criminal acts of another person apply equally to regulators. There are also additional policy reasons why a regulator should not be held to owe a duty in tort to those participants in the regulated industry who might suffer damage. First of all, the statutory duties of regulators are primarily public in nature, and generally no duty is owed to any private individual.[209] The legislators that create regulatory regimes usually do not intend that those regimes include compensation for participants, unless that is expressly provided for. When compensation is part of the scheme, premiums or other fees are often charged to pay for it: see for

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207 Trial Reasons paras. 825, 838.

208 *Supra*, paras. 78-89.

209 ***Cooper*** at para. 44, 49; ***Burgess v. Canadian National Railway Co.*** (2006), 85 O.R. (3d) 798 (C.A.) at para. 5, leave to appeal refused [2007] 1 S.C.R. vii; ***Klein v. American Medical Systems, Inc.*** (2006), 84 O.R. (3d) 217 (Div. Ct.) at para. 24; C. McIvor, Third Party Liability in Tort, (Oxford: Hart Publishing, 2006) at pg. 99; N. Siebrasse, "Liability of Public Authorities and Duties of Affirmative Action" (2007), 57 U.N.B.L.J. 84.

example the workers' compensation systems. In this way the costs of regulation, and of accidents, are paid for by the regulated industry.[210]

210 ***Cooper*** at para. 55; ***Klein v. American Medical Systems, Inc.***, at para. 37.

[128] As previously noted, regulators have not generally been found to be liable for the intentional acts of members of the regulated industry.[211] Holding the Inspector of Mining responsible for the criminal acts of others would expose him to indeterminate liability, for events over which he has little control.[212] The trial judge relied specifically on ***Swanson Estate v. Canada***.[213] In ***Swanson Estate*** the plaintiffs sued Transport Canada for damages that arose out of an airplane crash. The Court allowed the claim, finding that Transport Canada had been negligent in its inspection and monitoring of the airline in question. In ***Swanson Estate*** the allegedly negligent acts were clearly within the scope of the statute, which had to do with airplane safety. The result may well have been different if the airplane had crashed because of an intentional criminal act by someone not under the control of Transport Canada. Any such intentional criminal act would clearly be outside the scope of the statute, and that is sufficient to distinguish this case from ***Swanson Estate***.

[129] One of the goals of tort law is to modify behaviour and encourage personal responsibility. The spectre of liability is intended to discourage negligence. However,regulators must exercisetheir powers in the public interest. Visiting them with financial liability might cause them to over-regulate or under-regulate in an abundance of caution, which would be contrary to the public interest.[214] Regulators should not be distracted from their statutory obligations by fears that they might be sued for their activities or inactivity. Regulators cannot answer to different masters and still discharge their public obligations.[215] Further, many regulatory schemes are designed to establish minimum standards, which by definition do not guarantee that all accidents and injuries will be prevented.

[130] Even assuming a duty was owed, the trial judge did not articulate the standardof care that the GNWT had to meet. He did however identify[216] some breaches of the occupational health and safety legislation that he described as "blatant acts of negligence". For example, he held that there was no evidence that Royal Oak "inspected escape exits at least once a month". It is unclear how that is relevant to this case. The inspection of escape exits is presumably to ensure that people can escape the mine in case of emergency. If the trial judge was implying that the inspectors should have ensured that Royal Oak had welded the exits shut, that would seem to be inconsistent with the regulation. This is akin to chaining shut the fire doors in a crowded nightclub. The trial judge also

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211 *Supra*, paras. 62-3.

212 ***Cooper*** at para. 54; ***Klein v. American Medical Systems, Inc.***, at para. 37.

213 [1992] 1 F.C. 408, 80 D.L.R. (4th) 741 (C.A.).

214 ***Stovin v. Wise***, [1996] A.C. 923 at pg. 958; ***X. v. Bedfordshire County Council***, [1995] 2 A.C. 633 at pg. 750.

215 ***Cooper*** at para. 52; ***Holtslag v. Alberta***, 2006 ABCA 51, 55 Alta. L.R. (4th) 214 at para. 38; ***Syl Apps Secure Treatment Centre v. B.D.***, 2007 SCC 38, [2007] 3 S.C.R. 83 at paras. 28, 41, 50; ***X. v. Bedfordshire County Council***, [1995] 2 A.C. 633 at pg. 739.

216 Trial Reasons paras. 730-33.

noted the regulation that every shaft must be securely fenced. This regulation is clearly intended to prevent people from falling into the shaft, not to deter people who are intentionally trying to trespass in the mine. Since Warren went out of his way to enter the mine notwithstanding any obstaclesput in his place, there is no basis for thinking that compliance with these regulations would have had any effect at all. Even the removal of the top flight of the ladder at the Akaitcho access point did not stop him.

[131] Just because the government creates a regulator to promote safety in an industry does not mean that the government thereby becomes the insurer of any and all damage that the regulator fails to prevent in that industry. The statutory duty to ensure safety in the mines does not automatically translate into a duty in tort, that is a duty to answer in damages to anybody who is injured in a mine regardless of the source of the injury.[217] The statute does not change the government from a regulator into an insurer just because with hindsight it appears that the inspectors could have ordered changes to the operations of the mine that might have prevented an intentional criminal act. Even if one assumes sufficient proximity between the Inspector of Mines and the miners to create a *prima facie* duty of care,[218] there is no basis in law to extend that duty to damage arising from intentional criminal acts.

[132] In the final analysis, the GNWT did not owe a private law duty of care to prevent the intentional criminal conduct of Warren. Whatever duties arise under the statute, they do not extend to preventing criminal acts, nor to labour relations issues. In any event, the record does not disclose any negligent conduct by the mining inspectors. The findings of liability made againstthe GNWT cannot stand.

Liability of the Union Entities

[133] The trial judge found that the national unions and the union locals are legally one entity, so each is effectively liable for the torts of the other.[219] The trial judge also held that CAW National "took over" and had *de facto* control of Local 4,[220] making the former liable for the torts committed in the name of the latter. The trial judge further held that the unions were vicariously liable for the actions of their members.[221] The liability of the union entities therefore depends on the answer to these threshold issues about their relationship to each other and to their members.

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217 ***Stewart v. Pettie; R. v. Saskatchewan Wheat Pool***, [1983] 1 S.C.R. 205; ***Stovin v. Wise***, [1996] A.C. 923 at pp. 952-3, 954-5.

218 See L. Klar, "*Syl Apps Secure Treatment Centre v. B.D.*: Looking for Proximity within Statutory Provisions" (2007), 86 Can. Bar Rev. 337 at pg. 340.

219 Trial Reasons paras. 862-7.

220 Trial Reasons paras. 197, 875, 883, 888, 891, 900, 917, 919.

221 Trial Reasons paras. 888, 905 ff.

Are the Unions a Single Entity?

[134] The first question is whether the various union entities are one suable entity or are separate and distinct entities in law. CAW National argues that the union locals have a separate existence from the national unions. The respondents argue that they are all one entity.

[135] There is only one union entity named as a defendant in the Fullowka action: "National Automobile, Aerospace, Transportation and General Workers Union of Canada, Successor by Amalgamation to Canadian Association of Smelter and Allied Workers; and the Said Canadian Association of Smelter and Allied Workers". This is the entity described by the trial judge as CAW National. The O'Neil action named as defendants each of Local 4, Local 2304, CASAW National and CAW National. It was agreed that the previous national union, CASAW National, merged with CAW National on July 1st, 1994. This was almost two years after the fatal explosion.

[136] Local 4 was affiliated with CASAW National. It was the local in existence at the time of the strike and the explosion, and it held the certification for the mine workers. When CASAW National merged with CAW National, Local 4 became CAW Local 2304, which acquiredLocal 4's bargaining rights. As mentioned, the Fullowka respondents did not sue Local4. In 1997 they commenced a fresh action against Local 2304, but that action was dismissed because of the expiry of the limitation period.[222]

[137] None of the union entities is incorporated. The separate legal existence of the corporation, and the recognition that members of a corporation are not liable for the obligations of the corporation, is now a well-established and important part of public policy.[223] If CAW National, CASAW National or the two Locals were incorporated, their position would be clear. This point distinguishes, for example, ***Civil Service Association of Alberta v. Farran***[224] where the union and its branches were by statute a single corporation.

[138] The law, on the other hand, has generally not recognized unincorporated associations as being suable entities. They have no separate legal existence in law and can only be sued by suing some of their members (usually the members of the executive) as representatives of the group as a whole. Notwithstanding this common law position, as society has evolved certain socially important unincorporated groups have emerged, Indian Bands and trade unions being two prominentexamples. The common law has accepted the reality of the situation and now recognizes trade unions as being

[222] ***Fullowka v. Slezak***, 2002 NWTSC 23.

[223] *Interpretation Act*, R.S.N.W.T. 1988, c. I-8, s. 17; ***Salomon v. Salomon & Co.***, [1897] A.C. 22.

[224] (1976), 68 D.L.R. (3d) 338 (Alta. S.C., App. Div.).

suable entities.[225] This is a common law development, built upon the statutory foundation of the various labour codes.

[139] The common law also recognizes locals of unions as being separate from national unions. In ***International Longshoremen's Assn., Local 273 v. Maritime Employers Assn***.,[226] the Court held:

> The Locals here were certified as bargaining agentsfor the employees concerned and as such acquired a clearly defined status under the statute. . . . In the result, the Association is a legal entity fully capable of bringing these proceedings; and the three Locals are likewise each legal entities fully capable at law of being added as a party defendant. . . . The Locals are legal entities capable of being sued and of being brought before the Court to answer the claims being made herein for an injunction prohibiting the participation in the activities found to constitute an illegal strike.

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225 ***Berry v. Pulley***, 2002 SCC 40, [2002] 2 S.C.R. 493.

226 [1979] 1 S.C.R. 120 at pp. 136-7.

This is binding authority that the locals are separate entities, which must be taken to have overruled earlier decisions to the contrary.[227]

[140] There are a number of reasons to reach this conclusion:

(a) the evolution of unions as separate suable entities is based on a statutory foundation, and the statutes generally grant bargaining certificates to the locals, not the national unions.

(b) local unions generally have their own executives and decision-making structures, and in accordance with the principles in ***Berry v. Pulley*** they should be recognized as separate entities.

(c) locals can enter into contracts, the most significant of course being collective agreements. Those agreements should be enforceable only by and against the local, not the national union or other affiliated locals.

(d) if locals and national unions are not separate entities, it would seem to follow that they have no separate rights to hold property. Not only would local and national entities be responsible for each other's obligations, it would appear that each local would be responsible for all the obligations of the other locals. This is a commercially unreasonable result.

The separate legal existence of local unions is now accepted as a reality in the labour community.[228]

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227 ***United Brotherhood of Carpenters and Joiners of America, Local 1338 v. Bradley*** (1999), 174 Nfld. & P.E.I.R. 104 (P.E.I.S.C.) at para. 46, which held to the contrary, did not cite ***Maritime Employers***.

228 ***Labourers' International Union of North America v. Penegal Trim & Supply Ltd.***, [1998] O.L.R.D. No. 3834 at paras. 81-3.

[141] The constating documents and organizational structureof the union will alwaysbe relevantto determining whether a national union and its locals are separate entities.[229] There will always be financial and other links between the locals and their national unions. In many cases members will automatically belong to both the local and the national, but overlapping membership is not sufficient to displace separate legal existence. National unions may well depend on dues remitted by their locals. The union constitution may well provide that if a local is wound up, any residual assets revert to the national entity. The national union may have a greater or lesser degree of control over the constitution and operations of the local. The CASAW National Constitution is noteworthy however for the fact that it explicitly recognizes the possessory rights of locals over their assets,[230] and stipulates that "[a]ll locals shall have the right to retain <u>their</u> assets and records and apply to the National Executive Board to secede from the National Union" to affiliate with another Canadian union or become an unaffiliated body.[231]

[142] In our view none of these factors that linked Local 4 and CASAW National is sufficient to displace the separate existence of the local and the national entity. All organizations have links of one sort or another with other organizations or individuals. All organizations are either controlled by their membership, or by other organizations, but that does not mean that they do not exist as separate entities. It is only prudent for any organization to have some rule as to what will happen to its assets if it ceases to exist; indeed such a rule is not needed if there is only one entity in existence.

[143] In conclusion, Local 4 was a separate legal entity from CASAW National. Local 2304 is a separate legal entity from CAW National. The trial judge's conclusion to the contrary is in error. CASAW National and CAW National are now one legal entity as a result of their merger. Local 2304, as the successor to Local 4, inherited all the debts and obligations of Local 4. There is no basis on this record to conclude that CAW National assumed the debts and obligations of Local 4 upon the merger of CAW National and CASAW National. CAW National (the only named defendant in the Fullowka action) is not liable for the debts and obligations of Local 4 or Local 2304.

<u>Vicarious Liability</u>

[144] Corporations are liable for torts committed in their names by their agents. They can also be vicariously liable for torts committed by their employees. It was argued that the union entities might be vicariously liable for torts committed by their officers and members.

[145] Vicarious liability arises out of certain relationships, such as the relationship of employer and employee. Vicarious liability is said to be "no fault" liability, because no independent tort by the

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[229] The relevant merger and constating documents are discussed in the Trial Reasons at paras. 852-3, 862.

[230] Section 4(b). See also, Local 4 By-Law, Articles 13, 15, 17(d).

[231] Section 13 [underlining added].

principal need be shown. If the individual tortfeasor commits a tort within the scope of a relationship that produces vicarious liability, and if such a relationship is established, then the principal is liable for the tort as well. This is not a true exception to the rule that no person is responsible for the torts of others, because the agent while acting in the course of employment is identified in law with the principal.[232]

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232 ***Bazley v. Curry***, [1999] 2 S.C.R. 534; ***Jacobi v. Griffiths***, [1999] 2 S.C.R. 570; ***671122 Ontario Ltd. v. Sagaz Industries Canada Inc.***, [2001] 2 S.C.R. 983, 2001 SCC 59; ***K.L.B. v. British Columbia***, [2003] 2 S.C.R. 403, 2003 SCC 51; ***Doe v. Bennett***, [2004] 1 S.C.R. 436, 2004 SCC 17; ***E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia***, [2005] 3 S.C.R. 45, 2005 SCC 60.

[146] As mentioned, vicarious liability is a consequence of certain relationships. It is established that the relationships of employer and employee and of principal and agent create vicarious liability. The relationship of contractor and subcontractor does not.[233] Neither does the relationship between the government and foster parents attract vicarious liability.[234] There may be situations of "near employment" that warrant vicarious liability. There are *sui generis* relationships, such as that between a priest and the diocese, that warrant vicarious liability.[235] The law starts, however, from the presumption that one legal entity is not vicariously liable for the torts of another.

[147] Relationships outside the traditional categories must be examined to see if vicarious liability will result.[236] First it must be shown that the relationship between the tortfeasor and the person against whom vicarious liability is alleged is sufficiently close to make vicarious liability appropriate. Second, the tort must be sufficiently connected to the tortfeasor's assigned tasks, such that the tort can be regarded as a materialization of the risks created by the enterprise of the person being held vicariously liable. The remoteness of the parties, the remoteness of the tort from the enterprise of the vicariously liable person, and the degree of independence of the tortfeasor are all important.[237] Consistent with the finding that the locals and the national unions are separate legal entities,[238] each would only be potentially vicariously liable for the torts of its own representatives. Thus, CAW National would be vicariously liable for the torts of its officers and employees, when those torts are committed within the scope of the business of CAW National. Local 4 would be

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233 ***Sagaz Industries*** at para. 33; ***K.L.B.*** at para. 20; ***Leichhardt Municipal Council v. Montgomery***, [2007] HCA 6, 233 ALR 200.

234 ***K.L.B.*** at paras. 23-5.

235 ***Doe v. Bennett*** at paras. 27, 32.

236 ***Bazley*** at para. 15.

237 ***K.L.B.*** at paras. 19-20.

238 *Supra*, paras. 134-43.

vicariously liable for the torts of its officers and employees, when those torts are committed within the scope of their employment by Local 4.

[148] The contentious issue is if and when the unions are vicariously liable for the acts of their members. The relationship between a member and his or her union is not characterized by the level of control, unity of purpose and proximity needed to generate vicarious liability.[239] Unions are not vicariously liable for the acts of their members *per se*. However, if a member of the union were given some specific task to do on behalf of the union, and during the course of and within the scope of that assignment the union member committed a tort, then the union could be vicariously liable.[240] The fact that the actor was a member of the union is, however, irrelevant. If the union had retained a non-member to do the same task, resulting in the same tort, the result would be the same because the union would be vicariously liable for its agent. Therefore, whether those responsible for the respondents' injuries were "members" of the national unions, or the locals, or both, is largely irrelevant. The true issue is whether the member in question committed a tort in the scope of some specific duty assigned to that member on behalf of the union.

[149] For example, if a member of the union executive, or even an ordinary member, were given responsibility for organizing the annual union meeting, and while doing that the membercommitted a tort within the scope of his assignment, the union would be vicariously liable. The result would be the same if the union member were given the responsibility of organizing the picket line. This does not mean that the union would automatically be vicariously liable for any tort committed by the assigned member, much less any tort committed by anyone at the meeting or on the picket line. Whether a criminal act committed by an employee is within the scope of employment is a matter of degree: compare the result in ***Bazley*** with the result in ***Jacobi*** and ***Oblates***. Obviously, if the assigned employee was expressly told to conduct a violent picket line, then the union would be not only vicariously liable, but directly liable.[241] The tort would be part of the enterprise of the union. If the member had been told to do everything reasonable to prevent violence, but instead the member had

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239 See ***K.L.B.*** at para. 20.

240 ***Leroux v. Molgat*** (1985), 67 B.C.L.R. 29 at para. 61.

241 ***Matusiak v. British Columbia and Yukon Territory Building and Construction Trades Council***, [1999] B.C.J. No. 2416, 22 B.C.T.C. 193 at paras. 71-81.

incited or personally engaged in violence, then whether any tort was within the ordinarycourse of the member's employment becomes a more difficult issue. There must be something about the assignment given to the member, and the way that assignment was carried out, that brings the eventual tort within the enterprise risk of the union. If the resulting tort was so closely connected to the given assignment that the union had to accept it as arising out of the risk of its enterprise, then again liability would result.[242]

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242 ***K.L.B.*** at para. 19.

[150] One of the accepted categories where one party is liable for the torts of another "is where a defendant intentionally attracts and invites third parties to an inherent and obvious risk that he or she has created or controls".[243] This would be direct, not vicarious, liability. But merely knowing that torts might be committed by members, who are to a large extent outside the control of the union, would not found liability. If a fight broke out at the annual meeting, the union would not be liable merely because it held a meeting, even if fights had occurred at past meetings.[244] Likewise, if the union set up a picket line, the union would not automatically be liable for any violence by ordinary members on the picket line, even though it is well known that violence sometimes occurs on picket lines.

[151] It is therefore not enough simply to determine that Warren was a member of one of the locals or one of the national unions to find them liable for the bombing. Likewise, it is not enough to simply demonstrate that other defendants, such as Seeton, Shearing, or Bettger, were members of the union, or even members of the executive of the union, to found liability in the unions. What must be determined is whether the conduct of these union members occurred during the discharge of assignments given to them by the union and whether any resulting tort was a materialization of the risks of performing those duties.

Usurpation and Secondment

[152] In this case it was further suggested that CAW National might be liable for the torts of Local 4, even if the two of them were separate legal entities. It was suggested that the provisionof financial assistance, or the involvement of CAW National employees in the business of Local 4, made CAW National responsible for the torts of Local 4 or its employees. It was also alleged that CAW National was liable because it "took over" Local 4; the trial judge found that Local 4 and its members were "completely enslaved" by CAW National.[245]

[153] There is a difference between:

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243 ***Childs*** at para. 35; ***Mainland Sawmills Ltd. v. United Steel, Paper etc. Workers International Union Local 1-3567***, 2007 BCSC 1433.

244 ***Childs*** at para. 33.

245 Trial Reasons paras. 197, 875, 883, 890, 900, 919.

(a) secondment of employees by one entity to another;
(b) providing moral or financial support to another entity;
(c) providing advice to another entity;
(d) inciting a tort or crime;
(e) "taking over" an entity.

The line between some of these may be fine (e.g. between (c) and (d)) but the legal consequences are significantly different.

[154] Secondment is a process by which one entity "lends" an employee to another. Suppose that a charitable organization requires technical help installing a new computer system, and a benevolent corporation seconds an employee with the necessary technical expertise to the charity. The seconded employee will likely stay an employee of the benevolent corporation but might also become an employee or agent of the charity. If the seconded employee commits a tort in the course of his employment with the charity, the issue arises as to which entity is vicariously liable for that tort: the charity, the benevolent corporation, or both? With secondment, if the employee commits a tort during his or her assignment, it is the secondee that should generally be liable, not the seconder. The risk that materializes is a risk of the secondee's enterprise, and the secondee has control of the project and the employee, and it is unreasonable to think that the seconder should not only provide the employee, but also be an insurer for his or her torts while on assignment.[246] Of course, if the seconder is in the business of "lending" its employees to others, the result is different.[247]

[155] Merely providing moral or financial support to an entity does not support vicarious liability. For example, if a benevolent corporation makes a large financial donation to a charity, knowing that the charity will use it to implement some particular program, the benevolent corporation does not become vicariously liable for any torts committed by the employees of the charity. If an employee of the charity were to assault one of the children under the care of the charity, the charity might be vicariously liable, but the benevolent corporation would not. Even if employees or officers of the benevolent corporation sat on the board of directors of the charity, that would not make the benevolent corporation vicariously liable. This simply flows from the recognition that suable entities are responsible for their own debts and obligations but not for the debts and obligations of others. It also flows from the principles underlying vicarious liability, particularly that each entity is responsible for the risks flowing from the enterprise of that entity, and from the control that each entity has over the tortfeasor. The fact that CASAW National or CAW National gave financial support to Local 4 does not itself make them liable for Local 4's torts.

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246 ***Denham v. Midland Employers Mutual Assurance LD.***, [1955] 2 Q.B. 437 (C.A.).

247 ***Mersey Docks and Harbour Board v. Coggins & Griffith (Liverpool) Ltd.***, [1947] A.C. 1; ***Hardisty v. 851791 N.W.T. Ltd.***, 2005 NWTCA 4, [2006] 4 W.W.R. 199, affm'g 2004 NWTSC 70, [2005] 5 W.W.R. 334.

[156] The vicarious liability analysis does not change simply because two entities might share common or overlapping goals. Assume that two not-for-profit organizations are both dedicated to the preservation of the environment. One entity gives funds or other support to the other, because the advancement of the donee's objectives is consistent with the donor's objectives. This is not, in and of itself, sufficient to create vicarious liability. Thus the fact that the Canadian labour movement generally, or a national union in particular, gives support to a local that is on strike does not create vicarious liability. The fact that the support might be given in pursuit of a common goal, such as the elimination of the use of replacement workers, does not change the analysis. However, if the funds were given knowing and intending that they be used for a tortious purpose, at some point the donor will become a joint tortfeasor.

[157] As just indicated, providing advice to an entity will not create vicarious liability. Inciting a tortfeasor to commit a tort will create liability but the liability will be joint and direct, and not vicarious.[248]

[248] See *infra*, paras. 160-63.

[158] It is theoretically possible for one entity to usurp the powers and resources of another and "take over" the latter, thereby making one responsible for the torts of the other. In extreme cases the "one man company" and its shareholder might become jointly liable under this scenario. But "taking over" must require more that just providing advice, or money, or seconded employees. It must amount to a usurpation of the decision-making function of the entity, or the use of the powers or resources of the entity for purposes that are inconsistent with the objects of that entity. Notwithstanding the general statements in the trial reasons to that effect, there is no evidence on this record that CAW National "took over" Local 4. Harold David was seconded by CAW National to help Local 4 during the strike, but he did so within the decision-making structure of Local 4, and with the consent of its executive, not in usurpation of its authority.[249] He acted as part of, and with the authorization of, the controlling minds of Local 4, not in defiance of them. Just because he was given some specific assignments that might otherwise have been given to Local 4 officers or members (e.g. head negotiator, media contact, etc.) does not mean that he or CAW National "took over" the Local. The result is the same as if Local 4 had hired a non-member off the street to perform these tasks. Just because the objectives David pursued (for example,opposing the use of replacement workers) were parallel objectives of both Local 4 and the national union does not amount in law to "taking over".

Inciting and Control

[159] The trial judge found liability on the part of the unions because they "incited and failed to control" their members.[250] These are two entirely different concepts.

[160] If one person incites another to commit a tort, the two of them are joint tortfeasors. In such cases the tortfeasor and the counselling party are identified as one, and they are jointly liable for the damage. If, for example, any union members (or the unions themselves) incited Warren to commit his tort, they would be jointly liable with Warren for the resulting damage.

[161] Incitement is not a separate tort. If tortfeasor A incites tortfeasor B to commit a tort, they are joint tortfeasors,[251] and in many cases there will be a conspiracy between A and B. It is necessary, of

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[249] Trial Reasons paras. 185, 189.

[250] Trial Reasons paras. 868, 878, 880-81, 917, 923, 954, 971.

course, to show that B owed the plaintiff a duty, if B's tort sounds in negligence, or by definition there would be no tort. But once that duty is shown, it is not necessary to find a duty on the part of A, either to B or to the plaintiff. No one has the right to incite another to commit a tort. Once A incites B to breach B's duty to the plaintiff, A is jointly liable.

[251] ***Credit Lyonnais N.V. v. Export Credits Guarantee Department***, [2000] 1 A.C. 486 at pp. 498-9.

[162] On the other hand, holding one person responsible for the torts of the other because of a "failure to control" is inconsistent with many principles of the law of tort, particularly in the absence of any legal or *de facto* control.[252] It is rare that liability would be found unless there was "control in fact", or at the least past control that was lost through the negligence of the ancillary tortfeasor. The trial judge failed to appreciate the important distinction between these two concepts of "incitement" and "control" and did not conduct any ***Cooper*** analysis before holding the union entities liable on this basis.

[163] The trial judge also confused the concepts of incitement, control, and vicarious liability:[253]

> Hargrove [the President of CAW National], self-describedas a person with a significant profile nationally and internationally, asked the Court to accept that, because of his exalted position, he, like Witte [the CEO of Royal Oak], was not fed details of the threats, vandalism and sabotage occurring during the strike and had no time for such minutiae. Perhaps that is so, but CAW National is deemed to have known that that, together with inadequate leadership and inflammatory statements, which Hargrove passes off as "strike talk" (in my opinion, wrongly), made CASAW Local 4, CASAW National and CAW National vicariously liable for the deviant acts of the strikers, including Warren.

The mere possession of knowledge, actual or inferred, does not support a finding of vicarious liability. "Inflammatory statements" might amount to incitement, but not vicarious liability. It seems unlikely that "inadequate leadership" is an independent tort, and it is irrelevant to vicarious liability unless the underlying relationship is one that engages vicarious liability.

<u>Duty to Bargain</u>

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252 *Supra*, paras.78-89.

253 Trial Reasons para. 888.

[164] The trial judge proceeded on the assumption that failing to bargain in good faith, or negligent collective bargaining, could be a source of liability in tort.[254] The duty to bargain in good faith is a statutory obligation arising in a very discrete context: labour relations. The labour relations statutes create specific remedies for a failure to fulfill this duty and establish a specialized tribunal to deal with any breaches. It is inconsistent with the labour relations regimes, and with the principles underlying the law of tort, to suggest that bargaining in bad faith also gives rise to remediesin tort.[255] Equally alien to the principles underlying the law of tort is the suggestion that "negligent bargaining" could make the negotiators liable (as ancillary tortfeasors) for the intentional torts of parties like Warren. The ***Cooper*** analysis would fail at the levels of foreseeability, proximity, and policy.

Local 4 and Local 2304

[165] Neither Local was named as a defendant in the Fullowka action, but both are defendants in the O'Neil action. Since Local 4 became Local 2304 as a result of the merger, they can be treated as one entity. As previously discussed,[256] the Locals would be directly liable if they conducted their business in a tortious way, for example, if they resolved to conduct their picket line tortiously. They could also potentially be vicariously liable for torts committed by their officersor memberswhile the latter were engaged in the ordinary course of their duties.[257] The trial judge found that Seeton committed torts while discharging his duties as an officer of Local 4, and the locals would potentially have been vicariously liable for his torts, if such liability had been pleaded.

[166] Merely creating background circumstances against which another person might commit a crime is not sufficient to found liability in tort. In ***Childs*** it was argued that creating an opportunity for consumption of alcohol was a sufficient act to found liability:[258]

> It is argued that they *facilitated* the consumption of alcohol by organizing a social event where alcohol was consumed on their premises. But this is not an act that creates risk to users of public roads. The real complaint is that having organized the party, the hosts permitted their guest to drink and then take the wheel of an automobile.

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254 Trial Reasons paras. 736-43, 882-87, 971.

255 By analogy, the Supreme Court has held that tort law should not be used to supplement family law, which is likewise founded on different policy considerations: ***Frame v. Smith***, [1987] 2 S.C.R. 99 at paras. 15, 43-4, 47-8.

256 *Supra,* para. 150.

257 *Supra,* paras. 148-150.

258 At para. 33. See also ***Lamb v. Camden LBC***, [1981] Q.B. (C.A.) 625 at pg. 642; ***Jones v. Shafer Estate***, [1948] S.C.R. 166.

Here it is argued that the Locals should be liable because their actions led to a strike, which set the stage for the picket line, and which resulted in violence. But the strike and the picket line did not pose any threat to the miners. The issue is whether the Locals did anything to incite, assist or enable Warren to commit his crime.

[167] The trial judge found that Local 4 and its leaders created an atmosphere during the strike that violence was an acceptable means to accomplish the strikers' goals, and that the law need not be obeyed. The possession and use of weapons and explosives was, at the very least, acquiesced in. Inflammatory statements were made. Dehumanizing and threatening comments about replacement workers were repeated and encouraged. At the same time, the union leaders lacked effective control over the members they were inciting. While statements were sometimes made against the use of violence, they were "couched in insincere words and glamour".[259] There was ample evidence on the record entitling the trial judge to conclude that Local 4 incited violence which led to Warren's tort. There are strong policy reasons for making unions responsible for violence on picket lines, given the apparent belief of some union members that such violence is a legitimate form of labour protest. But Local 4 and Local 2304 were not defendants in the Fullowka action. Local 4 and its successor Local 2304, are defendants in the O'Neil action, but for the reasons given they are not liable to O'Neil.[260]

The National Unions

[168] The trial judge held that both CASAW National and its successor CAW National owed a duty of care to the miners. While that may be so, for the reasons previously given that duty did not extend to preventing the intentional torts of persons beyond the control of the unions.[261] The trial judge also found, however, that certain of the union officers incited Warren to commit his tort while discharging their duties as union officers. Even if a duty to control Warren was not owed in tort, liability would be established based on the incitement of Warren.[262] Because the trial judge concluded that the

259 Trial Reasons para. 275.

260 *Supra*, para. 101.

261 *Supra*, paras. 91-100.

262 *Supra*, paras. 160-61.

Locals and the National Unions were one entity, he did not distinguish between those officers who were acting in their capacity as officers of the Locals, from those who were acting in their capacityas officers of the National Unions. Thus, generic findings of liability, such as those found in the Trial Reasons[263] are not helpful.

[263] At para. 905.

[169] The National Unions would potentially be directly liable if they conducted their business in a tortious way, or vicariously liable for the torts of their own officers or employees while engaged in the ordinary course of their duties. The National Unions are not vicariously liable for anything and everything their members (including Warren) did during the strike.[264] While Harold David was from time to time a representative of CAW National, during the strike he acted as a representative of Local 4, and CAW National is not vicariously liable for his conduct.[265] The defendant Basil Hargrove, an officer of CAW National at the relevant times, was only named as a defendant in the O'Neil action. The trial judge found no tortious conduct by Hargrove, which precludes any vicarious liability of CAW National for his activities.

[170] Ross Slezak was the national president of CASAW National, and all his activities during the strike were in the ordinary course of his employment. Slezak was only named personally as a defendant in the O'Neil action. CASAW National (and therefore as a result of the merger, CAW National) would be vicariously liable for any torts he committed.

[171] Slezak was only in Yellowknife on one or two occasions during the strike. There are only two passages in the Trial Reasons suggesting any tortious conduct by Slezak himself. At para. 1090 the trial judge stated:

> That so many strikers were so involved satisfies me that each of the unions, their executives including Hargrove, Slezak, Schram, Seeton and Shearing, certain rank and file members including Bettger, and CAW National interlopers such as David, *incited and inflamed the members of CASAW Local 4* and must share the blame for this conduct as I will set out herein. It does not lie in their mouths to now deny knowledge of what the others were doing, for the evidence clearly establishes that they did know, and, because they did know, they owed a duty to the workers at Royal Oak and their families, which they breached and attempted to hide from behind various rubrics, the most common being that the oral transmission of threats of bodily injury, death and destruction of property was mere rhetoric, or just "strike talk" to use Hargrove's definition. (emphasis added)

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264 *Supra,* paras. 148-51.

265 *Supra,* para. 158.

This passage is not sufficient to constitute a finding that Slezak himself incited Warren specifically. The passage suffers from the problem that the trial judge viewed all of the unions, all of their members, and all of their officers, as one entity for the purposes of determining liability. The passage does not clearly identify what Slezak personally did that incited Warren. The suggestion that mere knowledge that tortious acts might occur leads to liability for those acts if they do occur, is erroneous in law.

[172] At paras. 651-2 the trial judge stated:

> [651] Warren's act, on September 18 is not disputed and was a reaction to the negligent acts of other strikers, including Seeton, Shearing, Bettger, Legge and others referenced herein. He got caught up in the strikers' rhetoric, incitement on the line and strike bulletins, and, fueled by the union's aberrant urgings to cause the mine to shut down whatever the price that must be paid, he finally deciding [sic] that something significant had to happen to accomplish that end. His act carried out the wishes of his fellow strikers and was for many of them a commendable deed.
>
> [652] CASAW Local 4's president Schram, for example, said that, "we will do whatever we have to win, no matter who or what gets in our way". When Warren learned there would be no more offers or even negotiating, he became very depressed and angry. Then at the rally on June 7th, Slezak in addressing the crowd with Schram and Seeton, said Witte could expect severe confrontation on the "scab" issue. It was at this public rally that Warren made his threat in response to Conrad Lisoway's query. He became a pawn between Royal Oak and his union and his killing remark on June 7 was the beginning of a formulation of a plan that took shape as time wore on. Few paid any attention to Warren's remark, and some around him then would have described it as rhetoric, if asked.

These passages again assign collective responsibility to a number of people. Slezak's comment that "Witte could expect severe confrontation" cannot reasonably be read as an incitement to commit violent acts. The trial judge acknowledged that this comment, at most, preceded the "formulation of a plan that took shape as time wore on". There is nothing in this passage that would justify a finding of incitement or tortious conduct by Slezak. That precludes any vicarious liability based on his acts.

[173] The National Unions might alternatively be directly liable for conducting their business in a tortious way. The trial judge held that CAW National "incited or failed to control the union membership", and found liability on that basis.[266] As previously noted,[267] "inciting" and "failing to

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[266] Trial Reasons paras. 878, 880-81.

control" are different concepts. Whether CAW National (as an ancillary tortfeasor) is liable for the torts of the immediate tortfeasor (Warren) as a result of a "failure to control" requires a full ***Cooper*** analysis.[268] For the reasons previously given, there is no such duty.

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267 *Supra,* paras. 159-63.

268 *Supra*, paras. 42-6.

[174] If it were found that CAW National incited torts by Warren, then it would be jointly liable with Warren.[269] Such incitement would have to arise from the conduct of its "controllingminds", that is, its officers. The trial judge made findings to that effect, but the analysis is flawed in many respects. First of all, the trial judge proceeded on the assumption that CASAW National was responsible for the conduct of David, whereas David at all times acted as a representativeof Local 4. There was no finding of tortious conduct by any other representative of CASAW National or CAW National. Secondly, he proceeded on the assumption that Local 4 and CASAW National were but a single entity in law. Thirdly, much of the analysis assumes there is a duty in tort to bargain in good faith or not to bargain negligently,[270] which are concepts that are not supportable in law.[271] Fourthly, he rested liability, in part, on the mere provision of financial and moral support to Local 4. When these erroneous assumptions are removed from the analysis,there remains no clear factual findingby the trial judge of direct tortious conduct on the part of CASAW National.

[175] The trial judge was justifiably critical of the conduct of many of those who were involved in this strike. At para. 888 he stated:

> . . . but CAW National is deemed to have known that [threats and actual acts of violence], together with inadequate leadership and inflammatory statements, which Hargrove passes off as "strike talk" (in my opinion, wrongly), made CASAW Local 4, CASAW National and CAW National vicariously liable for the deviant acts of the strikers, including Warren. CAW National in the beginning did not enjoy a special relationship with the replacement workers,but it was a relationship on basic neighbour principles. Yet CASAW Local 4, CASAW National and CAW National executives displayed a total lack of human decency and respect towards the replacement workers. One could hardly imagine how persons in a civilized society could treat others, some of whom were friends, the way that some of the leaders and members dehumanized replacement workers.

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269 *Supra*, paras. 159-63.

270 Trial Reasons paras. 882-3, 971.

271 *Supra*, para. 164.

The conduct in question was morally unacceptable, but mere knowledge that violent acts may occur is not sufficient to found liability in tort, just because nothing is done to stop the tortfeasor. The neighbour relationship does not create liability for failing to prevent the torts of persons beyond one's control. It does not make the National Unions vicariously liable for everything its membersdo. Absent a finding of incitement or other tortious conduct by a representative of the National Unions within the scope of his employment, or a decision to conduct businessin a tortious way, liabilitydoes not arise. The findings of liability against CAW National cannot be supported.

Liability of Bettger

[176] Bettger was a striking miner who was found criminally liable for his conduct during the strike.[272] The trial judge also found him civilly liable for the respondents' damages and apportioned 1% of the responsibility to him.[273] Bettger launched an appeal from that finding, arguing that he was not liable on the facts of this case.

[177] The trial judge conducted a ***Cooper*** analysis to determine if Bettger owed a duty in tort to the respondents to answer for Warren's conduct. He concluded that Bettgerwas sufficiently proximateto the respondents, and that Warren's conduct was sufficiently foreseeable, to support a duty in tort. The trial judge found that Bettger fell into the established category(recognized in ***Cooper***) of liability where "the defendant's act foreseeably causes physical harm to the plaintiff". It was, however, Warren's act, not Bettger's act, that caused physical harm to the respondents, so Bettgerdoes not fall into this established category. Bettger's liability must have been ancillaryand must have arisen out of a duty on Bettger's part to exercise reasonable care to prevent Warren's tort. The trial judge did not note that it takes exceptional circumstances to make one party responsible for the tort of another,nor did he discuss the policy reasons that tend to negate any such duty.

[178] The trial judge also concluded[274] that Bettger owed a "duty to warn". The trial judge found, however, that the fact that there was a violent strike in progress was notorious in the community.[275] Therefore, those crossing the picket lines would have been aware of the existence of the picket line,

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[272] *Supra*, para. 10.

[273] Trial Reasons paras. 942-64, 1300.

[274] Trial Reasons para. 947.

[275] Trial Reasons paras. 7, 148, 225.

that there had been acts of violence, that there were frequent incursions into the mine as evidenced by the graffiti found underground, that there had been explosions and other acts of sabotage and vandalism, and that the perpetrators of much of this activity were unknown. In the circumstances, it is difficult to identify what warning Bettger was expected to give.

[179] The trial judge found that Bettger participated in many of the unlawful acts that occurred during the strike, and that Bettger "encouraged others to do the same, particularly by example".[276] As previously noted[277] no person has the right to incite another to commit a tort. If the trial judge had made a finding of fact that Bettger incited Warren to commit acts of violence, then Bettger would be liable as a joint tortfeasor. Further, if the trial judge had made a finding that Bettgerand Warrenwere engaged in a conspiracy or a common plan to commit acts of violence, then again Bettger would be jointly liable with Warren. There are, however, no such findings in the reasons of the trial judge. At most the findings are that Bettger set a bad example by committing crimes himself, and Warren may have known that.[278]

[180] The conduct of Bettger during the strike was obviously shameful and inexcusable. Short, however, of a finding that he incited Warren to set the bomb, there is no basis for finding Bettger liable. As unacceptable as his conduct was, he had no control over Warren, and for the reasons previously given it is not possible under ***Cooper*** to impose on him a duty to prevent the torts of other striking miners. Merely because both he and Warren were concurrently committing intentional torts with a view to the same objective is not enough to render him liable, even on the principles set out in ***Thorpe v. Brumfitt***.[279] While Bettger and Warren were both committing torts by reason of the same motivation, their torts were not otherwise temporally or geographically common.If, for example,the deaths had occurred during the riot of "Black Tuesday" the result would have been different. Bettger's appeals must be allowed.

Causation

[181] Our conclusions on duty of care provide a sufficient basis to allow these appeals and therefore dismiss the respondents' claims against Pinkerton's, the GNWT, CAW National and Bettger. However, the trial judge's analysis of causation occupied a central part of the argument on these appeals. The appellants argued strenuously that the trial judge erred in law in applying the wrong test of causation in the circumstances of this case. The Supreme Court of Canada has recently reconsidered the legal principles governing the analysis of causation in ***Hanke v. Resurfice***.[280] Accordingly, we address the appellants' legal arguments below.

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276 Trial Reasons para. 949.

277 *Supra*, paras. 160-61.

278 Trial Reasons paras. 954-61.

279 *Supra*, para. 39.

280 2007 SCC 7, [2007] 1 S.C.R. 333.

Trial Judge's Findings of Fact and Conclusions

[182] In discussing the general law on causation, the trial judge reviewed some of the leading authorities and said, "where tortious conduct causes or materially contributes to a plaintiff's injury, the defendant will be liable to the plaintiff".[281] He proceeded to quote passages from ***Athey v. Leonati*** [282] for the proposition that the general test for causation is the "but for" test, but where the "but for" test is unworkable, causation is established if the defendant's negligence materially contributed to the occurrence of the injury. He also noted that it is not necessary for the defendant's negligence to be the sole cause of the injury as long as the defendant is part of the cause of the injury.[283]

[183] Later in his reasons, the trial judge said that he did not disagree with the "but for" test nor with the material contribution test,[284] but then said elsewhere that, "the current test for causation is whether the defendant's negligence materially contributed to the injury or loss".[285]

[184] In fact, a careful examination of his reasons and his causation analysis with respect to each defendant demonstrates his reliance on the "material contribution" test as opposed to the "but for" test. This was not a case where the trial judge merely used the phrase "material contribution" colloquially, as was suggested by the respondents, while taking a robust and pragmatic view of causation that did in reality, if not in words, utilize the "but for" test.

[185] A brief review of the trial judge's causation analysis undertaken with respect to each defendant illustrates that the trial judge in fact applied the "material contribution" test. The trial judge's causation analysis with respect to each defendant was perfunctory and can be set out in full here.

a. Pinkerton's

[186] The trial judge analyzed causation with respect to Pinkerton's in two paragraphs:[286]

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[281] Trial Reasons para. 609.

[282] [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235.

[283] Trial Reasons para. 610.

[284] Trial Reasons para. 898.

[285] Trial Reasons para. 746.

[286] Trial Reasons paras. 765-66.

> There is no question there was a duty of care owed and breached, as delineated, *supra*, and I find that the breach materially contributed to the deaths of the nine miners for which Pinkerton's is responsible.
>
> Furthermore, I have discussed the drawing of adverse inferences for failure to call witnesses in a separate section of this judgment and will not repeat it here.

b. Government of the Northwest Territories

[187] The trial judge analyzed causation with respect to the GNWT in two paragraphs:[287]

> The GNWT Defendants said that, even if a duty of care in negligence is presumed, there is no causal link between such activities and the deaths.
>
> Pursuant to the detailed reasons set out above, failing to enforce the *Mining Safety Act*, *supra*, materially contributed to the deaths of the nine miners.

c. CAW National

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[287] Trial Reasons paras. 840-41.

[188] The trial judge analyzed causation with respect to CAW National in five paragraphs. The final three paragraphs contain the operative part of the causation analysis:[288]

> Counsel for CAW National argued that Warren had limited or no knowledge of the activities of the strikers or the role of CAW National; a consideration of all the facts indicates that both are incorrect. Warren was aware at all times of the mediations referenced herein. He read strike bulletins virtually daily, in which CAW National had involvement. Furthermore, how can CAW National make the second statement on the very heels of testimony by Warren of his discussions with and impression of David?
>
> In the beginning, there was no direct connection between the CAW National and Warren but CAW National saw opportunityas aforesaid and it seized on it, securing *de facto* control of CASAW Local 4. This occurred with significant funding to see CASAW Local 4 throughthe strike and by injecting CAW National's personnel into the matrix, to assume leadership, to "keep a good strike going" and to assist in labour relations.
>
> It was also suggested that all that CAW National can be identified with is writing to the Minister and providing financial support to CASAW Local 4. However, this is not in accord with the facts. I reiterate, it is the cumulative effect and the progression of the acts of negligence of all the Defendants, including CAW National, as delineated herein, that materially contributed to Warren's act.
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> d. Seeton and Shearing

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[288] Trial Reasons paras. 899-901.

[189] The trial judge analyzed causation with respect to Seeton and Shearing in one paragraph each:[289]

> For the reasons discussed above, and those provided in the section dealing with the liability of CAW National, I find that Seeton's conduct materially contributed to Warren's act.
>
> . . . Pursuant to the reasons discussed, *supra*, I find that Shearing's conduct materially contributed to Warren's act.

e. Bettger

[190] The trial judge analyzed causation with respect to Bettger in a somewhat more detailed manner. He found that Bettger's aberrant behavior, in combination with the aberrant behavior of others, progressively incited Warren to do his act.[290] He found it was irrelevant whether or not Bettger was aware of Warren's plan to plant a bomb.[291] He found there was evidence that Bettger influenced Warren. He noted that Bettger's activities were "well known and talked about with pride among the strikers, at the union hall, on the picket line and in the bars".[292]

[191] The trial judge accepted Warren's evidence that:[293]

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[289] Trial Reasons paras. 931, 940.

[290] Trial Reasons para. 954.

[291] Trial Reasons para. 955.

[292] Trial Reasons para. 956.

[293] Trial Reasons paras. 957-58.

> There was a lot of things that probably influenced a lot of people and I'm not going to say I wasn't influenced by something.

The trial judge found "Bettger's criminal activity and his boasts with others contributed to Warren appreciating that his turn must arrive since the acts of others had not succeeded in meeting the union's objective of shutting down the mine".[294] He found that Warren's act was "but a part of a series of connected criminal activities"[295] and concluded:[296]

> For the reasons herein, I find that Bettger's conduct meets the material contribution test required to find a sufficient causal connection.

General Principles of Causation

[192] One significant purpose of tort law is to compensate victims for the negligent acts or omissions of defendants. But tort law does not concern itself with negligence in the abstract. To found liability, the court must be satisfied on a balance of probabilities that the defendant's wrongful conduct caused the plaintiff's damage or loss. As simple a proposition as this may first appear, it has nonetheless proved exceedingly difficult for courts to apply consistently.

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[294] Trial Reasons para. 959.

[295] Trial Reasons para. 960.

[296] Trial Reasons para. 961.

[193] The "but for" test is the primary test of causation in negligence. It involves a hypothetical inquiry into the tortious aspect of the defendant's conduct. The plaintiff bears the burden to prove on a balance of probabilities that his or her injury would not have occurred but for the defendant's negligent act or omission.[297] As stated by Lewis N. Klar, in *Tort Law*:[298]

> . . . if the defendant's conduct can be shown to have been a necessary cause of the plaintiff's harm. . . the but for test is satisfied. Conversely, if the plaintiff fails to prove this on the balance of probabilities, the causal connection has not been established.

[194] The "but for" test ensures that a defendant will not be held liable for a plaintiff's injuries if they are due to factors unconnected to the defendant.[299] However,the plaintiffdoes not have to prove that a defendant was the sole cause of the injury: "there is more than one cause in virtually all litigated cases of negligence".[300]

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297 ***Hanke v. Resurfice Corp.***, 2007 SCC 7, [2007] 1 S.C.R. 333 at paras. 21, 22; ***Athey*** at pg. 466.

298 3rd ed. (Toronto: Thomson Carswell, 2003) at pp. 389-90.

299 ***Hanke*** at para. 23.

300 ***Hanke*** at paras. 19, 21; ***Athey*** at pg. 468.

[195] In exceptional circumstances, the "but for" test may be "unworkable", even though evidence supports the inference that the defendant's conduct *materially contributed* to the plaintiff's injury.[301] If it is "impossible" for the plaintiff to prove, due to factors outside the plaintiff's control, that the defendant's negligence caused the plaintiff's injury on a "but for" basis, and it is clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of the kind of injury suffered by the plaintiff, then liability may be imposed, according to basic notions of fairness and justice.[302] For example, where the limits of science make it impossible to prove on a balance of probabilities that the defendant's negligence was a necessary cause of injury, it may be appropriate to resort to the more easily satisfied "material contribution" test. When interpreted in that way, the test significantly lowers the proof requirement for causation.

[196] However, the "but for" test is not rendered unworkable simply because the hypothetical inquiry involves another persons's reaction to the conduct of the defendant as an element in the chain of causation.[303] Generally speaking, in these types of cases, the hypothetical inquiry focuses on whether the conduct of the other defendant acting reasonably would have diverted the third party from his or her intended course of conduct.

[197] Canadian trial and appellate courts have not applied the expression "material contribution" uniformly. In some cases, courts have used the phrase in the "conventional sense" to describe conduct that is a necessary, though not sufficient, cause of the injury.[304] In other cases, courts have used the phrase to invoke the less stringent test of causation.[305] The trial judge in this case rendered his decision before ***Hanke*** and therefore did not have the benefit of the Supreme Court of Canada's restatement and clarification of the law on causation.

[198] The appellants in this case argue that the trial judge erred in law by applying the "material contribution" test in circumstances where it was not warranted. They submit that had the trial judge

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301 ***Athey*** at pg. 466.

302 ***Hanke*** at para. 25.

303 See, for example, ***Walker Estate v. York Finch General Hospital***, 2001 SCC 23, [2001] 1 S.C.R. 647; ***B.S.A. Investors Ltd. v. Mosly***, 2007 BCCA 94, 283 D.L.R. (4th) 220, leave to appeal refused, SCC #32148; ***Wiebe v. Canada (Attorney General)***, 2006 MBCA 159, 212 Man. R. (2d) 99, leave to appeal refused [2007] 1 S.C.R. xvi; ***B.M. (sub. nom. "Mooney") v. B.C. (Attorney General)***, 2004 BCCA 402, 31 B.C.L.R. (4th) 61, leave to appeal refused [2005] 1 S.C.R. xiii; ***Ortega v. 1005640 Ontario Inc. (c.o.b. Calypso Hut 3)*** (2004), 187 O.A.C. 281, leave to appeal refused [2005] 1 S.C.R. xiv.

304 ***B.M.*** at paras. 187, 190 per Smith J.A.; Klar, Tort Law, at pg. 396.

305 ***Athey*** at pg. 466; ***Myers v. Peel County Board of Education***, [1981] 2 S.C.R. 21; ***Bonnington Castings Ltd. v. Wardlaw***, [1956] A.C. 613, and ***McGhee v. National Coal Board***, [1973] 1 W.L.R. 1.

employed the "but for" test, as he was required to do, he would not or could not have reached the same conclusion on liability.

[199] The respondents submit that although the trial judge frequently invoked the phrase "material contribution" in his reasons for judgment, a review of those reasons suggests that he actuallyapplied the "but for" test. Thus, they say, his findings on causation ought not to be disturbed. In the alternative, the respondents say the trial judge correctly applied the "material contribution" test, because it was impossible to prove what Warren would have done had the appellants not committed those negligent acts or omissions.

Standard of review

[200] A finding of causation is a finding of fact reviewable only for palpable and overriding error.[306] However, the appropriate legal test to determine causation is an extricable question of law reviewable on a correctness standard.[307]

Liability of the Appellants

[201] We have concluded that it is possible in this case to apply the "but for" test and that it is therefore neither necessary nor appropriate to apply the "material contribution" test. The "but for" test can apply even in cases where the hypothetical question requiresprediction of human reaction.In this case,[308] it was not "impossible" to establish on a balance of probabilities how Warren would

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306 ***Housen v. Nikolaisen***, 2002 SCC 33, [2002] 2 S.C.R. 235 at para.70, per Iacobucci and Major JJ., at para. 159, per Bastarache J. dissenting.

307 ***Athey*** at pg. 479***; St. Jean v. Mercier***, 2002 SCC 15, [2002] 1 S.C.R. 491 at paras. 33, 35, 98, 103; ***Meyers (Next Friend of) v. Stanley (sub.nom. Moscovitz)***, 2005 ABCA 114, 363 A.R. 262 at para. 19, leave to appeal refused [2005] 2 S.C.R. ix.

308 As in ***B.S.A. Investors Ltd. v. Mosly***, ***Wiebe v. Canada (Attorney General)***, ***B.M. (sub. nom. "Mooney") v. B.C. (Attorney General)***, and ***Ortega v. 1005640 Ontario Inc. (c.o.b. Calypso Hut 3)***.

have reacted had one or more of the appellants acted reasonably in the circumstances. It was possible to lead direct and circumstantial evidence sufficient to overcome the burden of proof concerning Warren's likely course of conduct.

[202] The trial judge's brief comments on causation do not attempt to ascertain whether Warren would have set the blast that killed the miners if any of the appellants had acted differently. No attempt to conduct a "but for" analysis is apparent from the reasons. We note that early in his reasons the trial judge comments on the role of the GNWT alone or together with the co-defendants.[309] We do not view this passage as an attempt to apply the "but for" analysis to the GNWT or to any of the other co-defendants. It underscores the concern that the actions of each defendant were viewed cumulatively or collectively rather than individually in determining causation. Moreover, this comment, if taken as a finding of "but for" causation, would conflict with the trial judge's subsequent, specific finding that the GNWT's negligence "materially contributed" to the deaths of the nine miners.[310] The "but for" test requires the court to consider whether a defendant's conduct was a *necessary* cause of the harm, not merely a *contributing* cause. Put another way, the trial judge should have considered whether Warren would have been diverted from his intended course of conduct if any of the appellants had acted reasonably.

[203] Thus, while it is evident that the trial judge was aware that there were two distinct tests for determining causation, he nonetheless concluded that the "material contribution" test was "the current test" of causation. In doing so, he failed to consider why the primary "but for" test was unworkable and, as a result, did not provide any justification for his acceptance of the more relaxed test of causation. In the context of this case, the failure to do so is reversible error.

[204] There is an additional problem with the trial judge's causation analysis. He did not ask whether each appellant's negligent act or omission was a cause of the respondents' harm. Rather, he considered the conduct of the appellants collectively, concluding that the actions or inactions of all the appellants combined to contribute materially to Warren's criminal act. This error in analysis is illustrated where the trial judge says, "it is the cumulative effect and the progression of the acts of negligence of all the Defendants . . . that materially contributed to Warren's act".[311] The error also finds expression later in his reasons where he writes: "Mr. Polsky's attempt to isolate Warren's act and argue that it be treated singly does not accord with the evidence. It was but a part of a series of connected criminal activities."[312]

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309 Trial Reasons para. 663 states in part: "I do not accept that the only evidence to support a causative link was provided by Warren. In the case of the GNWT Defendants, had they discharged their statutory obligations, as illustrated in more detail below, alone or together with discharge of their co-Defendants' obligations, Warren would have been deterred."

310 Trial Reasons para. 841.

311 Trial Reasons para. 901.

312 Trial Reasons para. 960.

[205] This was a fundamental error in approach. The proper application of the "but for" test to determine causation requires a consideration of each appellant's negligent acts and omissions in isolation from those of the other appellants. The trial judge's failure in that regard is also reversible error.

[206] Given our conclusions on duty of care, we will not attempt the task of reviewing the evidence, making findings of fact, and applying the test to those findings. Such a review by an appellate court would be problematic on this record given the volume of evidenceand the unresolved issues of credibility.

Other Issues

[207] The parties raised other issues. The appellants challenged the apportionment of liability between themselves. Pinkerton's argued that it was not liable to contribute to the respondents the share of their damages that they could not recover from Royal Oak by reason of the *Workers' Compensation Act*. The appellants argued that the trial judge should not have drawn adverse inferences from the failure to call certain witnesses. The appellants appealed and the respondents cross-appealed certain aspects of the damage award. In light of the conclusions we have reached,it is not necessary to express any opinion on these issues.

Conclusion

[208] To summarize, the appeals by Pinkerton's, GNWT, Bettger and CAW National are allowed, and both actions against them are dismissed. The cross-appeals are dismissed.

[209] The appellants may make written submissions on costs within 30 days of the date of these reasons. The respondents may reply within 60 days of the date of these reasons. The appellants' written briefs on costs should not exceed 10 double-spaced pages, and the respondents' written brief on costs should not exceed 15 double-spaced pages.

Appeal heard on October 15 and 16, 2007

Memorandum filed at Yellowknife, N.W.T.
this 22nd day of May, 2008

Costigan J.A.

Authorized to sign for Paperny J.A.

Slatter J.A.

Appearances:

J.M. Hope, Q.C./M. Atwal
for Pinkerton's of Canada Ltd.

P.D. Gibson/C.J. Pratt
for the Government of the Northwest Territories as Represented by the Commissioner of the Northwest Territories

L.S.R. Kanee/P. Nugent/S.M. Barrett
for the National Automobile, Aerospace, Transportation and General Workers Union of Canada

S.L. Polsky/H.A. Sanderson
for Timothy Alexander Bettger

J.P. Warner, Q.C./J.B Champion, Q.C./W.B. Russell
for Sheila Fullowka, Doreen Shauna Hourie, Tracey Neill, Judit Pandev, Ella May Carol Riggs, Doreen Vodnoski, Carlene Dawn Rowsell, Karen Russell, Bonnie Lou Sawler

J.E. Redmond, Q.C.
for James O'Neil

R.G. McBean, Q.C./D.P. Wedge
for Royal Oak Ventures Inc. (formerly Royal Oak Mines Inc.)

A-1-AP 2005000021

IN THE COURT OF APPEAL
OF THE NORTHWEST TERRITORIES

BETWEEN:

Pinkerton's of Canada Limited, The Government of the Northwest Territories as Represented by the Commissioner of the Northwest Territories, National Automobile, Aerospace, Transportation and General Workers Union of Canada, Timothy Alexander Bettger

Appellants/Respondents by Cross-Appeal

- and -

Sheila Fullowka, Doreen Shauna Hourie, Tracey Neill, Judit Pandev, Ella May Carol Riggs, Doreen Vodnoski, Carlene Dawn Rowsell, Karen Russell, Bonnie Lou Sawler

Respondents/Appellants by Cross-Appeal

- and -

James O'Neil

Respondent/Appellant by Cross-Appeal

- and -

Harry Seeton, Allan Raymond Shearing and Roger Wallace Warren

Respondents/Respondents by Cross-Appeal

- and -

Royal Oak Ventures Inc. (formerly Royal Oak Mines Inc.)

Respondent

MEMORANDUM OF JUDGMENT