



LAWSON LUNDELL LLP

Tort Law Update 2026: The Inaugural Edition

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1. Introducing the Tort Law Update

Lawson Lundell is starting a new tradition: the Tort Law Update.

This initiative is modeled on our annual [Contract Law Update](#), which many of our clients read every year and regularly return to as a resource.

Tort law is another area where developments in the law can have significant impact for business lawyers and clients. Therefore, we have decided to expand the annual update menu with a similar annual update on tort law. We hope that, like the Contract Law Update, it will become a valued resource for our clients.

In future editions, we will choose developments to cover based on the same approach as the Contract Law Update: we will focus on recent decisions (from the 12 to 18 months preceding the applicable update) relevant to commercial practice, including significant appellate decisions that change or develop tort law principles, any tort law decisions from the Supreme Court of Canada,² and decisions that illustrate existing tort law principles and how they apply in practice.

This first edition of the Tort Law Update takes a different approach. We start with a refresher on core tort law principles as they apply in the commercial context. (Readers who are familiar with those principles may want to skip that section.) We then delve into two topics that matter to commercial practitioners: recovery for pure economic loss and the impact of the Supreme Court of Canada's recent ruling in *Ahluwalia v Ahluwalia*,³ which has modified the test for recognizing new torts.

2. Tort law and commercial relationships

When we think about the law that governs commercial relationships, tort law is probably not the first area that comes to mind. We are more likely to think first of contract law—and for good reason. When people and businesses make deals and transactions with one another, usually they make contracts, and the rights and obligations between them are governed by the law of contract.

Nevertheless, it is important not to forget about the law of *non*-contractual civil obligations: that is, tort law. Tort law imposes duties on us that we owe automatically, without making a choice (as through a contract) to take them on. The basis of tort law is the recognition that all the things we do create risks that can affect other people and materialize as harm to other people. Tort law requires compensation for those harms, but only in specific circumstances.

For example, businesses have legal duties, independent of contract, not to put unreasonably dangerous products out in the marketplace so as to cause harm to consumers. Enterprises have a duty not to make excessive noise, or emit pollution, in a way that harms their neighbours' ability to use and enjoy their land. Restaurants and bars have a duty to take reasonable steps to ensure their patrons don't leave drunk and harm themselves or others on the road.

Business clients should be aware both of their potential exposure in tort law and of potential claims they

¹ I gratefully acknowledge the assistance of Dinah Leom, Eliza Malhi and Maddison Zapach in drafting this Update, as well as the valuable input of Lisa A. Peters, KC and Codie Chisholm.

² We use the terms "Supreme Court of Canada" and "SCC" interchangeably in this Update.

³ 2026 SCC 16.

could have against others whose actions cause them harm. It is particularly important for business clients to be properly advised of the *limits* of tort law in protecting purely economic interests. The law in this area can be different from what many people assume it to be. For example, if a business suffers lost profits because of someone else's careless or wrongful act, even if there clearly was wrongdoing, it is unlikely that the losses would be recoverable in tort law.

To understand the limits on protection for economic interests in tort law, it is helpful to divide tort law up into two broad categories: (1) negligence; and (2) various specific torts, sometimes called “nominate torts” or “intentional torts.”⁴

Negligence is a broad, flexible concept, which is continually being developed in the case law to recognize new situations where there can be liability. The foundation of modern negligence law is one of the most famous cases in the common law: the judgment of the House of Lords in *Donoghue v. Stevenson*.⁵ In *Donoghue*, Lord Atkin identified a general organizing principle: “You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.” Negligence means failing to take reasonable care and causing injury to another person. Traditionally, “injury” here meant either physical harm to the body (personal injury) or to property but did not include pure economic loss: that is, economic loss that does not flow from a personal injury or damage to property. Modern tort law has recognized some limited situations where pure economic loss can be recoverable in negligence, which we discuss below.

In addition to the broad category of negligence, there are specific **nominate torts**: a list of distinct and relatively narrow torts, each of which has a specific name and a specific list of criteria. The nominate torts include:

- ancient forms of action like battery, trespass, and assault;
- specialized areas like defamation; and
- economic torts, particularly relevant in the business context, such as:
 - unlawful interference with economic relations (when a defendant interferes with a plaintiff's economic interests by committing an unlawful act against a third party),⁶ and
 - inducing breach of contract (the defendant intentionally procures breach of a valid contract between the plaintiff and a third party).⁷

Courts are usually unlikely to recognize new nominate torts beyond those already established in the common law. One notable exception is torts related to invasion of privacy, which have been developed significantly in court decisions in response to new threats to privacy posed by technological advancements. In 2012, the Ontario Court of Appeal in *Jones v Tsige*⁸ recognized a new privacy tort, intrusion upon seclusion, and suggested that the right to privacy could ground three additional torts (public disclosure of private facts, false light publicity, and appropriation of the plaintiff's name or

⁴ These terms do not mean exactly the same thing; “intentional” torts, as the name suggests, include in their definition a mental element of intentional action, while “nominate” torts is used to describe the torts with specific labels and criteria. As a practical matter, the two categories largely overlap.

⁵ [1932] A.C. 562 (H.L.).

⁶ See *A.I. Enterprises Ltd. v Bram Enterprises Ltd.*, 2014 SCC 12 [*A.I. Enterprises*].

⁷ *Drouillard v Cogeco Cable Inc.*, 2007 ONCA 322; *Correia v Canac Kitchens*, 2008 ONCA 506.

⁸ 2012 ONCA 32 [*Jones v Tsige*]; *Sateri (Shanghai) Management Limited v Vinall*, 2017 BCSC 491.

likeness⁹). The law has continued to develop in this area, both in Ontario and in other provinces.

The nominate torts are distinct causes of action, each with its own established list of requirements that are usually difficult to meet. By contrast, negligence is a broader, more flexible principle that adapts to recognize duties in new contexts. As Lord Atkin said in *Donoghue v Stevenson*, “[t]he categories of negligence are never closed.” But the nominate torts are for the most part fixed and unlikely to change: the categories *are* closed. Each of them describes a narrowly defined route to liability in specific situations.

Putting these two things together—the law’s caution about recognizing duties of care in negligence for pure economic loss and the fact that nominate torts are mainly a closed list—the overall result is that tort law offers only limited avenues for recourse for economic harm. In negligence, recovery for pure economic loss is exceptional, although not impossible. There are nominate torts that protect economic interests, but they are narrow in scope.

3. Pure economic loss in tort law

(a) Why is economic loss treated differently in negligence law?

Why is recovery for negligently caused economic loss so limited in tort law? After all, losing money because of someone else’s wrongful or careless act may, intuitively, seem like a real injury that the law should recognize and for which the wrongdoer should have to compensate the victim. As with many legal questions, there is no one clear answer, but there are several different (and interrelated) rationales mentioned in the case law and by legal scholars:

- **Avoiding indeterminate liability.** There is a famous quotation from the great American judge Benjamin Cardozo from a case involving a claim of negligence against an accounting firm. Cardozo J. cautioned against imposing “liability in an indeterminate amount for an indeterminate time to an indeterminate class.”¹⁰ This warning is cited in almost every significant Canadian case on pure economic loss in negligence law. Why does recovery for pure economic loss increase the risk of indeterminate liability? When the kinds of injuries that are recognized are limited to physical injury or property damage, there is a kind of built-in containment of the loss; there must be a direct link from the wrongful act or mistake to the victim or his or her property. But the purely economic effects of an error can spread much further. For example, a negligent misstatement by an accountant (such as “this company is profitable”) can be published and repeated almost instantaneously, and the universe of people who might believe it and lose money as a result (by investing in that company when in fact it is insolvent and about to collapse, for example) is virtually unlimited.
- **Avoiding undue interference in the marketplace.** In *A.I. Enterprises Ltd. v Bram Enterprises Ltd.*,¹¹ the Supreme Court of Canada considered the scope of the intentional tort of unlawful interference with economic relations (also known as the unlawful means tort), confirming that this tort “should be kept within narrow bounds”¹² and that the law would not recognize principled exceptions to the established requirements for establishing this cause of action.¹³ Cromwell J. stated that there should be a “clear ‘control mechanism’ in this area of the law, consistent with tort law’s reticence to intrude too far into

⁹ The four categories come from an influential 1960 article by the American legal scholar William L. Prosser. See *Jones v Tsige*, at paras 16-19.

¹⁰ This quotation comes from an opinion written by Justice Cardozo in *Ultramares Corp. v Touche*, 255 N.Y. 170 at 179, 174 N.E. 441 (1931). It has been cited many times in Canadian tort decisions.

¹¹ 2014 SCC 12 (CanLII), [2014] 1 SCR 177.

¹² *Ibid.*, at para 5.

¹³ *Ibid.*

the realm of competitive economic activity.”¹⁴ Economic actors pursue their own interests vigorously in the marketplace, and it is a natural consequence that where they succeed their competitors and rivals will suffer harm in some sense—but usually not in a sense that the law recognizes as compensable.

- **Bodily integrity and property are more protected than economic interests.** The case law suggests that there is a hierarchy of rights, whereby “economic interests are viewed as less compelling of protection than bodily security or proprietary interests.”¹⁵ Protection from economic harm is “an important value,” but the law “has never recognized a sweeping right” to protection from such harm.¹⁶
- **In a commercial context, businesses can manage the risk of economic loss.** In *Martel*, the plaintiffs argued that they had suffered economic loss because the defendants had failed to provide them with important information in pre-contractual negotiations. The Supreme Court of Canada declined to extend the duty of care in negligence to this situation. Among the rationales it cited was the fact that “economic losses often arise in a commercial context, where they are often an inherent business risk best guarded against by the party on whom they fall through such means as insurance.”¹⁷ To allow recovery in tort would “interject tort law as after-the-fact insurance against failures to act with due diligence or to hedge the risk of failed negotiations through the pursuit of alternative strategies or opportunities.”¹⁸ Commercial actors can also protect themselves through contractual allocation of risk¹⁹ or just by actively looking out for their own interests—what the SCC called “self-vigilance.”²⁰

Bottom line: It is important for business clients to be mindful of the limited scope of tort protection for their economic interests, because this principle of tort law sometimes yields results that are different from what we might assume would happen or what we might think is fair. If a business suffers economic loss because of another party’s careless or wrongful actions, then the business might assume the law will force the person at fault to compensate the loss, even without a contract clarifying that the other party is responsible for the loss. But in most situations that assumption would be wrong. Clients who are properly advised on this point can make well-informed commercial choices about protecting their interests through contractual risk allocation, due diligence, and insurance.

On the other side of the coin, for a business that finds itself in the position of a potential defendant, the limited protection in tort law for economic interests can mean reduced exposure. If a business is the target of a non-contractual claim for compensation for lost profits or other purely economic loss, the claim is unlikely to be a real threat.

At the same time, it is advisable to be aware of new legal developments that could open up a way for creative plaintiffs’ counsel to advance novel theories for recovery. There is somewhat more uncertainty in this area following the SCC’s *Ahluwalia* decision, which appears to have made it somewhat easier to

¹⁴ *Ibid*, at para 44.

¹⁵ *Martel Building Ltd. v Canada*, 2000 SCC 60 (CanLII), [2000] 2 SCR 860 [*Martel*], at para 37.

¹⁶ *R.W.D.S.U., Local 558 v Pepsi-Cola Canada Beverages (West) Ltd.*, at para 72.

¹⁷ *Martel*, at para 37.

¹⁸ *Martel*, at para 68.

¹⁹ As the Supreme Court of Canada noted, the plaintiff’s claims amounted to an assertion that there was a duty to engage in contractual bargaining in good faith. Canadian courts had not recognized such a duty, and the *Martel* court left the question open for another time (*Martel*, at para 73). The British Columbia Court of Appeal recently issued a decision in a case that raised the question of whether the duty of honest performance applies to pre-contractual negotiations: *Ocean Pacific Hotels Ltd. v Lee*, 2025 BCCA 57. See the discussion of *Ocean Pacific* in the most recent [Contract Law Update](#).

²⁰ *Martel*, at para 68.

advance a novel claim in tort law. We discuss the *Ahluwalia* case in the last section of this paper.

(b) Pure economic loss in negligence: when is it recoverable?

To illustrate the limits on recovery for pure economic loss in negligence law, think back to 2021 when a container barge got stuck in the Suez Canal, blocking global trade routes and delaying shipments. That event caused billions of dollars' worth of economic harm to businesses who were expecting on shipments of goods that got delayed. The costs might include, for example, penalties or indemnities due because the business was delayed in meeting its own contractual commitments, or lost profits. In general, these economic losses would *not* be recoverable in Canadian negligence law, even if the barge crash and the delay were caused by someone's negligence. Businesses in that situation would have to absorb the loss themselves, unless they had some recourse to another party by contract, or unless the loss was covered by business interruption or similar insurance.

This type of loss is known in tort law as “pure economic loss,” as distinct from consequential economic loss. The losses are not caused by damage to any property *that the business owns*. Goods in shipment may not be the property of the buyer until they arrive, and, in any case, the goods are not damaged, just delayed. *Consequential* economic loss—for example, if the ship crashed into a dock and damaged it and the dock owner suffered lost profits as a result—is recoverable in negligence. *Pure* economic loss, by contrast, is economic loss that is not connected to a physical or mental injury to the plaintiff or to physical damage to the plaintiff's property. It is much more difficult to recover.

As Linden *et al* observe, recovery for negligently inflicted pure economic loss used to be “virtually unknown” if the plaintiff could not point to a contractual right to recovery; it was “assumed that such claims were actionable in contract, if at all.”²¹

That changed in 1963, when the House of Lords decided the *Hedley Byrne v Heller*²² case. *Hedley Byrne* recognized that such claims could potentially succeed outside of a contractual relationship, although the claim in that case failed. Since then, limited categories of recovery for negligently inflicted pure economic loss have made their way into Canadian law.

The Supreme Court of Canada set out a list of five such categories in *Winnipeg Condominium Corporation No. 36 v Bird Construction Co.*,²³ adopted from an article by legal scholar Bruce Feldthusen:²⁴

1. Independent liability of statutory public authorities;
2. Negligent misrepresentation;
3. Negligent performance of a service;
4. Negligent supply of dangerous²⁵ goods or structures; and

²¹ Linden *et al.*, *Canadian Tort Law* 13th ed. (LexisNexis, 2025), Ch. 8.

²² [1963] 2 All E.R. 575 [H.L.].

²³ 1995 CanLII 146 (S.C.C.), [1995] 1 S.C.R. 85 [*Winnipeg Condominium*].

²⁴ Bruce Feldthusen, “Economic Loss in the Supreme Court of Canada: Yesterday and Tomorrow” (1990–91), 17 Can. Bus. L. J. 356.

²⁵ This category was labeled “shoddy” or defective goods or structures in *Winnipeg Condominium* (as it was in Feldthusen's article) and in the case law prior to the Supreme Court of Canada's decision in *1688782 Ontario Inc. v Maple Leaf Foods Inc.*, 2020 SCC 35 (CanLII), [2020] 3 SCR 504 [*Maple Leaf Foods*]. In *Maple Leaf Foods*, the SCC confirmed that the category is limited to dangerous (not merely shoddy) products

5. Relational economic loss.²⁶

In the 2020 *Maple Leaf Foods* decision,²⁷ the Supreme Court of Canada said that the categories of pure economic loss *between private parties* have now effectively been reduced to three, because negligent misrepresentation and negligent performance of a service are treated as a single kind of pure economic loss and have merged into a single category.²⁸

Now the categories of pure economic loss incurred between private parties are:

1. Negligent misrepresentation or performance of a service;
2. Negligent supply of dangerous goods or structures; and
3. Relational economic loss.

It makes sense to consider the categories that apply between private parties separately from statutory liability of public authorities, because the liability of public authorities involves special considerations such as policy immunity or unique duties of care.²⁹

In this Update we will look at the three *Maple Leaf Foods* categories (those that apply between private parties): negligent misrepresentation, dangerous goods or structures, and relational economic loss.

(i) Negligent misrepresentation and negligent performance of a service

Cardozo J.'s warning in *Ultramares* against imposing "liability in an indeterminate amount for an indeterminate time to an indeterminate class" comes from a case where the plaintiff's claim—an unsuccessful one—was based on a theory of negligent misrepresentation. The events in that case took place more than a century ago, before modern regulation of investment, securities, and auditing, but the issues are similar to those that can arise in today's capital markets.

A company hired an accounting firm to prepare and certify a balance sheet showing that it was financially strong. In fact, the managers had falsified the books and the company was insolvent. The certified balance sheet was used to show lenders and stockholders that the business was a good investment. The plaintiff loaned money to the company on the basis of the inaccurate balance sheet. The company ended up going bankrupt and the plaintiff lost its money.

The Court agreed that the evidence showed the balance sheet was negligently made, but the plaintiff's claim did not succeed. The accountants had a duty under contract to the company that had hired them and a duty not to commit fraud, but as a matter of negligence law, they did *not* have a duty to third parties who relied on their negligent misstatement about the financial state of the company.

(see para 47). *Winnipeg Condominium* itself involved a building that was not merely substandard but dangerous.

²⁶ *Winnipeg Condominium*, at para 12.

²⁷ See note 24.

²⁸ *Maple Leaf Foods*, at paras 20-21. See also *Linden et al.*, at §8.02.

²⁹ *Linden et al.*, Ch. 8. On negligently caused pure economic loss generally, see Russell Brown, *Pure Economic Loss in Canadian Negligence Law* (LexisNexis, 2011).

A. The *Hedley Byrne* reliance principle

The English *Hedley Byrne* case established that in principle there *could* be liability for negligent misrepresentations, but only in limited situations: where negligent advice was given to someone who trusted and relied on the skill and judgment of the speaker or writer. The key factors are that the person making the representation undertakes a responsibility to the recipient, knows (or reasonably should know) that the recipient will rely on it, and the recipient reasonably acts in reliance on the representation to his or her detriment. The key principle is that there is no duty at large to all third parties who might act in reliance on the misstatement. A duty arises only if there is a special relationship between the parties where the representee is justifiably and foreseeably relying on the representor, and the representor has undertaken a responsibility to give advice or information that the representee will rely on.

In the *Hedley Byrne* case itself, the defendant (a bank, to which the plaintiff had made inquiries about the financial situation of a company it advanced credit to) had disclaimed any such responsibility. Therefore, no duty arose.

B. The *Hedley Byrne* principle in Canadian law

The Supreme Court of Canada has adopted the *Hedley Byrne* principle that a cause of action for negligent misrepresentation can arise in the context of a special relationship of reliance. Two of the key SCC authorities that developed the doctrine are:

- ***Queen v Cognos Inc.***³⁰ Queen accepted a job with Cognos, a software company. During his job interview, the manager who interviewed him negligently misrepresented the nature of the job. He led Queen to believe that he would be working on a major project lasting two years (with enhancements and maintenance after that) and failed to make him aware that in fact, the project still had not received budgetary approval. The SCC confirmed that the *Hedley Byrne* principle was well established in Canada and that there was a special relationship between the parties such that Cognos, through its representative, owed Queen a duty of care. The fact that there was a subsequent contractual relationship between them as employer and employee did not affect the tort law duty, which was completely independent of the contract.
- ***Hercules Managements Ltd. v Ernst & Young.***³¹ Ernst & Young were the auditors of two related companies in the mortgage lending business. The appellants were shareholders in those companies. The companies went into receivership, and the investors sued Ernst & Young claiming that the audit reports for several years preceding the receivership were negligently prepared and the investors had lost money in reliance on those reports. The companies were closely held, and the auditors knew that these individual investors would rely on their reports. The SCC held that an auditor does owe its client a duty of care in the context of a statutory audit. But here it was not the client (the companies) that sued, but investors. La Forest J., writing for the Court, said that a “special relationship” exists when: (a) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (b) reliance by the plaintiff would, in the particular circumstances of the case, be reasonable. It is reasonably foreseeable that a wide range of people, including investors, will rely on audited financial statements. But in tort law the duty of care can be limited (or entirely negated) by policy concerns. Here, the relevant policy concern was avoiding unlimited liability. To avoid that, the Court limited the scope of the duty of care. A duty of care may exist where the person relying on the audit reports is using them for the specific purpose for which they were prepared. Here, the audit reports were prepared to assist the collectivity of shareholders of the audited companies in their task of overseeing

³⁰ 1993 CanLII 146 (S.C.C.), [1993] 1 SCR 87 [*Cognos*].

³¹ 1997 CanLII 345 (S.C.C.), [1997] 2 SCR 165 [*Hercules Management*].

management, not for the individual shareholders to rely on in making personal investment decisions. Therefore, in these circumstances, the auditors did not owe a duty of care to the investors.

C. *Livent*

The current leading Supreme Court of Canada authority on negligent misrepresentation and negligent performance of a service is ***Deloitte & Touche v Livent Inc. (Receiver of)***.³² *Livent* is (like *Hercules Management*) another case about the liability of statutory auditors. It arose following the collapse of *Livent*, a publicly traded live-entertainment company whose senior management had engaged in a years-long accounting fraud, disguising losses as profits and inflating assets. When the fraud was uncovered after a change in management, *Livent* went into receivership. The two founders, Garth Drabinsky and Myron Gottlieb, were convicted of crimes and served prison terms.

Deloitte, *Livent*'s auditor, had signed off on misleading financial statements despite increasingly evident red flags that the company was manipulating the books. *Livent*'s receiver sued Deloitte arguing that its negligent failure to detect the real situation at *Livent* had caused the life of the company to be artificially prolonged, causing more losses while *Livent* continued to operate. The receiver, standing in the shoes of *Livent*, sued Deloitte for \$450 million, bringing concurrent claims in contract and in tort.³³

In this case, Deloitte was found to be liable to *Livent*/the receiver. The amount of the award was only a fraction of the total amount the receiver sought, but nevertheless it was a significant sum, about \$40 million. In practice, since *Livent* was in receivership, that meant that Deloitte was liable to the receiver and, in turn, the money was available for the claims of *Livent*'s stakeholders. Even though that was the practical outcome, the case does *not* say that the auditors owed a duty of care to *Livent*'s investors. The investors were not in a close relationship with Deloitte such that they could reasonably have relied on Deloitte's representations in making their investment decisions. The practical result was that something was salvaged for *Livent*'s creditors, but the case does not mean auditors have a duty directly to creditors.

Rather, *Livent* underlines that the foundation of a duty of care under this heading is the *undertaking* of the defendant to provide information, advice, or services that it accepts the plaintiff will rely on. The scope of the duty is limited by the scope of the undertaking, including the purpose of the undertaking and to whom it is made. The defendant is only liable for the risk of injuries against which it undertook to protect: this is known as the "end and aim" rule.³⁴

The claims related to two distinct categories of misstatements by the auditors. The difference between the two was important. The first statements were in 1997: Deloitte prepared a press release and a comfort letter that *Livent* used in soliciting investment. The second was in 1998: Deloitte gave a clean audit opinion for *Livent*'s financial statements for the 1997 fiscal year.

For the 1997 press release and comfort letter, Deloitte was *not* liable, because they were prepared for *Livent* for the purpose of seeking investment. The receiver's claim was for losses that *Livent* sustained because it continued to stay alive artificially and lose more money. But the only losses that the receiver could have been compensated for would be losses due to failing to secure the investment—the purpose of Deloitte's undertaking. In fact, if Deloitte's statements had been accurate, the investment deals might not have gone ahead, so Deloitte's alleged negligence actually helped *Livent* to secure the investment and to prolong its existence.

³² 2017 SCC 63 (CanLII), [2017] 2 SCR 855 [*Livent*].

³³ *Livent*, at para 126.

³⁴ *Livent*, at para 31.

The 1998 clean audit opinion was different, because the purpose of the undertaking was different. This representation that Livent's accounts were in order was prepared to allow the shareholders collectively to supervise management and safeguard the interests of the corporation (the purpose described in *Hercules Management*). That was exactly the function that the shareholders were unable to discharge because of Deloitte's failure. Deloitte was therefore liable in negligence for the increase in Livent's liquidation deficit after the negligent audit (about \$40 million), which was the same amount for which it would be liable for breach of contract.³⁵

D. Negligent performance of a service

Cases involving negligent performance of a service "closely resemble the misrepresentation cases except that the service does not consist of providing information or advice. Instead, the negligently performed professional service manifests itself in an act, not by a representation."³⁶ As in the misrepresentation cases, the duty of care exists because the defendant has undertaken to do something and the plaintiff reasonably relies on the defendant to do it with due care. The two categories may exist in the same fact situation; for example, *Livent* was a case of both negligent misrepresentation and negligent performance of a service by the auditor.

E. Examples of the negligent misrepresentation/performance of a service category in action

- **Auditors' liability and engagement letters.** Deloitte was also involved in a long dispute over its auditing of Philip Services Corp., a company involved in a major accounting fraud in the 1990s. A syndicate of banks entered into a credit agreement to lend Philip \$1.5 billion USD. Philip defaulted after the accounting fraud came to light. The lenders' claim against Deloitte in negligence was dismissed on a motion for partial summary judgment by the Ontario Superior Court of Justice.³⁷ That decision was overturned on appeal to the Ontario Court of Appeal,³⁸ which noted that Deloitte knew the lenders would rely on the representations in the financial statements.³⁹ The Court ruled that the negligence claims should proceed to trial. Deloitte applied for leave to appeal to the Supreme Court of Canada. The SCC was due to render a decision on the application in 2017, not long after the *Livent* decision came out. Deloitte ended up settling with the plaintiffs. In 2017, the Ontario Superior Court of Justice approved a settlement for \$90,000,000 USD (\$121,896,000 CAD at the time).⁴⁰ Deloitte had argued that its engagement letter with Philip limited the purpose of its undertaking to assisting Philip's shareholders and management in their collective supervision of Philip's affairs, and the motion judge found that persuasive.⁴¹ The engagement letter included a standard statement that the purpose of Deloitte's engagement was to evaluate the fairness of presentation of the statements in conformity with generally accepted accounting principles and express an opinion on Philip's financial statements.⁴² But the Court of Appeal said the motion judge had erred by considering only Deloitte's subjective intention instead of interpreting the contract holistically.
- **Opioids litigation and consultants.** *McKinsey & Company, Inc. United States v British Columbia*⁴³ is an interesting case at the intersection of economic loss, negligent misrepresentation, and traditional

³⁵ *Livent*, at para 114.

³⁶ *Linden et al.*, at § 8.02.

³⁷ *Canadian Imperial Bank of Commerce v Deloitte & Touche*, 2015 ONSC 7695.

³⁸ *Canadian Imperial Bank of Commerce v Deloitte & Touche*, 2016 ONCA 922 [CIBC].

³⁹ *CIBC*, at para 25.

⁴⁰ *Canadian Imperial Bank of Commerce v Deloitte*, 2017 ONSC 5000.

⁴¹ *CIBC*, at para 70.

⁴² *CIBC*, at para 70 n. 3.

⁴³ 2024 BCCA 277 [McKinsey].

negligence liability flowing from physical harm to the victim. This case involved a claim by the Province of British Columbia to recoup the cost of health care benefits connected with the harms of opioids. There is an extensive prior history of litigation against the manufacturers and distributors of opioids, which is summarized in the decision. This case was different: the claim was against McKinsey, which was not itself an opioid manufacturer or distributor, but had been a consultant to opioid manufacturers and distributors.

The Province alleged McKinsey had designed marketing campaigns promoting the sale and distribution of dangerous opioids that misrepresented the dangers of the drugs, thus contributing to overprescription of the drugs and physical harm to end users. McKinsey moved to strike the claim, and Brundrett J. (as he then was), at the B.C. Supreme Court before his elevation to the Court of Appeal, dismissed the motion. The Court of Appeal upheld Brundrett J.'s decision that the claims should be allowed to move forward and be adjudicated based on a factual record developed at trial.

The Province was able to sue for recovery of health care costs under a statute, the *Opioid Damages and Health Care Costs Recovery Act*,⁴⁴ which expressly allowed it to sue a manufacturer, wholesaler or consultant to recover the cost of health care benefits caused or contributed to by an opioid-related wrong. Therefore, the first hurdle that the Province would ordinarily have faced in tort law—the fact that the losses it sought to recoup were pure economic losses—was removed by the statute. Had this statutory route not existed, the Province almost certainly would not have had a viable claim against McKinsey.

To recover under the statute, the Province had to show that the losses were caused by an opioid-related wrong as defined in the statute. Therefore, there had to be an underlying wrong that was either a tort committed by McKinsey that caused or contributed to opioid-related disease, injury, or illness, or a breach by McKinsey of a common-law, equitable, or statutory duty owed to persons in British Columbia who have used or been exposed to or might use or be exposed to an opioid product. If the Province could show that McKinsey had committed a tort against end users or breached a duty to end users, its claims could succeed.

McKinsey argued that the claims were bound to fail because it was plain and obvious that it did not owe a duty of care to consumers. McKinsey did not make or distribute the drugs but advised the companies that did. The Court of Appeal pointed out the difference in the way the negligence test for a duty of care is applied when the harm is physical versus purely economic, observing that the Province's allegations in this case were not analogous to the classic negligent misrepresentation cases because the harm suffered by the consumers was physical: "The common law more readily finds a duty of care based on reasonable foreseeability of harm where the defendant's actions caused bodily injury."⁴⁵ Even though the Province was seeking compensation of economic losses, its claim, by statute, was derived from an underlying wrong to consumers that was *not* purely economic and this affected the duty of care analysis.

The claims were allowed to go forward. In June 2025, the B.C. Supreme Court certified a Canada-wide class action against McKinsey Canada and its US parent brought by British Columbia on behalf of itself and other federal, provincial, and territorial governments to recover opioid-related healthcare costs.⁴⁶

⁴⁴ S.B.C. 2018, c. 35.

⁴⁵ *McKinsey*, at para 50.

⁴⁶ *British Columbia v McKinsey & Company, Inc. United States*, 2025 BCSC 1094.

- **Negligent misrepresentation via AI chatbot.** *Moffatt v Air Canada*⁴⁷ is a decision of British Columbia's Civil Resolution Tribunal where a claim of negligent misrepresentation was established based on inaccurate information provided by Air Canada's online AI chatbot. The claimant was looking for information about Air Canada's policy on bereavement fares. The chatbot indicated that the claimant could apply for the bereavement discount retroactively, after buying the tickets, which was not true. The Tribunal found that Air Canada owed the claimant a duty of care "given their commercial relationship as a service provider and consumer" and that it had failed to take reasonable steps to ensure that the chatbot's representations were accurate and not misleading. The decision does not have a detailed analysis of the elements of a duty of care in a *Hedley Byrne*-type situation or of why any steps Air Canada might have taken to ensure accuracy fell short of the standard of reasonableness. The brevity of the analysis is in keeping with the nature of the Civil Resolution Tribunal as an accessible forum for speedy resolution of small claims disputes.⁴⁸
- **Personal information data breaches and pure economic loss.** *Tucci v Peoples Trust Company*⁴⁹ is a decision concerning certification of a class action following an alleged hack of confidential financial information held by Peoples Trust. The defendant moved to strike or decertify claims for out-of-pocket expenses (e.g., for credit monitoring) because the claims were for pure economic loss. Masuhara J. held that it was not plain and obvious that the expenses were unrecoverable pure economic loss. The claim could succeed as one based on negligent performance of a service. In addition, the law remained unsettled as to whether the theft of the class members' personal information by criminals constituted an injury to the person or property damage, rather than pure economic loss.

F. Bottom line

Negligent misrepresentation (now combined with negligent performance of a service) was the first exception recognized to what was once a complete bar on recovery for pure economic loss in tort law. It remains a narrow category that is hard to establish. The critical ingredient is a special relationship between plaintiff and defendant, where the defendant has undertaken to provide a service or statements to the plaintiff that the plaintiff reasonably relies on. It can arise in the context of professional relationships, where a client relies on a professional to provide accurate advice or services that meet the standard of reasonable care.

Attempts to extend this type of duty to new contexts where it has not already been recognized will face an uphill battle, given the courts' concerns about indeterminate liability. The duty of care is limited not only by the relationship between the parties but also by the purpose of the undertaking. Reliance for a purpose that is outside the scope of the defendants' undertaking will not ground recovery because it is not reasonable.

This type of tort claim often arises where there is also a contractual relationship, either between the parties or among a network of people including the parties. If there is a contract directly between the plaintiff and the defendant, tort liability can arise completely independently of the contract, as in *Cognos*, or there can be concurrent liability in both tort and contract, if liability is not precluded by the contract.⁵⁰ Businesses that use technological tools to provide information, including tools powered by AI that

⁴⁷ 2024 BCCRT 149 [*Moffatt*].

⁴⁸ See Isabelle St-Hilaire, "Case Comment: Chatbot Makes Airline Liable: Negligent Misrepresentation in *Moffatt v Air Canada*," 2025 58:2 UBC L. Rev 591, 2025 CanLIIDocs 1963.

⁴⁹ 2023 BCSC 2004.

⁵⁰ The key authority is *BG Checo International Ltd. v British Columbia Hydro and Power Authority*, 1993 CanLII 145 (SCC), [1993] 1 SCR 12.

sometimes make unpredictable mistakes, can contractually limit their potential liability for any wrong information the tools may generate in the terms of service. In the *Moffat* case, Air Canada apparently did not raise any defence of contractual limitation of liability; its response to the claim appears to have been simply a boilerplate denial of any liability.

Service providers, professional advisors, and anyone who provides information that others could rely on should give careful consideration to how they can limit liability for reliance on their statements through contract. Contractual disclaimers and carefully drafted engagement agreements can foreclose arguments about the parties' objective intentions concerning the scope of the undertaking and can clarify what the advisor is accepting and not accepting in terms of the persons who can rely on the statements or services and the purposes for which they can rely. The limits may appear to be implicit in the nature of the engagement, but having to prove in court, for example, whether or not a defendant reasonably knew or accepted that third parties would rely on their work product, can be expensive and unpredictable. There may of course be statutory,⁵¹ regulatory, or professional ethical limits on the extent to which liability can be disclaimed by contract. Insurance coverage may be tailored to cover risk exposure beyond what can be protected against by contract.

(ii) Negligent supply of dangerous goods or structures

Canadian law sometimes allows for recovery in negligence for the costs of fixing a structure or a product that is so defective it poses a real and substantial danger of personal injury to the plaintiff or of damage to the plaintiff's property, even where the owner of the structure or product does not have a way to recover in contract such as a warranty claim.

This category of pure economic loss was originally defined by the Supreme Court of Canada in the *Winnipeg Condominium* case. The only other SCC decision on this type of claim is the 2020 *Maple Leaf Foods* case.

Maple Leaf Foods confirms that the dangerous goods or structures category still exists, but it is not easy to meet the test. Since the *Maple Leaf Foods* decision, lower courts have wrestled with how strict the criteria really are and on how much difference it makes if the plaintiff could have covered its exposure through a contractual warranty but did not.

One of the challenges of extracting a coherent framework from the two SCC cases on this category is that they seem to be based on different conceptual foundations. *Maple Leaf Foods* was decided twenty-five years after *Winnipeg Condominium*. The key question in economic loss cases is whether there was a duty of care. Between *Winnipeg Condominium* and *Maple Leaf Foods*, the test for a duty of care in negligence in Canadian tort law had changed, altering the doctrinal underpinnings of this category of liability. The old test was the two-step *Anns* (or *Anns/Kamloops*) test,⁵² which asked (1) whether the relationship between the parties was close enough that it was foreseeable that the defendant's carelessness would harm the plaintiff; and (2) whether the scope of liability should be limited, or negated, by policy considerations. In 2001, the Supreme Court of Canada adopted a new duty of care test in *Cooper v Hobart*.⁵³ The new test

⁵¹ For auditors of public companies, see, e.g., Ontario's *Securities Act*, R.S.O. 1990, c. S.5, at s 130; British Columbia's *Securities Act*, R.S.B.C. 1996, c. 418, at s 131.

⁵² The *Anns* test was formulated by the House of Lords in *Anns v Merton London Borough Council*, [1978] A.C. 728, and adopted into Canadian law by the SCC in *City of Kamloops v Nielsen*, [1984] 2 S.C.R. 2. By the time *Winnipeg Condominium* was decided, the *Anns* test had been repudiated by the House of Lords and was no longer the test in English law, but it remained part of Canadian law.

⁵³ 2001 SCC 79, [2001] 3 S.C. R. 537 [*Cooper*].

introduced another step (or split the first step into two sub-parts, depending on your point of view). In the *Anns/Cooper* test, which is now the law, the questions are: (1) was the harm foreseeable? (2) was there a close and direct relationship of proximity between the plaintiff and the defendant, such that the defendant should be held liable for the harm? and (3) should the duty be limited or negated by policy considerations?

The difference between these two tests seems subtle at first glance, but the shift from the *Anns* two-step test to the *Anns/Cooper* three-step test significantly alters the focus of the inquiry. Under the old *Anns* test the first step, foreseeability, is not a particularly high threshold. Accordingly, under *Anns* much of the work of determining whether or not a duty of care existed was done at the second step: policy considerations. In keeping with the *Anns* test's emphasis on policy considerations, policy plays a very significant part in La Forest J.'s analysis in *Winnipeg Condominium*. La Forest J. wrote that the question of economic loss had to be "approached with reference to the unique and distinct policy issues" associated with each category.⁵⁴ La Forest J. highlighted the potentially catastrophic consequences of not repairing a dangerously defective building, the question of who is best situated to bear the loss, and considered what incentives would be created by imposing or not imposing liability. These are classic policy concerns, focusing on broad social consequences rather than the relationship between the particular parties and the traditional scope of legally cognizable harm.

In contrast, by the time *Maple Leaf Foods* was decided the focus had shifted somewhat away from policy driven analysis, back to a more traditional emphasis on the relationship between the parties and whether the plaintiff can assert a legally recognized right. The requirement of proximity between the parties—which requires more than just foreseeability of harm to the plaintiff—is critical and is often the difference between a viable claim and a dismissible one.

We have two and only two SCC cases on this category, decided twenty-five years apart, applying different tests for duty of care, and with different philosophical foundations. And yet *Maple Leaf Foods* did not overrule *Winnipeg Condominium*: it purportedly applied the same test. It has been left to lower courts to try to untangle whether the *Winnipeg Condominium* test has been narrowed or simply re-explained in a new context and what the implications are.

A. *Winnipeg Condominium*: dangerous latent construction defects

In *Winnipeg Condominium*, a developer had hired a construction company (Bird Construction) to build an apartment building in downtown Winnipeg. Bird Construction subcontracted part of the masonry work. The building converted into a condominium and the condominium corporation (the plaintiff) became the owner of the land and the building. In the early 1980s, problems emerged with the stone cladding on the outside of the building, installed by the subcontractor: parts of the mortar broke away, and cracks appeared in the stonework. In 1989, a large portion of the stone cladding broke off and fell from the ninth storey of the building to the ground below. The condominium corporation had the entire cladding removed and replaced at a cost of \$1.5 million.

The condominium corporation sued Bird Construction, the architects, and the subcontractor for the cost of repairing the defects in the building, alleging that they had been negligent in its design and construction. The condominium corporation could not sue the defendants in contract because it was the original owner who had hired them, so there was no privity of contract between the condominium corporation and any of the responsible parties. Initially, the claims were struck out because they were for pure economic loss: the cost of repairing the defects in the cladding. The Supreme Court of Canada allowed the condominium corporation's appeal and held that the claims could proceed. La Forest J., writing for the Court, said that the law in Canada had now progressed to the point where contractors, subcontractors, architects, and

⁵⁴ *Winnipeg Condominium*, at para 12.

engineers who took part in the design and construction of a building owed a duty in tort to subsequent purchasers of the building if it was foreseeable that failure to take reasonable care in constructing the building would create defects posing a substantial danger to the health and safety of the occupants.

An important factor driving the Court's reasoning was avoiding perverse incentives. If the defect eventually caused a tragedy, the negligent contractor would be liable to anyone suffering a personal injury. It did not make sense to penalize the condominium for acting promptly to mitigate the danger. La Forest J. left open the question of whether contractors could also be held liable to subsequent purchasers for the cost of repairing non-dangerous defects.

B. *Maple Leaf Foods*: recalled meat products

Maple Leaf Foods answered the question that *Winnipeg Condominium* left open: this category is limited to negligently supplied goods or structures that are dangerous and does not apply if the product or building is shoddy or defective but non-dangerous.

Further, *Maple Leaf Foods* held that recovery in this type of case is possible only if the product or structure poses an imminent danger to the plaintiff (who cannot piggyback on danger to others or to the public at large) and where the plaintiff did not have the opportunity to allocate the risk by contract.

Maple Leaf Foods was a class action between franchisees of the chain sandwich restaurant Mr. Sub and Maple Leaf, which was the exclusive provider of ready-to-eat meats to the restaurants. There was a listeria outbreak in one of Maple Leaf's factories, and it issued a recall notice for all meats that had been processed there. Franchisees were stuck without a supply of ready-to-eat meats for six to eight weeks, with purchased meat that they had to discard, and being associated with tainted meat. The franchisees claimed to have suffered economic loss and reputational injury.

According to the franchisees, they were effectively prevented by their agreements from purchasing ready-to-eat meats from any other supplier.⁵⁵ The franchisees had no direct contractual relationship with Maple Leaf; the supply contract was between Maple Leaf and the franchisor, so that there was only an indirect contractual link between the franchisees and Maple Leaf (the franchisees had contracts with Mr. Sub, the franchisor, which in turn had a contract with Maple Leaf).

The SCC held that Maple Leaf did not owe a duty of care in negligence to the franchisees. To fit into the *Winnipeg Condominium* category, there had to be imminent danger to the plaintiffs or their property. Claims for non-dangerous defects are "better channelled through the law of contract."⁵⁶ Dangerousness is a principled basis for looking beyond the contractual allocation of risk, since the defendant would be liable to a third party for any injury or physical damage if the risk materialized. Recoverable costs are therefore limited to those necessary to abate the danger. And the danger must be to the plaintiff or the plaintiff's property. In this case, to the extent that the recalled meats posed any danger, it was to the ultimate consumers, not to the Mr. Sub franchisees.⁵⁷

Maple Leaf Foods also clarified that there is no duty of care in negligence if the parties allocated the risk of economic loss by contract or if the plaintiff could have protected its interests by contract.⁵⁸ Courts will look to the entire contractual matrix, not just contracts to which the plaintiff is a party. The matrix of contracts may indicate where the parties expected the loss to lie: the "reasonable availability of adequate

⁵⁵ Technically the franchise agreement gave them the option of requesting to purchase from another supplier, which was subject to the franchisor's absolute right to refuse permission.

⁵⁶ *Maple Leaf Foods*, at para 47.

⁵⁷ *Maple Leaf Foods*, at para 57.

⁵⁸ *Maple Leaf Foods*, at para 67.

contractual protection within a commercial relationship” is a factor that weighs against recognizing a duty of care.⁵⁹ By choosing to operate their franchises, the Mr. Sub franchisees took on certain risks, including the risk of lost profits arising from agreeing to purchase meats exclusively from Maple Leaf.

Because the rationale for recovery in this type of action is the danger posed by the product or structure, the plaintiff’s loss will not be recoverable if it is feasible to discard the thing (instead of incurring costs to repair it) as a way of averting the danger.⁶⁰ Generally this limitation does not apply to buildings and structures, because owners of buildings usually cannot remove the danger by abandoning the building. The Court did not explain when it would be feasible to discard an article other than a building. Logically, if the cost of replacing the thing is lower than the cost of repairing it, that would seem to be a relevant factor and would mean a claim for the cost of repairs would be less likely to succeed.

Maple Leaf Foods also provides a reminder of the rationale for the limited recourse tort law provides for pure economic loss. It is fundamental in tort law that “the loss sought to be recovered must be the result of an interference with a legally cognizable right.”⁶¹ The SCC quoted from a classic of negligence law, the decision of Cardozo C.J. in *Palsgraf v Long Island Railroad Co.*: “[n]egligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right.”⁶² Bodily integrity (as well as mental health, in modern tort law) and property are legally recognized rights. But while pure economic loss “may be recoverable in certain circumstances, there is no general right, in tort, protecting against the negligent or intentional infliction of pure economic loss.”⁶³

In the dangerous goods category, the danger creates an imminent prospect of injury and property destruction, i.e., not actually an interference with a legally protected right, but a threat of one that is so close that it makes sense to allow the plaintiff to recover, rather than insisting that the plaintiff has to wait for a predictable disaster to unfold and then sue the defendant whose negligence caused it. That principle is the theoretical bridge to the traditional tort framework that justifies this category of recovery for pure economic loss—at least, it is in the new *Maple Leaf Foods* formulation, while under *Winnipeg Condominium* the reasons for allowing recovery were grounded in policy.

Maple Leaf Foods is a 5-4 decision. Karakatsanis J. wrote the opinion for the four dissenting judges. They would have recognized a novel duty of care, based on the close connection between the parties in the network of contracts that governed their business relationship. Karakatsanis J. pointed out that, realistically, the franchisees were not in a position to negotiate terms of the franchise agreements or to protect themselves contractually from the type of economic loss they alleged.⁶⁴

C. *Centurion*: return of *Winnipeg Condominium*?

Commentators have different views on whether *Maple Leaf Foods* substantially changed the law set out in *Winnipeg Condominium*. Some see it as a significant narrowing of this category of liability, while others (including the majority in *Maple Leaf Foods*) view it as restating the principles that were already set out, whether expressly or implicitly, in the older case.

A 2024 decision of the British Columbia Court of Appeal, *Centurion Apartment Properties Limited*

⁵⁹ *Maple Leaf Foods*, at paras 67-68.

⁶⁰ *Maple Leaf Foods*, at para 51.

⁶¹ *Maple Leaf Foods*, at para 18 (emphasis added).

⁶² 162 N.E. 99 (N.Y. 1928) (quoted in *Maple Leaf Foods*, at para 18).

⁶³ *Maple Leaf Foods*, at para 19.

⁶⁴ *Maple Leaf Foods*, at para 144.

Partnership v Sorenson Trilogy Engineering Ltd.,⁶⁵ brought into focus whether the matrix of contracts—an important consideration in *Maple Leaf Foods*—made a difference in a fact pattern that was almost exactly the same as the situation in *Winnipeg Condominium*.

This case was about an 11-story rental apartment building in Langford. Sorensen, the firm engaged as structural engineers, did not have the necessary expertise to work on a building that size, but took on the work anyway. Later, serious structural defects were discovered in the building, its occupancy permit was revoked, and the building was evacuated. In the interim the building had been sold to a new owner, Centurion, who had no contractual privity with Sorensen. Sorensen applied for dismissal of the tort claims against them on the basis that there was no proximity between them and Centurion and no duty of care.

The Chambers judge held that the situation was not analogous to *Winnipeg Condominium*, because in *Centurion* there was a matrix of contractual relationships under which risks arising from defective design had been addressed and allocated. The original owner-developer hired a company as a designer-builder and that contract addressed the risk of defects and required the designer-builder to carry insurance to cover those risks (although in fact the designer-builder failed to get the required insurance). In turn, the designer-builder engaged Sorensen for the structural engineering work. When Centurion bought the building, it negotiated representations and warranties that the building was safe and habitable. In the multipartite contractual scheme, the parties had addressed and allocated exactly the risk that materialized. The Chambers judge saw no reason to create a tort law duty, not created by the contracts, arising from a duty of care owed by Sorensen to Centurion.⁶⁶

The Court of Appeal disagreed. Proximity and a duty of care were made out based on the category of proximate relationship in *Winnipeg Condominium*⁶⁷: there was “much about [*Winnipeg Condominium*] that is like the present case.”⁶⁸ The building, like the one in *Winnipeg Condominium*, was dangerously defective, and *Winnipeg Condominium* remained the binding authority.⁶⁹

The existence of a matrix of contracts did not distinguish the case from *Winnipeg Condominium*. The Supreme Court of Canada in *Winnipeg Condominium* did not discuss whether there were contracts and whether they addressed the allocation of risk or could have done so. As the Court of Appeal noted in *Centurion*, “[t]he reality is that we do not know what the relevant contracts provided. It seems logical that there would have been clauses in the applicable contracts in *Winnipeg Condominium* that considered the allocation of risk, but they were not part of the analysis.”⁷⁰

Maple Leaf Foods was different from *Winnipeg Condominium* (and from *Centurion*) because there was no real and substantial danger to the Mr. Sub franchisees. The notion of an “imminent risk” in *Maple Leaf Foods* was not an additional criterion; it was equivalent to “real and substantial danger.” The phrase “imminent risk” was simply a way of emphasizing the difference between dangerous and non-dangerous defects.⁷¹ The SCC in *Maple Leaf Foods* had not introduced a new requirement “that the danger be imminent in the sense of bound to happen immediately. What mattered was that it was a presently existing risk.”⁷² Danger of unexpected and immediate failure is imminent danger, even if it may take a period of time for the failure

⁶⁵ 2024 BCCA 25 [*Centurion*], leave to appeal to Supreme Court of Canada denied 2024 CanLII 88323.

⁶⁶ *Centurion Apartment Properties Limited Partnership v Loco Investments Inc.*, 2022 BCSC 2273.

⁶⁷ *Centurion*, at para 89.

⁶⁸ *Centurion*, at para 63.

⁶⁹ *Centurion*, at para 89.

⁷⁰ *Centurion*, at para 85.

⁷¹ *Centurion*, at para 79.

⁷² *Centurion*, at para 79.

to happen, because it requires steps to be taken promptly in order to ensure safety.⁷³

D. *Palmer*: no right to be free of the prospect of damage

In *Palmer v Teva Canada Limited*,⁷⁴ the plaintiffs sought to certify a class action against a manufacturer of blood pressure medication known as Valsartan. Certain lots of Valsartan were contaminated in the manufacturing process with what the plaintiffs claimed were toxic carcinogens and were later recalled. The plaintiffs claimed that the manufacturer had manufactured the medication negligently.

Notably, as the Ontario Court of Appeal emphasized, the claim was “not a claim for compensation for consumers who have been or may be diagnosed with cancer as a result of consuming contaminated Valsartan.” It was for “damages for the potential increased risk of being diagnosed with cancer in the future as a result of ingesting contaminated Valsartan,”⁷⁵ including pure economic loss claims for the costs of medical services and monitoring, refunds for the drugs consumed, and the cost of drugs discarded after the recall.

The Ontario Superior Court of Justice had dismissed all the claims⁷⁶ and the Court of Appeal affirmed. On the negligence claim, neither increased risk of future harm nor genotoxic cellular changes with no perceptible health effect constitute compensable damage: “there is no liability ‘in the air’ and no right to be free from the prospect of damage.”⁷⁷ The pure economic loss claim failed because the contaminated product posed no imminent danger and discarding the pills was a feasible remedy that extinguished any basis for recovery. The Ontario Court of Appeal rejected the appellants’ argument that the prospect of real and substantial harm was sufficient to establish liability; it reasoned that *Maple Leaf Foods* had “clarified the test from [*Winnipeg Condominium*] to include the concept of imminent risk.”⁷⁸

E. Defects in cars and car parts

Following *Maple Leaf Foods*, the courts of several provinces have considered class action claims involving defects in cars and car parts. These cases illustrate the challenges of applying *Maple Leaf Foods*. Some of the thorny points are:

- When is there imminent risk of harm, and when is there merely a possible risk in the future that can be resolved by repairing or replacing the product? If harm is sure to happen but may take years to occur, is the “imminent risk” criterion met?
- When does one defective item cause property damage to other property of the plaintiff and when is the defective part simply part of a defective whole, so that the claim is based on the reduced value of the item and is therefore for pure economic loss rather than property damage?
- When is it feasible to discard the thing that poses a risk—and when does it matter?

In British Columbia, in *Nissan Canada Inc. v Mueller*,⁷⁹ negligence claims in a class action were allowed to proceed. The notice of civil claim alleged that defects in an engine component, the timing chain

⁷³ *Centurion*, at para 79.

⁷⁴ 2024 ONCA 220 [*Palmer*].

⁷⁵ *Palmer*, at para 4.

⁷⁶ *Palmer v Teva Canada Ltd.*, 2022 ONSC 4690.

⁷⁷ *Palmer*, at para 47 (citing *Maple Leaf Foods*, at paras 33 and 44).

⁷⁸ *Palmer*, at para 74.

⁷⁹ 2022 BCCA 338 [*Nissan*].

mechanism, could cause sudden engine failure and loss of control of the vehicle. This was potentially enough to meet the dangerousness requirement. In *North v Bayerische Motoren Werke AG*,⁸⁰ negligence claims relating to the timing chain mechanism were struck. The plaintiffs argued that they had suffered property damage, because the defective timing chain system had damaged other property that they owned: the engines. The Ontario Court of Appeal did not accept that argument. The timing chain system was not separate from the engine, but an integrated part of the whole. The Alberta Court of Appeal in *Hyundai Auto Canada Corp. v Engen*⁸¹ allowed class action claims concerning allegedly defective sunroofs to proceed, observing that if a vehicle has defective components, it will often not be feasible to discard the vehicle and may be necessary to replace the defective part.⁸² Determining what is a reasonable way to deal with the defect may require an evidentiary record to be developed at trial.⁸³

F. Bottom line

Liability for dangerously defective goods or structures *can* be the basis of a valid claim, but such claims are difficult to make out. Many of the cases arise in situations where there was, or could have been, contractual allocation of the risk of defects, for example through a warranty. Generally speaking, if a person who bought a product that turns out to be defective does not have protection through a contractual warranty, it is unlikely that they will be able to get what amounts to the same protection through a tort claim. But it may be possible, if the product poses an imminent threat of danger.

Claims in tort for dangerously defective goods or structures must be pled with specificity concerning the real and substantial, and imminent, risk of danger to property or persons. A claim that lacks those specific allegations should generally be dismissible. The specific facts are important and may make the difference between a dismissible claim and a viable claim.

It is difficult to extract a coherent theory from the case law of the right that is protected by this cause of action. In the *Winnipeg Condominium* decision, most of the discussion is on policy questions, such as who is best placed to bear the loss, rather than the nature of the right involved. *Maple Leaf Foods* reasserted the requirement that liability in tort must be based on the invasion of a legally cognizable right. Here it seems that it arises from the imminent threat of danger to property or person, the traditional interests protected by tort law, although this type of liability is unusual in that it arises when harm to property or person has not happened yet. It must, however, be imminent.

There remains some uncertainty in the case law about what “imminent” means. According to the British Columbia Court of Appeal in *Centurion*, it appears to be enough if there is a current risk of harm that could materialize either immediately or at some other unpredictable time. In the *Nissan* case, the B.C. Court of Appeal noted that even if the risk of engine failure may take many years to materialize, it is still “imminent” if it can materialize in an unexpected and immediate way.

Businesses may be involved in a matrix of contracts where they lack a contractual basis to claim against one of the other parties if they end up suffering an economic loss because of that party’s mistakes. Careful attention should be paid to such gaps or exposures in the contract negotiations and drafting. It may be

⁸⁰ 2025 ONCA 340.

⁸¹ 2023 ABCA 85 [*Hyundai*].

⁸² *Hyundai*, at para 41.

⁸³ See also *Kane v FCA US LLC*, 2024 SKCA 86 (denying class certification for claims relating to vehicles that had been the subject of recall notices) and *Evans v General Motors of Canada Company*, 2024 SKCA 87 (setting aside pure economic loss claims related to alleged defects in cooling systems, but granting leave to amend to plead an imminent risk of real and substantial danger).

that as a matter of the relationship and relative bargaining power between the parties there is no realistic ability to allocate the risk to someone else—as was the case, for example, for the *Maple Leaf* franchisees. This is where business loss insurance can play an important role in managing the risk of losses for which there may be no recovery in tort or contract, even if they are someone else's fault.

(iii) Relational economic loss

The third recognized category of recoverable pure economic loss is relational economic loss. Relational economic loss is economic loss that the plaintiff suffers because of damage to someone else—there is either personal injury to the other person or (the situation in all the cases we look at here) damage to the other person's property. The plaintiff incurs economic loss because of a relationship, usually contractual, with the injured third party or the owner of the damaged property. In earlier cases this category is also referred to as contractual relational economic loss, a term used by La Forest J. in his dissent in *Canadian National Railway Co. v Norsk Pacific Steamship Co.*,⁸⁴ discussed below.

Relational economic loss is different from the other categories of negligently caused economic loss in that there is a *presumptive* rule of exclusion. The law recognizes narrow categories where the presumption is overcome, and recovery is possible, and also recognizes the possibility that other categories could emerge. But usually, recovery is precluded. An important factor here is that the claimant, typically being involved in a contractual relationship with the owner of the damaged property, would have had the opportunity to address the risk of loss through seeking contractual limitations of liability or indemnities, or by obtaining insurance.

A. *Norsk*

The starting point for this category is the decision of the Supreme Court of Canada in *Norsk*. Canadian National Railway used the New Westminster railway bridge to run its trains. The owner of the bridge was not CN, but Public Works Canada. CN had a contract with Public Works that allowed CN to run its trains over the bridge. A ship owned by Norsk was towing a barge, which collided with the bridge in heavy fog. The collision caused extensive damage to the bridge, which was closed for several weeks. Norsk admitted that the collision and damage were caused by its negligence. Under its contract with Public Works, CN had no right to indemnity for losses in case of closure of the bridge.

The Supreme Court of Canada allowed CN to recover against Norsk, in a 4-3 decision, with McLachlin J. (as she then was) writing for herself and Cory and L'Heureux-Dubé JJ., and Stevenson J. writing a separate concurring opinion. Because of the split in the court, the exact theory on which liability was premised remained unclear. McLachlin J. reasoned that the requisite proximity existed because CN's operations were so closely allied to the operations of the damaged bridge that its relationship with the bridge owner was akin to a joint venture, a category where recovery for relational economic loss has traditionally been allowed.⁸⁵

La Forest J. wrote a dissent emphasizing the traditional tort law rule “that persons cannot sue a tortfeasor for suffering losses to their contractual rights with the owner of property by reason of damages caused to that property by the tortfeasor,” which, he said, was based on “sound policy reasons.”⁸⁶

⁸⁴ *Canadian National Railway Co. v Norsk Pacific Steamship Co.*, 1992 CanLII 105 (SCC), [1992] 1 SCR 1021 [*Norsk*], at para 129.

⁸⁵ *Norsk*, at para 74.

⁸⁶ *Norsk*, at para 131.

B. *Bow Valley Husky*

*Bow Valley Husky (Bermuda) Ltd. v Saint John Shipbuilding Ltd.*⁸⁷ is the leading SCC statement of the law on relational economic loss. In this case, the losses were caused by damage to an offshore oilrig. The two plaintiffs, Husky Oil Operations and Bow Valley Industries, had contracted with a builder, Saint John Shipbuilding, to build the oilrig for drilling on the Grand Banks. Husky and Bow Valley did not own the rig themselves. Instead, to take advantage of government funding opportunities, they incorporated a separate company, BVHB. BVHB owned the rig, and Husky and Bow Valley contracted with BVHB to hire the rig for a daily rate. Under the contract, they had to pay the day rate even if the rig was out of service. The rig was damaged because it had a defective heat-trace system (a mechanism needed to prevent the pipes from freezing), which malfunctioned, causing a fire. The rig was severely damaged and had to be towed to port for repairs.

BVHB sued Saint John Shipbuilding (which built the rig) and Raychem (which supplied the heat-trace system) for the cost of repairs and lost revenue. Separately, Husky and Bow Valley sued to recover the day-rate payments they had to pay BVHB for the days the rig was out of service; this was the relational economic loss claim.

McLachlin J. wrote the main opinion together with La Forest J.⁸⁸ The analysis sought to reconcile the approaches of McLachlin J. and La Forest J. in *Norsk*. It is the leading statement on the test for relational economic loss.

McLachlin J. set out three basic principles regarding relational economic loss: (1) relational economic loss is recoverable only in special circumstances where the appropriate conditions are met; (2) these circumstances can be defined by reference to categories, which will make the law generally predictable; (3) the categories are not closed.⁸⁹

The three existing categories are: (1) cases where the claimant has a possessory or proprietary interest in the damaged property; (2) general average cases;⁹⁰ and (3) cases where the relationship between the claimant and property owner constitutes a joint venture.⁹¹ This case did not fit into any of those categories, and so recovery for relational economic loss was not available. The plaintiffs had a contractual relationship with the owner of the damaged rig, but the parties were not in a joint venture. McLachlin J. went on to consider whether a new category permitting recovery should be recognized here, and decided it should not, based mainly on concerns about indeterminate liability: how would the defendants' duty be limited to Husky and Bow Valley when other classes of persons, such as investors in the project, also lost money when the rig was out of service?⁹² (BVHB did recover against Saint John and Raychem, based on a duty to warn theory.)

⁸⁷ 1997 CanLII 307 (SCC), [1997] 3 SCR 1210 [*Bow Valley Husky*].

⁸⁸ The other judges agreed with McLachlin and La Forest JJ. on BVHB's claims. McLachlin and La Forest JJ. were in dissent on another issue.

⁸⁹ *Bow Valley Husky*, at para 48.

⁹⁰ A doctrine of maritime law; when a ship and cargo are exposed to a common peril during a voyage, and the master deliberately sacrifices some property to save the whole, the loss is shared instead of falling only on the owner of the sacrificed property.

⁹¹ *Bow Valley Husky*, at para 48.

⁹² *Bow Valley Husky*, at para 62.

C. Subsequent SCC cases

In *Martel* (discussed above in the introduction to pure economic loss), the plaintiff claimed to have suffered economic losses because of the negligence of a counterparty in contractual negotiations. The plaintiff was seeking to renew a lease and alleged that it had been led to believe the lease would be renewed based on its offered rate, but the defendant awarded the lease to a competitor. This is a case that today might fit more appropriately into contract doctrines concerning good faith. The SCC discussed *Norsk and Bow Valley Husky* and confirmed that relational economic loss is a “narrow realm” where a “presumptive exclusionary rule” exists, unlike in the other categories of economic loss.⁹³

In *Design Services Ltd. v Canada*,⁹⁴ a tender case where the contract was negligently awarded to a non-compliant bidder, the claim for relational economic loss failed because there was no personal injury or property damage to a third party, a requisite element in the relational economic loss category.

D. *Waterway Houseboats*

*Waterway Houseboats Ltd. v British Columbia*⁹⁵ is a British Columbia Court of Appeal case that addresses relational economic loss. The case arose from a debris flood in Sicamous that resulted in significant damage to property owned by two companies. The companies leased out houseboats that were owned by individual owners. That business was interrupted because of the property damage from the flood. The houseboat owners sued for the losses they incurred while the houseboats could not be rented. Their claim failed because their property (the houseboats) was not physically damaged. The trial judge had recognized the houseboat owners’ right to recovery on the basis that they were in a joint venture with the two companies. The Court of Appeal overturned that finding.

E. Relational economic loss cases unlikely to succeed

Because relational economic loss is a narrow category confined to specific situations with a presumptive rule against recovery—and because courts generally expect parties exposed to this type of loss to protect themselves through contract or insurance—relational economic loss claims are unlikely to succeed.

The British Columbia Supreme Court recently overturned a decision not to strike a relational economic loss claim in *Pacific Bioenergy Corporation v AG Growth International Inc.*,⁹⁶ a case where the shutdown of a terminal in North Vancouver caused the plaintiff, which shipped wood pellets through the terminal, to lose 62.2 days of operations through the terminal and to incur economic losses, although its property was not damaged. The Court reviewed the case law on pure economic loss and relational economic loss. In the ruling appealed from, the Associate Judge had declined to strike the pleading on the basis that, even if the situation did not fit into the recognized categories of recoverable relational economic loss, the plaintiff might succeed in establishing a novel claim for pure economic loss. The Court observed that the authorities confirm “for there to be a duty of care and a right to recover for economic loss, the plaintiff must show it had a legally cognizable right or interest and that the loss suffered was the result of the defendant’s interference with that right or interest.”⁹⁷ The Associate Judge’s analysis was incorrect, because she had “failed to identify the legally cognizable right or interest of the plaintiff that the defendants interfered with.”⁹⁸

⁹³ *Martel*, at paras 41-44.

⁹⁴ 2008 SCC 22 (CanLII), [2008] 1 SCR 737.

⁹⁵ 2020 BCCA 378.

⁹⁶ 2025 BCSC 80 [*Pacific Bioenergy*].

⁹⁷ *Pacific Bioenergy*, at para 56.

⁹⁸ *Pacific Bioenergy*, at para 57.

F. Bottom line

Claims in the relational economic loss category are about economic loss incurred by the plaintiff because property that belongs to someone other than the plaintiff was damaged. It is not uncommon for businesses to be exposed to this type of loss, for example if they depend on facilities or equipment that someone else owns. The message from the SCC authorities is that these cases are very unlikely to succeed. Anyone who depends on the use of property owned by someone else, and who might be exposed to losing money if the property is damaged or destroyed by a third party's negligence, should be aware that recovery of the loss from the negligent third party is improbable, and should seek protection through contractual mechanisms such as limitations of liability (not having to pay for the property if it is damaged or out of commission) and indemnities, and/or through insurance.

4. New Supreme Court of Canada decision on novel torts: *Ahluwalia v Ahluwalia*

(a) Overview

The Supreme Court of Canada does not decide tort law cases very often, so a new decision from the Court on a significant aspect of tort-law doctrine is a notable event. This year, the Court did release such a decision: its much-anticipated judgment in *Ahluwalia*.

In *Ahluwalia*, the SCC recognized a new tort of “intimate partner violence” and upheld an award of damages to the plaintiff, who had been abused and coercively controlled by her former husband. *Ahluwalia* is not directly relevant to commercial lawyers, since it arose in the family law context. The new tort of intimate partner violence by definition can only arise in intimate relationships. What makes the decision more broadly significant, beyond family law, is what the SCC had to say about the principles that govern the recognition of new torts.

The new framework set out by the SCC in *Ahluwalia* is somewhat more liberal than the pre-*Ahluwalia* state of the law. Although it will probably remain rare for courts to recognize new torts, creative advocates will probably look to these principles to argue for novel causes of action, including, potentially, causes of action in the commercial arena.

At trial, Madhane J. of the Ontario Superior Court of Justice had awarded the wife \$150,000 in compensatory, aggregated, and punitive damages for a tort she described as the “tort of family violence,” a new tort that had not previously been recognized in Canadian law.⁹⁹ Madhane J. reasoned that it could be appropriate for the courts to develop “new foundations for liability ... where the interests are worthy of protection and the development is necessary to stay abreast of social change.”¹⁰⁰

The husband appealed to the Ontario Court of Appeal, saying that the novel tort should not be recognized. The Ontario Court of Appeal held unanimously that Madhane J. had erred; there was no need to create a new tort of family violence, because existing causes of action—battery, assault, and intentional infliction of emotional distress—already addressed the harm the wife complained of.¹⁰¹ The Court of Appeal also declined to recognize a new tort of coercive control (proposed by the respondent), which would have been more narrowly defined than Madhane J.’s tort of family violence.

⁹⁹ *Ahluwalia v Ahluwalia*, 2022 ONSC 1303 [*Ahluwalia* ONSC].

¹⁰⁰ *Ahluwalia* ONSC, at para 50.

¹⁰¹ *Ahluwalia v Ahluwalia*, 2023 ONCA 476 [*Ahluwalia* ONCA].

(b) New framework for novel torts

The SCC, in its judgment in the case, set out a new “consolidated framework for the recognition of new torts.”¹⁰² There are three elements in the framework:

1. **There must be a wrongful act that offends a *recognized or emerging legal interest*.** The facts must disclose wrongful conduct that offends either a legal interest that is already recognized in private law or “an interest around which there is an ‘emerging acceptance.’” A notable example here is privacy, which gradually gained recognition as an interest that should be protected by private law, leading to the Ontario Court of Appeal’s recognition of a new common-law tort of “intrusion upon seclusion” in *Jones v Tsige* in 2012.
2. **Existing legal remedies must be inadequate.** There is no need to recognize a new tort where existing causes of action already respond to the conduct complained of. But “[t]o be adequate, the existing tort or remedy must be capable of capturing the nature and scope of the wrong.”¹⁰³
3. **Tailoring the new tort.** If the first two steps are met, the analysis goes on to the third step, “where a novel tort is tailored to address the wrong in a manner consistent with the purposes of tort law, and the parameters of the proper role of the judiciary.”¹⁰⁴

This new test alters the framework for recognizing new torts in two ways, which could potentially be significant for the evolution of tort law outside the realm of family law.

First, the requirement that the plaintiff not have existing or alternative remedies has been softened. In *Ahluwalia*, the wife was awarded exactly the same remedy (the same amount of money damages that she would have recovered under tort causes of action that already existed. In a literal sense, there was already a route in the law to the remedy the plaintiff sought. But now there is more to this analysis than just whether the same remedy is available. The SCC saw the need for a new tort in *Ahluwalia* because the existing torts did not capture the “nature and scope of the wrong.” Traditional torts like assault and battery did not properly respond to the harm to the wife’s dignitary interest that the new tort of intimate partner violence expressly recognized.

Second, there is a shift in *Ahluwalia* from a requirement that a tort must involve a violation of a legally cognizable *right* to a requirement of harm to a “recognized or emerging legal *interest*.” At paragraph 137, Kasirer J. writes that “[w]hether tort liability turns on legally cognizable ‘rights’” is “a point on which some disagree.” That is a somewhat surprising statement given the many cases (many of them reviewed in this Update) that reiterate the fundamental principle that liability in tort must arise from infringement of a legally cognizable right.

This change seems capable, potentially, of having repercussions in the law on other kinds of torts, including economic ones. Theoretically, liability for pure economic loss could expand significantly if interference with an “interest” or an “emerging interest” were to become a sufficient basis for a claim. After all, it is generally the case that one has an *interest* in not being exposed to economic losses caused by the carelessness of others—but it is only in a much narrower subset of situations that it is possible to identify a legally cognizable *right* that has been invaded, as the economic loss case law repeatedly emphasizes.

¹⁰² See *Ahluwalia* paras 83-95.

¹⁰³ *Ahluwalia*, at para 91 (emphasis added).

¹⁰⁴ *Ahluwalia*, at para 83.

Will we see the emergence of new theories of liability for pure economic loss based on interference with an “interest” rather than a “right”? It does not seem very likely, given the particular considerations that were at play in *Ahluwalia*, including the Court’s evident wish to make a firm statement condemning domestic violence and coercive control—as well as the well recognized reasons for limiting liability for pure economic loss. But it is not impossible. It is never straightforward to predict the ripple effects of such a change in the way the top Canadian court characterizes the conceptual underpinnings of tort liability.

(c) Bottom line

The *Ahluwalia* holding itself and the new tort recognized by the SCC are not likely to have a direct impact on commercial lawyers’ practice, since the new tort of intimate partner violence applies only in the context of intimate relationships.

The SCC’s new test for novel torts, however, could have more far-reaching implications.

The requirements for recognizing a new tort after *Ahluwalia* are:

1. A wrongful act that offends a recognized or emerging legal interest.
2. Existing legal remedies are inadequate—not only in the sense of providing a remedy, but also by capturing the nature and scope of the wrong.
3. The new tort must be tailored to address the wrong in a manner consistent with the purposes of tort law, and consistent with the proper role of the judiciary.

This new test sets out a slightly broader approach to recognizing new torts compared to the pre-*Ahluwalia* law.

In particular, it contemplates that a new tort need not necessarily involve the infringement of a legal *right*, but could arise from harm to an “emerging legal interest,” if there is some consensus (including in legal scholarship) that this interest ought to be protected by tort law. By contrast, the law on negligent pure economic loss and business torts has consistently stressed the requirement to show harm to a cognizable legal right as an important liability-limiting mechanism. Arguably, however, many situations involving pure economic loss involve wrongful acts that damage, if not recognized legal rights, at least legitimate interests.

Although it is difficult to predict what might evolve from a new development in the law, one realistic possibility is that creative counsel will put their minds to proposing more novel torts, including in the economic arena.

