

S.C.C. File No.:

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO)**

**BETWEEN:**

**CLAUDE JOHN and ROSE JOHN**

**Applicants  
(Plaintiffs)**

**- and -**

**SHAWN FLYNN, STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY, STATE FARM FIRE AND  
CASUALTY COMPANY, EATON YALE LTD., ROBERT  
BLAKE and WALLACEBURG GLASSWORKERS INC.**

**Respondents  
(Defendants)**

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**APPLICATION FOR LEAVE TO APPEAL**

Pursuant to Section 40 of the *Supreme Court Act*, R.S.C. 1985, c.S-26, as amended  
**VOLUME ONE Pages 1 - 200**

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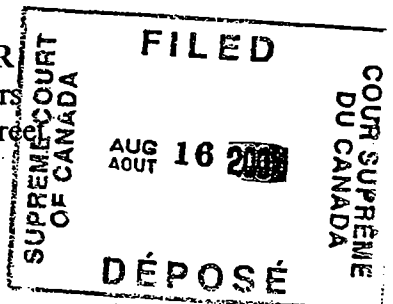
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PART I - STATEMENT OF FACTS**(a) TEST CASE: Employer liability for known conduct of employee on premises, causing harm to third party off premises.**

1. This test case is about an employer's liability for the actions of its employee that injure a third party, where the employer controls the circumstances leading to the harm, and the harm occurs just after the employee leaves work.

**10 (b) Brief Chronology of Facts**

2. A brief chronology of the facts is as follows:

**The Company's Control Over The Workplace and Employee** → p. 6.

3. Eaton Yale ("the company") operates a leaf spring manufacturing plant in Wallaceburg, Ontario. It is a large, heavy manufacturing facility that makes leaf springs for trucks. It is a multi-national company.

*Ref.:* Court of Appeal below, para 3, per Finlayson, J.A. [Tab 4E]

4. Sean Flynn works there since 1984. His job is in the forge, where he operates and sets up the machinery that forms large, heated metal sheets into shapes. Some of the machines are two and three times the height of the operator. His job has multiple steps, some of which are:

- "Check set up by operating eye machine and punch press, check for proper eye closing, eye size that eyes are parallel... Read detailed prints showing eye size and type centre bolt hole position material necessary."
- "Training: Know lock out procedure [turning off the machine and then locking]... Identify safety hazards...SPC locking and charts."
- "Potential Risk: loss of finger or hand...Slips and falling on walking beam."

*Ref.:* Court of Appeal below, para 4, per Finlayson, J.A. [Tab 4E]  
 Trial Exhibit 91 [Tab 2B]  
 Trial Exhibit 3 (excerpts only – index) [Tab 2B]

5. The company imposes safety procedures on its employees, to prevent injuries in the moving equipment and machinery, including

"safety glasses, safety shoes, ear plugs, long sleeved gloves, shop coat or overalls. Lockout procedures, is a seven-step process, shuts the machine down during repair, setup and like activity".

*Ref.:* Trial Exhibit 91 [Tab 2B]  
 Trial Exhibit 3 [Tab 2B]

6. The plant is noisy, hot and covers a number of acres. It is divided into sections, each supervised by a foreman. A general foreman is in charge of the entire plant floor operation.

*Ref.:* Trial Transcript, p. 568, lines 18-20 [Tab 2A]

7. The company employs 500-600 people, and operates three shifts of 150 employees each, to maximize production. Employees "swing" from - days (7am- 3 pm) - to afternoons (3pm to 11pm) - to nights (11 pm to 7 am) on two-week rotations. Breaks over the night shift are at 1 am, 3 am and 5 am. The company lets employees take their breaks in their cars in the company lot.

*Ref.:* Trial Transcript, p. 560, lines 18-24; p. 43, lines 15-20 [Tab 2A]  
Court of Appeal below, para 5, per Finlayson, J.A. [Tab 4E]

8. Flynn works in an area known as the "backend" of the plant. The backend area gives on to the company lot. The Trial Judge found that the "company had absolute control over that work place and the company parking lot."

*Ref.:* Trial Transcript, p. 159, lines 16-31; p. 160, lines 1-31; p. 369, lines 13-30 [Tab 2A]  
Trial Exhibit 16 [Tab 2B]  
Decision on Application, para 7, per Donnelly, J. [Tab 4B]

9. The company lot runs the entire length of the plant. At the rear of the lot, opposite the building, it abutts a farm, leased by an employee of the company, Al Bishop. The back of the company lot is "virtually in darkness prior to the installation of those lights" according to the maintenance supervisor, Doug MacLennan.

*Ref.:* Trial Exhibit 16 [Tab 2B]  
Trial Transcript, p. 170, lines 24-26; p. 819, lines 2-9 [Tab 2A]

10. Drinking in the company lot has gone on since at least 1978, when the company posts a notice to its employees that read:

"Apparently, some employees are drinking alcoholic beverages in the parking lot during their lunch and rest breaks- this must cease immediately".

It did not stop. The company did not stop it. Because they did not, the applicant cannot walk today.

*Ref.:* Trial Exhibit 11 [Tab 2B]  
Charge to the Jury by Donnelly J. at p. 863 [Tab 4A]

Decision on Application, paras 2 and 4, per Donnelly J. [Tab 4B]

11. The company lot drinking is described by forge employee, Mike Paolone:

"I'd say close to 30 to 40 percent of the work force at the backend would be probably participating in drinking either before work or during work... Well it was pretty...I'd say rampant..."

Ref.: Trial Transcript, p. 159, lines 20-31 [Tab 2A]

10

12. General foremen tell the company about the drinking:

- Ivan Bilodeau, retired general foreman, speaking of 1980:  
"When I told him [Personnel Manager] about the problem he instructed me and Mr. Bedell to go outside and check this problem out; and he says: Bring me back some evidence. [So what did you do]. I went and got a box...a cardboard box, two feet by a foot and a half by two feet deep...towards the back of the parking lot... I filled the box right up... (with) whisky bottles, beer bottles, gin bottles, rum bottles...just plain alcohol bottles."
- Mr. Bilodeau concludes that employees must have had a drinking problem:  
"Well they must have...like, you know...what are all these bottles doing there? Why else would the bottles be there?"
- Mr. Bilodeau proposes solutions to the problem, like "restricting access to the lot, fencing the lot, increased security, checking lunch pails"

20

There is no company response. No restricted access, no fencing, no increased security, no checking lunch pails.

- Bev Howard, retired general foreman, finds alcohol bottles in the company lot:  
"Well I've seen them myself when I'm out".
- Mr. Howard reported this to the Personnel Manager.

30

No company response.

Ref.: Trial Transcript, p. 73, lines 13-30, p. 74, lines 1-14; p. 80, lines 14-29; p. 81, lines 1-10; p. 85, lines 14-30; p. 86, lines 1-23  
p. 128, lines 7-10 [Tab 2A]

40

13. Security personnel hired by the company reported finding evidence of drinking in the company lot. No company response.

14. The current personnel manager, Vincent Vlamink, says this about Bilodeau's concerns and proposed solutions:

“If I had a member of management coming forward saying: I think there’s incidence of drinking going on...? (yes?) And here are some solutions that I have to address those? That would be something that would have to be taken seriously.”

Even then, no company response.

*Ref.:* Trial Transcript, p. 777, lines 17-30, p. 778, lines 1-19 [Tab 2A]

10

15. Al Bishop, the employee of the company who farms the adjacent lot for 20 years has to clear a case of twenty-four beer bottles and other liquor bottles from the field each spring and fall, when he cultivates his land to avoid fouling his equipment.

*Ref.:* Trial Transcript, p.169, lines 1-31 [Tab 2A]

16. The company rarely patrols the company lot. Security is not responsible to supervise company employees in the company lot or elsewhere. Because the company has not lit its lot, the lot’s in darkness, and as a result in darkness along the fence adjacent to the farmer’s field. Employees’ vehicles at the back of the company lot are not supervised, nor visible.

*Ref.:* Trial Transcript, p. 764-8 and 819, lines 2-13 [Tab 2A]

20

17. The company posts notices, or puts notes in pay envelopes from time to time about not drinking on the premises. Flynn, his co-workers Paolone, and Robert Blake, knew it wasn’t allowed.

*Ref.:* Trial Exhibit 16 [Tab 2B]  
Trial Transcript, p. 145, lines 8-13; p. 164, lines 8-31;  
p. 165, lines 1-19; p. 427, lines 10-18; p. 429, lines 30-430, line 4 [Tab 2A]

30

18. Flynn, Paolone and Blake said that’s why they drink in the back of the company lot, so as not to get caught.

*Ref.:* Trial Testimony, p. 162, lines 1-10; p. 166, lines 23-30;  
p. 167, lines 1-9; p. 145, lines 19-28; p. 433, line 7; p. 434, line 8 [Tab 2A]

10

19. Ron Beckett is a foreman who supervises Flynn from time to time. He says the company makes it very clear that foremen are evaluated according to their production numbers and those numbers are very important. The company makes “it tough on him” to make a decision to send an employee home, even if drinking, since that could reduce production, and reduced production could affect his evaluation and pay raises.

*Ref.:* Trial Transcript, p. 595, lines 5-30; p. 596, lines 1-31 [Tab 2A]

253

## 20. Beckett agrees

“... if Mr. Flynn had been drinking that night, with all that stuff on him [safety glasses, gloves, boots] and all that noise around him the only way you’d have been able to have a chance to pick up on whether he was impaired is if he was staggering”.

*Ref.:* Trial Transcript, p. 597, lines 12-30 [Tab 2A]

10

## 21. The company participates in an Employee Assistance Plan (EAP) directed at and designed to deal with drinking by employees on and off the premises, and having two goals:

- increase productivity lost by absenteeism due to drinking, and
- offer assistance to the employee to stop.

Absenteeism is a “red-flag” of alcohol abuse by an employee.

*Ref.:* Trial Exhibit 2 [Tab 2B]

20

## 22. Part of the EAP is a “Last Chance Contract” that outlines specific return-to-work requirements for an employee who has been off work because of alcohol abuse. A positive prognosis from a dry-out centre is needed for the employee to go back onto the line and operate machinery.

*Ref.:* Trial Exhibit 2 [Tab 2B]

30

## 23. The Learned Trial Judge states the company “ had a claimed policy of zero tolerance for alcohol in the workplace. It had a policy of intervention to supervise known alcoholics. It gave mouth honour to those policies by sporadic postings on notice boards. In relation to Flynn both policies were disregarded.”

*Ref.:* Decision on Application, para 4, per Donnelly, J. [Tab 4B]

## 24. The company toxicologist, Dr. Kalant, says availability of alcohol in the company parking lot, combined with lax enforcement, could actually encourage workplace drinking by an alcoholic.

*Ref.:* Trial Transcript, p. 687-90 [Tab 2A]

40

## 25. Company policy requires an employee who is caught drunk to be sent home in a taxi, or with a union representative, other than in his own car. Vlamink, the personnel manager says,

“Oh, the reason we send them home in a cab is, if we deem them not to be fit for work, we also would take that step to make sure that they get home safely.” “They’re a safety hazard, possibly to themselves or to other employees”.

*Ref.:* Trial Transcript, p.742, lines 23-31; p. 743, lines 1-13 [Tab 2A]

26. Beckett, the foreman agrees the system of leaving the employee’s car in the parking lot is a “safe system”.

10 *Ref.:* Trial Transcript, p. 589, lines 5-16 [Tab 2A]

27. Howard, the general foreman said employees are not sent home in their own cars because:

“... if anything happened to him on the way home you could be in a lot of trouble [Anything like?] An accident.”

*Ref.:* Trial Transcript, p. 140, lines 2-11 [Tab 2A]

20 28. None of this happened in Flynn’s case, if it did, Claude John wouldn’t be in a wheelchair now.

### Sean Flynn’s History At The Company

29. Flynn lives 20 to 25 minutes from the factory.

*Ref.:* Trial Transcript, p. 878, line 25; p. 396, lines 6-8 [Tab 2A]  
Decision on Application, para. 9, per Donnelly, J. [Tab 4B]

30 30. He has a long-standing pattern of absenteeism and coming in to work late. His absentee record is described as “not very good” by the general foreman, Howard.

*Ref.:* Trial Exhibit 1 [Tab 2B]  
Trial Transcript, p. 131, lines 19-21, 132-143 [Tab 2A]

31. The company knows Flynn is an alcoholic because

- 40
- Flynn tells the personnel manager;
  - Flynn has long-standing absenteeism problems;
  - Flynn participates, with the support of the company, in a dry-out program for 90 days starting on May 15, 1990;
  - The dry out program’s prognosis given to the company on August 22, 1990 (i.e. three months later) was that “His chances for continued sobriety are poor”;

- He does not “graduate” from the dry-out program. He would “have to attend Chatham Brentwood meetings at least three times per week for three months...” in order to graduate. He does not.
- Flynn, the company and a union representative sign a “Last Chance” contract. It has alcohol abstinence requirements;
- The company takes no steps to ensure Flynn doesn’t drink on the job or in the company lot after he gets back on the line.

10 *Ref.:* Trial Exhibit 1 [Tab 2B]; Trial Transcript, p. 377, lines 23-378, 13;  
p. 379, lines 12-26; p. 380, lines 10-382, 19; p. 388, lines 25-386, 8;  
p. 390, lines 5-7 [Tab 2A]; Trial Exhibit 19 [Tab 2A]

32. After attending the dry-out program so he can return to work (August, 1990), Flynn’s absenteeism pattern resumes. The company writes him up twice, the second time in September of 1992. A written record of absentee problems is preceded by a number informal and formal verbal “counselling” sessions.

20 *Ref.:* Trial Exhibit 1 [Tab 2A]  
Trial Transcript, p. 713, lines 28-31; p. 714, lines 1-6 [Tab 2A]  
Trial Exhibit 19 [Tab 2B]

33. The September 1992 counselling report states there is room for “100% improvement” and that “if he needed it, there was an Employee Assistance Program available.” Flynn does not access it. The company takes no steps to monitor Flynn.

*Ref.:* Trial Exhibit 2 [Tab 2B]  
Decision on Application, para 4, per Donnelly, J. [Tab 4B]

### 30 **Claude John**

34. Claude John is a married man with two children. He and his wife Rose have an 11 year old daughter, Stephanie, and a 6 year old son, Michael. Claude is a former heavy-equipment operator who is unable to work in that capacity since an industrial accident. He continues to do contracting locally and is a wood lot operator and hunting and fishing guide around their home on Walpole Island.

10 35. In 1992, Rose John is taking a university degree at the University of Windsor as a full-time student, while working full-time in Windsor at the Federal Business Development Bank, over an hour from their home. This leaves Claude with the primary responsibility of caring for their two children, taking them to school, activities, preparing meals, laundry and cleaning. They drive a blue Econoline family van.



Beckett extra supervisory duties] there was no way you could have gone out into the parking lot checking up on this guy and trying to figure out what he was up to?

A. That's right. (emphasis added)

*Ref.:* Trial Transcript, p. 599, lines 1-23 [Tab 2A]

40. While Flynn works and drinks his way through the company night shift, Claude, Rose and their children sleep.

10

41. In the company parking lot, Flynn drinks:

- one bottle of beer at the 1 am break;
- two bottles of beer at the 3 am break;
- one rum and coke at the 5 am break;
- one beer at 6:30 a.m., 30 minutes before shift end.

*Ref.:* Decision on Application, para 6, per Donnelly J. [Tab 4B]

20

42. By 6:30 in the morning, Claude John has risen and starts to prepare to drive to London for a medical check-up. Rose John leaves for work in Windsor, and Claude assists the children with their morning routine, fixing breakfast, making lunches and seeing to school bags being packed. Claude leaves his home in the family van.

43. With alcohol in his blood at 174 to 185, Flynn leaves the company lot in his pick up truck.

*Ref.:* Decision on Application, para 10, per Donnelly J. [Tab 4B]

30

44. It's snowing and the roads are snow-covered and becoming slippery.

*Ref.:* Trial Transcript, p. 9-16 [Tab 2A]

45. As soon as he gets home, Flynn takes a sausage and six to eight beers, cracks one open and immediately goes out in his pick up truck, the beer between his legs, headed for a card game.

*Ref.:* Charge to the Jury, p. 872 [Tab 4A]

40

46. Within 15 minutes of his scheduled shift end, the unfinished beer still between his legs, Flynn loses control of his pickup truck, fishtails, and drives across into oncoming traffic as Claude drives the family van. Claude sees Flynn's truck cross the centre line and come

towards him, and tries to avoid the crash by veering right. Flynn still hits Claude head on, crushing the dash of the van into Claude's legs, the steering wheel into Claude's chest.

*Ref.:* Decision on Application, para 9, per Donnelly J. [Tab 4B]  
Trial Transcript, p. 10, line 17; p. 12, line 31 [Tab 2A]

10 47. Claude's thigh bones are smashed, leaving him wheel-chair-bound for the rest of his life. He now suffers from osteomyelitis (a bone infection that may lead to amputation of his left leg), which delays treatment for his renal condition thereby putting his life at risk. Rose is called away from writing her university exams to attend to her husband who is airlifted to London for emergency treatment. She ultimately has to leave her job to care for him. Michael and Stephanie spend the next 7 years, along with their mother, tending to their father's dressing, feeding, toileting, and literally are bending his legs for him. Michael becomes delinquent in school. Stephanie seeks counselling through her school. Rose shoulders all of the family responsibilities.

*Ref.:* Charge to the Jury, p. 887, line 7 to p. 900, line 6 [Tab 4A]

20 48. The first opportunity to take blood alcohol samples from Flynn is 90 minutes after his shift is over [8:34 am]. It is 160, the equivalent of twice the legal driving limit. He is criminally impaired.

*Ref.:* Charge to the Jury, p. 874, lines 1-11 [Tab 2E]

49. Flynn is impaired by what he drinks at the company.

*Ref.:* Trial Transcript, p. 690, lines 30-691, 19 [Tab 2A]  
Trial Exhibit 33 [Tab 2B]

30 50. Beckett is called in to the manager's office later in the day and questioned about what happened on his shift with Flynn. Beckett says nothing irregular happened. If he "told them otherwise [i.e. nothing irregular happened], there might have been repercussion for him". Beckett says what happened is important because Flynn driving in to someone happened just after leaving work.

*Ref.:* Trial Transcript, p. 614, lines 23-615, 27 [Tab 2A]

51. After 26 years of service to the company and “glowing” performance reviews until 1992, Beckett’s employment with the company is terminated in “mysterious” and “unexplained” circumstances, just before the lawsuit.

*Ref.:* Trial Transcript, p. 609, lines 11-611, 17 [Tab2A]

52. The company says it’s not responsible for what happened on the company lot, during the company night shift. What happened to Claude John has nothing to do with them.

HELLO = INFUR POLICY  
(= NOT AT \$)

## 10 The Contract Of Insurance – Collateral Benefits

53. Flynn and Claude are each insured under contracts of automobile insurance. Flynn’s policy provides coverage for third-party liability. Claude’s provides with first party, no-fault benefits. The company is not insured under an auto policy.

54. The auto policies are mandatory policies governed by the amendments to the *Insurance Act of Ontario*, R.S.O. 1990, c. I.8 as amended.

*Ref.:* The *Insurance Act of Ontario*, R.S.O. 1990, c. I.8 as amended [Tab 6A]

20

55. After a trial lasting 19 days, hearing all evidence (including 10 expert witnesses, 16 lay witnesses and 113 documents as exhibits), the jury awards the John family damages of \$976,046.36. Collateral benefits from the no-fault policy total \$355,993.68. The Learned Trial Judge gives equal benefit to both the company and Flynn of a deduction for those benefits from the damages awarded.

*Ref.:* Reasons for Judgment of Donnelly J. dated March 16,2000 [Tab 4C]

30

56. After hearing literally no evidence, the Court of Appeal reverses the jury, saying “There is no duty of care on the part of [the company] to members of the driving public...and if there was such a duty, it did not extend beyond the point where Flynn left the company premises...any suggestions as to how [the company] could have controlled Flynn’s activities beyond that point are hopelessly speculative”.

*Ref.:* Court of Appeal below, para 50, per Finlayson, J.A. [Tab 4E]

**PART II - POINTS IN ISSUE**

57. This case raises three issues of public importance that warrant the consideration of and guidance of the Honourable Court;

**Issue No.1:**        **Is there a general duty of care on employers because of what happens at work?**

58. Is there a general duty of care owed by employers to third parties where employers are negligent because of what happened at work, and the work negligence damages someone else within 15 minutes of the end of the shift?

**Issue No. 2:**        **Is there a special duty of care because of special workplace knowledge?**

59. Is there a special or new duty of care on employers where employers have specific workplace knowledge of problem employees' negative behaviour in the workplace, then do nothing about it?

**Issue No. 3:**        **Is a tortfeasor who does not contribute to the collateral benefit scheme entitled to deduct those benefits from damages awarded to the plaintiff?**

60. Where one of two tortfeasors does not participate in a provincial no-fault insurance scheme, and the tort victim is given some immediate medical and other care from the scheme (collateral benefits) should the non-contributing tortfeasor be able to deduct that from damages payable to the detriment of the non-contributing tortfeasor?

**PART III - STATEMENT OF ARGUMENT**

**Issue No. 1:**        **Is there a general duty of care owed by employers to third parties because of what happens at work?**

61. Is there a general duty of care owed by employers to third parties because of what happens at work, and the negligence causes damage to someone else within 15 minutes of the end of the shift?

**Duty of Employer to Third Parties**

62. How far an employer's duty extends, to whom, and in what circumstances, is of utmost importance to employers. In its submissions to the Court of Appeal, the company itself stated the matter this way:

This appeal raises important public issues about the responsibilities an employer has for the conduct of its employees and the limits to which those responsibilities extend in relation to third parties.

*Ref.:* Factum of Eaton Yale filed in the Court of Appeal, para 2 [Tab 2C]

### No Incentives to Eliminate Risks

- 10 63. Since “ the task of the common law liability is merely to complement [social insurance against work injuries] by administering a deterrent lash to those employers who, through indifference, ignorance or inexperience, fail to ensure the elimination of risks which reasonable prudence demands”, serious issues are raised by a ruling which effectively absolves employers of any responsibility to anyone other than an employee once an employee leaves its premises.

*Ref.:* J. G. Fleming, The Law of Torts 9<sup>th</sup> Ed. (LBC Information Services: Sydney, 1998) p. 560 [Tab 7F]  
Court of Appeal below, para , per Finlayson, J.A.[Tab 4E]

- 0 64. Without the “lash” of the common law, employers need only be concerned with the effect of its policies on employees, and need not be concerned in relation to third parties who clearly are within their contemplation and are injured by the employer’s negligence.

65. Employers who, through indifference or neglect permit and promote workplace drinking, are beyond the reach of the criminal law, much to the frustration of judges who must deal with the outcome of that indifference. In a strikingly similar situation, an Ontario judge, in sentencing an employee of General Motors who, following regular drinking in GM’s parking lot, drove and killed a twelve-year- old girl said this:

30 ...As a result of this trial a pattern of conduct that takes place in this community in the parking lot of one of the major employers of this community, General Motors, I find, as a newcomer to the community, to be shocking and outrageous, and I agree with Mr. Fitzgerald that General Motors and the Union, if they countenance this, if they are aware of this problem, this drinking that goes on in the parking lot, and they have not taken, what I can only describe as the most pro-active steps that they can think of to stop it is just incomprehensible to me. (emphasis added)

*Ref.:* *R. v. Kapczynski*, unreported, [1991] O.J. No. 2235  
Action No. 5360/90 (O.C.G.D.) [Tab 7J]

### The Common Law Must Remain Flexible: The Categories Of Fault Are Not Closed

66. Workplace drinking is a fact of modern society. The very existence of Employee Assistance Programs in conjunction with dry-out centres is demonstrative of the extent of the problem and the awareness of employers of the problem. When the drinking goes on in the company parking lot, goes on during work hours, it leads to what the Learned Trial Judge saw as the obvious result – a car crash. It is a circumstance that ought to be considered in relation to Laskin's, J. statement in *Jordan House v. Menow*:

The common law assesses liability for negligence on the basis of breach of a duty of care arising from a foreseeable and unreasonable risk of harm to one person created by the act or omission of another. It is this generality which exhibits the flexibility of the common law; ...the guiding principle assumes a nexus or relationship between the injured person and the injuring person which makes it reasonable to conclude that the latter owes a duty to the former not to expose him to an unreasonable risk of harm. (emphasis added)

Ref.: *Jordan House v. Menow*, [1974] S.C.R. 239, p. 247 [Tab 7G]

### Foreseeability is the Foundation

67. It is a fundamental principle of the common law that a duty of care flows from foreseeability. Major J. stated a duty will be owed to one whom "they ought reasonably have in contemplation as being at risk when they act". The motoring public must be within the contemplation of an employer that prescribes policies, and designs its workplace in relation to a known and risky behaviour which is workplace drinking.

Ref.: *Stewart v. Pettie*, [1995] 1 S.C.R. 131, para 25 [Tab 7K]

### The Employer has Control Over the Circumstances Leading to the Harm

68. The employer has control over the workplace and its employees *while they are at work*. The employer cannot ignore the actions of the employee at work *that are within the control of the employer*, if those actions could have foreseeable and harmful consequences to the employee or a third party, even after the employee leaves its premises and direct control. Sending a drunk employee out into the neighbourhood is like sending a bulldozer into a playground. The construction company shouldn't be able to walk away because the playground isn't a part of the workplace.

Ref.: Decision on Application, para 7, per Donnelly, J. [Tab 4B]

### Should the Failure to Exercise Control Absolve the Employer?

69. The Court of Appeal's ruling gives arbitrary and absolute absolution on the liability of an employer to third parties, even in circumstances where it is negligent in the operation of its business and that negligence is found to be a proximate cause of the harm. This limitation is imposed solely on the basis that the harm occurs outside the workplace.

*Ref.:* Court of Appeal below, para 26, per Finlayson, J.A. [Tab 4E]

70. Tavern-owners that blind themselves to the amount a drinker has to drink by the negligent system they adopt are not given this absolution by the Courts. Short shrift is given to their argument that they could not have known the drinker had too much to drink. The law now says the system adopted by the tavern must be one that permits both knowledge and monitoring. An employer's circumstances are logically the same:

- It is faced with a known risk, workplace drinking, as is the tavern owner faced with the risk of drinking on its premises;
- It is faced with the risk that the employee may come to harm due to over-consumption, and may harm others, just as the tavern owner is faced with the risk of harm coming to its guest or a third party.

The fact that the harm occurs after the tavern's guest has left its premises, and even been in the company of another person, does not limit the tavern's liability. Neither should the employer's liability.

*Ref.:* *Picka Estate v. Porter* unreported, [1980] O.J. No. 252 (Ont. C.A.), para 13 [Tab 7I]  
*Jordan House v. Menow*, supra, p. 248 and following [Tab 7G]

### Issue No. 2: Is there a special duty of care because of special workplace knowledge?

71. Is there a special or new duty of care on employers where employers have specific workplace knowledge of problem employees' negative behaviour in the workplace, then do nothing about it?

72. Knowledge of drinking alcohol in the company lot for almost 15 years, combined with knowledge of alcoholism, led the Learned Trial Judge to conclude that the company knew or ought to have known of the drinking that night – they knew on other nights.

*Ref.:* Decision on Application, para 6, per Donnelly, J. [Tab 4B]

73. The Learned Trial Judge held there was an undertaking to supervise, a duty to do so due to the inherent danger of combining alcohol with this workplace of heated metal and machinery, and ample opportunity to supervise. An opportunity not taken.

*Ref.:* Decision on Application, paras 6-8, per Donnelly, J. [Tab 4B]  
Charge to the Jury, p. 879, lines 25-31; p. 880, lines 1-5 [Tab 4A]

10 74. The EAP and Last Chance Agreement provided the company with all the tools it needed (in addition to its ordinary disciplinary tools), to monitor an employee who was a known risk. In this respect the Court of Appeal misstates the issue. The issue is not whether there was "a duty of care on the part of Eaton Yale to members of the driving public arising out of Flynn's participation in the EAP" [para 18]. Rather, the relevance of the EAP is only that it provides an additional tool to supervise and gain knowledge of the employee's alcoholism, and to *discharge its duty*. The duty does not *arise* from the existence of the EAP.

#### The Special Relationship of Master and Servant

75. A special relationship arises between an employer and employee, consequent on the employer's control over the employee and the workplace. That relationship creates a duty of care.

20 *Ref.:* *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186 at 1193, citing Linden, Canadian Tort Law, 3<sup>rd</sup> ed. (1982) [Tab 7C]

76. The extent of the duty will be based on foreseeability of harm. There is no limitation of the duty only to harm that occurs at the workplace or during work hours, if the harm is foreseeable and is consequent on the action or inaction of the employer.

*Ref.:* *Crocker v. Sundance*, supra, at 1197 [Tab 7C]

#### Requires Clarification By This Honourable Court

30 77. This is a very important consideration and a matter that requires clarification. Employers, unions and employees need to understand the role that potentially progressive work-place programs will play in determining the extent of an employer's obligations in discharging its duty to the employee and others.

### First Case of its Kind

78. This is a case of first instance. This Court has not considered the limits of an employer's duty of care to third parties. The Ontario Court of Appeal has reviewed the issue for the first time in this action. The novelty of the issue is noted by the Court of Appeal below in the case of *Hunt v. Sutton Realty* where the Learned Trial Judge states:

"Although counsel was able to cite many cases where the court held that an employer had fallen short of his duty of care towards his employee, they were unable to cite decisions defining the duty of an employer in regard to a "drinking employee"".

Ref.: *Hunt (Litigation guardian of) v. Sutton Group Incentive Realty Inc.* (2001),  
52 O.R. (3d) 425 (O.C.G.D.), para 53 [Tab 7E]

**Issue No. 3:** Is a tortfeasor who does not contribute to the collateral benefit scheme entitled to deduct those benefits from damages awarded to the plaintiff?

79. Where one of two tortfeasors does not participate in a provincial no-fault insurance scheme, and the tort victim is given some immediate medical and other care from the scheme (collateral benefits) should the non-contributing tortfeasor be able to deduct that from damages payable, to the detriment of the contributing tortfeasor?

80. The Ontario Court of Appeal and the Supreme Court of British Columbia agree that the purpose of provisions providing for deduction of collateral benefits from damages is to prevent double recovery. But in dealing with non-auto Defendants, the Courts have taken opposite approaches to the resolution of this issue.

### British Columbia

81. In *Just v. British Columbia*, s. 24 of the *Insurance (Motor Vehicle) Act* was interpreted. It provides, inter alia,

Liability reduced

24. (4) In an action in respect of bodily injury or death caused by a motor vehicle or trailer or its ownership, use or operation, the amount of benefits paid, or to which the claimant is or would have been entitled, shall not be referred to or disclosed to the court of jury until the court has assessed the award of damages and costs.

(5) After assessing the award of damages and costs under subsection (4), the amount of benefits referred to in subsection (4) shall be disclosed to the court, and taken into account...

*Ref.:* *Just v. British Columbia* (1991), 60 B.C.L.R. (2d) 209 (B.C.S.C.),  
para 70 [Tab 7H]

82. The British Columbia Court of Appeal held that the non-auto defendant does not benefit from the deduction of collateral benefits under the no-fault scheme,

“because it stands outside the universal plan of motor vehicle insurance created by the Act. I interpret s. 24(2) as having reference only to parties within the scheme, that is, whose insurer is ICBC. The protection against double recovery was intended for the ultimate advantage of ICBC so that it would not provide a benefit under the no fault regulations only to face an obligation to cover the same item in a tort claim.”

### Ontario

83. In Ontario, the provision is s. 267 which reads:

267.(1) The damages awarded to a person in a proceeding for loss or damage arising directly or indirectly from the use or operation of an automobile shall be reduced by,

(a) all payments that the person has received or that were or are available for statutory accident benefits... (emphasis added)

*Ref.:* *The Insurance Act of Ontario*, R.S.O. 1990, c. I.8 as amended, s. 267.(1)  
[Tab 6A]

84. It is open to two interpretations. Either the deduction is not available to tortfeasors whose wrong is not based on the operation of an automobile, but some other negligence, as with the company here, or it is available because the instrument of harm was ultimately a motor vehicle.

### Issue Affects Premiums

85. The issue is of fundamental importance to the public. Insurers must base their premiums on known risks and potential liability. The potential liability to pay damages will be based on a deduction in favour of the automobile defendant for no-fault insurance benefits, or it will potentially be shared with non-contributing defendants, such as the company here. That could affect premiums, but must certainly create uncertainty in the cost of the providing insurance.

86. The Ontario Court of Appeal has itself taken two, opposite, approaches where there are concurrent torts and therefore concurrent causes of action. One relates to statutes of limitation and insurance coverage and the other to the deductibility of no-fault benefits.

87. In *Clark v. The Albion Hotel*, the Court of Appeal adopted the Judgment of the Learned Trial Judge, MacDonald, J.;

Consequently, the process of characterizing a claim consists of determining the legal substance or essence raised by the facts. It is the process of determining how the mind and heart of law regard the facts. It is not simply the mechanistic selection of facts or factors most proximate in time or place to the casualty, although they may influence the legal character.

I find that the proper characterization is that this action raises both a taverners negligence claim and a vehicular negligence claim....I can see nothing in law which prevents such a dual characterization. (emphasis added)

Ref.: *Clark v. 449136 Ontario Inc. carrying on business as The Albion Tavern et al* (1996), 27 O.R. (3<sup>rd</sup>) 658 at p. 675-676 (O.C.G.D.) [Tab 7A]

*Clark v. Albion Hotel* (1997), 34 O.R. (3d) 742 (Ont.C.A.) [Tab 7B]

88. This line of reasoning is consistent with the Court of Appeal's decision in *Derksen v. 539938 Ontario Ltd.*,

This conclusion was reached upon the basis that the loss had two causes operating concurrently, one related to the operation of the motor vehicle and the second related to the contractor's liability for negligence in cleaning up at the work site.

Ref.: *Derksen (Litigation guardian of) v. 539938 Ontario Ltd.*, File No.: 27524 unreported, [1999] O.J. No. 2743 (C.A.), appeal to Supreme Court of Canada dismissed, April 25, 2001, reasons to follow. S.C.C. Bulletin, 2001, p. 787 [Tab 7D]

89. The decision of the Court of Appeal in this action is not consistent with those decisions. The Court held,

It is further submitted that recovery against Eaton Yale is founded on the independent tort of negligent supervision. The automobile is said to be no more than the instrument through which Eaton Yale's negligence caused the loss.

I reject the cross-appellants' argument. All of the damages that the cross-appellants suffered arose directly out of the operation of an automobile. The conduct of Eaton Yale as found by the jury did not effect the quantum of those damages in any sense. Its findings of liability only made Eaton Yale a contributor to those damages.

*Ref.:* Court of Appeal below, paras 55 and 56, per Finlayson, J.A. [Tab 4E]

**Clarification Request by this Honourable Court**

90. The decision of the Court of Appeal in this action cannot stand beside the reasoning it adopted in *Derksen*, and in *Clark*. As a consequence, clarification of this issue is required by this Honourable Court. Interpretation of Statutes of Limitation dependant upon the nature of the cause of action are in a confused state as a consequence of the Court's decision.

**10 Conclusion**

91. This Honourable Court is requested to determine for the first time, in Canada (and the Commonwealth), the extent of employer negligence for workplace drinking. It is an issue that calls out for guidance.

*Ref.:* Affidavit of Andrew Murie, MADD Canada [Tab 3]

**PART IV – ORDER REQUESTED**

20 92. That leave to appeal be granted, with costs in any event of the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 8 DAY OF AUGUST,  
2001, LONDON, ONTARIO.

*Engene Medlam Q.C. for Barbara L. Legate*  
\_\_\_\_\_  
Barbara L. Legate  
Counsel for the Applicants

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