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Justice John E. Simonett and the Law of Torts

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JUSTICE JOHN E. SIMONETT AND THE LAW OF TORTS

Mike Steenson[†]

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In his *American Bar Association Journal* article, *The Common Law of Morrison County*,¹ John Simonett mused that Oliver Wendell Holmes Jr. must have had Morrison County in mind when he said that the life of the law has been experience rather than logic. Reading Justice Simonett’s opinions, you can almost see the Morrison County watermark. In fact, a more tempting title for an essay on Justice John E. Simonett and the law of torts might be, “You Can Take the Judge out of Morrison County, But You Can’t Take Morrison County out of the Judge.”

In his article, *The Use of the Term “Result-Oriented” to Characterize Appellate Decisions*,² Justice Simonett explored what it means when a court is accused of arriving at a “result-oriented” decision. His article points out that “[e]ach time judges seek to find a way to attain a certain result that to them seems just under the circumstances, they are, of course, being result-minded,” but

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1. John E. Simonett, *The Common Law of Morrison County*, 49 A.B.A. J. 263 (1963).

2. John E. Simonett, *The Use of the Term “Result-Oriented” to Characterize Appellate Decisions*, 10 WM. MITCHELL L. REV. 187 (1984).

“result-oriented” should be used pejoratively not just when there is disagreement with a decision, but only if the decision represents a departure from decision-making norms.³

His commentary on the format and substance—the norms—of appellate opinions is a window to an examination of his opinions involving tort law and tort-related issues:

The typical appellate opinion in its published form marches along in an orderly fashion, but it should come as no surprise that the court, consciously or unconsciously, may not be setting out all the factors that entered into its decision. In their written opinions, judges are not necessarily expected to state the reasons for deciding as they did, but only to justify their decision with reasoning that is respectable and authorities that are appropriate.

The published opinion may march inexorably forward step-by-step toward a conclusion, but it is unlikely that the judge’s mental processes proceeded in that manner. Rather than to march forward, it is likely that the human mind (to switch metaphors) tends to hover, until finally, it alights on a conclusion. “General propositions do not decide concrete cases,” said Justice Oliver Wendell Holmes, adding, “[t]he decision will depend on a judgment or intuition more subtle than any articulate major premise.” The key notion here is that of inarticulateness. What may seem to be reasoning backwards from a desired result may be a normal process of reasoning from an inarticulate premise intuitively felt but nevertheless real and meritorious. Even if one could go behind a written opinion to see how the result was reached, there is no certainty that one would be any the wiser. So, a result-oriented decision cannot fairly be cast in a pejorative light merely on surmise about that which the court “really had in mind.”⁴

Appellate courts perform dual functions of making new law and correcting error:

As to the latter, the appellate court plays a limited role as a court of review and is expected to give due deference to the trial court’s findings of fact and conclusions of law. As to the former, the lawmaking role, the appellate court is

3. *Id.* at 209.

4. *Id.* at 193–94 (alteration in original) (footnotes omitted).

expected to decide new issues in a reasoned manner, with respect for precedent and the judiciary's role in a government of separated power, and, if established law is to be overruled, to do so candidly, sparingly, and for good cause. For example, if judges are neither required nor necessarily expected to state all their reasons for deciding as they did, at a minimum, they are expected to justify their result with scrupulous handling of the facts, honest reasoning, and pertinent precedent. Legitimate reasons for the result must be articulated even if they are not all the reasons and even if the true motivation for the result is only intuitively felt.⁵

While decisions may of necessity be result-oriented, a "decision is bad when it gives the impression of being ad hoc justice, unprincipled, and dependent on the personal predilections of the judges."⁶ Justice Simonett's opinions most certainly never give the appearance of ad hoc justice; they are always principled; they do not appear to be based on his personal predilections. There are several identifying characteristics of his opinions, as I read them.

1. The opinions show a deep respect for the trial process and the role of the judge and jury in that process. Simonett, the experienced trial lawyer, always seemed to be looking on.⁷

5. *Id.* at 195–96.

6. *Id.* at 196.

7. There are many examples. Justice Simonett's comments on summary judgment practice in *Lundgren v. Eustermann*, 370 N.W.2d 877 (Minn. 1985), is an excellent one. The case was a medical malpractice case that turned on the admissibility of the opinion of a licensed consulting psychologist as to whether the defendant family practice physician was negligent in his prescription of antipsychotic medication. Justice Simonett held that it was not error for the trial court to consider an unsworn and untimely letter submitted by the psychologist, particularly since the defense attorney made only a vague objection to the letter. In a footnote, Justice Simonett added the following observations on making a record for summary judgment motions:

We do not mean to minimize the importance of making a proper record for a summary judgment motion. As Professor Moore has commented, in addition to the pleadings, affidavits and depositions, the trial court in deciding a motion may consider oral testimony, facts subject to judicial notice, stipulations, concessions of counsel, and any other material that would be admissible in evidence or otherwise usable at trial. 6 J. Moore & J. Wicker, *Federal Practice* ¶ 56.15[7] (1985). The informality which sometimes accompanies motion practice should not, however, lull counsel into taking less care in making their record for summary judgment than they would for a trial. It is important, both for clarity and fairness, that court and counsel all know and agree on the contents of the record.

Lundgren, 370 N.W.2d at 881 n.1.

2. His opinions are carefully structured to provide guidance in the form of intelligible, workable principles that judges and lawyers will not have to struggle to understand. Appellate opinions make law, but determining how that law is translated for juries may often be difficult. He would often provide guidance by suggesting a potential jury instruction, “along these lines . . . [,]” but of course leaving it up to judges and lawyers how best to implement the opinion.⁸
3. His opinions are often didactic, but without really seeming to be so. This characteristic seems to be particularly prominent in his concurring opinions, in which he uses to advantage the chance to explain some nuance of the case that was perhaps overlooked in the majority opinion. This leads to a fourth and related point.
4. His opinions are scholarly, although I am not sure if he would have liked that label, at least if the term is used pejoratively to describe work that judges and lawyers can’t use; but he wrote the same way in his law review articles as he did in his opinions.⁹ He always brings theory home. His audience was the bench and bar.
5. His opinions are relatively short, as opinions go, supported with appropriate authority, but not overloaded with it.¹⁰ The opinions get to the point quickly. They are not overburdened by complicating footnotes.¹¹

8. See *Bilotta v. Kelley Co.*, 346 N.W.2d 616, 626 n.2 (Minn. 1984) (Simonett, J., concurring specially).

9. See, e.g., John E. Simonett, *Dispelling the Products Liability Syndrome: Tentative Draft No. 2 of the Restatement (Third)*, 21 WM. MITCHELL L. REV. 361 (1995). In the preface to his article he notes:

The latest draft [of the Restatement (Third)] has four topics, thirteen sections with seventy-nine comments, plus detailed reporters’ notes. While much has happened, one is left with the impression that the law has come full circle. Except for the manufacturing defect, products liability law now appears to be pretty much negligence tort law but with its own idiosyncratic features.

Id. at 361. He cuts to the quick in his analysis, the same as he did in his products liability opinions dealing with the problem of how to handle design defect cases. He provides guidance for trial judges and lawyers who have to deal with the problem of trying and submitting complicated products liability cases to juries.

10. Kevin G. Ross, *A Few Lessons from the Master Craftsman: Justice John Simonett the Writer*, 39 WM. MITCHELL L. REV. 708, 714 (2013).

11. In deference to and in honor of Justice Simonett, footnotes in this essay are limited. His article, John E. Simonett, *The Footnote as Excursion and Diversion*, 55

What follows is a brief discussion of his opinions covering nine sometimes-overlapping areas of tort and tort-related law. The discussion highlights these characteristics.

I. PRODUCTS LIABILITY

The supreme court adopted strict liability in tort in 1967 in *McCormack v. Hanksraft Co.*,¹² but in *Holm v. Sponco Manufacturing, Inc.*,¹³ the court was still in the process of working out the implications of the theory. One of the problems concerned the relationship between overlapping theories of recovery of strict liability, breach of warranty, and negligence.

In *Holm*, the supreme court jettisoned the latent-patent danger rule it had adopted six years earlier in *Halvorson v. American Hoist and Derrick Co.*¹⁴ as inconsistent with the policy justifications that originally prompted the adoption of strict liability theory in *McCormack*. There was a second issue in *Halvorson* that created problems, the issue of an inconsistent verdict that occurred when the jury found that the defendant crane manufacturer was not strictly liable, but was negligent. In *Holm*, which was factually similar, the supreme court allowed the plaintiff to proceed to trial on both his negligence and strict liability counts, which included design defect and failure to warn allegations. That created the potential for the same inconsistent verdict that had occurred in *Halvorson*.

A.B.A. J. 1141, 1141 (1969), begins with a reflection on the footnote addiction:

Lawyers have a passion for documentation. When counsel's experienced eye first scans a legal manuscript, whether it be an appellate court's opinion, a brief, memorandum or article, the presence or absence of footnotes immediately registers on the legal subconscious. If the text flows on serenely for any distance without the ripple of at least a footnote or two, counsel knows, knows in his bones, before reading further, that the text is suspect.

The article notes that excursionary footnotes are worthwhile. Defining an "excursion" as "a short trip taken with the intention of returning to the point of departure; short journey for health or pleasure," the article suggests that a good footnote should accomplish just exactly that. *Id.* The conclusion urges the use of the excursionary footnote: "In the sombre tomes of jurisprudence, and particularly there, midst the inundation of terms, concepts, doctrines, principles and premises that articulate the law, there should occasionally be respite, a footnote or two, some time taken for a short journey for pleasure or health." *Id.* at 1143.

12. 278 Minn. 322, 337-40, 154 N.W.2d 488, 499-501 (1967).

13. 324 N.W.2d 207 (Minn. 1982).

14. 307 Minn. 48, 240 N.W.2d 303 (1976).

Justice Simonett agreed with the court's opinion on the latent-patent danger issue, but dissented from the court's conclusion that the plaintiff should be permitted to advance to trial on both his negligence and strict liability theories.¹⁵ He noted the confusion in products liability law caused by the overlapping theories of strict liability, breach of warranty, and negligence theory, but, he wrote, "[w]hile fine distinctions can be made, these are often of little help to the trial bench that has to instruct the jury and to the jury that has to bring in a verdict."¹⁶ He saw the case as essentially a negligence case:

[T]he plaintiff was working on an aerial ladder in close proximity to an electric powerline. He knew the powerline was there and he knew the dangers involved. Nevertheless, in maneuvering the ladder, he "made a mistake," as his counsel put it, by "unconsciously exposing himself" to an obvious danger. As a consequence, plaintiff's arm (apparently not the ladder itself) came in contact with the powerline. Plaintiff's theory, really, is that the manufacturer could have protected him from his forgetfulness by doing more than affixing warning decals to the ladder, however adequate their message might be; the manufacturer should have equipped the ladder with insulation, sensors or other proximity warning devices which would have either warned plaintiff he was too close to the electric wires or prevented an electric current from passing through plaintiff to the ground.¹⁷

The case involved negligence issues, including the issue of whether the manufacturer could reasonably have foreseen that its ladder would be used in proximity to power lines, but there was a corresponding duty on the plaintiff's part to use reasonable care for his own safety. The key point was that negligence law serves the same policy considerations as strict liability law. Manufacturers are held accountable according to a theory that requires "weighing the likelihood and severity of the harm (electrocution) against the burden of adding safety devices more effective than warning decals (insulation or sensors)."¹⁸ He asked the question of why it was necessary to impose yet another theory on the case, "a strict liability

15. *Holm*, 324 N.W.2d at 213–14 (Simonett, J., concurring in part and dissenting in part).

16. *Id.* at 214.

17. *Id.*

18. *Id.*

theory that is really a carbon copy of the negligence action.”¹⁹ In his opinion, “[a]s a practical matter, where the strict liability claim is based on unsafe design or failure to warn, as is this case, there is essentially no difference between strict liability and negligence.”²⁰

Four years later, Justice Simonett’s views became the law in *Bilotta v. Kelley Co.*²¹ The majority accepted the effective merger of negligence and strict liability theory. Justice Simonett, concurring specially in that case, explained his understanding of the differences:

In a design defect case, I do not think it can be said that either negligence or strict liability is “broader” than the other. The most that can be said is that, depending on the facts of a particular case, the proof needed to survive a defendant’s motion for directed verdict may vary, so that one theory is “better” than the other for purposes of recovery. In other words, the distinctions between strict liability and negligence may be important to the trial court in deciding whether the case goes to the jury, but once the case is submitted, insofar as the jury is concerned, any distinction between strict liability and negligence is nonexistent where the claim is for design defect or failure to warn.²²

Characteristically, he considered how a case would be submitted to a jury under a merged theory. He agreed with the majority that a design defect case should be submitted under a single theory of products liability. In his view, the instruction could be labeled either negligence or strict liability because the theory is “something of both.”²³ He agreed with the majority that in design defect cases a reasonable care balancing approach was appropriate, and that the instruction could be labeled either negligence or strict liability. In a footnote, he suggested how an instruction might be framed:

A product is unsafely designed if, by reason of its design, the product is in a defective condition unreasonably dangerous to the user. The manufacturer has a duty to use due care to design a product that does not create an unreasonable risk of harm to anyone who is

19. *Id.* at 214–15.

20. *Id.* at 215.

21. 346 N.W.2d 616 (Minn. 1984).

22. *Id.* at 625–26 (Simonett, J., concurring specially).

23. *Id.* at 626.

likely to be exposed to the danger when the product is put to its intended use or to any unintended yet reasonably foreseeable use.

The reasonable care to be exercised by a manufacturer in the design of a product will depend on all the facts and circumstances, including, among others, a balancing of the likelihood of harm and the seriousness of that harm against the feasibility and burden of any precautions which would be effective to avoid the harm.²⁴

Of course, he noted that the proposed instruction was “only a suggestion,” and that “trial bench and bar is best situated to devise the appropriate instructions.”²⁵

In *Kallio v. Ford Motor Co.*,²⁶ decided three years after *Bilotta*, the plaintiff was injured because of an alleged defect in the automatic transmission shifting mechanism of a Ford pickup truck. A jury found that the truck was defective. Ford appealed, arguing that the trial court should have granted Ford’s motion for a directed verdict due to the lack of proof of a feasible alternative design or, in the alternative, that the trial court should have given Ford’s requested instruction relating to proof of a feasible alternative. Justice Simonett, concurring specially, wrote to comment on additional evidence the plaintiff offered to establish a design defect. The plaintiff’s expert previously testified in a different trial that the Ford transmission system was not unreasonably dangerous, but in the *Kallio* case he testified that he had invented a device that, although untested and possessing some bugs, and never installed in a vehicle, would, with substantial work, fix the problem. The majority characterized the evidence as “weak,” but Justice Simonett thought the expert did not show that his alternative design was practical and that his testimony may not have withstood a motion to strike, had Ford made one. He commented on the proof problems inherent in design defect cases on his way to stating his agreement with the outcome of the case, if not the majority’s rationale in getting there:

Conscious design defects present difficult problems of proof for both plaintiffs and manufacturers. There is much room for second guessing, and courts are being asked to establish standards of reasonableness for

24. *Id.* at 626 n.2.

25. *Id.*

26. 407 N.W.2d 92 (Minn. 1987).

manufacturers (whether it be Ford or a fledgling family operation). Establishing standards entails a weighing of engineering, marketing, and financing factors, which, at times, may be a difficult task for courts to perform. On the other hand, the establishment of standards cannot always be avoided by passing the problem off to the jury under a general reasonable care instruction.

In any event, the limited issue before us is whether the trial court erred in refusing to give defendant's requested instruction that plaintiff was required to prove the existence of a feasible, practical alternative design. I agree with the majority opinion that the trial court's instructions on burden of proof were adequate and that it was unnecessary to give the requested instruction which would have unduly singled out one aspect of the proof. . . .

Sometimes where proof is lacking for a conscious design defect, plaintiff may still be able to show breach of a duty to warn. Here, plaintiff knew his pickup might move if the shift lever was not completely in the park position, and there was no need to warn on this elementary, obvious fact. But what plaintiff did not know was that the shift lever would feel like it was in park when it was not. The jury could have found there should have been a warning placed in the owner's manual about this illusory effect.²⁷

Justice Simonett's separate opinions in these three pivotal Minnesota products liability cases help to establish a base for design defect and, effectively, failure to warn cases. His intuitive sense is that those cases are really negligence cases, a conclusion that other courts have reached and that is also the position taken in the Restatement (Third) of Torts: Products Liability.²⁸ He also has an acute sense of the difficulties jurors may have in determining whether a manufacturer acted reasonably in designing a product, suggesting, perhaps, that trial courts will have to be gatekeepers in considering the complex balancing of factors involved in making the alternative design determination.

These cases effectively settled arguments over distinctions between strict liability and negligence theories. The basic principles have not been challenged since.

27. *Id.* at 101 (Simonett, J., concurring specially) (citations omitted).

28. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998).

Two other cases involved the intersection of products liability law and the Uniform Commercial Code. In *Peterson v. Bendix Home Systems, Inc.*,²⁹ he established the template for the application of comparative fault principles to warranty claims in a straightforward opinion that logically precludes the application of comparative fault principles in cases involving direct and incidental damages that were unaffected by plaintiff fault.

The plaintiff in the case bought a mobile home that was manufactured by Bendix from a local dealer. Almost immediately after she moved in she began experiencing physical problems that were attributed in substantial part to the use of formaldehyde in the construction of the mobile home. She brought suit against the dealer and manufacturer, alleging strict liability, negligence, and breach of express and implied warranties. The trial court granted a directed verdict in favor of the dealer pursuant to Minnesota Statutes section 544.41 and in favor of the manufacturer on the negligence claim. The jury found in favor of the defendant on the strict liability and express warranty claims but in favor of the plaintiff on the implied warranty of merchantability claim. The jury was asked to compare “the combined fault that caused the damages.”³⁰ It found that Bendix was only 25% at fault while the plaintiff, Peterson, was 75% at fault. The jury found Peterson’s damages for the physical harm she suffered to be \$5000, the difference in value between the mobile home as warranted and as delivered to be \$15,000, and the incidental damages for installation and utility hookups to be \$2500.

Bendix argued that since implied warranty of merchantability sounds in tort, the plaintiff’s contributory negligence barred her recovery for all damages. The opinion rejects the argument. While holding that the plaintiff was barred from recovering for her consequential harm from Bendix because her fault was greater than Bendix’s, Justice Simonett explained that the plaintiff’s contributory negligence should not bar her claim for the direct and incidental damages. He approached the issue from two different directions. The first was application of the language of the Comparative Fault Act. The Act says nothing about consequential damages, but the definition of “fault” in section 604.01, subdivision 1(a), includes conduct that is “negligent or

29. 318 N.W.2d 50 (Minn. 1982).

30. *Id.* at 52.

reckless toward the person or property” of another.³¹

The definition of fault was based upon the Uniform Comparative Fault Act, however, and the comments to section 1 of that Act make it clear that comparative fault is not intended to cover actions “that are fully contractual in their gravamen and in which the plaintiff is suing solely because he did not recover what he contracted to receive.”³²

Then analyzing the warranty claim itself, the opinion reaches the same conclusion:

Since the buyer did not design or make the defective product, the buyer cannot be legally responsible for the original defect. Ordinarily, a buyer’s contributory fault in a warranty action will be some kind of product misuse or assumption of risk. But while the buyer’s acts may bring on or avoid certain consequential harms from the product and thus bar recovery for such consequential harms, this conduct should not affect the buyer’s right to recover money paid for the defective goods. The buyer is seeking a remedy for a bad bargain, a matter more like contract, not for consequential damages resulting from a bad product, a matter more like tort.³³

He continued to explore the relationship between tort and warranty claims in *Lloyd F. Smith Co. v. Den-Tal-Ez, Inc.*,³⁴ a case involving a fire caused by a defective dental chair that also caused other property damage. The plaintiffs included the dentist, the building owner, and other building tenants.

The opinion first notes the difficulties involved in determining how tort and contract remedies relate to each other in defective product cases, which necessitates finding a principled basis for deciding when warranty applies and when negligence and strict liability apply. The courts have said that the Code applies when the parties are sophisticated commercial entities or merchants, that a tort claim is appropriate if the product is unreasonably dangerous from a safety standpoint, and that a product failure that results in a sudden and calamitous occurrence indicates a tort claim.³⁵

31. MINN. STAT. § 604.01, subdiv. 1(a) (2010). The definition of “fault” also includes breach of warranty.

32. *Peterson*, 318 N.W.2d at 54 (quoting UNIF. COMPARATIVE FAULT ACT § 1, cmt., 12 U.L.A. 35 (Supp. 1982)).

33. *Id.*

34. 491 N.W.2d 11 (Minn. 1992).

35. *Id.* at 11 (citing *Hapka v. Paquin Farms*, 458 N.W.2d 683, 688 (Minn.

He noted that while those individual tests may be helpful in deciding whether contract or warranty should apply in a given case, they are less helpful in determining whether, if both theories apply, one or the other is exclusive. The problem is enhanced after the adoption of strict liability in tort because “[a]lthough strict liability is a tort, it is really a stripped-down model of a breach of warranty claim, with the result that the two remedies frequently overlap.”³⁶ The real issue in those cases “is whether allowing the tort remedy concurrent with breach of warranty would undermine the Uniform Commercial Code.”³⁷ The overlap problem is complicated by the privity doctrine in sales law. Warranty protection extends not only to subpurchasers but, under section 2-328 of the Uniform Commercial Code, to “any person who may reasonably be expected to . . . be affected by the goods and who is injured by breach of the warranty.”³⁸ In general terms:

As the Code’s warranty mantle extends out beyond the immediate sale, the less need there is to deny to those on the periphery of the sales transaction access to tort as well as contract remedies. There is less likelihood, in such cases, of the U.C.C. being undermined by allowing concurrent tort remedies. On the other hand, the closer the remedy comes to the very heart of the sales transaction, the more need there is to preserve the integrity of the Code.³⁹

Put another way:

[I]f the buyer of a defective product is not a merchant dealing with another merchant in goods of the kind, the buyer is not precluded from suing in tort as well as contract for damage to his other property. When the property damaged is not the property that was the subject of the sale, there is less reason, as between unequal contracting parties, to restrict the purchaser to his warranty remedies under sales law. Such property losses can be substantial. . . . But more importantly, allowing

1990)); *see also* 80 S. Eighth St. Ltd. v. Carey-Can., Inc., 486 N.W.2d 393 (Minn. 1992) (adopting the dangerous from a safety standpoint rule); S.J. Groves & Sons Co. v. Aerospatiale Helicopter, 374 N.W.2d 431, 434–35 (Minn. 1985) (declining to adopt the “sudden and calamitous” distinction). Justice Simonett was on the court for all of these cases.

36. *Lloyd F. Smith Co.*, 491 N.W.2d at 14.

37. *Id.*

38. MINN. STAT. § 336.2-318 (2010).

39. *Lloyd F. Smith Co.*, 491 N.W.2d at 14–15.

tort liability in these cases does not undermine the Code's primary role in regulating risk of loss of the defective product itself.⁴⁰

As applied, for the building owner and other tenants, as well as the dentist seeking recovery for property damage to property other than the dental chair, tort liability controlled, rather than the Uniform Commercial Code.⁴¹

Peterson and Lloyd F. Smith Co. clarify the law governing cases in which plaintiffs have both tort and warranty claims involving defective products. They provide a clear roadmap for determining which theory applies and what the defenses will be to each.⁴²

II. DUTY AND SPECIAL RELATIONSHIPS

While one person ordinarily owes no duty to act for the protection of a third person, a duty may be imposed if there is a special relationship between the defendant and plaintiff or between the defendant and the person who causes the harm, and the harm is foreseeable.⁴³ Stating the basic principle is simple, but the application is frequently not. Application of the basic rules is heavily fact-dependent, of course, but policy considerations also play a key role in how broadly or narrowly the rules governing special relationships are applied.

The two cases noted in this section indicate both problems. In the first, *Leaon v. Washington County*,⁴⁴ a Washington County Deputy Sheriff attended a stag party in which other men, apparently from the department, forced him to be the recipient of certain lewd action by a nude female dancer. He brought suit against Washington County, the Green Acres Recreation site where the party was held, the county sheriff, the four party organizers, and John Doe defendants, alleging various intentional torts as well as torts based on negligence. All claims were dismissed on the defendants' motion for summary judgment, and the plaintiff was denied permission to amend his complaint to state a claim for the negligent infliction of emotional distress.

The last paragraph of the opinion effectively sets the stage for

40. *Id.* at 15.

41. *Id.* at 17.

42. Two economic loss statutes, §§ 604.10, 604.101, also cover claims for economic loss.

43. *E.g.*, *Lundgren v. Fultz*, 354 N.W.2d 25, 27 (Minn. 1984).

44. 397 N.W.2d 867 (Minn. 1986).

a discussion of the special relationship issue:

One final comment. The conduct at the party towards Donald Leaon was despicable. Nor is the convenient “loss” of memory by law enforcement personnel attending the party edifying. At the same time, as the trial court observed, Donald Leaon “had as much opportunity and certainly more reason to observe the culpable parties.” Leaon has, however, been able to point to only [two of the individuals who held him down]. We concur with the trial judge’s concluding comment: “The court is unable and unwilling to transfer the liability of the unnamed wrongdoers to the individual defendants merely because of their presence at the party or to Washington County simply because it may have employed these persons who behaved with such mean contempt of human dignity on their off-duty hours.”⁴⁵

The court held that there was no duty on the part of the party organizers based on a special relationship:

Ordinarily a person owes no duty to control the conduct of another unless some special relationship exists. Plaintiffs claim a duty arises here because the four defendants were deputy sheriffs, because they were the organizers of the stag party, and because, as “possessors of the land,” they had a duty to keep the premises reasonably safe. Mere status as police officers does not, however, give rise to an affirmative duty to protect. Neither does defendants’ status as organizers of the party create a special relationship between them and Leaon requiring them to exercise reasonable care to protect Leaon. Finally, a possessor of land may have a duty to protect, but this duty arises only if the possessor “(a) knows or has reason to know that he has the ability to control the third person, and (b) knows or should know of the necessity and opportunity for exercising such control.” Ordinarily, this is a question of fact, but nothing in the record indicates that these two requirements for imposition of section 318 liability might exist.⁴⁶

Given the factual setting, it seems clear that the special relationship theory was a stretch, necessitated by the plaintiff’s unwillingness to name all the parties who actually forced him to

45. *Id.* at 875.

46. *Id.* at 873 (citations omitted).

engage in the conduct leading to the lawsuit.

The special relationship issue has to be approached with caution, as Justice Simonett's opinion in the second case, *Erickson v. Curtis Investment Co.*,⁴⁷ indicates. The case was more complicated from a policy standpoint. The case arose out of a sexual assault of a parking ramp customer. He held in that opinion that the ramp owner owed a duty to the customer.

The court had previously considered the special relationship issue in a variety of contexts, including the duty of a business holding its premises open to the public to entrants on the premises,⁴⁸ but because of the implications of a finding of duty, Justice Simonett proceeded cautiously, noting that "[a]s to business enterprises generally, the law has been cautious and reluctant to impose a duty to protect," and that "[a] mere merchant-customer relationship is not enough to impose a duty on the merchant to protect his customers."⁴⁹

The opinion highlights Justice Simonett's reasons for the need for caution in cases involving the potential liability of a business for failure to provide appropriate security for its customers. It echoes the concerns he expressed in his special concurrence two years earlier in *Kallio v. Ford Motor Co.*⁵⁰

Although Justice Simonett had great faith in the jury system, he was concerned that there would be a tendency in cases involving security issues for the focus to be not on the measures the defendant actually took, but whether additional security measures might have prevented the crime and that those additional security measures would ex post facto be the standard of care. He also thought that the issue of whether the security precautions should have been taken requires some hindsight determination but that the tendency to invoke hindsight was exacerbated in cases involving failure to take security precautions.

He also identified the cost-benefit equation as an additional policy consideration in the case. Given the fact that society is presumably not risk-free, he observed, the question of whether security is adequate raises an issue as to what level of risk is acceptable for members of the public, which necessitates a cost-

47. 447 N.W.2d 165, 168 (Minn. 1989).

48. *E.g.*, *Gresser v. Taylor*, 276 Minn. 440, 150 N.W.2d 869 (1967).

49. *Erickson*, 447 N.W.2d at 168.

50. 407 N.W.2d 92, 101 (Minn. 1987) (Simonett, J., concurring specially).

benefit analysis.⁵¹ “In these cases,” he observed, “we recognize the jury may be deciding not so much a conflict in the facts as making an evaluative policy judgment.”⁵²

He concluded that *some* duty was owed by the defendant. The decisive facts were:

1. It was a large commercial parking ramp in a downtown metropolitan area.
2. For a fee, several hundred cars were parked in the ramp.
3. The interior had several levels, with support pillars, stairwells, and rows of unoccupied parked cars, which provided places of concealment, particularly if the interior was dimly lit.
4. Anyone from the street could gain entrance to the ramp from the street.
5. The ramp was relatively deserted. People were present only momentarily, either to park and leave or retrieve their cars.
6. Unattended cars attracted thieves and vandals, and criminal activity involving property crimes was common.⁵³

The general characteristics of parking ramps prompted him to conclude that the opportunity for criminal activity is different from and greater than the risk presented on the street and in the neighborhood generally.⁵⁴

To ensure that the jury’s attention would be focused on the relevant factors governing the breach issue, Justice Simonett also stated that the defendant’s duty should be explained “along the following lines”:

The operator or owner of a parking ramp facility has a duty to use reasonable care to deter criminal activity on its premises which may cause personal harm to customers. The care to be provided is that care which a reasonably

51. *Erickson*, 447 N.W.2d at 168.

52. *Id.* at 170. In a following footnote he quoted Holmes:

[E]very time that a judge declines to rule whether certain conduct is neglect or not, he avows his inability to state the law, and that the meaning of leaving nice questions to the jury is that while if a question is pretty clear we can decide it, as it is our duty to do, if it is difficult it can be decided better by twelve men at random from the street.

Id. at 170 n.3 (alteration in original) (quoting OLIVER WENDELL HOLMES, JR., COLLECTED LEGAL PAPERS 234 (1920)). Over time, jury verdicts on similar facts would, in Holmes’s opinion, enable a court to declare a specific standard of conduct, leaving the jury only with the issue of whether that standard of conduct was violated. See George C. Christie, *Judicial Review of Findings of Fact*, 87 NW. U. L. REV. 14, 36 (1992).

53. *Erickson*, 447 N.W.2d at 169.

54. *Id.*

prudent operator or owner would provide under like circumstances. Among the circumstances to be considered are the location and construction of the ramp, the practical feasibility and cost of various security measures, and the risk of personal harm to customers which the owner or operator knows, or in the exercise of due care should know, presents a reasonable likelihood of happening. In this connection, the owner or operator is not an insurer or guarantor of the safety of its premises and cannot be expected to prevent all criminal activity. The fact that a criminal assault occurs on the premises, standing alone, is not evidence that the duty to deter criminal acts has been breached.⁵⁵

A cautious opinion, *Erickson* establishes a limited liability rule for business owners who are the subject of suits based upon negligent failure to provide adequate security for their customers. The conservative approach he counseled has defined subsequent cases involving failure to provide security by businesses.⁵⁶ The opinion is equivocal about the role of the jury in these cases and, in light of those concerns, provides some detailed guidance as to how the duty issue should be explained to a jury.

III. PREMISES LIABILITY

In *Bisher v. Homart Development Co.*,⁵⁷ the plaintiff was injured when she tripped on a large, visible planter in a shopping mall. The trial court submitted the case to a jury, which found the defendant liable and the plaintiff contributorily negligent. The jury assigned fifty-seven percent of fault to the defendant and forty-three percent to the plaintiff. The trial judge granted defendant's motion for judgment notwithstanding the verdict.⁵⁸ On appellate review, the issue was whether there was any competent evidence reasonably tending to sustain the verdict.

Justice Simonett, writing for the court, affirmed. The case

55. *Id.* at 169–70. The factors are roughly similar to the risk-utility factors Justice Simonett suggested in his special concurring opinion in *Bilotta v. Kelley Co.*, 346 N.W.2d 616, 626 n.2 (Minn. 1984) (Simonett, J., concurring specially).

56. *See, e.g.*, *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 674 (Minn. 2001); *Anders v. Trester*, 562 N.W.2d 45, 47–48 (Minn. Ct. App. 1997) (concluding fast food restaurant not liable for criminal assault of patron during late night bar rush); *Errico v. Southland Corp.*, 509 N.W.2d 585, 587–89 (Minn. Ct. App. 1993) (holding convenience store not liable for assault outside store).

57. 328 N.W.2d 731 (Minn. 1983).

58. *Id.* at 733.

turned on the breach issue. The opinion noted the relevant factors from *Peterson v. Balach*⁵⁹ for resolving the breach issue, including the circumstances of the injured person's entry; the foreseeability of harm; the defendant's obligation to inspect, repair, or warn; the reasonableness of any inspection or repair; and the opportunity of correction or ease of repair.⁶⁰ Then, the court noted the cautionary statement from *Johnson v. Evanski*⁶¹ that breach of duty has to be based upon "what should have been reasonably anticipated, not merely on what happened."⁶² The landowner is not required to guard against all possible consequences, but only against those which should reasonably be anticipated "in the normal course of events."⁶³

Applying those standards, the court held that there was no evidence establishing a breach of the defendant's duty.

The planter was in plain view, obvious in its presence, and had presented no problem for the heavy customer traffic that has existed since 1977, except for the one other accident that occurred after plaintiff's. To place warning signs at each corner of the multi-cornered planter would be ridiculous. To add, say, another level of bricks to the 3½-inch high border would have made no difference to plaintiff's lookout and would not have prevented plaintiff's fall.⁶⁴

It was the plaintiff's obligation to establish that a different design would have made a difference. Justice Simonett concluded that she did not make that showing. The case is a faithful application of *Peterson*, in which the court held that a landowner owes a duty to use reasonable care for the protection of property entrants. The emphasis is on breach rather than duty.

In a second premises liability case, *Wagner v. Thomas J. Obert Enterprises*,⁶⁵ the issue concerned the liability of a roller skating rink owner for injuries sustained by the fifty-seven-year-old plaintiff, who fell while leaving one of the exits to get to the lobby area. There

59. 294 Minn. 161, 199 N.W.2d 639 (1972).

60. *Bisher*, 328 N.W.2d at 733 (citing *Peterson*, 294 Minn. at 174 n.7, 199 N.W.2d at 648 n.7).

61. 221 Minn. 323, 22 N.W.2d 213 (1946).

62. *Bisher*, 328 N.W.2d at 733 (quoting *Johnson*, 221 Minn. at 326, 22 N.W.2d at 215).

63. *Id.* (quoting *Johnson*, 221 Minn. at 326, 22 N.W.2d at 215).

64. *Id.* at 734.

65. 396 N.W.2d 223 (Minn. 1986).

were two versions of the facts. The plaintiff attempted to prove that she slipped on an improperly maintained threshold at the exit, but the defendant's proof refuted that and attempted to establish that the plaintiff simply fell while trying to avoid a child while she was exiting the rink. The governing legal principles turned on which version the jury accepted. The jury found that the owner was not negligent but that the plaintiff was 100% negligent. She appealed from the trial court's denial of her post-trial motions for judgment notwithstanding the verdict or, in the alternative, for a new trial. The court of appeals reversed, holding that a new trial should be granted.⁶⁶ One of the issues in the case was whether the trial court should have instructed the jury on primary assumption of risk.

Distinguishing between primary and secondary assumption of risk has been problematic on a continuing basis in the Minnesota decisions. The *Wagner* case is important because of the suggested limitations on the reach of primary assumption of risk. The court noted that "[o]ne of the few instances where primary assumption of risk applies is in cases involving patrons of inherently dangerous sporting events."⁶⁷ It applies where the "parties have voluntarily entered a relationship in which plaintiff assumes well-known, incidental risks."⁶⁸ The defendant owes no duty to the plaintiff to protect the plaintiff from those incidental risks. The court added, however, that primary assumption of risk does not operate to relieve the defendant of a duty to supervise the safety of skating activities or to maintain the premises in a safe condition. "Negligent maintenance and supervision of a skating rink are not inherent risks of the sport itself."⁶⁹

Although the issue was not previously raised, Justice Simonett commented on the method of submitting primary and secondary assumption of risk to the jury, with the obvious intent of avoiding confusion in future cases. The first special verdict question submitted to the jury asked, "Was the Defendant negligent on April 12, 1982?"⁷⁰ The jury was then instructed, "[I]f you find that the accident on April 12, 1982 arose from a risk inherent in the activity

66. *Wagner v. Thomas J. Obert Enters.*, 384 N.W.2d 477 (Minn. Ct. App. 1986).

67. *Wagner*, 396 N.W.2d at 226 (citing *Springrose v. Willmore*, 292 Minn. 23, 24, 192 N.W.2d 826, 827 (1971)).

68. *Id.* (quoting *Olson v. Hansen*, 299 Minn. 39, 44, 216 N.W.2d 124, 127 (1974)).

69. *Id.*

70. *Id.* at 227.

of skating and well-known to plaintiff Vera L. Wagner, then you must answer the question ‘No.’”⁷¹ The trial court also instructed the jury on the defendant’s general duty of reasonable care to keep its premises safe. The effect was that the first question had to perform a double function. If the jury found that the plaintiff’s fall was not due to an inherent skating risk, it could answer the question “no” if it also found that the defendant had used reasonable care in keeping its premises safe.

He noted that the jury answered the question in the negative and that, under the evidence, could have done so. The negative answer might have been supported either on primary assumption of risk grounds or on the basis that the defendant did not breach any duty to the plaintiff.

Justice Simonett suggested an alternative means of submission in which the first question would ask whether the plaintiff assumed an inherent risk of roller skating in her accident. If the jury answered yes, it would be told to go no further, but if it answered no, it would proceed to the remaining questions, beginning with a question asking whether the defendant was negligent.⁷² That would have separated the assumption of risk and liability issues into separate questions and would have provided greater clarity for the jury and in any post-trial review of the verdict.

The most important aspect of the case is the statement that primary assumption of risk has limited application, primarily to cases involving inherently dangerous sporting events.

IV. MEDICAL MALPRACTICE

In *Kinikin v. Heupel*,⁷³ a medical malpractice case, the supreme court in an opinion by Justice Simonett upheld a jury verdict for \$600,000 against the defendant physician. The plaintiff alleged both battery and failure to obtain informed consent. The court upheld the jury verdict, holding that it was not error to give both instructions under the circumstances and that the informed consent instruction was properly framed.

One of the issues in the case concerned the plaintiff’s awareness of the risks of the surgery the physician performed. The opinion evaluated the impact of a patient’s awareness of a risk on

71. *Id.*

72. *Id.*

73. 305 N.W.2d 589 (Minn. 1981).

an informed consent claim and then rejected it on the facts:

Concededly, a patient's own medical expertise or prior treatments could reduce the amount of information needed from an attending physician to permit the patient to make an intelligent decision concerning surgery. Perhaps at times or in certain communities it is medical practice to assume from a patient's medical history some medical expertise when explaining risks and alternate courses of treatment to him, although here the uncontroverted testimony of plaintiff's expert was to the contrary. In all situations, however, it is to the advantage of both the patient and his physician that the latter not presume too much upon the apparent experience or expertise of the former.

We do not mean by this that a physician may be liable for nondisclosure of a risk of which the patient had actual knowledge. To win her case, plaintiff had to prove proximate cause, of which there are two elements: first, that had a reasonable person known of the risk he would not have consented to treatment; and, second, that the undisclosed risk materialized in harm. If the physician could prove that the patient had actual knowledge of the risk which materialized, then his negligence would be immaterial and the patient's case would fail. Here, Dr. Heupel maintained that Mrs. Kinikin's history of prior abdominal surgeries made her aware of the risk of skin necrosis presented by the breast surgery he performed and, hence, that any failure of disclosure on his part was not the proximate cause of her injuries. Mrs. Kinikin disputed this and the jury resolved the issue in her favor.⁷⁴ We see no error.

The opinion cautions against physicians making undue assumptions about a patient's knowledge and experience for informed consent case purposes. It is a reminder of the underlying basis for informed consent doctrine. In light of that reminder, the court refused to hold as a matter of law that there was no duty to disclose, upholding the jury's resolution of the issue in favor of the plaintiff.

74. *Id.* at 595–96 (citation omitted).

V. GOVERNMENT LIABILITY

Claims against governmental entities or government employees involve questions of substantive liability but also require consideration of immunities. One of the issues in cases where a political subdivision fails to carry out its statutory obligations is whether recovery is barred based on the public duty exception the Minnesota Supreme Court adopted in *Cracraft v. City of St. Louis Park*.⁷⁵ *Cracraft* set out a four-factor test for determining when a political subdivision owes a “special duty” to persons injured by the political subdivision’s negligence. The factors include whether the subdivision had actual knowledge of the dangerous condition; whether there was reasonable reliance on specific representations of the subdivision; whether the statutory obligation was for the protection of a particular class; and whether the subdivision’s action increased the risk of harm.⁷⁶ Stating the test is easier than applying it.

*Andrade v. Ellefson*⁷⁷ was a case involving a claim for negligence against day care providers and the county that licensed them. Considering whether a political subdivision owes a duty under *Cracraft*, Justice Simonett described the need for a limitation on the liability of a political subdivision:

The regulatory and licensing presence of the state and its political subdivisions in the affairs of the public is pervasive. If there were blanket liability, it would be a rare lawsuit where some unit of government would not be sued. If one accepts the premise, as we do, that not all government presence may impose potential tort liability on the government, then some test like *Cracraft* is needed to discern those instances where the state should be liable for not protecting against the acts of someone who injures someone else. This is not a matter of sovereign immunity any more than a claim against [a next-door neighbor who complained about overcrowding at the day care center] would involve sovereign immunity. As we said in *Cracraft*, there is no bright line, and each situation will require its own analysis. The four *Cracraft* factors are helpful, however, and on occasion there may be other relevant factors as well. We might add, too, as to the four *Cracraft*

75. 279 N.W.2d 801 (Minn. 1979).

76. *Id.* at 806–07.

77. 391 N.W.2d 836 (Minn. 1986).

factors, that while they should all be considered, all four need not necessarily be met for a special duty to exist.⁷⁸

The third *Cracraft* factor was so “overwhelmingly dominant” that the court had “no difficulty in finding” that “a ‘special relation’ exists between the county and the small children in the day care homes that it inspects for licensure.”⁷⁹ While the court in *Cracraft* stated that the factors did not lead to a bright-line analysis, Justice Simonett’s opinion emphasizes that the public duty exception is applied with some flexibility. *Cracraft* is not a litmus test, and its factors are not exclusive.

VI. MINN. STAT. § 347.22—THE DOG INJURY STATUTE

In *Lewellin v. Huber*,⁸⁰ the issue concerned the scope of liability under Minnesota Statutes section 347.22—the dog injury statute. The statute applies where a dog “attacks or injures” a person. In *Lewellin*, a dog that was riding in a car distracted the driver, who lost control of her car and drove it into a ditch, hitting the plaintiff’s decedent. While there was no question but that the dog’s actions were a cause-in-fact of the accident, the court concluded that the causal connection was too attenuated to justify making the dog owner liable for the death of the decedent. While Justice Simonett noted that the statute is intended to impose absolute liability on the owner, the chain of causation may not be attenuated. Without considering other potential scenarios, he concluded that “[i]t is enough to say here that legal causation for absolute liability under the statute must be direct and immediate, i.e., without intermediate linkage.”⁸¹

He noted that section 347.22 is not the exclusive remedy in dog injury cases. He noted that a common law negligence action is also potentially available in these cases and that the usual rules governing proximate cause apply to those claims. In a negligence action, the defendant is liable for “all injuries naturally and proximately resulting from the negligence,” but he concluded that

78. *Id.* at 841.

79. *Id.* at 843. While the county would have sovereign immunity, it was waived to the extent of the county’s liability insurance. For the legislative responses to the problem, see *id.* at 843 n.7. The supreme court followed *Andrade* in finding that the third factor was dominant in *Radke v. County of Freeborn*, 694 N.W.2d 788, 798 (Minn. 2005) (finding the county liable under the Child Abuse Reporting Act).

80. 465 N.W.2d 62 (Minn. 1991).

81. *Id.* at 65.

similarly elongating “the causal chain under the ‘dog bite’ statute would extend absolute liability beyond its intended purpose and reach.”⁸² He explained:

Courts have always used the tort doctrine of proximate cause, as distinguished from causation in fact, to implement public policy in establishing the parameters of liability. Thus this court has frequently quoted Prosser’s statement that, “[a]s a practical matter, legal responsibility must be limited to those causes which are so close to the result, or of such significance as causes, that the law is justified in imposing liability. This limitation is not a matter of causation, it is one of policy” In applying our dog owner’s liability statute, public policy and legislative intent are best served by limiting proximate cause to direct and immediate results of the dog’s actions, whether hostile or nonhostile.⁸³

Questions concerning the scope of liability have been an ongoing problem in the interpretation of section 347.22.⁸⁴ Legislative intent and public policy caution against a broad application of the statute. Justice Simonett’s approach to the problem is straightforward. Liability under the statute has to be limited. Basic proximate cause principles are the key to that limitation.

VII. CIVIL DAMAGES ACT

Justice Simonett wrote for the court in two cases involving the issue of what constitutes an illegal sale of alcohol under the Civil Damages Act.⁸⁵ The first was *Hollerich v. City of Good Thunder*.⁸⁶ *Hollerich* involved an after-hours sale of alcohol and was, perhaps, a slightly easier case, at least insofar as determining whether an after-hours sale is the sort of illegal sale contemplated by the Civil Damages Act.⁸⁷ *Rambaum v. Swisher*⁸⁸ is another example, but a

82. *Id.*

83. *Id.* at 65–66 (alterations in original) (citations omitted).

84. *Anderson v. Christopherson*, 816 N.W.2d 626 (Minn. 2012), is the supreme court’s most recent foray into the scope of liability issue. The court relied heavily on *Lewellin* in concluding that the injuries Anderson sustained in trying to separate his dog from the attacking dog were directly and immediately caused by the attacking dog.

85. MINN. STAT. § 340A.801 (2010)

86. 340 N.W.2d 665 (Minn. 1983).

87. Justice Simonett emphasized that finding that an after-hours sale is an “illegal sale” within the meaning of the Act solves only one of the requirements:

more difficult case.

The issue in *Rambaum* was whether a sale of alcohol by a fraternal club to a driver who was neither a member nor guest was an “illegal sale” for purposes of liability under the Civil Damages Act. Civil Damages Act cases require proof of an illegal sale, that the illegal sale caused intoxication of a person, and that the intoxication was a cause of injury to the intoxicated person or some third person. The usual case involves a sale to an obviously intoxicated person, but there are other cases where illegal sales may be made, although connecting those violations to the purposes of the Civil Damages Act is less intuitive than in cases involving sales to obviously intoxicated persons. Justice Simonett reasoned that the deeper history of the Act required broader consideration of the illegal sale issue:

If we were writing on a clean slate, the argument that dramshop liability should be limited to sales to obviously intoxicated persons would not be unattractive as a matter of logic. In 1917, however, this court held that an illegal sale of liquor on Sunday was covered by the Dramshop Act. In 1965, we added sales to minors, *Kvanli v. Village of Watson* . . . , and 5 years ago we added after-hours sales. We have looked to the manner in which certain kinds of illegal sales impact on the public’s access to and consumption of alcoholic beverages. The legislature has not seen fit to disagree with our interpretations of the Civil Damages Act over the years. In this case, with this background, we think it significant that the legislature has placed limits on the number of regular liquor licenses that a municipality may issue based on population. *See* Minn. Stat. § 340A.413 (1986). Club licenses, however, are excepted from this license quota, even though clubs, unlike some other special licensees, do substantial business. The club exception is granted, however, with the proviso that sales must be limited to club members

What must be remembered, however, is that more than an illegal sale is required for dramshop liability. In addition, a claimant must, first, establish that the illegal sale contributed to the intoxication, and, second, that the intoxication contributed to cause the injury. As to the first causation issue, a scrutiny of all the surrounding circumstances must show “a practical and substantial relationship” between the illegal sale and intoxication.

Id. at 668 (quoting *Kvanli v. Vill. of Watson*, 272 Minn. 481, 484, 139 N.W.2d 275, 277 (1965)).

88. 435 N.W.2d 19 (Minn. 1989).

and guests. This proviso serves, we think, to limit the extent clubs can compete for business with other licensed vendors, thereby reducing the potential for alcohol abuse that occurs with competition for consumers in an over-saturated market.⁸⁹

Because of the legislature's strict regulation of alcohol vendors and its deep concern over the problem of alcohol abuse, the court held that the relationship between the restrictive club license and the purposes of the Civil Damages Act was sufficiently substantial to make a club sale to a nonmember an illegal sale. The result was justified by a careful consideration of precedent interpreting a statute with a long history. Absent that history, Justice Simonett likely would have reached a different result.

VIII. COMPARATIVE FAULT

In *Hudson v. Snyder Body, Inc.*,⁹⁰ Hudson was injured when the box of a dump truck dropped on his shoulder. He and his wife brought suit in negligence and strict liability against the manufacturer of the hoist that raised the box of the truck (Perfection), the dealer that supplied the chassis on which the box was mounted (Potomac), and the company that assembled the truck (Snyder). The assembler brought a third-party claim for contribution and indemnity against the plaintiff's employer (Olsen). The jury found for the plaintiff. It found each defendant liable on the negligence and strict liability theories and assigned fault as follows:

Hudson	20%
Snyder	35%
Perfection	25%
Potomac	0%
Olsen	20%

The defendants appealed. The supreme court affirmed in part and reversed in part. The court held that the evidence did not support any finding of negligence on the part of the chassis dealer, Potomac, and that Potomac, which simply passed on a product, was not the cause of the defect. The court also held that Olsen, the employer, could be held liable on the contribution claim by the defendants, even though the plaintiff's fault was equal to Olsen's

89. *Id.* at 21–22 (citations omitted).

90. 326 N.W.2d 149 (Minn. 1982).

and Olsen, had it been a defendant, could not have been held liable to the plaintiff (the comparative negligence statute, at the time, barred from recovery a plaintiff whose fault was equal to or greater than the fault of the defendant).

Justice Simonett concurred in part and dissented in part. He dissented from the majority's conclusion that Olsen, the employer, could be held liable on a contribution claim by the defendants. Even though workers' compensation was the exclusive remedy of the plaintiff and the employer could not have been held liable in a direct suit by its employee, Justice Simonett thought that irrelevant, given the right of third parties to obtain contribution from employers,⁹¹ but he would not have created a pure comparative fault exception to the Comparative Fault Act.⁹²

In analyzing the liability of the dealer, Potomac, he thought that the jury's findings, that Potomac sold a defective unit yet was zero percent at fault, were not inconsistent. He concluded that it meant only that Potomac sold a defective product but was not responsible for the defect. He understood the majority opinion to mean that Potomac was liable, "but only in a vicarious or derivative sense as the inert seller in the marketing chain."⁹³ He observed that "[t]his is not the kind of conduct that needs to be included in a comparative fault question, and the jury properly ignored it. Potomac should be found liable to plaintiffs but entitled to indemnity from the other defendants"⁹⁴

Justice Simonett's analysis becomes important in cases where a party lower in the chain of manufacture and distribution sold a defective product but is not assigned a percentage of fault.⁹⁵ It helps to clarify the majority opinion and provides critical guidance in determining how the fault of multiple parties should be submitted to a jury where the fault of one or more parties is

91. See *Lambertson v. Cincinnati Corp.*, 312 Minn. 114, 257 N.W.2d 679 (1977).

92. *Hudson*, 326 N.W.2d at 159 (Simonett, J., concurring specially).

93. *Id.*

94. *Id.*

95. The seller's exception statute, MINN. STAT. § 544.41 (2010), enacted in 1980 but not applicable to the case, allows a seller lower in the chain to avoid strict liability where the manufacturer is solvent and subject to jurisdiction in Minnesota, but there may be cases where the manufacturer's fault is submitted on a special verdict form and the manufacturer's fault is set at 100% but the manufacturer is bankrupt. A retailer found to have sold the defective product is nonetheless liable for 100% of the damages. See *Marcon v. Kmart Corp.*, 573 N.W.2d 728 (Minn. Ct. App. 1998).

vicarious or derivative.

In *Cambern v. Sioux Tools, Inc.*,⁹⁶ an important case interpreting the Comparative Fault Act, the plaintiff was injured in the course of her employment with Bayliner Boats when a drill handle slipped and twisted, causing her serious injuries. The plaintiff brought suit against the manufacturer of the drill, Sioux Tools. The jury found the plaintiff 35% at fault, Sioux Tools 20% at fault, and Bayliner Boats 45% at fault. The issue was whether the plaintiff was entitled to recover against Sioux Tools, even though her fault was greater than Sioux Tools's.

Justice Simonett, writing for the court, held that she could not. The plaintiff argued that the fault of the defendants should be aggregated in cases such as this, where the fault of the defendants overlapped. He rejected the argument. Minnesota precedent is clear. Absent proof of an economic joint venture, there is no aggregation of fault. The overlapping duty argument would expand that precedent and present a jury with a “nearly impossible task” of sorting out what portions of fault overlap.⁹⁷ Furthermore, there was no joint duty in the case. Bayliner and Sioux Tools were simply concurrently negligent.⁹⁸

One cannot help but wonder whether the opinion was also influenced by *Delgado v. Lohmar*,⁹⁹ a 1979 case in which a farm owner was blinded by a shot fired by one of the members of a grouse hunting party. Justice Simonett, in private practice, represented one of the members of the hunting party who had not fired the shot. In a joint brief, the respondents argued that liability should not be imposed on the other members of the hunting party under a joint enterprise liability theory. While I do not know whether Justice Simonett wrote the following part of the brief, the style and mode of argument certainly sound like his. If he did not author that part of the brief, he must have influenced it:

Prosser, in his fourth edition, has an excellent discussion of joint enterprise. He points out how it rests on an analogy to the law of partnership, but that “except in comparatively rare instances,” its application outside commercial transactions has been in the field of automobile negligence. Prosser does not believe joint

96. 323 N.W.2d 795 (Minn. 1982).

97. *Id.* at 798.

98. *Id.* at 799.

99. 289 N.W.2d 479 (Minn. 1979).

enterprise should apply to situations of friendly cooperation and accommodation, “where there is not the same reason for placing all risks upon the enterprise itself,” as there is in the case of a business venture. Moreover, to say here the parties on a hunting trip entered into a contractual relationship and to say, further, that each member shared a “right of control” over the others, and, then, to say further, that each hunter was the agent or servant of the others, is to pile here fictions on top of each other. “This top heavy structure,” says Prosser, referring to the three fictions, “tends to fall of its own weight.” *Prosser, Torts*, (4th ed.), pp. 475–481.

Moreover, the policy implications of plaintiffs’ theory are alarming. Every Minnesota hunter—no matter if he or she is not at fault, for that is irrelevant—becomes liable for the fault of anyone else in the group. And if negligence can be imputed to persons hunting, presumably it can be imputed to persons playing golf together or baseball or whatever. This is not, and should not be, the law.¹⁰⁰

In *Rambaum v. Swisher*,¹⁰¹ the court considered the relationship between a *Pierringer* release and the Comparative Fault Act. The plaintiff’s post-collateral-source discount damages totaled \$268,241.67. The jury assigned 10% of the fault in the case to a fraternal organization where the plaintiff was illegally served alcohol, 10% to another bar where the plaintiff drank, and 80% to Swisher, the driver of the car that hit the plaintiff. The plaintiff settled with the other bar for \$200,000. The remaining defendants argued that the full amount of the settlement should be deducted from the damages. The fair share of the remaining bar, the Croatian Club, would have been 10% of the damages, or \$26,924.17. The plaintiff arguably would receive a windfall if permitted to recover the damages against the remaining defendants with no deduction for the settlement. The Comparative Fault Act seemed to anticipate this in subdivision 5 of section 604.01:

All settlements and payments made under subdivisions 2 and 3 shall be credited against any final settlement or judgment; provided however that in the

100. Respondents’ Brief at 17–18, *Delgado v. Lohmar*, 289 N.W.2d 479 (Minn. 1979) (No. 49636).

101. 435 N.W.2d 19 (Minn. 1989).

event that judgment is entered against the person seeking recovery or if a verdict is rendered for an amount less than the total of any such advance payments in favor of the recipient thereof, such person shall not be required to refund any portion of such advance payments voluntarily made. Upon motion to the court in the absence of a jury and upon proper proof thereof, prior to entry of judgment on a verdict, the court shall first apply the provisions of subdivision 1 and then shall reduce the amount of the damages so determined by the amount of the payments previously made to or on behalf of the person entitled to such damages.¹⁰²

The defendant fraternal organization argued that if the settlement exceeded the settling defendant's fair share, the amount by which the settlement exceeded the settling defendant's fair share should be credited against the plaintiff's award. Justice Simonett rejected that argument. Applying the *Pierringer* payment in full against the entire award would be contrary to the intent of the parties to the settlement, "who agreed to deduct from the verdict award only that portion of the settlement payment attributable to the fault of the settling defendant."¹⁰³ It would also seriously impair the utility of the *Pierringer* release.

Justice Simonett noted that subdivision 5 of the Comparative Fault Act was enacted in 1969, before the *Pierringer* release was recognized by the supreme court,¹⁰⁴ and that the legislature did not appear to have *Pierringer* releases in mind when it adopted subdivision 5.¹⁰⁵ Allowing an overall *pro tanto* reduction of the plaintiff's damages would effectively dismantle the *Pierringer* release, he concluded, and the nonsettling defendants would obtain a "windfall" and provide it with a further reason for not considering settlement.¹⁰⁶ Of necessity, subdivision 5 had to be ignored.

102. MINN. STAT. § 604.01, subdiv. 5 (2010).

103. *Rambaum*, 435 N.W.2d at 22–23.

104. The supreme court recognized the *Pierringer* release in *Frey v. Snelgrove*, 269 N.W.2d 918, 922 (Minn. 1978). Of course, Justice Simonett wrote the definitive article on *Pierringer* releases in Minnesota when he was in practice. See John E. Simonett, *Release of Joint Tortfeasors: Use of the Pierringer Release in Minnesota*, 3 WM. MITCHELL L. REV. 1 (1977).

105. *Rambaum*, 435 N.W.2d at 23.

106. *Id.*

IX. FRAUD AND MISREPRESENTATION

*Florenzano v. Olson*¹⁰⁷ was a fraudulent misrepresentation case brought against an insurance agent based upon false representations that induced the insured to withdraw from participation in the social security program. The case is complicated because of the various forms a misrepresentation claim may take. Justice Simonett concurred specially:

The majority opinion, as I read it, holds that (1) comparative negligence does not apply to an intentional tort; (2) plaintiffs failed to prove intentional fraud as a matter of law; and (3) while negligent misrepresentation was proven, comparative negligence applies, and the jury's verdict putting 62.5% negligence on plaintiff precludes plaintiffs' recovery. I join in the result reached by the majority and in its essential holdings, but because the subject is important, with consequences yet to be seen, and because my approach differs in some respects, I take this occasion to write. The majority opinion, prudently, leaves to another day a further formulation of the concept of intentional misrepresentation. Yet, it seems to me, that formulation is very much implicated here and it might be useful to say something more, if not to provide a solution, at least to point out where the problems lie.¹⁰⁸

The concurrence goes on to further clarify. The court accepted the proposition that comparative negligence is inapplicable to claims involving intentional torts, raising the issue of when a fraudulent misrepresentation is intentional. Intent to deceive is a clear case. He reads the majority opinion to say that a defendant asserting a fact as of his own knowledge without knowing if it is true or false would also constitute an intentional tort. In discussing fraud claims, he wrote:

It seems to me that under the broad category of fraud we have three types of actionable misrepresentations: the first is deceit; the second, for want of a better name, I will call reckless misrepresentation; and the third is negligent misrepresentation. The first two types have always been combined under the *Davis v. Re-Trac*¹⁰⁹ formulation, but now, because of the enactment of Minn. Stat. § 604.01

107. 387 N.W.2d 168 (Minn. 1986).

108. *Id.* at 176-77 (Simonett, J., concurring specially).

109. *Davis v. Re-Trac Mfg. Corp.*, 276 Minn. 116, 149 N.W.2d 37 (1967) (footnote added by author).

and today's holding, they must be separated at least for the purpose of determining whether comparative negligence or fault applies.¹¹⁰

The concurrence takes the position that comparative responsibility applies to reckless and negligent misrepresentations but not to deceit claims. "The dividing line is the 'intent to deceive' which distinguishes deceit from the other two torts and which makes deceit a true, not a fictional, intentional tort."¹¹¹

The majority opinion suggested that, where a case is submitted to the jury on intentional and negligent misrepresentation claims, there should be separate interrogatories on the intent element asking, first, whether the defendant knew the facts to be false and, if not, whether the defendant asserted the facts as of his or her own knowledge without knowing if they were true or false. Justice Simonett clarified that approach by suggesting an alternative that focused on the representation, as well as what the impact of the findings would be on the application of comparative negligence principles:

In future cases where both deceit and reckless misrepresentation are submitted to the jury, I assume the trial court, in submitting the 11 elements of misrepresentation . . . , may wish to separate the element of "fraudulent intent" into two questions, namely: (1) Did defendant know the representation to be false? and, if not, then (2) Did defendant assert the representation as of his own knowledge without knowing whether it was true or false? Only if the second question is answered yes would comparative negligence apply.¹¹²

Here, as elsewhere, he writes separately, just to clarify a few things. He makes suggestions that will avoid further confusion, and he makes a suggestion as to how claims involving intentional and negligent misrepresentations can be submitted to a jury to achieve a clear resolution of the separate claims, as well as providing a clear basis for applying comparative negligence principles to misrepresentation claims.

110. *Florenzano*, 387 N.W.2d at 177 (footnotes omitted).

111. *Id.*

112. *Id.* at 179 (citations omitted).

X. CONCLUSION

A discussion of these nine areas of tort and tort-related law cannot do full justice to the talents of the Justice in structuring and applying the law of torts. The strength of his approach to *crafting* his opinions, a more descriptive word than writing, is his consistency in striving to simplify the law and to apply the rules fairly. While Holmes may have said that his job was not to do justice but to apply the rules,¹¹³ Justice Simonett most certainly did both. He decided cases, of course, but he taught the law so that judges, lawyers, and juries could do justice in applying it.

113. See Michael Herz, "Do Justice!" *Variations of a Thrice-Told Tale*, 82 VA. L. REV. 111, 111 (1996). Justice Simonett quoted Holmes in *The Use of the Term "Result-Oriented" to Characterize Appellate Decisions*. Simonett, *supra* note 2, at 201.