A Lurch Forward in the Law — *Doiron* v. *La Caisse Populaire d'Inkerman Ltée.*[1] and *Coopers & Lybrand* v. *H.E. Kane Agencies Ltd.*[2]

Geologists tell us that the earth's surface is composed of plates constantly rubbing against each other. Incredible stresses build up; after years of imperceptible movement, one plate "gives way", allowing a sudden lurch forward. This lesson is not lost on students of the common law. Movement within the Canadian legal system has been at times imperceptible. Yet at points of contact with the civil law system and through changed public attitudes or statutory progress, incredible stresses build up. Finally, after years of intransigence, the common law will lurch forward. Taken in tandem, two cases handed down by the New Brunswick Court of Appeal on 13 March 1985, represent such a "lurch forward". Ironically the decisions were by two quite different panels. *Doiron* was heard by Richard C.J.Q.B., Angers J.A., and La Forest J.A. in one of his last decisions as a member of our Court of Appeal. *Coopers & Lybrand* was heard by Stratton J.A., Angers J.A., and — in one of his last reported cases — Hughes C.J.N.B.

Doiron was an action by a credit union against its solicitor. The solicitor had been instructed to prepare a mortgage which required guarantees to be executed. He failed to do so. In the result the mortgage was defaulted upon and the power of sale clause was invoked by the credit union. Owing to the inadquate guarantees, the credit union sustained a loss and took action against its lawyer. At trial the solicitor was held to have breached his contract to "carry out the work according to the standard of a careful and prudent solicitor".[3] The solicitor appealed.

Coopers & Lybrand involved a firm of chartered accountants which had for almost 30 years been the auditors for a firm of Saint John charter brokers. A son of the president of the company operated a travel agency as one of the firm's enterprises. The company president did not approve of credit being extended over lengthy periods of time. Without his knowledge his son did just that during the course of the operation of the travel agency. To keep his father from finding out, the son held vouchers for air line tickets until payment had been received, when an invoice would be prepared and forwarded with the payment cheque to the company president. Unfortunately for the son, the scheme unravelled when one of the customers of the travel agency went into receivership. The travel agency had issued tickets to the now bankrupt company for which it was indebted to Air Canada for more that a quarter of a million dollars. At trial, the accounting firm was held not to have met "the standard of care and skill required of them" in failing to detect creative accounting practices of the travel agency.[4] The accounting firm appealed and the travel agency cross-appealed the assessment of damages.

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[1](1985), 61 N.B.R. (2d) 123, 32 C.C.L.T. 73 (hereafter *Doiron*).

[2](1985), 62 N.B.R. (2d) 1, 32 C.C.L.T. 1 (hereafter *Coopers & Lybrand*).

[3]*Supra*, footnote 1 at N.B.R. 135, C.C.L.T. 82.

[4]*Supra*, footnote 2 at N.B.R. 9, C.C.L.T. 8.

In both cases there was a contract between a professional and a client, and a finding at trial that the former was found to have breached a professional duty. To the extent that these are professional liability cases, they are unremarkable. One ground for appeal in *Doiron*, however, was the extent to which the credit union was itself negligent. La Forest J.A. concluded:

> ...La Caisse is a financial institution which gave specific instructions regarding what it wanted done. One would expect it to exercise some degree of care to see that its instructions had been carried out before parting with its money... . I therefore conclude that La Caisse was also negligent in its dealings with Doiron.[5]

In *Coopers & Lybrand* Stratton J.A. concluded that "the proximate cause of the Kane company's loss was the excessive extension of credit to TRI [the bankrupt company] by Charles Kane without thought of its possible consequences".[6] In both cases at issue was the contributory negligence of the plaintiff. In tort the concept poses no problem. But in both *Doiron* and *Coopers & Lybrand*, the relationship between the parties was founded in contract.

Classic contract theory abhors contribution. As Waddams has said, freedom of contract "took the form of the pursuit of predictability and certainty at the expense of every other legal value".[7] Even in tort the doctrine is founded in statute rather than common law. Fleming succinctly summarizes the legal history of the concept:

> The Common Law treated contributory negligence as a complete defence: as not only impairing the plaintiff's recovery, but defeating it entirely. Less drastic would have been the rule of equal division of loss under Admiralty Law or apportionment in accordance with the parties' share of responsibility favoured by the civil Law.[8]

In order to mitigate the harshness of contributory negligence as a complete defence, most common law jurisdictions have adopted contributory negligence acts. La Forest J.A. observed that it is "generally known among the profession that the reason the statute was enacted was to avoid the injustice and rigidity of an absolutists concept of fault negligence law".[9] The civil law has always recognized apportionment of liability. It comes as no surprise to learn that the civil tradition would apply the principle of contributory negligence to all actions, whether in contract or tort, as part of the general law of obligations.

In many common law jurisdictions when professionals are involved as plaintiffs, provisions of contributory negligence statutes have been applied directly in cases of contract.[10] It would appear at first blush that the New Brunswick *Contributory Negligence Act*[11] lends itself to such application. The relevant New Brunswick section reads:

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[5] *Supra*, footnote 1 at N.B.R. 140-41, C.C.L.T. 86.

[6] *Supra*, footnote 2 at N.B.R. 17, C.C.L.T. 15.

[7] S.M. Waddams, *The Law of Contracts*, (Toronto: Canada Law Book, 1977) 3.

[8] J.G. Fleming, *The Law of Torts*, 6th ed. (Agincourt: Carswell, 1983) 242.

[9] *Supra*, footnote 1 at N.B.R. 151, C.C.L.T. 93.

[10] *Ibid.*, at N.B.R. 145, C.C.L.T. 89.

[11] R.S.N.B. 1973, c. C-19.

> 1(1) Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree in which each person was at fault but if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally.

The drafters of the legislation could well have restricted the *Act* solely to "damage", thus giving it a tortious colouring. By using the word "loss", the *Act* would appear to have a wider application. In *Dominion Chain Co. Ltd.* v. *Eastern Construction Co. Ltd.*[12] the Ontario Court of Appeal so held in considering the Ontario Act. Jessup J.A. agreed with Glanville William's description of the Act as "a somewhat clumsy enactment".[13] Alternatively, courts may strain to create some kind of duty on the part of the plaintiff to use "due care", which, when breached, gives rise to a counter-claim for damages in negligence. These would set-off the plaintiff's claim. This possibility is suggested by Waddams.[14] La Forest J.A. rejected both approaches. The method he used to arrive at his conclusion, like that of Stratton J.A. in *Coopers & Lybrand*, is of more significance than the conclusion themselves. It is, in fact, the approach to the problem which represents a "lurch" in the common law.

In an earlier case, *Maryon (J.) Int.* v. *NBTel Co.*,[15] La Forest J.A. had asked, "why should a person be deprived of his tortious action where there is no contractual term to the contrary?".[16] Simply put, there would appear to be no policy, legal or historical grounds for impairing an individual's rights in a cause of action merely because he happens to be involved in a contractual relationship, when absent a contract he would have a ready cause of action in tort. This same approach is echoed in *Coopers & Lybrand* and *Doiron*. In the latter case, La Forest J.A. once again posed the question:

> With the modification of the law of contributory negligence in tort to permit contribution, however, why, there being no compelling precedent or rationale, should the courts extend 19th century notions into 20th century contract law? The demands of consistency that would once have suggested an absolutist solution now suggest contribution. ...Thanks to legislative intervention, contribution is now the rule in torts as it is with collisions at sea. Since the tort position no longer impedes contract development, I see no reason why the courts should not respond, as they have, to the felt needs of the time.[17]

On the other hand, in *Coopers & Lybrand*, Stratton J.A. quoted with evident approval from Professor Mary Hatherly: "The principle 'that a person who is part author of his own injury should not receive full compensation from the other party' is as surely an aspect of contract law as it is of tort."[18]

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[12](1976), 68 D.L.R. (3d) 385.

[13]*Ibid.*, at 401.

[14]*Supra*, footnote 7 at 468.

[15](1982), 43 N.B.R. (2d) 469.

[16]*Ibid.*, at 506.

[17]*Supra*, footnote 1 at N.B.R. 155-56, C.C.L.T. 96.

[18]*Supra*, footnote 2 at N.B.R. 20-21, C.C.L.T. 16.

Applying the principle of contributory negligence to actions in contract rests within the basis principles of foreseeability as enunciated in *Hadley* v. *Baxendale*.[19] In *Doiron* La Forest J.A. decided that "liability should be apportioned on the basis of what might reasonably have been in the contemplation of the parties had an eventuality such as the present occurred to them",[20] with the result that loss was apportioned on a fifty-fifty basis. In *Coopers & Lybrand* Stratton J.A. took a wider view in ruling:

> Whether one accepts the argument that at common law damages could be apportioned in actions in contract as well as in actions of tort and that the *Contributory Negligence Act* should be applied by analogy, or adopts the theory of the reasonable expectations of the parties, or the notion of reliance that was either qualified or unreasonable, or simply that in fairness and to do justice the damages ought to be apportioned, I do not think that in the circumstances of this case the trial Judge erred in concluding that the actions of the company president Harold Kane and of Charles Kane, its employee, contributed to the company's loss.[21]

Such a result will not unduly shock a businessman. Prowse J.A. notes in *Canada Western Natural Gas Co.* v. *Pathfinder Surveys Ltd.* that "contributory negligence is regularly applied by the business community in such circumstances".[22]

In these two landmark cases the New Brunswick Court of Appeal boldly took an expansive view of the grounds for application of contributory fault in contract law. By selecting the high road of policy rather than a narrow technical route, the justices provided a wide opening for future defences. As La Forest noted in Doiron: "there does not seem to be any inherent requirement in contract law dictating an absolutist doctrine of liability".[23] In providing comprehensive authority for the apportionment of loss in the contract actions, the Court of Appeal relieved some of the strain on the common law. In both cases the court incorporated the cogent arguments of academics on the issue. The court has supplied a powerful new tool to be used by lawyers practising in New Brunswick and elsewhere in the advancement of fairness and justice. New Brunswick's highest court is to be commended for courageously "lurching ahead" in the common law.

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[19](1854), 156 E.R. 145.

[20]*Supra*, footnote 1 at N.B.R. 164, C.C.L.T. 101.

[21]*Supra*, footnote 2 at N.B.R. 22-23, C.C.L.T. 17.

[22](1980), 21 A.R. 459 at 485 (Alta. C.A.), quoted by La Forest J.A. in *Doiron*, *supra*, footnote 1 at N.B.R. 164, C.C.L.T. 101.

[23]*Supra*, footnote 1 at N.B.R. 153, C.C.L.T. 95.

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