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Precedent, Principle and Pragmatism: Justice Wilson and the Expansion of Canadian Tort Law

Kate Sutherland*

I. INTRODUCTION

Tort law does not appear to have been a particular area of interest for Bertha Wilson during her years as a law student or in legal practice. But after she was appointed to the bench, some of her best-known judgments both at the Ontario Court of Appeal and at the Supreme Court of Canada were tort decisions (for example, *Bhadauria v. Seneca College of Applied Arts and Technology*¹ and *Kamloops (City) v. Nielsen*),² and they, along with a number of other decisions authored by her, remain staples of the tort law curriculum. Clearly Justice Wilson made an impact on Canadian tort law.

This article focuses squarely on her tort decisions, analyzing them as a body with a view to determining whether a coherent tort theory or philosophy underpins them. At first glance, a thread to connect this body of decisions is elusive; indeed, on the surface, a number of them appear to contradict one another. For example, based on her *Bhadauria* judgment in which she boldly created a new tort of discrimination, we might regard Justice Wilson as a tort expansionist. Yet elsewhere, we see her protecting other areas of law from incursion by tort (contract law in *Dominion Chain v. Eastern Construction Co.*³ and family law in *Frame v. Smith*).⁴ And in other decisions, she positions herself somewhere between these poles, championing an incremental expansion of tort law

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¹ [1979] O.J. No. 4475, 27 O.R. (2d) 142, 105 D.L.R. (3d) 707 (Ont. C.A.), revd [1981] S.C.J. No. 76, [1981] 2 S.C.R. 181 (S.C.C.) [hereinafter "*Bhadauria*"].

² [1984] S.C.J. No. 29, [1984] 2 S.C.R. 2 (S.C.C.) [hereinafter "*Kamloops*"].

³ [1976] O.J. No. 2104, 12 O.R. (2d) 201, 68 D.L.R. (3d) 385 (Ont. C.A.), affd [1978] S.C.J. No. 61, [1978] 2 S.C.R. 1346 (S.C.C.) [hereinafter "*Dominion Chain*"].

⁴ [1987] S.C.J. No. 49, [1987] 2 S.C.R. 99 (S.C.C.) [hereinafter "*Frame*"].

where precedent allows and justice demands (for example, in *Kamloops* and in *Crocker v. Sundance Northwest Resorts Ltd.*)⁵

But digging deeper into Justice Wilson's tort decisions, common themes emerge which link them to one another and ground them firmly in the broader context of her judicial work as a whole. In tort, as in other areas of law, we find Justice Wilson striving to make decisions that are respectful of the constraints within which she operated as an appellate judge, true to her liberal principles, and responsive to the practical concerns of the parties appearing before her.

II. INITIAL ENCOUNTERS WITH TORT LAW

Bertha Wilson's experience as a first-year torts student was noteworthy for two reasons. First, it was in that class that she made the acquaintance of Dr. William R. Lederman, who became her favourite law school professor and an important mentor to her for many years thereafter. Second, it was there that she learned an important lesson about exam writing that set her on track for the excellence she ultimately achieved as a student. In a 1993 tribute to Dr. Lederman, she explained:

I recall, as a mature first year student many years removed from the technique of writing examinations, going to his office to ask why I had not done better in the Christmas test in torts. He handed me my paper and asked me to read my answer to a question involving a hockey player hitting another player during the game with his hockey stick. He said "You assumed that I knew that you knew that the tort involved was the tort of assault but at no point in your paper did you say so. You have to set your answer out step by step from the beginning and after you have done that go on to argue the finer points." I will always be grateful for that first interview because it reminded me that in the world of examinations nothing is to be taken for granted and everything is to be documented. I had no further problems with examinations from then on.⁶

Nevertheless, tort law does not seem to have become a particular area of interest for her at that stage. It was the upper year courses in constitutional law and jurisprudence taught by Dr. Lederman more so than that first-year torts class that she found especially stimulating. In her biography of Justice Wilson, Ellen Anderson describes Justice

⁵ [1988] S.C.J. No. 60, [1988] 1 S.C.R. 1186 (S.C.C.) [hereinafter "*Crocker*"].

⁶ Bertha Wilson, "The Ideal Teacher" (1993) 19 Queen's L.J. 16, at 16-17.

Wilson's response to her initial exposure to tort law as an ambivalent one:

There is no question that Wilson found torts conceptually interesting, and the method of teaching it generally appropriate. However, she considered the case book approach to be too much of a good thing. The torts course suffered from the excessive number of cases (some 187) with which Dalhousie students were to be familiar for the examination.⁷

During her 17 years in practice, Justice Wilson developed particular expertise in the realm of corporate and commercial law. Doubtless she would have encountered tort law occasionally, in the guise of one or another of the business torts, or negligence as it intersects with contract law. But tort law was not a primary focus for her then either.

It was only after Justice Wilson ascended to the bench that tort law began to figure prominently in her legal work. Not that she penned a vast number of tort decisions — in contrast to her constitutional output, for example, her tort decisions seem a modest handful.⁸ But of those tort decisions she did pen, both at the Ontario Court of Appeal and at the Supreme Court, several were high profile decisions that proved to be of long-standing importance.

III. EARLY JUDICIAL PRONOUNCEMENTS ON TORT: *BHADAURIA*

Bhadauria v. Seneca College,⁹ arguably Justice Wilson's best-known judgment from her tenure on the Court of Appeal, was a tort case. Indeed, even after all of her distinguished work at the Supreme Court, I would venture to say that *Bhadauria* remained one of the best-known judgments of her judicial career. As such, it deserves sustained attention here.

⁷ Ellen Anderson, *Judging Bertha Wilson: Law as Large as Life* (Toronto: University of Toronto Press, 2001), at 41 [hereinafter "*Judging Bertha Wilson*"].

⁸ See James MacPherson, "Canadian Constitutional Law and Madame Justice Bertha Wilson — Patriot, Visionary and Heretic" (1992) 15 Dalhousie L.J. 217, at 222 for a statistical picture of Justice Wilson's constitutional activity on the Supreme Court:

During her nine years at the Supreme Court of Canada, the Court heard 217 constitutional cases. Justice Wilson participated in 188 or 85.7 per cent of these cases. Moreover, she wrote judgments in 69 or 36.5 per cent of the cases in which she participated. These participation and writing rates are even higher in Charter cases. She participated in 89 per cent of the Court's Charter cases and wrote judgments in 43.6 per cent of the cases in which she participated (65:149).

⁹ *Supra*, note 1.

The plaintiff in the case was a highly educated East Indian woman. She held a B.A., an M.A. and a Ph.D. in Mathematics as well as an Ontario teaching certificate. She had seven years of experience teaching mathematics. During a four-year period she made 10 applications for teaching positions at the defendant College, each time in response to advertisements placed in Toronto newspapers. Her applications were acknowledged but she was never granted an interview, nor provided with any reason for the rejection of her applications. She alleged that each position was filled by someone who did not have her high qualifications, but who was not of East Indian origin.

The plaintiff alleged that she had been discriminated against in contravention of section 4 of the Ontario *Human Rights Code*,¹⁰ which prohibited discrimination in employment on grounds of race, creed, colour, sex, marital status, nationality, ancestry or place of origin. She declined to file a complaint with the Ontario Human Rights Commission, instead bringing an action in tort. She claimed damages for deprivation of teaching opportunities and of a teaching salary. Further, she claimed damages for mental distress, frustration, loss of self-esteem and dignity arising from the discriminatory treatment to which she had been subjected.

These claims were grounded in two separate causes of action. First, the plaintiff argued that the respondent College had breached a common law duty not to discriminate against her. Second, it had breached a statutory duty not to discriminate that flowed from its breach of the Ontario *Human Rights Code*. Writing for a unanimous court, Wilson J. found for the plaintiff based on the common law cause of action.

She noted that, “[w]hile no authority . . . has recognized a tort of discrimination, none has repudiated such a tort”,¹¹ then quoted the following passage from Prosser’s *Handbook of the Law of Torts*:

The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff’s interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy.¹²

She cited the preamble to the Ontario *Human Rights Code* as evidence of the public policy of the province regarding human rights,

¹⁰ R.S.O. 1970, c. 318.

¹¹ *Bhadauria*, *supra*, note 1, at 149 O.R. (C.A.).

¹² *Id.*

particularly equality, but not as the originator of such public policy.¹³ She held that the right to equality ought to receive the full protection of the common law, and that tort recovery for discrimination provided appropriate protection. She did not regard the Code as impeding the development of such a remedy, but rather the reverse given that relief under it is dependent on Ministerial discretion.¹⁴ Thus, a new common law tort of discrimination was born.

The decision was widely lauded.¹⁵ Mr. Justice Allen Linden, a renowned tort scholar and professor before his appointment to the bench, indicated that he had been delighted by it and that others were “dancing in the streets”.¹⁶ This seems no hyperbole when we consider such contemporaneous responses as that of civil rights lawyer Joseph Pomerant, who deemed it “the most important decision for the little guy on the street in the history of this country”¹⁷ and academic Dale Gibson, who pronounced it “a blessed event”.¹⁸

Alas, the reception by the Supreme Court was not so positive; a year and a half later, *Bhadoria* was overturned on appeal. Chief Justice Laskin (as he then was) expressed puzzlement at Wilson J.’s observation that “while the fundamental human right we are concerned with is recognized by the Code, it was not created by it”.¹⁹ He could see little difference between the common law and statutory causes of action put forward by the plaintiff, viewing the common law argument as an attempt to found a new action at common law “by reference to policies reflected in the statute and standards fixed by the statute”.²⁰ The case, for him, “[was] not concerned with whether a remedy can be provided for an admitted right but whether there is a right at all, that is, an interest which

¹³ *Id.*, at 149-50 O.R.

¹⁴ *Id.*, at 150 O.R.

¹⁵ *Judging Bertha Wilson, supra*, note 7, at 121-24; Dale Gibson, “The New Tort of Discrimination: A Blessed Event for the Great-Grandmother of Torts” (1980) 11 C.C.L.T. 141 [hereinafter “The New Tort of Discrimination”]; Maureen E. Baird, “Pushpa Bhadoria v. The Board of Governors of The Seneca College of Applied Arts and Technology: A Case Comment” (1981) 39 U.T. Fac. L. Rev. 96; Ian A. Hunter, “The Stillborn Tort of Discrimination: *Bhadoria v. Board of Governors of Seneca College of Applied Arts and Technology*” (1982) 14 Ottawa L. Rev. 222; and Harry Kopyto, “The *Bhadoria* Case: The Denial of the Right to Sue for Discrimination” (1981) 7 Queen’s L.J. 162.

¹⁶ *Judging Bertha Wilson, id.*, at 124.

¹⁷ Cited *id.*, at 121.

¹⁸ “The New Tort of Discrimination”, *supra*, note 15, at 150.

¹⁹ *Bhadoria, supra*, note 1, at 192.

²⁰ *Id.*, at 188.

the law will recognize as deserving protection”.²¹ He characterized the tort recognized by the Court of Appeal as “a species of an economic tort, new in its instance and founded, even if indirectly, on a statute enacted in an area outside a fully recognized area of common law duty”.²²

Chief Justice Laskin stated that “while the view taken by the Ontario Court of Appeal [was] a bold one and may be commended as an attempt to advance the common law”, such an attempt was “foreclosed by the legislative initiative which overtook the existing common law in Ontario and established a different regime”.²³ He held that, in the *Human Rights Code*, the legislature of Ontario had created a comprehensive scheme “in its administrative and adjudicative features, the latter including a wide right of appeal to the Courts on both fact and law”.²⁴ He concluded that “not only does the Code foreclose any civil action based directly upon a breach thereof but it also excludes any common law action based on an invocation of the public policy expressed in the Code”.²⁵

Despite this prompt reversal, Justice Wilson’s Court of Appeal decision in *Bhadauria* has generated continuing interest and enthusiasm among activists and academics, some of whom have expressed hope that the entrenchment of a constitutional right to equality in the intervening years would dictate a different result should the Supreme Court be called upon to consider anew the possibility of a common law tort of discrimination.²⁶

Justice Wilson’s decision in *Bhadauria* was undoubtedly an important event in her judicial career. Ellen Anderson goes so far as to suggest that it was one of the factors that elevated her name to the top of the list of potential appointees to the Supreme Court in 1982. She recounts an exchange that occurred between Allen Linden and then Prime Minister Pierre Trudeau just prior to her appointment. Trudeau, who was seeking to identify a female candidate who would make a credible appointment to the as yet all-male court, asked Linden for his

²¹ *Id.*, at 192.

²² *Id.*, at 189.

²³ *Id.*, at 195.

²⁴ *Id.*, at 183.

²⁵ *Id.*, at 195.

²⁶ See, for example, Kate Sutherland, “The New Equality Paradigm: The Impact of Charter Equality Rights on Private Law Decisions” in D. Schneiderman & K. Sutherland, eds., *Charting the Consequences: The Impact of Charter Rights on Law and Politics in Canada* (Toronto: University of Toronto Press, 1997); Jeffrey Radnoff & Pamela Foy, “The Tort of Discrimination” (2002) 26 *Advoc. Q.* 311; and Gillian Demeyere, “Common Law Actions for Sexual Harassment: The Jurisdiction Question Revisited” (2003) 28 *Queen’s L.J.* 637.

views on Justice Wilson. Trudeau was already aware of her solid reputation in commercial law, but looking ahead to the impending coming into force of the *Canadian Charter of Rights and Freedoms*,²⁷ he wanted to know about her record on human rights and civil liberties. Anderson describes Linden's response to the query and the events that followed thus:

In Linden's opinion, Wilson was supremely competent in commercial law but her heart was in human rights; there could be no one finer. Trudeau was not familiar with the Wilson judgment in *Bhadauria*; when Linden described it to him, he requested that Linden forward a copy of it to him. Within a few days, the Wilson appointment had been announced.²⁸

The fact that Justice Wilson's *Bhadauria* decision had made an impression on Trudeau and his government was underscored by a playful mention of it by then Justice Minister Jean Chrétien at her swearing-in ceremony:

Although I know that Madame Justice Wilson will work closely with her new associates, her service on the Court of Appeal demonstrates that she will not hesitate to write clearly and compellingly in dissent. My Lord the Chief Justice has been recently aware of the persuasive innovation which his new associate can bring to her judgments, and in the future, he may find it more difficult to resist the kind of reasoning which he recently characterized as a bold and commendable attempt to advance the common law.²⁹

Justice Wilson's *Bhadauria* decision does seem to have augured things to come when we think of the reputation she went on to develop at the Supreme Court for creative judgments responsive to equality concerns, particularly in the realm of Charter jurisprudence. But what does *Bhadauria* tell us about her tort philosophy? Did it hold any predictive power with respect to her future tort decisions?

IV. TO EXPAND OR NOT TO EXPAND TORT LAW

Based on her bold creation of a new tort of discrimination in *Bhadauria*, we might be tempted to label Justice Wilson a tort

²⁷ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

²⁸ *Judging Bertha Wilson*, *supra*, note 7, at 125.

²⁹ Cited *id.*, at 129.

expansionist and to anticipate that in future judgments she would create other new torts to protect other legal interests. In fact, however, analyzing her tort decisions as a body, the picture becomes much more complicated. Both before and after *Bhadauria*,³⁰ she was as likely to put the brakes on tort expansion as to further it.

Early in her tenure at the Ontario Court of Appeal, Justice Wilson registered dissents in a pair of cases, *Dominion Chain* and *Dabous v. Zuliani*,³¹ that,

. . . raise[d] the question of whether a contractor on the one hand, and an architect or engineer on the other hand, who have both been negligent in the performance of their respective contracts with a plaintiff for the construction of a building by the contractor and for the supervision of such construction by the architect or engineer, have rights under the *Negligence Act*, R.S.O. 1970, c. 296, of contribution and indemnity against one another.³²

The majority held that the contractor and the architect or engineer in that scenario owed tort duties that overlapped with the contractual obligations that they had taken upon themselves; as a consequence they did constitute tortfeasors within the meaning of the *Negligence Act* and so had rights under it of contribution and indemnity against one another.

Justice Wilson disagreed with the majority on the issue of contract/tort overlap, opining that “where the architect or engineer has been negligent in the performance of his contractual obligations to the owner, the owner’s suit should properly be brought in contract.”³³ She continued:

We are not in my view concerned here with the duty of a defendant not to injure his “neighbour” as defined by Lord Atkin in *M’Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562 at p. 580. It is true that if A has contracted with B to perform certain acts in relation to B’s person or property, then B may be characterized as a member of a class of “persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question”. However, where the person to whom the duty is owed, the scope of the duty and the standard of care have all been expressly or impliedly agreed upon by the parties, it appears to me somewhat

³⁰ *Supra*, note 1.

³¹ *Dominion Chain*, *supra*, note 3 (C.A.); *Dabous v. Zuliani*, [1976] O.J. No. 2105, 12 O.R. (2d) 230, 68 D.L.R. (3d) 414 (Ont. C.A.).

³² *Dominion Chain*, *id.*, at 204-205 O.R.

³³ *Id.*, 223 O.R.

artificial to rely upon Lord Atkin's "neighbour" test to determine whether or not the duty is owed to the particular plaintiff and as to the requisite standard of care the defendant must attain. In other words, it would appear that if the acts or omissions complained of by the plaintiff are in relation to the very matters covered by the contract, the essence of the plaintiff's action is breach of the contractual duty of care rather than breach of the general duty of care owed to one's "neighbour" in tort.³⁴

She noted that the scope of the duty owed and the remedies available for breach may be different in contract and in tort, and made clear that she regarded it as an undesirable outcome that parties to a contract should recoup in tort damages that they were not entitled to under that contract: "In my view, the provisions of the contract must govern in such circumstances. I do not believe, for example, that a plaintiff, by framing his action in tort, can allege a higher standard of care than that agreed upon by the parties themselves."³⁵

Initially I tried to make sense of the apparent disjunction between Justice Wilson's *Bhadauria* and *Dominion Chain* judgments by reference to the following well-known passage from her 1990 "Will Women Judges Really Make a Difference?" speech:

Taking from my own experience as a judge of fourteen years' standing, working closely with my male colleagues on the bench, there are probably whole areas of the law on which there is no uniquely feminine perspective. This is not to say that the development of the law in these areas has not been influenced by the fact that lawyers and judges have all been men. Rather, the principles and the underlying premises are so firmly entrenched and so fundamentally sound that no good would be achieved by attempting to re-invent the wheel, even if the revised version did have a few more spokes in it. I have in mind areas such as the law of contract, the law of real property, and the law applicable to corporations. In some other areas of the law, however, a distinctly male perspective is clearly discernible. It has resulted in legal principles that are not fundamentally sound and that should be revisited when the opportunity presents itself. Canadian feminist scholarship has done an excellent job of identifying those areas and making suggestions for reform. Some aspects of the criminal law in particular cry out for change; they are based on presuppositions about the nature

³⁴ *Id.*, at 224 O.R.

³⁵ *Id.*

of women and women's sexuality that, in this day and age, are little short of ludicrous.³⁶

There is no explicit mention of it here, but given the diverse terrain that tort law encompasses, it seems bound to straddle the divide Justice Wilson constructed between those areas of the law that ought to be left alone and those that cry out for reform.

Thus we could imagine Justice Wilson regarding the tort/contract overlap issue of *Dominion Chain* as falling within the "firmly entrenched" and "fundamentally sound" realm of contract and requiring no reform through tort expansion, whereas the damages suffered as a consequence of discrimination in *Bhadauria* would seem an obvious site for innovative tort remedies. But an analysis that links in straightforward fashion Justice Wilson's openness to tort expansion with areas of the law that she identified as ripe for feminine/feminist reform does not hold up when we factor in more of her Supreme Court tort decisions. For example, in *Frame v. Smith*,³⁷ she declined to expand tort remedies in the family law context, an area that would certainly fall on the "ripe for reform" side of her ledger.

In *Frame*, the plaintiff brought an action against his ex-wife and her new husband, alleging that they had done everything that they could to frustrate his court-ordered access to his three children, ultimately destroying his relationship with them. He claimed that the defendants' conduct had put him to considerable expense and also caused him extreme mental distress. He sought damages from them for their interference with his legal relationship with his children. The defendants' application to strike succeeded at trial and was, in turn, upheld by the Court of Appeal and the Supreme Court of Canada.

Justice Wilson dissented in the result, but agreed with the majority that there should be no recovery in tort for this plaintiff. She noted that the facts of the case could fit within the existing tort of conspiracy and that precedent did not preclude the extension of the tort into the family law context. But, she asserted, the real question is not whether the tort could be extended to cover this scenario, but whether it *should* be extended. Despite her sympathy for the plaintiff, she concluded that it should not:

³⁶ Bertha Wilson, "Will Women Judges Really Make a Difference?" (1990) 28 Osgoode Hall L.J. 507.

³⁷ *Frame*, *supra*, note 4.

It would be my view that the tort of conspiracy should not be extended to the family law context. Although “the law concerning the scope of the tort of conspiracy is far from clear” the criticisms which have been levelled at the tort give good reason to pause before extending it beyond the commercial context”.³⁸

Further: “Having regard to the overriding concern for the best interests of the children, I am not persuaded that the tort of conspiracy should be extended to encompass the claim of the plaintiff.”³⁹

For similar reasons, Wilson J. was no more inclined to extend the tort of intentional infliction of mental distress to cover the plaintiff’s claim:

Finally, and most importantly, the extension of this cause of action to the custody and access context would not appear to be in the best interests of children. Like the tort of conspiracy the tort of intentional infliction of mental suffering would be relatively ineffective in encouraging conduct conducive to the maintenance and development of a relationship between both parents and their children. It is obvious also that such a cause of action, if it were made available throughout the family law context, would have the same potential for petty and spiteful litigation and, perhaps worse, for extortionate and vindictive behaviour as the tort of conspiracy. Indeed, the tort of intentional infliction of mental suffering appears to be an ideal weapon for spouses who are undergoing a great deal of emotional trauma which they believe is maliciously caused by the other spouse. It is not for this Court to fashion an ideal weapon for spouses whose initial, although hopefully short-lived objective, is to injure one another, especially when this will almost inevitably have a detrimental effect on the children. Yet, if this cause of action were extended to encompass the facts of this case, it seems to me that there is no rational basis upon which its extension to other areas of family law could be resisted. The gist of the tort is the intentional infliction of mental suffering regardless of the relationship between plaintiff and defendant. It would be available in respect of all inter-spousal conduct both before and after marital breakdown. I would therefore not extend this common law tort to the family law context where the spin-off effects on the children could only be harmful.⁴⁰

³⁸ *Id.*, at 124.

³⁹ *Id.*, at 126-27.

⁴⁰ *Id.*, at 128-29.

Finally, Wilson J. indicated that a new tort to remedy violation of parental access rights was foreclosed by the Supreme Court's decision in *Bhadauria*. Given the foregoing, however, I think it is safe to say that she would not have been inclined to create such a tort even if she believed that precedent left room to do so. It is not that she was reluctant to extend tort liability when she thought it appropriate, but rather that she did not think it appropriate in this context. Although she had sympathy for the plaintiff and judged him to have suffered a compensable loss, she was not convinced that the individualized relief provided by tort law was the right way to address that loss.

Instead, she looked to the cause of action for breach of fiduciary duty for a remedy, and here parted way with the majority of the Court, who denied the plaintiff's appeal altogether. She opted for fiduciary duty over tort because, in her view, to do so would afford the Court the flexibility to give the best interests of the child paramount importance:

Finally, unlike the causes of action in tort, the cause of action for breach of fiduciary duty allows the court to take into account conduct of a non-custodial parent (whether related to custody and access issues or not) which might be contrary to the best interests of children. When considering breaches of equitable duty and awarding equitable remedies the court has a wide scope for the exercise of discretion which does not exist in respect of common law causes of action. In the context of breach of fiduciary duty this discretion would allow the court to deny relief to an aggrieved party or grant relief on certain terms if that party's conduct has disabled him or her from full relief, e.g., non-payment of spousal support or previous abuse of access rights. There is neither precedent nor historical basis for the exercise of such a discretion in the case of a common law tort action. The tort would be actionable regardless of the inequitable conduct of the plaintiff.⁴¹

The extension of the cause of action for breach of fiduciary duty that Wilson J. proposed in her *Frame* dissent would have been an innovative move,⁴² so her reluctance to expand the reach of tort law in the case

⁴¹ *Id.*, at 144.

⁴² On this point, see Mary Jane Mossman, "The 'Family' in the Work of Madame Justice Wilson" (1992) 15 *Dalhousie L.J.* 115, at 146, n. 88:

It should also be noted that Justice Wilson's conclusion that a custodial parent has a fiduciary obligation in relation to the non-custodial parent and the children is remarkable for its destruction of the public/private division in law. None of the literature cited in her judgment applied the fiduciary concept to family relationships; this analysis was her work alone.

cannot be regarded as a cautious turn prompted by the Supreme Court reception of her Court of Appeal decision in *Bhadauria*. Nor can it be seen simply as a reflection of her doubts about the tort of conspiracy. For a few years later, in *Hunt v. Carey Canada Inc.*,⁴³ we find her expressing an openness to the extension of that tort in a different factual context.

The plaintiff in *Hunt* brought an action against the defendants after developing mesothelioma. He alleged that this medical condition was the result of his exposure to asbestos fibres in the course of his employment, and that the defendants, all companies involved in the mining, production and supply of asbestos and asbestos products, had known of the dangers of such exposure at the time and that they had withheld information about those dangers. His action was founded exclusively in the tort of conspiracy and the defendants moved to have the action struck for want of a reasonable claim. The defendants were successful in having the action struck out at trial, but the Court of Appeal overturned that decision and the Supreme Court agreed with the Court of Appeal.

In their arguments, the defendants placed considerable weight on the portion of Wilson J.'s judgment in *Frame* in which she expressed doubts about expanding the tort of conspiracy and declined to do so in the family law context.⁴⁴ But Wilson J., writing for a unanimous Court this time around, was not willing to concede that it would be equally inappropriate to extend the tort of conspiracy to cover the facts of *Hunt*, at least not in the context of an application to strike a statement of claim:

Is it plain and obvious that allowing this action to proceed amounts to an abuse of process? I do not think so. While there has clearly been judicial reluctance to extend the scope of the tort beyond the commercial context, I do not think this Court has ever suggested that the tort could not have application in other contexts. ... While courts should pause before extending the tort beyond its existing confines, careful consideration might conceivably lead to the conclusion that the tort has a useful role to play in new contexts.

I note that in *Frame v. Smith, supra*, at p. 125, I was not prepared to extend the tort of conspiracy to the custody and access context both because such an extension was not in the best interests of children and because such an extension would not have been consistent with the rationale that underlies the tort of conspiracy: "namely that the tort be

⁴³ [1990] S.C.J. No. 93, [1990] 2 S.C.R. 959 (S.C.C.) [hereinafter "*Hunt*"].

⁴⁴ Remember that though hers was a dissenting judgment the majority agreed with her on this point. *Frame*, [1987] S.C.J. No. 49, [1987] 2 S.C.R. 99, at 109 (S.C.C.).

available where the fact of combination creates an evil which does not exist in the absence of combination". But in the appeal now before us it seems to me much less obvious that a similar conclusion would necessarily be reached. If the facts as alleged by the plaintiff are true, and for the purposes of this appeal we must assume that they are, then it may well be that an agreement between corporations to withhold information about a toxic product might give rise to harm of a magnitude that could not have arisen from the decision of just one company to withhold such information. There may, accordingly, be good reason to extend the tort to this context.⁴⁵

She concluded therefore that it was not "plain and obvious" that the plaintiff had no chance of success and so his action should be allowed to proceed to trial.

Thus in the quartet of Wilson J.'s tort decisions that we have considered so far, we see a bold expansion of tort law in *Bhadauria*,⁴⁶ and an openness to future expansion in *Hunt*,⁴⁷ contrasted with the expression of firm convictions in her dissents in *Dominion Chain*⁴⁸ and *Frame*⁴⁹ that the incursion of negligence into contract law and of the tort of conspiracy into family law respectively should be stopped cold. More often though, what we see in her Supreme Court judgments is an incremental expansion of tort law, such as in *Kamloops*,⁵⁰ *Crocker*⁵¹ and *Fletcher v. Manitoba Public Insurance Co.*⁵²

Justice Wilson's majority judgment in *Kamloops* is best known by contemporary torts students as an authoritative pronouncement that the House of Lord's two-stage *Anns* test for determining the existence of a duty of care in negligence was duly adopted into Canadian law. But at the time it was handed down, it was hailed for important developments in three areas of negligence law: (1) liability of public authorities; (2) liability for pure economic loss; and (3) the time at which the statutory

⁴⁵ *Hunt*, *supra*, note 43, at 988-89.

⁴⁶ [1979] O.J. No. 4475, 27 O.R. (2d) 142, 105 D.L.R. (3d) 707 (Ont. C.A.), *revd* [1981] S.C.J. No. 76, [1981] 2 S.C.R. 181 (S.C.C.).

⁴⁷ *Supra*, note 43.

⁴⁸ [1970] O.J. No. 2104, 12 O.R. (3d) 201, 68 D.L.R. (3d) 385 (Ont. C.A.), *affd* [1978] S.C.J. No. 61, [1978] 2 S.C.R. 1346 (S.C.C.).

⁴⁹ [1987] S.C.J. No. 49, [1987] 2 S.C.R. 99 (S.C.C.).

⁵⁰ [1984] S.C.J. No. 29, [1984] 2 S.C.R. 2 (S.C.C.).

⁵¹ [1988] S.C.J. No. 60, [1988] 1 S.C.R. 1186 (S.C.C.).

⁵² [1990] S.C.J. No. 121, [1990] 3 S.C.R. 191 (S.C.C.) [hereinafter "*Fletcher*"].

limitation period begins to run in cases in which damage is caused by latent defects.⁵³

The issue in *Kamloops* was “whether a municipality can be held liable for negligence in failing to prevent the construction of a house with defective foundations”.⁵⁴ Justice Wilson, writing for a majority of the Court, concluded that it could:

. . . [T]he evidence gives rise to a strong inference that the City, with full knowledge that the work was progressing in violation of the by-law and that the house was being occupied without a permit, dropped the matter because one of its aldermen was involved. Having regard to the fact that we are here concerned with a statutory duty and that the plaintiff was clearly a person who should have been in the contemplation of the City as someone who might be injured by any breach of that duty, I think this is an appropriate case for the application of the principle in *Anns*.⁵⁵

In arriving at this conclusion, Wilson J. considered unresolved questions relating to each of the areas of negligence law listed above. With respect to the liability of public authorities, she found that the decision at issue here was an operational one and so imposing a duty in relation to it would not compromise the municipality’s discretion to make policy decisions.⁵⁶ Further, though the duty was a positive one, given that it was a duty that the municipality had elected to impose on the building inspector, it made no sense to draw a distinction between nonfeasance and misfeasance.⁵⁷ Finally, she concluded that the imposition of liability in these circumstances would not lead to indeterminate liability.⁵⁸ On the question of liability for pure economic loss, she determined that the Court’s prior decision on this issue in *Rivtow*⁵⁹ did not preclude such liability here, given the factual distinctions between the cases, in particular the lack of contractual overtones in *Kamloops*.⁶⁰

⁵³ See, for example, Beth Bilson, “Should City Hall Be Worried? *City of Kamloops v. Nielsen*” (1984) 49 Sask. L. Rev. 345; and Bruce Feldthusen, “*City of Kamloops v. Nielsen*: A Comment on the Supreme Court’s Modest Clarification of Colonial Tort Law” (1985) 30 McGill L.J. 539.

⁵⁴ *Kamloops*, *supra*, note 50, at 5.

⁵⁵ *Id.*, at 24.

⁵⁶ *Id.*, at 12-13.

⁵⁷ *Id.*, at 24.

⁵⁸ *Id.*, at 25-26.

⁵⁹ *Rivtow Marine Ltd. v. Washington Iron Works*, [1973] S.C.J. No. 126, [1974] S.C.R. 1189 (S.C.C.) [hereinafter “*Rivtow*”].

⁶⁰ *Kamloops*, *supra*, note 50, at 33-35.

On the question of when the limitation period should begin to run, Wilson J. canvassed two conflicting lines of cases and, in contrast to the House of Lords, embraced the reasonable discoverability rule, that is, that the limitation period should begin to run not when the damage occurs but rather at the point when it is reasonably discoverable by the plaintiff. In adopting the reasonable discoverability rule over the alternative, Wilson J. emphasized “the injustice of a law which statute-bars a claim before the plaintiff is even aware of its existence”.⁶¹

Justice Wilson’s statements in *Kamloops* on the liability of public authorities and liability for pure economic loss represent incremental changes in tort law that the Court would build upon to formulate the more authoritative pronouncements on each issue to be found in later decisions such as *Just*⁶² and *Norsk*,⁶³ while the adoption of the reasonable discoverability rule was a more dramatic development that paved the way for such future innovations as the decision of the Court in *M. (K.) v. M. (H.)*.⁶⁴

Incremental expansion was also the order of the day in *Crocker*, where the Court was called upon to determine whether the defendant ski resort “had a positive duty at law to take certain steps to prevent a visibly intoxicated person from competing in the resort’s dangerous ‘tubing’ competition”.⁶⁵ Writing for the majority, Wilson J. held that it did, and that so holding followed logically from the Court’s previous determination in *Menow v. Jordan House*⁶⁶ that a tavern owed a duty in negligence to an intoxicated patron that “required the defendant to take certain positive steps to avert potential calamity”.⁶⁷ In her view it was a short step from the facts of *Menow* to those of *Crocker*:

. . . [W]hen a hotel ejects a drunken patron, it owes a duty of care to the patron to take certain steps to ensure that the patron arrives home safely (*Jordan House*). It would seem *a fortiori* that when a ski resort establishes a competition in a highly dangerous sport and runs the

⁶¹ *Id.*, at 40.

⁶² *Just v. British Columbia*, [1989] S.C.J. No. 121, [1989] 2 S.C.R. 1228 (S.C.C.).

⁶³ *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] S.C.J. No. 40, [1992] 1 S.C.R. 1021 (S.C.C.).

⁶⁴ [1992] S.C.J. No. 85, [1992] 3 S.C.R. 6 (S.C.C.).

⁶⁵ *Crocker*, *supra*, note 51, at 1188.

⁶⁶ [1973] S.C.J. No. 80, [1974] S.C.R. 239 (S.C.C.).

⁶⁷ *Crocker*, *supra*, note 51, at 1196.

competition for profit, it owes a duty of care towards visibly intoxicated participants.⁶⁸

Indeed, Wilson J. concluded that the risk of harm was even greater in the latter case than in the former.

Finally, in *Fletcher*,⁶⁹ the Supreme Court addressed the question of whether public insurers owe duties in negligence to their clients. The plaintiffs suffered serious injuries in a car accident. The driver of the other car was judged responsible but did not have sufficient insurance to cover the plaintiffs' losses so the plaintiffs claimed the shortfall from the defendant public insurer. The defendant denied the claim because the plaintiffs had not purchased optional "underinsured motorist coverage". The plaintiffs then sued the defendants in negligence alleging that they had not been properly informed of the full range of coverage available to them at the time that they purchased their insurance package. The trial judge found for the plaintiffs but the Court of Appeal allowed the defendant's appeal.

Justice Wilson, writing for a unanimous Court, restored the trial judgment in favour of the plaintiff. In so doing, she endorsed the English and Canadian cases that had already held insurance agents to have duties to their clients under the *Hedley Byrne* principle, stating:

In my view, the sale of automobile insurance is a business in the course of which information is routinely provided to prospective customers in the expectation that they will rely on it and who do in fact reasonably rely on it. It follows, therefore, that the principle in *Hedley Byrne* applies and that MPIC will owe a duty of care to its customers if: (i) such customers rely on the information, (ii) their reliance is reasonable, and (iii) MPIC knew or ought to have known that they would rely on the information.⁷⁰

Of private insurers, she said the following:

In my view, it is entirely appropriate to hold private insurance agents and brokers to a stringent duty to provide both information and advice to their customers. They are, after all, licensed professionals who specialize in helping clients with risk assessment and in tailoring insurance policies to fit the particular needs of their customers. Their service is highly personalized, concentrating on the specific circumstances of each client. Subtle differences in the forms of

⁶⁸ *Id.*, at 1198.

⁶⁹ *Supra*, note 52.

⁷⁰ *Fletcher, id.*, at 212.

coverage available are frequently difficult for the average person to understand. Agents and brokers are trained to understand these differences and to provide individualized insurance advice. It is both reasonable and appropriate to impose upon them a duty not only to convey information but also to provide counsel and advice.⁷¹

Turning her mind to the question of the scope of the duties owed by public insurers, she concluded that circumstances dictate that they not be quite so onerous. Nevertheless, she found that they did owe duties to inform clients of the available range of insurance and that the defendant had failed to meet that duty on the facts of the case.⁷²

Thus we can see from the foregoing that Justice Wilson's tort decisions swing from the pole of bold expansion on the one hand to that of a decisive halting of tort incursion into other areas of the law on the other, with many stops in between for varying degrees of incremental tort reform. Clearly, giving in to the temptation to focus on her most dramatic tort innovation and attempting to ascribe to her an overarching tort philosophy on that basis would be a mistake.

Former Chief Justice Brian Dickson has said of Justice Wilson's judicial work more broadly:

It is of course fairly easy to track the way in which Bertha Wilson redrew boundaries or incorporated new ideas into existing methods of analysis. But the less obvious and more difficult exercise, yet one that is equally important, is to understand why she stopped at any given point and why in some instances she chose not to realign particular frontiers.⁷³

Given the subtleties of many of her tort decisions, this seems precisely the sort of exercise that is required to come to grips with the values that underpin them and what, if any, tort philosophy they add up to.

V. COMMON THEMES AND UNDERLYING VALUES

Although an overarching tort philosophy is not immediately apparent in Justice Wilson's judgments, a careful analysis of her tort decisions does reveal a series of recurring themes and underlying values that unite them. I have grouped these themes and values loosely under

⁷¹ *Id.*, at 217.

⁷² *Id.*, at 217-18.

⁷³ Brian Dickson, "Madame Justice Wilson: Trailblazer for Justice" (1992) 15 Dalhousie L.J. 1, at 9 [hereinafter "Trailblazer for Justice"].

the overlapping labels of precedent, principle and pragmatism.⁷⁴ Below I will discuss what these labels are intended to denote and which aspects of Wilson J.'s tort decisions I associate with each.

1. Precedent

I am using the term “precedent” here as an alliterative shorthand to refer not just to Justice Wilson’s adherence to the doctrine of precedent, but to the respect that she accorded to the whole constellation of constraints within which appellate judges operate. Among these, alongside the doctrine of precedent, I would highlight the emphasis she placed on showing deference to the findings of fact of trial judges and also deference to the legislature when she judged it a more appropriate vehicle for legal reform.

Justice Wilson accorded respect to these constraints not simply as a matter of form but because she believed that they served an important function. On this topic, Justice Dickson has said: “[I]t has long seemed to me that one can only begin to appreciate [Bertha Wilson’s] contribution fully if one recognizes that underlying her work is a sophisticated vision both of the role of the Supreme Court of Canada in our constitutional democracy and of the implications of that role for the constraints within which a judge must operate.”⁷⁵ Just as she did not hesitate to rein in other branches of government when she judged them to have exceeded their authority in, for example, violating Charter rights, she reined herself in by respecting the limits of her own judicial role as she conceived it.

Her reputation as a judicial activist notwithstanding, Justice Wilson’s judgments are replete with references to prior Supreme Court decisions; she did not depart from past authority lightly. For example, in *Kamloops* she raised questions about the Court’s *Rivtow* decision on pure economic loss, noting that the House of Lords had recently expressed a preference for the approach adopted by Laskin J. over that

⁷⁴ In formulating these categories, I have been influenced by Philip Bryden’s articulation of Justice Wilson’s characteristics as a judge in “The Democratic Intellect: The State in the Work of Madame Justice Wilson” (1992) 15 Dalhousie L.J. 65, at 68-71 [hereinafter “The Democratic Intellect”], and also by Justice Wilson’s own identification of a series of tensions in judicial decision-making in “Decision-Making in the Supreme Court” (1986) 36 U.T.L.J. 227.

⁷⁵ “Trailblazer for Justice”, *supra*, note 73, at 6. See also “The Democratic Intellect”, *id.*, at 68 and 77.

adopted by the majority in the case.⁷⁶ But rather than revisiting it, she distinguished the facts of *Kamloops*, leaving any doubts swirling round *Rivtow* for another day: “In any event, the majority judgment of this Court in *Rivtow* stands until such time as it may be reconsidered by a full panel of the Court.”⁷⁷

She also paid careful consideration to the pronouncements of other influential courts such as the House of Lords, but without being unduly deferential to them. For example, again in *Kamloops*, this time on the issue relating to limitation periods, she fully canvassed the arguments in favour of the approach adopted by the House of Lords in *Pirelli*,⁷⁸ but ultimately judged the opposing arguments in favour of the reasonable discoverability rule more persuasive, stating simply: “This Court is in the happy position of being free to adopt or reject *Pirelli*. I would reject it.”⁷⁹

There are a number of instances in Justice Wilson’s tort judgments in which she emphasized the importance of deferring to the factual determinations made by trial judges.⁸⁰ One of the most definitive can be found in *Fletcher*:

These authorities, in my view, make crystal clear the test for determining when it is appropriate for an appellate court to depart from a trial judge’s findings of fact: appellate courts should only interfere where the trial judge has made a “palpable and overriding error which affected his assessment of the facts.” The very structure of our judicial system requires this deference to the trier of fact. Substantial resources are allocated to the process of adducing evidence at first instance and we entrust the crucial task of sorting through and weighing that evidence to the person best placed to accomplish it. As this Court and the House of Lords have repeatedly emphasized, it is the trial judge who is in the best position to assess the credibility of testimony. An appellate court should not depart from the trial judge’s conclusions concerning the evidence “merely on the result of their own comparisons and criticisms of the witnesses”.⁸¹

⁷⁶ *Kamloops*, *supra*, note 50, at 32. *Rivtow*, *supra*, note 59.

⁷⁷ *Id.*, at 33.

⁷⁸ *Pirelli General Cable Works Ltd. v. Oscar Faber and Partners*, [1983] 1 All E.R. 65, [1983] 2 A.C. 1 (H.L.) [hereinafter “*Pirelli*”].

⁷⁹ *Kamloops*, *supra*, note 50, at 40.

⁸⁰ For example, see *Janiak v. Ippolito*, [1985] S.C.J. No. 5, [1985] 1 S.C.R. 146, at 151-52 (S.C.C.) [hereinafter “*Janiak*”]; *Crocker*, *supra*, note 51, at 1201; and *Fletcher*, *supra*, note 52, at 205.

⁸¹ *Fletcher*, *id.*

Finally, a clear expression of Justice Wilson's deference to the legislature can be found in her majority decision in *Tock v. St. John's Metropolitan Area Board*,⁸² a case that raised the question of whether a municipality could rely upon the defence of statutory authority in a nuisance case. Although she concluded that, on the facts of the case, the defence was not available to the defendant municipality, she was not willing to reformulate it along the lines urged by her colleague LaForest J. in his concurring judgment:

I do not, however, share La Forest J.'s view that this Court should, or indeed can, on this appeal virtually abolish the defence of statutory authority for policy reasons and treat municipalities exercising statutory authority in the same way as private individuals. Such a major departure from the current state of the law would, it seems to me, require the intervention of the legislature.⁸³

2. Principle

I am using the term "principle" here in reference to form and to substance. At the level of form, considerable overlap with the foregoing will immediately be apparent. For when we speak of "principled decision-making", generally we are referring, at least in part, to making decisions consistent with precedent. In Ronald Dworkin's liberal philosophy, this is "law as integrity":

Law as integrity asks a judge deciding a common-law case . . . to think of himself as an author in the chain of common law. He knows that other judges have decided cases that, although not exactly like this case, deal with related problems; he must think of their decisions as part of a long story he must interpret and then continue, according to his own judgment of how to make the developing story as good as it can be. (Of course the best story for him means best from the standpoint of political morality, not aesthetics.) . . . The judge's decision — his post-interpretive conclusions — must be drawn from an interpretation that both fits and justifies what has gone before, so far as that is possible.⁸⁴

⁸² [1989] S.C.J. No. 122, [1989] 2 S.C.R. 1181 (S.C.C.) [hereinafter "*Tock*"].

⁸³ *Id.*, at 1204.

⁸⁴ Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Belknap Press, 1986), at 238 [hereinafter "*Law's Empire*"].

In a number of the cases discussed above in which Justice Wilson incrementally expanded tort law, her decision-making process can be characterized as comporting with Dworkin's description of law as integrity. For example, in *Crocker*, to arrive at the conclusion that the defendant ski resort did owe a positive duty to the plaintiff, she had to address prior cases that differentiated between nonfeasance and misfeasance: "The early common law was reluctant to recognize affirmative duties to act. Limited exceptions were carved out where the parties were in a special relationship (e.g. parent and child) or where the defendant had a statutory or contractual obligation to intervene."⁸⁵ She noted the increasing willingness of Canadian courts to expand the categories of special relationship that constitute exceptions.⁸⁶ But rather than simply carving out another exception, she sought to rationalize the established exceptions and to link the facts of *Crocker* to them by identifying the principle that unites them:

. . . The common thread running through these cases is that one is under a duty not to place another person in a position where it is foreseeable that that person could suffer injury. The plaintiff's inability to handle the situation in which he or she has been placed — either through youth, intoxication or other incapacity — is an element in determining how foreseeable the injury is.⁸⁷

Returning to Dworkin's explanation of law as integrity, remember that the goal of this decision-making process is to create "the best story", that is, the "best from the standpoint of political morality".⁸⁸ This is where substance comes into it. Best from the standpoint of political morality will be the decision that best comports with liberal principles such as autonomy, equality, and fairness.

These are values that Justice Wilson embraced. The complication is that though these values are sometimes complementary, at other times they are in tension with one another. In negotiating such tensions, Justice Wilson espoused a complex, nuanced liberalism. A closer look at the vision of autonomy that emerges from her tort decisions is illustrative here.

⁸⁵ [1988] S.C.J. No. 60, [1988] 1 S.C.R. 1186, at 1193 (S.C.C.).

⁸⁶ *Id.*

⁸⁷ *Id.*, at 1197.

⁸⁸ *Law's Empire*, *supra*, note 84, at 238.

In such decisions as *Dominion Chain*,⁸⁹ Justice Wilson evidenced a very traditional liberal notion of autonomy. She conceived of the contracting parties in that case as equals who had arrived at a consensual agreement. Thus, in her view, respecting their autonomy required giving effect to that consensual agreement by keeping potentially conflicting tort duties out of the equation. This determination in this context is very much in line with a number of her corporate law decisions which Maureen Maloney has criticized as bordering on libertarian.⁹⁰

But this starkly individualist vision of autonomy is tempered in other judgments. For example, in *Crocker*, the defendant ski resort and the plaintiff were both private actors in the marketplace as well, and, in arguing that there ought not to be a positive duty here, or that, in the alternative, the defence of voluntary assumption of risk ought to apply, the defendant sought to establish a consensual relationship between equals, the terms of which (as embodied in the waiver form the plaintiff had signed) ought to be given effect. Justice Wilson did not see the relationship that way:

. . . The fact that Crocker was an irresponsible individual and was voluntarily intoxicated during the tubing competition is the very reason why Sundance was legally obliged to take all reasonable steps to prevent Crocker from competing. While it may be acceptable for a ski resort to allow or encourage sober able-bodied individuals to participate in dangerous recreational activities, it is not acceptable for the resort to open its dangerous competitions to persons who are obviously incapacitated. This is, however, what Sundance did when it allowed Crocker to compete. I conclude, therefore, that it failed to meet its standard of care in the circumstances.⁹¹

Again in *Janiak*, where the duty of the plaintiff to mitigate was at issue, capacity to exercise autonomy was at the heart of the matter for Justice Wilson:

It seems to me that the line must be drawn between those plaintiffs who are capable of making a rational decision regarding their own care and those who, due to some pre-existing psychological condition, are not capable of making such a decision. . . . Accordingly, non-pathological but distinctive subjective attributes of the plaintiff's

⁸⁹ [1970] O.J. No. 2104, 12 O.R. (3d) 201, 68 D.L.R. (3d) 385 (Ont. C.A.), affd [1978] S.C.J. No. 61, [1978] 2 S.C.R. 1346 (S.C.C.).

⁹⁰ Maureen Maloney, "Economic Actors in the Work of Madame Justice Wilson" (1992) 15 Dalhousie L.J. 197, at 201.

⁹¹ *Crocker*, *supra*, note 85, at 1200.

personality and mental composition are ignored in favour of an objective assessment of the reasonableness of his choice. So long as he is capable of choice the assumption of tort damages theory must be that he himself assumes the cost of any unreasonable decision. ... On the other hand, if due to some pre-existing psychological condition he is incapable of making a choice at all, then he should be treated as falling within the thin skull category and should not be made to bear the cost once it is established that he has been wrongfully injured.⁹²

If the plaintiff has the capacity to exercise autonomy, that capacity will be given effect, sometimes to the plaintiff's detriment. If not, however, the plaintiff is to be accorded some protection by tort law, here under the auspices of the thin skull rule.

That Justice Wilson's vision of autonomy extended beyond a narrow, individualistic one is particularly apparent when we look at decisions involving public authorities as defendants. In *Kamloops*, for example, we see that she did not hesitate to impose positive duties on municipalities and municipal employees who have regulatory responsibilities that citizens rely upon them to discharge. Indeed, in other decisions such as *Crocker*, we see Wilson J., ever attentive to context, similarly attaching responsibilities dictated by other social roles, for example, positive duties imposed on the defendant who is seeking to profit from his or her engagement with the plaintiff in a commercial host scenario.

Danielle Pinard has written of Justice Wilson's "preoccupation with a contextual notion of liberty" which is "alive and well only if the state not only respects it in a passive way, but protects and promotes it as well in a positive way".⁹³ Wilson's imposition of positive duties in tort can be characterized as a means of protecting and promoting the liberty of vulnerable parties in unequal relationships.

3. Pragmatism

I am not using the term "pragmatism" here to denote the particular school of legal theory that goes by that label, but simply in the ordinary sense of the word. Again and again in her tort judgments, we see Justice Wilson weighing the practical consequences of opting for one legal

⁹² *Janiak, supra*, note 80, at 159.

⁹³ Danielle Pinard, "The Constituents of Democracy: The Individual in the Work of Madame Justice Wilson" (1992) 15 Dalhousie L.J. 81, at 97.

solution over another, for the particular parties before her, but also for others who will thereafter be affected by shifts in the law.

For example, one of the concerns animating her dissent in *Dominion Chain* was the importance of certainty in commercial relationships. She sought to resolve that case in a way that would allow contracting parties the stability of knowing that their relationship would be governed by the contractual terms that they had agreed to and that those terms would not be rewritten by the intervention of tort law. Similarly, in *Tock*, she expressed concern about the effect that a shift in the law proposed by La Forest J. in his concurring judgment would have on the capacity of public bodies and citizens to sort out their legal rights and responsibilities:

... I do not favour replacing the existing law in this area with a general test of whether it is reasonable or unreasonable in the circumstances of the case to award compensation. This test may, because of the high degree of judicial subjectivity involved in its application, make life easier for the judges but, in my respectful view, it will do nothing to assist public bodies to make a realistic assessment of their exposure in carrying out their statutory mandate. Nor will it provide much guidance to litigants in deciding whether or not to sue. It is altogether too uncertain.⁹⁴

In *Kamloops*, on the issue relating to limitation periods, in opting for the reasonable discoverability rule over the alternative adopted by the House of Lords in *Pirelli*, Wilson J. was in part influenced by the practical difficulties she perceived in applying the latter:

There are obvious problems in applying *Pirelli*. To what extent does physical damage have to have manifested itself? Is a hair-line crack enough or does there have to be a more substantial manifestation? And what of an owner who discovers that his building is constructed of materials which will cause it to collapse in five years time? According to *Pirelli* he has no cause of action until it starts to crumble.⁹⁵

And in *Fletcher*, in outlining the scope of the duty owed to clients by public insurers as opposed to private ones, Wilson J. was attentive to concrete differences in the set-up of their respective operations and to the distinct consumer expectations those differences generated:

⁹⁴ *Tock*, *supra*, note 82, at 1204-1205.

⁹⁵ [1984] S.C.J. No. 29, [1984] 2 S.C.R. 2 (S.C.C.).

By the same token, however, there are a number of reasons why the public insurer's duty is less onerous than that of the private agent or broker. The institutional setting in which the public insurance is sold affords considerably less scope for privacy and individualized attention than that provided by a private agency. As the trial judge noted, an MPIC employee may serve as many as 60 people a day. Further, the employees who serve the customers do not hold themselves out as specialists in risk assessment and insurance advice. The service they provide is more sales and clerical than that provided by an insurance agent.⁹⁶

Finally, in *Frame*,⁹⁷ in declining to extend the torts of conspiracy and intentional infliction of mental suffering into the family law context, Wilson J. considered how such tort actions might be employed in the middle of the emotionally fraught context of family breakdown, and of how adding such tort actions into the mix would affect children, the most vulnerable parties in the situation who would have no voice in a private tort action between their parents.

VI. CONCLUSION: JUSTICE WILSON'S TORT PHILOSOPHY

Having outlined the themes and values that I perceive to be threaded through Justice Wilson's tort decisions, I want to conclude by circling back around to the question of what, if any, distinct tort philosophy they reveal. For these themes and values are not unique to Justice Wilson's tort decisions, but are evident in her judgments in other areas as well.

In her judgment in *Frame*, Wilson J. made reference to an ongoing debate about the theoretical basis for tort law which stretches back to the 19th century. She cited the following passage from *Cases and Materials on the Law of Torts* by Solomon *et al.* by way of illustration:

Initially, the search for a theoretical basis for tort law centred on the issue of whether there was a general principle of tortious liability. Sir John Salmond argued that tort law was merely a patchwork of distinct causes of action, each protecting different interests and each based on separate principles of liability [see Salmond, *The Law of Torts* (6th ed., 1924) at pp. 9-10]. Essentially the law of torts was a finite set of independent rules, and the courts were not free to recognize new heads of liability. In contrast, writers such as Pollock contended that the law of torts was based upon the single unifying principle that all harms

⁹⁶ [1990] S.C.J. No. 121, [1990] 3 S.C.R. 191, at 218 (S.C.C.).

⁹⁷ [1987] S.C.J. No. 49, [1987] 2 S.C.R. 99 (S.C.C.).

were tortious unless they could be justified [see Pollock, *The Law of Torts* (13th ed., 1929) at p. 21]. The courts were thus free to recognize new torts. Glanville Williams suggested a compromise between the two viewpoints. He argued that tort law historically exhibited no comprehensive theory, but that the existing categories of liability were sufficiently flexible to enable tort law to grow and adapt.⁹⁸

Justice Wilson allowed that it “would perhaps be interesting for the Court to join in this debate”, but for purposes of arriving at a decision on the facts before her, she endorsed Glanville Williams’ compromise, pronouncing it a “pragmatic resolution” which “correctly characterizes the task before the Court when confronted with a heretofore unprecedented basis for liability”.⁹⁹ She concluded:

Thus, whatever one considers the theoretical foundation of liability to be, it is not enough for the appellant simply to invoke a general principle of freedom from harm. Rather, he must show why “existing principles of liability may properly be extended”, that is, he must identify the nature of the right he invokes and justify its protection.¹⁰⁰

In the discussion of principle above, I linked Justice Wilson to the liberal legal philosophy espoused by Ronald Dworkin, but she cannot be neatly slotted there when considering her tort decisions as a whole. The blending of principle and pragmatism in her decisions of which the above statement is emblematic precludes that. Note, for example, that Dworkin has categorically stated that Hercules, the super-human judge he created to personify law as integrity, rejects the pragmatism that would have him weighing policy alongside principle.¹⁰¹

But considering Justice Wilson’s nuanced, contextualized liberalism, which blends principle with pragmatism, and infuses autonomy with equality, I think it would be fair to link her tort jurisprudence with tort theorists that I have described elsewhere as cautious optimists about the progressive potential of tort law.¹⁰²

These cautious optimists insist not only that tort *can* serve an educative or symbolic function which fosters equality, but that it *must* do so. Accordingly, they find promise in some of the underlying principles

⁹⁸ R. Solomon *et al.*, *Cases and Materials on the Law of Torts*, 2d ed. (Toronto: Carswell, 1986), at 6. Cited in *Frame, id.*, at 120.

⁹⁹ *Frame, id.*

¹⁰⁰ *Id.*, at 121.

¹⁰¹ *Law’s Empire, supra*, note 84.

¹⁰² Kate Sutherland, *Remedying Sexual Harassment: The Radical Potential of Tort Law* (1994) [unpublished LL.M. Thesis, archived at Harvard Law Library].

of tort law and in two trends in modern tort law — shifting conceptions of autonomy, and the “etherialization” of tort law.¹⁰³

Ken Cooper-Stephenson stresses that “tort law locates itself in, and is throughout influenced by, a socio-legal context which includes important norms of substantive equality”.¹⁰⁴ He suggests not only that tort law can and should integrate concepts of substantive equality that have developed in human rights law, but that it already has.¹⁰⁵ He asserts that tort law frequently “serves to redistribute collective wealth for the benefit of the underprivileged and disadvantaged at the expense of the privileged and the advantaged” through the way threshold questions of duty and tort obligation are constructed and answered.¹⁰⁶ This is evident in determinations of what counts as a loss for purposes of tort law, in the choice of fault requirements for different relationships and, finally, in the types of relationships which tort law recognizes as significant in the imposition of duties.¹⁰⁷ He concedes that at one time tort law concerned itself primarily with protecting the advantaged, by virtue of their status as property owners, but asserts that tort law’s distributive sympathies have changed gradually to address the interests of the underprivileged and powerless.¹⁰⁸ He concludes: “In short, a tort remedy is corrective at its core but is set in a distributive egalitarian context which drives its content.”¹⁰⁹

Martin Kotler tracks the development of a shift away from the primacy of property concerns in American tort law which supports Cooper-Stephenson’s point. Kotler asserts that American tort law is currently “between paradigms”, but that autonomy has been and remains

¹⁰³ See Martin A. Kotler, “Competing Conceptions of Autonomy: A Reappraisal of the Basis of Tort Law” (1992) 67 *Tulane L. Rev.* 347 [hereinafter “Competing Conceptions of Autonomy”]; Ken Cooper-Stephenson, “Corrective Justice, Substantive Equality and Tort Law” in Ken Cooper-Stephenson & Elaine Gibson, eds., *Tort Theory* (Toronto: Captus Press, 1993), at 48 [hereinafter “Corrective Justice”]; Ken Cooper-Stephenson, “Economic Analysis, Substantive Equality and Tort Law” in Ken Cooper-Stephenson & Elaine Gibson, eds., *Tort Theory*, at 131 [hereinafter “Economic Analysis”]; Lucie Léger, “The Culture of the Common Law in the 21st Century: Tort Law’s Response to the Needs of a Pluralist Society” in Ken Cooper-Stephenson & Elaine Gibson, eds., *Tort Theory*, at 162; Ted DeCoste, “Taking Torts Progressively” in Ken Cooper-Stephenson & Elaine Gibson, eds., *Tort Theory*, at 240; and Nancy Levit, “Ethereal Torts” (1992) 61 *Geo. Wash. L. Rev.* 136 [hereinafter “Ethereal Torts”].

¹⁰⁴ “Economic Analysis”, *id.*, at 49.

¹⁰⁵ *Id.*, at 48.

¹⁰⁶ *Id.*, at 53.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*, at 55-56. He cites, as an example, the explicit policy analysis that has become part of the duty of care analysis in Canadian law.

¹⁰⁹ *Id.*, at 57.

its primary goal. The change that has occurred has been in the way that autonomy is conceived: “Although at one time protection of autonomy was understood primarily in terms of protection of private property rights, now the societal and legal perception of autonomy focuses on the protection of one’s bodily integrity.”¹¹⁰

In support of his thesis, Kotler points to the fact that preventative remedies are now available to protect individuals from bodily invasion in advance, for example, in the context of domestic violence, whereas before-the-fact remedies are no longer as readily available to protect private property from damage.¹¹¹ Putting bodily integrity at the core of autonomy in place of property interests necessarily compels tort law in a more egalitarian direction. At the very least, it affords tort protection to a broader range of people.

Nancy Levit describes a process of the progressive “etherealization” of tort law which, I would contend, marks a further evolution in conceptions of autonomy beyond bodily integrity to emotional integrity. She points to the recent trend toward successful claims for intangible and emotional injuries, claims to which courts have not traditionally been receptive because of social and legal devaluation of the injuries which give rise to them.¹¹²

A number of Justice Wilson’s judgments can be characterized as having furthered the shift in conceptions of autonomy that underpin tort doctrine and also the etherealization of tort law. In her tort judgments, she conceptualizes autonomy in a contextualized way that is attuned to the varying capacities of individuals and to the inequalities that may be present in the relationships and in the broader social contexts within which those individuals are embedded. Further, her conception of the legal interests which tort law ought to protect expands well beyond interests in property and in bodily integrity to encompass the dignitary harms of which the plaintiff in *Bhadauria*¹¹³ complained. Certainly an interest in equality animates Justice Wilson’s tort decisions, whether she is opting to expand tort liability or to hold the line. To expand tort law by creating a tort of discrimination in *Bhadauria* served the goal of equality, whereas to expand the tort of conspiracy into the family law

¹¹⁰ “Competing Conceptions of Autonomy”, *supra*, note 103, at 351.

¹¹¹ *Id.*, at 370-74.

¹¹² “Ethereal Torts”, *supra*, note 103, at 172-74.

¹¹³ [1979] O.J. No. 4475, 27 O.R. (2d) 142, 105 D.L.R. (3d) 707 (Ont. C.A.), *revd* [1981] S.C.J. No. 76, [1981] 2 S.C.R. 181 (S.C.C.).

context in *Frame*¹¹⁴ would have been to compromise equality by worsening the situation of the most vulnerable parties in the equation, the children.

While few would suggest that tort law can play a pivotal role in correcting injustice and inequality in society, it does constitute one of the tools available in that larger quest. Cooper-Stephenson states:

Although tort law is unlikely to be the primary mechanism for the development of an appropriate balance between the advantaged and disadvantaged in Canadian society — of a more generalized just distribution of rights, entitlements and rewards — tort law nevertheless forms part of a structure of norms that can be moulded and cultivated in a principled way to further implement substantive justice.¹¹⁵

Throughout her career, Justice Wilson demonstrated a commitment to implementing substantive justice. In her role as a judge, tort law was just one of the tools available to her by which to pursue that commitment. In instances when she found it to be poorly suited to the task, she turned to other means. But when she judged it an appropriate and effective tool, she did not hesitate to employ it to achieve reform, whether bold or incremental. In so doing, she produced a body of tort jurisprudence from which those who maintain a cautious optimism about the progressive potential of tort law can draw some inspiration.

¹¹⁴ *Supra*, note 97.

¹¹⁵ “Economic Analysis”, *supra*, note 103, at 158.