CONCURRENT CAUSES OF ACTION IN CONTRACT AND TORT

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# Concurrent Causes of Action
## In Contract and Tort

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I. INTRODUCTION

Since Central Trust Co. v. Rafuse, [1986] 2 S.C.R. 147 was decided, concurrent liability in contract and tort has received considerable attention from Canadian courts and academics. The Supreme Court of Canada revisited the overlap between tort and contract claims on several occasions in the 1990's.

As a result, we now have a fairly clear understanding of the basic rules governing concurrent claims in tort and contract, and thus it has become quite common for parties to initiate actions where claims in both negligence and breach of contract are based on the same facts. This occurs in many different kinds of factual contexts, ranging from construction, to professional advice, to employment.

This paper will attempt to:

- review the basic rules governing concurrent claims, and how such claims interact with exclusionary clauses,
- address the reasons why parties might want to sue concurrently in tort and contract, and
- explain some of the key issues of which counsel should be aware.

II. BASIC RULES GOVERNING CONCURRENT LIABILITY

A. CENTRAL TRUST CO. v. RAFUSE

The question of whether a party could sue concurrently in contract and tort in respect of the same facts was finally settled in Central Trust Co. v. Rafuse, which concerned a claim against a solicitor in both contract and tort. The defendant solicitors had been retained to work on a mortgage transaction, and had failed to ensure that the mortgage complied with legislation. As a
result, the mortgage was found void. An action in contract would have been statute-barred. The issue was whether the plaintiff could also sue in tort, and avoid the limitations problem (by operation of the reasonable discoverability rule).

Mr. Justice Le Dain held that, notwithstanding that the claim arose from a contractual relationship between solicitor and client, the plaintiff could claim in tort. The key question for a tort claim is whether there is a relationship of sufficient proximity to give rise to a duty of care, rather than how that relationship came about (see para. 49 of the decision). The Court held that while the work undertaken by the contract would provide guidance as to the nature of the relationship, "the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract." Thus, staying with the fact situation in Central Trust, a lawyer who is retained to carry out a specific transaction cannot narrowly carry out his or her instructions without regard to relevant issues that, if not addressed, could impact on the client.

His Lordship was careful, however, to place a limitation on concurrent liability (at para. 51):

A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort. Subject to this qualification, where concurrent liability in tort and contract exists the plaintiff has the right to assert the cause of action that appears to be most advantageous to him in respect of any particular legal consequence.

More recently, the majority in BG Checo International Ltd. v. British Columbia Hydro and Power Authority, [1993] 1 S.c.R. 12, set out this succinct description of the core rules governing concurrent liability (at para. 15):

In our view, the general rule emerging from this Court's decision in Central Trust Co. v. Rafuse, [1986] 2 S.C.R. 147, is that where a given wrong prima facie supports an action in contract and in tort, the party may sue in either or both, except where the contract indicates that the parties intended to limit or negative the right to sue in tort. This limitation on the general rule of concurrency arises because it is always open to parties to limit or waive the duties which the common law would impose on them for negligence.
B. EXCLUSIONARY CLAUSES IN CONTRACT

The Court in BG Checo also debated how contractual provisions will restrict the right to sue concurrently in tort. The facts of the case are as follows. B.C. Hydro had called for tenders to erect transmission towers and to string lines. The tender documents (which were incorporated into the contract when Checo’s tender was accepted) stated that clearing of the right-of-way in which the towers were to be erected would be done by others, and that Checo would not be responsible for any of that work. Much of the right-of-way clearing did not get done as had been represented to Checo. As a result, Checo had to complete the clearing work, and experienced difficulties in completing its own work. Checo sued in tort for negligent misrepresentation and also sued for breach of contract.

In a partial dissent, Mr. Justice Iacobucci argued that where parties have expressly dealt with a matter in their contract (i.e., defined the scope of the contractual duty), no concurrent duty of care in tort will exist. He concluded that, because the representation as to how the right-of-way would be completed was an express term of the contract, Checo knew that disputes about the right-of-way could be governed by the contract. He reasoned that express mention of the matter in the contract -- the creation of a contractual duty on Hydro to ensure the right-of-way was cleared, such duty being co-extensive with the tort duty of care that Checo was claiming under -- precluded Checo from suing in tort. In arriving at that conclusion, Mr. Justice Iacobucci placed considerable weight on the fact that the transaction occurred in a commercial context.

Mr. Justice La Forest and Chief Justice McLachlin wrote the majority decision. They more narrowly defined when a contract will be interpreted as precluding a concurrent claim in tort, stating:

¶26 While the tort duty may be limited by the contractual terms so as to be no broader than the contract duty, there is no reason to suppose that merely by stipulating a duty in the contract, the parties intended to negate all possibility of suing in tort.
If there are particular commercial relationships in which the parties wish remedies for disputes between them to be in contract only, then they may be expected to indicate this intention by including an express clause in the contract waiving the right to sue in tort.

Thus, concurrent liability in tort can be negated only by clear contractual provisions to that effect.

Examples of where exclusionary clauses succeeded in barring concurrent tort claims include: London Drugs Ltd. v. Kuehne & Nagel International Ltd., [1992] 3 S.C.R. 299 (discussed below); and Toffoli v. Rozenhart (1992), 1 Alta. L.R. (3d) 104 (M.e.) (property purchased on "as is" basis).

To avoid an exclusionary clause, a plaintiff may argue that the tort claim is not concurrent, but is independent from the contract. In Queen v. Cognos Inc., [1993] 1 S.C.R. 87, Cognos hired a chartered accountant who already had a well-paid and secure managerial position. During the job interview, the plaintiff accountant was told that Cognos was creating a new position to assist in developing accounting software, that it was a major project that would involve some two years of development with enhancements and maintenance thereafter, and that the position would be required throughout this period. He was also told that staff on the project would double from 16 to 32. The plaintiff was offered the job and accepted it. He signed a written employment contract that (in clauses 13 and 14) allowed Cognos to terminate his employment at any time without cause on one month's notice (or one month's salary in lieu), or to assign him to another position in the company on one month's notice. The plaintiff was laid off in about 18 months.

The manager interviewing the plaintiff was aware, but did not tell the plaintiff, that Cognos had not yet decided to fund the project. The plaintiff sued Cognos (in tort only) for negligent misrepresentation, claiming damages for income he lost by leaving his prior position. Cognos defended on the basis that the employment contract entitled it to terminate on one month's notice. In response, Mr. Justice Iacobucci (whose reasons were concurred with by the majority on this point) stated (para. 90; emphasis added):

[Continued text]
[The plaintiff] does not argue that Cognos, through its representative, breached a duty of care by negligently misrepresenting his security of employment with the respondent company. Rather, the appellant argues that Mr. Johnston misrepresented the nature and existence of the employment opportunity being offered. It is on these latter representations that the appellant relied in leaving his relatively secure and well paying job in Calgary. The employment agreement neither expressly nor impliedly states that there may be no job of the sort described during the interview after the appellant's arrival in Ottawa. Stipulations that an employee can be dismissed without cause upon proper notice or reassigned to another position are not incompatible with a pre-contractual representation that a particular job would exist, as described, should the employee accept employment.

For a critical analysis of the Supreme Court's approach to exclusionary clauses and negligent misrepresentation, see: Joost Blorn's case comment on BG Checo and Queen v. Cognos Inc. at (1994),37 Cdn. Bar Rev. 243.

Also interesting is University of Regina v. Pettick (1990), 77 D.L.R. (4th) 615 (Sask. C.A.). The claim was for negligent design of a roof system. The contract provided a for one year warranty, but no exclusion of further liability for negligence. The negligence claim succeeded despite being brought many years after the expiration of the warranty.

Counsel should also consider whether the facts will support a claim of fraudulent misrepresentation, which, if made out, would overcome an exclusion clause. See, for example, Neill v. Trenholm (2000), 234 N.B.R. (2d) 120 (T.D.). Counsel must, of course, be cautious about pleading fraud (even fraudulent misrepresentation) unless it is well-founded, as the failure to prove it can lead to a punitive costs award.

III. WHY BRING CONCURRENT TORT AND CONTRACT CLAIMS?

There are many reasons to sue concurrently in tort and contract (or to sue in tort for what many would think of as primarily a contract matter, or vice versa). One such reason has already been discussed: to avoid exclusionary clauses contained in contracts by claiming against the same party in tort. Other issues that have driven parties to do so include:
• To obtain the benefit of the discoverability rule that extends tort limitation periods;

• To avoid exclusionary clauses contained in contracts by claiming against additional parties who are not privy to the contract;

• To avoid exclusionary language in legislation;

• To improve the chances of obtaining punitive damages; and

• To obtain a more favourable measure of damages.

All of those issues will be discussed in below in this section.

A. LIMITATION PERIODS

In *Central Trust Co. v. Rafuse*, the plaintiff lender was out of time to sue the solicitors who had acted for it in handling a mortgage transaction. The solicitors had negligently failed to note that the company granting the mortgage lacked the legal capacity to do so. When the lender brought foreclosure proceedings some eight years later, the mortgage was declared void. The lender attempted to sue the solicitors in contract, but the limitation period had expired and that claim was dismissed.

However, by virtue of the discoverability rule (established in *Kamloops v. Neilsen*, [1984] 2 S.c.R. 2), the limitation period on a tort claim against the lawyers did not begin to run until the validity of the mortgage was contested in the foreclosure proceedings (approximately two years after the contract limitation period expired). Thus, the lender also sued in tort and succeeded in that claim.

*Fritz v. Knorr (c.o.b. C & K Construction)* involved a claim for faulty construction of a house. Mr. Justice Klebuc found that the contract breaches occurred no later than May 1, 1985. Structural problems in the house became apparent in 1990, but the statement of claim was not issued until February 3, 1992. As such, the six year limitation period barred the homeowner's claim in contract. But because the negligence was not reasonably discoverable until 1990, he was able to succeed in his tort claim.
B. CLAIMS AGAINST PARTIES NOT IN PRIVITY

Where an exclusionary clause precludes claiming against a contracting party, plaintiffs look for alternatives to obtain recovery. Plaintiffs have attempted to overcome the obstacle of the exclusionary clause by suing parties who were connected with, but not party to, the contract (and thus might not be able to claim the benefit of the exclusionary clause). That approach succeeded in *Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd.*, [1993] S.C.R. 206, but not in *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299.

The facts of *London Drugs* are well known. The plaintiff had delivered equipment to the defendant warehouse company for storage. The contract contained a clause limiting the warehouseman's liability to $40 on any single package. The plaintiff did not obtain additional insurance. The warehouse employees negligently moved the equipment, causing it to fall and suffer extensive damage. The plaintiff sued the warehouse company and the employees. The employer's liability was held to be limited to $40. On the question of liability of the employees, the majority of the Supreme Court analysed the issue as follows (at para. 250):

... it would be absurd in the circumstances of this case to let the appellant go around the limitation of liability clause by suing the respondent employees in tort. The appellant consented to limit the "warehouseman"'s liability to $40 for anything that would happen during the performance of the contract. When the loss occurred, the respondents were acting in the course of their employment and performing the very services, albeit negligently, for which the appellant had contracted with Kuehne & Nagel. The appellant cannot obtain more than $40 from Kuehne & Nagel, whether the action is based in contract or in tort, because of the limitation of liability clause. However, resorting to exactly the same actions, it is trying to obtain the full amount from the individuals ("warehousemen") who were directly responsible for the storing of its goods in accordance with the contract. As stated earlier, there is an identity of interest between the respondents and Kuehne & Nagel as far as performance of the latter's [page445] contractual obligations is concerned. When these facts are taken into account, and it is recalled that the appellant knew the role to be played by employees pursuant to the contract, it is clear to me that this Court is witnessing an attempt in effect to "circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort". In my view, we should not sanction such an endeavour in the name of privity of contract.
Thus, even though the employees were not privy to the contract, they were nonetheless entitled to its benefit. The concurrency of tort and contract can work both ways.

In *Edgeworth Construction*, Edgeworth was a road builder that had bid on a contract tendered by the Province of British Columbia to construct a section of highway. It won the contract, which contained a clause stating that any representations in the tender documents were for the general information of bidders and were not in any way warranted or guaranteed by the Province. Thus, the Province could not be sued for errors in the tendering package.

N.D. Lea was an engineering firm that had designed the project and prepared plans and specifications that were incorporated into the contract. Edgeworth sued N.D. Lea, and the individual engineers who had affixed their seals to the construction drawings, claiming that it had lost money on the project due to errors in the specifications and drawings.

Edgeworth did not have a contract with the engineering firm or its employee engineers. The Court had to consider whether the firm and the engineers could claim to be protected by the Province's exclusion of liability. The majority concluded that they could not claim such protection. They distinguished *London Drugs* on the basis that in that case the work that was covered by the warehouseman's exclusion clause could only be done by the employees. As well, unlike the engineering firm, which could protect itself in various ways (by obtaining insurance, recording a disclaimer on the design documents), the employees in *London Drugs* were effectively powerless to protect themselves. (The claim against the individual engineers was struck on the basis that the only basis on which they were sued was that they had affixed their seals to the design documents, which did not establish a duty of care between them and Edgeworth).

For a much more detailed and theoretical discussion of these issues (and a contrarian approach to that taken by the Supreme Court) see Christopher Gosnell, "The Personal Liability of Corporate Agents: Who Should Bear Pure Economic Losses" (1997), 55(1) D.T. Fac. L. Rev. 77 (available on Quicklaw). Also see Robert Frank, "Directors' and Officers' Liability in Tort", available on the Macleod Dixon website at [www.macleoddixon.com/content/files/FrankTort.pdf](http://www.macleoddixon.com/content/files/FrankTort.pdf).
C. CLAIMS AGAINST THE FEDERAL CROWN

While it tends to be rare, in some circumstances a plaintiff can fare better claiming in contract than in tort.

The Federal Government has attempted in several different pieces of legislation to limit the ability of parties to sue it. The broadest example of that is found in the Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, which contains bars to actions and also sets out limitation periods that will apply in the absence of a more specific limitation period appearing in a particular act.1 Section 32 of the Crown Liability and Proceedings Act provides for a general six year limitation period.

Section 9 of the Crown Liability and Proceedings Act is a complete bar to certain claims against the Federal Crown:

No proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the consolidated revenue fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.

That section, along with section 111 of the Pension Act was in issue in Aussant v. Canada, (2000), 188 F.T.R. 245 (F.e. T.D.). The plaintiff was an RCMP constable who, while seated in a police car, writing out a traffic ticket, was struck from behind by a vehicle travelling over 50 miles per hour. He suffered serious and permanent injuries (resulting in ten surgeries along with many other treatments and medications). He claimed that due to the deterioration of his medical condition, and the RCMP’s failure to accommodate his disabilities, he was forced to leave the force and treat himself as having been constructively dismissed. He alleged harassment, abuse and bad faith by the RCMP. Canada applied for summary judgment, arguing that section 9 of

1 For a detailed discussion of this issue, see Sweeney, "The Pitfalls of Suing the Crown - Section 9 of the Crown Liability and Proceedings Act" (2001; available on Quicklaw)
the *Crown Liability and Proceedings Act* and section 111 of the *Pension Act* barred his claims. Section 111 of the *Pension Act* stated as follows: ²

> No action or other proceeding lies against Her Majesty or against any officer, servant or agent of Her Majesty in respect of any injury or disease or aggravation thereof resulting in disability or death in any case where a pension is or may be awarded under this Act or any other Act in respect of the disability or death.

The plaintiff was being paid a pension in connection with the injuries he had suffered. Canada argued that, by virtue of the pension being received in with respect to those injuries, the plaintiff was barred from making any further claim arising from those injuries. The Court concluded that section 9 of the *Crown Liability and Proceedings Act* and section 111 of the *Pension Act* "may well" bar the claims in tort (see paras. 50 to 54).³ However, the Court was less inclined to believe that the contract claims for constructive dismissal were barred. Section 9 of the *Crown Liability and Proceedings Act* was considered to apply to tort claims only, and the Court questioned whether section 111 of the *Pension Act* would apply to the constructive dismissal claim. Because it was a summary judgment application, and the Court clearly considered it appropriate to permit the contract claim to stand, the Court also declined to dismiss the claims in tort (although they seemed unlikely to succeed).

This is a relatively narrow circumstance in which it can be important to plead concurrently in tort and contract, but it speaks to the need to consider various causes of action when preparing a claim. The writer has not had the opportunity to conduct a detailed review of Provincial legislation to determine if similar issues would arise there.

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² It has since been amended.
³ Sweeney, supra note 1, states:

> It should be noted that s. 9 of the Crown Liability and Proceedings Act does not bar all actions against the Federal Crown when one is in receipt of a federal pension. Rather, it has been accepted that this provision operates only to bar those claims against the Crown in tort when the claimant is in receipt of a pension in respect of those injuries.
D. PUNITIVE DAMAGES

One reason to attempt to bring claims concurrently in tort and contract, particularly where the claim is one that would most commonly be made in contract, is to improve the chance of a successful claim of punitive damages. The Supreme Court's decision in Vorvis v. Insurance Corporation of British Columbia, [1989] 1 S.C.R. 1085, limited access to claims for punitive damages for breach of contract to where the conduct being punished was itself an "actionable wrong". As well, in Royal Bank of Canada v. W. Got & Associates Electric Ltd., [1999] 3 S.C.R. 408, the Court stated (at para. 26) that "the circumstances that would justify punitive damages for breach of contract in the absence of actions also constituting a tort are rare".

Those comments would lead most parties seeking punitive damages to plead in both contract in tort. However, in Whiten v. Pilot Insurance Co., [2002] S.C.J. No. 19, the Court confirmed that there can be instances where an actionable wrong can exist in connection with a breach of contract that is not necessarily a tort. The most common example would be a fiduciary duty (see Whiten, paras. 81 to 82).

Thus, it may be less necessary than some had thought to plead a separate tort if one also wishes to claim punitive damages.

E. MEASURE OF DAMAGES

One of the primary reasons to bring a claim concurrently in tort and contract is to ensure that the most favourable measure of damages is available. More often, it is the tort claim that would result in a higher damages claim.

1. Damages in Contract v. Damages in Tort

The majority in BG Checo International Ltd. v. British Columbia Hydro and Power Authority very succinctly stated the difference between the two damage calculations (para. 39):

The measure of damages in contract and for the tort of negligent misrepresentation are:
Contract: the plaintiff is to be put in the position it would have been in had the contract been performed as agreed.

Tort: the plaintiff is to be put in the position it would have been in had the misrepresentation not been made.

As discussed in a previous section, *BG Checo* concerned misrepresentations in a tendering process that were incorporated into the contract. *B.C.* Hydro had represented to *BG Checo* that the right-of-way would be cleared by other parties. Hydro had contracted the work out to third parties, and was aware that it had not been done adequately. In order to perform its own contract, Checo was forced to complete the clearing work. As well, Checo's own work was hindered by the presence of trees and debris.

The majority held that, on the claim for breach of contract, Checo was entitled to be put in the position it would have been in had the work site been cleared properly (i.e., had the contract been performed as agreed). It was entitled (para. 48):

- to be reimbursed for all expenses incurred as a result of the breach of contract, whether expected or not, except, of course, to the extent that those expenses may have been so unexpected that they are too remote to be compensable for breach of contract. We note that in this respect the test for remoteness in contract may be of no practical difference from the test of reasonable foreseeability applicable in tort. … Viewed thus, the damages in contract would include not only the costs flowing directly from the improperly cleared work site, but also consequent indirect costs such as acceleration costs due to delays in construction [such as payment of overtime premiums to ensure that the contract completion date was met].

On the tort claim, Checo was entitled to be compensated for all reasonably foreseeable loss caused by the negligent misrepresentation (para. 47). First, the majority commented on the B.C. Court of Appeal's measure of damages in tort:

The Court of Appeal was of the view that Checo, had it known the true facts (i.e., had the tort not been committed) would have increased its bid by an amount equal to the cost of the extra work made necessary by the improperly cleared site work plus profit and overhead. Such loss was not too remote, being reasonably foreseeable.
But the majority felt that this did not go far enough:

But to compensate only for the direct costs of clearing is to suggest that the only tort was the failure to clear. The real fault is that Hydro misrepresented the situation and Checo may have relied on that representation in performing its other obligations under the contract. For example, having to devote its resources to that extra work might have prevented Checo from meeting its original schedule, thereby resulting Checo incurring acceleration costs in order to meet the contract completion date. Such costs would also arguably be reasonably foreseeable.

The Court remitted the matter back to the trial division for reassessment of the damages in both contract and tort.

2. Judicial Efforts to Close the Gap Between Tort and Contract Damages

There may be one particularly significant advantage that a tort claim for negligent misrepresentation might have over a contract claim, but courts have shown considerable reluctance to go in that direction, and it is unclear where the jurisprudence will end up.

Where the misrepresentation has induced the plaintiff to enter into the contract, and the plaintiff can establish that, but for the misrepresentation they would not have done so, the plaintiff may in some circumstances be able to obtain damages that compensate for, a much broader range of losses. This includes the possibility of damages for having entered into a bad bargain. That could potentially entitle the plaintiff to recover for having underbid the contract or for unexpected changes in market or other conditions. There will always be two key questions here: would the plaintiff have entered into the contract but for the misrepresentation, and would the damages claimed fail on the remoteness and causation tests?

The Supreme Court has discussed this issue in a couple of recent cases. In *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.*, [1991] 3 S.C.R. 3, CN had called for tenders for nationwide catering of meals for its track crews. It had estimated that 1,092,500 meals would be required. Rainbow bid $4.94 per meal. When CN revised the meals estimate down by 15%, Rainbow submitted a new bid of $5.02 per meal. It turned out that far fewer meals were required.
(about 30% fewer than estimated). Rainbow lost about $1,000,000 on the contract and sued CN. The causes of action included breach of contract and negligent misrepresentation.

The proper calculation of damages for negligent misrepresentation was a key issue. First, the majority discussed the burden of proof (paras. 22 to 27). The plaintiff in such cases will allege that, absent the misrepresentation he would not have entered into the transaction and should be restored to the position he would have occupied had the transaction never occurred. Then the defendant will argue that the plaintiff would have bid higher, but still entered into the transaction. This requires the court to speculate about a hypothetical situation. Does that shift the burden of evidence to the defendant? The majority in *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.* held that, at least on the facts of that case, it did:

¶ 27 It was argued by CN that much of the loss was not caused by the misrepresentation and would have been suffered even had the estimate been accurate. CN pointed out that Rainbow itself, in para. 49 of its statement of claim, alleged that losses were caused by certain conduct of CN and its employees during the performance of the contract, such as taking too much food. Those claims were in breach of contract, and have never been adjudicated. But CN's position is that the losses caused by such conduct cannot be recoverable in the misrepresentation claim.

¶ 28 But I have concluded that CN bore the burden of proving that Rainbow would have bid even if the estimate had been accurate. That was not proved, and so it is taken as a fact that Rainbow would not have contracted had the estimate been accurate. The conduct referred to in para. 49 would not have occurred if there had been no contract, and therefore the loss caused thereby, like all other losses in the proper execution of the contract by Rainbow, is directly related to the negligent misrepresentation. The entering into of the contract is a link in the chain with respect to the para. 49 losses. These losses are causally and directly connected to the contract and the contract is causally connected to the negligent misrepresentation. Finally, in my view these damages were foreseeable and therefore are not remote.

Two key findings are found in that discussion: first, the Court was not satisfied that Rainbow would have entered into the contract in the absence of a misrepresentation; second, the damages claimed by Rainbow were foreseeable.
It is also worthwhile considering Madam Justice McLachlin's dissent. She was concerned that the majority's approach could overcompensate Rainbow because of lack of attention to the question of causation:

¶ 35 The plaintiff may contend that all its losses on the contract were caused by the negligent misrepresentation. But if it is shown that the loss was caused by factors other than the misrepresentation, then the chain of causation is broken. Generally, the plaintiff establishes a prima facie case by proving losses resulting from the contract. But the defendant may show that the chain of causation was broken by, for example, the plaintiffs own acts, the acts of third parties, or other factors unrelated to the tortious misrepresentation. Tort liability is based on fault, and losses not caused by the defendant's fault cannot be charged to it. It is for the plaintiff in contracting to make proper allowance for contingencies such as weather. The plaintiff may also have claim against third parties who cause it loss.

¶ 39 To amplify, the plaintiffs' losses may have been caused by: (a) the defendant's negligent misrepresentation; (b) other wrongful acts or omissions of the defendant, whether in negligence or breach of contract; (c) the plaintiffs' acts or omissions; (d) the acts of third parties; and/or (e) factors unrelated to the fault of either the plaintiffs or the defendant. The defendant is responsible for losses flowing from (a) or (b), but not for losses flowing from (c), (d), and (e). The trial judge wrongly assumed that all the plaintiffs' contract losses must be attributed to (a) and made no findings with respect to the other possibilities, notwithstanding the fact that the defendant CN led evidence on them. These findings must be made if justice is to be done.

Based on those concerns, McLachlin J. would have remitted the case back to the trial judge for determination of whether any part of the loss was caused by factors unrelated to the defendant's misrepresentation. She argued that the defendant was entitled to assume that the plaintiffs in bidding would make allowance for all factors relevant to the cost of executing the contract (excluding the defendant's wrongful acts), and that the plaintiff would not exacerbate the loss by its own acts. If that approach were to be adopted, it could significantly close the gap between recovery in tort and contract (because it would not truly restore the plaintiff to the position they would have been in had they not been induced to enter into the contract).

In *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, the trial judge had concluded that Checo would not have submitted its bid on the basis that it did if Hydro had
disclosed the true facts and had awarded damages to Checo to compensate it for the total losses it suffered as a result of being induced to enter into the contract. These losses totaled $2.6 million. The Supreme Court of Canada disagreed. The majority considered *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.* and noted:

¶45 In the situation of concurrency, the main reason to expect a difference between tort and contract damages is the exclusion of the bargain elements in standard tort compensation. In the terminology of L. L. Fuller and W. R. Purdue, as set out in their article, "The Reliance Interest in Contract Damages" (1936-37), 46 Yale L.J. 52 and 373, contract is normally concerned with "expectation" damages while tort is concerned with "reliance" damages. The denial of "expectation" or "loss of bargain" damages in a misrepresentation case like the present will occur when it is concluded, for example, that but for the misrepresentation, no contract would have been entered at all; this was the situation that the Court found in *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.*, [1991] 3 S.C.R. 3. The Rainbow assessment of damages can obviously lead to a different quantum of damages because this method frees the parties from the burden or benefit of the rest of their bargain. The assessment of damages in a Rainbow situation could be lower or higher than the contract damages depending on whether the contract was a good or bad bargain; see D. W. McLauchlan, "Assessment of Damages for Misrepresentations Inducing Contracts" (1987), 6 Otago L. Rev. 370, at pp. 375-78. We note that a tendency towards similar damages in tort and contract can be identified even in Rainbow situations; see J. Blom, "Remedies in Tort and Contract: Where is the Difference?" [page41] in J. Berryman, ed., Remedies: Issues and Perspectives (1991), 395, at pp. 401-2.

¶46 This is not a case like Rainbow. Here the evidence at trial concerning Checo's desire to break into the B.C. market already provides solid support for the conclusion reached by the Court of Appeal. On the basis of that evidence, and in light of the absence in the trial judge's reasons of a clear conclusion as to what Checo would have done had the misrepresentation not been made, the Court of Appeal was in our view justified in making its own finding that Checo would have entered the contract in any event, albeit at a higher bid. This conclusion having been reached, one would expect that the quantum of damages in tort and contract would be similar because the elements of the bargain unrelated to the misrepresentation are reintroduced. This means not giving the plaintiff compensation for any losses not related to the misrepresentation, but resulting from such factors as the plaintiff's own poor performance, or market or other forces that are a normal part of business transactions.

In that passage, the Court again appears to recognize that a plaintiff might in some circumstances be able to claim for all losses resulting from having been wrongfully induced to enter into a
contract (while holding that on the facts of that case the defendant had established that the plaintiff would have entered the contract anyway, but would have bid higher). But it seems that the Court is inclined to narrow the circumstances where a plaintiff with concurrent claims in tort and contract will be able to obtain a higher damages calculation in one than the other. At para. 40, the majority stated:

In situations of concurrent liability in tort and contract, however, it would seem anomalous to award a different level of damages for what is essentially the same wrong on the sole basis of the form of action chosen, though, of course, particular circumstances or policy may dictate such a course.

As well, they made the following comment at para 1:

Rather than attempting to establish new barriers to tort liability in contractual contexts, the law should move towards the elimination of unjustified differences between the remedial rules applicable to the two actions, thereby reducing the significance of the existence of the two different forms of action and allowing a person who has suffered a wrong full access to all relevant legal remedies.

Canadian caselaw does not seem to have substantively addressed these questions much since BG Checo, at least not at the appellate level. The scope of this paper does not permit anything approaching a complete canvass of court decisions in this area. A recent article does attempt to be more thorough (it focuses on tort claims, but that is where the controversy really exists): see Laura Hoyano: "The Profit Paradox: Protecting Legitimate Expectations in Tort" (1999), 78 Cdn. Bar Rev. 363.

A glance at the ultimate resolution of the BG Checo case is warranted to illustrate the impact that these issues can have. It was noted above that the trial judge awarded $2.6 million in damages in an attempt to compensate Checo for all losses occasioned by it from entering into the contract. The trial judge was directed to reassess damages on the basis that Checo would have entered into the contract, but at a higher bid. The revised calculation for damages for breach of contract was $1.6 million. For negligent misrepresentation it was $1.7 million. Checo was awarded that higher amount (see: (1994), 109 D.L.R. (4th) 1 (B.C. S.c.)), and the award was upheld by the Court of Appeal: (1995) 126 D.L.R. (4th) 127). The difference can thus be sizeable.
IV. ADDITIONAL ISSUES

A. CLAIMS FOR PURE ECONOMIC LOSS

Many or most claims for concurrent liability in tort and contract are for economic loss. Defendant counsel will wish to characterize such damage claims as being for pure economic loss that was not reasonably foreseeable. The ability to recover for pure economic loss against a party with whom one does not have a contract will be particularly restricted (such as where a subsequent purchaser of a building wishes to claim against the building contractor to recover the cost of repairing defects arising from the contractor's negligence). Such a recovery was permitted in Winnipeg Condominium Corporation No. 36 v. Bird Construction Co. [1995] 1 S.C.R. 185, but in the narrow circumstance where the defect was dangerous and was reasonably likely to cause injury to its inhabitants.

For further insight, see Bruce Feldthusen, "The Recovery of Pure Economic Loss in Canada: Proximity, Justice, Rationality and Chaos" (1996), 24 Man. L.J. 1 (available on Quicklaw).

B. CONTRIBUTORY NEGLIGENCE

Counsel should be alert to the possibility of claims for contributory negligence. Such claims are clearly available in the tort realm, by virtue of the operation of The Contributory Negligence Act, S.S., c. C-31. There has been an ongoing debate as to whether a defendant can claim contributory negligence where the plaintiff has claimed in contract.

The issue has been considered once in Saskatchewan, in Husky Oil Operation Ltd. v. Oster (1978), 87 D.L.R. (3d) 86 (Sask. Q.B.), where the plaintiff sued a welder in both tort and contract in connection with an explosion that occurred while the defendant was carrying out welding on the plaintiff's water storage tank. The welder defended on the basis that the plaintiff's negligence caused the explosion and pleaded contributory negligence in the alternative. Hughes J. analysed the issue of whether the pleading of contributory negligence could succeed as follows:
Alternatively, contributory negligence is pleaded.

I have concluded that unless the plaintiff can succeed against the defendant in negligence, a basis for fixing a portion of the liability with the plaintiff does not exist. That is because any basis for apportioning liability that might exist would be pursuant to the Contributory Negligence Act, R.S.S. 1965, c. 91, a statute that, is, of course, without applicability in the case of a breach of contract.

The Court found that the defendant was negligent, and that the plaintiff was also negligent, and that therefore The Contributory Negligence Act did apply.

Thus, in a case of concurrent liability in tort and contract, the defendant should be able to successfully claim for contributory negligence.

British Columbia's contributory negligence legislation contains language virtually identical to Saskatchewan's, and a similar issue arose there recently in the context of a claim against an insurance broker for failure to recommend adequate insurance coverage. In Crown West Steel Fabricators v. Capri Insurance Services Ltd., [2002] B.C.J. No. 1499 (B.C. c.A.), the Court conducted a broad survey of authorities considering this issue (including courts in England, Australia and New Zealand). The majority noted that the practice of B.C. trial courts was to extend the provisions of The Negligence Act to cover the liability of parties in contract concurrently with their liability in negligence, and held (at para. 21):

... it is preferable to adopt that generally accepted provision and apportion damages under the Act, at least where there is concurrent liability in tort and contract. I think that the contributory fault of Crown West should result in apportionment under both causes of action. [emphasis added]

That position would appear to go further than the Court went in Husky Oil Operation Ltd. v. Oster, where it appeared that the apportionment for contributory negligence would apply only in respect of the plaintiff's claim in tort.

Even though a plaintiff has framed their action only in contract, that may not preclude the court from engaging contributory negligence legislation. In Canadian Western Natural Gas Co. v. Pathfinder Surveys Ltd. (1980), 12 Alta. L.R. (2d) 135 (C.A.), the majority addressed whether
the plaintiff could avoid the consequences of its negligence that contributed to the loss it suffered by framing its action only in contract. Mr. Justice Prowse wrote (para. 52):

In my view an injustice would arise if the court failed to deal with the claim in this manner [to view the claim as being one in tort, which would permit a claim of contributory negligence] on the ground that it was not free to do so in view of the form in which the matter was pleaded. To so hold would mean that a court could be deprived of jurisdiction to arrive at an equitable result by the form of pleading chosen by a plaintiff.4

Thus, where a plaintiff is capable of claiming concurrently in tort and contract, the defendant should be able to plead contributory negligence, even if the plaintiff's claim is brought only in contract. Defendant counsel should be alert to such opportunities.

C. PLEADINGS

Counsel should take particular care in drafting pleadings where concurrent tort and contract claims are involved. While courts tend not to be overly rigid in determining whether a claim has been properly pleaded, tort and contract claims nonetheless have distinct elements that should be pleaded. This is particularly so in respect of certain tort claims.

As an example, the test for negligent misrepresentation, as set out in *Queen v. Cognos Inc.* (at para. 33) is:

1. there must be a duty of care based on a "special relationship" between the representor and the representee;
2. the representation in question must be untrue, inaccurate, or misleading;
3. the representor must have acted negligently in making said misrepresentation;
4. the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and

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4 Mr. Justice Harradence, writing in dissent, was of the view that the plaintiff had not been negligent, and did not address the legal question of whether the court had jurisdiction to apply contributory negligence principles where the claim had been brought only in contract.
(5) the reliance must have been detrimental to the representee in the sense that damages resulted

A statement of claim needs to allege each of these elements against each defendant who is being sued for negligent misrepresentation. *ScotiaMcLeod Inc. v. Peoples Jewellers Limited* (1995), 26 O.R. (3d) 481 (C.A.), application for appeal dismissed, [1996] S.C.C.A. No. 40, is an example of a case where claims were dismissed for not disclosing a reasonable cause of action where negligent misrepresentation was claimed. The claims dismissed had been brought against directors of a corporation, and the key issue was whether the claim disclosed allegations that could lead to the directors being liable in their personal capacities. The pleadings in respect of those directors failed to allege many of the necessary elements to make out the tort.

*ScotiaMcLeod Inc. v. Peoples Jewellers Limited* was not a case of concurrent liability, but one can certainly imagine circumstances where claims against a corporation for breach of contract could be coupled with claims against directors or employees of the corporation for negligent misrepresentation in their personal capacity. Thus, as in pleading any claim, counsel should break the legal test for the claim down into its constituent elements and ensure that each element is properly pleaded.

For an excellent discussion on potential tort claims that could be made against corporate directors and officers, and the need to be particularly careful in pleading such claims, see Robert Frank, "Directors' and Officers' Liability in Tort". The three types of tort claims focused on by the author are conspiracy, inducing breach of contract, and misrepresentation.

When pleading against multiple parties, particularly when trying to combine claims against corporate and individual defendants, it is important to be as specific as possible in making allegations of conduct against specific defendants. Otherwise, counsel risks having the statement of claim struck. For an example (in the insurance context) of a claim against individual employees that failed to survive a motion to dismiss, see *Syrtash v. Provident Life and Accident Insurance Co.*, [1996] O.J. No. 1782 (Gen. Div.). *Spiers v. Zurich Insurance Co.* (1999), 45 O.R. (3d) 726 (Sup. Ct.) is an example of a less-than-ideal claim that did manage to survive.
As litigation proceeds, counsel should stay alert to the possible need to amend pleadings to add causes of action. While it is preferable to amend pleadings before examinations for discovery and certainly well in advance of trial, in *Pandolfo Management Services Ltd. v. Grasslands Feeders Ltd.*, [1993] 6 W.W.R. 218 (Sask. Q.B.) the defendants/plaintiffs by counterclaim applied after the close of evidence at trial, but before the presentation of argument, to amend their pleadings. This was in response to a suggestion by the trial judge, Mr. Justice Sherstobitoff sitting *ex officio*, that the parties should review their pleadings because the case would be decided in accordance with the pleadings. The defendants by counterclaim objected. His Lordship stated (para. 40):

A careful examination of the proposed amendments disclosed that they dealt only with matters which were the subject of evidence at the trial, and that the effect of the amendments would be to bring the pleadings into line with the evidence. The nature of the action would not be changed - at most, some additional particulars for certain of the grounds of defence or counterclaim will have been given, or some particulars will have been changed. The plaintiffs cannot have been taken by surprise, since the evidence upon which the proposed amendments are based was evidence which was heard by them and not objected to (and was in some cases their own evidence) and must therefore be considered as relevant.

Cases where concurrent liability for tort and contract could arise would be particularly amenable to later amendments such as occurred in *Pandolfo Management Services Ltd. v. Grasslands Feeders Ltd.* While the constituent elements between the tort and contract claims may differ, the evidence will often overlap significantly, if not entirely. Thus, if counsel realizes late in the game that a contract claim is in trouble but a tort claim (that has not yet been pleaded) might succeed, it may not be too late to seek leave to amend.

**V. CONCLUSION**

The foregoing discussions have covered a broad range of factual contexts where concurrent tort and contract claims have been made:

- negligent construction
- negligent professional advice
• misrepresentations in tendering, design and specifications work
• misrepresentations in hiring an employee
• commercial relationships
• claims against insurers

One further type of situation that appears to have potential for concurrent tort and contract claims is the wrongful realization on security by lenders. The Supreme Court considered a possible such claim in *Royal Bank of Canada v. W. Got & Associates Electric Ltd.*, [1999] 3 S.C.R. 408. The Royal Bank had appointed a receiver over the company's assets, and sued to recover the debt owing to it. The company counterclaimed in breach of contract and tort (conversion), alleging a wrongful seizure because inadequate notice had been given. The Court noted that the calculation of damages would be identical in tort and contract, and so declined to rule on the tort claim, but stated that it was at least "theoretically possible for the bank to be liable in both contract and in tort" (para. 22).

Thus, it appears that the boundaries of concurrent liability will continue to expand into new areas for some time to come.