

Commentary on the "Law Reform Act"

Law Reform Branch
Office of the Attorney General

May 1993

FOREWORD

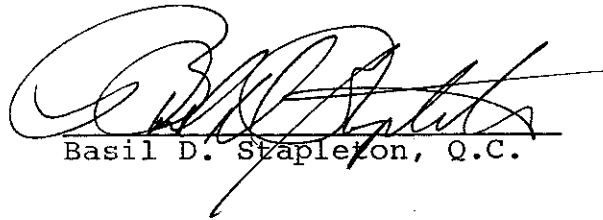
Part of the mandate of the Law Reform Branch is to review the common law principles currently operative in New Brunswick and to suggest changes where appropriate. The Law Reform Act, introduced in the Legislature as Bill 60 of the 1993 spring sitting, proposes several such changes.

In introducing the Bill the Attorney General stated

The Law Reform Act is being presented to the Legislative Assembly as the first stage in a consultation process. The Bill contains amendments to various common law provisions, and some of them may affect a wide variety of situations. By introducing a Bill, the Government hopes to give the proposals wide publicity and to bring them to the attention of interested parties who will want to make comments. The Government wishes to consider those comments, and is therefore only proposing to take this Bill as far as First Reading before this House adjourns. . . I would encourage everybody who may be affected by the Bill's provisions to review the legislation and submit their comments.

This Commentary is intended to assist in the discussion of the Bill. Those wishing to make representations are invited to do so by July 15th, 1993. Communications should be directed to

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**A COMMENTARY ON
THE LAW REFORM ACT**

Introduction

The proposed Law Reform Act discussed in this paper was introduced in the Legislature in May 1993, for First Reading only, as Bill 60. The introduction of the Bill was the first step in a consultative process; this Commentary is the second step. The Bill deals with a number of common law rules which the Law Reform Branch of the Office of the Attorney General has recommended as deserving legislative attention. Some of them could affect a wide range of situations and interests, and the Branch has suggested the introduction of a draft Bill as an appropriate part of the consultation process. Putting the proposals in the form of a Bill makes them available to a wide range of potentially interested parties. It also makes them concrete enough for their likely impact to be assessed. It should be emphasized that the Bill does not contain policy decisions that have already been taken. The purpose behind submitting a Bill for First Reading only was to make it available for detailed scrutiny over the summer. The eventual disposition of the Bill will depend on the comments that are received.

Before the details of the Bill are examined, a brief word is in order on the general purpose behind establishing a Law Reform Act. In a common law system like New Brunswick's,

many important legal rules exist in case-law rather than in statutory form, and when legislation aims to alter case-law, a pre-existing Act with a suitable subject-matter is not always available. Establishing such an Act would be useful. It would create a natural home for various legislative measures that do not obviously belong in other existing Acts, and should make it easier for lawyers to keep track of the changes. Acts which, for whatever reason, appear only in the annual volumes of statutes and are not carried forward in the Queen's Printer's loose-leaf consolidations can fall out of sight. This may become more important as computerized database searching becomes more prevalent; legislation which does not appear under a lasting form may be hard to locate. A Law Reform Act could provide that lasting form and would be expected to grow over the course of the years as additional common law principles received legislative attention.

This being the general purpose of the Law Reform Act, it will be no surprise that the specific items examined below are miscellaneous in nature; some are clearly of greater significance than others. This paper takes each section of the Bill in turn, providing first the text, and then the commentary. We encourage people to comment not only on the general thrust of the reforms suggested but also on the specific words in which they are expressed. If the present Bill does proceed to become an enactment, its terms are likely to be very similar to those of the Bill unless specific deficiencies are identified.

Section 1: The Action Per Quod Servitium Amisit

1(1) The action per quod servitium amisit is abolished.

1(2) This section does not apply where the cause of action occurs before the commencement of this section.

The action per quod servitium amisit is a left-over from bygone days -- or perhaps, in New Brunswick, from days that never came. In its origins it was a means by which the master of the household could obtain compensation if a third party injured his wife, child or servant, thus depriving the master of their services. In relation to the wife or child, the action was abolished by s.4 of An Act Respecting Compliance of the Laws of the Province with the Canadian Charter of Rights and Freedoms, 1985. The law was considered outmoded and inconsistent with equality guarantees in s.15 of the Charter. The purpose of the present proposal is to abolish the remnant of the action.

In New Brunswick, as far as we are aware, there are no decided cases awarding damages under the action per quod servitium amisit. The scope of the action in this province is therefore uncertain. Some cases elsewhere have held that it only applies where the services lost are those of a "menial or domestic servant." We assume that in the light of The Queen v. Buchinsky (1983) 1 S.C.R., 481 the action would probably not be

held to be limited to those cases, but Buchinsky does not make this a sure thing: the judgment of the majority in that case leaves room for provincial variations and certainly does not contain a statement that all employees are within the scope of the action. We note also that the measure of the employer's recovery under the action is uncertain. In Buchinsky it was held that "The measure of damages is the cost necessarily incurred by the master in respect of the loss of any services of his servant. . . ." Presumably the main element will normally be the cost of hiring a replacement, but this will only cause a loss to the employer if more is being paid to the replacement hired than to the employee injured or if the latter is still being paid despite being off work.

Evidently the scope of the action is such that it will rarely be of use. It has also been criticized on a number of accounts: as being anomalous, as inconsistent with general principles of recovery in tort, and so forth. Rather than repeat the criticisms, we would refer readers to the 1986 report of the Law Reform Commission of British Columbia entitled **The Action Per Quod Servitium Amisit.**

We recommend that the action per quod servitium amisit be repealed, as it has been in England, New Zealand and, more recently, British Columbia. We suggest, however, that existing causes of action that have accrued before the repeal should not be affected. That is the purpose of s.1(2).

Section 2: Occupier's Liability

2(1) The law of occupier's liability is abolished.

2(2) Any matter which, before the commencement of this section, would have been determined in accordance with the law of occupier's liability shall be determined in accordance with other rules of liability.

2(3) Where a person suffers injury, loss or damage while a trespasser, any damages recoverable against the person trespassed against may be reduced on account of the trespass.

2(4) Subsection (3) does not limit any defence that may be available on account of the trespass, nor any entitlement to an apportionment of damages that may exist under the Contributory Negligence Act or otherwise.

2(5) This section does not apply where the cause of action occurs before the commencement of this section.

The purpose of this section is to abolish the law of occupier's liability, substituting the ordinary law of negligence as the test of the circumstances in which an occupier of land will be liable for accidents that occur there.

Occupier's liability is an area of law which has been regularly studied throughout the Commonwealth and equally regularly found wanting. The general law in New Brunswick (with occasional exceptions such as s.9 of the Trespass Act) is unreformed common law, under which an occupier's liability for accidents that occur on his or her land depends on the capacity in which the plaintiff entered the land. Three basic categories of visitor are recognized: invitees, licensees and

trespassers. Arguably other categories exist too, but for practical purposes it is sufficient to consider only those three. To each of these categories the occupier owes a different duty. The duty to the invitee is to use reasonable care to prevent damage from unusual dangers of which the occupier knows or ought to know. The duty to the licensee is to prevent damage from concealed dangers of which the occupier actually knows. The duty to the trespasser is to comply with the standard of 'common humanity'. Whether a visitor injured on the premises can recover will depend on which category he or she falls into.

The main criticism of the existing law is that it is wrong to subdivide categories of visitor in this way, particularly in the case of invitees and licensees. Subdividing categories makes a crucial difference to a person's prospects of recovery, and can place a premium on refined and probably unrealistic arguments about how a person's presence on land should be described.

In other places where the common law has been reformed, the trend has been to collapse the distinctions between the categories and establish by statute a standard duty of care that is owed to all visitors -- at least, to all lawful ones. The position of trespassers is more complicated, mostly because the legal notion of 'trespass' covers an enormously wide range of circumstances. At one end are people like burglars; at the

other are people like pedestrians who innocently stray onto land which they have no reason to believe is private property. With such a wide variety of people falling under the legal definition of "trespasser," it is not surprising that the question of how to deal with them has proved hard to resolve.

Our belief is that statutory reform along the lines followed elsewhere would be an improvement on the existing situation, but that even then the law would bear the stamp of its present deficiencies. Creating a statutory duty of care would place a premium on the exact words chosen; their meaning would surely be a source of litigation. The statute, moreover, would have to state who the duty was owed to. This, too, would be subject to interpretation and would lead to some plaintiffs being owed the statutory duty while others were owed some other duty, a demarcation similar in some ways to that of the present law. The position of trespassers might produce an additional complication. Taken as a class ranging from the burglar to the unwary pedestrian, they could not expect to have the benefit of the standard duty of care owed to lawful visitors. Again, therefore, a demarcation would exist of the kind that we think counter-productive. The distinction might be between trespassers and lawful visitors, with only the lawful visitors coming within the new statutory duty. Alternatively, the broad heading of 'trespassers' might be subdivided, with innocent trespassers being differentiated from wilful trespassers and receiving more favourable treatment, whether at the same level

as lawful visitors or at a separate level all of their own. Either way, what seems to emerge is a new set of categories to replace the old one, a result that we do not regard as desirable.

A simpler solution, therefore, seems to us to be the one that has developed through case-law in Australia, and which the Australian Law Reform Commission gave its seal of approval in its 1988 Report Occupiers' Liability. Under this approach, special rules for occupiers' liability are abandoned, being replaced by ordinary principles of liability in negligence. It is this principle that s.2 of the proposed Act attempts to put into place.

Under our proposed Act, s.2(1) abolishes the existing rules; s.2(2) explains that other principles of liability are to take up the slack. It will be noted that the legislation does not expressly refer to the law of negligence, though this is the way in which we have summarised the effect of the change in this paper. The reason is that we do not wish to restrict in any way the possibility that there might be 'other principles' on which occupiers' liability cases would be decided. Conceivably, rules other than the law of negligence might be applicable in some circumstances, and if that were the case, we would not want legislation in place that suggested that the law of negligence was the only body of legal principle

on which a plaintiff could rely in an action against an occupier of premises.

We also see those 'other principles' as containing, when read with s.2(3) and (4), the response to the issue of liability to trespassers. Under this approach the issue of trespass would be dealt with partly as a matter of foreseeability, partly as a matter of defence, and partly as a matter of adjusting damages. Under 'other principles', the first thing a plaintiff would have to establish was that he or she was the victim of an accident that was reasonably foreseeable and that should have been prevented by reasonable measures. Many trespassers will fail to cross this threshold and will therefore not recover. As to matters of defence we note the availability of pleas such as 'volenti non fit injuria' or 'ex turpi causa non oritur actio.' These could well be effective to exclude trespassers who are at the 'burglar' end of the range. In other cases, we suggest, apportionment of damages under the Contributory Negligence Act or otherwise is the appropriate way of acknowledging the fact of trespass. The more culpable the trespass, the greater the reduction would be. If an accident was foreseeable and the injured party was a trespasser by sheer bad luck, one could expect that the reduction of damages, if any, would be small. If, though, the injured party was a trespasser despite repeated warnings to stay off the land, he or she could expect the reduction in damages to be significant.

The proposal to reform the theoretical base of occupier's liability law naturally raises the question of what the effect will be in practice. What will be the effect on plaintiffs' rights or defendants' liabilities?

Our belief is that the effect will not be great. This is one reason why we are prepared to advocate our present proposal on the grounds of its simplicity; simplicity would be a less compelling virtue if the substantive effect of the alteration was going to be large. One thing that would cause us to re-think our proposal would be if we believed that the law of negligence was inadequate in response to the inaction of defendants rather than to their actions. The view is sometimes expressed that omissions to act (or 'nonfeasance') are less capable of being classified as negligence than positive actions ('misfeasance') are. If that were so, it could affect this proposal considerably, for occupiers' liability issues often focus upon the occupier's failure to do things that he or she should have done. Damage resulting from allowing property to become dilapidated is the obvious example. One thing that the present law certainly does do, whatever its other deficiencies, is place a clear obligation on occupiers to observe at least some standards in relation to visitors to their premises.

We do not believe, however, that there is any real life in the action/omission (or 'misfeasance'/'nonfeasance') distinction in the present context. Property-owners can be

held liable in negligence when inadequate maintenance of their property causes damage off the premises to neighbours or to users of the public highway. It is only when the accident is on the premises that occupiers' liability rules apply. If the ordinary law of negligence can protect passers-by, it ought to be able to protect visitors as well. We do not believe, therefore, that the change proposed here would prove a windfall to occupiers by relieving them of liability for nonfeasance.

In relation to the standard of care required under the proposal, obviously there will be a change, if for no other reason than that the present law prescribes three separate standards of care (at least), whereas the proposal would substitute one. In relation to the existing law, however, we would note that although there are in theory three separate standards of care, there is in substance, for the occupier who wishes to be sure of avoiding liability, only one standard -- the highest one. This is because the occupier cannot know in advance whether the person injured on the premises will be there as an invitee, a licensee or a trespasser. The occupier can only be sure of avoiding liability, therefore, by observing the standard of care owed to invitees. We would also suggest that if there is a difference between the three existing levels of duty and the one that we are proposing, it is the three, rather than the one, that need the special justification. If there is no theoretical obstacle to applying the law of negligence in situations to which the law of occupier's

liability now applies, and if the law of negligence is considered to provide a reasonable test of liability in other circumstances, what is it about the situation of the occupier of land that requires special treatment? It is to be expected, of course, that even under a single legal duty of care -- the negligence standard -- what constitutes 'reasonable' care may vary in different circumstances. What is reasonably required of a householder may well be less than would be expected of a department store, and in this respect there might be echoes of the old law in the new. Nonetheless, the single legal rubric of 'reasonable care in all the circumstances' seems preferable as a framework to resolve these issues than the present one, with its artificial categories and separate duties.

We would encourage comments on all or any of this, as well as on technical matters relating to the wording of the necessary legislation. We have considered, for example, whether we should define, or describe more expansively, "the law of occupiers' liability" which s.2(1) abolishes. We find the task difficult. The more words one adds trying to pin down what "the law of occupier's liability" is, the greater the danger that the definition itself will become a source of argument as to exactly what has, and what has not, been repealed. Can there be any real doubt about what s.2(1) means? We have also considered whether s.2(2) is necessary, and if it is, whether it is clearly expressed. Our belief is that it is probably not necessary, but that including it is

nonetheless advisable as a means of making clear that our intent is not merely to repeal one body of law but to replace it with another.

The wording s.2(3) and (4) has caused us particular difficulty. The subsection attempts to express the principle that damages can be reduced on account of a plaintiff's trespass. It is difficult, though, to decide exactly how to do this. One tends to reach instinctively for the Contributory Negligence Act as providing the legal framework for an apportionment of damages, particularly given that the Act is expressed in terms of the "fault" of the parties, a broad expression, wide meanings of which have been argued for. Some cases, though, suggest that the Contributory Negligence Act has a more specific focus and that apportionment is available outside the Act as well as under it. See, for example, Hoyt J.A.'s judgment in Bulmer v. Horsman (1987) 82 N.B.R. (2d) 107. Similarly Caisse Populaire d'Inkerman v. Doiron (1985) 61 N.B.R. (2d) 123 has analysed New Brunswick's Contributory Negligence Act as being directed at overcoming the 'last chance' rule that developed in negligence cases early this century, and has suggested that courts have discretion to apportion damages even where the Act does not apply. Against this background of uncertainty as to the scope of the Contributory Negligence Act, s.2(3) and (4) have been prepared in all-embracing terms designed to achieve its effect even though both the scope of the Contributory Negligence Act and

the principles governing apportionment outside that Act are unclear. If something more specific and focused could be devised, it could well be preferable. Leaving the Act silent would also be attractive if we were confident that this would achieve the desired legal effect. As things stand, however, with the law of apportionment of damages being uncertain, we do not have that confidence.

Section 3: Aggravated, Exemplary and Punitive Damages

3(1) Where in any proceedings a claim is made for aggravated, exemplary or punitive damages, it is not necessary that the matter in respect of which those damages are claimed be an actionable wrong independent of the alleged wrong for which the proceedings are brought.

3(2) This subsection applies whether the matters in respect of which the aggravated, exemplary or punitive damages are claimed occurred before or after the commencement of this section.

This section, though drafted in broad terms (the reason for which will be explained later), is essentially a response to the decision of the Supreme Court of Canada in Vorvis v. Insurance Corporation of British Columbia [1989] 1 S.C.R. 1085. The case dealt with the availability of aggravated, punitive and exemplary damages in contract, and was a landmark decision in two respects: first, in establishing clearly that in contract such damages could be available at all, which had not previously been certain; second, by a majority of 3-2, in indicating limits to their availability. The section outlined above relates to what emerges from Vorvis as being the most prominent indicator of whether a claim for aggravated, punitive or exemplary damages can succeed in contract, namely whether the plaintiff can show that the conduct complained of is in itself an actionable wrong independent of the breach of contract.

It must be said that exactly what Vorvis held as to the need to show an independently actionable wrong is not clear. The judgment of McIntyre J., for the majority, falls fractionally short of being categorical. A fair reading seems to be that an independently actionable wrong

- (a) is necessary if punitive or exemplary damages are to be awarded in contract;
- (b) is probably necessary if aggravated damages are to be awarded for wrongful dismissal;
- (c) may well be necessary if aggravated damages are to be awarded for breaches of contract other than those falling within established case-law.

There are two main reasons for suggesting that the requirement to establish an 'independent actionable wrong' is inappropriate as a precondition to an award of punitive, exemplary or aggravated damages. First, the test seems self-contradictory. It seems strange to say, on the one hand, that exemplary damages are available in contract, but then, on the other, that they are only available on the basis that the defendant has committed an independently actionable wrong, for if the wrong is independently actionable, the plaintiff is not really getting exemplary damages for the breach of contract at all. Second, we do not really share the view that there is

anything anomalous or offensive in principle about the courts, in civil proceedings, punishing at the same time that they compensate. Certainly the dominant principle in civil cases is that damages are intended to compensate the plaintiff, but it does not follow from this that punitive damages are 'overcompensation' or a 'windfall' to the plaintiff. If one asks, as McIntyre J. does in Vorvis, what the rationale can be for imposing on a defendant damages greater than the loss that the plaintiff has suffered, the answer, surely, is simple: that the conduct of the defendant has gone far beyond the conduct that would entitle the plaintiff to the compensation. The conduct that, in law, entitles a plaintiff to compensation can often be innocent, unavoidable or well-intentioned. When, though, a defendant acts atrociously toward a plaintiff at the same time as inflicting a compensable injury, why should the law not recognize this? Where the defendant's conduct adds insult to injury, why should the law only recognize the 'injury' but not the 'insult'?

The purpose of s.3 is, essentially, to take the law to the point where the minority in the Supreme Court thought it already was. S.3 would therefore remove the specific limitations that the majority established, leaving in place the general rule that aggravated, punitive and exemplary damages are available in contract. The section does not attempt to determine the circumstances in which they will be awarded. To do so would be a much broader project than we are engaging in

here. The general approach is that it should remain to be left to the courts to determine the circumstances in which such awards would be allowed, and we imagine that, at least in relation to exemplary and punitive damages, such awards will continue to be extremely rare. Nonetheless we believe that the specific legal restrictions described in the Vorvis decision should not remain as bars to such awards.

In terms of drafting, the section goes beyond what is strictly necessary to respond to Vorvis. In particular, it is not expressly limited to actions in contract. This reflects the difficulty of formulating legislation designed to address common-law rules. By expressing the legislation in general terms, we hope to nip in the bud the possibility that, if the legislation restricted itself to damages in contract, it might leave Vorvis as a precedent to be applied in other contexts. At the same time, by directing the language of the section to the specific obstacles examined in Vorvis, we hope to avoid the section giving any indication of when and why aggravated, exemplary or punitive damages should be awarded. The objective is simply to cancel out that part of Vorvis that imposes an inappropriate limitation.

The proposed transitional provision in s.3(2) deserves a brief comment. Essentially, its purpose is to allow the claim for aggravated, exemplary or punitive damages to be made regardless of when the conduct complained of occurred. There

is an obvious element of retroactivity in this, but in the circumstances it seems appropriate. The conduct giving rise to the claim is equally reprehensible whenever it occurred, and if anybody had actually conducted themselves before the commencement of the Act in a way that specifically depended upon the unavailability of exemplary damages, their conduct would be doubly reprehensible.

Section 4: Privity of Contract

4(1) A person who is not a party to a contract but who is identified by or under the contract as being intended to receive some performance or forbearance under it may enforce that performance or forbearance by a claim for damages or otherwise.

4(2) In proceedings under subsection (1) against a party to a contract, any defence may be raised that could have been raised in proceedings between the parties.

4(3) The parties to a contract to which subsection (1) applies may amend or terminate the contract at any time, but where, by doing so, they cause loss to a person described in subsection (1) who has incurred expense or undertaken an obligation in the expectation that the contract would be performed, that person may recover the loss from any party to the contract who knew or ought to have known that the expense would be or had been incurred or that the obligation would be or had been undertaken.

4(4) This section applies to contracts entered into before or after the commencement of this section, except that subsection (3) does not permit the recovery of loss arising in relation to an expense incurred or an obligation undertaken before the commencement of this section.

The purpose of this section is to displace the law of privity of contract to a limited extent. Under the existing law, the only people who can enforce contractual promises are the parties to the contract. That this can cause injustice in some circumstances is widely recognized. Less clear, though, is what to do about it. Any departure from the simple rule that only parties can enforce contracts raises questions about

exactly how far one should go and about how the rights of the original parties to the contract should be affected by allowing somebody else into the contractual relationship. Some of the precedents and alternatives are canvassed by the Ontario Law Reform Commission in its Report on Amendment of the Law of Contract (1987) and by the English Law Commission in its Consultation Paper Privity of Contract: Contracts for the Benefit of Third Parties (1991).

What is proposed in s.4 of the Bill is, we believe, a relatively modest amendment that addresses the most glaring deficiency in the existing law while taking only a small step in creating third party rights that are independent of those of the parties. Where the law is most obviously deficient at present is that it gives the third party no status to enforce binding contractual provisions that were specifically included in a contract for his or her benefit even though there is no reason why those provisions should not be observed. S.4(1) would, essentially, reverse this rule in cases in which the obligation and the intended beneficiary of it were readily identifiable. Under s.4(2), however, the third party would not be in a better position than the party to whom the original promise was made. If, by virtue of breach of contract or whatever, the obligation was no longer enforceable as between the original parties, the third party would not be able to

enforce it either. The third party's conduct might itself provide a ground on which an action to enforce the contractual obligation might be defeated.

As to the position of the original parties to the contract, the suggestion in s.4(3) is that it should be open to them at all times to vary or revoke the contract. This is apparently more limited than some of the examples the Ontario Report and the English Consultation Paper examine, under which, on the occurrence of certain triggering events, the original contract appears to be converted into a kind of tripartite arrangement. It does seem right, though, that the third party should receive at least some degree of protection from unexpected changes in the contract between the parties, and the draft therefore proposes in s.4(3) a form of restitutionary relief. Under this subsection the third party could recover actual losses incurred in the expectation that the contractual obligation would be performed, but such loss could only be recovered if, an important qualification, a party knew or ought to have known of the actions that the third party was taking in reliance on the contract, yet still agreed to alterations that would undermine that reliance.

As indicated earlier, we view the latter part of this as being the more complicated. Other things being equal, it seems relatively easy to say that when one person has contracted with another to do something for a third, the third person should be

able to enforce that obligation when there is no reason why the obligation should not be performed. More difficult, though, is to decide just how far one is prepared to go in asserting the claim of the third party as against that of the others. The present proposal is an attempt to give the third party a measure of protection against the actions of the parties to the contract, but not to put the third party in a position of control.

Against this general background, s.4(4) of the Bill deals with the question of retroactivity. It proposes that, with limitations, the new law should apply to existing contracts as well as to those concluded after the coming into force of the legislation.

In this case the question of retroactivity is difficult. It involves choosing between alternatives each of which has drawbacks. For example, it would be possible to suggest, contrary to what is in s.4(4), that the new law should not be retroactive at all, and should only apply to contracts entered into after the new law comes into force. The difficulty with this is that for a period of time it creates two parallel systems of law, one for old contracts, one for new. Given that some contracts can be long-standing, and that others may reflect courses of dealings that might legitimately be viewed either as one long contract commencing under the old law or a series of short contracts the most recent of which is

under the new law, creating parallel systems of law could cause complications. Compared to this, the attraction of the retroactivity proposed in s.4(4) is that it allows a single legal rule to apply to all contracts, whenever they were concluded.

The degree of retroactivity proposed, moreover, seems small. Given that, under s.4(3), the parties to a contract can amend it at any time, it may not often matter whether a contract is under the new law or the old; an unwanted obligation can be altered. The new law would, however, contain in some circumstances a disincentive to amending a contract, namely the possibility of the restitutionary claim under s.4(3). In this respect allowing full retroactivity of the law would expose people to the risk of claims arising out of conduct which, at the time it took place, had no legal implications. To avoid this, s.4(4) aims, in effect, to make the restitutionary part of the proposal a purely prospective element in an otherwise retrospective provision. The remedy will only be available where reliance on the contract takes place after the new section is in force.

There is an additional possible amendment to the law of privity of contract, not covered by the draft above, that we are also considering at present. It arises out of our recent work on the Mechanics' Lien Act. The Act applies to construction contracts, and establishes a legal régime under

which contractors, sub-contractors, labourers and suppliers are given rights in relation to payment for work done or materials supplied. These rights are enforceable against the landowner and as between the various participants in the project. Enforceability does not depend on the existence of privity of contract, and this is said to be one of the merits of the Mechanics' Lien Act: it prevents a landowner from taking the benefit of, say, a sub-contractor's work while using the doctrine of privity of contract to deny that there is any obligation to pay for it.

In our discussion paper The Mechanics' Lien Act: Time for Repeal? we asked for comment on the suggestion that the Act might be repealed. We also expressed doubt that, in the absence of the Act, there would really be situations in which an owner who was able to pay would really be able to take the benefit of the works and pay nobody for them. On the other hand, if the doctrine of privity of contract is not sacrosanct, we see nothing wrong with allowing a direct action between the sub-contractor and the owner under the kinds of three-party arrangements that the Mechanics' Lien Act exemplifies. If, in whatever situation, one party contracts with another and the other sub-contracts with a third, we see no reason in principle why the third, having performed the sub-contract and having thereby delivered to the original party the benefit that he or she was originally seeking, should not be able to proceed directly against the original party. If there are problems

here, they seem to relate more to the possible practical complications of such an approach than to its merits in principle.

We would therefore welcome comments on an additional measure dealing with third party enforcement of contracts. The provision would be along these lines:

(1) In this section

"chain of contracts" means a series of two or more contracts, in which the second and any subsequent contracts

(a) are entered into as means to the performance of the first, and

(b) are linked to the first directly or through intervening contracts.

(2) Where a party to any contract in a chain of contracts

(a) has performed his or her obligations under the contract,

(b) has thereby conferred on a person who is a party to a prior contract within the chain part or all of the benefit which that person was to receive under that prior contract, and

(c) has made reasonable efforts to obtain payment under the terms of the contract performed, but has been unsuccessful,

the party who has performed the contract may claim directly against the person who has obtained the benefit of the performance.

(3) A claim under subsection (2) shall be for the lesser of

(a) the payment due under the contract performed,

(b) the payment due under the prior contract in respect of that performance, and

(c) the value of that performance to the person who has obtained the benefit of it.

(4) A payment made in satisfaction of a claim under subsection (2) discharges, to the extent of the payment, the obligation of the person who makes the payment under the prior contract.

(5) A claim under subsection (2) shall not succeed if the person claimed against has already paid, under the prior contract, for the benefit obtained by the performance to which the claim relates.

Against this general background, it might also be wise to clarify what the position would be if two or more concurrent claims were made in relation to a single principal contract. If the two claims were unrelated -- under completely separate sub-contracts, say -- there should be no difficulty: under subsection (3) above, each sub-contractor could only claim for the value of the work that he/she had done, and these should not overlap. If, though, the two claims were related -- if, for example, a contractor and his/her sub-contractor were both claiming (the former under the terms of the principal contract, the latter under subsection (2)) -- there might be the possibility of conflict, since the contractual claim of the contractor would be calculated to include the amount payable to the sub-contractor. In some cases it might be necessary to state which of these claims should prevail.

In our view, in these circumstances it should be the claim of the person who did the actual work that takes precedence. Thus in the example given above, the sub-contractor could recover the value of the work done, while the original promisor would be limited to the contract price less the value of the sub-contract. This result appears to us to reflect the reality of the situation. It is, after all, the sub-contractor who has in fact provided the contractual performance, whereas the interest of the contractor was all along, in reality, restricted to the difference in value between the principal contract and the related sub-contracts.

In putting forward a suggestion of the kind outlined above, we are aware that it has the potential to produce complex results. In theory, virtually any contract can generate many sub-contracts, and the framework suggested above would certainly be less categorical than the doctrine of privity of contract in determining who could claim what against whom. However, our work on the Mechanics' Lien Act leads us to believe that this complexity is more likely to be conjectural than real. Construction contracts, it is said, are especially likely to generate complex contractual relationships, yet in the brief review we conducted of mechanics' lien filings in three counties in 1991, we found little evidence of contractual complexity. Almost half of the liens filed arose from simple contracts rather than chains of contracts, and where there were chains, few were more than two links long. If this is so for

construction contracts, it seems likely to be the case in other situations too. We would certainly appreciate comments on whether a provision of the kind outlined above would become unmanageably complicated, but at present we tend to doubt that it would do so.

Section 5: Contributory Fault in Contract

5(1) Where the conduct of one party to a contract is a partial cause of a breach of contract by another party to the contract or of the damages that the party first mentioned suffers in consequence of the breach, the damages to be awarded for that breach may be reduced proportionately.

5(2) This section applies to conduct occurring before or after the commencement of this section.

The main purpose in including s.5 in this Bill is to provide a focus for discussion of the issue of contributory fault in contract. We believe, in fact, that legislation is unnecessary, given the present state of the case-law in New Brunswick.

The general question here is whether, when a party to a contract suffers loss by reason of another party's breach of that contract, the damages recoverable should be reduced because the victim is in part the author of his or her own misfortune. There is considerable support for the view that they should be, at least where the breach of contract is a breach of a duty of care. There is less agreement as to whether apportionment of damages should apply to all breaches of contract and as to whether apportionment is an application of the Contributory Negligence Act or whether it is based on other principles. See, for example, the Ontario Law Reform

Commission's Report on Amendment of the Law of Contract and its examination of the proceedings of the Uniform Law Conference on this subject.

In New Brunswick it appears that recent case-law has clearly established that damages in contract can be reduced on account of contributory fault. The leading case is Caisse Populaire d'Inkerman v. Doiron (1985) 61 N.B.R. (2d) 123. There LaForest J.A. reviewed the existing law extensively and concluded that apportionment was available as an ordinary part of contract law, and that this had nothing to do with the Contributory Negligence Act. On the same day a differently constituted Court of Appeal came to much the same practical conclusion in H. E. Kane Agencies v. Coopers & Lybrand (1985) 62 N.B.R. (2d) 1, while setting aside the underlying theoretical issues. Stratton J.A. (pp.22-23) said:

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

Neither case contains any indication that the only circumstance in which apportionment is available is where there has been a breach of a contractual duty of care. LaForest J.A. in Caisse Populaire d'Inkerman (p.149) indicated that various issues might need to be resolved by the courts in application of the principle of apportionment, but that it should not be beyond the ability of the courts to handle them.

Against this background we are inclined to let the common law run its course rather than to intervene by legislation. If there were doubt as to the existence in New Brunswick law of the principle that section 5 describes legislation might be appropriate, but we do not think there is. Likewise, if there were a desire to restrict the general principle established by the Caisse Populaire d'Inkerman and Coopers & Lybrand cases legislation might be appropriate, but we are not at all convinced that such a restriction is desirable. As for possible legislative fine tunings of the general principle, we are not at present in a position to know what these should be.

Our general position at present, then, is that we support the principle of section 5 but believe that the best way to advance it is by taking no legislative action. We have included the section in the Bill in order to provide an opportunity for comment.

Section 6: Penalty Clauses

6(1) A party to a contract may enforce a penalty clause or a liquidated damages clause to the extent that it is reasonable in all of the circumstances that the clause should be enforced.

6(2) Without limiting subsection (1), a court may determine in the circumstances of a case before it that a penalty clause or a liquidated damages clause should be enforced in full, in part or not at all.

6(3) Where a penalty clause or a liquidated damages clause is enforced only in part or not at all, damages are recoverable in respect of conduct which is in breach of contract but in relation to which the penalty clause or liquidated damages clause is not enforced.

6(4) This section applies to contracts entered into before or after the commencement of this section but only in relation to breaches of contract occurring after the commencement of this section.

The law relating to penalty clauses is widely recognized as being unsatisfactory. Penalty clauses are clauses designed to penalize a person for a breach of a contract, and they are unenforceable. As an abstract proposition, this seems acceptable as a safeguard against the inclusion of oppressive terms in contracts. In its application, however, the general principle that penalty clauses are unenforceable is troublesome.

This is because penalty clauses, at least the ones that are discussed in the reported cases, rarely seem to bear on their face the unmistakable mark of their nature. The task of the courts normally is to differentiate them from liquidated

damages clauses, clauses in which the parties agree in advance the compensation that will be paid in the event of breach of contract, which the law accepts as being valid. It is not easy, however, to see where the dividing line falls, or why. What is more, the main test that the courts have developed for telling the two apart is arguably inappropriate. The test is that a clause that provides a genuine pre-estimate of damages in the event of a breach of contract will be acceptable as a liquidated damages clause, but one that provides payments that are not a pre-estimate of damage creates a penalty. This test begs the question of why the parties to contracts should only be able to negotiate for a genuine pre-estimate of damages. It is not immediately clear that there is anything wrong with agreeing to financial disincentives to breaches of contract. Legislation such as the Crown Construction Contracts Act has specifically authorized penalty clauses (s.3).

Putting all of this together, the problem with the existing law on penalty clauses is this. The law is based on a distinction between penalty clauses and liquidated damages clauses which is probably inappropriate and is certainly unclear. It produces results, though, which given their unpredictability, are all too clear: the clause will be either wholly unenforceable or wholly valid. It is troublesome that such an unclear process should produce such clear, yet radically different, results.

The response to this that s.6 of the proposed Act suggests involves two elements. First, it collapses the distinction between penalty clauses and liquidated damages clauses in terms of their enforceability. Then it builds in a compromise solution between the complete unenforceability and the complete enforceability of the clause in question. We will mention below an alternative approach that we have considered, but first we will discuss the draft suggested above.

The effect of s.6(1) is to subject both penalty clauses and liquidated damages clauses to the same legal regime: each will be enforceable "to the extent that it is reasonable in all of the circumstances that the clause should be enforced." With the same rule on enforceability applying, the question of how to classify the clauses becomes immaterial. This responds to the problem of the unpredictability and unsuitability of the existing test by outflanking it.

S.6(2) moves on to explain what follows from making all of these clauses enforceable "to the extent that it is reasonable in all the circumstances." The result is that there will be some cases in which the clause is entirely unobjectionable and can be enforced in full, others in which it is oppressive and should not be enforced at all, and others where a degree of reliance is reasonable, but not complete reliance. By establishing this middle ground of partial reliance, it is hoped that the 'all or nothing' effect of the

existing law will be avoided. If the facts relating to penalty clauses and liquidated damages clauses may often fall in a grey area, as seems to be the case, the law should not be constrained to give black or white answers.

S.6(3) then goes on to elaborate on the implications of subsections (1) and (2), most importantly, in relation to the new 'grey' option of partial enforcement that s.6(2) proposes. Where the contractual clause is not enforceable at all, damages for breach of contract could be recovered but no reliance could be placed on the clause. This would be the same as the existing law on penalty clauses. Where, however, the clause is considered partially enforceable under the proposed new law, the proposal is that the plaintiff's remedy would partly be calculated in accordance with the contractual clause, and partly by an assessment of actual damage suffered. For example, a contract might provide a daily penalty for breach and a court might determine that it was reasonable to enforce that penalty for one month of a three-month breach. Damages, however, might have continued to accumulate over the remaining two months. The intent is that in such cases the penalty should apply for the first month, but that damages will be recoverable in addition in respect of the actual loss suffered over the remaining two months.

One criticism that might be made of this approach is that, by adding the option of partial enforcement of a penalty

clause or liquidated damages clause, it makes the law less certain than it is already. We would welcome comment on this. Our present view is that such a criticism would have some force if the means of differentiating penalty clauses from liquidated damages clauses were more clear. Given, though, that the two are hard to distinguish but that the distinction produces major differences of legal result, we think that a sliding scale of enforceability may be better than superficially simple black or white answers. We also suggest that the sliding scale may well conform better to the expectations of the parties. It seems quite plausible that in many cases parties who agree to penalties expect them to be incurred if breach occurs. They might well consider, however, that the penalties would only be extracted up to a certain point. The 'middle ground' of partial enforcement might therefore prove a very realistic option, establishing the point beyond which penalties would not go.

Another criticism of the approach proposed is that the Bill should go further, and simply adopt a general rule that 'unconscionable' provisions cannot be enforced. The Ontario Law Reform Commission viewed this as the better approach. In its Report on the Amendment of the Law of Contract it recommended the adoption of an 'unconscionability' doctrine on wider grounds, and then concluded in relation to penalty clauses that with a general 'unconscionability' doctrine in place, nothing specific needed to be done about penalty clauses.

Our response to this is twofold. First, we have not studied the broader question of unconscionability and are not in a position to make a recommendation. Some would argue that a general jurisdiction to relieve against unconscionability already exists. Second, though, it is not clear that accepting a general rule against unconscionability would provide the answer to the problem s.6 addresses. The law on penalty clauses is already, in a sense, an example of a doctrine against unconscionability. The rule on this basis is perfectly simple: penalty clauses are unconscionable; liquidated damages clauses are not. Our belief, then, is that even if the option of adopting a general rule against unconscionability were pursued, the particular difficulties surrounding penalty clauses would still need attention.

A few comments on the details of the suggested wording of the amendment are in order. It will be noted that s.6(1) does not deal expressly with one issue which would certainly come up in examining the extent to which a clause should reasonably be enforced. This is the question of whether reasonableness is to be assessed as at the time the contract was entered into or at the time when it is to be enforced. Our view at present is that it is better not to tie this down one way or the other. We note that the Ontario Law Reform Commission saw the test of unconscionability being applied as at the date of the contract; we recognize that there is merit in that position. We note also that if the wording of the Bill

stays as it is, referring to the enforcement of clauses, the inference may be that circumstances at the time of enforcement are the more important. We suspect, however, that the difference is more apparent than real. We would expect that a court, considering the 'extent to which it is reasonable to enforce' a penalty clause or liquidated damages clause, would view the expectations of the parties at the time the contract was made as being a very significant factor. We are reluctant to single it out as being the only significant factor.

In relation to s.6(2) and (3), the main question is whether they should be there at all. Their main purpose is to clarify s.6(1). S.6(2) explains the alternatives that we see s.6(1) as presenting, and serves to counteract to some extent the impression that s.6(1) may convey of everything being relative, of there being no longer any black or white solutions but only shades of grey. Though the middle option the draft suggests means that a balancing exercise will be undertaken in some cases, there will be others in which the existing absolutes of the law apply: some clauses will still be absolutely enforceable, others will be absolutely unenforceable.

S.6(3) is likewise an attempt to spell out the implications of s.6(1), and again it raises the question of whether a legislative explanation is necessary. The main purpose of the subsection is to underscore the availability of the 'part penalty - part damages' option, but arguably the

detail spelled out may be counter-productive, as creating a complication and over-refinement of the section. In the kind of example given above, where a court decides that a penalty should be enforced for the first month of a three-month breach and damages awarded thereafter, the court could perhaps produce exactly the same financial result by following a less regimented approach to the question of the 'extent to which it is reasonable in all the circumstances' that the penalty be enforced. Perhaps, rather than to specifically identify the 'part penalty - part damages' option, it would be better to leave it all to be dealt with under the broader heading of the 'reasonable extent' of the enforcement of the contract.

S.6(4), the transitional provision, also deserves comment. The question is whether the new law on enforcement of penalty clauses and liquidated damages clauses should apply to contracts that were entered into before the new law comes into force. The instinctive reaction tends to be that it should not, that contracts prepared under the old law should continue to be governed by the old law. On that basis the transitional provision would read something like "This section applies to all contracts entered into after the commencement of the section."

As mentioned previously, however, that approach has the drawback that it perpetuates two systems of law for the foreseeable future, one for old contracts, one for new ones.

Some contracts, moreover, can last for many years. The proposal is, therefore, that the new law should apply to the enforcement of penalty clauses and liquidated damages clauses in relation to breaches of contract occurring after the Act is in force. Our belief is that this would not be unduly disruptive of existing contracts, since we believe that in relation to many existing contracts, the new law will reflect the expectations of the parties better than the old law did. We note, moreover, that if there are cases in which the state of the old law was important to the parties and to the terms of their contract, this fact could be reflected in the decision as to the extent to which it was reasonable that the contractual terms be enforced.

Finally, as noted earlier, we wish to mention briefly an alternative approach to the question of penalty clauses. This would be a narrower approach aimed at counteracting what we see as being a major factor contributing to the present uncertainties surrounding penalty clauses, the unsuitability of the existing test for differentiating them from liquidated damages clauses. Arguably parties should be able to include in their contracts reasonable disincentives to breach of contract, and should not be restricted to making pre-estimates of the damages that may be suffered. A statutory provision recognizing this might go some way towards making the law more realistic and easier to apply. Such a clause would say something like this: "A contract may validly provide for

reasonable disincentives to breach of the contract, and a term which so provides is not, on that account alone, to be held unenforceable as providing for a penalty."

Our present view is that what is in the draft is more satisfactory, that the law should accept and accommodate the grey area between absolute enforceability and absolute unenforceability. The suggestion above would not do that. It would move the dividing line between the two categories a little, and would, we suggest, slightly improve the basis on which the existing differentiation is made. Still, though, the difference between unenforceable penalty clauses and other clauses would be an absolute one, with major consequences in terms of one's contractual situation continuing to depend upon whether a particular disincentive was considered 'reasonable'.

Section 7: Rescission of Executed Contracts

7(1) The fact that a contract is wholly executed is a matter which a court may take into account in determining whether to rescind a contract but is not in itself a bar to rescission of the contract.

7(2) Subsection (1) applies to a contract entered into before or after the commencement of this section.

This section aims to displace an existing legal rule that is generally considered to be anomalous, though its scope is not entirely clear. The rule at present is generally taken to be that a contract for the sale of land cannot be rescinded for innocent misrepresentation once the contract has been wholly performed. Arguments can be made on the case-law, however, for a rule that is either narrower or wider. Either way, there seems to be a widespread view that a rule that certain contracts cannot be rescinded once they have been executed is too categorical.

The effect of s.7 is, essentially, to say that though the fact that a contract has been performed may well be relevant in determining whether a contract should be rescinded it should not determine that rescission is not available.

In terms of drafting, we are suggesting that the provision should be in general terms rather than directed to the specific situation of innocent misrepresentation and the

sale of land. We do not see that any harm will come from the broader form of words, and we are reluctant to try to address the section to the limited situation where it is most clearly needed, for fear that, with more specific words, the legislation might miss its slightly uncertain target.

S.7(2) also raises once more the question of retroactivity. The draft here proposes an entirely retroactive change, so that once the legislation was in force, rescission could be sought in relation to representations made at any time -- though subject, of course, to defences such as delay or laches, which would limit considerably the number of cases in which litigants could realistically hope that rescission would be granted in relation to representations made before the Act came into force. There are, no doubt, many times or events that the legislation might focus on if a less all-embracing approach to the change from the old law to the new were to be followed. The Act might be limited, for example, to cases in which the representation was made after the Act came into force; to cases in which the contract was entered into after that date; to cases in which the execution of the contract took place, or the discovery of the misrepresentation occurred, at that later date. None of these, however, seems obviously preferable to the simpler approach in s.7(2). If the approach proposed does indeed impose a potential burden on those who made misrepresentations before the Act comes into force, the burden is one that it seems reasonable that they should bear.

The court could also take into account the fact that the contract was executed and the misrepresentation was made before the law was changed in deciding whether to allow rescission.

