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THE CONTRIBUTION TO PRIVATE LAW OF JUSTICE LA FOREST

Stephen Waddams

Justice La Forest, as judge of the New Brunswick Court of Appeal and in the Supreme Court of Canada, took part in about 300 cases that may be regarded as belonging to the realm of private law. He was one of the most influential judges during his time in the Supreme Court; his judgments have been very influential during the 15 years since his retirement, and they continue to be frequently cited.

I. FIDUCIARY DUTIES

In two important cases, La Forest J. took an expansive view of the existence of fiduciary relationships. In Lac Minerals Ltd. v. International Corona Resources Ltd., confidential information had been disclosed in the course of negotiations contemplating a joint venture; when the negotiations failed, the party to whom disclosure had been made took advantage of the information, and it was held by the court that the advantage had to be given up. The majority decided the case on the basis of misuse of confidential information, but La Forest J., in a careful and elaborate judgment, considered that there was a fiduciary relationship between the parties. Five years later, in Hodgkinson v. Simms, La Forest J., now giving the judgment of the majority of the court, held that an accountant giving tax advice owed fiduciary duties to his client. The client had made an investment on the advice of the accountant, and the latter, who was later found to have had an improper personal interest in the investment, was held liable for loss caused to the client by a

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* University Professor and holder of the Goodman/Schipper Chair, Faculty of Law, University of Toronto.


decline in land values occurring after the date of the investment. In addition to the question of whether or not there was a fiduciary relationship, a crucial point was whether this loss could be said to have been caused by the defendant’s wrong: it was argued for the defendant that probably the client would have made a similar investment and would have suffered a similar loss even if the defendant had acted properly. This argument was rejected by the majority, who said that the burden of proof was on the defendant and had not been discharged.

Running through the majority judgment are strong overtones of punishment and deterrence. A 19th-century English case, \textit{Waddell v. Blockey},\textsuperscript{3} was distinguished partly on the ground that “there is no mention of any equitable remedial principles such as would have been dictated by a strict trust approach.” The “disgorgement” measure (\textit{i.e.}, an award based on the actual profit made by the defendant from the transaction) was rejected as insufficient “to guard against abusive behaviour”, and because

\ldots like-minded fiduciaries in the position of the respondent would not be deterred from abusing their power \ldots As a result the social benefits of fiduciary relationships, particularly in the field of independent professional advisors, would be greatly diminished.

There is thus some blurring of the dividing lines between restitutionary, compensatory and punitive considerations. When this is combined with a greater readiness to categorize relationships as “fiduciary”, and with the suggestion that the principles applicable to remedies for breach of fiduciary duty may apply in any event also to other legal wrongs, it will be seen that the decision has extremely interesting and potentially far-reaching consequences that affect every branch of private law.

\textbf{II. FINDINGS OF FACT AND DEFERENCE TO TRIAL JUDGES}

One of the issues that arose in \textit{Hodgkinson v. Simms} was whether deference was due by appellate courts to what were characterized as findings of fact by the trial judge. This is a difficult issue on which the law remains unclear. Findings of fact are often said to be “peculiarly within the province of the trial judge.” Where the findings depend on the credibility of witnesses, there is good reason for deference to the opinion of the judge who has heard them, though the deference can never be absolute. But where the findings depend on secondary inferences drawn from primary findings or

\textsuperscript{3} (1879). 4 Q.B.D. 678 (Eng. C.A.).
from expert evidence, there is, it is suggested, no particular reason for deference. This point was forcefully made by La Forest J. when he was a member of the New Brunswick Court of Appeal. In *Bernier v. Theriault*\(^4\) the question arose whether a collision between two vehicles had caused a fire in a nearby house. La Forest J. said:\(^5\)

> What caused the fire is, of course, a question of fact, and it is trite law that a court of appeal will not ordinarily overturn the findings of a trial judge unless it is convinced that he was clearly wrong. This respect to the trial judge's findings largely flows from his advantage in having been able to see and hear the witnesses and to assess their demeanour. But where, as in the present case, a pertinent fact must be inferred from other facts, a court of appeal is in as good a position to make the inferences as the trial judge.

Indeed, an appellate court, consisting of three or more judges, and having more time than the trial judge to consider the matter, and having heard more extensive argument, is usually in a much better position to assess the merits of a logical inference. Argument and mature consideration will often show that an inference apparently compelling at first sight is less so on reflection. It is arguable that a right of appeal would be unduly fettered if the appellate court refuses to reconsider inferences drawn by the trial judge. In *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*,\(^6\) McLachlin J. said, in a judgment in which La Forest J. joined:\(^7\)

> I agree that the principle of non-intervention of a Court of Appeal does not apply with the same force to inferences drawn from conflicting testimony of expert witnesses where the credibility of these witnesses is not in issue. This does not however change the fact that the weight to be assigned to the various pieces of evidence is under our trial system essentially the province of the trier of fact, in this case the trial judge.

These two sentences seem to lean in somewhat opposite directions, and the tendency of the second sentence was (after La Forest’s time on the court) taken a step further in *Housen v. Nikolaisen*\(^8\) in 2002. The law on this question is further complicated by the difficulty of characterizing the conclusions of

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a judge as fact or law. In Galaske v. O'Donnell, La Forest J. favoured reversal of a trial judge's conclusion on the question of whether the driver of a car was liable for injury to a child who was not wearing a seat belt, characterizing the judge's conclusion as one of law (whether a duty was owed), rather than, as did the two dissenting judges, one of fact (whether the standard of care was met). Uncertainties are inevitable, whatever test is adopted, because an appellate court does have the power (even under the narrowest test) to reverse findings of a trial judge if the judge failed to give due weight to relevant evidence, failed to give adequate reasons, or made an error that, in the opinion of the appellate court, was "palpable and overriding." None of these are terms of precision, and they are liable to be gradually extended in unpredictable ways in cases where the appellate court is in sympathy with the appellant, whereas, when it is not, it becomes an attractive shortcut to announce that all difficult questions are foreclosed by the need for deference to the trial judge.

Might it not be better to return to the comparatively simple and rational test suggested by La Forest J. in 1982: an appellate court may, and should, be prepared to review the findings of a trial judge except where those findings depend on the judge's advantage of hearing and seeing the witnesses at the trial? Such a test would be an advance not only in rationality and certainty, but also in justice: the burden of persuasion is on the appellant, but if the appellant does persuade the court that the trial judge was probably wrong, the appellant (having a right of appeal) has a right to a decision in his or her favour. In the old procedure in the admiralty and ecclesiastical courts (i.e., before oral evidence was allowed in the mid-19th century) all the evidence was taken in writing, and, on appeal, the appellate court, being in just as good a position as the trial judge to draw inferences of fact, did not hesitate to review the judge's conclusions. If it had been otherwise, the right of appeal would have been considered incomplete.

III. ECONOMIC LOSS IN NEGLIGENCE CASES

In Canadian National Railway v. Norsk Pacific Steamship Co., the defendant's tug negligently damaged a railway bridge. The bridge was owned by the Government of Canada, and used by four

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railways, the principal user being the plaintiff. The Supreme Court of Canada held, by a majority of four to three, that the plaintiff was entitled to recover compensation for the economic loss incurred in rerouting its traffic while the bridge was closed for repair.

The four judges forming the majority differed in their reasons. McLachlin J. gave the judgment of three of them, but Stevenson J. rejected their reasons. La Forest J., who gave the judgment of the three dissenting judges, expressly agreed with him in this. Stevenson J.’s own reasons were specifically rejected by all six of the other judges, so it will be seen that, although the plaintiff won the case, there is a clear majority of the court against each of the two reasons given for supporting the result. Lord Reid said, in respect of the House of Lords, that

There are dangers in there being only one speech in this House. Then statements in it have often tended to be treated as definitions and it is not the function of a court or of this House to frame definitions; some latitude should be left for future developments.

Lord Reid would, from this point of view, have welcomed the Norsk case, which left plenty of latitude for future developments. On the other hand, the result does leave something to be desired in terms of clarity for those seeking guidance as to what rule the court laid down.

Both principal judgments in Norsk give extensive attention to economic theory, and to insurance considerations. Both judgments speak of deterrence as one of the objectives of tort law, but they differ on how much deterrence is enough. Standard economic analysis often seems to imply that the actor should be made to bear the full cost of the action, but La Forest J. concluded that liability to the owner of the bridge was sufficient deterrence, and that there was no need, from a deterrence perspective, to add the threat of liability to third parties for economic loss. La Forest J. also pointed out, with persuasive examples, that first-party insurance is usually more efficient than liability insurance, and that this was often a good reason for denying liability for economic losses. His approach was substantially adopted by the court in Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd. Liability

for economic loss continues to be a troublesome issue, and the
dissenting judgment in the Norsk case will continue to be a useful
summary of the reasons for reluctance to extend liability too far.

Difficult and important questions arose in Winnipeg Condominium Corp. No. 36 v. Bird Construction Co. The plaintiff became
the owner, in 1978, of a building constructed in 1972. In 1989 a
section of exterior stone cladding collapsed. No one was injured,
but the plaintiff claimed the cost of repairs from (among others)
the general contractor which had constructed the building in 1972.
The Manitoba Court of Appeal, on an appeal from a motion for
summary dismissal of the action, had held that the claim disclosed
no cause of action, but the plaintiff’s appeal was allowed by the
Supreme Court of Canada, which held that the plaintiff was
entitled to recover the reasonable cost of making the building safe.
La Forest J., giving the judgment of the court, relied primarily on
public policy. He said that repair of dangerous defects was a means
of mitigating a larger loss (by averting the danger of personal
injury) and that “allowing recovery against contractors in tort for
the cost of repair of dangerous defects thus serves an important
preventative function by encouraging socially responsible beha-
viour.”

Some difficult issues arise as to how damages should be
assessed, but the court did not have to resolve them since the
case was decided on appeal from an interlocutory motion. In the
case of non-dangerous defects, it is reasonably clear that no
convincing rationale exists for holding the original builder liable to
a remote subsequent owner unless there is some legal nexus
between the parties: the mere fact that a subsequent owner incurs
repair costs is not, in itself, a convincing reason for imposing
liability on the original builder; the subsequent owner may have
paid a fair price for the land (even taking account of the defect);
even if the subsequent owner has paid an excessive price for the
land, this is not sufficient reason for imposing liability on the
original builder, which has not received the price, is not responsible
for the subsequent owner’s expectations, and which may have fully
performed its contract with the first owner. In the case of
dangerous defects, it is in the public interest, of course, that the
building should be made safe, but it is not so clear that, as between

builder and subsequent owner, the cost of doing so should be borne by the builder — still less that the subsequent owner should be entitled, at the builder’s expense, to an increase in the capital value of the building. Attempts to deal with these problems exclusively in the framework of negligence law inevitably lead to difficulties. The contract between the builder and the first owner, which defines the builder’s obligations, and the sale contract between the first owner and the subsequent owner (which defines the latter’s loss, if any) must also be relevant. An alternative way of approaching this problem would be through the concept of subrogation, or some similar concept (e.g., assignment of contractual rights), whereby the subsequent owner would be entitled to take advantage of such obligations (if any) as were owed by the builder to the first owner. In this way the builder’s liability would be neither enlarged nor diminished by a subsequent change of ownership: the builder would not profit by a fortuitous change of ownership, nor would a subsequent owner who had received fair value in its purchase contract be able to improve its position at the builder’s expense.

IV. CONCURRENT ACTIONS IN CONTRACT AND TORT

Where the same facts give rise to claims both in contract and in tort, the question arises whether concurrent actions are permissible. The Supreme Court of Canada had suggested in 1972 that, where the relations between the parties were governed by contract the plaintiff should be restricted to an action in contract, unless the tort was an independent tort unconnected with the contract.15 This test proved (to say the least) difficult to apply, and in New Brunswick Telephone Co. v. John Maryon International Ltd.16 La Forest J., giving the judgment of the New Brunswick Court of Appeal, held that concurrent actions were permissible. This decision influenced the Supreme Court of Canada in Central Trust Co. v. Rafuse,17 where the Nunes Diamonds case was effectively bypassed. The new position, permitting concurrent actions, was confirmed in BG Checo International Ltd. v. British Columbia

Hydro & Power Authority,\textsuperscript{18} in which La Forest J., together with McLachlin J., gave the judgment of the majority of the court. The conclusion has not subsequently been seriously doubted, probably because no convincing argument has been adduced in support of the idea that the simultaneous commission of two wrongs means that one must be excused. Damages can only be recovered once, but the plaintiff is entitled to take advantage of the more favourable cause of action.

V. NUISANCE AND THE DEFENCE OF STATUTORY AUTHORIZATION

In Tock v. St. John’s (City) Metropolitan Area Board,\textsuperscript{19} the Supreme Court of Canada dealt with the important question of statutory authorization as a defence to nuisance. The plaintiff’s basement was flooded by a sewer back-up following heavy rain, and the question was whether the municipality should be excused from paying compensation on the ground that the sewer system had been authorized by statute. The court held unanimously in favour of the plaintiff, but three different sets of reasons were given. La Forest J., giving the reasons of himself and Dickson C.J.C., took the view that statutory authorization should not excuse the municipality from paying compensation in circumstances that would constitute a nuisance as between private individuals. The argument in favour of this conclusion, advanced in substance a century earlier in a number of cases by Baron Bramwell,\textsuperscript{20} is that authorization to perform certain actions in the public interest need not, and usually should not, exclude an obligation to make compensation to individuals suffering exceptional damage. The enterprise (a sewage system in this case) may well be in the public interest, and injuries to particular individuals may be inevitable, but it does not follow that those individuals should bear the full cost of injury themselves; if they had to do so they would, in effect, be subsidizing the public enterprise, and the public (taxpayers) would not be bearing its full cost. La Forest J. put the point in this way:\textsuperscript{21}


\textsuperscript{21} Supra, footnote 19, at p. 1199 (S.C.R.).
Turning to the question of inevitability, it seems to me that, in strict logic, most nuisances stemming from activities authorized by statute are in fact inevitable. Certainly, if one is to judge from the frequency with which storm drain and sewer cases occur in the reports, it would seem a safe conclusion that blockage of such systems is inevitable if one accepts this to mean that it is demonstrably impossible to operate these systems without such occurrences. But what escapes me is why any particular importance should be accorded this fact when weighing a nuisance claim against a statutory authority. The fact that the operation of a given system will inevitably visit random damage on certain unfortunate individuals among the pool of users of the system does not tell us why those individuals should be responsible for paying for that damage.

As he pointed out, the legislature could provide expressly that civil actions for compensation should be abrogated, but, if this has not been done, it is both reasonable and just that the public as a whole should compensate an individual who suffers exceptional loss from the operation of a public enterprise in circumstances that would, as between individuals, constitute a nuisance. It is unfortunate, in my opinion, that this persuasive rationale did not attract the support of the whole court. The force of the argument may be illustrated by supposing a case in which the plaintiff’s house is made uninhabitable (and unsaleable) by permanent inundation of sewage. If there were no liability, the municipality would be permitted, in effect, to expropriate without paying compensation.

VI. DAMAGES FOR LOSS OF CHANCE

An important and difficult question in the law of damages is when damages can be awarded for loss of a chance. Where the plaintiff loses an identifiable asset of economic value (e.g., the chance of winning a competition, or the chance of bringing a successful lawsuit, or the chance of economic development of land), it is clear that such damages can be awarded, even if the chance lost is less than 50%. It has long been a controversial question whether damages for loss of chance can be awarded in personal injury cases, particularly cases of medical negligence. In *Laferrière c. Lawson*, an appeal from Québec, the majority of the Supreme Court of Canada held that damages for loss of chance could not be awarded in a medical negligence case. There was one dissenting opinion — that of La Forest J. Various arguments can be adduced against recognizing damages for loss of a chance in this case.

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context, some theoretical (the plaintiff has not proved causation on the balance of probabilities) and some practical (litigation would increase; defendants would not welcome a rule that damages should be awarded for loss of chances less than 50%; and plaintiffs generally would not welcome a rule that proportional damages only should be awarded where the chance was greater than 50% but less than a certainty). It may be that Laferrière v. Lawson has settled this issue for the foreseeable future. But the arguments in favour of proportionate recovery are strong. As John Fleming forcefully pointed out, denying any remedy scarcely does justice to a plaintiff’s complaint that the defendant has wrongfully deprived the plaintiff of a 40% chance of a cure. There is also the economic argument that negligent defendants should bear the full cost of their negligence. Laferrière v. Lawson is a Québec case, and, though it has been assumed that it applies also in common law jurisdictions, the arguments in favour of proportionate recovery remain strong, and La Forest J.’s dissenting opinion may well come to prevail in the future.

VII. FAMILY LAW

A difficult problem for all common law jurisdictions has been the division of property on dissolution of marriage, or of marriage-like relationships. Canadian common law, in contrast to most other common law jurisdictions, has chosen to seek a fair and equitable solution to this problem through the concept of restitution, or unjust enrichment, with frequent use of the equitable concept of constructive trust. La Forest J. played a part in the development of this branch of the law in the important cases of Sorochan v. Sorochan, and Peter v. Beblow. Legislatures were also active in this period, and the intersection of judicial and legislative development of the law gave rise to an interesting division of judicial opinion in Rawluk v. Rawluk. The Ontario Family Law Act, 1986, provided for an equal division of family property on separation, and set the date for valuation of the property at the date of separation. Property in the husband’s name increased in value after that date, and the question arose whether

27. S.O. 1986, c. 4.
the wife was entitled to a share of the increase in value. The majority of the Supreme Court held that the wife was entitled to the benefit of a constructive trust, giving her a proprietary interest in the disputed assets, and therefore a right to a share in their present value. Thus, the constructive trust, conceived in the earlier cases as a remedial device at the court’s disposal to reverse an unjust enrichment established on grounds other than ownership of property, came to assume the characteristics of an independent vested property right. The counter-argument, forcefully and persuasively expressed by the three dissenting judges, who included La Forest J., was summed up by saying that the constructive trust “is not a doctrine of substantive law, but a remedy.”

A decision in the field of family law, touching also on fundamental questions of human rights and civil liberties, is the *Eve* case, where La Forest J., giving the judgment of the whole court, held that a court has no inherent power to authorize the sterilization of a person for non-therapeutic purposes. This is perhaps the best-known decision, internationally, of the Supreme Court of Canada in this period, “justly celebrated”, as Kent Roach said, though not always followed in other jurisdictions.

**VIII. PRIVITY OF CONTRACT AND EMPLOYEE LIABILITY**

In *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, valuable equipment stored in a warehouse was damaged by employees of the warehouse. The owner of the equipment had agreed with the warehouser that liability, in case of damage, would be limited to $40, and the question in issue was whether the owner could sue the employees individually for the full loss. The majority of the Supreme Court, departing in effect from a quite recent decision of the court on very similar facts, held that the strict rule of privity of contract should be relaxed, and that the employees

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should be permitted to benefit from the limitation of liability clause in the contract between the owner and the warehouse. La Forest J., though agreeing in substance with the result, dissented on a cross-appeal by the employees, and held that they were not liable even to the extent of the $40. The traditional approach to vicarious liability has been that the employer is vicariously liable if the employee negligently causes damage in the course of employment, but that the employee’s personal liability is not thereby displaced. John Fleming had pointed out that “this conclusion is neither self-evident nor beyond all objection”, and had advanced some arguments in favour of employee immunity, while conceding that this position “is as yet hardly reflected by the law in books.”

In an elaborate and lengthy opinion (79 pages in the Supreme Court Reports) La Forest advanced persuasive arguments in favour of Fleming’s suggestion: the policies underlying vicarious liability, insurance practices, and “evolving social and organizational realities” all pointed to the conclusion that the employer only, and not the individual employee, should be liable. His opinion was praised by McLachlin J. for its “scholarship and good sense”, but neither she nor the other members of the court was prepared to agree with it, probably because of the fear of theoretical and practical difficulties that might arise if the individual liability of employees were abolished. La Forest J.’s judgment illustrates his bold adherence both to principle and to considerations of policy, even where these considerations led him to an unorthodox conclusion. He reaffirmed his view in Edgeworth Construction Ltd. v. Lea (N.D.) & Associates Ltd. agreeing with the majority that professional engineers acting in the course of employment were not personally liable for negligent misrepresentation, but giving his own separate concurring reasons. These reasons were praised by the House of Lords as “instructive” and adopted as consistent with English law in Williams v. Natural Life Health Foods Ltd.

IX. EXEMPTION CLAUSES IN CONTRACTS

The doctrine of fundamental breach, developed by Lord Denning in the middle of the 20th century as a device to control unfair use of exemption clauses, had considerable defects. Though

it served a useful purpose, especially in the consumer context, in enabling unfair clauses sometimes to be struck down, it concentrated attention on a test that turned out ultimately to be incoherent and irrelevant (whether a breach was "fundamental") and, by failing to address directly the question of unfairness, it led to unacceptable results in both directions: unfair clauses were sometimes enforced, and clauses that were perfectly fair and reasonable were sometimes struck down. In *Hunter Engineering Co. v. Syncrude Can. Ltd.*\(^\text{37}\) the Supreme Court addressed this question in the context of a commercial contract between business parties. The court was unanimous in holding that the clause was enforceable, but they were divided in their reasons. La Forest J. joined with Dickson C.J.C. in holding that exemption clauses should be enforceable unless unconscionable, and that the doctrine of fundamental breach should be abandoned, an approach that the present writer would warmly support. Two other judges in the five-judge panel took a somewhat different view, and so it was not entirely clear that the doctrine of fundamental breach had effectively been abolished. The doctrine, despite the defects noted above, proved to be rather resilient: as recently as 2010, the court announced that "on this occasion we should again attempt to shut the coffin on the jargon associated with ‘fundamental breach’",\(^\text{38}\) and perhaps the last word has still not been said on this issue.

**X. SPECIFIC PERFORMANCE**

The traditional rule (and still the rule in every other common law jurisdiction, and the usual rule in civil law jurisdictions also) was that specific performance is ordinarily available to a purchaser of land. In *Semelhago v. Paramadevan*\(^\text{39}\) the majority of the Supreme Court of Canada announced that the traditional rule should be revised, and that the purchaser of land should only be entitled to specific performance on proof that the land was unique. This holding was not necessary for the decision of the case, and the point was not argued in those terms. The case for change was based on the supposition that the only argument in favour of specific performance was that every piece of land was presumed to be unique, and that, since many pieces of land in modern times


were very similar, the rule rested on a kind of factual falsity, and that a change in the traditional rule was required by principle.

But this approach does not do justice to the arguments in favour of the traditional rule, which may be supported on several grounds other than that every piece of land is unique. Specific performance of land sale contracts, in contrast to many other kinds of contract, is usually very practicable, and for two principal reasons: (1) the court itself can implement the decree directly, if necessary, very cheaply and effectively, by the stroke of a pen \( (i.e., \text{there are no supervision problems} \) ); and (2) performance is unlikely in most cases to be unduly oppressive to the promisor. These are practical reasons for favouring specific performance in land sale cases that do not depend directly on proof of uniqueness, though uniqueness might become relevant where the traditional equitable defences are in issue, such as laches \( \text{(is the plaintiff speculating unreasonably at the defendant’s expense?)} \) or hardship \( \text{(would the decree cause unreasonable hardship to the defendant or to a third party, considering the legitimate interests of the claimant?)} \) or clean hands. The traditional rule did not give an absolute right to specific performance: specific performance was available \text{as of course}, \( \text{(not \text{“as of right”})} \), \( i.e., \) under the traditional rule the remedy remained \text{“discretionary”} in the sense in which equity understands this concept, and this supplied a built-in protection against oppressive or unfair use of the remedy.

The traditional rule thus facilitated reliance by a purchaser on the contract as soon as it was made: the purchaser could say immediately, with truth, “I have bought a house.” The new rule has created uncertainty with \( \text{(I would suggest)} \) little compensating advantage. “Uniqueness” is not a question of empirical fact: in one sense every piece of land is indeed unique; in another sense it may not be, in that a substitute might be acceptable to many purchasers. But to make this question crucial means that the ordinary purchaser can no longer, as a practical matter, seek specific performance, and the consequence is that in many cases no practical remedy at all is available. On anticipatory breach by the vendor, the purchaser will almost always be advised to purchase a substitute house, because litigation is uncertain and expensive, a claim of “uniqueness” can never be sure of success, and if a claim to specific performance fails, the purchaser will be found, on a rising market, to have failed to mitigate damages. The advice will be to purchase a substitute and then consider an action against the vendor for damages. But the action for damages will rarely be
worth pursuing, because in fact land is in one sense unique, and it will usually be difficult or impossible for the purchaser to prove that a more expensive substitute was precisely comparable with the land agreed to be sold. The presumption that common law damages were inadequate may have been justified not only because the purchaser could not buy an exact equivalent, but also for the slightly less obvious reason that, where a substitute was purchased, it was, in practice, difficult for the purchaser to prove a precise money loss. Ironically, it has been commercial purchasers, not individual purchasers, who have, in several cases, succeeded in actions for specific performance by showing that land has special business advantages, and therefore that it is commercially unique.40 But, where specific performance is refused, even a commercial purchaser will be left without an effective remedy in the absence of convincing proof of a difference between contract price and market value at the date of the breach,41 proof that will often be impossible to make because of the inherent difficulty of calculating precise land values: where the dates of contract and of closing are fairly close together, the defendant will often be able to find an expert to say that the best evidence of the value of the land at the date of breach is the price that was agreed in the disputed contract itself.

La Forest J. was a member of the seven-judge court in *Semelhago*, and, though he agreed with the result, he rightly saw, as the other six judges did not, that abolition of the traditional rule was a complex question that required argument and deliberation. He said:42

> I have had the advantage of reading the reasons of my colleague, Justice Sopinka, and I agree with his proposed disposition in the circumstances of this case. However, given the assumption under which the case was argued, I prefer not to deal with the circumstances giving rise to entitlement to specific performance or generally the interpretation that should be given to the legislation authorizing the award of damages in lieu of specific performance.

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40. See John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd. (2003), 223 D.L.R. (4th) 541 (Ont. C.A.), leave to appeal refused 230 D.L.R. (4th) vi (S.C.C.), and other cases cited in Robert J. Sharpe, *Injunctions and Specific Performance* (Toronto, Canada Law Book) (looseleaf), section 8.60. These cases may, however, be in doubt after *Southcott Estates Inc. v. Toronto Catholic District School Board* (2012), 351 D.L.R. (4th) 476, 2012 SCC 51 (S.C.C.), where, at para. 41, the majority, though *obiter*, suggests that a purchaser “engaged in a commercial transaction for the purpose of making a profit” has no claim to specific performance.

41. See *Southcott Estates Inc. v. Toronto Catholic District School Board*, supra.

42. *Supra*, at p. 418.
In considering modification to existing law, both these interdependent factors may well require examination, and the arguments in this case were not made in those terms.

These are the wise words of an experienced judge, who appreciated the importance in legal reasoning of pragmatic as well as theoretical considerations, who understood the history and practical operation of the equitable remedy of specific performance, and who was aware that a legal rule may be supported by a variety of reasons, and should not be too quickly abandoned simply because one reason in support of the rule may seem to be insufficient. Two law reform bodies have recommended legislation to restore the pre-Semelhago state of the law. 43

XI. PROTECTION OF PRIVACY

The judgment of La Forest J. in R. v. Dyment, 44 though not a private law case, has influenced the development of tort law. In the recent case of Jones v. Tsige 45 the Ontario Court of Appeal, in recognizing the existence in Ontario law of a tort of invasion of privacy, relied in large part on cases decided under the Charter, quoting La Forest J.’s comments that the s. 8 protection of privacy was “grounded in a man’s physical and moral autonomy”, and that “privacy is essential for the well-being of the individual” and has “profound significance for the public order.” The court went on to quote the following passage: 46

In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected.

This use of La Forest J.’s opinion demonstrates his continuing influence. The Ontario Court of Appeal characterized its decision in the Jones case as “an incremental step.” 47 This cautious

47. Jones v. Tsige, supra, footnote 45, at para. 65.
description of the law-making role of the court is understandable, but it cannot be doubted that the implications of the decision are far-reaching, and the court itself said that the case “has clearly broken new ground.” It is probable that La Forest J. would approve of the decision in the Jones case, but probably he would not have thought it necessary to restrict the court to an incremental role. He wrote, after his retirement from the Supreme Court of Canada, that “I have never found it necessary to limit myself to purely incremental changes and while some of my former colleagues on the Supreme Court paid lip service to incrementalism, they frequently involved me on distant voyages of discovery.”

XII. CONCLUSION

La Forest J.’s judicial style was clear and forceful. His judgments, like Lord Denning’s, were characterized by attention both to questions of policy and to the pragmatic implications of his decisions, especially in the light of insurance practices. He openly embraced an active role for the courts in developing the law in accordance with what they considered to be good policy. He wrote (extra-judicially) that “whenever I come across a case where the law can be refashioned for the public good and private justice, I shall continue to do so — with relish!” At his retirement he wrote that “judges made the common law and it is their responsibility to adapt it to modern needs.” He recognized, however, the need for constraints on individual judicial opinion, saying that “it is the duty of judges, as much as possible, to discount their own personal feelings or idiosyncratic values” but then adding that they should “attempt to grasp where the law and society have been, where they are now, and where on the basis of long term social values they should be going.” Sharpe J. has praised his “confident and progressive” approach to judicial law-making, while praising also his “patient and thorough analysis of existing authorities, and the logical extension of the principles they established.”

48. Supra, at para. 93.
52. La Forest, ibid., at p. 6.
J. has described his approach as "cautiously liberal." Lord Cooke, rejecting the view that his judgments tended "to plunge straight into policy", wrote that "he will evolve a solution whereby the policy of the law which he prefers receives effect in a formulation of logical principles", indicating, correctly in my view, that principle and policy are closely inter-related. La Forest J. was never reluctant to dissent, or to write a separate opinion, where he differed from his fellow judges (as thoughtful judges are sometimes bound to do) on questions of principle or policy. He has made important contributions to almost all areas of private law, and his judgments continue to be an important source not only of the law itself, but of stimulating and original legal ideas. 

55. Lord Cooke of Thorndon, "Learning from La Forest" in Johnson and McEvoy, ibid., p. 415.
57. I am very grateful to Fidelia Ho for valuable research assistance in preparing this article.