Indexed as:

Non-Marine Underwriters, Lloyd's of London v. Scalera

Vincent Scalera, appellant;
v.
M. J. Oppenheim in his quality as Attorney in Canada for the Non-Marine Underwriters, members of Lloyd's of London, respondent.

[2000] 1 S.C.R. 551

[2000] S.C.J. No. 26

2000 SCC 24

File No.: 26695

Supreme Court of Canada

1999: October 14 / 2000: May 3.

Present: L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL (139 paras.)

Insurance -- Homeowner's insurance -- Insurer's duty to defend -- Plaintiff bringing action against insured alleging battery, negligent battery, negligent misrepresentation and breach of fiduciary duty -- Policy containing exclusion for intentional acts of insured -- Whether insurer has a duty to defend.

Torts -- Intentional torts -- Battery -- Evidence -- Burden of proof -- Consent -- Whether plaintiff must prove lack of consent.

In 1996, a plaintiff brought a civil action against five B.C. Transit bus drivers, including the appellant, arising out of various alleged sexual assaults between 1988 and 1992. The allegations included battery, negligent battery, negligent misrepresentation and breach of fiduciary duty. The appellant owned a homeowner's insurance policy issued by the respondent insurer. The policy provided coverage for "compensatory damage because of bodily injury" arising from the insured's personal ac-

tions, excepting "bodily injury or property damage caused by any intentional or criminal act". The British Columbia Supreme Court dismissed the respondent's request for a declaration that it not be required to defend [page552] the appellant against the plaintiff's claims. The Court of Appeal allowed the respondent's appeal.

Held: The appeal should be dismissed.

Per L'Heureux-Dubé, Gonthier, McLachlin and Binnie JJ.: The plaintiff's claims could not trigger coverage under the policy. Accordingly, the respondent has no duty to defend. While there is substantial agreement with Iacobucci J.'s reasoning, his approach to the tort of battery in the sexual context is disagreed with. In the tort of sexual battery, consent operates as a defence and must be proven by the defendant. The plaintiff is not required to prove that the defendant either knew that she was not consenting or that a reasonable person in the defendant's position would have known that she was not consenting.

The traditional rights-based approach to the law of battery that is now the law of Canada should not be set aside lightly. The tort of battery is a form of trespass against the person and is aimed at protecting the personal autonomy of the individual. Its purpose is to recognize the right of each person to control his or her body and who touches it, and to permit damages where this right is violated. The compensation stems not from fault, but from violation of the right to personal autonomy. When a person interferes with the body of another, a prima facie case of violation of the plaintiff's autonomy is made out. The law may then fairly call upon the person thus implicated to explain, or raise some defence, such as the defence of consent. If he can show that he acted with consent, the prima facie violation is negated and the plaintiff's claim will fail. But it is not up to the plaintiff to prove that, in addition to directly interfering with her body, the defendant was also at fault. Unlike negligence, where the requirement of fault can be justified because the tortious sequence may be complicated, trespass to the person is confined to direct interferences. Where the trespass causes actual injury to the plaintiff, there is a direct connection between the defendant's action and the plaintiff's injury. The traditional approach to trespass is also practical, since, if the defendant is in a position to say what happened, it is both sensible and just to give him an incentive to do so by putting the burden of explanation on him. In addition, the close causal relationship between the defendant's conduct and the violation of the plaintiff's bodily integrity, the identification of the loss with the plaintiff's personality and freedom, the infliction of the loss in isolated (as opposed to systemic) circumstances, and [page553] the perception of the defendant's conduct as anti-social all support the legal position that once the direct interference with the plaintiff's person is shown, the defendant may fairly be called upon to explain his behaviour if indeed it was innocent.

Therefore, while a plaintiff generally must prove all elements of the tort she alleges, the fact that contact must be harmful or offensive to constitute battery does not mean that the plaintiff must prove that she did not consent and that the defendant actually or constructively knew she did not consent to sexual contact. When it is accepted that the foundation of the tort of battery is a violation of personal autonomy, all contact outside the exceptional category of contact that is generally accepted or expected in the course of ordinary life is prima facie offensive. Since sexual contact is not generally accepted or expected in the course of ordinary activities, the plaintiff may establish an action for sexual battery without negativing actual or constructive consent. Nothing special about sexual battery justifies requiring the plaintiff to prove that she did not consent or that the defendant either knew or ought to have known that she did not consent.

The exclusion clause in the policy must be interpreted as requiring an intent to injure. Where there is an allegation of sexual battery, courts will conclude as a matter of legal inference that the defendant intended harm for the purpose of construing exemptions of insurance coverage for intentional injury.

It is unnecessary to comment on the relationship between battery and negligence.

Per Iacobucci, Major and Bastarache JJ.: The respondent has no duty to defend the appellant because the plaintiff's statement of claim makes no allegation that could potentially give rise to indemnity under the insurance contract.

An insurer only has a duty to defend when a lawsuit against the insured raises a claim that could potentially [page554] fall within coverage. The insurer's duty to defend is related to its duty to indemnify. Therefore if an insurance policy, like the one in this case, excludes liability arising from intentionally caused injuries, there will be no duty to defend actions based on such injuries.

A three-step process must be applied to determine whether a claim could trigger indemnity. First, a court should determine which of the plaintiff's legal allegations are properly pleaded. In doing so, courts are not bound by the legal labels chosen by the plaintiff. A plaintiff cannot change an intentional tort into a negligent one simply by choice of words, or vice versa. Therefore, when ascertaining the scope of the duty to defend, a court must look beyond the choice of labels, and examine the substance of the allegations contained in the pleadings. This does not involve deciding whether the claims have any merit; all a court must do is decide, based on the pleadings, the true nature of the claims.

At the second stage, the court should determine if any claims are entirely derivative in nature. The duty to defend will not be triggered simply because a claim can be cast in terms of both negligence and intentional tort. A claim for negligence will not be derivative if the underlying elements of the negligence and of the intentional tort are sufficiently disparate to render the two claims unrelated. However, if both the negligence and intentional tort claims arise from the same actions and cause the same harm, the negligence claim is derivative, and it will be subsumed into the intentional tort for the purposes of the exclusion clause analysis. If neither claim is derivative, the claim of negligence will survive and the duty to defend will apply. Finally, at the third stage, the court must decide whether any of the properly pleaded, non-derivative claims could potentially trigger the insurer's duty to defend. This appeal's holding with respect to the proper characterization of a plaintiff's tort allegations should not be taken to affect any areas of law outside the insurance context presented by this appeal.

In this case, the exclusion clause must be read to require that the injuries be intentionally caused, in that they must be the product of an intentional tort and not of negligence. The plaintiff has stated three possible claims arising out of the alleged sexual assaults: sexual battery, negligent battery, and breach of fiduciary duty. Sexual [page555] battery requires the plaintiff to prove that a reasonable person should have known that the plaintiff did not validly consent to the sexual activity in question. Since non-consensual sexual activity is inherently harmful, any injuries resulting therefrom are intentionally caused, and the exclusion clause would apply. If a reasonable person would not have known that the plaintiff did not validly consent, the plaintiff's claim will fail, and there will be no duty to indemnify or duty to defend. The plaintiff's claims of negligence and breach of fiduciary duty are either not properly pleaded or are subsumed into the sexual battery because these claims are based on the same facts and resulted in the same harm. Therefore the exclusion clause applies

equally to them. There being no potentially indemnifiable claim, the respondent has no duty to defend.

Cases Cited

By McLachlin J.

Referred to: Collins v. Wilcock, [1984] 3 All E.R. 374; Cook v. Lewis, [1951] S.C.R. 830; Larin v. Goshen (1974), 56 D.L.R. (3d) 719; Walmsley v. Humenick, [1954] 2 D.L.R. 232; Tillander v. Gosselin (1966), 60 D.L.R. (2d) 18, aff'd (1967), 61 D.L.R. (2d) 192; Dahlberg v. Naydiuk (1969), 10 D.L.R. (3d) 319; Ellison v. Rogers (1967), 67 D.L.R. (2d) 21; Reibl v. Hughes, [1980] 2 S.C.R. 880; Norberg v. Wynrib, [1992] 2 S.C.R. 226; Scott v. Shepherd (1773), 2 Black. W. 892, 96 E.R. 525; Leame v. Bray (1803), 3 East 593, 102 E.R. 724; Fowler v. Lanning, [1959] 1 Q.B. 426; Letang v. Cooper, [1965] 1 Q.B. 232; Bell Canada v. COPE (Sarnia) Ltd. (1980), 11 C.C.L.T. 170, aff'd (1980), 31 O.R. (2d) 571; Cole v. Turner (1704), 6 Mod. 149, 87 E.R. 907; Stewart v. Stonehouse, [1926] 2 D.L.R. 683; In re F., [1990] 2 A.C. 1; M. (K.) v. M. (H.), [1992] 3 S.C.R. 6; Freeman v. Home Office, [1983] 3 All E.R. 589, aff'd [1984] 1 All E.R. 1036; H. v. R., [1996] 1 N.Z.L.R. 299; Pursell v. Horn (1838), 8 AD. & E. 602, 112 E.R. 966; Green v. Goddard (1704), 2 Salkeld 641, 91 E.R. 540; Humphries v. Connor (1864), 17 Ir. Com. L. Rep. 1; Forde v. Skinner (1830), 4 Car. & P. 239, 172 E.R. 687; Schweizer v. Central Hospital (1974), 53 D.L.R. (3d) 494; Allan v. New Mount Sinai Hospital (1980), 109 D.L.R. (3d) 634, rev'd on other grounds (1981), 33 O.R. (2d) 603; Brushett v. Cowan (1990), 3 C.C.L.T. (2d) 195; [page556] O'Bonsawin v. Paradis (1993), 15 C.C.L.T. (2d) 188; State Farm Fire and Casualty Co. v. Williams, 355 N.W.2d 421 (1984).

By Iacobucci J.

Referred to: Sansalone v. Wawanesa Mutual Insurance Co., [2000] 1 S.C.R. 627, 2000 SCC 25; Brissette Estate v. Westbury Life Insurance Co., [1992] 3 S.C.R. 87; Wigle v. Allstate Insurance Co. of Canada (1984), 49 O.R. (2d) 101; Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co., [1993] 1 S.C.R. 252; Indemnity Insurance Co. of North America v. Excel Cleaning Service, [1954] S.C.R. 169; Parsons v. Standard Fire Insurance Co. (1880), 5 S.C.R. 233; Scott v. Wawanesa Mutual Insurance Co., [1989] 1 S.C.R. 1445; Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co., [1980] 1 S.C.R. 888; Guarantee Co. of North America v. Gordon Capital Corp., [1999] 3 S.C.R. 423; Nichols v. American Home Assurance Co., [1990] 1 S.C.R. 801; Conner v. Transamerica Insurance Co., 496 P.2d 770 (1972); Modern Livestock Ltd. v. Kansa General Insurance Co. (1993), 11 Alta. L.R. (3d) 355; B.P. Canada Inc. v. Comco Service Station Construction & Maintenance Ltd. (1990), 73 O.R. (2d) 317; Kates v. Hall, [1990] 5 W.W.R. 569; Colorado Farm Bureau Mutual Insurance Co. v. Snowbarger, 934 P.2d 909 (1997); Aerojet-General Corp. v. Transport Indemnity Co., 948 P.2d 909 (1997); Lawyers Title Insurance Corp. v. Knopf, 674 A.2d 65 (1996); Allstate Insurance Co. v. Patterson, 904 F. Supp. 1270 (1995); Allstate Insurance Co. v. Brown, 834 F. Supp. 854 (1993); Gray v. Zurich Insurance Co., 419 P.2d 168 (1966); Bacon v. McBride (1984), 6 D.L.R. (4th) 96; Peerless Insurance Co. v. Viegas, 667 A.2d 785 (1995); Houg v. State Farm Fire and Casualty Co., 481 N.W.2d 393 (1992); Linebaugh v. Berdish, 376 N.W.2d 400 (1985); Horace Mann Insurance Co. v. Leeber, 376 S.E.2d 581 (1988); Allstate Insurance Co. v. Troelstrup, 789 P.2d 415 (1990); Nationwide Mutual Fire Insurance Co. v. Lajoie, 661 A.2d 85 (1995); M. (K.) v. M. (H.), [1992] 3 S.C.R. 6; Canadian Indemnity Co. v. Walkem Machinery & Equipment Ltd., [1976] 1 S.C.R. 309; Wilson v. Pringle, [1986] 2 All E.R.

440; Spivey v. Battaglia, 258 So.2d 815 (1972); Bettel v. Yim (1978), 20 O.R. (2d) 617; Long v. Gardner (1983), 144 D.L.R. (3d) 73; Veinot v. Veinot (1977), 81 D.L.R. (3d) 549; Rumsey v. The Queen (1984), 12 D.L.R. (4th) 44; Holt v. Verbruggen (1981), 20 C.C.L.T. 29; Garratt v. Dailey, 279 P.2d 1091 (1955); Vosburg v. Putney, 50 N.W. 403 (1891); Reibl v. Hughes, [1980] 2 S.C.R. 880; Clayton v. New Dreamland Roller Skating Rink, Inc., 82 A.2d 458 (1951); [page557] Kirkpatrick v. Crutchfield, 100 S.E. 602 (1919); Cook v. Lewis, [1951] S.C.R. 830; Norberg v. Wynrib, [1992] 2 S.C.R. 226; Hambley v. Shepley (1967), 63 D.L.R. (2d) 94; Mandel v. The Permanent (1985), 7 O.A.C. 365; Wiffin v. Kincard (1807), 2 Bos. & Pul. (N.R.) 471, 127 E.R. 713; Coward v. Baddeley (1859), 4 H. & N. 478, 157 E.R. 927; Freeman v. Home Office, [1983] 3 All E.R. 589, aff'd [1984] 1 All E.R. 1036; H. v. R., [1996] 1 N.Z.L.R. 299; State Farm Fire and Casualty Co. v. Williams, 355 N.W.2d 421 (1984); R. v. Mills, [1999] 3 S.C.R. 668; R. v. Osolin, [1993] 4 S.C.R. 595; R. v. Seaboyer, [1991] 2 S.C.R. 577; R. v. Ewanchuck, [1999] 1 S.C.R. 330; M. (M.) v. K. (K.) (1989), 61 D.L.R. (4th) 392; Harder v. Brown (1989), 50 C.C.L.T. 85; Lyth v. Dagg (1988), 46 C.C.L.T. 25; R. v. McCraw, [1991] 3 S.C.R. 72; CNA Insurance Co. v. McGinnis, 666 S.W.2d 689 (1984); B.B. v. Continental Insurance Co., 8 F.3d 1288 (1993); J.C. Penney Casualty Insurance Co. v. M.K., 804 P.2d 689 (1991); State Farm Fire & Casualty Co. v. D.T.S., 867 S.W.2d 642 (1993); American States Insurance Co. v. Borbor, 826 F.2d 888 (1987); Troelstrup v. District Court, 712 P.2d 1010 (1986); Rodriguez v. Williams, 729 P.2d 627 (1986); Horace Mann Insurance Co. v. Independent School District No. 656, 355 N.W.2d 413 (1984); Altena v. United Fire and Casualty Co., 422 N.W.2d 485 (1988); Wilkieson-Valiente v. Wilkieson, [1996] I.L.R. para. 1-3551; Ellison v. Rogers (1967), 67 D.L.R. (2d) 21; Hatton v. Webb (1977), 81 D.L.R. (3d) 377; Co-operative Fire & Casualty Co. v. Saindon, [1976] 1 S.C.R. 735; Newcastle (Town) v. Mattatall (1988), 52 D.L.R. (4th) 356; Long Lake School Division No. 30 of Saskatchewan Board of Education v. Schatz (1986), 18 C.C.L.I. 232; Devlin v. Co-operative Fire & Casualty Co. (1978), 90 D.L.R. (3d) 444; Pistolesi v. Nationwide Mutual Fire Insurance Co., 644 N.Y.S.2d 819 (1996); M'Alister v. Stevenson, [1932] A.C. 562; Frame v. Smith, [1987] 2 S.C.R. 99; Rodriguez by Brennan v. Williams, 713 P.2d 135 (1986).

Statutes and Regulations Cited

Alberta Evidence Act, R.S.A. 1980, c. A-21, s. 12.
Criminal Code, R.S.C., 1985, c. C-46, s. 273.2(b) [ad. 1992, c. 38, s. 1].
Evidence Act, R.S.N. 1990, c. E-16, s. 16.
Evidence Act, R.S.N.S. 1989, c. 154, s. 45.
Evidence Act, R.S.N.W.T. 1988, c. E-8, s. 17.
Evidence Act, R.S.O. 1990, c. E.23, s. 13.
Evidence Act, R.S.P.E.I. 1988, c. E-11, s. 11.
Evidence Act, R.S.Y. 1986, c. 57, s. 14.
Insurance Act, R.S.B.C. 1996, c. 226, s. 28.

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Authors Cited

American Law Institute. Restatement of the Law, Second, Torts 2d, vol. 1. St. Paul, Minn.: American Law Institute Publishers, 1965.

Atrens, Jerome J. "International Interference with the Person". In Allen M. Linden, ed., Studies in Canadian Tort Law. Toronto: Butterworths, 1968.
Bell, Robert. "Sexual Abuse and Institutions: Insurance Issues" (1996), 6 C.I.L.R. 53.
Brown, Craig. Insurance Law in Canada, 3rd Student ed. Scarborough: Carswell, 1997.
Brown, Craig. Insurance Law in Canada, vol. 1. Scarborough: Carswell, 1999 (loose-leaf).
Brown, Craig, and Julio Menezes. Insurance Law in Canada, 2nd ed. Scarborough: Carswell, 1991.
Canada. Federal/Provincial/Territorial Working Group of Attorneys General Officials on Gender Equality in the Canadian Justice System. Gender Equality in the Canadian Justice System: Summary Document and Proposals for Action. Ottawa: The Group, 1992.
Feldthusen, Bruce. "The Canadian Experiment with the Civil Action for Sexual Battery". In Nicholas J. Mullany, ed., Torts in the Nineties. Sydney: LBC Information Services, 1997, 274.
Feldthusen, Bruce. "The Civil Action for Sexual Battery: Therapeutic Jurisprudence?" (1993), 25 Ottawa L. Rev. 203.
Fischer, James M. "Broadening the Insurer's Duty to Defend: How Gray v. Zurich Insurance Co. Transformed Liability Insurance Into Litigation Insurance" (1991), 25 U.C. Davis L. Rev. 141.
Fleming, John G. The Law of Torts, 9th ed. Sydney: Law Book Co., 1998.
Florig, David S. "Insurance Coverage for Sexual Abuse or Molestation" (1995), 30 Torts & Ins. L.J. 699.
Fridman, Gerald Henry Louis. The Law of Torts in Canada, vol. 1. Toronto: Carswell, 1989.
Klar, Lewis. Tort Law, 2nd ed. Scarborough: Carswell, 1996.
Linden, Allen M. Canadian Tort Law, 6th ed. Toronto: Butterworths, 1997.
Linden, Allen M., and Lewis N. Klar. Canadian Tort Law: Cases, Notes and Materials, 10th ed. Toronto: Butterworths, 1994.
McCormick on Evidence, vol. 2, 5th ed. By John W. Strong, General Editor. St. Paul, Minn.: West Group, 1999.
Pryor, Ellen S. "The Stories We Tell: Intentional Harm and the Quest for Insurance Funding" (1997), 75 Tex. L. Rev. 1721.
Pryor, Ellen S. "The Tort Liability Regime and the Duty to Defend" (1999), 58 Md. L. Rev. 1.

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Reynolds, Osborne M. "Tortious Battery: Is 'I Didn't Mean Any Harm' Relevant?" (1984), 37 Okla. L. Rev. 717.
Salmond and Heuston on the Law of Torts, 21st ed. By R. F. V. Heuston and R. A. Buckley. London: Sweet & Maxwell, 1996.
Sharp, Frederick L. "Negligent Trespass in Canada: A Persistent Source of Embarrassment" (1977-78), 1 Advocates' Q. 311.
Sopinka, John, Sidney N. Lederman and Alan W. Bryant. The Law of Evidence in Canada, 2nd ed. Toronto: Butterworths, 1999.
Street on Torts, 10th ed. By Margaret Brazier and John Murphy. London: Butterworths, 1999.
Sullivan, Ruth. "Trespass to the Person in Canada: A Defence of the Traditional Approach" (1987), 19 Ottawa L. Rev. 533.
Vail, Brian. "'My Mistake, Your Problem': The Duty to Defend Liability Claims in Canada" (1996), 6 C.I.L.R. 201.

APPEAL from a judgment of the British Columbia Court of Appeal (1998), 106 B.C.A.C. 268, 172 W.A.C. 268, 48 B.C.L.R. (3d) 143, 158 D.L.R. (4th) 385, 2 C.C.L.I. (3d) 1, [1998] I.L.R. para. 1-3568, [1998] 9 W.W.R. 209, [1998] B.C.J. No. 834 (QL), allowing an appeal from the British Columbia Supreme Court (1997), 47 B.C.L.R. (3d) 187, 49 C.C.L.I. (2d) 305, [1998] I.L.R. para. 1-3519, [1997] B.C.J. No. 2481 (QL). Appeal dismissed.

Bruce P. Cran and Murray G. Madryga, for the appellant. Eric A. Dolden and Karen F. W. Liang, for the respondent.

Solicitors for the appellant: Cran Law Offices, Vancouver.
Solicitors for the respondent: Dolden Walker Folick, Vancouver.

The judgment of L'Heureux-Dubé, Gonthier, McLachlin and Binnie JJ. was delivered by

1 **McLACHLIN J.**:-- I have read the reasons of Iacobucci J. and agree with the result he reaches and with much of his reasoning. I would respectfully disagree, however, from the view that in the tort of sexual battery, the onus rests on the plaintiff to prove that the defendant either knew that she was not consenting or that a reasonable person in [page560] the defendant's position would have known that she was not consenting.

2 As Goff L.J. (as he then was) stated in Collins v. Wilcock, [1984] 3 All E.R. 374 (Q.B.), at p. 378, "[t]he fundamental principle, plain and incontestable, is that every person's body is inviolate". The law of battery protects this inviolability, and it is for those who violate the physical integrity of others to justify their actions. Accordingly, in my respectful view, the plaintiff who alleges sexual battery makes her case by tendering evidence of force applied directly to her. "Force", in the context of an allegation of sexual battery, simply refers to physical contact of a sexual nature, and is neutral in the sense of not necessarily connoting a lack of consent. If the defendant does not dispute that the contact took place, he bears the burden of proving that the plaintiff consented or that a reasonable person in his position would have thought that she consented. My reasons for so concluding are the following.

I. Analysis

A. The Canadian Law of Battery Places the Onus of Proving Consent on the Defendant

3 As Iacobucci J. states (at para. 103) "for traditional batteries, consent is conceived of as an affirmative defence that must be raised by the defendant".

4 This Court has long affirmed this proposition. In Cook v. Lewis, [1951] S.C.R. 830, at p. 839, Cartwright J. stated that "where a plaintiff is injured by force applied directly to him by the defendant his case is made by proving this fact and [page561] the onus falls upon the defendant to prove 'that such trespass was utterly without his fault'."

5 In Larin v. Goshen (1974), 56 D.L.R. (3d) 719 (N.S.C.A.), at p. 722, Macdonald J.A., citing numerous authorities, stated: "The law in Canada at present is this: In an action for damages in trespass where the plaintiff proves that he has been injured by the direct act of the defendant, the onus falls upon the defendant to prove that his act was both unintentional and without negligence on

his part, in order for him to be entitled to a dismissal of the action." (Emphasis in original.) See also Walmsley v. Humenick, [1954] 2 D.L.R. 232 (B.C.S.C.); Tillander v. Gosselin (1966), 60 D.L.R. (2d) 18 (Ont. H.C.), aff'd (1967), 61 D.L.R. (2d) 192 (Ont. C.A.); Dahlberg v. Naydiuk (1969), 10 D.L.R. (3d) 319 (Man. C.A.), and Ellison v. Rogers (1967), 67 D.L.R. (2d) 21 (Ont. H.C.). A number of academic commentators also agree that the burden of proving consent lies on the defence: see J. G. Fleming, The Law of Torts (9th ed. 1998), at p. 86; A. M. Linden and L. N. Klar, Canadian Tort Law: Cases, Notes and Materials (10th ed. 1994), at p. 102, note 2; and G. H. L. Fridman, The Law of Torts in Canada (1989), vol. 1, at p. 63.

6 This proposition holds for particular forms of battery like medical battery and sexual battery. In Reibl v. Hughes, [1980] 2 S.C.R. 880, at p. 890, dealing with medical battery, Laskin C.J. stated for the Court that:

> The tort [of battery] is an intentional one, consisting of an unprivileged and unconsented to invasion of one's bodily security. True enough, it has some advantages for a plaintiff over an action of negligence since it does not require proof of causation and it casts upon the defendant the burden of proving consent to what was done.

And in Norberg v. Wynrib, [1992] 2 S.C.R. 226, dealing with sexual battery, La Forest J., for the plurality, stated, at p. 246, that "[a] battery is the intentional infliction of unlawful force on another person. Consent, express or implied, is a defence [page562] to battery." None of the members of the Court participating in the decision dissented from the view that the burden lies on the defendant to prove consent.

7 The question, then, is whether we should in this case depart from the settled rule that requires the plaintiff in a battery case to show only contact through a direct, intentional act of the defendant and places the onus on the defendant of showing consent or lawful excuse, including actual or constructive consent. For the reasons that follow, I am not convinced that we should alter the established rule.

B. The Traditional Approach to Trespass is Justified as a Rights-Based Tort

8 The traditional rule, as noted, is that the plaintiff in an action for trespass to the person (which includes battery) succeeds if she can prove direct interference with her person. Interference is direct if it is the immediate consequence of a force set in motion by an act of the defendant: see Scott v. Shepherd (1773), 2 Black. W. 892, 96 E.R. 525 (K.B.); Leame v. Bray (1803), 3 East 593, 102 E.R. 724 (K.B.). The burden is then on the defendant to allege and prove his defence. Consent is one such defence.

9 Some critics have suggested that this rule should be altered. They suggest that tort must always be fault-based. This means the plaintiff must prove fault as part of her case, by showing either: (1) that the defendant intended to harm; (2) that the defendant failed to take reasonable care or was "negligent"; or (3) that the tort is one of strict liability, i.e. legally presumed fault. On a practical level, some, like F. L. Sharp, argue that the traditional approach confers an unfair advantage on the plaintiff by easing her burden of proof: "Negligent Trespass in Canada: A Persistent Source of Embarrassment" (1977-78), 1 Advocates' Q. 311, at pp. 312-14 and 326 [page563]. It is suggested that the law has moved in this direction in England: see Fowler v. Lanning, [1959] 1 Q.B. 426, approved in obiter in Letang v. Cooper, [1965] 1 Q.B. 232 (C.A.). In the spirit of these comments, my col-

league Iacobucci J. proposes to alter the traditional rule, at least for sexual battery, to require the plaintiff to prove fault, i.e. that the defendant either knew or ought to have known that she was not consenting.

10 I do not agree with these criticisms of the traditional rule. In my view the law of battery is based on protecting individuals' right to personal autonomy. To base the law of battery purely on the principle of fault is to subordinate the plaintiff's right to protection from invasions of her physical integrity to the defendant's freedom to act: see R. Sullivan, "Trespass to the Person in Canada: A Defence of the Traditional Approach" (1987), 19 Ottawa L. Rev. 533, at p. 546. Although I do not necessarily accept all of Sullivan's contentions, I agree with her characterization, at p. 551, of trespass to the person as a "violation of the plaintiff's right to exclusive control of his person". This right is not absolute, because a defendant who violates this right can nevertheless exonerate himself by proving a lack of intention or negligence: Cook, supra, at p. 839, per Cartwright J. Although liability in battery is based not on the defendant's fault, but on the violation of the plaintiff's right, the traditional approach will not impose liability without fault because the violation of another person's right can be considered a form of fault. Basing the law of battery on protecting the plaintiff's physical autonomy helps explain why the plaintiff in an action for battery need prove only a direct interference, at which point the onus shifts to the person who is alleged to have violated the right to justify [page564] the intrusion, excuse it or raise some other defence.

11 I agree with Sullivan's view that the traditional approach to trespass to the person remains appropriate in Canada's modern context for a number of reasons. First, unlike negligence, where the requirement of fault can be justified because the tortious sequence may be complicated, trespass to the person is confined to direct interferences. Where the trespass causes actual injury to the plaintiff, there is a direct connection between the defendant's action and the plaintiff's injury. As Sullivan notes, at p. 562:

> ... where the injury complained of is an immediate consequence of the defendant's act, it is intuitively sound to require compensation from the defendant unless he offers a defence. In cases of direct interference, the relationship between the defendant's will, his decision to act, and the injury to the plaintiff is both simple and clear; there are no competing causal factors to obscure the defendant's role or dilute his factual responsibility. The question of his moral and legal responsibility is thus posed with unusual sharpness: as between the defendant who caused the injury and the plaintiff who received it, other things being equal, who shall pay? ... Once the plaintiff has shown that his right to personal autonomy has been violated by the defendant, prima facie the defendant should pay. [Emphasis added.]

12 Another factor supporting retaining the traditional approach to trespass and battery is that it makes practical sense. Linden J. in Bell Canada v. COPE (Sarnia) Ltd. (1980), 11 C.C.L.T. 170 (Ont. H.C.), aff'd (1980), 31 O.R. (2d) 571 (C.A.), after noting the attacks on the Canadian law of trespass, writes (at p. 180):

> The trespass action still performs several functions, one of its most important being a mechanism for shifting the onus of proof of whether there has been intentional or negligent wrongdoing to the defendant, rather than [page565]

> requiring the plaintiff to prove fault. The trespass action, though perhaps somewhat anomalous, may thus help to smoke out evidence possessed by defendants, who cause direct injuries to plaintiffs, which should assist Courts to obtain a fuller picture of the facts, a most worthwhile objective. [Emphasis added.]

13 In cases of direct interference, the defendant is likely to know how and why the interference occurred. I agree with Sullivan's suggestion, at p. 563, that "if the defendant is in a position to say what happened, it is both sensible and just to give him an incentive to do so by putting the burden of explanation on him".

14 Finally, I share Sullivan's concern with the fact that cases of direct interference with the person tend to produce high "demoralization costs" (p. 563). Victims and those who identify with them tend to feel resentment and insecurity if the wrong is not compensated. The close causal relationship between the defendant's conduct and the violation of the plaintiff's bodily integrity, the identification of the loss with the plaintiff's personality and freedom, the infliction of the loss in isolated (as opposed to systemic) circumstances, and the perception of the defendant's conduct as anti-social, all support the legal position that once the direct interference with the plaintiff's person is shown, the defendant may fairly be called upon to explain his behaviour if indeed it was innocent.

15 These arguments persuade me that we should not lightly set aside the traditional rights-based approach to the law of battery that is now the law of Canada. The tort of battery is aimed at protecting the personal autonomy of the individual. Its purpose is to recognize the right of each person to control his or her body and who touches it, and to permit damages where this right is violated. The compensation stems from violation of the right to autonomy, not fault. When a person interferes with [page566] the body of another, a prima facie case of violation of the plaintiff's autonomy is made out. The law may then fairly call upon the person thus implicated to explain, if he can. If he can show that he acted with consent, the prima facie violation is negated and the plaintiff's claim will fail. But it is not up to the plaintiff to prove that, in addition to directly interfering with her body, the defendant was also at fault.

16 Having stated that we should not set aside the traditional approach to battery, I do not wish to foreclose the possibility of future growth in this area of the law. References in definitions of the tort of battery to "injury", or to contact being "unlawful" or "harmful or offensive" are different ways of expressing the idea that not every physical contact constitutes a battery. In other words, the tort requires contact "plus" something else. One view, as I discuss in the next section, is that the "plus" refers merely to non-trivial contact. The caselaw to date tends to support this view, and generally does not require actual physical or psychological injury: Cole v. Turner (1704), 6 Mod. 149, 87 E.R. 907; Stewart v. Stonehouse, [1926] 2 D.L.R. 683 (Sask. C.A.), at p. 684; Fleming, supra, at p. 29; Fridman, supra, at p. 45. In a future case, it may be necessary to consider whether the "plus" required in addition to contact should be extended beyond the minimum of non-trivial acts. However, the issue does not arise in this case, since the plaintiff pleads physical and psychological damage. This is sufficient to bring the case within the traditional view of battery, however the "plus" is defined. Therefore, for the purposes of this case, I proceed upon the traditional view.

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C. The Argument that the Contact Must Be "Harmful or Offensive" Does Not Support Placing the Onus of Proving Non-Consent on the Plaintiff

17 The proposition that the law should require a plaintiff in an action for sexual battery to prove that she did not consent, is supported, it is suggested, by a requirement that the contact involved in battery must be harmful or offensive. The argument may be summarized as follows. The plaintiff must prove all the essential elements of the tort of battery. One of these is that the contact complained of was inherently harmful or offensive on an objective standard. Consensual sexual contact is neither harmful nor offensive. Therefore the plaintiff, in order to make out her case, must prove that she did not consent or that a reasonable person in the defendant's position would not have thought she consented.

18 I do not dispute that a plaintiff generally must prove all elements of the tort she alleges. Nor do I dispute that contact must be "harmful or offensive" to constitute battery. However, I am not persuaded that plaintiffs in cases of sexual battery must prove that contact was "non-consensual" in order to prove that it was "harmful or offensive". If one accepts that the foundation of the tort of battery is a violation of personal autonomy, it follows that all contact outside the exceptional category of contact that is generally accepted or expected in the course of ordinary life, is prima facie offensive. Sexual contact does not fall into the category of contact generally accepted or expected in the course of ordinary activities. Hence the plaintiff may establish an action for sexual battery without negativing actual or constructive consent.

19 The idea that battery is confined to conduct that is "harmful or offensive" finds root in the old [page568] cases involving trivial contacts. While the law of battery traditionally has held that the defendant, not the plaintiff, bears the onus of proving consent, it has also held that not every trivial contact suffices to establish battery. The classic example is being jostled in a crowd. A person who enters a crowd cannot sue for being jostled; such contact is not "offensive". Two theories have been put forward to explain this wrinkle on the general rule that all a plaintiff in a battery action must prove is direct contact. The first is implied consent: Salmond and Heuston on the Law of Torts (21st ed. 1996), at p. 121. The second sees these cases as "a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of everyday life": In re F., [1990] 2 A.C. 1 (H.L.), at p. 73, per Lord Goff.

20 Both these theories are consistent with the settled rule in Canadian law that a plaintiff in a battery action need not prove the absence of consent. On the implied consent theory, even if the plaintiff proves contact, the burden never shifts to the defendant to prove consent because consent is implied by law. On the "exception" theory, the plaintiff cannot succeed merely by proving contact if such contact falls within the exceptional category of conduct generally acceptable in ordinary life. It is not necessary in this appeal to choose between these approaches, but in my view both refer to the sort of everyday physical contact which one must be expected to tolerate, even if one does not actually consent to it.

21 The question then becomes whether sexual battery falls into the extraordinary category of cases where proving contact will not suffice to establish the plaintiff's case. Is sexual activity the sort of activity where consent is implied? Clearly it is not. [page569] Alternatively, is it the sort of activity, like being jostled in a crowd, that is generally accepted and expected as a normal part of life? Again, I think not. The sort of conduct the cases envision is the inevitable contact that goes with ordinary human activity, like brushing someone's hand in the course of exchanging a gift, a gratuitous handshake, or being jostled in a crowd. Sexual contact does not fall into this category. It

is not the casual, accidental or inevitable consequence of general human activity and interaction. It involves singling out another person's body in a deliberate, targeted act.

22 The assertion in some of the authorities that the contact must be harmful or offensive to constitute battery (see, e.g., La Forest J. in M. (K.) v. M. (H.), [1992] 3 S.C.R. 6, at p. 25), reflects the need to exclude from battery the casual contacts inevitable in ordinary life. It does not, however, require the conclusion that to make out a case of battery, a plaintiff must prove that the contact was physically or psychologically injurious or morally offensive. The law of battery protects the inviolability of the person. It starts from the presumption that apart from the usual and inevitable contacts of ordinary life, each person is entitled not to be touched, and not to have her person violated. The sexual touching itself, absent the defendant showing lawful excuse, constitutes the violation and is "offensive". Sex is not an ordinary casual contact which must be accepted in everyday life, nor is it the sort of contact to which consent can be implied. To require a plaintiff in an action for sexual battery to prove that she did not consent or that a reasonable person in the defendant's position would not have thought she consented, would be to deny the protection the law has traditionally afforded to the [page570] inviolability of the body in the situation where it is perhaps most needed and appropriate.

23 Only two cases, one in England concerning therapeutic administration of drugs and one in New Zealand concerning sexual assault, are cited in favour of the proposition that the plaintiff must show harm by proving a lack of consent as an element of the tort of battery: see Freeman v. Home Office, [1983] 3 All E.R. 589 (Q.B.), aff'd [1984] 1 All E.R. 1036 (C.A.), H. v. R., [1996] 1 N.Z.L.R. 299 (H.C.). The proposition that the plaintiff must prove a lack of consent, on the basis that she must prove that the impugned contact was harmful, is not supported by the law of battery, which has traditionally been confined to acts which are inherently harmful, like hitting, shooting or stabbing someone. Rather, its focus is on the protection of one's bodily integrity from any unwanted contact. Many of the older cases concern contacts devoid of any real harm apart from the violation of bodily integrity: Pursell v. Horn (1838), 8 AD. & E. 602, 112 E.R. 966 (pouring water on a person); Green v. Goddard (1704), 2 Salkeld 641, 91 E.R. 540 (forcibly taking an object held by another); Humphries v. Connor (1864), 17 Ir. Com. L. Rep. 1 (Q.B.) (taking flower worn by plaintiff), and Forde v. Skinner (1830), 4 Car. & P. 239, 172 E.R. 687 (cutting a person's hair). In more modern times, the same is true of medical battery cases. Like sexual acts, medical interventions may incidentally produce physical and psychological harm which may go to damages, but the basic "offence" or "harm" upon which the tort rests is the violation of the plaintiff's bodily integrity. As I discuss below, Canadian courts do not require plaintiffs alleging medical battery to prove that the defendant medical practitioner knew or ought to have known that the plaintiff did not consent to the medical contact.

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24 The practical counterpart of the argument that battery must involve inherently harmful or offensive conduct in some larger sense is the suggestion that absent such a requirement, plaintiffs will be able to unfairly drag defendants into court as a result of consensual sex, putting them to the trouble and risk of proving that the plaintiff consented or that a reasonable person would have concluded she consented. This point was not strongly argued, and with reason. Few plaintiffs to con-

sensual sex or in situations where consent is a reasonable inference from the circumstances, are likely to sue if they are virtually certain to lose when the facts come out. Moreover, the rules of court provide sanctions for vexatious litigants. There is no need to change the law of battery to avoid vexatious claims.

25 Moreover, the prospect of plaintiffs suing and saying nothing about consent is more theoretical than real. In fact, plaintiffs suing for sexual battery usually testify that they did not consent to the sexual contact. Failure to do so, absent an explanation, makes it more likely the defendant could win when he calls evidence of consent or reasonable appearance of consent. Even if a plaintiff were to bring an action in sexual battery against the estate of a deceased defendant, many provincial and territorial evidence acts would not allow the plaintiff to obtain a judgment against the estate unless her evidence were corroborated by other material evidence: see Evidence Acts of Alberta, R.S.A. 1980, c. A-21, s. 12; Newfoundland, R.S.N. 1990, c. E-16, s. 16; Northwest Territories, R.S.N.W.T. 1988, c. E-8, s. 17; Nova Scotia, R.S.N.S. 1989, c. 154, s. 45; Ontario, R.S.O. 1990, c. E.23, s. 13; Prince Edward Island, R.S.P.E.I. 1988, c. E-11, s. 11; Yukon, R.S.Y. 1986, c. 57, s. 14. At the same time, as discussed more fully below, placing on the plaintiff the legal burden of always [page572] negativing actual and constructive consent on pain of non-suit, may lead to injustice.

26 I conclude that the fact that the law of battery excludes trivial contact and requires contact that is "harmful or offensive" does not require us to conclude that the plaintiff bears the burden of proving that the defendant actually or constructively knew she did not consent to sexual contact.

D. There Is Nothing Particular About Sexual Assault that Makes it Necessary to Have a Special Rule of Battery for Sexual Assaults for What the Plaintiff Must Prove

27 If there were something special about sexual battery that justified requiring the plaintiff to prove that the defendant either knew she was not consenting or ought to have known that she was not consenting, a case might be made for so doing. The result would be a special rule for sexual battery inconsistent with the law of battery generally, and the creation of a new tort of sexual battery. Thus far the courts have declined to do this. As Professor Feldthusen notes, "[t]here has yet to be recognised a new nominate tort of sexual battery" (emphasis in original): "The Canadian Experiment with the Civil Action for Sexual Battery", in N. J. Mullany, ed., Torts in the Nineties (1997), 274, at p. 281. The sexual aspects of the claim go only to damages. However, as I stated above, a new tort of sexual battery with different rules from ordinary battery could be recognized in an appropriate case.

28 Before examining whether sexual battery is so different that special rules are required as to what the plaintiff must show, it is important to take note of the danger of placing special, unjustified [page573] burdens on victims of sexual encounters. At p. 282, Feldthusen notes that "in the criminal sphere, enquiries into alleged consent have allowed the focus of the criminal trial to shift from the actions of the defendant to the character of the complainant. The same potential exists in tort law" (emphasis added). As he points out, "[t]here exist in our law deeply imbedded tendencies towards victim blaming" (p. 283). This is not to say that alleged victims of sexual assault could never be singled out by placing special rules of proof on them that do not apply to other types of plaintiffs. It is rather to say that we must guard against placing such burdens upon alleged victims of sexual assault unless it can objectively be shown that it is necessary to do so in order to achieve justice.

29 To require plaintiffs in actions for sexual battery to prove that they did not consent and that a reasonable person in the circumstances of the defendant would not have believed they consented, is to place a burden on plaintiffs in actions for sexual battery that plaintiffs in other types of battery do not bear. It is to do so, moreover, in the absence of any compelling reason. Indeed, there are powerful reasons for applying the usual rules that require a plaintiff to prove only direct contact in cases of sexual battery.

30 The first concern is that by requiring the plaintiff to prove more than the traditional battery claim requires, we inappropriately shift the focus of the trial from the defendant's behaviour to the plaintiff's character. Requiring the plaintiff to prove that a reasonable person in the position of the defendant would have known that she was not consenting requires her to justify her actions. In practical terms, she must prove that she made it clear through her conduct and words that she did not consent to the sexual contact. Her conduct, not the [page574] defendant's, becomes the primary focus from the outset. If she cannot prove these things, she will be non-suited and the defendant need never give his side of the story.

31 The proposed shift to the plaintiff of the onus of disproving constructive consent runs the risk of victim blaming, against which Feldthusen and others properly warn. It also runs the risk of making it impossible for deserving victims of sexual battery to even get their foot in the litigation door. Consider the case of the victim of sexual assault who cannot testify to the events because of shock, loss of memory or inebriation. If she can prove that she was sexually assaulted and identify the perpetrator through third-person evidence, should she be non-suited at the outset because she cannot prove that her conduct in the circumstances would have led a reasonable person to conclude she was not consenting? Is it not better in such cases that the defendant be called upon to give evidence so the court can decide the case on a more complete picture of the facts? This is what the law of battery would traditionally require. Why should we exempt the defendant because the battery is a sexual battery?

32 The proposed shift of onus runs counter to Parliament's expressed view in the criminal context. Although the aims of criminal law and the law of tort are not identical, it remains significant that Parliament in s. 273.2(b) of the Criminal Code, R.S.C., 1985, c. C-46, stipulates that those accused of sexual assault who seek to invoke the defence of honest but mistaken belief in consent must have taken reasonable steps in the circumstances known to them at the time to ascertain the complainant's [page575] consent. Parliament has thus moved to counteract the historic tendency of criminal trials for sexual assault to focus unduly on the behaviour of the complainant, and to redirect some of the focus to the defendant. The traditional tort of battery already provides this focus in the civil domain. That focus should be retained in my view. To quote Sullivan, supra, at p. 563, "if the defendant is in a position to say what happened, it is both sensible and just to give him an incentive to do so by putting the burden of explanation on him".

33 Requiring the plaintiff to disprove constructive consent seems all the more unfair because the relevant facts lie first and foremost within the defendant's sphere of knowledge. He alone knows whether he actually believed the plaintiff was consenting, and if he believed she was consenting, he is in the best position to give evidence on the factors that led him to believe that. The plaintiff, by contrast, is not in a position to produce evidence of what was in the defendant's mind nor in as good a position to say what factors led him to that state of mind and whether he acted reasonably. While the defendant's particular knowledge about his state of mind regarding consent is not determinative of who bears the burden of proof regarding consent, it is one of the principles of fairness and policy

that are said to influence the allocation of this burden: see J. Sopinka, S. N. Lederman, and A. W. Bryant, The Law of Evidence in Canada (2nd ed. 1999), at para. 3.70; McCormick on Evidence (5th ed. 1999), vol. 2, at para. 337.

34 I conclude that there is nothing about sexual battery that requires that the traditional rules of onus governing battery actions be changed. On the contrary, placing the onus on the plaintiff of disproving consent and constructive consent seems [page576] unfairly to impose special obligations on plaintiffs who sue for sexual assault.

E. To Require the Plaintiff to Prove that the Defendant Knew or Ought to Have Known She Was Not Consenting Presents the Dilemma of Either Changing the Law for Other Types of Battery or Introducing an Inconsistency in the Law of Battery

35 To hold that battery must involve a contact that is inherently harmful or offensive has the potential to change the law relating to other types of battery, like medical battery. Alternatively, if it does not, it will introduce an inconsistency into the law of battery.

36 As discussed, Canadian courts have repeatedly held that for medical battery, the defendant bears the onus of proving consent as a defence: see, for example, Reibl, supra; Schweizer v. Central Hospital (1974), 53 D.L.R. (3d) 494 (Ont. H.C.); Allan v. New Mount Sinai Hospital (1980), 109 D.L.R. (3d) 634 (Ont. H.C.), rev'd on other grounds (1981), 33 O.R. (2d) 603 (C.A.); Brushett v. Cowan (1990), 3 C.C.L.T. (2d) 195 (Nfld. C.A.), at p. 199, and O'Bonsawin v. Paradis (1993), 15 C.C.L.T. (2d) 188 (Ont. Ct. (Gen. Div.)). Like sexual contact, the act of medical intervention is not inherently harmful or offensive, beyond its potential to violate bodily integrity. If sexual battery requires the plaintiff to prove that the defendant knew or ought to have known that the plaintiff did not consent, it is difficult to see why the same would not hold for medical malpractice. Yet no one has suggested that the law of medical malpractice ought to be changed to place an additional burden on the plaintiff of proving a culpable state of mind in the defendant medical practitioner. The alternative, if the law of battery were changed in this regard for sexual battery, would be inconsistency in the law of battery. Neither alternative is attractive. This suggests a further reason for being wary of the proposition that battery requires proof [page577] by the plaintiff of an inherently harmful or offensive act.

F. Requiring the Plaintiff to Prove that the Defendant Knew or Ought to Have Known that She Did Not Consent is Neither Necessary nor Sufficient to Permit the Conclusion that the Insurers in this Case Are Not Obligated to Defend the Defendant

37 The question at issue on this appeal is whether the insurer may avoid the obligation to defend the defendant to the battery action under the policy exclusion for "any intentional ... act". I agree with Iacobucci J. that this clause must be interpreted as requiring an intent to injure. It follows that for the tort of sexual battery to be excluded from policy coverage, it must always involve intent to injure.

38 As I understand his reasons, Iacobucci J. finds this intent to injure is present on the basis of legal inference, not as a matter of fact. The law presumes that in actions of battery for sexual assault, the defendant intends to injure the plaintiff. Thus Iacobucci J. states "[g]iven ... actual or constructive knowledge of non-consent, the law will not permit the appellant to claim that he did not

intend any harm" (para. 94 (emphasis added)). This legal inference is necessary because in cases of constructive knowledge, the defendant may be held liable despite the fact that he had no actual knowledge of lack of consent and hence no actual intent to harm the plaintiff. Iacobucci J. elaborates at para. 121 in reviewing the American jurisprudence [page578] on this issue, in the context of sexual assaults on children:

> Courts have had little difficulty in concluding that defendants in these cases are presumed to intend harm to their victims -- notwithstanding the fact that "males who are involved in such activities do not expect or intend that the females will sustain any injury"... . [Emphasis added.]

In other words, where there is an allegation of sexual battery, courts will conclude as a matter of legal inference that the defendant intended harm for the purpose of construing exemptions of insurance coverage for intentional injury.

39 This presumption of intent to harm does not depend on requiring the plaintiff to prove that the defendant knew or ought to have known that the plaintiff was not consenting to the sexual contact. Rather, the presumption flows from the allegation in the pleadings of battery of a sexual nature. American cases, like State Farm Fire and Casualty Co. v. Williams, 355 N.W.2d 421 (Minn. 1984), do not turn on the plaintiff's bearing the burden of showing the defendant either knew or ought to have known she did not consent. The logic is simply that either the act must have been consensual or not consensual. If it was not consensual, the policy does not apply because neither the insured nor the insurer contemplated coverage for non-consensual sexual activities. If it was consensual, then there is no battery and no claim for recovery. In either case, the policy does not apply. As stated in Williams, at p. 424:

> Does the fact that Williams, the victim, was an adult distinguish this case? We think not. Neither the insured nor the insurer in entering into the insurance contract contemplated coverage against sexual claims arising out of non-consensual sexual assaults.

40 This reasoning applies equally to allegations of negligent sexual battery where the alleged negligence relates to the defendant's belief in the plaintiff's consent to sexual contact. For these reasons [page579] I conclude that it is not necessary to place on the plaintiff the burden of proving the defendant's knowledge or constructive knowledge of the plaintiff's non-consent.

41 If this reasoning is correct, then placing the non-traditional burden of disproving consent or constructive consent on the plaintiff is neither a necessary nor a sufficient condition of concluding that the policy does not apply in cases like this. Regardless of how one views the matter of onus, the result will be the same.

G. Negligent Battery

42 It is unnecessary on this appeal to comment on the relationship between battery (traditionally thought of mainly as an intentional tort) and negligence. In this case, insofar as one could speak of negligent battery, it would be to recognize the defence of reasonable belief in consent to a suit based on an intentional act. As discussed, the law in these circumstances presumes an intention to injure, taking it out of the realm of pure negligence and bringing it within the ambit of the exclusion clause.

II. Conclusion

43 I conclude that there is no justification in cases of battery of a sexual nature for departing from the traditional rule that the plaintiff in a battery action must prove direct contact, at which point the onus shifts to the defendant to prove consent. To do so would be to place a burden upon plaintiffs in battery actions of a sexual nature which plaintiffs in other battery actions do not bear. I see neither the need nor the justification for doing this on the material before us in this case.

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44 This said, I agree fully with Iacobucci J. that the law will not permit a defendant in an action for sexual battery to say that though he might be found to have committed the battery, he did not intend any harm. This leaves the defendant with two alternatives discussed in Williams, supra. Either the plaintiff consented, in which case no action lies, or she did not consent and the defendant is deemed to have intended to injure her. In neither case does the policy provide coverage.

45 Like Iacobucci J., I would dismiss the appeal with costs.

The reasons of Iacobucci, Major and Bastarache JJ. were delivered by

IACOBUCCI J.:--

I. Introduction and Overview

46 This appeal raises the novel question of whether an insurance company has a duty to defend the holder of a homeowner's insurance policy against a civil sexual assault suit. In answering this question, we must also address the role of consent in an action for sexual assault.

47 It should be noted that this appeal was heard along with the appeal in Sansalone v. Wawanesa Mutual Insurance Co., [2000] 1 S.C.R. 627, 2000 SCC 25, reasons in which are being released concurrently.

48 This appeal concerns the insurance implications of a series of allegedly non-consensual sexual touchings. For ease of reference, I will use the term "sexual assault" to refer in general to any allegation of non-consensual sexual touching. My use of the term "sexual assault" should not be taken to imply any specific legal ramifications. But for "sexual battery", by contrast, I will give a more specific definition in the course of these reasons.

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49 An insurance company's duty to defend is related to its duty to indemnify. A homeowner's insurance policy entitles the holder to have the insurer indemnify any liability falling within the policy's terms. Since the insurance company will be paying these costs, it has also developed the right -- now a duty -- to conduct the defence of such claims. However, the duty to defend is not so great that it is presumed to be independent of the duty to indemnify. Absent express language to the

contrary, the duty to defend extends only to claims that could potentially trigger indemnity under the policy. Therefore if an insurance policy, like the one in this case, excludes liability arising from intentionally caused injuries, there will be no duty to defend intentional torts.

50 Determining whether or not a given claim could trigger indemnity is a three-step process. First, a court should determine which of the plaintiff's legal allegations are properly pleaded. In doing so, courts are not bound by the legal labels chosen by the plaintiff. A plaintiff cannot change an intentional tort into a negligent one simply by choice of words, or vice versa. Therefore, when ascertaining the scope of the duty to defend, a court must look beyond the choice of labels, and examine the substance of the allegations contained in the pleadings. This does not involve deciding whether the claims have any merit; all a court must do is decide, based on the pleadings, the true nature of the claims.

51 At the second stage, having determined what claims are properly pleaded, the court should determine if any claims are entirely derivative in nature. The duty to defend will not be triggered simply because a claim can be cast in terms of both negligence and intentional tort. If the alleged negligence is based on the same harm as the intentional [page582] tort, it will not allow the insured to avoid the exclusion clause for intentionally caused injuries.

52 Finally, at the third stage the court must decide whether any of the properly pleaded, non-derivative claims could potentially trigger the insurer's duty to defend. In this appeal, I conclude that the respondent has no duty to defend. The plaintiff has alleged three basic claims against the appellant: sexual battery, negligence, and breach of fiduciary duty.

53 To prove a claim for sexual battery, the plaintiff will have to establish that the defendant intentionally inflicted a harmful or offensive touching on her. In the context of sexual battery, "harmful or offensive" is equivalent to non-consensual. This test is objective: to establish sexual battery, the plaintiff must demonstrate that a reasonable person would have known that the plaintiff did not validly consent to sexual relations. To put it another way, the plaintiff will have to prove that the defendant should have known that she did not validly consent. It is important to note that, absent any evidence from the defendant, a simple allegation of non-consensual sex will suffice to meet this initial burden. If the plaintiff succeeds, then the defendant must also be presumed to have intended to injure the plaintiff, given the inherently harmful nature of non-consensual sexual activity. The same facts that prove the sexual battery also necessarily prove an intent to injure, and therefore the exclusion clause should apply. If, on the other hand, the plaintiff cannot establish non-consent, then the plaintiff's action would have no chance of success, there would be no possibility of a claim for indemnity, and the duty to defend would not arise.

54 The claims for negligence and breach of fiduciary duty fail to trigger the duty to defend not because they could not fall within coverage, but because they are either not properly pleaded, or derivative of the claim for sexual battery. As a [page583] result, they are also covered by the exclusion for injuries intentionally caused.

55 As there are no properly pleaded claims that, even if successful, could potentially trigger indemnity, the respondent has no duty to defend, and I would therefore dismiss the appeal.

II. Facts

56 The underlying action in this appeal is based on a series of alleged sexual assaults committed against a young girl ("the plaintiff"), who was born in 1974 and was an adolescent at the time of

the incidents in question. The plaintiff worked part-time at a grocery store owned and operated by her parents, located near the terminus of two B.C. Transit bus routes. In 1996, the plaintiff brought a civil action against five B.C. Transit bus drivers, including the appellant, alleging various sexual assaults between 1988 and 1992. The liability insurance policy owned by one of the bus drivers, Vincent Scalera, is at issue in this appeal.

57 The plaintiff's statement of claim alleges that between 1986 and 1992, while on duty with B.C. Transit, the appellant regularly attended the store belonging to the plaintiff's parents, and became acquainted with the plaintiff. She, in turn, regularly rode on buses driven by the appellant. The statement of claim further alleges as follows:

> 103. On one occasion between approximately January and June of 1991 Scalera committed various sexual acts upon [the plaintiff], including:
>
> (a) sexual kissing;
> (b) sexual touching of her neck, back, breasts, and genitals; and
> (c) fellatio
>
> together (the "Scalera sexual acts").

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> 104. Scalera committed the Scalera sexual acts upon [the plaintiff] in various locations, including:
>
> (a) on buses owned by B.C. Transit; and
> (b) in his truck.
>
> 105. The Scalera sexual acts were committed upon [the plaintiff] by Scalera for a sexual purpose and/or without [the plaintiff]'s consent.
> 106. Scalera committed the Scalera sexual acts upon [the plaintiff] by coercion, manipulation, and abuse of power.
> 107. The Scalera sexual acts were sexual assaults and/or sexual exploitation and/or unlawful.
> 108. At all material times, Scalera was an adult and [the plaintiff] was an infant and/or a young person.
> 109. Scalera, by words or conduct, threatened that harm would come to [the plaintiff] if she disclosed the Scalera sexual acts to another person, intending to persuade [the plaintiff] to submit to the Scalera sexual acts.
> 110. Scalera, by words or conduct, knowingly, fraudulently, and deceitfully misrepresented the Scalera sexual acts committed by him upon [the plaintiff] as:
>
> (a) the prerogative of an adult;
> (b) consensual activity; and/or
> (c) a healthy, normal expression of his affection for her

together (the "Scalera Representations").

111. Scalera made the Scalera Representations intending to persuade [the plaintiff] to submit to the Scalera sexual acts.
112. The Scalera Representations were untrue.
113. [The plaintiff] relied on the Scalera Representations concerning the nature of the Scalera sexual acts and thereby submitted to the Scalera sexual acts.
114. [The plaintiff] relied on the Scalera Representations concerning the nature of the Scalera sexual acts and thereby failed to report Scalera's conduct to other adults.
115. Scalera knew or ought to have known that the Scalera sexual acts were unlawful and/or the Scalera Representations were untrue.

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116. Scalera knew or ought to have known that [the plaintiff] was an infant and/or a young person.
117. Scalera knew or ought to have known that [the plaintiff] did not consent to the Scalera sexual acts.
118. Scalera owed a duty of care to [the plaintiff], which duty of care arose from the relationship of authority and trust between himself as an adult and/or bus driver and [the plaintiff] as an infant and/or young person and/or bus passenger, and Scalera breached this duty of care.
119. Scalera owed a fiduciary duty to [the plaintiff], which fiduciary duty arose from the relationship of authority and trust between himself as an adult and/or bus driver and [the plaintiff] as an infant and/or young person and/or bus passenger, and Scalera breached this fiduciary duty.
120. Scalera committed the Scalera sexual acts willfully and without lawful justification.
121. The Scalera sexual acts were committed intentionally and/or with reckless disregard as to their effect on [the plaintiff].
122. By reason of Scalera's actions in committing the Scalera sexual acts [the plaintiff] has suffered nervous shock and sustained severe personal injuries, particulars of which are set out in paragraph 127 below.

...

128. As a result of the aforesaid sexual assaults, sexual exploitation, intentional infliction of nervous shock, misrepresentations, negligence, breaches of duty, and breaches of fiduciary duty committed by ... Scalera, and/or B.C. Transit [the plaintiff] has suffered a loss of income and a loss of ability to earn income in the future.
129. As a result of the aforesaid sexual assaults, sexual exploitation, intentional infliction of nervous shock, misrepresentations, negligence, breaches of duty, and

> breaches of fiduciary duty committed by ... Scalera, and/or B.C. Transit [the plaintiff] has and/or will continue to incur expenses, including obtaining proper psychiatric and psychological counselling and treatment which will be required on both an ongoing and crisis basis.

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58 In response to a demand for particulars, counsel for the plaintiff stated that the coercion, manipulation, and abuse of power alleged in para. 106 of the statement of claim consisted of:

(a) pressure to engage in the sexual acts as a result of Scalera's position as an adult and [the plaintiff]'s position as an infant and/or young person;
(b) pressure to engage in the sexual acts in order to demonstrate affection to Scalera;
(c) pressure to engage in the sexual acts in order to secure and/or maintain Scalera's alleged affection and/or friendship;
(d) pressure to engage in the sexual acts in order to overcome personal loneliness and/or insecurity;
(e) pressure to engage in the sexual acts in order to demonstrate maturity.

59 The appellant owned a homeowner's insurance policy issued by the respondent. The relevant provisions of that policy are as follows:

SECTION TWO -- PERSONAL LIABILITY INSURANCE

...

> This insurance applies only to accidents or occurrences which take place during the period of insurance indicated on the Declarations. ...
>
> We will pay all sums which you become legally liable to pay as compensatory damage because of bodily injury or property damage. ...
>
> You are insured for claims made against you arising from:

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> 1. Personal Liability -- legal liability arising out of your personal actions anywhere in the world.
>
> ...

> We will defend, by counsel of our choice, any suit against you alleging bodily injury or property damage and seeking compensatory damages, even if it is groundless, false or fraudulent. We reserve the right to investigate, negotiate and settle any claim or suit if we decide this is appropriate.
>
> ...
>
> GENERAL EXCLUSIONS APPLICABLE TO THIS SECTION TWO
>
> You are not insured for claims arising from:
>
> ...
>
> (5) bodily injury or property damage caused by any intentional or criminal act or failure to act by:
>
> (a) any person insured by this document ...

60 The respondent sought a declaration that it not be required to defend the appellant against the plaintiff's claims. Humphries J. dismissed the respondent's petition, but the Court of Appeal allowed the appeal.

III. Judicial Decisions

A. British Columbia Supreme Court (1997), 47 B.C.L.R. (3d) 187

61 Humphries J. interpreted the insurance policy's exclusion such that only intentional acts, but not intentional injuries, trigger exclusion. However, she believed that the relevant act underlying the plaintiff's claim must be sexual assault, not merely sexual contact, for it to fall within the exclusion. Relying on Co-operative Fire & Casualty Co. v. Saindon, [1976] 1 S.C.R. 735, she found at para. 23 that "[i]f the allegations in the Statement of Claim include a possible claim in negligence against [the appellant], and if such a plea is a legitimate one made in good faith, [the respondent] [page588] cannot rely on the exclusion clause because injury or damage caused by a negligent act falls outside it". Since it was possible that the appellant had intended only sexual contact, but was simply negligent regarding sexual assault, there was a duty to defend.

B. British Columbia Court of Appeal (1998), 48 B.C.L.R. (3d) 143

(i) Hollinrake J.A., Proudfoot J.A. concurring

62 The appeals of the respondent and Wawanesa Mutual Insurance Co., respondent in the companion appeal, Sansalone, were consolidated at the Court of Appeal. Having accepted Saindon as the leading case on point, Hollinrake J.A. turned to the specific issues raised by the Scalera appeal. He concluded that the exclusion clause in question barred claims based on intentional acts. Since most tort claims allege negligence and not intent to injure, excluding intentional acts from coverage was "in keeping with coverage historically provided by policies insuring against liability imposed by law caused by accident" (para. 91). It was also consistent with the reasonable expectations of the parties.

63 Hollinrake J.A. found that the claim advanced sounded in intentional tort, and saw no reason to require the respondent to prove the intent to injure. The appellant's act was clearly intentional and

was within the exclusion clause, so there was no possibility of coverage. Any claims based on the power-dependency relationship between the plaintiff and the appellant also fell within the exclusion, as it had in Sansalone. Finally, Hollinrake J.A. disagreed with Finch J.A. as to the meaning of the duty to defend clause. He concluded that, in order for there to be a duty to defend, there had to be at least a possibility of coverage. Since he had [page589] already determined that there was no possibility of coverage, he allowed the appeal.

(ii) Finch J.A., dissenting

64 Finch J.A. concluded that in spite of the exclusion clause's language referring only to intentional acts, it must be read to exclude liability only for injury or damage caused intentionally. To do otherwise would exclude the vast majority of all claims, since most accidents or occurrences can be traced back to an intentional act. Finch J.A. did not read the pleadings as alleging an intention on the part of the appellant to cause the plaintiff injury. He therefore concluded that the duty to defend should apply.

65 Moreover, Finch J.A. held that under the wording of the appellant's policy, the duty to defend was not linked to the duty to indemnify. As a result, the respondent was obliged to defend any claim for bodily injury causing compensable damages, regardless of whether that claim could also trigger indemnity.

IV. Issues

66 This appeal raises four issues.

1. Is the duty to defend in the appellant's insurance policy linked to the duty to indemnify?
2. Do the intentional act exclusion clauses in the appellant's insurance policy operate to relieve the respondent's duty in this case?
3. Was there an "accident" or "occurrence" that is sufficient to trigger coverage?
4. Does s. 28 of the British Columbia Insurance Act, R.S.B.C. 1996, c. 226, absolve the respondent of any duty to defend the appellant?

[page590]

Because of my disposition of the first two issues, I find it unnecessary to address the latter two in this appeal.

V. Analysis

A. General Principles of Insurance Contract Interpretation

67 To begin with, I should like to discuss briefly several principles that are relevant to the interpretation of the insurance policy in question. While these principles are merely interpretive aids that cannot decide any issues by themselves, they are nonetheless helpful when interpreting provisions of an insurance contract.

(i) The General Purpose of Insurance

68 It is important to keep in mind the underlying economic rationale for insurance. C. Brown and J. Menezes, Insurance Law in Canada (2nd ed. 1991), state this point well at pp. 125-26:

> Insurance is a mechanism for transferring fortuitous contingent risks. Losses that are neither fortuitous nor contingent cannot economically be transferred because the premium would have to be greater than the value of the subject matter in order to provide for marketing and adjusting costs and a profit for the insurer. It follows, therefore, that even where the literal working of a policy might appear to cover certain losses, it does not, in fact, do so if (1) the loss is from the inherent nature of the subject matter being insured, or (2) it results from the intentional actions of the insured.

69 In other words, insurance usually makes economic sense only where the losses covered are unforeseen or accidental: "The assumptions on which insurance is based are undermined if successful claims arise out of loss which is not fortuitous" (C. Brown, Insurance Law in Canada (3rd ed. 1997), at p. 4). This economic rationale takes on a public policy flavour where, as here, the acts for which the insured is seeking coverage are socially harmful. It may be undesirable to encourage people to injure others intentionally by indemnifying them from the civil consequences. On the other hand, denying coverage has the undesirable [page591] effect of precluding recovery against a judgment-proof defendant, thus perhaps discouraging sexual assault victims from bringing claims. See B. Feldthusen, "The Civil Action for Sexual Battery: Therapeutic Jurisprudence?" (1993), 25 Ottawa L. Rev. 203, at p. 233.

(ii) Contra Proferentem

70 Since insurance contracts are essentially adhesionary, the standard practice is to construe ambiguities against the insurer: Brissette Estate v. Westbury Life Insurance Co., [1992] 3 S.C.R. 87, at p. 92; Wigle v. Allstate Insurance Co. of Canada (1984), 49 O.R. (2d) 101 (C.A.), per Cory J.A. A corollary of this principle is that "coverage provisions should be construed broadly and exclusion clauses narrowly": Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co., [1993] 1 S.C.R. 252, at p. 269; Indemnity Insurance Co. of North America v. Excel Cleaning Service, [1954] S.C.R. 169, at pp. 179-80, per Estey J. Therefore one must always be alert to the unequal bargaining power at work in insurance contracts, and interpret such policies accordingly.

(iii) Reasonable Expectations

71 Where a contract is unambiguous, a court should give effect to the clear language, reading the contract as a whole: Brissette Estate, supra, at p. 92; Parsons v. Standard Fire Insurance Co. (1880), 5 S.C.R. 233. Where there is ambiguity, this Court has noted "the desirability ... of giving effect to the reasonable expectations of the parties": Reid Crowther, supra, at p. 269 (citing Brown and Menezes, supra, at pp. 123-31, and Brissette Estate, supra). See also Scott v. Wawanesa Mutual Insurance Co., [1989] 1 S.C.R. 1445, at p. 1467; Wigle, supra. Estey J. stated the point succinctly in Consolidated-Bathurst Export Ltd. v. Mutual [page592] Boiler and Machinery Insurance Co., [1980] 1 S.C.R. 888, at pp. 901-2:

> [L]iteral meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result... . Said another way, the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract.

This court recently re-stated the importance of commercial reality, in another context, in Guarantee Co. of North America v. Gordon Capital Corp., [1999] 3 S.C.R. 423, at para. 62.

72 With these principles in mind, I now wish to discuss the principal issues in this appeal.

B. The Scope of the Insurer's Duty to Defend

(i) The Linkage Between the Duties to Indemnify and to Defend

73 The appellant's first argument is that the duty to defend is independent of the duty to indemnify. The relevant clause in the appellant's policy states: "We will defend, by counsel of our choice, any suit against you alleging bodily injury or property damage and seeking compensatory damages, even if it is groundless, false or fraudulent." The appellant argues, and Finch J.A. agreed in dissent at the Court of Appeal, that this requires not a potentially [page593] indemnifiable claim, but only a claim alleging bodily injury and seeking compensatory damages.

74 With respect, I cannot agree. McLachlin J. addressed this question in Nichols v. American Home Assurance Co., [1990] 1 S.C.R. 801. The policy in that appeal specifically limited the duty to defend to suits "seeking damages which are or may be payable under the terms of this Policy" (p. 805), and so there was obviously no independent duty to defend under that particular policy. However, McLachlin J. went on, at pp. 810-11, to set out general principles governing the duty to defend, regardless of whether there is express language or not:

> Thus far, I have proceeded only by reference to the actual wording of the policy. However, general principles relating to the construction of insurance contracts support the conclusion that the duty to defend arises only where the pleadings raise claims which would be payable under the agreement to indemnify in the insurance contract. Courts have frequently stated that "[t]he pleadings govern the duty to defend": Bacon v. McBride (1984), 6 D.L.R. (4th) 96 (B.C.S.C.), at p. 99. Where it is clear from the pleadings that the suit falls outside of the coverage of the policy by reason of an exclusion clause, the duty to defend has been held not to arise: Opron Maritimes Construction Ltd. v. Canadian Indemnity Co. (1986), 19 C.C.L.I. 168 (N.B.C.A.), leave to appeal refused by this Court, [1987] 1 S.C.R. xi.

> At the same time, it is not necessary to prove that the obligation to indemnify will in fact arise in order to trigger the duty to defend. The mere possibility that a claim within the policy may succeed suffices. In this sense, as noted earlier, the duty to defend is broader than the duty to indemnify.
>
> ...
>
> Other Canadian authority overwhelmingly supports the view that normally the duty to defend arises only with respect to claims which, if proven, would fall [page594] within the scope of coverage provided by the policy... .
>
> The same view generally prevails in the United States... .

75 McLachlin J. also provided two policy reasons in support of this conclusion, and in so doing refuted the contrary arguments made in the American case Conner v. Transamerica Insurance Co., 496 P.2d 770 (Okla. 1972). First, the insurer would have to pay defence costs for claims outside the policy's scope. This raised "policy questions of whether others in the insurance pool should be taxed with providing defences for matters outside the purview of the policy": Nichols, supra, at pp. 811-12. Second, an independent duty to defend raises conflict of interest problems. If the insurer is defending claims for which it owes no duty to indemnify, there is a strong incentive simply to settle the claim as quickly as possible. At the very least, the insurer has an incentive to try to prove only that the insured is liable for claims falling outside coverage. There would be little incentive to establish that the insured was entirely without blame. McLachlin J. therefore concluded, at p. 812, that

> considerations relat[ing] to insurance law and practice, as well as the authorities, overwhelmingly support the view that the duty to defend should, unless the contract of insurance indicates otherwise, be confined to the defence of claims which may be argued to fall under the policy. That said, the widest latitude should be given to the allegations in the pleadings in determining whether they raise a claim within the policy.

76 While this is obiter dictum, I find McLachlin J.'s arguments compelling. Absent specific language to the contrary, the duty to defend is broader than the duty to indemnify only in so far as it extends to groundless, false, or fraudulent claims. Given the historical evolution of the duty [page595] to defend as a way for insurers to protect their interests when they will be forced to pay any resulting judgment (see J. M. Fischer, "Broadening the Insurer's Duty to Defend: How Gray v. Zurich Insurance Co. Transformed Liability Insurance Into Litigation Insurance" (1991), 25 U.C. Davis L. Rev. 141, at pp. 146-57; E. S. Pryor, "The Tort Liability Regime and the Duty to Defend" (1999), 58 Md. L. Rev. 1), it makes little sense to presume an independent duty to defend absent express language: see B. Vail, "'My Mistake, Your Problem': The Duty to Defend Liability Claims in Canada" (1996), 6 C.I.L.R. 201, at p. 207, and Fischer, supra. To hold otherwise would convert indemnity insurance into litigation insurance. In my opinion, such an interpretation would violate the reasonable expectations of the parties absent express language to that effect.

77 Although prior to Nichols, Canadian courts were split on the issue, since Nichols courts have followed the dictum from that case. See Modern Livestock Ltd. v. Kansa General Insurance Co. (1993), 11 Alta. L.R. (3d) 355 (Q.B.); B.P. Canada Inc. v. Comco Service Station Construction

& Maintenance Ltd. (1990), 73 O.R. (2d) 317 (H.C.), and Kates v. Hall, [1990] 5 W.W.R. 569 (B.C.S.C.).

78 This conclusion is consistent with the majority of American courts, which have concluded that the "duty to defend arises when the underlying complaint alleges any facts that might fall within the coverage of the policy": Colorado Farm Bureau Mutual Insurance Co. v. Snowbarger, 934 P.2d 909 (Colo. Ct. App. 1997), at p. 912. See also, e.g., Aerojet-General Corp. v. Transport Indemnity Co., 948 P.2d 909 (Cal. 1997), at p. 921; Lawyers Title Insurance Corp. v. Knopf, 674 A.2d 65 (Md. Ct. Spec. App. 1996), at p. 70; Allstate Insurance Co. v. Patterson, 904 F. Supp. 1270 (D. Utah 1995); Allstate Insurance Co. v. Brown, 834 F. Supp. 854 [page596] (E.D. Pa. 1993). To the contrary, see Gray v. Zurich Insurance Co., 419 P.2d 168 (Cal. 1966).

(ii) The Relevance of the Pleadings

79 The appellant notes that the plaintiff's statement of claim alleged the non-intentional torts of negligence and breach of fiduciary duty. He therefore argues that the respondent has a duty to defend because the exclusion clause does not apply to these claims. However, these bare assertions alone cannot be determinative. Otherwise, the parties to an insurance contract would always be at the mercy of the third-party pleader. What really matters is not the labels used by the plaintiff, but the true nature of the claim.

80 The general rule regarding the role of the pleadings is well stated by Wallace J. in Bacon v. McBride (1984), 6 D.L.R. (4th) 96 (B.C.S.C.), at p. 99:

> The pleadings govern the duty to defend -- not the insurer's view of the validity or nature of the claim or by the possible outcome of the litigation. If the claim alleges a state of facts which, if proven, would fall within the coverage of the policy the insurer is obliged to defend the suit regardless of the truth or falsity of such allegations.

This principle was expanded upon by McLachlin J., for the Court in Nichols, supra, at pp. 810-11, in the following words cited in part above:

> Where it is clear from the pleadings that the suit falls outside of the coverage of the policy by reason of an exclusion clause, the duty to defend has been held not to arise: Opron Maritimes Construction Ltd. v. Canadian Indemnity Co. (1986), 19 C.C.L.I. 168 (N.B.C.A.), leave to appeal refused by this Court, [1987] 1 S.C.R. xi.
>
> At the same time, it is not necessary to prove that the obligation to indemnify will in fact arise in order to trigger the duty to defend. The mere possibility that a claim within the policy may succeed suffices. In this sense, as noted earlier, the duty to defend is broader than the duty [page597] to indemnify. O'Sullivan J.A. wrote in Prudential Life Insurance Co. v. Manitoba Public Insurance Corp. (1976), 67 D.L.R. (3d) 521 (Man. C.A.), at p. 524:

> Furthermore, the duty to indemnify against the costs of an action and to defend does not depend on the judgment obtained in the action. The existence of the duty to defend depends on the nature of the claim made, not on the judgment that results from the claim. The duty to defend is normally much broader than the duty to indemnify against a judgment. (Emphasis added.)

> In that case it was unclear whether the insurer might be liable to indemnify under the policy, so the duty to defend was held to apply. In the court's view it would have been unjust for the insurers to be able to assert that "the claim is probably groundless, or will probably end up falling outside of the indemnity coverage. Since we have no proof that we owe an indemnity in this case, we take the position that we owe no duty to defend".

81 This does not, however, mean that the parties to an insurance contract are to be bound by the plaintiff's choice of labels, and thus defenceless against inaccurate or manipulative pleadings. Nichols only held that, having determined the nature of the claim, an insured need not further prove that the claim would succeed. This is just common sense, since otherwise an insured would have to prove he is actually liable in order to get an insurer to defend a liability claim.

82 In my view, the correct approach in the circumstances of this case is to ask if the allegations, properly construed, sound in intentional tort. If they do, the plaintiff's use of the word "negligence" will not be controlling. The Rhode Island Supreme Court, in Peerless Insurance Co. v. Viegas, 667 A.2d 785 (1995), cleverly expressed the point as follows at p. 789:

[page598]

> In civil actions for damages that result from an act of child sexual molestation, an insurer will be relieved from its duty to defend and to indemnify its insured if the perpetrator is insured under a policy in which there is contained an intentional act exclusion provision... . The fact that the allegations in that complaint are described in terms of "negligence" is of no consequence. A plaintiff, by describing his or her cat to be a dog, cannot simply by that descriptive designation cause the cat to bark.

83 To be somewhat more prosaic, when determining the scope of the duty to defend, courts must take the factual allegations as pleaded, but then ask which of the plaintiff's legal claims could potentially be supported by those factual allegations. This is clear from Bacon, supra, at p. 99, where the court limited the duty to defend to cases where the "claim alleges a state of facts which, if proven, would fall within ... coverage" (emphasis added). Similarly, in Nichols, supra, at p. 810, McLachlin J. cited with approval O'Sullivan J.A.'s direction to look at "the nature of the claim made".

84 I would note that this approach can assist the insured, and not just the insurer. For example, as the California Supreme Court noted in Gray, supra, at p. 176,

> the complainant in the third party action drafts his complaint in the broadest terms; he may very well stretch the action which lies in only nonintentional conduct to the dramatic complaint that alleges intentional misconduct. In light of the likely overstatement of the complaint and of the plasticity of modern pleading, we should hardly designate the third party as the arbiter of the policy's coverage.

Conversely, a plaintiff may draft a statement of claim in a way that seeks to turn intention into negligence in order to gain access to an insurer's deep pockets. See E. S. Pryor, "The Stories We Tell: Intentional Harm and the Quest for Insurance Funding" (1997), 75 Tex. L. Rev. 1721, at p. 1735. A court must therefore look beyond the labels used by the plaintiff, and determine the true nature of [page599] the claim pleaded. It is important to emphasize that at this stage a court must not attempt to determine the merit of any of the plaintiff's claims. Instead, it should simply determine whether, assuming the verity of all of the plaintiff's factual allegations, the pleadings could possibly support the plaintiff's legal allegations.

85 Having construed the pleadings, there may be properly pleaded allegations of both intentional and non-intentional tort. When faced with this situation, a court construing an insurer's duty to defend must decide whether the harm allegedly inflicted by the negligent conduct is derivative of that caused by the intentional conduct. In this context, a claim for negligence will not be derivative if the underlying elements of the negligence and of the intentional tort are sufficiently disparate to render the two claims unrelated. If both the negligence and intentional tort claims arise from the same actions and cause the same harm, the negligence claim is derivative, and it will be subsumed into the intentional tort for the purposes of the exclusion clause analysis. If, on the other hand, neither claim is derivative, the claim of negligence will survive and the duty to defend will apply. Parenthetically, I note that the foregoing should not preclude a duty to defend simply because the plaintiff has pleaded in the alternative. As Pryor, "The Stories We Tell: Intentional Harm and the Quest for Insurance Funding", supra, points out at p. 1752, "[p]laintiffs must have the freedom to plead in the alternative, to develop alternative theories, and even to submit alternative theories to the jury". A claim should only be treated as "derivative", for the purposes of this analysis, if it is an ostensibly separate claim which nonetheless is clearly inseparable from a claim of intentional tort.

86 The reasons for this conclusion are twofold. First, as discussed above, one must always remember that insurance is presumed to cover only negligence, not intentional injuries. Second, this [page600] approach will discourage manipulative pleadings by making it fruitless for plaintiffs to try to convert intentional torts into negligence, or vice versa. While courts should not concern themselves with whether or not pleadings are designed to generate insurance coverage, following the guidelines set out above will provide insurers with sufficient protections against manipulative pleadings.

87 These concepts may seem rather complicated in the abstract, but they are more straightforward to apply in practice. While this issue is relatively new to Canadian law, it has been extensively canvassed in the United States, where courts have denied insurance coverage for claims of negligent battery, negligent misrepresentation, negligent infliction of emotional distress, negligent interference with familial relations, and any other claim of "negligence" where it is derivative of an intentional sexual assault. For example, in Houg v. State Farm Fire and Casualty Co., 481 N.W.2d 393 (Minn. Ct. App. 1992), a parishioner sued a priest who had been counselling her for sexual assault. In addition to intentional sexual battery, the plaintiff alleged negligent counselling by the defendant.

88 The court had little difficulty in finding that this allegation of negligence did not raise the duty to defend, because "[a]ny negligent counseling is so intertwined with [the insured]'s sexual exploitation of a psychologically dependent person as to be inseparable" (Houg, supra, at p. 397). To use the approach I have set out above, the negligent counselling claim was merely derivative of the sexual assault. The fact that there may have been negligent aspects of the priest's conduct will not change the essentially intentional nature of his conduct, for the purpose of the exclusion clause. To similar effect are: Linebaugh v. Berdish, 376 N.W.2d 400 (Mich. Ct. App. 1985) (denying a claim for "negligent" child molestation, which was "a transparent [page601] attempt to trigger insurance coverage by characterizing allegations of tortious conduct under the guise of 'negligent' activity" (p. 406)); Horace Mann Insurance Co. v. Leeber, 376 S.E.2d 581 (W. Va. 1988) (alleged negligent seduction of a child by a teacher (p. 587)); Allstate Insurance Co. v. Troelstrup, 789 P.2d 415 (Colo. 1990) (same (p. 418, n. 7)); Nationwide Mutual Fire Insurance Co. v. Lajoie, 661 A.2d 85 (Vt. 1995) (agreeing with the trial judge that "labeling [the insured]'s conduct as negligent 'is simply a disingenuous attempt to create a factual dispute'" (p. 86)); Colorado Farm Bureau Mutual Insurance Co. v. Snowbarger, supra ("[T]he only facts recited in the complaint concern the repeated acts of sexual assault. There are no factual allegations provided in the complaint to substantiate a negligence theory" (p. 912)).

89 I wish to make it clear that I am not denying that a given state of facts may give rise to several different tort claims. For example, in M. (K.) v. M. (H.), [1992] 3 S.C.R. 6, the Court noted at p. 59 that "[i]ncest is a breach of both common law and equitable duties". The Court therefore held that limitation periods applying to intentional or negligent actions did not apply to claims for breach of fiduciary duty. While I fully agree with this proposition, I would note that the present appeal presents a distinct question. In the context of an insurance contract's intentional injury exclusion clause, the goal is to determine the gravamen of the complaint, and whether one can infer an intent to injure from that complaint. Limitations issues, as shown by M. (K.), are different, and not applicable in the present appeal. Indeed, this appeal's holding with respect to the proper characterization of a plaintiff's tort allegations should not be taken [page602] to affect any areas of law outside the insurance context presented by this appeal.

(iii) Conclusion on the Scope of the Insurer's Duty to Defend

90 I therefore conclude that the respondent will only have to defend the appellant if the plaintiff's statement of claim alleges a state of facts that, properly construed, would support an action that could potentially fall within coverage.

C. Is There a Claim that Could Fall Within Coverage?

91 There is no dispute in this case that the plaintiff's allegations fall within the general coverage provisions of the policy. All that is at stake is whether the exclusion clause applies. That clause states that the appellant is "not insured for claims arising from: ... bodily injury or property damage caused by any intentional or criminal act or failure to act" by the insured.

92 At the outset, the wording of this clause presents a threshold issue. The respondent argues that the clause requires only an intentional act, not an intent to injure. The majority below agreed with this interpretation. However, I agree with Finch J.A.'s dissent on this point. If the respondent were correct, almost any act of negligence could be excluded under this clause. After all, most every act of negligence can be traced back to an "intentional ... act or failure to act". As this Court made

clear in Canadian Indemnity Co. v. Walkem Machinery & Equipment Ltd., [1976] 1 S.C.R. 309, "negligence is by far the most frequent source of exceptional liability which [an insured] has to contend with. Therefore, a policy which would not cover liability due to negligence could not properly be called 'comprehensive'" (pp. 316-17). Consistent with this decision, the purpose of insurance, and the doctrines of reasonable expectations and contra proferentem referred to above, I believe the exclusion clause must be read to require that the injuries be intentionally caused, in that they are the [page603] product of an intentional tort and not of negligence.

93 Our task, therefore, is to decide which of the plaintiff's legal allegations are properly pleaded, whether any of them are derivative, and whether any of the surviving claims evince an intention to injure, thus triggering the exclusion clause. To do this, it is necessary to understand precisely what the elements of the various torts alleged against the appellant are. If the elements of a tort claim require proof of conduct that also proves an intent to injure, there will be no duty to defend because any potentially successful claim would fall under the exclusion clause.

94 As will be seen from the following discussion, I conclude that each of the plaintiff's properly pleaded claims necessarily involves an intent to injure, because each requires proof that the appellant either knew, or should have known, that the plaintiff did not validly consent to sexual activity. Given this actual or constructive knowledge of non-consent, the law will not permit the appellant to claim that he did not intend any harm. The exclusion therefore applies because there is no claim against the appellant that, if successful, could potentially fall within coverage. There being no potentially indemnifiable claim, the respondent has no duty to defend.

(i) Sexual Battery

(a) Elements of the Tort of Sexual Battery

95 The tort of sexual battery is a relatively new one. As Professor Feldthusen points out in "The Canadian Experiment with the Civil Action for [page604] Sexual Battery", in N. J. Mullany, ed., Torts in the Nineties (1997), 274, at p. 274, this action is one that has appeared more frequently in the last 15 years. The sexual battery action signals the possibility of "dramatic changes to the law of consent, to the action for breach of fiduciary duty, to the rules governing punitive damages, to the rules of discovery and to the law of evidence" (p. 275). However, this appeal requires no such changes. Contrary to McLachlin J.'s assertions, my approach entails nothing more than understanding how traditional tort law applies in the context of sexual battery.

96 Sexual battery is a form of battery, the traditional test for which is relatively straightforward. In M. (K.), supra, at p. 25, La Forest J. defined assault and battery as "causing another person to apprehend the infliction of immediate harmful or offensive force on her person coupled with the actual infliction of that harmful or offensive force". What is notably absent from this definition is any intent to injure. Professor Klar, in his second edition of Tort Law (1996), makes this point at p. 42:

> For the tort of intentional battery, the defendant must have intended an offensive, physical contact with the plaintiff. The defendant need not have intended to harm or injure the plaintiff, although in most battery cases there is an intention to injure.

97 A. M. Linden, in Canadian Tort Law (6th ed. 1997), emphasizes this point at p. 43: "A battery can be committed even though no harm or insult is intended by the contact. If the contact is offensive to the recipient, even if a compliment was intended, it is tortious." See also Wilson v. Prin-

gle, [1986] 2 All E.R. 440 (C.A.), at p. 445; Spivey v. Battaglia, 258 So.2d 815 (Fla. 1972); O. M. Reynolds, "Tortious Battery: Is 'I Didn't [page605] Mean Any Harm' Relevant?" (1984), 37 Okla. L. Rev. 717.

98 Intentional battery generally requires only the intent to cause the physical consequences, namely, an offensive touching. Klar, supra, makes this point at p. 30:

> Technically, however, the concept of "intention" in the intentional torts does not require defendants to know that their acts will result in harm to the plaintiffs. Defendants must know only that their acts will result in certain consequences. It is not necessary for defendants to realize that these intended consequences are in fact an infringement of the legal rights of others. Intention, in other words, focusses on physical consequences.

To similar effect is Linden, supra, at p. 33: "Conduct is intentional if the actor desires to produce the consequences that follow from an act."

99 Moreover, if a tort is intended, it will not matter that the result was more harmful than the actor should, or even could have foreseen. Linden, supra, at p. 45, quotes Borins Co. Ct. J. (as he then was) in Bettel v. Yim (1978), 20 O.R. (2d) 617, at p. 628:

> If physical contact was intended, the fact that its magnitude exceeded all reasonable or intended expectations should make no difference. To hold otherwise ... would unduly narrow recovery where one deliberately invades the bodily interests of another with the result that the totally innocent plaintiff would be deprived of full recovery for the totality of the injuries suffered as a result of the deliberate invasion of his bodily interests. [Emphasis added.]

100 The appellant's argument, in light of the foregoing, is quite simple. Battery requires only intentional contact, not an intent to harm. Therefore, he could have had non-consensual sex with the plaintiff, thus committing battery, while thinking consent was present and thus not intending any harm. Any injuries could therefore have been unintentional, [page606] and the exclusion clause should not apply because a claim within coverage could succeed.

101 The problem with the appellant's argument is that it fails to recognize the subtleties of intentional tort, particularly as they apply to sexual battery. The law of intentional tort has traditionally focussed on a different set of problems from those presented in cases of sexual battery. In traditional battery, which is what the above-cited authorities were considering, what is usually at stake is whether the defendant can be liable for unintended physical consequences of his or her intentional actions, as in Bettel, supra. In these cases, the plaintiff's consent is not in question because of the nature of the conduct. Punching, shooting, stabbing, or otherwise attempting to injure another person is clearly offensive, and we would not expect someone to consent to it. See, e.g., Long v. Gardner (1983), 144 D.L.R. (3d) 73 (Ont. H.C.); Veinot v. Veinot (1977), 81 D.L.R. (3d) 549 (N.S.C.A.); Rumsey v. The Queen (1984), 12 D.L.R. (4th) 44 (F.C.T.D.); Holt v. Verbruggen (1981), 20 C.C.L.T. 29 (B.C.S.C.). As Borins Co. Ct. J. said in Bettel, supra, at p. 627, defendants in these cases have acted "with intent to violate the interests of others" (quoting J. J. Atrens, "International Interference with the Person", in Studies in Canadian Tort Law (1968), 378). Consent simply is not an issue, and intent to injure is obvious.

102 Moreover, even in those cases where intent to harm is less obvious, lack of consent usually is obvious. For example, Reynolds, supra, discusses various instances where courts have debated the need to show intent to harm. These cases typically involve childish pranks, see Garratt v. Dailey, 279 P.2d 1091 (Wash. 1955), Vosburg v. Putney, 50 N.W. 403 (Wis. 1891); unconsented medical treatment, [page607] see Reibl v. Hughes, [1980] 2 S.C.R. 880, Clayton v. New Dreamland Roller Skating Rink, Inc., 82 A.2d 458 (N.J. Super. Ct. App. Div. 1951); or unintended consequences, see Bettel, supra, Kirkpatrick v. Crutchfield, 100 S.E. 602 (N.C. 1919). In all of these situations, there is never any suggestion that the plaintiff consented to the battery; the focus instead is on whether the appellant intended any harm, and these cases have generally decided that no such intent is needed.

103 What is necessary, therefore, is to decide what role consent plays in an action for sexual battery. It is clear that for traditional batteries, consent is conceived of as an affirmative defence that must be raised by the defendant. As Cartwright J. said in Cook v. Lewis, [1951] S.C.R. 830, at p. 839, "where a plaintiff is injured by force applied directly to him by the defendant his case is made by proving this fact and the onus falls upon the defendant to prove 'that such trespass was utterly without his fault'". Obviously, one way to make this showing, is by establishing that the plaintiff consented to the touching. Therefore in Norberg v. Wynrib, [1992] 2 S.C.R. 226, La Forest J. stated in obiter dictum that "[c]onsent, express or implied, is a defence to battery" (p. 246). See also Reibl, supra, at p. 890 (battery "casts upon the defendant the burden of proving consent to what was done"); Hambley v. Shepley (1967), 63 D.L.R. (2d) 94 (Ont. C.A.), at p. 95; Linden, supra, at p. 67; G. H. L. Fridman, The Law of Torts in Canada (1989), vol. 1, at p. 63. If consent is merely a defence to battery, then presumably the plaintiff could establish battery without showing lack of consent. To paraphrase Cartwright J. in Cook, the plaintiff's case would be made by showing the mere application of force by the defendant. As I understand it, this is the position taken by McLachlin J. However, I have trouble concluding on these terms that the appellant necessarily intended injury. Without a fault requirement of any kind, I cannot agree that the exclusion clause [page608] would necessarily apply, and the respondent would therefore have a duty to defend.

104 This doctrine is of course consistent with our basic notions of intentional tort. A person's body is inviolable, and those who interfere with one's "intangible right to autonomy over one's own body" will be held liable: Klar, supra, at p. 41. However, not all intentional touchings are presumptively instances of battery. There are any number of contacts that are usually consensual. For example, in Mandel v. The Permanent (1985), 7 O.A.C. 365 (Div. Ct.), at p. 370, Henry J. noted that a man's placing his hand on the plaintiff's arm to guide her to the door was "merely a polite gesture and an accepted usage in daily life in a civilized society, whether or not she was in fact consenting to it". A more obvious example is certain sports, where physical contact is expected and even encouraged. What these examples show is that, in all cases, one must look to the context to understand the role of consent.

105 While, for reasons already given, consent is not a well-developed concept in battery cases, it is closely related to the more familiar requirement in tort law that a given contact be "harmful or offensive" if it is to generate liability: see M. (K.), supra, at p. 25. Unlike more traditional batteries, sexual activity by itself is not inherently harmful. Without denying the seriousness and frequency of sexual assault, the simple fact is that sexual activity -- unlike being punched, stabbed, or shot -- is usually consensual. It generally becomes harmful only if it is non-consensual, in the wider meaning of that word. Without trying to catalogue the various [page609] ways that consent may be vitiated, I note that Norberg, supra, established that simply because someone ostensibly consents to sexual ac-

tivity does not mean that their consent is valid. See, generally, Feldthusen, "The Canadian Experiment with the Civil Action for Sexual Battery", supra, at pp. 282-86.

106 That the "harmful or offensive" standard is a familiar one in tort law is shown by Wiffin v. Kincard (1807), 2 Bos. & Pul. (N.R.) 471, 127 E.R. 713 (C.P.), and Coward v. Baddeley (1859), 4 H. & N. 478, 157 E.R. 927 (Ex.). In those cases, the courts determined that touching someone on the shoulder to get their attention is not a battery, even if the recipient objected to the contact. As Linden, supra, at p. 44, points out:

> A line must be drawn between those contacts which are regarded as normal everyday events, which people must put up with in a crowded world, and those which are considered to be offensive and, therefore, unacceptable.

Klar, supra, at pp. 43-44, elaborates on this point:

> The distinction between "hostile" and "friendly" contact seems to depend upon the standard of generally acceptable conduct in society. The test is objective: what would the reasonable person consider to be acceptable? Two recent English cases demonstrate this proposition. In the first, Collins v. Wilcock, [1984] 1 W.L.R. 1172 (Q.B.), the act of a police officer in taking hold of someone's arm to restrain her from walking off was deemed to constitute a battery. The test suggested by Goff L.J. was this: "whether the physical conduct so persisted in has in the circumstances gone beyond generally acceptable standards of conduct." Ibid., at 1178... . In the second case, Wilson v. Pringle, [1986] 2 All E.R. 440 (C.A.), a schoolboy playfully pulled the schoolbag off the plaintiff's shoulder, causing him injury. In deciding whether this was a hostile touching and consequently a battery, Croom-Johnson L.J....agreed that certain conduct must be judged as [page610] "acceptable in the ordinary conduct of everyday life." [Emphasis added.]

107 In England, courts have concluded that "[t]he absence of consent is so inherent in the notion of a tortious invasion of interests in the person that the absence of consent must be established by the plaintiff": Street on Torts (10th ed. 1999), at p. 32. This issue was decided by Freeman v. Home Office, [1983] 3 All E.R. 589 (Q.B.), aff'd [1984] 1 All E.R. 1036 (C.A.), where the court held that a prisoner suing for battery because of therapeutic drug injections had the burden of proving non-consent. While it is not necessary in this appeal to decide whether the burden of proving non-consent will always rest on the plaintiff, I believe that it should for sexual battery. To repeat, sexual contact is only "harmful or offensive" when it is non-consensual. To succeed in an action for intentional battery, one must prove both that (a) the defendant intended to do the action; and (b) the reasonable person would have perceived that action as being harmful or offensive. For sexual activity, an action is harmful or offensive if it is non-consensual. Therefore in sexual battery, the trier of fact must be satisfied that the defendant intended to engage in sexual activity which a reasonable person would have perceived to be non-consensual.

108 The New Zealand High Court came to the same conclusion in H. v. R., [1996] 1 N.Z.L.R. 299, at p. 305:

> In sexual abuse cases, a conceptual difficulty with the tort has been as to whether an absence of consent is an element of the tort, or a defence. It seems to me that to the extent that it has always been necessary for the plaintiff to prove a hostile intent to ground this tort, the burden of demonstrating a lack of consent must be surmounted by the plaintiff, of course on the civil standard. I[f] that is so, lack of consent has always been, strictu sensu, an element of the offence.

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In short, the appellant's attempt to convert an intentional tort into negligence because of the possibility that he lacked a subjective intent to injure must fail. Consent, in so far as it is concerned with whether something is harmful or offensive, is an objective standard. If the plaintiff can prove that the appellant failed to meet this standard, the latter is liable for intentional sexual battery, not negligence.

109 In summary, I would advance the following basic propositions. For there to be a duty to defend, there must be the possibility of a duty to indemnify. In the context of the pleadings in this case raising in substance a sexual assault through a sexual battery, the issue of consent produces two possible results for the purposes of the duty to defend, both of which are unfavourable to the appellant. If the consent of the plaintiff was present, then no claim of sexual battery is made out since the conduct of the appellant would not be regarded objectively as being harmful or offensive, and therefore the duty to indemnify would not arise because the plaintiff's claim has no possibility of success. See State Farm Fire and Casualty Co. v. Williams, 355 N.W.2d 421 (Minn. 1984), at p. 424. On the other hand, if consent of the plaintiff is absent, the conduct of the appellant would be actionable as an intentional tort of sexual battery. As I will discuss, infra, in such a case an intent to harm is inferred, the exclusion clause would apply, and there would be no duty to indemnify. There being no state of affairs in which there could be a duty to indemnify, the duty to defend does not apply.

110 I wish to emphasize that the foregoing should not be taken to endorse in any way the inappropriate stereotype that women are to be presumed willing partners to sexual activity. See R. v. Mills, [1999] 3 S.C.R. 668, at para. 90; R. v. Osolin, [1993] 4 S.C.R. 595, at p. 670; R. v. Seaboyer, [1991] 2 S.C.R. 577, at p. 604; [page612] Federal/Provincial/Territorial Working Group of Attorneys General Officials on Gender Equality in the Canadian Justice System, Gender Equality in the Canadian Justice System: Summary Document and Proposals for Action (1992). Nothing in these reasons should be read to the contrary. Putting the onus of proving lack of consent on the plaintiff simply recognizes that in the sexual assault context, "non-consensual" is equivalent to "harmful or offensive"; and the latter has always been an element of the plaintiff's case.

111 I would also emphasize that the plaintiff's burden in a civil action to prove non-consent is much less onerous than the one faced by the prosecution in a criminal case. As Major J. noted in R. v. Ewanchuk, [1999] 1 S.C.R. 330, at para. 42, the mens rea of criminal sexual assault requires the Crown to prove beyond a reasonable doubt that the accused was "knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched". To prove the civil tort of sexual battery, by contrast, one need only prove by a balance of probabilities that the defendant knew or ought to have known that the plaintiff did not consent.

112 The onus of proving consent will be largely of theoretical importance. To meet her initial burden, the plaintiff need simply allege that the sexual activity was non-consensual. The issue will then be the same regardless of where the onus lies: on the balance of probabilities, should the defendant have known that the plaintiff did not validly consent? The only time the plaintiff's burden of pleading non-consent would be relevant is in those rare cases where, for whatever reason, the defence chooses to present no evidence. In such a case, having the onus on the plaintiff ensures that the defendant will only be liable if the plaintiff alleges, at a minimum, that the sexual activity was non-consensual. While the practical difference is thus minimal, I believe the theoretical one is important. Placing the onus of proving lack of consent on the [page613] plaintiff better reflects our traditional notions of tort law, as adapted to the relatively new tort of sexual battery.

113 Having concluded that in the context of sexual battery the "harmful or offensive" element is satisfied by showing lack of consent, I will now discuss whether the elements of a sexual battery claim necessarily prove an intent to injure on the part of the defendant. If a sexual battery claim requires proof of elements that also establish an intent to injure, then any successful claim would necessarily be excluded under the policy and there can be no duty to defend such a claim.

(b) Are There Properly Pleaded Allegations of Sexual Battery that Could Trigger the Duty to Indemnify?

114 As set out above, the first step is to determine whether there are properly pleaded allegations of sexual battery. In my opinion, this requirement is clearly satisfied. The plaintiff has alleged intentional sexual activity by the appellant, to which the plaintiff did not consent. Moreover, para. 117 of the statement of claim specifically alleges that "Scalera knew or ought to have known that [the plaintiff] did not consent to the Scalera sexual acts". The next question is whether sexual battery necessarily implies an intent to injure sufficient to trigger the exclusion clause.

115 This Court was presented with this issue, in a different context, in Norberg, supra. In that case the Court split three ways on the appropriate characterization of the actions of a doctor who convinced a drug-addicted patient to engage in sexual acts with him in return for pills to which she was addicted. This issue is not before the Court in this [page614] appeal. However, I will assume all three approaches set out in that case -- sexual battery, breach of duty, and breach of fiduciary duty -- are possible.

116 Writing for himself, Gonthier and Cory JJ., La Forest J. concluded that Wynrib's conduct amounted to sexual assault. Drawing an analogy to contract law, La Forest J. concluded that consent may be vitiated where "there is an overwhelming imbalance in the power relationship between the parties" (p. 248). If there was no valid consent, Wynrib was liable for battery.

117 What La Forest J.'s reasons left undecided is whether or not Wynrib had any intent to harm, or indeed whether such intent is necessary for sexual battery. La Forest J. did not inquire into subjective intent to harm, but instead focused on the presence or absence of valid consent. This approach is consistent with the few reported lower court decisions addressing sexual assault. For example, in M. (M.) v. K. (K.) (1989), 61 D.L.R. (4th) 392 (B.C.C.A.), the court concluded that notwithstanding the fact that the victim initiated the sexual contact, there could be no valid consent between a 41-year-old man and his 15-year-old foster daughter. Harder v. Brown (1989), 50 C.C.L.T. 85 (B.C.S.C.), and Lyth v. Dagg (1988), 46 C.C.L.T. 25 (B.C.S.C.), similarly declined to consider intention to harm, instead finding that consent was vitiated by the extreme power imbalances in the relationships.

118 One conclusion that could be drawn from these cases is that sexual battery requires no intent to harm, only the absence of consent. If this is correct, the exclusion clause would not necessarily apply to a sexual battery claim, and the respondent would have a duty to defend. However, in my view [page615] this interpretation is not correct. Consent, linked as it is to the "harmful or offensive" standard, as already discussed, is an objective standard. Sexual battery requires an objective set of circumstances such that the defendant either knew or should have known that there was no valid consent.

119 Leaving aside the physical injuries that can be inflicted by sexual assault, there can be no question that it occasions untold injury to the victim's dignity, physical integrity, and psychological well-being. The same facts that prove lack of consent will prove intent to injure; this follows because if a reasonable person should have known there was no consent, the law will not excuse that person's failure to perceive the lack of consent. On the other hand, a defendant will not be liable for sexual assault if there was no way for him or her to know that the victim did not, or could not, consent to sexual activity.

120 This Court has recognized the grave harm occasioned by sexual assault. For example, in R. v. McCraw, [1991] 3 S.C.R. 72, the Court held that threats of rape amounted to threats of serious bodily harm, within the meaning of s. 264.1(1)(a) of the Criminal Code. Cory J. aptly summarized the harm inherent in non-consensual sexual activity, at pp. 83-84:

> It seems to me that to argue that a woman who has been forced to have sexual intercourse has not necessarily suffered grave and serious violence is to ignore the perspective of women. For women rape under any circumstance must constitute a profound interference with their physical integrity. As well, by force or threat of force, it denies women the right to exercise freedom of choice as to their partner for sexual relations and the timing of those relations. These are choices of great importance that may have a substantial effect upon the life and health of every woman. Parliament's intention in replacing the rape laws with the sexual assault offences was to convey the message that rape is not just a sexual act but is basically an act of violence. See K. [page616] Mahoney, "R. v. McCraw: Rape Fantasies v. Fear of Sexual Assault" (1989), 21 Ottawa L. Rev. 207, at pp. 215-16.

See also Osolin, supra, at p. 669; Ewanchuk, supra, at para. 69 (per L'Heureux-Dubé J.). While McCraw was concerned with forcible rape, I do not think the harm is any less real just because the victim has been coerced into sex by mental as opposed to physical means. It can hardly be disputed, I think, that any type of non-consensual sex clearly evinces an intent to harm the victim thereof.

121 In the considerable jurisprudence on the point, most U.S. courts have reached the same conclusion. The majority of these cases have involved sexual assaults of children. Courts have had little difficulty in concluding that defendants in these cases are presumed to intend harm to their victims -- notwithstanding the fact that "males who are involved in such activities do not expect or intend that the females will sustain any injury": CNA Insurance Co. v. McGinnis, 666 S.W.2d 689 (Ark. 1984), at p. 690. See also B.B. v. Continental Insurance Co., 8 F.3d 1288 (8th Cir. 1993); J.C. Penney Casualty Insurance Co. v. M.K., 804 P.2d 689 (Cal. 1991); Horace Mann Insurance Co. v. Leeber, supra; State Farm Fire & Casualty Co. v. D.T.S., 867 S.W.2d 642 (Mo. Ct. App. 1993); Amercian States Insurance Co. v. Borbor, 826 F.2d 888 (9th Cir. 1987); Troelstrup v. District

Court, 712 P.2d 1010 (Colo. 1986) (en banc); Rodriguez v. Williams, 729 P.2d 627 (Wash. 1986) (en banc); Linebaugh v. Berdish, supra; Horace Mann Insurance Co. v. Independent School District No. 656, 355 N.W.2d 413 (Minn. 1984). These cases are obviously much easier than the present appeal. It is difficult to imagine someone successfully arguing that they intended no harm from sex with someone too young to consent to sexual activity.

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122 While there is more of a divergence of opinion when it comes to assaults on adults, some U.S. courts have also inferred an intent to harm in these cases. For example, in State Farm Fire and Casualty Co. v. Williams, supra, the court denied insurance coverage to someone who had sexually assaulted a man with cerebral palsy who was confined to a wheelchair. The court first examined cases involving assaults on minors, and concluded as follows, at p. 424:

> Does the fact that Williams, the victim, was an adult distinguish this case? We think not. Neither the insured nor the insurer in entering into the insurance contract contemplated coverage against claims arising out of non-consensual sexual assaults. On the other hand, if the sexual contacts were consensual, as asserted by respondent Keller, there would be no assault and hence no claim for recovery.

See also Houg, supra; Altena v. United Fire and Casualty Co., 422 N.W.2d 485 (Iowa 1988); and D. S. Florig, "Insurance Coverage for Sexual Abuse or Molestation" (1995), 30 Tort & Ins. L.J. 699.

123 Finally, I would note that the Canadian case most directly on point has reached a similar conclusion. Wilkieson-Valiente v. Wilkieson, [1996] I.L.R. para. I-3351 (Ont. Ct. (Gen. Div.)), involved an action by a young girl against her stepfather. The court disagreed with the defendant's assertion that "it is possible to commit a sexual assault without necessarily 'intending' injury" (p. 4132). Instead, the court concluded as follows at p. 4133:

> It may be conceivable, in rare circumstances, to commit a sexual assault without an intent to cause any psychological harm, (such as in the case of a transitory touching of a sleeping or unconscious victim). However, bearing in mind that "intentionally" does not refer to "desired result" but "awareness of possible result" such cases will be rare indeed. Particularly, as here, where the pleadings claim repeated sexual assaults over a period of many years on a victim who is a child, it is inconceivable that any right-thinking person would not be fully [page618] aware of the possible, indeed probable consequences of such conduct; that is, psychological harm to the victim.

124 Unlike the Court in Wilkieson-Valiente, supra, I cannot accept that one can commit sexual assault without an intent to harm: see Linden, supra, at p. 45; Restatement (Second) of Torts, s. 18 cmt. d (1965). Even if the victim is unconscious, the perpetrator has still violated another person's physical integrity. However, I agree that to prove sexual assault, a plaintiff must prove sufficient culpability on the part of the defendant that an intent to harm follows. Accordingly, the exclusion clause must apply, and the respondent has no duty to defend the plaintiff's claim of sexual battery.

(ii) Negligent Battery

(a) Elements of Negligent Battery

125 Klar, supra, defines negligent battery at p. 47:

> A negligent battery exists when the defendant causes a direct, offensive, physical contact with the plaintiff as a result of negligent conduct. The defendant's negligence consists of unreasonably disregarding a foreseeable risk of contact, even though the contact was neither desired nor substantially certain to occur.

The plaintiff has also alleged breach of duty, which is essentially negligence. In Norberg, supra, Sopinka J. relied on this theory to find Dr. Wynrib liable to Ms. Norberg. However, his reasoning was based on the professional duty owed by a physician to a patient. No such duty was alleged in the present appeal. Instead, and absent any particularized pleading by the plaintiff, I must presume that [page619] she is relying on a traditional negligent battery theory.

126 As Klar's definition makes clear, the "negligence" in negligent battery refers only to the "risk of contact". One might commit negligent battery by carelessly stretching one's arms, thereby striking someone. More commonly, negligent battery cases have involved projectiles. See Cook, supra; Ellison v. Rogers (1967), 67 D.L.R. (2d) 21 (Ont. H.C.); Hatton v. Webb (1977), 81 D.L.R. (3d) 377 (Alta. Dist. Ct.). The important point is that negligent battery is concerned with the physical consequences of one's actions. However, the appellant has not disputed the physical consequence of his actions for the purposes of this appeal. He has, appropriately, assumed the truth of the allegations contained in the plaintiff's Statement of Claim, which asserts that he intended to have sexual relations with the plaintiff. The only question is whether it was consensual, which is determined on an objective standard, as I have explained above.

127 I therefore do not find Co-operative Fire & Casualty Co. v. Saindon, supra; Newcastle (Town) v. Mattatall (1988), 52 D.L.R. (4th) 356 (N.B.C.A.); Long Lake School Division No. 30 of Saskatchewan Board of Education v. Schatz (1986), 18 C.C.L.I. 232 (Sask. C.A.), and Devlin v. Co-operative Fire & Casualty Co. (1978), 90 D.L.R. (3d) 444 (Alta. C.A.), to be relevant. These cases are not helpful in the present appeal, as they all involved unforeseen physical consequences of the actions of the insured, and asked whether the result was "substantially certain" given the defendant's actions. The "substantial certainty" test, focusing as it does on physical consequences, has no bearing on the issue of consent. The case at bar involves deciding solely whether the plaintiff validly consented to the appellant's actions. A negligent battery is properly pleaded only if the plaintiff alleges that the appellant was negligent as to the physical consequences of his actions; in other words, that he did not intend for sexual contact to [page620] occur. As explained above, lack of intention to have non-consensual sex is more properly construed as going to the "harmful or offensive" element of intentional battery, and will not found a claim for negligent battery. Therefore negligent battery will only be relevant if the pleadings allege that the appellant negligently harmed the plaintiff by disregarding a foreseeable risk of physical contact. No such allegation has been made. As the court said in Pistolesi v. Nationwide Mutual Fire Insurance Co., 644 N.Y.S.2d 819 (App. Div. 1996), at p. 820:

> ... the mere allegation that the injuries were the unintended result of an intentional act does not convert the cause of action from one sounding in intentional tort to one sounding in negligence... .

(b) Are There Properly Pleaded Allegations of Negligent Battery That Could Trigger the Duty to Indemnify?

128 Once again, the first step is to determine whether negligent battery was properly pleaded. I have concluded that it was not. As discussed above, negligent battery occurs when the defendant causes harm by negligently disregarding a foreseeable risk of physical contact. The plaintiff has not alleged such conduct; both parties have assumed, for the purposes of this appeal, that the appellant intended to have sexual contact with the plaintiff. Since there is no properly pleaded allegation of negligent battery, it is unnecessary to determine whether the exclusion clause would apply to such a claim.

(iii) Negligent Misrepresentations

129 Aside from the vague assertions of "breach of duty", the appellant notes that the plaintiff has [page621] alleged negligent acts independent of the sexual assault. For example, the statement of claim alleges negligent misrepresentations. It is unnecessary to spend much time on this issue. It is well established that one can be liable for damages to personal security caused by negligent statements, as well as acts:

> A statement of fact, on which the plaintiff relied, would give rise to liability if (i) it were inaccurate as a result of negligence (and a fortiori deceit); and (ii) it caused physical injury to the plaintiff or damage to his property.
>
> (Fridman, supra, at p. 263.)

See also Klar, supra, at p. 177; M'Alister v. Stevenson, [1932] A.C. 562 (H.L.), at pp. 580-81 (per Atkin L.J.).

130 Assuming without deciding that negligent misrepresentation has been properly pleaded here, I find that these claims are entirely derivative of the intentional sexual battery, and are thus subsumed into the latter for the purposes of the exclusion clause. The statement of claim alleges that the misrepresentations were designed to seduce the plaintiff, and convince her to engage in sexual activity with the appellant. As such, they were entirely subservient to the sexual battery. They arise from the same actions and cause the same harm. Indeed, para. 111 of the plaintiff's statement of claim alleges that the appellant "made the Scalera Representations intending to persuade [the plaintiff] to submit to the Scalera sexual acts". The West Virginia Supreme Court of Appeals reached the same conclusion in Horace Mann Insurance Co. v. Leeber, supra, at p. 587, where an exclusion clause applied in spite of allegations of negligent seduction of a student by a teacher. The court concluded that the allegations of "negligence" in the complaint were

> a transparent attempt to trigger insurance coverage by characterizing allegations of [intentional] tortious conduct [page622] under the guise of 'negligent' activity. [Insertion in Leeber; quoting Linebaugh, supra, at p. 406.]

I reach the same conclusion in this appeal. While courts must be careful not to restrict pleading in the alternative unduly and should only subsume allegations of negligence that are clearly derivative of the intentional tort, I conclude that this is one of those cases. The plaintiff has clearly alleged intentional conduct by the appellant. Without ruling out the possibility that the plaintiff's pleadings could support claims of both intention and negligence as a matter of tort law, I conclude as a matter of insurance law that the negligent claims are subsumed for the purposes of the exclusion clause. The allegations of negligent misrepresentation are derivative of the intentional sexual assault claims, and cannot trigger the duty to defend.

(iv) Breach of Fiduciary Duty

131 The final approach to allegations of sexual misconduct in Norberg, supra, was the fiduciary duty route taken by McLachlin J., L'Heureux-Dubé J. concurring. They concluded that the duty owed from a doctor to the patient met the test for fiduciary relationships set out by Wilson J. in Frame v. Smith, [1987] 2 S.C.R. 99, at p. 136. No doubt relying on these reasons, the plaintiff has also alleged breach of fiduciary duties against the appellant.

132 Without commenting on whether the relationship between the appellant and the plaintiff could potentially be characterized as a fiduciary one, the plaintiff's claims for breach of fiduciary duty are excluded much for the same reasons as the negligence claims. Looking beyond the label to what is actually alleged in the pleadings, and without expressing any opinion on the validity of a fiduciary duty claim on the facts of this appeal, there are no facts pleaded to suggest that the breach of fiduciary [page623] duty was anything but intentional in nature. The appellant was alleged to have intentionally seduced the plaintiff, and whether or not this can be characterized as a fiduciary duty claim, any injuries resulting therefrom were caused intentionally. The harm caused by any breach of fiduciary duty is identical to that caused by the sexual battery, and the claim is therefore subsumed, for the purpose of the exclusion clause, into the intentional battery.

(v) Conclusion

133 In summary, all of the plaintiff's claims against the appellant are covered by the exclusion clause for injuries caused intentionally. To prove her case, the plaintiff will have to establish that the appellant knew or should have known that the plaintiff did not validly consent to sexual relations with him. In such a situation, the appellant will not be heard to complain that he did not intend any harm. One who engages in objectively non-consensual sexual activity will be presumed to have intended harm; whether or not he subjectively intended harm will not change the injurious nature of his actions, and will not deny an insurer its bargained-for exclusion of intentionally injurious activities. This conclusion is consistent with the basic principles of insurance law discussed above.

134 In particular, it is consistent with the reasonable expectations of the parties. In this respect, I agree with the Iowa Supreme Court in Altena, supra, at p. 490, where the court quoted the following passage from Rodriguez by Brennan v. Williams, 713 P.2d 135 (Wash. Ct. App. 1986), at pp. 137-38:

> ... [t]he average person purchasing homeowner's insurance would cringe at the very suggestion that [the person] was paying for such coverage. And certainly [the person] would not want to share that type of risk with [page624] other homeowner's policy holders. [Insertions added in Altena.]

Similarly, in Horace Mann Insurance Co. v. Leeber, supra, at pp. 586-87, the court said the following:

> The majority rule rejecting an alleged duty to defend or to pay in sexual misconduct liability insurance cases is consistent with the "doctrine of reasonable expectations." ... [W]e simply believe that the insured under a homeowner's insurance policy does not reasonably expect the insurer to defend an action against the insured for, and to pay for, damages alleged to have been caused by the sexual misconduct of the insured.

See also R. Bell, "Sexual Abuse and Institutions: Insurance Issues" (1996), 6 C.I.L.R. 53, at pp. 54-55.

135 This conclusion is also consistent with basic insurance theory. Insurance is meant to cover risk of loss. See C. Brown, Insurance Law in Canada (loose-leaf), vol. 1, at p. 1-1. Where the loss is caused intentionally, it is hardly the result of a risk. Regardless of whether an insurance company could find a way profitably to insure someone against intentionally caused injuries, the respondent clearly did not believe it was doing so when it wrote the policy at issue in this appeal. Sexually assaulting someone is not like getting in a car accident, or having someone injure themselves by slipping on an unshovelled sidewalk. If the plaintiff is to succeed, she must prove that the appellant's conduct went beyond mere negligence, and rose to the level of sexual assault. Absent express language to the contrary, I am unable to conclude that the parties to this insurance contract agreed to cover such a claim.

136 Nor do I believe that contra proferentem, or any other insurance principle, is sufficient to overcome these conclusions. While ambiguous language will often be construed against the insurer, this consideration alone cannot be determinative. Moreover, I find that the most accurate reading of the language [page625] and intentions of the contract is that the exclusion clause applies to the allegations of sexual misconduct made by the plaintiff.

D. Other Arguments Raised by the Respondent

137 The respondent has also argued that the actions alleged by the plaintiff are not "accidents" or "occurrences", as required by the policy, and that s. 28 of the British Columbia Insurance Act, excludes the claim because it alleges a criminal act. Given my interpretation of the exclusion clause, I find it unnecessary to consider these other questions and therefore express no opinion on them.

VI. Summary and Disposition

138 I believe my conclusions in this appeal can be summarized fairly briefly:

1. An insurance company only has a duty to defend when a lawsuit against the insured raises a claim that could potentially fall within coverage.
2. In determining if a claim falls within coverage, courts are not bound by the labels chosen by the plaintiff, but must determine the true nature of the claim stated in the pleadings.

3. In this appeal, the plaintiff has stated three possible claims arising out of an alleged sexual assault: sexual battery, negligent battery, and breach of fiduciary duty.

   None of these claims could potentially fall within coverage because, even if ultimately successful, the respondent will have no duty to indemnify owing to the insurance policy's exclusion for injuries caused intentionally by the insured.

   a. Sexual battery requires proof that a reasonable person should have known that the plaintiff did not validly consent to the sexual activity in question. Since non-consensual [page626] sexual activity is inherently harmful, any injuries resulting therefrom are intentionally caused, and the exclusion clause would apply. If, to the contrary, a reasonable person would not have known that the plaintiff did not validly consent, the plaintiff's claim will fail, there will be no duty to indemnify, and therefore equally no duty to defend.
   b. Claims of negligence and breach of fiduciary duty are either not properly pleaded, or are subsumed into the sexual battery in this case because these claims are based on the same facts and resulted in the same harm. Therefore the exclusion clause applies equally to them.

4. Since there is no possible set of circumstances in which one of the plaintiff's claims could trigger indemnity, there is no duty to defend.

139 For the foregoing reasons, I would dismiss the appeal with costs.

cp/d/qlhbb