SUPREME COURT OF CANADA

CITATION: Fullowka *v.* Pinkerton's of Canada Ltd., 2010 SCC 5, [2010] 1 S.C.R. 132

DATE: 20100218
DOCKET: 32735

BETWEEN:

Sheila Fullowka, Doreen Shauna Hourie, Tracey Neill, Judit Pandev, Ella May Carol Riggs, Doreen Vodnoski, Carlene Dawn Rowsell, Karen Russell and Bonnie Lou Sawler

Appellants

and

Pinkerton's of Canada Limited, Government of the Northwest Territories as represented by the Commissioner of the Northwest Territories, National Automobile, Aerospace, Transportation and General Workers Union of Canada, Timothy Alexander Bettger and Royal Oak Ventures Inc. (formerly Royal Oak Mines Inc.)

Respondents

AND BETWEEN:

James O'Neil

Appellant

and

Pinkerton's of Canada Limited, Government of the Northwest Territories as represented by the Commissioner of the Northwest Territories, National Automobile, Aerospace, Transportation and General Workers Union of Canada and Timothy Alexander Bettger

Respondents

- and -

Attorney General of Canada and Attorney General of Ontario

Interveners

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: (paras. 1 to 166)

Cromwell J. (McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ. concurring)

Sheila Fullowka, Doreen Shauna Hourie,
Tracey Neill, Judit Pandev, Ella May Carol Riggs,
Doreen Vodnoski, Carlene Dawn Rowsell,
Karen Russell and Bonnie Lou Sawler *Appellants*

v.

Pinkerton's of Canada Limited, Government of the
Northwest Territories as represented by the
Commissioner of the Northwest Territories,
National Automobile, Aerospace, Transportation
and General Workers Union of Canada,
Timothy Alexander Bettger and
Royal Oak Ventures Inc. (formerly Royal Oak Mines Inc.) *Respondents*

- and -

James O'Neil *Appellant*

v.

Pinkerton's of Canada Limited, Government of the
Northwest Territories as represented by the
Commissioner of the Northwest Territories,
National Automobile, Aerospace, Transportation
and General Workers Union of Canada
and Timothy Alexander Bettger *Respondents*

and

Attorney General of Canada and
Attorney General of Ontario *Interveners*

Indexed as: Fullowka *v.* Pinkerton's of Canada Ltd.

2010 SCC 5

File No.: 32735.

2009: May 14; 2010: February 18.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

on appeal from the court of appeal for the northwest territories

Torts — Negligence — Duty of care — Territorial government — Security company — Miners — Ongoing bitter strike at mine — Striking members of local union committing several criminal acts against mine property and replacement miners, including planting bomb in mine that killed nine miners — Surviving family members of murdered miners suing security company hired by mine owner to protect property and miners and territorial government for non-closure of mine in spite of clear knowledge of dangerous situation — Miner among first on scene of explosion also

suing claiming damages for post-traumatic stress disorder — Trial judge finding both security company and government liable in negligence for failing to prevent murders — Whether security company and government owed duty of care to murdered miners — If so, whether they breached that duty.

Torts — Negligence — Duty of care — Unions — Miners — Ongoing bitter strike at mine — Striking members of local union committing several criminal acts against mine property and replacement miners, including planting bomb in mine that killed nine miners — Surviving family members of murdered miners suing unions — Miner among first on scene of explosion also suing claiming damages for post-traumatic stress disorder — Whether trial judge erred finding that national and local unions breached their duty of care to miners — Whether national and local unions separate legal entities — Whether national union directly or vicariously liable for acts of striking members of local union.

In May 1992, a strike began at the Giant Mine near Yellowknife. The employees' bargaining agent, CASAW Local 4, and the mine owner, Royal, had reached a tentative agreement, but it was rejected by the Local's membership. Royal decided to continue operating the mine during the ensuing strike with replacement workers. The strike rapidly degenerated into violence. Faced with attacks on its security guards and unable to control the situation, the private security firm Royal had hired withdrew. Royal turned to Pinkerton's for security services and by the end of May, Pinkerton's had 52 guards on site. The violence continued and escalated after Pinkerton's arrival. In mid-June, a large number of strikers rioted, damaging property and injuring security guards and replacement workers. Following the riot, Royal fired about 40 strikers, including W, and the police

laid many criminal charges. Later in the same month, three strikers, including B, entered the mine through a remote entrance. While underground, they stole explosives and painted graffiti threatening replacement workers. As the summer progressed, the atmosphere grew calmer although some trespassing, property damage and violence continued. On Royal's urging, Pinkerton's reduced its force to 20 guards. The police presence was also reduced. In late July, some strikers, including B, set an explosion which blew a hole in a satellite dish on mine property and, in early September, set a second explosion which damaged the mine's ventilation shaft plant. In the early morning hours of September 18, W evaded security, entered the mine and, while underground, planted an explosive device. When a man car carrying nine miners triggered the trip wire, they were all killed in the explosion. N was among the first on the scene and discovered the dismembered bodies of his colleagues, including a close friend. The territorial government ordered closure of the mine following the bombing. At the time of the fatal blast, CASAW Local 4 was affiliated with CASAW National which, in 1994, amalgamated with CAW National.

The miners' survivors sued Royal, Pinkerton's and the territorial government for negligently failing to prevent the murders. They also claimed against the strikers' national union, some union officials and members of CASAW Local 4 for failing to control W and for inciting him. As for N, he brought an action against the same defendants and Local 4, seeking damages for post-traumatic stress disorder which he alleged resulted from his having come upon the scene of the fatal explosion. Their claims largely succeeded at trial but were dismissed by the Court of Appeal.

Held: The appeals should be dismissed.

The plaintiffs do not claim that Pinkerton's and the government are responsible for W's tort; the claim is that they were negligent in trying to prevent it. The relationship between the murdered miners and Pinkerton's and the territorial government meets the requirements of foreseeability and proximity such that a *prima facie* duty of care existed.

In light of the trial judge's finding that the territorial government's mine safety division was aware that the explosion in the vent shaft could have caused a major fire, potentially endangering the lives of the men working underground at the time, there is no reason to interfere with his conclusion that the killing of the miners "was the very kind of thing that was likely to happen". As for Pinkerton's, the trial judge found that the company was advised by the mine superintendent that there was a bomb threat. Pinkerton's also knew there had been an explosion at an electrical substation, had received information that the strikers had explosives and intended to use them, and had heard threats from union members to the effect that they intended to kill the replacement workers. These factual findings support a conclusion not only that a reasonable person would have foreseen death resulting from an explosion, but that Pinkerton's actually foresaw that risk.

In cases of this nature, the proximity inquiry is concerned with whether the case discloses factors which show that the relationship between the plaintiff and the defendant was sufficiently close and direct to give rise to a legal duty of care, considering such factors as expectations, representations, reliance and the property or other interests involved. The reasonable expectations of both the miners and Pinkerton's as well as Pinkerton's undertaking to exert some control over the risk to the miners supported the trial judge's finding of proximity. The miners

reasonably relied on Pinkerton's to take reasonable precautions to reduce the risk and Pinkerton's must have shared the miners' expectation since the whole point of its presence at the mine was to protect property and people and help secure the site so that the mine could continue to operate. With respect to the government, the trial judge did not err in finding that there was a sufficiently close and direct relationship between the inspectors and the miners. The mine inspectors had a statutory duty to inspect the mine and to order the cessation of work if they considered it unsafe. In exercising this statutory power, the inspectors had been physically present in the mine on many occasions, had identified specific and serious risks to an identified group of workers and knew that the steps being taken by management and Pinkerton's to maintain safe working conditions were wholly ineffectual.

There are no residual policy considerations, alone or in combination, sufficiently compelling to oust the *prima facie* duty of care on the part of Pinkerton's and the territorial government. Since the plaintiffs seek to have these parties held responsible for their own negligence, not for the fault of others, holding them liable for their own negligence does not undermine the general principles that tort liability is personal and fault-based. Nor do considerations of control and autonomy negate the *prima facie* duty of care. Control is concerned with whether the defendant was either materially implicated in the creation of the risk or had control over a risk to which others have been invited. While it is true that Pinkerton's and the territorial government had no direct control over W, given their contractual and statutory obligations, it is misleading to speak of an absence of control over W since they had a significant measure of control of the risk that his activities would kill miners. As for autonomy, it is concerned with a person's right to engage in risky activities and to choose not to intervene to prevent others from doing so or to save them from the consequences. The miners were aware that they faced risk and decided to accept it, but they

made that choice in light of the assurances given to them and with the reasonable expectation that Pinkerton's and the territorial government would make reasonable efforts to guard against that risk. Pinkerton's surrendered much of its autonomy by its contractual undertaking with Royal to guard the miners. The territorial government had a statutory responsibility for mine safety and its autonomy gave way to its statutory duties. Pinkerton's and the territorial government were not mere bystanders who happened upon a dangerous situation and decided not to get involved. Given their contractual and statutory obligations, it does not unduly interfere with their autonomy to impose a duty on them to take reasonable care for the miners' safety. The proposed duty of care does not expose the government to indeterminate liability. The duty is to the finite group of miners working in the mine which the inspectors had inspected repeatedly. The concern about the potential for over- or under-regulation and conflicting duties is not justified in the circumstances of this case.

While the trial judge was correct in finding that both Pinkerton's and the territorial government owed the murdered miners a duty of care, he erred in finding that they did not meet the requisite standard of care. The trial judge failed to articulate the standard of care to which Pinkerton's was to be held, given the limitation of resources imposed by its contract with the mine owner and W's determination to commit an intentional, criminal act. To the extent that the judge required Pinkerton's to ensure that the entrances were properly guarded to avoid all clandestine access to the mine, he imposed an absolute duty, not a duty of reasonable care. The trial judge also did not indicate what "properly" guarding the entrances required Pinkerton's to do. Moreover, his reasons contain contradictory findings highly relevant to his conclusion about Pinkerton's breach of its standard of care. These diametrically opposed findings of fact on a critical issue constitute clear and determinative errors and require appellate intervention. With regard to the government,

the trial judge erred in law by rejecting the relevance and legal effect of good faith reliance on legal advice received by officials about the scope of their statutory powers. The mining inspectors had been advised that their jurisdiction did not permit them to close the mine for reasons derived from labour relations issues and criminal activity. Although that advice was wrong, in the context of allegations of negligence against those responsible for regulating mine safety, the fact that this advice was received and acted on cannot be dismissed — as the trial judge did — as being of "no consequence". This advice goes precisely to the issue of whether the government took reasonable care in deciding not to close the mine. The reliance on that advice, in the circumstances of this particular case, met the government's standard of care.

The trial judge also applied the wrong legal test for causation. In not applying the "but for" test, the trial judge committed a reversible error. This case does not fall into the class of exceptional situations in which the test for causation should be relaxed to the "material contribution" standard.

The trial judge's findings of liability with respect to the claims against the national union, union officers and members cannot be sustained. The trial judge erred both in concluding that Local 4 and CASAW National were a single legal entity and in considering the conduct of all union participants cumulatively. A local union which is certified as a bargaining agent under the *Canada Labour Code* is a legal entity capable of being sued in its own right in relation to the discharge of its function and performance of its role in the field of labour relations. Here, Local 4 was the certified bargaining agent for the mine workers and had legal rights and obligations distinct from those of the national union. Furthermore, the provisions of the union constitution underline

the separate and autonomous status of the national and local unions and the merger agreement treats the national union and the local unions as separate entities. Under the union constitution and merger agreement, the national and local unions have their own management structure, areas of responsibility and assets and liabilities. CAW National did not assume the debts and obligations of CASAW Local 4 upon the merger and its liability may only be sustained on the basis of its own acts or on the principles of joint and vicarious liability.

CAW National is not directly liable for the acts of Local 4's executive members. The trial judge's reasoning was that the acts of the Local's executive members should be considered to be acts of CASAW National. CAW National, on merger, acquired CASAW National's obligations and liabilities; however, because the trial judge erred by concluding that the acts of CASAW Local 4 were the responsibility of CASAW National, it follows that CAW National did not assume CASAW Local 4's obligations or liabilities on merger. CAW National is also not vicariously liable for the acts of B and W as members of Local 4. The trial judge's imposition of vicarious liability on the basis of the national unions' control of CASAW Local 4 cannot stand. Nor does the relationship between CAW National and the members of Local 4 render CAW National vicariously liable in a broad sense for torts committed by members of the Local in the course of a strike. Union members do not fall into any of the traditional categories of vicarious liability; nor is union membership closely analogous to any of those categories. The relationship between CASAW National and the striking union members W and B was not sufficiently close to justify imposing vicarious liability on the national union for their unlawful acts. Local 4 was a separate entity, had a large measure of autonomy under the union constitution and, by early July 1992, had the sole responsibility of negotiating with Royal.

CAW National cannot be found liable as a joint tortfeasor with W. Concerted action liability may be imposed where the alleged wrongdoers acted in furtherance of a common design — this means that all participants must act in furtherance of the wrong. Here, there is no basis in law or in fact for a finding that CAW National's liability could be sustained on the basis of concerted action liability because it "incited and participated in W's tort and contributed to the deaths". The trial judge's findings of fact do not meet the applicable test. There was no finding of any common design between W and CAW National to murder the miners and no finding that the murders were committed in direct furtherance of any other unlawful common design between W and the union.

The claims against B should be dismissed. The trial judge's reasons and findings of fact preclude imposing liability on B on the basis that he was a joint tortfeasor with W. As for causation, the trial judge did not apply the "but for" test and failed to assess B's own conduct individually. As to the imposition of a duty of care, the claim against B does not fall into the category of cases in which the defendant's act foreseeably causes physical harm to the plaintiff. It was W's act, not B's, which caused the physical harm. B had no duty to warn, and a duty to prevent W's acts should not have been imposed on B. He had no control over W and the trial judge made no finding that he was in any way aware of his plans.

N's claims must also be dismissed. The basis for liability of the defendants was the same in both actions. Since the defendants did not breach their duties in tort to the miners, they did not breach any duties owed to N. No submissions have been advanced that the outcome in N's case should be different based on the fact that there were some different parties named in his action.

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AFL-CIO-CLC, Local 1733 (1976), 16 N.B.R. (2d) 361; *International Longshoremen's Association, Local 273 v. Maritime Employers' Association*, [1979] 1 S.C.R. 120; *Bazley v. Curry*, [1999] 2 S.C.R. 534; *John Doe v. Bennett*, 2004 SCC 17, [2004] 1 S.C.R. 436; *Mainland Sawmills Ltd. v. U.S.W., Local 1-3567*, 2007 BCSC 1433, 62 C.C.E.L. (3d) 66; *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570; *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403; *E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*, 2005 SCC 60, [2005] 3 S.C.R. 45; *Re Oil, Chemical & Atomic Workers & Polymer Corp.* (1958), 10 Lab. Arb. Cas. 31; *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3; *Newcastle (Town) v. Mattatall* (1987), 78 N.B.R. (2d) 236, aff'd (1988), 87 N.B.R. (2d) 238; *The Koursk*, [1924] P. 140.

Statutes and Regulations Cited

Canada Labour Code, R.S.C. 1985, c. L-2, ss. 3(1) "bargaining agent", "trade union", 36(1)(*a*).

Constitution Act, 1867.

Mining Safety Act, R.S.N.W.T. 1988, c. M-13, ss. 2, 3, 5(3), 8(1)(a), (2), (9), 42, 43.

Mining Safety Regulations, R.R.N.W.T. 1990, c. M-16, ss. 4, 15, 125(10), 138.

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Jeffrey B. Champion, *Q.C.*, *J. Philip Warner*, *Q.C.*, and *W. Benjamin Russell*, for the appellants Fullowka et al.

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Written submissions only by *Robert G. McBean*, *Q.C.*, for the respondent Royal Oak

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John S. Tyhurst, for the intervener the Attorney General of Canada.

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The judgment of the Court was delivered by

CROMWELL J. —

I. Introduction

[1] During a bitter strike at the Giant Mine in Yellowknife, N.W.T., one of the strikers, Roger Warren, evaded security and surreptitiously entered the mine. He set an explosive device which, as he intended, was detonated by a trip wire, killing nine miners. Their survivors and another worker who came upon the carnage after the explosion sued the mine owner, its security firm and the territorial government for negligently failing to prevent the murders. They also claimed against the strikers' union, some union officials and members for failing to control Mr. Warren and for inciting him. Their claims largely succeeded at trial but were dismissed on appeal to the Court of Appeal. The principal issues on the appeal to this Court are whether the security firm and the government should be liable in negligence for failing to prevent the murders and whether the unions should be responsible, directly or vicariously, for the miners' deaths. The claims involving the mine

owner, its chief executive officer and one of its directors have been settled and are therefore not before us.

[2] In my opinion, the appeals should be dismissed. Although I would find that the security firm and the government owed a duty of care, my view is that the trial judge erred when he found that they had breached that duty. With respect to the claims against the union, union officers and members, I agree with the Court of Appeal that the trial judge's findings of liability cannot be sustained. I also agree with the Court of Appeal that the claims of Mr. O'Neil (the worker who came upon the carnage) should have been dismissed.

II. Overview of Facts, Claims and Proceedings

A. *Facts*

[3] The facts, in very brief overview, are as follows.

[4] On May 23, 1992, a strike began at the Giant Mine, a gold-producing facility near Yellowknife in the Northwest Territories. A few weeks earlier, the employees' bargaining agent, Local 4 of the Canadian Association of Smelter and Allied Workers ("CASAW Local 4") and the mine owner, Royal Oak Mines Inc. ("Royal Oak"), had reached a tentative agreement, but it was rejected by the Local's membership approximately one week before the strike began. Royal Oak decided to continue operating the mine during the ensuing strike with replacement workers.

[5] The strike rapidly degenerated into violence. Strikers took control of most of the mine property. Preventing trespass proved very difficult: the mine property was very large, included 23 points of entry to the underground and was bisected by a public highway. Many illegal and violent acts occurred during the strike. There were threats of bodily harm including gang rape and death; stalking and harassment of replacement workers and their families; assaults on security guards and police officers; wholesale disobedience of court injunctions aimed at controlling the violence; destruction of property by explosions; interruption of the power supply to the mine and to the nearby city, including the local hospital; vandalism, including arson, environmental spills and damage to mine property; and infiltration of the mine site for sabotage. Faced with attacks on its security guards and unable to control the situation, the private security firm Royal Oak had hired withdrew. Royal Oak turned to Pinkerton's of Canada Ltd. for security services and by the end of May, Pinkerton's had 52 guards on site.

[6] The violence continued and escalated after Pinkerton's arrival. In mid-June, a large number of strikers rioted, damaging property and injuring security guards and replacement workers. The riot was eventually broken up by police using tear gas and firing warning shots. Following the riot, Royal Oak fired about 40 strikers, including Mr. Warren, and the police laid many criminal charges. Later in the same month, three strikers including Timothy Bettger entered the mine through a remote entrance, the Akaitcho mine shaft. While underground, they stole explosives and painted graffiti threatening replacement workers. This event became known as the "graffiti run".

[7] As the summer progressed, the atmosphere grew calmer although some trespassing, property damage and violence continued. On Royal Oak's urging, Pinkerton's reduced its force to

20 guards. The police presence was also reduced. But the calmer atmosphere did not last. In late July, some strikers, including Mr. Bettger, set an explosion which blew a hole in a satellite dish on mine property. In early September, some strikers, including Mr. Bettger, set a second explosion which damaged the mine's ventilation shaft plant.

[8] Finally, in the early morning hours of September 18, Mr. Warren entered the underground through Akaitcho and descended to the 750 foot level. He walked about 1.5 kilometres underground to an active area of the mine. He used machinery to transport explosives and attached a trip wire to 25-30 sticks of dynamite and a bag of a nitrate-based explosive. Undetected throughout, he left the mine through another exit. At about 8:45 a.m., a man car carrying nine miners triggered the trip wire. All nine were killed in the explosion. James O'Neil was among the first on the scene, having been sent in to investigate why the air pressure in the mine had suddenly dropped. He discovered the dismembered bodies of his colleagues, including a close friend.

[9] Mr. Warren confessed to having planted the bomb. He was found guilty of nine counts of second degree murder and sentenced to life in prison. No one else was found guilty of a criminal offence with respect to the September 18 bombing. Other strikers were found guilty of a variety of criminal acts related to the strike, including Mr. Bettger who was sentenced to three years in jail for his role in the graffiti run, the ventilation shaft bombing and another explosion.

[10] The Government of the Northwest Territories ordered closure of the mine following the bombing, a step it had decided not to take earlier even when faced with clear knowledge of the dangerous situation. The strike ended after 18 months. Giant Mine ceased operating in 2004.

B. *Claims*

[11] Two actions went to trial together. In the first, the *Fullowka* action, the plaintiffs were the surviving family members of the murdered miners. They claimed on their own behalf and on behalf of their dependent children and/or grandchildren for damages occasioned by the wrongful deaths of their loved ones. In the second action, Mr. O'Neil claimed damages for post-traumatic stress disorder which he alleged resulted from his having come upon the scene of the fatal explosion.

[12] There were some differences in the defendants named in the two actions, but the bases of their alleged liability were the same in both. In summary, the claims in addition to those against Mr. Warren were as follows:

(a) Pinkerton's was sued in negligence, the gist of which was failing to undertake all reasonable safety precautions including those which the mine owner failed to carry out; it was also sued as an occupier of the mine property.

(b) The Government of the Northwest Territories was sued in its capacity as a regulator. The plaintiffs alleged that it and the individual officials (Mr. Whitford as Minister of Safety and Public Services and Mr. Turner as Chief Inspector of Mines) failed in their duties to the murdered miners to adopt and to implement policies and procedures that would attain and maintain safe working conditions at the mine and to order cessation

of work at the mine until it was safe.

(c) The union was alleged to be directly and vicariously liable for breaches of a duty to avoid conduct that created a foreseeable risk of harm, for failing to make clear to all persons under its influence that causing death or injury was unacceptable, failing to prevent Mr. Warren from acting and failing to warn the deceased miners.

(d) Some individual union members in addition to Mr. Warren were sued for assisting him and inciting violence.

C. *Proceedings*

[13] After a nine-month trial, Lutz J. gave detailed reasons for judgment extending to 1300 paragraphs: 2004 NWTSC 66, 44 C.C.E.L. (3d) 1. He made the following findings of liability. Pinkerton's was liable for failing to take reasonable steps to keep Mr. Warren from entering the mine and planting the bomb. The government was liable because of the conduct of its officials: they should have used their statutory powers to shut down the mine in the face of the unsafe conditions created by the violent strike. The union and some of its defendant officers and members were liable. In the trial judge's view, the national and local unions were one entity and their representatives incited, acquiesced in, or at least did nothing to stop the violence. The national union was, he held, vicariously liable for the torts of union officers and members.

[14] The Court of Appeal reversed these findings, holding that the trial judge had erred in

three critical areas: 2008 NWTCA 4, 66 C.C.E.L. (3d) 1. He erred, the court said, in finding that Pinkerton's and the government owed a duty of care in negligence to the appellants. He also erred by applying the wrong legal test for determining whether the wrongful acts caused the miners' deaths. Finally, he erred in several respects in his consideration of the union's liability: by treating a national union and its local as a single entity, by proceeding on the basis that the national union had assumed the debts and obligations of one of its predecessor's local unions, in finding a national union vicariously liable for the acts of members of a local and in finding that it had incited Mr. Warren's murderous acts.

III. Analysis

[15] My analysis will be set out in four main sections. In the first, I will consider whether Pinkerton's and the government owed a duty of care to the murdered miners to take reasonable steps to prevent Mr. Warren's intentional wrongful act and, if so, whether they breached that duty. My conclusion is that they did owe a duty of care but that they did not breach it. I will then consider whether the trial judge applied the wrong legal test for causation. In my respectful view, he did. In the third section of the analysis, I will address the claims against the union. The questions to be answered are whether a national union and its local union are separate legal entities, whether vicarious liability should be found and whether the trial judge's findings concerning incitement are sound. I conclude that the national and the local unions are separate legal entities, that vicarious liability should not have been found and the national union cannot be found to have incited Mr. Warren. Finally, I will consider the claim against Mr. Bettger and the claim advanced by Mr. O'Neil. In my view, the claims against Mr. Bettger and by Mr. O'Neil should be dismissed.

A. *Pinkerton's and the Government: Duty and Standard of Care*

(1) Duty of Care

[16] The appellants do not allege that either Pinkerton's or the Government actually inflicted the fatal injuries on the murdered miners; rather, they allege that Pinkerton's and the government breached a duty to take reasonable care to prevent the harm inflicted by Mr. Warren. The Court of Appeal characterized this as a claim that Pinkerton's and the government were liable for Mr. Warren's tort (para. 98). This however is not the right way to frame the issue because it does not accurately reflect the appellants' claims.

[17] We are here concerned with allegations of direct liability. Simply put, the appellants do not claim that Pinkerton's and the government are responsible for Mr. Warren's tort; the claim is that they were negligent in trying to prevent it. The appellants' position is that primary liability should be imposed based on the fault of these two defendants: see C. McIvor, *Third Party Liability in Tort* (2006), at p. 1; *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983, at paras. 25-26. The question is not, therefore, whether these defendants are responsible for the tort of another, but whether they, in relation to another's tort, failed to meet the standard of care imposed on them and thereby caused the ultimate harm.

[18] This question must be resolved by an analysis of the applicable legal duties, following the approach set down by the Court in a number of cases, including *Cooper v. Hobart*, 2001 SCC

79, [2001] 3 S.C.R. 537; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562; *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263; *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643; and *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129. The analysis turns on whether the relationship between the appellants and the defendants discloses sufficient foreseeability and proximity to establish a *prima facie* duty of care and, if so, whether there are any residual policy considerations which ought to negate or limit that duty of care: see, e.g., *Hill*, at para. 20. The analysis must focus specifically on the relationships in issue, as there are particular considerations relating to foreseeability, proximity and policy in each: see, e.g., *Hill*, at para. 27.

[19] In my view, the relationship between the murdered miners and Pinkerton's and the government meets the requirements of foreseeability and proximity such that a *prima facie* duty of care existed. I also conclude that these *prima facie* duties are not negated by policy considerations. In these respects, I part company with the Court of Appeal.

[20] It will be helpful to consider foreseeability, proximity and residual policy considerations in turn.

(a) *Foreseeability*

[21] In the view of both the trial judge and the Court of Appeal, the test for foreseeability in a case like this one is whether the harm would be viewed by a reasonable person as being very likely to occur: C.A. reasons, at paras. 53-54. The Court of Appeal upheld the trial judge's finding that this

foreseeability requirement was met in the case of both Pinkerton's and the government. Although the respondents challenge this conclusion, it is, in my view, well supported by the evidence.

[22] The trial judge found that Pinkerton's was advised by the superintendent of the mine in June that there was a bomb threat (para. 95), that Pinkerton's knew there had been an explosion in early June at an electrical substation that blew one of its guards a long distance away off his feet (para. 96), that Pinkerton's had received information that the strikers had explosives and intended to blow up the head frame, the mill or the vent shaft (para. 98) and that Pinkerton's had heard threats from union members to the effect that they intended to kill the replacement workers (para. 100), that they planned a "surprise party for the scabs" involving explosives (para. 115). These factual findings support a conclusion not only that a reasonable person would have foreseen death resulting from an explosion, but that Pinkerton's actually foresaw that risk.

[23] As for the government, the trial judge found that the mine safety division was aware that a set explosion in the vent shaft on September 2 could have caused a major fire which would have pumped high concentrations of smoke and noxious gases into the mine workings, potentially endangering the lives of the 40 men working in the underground at the time (para. 157). His conclusion was that the killing of the miners "was the very kind of thing that was likely to happen" (para. 812). Again, and like the Court of Appeal, I see no reviewable error in that finding.

[24] Given that conclusion, it is not necessary to address the question of whether the "very likely to occur" test for forseeability sets too high a standard or of whether foresight of physical harm short of grievous bodily harm would be sufficient to satisfy the forseeability requirement.

(b) *Proximity*

(i) Legal Principles

[25] The appellants' claims against Pinkerton's and the government are based on their alleged failure to protect the murdered miners from danger created by Mr. Warren's intentional wrongful acts. The case, therefore, is concerned with omissions by these defendants to prevent harm to the miners caused by another.

[26] In cases of this nature, the law requires close examination of the question of proximity. The inquiry is concerned with whether the case discloses factors which show that the relationship between the plaintiff and the defendant was sufficiently close and direct to give rise to a legal duty of care, considering such factors as expectations, representations, reliance and the property or other interests involved: *Hill*, at paras. 23, 24 and 29. Proximity is not confined to physical proximity, but includes "such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act": *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.), at p. 581.

[27] The Court discussed proximity in detail in *Childs*, at paras. 31-46. In *Childs*, as here, the proposed duty was to take care to prevent harm caused to the plaintiff by a third party; in other words, what was proposed there was a positive duty to act even though the defendant's conduct had not directly caused foreseeable physical injury to the plaintiff. The Court noted that there are at least

three factors which may identify the situations in which the law has recognized such duties (paras. 38-40). The first is that the defendant is materially implicated in the creation of the risk or has control of the risk to which others have been invited. The second is the concern for the autonomy of the persons affected by the positive action proposed. As the Chief Justice put it: "The law . . . accepts that competent people have the right to engage in risky activities . . . [and] permits third parties witnessing risk to decide not to become rescuers or otherwise intervene" (para. 39). The third is whether the plaintiff reasonably relied on the defendant to avoid and minimize risk and whether the defendant, in turn, would reasonably expect such reliance.

(ii) Pinkerton's

[28] The appellants maintain that the necessary proximity existed here between the miners and Pinkerton's: it undertook management of the risk and assumed responsibility to protect the miners from intimidation and injury by the strikers. Pinkerton's must have understood that the miners reasonably relied on it to do so: it assured the miners and other employees that they would be safe if they continued to work during the strike and it knew that Royal Oak was assuring mine workers, mainly on the basis of Pinkerton's presence, that they would be safe. These circumstances, the appellants contend, created a special relationship of the sort discussed in *Childs*.

[29] The Court of Appeal rejected this submission, holding that "[w]hile it was reasonable for the miners to expect that Pinkerton's would do what it could to mitigate the risks, they must have been aware that there had been incursions into the mine because of the graffiti that had been left. Notwithstanding any assurances of Pinkerton's and Royal Oak that they were 'safe', [the miners]

must have realized that they were still exposed to some residual risk. If they believed that they had an unconditional guarantee of safety, that belief was unreasonable" (para. 121). In the view of the Court of Appeal, there was no special relationship of vulnerability between the mine workers and Pinkerton's. Whatever control Pinkerton's had over the premises, it had no control over Mr. Warren and it could have no duty to the miners to provide greater resources or services than its principal, Royal Oak, had contracted for (para. 122).

[30] I cannot agree with this analysis as it seems to me to be based on a misstatement of the proposed duty. The Court of Appeal found that it would have been unreasonable for the miners to think that they had an "unconditional guarantee of safety" (para. 121). While I accept this conclusion, it is beside the point. The brutal reality of unfolding events was well known to the miners, and that knowledge would make unreasonable any reliance on those sorts of sweeping assurances. But no one was suggesting that Pinkerton's had a duty to provide any such "guarantee". All that was proposed was that Pinkerton's had a duty to take reasonable care. That was precisely the expectation that the miners had. The Court of Appeal confirmed this when it found that "it was reasonable for the miners to expect that Pinkerton's would do what it could to mitigate the risks" (para. 121). This, in my view, is the reliance that counts in the proximity analysis. The relevant question is whether the miners reasonably relied on Pinkerton's to take reasonable precautions to reduce the risk. The Court of Appeal found that was their reasonable expectation. This reasoning, in my view, supports rather than negates the existence of sufficient proximity. The fact that, as the Court of Appeal noted, any higher expectation on the miners' part would have been unreasonable was not relevant to the analysis.

[31] Pinkerton's must have shared the miners' expectation. It was there to protect property and people. The whole point of its presence was to help secure the site so that the mine could continue to operate. The miners who continued to work during the strike made up a well-defined and identifiable group. Pinkerton's surely ought to have expected that the very people it was there to protect would rely on it to exercise reasonable care in doing so.

[32] Pinkerton's also undertook to exert some control over the risk. While the Court of Appeal reasoned that Pinkerton's had no control over Mr. Warren, I do not think that is the issue. Pinkerton's undertook to exert some control over everyone who came onto the property, including Mr. Warren. Contrary to Pinkerton's submissions, the trial judge made a clear finding that Pinkerton's gave assurances to the miners (see, e.g., trial judge's reasons, at paras. 744 and 758) and the Court of Appeal accepted that finding (C.A. reasons, at paras. 117-19). Based on the purpose of Pinkerton's presence and the assurances given, the miners reasonably expected that Pinkerton's would take reasonable steps to guard against the risks.

[33] I have difficulty understanding the pertinence, in this context, of the Court of Appeal's comments that unless "the assurance amounts to a 'guarantee' or a covenant to indemnify, it does not itself form a cause of action" and that an assurance "that the situation is 'safe' does not make the defendant an insurer for any damage that might result" (para. 119). Respectfully, these considerations relate to the scope of a possible duty, not to whether proximity has been established.

[34] I conclude that the reasonable expectations of both the miners and Pinkerton's as well as Pinkerton's undertaking to exert some control over the risk to the miners supported the trial

judge's finding of proximity.

[35] Pinkerton's also submits that the trial judge erred in finding proximity because the relationship between it and the miners does not fall within any of the three situations recognized by the Court in *Childs*. This, of itself, is not fatal to the appellants' position on proximity. The Court in *Childs* made clear that the three situations it identified do not function as strict legal categories, but as factors that can lead to the conclusion that sufficient proximity exists to give rise to *prima facie* positive duties to act: *Childs*, at para. 34.

[36] In my view, the appellants established sufficient proximity to give rise to a *prima facie* duty of care on the part of Pinkerton's towards the miners.

(iii) The Government

[37] The Court of Appeal accepted the trial judge's reasoning that, in the case of the government as regulator, the existence of proximity turns mainly on the statute delegating the regulatory powers: trial judge's reasons, at para. 797; C.A. reasons, at para. 124. Unlike the trial judge, however, the Court of Appeal found that the regulatory duties imposed by the legislation in force at the time, the *Mining Safety Act*, R.S.N.W.T. 1988, c. M-13 ("*MSA*"), and the *Mining Safety Regulations*, R.R.N.W.T. 1990, c. M-16 ("*Regulations*"), "did not fix the [government] and its mining inspectors with the responsibility to reduce the risk of intentional criminal conduct"; "[t]he risk that materialized was completely outside the scope of the statute" (para. 125). It followed, the Court of Appeal reasoned, that as the *MSA* and *Regulations* were not concerned with labour

relations, crime prevention or criminal acts, there was not sufficient proximity between the government and the miners (para. 125).

[38] The appellants challenge these conclusions. They submit that the *MSA* creates a private law duty to the miners. They point in particular to two provisions: the mandatory language in s. 42 of the *MSA*, that a mining inspector "shall . . . order the immediate cessation of work in . . . a mine . . . that the inspector considers unsafe" and the broad parameters of the inspectors' obligation under s. 43 to give notice to management of "any matter, thing or practice . . . that, in the opinion of the inspector, is dangerous". In response, the government, supporting the conclusion of the Court of Appeal, contends that when the *MSA* is construed as a whole and in light of its purposes, the duties it imposes relate to the prevention of accidents, not to the prevention of intentional criminal acts. It follows, says the government, that there is no close and direct relationship between the miners and the government.

[39] These submissions must be evaluated in the context of legal principles which are not in dispute. They were recently summarized by the Court in *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83, at paras. 26-30:

- The statute is the foundation of the proximity analysis and policy considerations arising from the particular relationship between the plaintiff and the defendant must be considered.

- The fact that an alleged duty of care is found to conflict with an overarching statutory

or public duty may provide a policy reason for refusing to find proximity. Both *Cooper* and *Edwards* are examples. In *Cooper*, a duty to individual investors on the part of the Registrar of Mortgage Brokers potentially conflicted with the Registrar's overarching public duty; in *Edwards*, the proposed private law duty to the victim of a dishonest lawyer potentially conflicted with the Law Society's obligation to exercise its discretion to meet a myriad of objectives.

- A statutory immunity provision may also, as in *Edwards*, indicate the Legislature's intention to preclude or limit private law duties.

[40] The analysis in *Hill*, in relation to whether there was sufficient proximity between the police investigators and a particularized suspect, is instructive. The most basic factor relevant to proximity is whether there is a relationship between the alleged wrongdoer and the victim, usually described as "close and direct" (para. 29). The focus is on whether the actions of the alleged wrongdoer have a close and direct effect on the victim. Other considerations include expectations, representations, reliance and the nature of the interests engaged by the relationship. In *Hill*, the Chief Justice emphasized that the relationship between the police and a particularized suspect was closer than that between the regulator and the public which had been in issue in *Edwards* and *Cooper*. In those cases, the public officials were acting in relation to a third party, that is, the person being regulated who, in turn, interacted with the claimant (para. 33). In contrast, in *Hill* the police interacted directly with the suspect who was the claimant.

[41] In the case of the mining safety regulators and the miners, the closeness of the

relationship is somewhere between that in *Hill*, on the one hand, and *Cooper* and *Edwards* on the other. Under the *MSA*, the onus for maintaining mine safety is on the owner, management and employees of the mine. Section 2 of the *MSA* imposes on management the duty to take all reasonable measures to enforce the Act and on workers the duty to take all necessary and reasonable measures to carry out their duties according to the Act. Under s. 3, the owner is to ensure that the manager is provided with the necessary means to conduct the operation of the mine in full compliance with the *MSA* and under s. 5(3), the manager, or the competent person authorized by the manager, is to personally and continually supervise work involving unusual danger in an emergency situation. A worker has the right to refuse to do any work when he or she has reason to believe that there is an unusual danger to his or her health or safety (s. 8(1)(a)) and is to report the circumstances to the owner or supervisor (s. 8(2)). A worker acting in compliance with these provisions is protected against discharge or discipline for having done so (s. 8(9)). Thus, much as the regulatory schemes at issue in *Cooper* and *Edwards* put the onus on lawyers and mortgage brokers to observe the rules, the scheme set out in the *MSA* puts the onus on mine owners, management and workers to observe safety regulations. The role of the mining inspectors is essentially to see that the persons who have the primary obligation to comply with the *MSA* — mine owners, managers and workers — are doing so. In that sense, their role is analogous to the roles of the Law Society and the Registrar of Mortgage Brokers discussed in *Edwards* and *Cooper*.

[42] However, the relationship between the inspectors and the miners was considerably closer and more direct than the relationships in issue in *Edwards* or *Cooper*. While no single factor on its own is dispositive, there are three factors present here which, in combination, lead me to this conclusion.

[43] The persons to whom mining inspectors are said to owe a duty — those working in the mine — is not only a much smaller but also a more clearly defined group than was the case in *Cooper* or *Edwards*. There, the alleged duties were owed, in effect, to the public at large because they extended to all clients of all lawyers and mortgage brokers.

[44] In addition, the mining inspectors had much more direct and personal dealings with the deceased miners than the Law Society or the Registrar had with the clients of the lawyer or mortgage broker in *Edwards* and *Cooper*. As pointed out in *Hill*, in considering whether the relationship in question is close and direct, the existence, or absence, of personal contact is significant. The murdered miners were not in the sort of personal contact with the inspectors as the police in *Hill* were with Mr. Hill as a particularized suspect. However, the relationship between the miners and the inspectors was much more personal and direct than the relationship between the undifferentiated multitude of lawyers' clients and the Law Society as considered in *Edwards* or the undifferentiated customers of mortgage brokers as considered in *Cooper*. As the trial judge found in this case, visits by inspectors to the mine during the strike were "almost daily" occurrences, 11 official inspections were conducted and at any time a tour of the mine was required, the inspector would be accompanied by a member of the occupational health and safety committee (para. 256). There was therefore more direct and personal contact with miners than there was with the clients in either *Cooper* or *Edwards*.

[45] Finally, the inspectors' statutory duties related directly to the conduct of the miners themselves. This is in contrast to the Law Society in *Edwards* or the Registrar in *Cooper* who had

no direct regulatory authority over the claimants who were the clients of the regulated lawyers and mortgage brokers.

[46] In my view, there is a close parallel between this case and the Court's building inspection cases, *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2, *Rothfield v. Manolakos*, [1989] 2 S.C.R. 1259, and *Ingles v. Tutkaluk Construction Ltd.*, 2000 SCC 12, [2000] 1 S.C.R. 298. These cases are instructive because in each there were regulatory duties to inspect and enforce provisions of a building code. The purpose of the inspections was to detect, among other things, construction defects that violated those codes, whether committed by the owner-builder or third parties and the Court found a duty of care to the owner, a subsequent owner and/or third parties who suffered damage because of the construction defect. These features of building inspection schemes are similar to the mining safety scheme in issue in this case. In each of the building inspection cases, a duty of care was found to exist.

[47] In *Kamloops*, a municipal by-law prohibited construction without a building permit, provided for a scheme of inspections at various stages of construction, prohibited occupancy without an occupancy permit and imposed on the building inspector a duty to enforce the by-law (p. 12). During construction of a home, a building inspector found deficiencies and issued a stop work order pending the submission of a plan. Although a plan was submitted, it was not followed and construction continued in spite of a warning that the stop work order was in effect. The city solicitor informed the first purchasers of the deficiencies, the stop work orders and the need for an engineer's certificate of the adequacy of the construction to lift the stop work order. Nothing further was done and the house was later sold to Mr. Nielson without notice of the construction problems. When he

learned of them, he sued the builder and the City.

[48] A majority of the Court upheld the trial judge's attribution of 25 percent of the fault to the City. The City's building inspector had a duty to enforce the bylaw. Mr. Nielson's relationship to the City was sufficiently close that it ought to have had him in its reasonable contemplation as likely to be injured by a breach of its duty, and it was negligent in allowing construction to continue in breach of its duty to protect the plaintiff against the builder's negligence. Wilson J., for the majority, said this at p. 24:

> Having regard to the fact that we are here concerned with a statutory duty and that the plaintiff was clearly a person who should have been in the contemplation of the City as someone who might be injured by any breach of that duty, I think this is an appropriate case for the application of the principle in [*Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.)]. I do not think the appellant can take any comfort from the distinction between non-feasance and misfeasance where there is a duty to act or, at the very least, to make a conscious decision not to act on policy grounds. In my view, inaction for no reason or inaction for an improper reason cannot be a policy decision taken in the *bona fide* exercise of discretion.

[49] In *Rothfield*, the building inspector issued a building permit for a retaining wall based on a rough sketch. Construction began, but neither the owner nor the builder advised the city that construction had reached a stage at which an inspection was required. When the inspectors did attend, they directed that further backfilling be delayed in order to determine if there was any movement. The builder finished the backfilling when the wall had not moved in a 20-day period. Months later, the wall collapsed. A majority of the Court found the inspectors had a duty of care to the owner and to neighbouring owner's and that the builder's failure to give timely notice to the inspectors did not absolve the inspectors from liability. As La Forest J. put it at p. 1271:

> It is to be expected that contractors . . . will fail to observe certain aspects of the building by-laws. That is why municipalities employ building inspectors. Their role is to detect such negligent omissions before they translate into dangers to health and safety.

[50] *Ingles* was another action by a property owner against a municipality for negligent building inspection. Bastarache J. for the Court found that inspection schemes fall within a category of cases in which a statute confers powers, but leaves the scale on which they are to be exercised to the discretion of the delegate. If the delegate elects to exercise the statutory power, there is a duty at the operational level to use due care in doing so (para. 17). In cases of this type, "[o]nce it is determined that an inspection has occurred at the operational level, and thus that the public actor owes a duty of care to all who might be injured by a negligent inspection, a traditional negligence analysis will be applied" (para. 20). He noted in reviewing the relevant statutory provisions that the purpose of the building inspection scheme was to protect the heath and safety of the public by enforcing safety standards for all construction projects. The municipalities who appoint inspectors to inspect construction projects and enforce the statute owe a duty of care to all who it is reasonable to conclude might be injured by the negligent exercise of those inspection powers (para. 23).

[51] The analysis of the duty of care on the part of building inspectors in these three decisions supports the existence of a *prima facie* duty of care on the mining inspectors in this case. The relationship between the mining inspectors and the miners is analogous to that between the building inspectors and the owner, subsequent purchaser and neighbour. Like the building inspectors, the mining inspectors have a duty to inspect and to enforce mine safety laws. As with the building inspectors, there is some discretion as to how they carry out their duties, but also like the building

inspectors, once the mining inspectors embark on their inspections, it is reasonable to think they will exercise care in the way they carry them out. The mining inspectors are required by s. 42 of the *MSA* to "order the immediate cessation of work in . . . a mine . . . the inspector considers unsafe". Similar to the role of the building inspectors, the job of the mining inspectors includes protecting the miners from risk arising from other people's defaults. To paraphrase La Forest J. in *Rothfield*, the role of the mining inspector is to detect those defaults before they translate into dangers of health and safety.

[52] I accept, of course, that it is not the job of mining inspectors to prevent would-be murderers. However, the fact that the inspectors' statutory duties do not extend to the detection and prevention of crime does not seem to me to be an answer to the question of whether there is sufficient proximity between the inspectors and the miners in relation to mine safety issues, whatever the cause.

[53] The clear lines for which the government contends dividing safety, crime and labour relations do not, in my view, exist. For example, deliberately ignoring safety regulations may also constitute a crime and a violation of a collective agreement. This is recognized in the *Regulations* made under the *MSA*. They prohibit fighting or similar conduct that may constitute a hazard, prohibit the entry of unauthorized persons, require explosive magazines to be securely locked and prohibit the unauthorized taking away of explosive devices from the mine: *Regulations*, ss. 4, 15, 125(10) and 138. Fighting, theft and unauthorized possession of explosives are potentially criminal matters. They may also be the result of poisonous labour relations. But they all may put mine safety at risk. Categorizing the conduct as one of these rather than the others is artificial. Moreover, the

duties provided for in the *MSA* and *Regulations* have as their object the protection of workers from the acts and omissions of others. Unsafe conditions may arise from the conduct of co-workers, management or third parties. It is the impact of the conduct on the safety of the work-place that is the touchstone of the legislation and the concern of the mining inspectors.

[54] I am not at all persuaded that it was beyond the statutory jurisdiction of the inspectors to act in the extraordinary situation that presented itself here. They had a clear and well-substantiated belief that the mine was unsafe. As they put it in a report more than three months before the fatal blast, "the lack of security at the mine site is endangering the occupational health and safety of employees" (A.R., vol. 12, Tab 154, at p. 79). The legislative scheme is about safety in mines, it exists to protect miners from the acts of others and there were clearly identified and well-documented findings that the miners were subject to unsafe working conditions. I agree with the government that the *MSA* does not clothe the inspectors with power to issue orders simply to address strike-related violence. My view, however, is that it did give the authority to make orders to prevent obvious and serious risks to the miners in the mine even though the risks were by-products of the labour relations situation. Would it be argued that if the inspectors had actually known that there was a bomb in the mine, they could have done nothing because the placement of the bomb resulted from a labour relations dispute and constituted a crime? I would hope not. But that is the logical extension of the position adopted by the Court of Appeal and supported by the government in argument. I cannot accept this view.

[55] To sum up, the mine inspectors had a statutory duty to inspect the mine and to order the cessation of work if they considered it unsafe. In exercising this statutory power, the inspectors had

been physically present in the mine on many occasions, had identified specific and serious risks to an identified group of workers and knew that the steps being taken by management and Pinkerton's to maintain safe working conditions were wholly ineffectual. In my view, the trial judge did not err in finding that there was a sufficiently close and direct relationship between the inspectors and the miners to give rise to a *prima facie* duty of care.

(iv) Policy Considerations

[56] The Court of Appeal found that the claims against Pinkerton's and the government failed for want of proximity. But it went on to say that even if a *prima facie* duty of care existed, it should be negated by several policy considerations making it unjust to hold the defendants liable. The appellants challenge this conclusion. As several of the policy considerations relating to Pinkerton's and the government overlap, it will be helpful to discuss them at the same time.

[57] The question is whether there are broad policy considerations beyond those relating to the parties that make the imposition of a duty of care unwise: *Odhavji Estate*, at para. 51. At issue is the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally: *Cooper*, at para. 37. In order to trump the existence of what would otherwise be a duty of care (foreseeability and proximity having been established), these residual policy considerations must be more than speculative. They must be compelling; a real potential for negative consequences of imposing the duty of care must be apparent: *Hill*, at paras. 47-48; A. M. Linden and B. Feldthusen, *Canadian Tort Law* (8th

ed. 2006), at pp. 304-6.

[58] The Court of Appeal listed five policy considerations which, in its view, made imposing a duty of care here unwise (paras. 76-90 and 127-29). However, in my respectful view, these considerations are not compelling either individually or collectively.

[59] Two of these policy considerations may be considered together. The Court of Appeal held that imposing liability here would be contrary to the general principle that "tort liability is personal, and that some exceptional reason should be shown for making one person responsible for the torts of another" (para. 78). It also decided that imposing liability in these circumstances "undermines the general principle that tort liability is fault based, in those cases [like the present one] where the immediate tortfeasor has deliberately evaded the efforts of the ancillary tortfeasor" (para. 78). These lines of reasoning, in my view, are premised on the Court of Appeal's mischaracterization of the basis of the appellants' claims.

[60] The Court of Appeal described the appellants' claims as attempts to hold "one person responsible for the acts of someone else" (para. 78). This may be a convenient, short way of describing the claims. However, as I discussed earlier, it is not an accurate description of the appellants' claims against Pinkerton's and the government. The appellants seek to have these parties held responsible for their own negligence, not for the fault of others. Holding them liable for their own negligence does not undermine the general principles that tort liability is personal and fault-based. These first two policy considerations, therefore, have little to do with the claims advanced in this case.

[61] As third, fourth and fifth policy considerations, the Court of Appeal reasoned that liability should not be imposed simply on the basis that a party was aware of the risk where that party has no control over the tortfeasor or when doing so would unduly impinge on individual autonomy. "It is unfair", wrote the Court of Appeal, "to hold one person responsible for the acts of someone else that they [*sic*] do not control" (para. 78). Moreover, it would be "contrary to the general principle that a person has no duty to intervene just because he or she is aware that the plaintiff is exposed to a risk" (para. 78). I do not think these considerations negate the *prima facie* duty of care.

[62] Control and autonomy were discussed in the proximity analysis in *Childs*. Control is concerned with whether the defendant was either materially implicated in the creation of the risk or had control over a risk to which others have been invited: *Childs*, at para. 38. Autonomy is concerned with a person's right to engage in risky activities and to choose not to intervene to prevent others from doing so or to save them from the consequences.

[63] Consider first the issue of control. It is true that Pinkerton's and the government did not have control over Mr. Warren. The absence of direct control over Mr. Warren is of course a relevant consideration, but it must be placed in the context of Pinkerton's contractual and the government's statutory obligations. They had a significant measure of control of the risk that his activities would kill miners. Given their statutory and contractual obligations, I think it is misleading to speak of an absence of control over Mr. Warren.

[64] Next, consider the concern about individual autonomy. The Chief Justice explained this concern in *Childs*: "The law does not impose a duty to eliminate risk. It accepts that competent people have the right to engage in risky activities. Conversely, it permits third parties witnessing risk to decide not to become rescuers or otherwise intervene" (para. 39). This concern about autonomy, which is a core value of the common law, does not have much to do with the situation of the miners, Pinkerton's or the government in this case.

[65] Imposing a duty of care on Pinkerton's and the government does not seem to me to have much to do with the miners' autonomy. The miners were aware that they faced risk and decided to accept it. However, they made that choice in light of the assurances given to them and with the reasonable expectation that Pinkerton's and the government would make reasonable efforts to guard against that risk.

[66] Pinkerton's surrendered much of its autonomy by its contractual undertaking with the employer to become involved. Pinkerton's was hired by the employer to guard the miners. As for the government, it had a statutory responsibility for mine safety; its autonomy (if that is a useful concept in the case of the government) gave way to its statutory duties. Pinkerton's and the government were not mere bystanders who happened upon a dangerous situation and decided not to get involved. Given their contractual and statutory obligations, it does not unduly interfere with their autonomy to impose a duty on them to take reasonable care for the miners' safety.

[67] I do not share the view of the Court of Appeal that the policy of protecting

autonomy is a compelling policy reason to negate a duty of care on the part of Pinkerton's and the government in this case.

[68] The Court of Appeal discussed additional policy considerations relating only to the government. These focussed on the spectre of indeterminate liability and the potential for conflicting duties. As the Court of Appeal put it, holding a mine inspector responsible for the criminal acts of others "would expose him to indeterminate liability, for events over which he has little control" (para. 128). Moreover, imposing liability "might cause [the regulators] to over-regulate or under-regulate in an abundance of caution, which would be contrary to the public interest" and therefore conflict with the inspector's duty to regulate in the public interest (para. 129).

[69] In my view, the Court of Appeal erred in attaching weight to these policy considerations in the circumstances of this case.

[70] The concern about indeterminate liability is not valid here. This policy consideration has often held sway in negligence claims for pure economic loss. But even in that context, it has not always carried the day to exclude a duty of care. The concern is that the proposed duty of care, if accepted, would impose "liability in an indeterminate amount for an indeterminate time to an indeterminate class", to use the often repeated words of Cardozo C.J. in *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931), at p. 444. At the root of the concern is that the duty, and therefore the right to sue for its breach, is so broad that it extends indeterminately. In this sense, the policy concern about indeterminate liability is closely

related to proximity; the question is whether there are sufficient special factors arising out of the relationship between the plaintiff and the defendant so that indeterminate liability is not the result of imposing the proposed duty of care: see, e.g., *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, at p. 1153. What is required is a principled basis upon which to draw the line between those to whom the duty is owed and those to whom it is not: see, e.g., *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, at para. 64, *per* McLachlin J. (as she then was).

[71] I do not see this as a difficulty here and, as a result, I do not think that the proposed duty of care exposes the government to indeterminate liability. What is in issue is liability for physical injury to miners caused by an explosion in a mine which, it is alleged, would have been prevented had the government taken reasonable care in discharging its statutory duties in relation to mine safety. The duty is to the finite group of miners working in the mine which the inspectors had inspected repeatedly. The potential liability is no more indeterminate than in the building inspector cases I reviewed earlier.

[72] Nor do I think that the Court of Appeal's concern about the potential for over- or under-regulation and conflicting duties is justified here. Conflicting duties have been an important consideration in dealing with proximity in claims against regulators and others carrying out statutory duties: see, e.g., *Cooper*, *Edwards*, *Syl Apps* and *Hill*. Serious negative policy consequences may flow where such conflict exists: *Syl Apps*, at para. 28. However, it does not follow that such consequences will follow from every imposition of a duty of care on those who carry out statutory or public duties. No such concern about conflicting duties was

noted by the Court in the building inspector cases. I do not understand what duty could conflict with the inspector's duty to order the immediate cessation of work in a unsafe mine. Of course, every exercise of discretion calls for weighing and balancing different considerations that do not all point in the same direction. But there is a difference between the need to exercise judgment and the existence of conflicting duties. I see no conflict here.

[73] The argument that conflicting duties should preclude a finding of proximity was considered in detail and rejected by a majority of the Court in *Hill*. The majority emphasized that a conflict or potential conflict of duties does not in itself negate a *prima facie* duty of care; rather the conflict must be between the duty proposed and an overarching public duty and it must pose a real potential for negative policy consequences. That is not the case here. The Court of Appeal asserted that imposing a duty to carry out their public duties with reasonable care "might cause [the regulators] to over-regulate or under-regulate in an abundance of caution". This, in my view, is speculative and falls far short of showing that there is a "real potential" for negative policy consequences arising from conflicting duties. Moreover, any tension between the broader public interest with the immediate demands of safety may be taken into account in formulating the appropriate standard of care.

[74] The Court of Appeal also discussed, but expressly did not rely on, a further policy consideration. It is rooted in the fact that there were threats and intimidation directed at forcing the closure of the mine during the strike. The issue is whether the law of negligence should in effect require defendants to give into these threats. This policy consideration relates most directly to the mine owner who insisted on operating during the strike and whose liability

is not before us on this appeal. As neither Pinkerton's nor the government rely on this policy concern, I do not need to address it.

[75] To conclude, I do not find any of the residual policy considerations relied on by the Court of Appeal, alone or in combination, sufficiently compelling to oust the *prima facie* duty of care on the part of Pinkerton's and the government in this case.

(2) Standard of Care

[76] In my view, the trial judge erred in his analysis of whether Pinkerton's and the government failed to meet the standard of care necessary to discharge their duties to the murdered miners. My reasons for reaching that conclusion follow.

(a) *Pinkerton's*

[77] The trial judge found that Pinkerton's breached its standard of care in two ways. First, it failed to complete a security survey and plan, in contradiction of its own policy. Second, it failed to properly guard the entrances, thereby permitting striking workers access to the mine. The Court of Appeal disagreed with these conclusions and held that, if Pinkerton's had a duty of care, it met the required standard. The Court reasoned that Pinkerton's had devoted all of its resources to securing the site from striker incursions and could not be held liable for Royal Oak's decision to reduce the number of guards. As well, the Court of Appeal held that Pinkerton's had no duty to withdraw its services in light of insufficient resources

(paras. 115-16).

[78] The appellants submit that the trial judge's findings are entitled to deference. They say that it was so easy for Mr. Warren to enter the underground through Akaitcho that it is patent that Pinkerton's took no steps to prevent its use. Pinkerton's responds that it was Royal Oak's job to block the entrances and that Royal Oak neither provided a list of the entrances nor requested Pinkerton's to handle this. Pinkerton's further says that it continually, but unsuccessfully urged Royal Oak not to reduce the number of guards. As to the security survey and plan, Pinkerton's submits that this task had been undertaken by Royal Oak and the preceding security firm before the strike and that, in any event, it prepared a detailed security survey which Royal Oak ignored.

[79] I respectfully agree with the Court of Appeal that the trial judge made an error of law and palpable and overriding errors of fact which require that his conclusion about Pinkerton's breach of its standard of care be set aside.

[80] With respect to the law, my view is that the trial judge erred by failing to articulate the standard of care to which Pinkerton's was to be held. Although the trial judge acknowledged that Pinkerton's was not an insurer of the mine's safety (para. 752), he nonetheless found that it had failed to ensure that the entrances were properly guarded to avoid incursions (para. 764). This statement is problematic in two respects. To the extent that the trial judge required Pinkerton's to ensure there was no clandestine access to the mine, he imposed an absolute duty, not a duty of reasonable care. Moreover, the trial judge does not

indicate what "properly" guarding the entrances required Pinkerton's to do. Lacking in the trial judge's reasons is any articulation of what constituted reasonable care on Pinkerton's part given the limitation of resources imposed by its contract with the mine owner and Mr. Warren's determination to commit an intentional, criminal act. The difficulty with this aspect of the trial judge's reasons is attributable perhaps to his having based liability on Pinkerton's status as on occupier of the land. The trial judge's analysis in that respect, I should add, was found to have been incorrect by the Court of Appeal and there is no appeal from that finding.

[81] Turning to the facts, the trial judge's reasons contain contradictory findings highly relevant to his conclusion about Pinkerton's breach of its standard of care. These diametrically opposed findings of fact on a critical issue in my view constitute clear and determinative errors. I will refer to two examples. The trial judge found, that "[t]here were no limitations to [Pinkerton's] mandate by Royal Oak" (para. 243). I cannot reconcile that conclusion with the trial judge's extensive findings about the ongoing pressure by Royal Oak on Pinkerton's to reduce the costs of security by cutting back the number of Pinkerton's personnel on the site (para. 253). The trial judge also found that Pinkerton's had been advised of all means of access to the underground, including the Akaitcho shaft by which Mr. Warren gained access (para. 248). This finding, however, is at odds with the trial judge's later findings that Royal Oak "omitted to cause Pinkerton's to be duly familiar with the mine site's portals of entrances and exits" and that Pinkerton's "did not fully familiarize itself with knowledge of said portals" (para. 710). In my respectful view, these factual contradictions, highly relevant to whether Pinkerton's standard of care was met, require appellate intervention.

[82] In light of the trial judge's legal and factual errors, the Court of Appeal was justified in reversing the trial judge's findings about Pinkerton's breach of its standard of care.

(b) *The Government*

[83] The trial judge found that the government's conduct fell below its standard of care. As he put it, those responsible for regulating mine safety "dithered when [they] should have reacted" (para. 828). In the trial judge's view, officials were incompetent when, knowing about the unsafe conditions, they failed to use their statutory powers (paras. 821-39). The trial judge was dismissive of the Government's claims that it lacked the statutory power to intervene in what was essentially a situation involving labour relations and criminal law. He was similarly dismissive of the consideration that the inspectors had relied on legal advice to this effect. This, to the trial judge was "of no consequence, and certainly . . . no answer" (para. 834).

[84] The Court of Appeal, however, found that the trial judge had erred by failing to take into account that the government had obtained and acted on legal advice when it decided not to intervene by closing the mine. That reliance met the government's standard of care. For the Court of Appeal, it was critical that the mining inspectors had sought legal advice about the scope of their powers, had been advised that their jurisdiction did not permit them to close the mine for reasons derived from labour relations issues and criminal activity, and that they relied on that advice in deciding not to close the mine (para. 126).

[85] I respectfully agree with the Court of Appeal on this point. Before explaining why, I should briefly review the trial judge's factual findings concerning this legal advice.

[86] In late May 1992, Mr. Gould (whom the trial judge referred to as the acting chief mine inspector), Mr. McRae (director of the Mine Safety Division) and the fire marshal, Kit Bell, wrote a detailed memorandum outlining their serious concerns about the safety of the mine. Mr. Gould then wrote to the Minister, seeking his support for an order closing the mine. As Mr. Gould put it in his letter of May 28, 1992 to the Minister: "The mine site is clearly accessible by non-employees, virtually at will. Disruptions of power to the mine imperil the ventilation, hoist operation, and emergency communications to workers in and about the mine. The number of incidents of fire at the mine site indicates a lack of security, and the endangering of employees from fire or the products of those fires, especially when the fires involve highly toxic materials" (A.R., vol. 12, Tab 154, at p. 81; trial judge's reasons at paras. 90-91).

[87] Mr. Gould had never before sought the support of the Minister to issue any order. In this case, however, Mr. Gould questioned his jurisdiction, believing the situation to be inherently criminal. The trial judge noted that the Mine Safety Division had consistently taken the position that security issues were in the exclusive jurisdiction of the police and were not matters of occupational health and safety (para. 256). The Minister, however, felt unable to provide direction. The order in question, if made, would be appealable to the Minister and he wished to avoid the conflict of interest that would result from him giving direction in relation to the order and then deciding an appeal from it.

[88] With no direction available from the Minister, Mr. Gould sought and received legal advice about the scope of his powers. At para. 91, the trial judge states that Mr. Gould received legal advice from the acting Deputy Minister. At para. 825, however, the trial judge states that the Deputy Minister passed Mr. Gould over to departmental counsel who in turn gave the advice. Whatever the details, there is no dispute in this Court about two critical facts: Mr. Gould sought and received legal advice and the bottom line of that advice was that he did not have authority to make the order he proposed and that if he made the order, it could be promptly and successfully appealed (paras. 91 and 825).

[89] The trial judge thought that this advice was wrong. I agree with him about that for the reasons set out earlier in the duty of care analysis. But in the context of allegations of negligence against those responsible for regulating mine safety, the fact that this advice was received and acted on cannot be dismissed, as the trial judge did, as being of "no consequence" (para. 834). This advice goes precisely to the issue of whether the government took reasonable care in deciding not to close the mine. It will rarely be negligent for officials to refrain from taking discretionary actions that they have been advised by counsel, whose competence and good faith in giving the advice they have no reason to doubt, are beyond their statutory authority: see, e.g., *Dunlop v. Woollahra Municipal Council*, [1981] 1 All E.R. 1202 (P.C.), at p. 1209; *Stafford v. British Columbia*, [1996] B.C.J. No. 1010 (QL) (S.C.), at paras. 78-81. In the context of this case, the opposite view leads to alarming results, as the trial judge's holding here demonstrates. The effect of the trial judge's holding is that officials may be found to have acted negligently by refraining from taking action that they believed in good faith and

on the basis of reputable, professional legal advice, to be unlawful. In other words, the law of negligence would require the inspectors to take action which they believed abused their powers. This cannot be the law. There is no argument advanced on behalf of the appellants that it was unreasonable for officials to rely on the advice received or that they did not seek or rely on it in good faith.

[90] In my respectful view, the trial judge erred in law by rejecting the relevance and legal effect of good faith reliance on legal advice received by officials about the scope of their statutory powers. I agree with the government that, in the circumstances here, this is a complete answer to the negligence claims made against it and its officials.

(3) Summary of Conclusions on Duty and Standard of Care

[91] In my view, the trial judge did not err in finding that both Pinkerton's and the government owed the murdered miners a duty of care. However, I agree with the Court of Appeal that the trial judge erred in finding that they failed to meet the requisite standard of care. It follows that, like the Court of Appeal, I would dismiss the claims against these parties.

B. *Pinkerton's and the Government: Causation*

[92] The Court of Appeal found that the trial judge had made two errors in his analysis of causation: he applied the wrong legal test for causation and he wrongly considered the

conduct of the co-defendants collectively rather than individually (paras. 181-87 and 202-3). However, the Court of Appeal did not address the consequences that ought to flow from the trial judge's errors concerning causation. It was not necessary for it to do so given its conclusion that neither Pinkerton's nor the government owed the miners a duty of care.

[93] I agree with the Court of Appeal that the trial judge applied the wrong legal test for causation. When he wrote his reasons in 2004, the trial judge did not have the advantage of this Court's judgment in *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333. That decision clarified the law of causation, holding that absent special circumstances, the plaintiff must establish on the balance of probabilities that the injury would not have occurred but for the negligence of the defendant: *Hanke*, at paras. 21-22; *Athey v. Leonati*, [1996] 3 S.C.R. 458, at para. 14.

[94] In my view, the trial judge did not apply this "but for" test. The appellants' contention that he did cannot be sustained by a careful reading of his reasons as a whole. Failing to apply it is a reversible error.

[95] The appellants submit in the alternative that this case falls into the class of exceptional situations discussed in *Hanke* in which the test for causation should be relaxed to the "material contribution" standard. I cannot accept this submission. As *Hanke* made clear, the sorts of special situations for which the material contribution test is reserved generally have two characteristics. First, it is impossible for the plaintiff to prove that the defendant's negligence caused the injury under the "but for" test, and second, it is clear that the defendant

breached a duty of care owed to the plaintiff and thereby exposed the plaintiff to an unreasonable risk of injury of the type which the plaintiff ultimately suffered: *Hanke*, at para. 25. This case has neither of these characteristics. It was not impossible to prove causation to the "but for" standard. The appellants' submissions in effect demonstrate this: their primary position is that they did so and the trial judge found that they had. Moreover, there was no clear breach of a duty: for the reasons I have given, I would hold that neither Pinkerton's nor the government breached its duty of care towards the murdered workers. It follows that the "but for" standard should have been, but was not applied by the trial judge.

[96] In view of my conclusion that neither Pinkerton's nor the government breached their duty of care to the murdered miners, I will not address what consequences ought to flow from the trial judge's legal error with respect to causation.

C. *Claims Against the Unions*

(1) Introduction

[97] When the labour dispute at the mine began in May of 1992 and at the time of the fatal blast the following September, the workers were represented by CASAW Local 4, one of six locals affiliated with the Canadian Association of Smelter and Allied Workers ("CASAW National"). In July of 1994, nearly two years after the explosion, CASAW National amalgamated with the National Automobile, Aerospace, Transportation and General Workers Union of Canada ("CAW National"). As noted by the Court of Appeal, CAW

National (as successor to CASAW National) is the only union entity sued in the *Fullowka* action (para. 9). (The *Fullowka* plaintiffs also had sought to sue CAW Local 2304, the CAW local which succeeded CASAW Local 4. The claim against it was dismissed as barred by a limitation period: *Fullowka v. Slezak*, 2002 NWTSC 23 (CanLII).) In the *O'Neil* action, both national unions and both locals were named as defendants. However, as the trial judge observed, only CAW National defended.

[98] The trial judge found CAW National directly liable for the acts of Messrs. Shearing and Seeton who had been members of the CASAW Local 4's executive, and vicariously liable for the acts of CASAW Local 4's members, particularly those of Messrs. Warren and Bettger (para. 919). He treated the national and local unions as one legal entity so that each was responsible for the torts of the others. He found that CAW National's then President, Mr. Hargrove (who was sued in the *O'Neil* action) owed no duty of care to Mr. O'Neil.

[99] The Court of Appeal set aside the trial judge's findings of liability against CAW National and the appellants appeal that decision. They submit that: (1) the trial judge was correct to find that CASAW National and CASAW Local 4 were a single legal entity; (2) CAW National was vicariously liable for the acts of Messrs. Warren and Bettger; (3) CAW National was directly liable in negligence; and (4) CAW National was jointly liable for the torts of Messrs. Warren and Bettger.

[100] I cannot accept these submissions and would affirm the conclusions of the Court

of Appeal.

[101] Before turning to analyse the appellants' submissions, it will be helpful to set out some further details about the claims and how they were addressed at trial and in the Court of Appeal.

(a) *The Trial Judge's Findings*

[102] The trial judge made findings of liability against Mr. Seeton, who had been a shop steward, Vice-President and then President of CASAW Local 4; Mr. Shearing who was a member of the CASAW Local 4 executive; and Messrs. Warren and Bettger who were members of CASAW Local 4. The trial judge also found that CAW National was directly liable for the acts of Messrs. Shearing and Seeton as members of CASAW Local 4's executive and vicariously liable for the acts of CASAW Local 4's members, particularly Messrs. Warren and Bettger. Only the findings in relation to CAW National and Mr. Bettger are in issue before us.

[103] The trial judge found CAW National liable on three bases.

[104] First, he held that CASAW National and CASAW Local 4 were one entity and therefore that their conduct should be considered cumulatively. As the successor by merger to CASAW National, CAW National assumed responsibility for all the actions of both its predecessor national and local unions. It was on this basis that the trial judge concluded that

CAW National was directly liable for the conduct of the CASAW Local 4's officers, Messrs. Shearing and Seeton.

[105] Second, the trial judge found that, quite apart from the CAW National having assumed CASAW National's obligations by virtue of the merger, CAW National owed an independent duty of care to the murdered miners. He found that the requirements of foreseeability and proximity were met with respect to CAW National and no policy reason negated a *prima facie* duty of care (paras. 878-79). The trial judge also found that CAW National effectively controlled the conduct of the strike, encouraged and failed to prevent violence and provided financial support (para. 879).

[106] CAW National's control of the strike was exercised, in the trial judge's view, mainly through Harold David who was seconded from CAW National to CASAW Local 4 for a period of time during the strike. The trial judge found: that CAW National "assumed responsibility for . . . strike co-ordination and labour negotiation" for CASAW Local 4 through Mr. David in July of 1992 (para. 851); from the moment of Mr. David's arrival, CASAW Local 4 and its members were "completely enslaved" by him and through him, by CAW National (para. 883); CASAW National was "beneficially absorbed" by CAW National during the strike (para. 851); and that CAW National assumed management and *de facto* control of CASAW Local 4 during the strike (para. 875).

[107] He concluded that the union leadership, including the leadership of CAW National, CASAW Local 4 and CASAW National, "fell well below the standard of

reasonableness in the circumstances, and thus caused or contributed to the deaths of the nine miners" (para. 905). He found that CAW National (and CASAW Local 4) breached their duty of care by encouraging and condoning illegal acts by union members, by failing to discipline the aberrant behaviour of union members and in the case of CAW National by failing to withdraw its financial support and expertise in the face of continuing violence (paras. 887-88). As the trial judge put it, "CAW National did nothing to stop the illegal activity; that, in turn, made CAW National [directly] liable for the conduct of CASAW Local 4 and its members" (para. 892; see also para. 905).

[108] Third, the trial judge found that CAW National was vicariously liable for the acts of the members of CASAW Local 4, primarily on the basis that it not only failed to exercise its effective control of the members but also encouraged their unlawful acts. In the trial judge's view, Messrs. Schram and Seeton, successive presidents of CASAW Local 4 "not only encouraged violence to line crossers and their families, they promoted it through addresses to members, strike bulletins and any medium they could locate. Then they trumped it by causing strikers who committed criminal acts to have counsel and fines paid for by the union" (para. 887).

(b) *Court of Appeal's Findings*

[109] The Court of Appeal set aside the trial judge's findings on liability, holding that:

- CASAW National and CASAW Local 4 were separate legal entities and therefore

that CAW National had not on merger acquired the debts and obligations of CASAW Local 4 (para. 143);

- The union entities were not liable to Mr. O'Neil because they owed no duty of care to him (para. 101). CASAW Local 4 and Local 2304 were not defendants in the *Fullowka* action and were not liable to the *Fullowka* appellants (para. 167);

- Although it may be that CASAW National and its successor CAW National owed a duty of care to the miners, that duty did not extend to preventing the intentional torts of persons beyond the control of the unions (paras. 168-69 and paras. 91-100); and

- Mr. David during the strike was seconded to and acted as a representative of CASAW Local 4 so that CAW National was not vicariously liable for his conduct (para. 169).

[110] As the Court of Appeal summed up its conclusions: "The neighbour relationship does not create liability for failing to prevent the torts of persons beyond one's control. It does not make the National Unions vicariously liable for everything its members do. Absent a finding of incitement or other tortious conduct by a representative of the National Unions within the scope of his employment, or a decision to conduct business in a tortious way, liability does not arise. The findings of liability against CAW National cannot be supported" (para. 175).

(c) *The Appellants' Position*

[111] The appellants make three main points in relation to CAW National's liability. First, they contend that CAW National joined with Mr. Warren in concerted wrongful action. Second, the appellants submit that CAW National is vicariously liable for the torts committed by Messrs. Warren and Bettger. Finally, they submit that CASAW Local 4 was not a separate legal entity from CASAW National and therefore CAW National, on amalgamation, became responsible for the misconduct of CASAW Local 4.

[112] I cannot accept these submissions. I will address them in reverse order.

(2) Were CASAW Local 4 and CASAW National Separate Legal Entities?

[113] The question of whether CASAW Local 4 and CASAW National were separate legal entities is an important one for two reasons. If, contrary to the trial judge's view, they are separate legal entities, it follows that when CAW National stepped into the shoes of CASAW National on merger, CAW National did not thereby assume the obligations and liabilities of CASAW Local 4. Moreover, the trial judge's findings of liability considered the conduct of all union participants cumulatively. If he erred in doing so, his conclusions would be seriously undermined.

[114] The trial judge found that a national union and its local make a "two-tiered

structure of one entity" (para. 862) and therefore CASAW Local 4 was not a separate legal entity from CASAW National (para. 867). Nearly every aspect of his analysis of the negligence claimed against the unions was affected by that conclusion. Throughout the standard of care analysis in relation to the claims against the union, the trial judge treated the conduct of both CASAW Local 4 and CAW National cumulatively (para. 881) and held it liable for the torts of the others (paras. 197, 875, 883, 888, 891, 900, 917 and 919).

[115] The Court of Appeal found that the local and the national unions were separate legal entities. Assuming CASAW Local 4 could be found liable, its liability did not extend to CASAW National or to its successor, CAW National. As the court put it, "CAW National (the only named defendant in the Fullowka action) is not liable for the debts and obligations of Local 4" (para. 143; see also paras. 134-42).

[116] The appellants challenge this conclusion.

[117] However, in my view, the union constitution and the merger agreement between CASAW National and CAW National, as well as the jurisprudence, support the view of the Court of Appeal that CASAW National and CASAW Local 4 were separate legal entities and that on merger, CAW National did not succeed to CASAW Local 4's tort liabilities.

[118] There is no dispute that in the circumstances of this case CAW National is a legal entity capable of being sued in tort. As Iacobucci J. wrote for the Court in *Berry v. Pulley*, 2002 SCC 40, [2002] 2 S.C.R. 493, at para. 3, "unions have come to be recognized as entities

which possess a legal personality with respect to their labour relations role". The question to be answered is the narrower one of whether CASAW Local 4 was a separate legal entity from CASAW National, so that on merger, CAW National did not assume CASAW Local 4's liabilities.

[119] There is no doubt that union locals may have an independent legal status and obligations separate from those of their parent national unions. Whether they do depends on the relevant statutory framework, the union's constitutional documents and the provisions of collective agreements. For example, it has been consistently held that where, as in this case, the local union is a certified bargaining agent, it and not the national union assumes the statutory and contractual duties of a bargaining agent. The reasoning of the Court in *International Brotherhood of Teamsters v. Therien*, [1960] S.C.R. 265, is based on the fact that the local union, certified as a bargaining agent, was a legal entity that could be sued because it had statutory powers and responsibilities in relation to collective bargaining: Locke J., at pp. 275-76. In *New Brunswick Electric Power Commission v. International Brotherhood of Electrical Workers AFL-CIO-CLC, Local 1733* (1976), 16 N.B.R. (2d) 361 (S.C., App. Div.), the union local was found in contempt of a court order. The court noted at para. 17 that "[i]t is well established that a union certified as a bargaining agent for employees is a legal entity" and that it is "persona juridica and may be punished for contempt . . . and like a corporation may be made liable for the conduct of its officials even where they act in breach of their duty to their superiors".

[120] It is clear taking this approach that CASAW Local 4 is a legal entity capable of

being sued in actions relating to its labour relations role. CASAW Local 4 was the certified bargaining agent for the mine workers at the time of the strike and explosion. This is reflected in the collective agreement between it — and I would add *only* it — and Giant Yellowknife Mines Ltd. In the agreement, Giant recognized CASAW Local 4 as *exclusive* bargaining agent for all employees covered by the agreement (art. 2.01). The certification of CASAW Local 4 was pursuant to the *Canada Labour Code*, R.S.C. 1985, c. L-2 ("Code"). The Code defines a " bargaining agent" (in part) as a "trade union that has been certified by the Board as the bargaining agent for the employees in a bargaining unit" (s. 3(1)). A "trade union" is defined to mean "any organization of employees, of any branch or local thereof, the purposes of which include the regulation of relations between employers and employees" (s. 3(1)). Thus, CASAW Local 4 was a "trade union" as defined in the Code. As the certified bargaining agent, CASAW Local 4 had "exclusive authority to bargain collectively on behalf of the employees in the bargaining unit" (s. 36(1)(*a*)). CASAW National was not a party to the collective agreement and had no status as a bargaining agent under the Code.

[121] As the Court of Appeal rightly pointed out, there is binding authority from this Court that local unions who are certified bargaining agents under the Code are legal entities. That was the decision of a unanimous Court in *International Longshoremen's Association, Local 273 v. Maritime Employers' Association*, [1979] 1 S.C.R. 120. The Court considered whether the local unions were legal entities capable of being sued for an injunction prohibiting participation in an allegedly illegal strike. Estey J., for the Court, noted the Code "establishes in modern form an elaborate and comprehensive pattern of labour relations in all its aspects within the federal jurisdiction. The exercise of the rights and the performance of the

obligations arising under that statute can only be undertaken efficiently and conveniently by those groups acting as legal entities" (pp. 136-37 (emphasis added)). He concluded at p. 137:

> The Locals are legal entities capable of being sued and of being brought before the Court to answer the claims being made herein for an injunction prohibiting the participation in the activities found to constitute an illegal strike.

[122] I conclude, therefore, that CASAW Local 4 was a legal entity capable of being sued in its own right. For the reasons which follow, I also conclude that it had a separate legal existence from CASAW National. This, in my view, is confirmed by the Code, by the constitutional arrangements between the local and the national union and by the terms of the merger agreement between CASAW and CAW.

[123] As noted, under the Code and the collective agreement, CASAW Local 4 had *exclusive* bargaining rights. It therefore had legal rights and obligations distinct from those of the national union. This reality is also reflected in the CASAW National constitution and in the merger agreement between CASAW National and CAW National.

[124] The constitution deals with the establishment of local unions, and its provisions underline their separate and autonomous status. The constitution consistently differentiates between the national union and the locals and provides for a high measure of local autonomy. For example, s. 4b) provides that the funds and assets of any local belong to the local provided the constitution is complied with and s. 4f) provides that the local can make by-laws which are subject to national approval only with respect to whether they are consistent with the

constitution. Section 13 provides that local union autonomy will be fostered and encouraged.

[125] The separate and autonomous character of the local and the national unions is particularly clear in the merger agreement. Article 1, is headed "Assets and Other Rights Remain with the Locals". It provides that assets and bargaining rights of the CASAW locals remain the exclusive property of the CAW locals which succeeded them. Article 2 provides that the merged locals acquire the rights and duties of the CASAW local to which it has succeeded. Article 4 provides that each merged local union will have autonomy to make decisions on local union matters. Article 16 protects the rights of the merged CASAW locals to secede from the CAW with their assets, deeds, records and financial accounts. I agree with the respondent CAW when it submits that the merger agreement treats CASAW National and CASAW locals as separate entities, transferring rights and obligations from CASAW National to CAW National and from CASAW locals to new CAW locals.

[126] In my view, and contrary to the findings of the trial judge and the appellants' submissions, nothing in the constitution or in the merger agreement supports the view that the local and the national unions are simply branches of the same entity. Each has its own management structure, areas of responsibility and assets and liabilities which are treated as such consistently in both documents.

[127] The appellants submit that the Court's decision in *Berry* supports their position that the local and national union are one legal entity. I do not agree.

[128] At issue in *Berry* was whether a union member may be personally liable to other members in a breach of contract action based on the terms of the union constitution. The Court decided that it was time to move away from the notion that union members were joined together by a web of individual contracts. Instead, the relationship should be viewed as one in which a union member has a contractual relationship with the union itself. Taking this proposition as their starting point, the appellants submit that if local unions were entities distinct from their national unions, then a joining member would enter into two distinct agreements, one with the local union and one with the national union whereas in fact there is only one constitution and the member joins only once. This, it is submitted, shows that the Court in *Berry* viewed the local and national unions as one entity.

[129] I cannot accept this reading of *Berry*. Nothing in the Court's decision suggests that a local and national union are one entity simply because an individual joins a parent union at the same time as she joins the local. Moreover, the appellants' contention that a single constitutional structure cannot create two separate legal entities is not correct. Taken to its logical conclusion, this would mean that because there is a single constitution creating a federation, the provinces cannot be separate legal entities. This, of course, is not so as the *Constitution Act, 1867* demonstrates.

[130] The appellants further submit that one of the purposes of recognizing unions as legal entities is to allow victims of group action to recover from group assets. I agree. But in this case, the constitutional provisions make it clear that the union local retains control of its own assets. It is one thing to say that victims should have access to the assets of the entity that

causes the harm. It is quite another, however, to say as the appellants do, that there should be access to the assets of another entity. This view is supported by *Berry*, where Iacobucci J. for the Court, said at para. 46, "unions are legal entities at least for the purpose of discharging their function and performing their role in the field of labour relations. If follows from this that, in [suits by and against them in their own name], a union may be held liable to the extent of its own assets". I emphasize the words "its own assets". Moreover, the Court made it clear in *Berry* that the interpretation of the terms of the membership contract requires due regard to its unique character and context, including the statutory labour relations scheme which is superimposed over it (para. 49). When that analysis is undertaken in this case, the local union's autonomy and control over its assets is clear.

[131] The appellants are mistaken when they submit that the local union holds its assets in trust for the union membership as a whole, and not just for the members of the local. The cases said to support this view are based on very different constitutional arrangements than we have before us in this case. The decisions in *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers, Edmonton Local* (1993), 146 A.R. 184 (Q.B.), and *Canadian Union of Public Employees v. Deveau* (1976), 19 N.S.R. (2d) 44 (S.C.T.D.), aff'd (1977), 19 N.S.R. (2d) 24 (S.C., App. Div.), turn on the interpretation of the particular unions' constitutions relating to property and asset entitlement upon the dissolution of, or secession by, a local union. Those provisions were entirely different than those in issue here. The appellants' reliance on *M'Kendrick v. National Union of Dock Labourers* (1910), 2 S.L.T. 215 (Sess. 2nd Div.), is also misplaced. It involved a different constitutional arrangement between the union and its branches such that, as the Lord Justice-Clerk said at p. 222, the union had control and could order

transfer of money for union purposes from any branch to any other branch. To the same effect, Lord Salvesen said at p. 224, that if the branch had been a separate entity capable of being sued and possessing funds enabling it to meet its obligations, there would have been no question as to its own liability.

[132] Unlike the constitutional provisions in issue in these cases, CASAW National's constitution makes it clear that the locals retain their assets in the event of secession and, more generally, endorses local autonomy and provides for retention by locals of local assets (ss. 4(b) and 13).

[133] I conclude that the Court of Appeal was correct to hold that CAW National did not assume the debts and obligations of CASAW Local 4 upon the merger of CAW National and CASAW National and that CAW National is not liable for the debts and obligations of CASAW Local 4. Therefore, the liability of CAW National may only be sustained on the basis of its own acts or on the principles of joint and vicarious liability.

[134] This conclusion means that the trial judge's finding that CAW National was directly liable for the acts of CASAW Local 4's executive members, Messrs. Seeton and Shearing, cannot stand. The trial judge's reasoning was that CASAW Local 4's acts (i.e. the acts of the Local's executive members Shearing and Seeton) should be considered to be acts of CASAW National. CAW National, on merger, acquired CASAW National's obligations and liabilities. However, because the trial judge erred by concluding that the acts of CASAW Local 4 were the responsibility of CASAW National, it follows that CAW National did not assume CASAW

Local 4's obligations or liabilities on merger. CAW National is therefore not directly liable for the acts of CASAW Local 4's executive members Shearing and Seeton.

[135] The trial judge's error about the separate legal status of CASAW Local 4 and CASAW National also skewed his findings about CAW National's direct liability for its own acts. I agree with the Court of Appeal when it said at para. 168:

> Because the trial judge concluded that the Local and the National Unions were one entity, he did not distinguish between those officers who were acting in their capacity as officers of the Locals, from those who were acting in their capacity as officers of the National Unions. Thus, generic findings of liability, such as those found in the [t]rial [judge's] [r]easons are not helpful.

[136] I will have more to say about this aspect in the next two sections.

(3) CAW National's Vicarious Liability for Messrs. Warren's and Bettger's Torts

[137] There are two main issues to be addressed here. The first relates to the issue of control. The trial judge's finding that CAW National was vicariously liable for the acts of Messrs. Warren and Bettger as members of CASAW Local 4 turns on his conclusion that it was in control of CASAW Local 4. However, my respectful view is that this finding cannot be sustained. The second issue relates to the appellants' assertion of a broader basis on which vicarious liability may be imposed. They submit that unions are vicariously liable for the acts of their striking members. However, I cannot accept this broad contention. I will address these two points in turn.

(a) *Control*

[138] The trial judge was of the view that CASAW National and CAW National were in control of CASAW Local 4. Although he did not discuss this point in the portion of his reasons dealing with vicarious liability, this finding nonetheless seems to underpin his conclusion that the national union is vicariously liable for the Local's actions. I agree with the Court of Appeal that the trial judge's finding relating to control cannot be upheld.

[139] The trial judge's finding of control centred on the role of Mr. David. The trial judge concluded that Mr. David in effect ran the strike on behalf of CAW National. The difficulty with that conclusion, however, is that it is not consistent with the trial judge's other conclusions about Mr. David's involvement. The trial judge found, for example, that one of the terms of Mr. David being made available to CASAW Local 4 was that he should be answerable only to the local union (para. 185). The trial judge also noted that CASAW National and CASAW Local 4, in joint correspondence, accepted CAW National's offer of David's assistance but on the basis that he would act under the direction of CASAW Local 4 in conjunction with CASAW National (para. 189). As the trial judge put it, "Thus, CASAW Local 4 would retain its autonomy, yet have input from both Mr. David and CASAW National, neither of whom would have voting rights" (para. 189). As the trial judge's reasons make clear, CASAW Local 4 was at pains to limit, if not extinguish the role of the national president, Mr. Slezak. The trial judge found that "Local 4 did not want Slezak involved" (para. 189) and that, by "early July [1992], CASAW Local 4 had autonomy and Slezak was no longer the contact

person for the mediator or the company. This became the sole responsibility of CASAW Local 4 president Schram" (para. 206).

[140] My view is that the Court of Appeal was right to conclude that the trial judge's findings about the local's "enslavement" cannot be sustained. The trial judge's own findings of fact make clear that Mr. David, at his own insistence and by agreement of the various union entities, was operating within the decision-making structure of CASAW Local 4 (C.A. reasons, at para. 158). I therefore agree with the Court of Appeal that the trial judge's imposition of vicarious liability on the basis of the national unions' control of CASAW Local 4 cannot stand.

(b) *CAW National Liability for Acts of Striking Members of CASAW Local 4*

[141] The appellants advance a broader basis for vicarious liability. They submit that the relationship between CAW National and the members of CASAW Local 4 renders CAW National vicariously liable for torts committed by members of the local in the course of a strike. CAW National was the successor under the merger to the liabilities of CASAW National. The question, therefore, is whether CASAW National is vicariously liable for the acts of members of CASAW Local 4. In my view, it is not.

[142] The question of whether vicarious liability should be imposed is approached in three steps. First, the court determines whether the issue is unambiguously determined by the precedents. If not, a further two-part analysis is used to determine if vicarious liability should be imposed in light of its broader policy rationales: *Bazley v. Curry*, [1999] 2 S.C.R. 534, at

para. 15; *John Doe v. Bennett*, 2004 SCC 17, [2004] 1 S.C.R. 436, at para. 20. The plaintiff must show that the relationship between the tortfeasor and the person against whom liability is sought is sufficiently close and that the wrongful act is sufficiently connected to the conduct authorized by the party against whom liability is sought: *Bennett*, at para. 20. The object of the analysis is to determine whether imposition of vicarious liability in a particular case will serve the goals of doing so: imposing liability for risks which the enterprise creates or to which it contributes, encouraging reduction of risk and providing fair and effective compensation: *Bennett*, at para. 20.

[143] The trial judge implies in his reasons that the issue of the union's vicarious liability is settled by authority, citing *Leroux v. Molgat* (1985), 67 B.C.L.R. 29 (S.C.), and *Matusiak v. British Columbia and Yukon Territory Building and Construction Trades Council*, [1999] B.C.J. No. 2416 (QL) (S.C.). Assuming without deciding that two, trial level decisions could constitute an unambiguous determination of the question, these two cases do not do so as they are clearly distinguishable from the present one.

[144] *Leroux* was an action challenging a union election and claiming damages for wasted campaign expenses. The court imposed vicarious liability, finding that one or more of the union's agents with control of its electoral procedures permitted or deliberately arranged for the irregularities. This was not a case in which vicarious liability was imposed for the conduct of the union's members but rather for conduct of its agents who controlled its electoral procedures.

[145] In *Matusiak*, two management employees sued a number of building trades union locals and others alleging threats to their personal safety, infliction of mental suffering, nuisance, intimidation and conspiracy to injure, which had occurred in the lead up to and during a riot to protest the presence of another union at the work site. The building trades locals (and their umbrella organisation, the Building and Construction Trades Council) admitted that they had authorized civil disobedience and admitted liability for the protest and the assaults. Their defence was that the plaintiffs had not proved that their members had engaged in the activities of which the plaintiffs complained. The admission of responsibility for the acts of the union local's members was supported by findings that the officers and agents of the unions had planned, organized and participated in the tortious conduct. Vicarious liability was not based simply on the fact that union members had participated in this conduct.

[146] In addition to these authorities, the appellants rely on *Mainland Sawmills Ltd. v. U.S.W., Local 1-3567*, 2007 BCSC 1433, 62 C.C.E.L. (3d) 66, for the proposition that unions are vicariously liable for the torts committed by their members in the course of a strike because they are closely connected with the union enterprise. This is an overly general characterization of the court's decision in that case, however. At issue was a claim against a union local for assaults and batteries committed on workers when members of the local entered the workplace and shut it down. The local did not deny that it was vicariously liable for trespass in the workplace. The trial judge found it was also vicariously liable for the assaults and batteries committed by union members because they were led by the local president and his acts were subsequently ratified by the officers and the local's executive: (paras. 200-201). As the trial judge put it, the local president "led the charge" (para. 200). She also held that even if the

precise conduct was not expressly ratified, the wrongful acts were sufficiently related to the conduct authorized by the union to justify imposing vicarious liability (para. 213). Thus the local was held responsible for the acts of the membership which it had authorized, directed and led.

[147] I conclude that the appellants' broad proposition that a union is vicariously liable for the acts of its striking members is not settled by authority. It is therefore necessary to conduct the two-step analysis for determining vicarious liability set out in the authorities such as *Bazley*; *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570; *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403; *Bennett* and *E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*, 2005 SCC 60, [2005] 3 S.C.R. 45. In my view, the appellants' proposition fails at the first of the two steps.

[148] At the first step, the question is whether a union member has a sufficiently close relationship with the union so that imposing vicarious liability will be consistent with and further the purposes of doing so.

[149] Union members do not fall into any of the traditional categories of vicarious liability. They are not, by virtue of union membership, the employees, servants or agents of the union: see, for example, *Re Oil, Chemical & Atomic Workers & Polymer Corp.* (1958), 10 Lab. Arb. Cas. 31 (Ont.), at pp. 33-34. Nor is union membership closely analogous to any of these traditional categories. Unlike employers and principals, unions generally do not choose or control who their members are. The relationship between a union member and his or her union

is contractual in nature, with both the union and the member agreeing to be bound by the terms of the union constitution. However, the analogy to contract has its limits given that the relationship is greatly determined by the relevant statutory regime and the general principles of labour law which have been fashioned over the years. Significantly, the members have the "unqualified" right to speak out against the agenda of their bargaining agent: *Berry*, at paras. 48 and 60. This point is dramatically illustrated in this case: union members crossed the picket line against CASAW Local 4's wishes and we are told Mr. O'Neil, a member of the local, started a rival organization and campaigned to have CASAW Local 4 replaced while the local had a statutory duty to represent them.

[150] We must remember that the question is whether CASAW National is vicariously liable for the acts of the striking members of CASAW Local 4 and therefore it is the relationship between them that must be assessed. As discussed earlier, they are separate legal entities and the local had a large measure of autonomy under the constitution. Moreover, the trial judge found (as noted earlier) that CASAW Local 4 was at pains to eliminate, if not extinguish the role of CASAW National President Slezak (para. 189) and that by "early July [1992], CASAW Local 4 had autonomy and Slezak was no longer the contact person . . . . This became the sole responsibility of CASAW Local 4 president Schram" (para. 206). These findings do not support the conclusion that the relationship between CASAW National and the striking union members Mr. Warren and Bettger was sufficiently close to justify imposing vicarious liability on the national union for their unlawful acts.

(4) Joint Liability

[151] The appellants submit that there is a third basis upon which the trial judge did or could have imposed liability on CAW National. I cannot agree.

[152] Inciting another to commit a tort may make the person doing the inciting a joint tortfeasor with the person who actually commits it. However, I do not think that the trial judge imposed liability on this basis. His many references in his reasons to "incitement" by the union were in the context of his analysis of the various negligence claims (see, for example, para. 868 — negligence claim by Mr. O'Neil against Mr. Hargrove; para. 878 — analysis of duty of care of CAW National; paras. 880-81 — analysis of standard of care of CAW National; para. 917 — analysis of vicarious liability of CAW National; para. 923 — analysis of duty of care of Mr. Seeton; para. 954 — analysis of causation with respect to Mr. Bettger; para. 971 — analysis of adverse inferences). Reading the trial judge's reasons as a whole, I do not think that he found or meant to find that the union was a joint tortfeasor with Mr. Warren because it had incited him to commit murder. Rather, as I read his reasons, the trial judge considered the "incitement" to commit illegal acts to be one aspect of the union's negligence.

[153] The appellants further submit that CAW National's liability could be sustained on the basis of concerted action liability because it "incited and participated in Warren's tort and contributed to the deaths" (Factum, at para. 87). This submission, however, cannot be accepted. I agree with the respondent union that there is no basis in law or in fact for such a finding.

[154] As for the law, concerted action liability may be imposed where the alleged wrongdoers acted in furtherance of a common design: see, e.g., *Botiuk v. Toronto Free Press*

Publications Ltd., [1995] 3 S.C.R. 3, at para. 74, citing with approval J. G. Fleming, *The Law of Torts* (8th ed. 1992), at p. 255. While the required connection between the common design and the tort actually committed has been expressed in different ways in the authorities, the cases relied on by the appellants stand for the proposition that the tort, in this case the murders, must be committed in direct furtherance of the common design. As Fleming expressed it, this means that all participants must act in furtherance of the wrong: *Botiuk*, at para. 74; *Newcastle (Town) v. Mattatall* (1987), 78 N.B.R. (2d) 236 (Q.B.), aff'd (1988), 87 N.B.R. (2d) 238 (C.A.), at paras. 27-43; *The Koursk*, [1924] P. 140 (C.A.); *Mainland Sawmills*, at paras. 167-81; G. H. L. Fridman, *The Law of Torts in Canada* (2nd ed. 2002), at pp. 888-89; L. N. Klar, *Tort Law* (3rd ed. 2003), at p. 488.

[155] The trial judge's findings of fact in this case do not meet this test. There was no finding of any common design between Mr. Warren and CAW National to murder the miners and no finding that the murders were committed in direct furtherance of any other unlawful common design between Mr. Warren and the union. CAW National cannot be found liable as a joint tortfeasor with Mr. Warren on the basis that it acted with him in furtherance of a common design.

(5) Summary of Conclusions

[156] The appellants have not shown that the Court of Appeal erred in setting aside the trial judge' findings against CAW National.

D. *The Claims Against Mr. Bettger and the Claims by Mr. O'Neil*

(1) The Claims Against Mr. Bettger

[157] Mr. Bettger was a miner employed by Royal Oak and a member of CASAW Local 4. The trial judge described him as "radica[l] from the outset, determined to disrupt and destroy Royal Oak" (para. 278). He participated in the so called "graffiti run" on June 29, the satellite dish explosion on July 21 and the vent shaft blast on September 2. He was convicted criminally and imprisoned for some of his actions during the strike.

[158] The trial judge found Mr. Bettger liable in negligence and apportioned to him 1 percent of the responsibility for the miners' deaths (paras. 942-64 and 1300). The trial judge found that Mr. Bettger owed a duty of care and failed to exercise reasonable care towards those at the mine. With respect to causation, the trial judge concluded that it was irrelevant whether or not Mr. Bettger was aware of Mr. Warren's plan to plant a bomb. Mr. Bettger's conduct, the trial judge found, met the material contribution test because "Bettger's criminal activity and his boasts with others contributed to Warren appreciating that his turn must arrive since the acts of others had not succeeded in meeting the union's objective of shutting down the mine" (para. 959; see also para. 961).

[159] The Court of Appeal set aside these findings, holding that (1) the trial judge erred by concluding that the case fell within a pre-existing category of legal duties; (2) to the extent the trial judge found that there was a duty to warn, it was difficult in the circumstances to

identify what warning Mr. Bettger was expected to give; and (3) there was no basis to impose a *Cooper* duty on him to prevent the torts of others or to find him liable on the basis that he had incited or assisted Mr. Warren (paras. 176-80). The Court of Appeal was also of the view that the trial judge had applied the wrong legal test in his analysis of causation and had erred by failing to consider the acts or omissions of each defendant separately in carrying out that analysis (paras. 202 and 204).

[160] The appellants make few submissions specifically in relation to Mr. Bettger's liability. They submit that the trial judge's finding that Mr. Bettger had a duty and breached it should not have been disturbed, that Mr. Bettger's liability could be supported on the basis that he was a joint tortfeasor with Mr. Warren and that the trial judge did not err in his approach to causation.

[161] For the reasons given earlier, I cannot accept the second and third of these submissions. As the Court of Appeal correctly found, the trial judge's reasons and findings of fact preclude imposing liability on Mr. Bettger on the basis that he was a joint tortfeasor with Mr. Warren. As for causation, it is particularly clear in the trial judge's analysis of the claims against Mr. Bettger that he applied the material contribution rather than the "but for" test and failed to assess Mr. Bettger's own conduct individually.

[162] As to the trial judge's imposition of a duty of care on Mr. Bettger, I agree with the Court of Appeal that the trial judge erred to the extent that he found that the alleged duty fell within one of the existing categories. Contrary to the trial judge's conclusion, the claim against

Mr. Bettger does not fall into the category of cases in which the defendant's act foreseeably causes physical harm to the plaintiff. As the Court of Appeal points out, it was Mr. Warren's act, not Mr. Bettger's which caused the physical harm. I also agree with the Court of Appeal in relation to the trial judge's finding that Mr. Bettger had a duty to warn. In light of the trial judge's finding that it was notorious in the community that a violent strike was in progress, it is difficult to see what warning Mr. Bettger should have given or what possible effect it could have had. Finally, I agree with the Court of Appeal that a duty to prevent Mr. Warren's acts should not have been imposed on Mr. Bettger. He had no control over Mr. Warren and the trial judge made no finding that he was in any way aware of his plans.

[163] In my view, the Court of Appeal was right to set aside the finding of liability in negligence against Mr. Bettger.

(2) The Claims by Mr. O'Neil

[164] Mr. O'Neil came upon the dismembered bodies of nine fellow miners shortly after the fatal blast. He alleged that as a result, he suffers from post-traumatic stress disorder which has prevented him from working. Although the trial judge indicated that he had "some skepticism" about the extent to which the blast affected Mr. O'Neil's mental and physical health, he accepted that the blast and its aftermath had some impact (para. 1239). The trial judge found, however, that there was no manifestation of significant symptoms of any psychiatric disorder as of September 2000 and his claim for damages and loss of income should be considered at an end as of January 31, 2000 (paras. 1243-44).

[165] As the trial judge observed, the basis for liability of the defendants was the same in both the *Fullowka* and the *O'Neil* actions. If, as I have concluded, the respondents did not breach their duties in tort to the *Fullowka* appellants, they did not breach any duties owed to Mr. O'Neil. No submissions have been advanced to us that the outcome in the *O'Neil* appeal should be different based on the fact that there were some different parties named in his action. It follows, that even if Mr. O'Neil stands in the same position as the *Fullowka* appellants as regards tort duties owed to them by the respondents, his action must fail and his appeal should be dismissed.

IV. Disposition

[166] I would dismiss both appeals with costs and affirm the order of the Court of Appeal with respect to costs.

Appeals dismissed with costs.

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Solicitor for the appellant O'Neil: James E. Redmond, Edmonton.

Solicitors for the respondent Pinkerton's of Canada Ltd.: Duncan & Craig, Edmonton.

Solicitors for the respondent the Government of the Northwest Territories: Field, Edmonton.

Solicitors for the respondent National Automobile, Aerospace, Transportation and General Workers Union of Canada: Chivers Carpenter, Edmonton; Sack Goldblatt Mitchell, Toronto.

Solicitors for the respondent Bettger: MacPherson Leslie & Tyerman, Calgary.

Solicitors for the respondent Royal Oak Ventures Inc.: Parlee McLaws, Edmonton.

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