Alcohol Manufacturers and Suppliers, Fetal Alcohol Spectrum Disorder, and the Duty to Inform

*Robert Solomon & Madeline Hill**

All manufacturers and suppliers have a general common law duty of care to inform consumers of the risks inherent in using their products. Moreover, the Canadian courts have established a demanding standard of disclosure for products intended for human consumption, especially if they pose a significant risk of serious bodily harm or illness. Although these principles were clearly set out almost 40 years ago, alcohol manufacturers and suppliers have not yet been held accountable for failing to inform consumers of the risks of Fetal Alcohol Syndrome Disorder (FASD), the leading cause of birth defects, cognitive impairment

Tous les fabricants et fournisseurs ont un devoir général de diligence selon la Common Law d'informer les consommateurs des risques inhérents à l'utilisation de leurs produits. En outre, les tribunaux canadiens ont établi une norme de divulgation exigeante pour les produits destinés à la consommation humaine, plus particulièrement, si lesdits produits engendrent un risque important de lésions corporelles graves ou de maladie. Malgré le fait que ces principes aient été clairement établis il y a près de 40 ans, les fabricants et fournisseurs d'alcool ne sont toujours pas tenus responsables du devoir d'informer les consommateurs des risques

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and physical disabilities among Canadian infants and children. No doubt, complex causation and evidentiary issues will arise, particularly in civil suits involving subtle FASD-related disabilities. However, the major barrier in many other situations does not appear to be the governing legal principles, but rather the challenges that even the most knowledgeable plaintiffs face in suing multi-billion-dollar defendants. In our view, it is only a matter of time before the Canadian alcohol industry is sued and held liable for failing to inform consumers of the risks of FASD.

de trouble de syndrome d'alcoolisation fœtale (TSAF), laquelle est la principale cause de malformations congénitales, de déficiences cognitives et de handicaps physiques chez les nourrissons et les enfants canadiens. Il n'y a aucun doute que des questions complexes de causalité et de preuve se poseront, en particulier dans les procès civils portant sur des handicaps subtils liés au TSAF. Cependant, l'obstacle principal dans de nombreuses autres situations ne semble pas être fondé sur les principes juridiques en vigueur, mais plutôt sur les défis auxquels même les plaignants les mieux informés s'ont confronté lorsqu'ils agissent en justice contre des défendeurs dans des causes dont la valeur en litige s'élève à plusieurs milliards de dollars. À notre avis, des poursuites en responsabilité touchant le devoir de divulgation du risque de TSAF de l'industrie canadienne d'alcool sont à anticiper dans l'avenir pas si lointain.

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I. Introduction

Although researchers have provided differing estimates of the prevalence of Fetal Alcohol Spectrum Disorders (FASDs) in Canada,[1] FASDs are generally accepted to be far more common than the other major causes of developmental disabilities.[2] FASD is a broad diagnostic term that includes at least three related diagnoses, which are commonly listed in descending order of severity: Fetal Alcohol Syndrome (FAS), Partial Fetal Alcohol Syndrome (pFAS), and Alcohol-Related Neurodevelopmental Disorder (ARND). While all three diagnoses are associated with cognitive and behavioral deficits, only FAS and pFAS are characterized by facial dysmorphology and growth deficiencies.[3] FASD results from *in utero* exposure to

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1 The variation in the estimates reflect, among other things, the lack of reliable data on maternal drinking and the challenges of diagnosing infants and children with mild to moderate FASD-related impairments. See generally Nguyen Xuan Thanh et al, "Incidence and Prevalence of Fetal Alcohol Spectrum Disorder by Sex and Age Group in Alberta, Canada" (2014) 21:3 J Population Therapeutics & Clinical Pharmacology e395 at e395 ("14.2 to 43.8 per 1000 of births"); Katherine Flannigan et al, "The Prevalence of Fetal Alcohol Spectrum Disorder" (November 2024) at 2, online (pdf): <canfasd.ca> [perma.cc/9MTW-UA3W] ("In Canada, the minimum best estimate is 4%."); Svetlana Popova et al, "Population-Based Prevalence of Fetal Alcohol Spectrum Disorder in Canada" (2019) 19:1 BMC Public Health 845 at 845 [Popova et al, "Population-Based Prevalence"] ("2 to 3% among elementary school students in the GTA"). See also Bruce Ritchie, *Fetal Alcohol Spectrum Disorders (FASD): Exposure Rates, Primary and Cascade Results of In Utero Alcohol Exposure, and Incidence Markers*, (Sarnia, ON: FASLink, 2007), online (pdf): <acbr.com> [perma.cc/L3GS-52ZY]; Jeffrey R Wozniak, Edward P Riley & Michael E Charness, "Clinical Presentation, Diagnosis, and Management of Fetal Alcohol Spectrum Disorder" (2019) 18:8 Lancet Neurology 760 at 760 ("the prevalence of [FASD] in the global population is 0.77%").

2 See Flannigan et al, *supra* note 1 at 3, who states that FASD is 2 times more common than Autism Spectrum Disorder, 17 times more common than Cerebral Palsy, 29 times more common than Down Syndrome, and 40 times more common than Tourette's Syndrome. The Canada FASD Research Network has stated that "FASD impacts more people in Canada than Autism Spectrum Disorder, Cerebral Palsy, and Down syndrome combined" (see Canada FASD Research Network, "FASD Facts" (last visited 12 January 2025), online (pdf): <canfasd.ca> [perma.cc/7SPX-XPQ7]). See also Popova et al, "Population-Based Prevalence", *supra* note 1 at 845.

3 Some researchers have divided ARND into cases involving cognitive (ARND/C) as opposed to behavioural impairments (ARND/B). Other recog-

alcohol and, as such, is preventable. Children with FASD may suffer a range of negative health impacts, from mild intellectual and behavioral deficits to profound disabilities and premature death. The extent of a child's FASD-related disabilities varies greatly, depending on the amount of alcohol the mother consumed, when in the pregnancy alcohol was consumed, the frequency of heavy drinking, genetics, and other factors.[4]

Unlike tobacco and cannabis,[5] alcohol is not subject to any federal health labelling requirements,[6] nor is it subject to the stringent federal advertising and marketing restrictions that apply to tobacco and cannabis.[7] The

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nized diagnoses that fall within the scope of FASD include Alcohol-Related Birth Defects (ARBD), which may entail heart, kidney, bone, and hearing problems. See generally Svetlana Popova et al, "Comorbidity of Fetal Alcohol Spectrum Disorder: A Systematic Review and Meta-Analysis" (2016) 387:10022 Lancet 978 [Popova et al, "Comorbidity"]; Sarah N Mattson, Gemma A Bernes & Lauren R Doyle, "Fetal Alcohol Spectrum Disorders: A Review of the Neurobehavioral Deficits Associated with Prenatal Alcohol Exposure" (2019) 43:6 Alcoholism Clinical Experimental Research 1046; Claire D Coles et al, "Characterizing Alcohol-Related Neurodevelopmental Disorder: Prenatal Alcohol Exposure and the Spectrum of Outcomes" (2020) 44:6 Alcoholism Clinical Experimental Research 1245; Dae D Chung et al, "Toxic and Teratogenic Effects of Prenatal Alcohol Exposure on Fetal Development, Adolescence, and Adulthood" (2021) 22:16 Intl J Molecular Sciences 8785.

4 See Mattson, Bernes & Doyle, *supra* note 3; Chung et al, *supra* note 3. See also Philip A May et al, "Maternal Alcohol Consumption Producing Fetal Alcohol Spectrum Disorders (FASD): Quantity, Frequency, and Timing of Drinking" (2013) 133:2 Drug & Alcohol Dependence 502; Danielle Sambo & David Goldman, "Genetic Influences on Fetal Alcohol Spectrum Disorder" (2023) 14:1 Genes 195.

5 *Tobacco and Vaping Products Act*, SC 1997, c 13, ss 15–17 [*Tobacco & Vaping Act*]; *Cannabis Act*, SC 2018, c 16, ss 25–28 [*Cannabis Act*].

6 Federal law does not require alcohol beverage containers to include any health or safety warnings, or any health, nutritional or standard drink information. The federal labelling law is largely limited to rules governing: the name on the product (e.g., whether a product can be called Irish Whisky, Scotch Whisky, Canadian Whisky, Malt Whisky, or Tennessee Whisky), claims about its age, and the required alcohol by volume declaration. See *Food and Drug Regulations*, CRC, c 870, ss B.02.001–B.02.123.

7 Unlike alcohol, broadcast advertising of tobacco and cannabis is prohibited. See e.g. *Tobacco & Vaping Act*, *supra* note 5, ss 18–33; *Cannabis Act*, *supra* note 5, ss 17–24; *Discretionary Services Regulations*, SOR/2017-159, s 5;

federal government's hands-off policy stands in sharp contrast to alcohol's known risks.[8] Alcohol consumption in 2020 was estimated to have caused more than 17,000 deaths,[9] and generated social costs ($19.7 billion) well in excess of the related net government revenues ($13.3 billion).[10]

Nine private member's bills requiring warning labels on alcohol products were introduced in Parliament from 1988 to 2006. The first eight died on the order papers.[11] The ninth was defeated, with 163 members opposed and 91 in favour.[12] The most recent private member's bill calling for alcohol warning labels was introduced in November 2022 and died on the order papers in January 2025 when Parliament was prorogued.[13]

Canadian Radio-Television and Telecommunications Commission, *Code for Broadcast Advertising of Alcohol Beverages* (Ottawa: CRTC, 1996).

8 Alcohol, which the World Health Organization first designated as a Class 1 carcinogen in 1988, has been found to increase the risk of breast, esophageal, liver, rectal, colon, and other cancers. See World Health Organization, International Agency for Research on Cancer, *IARC Monographs on the Evaluation of the Carcinogenic Risks to Humans Volume 44* (UK: IARC, 1988). Alcohol is also associated with, or the sole cause of, many other major categories of disease and injury, including FASD (see Kevin D Shield, Charles Parry & Jurgen Rehm, "Chronic Diseases and Conditions Related to Alcohol Use" (2013) 35:2 Alcohol Research Current Reviews 155).

9 Canadian Substance Use Costs and Harms Scientific Working Group, *Canadian Substance Use Costs and Harms 2007-2020* (Ottawa: Canadian Centre on Substance Use and Addiction, 2023) at 3.

10 Adam Sherk, "Canada's Alcohol Deficit, 2007-2020: Social Cost, Public Revenue, Magnitudes of Alcohol Use, and the Per-Drink Net Deficit for a Fourteen-Year Period" (2024) 85:3 J Studies on Alcohol & Drugs 306 at 308.

11 For an excellent chronology of these Bills and the alcohol industry's role in their demise, see Alan Ogborne, Gina Stoduto & Lynn Kavanagh, "Warning Labels on Alcohol Beverage Containers: Public Support and Policy Failure?" in Norman Giesbrecht et al, eds, *Sober Reflections: Commerce, Public Health, and the Evolution of Alcohol Policy in Canada, 1980-2000* (Montréal: McGill-Queen's University Press, 2006) at 212.

12 Canada, Bill C-251, *An Act to amend the Food and Drugs Act (warning labels regarding the consumption of alcohol)*, 2nd Sess, 39th Parl, 2007 (defeated at second reading in the House of Commons 12 December 2007).

13 Bill S-254, *An Act to amend the Food and Drugs Act (warning label on alcoholic beverages)*, 1st Sess, 44th Parl, 2022 (Second reading 1 June 2023).

The threat of being sued and held civilly liable provides an alternative means of encouraging alcohol manufacturers to better inform women and their partners of the risks of FASD. In this paper, we examine the common law principles of negligence that govern such suits in Canada, with the exception of Québec. Prenatal injury cases, including those based on FASD, typically generate two sets of claims: one brought on the disabled infant's behalf for the injuries that he or she has suffered and a second set of claims by the infant's parents for any special care they have provided and for any additional expenses they have incurred attributable to their infant's disabilities.[14] As we will demonstrate, both types of claims are viable based on existing common law negligence principles. We will leave it to others to discuss the significantly broader vulnerability of alcohol manufacturers under Québec law.[15]

Private member's bills are rarely enacted into law. Of the 1,042 private member's bills introduced into the House of Commons from 1994 to 2000, only 18 (1.7%) became law. Of these, only half were substantive in nature and resulted in changing the statutory law. See Rob Walsh, "By the Numbers: A Statistical Review of Private Member's Bills" (2002) 25:1 Can Parliamentary Rev 29.

[14] *Cherry (Guardian) v Borsman*, 1991 CanLII 8297 at para 114, 5 CCLT (2d) 243 (BCSC) aff'd in part 1992 BCCA 93 [*Cherry*]; *Crawford (Litigation guardian of) v Penney*, 2003 CanLII 32636 at paras 265–317, [2003] OJ No 89 (ONSC), aff'd 2004 CanLII 22314 (ONCA) [*Crawford*]; *Ediger v Johnston*, 2009 BCSC 386, aff'd 2013 SCC 18 [*Ediger*]; *Cojocaru (Guardian Ad Litem) v British Columbia Women's Hospital*, 2009 BCSC 494 at para 367, aff'd 2013 SCC 30 [*Cojocaru*].

[15] The scope of potential liability in Québec is best reflected in *Létourneau v JTI-MacDonald Corp*, 2015 QCCS 2382 [*Létourneau*], a class action suit in which the defendant tobacco companies were held liable to Québec smokers for $15.5 billion in moral and punitive damages. The companies were found to have "committed fault" on four grounds: the general rules of civil liability in art 1457 CCQ; the safety defect provision in art 1468 CCQ; the unlawful interference provision in art 49 of the *Québec Charter of Human Rights and Freedoms*, CQLR c C-12; and the prohibited practice provisions in arts 219 and 228 of the *Consumer Protection Act*, CQLR c P-40.1. The trial judgment was upheld on appeal, subject to a very minor adjustment in damages. See also *Imperial Tobacco Canada Itée c Conseil québécois sur le tabac et la santé*, 2019 QCCA 358. For the potential implications of *Létourneau* on the duty to warn, see generally Jacob J Shelley, "A Reflection on the Duty to Warn after *Létourneau v JTI-MacDonald*: A Future for Obesity Litigation in Canada?" (2021) 14:2 McGill JL & Health 255.

In July 2023, two class action suits modelled on *Létourneau* were brought

It is generally agreed that all common law negligence actions involve the same basic issues.[16] Thus, the elements of a negligence claim against an alcohol manufacturer for failing to inform a woman of the risks of FASD are identical to those in a negligence claim against a careless driver. Unfortunately, there is less agreement on the naming and packaging of the elements of a negligence action. Before turning to the analysis of an FASD claim, we have set out below a six-part framework for analyzing negligence claims. The plaintiff has the burden of establishing each of the first five elements on the balance of probabilities, and the defendant has the burden of establishing the sixth element to the same standard of proof.[17]

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against the three largest beer companies in Québec and the provincial alcohol authority, Société des alcools du Québec (SAQ), for failing to inform consumers of the risks of liver cirrhosis and seven types of cancer. See generally Dominique Scali, "Demandes d'actions collectives contre la SAQ et les brasseurs Molson, Labatt et Sleeman: en faites-vous partie?", *Le Journal de Montréal* (7 July 2023), online: <journaldemontreal.com> [perma.cc/9VUE-8K3T].

The concept of fault under the *CCQ* is broader than the common law concept of negligence that applies in the rest of Canada, where the breach of a statutory provision does not, in and of itself, give rise to liability in negligence. See *The Queen (Can) v Saskatchewan Wheat Pool*, [1983] 1 SCR 205 at 226–27.

16 See e.g. RFV Heuston, RA Buckley & John W Salmond, *Salmond and Heuston on the Law Of Torts*, 21st ed (London, UK: Sweet & Maxwell, 1996) at 196, which divides negligence actions into three main issues (duty, breach and causation); James Goudkamp & Donal Nolan, *Winfield and Jolowicz On Tort*, 20th ed (London, UK: Sweet & Maxwell, 2020) at 78–80, which divides negligence into four issues (duty, breach, causation, and damages). For other approaches, see Prue Vines, "Negligence: Introduction" in Carolyn Sappideen & Prue Vines, eds, *Fleming's the Law of Torts*, 10th ed (Pyrmont: Thomson Reuters (Professional) Australia Limited, 2011) 119 at 121–22; Lewis Klar & Cameron SG Jefferies, *Tort Law*, 7th ed (Toronto: Thomson Reuters, 2023) at 200.

17 Although the balance of probabilities test is clearly less onerous than the criminal standard of proof (i.e., beyond a reasonable doubt), it is difficult to define more precisely. It has been argued that the trier of fact must have a conviction or belief in the claimed state of affairs and that a mere mathematical or statistical probability of 51% to 49% is insufficient. See John G Fleming, *The Law of Torts*, 9th ed (Sydney: LBC Information Services, 1998) at 352.

The Elements of a Common Law Negligence Action

1. **Duty of Care**: The plaintiff must establish, as a matter of legal policy, that the defendant has a legal obligation to exercise care for their benefit in the circumstances of the case.

2. **The Standard of Care and its Breach**: The plaintiff must establish that, based on all the facts of the case, the defendant breached the requisite standard of care. The general standard of care in negligence is that of a reasonable person in all the circumstances of the case.

3. **Causation**: The plaintiff must prove that the defendant's breach of the standard of care was a cause of their claimed loss. In legal terms, the plaintiff must establish that "but for" the defendant's breach of the standard of care, the loss would not have occurred.

4. **Remoteness of Damages**: The plaintiff must establish, as a matter of legal policy, that the causal relationship between their loss and the defendant's negligence was not too remote or tenuous to be recoverable. Liability is usually limited to losses that are a foreseeable result of the defendant's negligent act.

5. **Damages**: The plaintiff must prove that they have suffered legally recognized losses and must establish their extent. Certain losses, such as death and grief, are not, in and of themselves, recoverable at common law.

6. **Defences**: Finally, the defendant may allege that the plaintiff's conduct was a factor that should be taken into account to reduce or eliminate the plaintiff's claim. The two most relevant defences are contributory negligence and voluntary assumption of risk.

II. Do Alcohol Manufacturers and Suppliers Owe a Duty of Care to Inform Consumers of the Risks of FASD?

The Canadian appellate courts recognized more than 80 years ago that manufacturers have a common law duty to inform consumers of the risks

inherent in using their products.[18] The Supreme Court of Canada has repeatedly expanded and affirmed this duty,[19] requiring manufacturers to provide consumers with "clear, complete and current" information.[20] As the Supreme Court of Canada noted in *Hollis v Dow Corning Corp*, "it cannot be said that requiring manufacturers to be forthright about the risks inherent in the use of their product imposes an onerous burden" on them.[21]

Although most duty to inform cases are brought against manufacturers, Canadian courts have consistently held that similar principles apply to suppliers.[22] It is important to note that the provincial and territorial governments are alcohol suppliers by virtue of their monopolies over the wholesale alcohol market (hereinafter referred to as "government liquor authorities").[23]

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18 See *O'Fallon v Inecto Rapid (Canada) Ltd*, [1940] 4 DLR 276 at 277, 1939 CanLII 240, (BCCA) aff'g 1938 CanLII 215 (BCSC) [*O'Fallon*]. The Court held that the defendant manufacturer failed to adequately inform the plaintiff, who had a skin sensitivity, of the risk of developing a severe rash from its hair dye. The manufacturer's warnings were buried in a pamphlet that consumers were unlikely to read. Furthermore, even if these warnings had been brought to the plaintiff's attention, they were inadequate. They only referred to the risk of a minor rash and made no mention of the possibility of the severe blistering and swelling that the plaintiff suffered.

19 *Lambert v Lastoplex Chemicals*, [1972] SCR 569 at 574–75, 1971 CanLII 27 (SCC) [*Lambert*]; *Rivtow Marine Ltd v Washington Iron Works*, 1973 CanLII 6 at 1200 (SCC) [*Rivtow*]; *Hollis v Dow Corning Corp*, 1995 CanLII 55 at paras 40–41 (SCC) [*Hollis*].

20 *Hollis*, supra note 19 at para 26.

21 *Ibid*.

22 See e.g. *Allard Estate v Manahan (cob A to Z Rental Center)*, [1974] BCJ 568 at para 40, 46 DLR (3d) 614 (BCSC) [*Allard*]; *Lem v Barotto Sports Ltd*, 1976 AltaSCAD 153 at para 2, 1 AR 556 (ABCA) [*Lem*]; *Schulz v Leeside Developments Ltd* (1978), 90 DLR (3d) 98 at 106–07, 1978 CanLII 1976 (BCCA) [*Schulz*]. The plaintiff's claim against the supplier failed in these cases largely because the risks were obvious or known to the plaintiff. For cases where the plaintiff's claim against the supplier succeeded, see *Rivtow*, *supra* note 19; *Walford v Jacuzzi Canada Ltd*, 2007 ONCA 729.

23 Gerald Thomas, *Analysis of Beverage Alcohol Sales in Canada: Alcohol Price Policy Series Report 2 of 3* (Ottawa: Canadian Centre on Substance Abuse, 2012) at 5. Despite the increasing privatization of retail alcohol outlets, all the provinces and territories, except Alberta, maintain a network of government liquor stores of some kind. In these jurisdictions, the provincial and territorial

Consequently, like alcohol manufacturers, they too have a general duty to inform consumers of the risks associated with alcohol consumption.

While this duty is commonly referred to as a duty to warn, providing a warning is simply one of the ways in which manufacturers and suppliers can discharge their duty to inform. The requisite information can be conveyed by attaching a warning or health label to the product or its packaging, displaying point-of-sale signs, including a package insert, developing health-related public service announcements, incorporating the information in print and broadcast advertising, or by other means.[24]

Several leading cases illustrate that even if a warning label is provided, it must be assessed in terms of its prominence, clarity and specificity. In *Lambert v Lastoplex Chemicals*, the Supreme Court of Canada compared the warnings on the defendant's cans of lacquer sealer to the warnings on a competitor's product in number, size, and specificity. In holding the defendant liable, the Court concluded that the defendant's warnings were not explicit enough given the significant risk of fire that its lacquer sealer posed.[25] In *Moran v Wyeth-Ayerst Canada Inc*, the Court framed the issue in terms of "whether the warnings on the label were fair and reasonable in the circumstances," noting that while the warnings need not be perfect, they must address the dangers inherent in using the product.[26]

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governments would be viewed as suppliers based on both their wholesale alcohol monopoly and their retail liquor outlets.

[24] There is an extensive body of research on designing effective alcohol warning labels and other means of conveying health and safety information. The recent Canadian research includes: Tim Stockwell et al, *Strategies to Reduce Alcohol-Related Harms and Costs in Canada: A Review of Provincial and Territorial Policies* (Victoria: Canadian Institute for Substance Use Research, 2019) at 84–91 [Stockwell et al, *Strategies to Reduce Alcohol-Related Harms*]; Erin Hobin et al, *Enhanced Alcohol Container Labels: A Systematic Review* (Ottawa: Canadian Centre on Substance Use and Addiction, 2022); Tim Naimi et al, *Evidence-Based Recommendations For Labelling Of Alcohol Products in Canada* (Victoria: Canadian Institute for Substance Use Research, 2022) [Naimi et al, *Recommendations For Labelling*]; Tim Naimi et al, *Canadian Alcohol Policy Evaluation (CAPE) 3.0: Best Practice Policy Leaders* (Victoria: Canadian Institute for Substance Use Research, 2023) at 28–33.

[25] See *Lambert*, *supra* note 19 at 573–75. See also *O'Fallon*, *supra* note 18 at 277; *Hollis*, *supra* note 19 at paras 34–36.

[26] 2004 ABQB 646 at para 61 [*Moran*].

The warning must also be considered in light of the totality of the defendant's advertising, public statements, marketing, and other activities.[27] Consequently, we have phrased the common law duty in terms of the broader language of adequately informing consumers, rather than simply providing them with a warning.

The Canadian courts do not require manufacturers and suppliers to inform consumers of obvious or well-known risks.[28] There is no need to impose a duty to inform if the consumer's knowledge of the risks approximates that of the manufacturer or supplier. As often stated, there is no obligation to warn that a knife will cut.[29] Thus, it is unlikely that alcohol manufacturers and suppliers would be required to inform consumers that alcohol is intoxicating or that its consumption can impair one's driving ability.

Situations involving a product that poses an obvious or well-known risk must be distinguished from situations in which consumers have a vague understanding of the nature of the risks, are unaware of the probability or severity of the risks, or are only aware of some of the risks.[30] For example, a 2006 Canadian survey found that, although the great majority of women had heard of Fetal Alcohol Syndrome or Fetal Alcohol Disorder, detailed knowledge of what these terms actually involved was more limited.[31] While

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27 *Buchan v Ortho Pharmaceutical (Canada) Ltd*, [1986] OJ No 2331 at paras 18, 65–66, 1986 CanLII 114 (ONCA) [*Ortho* 1986]; *Siemens v Pfizer C&G Inc*, 1988 CanLII 5698 at paras 23–24 (MBCA) [*Siemens*]; *Moran*, *ibid*.

28 See e.g. *Kirby v Canadian Tire Corp* (1989), 57 Man R (2d) 207 at para 26, 1989 CanLII 7424 (MBKB) (food processing blades will cut); *Godin v Wilson Laboratories Inc* (1994), 145 NBR (2d) 29 at para 7, 1994 CanLII 4440 (NBKB) (rat poison will kill rats, which will begin to smell); *Cantlie v Canadian Heating Products Inc*, 2017 BCSC 286 (the glass front of a fireplace is very hot when in use). See also *Allard*, *supra* note 22 at para 36; *Schulz*, *supra* note 22 at para 29.

29 *Lem*, *supra* note 22 at para 22.

30 As the Supreme Court noted in *Lambert*, *supra* note 19 at 574–75, the plaintiff's knowledge that the lacquer sealer was flammable did not absolve the manufacturer of liability for failing to provide a specific warning that the fumes could be ignited by a nearby pilot light. The plaintiff, who was using the defendant's lacquer sealer in an adjacent room, was badly burned when the pilot light of the furnace ignited the product's highly flammable fumes. See also *O'Fallon*, *supra* note 18 at 277.

31 Environics Research Group, *Alcohol Use During Pregnancy and Awareness of*

two provincial surveys indicated that awareness of FASD had increased in Alberta between 2011 and 2017,[32] both surveys raised the concern that higher-risk subpopulations were under-represented.[33] Surprisingly, a study of college-aged students in Saskatchewan indicated that many lacked even a basic understanding of FAS and FASD. The authors reported:

> Most [focus group] participants seemed to know that FASD had something to do with alcohol but the depth of knowledge beyond that point varied: some participants did not know what FASD stood for, some had heard of FASD but did not know the exact cause of FASD, others were unaware of what exactly FASD was, while others did not associate alcohol consumption with FASD.[34]

Fetal Alcohol Syndrome and Fetal Alcohol Spectrum Disorder (Toronto: Environics Research Group, 2006) at 20. Moreover, there were significant regional differences in awareness of the terms. While 92% of women outside of Québec had heard of FAS or FASD, and 81% had heard of Fetal Alcohol Birth Defects (FABD), only 73% of women in Québec had heard of FAS or FASD, and 62% had heard of FABD (*ibid* at 21–22).

32 Cecilia Bukutu, Tara Hanson & Suzanne Tough, "What Albertan Adults Know About Fetal Alcohol Spectrum Disorders (FASD)" in Dorothy Badry et al, eds, *Reinvesting in Families: Strengthening Child Welfare Practice for a Brighter Future: Voices from the Prairies* (Regina: University of Regina Press, 2014) 221 at 228; Peter Choate et al, "Fetal Alcohol Spectrum Disorder: What Does Public Awareness Tell Us About Prevention Programming?" (2019) 16:21 Intl J Envtl Research & Public Health 1 at 5.

33 Bukutu, Hanson & Tough, *supra* note 32 at 238. See also Choate et al, *supra* note 32 at 8, who state: "[w]e remain concerned that effective messaging needs to be further explored with higher risk populations. The present work has not tapped into those populations."

34 Nicola Chopin et al, *Fetal Alcohol Spectrum Disorder Awareness and Prevention Strategies: Learning from the Reported Alcohol Knowledge and Behaviours of College-Age Youth* (Saskatoon: Community-University Institute for Social Research, 2014) at 25. The authors went on to state at 43:

> Similar to focus group participants, the online survey participants also had little knowledge about FASD. In fact, only approximately 30% of survey respondents perceived college-age youth as at risk of having a child with FASD. Moreover, the majority of participants believed that FASD was a problem among 'other' women – those who were addicted to alcohol, vulnerable

Most women are aware of the terms FAS and FASD and understand that they should limit their drinking during pregnancy. However, many women drink early in their pregnancy before realizing that they are pregnant, and they may not know that their fetus can suffer profound alcohol-related harm as a result.[35] For example, nearly half the women in an American study drank in the weeks immediately preceding and following conception, before they knew they were pregnant.[36] This post-conception period is critical in the central nervous system development of the embryo and fetus.[37] The authors refer to studies that have concluded that the facial dysmorphology characteristic of FAS results specifically from alcohol exposure in the first three to eight weeks of pregnancy.[38]

As one commentator noted: "[c]urrent public health advice to abstain from alcohol throughout pregnancy (i.e., from conception to birth) overlooks two important reproductive realities for women: almost half of pregnancies in the UK are unplanned,[39] and there is a period of time at the start of pregnancy (usually a matter of weeks) when a woman is unaware that she is pregnant."[40] Similarly, many women may not be aware that prenatal alcohol exposure is the leading preventable cause of birth defects and

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and/or marginalized, living in poverty, teen mothers, or individuals with FASD.

35 R Louise Floyd, Pierre Decouflé & Daniel W Hungerford, "Alcohol Use Prior to Pregnancy Recognition" (1999) 17:2 Am J Prev Med 101 at 102. See also Ritchie, *supra* note 1 at 7, who states that more than 37% of all Canadian infants are exposed in the first trimester to multiple episodes of maternal binge drinking (defined as having five or more drinks per occasion).

36 Floyd, Decouflé & Hungerford, *supra* note 35 at 102.

37 *Ibid* at 101.

38 *Ibid* at 101–02.

39 The rate of unplanned pregnancies in Canada is virtually identical to that in the UK. See The Society of Obstetricians and Gynecologists of Canada, "Pregnancy Info, Your Pregnancy, Special Considerations, Unintended Pregnancy" (last visited 6 January 2025), online: <pregnancyinfo.ca/> [perma.cc/HAX5-F3HX].

40 Natalie Davies, "Preventing Alcohol-Related Harm in Unplanned Pregnancies: Does a Lifecourse Perspective Make Sense?" (1 October 2021), online (blog): <addiction-ssa.org> [perma.cc/EE2S-QENU].

developmental delay in Canada[41] and that as many as one in twenty-five Canadian children are born with FASD-related impairments of some kind.[42] Thus, alcohol manufacturers and suppliers cannot justify failing to disclose these and other alcohol-related risks on the basis that they are obvious or sufficiently well known.

The failure to adequately inform women of the risks of alcohol consumption foreseeably endangers both the expectant mother and her unborn child.[43] Initially, the courts did not recognize a fetus as a legal person having any independent legal rights to whom a duty of care in negligence could be owed.[44] This bar to recovery was finally rejected in *Montréal Tramways Co v Léveillé*,[45] a 1933 case involving the *Civil Code of Québec*. In the words of the Supreme Court of Canada: "If a right of action be denied to [a child injured *in utero*] it will be compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor."[46] The Court held that a fetus injured *in utero* could maintain a civil action against a negligent defendant if the fetus was subsequently born alive

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41 Popova et al, "Population-Based Prevalence" *supra* note 1 at 846; Keith K Vaux & Christina Chambers, "Fetal Alcohol Syndrome" (last modified 3 February 2023), online: <emedicine.medscape.com> [perma.cc/P2XV-R7DF].

42 Flannigan et al, *supra* note 1. Ritchie put the figure far higher, stating that 10% to 15% of Canadian children were likely affected by prenatal alcohol exposure to the point that they required special education services (see Ritchie, *supra* note 1 at 43).

43 See e.g. Marcella Broccia et al, "Heavy Prenatal Alcohol Exposure and Obstetric and Birth Outcomes: A Danish Nationwide Cohort Study from 1996 to 2018" (2023) 8:1 Lancet Public Health e28 at e33–e34; Alexandra C Sundermann et al, "Alcohol Use in Pregnancy and Miscarriage: A Systematic Review and Meta-Analysis" (2019) 43:8 Alcoholism Clinical & Experimental Research 1 at 8.

44 *Walker v Great Northern Railway Company of Ireland*, (1891) 28 LR IR 69 (QB) at 86–87.

45 1933 CanLII 41 (SCC).

46 *Ibid* at 464.

and its injuries resulted from the defendant's negligence.[47] The common law courts adopted a similar position several decades later.[48]

In *Dobson (Litigation Guardian of) v Dobson*, the Supreme Court of Canada modified these duty of care principles.[49] In this case, a pregnant woman was alleged to have negligently caused a car crash in which her unborn child was severely injured.[50] The child's litigation guardian brought a suit on the child's behalf seeking damages from the woman's automobile insurance company.[51] The Court held that a pregnant woman does not owe a duty of care to her fetus for reasons of policy.[52] It stated that imposing such a duty would, among other things,[53] unjustifiably interfere with a pregnant woman's rights to bodily integrity, privacy and autonomous decision making.[54] As will be discussed, *Dobson* is important because it appears to preclude alcohol manufacturers that are held liable for an infant's FASD-related disabilities from seeking contribution from the infant's mother.

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47 *Ibid*.

48 *Duval v Seguin*, 1972 CanLII 371 (ONSC) aff'd 1973 CanLII 693 (ONCA). See also *Cherry*, *supra* note 14 at paras 40–41; *Ediger*, *supra* note 14 at para 174; *Cojocaru*, *supra* note 14 at paras 223–24; *Woods v Jackiewicz*, 2020 ONCA 458 at paras 18–19, 21, 24.

49 1999 CanLII 698 at paras 76–81 (SCC) [*Dobson*].

50 *Ibid* at para 2.

51 *Ibid* at para 3.

52 *Ibid* at para 76.

53 *Ibid* at paras 46–48. The Court stated that imposing a duty of care on pregnant women would have a severe psychological impact on the mother-child relationship and family unit. The Court also indicated that it was unable to establish a meaningful standard of care against which to determine when a pregnant woman's lifestyle choices should be considered negligent (see *ibid* at paras 49–63).

54 *Ibid* at paras 23–45. The Court stated that if the public believed that a child injured *in utero* by his or her mother's negligence warranted compensation, the legislature should formulate a scheme for providing it. Alberta has enacted a narrow exception to the maternal immunity rule in *Dobson*, permitting children to sue for prenatal injuries resulting from their mother's negligent driving but capping her liability at the maximum of her automobile insurance coverage, see *Maternal Tort Liability Act*, SA 2005, c M-7.5, ss 3–5.

In summary, based on the existing caselaw, alcohol manufacturers and government liquor authorities will be held to owe a duty of care to inform women of the risks of FASD.[55]

III. Have Alcohol Manufacturers and Suppliers Breached the Standard of Care in Failing to Inform Consumers of the Risks of FASD?

In this section, we discuss the information that manufacturers and suppliers are required to disclose, the factors considered in determining the appropriate standard of disclosure, and whether that standard has been breached regarding the risks of FASD.

Manufacturers and suppliers are required to inform consumers of the risks inherent in both the foreseeable use and the foreseeable misuse of their products.[56] Current Canadian alcohol consumption data indicate that "binge" or "risky" drinking (most commonly defined as consuming four or more drinks for females and five or more drinks for males on one occasion) cannot be written off as being unforeseeable.[57] Based on self-reporting, "risky drinking" accounted for 37% of total Canadian alcohol consumption in 2019. However, when adjusted for under-reporting and the level of official alcohol sales, risky drinking accounted for 74% of total consumption.[58] The highest percentage of "heavy drinkers" among women are those

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55 The duty to warn is predicated on the need to correct the knowledge imbalance between the parties. Given the prevalence, probability, and severity of FASD, women need to be put in a position to make informed decisions about consuming alcohol. See *Hollis*, *supra* note 19 at para 21.

56 *Lem*, *supra* note 22 at para 22; *Holowaty v Bourgault Industries Ltd,* 2007 SKQB 2 at paras 40–42, 46, 51.

57 Statistics Canada defines "heavy drinkers" as individuals who binge drank at least once every month in the past year. Almost 20% of Canadians (excluding the territories), age 12 and older, were reported to be "heavy drinkers" in 2022. See Statistics Canada, "Table 13-10-0096-11: Heavy Drinking, by Age Group" (6 November 2023), online: <150statcan.gc.ca> [perma.cc/V9US-3RLE].

58 Tim Stockwell & Jinhui Zhao, "Estimates of Compliance with Canada's Guidelines for Low and Moderate Risk Alcohol Consumption: The Importance of Adjustment for Underreporting in Self-Report Surveys" (2023) 114:6 Can J Pub Health 967 at 970.

in prime child-bearing age,[59] and it is this pattern of prenatal consumption that poses the greatest risk that their infant will be born with severe FASD-related disabilities.[60] Thus, the risks of heavy drinking, including those associated with FASD, need to be disclosed.

Manufacturers and suppliers are required to "tell the whole story."[61] They cannot bury, gloss over or otherwise obscure the risks associated with their products. If the risks are serious, a general or blanket warning will be insufficient.[62] For example, in *Buchan v Ortho Pharmaceutical (Canada) Ltd*, the trial judge stated that it was inadequate to only inform women that complications could arise from taking birth control pills when the manufacturer knew that its product was associated with a dramatically increased risk of stroke.[63]

The obligation to disclose applies to risks that are known or ought to be known to the manufacturer and supplier.[64] Manufacturers are required to be experts in their field and keep abreast of the relevant industry, scientific and academic literature.[65] The level of knowledge and the standard of disclosure expected of suppliers will vary depending on, among other things,

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59 Rates of heavy drinking are lower among females than males. Nevertheless, in 2022, approximately 25% of 18- to 34-year-old females, and 20% of 35- to 49-year-old females were heavy drinkers. See Statistics Canada, *supra* note 57. As noted, an estimated 37% of babies born in Canada were exposed to multiple episodes of maternal binge drinking during the first trimester (see Ritchie, *supra* note 1 at 42).

60 National Institute on Alcohol and Alcoholism, "Alcohol's Effects on Health: Understanding Fetal Alcohol Spectrum Disorders" (last modified August 2023), online: <niaaa.nih.gov> [perma.cc/N58A-SUJJ]; Vaux & Chambers, *supra* note 41; Mattson, Bernes & Doyle, *supra* note 3 at 1047.

61 *Ortho* 1986, *supra* note 27 at para 55; *Létourneau*, *supra* note 15 at paras 51–100, 125–27, 136–37.

62 *Lambert*, *supra* note 19 at 575; *Hollis*, *supra* note 19 at para 22.

63 (1984), 46 OR (2d) 113 at 131, 136–41(HCJ) [*Ortho* 1984]. See also *O'Fallon*, *supra* note 18 at 277.

64 *Lem*, *supra* note 22 at para 22; *Ortho* 1986, *supra* note 27 at para 16; *Hollis*, *supra* note 19 at paras 37–38.

65 In *Cominco Ltd v Westinghouse Can Ltd*, 1981 CanLII 2749 at para 108 (BCSC), var'd on other grounds in 1983 CanLII 3131 (BCCA), the Court held that the plaintiff did not have to prove that the defendant manufacturer had

their size, sophistication, and standing in the industry. For example, a small private wine store would not be expected to have sophisticated knowledge of FASD's prevalence or its lifelong adverse effects.[66] However, the same cannot be said for government wholesale and retail liquor authorities, which typically have annual revenues running into the hundreds of millions of dollars.[67]

Canadian courts have held manufacturers of products intended for human consumption to a very high standard of disclosure. This principle was first adopted in product liability cases involving contaminated beverages and foods and was later applied in cases involving a manufacturer's duty to inform.[68] As Justice La Forest stated in *Hollis*, "[t]he courts in this country have long recognized that manufacturers of products that are ingested, consumed or otherwise placed in the body, and thereby have a great capacity to cause injury to consumers, are subject to a correspondingly high standard of care under the law of negligence."[69]

The standard of disclosure increases with the probability and severity of the risks. For example, in *Ortho*, a case in which the plaintiff suffered a stroke after using the defendant manufacturer's birth control pills, the Ontario Court of Appeal stated that the warning had to be commensurate with

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actual knowledge of a new risk, but rather only that the manufacturer ought to have been aware of it. See also *Ortho* 1986, *supra* note 27 at para 54.

66 Drawing distinctions between different types of suppliers is consistent with the stated goal of the duty to warn, namely addressing the "knowledge imbalance" between the parties. See *Hollis*, *supra* note 19 at para 21. With the proliferation of convenience store alcohol outlets, there will be an increasing number of situations in which the customer's knowledge will equal or exceed that of the store employees.

67 Sherk, *supra* note 10 at 308. Given their resources and status as the exclusive wholesale alcohol distributors within their respective borders, the provincial and territorial government liquor authorities are likely to be held to the same duty and standard of disclosure principles as alcohol manufacturers. See generally *Rivtow*, *supra* note 19 at 1199–1200 for a discussion of the shared responsibility of manufacturers and exclusive distributors of their products.

68 *Shandloff v City Dairy Ltd and Moscoe*, 1936 CanLII 68 (ONCA); *Arendale v Canada Bread Co*, [1941] 2 DLR 41 at 44, 1941 CanLII 308 (ONCA); *Zeppa v Coca-Cola Ltd*, 1955 CanLII 160 (ONCA); *Heimler v Calvert Caterers Ltd*, 1975 CanLII 411 (ONCA).

69 *Hollis*, *supra* note 19 at para 23.

the potential risk: "the graver the danger, the higher the duty."[70] The fact that the drug was ordinarily safe and that the danger involved only a small percentage of users did not relieve the manufacturer of its obligation to disclose the risk.[71] Similarly, in *Hollis*, the manufacturer was held liable for failing to warn that its silicone breast implants could rupture from non-traumatic, normal activity. The Court stated that, although the number of such incidents was small (less than 1 in 1,000) and the cause was unknown, the manufacturer had to consider the seriousness of the risk to each potential user.[72]

The standard of disclosure will also reflect the consumer's sophistication and knowledge of the product.[73] The disclosure obligation is greater for products, like alcohol, that are mass-marketed to the general public, particularly if the consumers include youth or other vulnerable populations.[74] The less knowledgeable consumers are of the risk, the greater the obligation to alert them.[75] Manufacturers and suppliers cannot ignore or discount objective medical research because they believe their products are safe or do not find the research compelling.[76] The fact that information on FASD is available from health agencies and other third parties should not lessen the obligation of alcohol manufacturers and suppliers to inform the public directly.[77]

Even if a warning is provided, the courts will consider whether it has been undermined by the defendant's marketing and other activities.[78] For example, the Ontario Court of Appeal in *Ortho* was very critical of the

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70 *Ortho* 1986, *supra* note 27 at para 55. See also *Lambert*, *supra* note 19 at 575.

71 *Ortho* 1986, *supra* note 27 at para 55.

72 *Hollis*, *supra* note 19 at para 41.

73 *Austin v 3M Canada Ltd*, 1974 CanLII 689 (ONSC).

74 *Amin (Litigation Guardian of) v Klironomos*, [1996] OJ No 826 at paras 18–20; *Burton Canada Company v Coady*, 2013 NSCA 95 at paras 61–65.

75 As noted in *Hollis*, *supra* note 19 at para 22, the duty to warn is predicated on the need to correct the knowledge imbalance between manufacturers and consumers.

76 *Ortho* 1986, *supra* note 27 at para 55; *Hollis*, *supra* note 19 at para 40.

77 *Ortho* 1986, *supra* note 27 at para 59.

78 *Létourneau*, *supra* note 15. The Court discussed at length the tobacco companies' efforts to conceal, trivialize and deny the risks of smoking, and why that

Company's aggressive sales campaign which targeted Canadian physicians and emphasized the safety of its birth control pills without mentioning the increased risks of having a stroke. In contrast, the Company's American counterpart at that time was informing physicians in the United States of a study linking the pills to a seven to tenfold increase in mortality and morbidity due to strokes and related illnesses.[79]

Unlike the situation in the United States,[80] compliance with the federal alcohol labelling legislation in Canada would not automatically "pre-empt" or prevent a manufacturer or supplier from being sued for breaching their

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behaviour justified awarding the plaintiffs $1.31 billion in punitive damages (*ibid* at paras 1084, 1091, 1104).

For a discussion of the alcohol industry's partially successful efforts to prevent the Yukon liquor authority from attaching health warnings to the alcohol products that it sold, see Tim Stockwell et al, "Cancer Warning Labels on Alcohol Containers: A Consumer's Right to Know, a Government's Responsibility to Inform, and an Industry's Power to Thwart" (2020) 81:2 J Studies on Alcohol & Drugs 284; Tom Blackwell, "Liquor Industry Pressure Puts Abrupt Stop to Unique Alcohol Warning-Label Project in Yukon", *National Post* (2 January 2019), online: <nationalpost.com> [perma.cc/37AM-LWZN]. See also Ogborne, Stoduto & Kavanagh, *supra* note 11.

79 *Ortho* 1986, *supra* note 27 at paras 40–56.

80 The United States' *Alcoholic Beverage Labeling Act of 1988* requires alcohol products to include a "government health warning" and expressly prohibits the states from mandating the inclusion of any other information (27 USCA §§ 215–216 (West Supp 1989)). As in the case of the American federally mandated tobacco warnings, the courts have held that the alcohol "pre-emption" provision also precludes consumers from suing manufacturers and suppliers for failing to warn. See Clarke E Khoury, "Warning Labels May Be Hazardous to Your Health: Common-Law and Statutory Responses to Alcoholic Beverage Manufacturers' Duty to Warn" (1989) 75:1 Cornell L Rev 158; Eileen N Wagner, "The Alcoholic Beverages Labeling Act of 1988: A Preemptive Shield Against Fetal Alcohol Syndrome Claims?" (1991) 12:2 J Leg Med 167.

Again, in contrast to the United States, even if the Canadian federal government enacted alcohol warning label legislation, the provinces and territories would have constitutional authority to enact more demanding labelling legislation for alcohol marketed within their boundaries. See generally R Solomon & B Hovius, *Alcohol Warning Labels: A Preliminary Constitutional Review* (Ottawa: Canadian Centre on Substance Abuse, 1994).

common law duty to inform consumers.[81] As noted in *Ortho*, complying with labelling legislation would only be relevant if the statutory requirements are "coextensive" with the manufacturers' and suppliers' common law standard of disclosure.[82]

Given that the current federal alcohol labelling legislation does not require manufacturers to convey any warning or health information, complying with it would have no impact on civil liability.[83] Determining whether the diverse provincial and territorial FASD legislation and regulatory controls are "coextensive" with the common law standard of disclosure is more complex. Nevertheless, it is not necessary for present purposes to summarize the patchwork of provisions in each province and territory.[84] Comprehensive reviews published in 2019 and 2023 reported that the provinces and territories fared worse on their "Health and Safety Messaging" legislation and policies than on any of the other 10 policy domains, such as "Pricing

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81 *Ortho* 1986, *supra* note 27 at paras 35–36; *Smithson v Saskem Chemicals Ltd*, 1985 CanLII 2547 at paras 18–20 (SKQB).

82 *Ortho* 1986, *supra* note 27 at para 36.

83 *Food and Drug Regulations*, *supra* note 6.

84 For a summary of these provisions, see Jessica Burns et al, *Provincial and Territorial Strategies for Fetal Alcohol Spectrum Disorder in Canada* (Vancouver: Canada FASD Research Network, 2020), online (pdf): <canfed.ca> [perma.cc/8PJY-4PGM]. See also Tim Naimi et al, *Canadian Alcohol Policy Evaluation (CAPE) 3.0 Project: Policy Domain Results Summary (Provincial/Territorial)* (Victoria: Canadian Institute for Substance Use Research, University of Victoria, 2023) at 36–39 [Naimi et al, *Policy Domain Results*].

The Northwest Territories and the Yukon appear to be the Canadian jurisdictions that come closest to informing women about some of the risks of FASD. Like several provinces, both territories have FASD-specific strategies. Although the Northwest Territories and the Yukon have not enacted mandatory alcohol warning label legislation, their government liquor authorities attach a general warning about drinking during pregnancy to the alcohol products that they sell. These are the only Canadian jurisdictions in which alcohol products include any drinking and pregnancy label. See Northwest Territories Liquor and Cannabis Commission, "About: Social Responsibility (last visited 6 January 2025), online: <ntlcc.ca> [perma.cc/W6RY-CMSR]; Yukon Liquor Corporation, *Annual Report: April 1, 2022 to March 31, 2023* (Whitehorse: Yukon Liquor Corporation, 2023) at 11, online (pdf): <yukon.ca> [perma.cc/E5NQ-22VA].

and Taxation" and "Impaired Driving Countermeasures."[85] According to the 2023 review, the jurisdictions had implemented, on average, only 13% of the proposed "Health and Safety Messaging" policies, which include warning and health label recommendations.[86] Although the courts may take a more charitable view of the provincial and territorial health and safety messaging efforts, the huge gulf between what they have done and what they could do is striking.

Suffice it to say that in no jurisdiction are women in the general public directly and clearly informed of, among other things, the prevalence of FASD, its potentially lifelong catastrophic impact, or the risk that their fetus may suffer alcohol-related harm before they realize that they are pregnant.[87] Nor are women adequately informed that there is no known safe level of alcohol consumption when there is a possibility of getting pregnant, when trying to get pregnant, or during pregnancy.[88]

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85 See respectively, Stockwell et al, *Strategies to Reduce Alcohol-Related Harms*, *supra* note 24 at 10; Naimi et al, *Policy Domain Results*, *supra* note 84 at 36. The policy domain recommendations are based on the current research regarding the most effective means of reducing alcohol-related harms and costs.

86 Naimi et al, *Policy Domain Results*, *supra* note 84 at 36. Although the Yukon and the Northwest Territories were the only jurisdictions with any health-related alcohol product labels, these text-only labels did not meet the policy recommendations concerning message content, use of pictorials, prominence, and other criteria. These two jurisdictions also fared poorly on some other aspects of "Health and Safety Messaging" (*ibid* at 37–38). For a more detailed discussion of effective alcohol labelling policies, see Naimi et al, *Recommendations for Labelling*, *supra* note 24 at 8.

87 As noted, no province or territory has enacted mandatory alcohol warning label legislation. Only Alberta, Ontario, and Nova Scotia have enacted legislation requiring the display of an FASD-related poster in specified licensed premises and outlets. See Alberta, *Gaming, Liquor and Cannabis Regulation*, Alta Reg 143/1996, s 33(l)(b); Alberta Gaming and Liquor Commission, *Retail Liquor Store Handbook* (Alberta: AGLC, 2024) s 3.3.8, online (pdf): <aglc.ca> [perma.cc/GAE2-EDV8]; Alberta Gaming and Liquor Commission, *Liquor Licensee Handbook* (Alberta: AGLC, 2024) s 3.10.10, online (pdf): <aglc.ca> [perma.cc/V9X8-WN3A]. For Ontario, see *Liquor Licence and Control Act, 2019*, SO 2019, c 15, Schedule 22, s 36. For Nova Scotia, see *Public Education About Fetal Alcohol Syndrome Regulations*, NS Reg 181/2005, ss 2–3. Note that in Nova Scotia, the poster need only be displayed "periodically."

88 U.S. Centers for Disease Control and Prevention, "About Fetal Alcohol Spec-

In *Ortho*, the Ontario Court of Appeal provided the following summary of the common law standard of disclosure: "Once a duty to warn is recognized, it is manifest that the warning must be adequate. It should be communicated clearly and understandably in a manner calculated to inform the user of the nature of the risk and the extent of the danger; it should be in terms commensurate with the gravity of the potential hazard …"[89] The rigorous standard of disclosure in *Ortho* has been consistently adopted in subsequent cases,[90] most notably in *Hollis*.[91] While concerns have been expressed that expansive duty to warn principles and rigorous standards of disclosure could discourage the development of beneficial drugs, devices and other innovations,[92] this is not a relevant consideration regarding the risks of FASD.

Given their advertising and marketing expertise in promoting sales, it is difficult to believe that the alcohol manufacturers and government liquor authorities could not effectively convey health information to their consumers if they chose to do so. In our view, the Canadian alcohol manufacturers and government liquor authorities have breached the required standard of disclosure regarding FASD.

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trum Disorders (FASDs)" (6 September 2024), online: <cdc.gov> [perma.cc/GE5P-ZPE3]; Vaux & Chambers, *supra* note 41.

89 *Ortho* 1986, *supra* note 27 at para 18.

90 For more recent cases, see *Brousseau c Laboratoires Abbott limitée*, 2019 QCCA 801 at para 128 [*Brousseau*]; *656214 NB Ltd v Venmar Ventilation ULC*, 2023 NBKB 91 at para 17; *Gebien v Apotex Inc*, 2023 ONSC 6792 at para 399; *Ding v Canam Super Vacation Inc*, 2024 BCCA 102 at para 126 [*Ding*].

91 *Hollis*, *supra* note 19 at paras 25–26. In turn, *Hollis* has been widely cited regarding this standard of disclosure. See e.g. *Adam v Ledesma-Cadhit*, 2021 ONCA 828 at para 19; *Cuppen v Queen Charlotte Lodge Ltd*, 2005 BCSC 880 at paras 59–65; *Brousseau*, *supra* note 90 at paras 120, 122–23; *Kuiper v Cook (Canada) Inc*, 2018 ONSC 6487 at paras 118–21.

92 Giovanna Roccamo, "Medical Implants and Other Health Care Products: Theories of Liability and Modern Trends" (1994) 16:4 Adv Q 421; Glynnis Burt, "Creating Incentives to Market Mifepristone: No-Fault Insurance for Drug-Caused Birth Defects" (1991) 49:2 UT Fac L Rev 1; Bruce A Thomas & Lawrence G Theall, "Product Liability and Innovation: A Canadian Perspective" (1995) 21 Can-USLJ 313.

IV. Is the Alcohol Manufacturers' and Suppliers' Breach of the Standard of Care a Cause of the Plaintiffs' Losses?

Proving that an alcohol manufacturer or supplier breached the standard of disclosure is necessary, but not sufficient, to establish liability. The plaintiff must also prove on the balance of probabilities[93] that the defendant's negligent failure to inform her was a cause of the claimed losses.[94] In the case of FASD, this would require the plaintiff to establish that: (i) alcohol was a cause of the losses, (ii) she would have abstained from, or significantly reduced her, consumption had she been adequately informed, and (iii) as a result of the change in her alcohol consumption, her infant would not have been born with FASD.

Once a child has been diagnosed as suffering from FASD, alcohol will be held to be the cause of any injuries or disabilities attributable to that diagnosis. Children with the most profound disabilities, namely those with FAS, are the easiest to diagnose.[95] However, it has been estimated that for every child born with FAS, ten children are born with pFAS or ARND, which are harder to diagnose.[96] Consequently, many of these children, particular-

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93 As Rothstein J states in *FH v McDougall*, 2008 SCC 53 at para 49: "I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred."

94 As noted, this includes claims brought on the disabled child's behalf for their injuries and claims by the child's parents for any additional care and costs attributable to the child's FASD-related disabilities.

95 The alcohol manufacturers will likely argue that, even in these cases, the child's disabilities were due to maternal nutrition, problems during labour and delivery, naturally occurring birth defects, and other illnesses, syndromes, and factors unrelated to alcohol consumption. No doubt, the manufacturers will highlight the fact that most children who are exposed to alcohol *in utero* do not develop FASD.

96 As noted in one study, "the prevalence of FASD is at least ten times higher than the prevalence of FAS, with alcohol-related neurodevelopmental disorder [i.e., ARND] being the largest category of affected individuals." See Popova et al, "Comorbidity", *supra* note 3 at 979. See also Barbara Carpita et al, "Autism Spectrum Disorder and Fetal Alcohol Spectrum Disorder: A Literature Review" (2022) 12:6 Brain Sciences 1 at 12.

ly those with ARND, are not identified as having FASD[97] and are underreported.[98] These challenges, coupled with the more limited range of potential damages, will result in fewer suits being brought on behalf of this larger group of children. Determining whether a child's disabilities in these cases are due to FASD or some other factor can raise difficult evidentiary issues.

The second component of the causation test has been contentious. In *Ortho*, the trial judge applied a unique subjective test of causation in concluding that the plaintiff would not have taken the defendant's birth control pills had she been adequately informed of the risk of stroke.[99] On appeal, the Company argued that an objective test of causation should have been applied, which would have required the plaintiff to prove that a reasonable woman in her position would have abstained from using its birth control pills had an adequate warning been given.[100] The Company claimed that the

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97 Albert E Chudley, "Fetal Alcohol Spectrum Disorder: Counting the Invisible – Mission Impossible?" (2008) 93:9 Archives Disease in Childhood 721; Jennifer Benz, Carmen Rasmussen & Gail Andrew, "Diagnosing Fetal Alcohol Spectrum Disorder: History, Challenges and Future Directions" (2009) 14:4 Paediatrics & Child Health 231. See Coles et al, *supra* note 3 at 1258, who indicates that despite the debate regarding the ARND diagnoses, it is possible to distinguish children with ARND/C and ARND/B from children with other cognitive or behavioural problems.

98 See Flannigan et al, *supra* note 1; Coles et al, *supra* note 3 at 1245–46; Carpita, *supra* note 96 at 12; Sambo & Goldman, *supra* note 4 at 195–96.

99 *Ortho* 1984, *supra* note 63, at 146–48.

100 *Ortho* 1986, *supra* note 27 at para 67. In 1980, the Supreme Court adopted an objective test of causation for claims against physicians for failing to inform patients of the risks of a proposed treatment (see *Reibl v Hughes*, 1980 CanLII 23 at 896–97 (SCC); *Hopp v Lepp*, 1980 CanLII 14 at 208 (SCC)). This test, sometimes referred to as a modified objective test or an objective/subjective test, is phrased in terms of whether a reasonable person in the patient's position would have consented had the physician adequately informed them of the risks. The objective test of causation has been used in this line of cases ever since (see *Ciarlariello v Schacter*, [1993] 2 SCR 119 at 120–21, 1993 CanLII 138 (SCC); *Arndt v Smith*, 1997 CanLII 360 at para 6 (SCC) [*Arndt*]; *Laing v Sekundiak*, 2015 MBCA 72 at para 87; *Glazier-Goldie v Arseneault*, 2023 NBCA 5 at paras 19–20; *Denman v Radovanovic*, 2024 ONCA 276 at paras 45–47).

subjective test of causation gave undue weight to the plaintiff's unverifiable testimony.[101] The Court bluntly rejected this claim, stating:

> The suggestion that the determination of this causation issue other than by way of an objective test would place an undue burden on drug manufacturers is answered by noting that drug manufacturers are in a position to escape all liability by the simple expedient of providing a clear and forthright warning of the dangers inherent in the use of their products of which they know or ought to know. In my opinion, it is sound in principle and in policy to adopt an approach which facilitates meaningful consumer choice and promotes marketplace honesty by encouraging full disclosure. This is preferable to invoking evidentiary burdens that serve to exonerate negligent manufacturers as well as manufacturers who would rather risk liability than provide information which might prejudicially affect their volume of sales.[102]

In *Hollis*, the majority of the Supreme Court of Canada adopted the subjective test of causation in manufacturer duty to warn cases, stating that the Ontario Court of Appeal's reasoning in *Ortho* was "compelling."[103] In contrast, the minority in *Hollis* rejected the subjective test because, among other things, it ignored "the inherent unreliability of the plaintiff's self-serving assertion."[104] While the subjective test has prevailed and been routinely ap-

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101 *Ortho* 1986, *supra* note 27 at paras 67, 78.

102 *Ibid* at para 78.

103 *Hollis*, *supra* note 19 at paras 44–46. The majority stated that the Ontario Court of Appeal's reasoning in *Ortho* warranted being "quoted at length" and then proceeded to do so.

104 *Hollis*, *supra* note 19 at para 67. The minority also argued that there was no reason why the longstanding objective test of causation in physician duty to inform cases should not apply in manufacturer duty to warn cases (see *ibid* at para 69).

plied in subsequent manufacturer duty to warn cases,[105] it initially generated considerable academic commentary and criticism.[106]

In addition to adopting a subjective test of causation, the Ontario Court of Appeal in *Ortho* accepted at face value the plaintiff's testimony about what she would have done had she been adequately informed. In the Court's words:

> In my opinion, it was open to the trial judge, viewing the evidence as he did, to credit the plaintiff's testimony that she would not have taken the pill had she been told of the danger of stroke, and to determine the causation issue accordingly .... The selection of a method of preventing unwanted pregnancy in the case of a healthy woman is a matter, not of medical treatment, but of personal choice; and it is not unreasonable that notice of a serious potential hazard to users of oral contraceptives could influence her selection of another method of birth control. So long as the court is satisfied that the plaintiff herself would not have used the drug if properly informed of the risks, this causation issue should be concluded in her favour regardless of what other women might have done.[107]

Subsequent cases also reflect a willingness to ease the plaintiff's task in proving causation, albeit regarding factual or technical issues, as opposed to hypothetical issues regarding decisions that plaintiffs might have made.

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[105] In *Arndt*, *supra* note 100 at para 7, a physician duty to inform case, the majority of the Court reiterated that a subjective test of causation applies in manufacturer duty to warn cases. See also *Harrington v Dow Corning Corp*, 1996 CanLII 3118 at para 8 (BCSC); *Bowes v Edmonton (City of)*, 2007 ABCA 347 at paras 105, 233; *James v Johnson & Johnson Inc*, 2021 BCSC 488 at para 148. In *Ding*, *supra* note 90 at para 152, the Court of Appeal stated the trial judge had rightly applied the subjective test of causation while "recognizing that a plaintiff's evidence does not have to be taken at face value."

[106] See e.g. Vaughan Black & Dennis Klimchuk, "Torts – Negligent Failure to Warn – Learned Intermediary Rule – Causation – Appellate Court Powers: *Hollis v Dow Corning Corp*", Case Comment (1996) 75 Can Bar Rev 355; Denis W Boivin, "Factual Causation in the Law of Manufacturer Failure to Warn" (1998) 30:1 Ottawa L Rev 47; Mitchell McInnes, "Causation in Tort Law: A Decade in the Supreme Court of Canada" (2000) 63:2 Sask L Rev 445 at 462–69.

[107] *Ortho* 1986, *supra* note 27 at para 77.

For example, in *Snell v Farrell*, the Supreme Court of Canada cautioned against adopting too rigid an approach to causation,[108] calling for the adoption of what it variously described as a "robust," "pragmatic" or "common sense" approach.[109] According to *Snell*, this approach permits an inference of causation to be drawn in the plaintiff's favor in the absence of evidence to the contrary.[110] Statements to the same effect have been made in other Supreme Court of Canada decisions.[111]

Given the subjective test of causation in manufacturer duty to inform cases and the apparent adoption of a less rigid approach to proving causation, the courts may be reluctant to question a woman's testimony about the personal choices that she would have made. It may be difficult to refute a woman's testimony that she would have abstained from or reduced her alcohol consumption if adequately informed, unless there is evidence that she knowingly engaged in other behaviours that were equally threatening to her fetus.

If a court accepts that a woman would have abstained from drinking, it would be bound to conclude that her infant would not have been born with FASD. However, complex causation issues will arise if the court finds that the plaintiff would not have abstained from drinking, but rather only moderated her consumption. There is no simple formula for determining the exact impact of a particular pattern of prenatal alcohol consumption. Rather, certain factors increase the risk that an infant will be born with FASD, including when in the pregnancy the alcohol was consumed, the frequency of heavy drinking, the total amount of alcohol consumed, and the mother's genotype.[112] We will leave to others to discuss additional factors that would

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108 [1990] 2 SCR 311 at 328, 1990 CanLII 70 (SCC) [*Snell*].

109 *Ibid* at 324, 330–31, 336.

110 *Ibid* at 326.

111 *Athey v Leonati*, 1996 CanLII 183 at para 16 (SCC) [*Athey*]; *Clements v Clements*, 2012 SCC 32 at para 10. In summing up the preceding Supreme Court of Canada jurisprudence, the Court in *Clements* stated at para 28 that "*Snell*, *Athey*, *Walker Estate* and *Resurfice* were all resolved on a robust and common sense application of the 'but for' test of causation." Although these cases and concepts generated a huge volume of academic writing, it is not necessary to attempt to summarize that material for present purposes.

112 Vaux & Chambers, *supra* note 41; May et al, *supra* note 4; Sambo & Goldman, *supra* note 4.

further complicate the causation analysis, such as a pregnant woman's addiction to alcohol or the alcohol industry's efforts to thwart the enactment of mandatory warning and health labelling legislation.[113]

A woman may sue both the alcohol manufacturer and the government liquor authority, or only one of these defendants. In many circumstances, it may be easier to sue only the government liquor authority. If the woman sues a manufacturer, she must prove that its alcohol was a cause of her losses. This may be challenging, as it would require her to recall what she was drinking during her pregnancy and who had manufactured it. Similarly, complex causation issues may arise if the plaintiff consumed alcohol produced by different manufacturers. However, no such problems arise in suing a government liquor authority because it is the supplier of virtually all the alcohol that is sold and consumed within its borders.[114]

V. Are the Losses of the Plaintiffs Too Remote in Law to be Recoverable?

Having found that the defendant's breach of the standard of care was a cause of the plaintiff's loss, the court must decide if the causal relationship between the defendant's negligence and the plaintiff's loss is too tenuous or remote to be recoverable. This is a matter of legal policy that addresses the extent of the defendant's liability for the injuries that he or she has negligently caused.

Starting in the 1960s, the courts increasingly framed the test of remoteness in terms of whether the plaintiff's losses were a reasonably foreseeable result of the defendant's negligent act.[115] The courts have since modified this test in ways that expand the defendant's potential liability. By virtue of the "kind of injury" test, if the kind or type of injury the plaintiff suffers is a reasonably foreseeable result of the defendant's negligent act, it will be recoverable even if the means by which the injury occurred and the serious-

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113 In *Létourneau*, *supra* note 15, the Court discussed in detail the impact of these issues on the liability of the tobacco companies.

114 Thomas, *supra* note 23 at 4.

115 *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd*, [1961] AC 388, [1961] 2 WLR 126; *Jones v Wabigwan* (1969), 8 DLR (3d) 424 at 427, 1969 CanLII 452 (ONCA); *Mustapha v Culligan of Canada Ltd*, 2008 SCC 27 at paras 12–14 [*Mustapha*].

ness of the injury could not have been foreseen.[116] Thus, once it is foreseeable that an infant may suffer FASD-related impairments of any kind, all such injuries would be recoverable even if they were more profound than what could have been anticipated.

Pursuant to the "thin-skulled plaintiff" rule, if the initial kind or type of injury that the plaintiff suffers is reasonably foreseeable, the defendant will be held liable for any unforeseeable consequences that resulted from the plaintiff's pre-existing susceptibility or weakness.[117] Consequently, a defendant would not be relieved of liability simply because a woman's unique genetic make-up or age greatly increased her risks of having a child with FASD.

A woman should have little difficulty establishing that her child's FASD-related disabilities and the additional costs of raising the child were reasonably foreseeable results of not being adequately informed of the risks.[118]

VI. Have the Plaintiffs Suffered Legally Recognized Losses?

Children born with FASD and their parents typically suffer a broad range of losses that are legally recognized as being recoverable.[119] The gen-

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116 *Hughes v Lord Advocate*, [1963] AC 837 at 845, [1963] 2 WLR 779; *School Division of Assiniboine South, No 3 v Greater Winnipeg Gas Company Limited* (1971), 21 DLR (3d) 608 at 613, 1971 CanLII 959 (MBCA).

117 *Smith v Leech Brain & Co Ltd*, [1962] 2 QB 405 at 414, [1962] 2 WLR 148; *Peacock v Mills*, 50 WWR (NS) 626 at 629, 1964 CanLII 844 (ABCA); *Janiak v Ippolito*, 1985 CanLII 62 at para 23 (SCC).

118 The alcohol manufacturers will likely argue that the mother's excessive drinking was an intervening act that "broke the chain of causation," which thereby absolves them of liability. However, the Canadian courts have held that a defendant remains liable for the consequences of an intervening act if that act is within the scope of the risk that the defendant initially created. See *Bradford v Kanellos* (1973), 40 DLR (3d) 578 at 582, 1973 CanLII 1285 (SCC). The prospect that some women will drink to excess is clearly within the scope of the risk that alcohol manufacturers create in not disclosing the risks in this pattern of consumption. Moreover, for the policy reasons stated in *Dobson*, the courts may preclude the defendant from raising this issue. See *Dobson*, *supra* note 49 at paras 23–45.

119 While children who suffer prenatal injuries cannot recover damages for being

eral principle for assessing compensatory damages is easy to state, namely putting the plaintiff in the position in which they would have been, to the extent that money can do so, had the wrong not been committed.[120] However, applying this principle in the case of a child with significant disabilities involves complex calculations,[121] and assumptions about the child's life expectancy[122] and needs for decades into the future.[123] These cases typically generate million dollar damage awards[124] and take years to work their way through the legal system.[125]

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born, commonly referred to as a "wrongful life claim," they can recover for the loss of income, pain and suffering, loss of enjoyment of life, and additional costs of care and support attributable to their disabilities. See *Cherry*, *supra* note 14 at paras 111–69, aff'd in part 1992 BCCA 93 at paras 74–102, 122–51; *Crawford*, *supra* note 14 at paras 265–309; *Ediger*, *supra* note 14 at paras 215–306 and 321–50.

120 *Andrews v Grand & Toy Alberta Ltd*, 1978 CanLII 1 (SCC) at 240 [*Andrews*]; *Dodd Properties (Kent) Ltd v Canterbury City Council*, [1980] 1 All ER 928 at 938, [1980] 1 WLR 433 (CA).

121 For examples of how a disabled child's damages are calculated, see *Cherry*, *supra* note 14 at paras 111–69, aff'd in part 1992 BCCA 93 at paras 74–102, 122–51; *Crawford*, *supra* note 14 at paras 265–309; *Ediger*, *supra* note 14 at paras 215–306 and 321–50.

122 In *Crawford*, *supra* note 14 at paras 285–88, one of the plaintiff's expert witnesses estimated that the plaintiff would live to between 57 and 62 years of age, and a second expert for the plaintiff estimated that the plaintiff would live to 58. The defendant's expert estimated that the plaintiff would only live to 40. The trial judge preferred the evidence of the plaintiff's experts and based the damage award for future care costs on the assumption that the plaintiff would live to 54 (see *ibid* at para 288).

123 In *Cherry*, *supra* note 14 at para 115, damages were assessed on the basis that the plaintiff, who was 7 years old at the time of the trial, would require care and support for an additional 53 years. In *Bovingdon v Hergott*, 2008 ONCA 2 at para 82, the Court stated that the profoundly disabled 13-year-old twins were expected to need care and support for the rest of their lives, which was projected to be an additional 17 and 44 years respectively.

124 For example, the child was awarded more than $3.2 million in *Ediger*, *supra* note 14 at para 350, and almost $4 million in *Cojocaru*, *supra* note 14 at para 367. See also *Crawford*, *supra* note 14 at paras 265–309.

125 For example, it took 15 years to resolve the infant's claim in *Ediger, supra* note

Although parents cannot recover for their grief at having a disabled child,[126] they can recover for any special care that they provide and any additional costs they incur due to their child's disability. Parental damage awards tend to be less complicated and smaller than those made on the disabled child's behalf.[127]

An alcohol manufacturer may seek reductions in the damage awards, claiming that the plaintiffs failed to mitigate their losses.[128] While plaintiffs have a legal obligation to take reasonable steps to mitigate their losses, this principle is applied more rigorously in business and property damage cases than in personal injury cases. For example, the Canadian courts have repeatedly held that disabled plaintiffs are entitled to live in a home environment in the community with attendant care if it is appropriate for their medical, psychological, and other needs, even if it is far more expensive than institutional care.[129] As the Supreme Court of Canada noted in *Andrews v Grand &*

14, and 20 years to resolve the infant's claim in *Crawford*, *supra* note 14. See also *Cherry*, *supra* note 14; *Cojocaru*, *supra* note 14.

126 Although damages are generally not recoverable for grief and sorrow *per se*, damages are recoverable for nervous shock if it results in visible, provable physical illness or a recognized psychiatric illness. See *Guay v Sun Publishing Co*, 1953 CanLII 39 at 238 (SCC); *Radovskis v Tomn* (1957), 65 Man R 61, 1957 CanLII 451 (MBQB); *Hinz v Berry*, [1970] 2 QB 40 at 42. For example, in *Martin v Mineral Springs Hospital*, 2001 ABQB 58 at para 41, the parents' claim for grief following the stillbirth of their child was denied, but the mother was compensated for the psychiatric illness that she suffered. The Canadian courts have recently expanded recovery for psychiatric harm, indicating that courts might recognize profound grief and sorrow as recoverable psychiatric harms in the future. See also *Mustapha*, *supra* note 115 at paras 8–9; *Saadati v Moorhead*, 2017 SCC 28. Note that some provincial legislation permits awarding damages for grief and sorrow, see e.g. *Fatal Accidents Act*, RSNB 2012, c 104, s 10.

127 *Crawford*, *supra* note 14 at paras 310–17; *Ediger*, *supra* note 14 at paras 307–20; *Cojocaru*, *supra* note 14 at paras 343–66. *Contra RH v Hunter* (1996), 22 OTC 204, 32 CCLT (2d) 44 (ONCJ), in which the parents of two children with profound disabilities were awarded almost $3 million for the additional costs of raising the children.

128 For example, parents may hire whoever they want to care for their disabled child, but they may not be able to justify hiring a registered nurse at $50 an hour if a personal support worker at $28 an hour could meet the child's needs.

129 *Andrews*, *supra* note 120 at 242–48; *Arnold v Teno*, 1978 CanLII 2 at 321–23

Toy Alberta Ltd, the obligation to mitigate did not require the plaintiff who was negligently rendered a quadriplegic at the age of 21 to "languish in an institution which on all evidence is inappropriate for him." [130]

VII. Can Alcohol Manufacturers and Suppliers Establish a Defence?

If the tobacco litigation is any indication,[131] the alcohol manufacturers will likely raise numerous defences. It is unrealistic to suggest that the conduct of the disabled infant provides grounds for asserting any recognized defence to civil liability.[132] However, the alcohol manufacturers would likely challenge any parental claim on the basis that the mother's drinking during her pregnancy gives rise to the defences of contributory negligence and voluntary assumption of risk.[133] Leaving aside the policy reasons in

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(SCC); *Thornton v School District No 57 (Prince George) et al*, 1978 CanLII 12 at 272–73 (SCC); *Crawford*, *supra* note 14 at para 308; *Cojocaru*, *supra* note 14 at para 314.

130 *Andrews*, *supra* note 120 at 242.

131 For example, in response to New Brunswick's suit under the provincial *Tobacco Damages and Health Care Costs Recovery Act*, SNB 2006, c T-7.5, the tobacco companies raised six common law defences (contributory negligence, voluntary assumption of risk, *ex turpi causa*, *in pari delicto*, acquiescence, and waiver), and two equitable doctrines (laches and estoppel). Most of the defences were asserted by two or more of the companies. Some of the defences were esoteric and very rarely used. More importantly, none of defences or doctrines were applicable.

132 Nevertheless, the alcohol manufacturers may argue, pursuant to the doctrine of identification, that the negligence of the child's mother in drinking during her pregnancy can be attributed to the child, thereby reducing the child's FASD claims against them. The doctrine, aptly described as a "barbarous rule" in regard to parents and children, has long been eliminated from Canadian common law. See e.g. Fleming, *supra* note 17 at 325; *Governor and Company of Adventurers of England Trading into Hudson's Bay v Wyrzykowski*, 1938 CanLII 43 at 294 (SCC); *Ducharme v Davies*, 1984 CanLII 2383 (SKQB).

133 These defences are only relevant to the mother's claim. Presumably, the damage claim of the child and the other parent could be structured to minimize the damages sought in the mother's name. For example, instead of the mother claiming compensation for the additional hours of support that she will need to provide, the child or those acting on the child's behalf could claim

Dobson that would likely preclude raising these defences,[134] they would be difficult to establish in the circumstances of an FASD claim.

In order to establish contributory negligence,[135] an alcohol manufacturer would need to prove on the balance of probabilities that the woman breached the standard of care expected of a reasonable person in her position and that this breach was a cause of her losses (i.e., the additional supports and costs of raising a child with FASD). Once the court accepts that a manufacturer failed to adequately inform a woman of the risks of FASD, there would be a relatively limited number of situations in which she would be viewed as being contributorily negligent.[136] It would be incongruous to assert that a woman was negligent regarding risks of which she was unaware.

In order to establish voluntary assumption of risk, an alcohol manufacturer would need to prove on the balance of probabilities that the woman was aware of the nature, probability, and severity of the risks of FASD, and that she expressly, or by necessary implication from her behaviour, agreed to

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the cost of hiring personal support workers to provide this support. Once the case is resolved, those acting on the child's behalf could forego hiring personal support workers and compensate the child's mother for providing the necessary support.

134 *Dobson*, *supra* note 49 at paras 23–45.

135 If a plaintiff is found to have been contributorily negligent, the court will apportion liability between the defendant and the plaintiff based on their respective degrees of fault. The damage award will then be reduced to reflect the plaintiff's degree of fault. For a discussion of the statutory principles of contributory negligence in Canada, see Stephen GA Pitel, "Chapter 18 Defences to Negligence" in Erika Chamberlain & Stephen GA Pitel, eds, *Fridman's The Law of Torts in Canada*, 4th ed (Toronto: Thomson Reuters, 2020) at 600–05.

136 Leaving aside *Dobson*, *supra* note 49, and the issue of addiction, women who were fully aware of the risks but drank heavily prior to and during their pregnancy could be viewed as being contributorily negligent. However, their claims would likely fail at the duty of care stage because manufacturers have no duty to inform consumers of risks of which they are fully aware. The claims would also likely fail at the causation stage. In these circumstances, the women would not be able to prove that they would have stopped or limited their drinking had a warning been given. Although the women may be contributorily negligent, their claims would likely be dismissed before the issue of contributory negligence arose. For duty to warn cases in which the plaintiff was held to be contributorily negligent, see *Labrecque v Saskatchewan Wheat Pool*, 1980 CanLII 2062 (SKCA); *Laflamme c Groupe TDL ltée*, 2014 QCCS 312.

waive her right to sue.[137] The recent trend has been to narrow the defence.[138] With few exceptions, a manufacturer would be hard pressed to prove that a woman with whom it had no direct contact or relationship was fully aware of the risks of FASD, let alone agreed to give up her right to sue.[139]

One further issue warrants comment. Even if the plaintiffs sued only the alcohol manufacturers, they would invariably draw the relevant government liquor authority into the litigation.[140] First, the rules governing civil litigation across Canada generally permit a defendant to make a "third-party claim" against any person who is not a party to the action, if that person is or may be fully or partly liable for the plaintiff's claim.[141] Since the duty to inform applies to the government liquor authorities, an alcohol manufacturer that is sued would likely be able to establish the requirements for making a third-party claim against the relevant government liquor authority.

Second, legislation across Canada allows a defendant who has been held liable to recover "contribution or indemnity" from any other party who

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137 Voluntary assumption of risk is a complete defence. If a plaintiff is found to have voluntarily assumed the risk, they will be denied any recovery despite the defendant's negligence. For a discussion of voluntary assumption of risk in Canada, see Pitel, *supra* note 135 at 570–87.

138 *Dube v Labar*, 1986 CanLII 67 at 658–59 (SCC); *Crocker v Sundance Northwest Resorts Ltd*, 1988 CanLII 45 at paras 1201–03 (SCC); *Waldick v Malcolm*, [1991] 2 SCR 456 at 474–79, 1991 CanLII 71 (SCC); *Hall v Hebert*, [1993] 2 SCR 159 at 192–93, 1993 CanLII 141 (SCC).

139 The circumstances giving rise to the defence of voluntary assumption of risk would also provide manufacturers and suppliers with grounds for seeking the dismissal of the plaintiff's claim at the duty of care and causation stages of the analysis. See Pitel, *supra* note 135.

140 The tobacco companies made repeated unsuccessful attempts to draw the government into the tobacco health care cost recovery litigation. The tobacco companies' efforts failed because the government did not manufacture or supply tobacco but rather only regulated and taxed the industry. See e.g. *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42; *New Brunswick v Rothmans Inc*, 2012 NBQB 59.

141 See e.g. Ontario, *Rules of Civil Procedure*, RRO 1990, Reg 194, r 29.0l(a); New Brunswick, *Rules of Court*, NB Reg 82-73, r 30.0l(l)(a); British Columbia, *Supreme Court Civil Rules*, BC Reg 168/2009, r 3-5(1)(a).

would have been liable if sued.[142] An alcohol manufacturer that is held liable would almost surely seek contribution or indemnity from the relevant government liquor authority. Again, given the parallels in their legal obligations, manufacturers should be able to establish that the government liquor authority would have been held liable if sued.

Any attempt to make a third-party claim against, or obtain contribution or indemnity from, the mother of a child with FASD would fail. Pursuant to *Dobson*, a pregnant woman owes no duty of care in negligence to her fetus.[143] The third-party claim would fail because the child's mother is not a person who is or may be fully or partly liable for her child's claim. Similarly, the claim for contribution or indemnity would fail because the child's mother is not a person who would have been liable if sued by her child.

VIII. Conclusion

The common law principles of negligence impose a general duty on all manufacturers and suppliers to inform consumers of the risks inherent in the using their products. The courts have established a demanding standard of disclosure for products intended for human consumption, particularly if they pose a significant risk of serious bodily harm or illness. Alcohol manufacturers and the government liquor authorities have fallen short of this obligation regarding FASD, the leading cause of birth defects, cognitive impairment, and physical disabilities among Canadian infants. Existing legal principles provide many children born with FASD and their parents with a viable basis for suing Canadian alcohol manufacturers and government liquor authorities for their FASD-related losses.

These principles were clearly set out almost 40 years ago in the Ontario Court of Appeal decision in *Ortho* and have remained largely unchanged for decades. Nevertheless, to our knowledge, alcohol manufacturers and suppliers have not been held to account for failing to inform consumers of the risks of FASD. No doubt, some claims will fail because the woman was fully aware of the risks, or it is apparent that the woman, even if fully informed, would not have changed her consumption pattern. Other claims will

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142 See e.g. Ontario, *Negligence Act*, RSO 1990, c N.1, s 2; Alberta, *Contributory Negligence Act*, RSA 2000, c C-27, s 6; Manitoba, *The Tortfeasors and Contributory Negligence Act*, CCSM c T90, s 2(l)(c).

143 *Dobson*, *supra* note 49 at paras 46–68.

fail due to credibility issues or because a child's disabilities are not clearly attributable to FASD. However, the major barrier in many other situations does not appear to be the governing legal principles, but rather the real-world challenges that even the most knowledgeable plaintiffs face in suing multi-billion-dollar defendants.

The lack of any successful suits to date for FASD-related harms is reminiscent of the situation with the tobacco industry, which evaded liability until recently, even though the negative health effects of smoking were well known within the industry and health community by the mid-1960s.[144] The Canadian alcohol industry appears to be on a similar trajectory. We believe that it is only a matter of time before Canadian alcohol manufacturers and government liquor authorities are sued and held liable for failing to inform consumers of the risks of FASD.

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[144] See for example, US, Department of Public Health Service, Center for Disease Control, *Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service*, (PHS Pub No 1103) (Washington, DC: Government Printing Office, 1964). It concluded that an average male cigarette smoker is 9 to 10 times more likely to develop lung cancer than his non-smoking counterpart and that heavy smokers are at least 20 times more likely to do so. Cigarette smoking is the most important cause of chronic bronchitis and emphysema, is causally related to laryngeal cancer, and is associated with an increased death rate from coronary artery disease. Smoking is associated with a 70% increase in the age-specific death rate of males and, to a lesser extent, with increased death rates of females (see *ibid* at 31–32).