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"I Didn't Mean It That Way!": Racial Discrimination as Negligence

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I. INTRODUCTION

> Racism continues to be aided and abetted by self-conscious bigots and well-meaning liberals alike.[1]

What is the role of common law, and in particular torts, in providing a remedy for racial harm?[2] According to the Supreme Court of Canada in 1981, there is none. In *Seneca College of Applied Arts and Technology v. Bhadauria*,[3] the Supreme Court of Canada overturned the Ontario Court of Appeal decision which recognized a new tort of discrimination. The Supreme Court commended the Ontario Court of Appeal for its "bold" attempt to advance the common law, but ultimately found that the Ontario *Human Rights Code*, as a comprehensive scheme, was exhaustive and "foreclose[d] any civil action based directly upon a breach thereof [and] also exclude[d] any common law action based on the invocation of the public policy expressed in the Code".[4] Recently

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[1] Charles R. Lawrence III, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism" (1987) 39 Stan. L. Rev. 317, at 387 [hereinafter "Lawrence"].

[2] Racial harm can be described as: "[T]he direct or indirect, intentional or negligent, infliction of physical or emotional injury, injury to reputation or economic interests, interference with use and enjoyment of land and economic losses occasioned as a result of systemic and institutionali[z]ed violence, oppression or discrimination." Patricia Tuitt, *Race, Law, Resistance* (Portland: The GlassHouse Press, 2004), at 39 [hereinafter "Tuitt"].

[3] [1981] S.C.J. No. 76, [1981] 2 S.C.R. 181 (S.C.C.) [hereinafter "*Bhadauria*"].

[4] *Id*., at 195. See *Human Rights Code*, R.S.O. 1970, c. 318. Interestingly, LeBel J. (dissenting in part), responded to this statement in *Bhadauria* in the recent case of *Honda Canada Inc. v. Keays*, [2008] S.C.J. No. 40, 2008 SCC 39 (S.C.C.) [hereinafter "*Keays*"]. He suggested (at para. 119) that "[t]he development of tort law ought not to be frozen forever on the basis of this *obiter dictum*." However, both the majority and dissenting opinions agreed that it was unnecessary to reconsider the position of *Bhadauria* in that particular case.

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established human rights tribunals were perceived to have more expertise than courts to deal with claims of discrimination,[5] and it was assumed that they could do so more efficiently. Ultimately, the decision to not recognize a new tort of discrimination was based on the assumption that human rights tribunals could, and would, offer an effective remedy for discrimination.[6]

Although this decision sparked much debate at the time and disappointed many equality rights activists, the discourse around the capacity of torts to address discrimination, and racial injury in particular, has died down considerably. However, it is more important than ever for victims of discrimination to have access to the courts. More than 25 years after the *Bhadauria* decision, we know that human rights tribunals have failed to offer an effective remedy for discrimination as predicted by the Supreme Court. Instead, they have been repeatedly criticized for long delays, low damage awards in the rare cases where discrimination is found, an inability to deal effectively with systemic discrimination claims, and the complainants' lack of control over proceedings, to name only a few issues.[7] Moreover, human rights tribunals have a particularly

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[5] Some courts have since questioned this presumption of expertise. As the Nova Scotia Court of Appeal noted in *Kaiser v. Dural, a division of Multibond Inc.*, [2003] N.S.J. No. 418, 219 N.S.R. (2d) 91, at para. 28 (N.S.C.A.) [hereinafter "*Kaiser*"], "[t]here is no loss of expertise in having the court adjudicate on the issue of discrimination in the context of a wrongful dismissal action for there is no expertise or experience required for persons who are appointed to boards of inquiry under the *Act*," citing *Canada (Attorney General) v. Mossop*, [1993] S.C.J. No. 20, [1993] 1 S.C.R. 554 (S.C.C.). See also Kathleen Ruff, "A Critical Survey of Human Rights Acts and Commissions in Canada" [hereinafter "Ruff"] in Walter Tarnopolsky, Joyce Whitman & Monique Ouellette, eds., *Discrimination in the Law and the Administration of Justice* (Montreal: Éditions Thémis, 1993) 24, noting at 30 that: "Many of the appointments to human rights commissions and tribunals across the country read like cheering parties for the powerful and the privileged, not defenders of the disadvantaged."

[6] Note that the human rights schemes only maintain exclusive jurisdiction where no prior common law right of action exists and where the wording of the statute would suggest exclusive jurisdiction. As a result, some courts have since distinguished *Bhadauria* in the context of wrongful dismissal cases involving an allegation of discrimination. See, *e.g.*, *Kaiser*, *id.*

[7] For general discussions on the inadequacy of human rights tribunals, see Jeffrey Radnoff & Pamela Foy, "The Tort of Discrimination" (2002) 26 Advocates' Q. 309; Elizabeth Adjin-Tettey, "Picking Up Where Justice Wilson Left Off: The Tort of Discrimination Revisited" [hereinafter "Adjin-Tettey"] in Kim Brooks, ed., *One Woman's Difference: The Contributions of Justice Bertha Wilson* (UBC Press, forthcoming); Ruff, *supra*, note 5. Although Ontario and British Columbia recently amended their human rights statutes to allow victims of discrimination direct access to tribunals, this change does not alter the need for access to courts. Human rights tribunals continue to be an inadequate means by which to address complaints of discrimination given their other shortcomings, which include an ineffective and problematic approach to racism complaints (see *infra*, note 8). Moreover, the public investigation function of human rights commissions is viewed by some as a potential benefit of the human rights system in comparison to courts, in that the Commission is empowered to search and compel evidence from a defendant at no cost to the

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poor record in handling claims of racial discrimination, which in many cases are more difficult to prove than claims based on other grounds.[8]

Rather than elaborate on the well-documented shortcomings of these tribunals, I would instead like to begin this paper from the assumption that human rights tribunals are not realizing the goals originally envisioned for them. I do not suggest that we should give up on these tribunals altogether; rather, we need to offer a parallel means for providing redress to victims of racial discrimination. Given the ineffectiveness of human rights tribunals, we must revisit *Bhadauria* in the near future and ponder a new question: If *Bhadauria* is ultimately overturned, how should we proceed? What would a tort of discrimination look like?

In her case, Dr. Bhadauria argued for a new *intentional* tort of discrimination. Clearly there are merits to this approach, which I will explore later in this paper.[9] However, my primary focus is on another tort that in my view has a more realistic potential to compensate victims of racial discrimination. I argue that, properly analyzed, the tort of negligence offers a more effective means of addressing racial injury than does a specific tort of intentional discrimination. My conclusion is based in part on the ways in which racist behaviour is typically manifested. The most common racist acts are subtle and cause indirect harm, characteristics that intentional torts are not designed to address. Furthermore, because causing harm through negligence is less stigmatizing than intentionally inflicting harm, courts are more likely to acknowledge the actual injury and provide

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complainant. Access to courts is required to mitigate the deficiencies of human rights schemes, even in their evolving forms.

[8] See, *e.g.*, John Hucker, "Antidiscrimination Laws in Canada: Human Rights Commissions and the Search for Equality" (1997) 19 Hum. Rts. Q. 547, at 558 (noting the high dismissal rate for race complaints). See also James S. Frideres & William J. Reeves, "The Ability to Implement Human Rights Legislation in Canada: A Research Note" (1989) 26 Can. Rev. of Sociology and Anthropology 311, at 317, 320-21, 325 (noting that race cases are substantiated far less frequently than sex or disability discrimination claims and that the test for race discrimination appears to focus on evidence of the respondent's motivation to discriminate). Donna Young, in her study on the low success rates of race complaints at the Ontario Human Rights Commission, found that the assumptions and rationale relied upon to dispose of race complaints indicate individual and systemic racism at the Commission. These assumptions include the "abnormality" of racism and the "innocence" of respondents, the "oversensitivity" of complainants to racism and their inherent lack of objectivity, and the tendency to decontextualize the discriminatory behaviour in question. Donna Young, *The Handling of Race Discrimination Complaints at the Ontario Human Rights Commission* (1992) (unpublished memo to the Anti-Racism Committee of the Ontario Human Rights Commission).

[9] See also Larry Chartrand, "The Crumbling Wall of *Bhadauria*: If Not Today, Tomorrow" [hereinafter "Chartrand"] in this volume, on the use of intentional torts to address discrimination.

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for redress if the action is framed in negligence. Finally, establishing a tort of negligent racial discrimination would be well within the recognized jurisdiction of common law courts to develop the common law on an incremental basis.[10] Interestingly, in his judgment in *Bhadauria*, then Laskin C.J.C. also appeared open to a potential role for negligence even though he rejected the possibility of a new intentional tort. He stated:

> It is one thing to apply a common law duty of care to standards of behaviour under a statute; that is simply to apply the law of negligence in the recognition of so-called statutory torts. It is quite a different thing to create by judicial fiat an obligation — one in no sense analogous to a duty of care in the law of negligence — to confer an economic benefit upon certain persons, with whom the alleged obligor has no connection …[11]

This passage suggests that the Court distinguished between the possibility of creating a new intentional tort of discrimination and incorporating discrimination issues within negligence law, relying on the statute to indicate the content or scope of the duty. While recognizing a new intentional tort was precluded, the incorporation of new statutory duties into negligence law was not.

My paper begins with a brief discussion on why tort law is an important venue in which to deal with racial discrimination. Most of my arguments will be applicable to other forms of discrimination as well. However, this paper is concerned primarily with racial discrimination because of the distinctive socio-legal history of racism and the unique and fluid ways in which it has been, and continues to be, manifested.[12] In my view, these considerations, combined with the particularly biting stigma attached to an accusation of racism, warrant a separate discussion on how tort law should redress racial discrimination.

Having established the need for a tort to deal with the damage caused by racial discrimination, I will then look at the limitations of focusing on the intention to discriminate and the advantages of the

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[10] See *R. v. Salituro*, [1991] S.C.J. No. 97, [1991] 3 S.C.R. 654, at paras. 38-39 (S.C.C.); *Watkins v. Olafson*, [1989] S.C.J. No. 94, [1989] 2 S.C.R. 750, at paras. 13-15 (S.C.C.).

[11] *Bhadauria*, *supra*, note 3, at 189.

[12] For discussions on how racism is different from other oppressions, see, *e.g.*, Trina Grillo & Stephanie M. Wildman, "Obscuring the Importance of Race: The Implication of Making Comparisons between Racism and Sexism (Or Other-Isms)" (1991) Duke L.J. 397; George Jerry Sefa Dei, Nisha Karumanchery-Luik & Leeno Luke Karumanchery, *Playing the Race Card: Exposing White Power and Privilege* (New York: Peter Lang Publishing, 2004), at 105; Richard Delgado, "Words that Wound: A Tort Action for Racial Insults, Epithets and Name-Calling" (1982) 17 Harv. C.R.-C.L.L. Rev. 133 [hereinafter "Delgado, 'Words that Wound'"].

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negligence framework for compensating racial injury. In this section, I will set out the elements of a potential tort of negligent discrimination, highlight the challenges of developing and applying a tort of this nature and suggest how these challenges may be overcome.

The disadvantages of addressing racial discrimination through negligence as opposed to intentional torts will then be considered. Ultimately, I will conclude that even though intentional torts may appropriately deal with racist taunts and overtly racist acts, the widespread racism in North American culture, including systemic racism, is addressed more effectively through the negligence framework.

II. WHY TORTS?

Given the critical role tort law plays in regulating social conduct, it is not only a possible way to address racial discrimination, but in fact, a necessary one. As Prosser famously remarked, "[p]erhaps more than any other branch of the law, the law of torts is a battleground of social theory".[13] In deciding whether someone is at "fault" and should rightly pay for the harm "caused" to another, tort law makes definitive determinations of what is permissible and impermissible within a community. Such determinations depend on theories about morality — what sort of conduct is acceptable or wrongful — and equally about theories of social relationship — how the words or acts of one person affect the well-being of another. Historically, as shared or dominant notions of what is right and wrong change, the law of torts has adjusted accordingly.[14] That is the great strength of the common law. Given the established consensus among courts as well as law-makers that racism is a serious wrong from many points of view, and that the harm it inflicts on individuals and communities is significant, it follows then that tort law should reflect this sentiment.

Tort law has significant normative and narrative functions, as noted by Wriggins.[15] We are guided by torts in our everyday behaviour. We take precautions so that others are not injured and we are not held liable for the injury of others. More subtly, as Martha Chamallas has suggested, private law is an important reinforcer of social values and

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[13] William L. Prosser, *Handbook of the Law of Torts*, 4th ed. (St. Paul, Minn.: West Publishing, 1971), at 14-15.

[14] *Id.*, at 17.

[15] Jennifer B. Wriggins, "Toward A Feminist Revision of Torts" (2005) 13:1 Am. U. J. Gender Soc. Pol'y & L. 139, at 140 [hereinafter "Wriggins"].

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norms.[16] It not only deters behaviour that may lead to liability, but also teaches that such behaviour is wrong and harmful. Such adjustment of behaviour and attitude is essential in the fight against racism.[17] Importantly, tort law requires justice in the form of compensation for wrongful and harmful behaviour. Victims of social harm, such as racial discrimination, require access to torts to have access to justice.[18]

For the individual plaintiff, tort law often has an important psychological function. Linden has pointed out:

> The tort trial is an institution which displays great concern for the individual, especially if there is a jury. The parties have the undivided attention of everyone in the court — judge, jury, counsel, witnesses, spectators and occasionally, the press and the public.[19]

Other scholars have noted that plaintiffs often instigate litigation because they expect the process to be therapeutic.[20] Shuman writes that "[t]ort litigation provides the plaintiff an opportunity to tell an important story in a culturally meaningful context which manifests that society values the litigant".[21] Moreover, in litigation before the ordinary courts, unlike most human rights tribunals, the plaintiff has control over the process and can demand an explanation from the defendant about his or her conduct.[22] Where a plaintiff is successful, the "punishment" of a defendant who has intentionally or carelessly injured the plaintiff has the capacity to restore a plaintiff's "emotional equilibrium".[23] Drawing from empowerment theories, Shuman remarks that "tort litigants may enlist the coercive power of the judicial system to reshape the power

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[16] See, generally, Martha Chamallas, "Discrimination and Outrage: The Migration from Civil Rights to Tort Law" (2007) 48 Wm. & Mary L. Rev. 2115 [hereinafter "Chamallas"].

[17] Wriggins, *supra*, note 15, at 141.

[18] Arguably, racial discrimination could be categorized as a "social tort" as this term is suggested by Keith N. Hylton in the context of slavery. "Social torts", as he suggests, are equally if not more damaging than traditional torts such as assault and battery, and are particularly harmful in their capacity to cause injury to successive generations. "Slavery and Tort Law" (2004) 84 B.U. L. Rev. 1209, at 1212.

[19] Allen M. Linden, *Canadian Tort Law*, 7th ed. (Markham, ON: Butterworths, 2001), at 18. On the deterrent effects of bad publicity, see also Allen M. Linden, "Tort Law as Ombudsman" (1973) 51 Can. Bar Rev. 155, at 156-59.

[20] See, *e.g.*, Daniel Shuman, "The Psychology of Compensation in Tort Law" (1994) 43 U. Kan. L. Rev. 39 [hereinafter "Shuman, 'Compensation'"]; Bruce Feldthusen, "The Civil Action for Sexual Battery: Therapeutic Jurisprudence?" (1993) 25 Ottawa L. Rev. 203.

[21] Shuman, "Compensation", *id.*, at 64.

[22] *Id.*

[23] David G. Owen, "Punitive Damages in Products Liability Litigation" (1975-1976) 74 Mich. L. Rev. 1257, at 1279.

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imbalance in their relationships" with defendants.[24] This potential benefit of the tort system is particularly important in the context of racial discrimination, where issues of power and dominance are central to the relationship between plaintiff and defendant. Plaintiffs should be able to rely on tort law to assist them in repudiating the defendant's faulty assumption of superiority over them, and to assert their autonomy through control of the legal process. While the tort system may not fulfil its promise in every case, symbolically, its availability is important.[25]

III. LIMITATIONS OF INTENTIONAL TORTS: FITTING A SQUARE PEG INTO A ROUND HOLE

Although denied direct access to the tort system, victims of racial discrimination have often sought justice through indirect means, usually through other categories of intentional torts. These attempts have met with mixed success. In cases of racism by the police, for example, plaintiffs have brought actions in battery, assault, malicious prosecution and false imprisonment.[26] However, as critical race theorist Richard Delgado has observed, given the rigidity of intentional torts, the success of these types of claims often depends on whether the particular circumstances of a case can be moulded into the parameters of a specific tort.[27] To succeed in battery, for example, a plaintiff would have to prove that the racist act was accompanied by physical contact. Thus, recovery would depend on a factor that may have little or nothing to do with the discriminatory act itself. On this approach, compensation inappropriately turns on whether the plaintiff's harm happened to occur in circumstances that would allow recovery under traditional categories of torts.

Scholars have also considered the possibility of relying on the more recently developed tort of intentional infliction of emotional distress

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[24] Shuman, "Compensation", *supra*, note 20, at 56.

[25] I do not wish to idealize the tort law system. Given its costliness, delays and unpredictable damage awards, it is often an inaccessible and flawed mechanism by which to seek compensation. However, it still serves an important social and legal function.

[26] See, *e.g.*, *Nolan v. Toronto (Metropolitan) Police Force*, [1996] O.J. No. 1764 (Ont. Gen. Div.) (action in wrongful detention, false imprisonment and intentional infliction of emotional distress); *Wanli v. Preston*, [2003] B.C.J. No. 1934, 2003 BCPC 290 (B.C. Prov. Ct.) (action in battery); *Burrell v. Peel (Regional Municipality) Police Services Board*, [2006] O.J. No. 5009, 153 A.C.W.S. (3d) 1047 (Ont. S.C.J.) [hereinafter "*Burrell*"] (claims included assault, false arrest, false imprisonment and malicious prosecution); *Molnar v. Beausoleil*, [2005] O.J. No. 5115, [2005] O.T.C. 1011 (Ont. S.C.J.) (action in false arrest, false imprisonment and malicious prosecution).

[27] Delgado, "Words that Wound", *supra*, note 12 (arguing for a separate tort for racial insult).

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(nervous shock) to recover compensation for racist conduct.[28] Although many academics have recognized the potential of this tort to address racial injury in theory, they have also acknowledged its limitations in practice. Most racist conduct, for example, is subtle or systemic and does not meet the level of "outrageousness" required to succeed in proving this tort. Moreover, courts rarely recognize that racism can and does cause the manifest physical or psychological injury mandated by the tort. This type of injury may be more difficult to demonstrate in racialized individuals who have by necessity learned to function in a racist society.[29] As Richardson points out, using the tort of intentional infliction of emotional distress as a response to racial harm is problematic because it was not created as a civil rights remedy but rather as a colour blind cause of action.[30]

Ultimately, the attempt to fit discrimination into existing categories of intentional torts has been an uncertain and unsatisfactory means to deal with racial injury. Even if traditional intentional tort categories were more malleable and better able to encompass racial harm, the requirement of intent is inappropriate given the way racism often operates without conscious intent. In tort law, conduct is not intentional unless the defendant either desires the consequences of her conduct or the consequences are substantially certain to result.[31] In an immensely

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[28] Dean M. Richardson, "Racism: A Tort of Outrage" (1982) 61 Or. L. Rev. 267 [hereinafter "Richardson"]; Chamallas, *supra*, note 16; Delgado, "Words that Wound", *supra*, note 12.

[29] The dissenting opinion in the American case *Caldor, Inc. v. Bowden*, 625 A.2d 959, at 980 (Md. 1993), noted in response to the majority decision's requirement of a disabling emotional response to successfully prove an intentional infliction of emotional distress claim:

> [This requirement] will likely work against many members of groups which have, unfortunately and through no fault of their own, suffered more discrimination, harassment and abuse in our society than that suffered by the majority of individuals. Many members of certain minority and socioeconomic groups, who have suffered discrimination and abuse, have developed a tougher hide than many other persons. Many of those who have more frequently been the victims of outrageous conduct have developed, from experience and necessity, the ability to continue functioning in their daily activities. … In its application, the tort will discriminate against those who have developed a degree of resiliency because of past discrimination.

Cited in Camille A. Nelson, "Considering Tortious Racism" (2005) 9 DePaul J. Heath Care L. 905, at 945-46 [hereinafter "Nelson"].

[30] Richardson, *supra*, note 28, at 281.

[31] But see Klar, who notes that the reference to tort actions dealing with direct interferences with persons and property as "intentional" is somewhat inaccurate given the historical development of torts deriving from the writ of trespass. However, he notes that the current situation in Canada is confusing given that the historical distinctions between trespass and case have survived. In particular, the distinction between direct and indirect interference remains important. Lewis N. Klar, *Tort Law*, 3d ed. (Toronto: Thomson Carswell, 2003), at 25-29 [hereinafter "Klar"].

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influential article written more than two decades ago, Charles Lawrence, drawing from the work of psychologists, defined contemporary discrimination as emanating from unconscious forces. He argued that attitudes and stereotypes of a racist culture are absorbed by its individuals and influence behaviour in insidious and harmful ways. He noted:

> Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional — in the sense that certain outcomes are self-consciously sought — nor unintentional — in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker's beliefs, desires and wishes.[32]

Particularly relevant to the discussion of intent in tort law was his warning that:

> If the purpose of the law's search for racial animus or discriminatory intent is to identify a morally culpable perpetrator, the existing intent requirement fails to achieve that purpose. There will be no evidence of self-conscious racism where the actors have internalized the relatively new American cultural morality which holds racism wrong or have learned racist attitudes and beliefs through tacit rather than explicit lessons.[33]

Most critical race scholarship since that time has tried to move beyond the concept of racism as overt and intentional, to a more sophisticated understanding of the complex subtle and unconscious ways in which it can be manifested. In other words, the intentional tort of discrimination does not capture the nature of most racism that we see today.

Similarly, some courts and human rights commissions have begun to focus on the less obvious facets of racism. For example, the Ontario Human Rights Commission published a report on racism that stated:

> It is important to emphasize that racism in its more entrenched forms is often unconsciously applied and its operation is often unrecognized by even those practising it. In addition … while Canada has made much progress, racism remains a reality. It should not be treated as aberrant behaviour or a set of deviant attitudes on the part of a deviant individual — a so-called "rotten apple" within the system. Failing to

[32] Lawrence, *supra*, note 1, at 322.
[33] *Id.*, at 343-44.

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> recognize the complex, subtle and systemic nature of racism impedes effective action against it.[34]

In addition, Doherty J. in *R. v. Parks*,[35] in the context of anti-black racism, noted the prevalence of subconscious racism. He observed:

> Racism, and in particular anti-black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes. These elements combine to infect our society as a whole with the evil of racism.[36]

It should be noted that not all critical race theorists agree that racist behaviour is unconsciously motivated. Most notably, Derrick Bell, one of the founders of the critical race theory movement, has written extensively on his view that racism is essentially intentional in all its forms. "Racial realism", in his view, requires understanding the permanence of racism and the fact that racial equality will never be achieved.[37] He warns: "[W]e fool ourselves when we argue that whites do not know what racial subordination does to its victims. Oh, they may not know the details of the harm, or its scope, but they *know*."[38] Instead, he asserts that the harm done by racial discrimination is an "open secret everyone has agreed upon, however much individuals may deplore it from time to time".[39] Moreover, "[r]acism, as we now know, is not an aberrant disease afflicting bad, white folks … Rather, racism is a principal stabilizing force in a nation of varied people whose opportunities and status are wildly disparate, and are likely to remain so."[40] Similarly, Delgado argues that the fact that racism is constantly evolving, assuming new forms and targets over time, refutes the theory that racism is largely unconscious.[41]

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[34] Ontario Human Rights Commission, *Policy and Guidelines on Racism and Racial Discrimination*, online at: <http://www.ohrc.on.ca/en/resources/Policies/RacismPolicy/pdf>, at 13.

[35] [1993] O.J. No. 2157, 15 O.R. (3d) 324 (Ont. C.A.).

[36] *Id.*, at 342.

[37] Derrick Bell, "The Permanence of Racism" (1992-1993) 22 Sw. U. L. Rev. 1103.

[38] *Id.*, at 1108 (emphasis in original).

[39] *Id.*, at 1109.

[40] *Id.*, at 1105.

[41] Richard Delgado, "Two Ways to Think About Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection" (2000-2001) 89 Geo. L.J. 2279, at 2286 [hereinafter "Delgado, 'Reflections'"] (arguing that Lawrence's idealist theory of racism focusing on attitudes is incomplete in that it neglects the material benefits of racism).

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Professors Bell and Delgado offer an important counterpoint to discourse that accepts racism as mostly unconscious. Their grim but compelling arguments serve as a reminder that we live in a covertly racist society and we must fashion remedies accordingly. Perhaps ideally, intentional torts *should* encompass the full range of racial harm if on some level, whites understand the effects of racial subordination on its victims, as Bell suggests. Realistically, however, this will not work in practice given that racist beliefs, though prevalent, are now generally looked down upon in society.[42] Tort law is incapable of recognizing the complexity of racial discrimination as explained by Professors Bell or Delgado, nor, I suggest, would dominant white society be accepting of this framework.

Given the difficulty in ascertaining intent in the context of racial discrimination, particularly in cases of systemic discrimination or covert racism where the perpetrator intends racial harm but takes steps to avoid blame,[43] intentional racism is in practice essentially interchangeable with overt racism. It is virtually impossible to evaluate intent unless the discrimination is overtly manifested through, for example, racial insults or explicit differential treatment ("I don't rent apartments to Indian tenants"). Even in cases where racial discrimination is overt, courts and human rights tribunals are reluctant to find racism except in the most egregious of circumstances, instead preferring to find race-neutral reasons to explain the conduct in question.[44]

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[42] Reviewing psychological and sociological research, Oppenheimer notes: "These surveys support the view that overt racism has lost favor socially, but racist attitudes lie close beneath the surface of our society." David Benjamin Oppenheimer, "Negligent Discrimination" (1993) 141 U. Pa. L. Rev. 899, at 903 [hereinafter "Oppenheimer"]. Similarly, Lawrence suggests that, "[o]ur culture has only recently rejected the morality of white supremacy; the repression of racist ideas is a relatively new phenomenon." Lawrence, *supra*, note 1, at 336.

[43] As Anthony Cook explains:

> Covert racists refuse to take responsibility for their racism and thus carefully manufacture alibis that deflect any attempts to blame them for the consequences of their actions. In this sense, individual overt and covert racism both involve forms of intentional racism and fall squarely within the rationalist model. Since there is little correspondence between the language and thought of the covert racist, however, the latter provides a more difficult case for legal prosecution and moral condemnation.

"Cultural Racism and the Limits of Rationality in the Saga of Rodney King" (1992-1993) 70 Denv. U. L. Rev. 297, at 300 [hereinafter "Cook"].

[44] In a recent decision of the B.C. Human Rights Tribunal, the Tribunal refused to find that the actions of the defendant, which included a racial slur against the complainant, constituted discrimination. The complainant confronted the defendant when he felt he had been mistreated by him, and the defendant retaliated with a racial slur. In finding that there was no discrimination, the Tribunal stated:

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IV. THE POTENTIAL OF NEGLIGENCE: ROUND PEGS IN SQUARE HOLES?

Given the rigidity of the intentional tort framework, the evidentiary challenges of ascertaining a defendant's intent, and the fact that most racist conduct is not overtly manifested, negligence offers a more viable option. Many scholars have considered the value of framing discrimination as negligence in other contexts;[45] however, few have considered this framework in the context of torts although it has much to offer.[46] Unlike intentional torts, negligence is more flexible and broader in scope. It is "dynamic, expansionary, and largely reflective of current public attitudes and policies",[47] at least in aspiration. Interestingly, similar adjectives have been used to describe the nature of racism; for example, Henry and Tator have described the ways in which racism is manifested as "fluid, dynamic and ever-changing".[48] The tort of negligence is constantly evolving, unlike intentional torts which tend to remain static, making it more suitable to keep up with the changing faces of racism. Generally speaking, negligent conduct is a departure from the standard of care expected of reasonable people. Where a defendant acts unreasonably in creating a foreseeable risk of injury to a plaintiff, the defendant, and not the plaintiff, should be expected to bear the cost of the plaintiff's injury. Unlike intentional torts, negligence does not require a particular state of mind. Instead, it focuses on the conduct and

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> Specifically, the slur was made in the context of an isolated work place incident which escalated due to the actions and reactions of both parties. This does not, in any way, excuse Mr. Forsyth's issuing a racial slur: that comment is degrading, insulting and unacceptable.

Banwait v. Forsyth, [2008] B.C.H.R.T.D. No. 81, 2008 BCHRT 81, at para. 165 (B.C.H.R.T.).

[45] See, *e.g.*, Oppenheimer, *supra*, note 42 in the context of the *Civil Rights Act* in the U.S. Many American scholars have advocated for a move away from intent in the context of the *Civil Rights Act*, most predominantly in the context of employment discrimination (Title VII). Although they have not necessarily framed their discussion specifically in negligence, many of their arguments support this approach. For example, Wax explores whether unconscious discrimination could be framed as a "workplace accident" for race or sex discrimination in the workplace. Amy L. Wax, "Discrimination as Accident" (1998-1999) 74 Ind. L.J. 1129; in response to Wax's article, see Michael Selmi, "Discrimination as Accident: Old Whine, New Bottle" (1998-1999) 74 Ind. L.J. 1233.

[46] But see Jessie Allen, "A Possible Remedy for Unthinking Discrimination" (1995) 61 Brook. L. Rev. 1299 (considering negligence as a remedy for housing and employment discrimination in the U.S., but ultimately arguing that the concept of intent in Title VII and Title VIII cases should be expanded to include an "objective standard of inferred intent"). Also see Tsachi Keren-Paz, *Torts, Egalitarianism and Distributive Justice* (Aldershot, England: Ashgate, 2007), at 161-80; Tuitt, *supra*, note 2, at 37-54.

[47] Philip H. Osborne, *The Law of Torts*, 3d ed. (Toronto: Irwin Law, 2007), at 235.

[48] Frances Henry & Carol Tator, *The Colour of Democracy: Racism in Canadian Society*, 3d ed. (Toronto: Thomson Nelson, 2006), at 17.

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the ensuing harm, which is critical given that "the injury of racial inequality exists irrespective of the decision-makers' motives".[49]

1. Stigma

Recognizing discrimination as negligence would serve several important functions. First, it would destigmatize the label of racism. To be called racist is to be accused of a "deviant consciousness, bad intentions and mental culpability".[50] Negligence carries with it a lesser degree of culpability than intentional torts. Many scholars have attempted to categorize torts according to the type of fault that the plaintiff must prove to succeed.[51] In this framework, a wrong is intentional if the plaintiff has to prove that the defendant had an intention to harm; a wrong is negligent if the plaintiff has to demonstrate that the defendant did not exercise reasonable care.[52] Consequently, being called negligent, while still attracting condemnation, is arguably less stigmatizing than intending the consequences of one's conduct, particularly in the context of racism.

With the possible exception of self-proclaimed white supremacists, no one today wants to be labelled a racist. In fact, the accusation is perceived to be so offensive that it has formed the basis of many defamation suits.[53] Instead of focusing on eradicating systemic racism, whites become concerned with how to avoid the label.[54] Similarly, judges avoid labelling defendants as racist given the gravity of such a designation. Distinguishing between cases of conscious and unconscious

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[49] Lawrence, *supra*, note 1, at 319.

[50] Cook, *supra*, note 43, at 297.

[51] Ruth Sullivan, "Trespass to the Person in Canada: A Defence of the Traditional Approach" (1987) 19 Ottawa L. Rev. 533, at 534 [hereinafter "Sullivan"].

[52] *Id.* Sullivan argues that this has been an inaccurate way of organizing tort law given that intentional torts are not predicated on fault, but are in fact rights-based.

[53] See Kate Sutherland, "The Impact of the Tort of Defamation on Public Discourse about Racism", in this volume, on the use of defamation suits to respond to allegations of racism. See also *Campbell v. Jones*, [2002] N.S.J. No. 450, 209 N.S.R. (2d) 81 (N.S.C.A.) (police officer alleging that two lawyers defamed her when they suggested that race was connected to her strip search of three black students); *Gauthier v. Toronto Star Daily Newspapers Ltd.*, [2003] O.J. No. 2622, 228 D.L.R. (4th) 748 (Ont. S.C.J.) (police officers claiming that their reputation was damaged when newspaper articles portrayed them as racists and bigots); *Kenora (Town) Police Service v. Savino*, [1995] O.J. No. 486, 36 C.P.C. (3d) 46 (Ont. Gen. Div.) (police alleging that comments made implied that the police force used racist practices against Aboriginals and were therefore defamatory).

[54] Stephanie M. Wildman & Adrienne D. Davis, "Making Systems of Privilege Visible" in Richard Delgado & Jean Stefancic, eds., *Critical White Studies: Looking Behind the Mirror* (Philadelphia: Temple University Press, 1997) 314, at 315 [hereinafter "Wildman & Davis"].

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(or subconscious) discrimination would allow defendants to avoid the social stigma of a finding of intentional discrimination, thus also making it more likely that a court would be willing to find culpability. As Professor Randall Kennedy has observed in the American context:

> One of the greatest achievements of social reform in American history has involved the stigmatization of overt racial prejudice. But this triumph in principle has produced an unfor[e]seen consequence in application: it is precisely the sense that racial discrimination is a terrible evil that inhibits the Justices from "finding" it in all but the clearest circumstances. Perhaps they assume that conduct so horrible must be plainly observable. Or perhaps their sense of the shamefulness of racism is so intense that they find it difficult to burden an official or agency with the moral opprobrium that the "racist" label connotes without absolutely positive proof of culpability.[55]

Even in cases of covert racism in which the defendant has not acted in good faith, plaintiffs will be more likely to succeed if their accusations are perceived as less stigmatizing. In a perfect non-racist world, this consideration should be unnecessary; however, in our imperfect, racist reality, we need to be pragmatic. The stigma of being called racist is an obstacle to plaintiffs alleging discrimination and it needs to be considered.

Moreover, labelling someone a racist individualizes the behaviour and obscures the fact that "racism can occur only where it is culturally, socially, and legally supported".[56] It targets the individual rather than the systemic forces that have shaped that individual and his or her society. As Lawrence has noted in the context of employment discrimination in the United States, "the existing intent requirement's assignment of individualized fault or responsibility for the existence of racial discrimination distorts our perceptions about the causes of discrimination and leads us to think about racism in a way that advances the disease rather than combatting it".[57] Negligence could permit a focus on racist actions, and not on labelling individuals as racist. Further, this focus could serve as a reminder that racism manifests itself in many forms, and not only in the overt ways in

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[55] Randall L. Kennedy, "*McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court" (1988) 101 Harv. L. Rev. 1388, at 1418 (criticizing the U.S. Supreme Court's decision upholding a capital punishment sentence against a young black man who murdered a white police officer, despite evidence that murderers of whites are four times as likely to be sentenced to death as murderers of blacks).

[56] Wildman & Davis, *supra*, note 54, at 315.

[57] Lawrence, *supra*, note 1, at 324.

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which it is often understood. I am not suggesting that we avoid using the term racist or racism,[58] but only that we situate it in a framework that better reflects that racism is the norm and not the exception. In destigmatizing the label of racism, we also discredit the notion that it is an extraordinary and rare occurrence.

2. Systemic Racism

Second, negligence can address harms caused by systemic racism more effectively. Unlike intentional torts, negligence can compensate indirect or consequential harm. Direct interference is an essential requirement of intentional torts based on trespass,[59] which would be a significant obstacle in most racial discrimination claims. Outside of racial taunts and other overt manifestations of racism, most racial harm is arguably indirect as the term is understood legally.[60] Negligence is better situated to respond to the reality that racism is not a series of discrete actions but rather "an integrated system that elevates one group at the expense of another".[61] Intentional torts may be capable of dealing with isolated acts that cause direct harm, but not the predominantly systemic nature of racism.

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[58] Given the stigma of being called racist, some have advocated for less threatening ways of naming racial discrimination. For example, moral philosopher Lawrence Blum suggests that we reserve the terms "racist" and "racism" to describe only the most egregious manifestations of racial discrimination. He argues that calling more "minor" infractions racist impedes communication by making the accused anxious or resentful, thereby furthering racial divides, rather than facilitating racial healing. See Blum, *"I'm Not a Racist, But …": The Moral Quandary of Race* (Ithaca: Cornell University Press, 2002). John Bunzel, former member of the U.S. Commission on Civil Rights, has gone even further in requesting that the President's Advisory Board on Race call for a stop to the use of terms such as "racist" and "racism" because they are "wielded as accusations and smear words" that encourage "bitterness and polarization". See John Bunzel, "Words That Smear, Like 'Racism,' Provoke Polarization" *San Francisco Examiner* (July 26, 1998) D7, cited in Michael Omi, "Rethinking the Language of Race and Racism" (2001) 8 Asian L.J. 161, at 165.

[59] Professor Klar explains directness in the following way:

> An injury can be described as being directly produced by the defendant's act when it flows naturally from it, without the necessity of an intervention by another independent factor. Where, however, the defendant's act merely creates the situation of danger, and requires an additional act to produce the ultimate injury, the injury can be described as only flowing indirectly from the initial act. A test of directness can be posed as follows: would the result have occurred had it not been for the intervention of another independent agency?

Klar, *supra*, note 31, at 27-28.

[60] Tuitt notes that institutional racism should not be equated with indirect racial discrimination, though such harm may constitute indirect harm in the legal sense. She further notes: "What distinguishes indirect racial harm from direct racial harm is that the action, directive or other measure from which harm results, on the surface, applies equally to the adversely discriminated category as to the category that does not experience discrimination." *Supra*, note 2, at 45.

[61] Delgado, "Reflections", *supra*, note 41, at 2295.

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3. Compensation

Third, negligence could offer better opportunities for compensation as intentional torts are generally not covered under liability insurance. Most compensation received by plaintiffs is from insurance companies. Whether this would be a positive or negative development for victims of discrimination depends on which objective of tort law is prioritized. If deterrence is viewed as more important than compensation in the context of discrimination, then the fact that potential tortfeasors may not pay awards out of their own pockets is problematic.[62] However, if compensating plaintiffs for harm suffered from discrimination is the ultimate goal, the fact that negligent conduct is generally encompassed within the scope of liability insurance would be an advantage to plaintiffs. These dilemmas are not unique to negligent discrimination; the aspirations of tort law and how best to achieve them continue to challenge courts and scholars alike. In fact, many scholars have argued that compensation and deterrence are simply not compatible, despite the fact that both are frequently cited as important functions of tort law.[63] Others have doubted the ability of tort law to deter at all.[64]

V. To Create a New Tort or Improve the Existing Options

Assuming that torts, and negligence in particular, is an important mechanism by which to address racial discrimination, there still remains the issue of how to utilize the system most effectively. In particular, should discrimination be considered within existing negligence actions, which could be implemented immediately with no change to *Bhadauria*, or is a new tort of negligent discrimination, which would likely

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[62] But see John G. Fleming, "The Role of Negligence in Modern Tort Law" (1967) 53 Va. L. Rev. 815, at 825. He argues that an increase in premiums could be an even more effective deterrent than personal liability. Unlike a tort judgment, an increase in premiums cannot be avoided. Shuman notes that the non-financial consequences of litigation may also be a deterrent. See Daniel Shuman, "The Psychology of Deterrence in Tort Law" (1994) 42 U. Kan. L. Rev. 115, at 130 [hereinafter "Shuman, 'Deterrence'"].

[63] See, *e.g.*, Marc A. Franklin, "Replacing the Negligence Lottery: Compensation and Selective Reimbursement" (1967) 53 Va. L. Rev. 774, at 790, criticizing the connection between compensating plaintiffs and deterring defendants as a "clumsy and inefficient way" to achieve separate goals. See also Shuman, "Compensation", *supra*, note 20, at 40-42, arguing that the plaintiff's compensation needs are not related to the fault of the defendant and the need to deter the defendant.

[64] See, *e.g.*, Shuman, "Deterrence", *supra*, note 62, at 130, who claims that there is no support for the conclusion that tort law effectively deters injurious behaviour; at best, it either over or under deters.

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necessitate a reconsideration of *Bhadauria*, required to meet the challenge? In some cases, negligence actions already are accompanying intentional tort and *Canadian Charter of Rights and Freedoms*[65] claims in racism allegations, usually in the context of a failure appropriately to supervise the allegedly racist behaviour of employees or other subordinates.[66] In my view, both approaches are needed. As a starting point, an anti-racist framework needs to be incorporated into existing negligence actions. This should be inserted at every stage of the negligence analysis. However, and by way of illustration, it is easiest to envision this incorporation at the standard of care determination. When we consider what a reasonable person would have done in particular circumstances, we must begin from the perspective that reasonable people are not racist and that racist acts are neither reasonable nor socially useful.[67] This should be true in any claim of negligence, not only those in which discrimination is specifically asserted.

This approach is not, however, adequate on its own. It is limited by the racial illiteracy of both judges and lawyers who deny, excuse or ignore the existence of racism. For example, in the recent case of *Hill v. Hamilton-Wentworth Regional Police Services Board*,[68] the Supreme Court of Canada recognized a new tort of negligent investigation. This case involved an Aboriginal man who was wrongly convicted following a problematic police investigation that was racially motivated. Although the Court recognized the potential of this new tort of negligent investigation to address institutional racism,[69] the Court refused to consider race as an issue in this particular case. The Court found that the police line-up, which included the plaintiff as the only Aboriginal man among 11 white foils, was "not ideal" but did not constitute a breach of the standard of care.[70] Similarly, even though the police centred their entire investigation on the plaintiff, despite contradictory suspect descriptions and other leads, the Court found that the police did not

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[65] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

[66] See, *e.g.*, *Peart v. Peel (Regional Municipality) Police Services Board*, [2003] O.J. No. 2669, [2003] O.T.C. 599 (Ont. S.C.J.); *Burrell*, *supra*, note 26.

[67] While it could be argued that in a racist society, the reasonable person is in fact racist, the standard of care should expressly denounce discriminatory behaviour and should not be articulated from the perspective of the dominant white norm.

[68] [2007] S.C.J. No. 41, [2007] 3 S.C.R. 129 (S.C.C.) [hereinafter "*Hill*"].

[69] *Id.*, at para. 36.

[70] *Id.*, at para. 80. The Court made this observation in the context of police practices in 1995. They failed to make a conclusive determination of whether such a practice would be considered negligent by today's standards.

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suffer from "tunnel-vision".[71] They, like most other courts, preferred to find race-neutral reasons for racist conduct. Despite the many shortcomings of this decision, it is important for its recognition, however brief, of the potential role of negligence law in dealing with racial discrimination.[72]

How would this case have been considered differently had there been a tort of negligent discrimination? Most importantly, even if its ultimate holding would have remained the same, the Court would have been forced to consider race directly, rather than choosing to minimize its relevance. Moreover, in framing their arguments, the lawyers too would have needed to make race a central consideration. Both the judges and the lawyers would have been obligated to analyze the claim by Mr. Hill from the perspective of systemic racism. Instead, with the notable exception of the dissent by LaForme and Feldman JJ. at the Ontario Court of Appeal and the intervenor Aboriginal Legal Services of Toronto, the judges and the lawyers only glossed over the issue of race and barely mentioned racism when, in fact, this was at the heart of the case.[73] In the absence of a specific tort of negligent discrimination, courts and lawyers can continue to minimize or ignore allegations of racism when they find them uncomfortable or threatening. In sum, while anti-racist perspectives need to be incorporated into other negligence actions as well, a new tort of negligent discrimination is warranted and would ensure that race issues do not remain marginalized.

VI. TORT OF NEGLIGENT DISCRIMINATION

1. Duty

Although a detailed examination of how a tort of negligent discrimination would be developed in practice is beyond the scope of this paper, a brief overview of the contours of the tort is warranted to address the fear that using negligence law would prove unfeasible. This discussion is not intended to be comprehensive. Although it may seem

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[71] *Id.*, at para. 88.

[72] For a more extensive discussion of the limitations of this case from the perspective of race, see Rakhi Ruparelia, "'Denying Justice': Does the Tort of Negligent Investigation Go Far Enough?" (2008) 16 Tort L. Rev. 48.

[73] Justices LaForme and Feldman, co-writing the dissenting opinion of the Ontario Court of Appeal, discussed the case in the context of systemic racism. They would have found the police liable. *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2005] O.J. No. 4045, 76 O.R. (3d) 481 (Ont. C.A.).

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that establishing a duty of care would be an obstacle, in my view it is not insurmountable. In fact, some support for a duty of care arguably can be surmised from the *Bhadauria* decision itself as is indicated by Laskin C.J.C.'s reference to negligence law.[74]

The test for determining whether a duty of care is owed involves two questions:

> (1) Does the relationship between the plaintiff and the defendant disclose sufficient foreseeability and proximity to establish a *prima facie* duty of care; and
>
> (2) If so, are there any residual policy considerations which ought to negate or limit that duty of care?[75]

In situations where courts already generally have acknowledged a relationship of proximity — for example, where a duty of care is owed by a doctor to her patient, by an employer to his employee, or a teacher to her student — it should be easy to show that the duty includes a duty not to engage in racist or discriminatory behaviour. The risk of harm to the target of discrimination is foreseeable. Establishing a duty of care in this context arguably would not require special considerations. However, it is more difficult to predict how courts would determine proximity in new relationships in the context of a discrimination claim. A strong case could be made that most relationships between the discriminator and the discriminated meet the "close and direct" requirement in that "the *actions* of the alleged wrongdoer have a close or direct effect on the victim, such that the wrongdoer ought to have had the victim in mind as a person potentially harmed".[76] Policy considerations should in most contexts support the establishment of a duty, and not negate or limit it, given the public interest in remedying racism and other forms of discrimination, and the need to protect vulnerable members of society from the harm that results from discrimination.

2. Standard of Care

The standard of care is at the core of the analysis in a tort of negligent discrimination. The standard articulated would establish what

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[74] *Bhadauria*, *supra*, note 3, at 189.

[75] As quoted in *Hill*, *supra*, note 68, at para. 20 (stating the test formulated in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.)).

[76] *Hill*, *id.*, at para. 29 (emphasis in original).

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conduct is acceptable in society. In this case, the standard of care should be that of the reasonable non-racist (non-sexist, non-homophobic, non-ableist) person in similar circumstances.[77] There are many ways that the courts could develop this standard of non-discrimination. These include by referring to the Charter, particularly section 15, as well as to human rights codes, reports, guidelines, policies, scholarly research and jurisprudence. Although a breach of human rights statutes cannot be used to create a statutory tort, a breach of those codes could be viewed as evidence of breach of the standard of care for the purposes of negligence.[78] As well, Charter values are understood to inform common law principles.[79] Although not specific to the tort context, the following general observation from *R. v. S. (R.D.)*[80] also is helpful:

> The reasonable person … is an informed and right-minded member of the community, a community which, in Canada, supports the fundamental principles entrenched in the Constitution by the *Canadian Charter of Rights and Freedoms*. Those fundamental principles include the principles of equality set out in s. 15 of the *Charter* and endorsed in nation-wide quasi-constitutional provincial and federal human rights legislation. The reasonable person must be taken to be aware of the history of discrimination faced by disadvantaged groups in Canadian society protected by the *Charter's* equality provisions.[81]

Moreover, the reasonable person "must be taken to possess knowledge of the local population and its racial dynamics, including the existence in the community of a history of widespread and systemic discrimination against black and aboriginal people … ".[82]

As stated earlier, racist acts should be perceived as having little or no social utility when determining the proper standard of care in a particular

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[77] Tuitt, *supra*, note 2, at 38, notes that the existing "reasonable man" standard is "more likely than not to result in the sanctioning of acts or omissions resulting in racial harm". It is important that the reasonable person is imbued with specific and explicit attributes of non-discrimination for the standard to be effective. For feminist critiques of the reasonable man standard, see Leslie Bender, "A Lawyer's Primer on Feminist Theory and Tort" (1988) 38 J. Legal Educ. 3; Joanne Conaghan, "Tort Law and the Feminist Critique of Reason" in Anne Bottomley, ed., *Feminist Perspectives on the Foundational Subjects of Law* (London: Routledge, 1996) 47; Martha Chamallas, "Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation" (1992) 1 Tex. J. Women & L. 95.

[78] *Canada v. Saskatchewan Wheat Pool*, [1983] S.C.J. No. 14, [1983] 1 S.C.R. 205 (S.C.C.), indicating that where the statutory breach caused the plaintiff's damages, the violation of the statute may be evidence of negligence. See also *Bhadauria*, *supra*, note 3, at 189.

[79] *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.*, [1986] S.C.J. No. 75, [1986] 2 S.C.R. 573 (S.C.C.).

[80] [1997] S.C.J. No. 84, [1997] 3 S.C.R. 484 (S.C.C.).

[81] *Id.*, at para. 46, *per* L'Heureux-Dubé and McLachlin JJ.

[82] *Id.*, at para. 47.

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case. One possibility for determining whether conduct should be seen as racist is the "less discriminatory alternative test" articulated by Oppenheimer in the employment context. The failure to use a less discriminatory option would render the defendant liable for the harmful effects of the more injurious discriminatory choice.[83] A test such as this one could have been helpful in the *Hill* case, where it was clear that the police had numerous "less discriminatory alternatives" at their disposal, including the most obvious option of creating a photo line-up with Aboriginal foils rather than Caucasian ones.

3. Proximate Cause

Many courts fail to engage in a full analysis of causation in negligence claims.[84] This is, however, unlikely to be the case in any new tort of negligent discrimination. Some commentators have indicated that proof of causation is a significant barrier in discrimination claims.[85] In the tort context, Professor Mari Matsuda has argued that when determining legal cause, tort law must adopt a more expansive view. In her view, current rules employ limiting doctrinal devices that are artificial and reflect policy decisions that protect selective interests, largely economic ones.[86] Instead, she suggests that we consider causation from the perspective of defendants' ability to avoid, prevent and remedy social harm, such that persons in the best position to prevent the harm are held accountable.[87]

Importantly for a discrimination claim sounding in negligence, the defendant's breach of the standard of care need not be the sole cause of the plaintiff's compensable injury. If the traditional "but for" test — "but for" the negligent act or omission of the defendant, the injury would not have occurred — is unworkable in situations involving multiple causes, the plaintiff must show only that the breach materially contributed to her

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[83] Oppenheimer, *supra*, note 42, at 933, adopting a test from Title VII litigation in the United States.

[84] Allen M. Linden, Lewis N. Klar & Bruce Feldthusen, *Canadian Tort Law: Cases, Notes & Materials*, 12th ed. (Markham, ON: LexisNexis Canada, 2004), at 167 [hereinafter "Linden, Klar & Feldthusen"].

[85] For example, Vizkelety has suggested that requiring proof of causation in the context of human rights legislation is tantamount to requiring proof of intent. Béatrice Vizkelety, "Discrimination, the Right to Seek Redress and the Common Law: A Century-Old Debate" (1992) 15 Dal. L.J. 304, at 317 [hereinafter "Vizkelety"].

[86] Mari Matsuda, "On Causation" (2000) 100 Colum. L. Rev. 2195, at 2200-2202.

[87] *Id.*, at 2211.

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injury.[88] Human rights tribunals have also taken the approach that discrimination need only be one factor influencing the respondent's actions, and not the sole factor.[89]

4. Damages

Unless a plaintiff is able to show compensable damages, she will not be able to recover in negligence. The harm resulting from discrimination has been historically difficult to qualify and quantify. However, more and more research has become available on both the physical and psychological harms experienced by racialized people through exposure to racism.[90] As a result, the presumption should be that racist injury is inherently harmful. The consequences of racial discrimination may be analogized to the injuries suffered in other abusive contexts.[91] However, the harm from racial discrimination also has unique facets, given the distinct social context in which it occurs and the cumulative effects of ongoing exposure to racism.[92] The challenge will be to quantify these injuries, although this challenge is not specific to the tort of negligent discrimination. Psychological harm, in particular, has been difficult to evaluate in torts.

In the case of injury flowing from racial discrimination, the further challenge will be to incorporate an understanding that all racialized people have to some extent learned to cope with racism, and that injuries may

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[88] See *Resurfice Corp. v. Hanke*, [2007] S.C.J. No. 7, [2007] 1 S.C.R. 333 (S.C.C.).

[89] See, *e.g.*, *Chopra v. Canada (Department of National Health and Welfare)*, [2001] C.H.R.D. No. 20, [2001] D.C.D.P. No. 20, at para. 204 (C.H.R.T.). The discrimination does not have to be the main factor influencing the respondent's behaviour either. *Almeida v. Chubb Fire Security* (1984), 5 C.H.R.R. D/2104, at 2105.

[90] For a general overview, see Feagin & McKinney, examining some of the physical effects of experiencing racism, including increased blood pressure in response to racist stimuli, significant changes to galvanic skin response, increased heart rate, sleep disorders and general illness. Psychologically, the pain and distress of racism are typically manifested as depression, demoralization, hopelessness, anxiety, fear, worry and anger. Joe R. Feagin & Karyn D. McKinney, *The Many Costs of Racism* (Lanham, Md: Rowman & Littlefield, 2003), at 39-93.

[91] Nelson, *supra*, note 29, at 945-46.

[92] As Nelson notes:

> The debilitating effects of racism stem not only from obviously racialized abuses, but also from specific social situations and lifetime experiences of racialized hostility. These discriminatory experiences are not isolated, but accumulate over the course of one's life, in workplaces, schools, businesses and other randomized locations. As events, they often include driving, walking, shopping, studying or standing while Black or Brown … It should not be surprising, therefore, that both physical and mental health are negatively impacted by racist encounters.

Id., at 919.

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manifest differently depending on an individual's resilience. If a person's injury is less extensive because she has built up resilience through repeated exposure to racism, should she be compensated less because the tortfeasor got lucky in finding a "tough" victim? The opposite situation is also plausible. If a person has become more vulnerable to racial harm through her damaging experiences of racism, should that person be compensated more because her injuries are worse?[93] These are issues that need further exploration. However, most importantly for this brief discussion, there is reason to be optimistic that damage resulting from racial discrimination would meet the requirements of compensable harm in negligence law if framed properly.

VII. THE LIMITATIONS OF USING NEGLIGENCE LAW

Evaluating racial injury through negligence as opposed to intentional torts is not ideal. Intentional torts are an appropriate mechanism by which to bring claims for overtly racist behaviour, the proper scope of which would require further consideration, but should include racial taunts and other discriminatory conduct that directly interferes with a person's well-being. In these cases, defendants would be liable for all of the consequences of their tortious behaviour, not only the foreseeable ones as is the case in negligence. Furthermore, the evidentiary challenges could be mitigated if defendants were required to disprove intent, a burden on defendants that is characteristic of trespass actions. Moreover, an intentional tort of discrimination arguably would be actionable without proof of damage, a significant distinction from negligence given the difficulty in proving harm resulting from racial discrimination. This difference is also important symbolically, given its recognition that racist conduct is wrongful not because it causes actual physical damage but because the "plaintiff's security" and "society's tranquility" have been disrupted.[94] Because the tort of discrimination as envisioned by the Ontario Court of Appeal was never allowed to

[93] Nelson argues that principles of thin-skull plaintiffs and egg-shell doctrines should apply in these circumstances. Camille A. Nelson, "Of Eggshells and Thin-Skulls: A Consideration of Racism-related Mental Illness Impacting Black Women" (2006) 29 Int'l J. L. & Psychiatry 112.

[94] Linden, Klar & Feldthusen, *supra*, note 84, at 35. See generally Sullivan, *supra*, note 51, who defends a rights-based approach to recovery in cases of direct interference.

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develop, we do not have a sense of how far traditional intentional tort principles would apply to a new intentional tort in these circumstances.[95]

Proving fault remains a limitation of negligence, given that such evidence is difficult to acquire. As Vizkelety notes, a fault-based approach is highly individualistic and ignores the fact that discrimination tends to be systemic and not easily reduced to a conflict between two individuals.[96] However, in my view, negligence offers better opportunities than do the intentional torts to recognize the institutional nature of discrimination. Moreover, actions brought by individuals against other individuals or organizations have the capacity to bring about systemic change that benefits a much larger community. In any event, short of making discrimination a strict liability tort, which despite its appeal is an unlikely occurrence, the requirement of some degree of fault is an inevitable shortcoming if tort law is understood to be an appropriate and important location, symbolically and practically, to recognize the harm suffered by victims of discrimination.

VIII. CONCLUSION

Whether it is identified as unconscious, subtle or covert, racist behaviour that is not direct and overtly manifested may be more effectively addressed through the tort of negligence than through the intentional torts. For the reasons argued above, plaintiffs who have suffered racial harm have more reason to be optimistic about their chances of success in a negligence claim than an intentional tort claim, an important strategic consideration when bringing an action.

Tort liability will not "cure" racism. It is only one way in which we can treat a symptom of racism. Will tort liability curb racist behaviour? Does deterrence work for other torts? Whether or not deterrence is effectively achieved through tort liability, there is important symbolic value in recognizing discrimination as a compensable harm in torts. Victims of racism need to have access to the legal system as a means to enforce their rights and to be compensated for wrongs against them. Of course the problem of racism goes far deeper than anything the tort system can fix; however, torts can reinforce the norm that racist conduct, in all its forms, will not be tolerated.

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[95] See Adjin-Tettey, *supra*, note 7, for a discussion of how a tort of discrimination could be developed as an intentional tort and Chartrand, *supra*, note 9.

[96] Vizkelety, *supra*, note 85, at 570.

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The recent *obiter dictum* of LeBel J. in *Keays* hinted at a readiness to reconsider *Bhadauria*. He stated that it was not necessary for the Supreme Court in *Bhadauria* "to preclude all common law actions based on all forms of discriminatory conduct".[97] Furthermore, he observed the change in the legal landscape and suggested that tort law should not remain static.[98] We should seize this opportunity to forge a critical role for tort law in remedying discrimination.

[97] *Keays*, *supra*, note 4, at para. 118 (dissenting in part).
[98] *Id.*, at para. 119.

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