Court of Queen's Bench of Alberta

Citation: 376599 Alberta Inc. v. Tanshaw Products Inc., 2005 ABQB 300

Date: 20050603
Docket: 0301 05693
Registry: Calgary

Between:

376599 Alberta Inc.

Plaintiff

- and -

Tanshaw Products Inc., Jay Johnson and Jay Johnson operating as Foam Frenzy Productions, 1434381 Ontario Inc., Premetalco Inc. operating as Debro Chemicals and Pharmaceuticals, 1198810 Ontario Inc. operating as Foam Frenzy Productions, John Does 1 - 6, and ABC Corps 1 - 6

Defendants

- and -

Tanshaw Products Inc., Jay Johnson and Jay Johnson operating as Foam Frenzy Productions, 1434381 Ontario Inc., 1198810 Ontario Inc. operating as Foam Frenzy Productions and Jim Johnson

Third Parties

And Between:

Action No: 0101 10806

Vincent Matthews and Her Majesty the Queen in Right of Alberta

Plaintiffs

- and -

Landex Investments Ltd., 376599 Alberta Inc. operating as the Back Alley, "John Does" 1 - 5, Tanshaw Products Inc., Tanshaw Manufacturing Inc., O.T.W.E. Co. operating as Off the Wall Entertainment, Jay Johnson, Richard Roe, Premetalco Inc. operating as Debro Chemicals and Pharmaceuticals and 1198810 Ontario Inc. operating as Foam Frenzy Productions

Defendants

- and -

Tanshaw Products Inc., Tanshaw Manufacturing Inc., O.T.W.E. Co., O.T.W.E. Co. operating as Off the Wall Entertainment, Jay Johnson, Jay Johnson operating as Foam Frenzy Productions, Jay Johnson operating as Lakeside, 1434381 Ontario Inc., Premetalco Inc. carrying on business as Debro Chemicals and Pharmaceuticals and 1198810 Ontario Inc. operating as Foam Frenzy Productions and Jim Johnson

Third Parties

- and -

Landex Investments Ltd., 376599 Alberta Inc. operating as the Back Alley, Jay Johnson, Jay Johnson operating as Foam Frenzy Productions, Jay Johnson operating as Lakeside, 1434381 Ontario Inc.,1198810 Ontario Inc. operating as Foam Frenzy Productions, Jim Johnson, Tanshaw Products Inc. and Premetalco Inc. carrying on business as Debro Chemicals and Pharmaceuticals

Fourth Parties

Corrected judgment: A corrigendum was issued on September 20, 2005; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Judgment
of the
Honourable Madam Justice C.S. Phillips

I. INTRODUCTION

[1] On April 12, 2001, a "foam party" was held at the Back Alley, a popular Calgary nightclub. Extremely large quantities of bubbles were poured from a machine onto the Back

Alley dance floor and the Back Alley clientele, who danced in the foam. Initially, it appeared that the event had been a success, from the standpoint of both customer enjoyment and Back Alley receipts. At about 2:30 a.m., on the morning of April 13, 2001, however, the Back Alley began to field phone calls from local hospitals and clinics. A large number of patrons who had been at the club that night were suffering significant skin and eye irritation. The staff at the hospitals and clinics wanted to know what the patrons had been exposed to at the Back Alley that night.

[2] The April 12, 2001 foam party was not the first at the Back Alley. A trial run had taken place on Sunday, February 25, 2001. That event had been an unequivocal success, with no ill effects. Consequently, the management of the Back Alley decided to schedule the next foam party for April 12, 2001, the last day of regular classes at the University of Calgary, known as "Bermuda Shorts Day" and the Thursday before the Easter long weekend. Unbeknownst to Back Alley management, however, the chemical product used to generate the foam had been changed between the first and second events. The complaints of skin and eye irritation to the injured Back Alley patrons were serious, and attracted the attention of the media, both local and national.

[3] This matter comes before me as two separate actions. A personal injury claim was brought by Vincent Matthews and, by order of Associate Chief Justice Sulatycky, the 36 other claims advanced by Back Alley patrons in respect of their personal injuries arising out of the April 12, 2001 foam party were consolidated with that action. The personal injury claims were settled and discontinued without prejudice to the right of the Back Alley to pursue contribution and indemnity from the other defendants, third parties and fourth parties. Action No.0101-10806, therefore, is essentially a claim by the Back Alley for contribution and indemnity in respect of the amounts paid to compensate its patrons for their injuries. The net settlement was in the amount of $481,808.52 inclusive of all damages and claims for taxable costs and disbursements. Aside from the issue of interest, the quantum of this claim is not in dispute.

[4] Action No.0301-05693 is a claim brought by 376599 Alberta Inc., the owner of the Back Alley, against various other parties associated with producing the April 12, 2001 foam party and providing the chemical concentrate used to generate the foam. The Back Alley claims that it has suffered significant economic losses in the wake of the foam party. Liability and quantum are very much in dispute in this action.

II. THE PARTIES

[5] The Back Alley nightclub has operated in Calgary since 1991. It is owned by 376599 Alberta Ltd. The shares of 376599 Alberta Ltd. are owned by the Rasberry family trust and 307379 Alberta Inc, the shares of which in turn are wholly owned by Douglas and Patricia Rasberry. Douglas Rasberry has an extensive background in the hospitality industry and takes an active role in the management of the Back Alley. For the sake of simplicity, I will refer to 376599 Alberta Ltd. as the Back Alley.

[6] Landex Investments Inc. ("Landex"), which is named as a defendant in the personal injuries action, is an Alberta corporation and the Back Alley's landlord. The Back Alley and

Landex have come to an agreement whereby the Back Alley has assumed the obligations of Landex.

[7] Jay Johnson was the sole shareholder and director of 1434381 Ontario Inc. and 1198810 Ontario Inc., which operated under the name Foam Frenzy Productions. He and/or one or both of those corporations provided the equipment, chemical product and some of the promotion for the two Back Alley foam parties of February 25, 2001 and April 12, 2001. Jay Johnson operated the foam generating equipment at those parties. Jim Johnson is Jay Johnson's father, and played an active role in sourcing, purchasing and shipping the foam generating chemical used in the April 12, 2001 foam party to his son in Calgary. Jim Johnson, who is named as a defendant in the personal injuries action, gave evidence at trial, though the claim against him was discontinued after he contributed $30,000 to the settlement.

[8] O.T.W.E. Co. is a U.S. corporation. It appears that it was never served with the Statement of Claim. O.T.W.E. Co. provided Jay Johnson with the original equipment and foam chemical solution used at foam parties in Ontario, and at the February 25, 2001 foam party.

[9] Tanshaw Products Inc. ("Tanshaw") is an Ontario corporation. At all relevant times, its shares were wholly owned by Douglas and Susan Lostracco who, together with Ron Hubert, were the corporation's sole employees. Tanshaw is primarily a distributor of cleaning supplies, though on Mr. Lostracco's business card and Tanshaw's sales flyer documentation the company holds itself out as a manufacturer and distributor of chemicals and equipment. To the extent that Tanshaw manufactures chemical substances, it does so by purchasing chemical components from other distributors and blending them in a very simple manner and packaging them. Tanshaw relies upon the chemical formulations provided by its suppliers in determining how to mix and blend the products it manufactures.

[10] Debro Chemicals and Pharmaceuticals ("Debro) is a division of Premetalco Inc., an Ontario corporation. Debro is a distributor and manufacturer of a broad spectrum of chemicals for a range of industries, including food, pharmaceuticals and cleaning. It provides both chemicals and formulation instructions to its clients and customers, which include other chemical distributors.

III. FACTS

[11] It is necessary, in view of the widely diverging accounts of the events leading up to the April 12, 2001 foam party, to review the evidence in some detail.

A. The Ontario Foam Parties

[12] In the early 1990's, Jay Johnson began working for his uncle, who owned the Lakeside Bar in St. Catharines, Ontario. By the time he was 17 years old, Jay was managing the bar. At the age of 18, he borrowed money from friends and family, and, using those funds, the corporation of

which he was the sole shareholder, 1198810 Ontario Inc., took over the lease and acquired the assets of the Lakeside Bar.

[13] The Lakeside Bar was a seasonal operation, primarily an outdoor patio bar, though a very large one, which served alcohol to its patrons. Some time in the first half of 2000, after seeing foam parties on television and witnessing one in person while on vacation in Mexico, Jay Johnson decided that these parties could be a viable promotion for his bar. After some searching on the internet, he came across O.T.W.E. Co., operating as Off the Wall Entertainment ("Off the Wall"), a company based in Texas that supplied the machinery and chemicals for foam parties. Off the Wall provided Mr. Johnson with all the documentation, machinery and chemical product necessary to hold foam parties at the Lakeside Bar.

[14] The machine that Jay Johnson purchased is called a Mad Dog MD-2000 foam generator. It is mounted or suspended above a dance floor. Tubes run from tubs filled with a mixture of water and the chemical concentrate required to produce the bubbles to the machine. A combination of fan and filters generates the bubbles, which are blown out of the machine in the form of foam and onto the dance floor. Bar patrons dance or play in foam as high as their necks. They may be immersed, or completely covered in foam.

[15] The documentation provided to Jay Johnson included a mixture chart. The appropriate concentration of the bubble generating chemical was stated to range from 2% to 5%, depending on the hardness of the water.

[16] The foam generating chemical itself was supplied by Off the Wall in 5-gallon pails. Along with each shipment of chemical product Off the Wall provided a Material Safety Data Sheet ("MSDS"). An MSDS is used to disclose certain information about a chemical product, including, to a certain extent, its ingredients and any hazards or risks associated with its use. The MSDS provided by Off the Wall indicates that the product contains no hazardous substances and lists the ingredients as a proprietary mixture of hydrocarbon surfactants and solvents. It further indicates that the product may cause eye and skin irritation.

[17] The foam parties held at the Lakeside Bar were a success. Thursdays, when the foam parties were held, tended to be the bar's best nights. Jay Johnson also became involved in producing foam parties at Brock University. An estimated 16 to 20 foam parties were held by Jay Johnson in Ontario with, apparently, only one instance of injury or ill effect; a minor rash suffered by one Lakeside Bar patron with sensitive skin.

[18] By August, 2000, Jay Johnson had a number of concerns with respect to the foam generating chemical provided by Off the Wall. The chemical product was expensive, particularly in view of the U.S. exchange rate and because it had to be shipped from Texas. Jay Johnson was required to travel to Buffalo, New York, to pick up the shipments of the chemical solution and transport it across the border himself. Jay Johnson decided to seek a chemical product by which he could continue to produce foam parties without having to purchase and import the chemical

solution from Texas. He discussed the matter with his father, Jim Johnson, who offered to look for alternative sources.

[19] Jim Johnson sought out local chemical suppliers. He talked with a number of companies, who were apparently unwilling or unable to assist him. Eventually, he came upon Crown Chemical Products Inc. ("Crown"). Crown appeared to be willing to make an effort to provide an alternative chemical product. Jim and Jay Johnson met with an employee of Crown and provided a sample of the Off the Wall product, and a copy of the MSDS from Off the Wall. They explained the concept of a foam party. They explained that the Texas product worked well. Jay Johnson said, at trial, that the Crown employee was shown the Lakeside website, which contained pictures of a foam party. Jim Johnson's evidence is that he asked Crown to get or produce "the same stuff" as the Texas product from Off the Wall. His recollection of the discussion with Crown is vague, but he understood that Crown would undertake an analysis of the sample.

[20] Shortly thereafter, Crown provided, as an alternative, a 10-litre sample of product to Jay Johnson to test. He tested the product by using it at the Lakeside Bar. He was still using the Texas product but, on one of the foam party nights, he mixed it with the sample provided by Crown. The bubbles were too light, and tended to blow away in the wind. There were no apparent injuries or safety concerns arising out of the use of the Crown product, but to Jay Johnson it was not adequate to the task.

[21] On the night of the failed test of the Crown product, Jim Johnson was referred, by the operator of a hot dog stand in the vicinity of the Lakeside Bar, to Tanshaw Products Inc. as another possible source of chemical product for foam parties. He made contact with Tanshaw in late August or early September, 2000.

B. The Initial Dealings Between the Johnsons and Tanshaw

[22] The parties offered widely divergent accounts of the dealings between the Johnsons and Tanshaw. Jim and Jay Johnson say that initial contact was made by a telephone call from Jay Johnson to Doug Lostracco, followed up by a meeting, at which both Johnsons, Doug Lostracco, and Ron Hubert were present.

[23] Jay Johnson says that this meeting primarily involved Doug Lostracco. He provided Mr. Lostracco with his Lakeside Bar business card, upon which he wrote the website address for the Lakeside Bar, where pictures of foam parties could be viewed. He says that Doug Lostracco indicated that he would look up the website when he got home, so he could see exactly what foam parties entailed. Jay Johnson wrote "Thur nite" on the back of the card and invited Mr. Lostracco to witness a foam party for himself. Jay Johnson says that he also provided Doug Lostracco with a copy of the Off the Wall product MSDS, with the name of the supplier company blocked out, in an effort to preserve his "exclusivity". Jay Johnson recalls doing most of the talking at this initial meeting, and said that he told Doug Lostracco that he was happy with the Texas product, that it did not stain clothes, hurt eyes or cause skin irritation, that it wasn't

slippery and built up well. He mentioned the Crown Chemical sample and the problems he had with it. Jay Johnson came out of the meeting with the impression that, while Mr. Lostracco had initially seemed cool to the proposition of supplying a chemical formulation for foam parties, his interest was stimulated when he was told of the large quantities that would be required. He also felt that Mr. Lostracco, by the end of the meeting, had a good handle on what foam parties entailed.

[24] Jay Johnson says that Mr. Lostracco told him that Tanshaw could make anything, and told him that it would provide an exact duplicate of the Texas product.

[25] Jim Johnson remembers this initial meeting somewhat differently. He is unsure whether he made the initial phone call, but remembers a meeting with Mr. Lostracco and Ron Hubert, and believes that Susan Lostracco was also present. Jim Johnson says that he explained the foam party concept in great detail. He attempted to convince Ron Hubert to attend a party at the Lakeside Bar. He does not recall going into detail with respect to safety issues, but vividly recalls explaining that bar patrons were dancing, partying, removing their clothes, and having sex in the foam. He had full confidence, by the end of the meeting, that the individuals from Tanshaw had grasped the concept of a foam party. He says that the MSDS for the Texas product was provided to Tanshaw, either at that initial meeting, or thereafter. The only inquiries he can recall from Tanshaw were with respect to the price paid for the Texas product. He says that either he or Jay Johnson would have explained that the product was used in a 2% to 4% dilution at time of use, and that two to four pails would be used per party. It is not clear from Jim Johnson's evidence whether the sample of the Texas product was provided to Tanshaw at this initial meeting.

[26] Douglas Lostracco's recollection of the initial contact with the Johnsons is profoundly different. He says that Tanshaw was first contacted by the Johnsons when a business card was dropped off with Ron Hubert, in July or August 2000, at Tanshaw's premises. He responded by placing a telephone call to Jim Johnson. In the course of that conversation, Jim Johnson explained that he needed, in Doug Lostracco's words on direct examination, "a foam product for boosting foam... for foam dancing." Jim Johnson was anxious for a product to be analyzed, or something similar to be made. Mr. Lostracco invited Jim Johnson to a meeting at Tanshaw's place of business. His recollection of the meeting, contrary to Jay Johnson's account, is that Jim Johnson did the talking; in fact he can't recall if Jay Johnson was even present. His conversation with Jim Johnson was brief. Jim Johnson said he wanted something that would not hurt clothing, was not slippery, and would not cause harm or irritation to people's skin. Mr. Lostracco does not recall any detailed discussion of the nature of foam parties, though it was clear that the Johnsons wanted something that would generate a lot of foam. He does not recall any discussion concerning dilution or the particular nature of the machine that was used to generate the foam. He emerged from the meeting, he says, with the view that foam would be generated and poured onto a dance floor, in which people would dance, and that the foam would rise to roughly knee or waist level. He says that he was never provided with the MSDS for the Texas product and, in fact, when he asked for one, he was told either that the Johnsons did not have one, or it was not available. He does recall that Ron Hubert was present at the meeting, but says that he was not actively involved in the meeting and that Susan Lostracco had no role in the meeting. He says

that he was never made aware of the Lakeside website, and that he did not see a picture of an actual foam party until after the incident at the Back Alley. He told the Johnsons that he would need a sample of the Texas product.

[27] Mr. Lostracco could not recall using the word "duplicate" with respect to what Tanshaw intended to, or was capable of doing, with the Texas product. He says that he told the Johnsons that Tanshaw would have to see what was in the sample, and that it would be analyzed. He did not indicate, at that initial meeting, that Tanshaw lacked the capability to analyze the sample of the Texas product, and that it would have to be sent out for analysis.

[28] Ron Hubert says that the initial contact with the Johnsons was made when Jim Johnson walked into the Tanshaw premises and inquired whether Tanshaw made chemicals. Mr. Hubert told him that Tanshaw did. Jim Johnson told him that he needed a soap mixture, though he did not state for what purpose. He also asked if Tanshaw had a lab, and Mr. Hubert told him that it did not. At that time, Jim Johnson provided him with the business card, and Mr. Hubert told him that Doug Lostracco would be in touch. Mr. Hubert put the business card on Doug Lostracco's desk. He unequivocally denies being present at a subsequent meeting with Jay and Jim Johnson, and being invited to attend a foam party, though he did later form an impression of what the Johnsons were seeking. He envisioned bubbles floating in the air, but he did not understand that the product was likely to come into contact with skin and eyes. In this respect, his account differs markedly from that of Jay Johnson, who says that he very clearly described the nature of a foam party to Mr. Hubert.

[29] Susan Lostracco says that she was present when the initial contact with the Johnsons was made, when a business card was dropped off with Ron Hubert at Tanshaw. She does not recall being present at any subsequent meetings with the Johnsons.

[30] Shortly after the initial meeting between Tanshaw and the Johnsons, Jay Johnson delivered a sample of the Texas product in a mason-type jar to Mr. Hubert. Mr. Hubert recalls receiving the sample, but says that it was Jim Johnson who delivered it. There was no further discussion at that time.

C. The Initial Dealings between Tanshaw and Debro

[31] According to the Johnsons, they formed the view, in the course of their dealings with and attendances at Tanshaw, that Tanshaw had the capability to analyze the sample of Texas product. However, Mr. Lostracco says that he made it clear, in the course of a subsequent telephone conversation with Jim Johnson, that the sample had been sent out for analysis. In fact, the sample had been sent to one of Tanshaw's suppliers, Debro for analysis.

[32] Some time prior, Tanshaw and Debro had recommenced a commercial relationship that had been dormant for several years. Debro had once been a supplier to Tanshaw; though when the Debro sales representative responsible for the account had either died or left the company, Debro ceased making calls upon Tanshaw and Tanshaw found other suppliers. In the spring or

summer of 2000, Tanshaw and Debro made contact again. Doug Lostracco says that prior to May, 2000, he was contacted by a Debro representative named Carmen Poblete, now Carmen East (and hereafter referred to as Carmen East). Debro is of the view that contact was first made by Tanshaw, seeking a chemical used for car washes, and thereafter Ms. East contacted Debro in August, not May, 2000.

[33] It is common ground that, by September, 2000, Carmen East had commenced making monthly sales calls to Tanshaw. Mr. Lostracco says that he became aware that her prior experience was primarily in the field of cosmetic and food chemicals, and that industrial chemicals were somewhat new to her. Nevertheless, Ms. East seemed knowledgeable to him. He knew that she had a degree in chemistry.

[34] For a period of time, the sample of Texas product sat on Mr. Lostracco's desk, while he decided what to do with it. According to notes made by Ms. East, on September 9, 2000, in the course of a sales call to Tanshaw from Ms. East, the subject of the sample came up. The accounts of this meeting differ in significant respects.

[35] Doug Lostracco says that he told Ms. East that the sample was a product from the United States, used for dance floor foam parties. He told her that the customer required a product that yielded heavy foam, was non-irritating to skin and eyes, and non-slippery. They did not discuss dilution. Ms. East asked if an MSDS was available and he said it was not. She thought the idea of a foam party was odd, but Mr. Lostracco felt that she understood the concept that people would be dancing in the foam. He did not show her the Lakeside business card or provide the identity of his customer. He asked her to analyze the sample and determine whether Tanshaw could supply this foam agent to its customer. She told him that she would take it back to Debro's lab. Because Ms. East was a chemist, Mr. Lostracco assumed that she would do the analysis and then come back to him with a recommendation on a product he could sell to his customer. She told him that she would have it analyzed and would get back to him with the results.

[36] Carmen East says that Mr. Lostracco asked if Debro had a lab, and she told him that it did not. He asked if Debro could analyze the sample, and she said it could not. He asked if Rhodia, a chemical manufacturer, could analyze the sample, and she said it likely would not. Mr. Lostracco told her about the product, but from his description she says that she formed the view that it was intended to produce floating bubbles. She had never heard of any machine that would generate these bubbles. She offered to show the sample to her manager, Mr. Ruffo. She said that he could look at it, and "perhaps recommend some products." Ms. East acknowledged on cross-examination that she had never taken a sample of a finished product from a customer before and that Mr. Lostracco's request was somewhat unusual. Also, she says that she asked for an MSDS or specification sheet for the product, because she felt it would be useful to have some information about the product, but Mr. Lostracco had none. Ms. East completed a "contact note"; a record of the meeting for review by her supervisor, Mr. Ruffo, on September 9, 2000. In the contact note, she wrote:

> He gave me a sample of this blend which makes lots of bublles [sic] and they are very stable they are used in dancing floors... he wants to know which product can he use to reproduce this blend and he will be using @ 9 drums per month.

In response, Mr. Ruffo added a comment to the note:

> What is the name of the blend so I can advise you.

But, as indicated above, no further information was available.

D. Debro's Analysis and Recommendations

[37] Ms. East took the sample back to Debro where, not long after the September 9, 2000 meeting, she gave it to Mr. Ruffo. At the time Mr. Ruffo was Debro's Sales Manager and Marketing Manager for Ontario out to Western Canada. Mr. Ruffo was Ms. East's direct manager. She reported to him and he provided her with guidance, recommendations and training on the application and use of products that Debro sold. With respect to this sample she had given to him, Ms. East told Mr. Ruffo that the product was used for dance floors and that the bubbles were very stable. She says that her understanding of the product was that it was used to generate bubbles floating in the air, and she conveyed this to Mr. Ruffo who understood the same thing but did not know they were dealing with a foam party application. Further, Ms. East acknowledged on cross-examination that it was her understanding that people would be dancing in proximity to these bubbles and that it was to be anticipated that these bubbles could potentially be in contact with skin and eyes.

[38] Mr. Ruffo visually inspected the sample. He smelled the sample. He poured a small amount into a sink, poured water over it, and noted the quality of the bubbles produced. He took a reading with a pH meter. The product had a neutral pH. Mr. Ruffo characterized this testing of the sample as preliminary. He said that he was looking at the sample from the "application aspect", in order to determine what kind of product Debro could offer as an "offset". An offset was described by Mr. Ruffo as a similar type of product that performs in a similar way, but may not chemically be the same. He was not conducting, and did not at any time attempt, a detailed chemical analysis. He concluded, and told Ms. East, that the product was a foam booster, and possibly a CDO, a class of chemicals which I will return to further in these reasons. He says that he recommended a product he had recently learned about at a product training session called Colamid C, as an offset. At that training session he had been told that Colamid C was a "milder form" of CDO. He told Ms. East to go and offer the Colamid C as a product to her customer, which he could use to build his finished product with. Mr. Ruffo also indicated to Ms. East that the Colamid C, which does not have a neutral pH, would have to be neutralized with citric acid. Ms. East inquired about "usage level", and Mr. Ruffo told her that he could not advise the customer in this respect, because he had no idea as to the end use of the product and the equipment with which it would be used; although he did assume some type of machine or equipment would be used. Mr. Ruffo says that he told Ms. East that the customer would have to determine the appropriate degree of dilution on his own. He says that his expectation was that

customers who purchased raw materials to make finished products would take the finished product to a lab to have irritation levels tested. He says that he expected Tanshaw to do this, but never had any discussions about this or any other matter with Mr. Lostracco or anyone at Tanshaw. All dealings with Tanshaw were between Ms. East and Tanshaw's personnel.

[39] The timing is not clear, but Mr. Ruffo says that "on the heels" of recommending Colamid-C as an offset, and apparently before any recommendation was made to Tanshaw, he told Ms. East that another CDO, called Alkamide DC 212/S, could be used instead. In the wake of this conversation, Ms. East says that she placed a telephone call to Doug Lostracco, for which I note there is no contact note of this conversation. At trial, she described the telephone call:

> I called Mr. Lostracco and I told him that we thought this sample contain [sic] some CDO which is coca DEA and we had two products to offer him. One was the Alkamide DC 212/S and the other one was the Colamid C. And I told him that he could use either or but he had to neutralize them... with citric acid.

[40] Ms. East acknowledged that she did not tell Mr. Lostracco what type of testing had been done or what steps had been taken to review the sample. Further, Mr. Ruffo had not instructed Ms. East to advise Mr. Lostracco that irritability tests should be done on the sample at an outside laboratory.

[41] Ms. East testified that Mr. Lostracco inquired about how much CDO was in the product and she replied that she did not know; it could be anywhere from 10:1 to 3:1. Mr. Lostracco didn't understand that, so she explained that it was 10 parts of water and 1 part of CDO. She says that she told Mr. Lostracco that Debro did not know what type of machine would be generating the bubbles and how much water was going through the machine and, as such, Tanshaw should conduct its own trials and find its own concentration. Ms. East suggested Mr. Lostracco, when conducting the trials, should start with the lowest concentration to be on the safe side "because it probably could be dangerous if he has a higher concentration".

[42] Mr. Lostracco remembers the recommendation and telephone conversation differently. He says that, some time after he provided the sample of the Texas product to her, Ms. East called him and simply said that she had a sample to offer. There was no discussion, at that time, of two different products, and no discussion of the nature of the sample.

[43] Mr. Lostracco and Ms. East agree that, after the phone call, Ms. East brought a small sample of Colamid-C to Tanshaw. According to Ms. East's contact note, the meeting took place on October 4, 2000. Ms. East says that she also provided a copy of the MSDS for Colamid-C. She says that she told Mr. Lostracco that Colamid-C was a better option than Alkamide DC 212/S because it was milder, though it was also roughly twice as expensive. It was Ms. East's understanding that Mr. Lostracco was going to "test"/". . . try" the Colamid-C for the foam solution but that he never mentioned anything about giving it to his customer to test. According to Mr. Lostracco, there was still no mention of using Alkamide DC 212/S for the proposed

application; however, he did acknowledge on cross-examination that Ms. East did tell him that Colamid-C was a milder version of CDO compared to Alkamide DC 212/S

[44] Ms. East says that it was at the meeting of October 4, 2000 that she first came to be aware of the true nature of foam parties. She says that Ron Hubert took her to a computer and showed her photographs of a foam party. She saw people virtually covered in foam. This was not what she had in mind, and it gave her cause for concern. She left Mr. Lostracco with the sample and MSDS for Colamid-C and a price estimate. Ms. East completed a contact note in respect of the October 4, 2000 meeting. It refers to the sample being provided to Tanshaw, and indicates that Tanshaw would test it. Specifically, the relevant portion of the October 4, 2000 contact note reads:

> I took sample [sic] of Colamide C [sic] he will try ASAP and he will let us know if it is the right product. He asked me for price and availability. Could you please help me with this inf. Paul? Also I noticed this morning his sample of the Pina Colada bubbles was solid due to temp does this give you any other idea of a possible product? He already please [sic] a sample on the last product we helped him and he is very pleased with our service.

There is no reference in this October 4, 2000 contact note to the viewing of foam party pictures and Ms. East's realization that foam parties were not what she had envisioned.

[45] Having seen the pictures and become concerned, Ms. East says that she was anxious to discuss the matter with Mr. Ruffo, though she made no mention in her contact note of the proposed application for the chemical product being very different from what she had expected. Some time shortly after October 4, 2000, she met with Mr. Ruffo and told him about the foam party pictures. Mr. Ruffo says that this conversation completely changed his understanding of the application. He says that he immediately became concerned about the fact that this was not the application he had in mind when he made the recommendation; it was "completely different." More specifically, he testified: "The initial application, my understanding was bubbles floating in the air that were very stable and would float around the room. And in this application these young people were pouring foam on top of themselves.". He told Ms. East to go back to Tanshaw immediately and indicate that the recommendation had been made on the understanding that the application involved bubbles floating in the air, not poured on top of people. He was concerned about irritation to skin and eyes and clothing damage and he told Ms. East to tell the customer Debro "would not be held responsible for this." Mr. Ruffo said that it was very possible he mentioned to Ms. East about obtaining a waiver from Tanshaw, although his recollection was that he was concerned that Debro "protect" itself. Mr. Ruffo confirmed that Ms. East had carried out these instructions.

[46] Mr. Ruffo made a notation to Carmen's contact note in respect of the October 4, 2000 meeting:

> [P]lease discuss with me about the properties but be careful here as we can't tell him anything that could be used against Debro at a later date if something was to happen to clothing or their eye's [sic], that is up to him to take on the risk!

[47] Mr. Ruffo acknowledged on cross-examination that while he instructed Ms. East to advise Tanshaw about Debro's concerns of skin and eye irritation were it to use the recommended product, he did not tell her to say to Mr. Lostracco or to Tanshaw "don't use" the product for as he explained: ". . . you cannot refuse to sell somebody a product."

[48] Mr. Lostracco's recollection of the October 4, 2000 meeting is that Ms. East provided a sample of what he understood to be a form of CDO called Colamid C. They discussed the sample of the Texas product previously provided by the Johnsons, and Ms. East told him the Texas product was definitely a CDO and that it had been tested at Debro. She did not disclose the manner of testing. He does not recall being provided with a copy of the MSDS for Colamid C, but was told by Ms. East that it was a mild form of CDO used in shampoo, bubble bath and detergents. He became aware that it was comparatively expensive. There was no discussion of citric acid or dilution. Ms. East told him to take the product to his customer and have him test it. He has no recollection of Ms. East viewing any foam party pictures.

[49] Ron Hubert also denies that he viewed foam party photographs with Carmen East at the time of the October 4, 2000 meeting. He says that he did not view any foam party pictures until April 2001, after the incident at the Back Alley. The clear contradiction between Tanshaw and Debro's accounts with respect to the timing and extent of Ms. East's knowledge of what a foam party entailed is further highlighted by the evidence of Susan Lostracco. Mrs. Lostracco says that Carmen East told her that she was familiar with foam parties, as they were very popular in Mexico. Carmen East, when confronted with this evidence denied that she had any idea what foam parties were all about until October 4, 2000, when she viewed the foam party photographs on the Tanshaw computer.

[50] After the October 4, 2000, meeting, Mr. Lostracco contacted the Johnsons, who had been calling from time to time to check on the progress of the analysis, and told them that he had a sample. Jay Johnson came to pick it up, but the sample, at 16 oz., was far too small to run through the foam machine. The Johnsons needed a much larger sample, at least 20 litres. Jay Johnson says that he met with Doug Lostracco when he picked up the sample. He visually examined it, and found that it looked the same as the Texas product. He says that he asked Mr. Lostracco if the sample was "the same thing". He says that Mr. Lostracco told him that the only thing different was the scent. He did not ask and was not given an MSDS.

[51] Tanshaw's account of events at this point is significantly different. Doug Lostracco denies having met with Jay Johnson and, therefore, making the representation that the Colamid-C sample was the same as the Texas product. He did become aware, through Ron Hubert, who Mr. Lostracco believes met with Jay Johnson, that the sample was too small, and, accordingly, Mr. Lostracco contacted Ms. East to request a 20-litre sample of Colamid-C.

E. From Colamid-C to Alkamide DC 212/S and the Debro "Warning"

[52] According to Mr. Lostracco, it was only at this point, after he learned that the Colamid-C sample was too small and requested a larger sample, that the subject of Alkamide DC 212/S came up. He says that he was told by Carmen East, by telephone, that Debro could not provide a 20-litre sample of Colamid-C, and that the product could only be purchased in 45-gallon drums. Mr. Lostracco was not prepared to take on this cost merely to test a product. Ms. East told him that Alkamide DC 212/S was a suitable alternative and he believed that she had conducted the appropriate test to make that recommendation. She told him that it was a CDO, like Colamid-C. There was no discussion at this time of the relative mildness of the two products. Mr. Lostracco was already somewhat familiar with Alkamide DC 212/S. He had used the product to mix formulations for carpet shampoo, car wash detergent and hand cleaners. He had some in stock and was able to obtain the 20 litres for testing purposes by the Johnsons from stock on hand.

[53] Carmen East has no recollection of this phone call. According to Ms. East, Mr. Lostracco did not call to request a larger sample of Colamid-C. She says that within a week after the October 4, 2000 meeting, after learning the true nature of foam parties and consulting with Mr. Ruffo, she went back to Tanshaw for another meeting. She says that she met with Doug Lostracco and Ron Hubert and told them that CDO products were very aggressive and could damage clothing, skin and eyes. She says that she warned them that Tanshaw could end up in a lawsuit if it was not careful, and that Debro would not be responsible for anything, and that Tanshaw should not be using a CDO for this purpose. Following Mr. Ruffo's instructions, she says that she told Mr. Lostracco, ". . .if I was him, I wouldn't use it. So if he wanted to use it, he could make a waiver to protect himself." Ms. East says that Mr. Lostracco indicated that he too was concerned about the risk of injury, and that he would not use the product for foam parties, as it sounded "too much like a trouble."

[54] Unlike the earlier meetings, there is no contact note for this one as no sales were discussed. Ms. East testified that she "went exclusively to talk to him about the risk to use the produce." She explained that she did not make contact notes in respect of meetings unless they dealt directly with sales. Mr. Lostracco and Mr. Hubert deny that any such meeting took place. Mr. Lostracco said "It didn't happen."

[55] According to Ms. East, she again advised that Tanshaw should obtain some sort of waiver in the course of a phone call from Mr. Lostracco, in November, 2000. She denies that Mr. Lostracco called to ask for a 20-litre sample of Colamid-C, insisting that he actually called to request a 20 kilos sample of Alkamide DC 212/S as he wanted to reproduce the "blend" used for the foam parties. She says that she declined to provide one. Her concern, she admits, was with the size of the sample requested. More specifically, Ms. East indicated to Mr. Lostracco that Debro could not give so large a sample, because standard samples were 16 ounces. Ms. East says that Mr. Lostracco responded that he would just use the Alkamide DC 212/S left over in the drum that he had ordered from Debro previously, in August. Though Ms. East says that she had serious reservations about the use of CDO products for foam parties, and again told Mr. Lostracco that he should obtain a waiver, Ms. East testified that Mr. Lostracco did not respond.

Furthermore, she did not feel that she could refuse to sell product to Mr. Lostracco on the basis of her concerns about how he might use it. To decline to sell the product on this basis, in her view, would not be good customer service.

[56] Mr. Lostracco again denies having any conversation with Ms. East regarding obtaining a waiver, or receiving any warning about using either Colamid-C or Alkamide DC 212/S for foam party purposes.

F. The Lakeside Bubbles Sample

[57] Unable to obtain a 20-litre sample of Colamid-C from Debro, Mr. Lostracco used a 20-litre sample of Alkamide DC 212/S from his own stock. He neutralized the pH (not in accordance with any specific instructions from Debro, but on the understanding, from Carmen East that the product would have to be neutralized) by adding 30 grams of citric acid to a litre of water and adding it to the Alkamide DC 212/S. He added a tablespoon of bubblegum fragrance. He used litmus paper to establish that the sample had a neutral pH. He called the Johnsons and told them that he had a sample ready. Ron Hubert prepared a label for the sample, calling it "Lakeside Bubbles". The label he created included a capital "T" inside a circle, an accepted symbol for toxic substances, and the following:

> Skin contact: Prolonged contact may cause irritation or defatting.
> Eye Contact: May cause severe irritation.
> Inhalation: May cause headache or nausea, irritation to mucous membranes.
> Ingestion: May be harmful if swallowed.
>
> FIRST AID
> Skin: Wash thoroughly with plenty of water.
> Eye: Immediately flush eyes with plenty of water, if irritation persists get medical attention.
> Inhalation: Remove victim to fresh air.
> Ingestion: Do not induce vomiting. Have victim drink large amounts of water and get medical attention immediately.
> Keep out of the reach of children...
> See Material Safety Data Sheet.

[58] The Johnsons paid $120 for the 20 litre sample of Lakeside Bubbles, which contained Alkamide DC 212/S, citric acid and bubblegum fragrance. On November 2, 2000, Jay Johnson attended at Tanshaw to pick it up. It is common ground that Tanshaw did not advise him that it was different from the 1 litre sample of Colamid C he had been provided earlier, and that Tanshaw did not provide an MSDS. Jay Johnson says that Doug Lostracco told him that the 20 litre sample was a duplicate, the same thing, as the Texas product. Mr. Lostracco denies this. Mr. Lostracco says that he believed that the Johnsons would test the product and get back to him. Jay Johnson says that he had no specific intention of testing the product, as such, though he did tell Mr. Lostracco that he would get back to him and tell him how it worked. In fact, the 20 litre

sample of Lakeside Bubbles, containing Alkamide DC 212/S was never used, or tested in any way, though Jay Johnson did open the pail and visually inspect the sample. He noted that it possessed the same consistency and colour as the Texas product and, in his view, it appeared to be the same.

[59] After a December 13, 2000 conversation with Mr. Lostracco, Ms. East completed a contact note. She wrote:

> Doug tried CDO for a customer that promotes a beverage and blows bubbles for a dancing floor. The product works very well, he just neutralized the product as Paul suggested. Also he is interested in a rinse aid agent (formulation) to rinse off the CDO. CDO will be 9 drums at a time and it will be seasonal from spring to fall.

[60] As noted above, the December 13, 2000 contact note indicated that Tanshaw was also interested in obtaining a rinse aid agent to rinse off the CDO. Doug Lostracco confirms that he discussed rinse agents with Carmen East, but says the request was in association with a product he was developing for use in industrial dishwashers, not for rinsing CDO off dance floors, as Ms. East appears to have believed at the time, and now asserts.

[61] It was Ms. East's evidence that she ultimately declined to and did not sell a rinse aid agent to Tanshaw for use in association with foam parties because she remained concerned about the use of CDO products for the foam party application. She says that she refused to sell the rinse aid because she did not want to get involved in providing any more products associated with foam parties, though she admitted that she did not tell this to Mr. Lostracco. Furthermore, Ms. East claims she told Mr. Lostracco for a third time in December, 2000 to get a waiver from his customer.

[62] Mr. Ruffo cannot recall any discussion with Ms. East regarding her unwillingness to sell rinse aid to Tanshaw. His only recollection about a discussion with Ms. East concerning a rinse aid product is that he told Ms. East: "It would make no sense to use a rinse aid in a product like this." Mr. Ruffo said that the product would be unnecessary; for "as soon as you added a rinse aid there would be no foam". Further, there would be no need to use a rinse agent to remove CDO from a dance floor.

G. The Initial Dealings Between Jay Johnson and the Back Alley, and the February 25, 2001 Foam Party

[63] In December, 2000, Jay Johnson relocated to Calgary, with the intention of promoting foam parties throughout Western Canada. He was introduced to the Back Alley by a friend, John Pintwala, who had managed the bar at Brock University where Jay had held foam parties and now worked as a doorman at the Calgary nightclub. Mr. Pintwala introduced Jay to Chuck Johnston, night manager of the Back Alley, in either December, 2000, or January, 2001.

[64] There is evidence from Douglas Rasberry, the owner of the Back Alley, and from Chuck Johnston, that both individuals had some prior knowledge of foam parties, which they had acquired from watching television. In any event, Jay Johnson had a videotape of foam parties at the Lakeside Bar, which he showed to Chuck Johnston in the course of a meeting. Chuck Johnston says that Jay Johnson billed himself as having exclusive rights to the foam generating product, which he obtained from the United States. Jay Johnson told him that foam party nights at the Lakeside Bar were the biggest nights of the week. He described the product as something like baby shampoo, mixed with water, pumped through a machine and spread all over the dance floor. Watching the video, Chuck Johnston had immediate safety concerns, initially with respect to the risk of slips and falls. He was assured that the substance, when it broke down, was more gritty than slippery.

[65] Chuck Johnston took the idea and the video to Doug Rasberry. Mr. Rasberry, who has considerable experience in the hospitality industry, also had safety concerns, though he thought the foam party looked like an appealing promotion for the Back Alley. He asked Chuck Johnston to take four questions back to Jay Johnson: he wanted to know if the video showed one of Jay Johnson's own foam party productions; he wanted confirmation that the product was safe and would not hurt skin and eyes; he wanted to be sure that the product was not slick and slippery; and he wanted assurances that it did not stain clothes or shoes. Chuck Johnston took those concerns back to Jay Johnson, and, in his view, received the necessary assurances. It is worth noting that the video provided by Jay Johnson came in a box, upon which is written, "Our patented system produces a safe and completely nontoxic foam."

[66] After several meetings between Chuck Johnston, acting as go-between, and Jay Johnson, it was determined that the Back Alley would host a foam party on February 25, 2001. The night was chosen because it was a Sunday, an evening that the Back Alley was not normally open, but it was the Sunday before a holiday Monday, so some interest could be anticipated. The Back Alley did some promotion for the event, primarily by airing the videotape on televisions within the nightclub, thereby stoking interest in the event. For the most part, promotion was handled by Jay Johnson, who created banners and distributed handbills. The arrangement was that Jay Johnson would be responsible for the technical aspects of putting on the event, and as compensation for his work would be entitled to the Back Alley's cover charge receipts for that night.

[67] Jay Johnson still had sufficient quantities of the Texas product for the February 25, 2001 party. Doug Raspberry was not present, but his understanding from his management was that the event drew 200 to 300 people. There were no injuries or complaints, and sales were very good. The event was a success.

H. The Purchase of Lakeside Bubbles and the Tanshaw Waiver

[68] Doug Lostracco says that, in the few weeks prior to April, 2001, he received a phone call from Jim Johnson, wherein Jim Johnson indicated that the sample of Lakeside Bubbles had been tested and worked very well. Mr. Lostracco says that he called Carmen East and passed this

information along to her. As noted above, Ms. East's contact note of December 13, 2000 indicates that a conversation confirming that the product had been tried, and that it worked very well, actually took place in December 2000, in the course of a sales visit. The Johnsons deny ever having told Tanshaw that the Lakeside Bubbles sample had been tested in any way.

[69] On April 3, 2001 (according to Tanshaw) or very shortly before that day (according to the Johnsons), either Jay or Jim Johnson placed an order with Susan Lostracco for 10 drums of Lakeside Bubbles. Tanshaw had enough Alkamide DC 212/S to fill 9 drums because 20 litres from the standard 200-litre drum of Alkamide DC 212/S had already been used for the sample provided to Jay Johnson in November, 2000. Doug Lostracco mixed the product in the same manner as he had the November sample of Alkamide DC 212/S, adding citric acid in solution and bubblegum fragrance and testing to ensure a neutral pH.

[70] Susan Lostracco customized an MSDS for Lakeside Bubbles. She reduced a portion of the label that Ron Hubert had already created and superimposed it atop an existing MSDS from the Tanshaw files. The MSDS she selected was for a product called Jemcamide. Jemcamide is yet another form of CDO, but it is neither Alkamide DC 212/S, nor Colamid C. Susan Lostracco used the Jemcamide MSDS to create the Lakeside Bubbles MSDS because Tanshaw had it on hand, and because it was her understanding that all CDO products were essentially the same. More particularly, Tanshaw thought that the Alkamide DC 212/S and Jemcamide were interchangeable; to be specific, Mr. Lostracco testified: "We thought they were identical."

[71] According to Jay Johnson, on April 3, 2001, while he was back in Ontario for a family visit, he attended at Tanshaw to pick up the order that had been placed with Mrs. Lostracco. He says that Tanshaw was only able to provide nine pails. He was given credit for another pail, and he says that he picked up this remaining pail on April 4, 2001.

[72] According to Susan Lostracco and Ron Hubert, it was April 4, 2001, not April 3, when Jay Johnson attended to pick up the order of Lakeside Bubbles, and Jay Johnson did not attend to pick up a tenth pail on the following day. This appears to be borne out by Tanshaw's documentation, which indicates that the order was placed on April 3, 2001 and that Jay Johnson signed for a one-pail credit on April 4, 2001. When the second order, to which I will return later in these reasons, was made later in April, Jay Johnson was only charged for 9 pails, though he received 10; thereby accounting for the credited pail.

[73] When Jay Johnson attended at Tanshaw on April 4, 2001, Ron Hubert gave him a waiver to sign. The waiver provides:

> Lakeside
> To whom it may concern;
> Tanshaw Products Inc. assumes no responsibilities and will not be held liable for any damages to person or property incurred by the use of this product (Lakeside Bubbles).

Jay Johnson signed the waiver. Doug Lostracco acknowledged on cross-examination that one of the reasons he requested that Mr. Johnson sign this waiver was to draw his attention to the contents of the MSDS that was being provided; albeit it was an incorrect MSDS in that it was for Jemcamide and not for the product being supplied (i.e. Alkamide DC 212/S).

[74] It is worth repeating, at this point, that Carmen East says that she repeatedly suggested to Tanshaw that it obtain a waiver from its customer. Mr. Lostracco and Mr. Hubert say that no such advice was ever received. They say that the waiver originated solely with Tanshaw.

[75] Ron Hubert says that when he first started working at Tanshaw he found that the Material Safety Data Sheets provided with Tanshaw's products were a mess, and he set about to re-type them on the computer. According to Mr. Hubert, all of the sheets contained a waiver, similar in wording to the one provided to Jay Johnson on April 4, 2001. The Lakeside Bubbles MSDS, however, which had just been created by Susan Lostracco using the Jemcamide MSDS, did not contain the waiver. According to Mr. Hubert, this is why he created the waiver. Mrs. Lostracco reviewed it, approved it, and it was given to Jay Johnson to sign, together with the MSDS she had created for Lakeside Bubbles.

[76] Jay Johnson returned to Calgary and Jim Johnson made arrangements to have the 9 drums of Lakeside Bubbles shipped from Ontario. The shipment went missing en route.

[77] By about April 11, 2001, it was clear to the Johnsons that the shipment had gone missing, and there was an urgent need for more, because the Back Alley foam party was scheduled for the following day. Jim Johnson placed another order with Tanshaw for 10 pails of Lakeside Bubbles. Tanshaw no longer had Alkamide DC 212/S in stock. Susan Lostracco called Debro and spoke with Carmen East to place a rush order. Debro filled the order. Carmen East was aware that the product was going to be used for a foam party. Printed on the back of Debro's invoice were "Terms and Conditions of Sales":

> The seller sells products according to its standard specifications.
> The seller [sic] liability with respect to any defect in the good [sic] on this order, is limited to making good within 30 days after receipt by the buyer by one of the following, at the seller's option:
>
> A. The replacement of defective goods, or
> B. The repayment of the purchase price paid for defective goods.
>
> The seller will not be liable if the goods on this order do not retain all of its [sic] original properties by reason of the buyer not selling or using properly under normal conditions and with all the proper care, said goods. Any recommendations made on the use of the goods on this order have been made and are based on tests to be reliable, however, the seller makes no warranty and disclaims all implied warranties including the use of the goods for a particular purpose concerning the effects or results of such use.

> The seller shall not be liable or responsible in any way for any injury that may be suffered or sustained by the buyer, any of its employees, agents or customers, or for any loss of, or damage to, any goods or property belonging to the buyer caused directly by the goods sold.

[78] Ron Hubert mixed the batch of Lakeside Bubbles, following directions received from Doug Lostracco. The only difference between the first and second batches was that Mr. Hubert added the citric acid directly to the Alkamide DC 212/S, and did not put it in a one litre solution of water first, or add any water to the Alkamide DC 212/S. He tested the pH and found it neutral.

[79] Jim Johnson attended at Tanshaw on April 12, 2001, and found Ron Hubert still mixing the formula. He waited until the mixing was complete, purchased the 10 drums of Lakeside Bubbles, and immediately had them shipped via Air Canada to Calgary. He was not provided with a waiver but he was given the Lakeside Bubbles MSDS. He was not told that there had been no dilution of the product whatsoever.

I. The April 12, 2001 Foam Party

[80] The February 25, 2001 foam party had been a success for the Back Alley. Doug Rasberry, therefore, decided to hold another party and selected the date of April 12, 2001. This was the Thursday before Good Friday, and the last day of regular classes, known as Bermuda Shorts Day, at the University of Calgary. It was anticipated that it would be a very busy night for the Back Alley. Instead of compensating Jay Johnson with receipts from the cover charge, the Back Alley agreed to pay him a $1200 flat fee for the party. Doug Rasberry says it was his understanding that the product used to generate the foam would be the same as that used for the first party, though nobody at the Back Alley made specific inquiries in that regard.

[81] Consistent with his concern with preserving his “exclusivity” in his foam product, Jay Johnson removed the Lakeside Bubbles labels from the product prior to its use at the Back Alley. He sold plastic goggles at the event, but they were essentially a novelty item, and not connected to any concern he had with the nature of the foam chemical.

[82] As expected, April 12, 2001 was a busy night for the Back Alley. Doug Rasberry says that he believes as many as 800 to 1000 patrons attended the bar that night. Once again, the initial indications were that the event had been a success. By about 2:30 a.m. on April 13, 2001, however, it was clear that something had gone wrong. The telephone was ringing off the hook with hospitals and clinics calling to inquire about the chemical to which the Back Alley’s patrons had been exposed.

J. The Conduct of the Parties after the April 12, 2001 Foam Party

[83] The first indication that something had gone wrong was a phone call from a local hospital to Charles Johnston at the Back Alley. Mr. Johnston was asked what had gone on at the bar that night, and what was in the product that was used. Jay Johnson was still at the bar, and Charles

Johnston told him that the hospital was on the phone and he needed to know about the product used for the foam.

[84] Jay Johnson contacted his father in Ontario, who faxed a copy of the Lakeside Bubbles MSDS (which, as noted earlier, was essentially the MSDS for Jemcamide, not Alkamide DC 212/S) to Jay. Jay Johnson gave the sheet to Chuck Johnston, who faxed it to two or three hospitals. Jim Johnson also recalls receiving a telephone call from a doctor in Calgary, and faxing a copy of the MSDS directly to a hospital.

[85] From the tenor of his evidence at trial, it is clear that Jim Johnson was deeply shaken by the disastrous turn of events in Calgary. The following day he took immediate steps to attempt to contact Tanshaw. In the course of at least two telephone conversations on April 13, 2001, Jim Johnson spoke to Doug Lostracco, advising him that there was a problem with eye irritation in Calgary and telling him to go to websites to read the news reports. Jim Johnson was troubled by what he perceived to be a lack of response from Mr. Lostracco who, in his view, did not share his serious concerns.

[86] Doug Lostracco also says that the first notification he received of the problems at the Back Alley came in the form of two telephone calls from Jim Johnson. He says that the calls took place on April 14, 2001, though it appears more likely that he is confused as to the date, and that the April 13, 2001 date is correct. In any event, Jim Johnson gave him Jay Johnson's cell phone number, but Mr. Lostracco was unable to get through to Jay Johnson. He recalls Jim Johnson telling him that there was a lot of eye irritation, and the situation was very serious. He also recalls being referred to various websites to read news coverage of the incident.

[87] Doug Lostracco says that he checked the websites to which Jim Johnson referred him at the office, on Monday, April 16, 2001, with Ron Hubert. Mr. Lostracco, Mrs. Lostracco, and Ron Hubert also looked at the Lakeside Bar website the Johnsons had given them.

[88] Apparently for purposes unrelated to the foam party, Carmen East also attended at the Tanshaw premises on April 16, 2001 for her regular sales call. According to Ron Hubert and Doug Lostracco, she was told of the incident at the Back Alley and shown the Lakeside Bar website and the websites for the Calgary newspapers. She seemed very concerned, but, according to Mr. Lostracco, assured him that he could not be liable. He did not ask her to explain, though he recalls her asking if Tanshaw had obtained a waiver. Aside from one phone call placed to Ms. East to inquire about a product, and to tell Debro that Tanshaw was returning the excess Alkamide DC 212/S in stock, Tanshaw had no further dealings with Ms. East or Debro after April 16, 2001. Carmen East never called on Tanshaw again.

[89] The April 16, 2001 visit by Carmen East to Tanshaw is recorded in a contact note for that day:

> Discussion. CDO. - He sold this product as a bubble buster [sic] but his customer use it [sic] in high concentration causing eye irritation.

[90] Though Mr. Lostracco's recollection of the day is limited, he does not believe that he mentioned anything to Carmen East about high concentrations.

[91] Carmen East says that, at the April 16, 2001 meeting Mr. Lostracco told her about the events in Calgary, specifically "he sold the bubble product and there was a disaster. There were some kids with eye irritation." He was very nervous, saying that he shouldn't have "done it" and speculating that the cause of the injuries was high concentration. She says that she asked Mr. Lostracco if he had made a waiver, but he did not answer nor did he accuse Debro of anything. Ron Hubert, who was in the room, simply raised his hands and said that he had read the MSDS to the customer.

[92] On May 25, 2001, Tanshaw contacted Debro to return an unopened drum of Alkamide DC 212/S and gave as its reason for returning it, according to Susan Lostracco, that: "We wouldn't be using it any longer." Susan Lostracco says that she made the call to Debro but cannot recall if she spoke with Carmen East. Carmen East says that she filled out the return of product documentation, but that it was Mr. Lostracco who asked to return the product. It appears to be common ground that, whoever was in personal contact on May 25, 2001, there was no discussion of the Back Alley incident. The product return form completed by Carmen East reads:

> Reason for Return: Final product rejected by his customer. He placed an order for 2 drums he opened one. He won't use the rest by now.

[93] After that Ms. East ended any contact with Tanshaw. Ms. East gave no reason as to why she ended her relationship with Tanshaw. According to Mr. Ruffo he did not instruct her to do so, but it was based on her decision alone. As well, no phone calls or any type of contact was undertaken by Ms. East or anyone from Debro to find out from Tanshaw what exactly had transpired at the April foam party to cause the skin and eye irritation suffered by the Back Alley patrons.

K. The Chemistry of Substance Used at the April 12, 2001 Foam Party

[94] Alkamide DC 212/S, the substance used to generate the foam at the April 12, 2001 foam party, is significantly different from the Texas product that was used at all of Jay Johnson's prior foam parties. Contrary to what Carmen East told Doug Lostracco after Debro examined the sample of the Texas product, the Texas product did not contain CDO.

[95] In the wake of the April 12, 2001 event, the Back Alley sent a number of samples to Dr. Detlef Birkholz. Dr. Birkholz was qualified at trial as an expert in the field of analytical chemistry. He was provided with samples of the product used at the Back Alley on April 12, 2001; the product that was purchased from Tanshaw on April 3, 2001 but went missing en route to Calgary; the Texas product; and Colamid-C, the product initially recommended by Debro. He subjected the samples to gas chromatography mass spectometry analysis. He found similarities among all the samples except the Texas product. He concluded that the product used at the Back

Alley was an amine based carboxylate, which is an irritant to skin and eyes, whereas the Texas product was a lauryl alcohol ethoxylate - a non-irritant.

[96] What is significant about the distinction between amine based carboxylates and lauryl alcohol ethoxylates is the presence of nitrogen in the former, particularly in the form of diethanolamine (DEA).

[97] Dr. Chris Swyngedouw was also qualified as an expert in analytical chemistry. He analyzed samples of the Texas product, the substance used at the April 12, 2001 foam party, as well as Colomid-C. He was in agreement with Dr. Birkholz that the Texas product differed markedly from the others, inasmuch as it was a lauryl-alcohol based surfactant, not a CDO. It did not contain DEA, the latter of which Dr. Swyngedouw also identified as an irritant to skin and eyes.

[98] Dr. Swyngedouw summarized the differences between the lauryl-alcohol based Texas product and the CDO-based products recommended by Debro. According to Dr. Swyngedouw, the Texas product could be characterized as a non-hazardous linear alcohol ethoxylate with a pH of 7. Because DEA plays no role in its formulation, there is no risk of free DEA, which is an irritant, persisting in the mix. The product that was used at the Back Alley, Alkamide DC 212/S, is a diethanolamide with a basic pH requiring neutralization with an acid to obtain a neutral pH. It contains the irritant DEA, because DEA is used in its formulation and some will always remain in the mix, unreacted.

[99] Dr. Swyngedouw also confirmed that it would be impossible, on the sort of cursory analysis undertaken by Mr. Ruffo, to determine whether a surfactant was lauryl-alcohol based or a CDO. This would require a highly sophisticated chemical analysis.

[100] While much of the evidence concerning the nature of the chemicals used in the foam parties and the manner of testing was very complex, the conclusions of the experts were clear and they were in agreement in respect of the fundamental issue: CDO-based foam boosters, because they will always contain some degree of free DEA, are irritating to skin and eyes. While Colamid-C might be a “milder” form of CDO, it was clear from the evidence of the experts that CDO-based foam boosters in general, including Alkamide DC 212/S, Colamid-C and Jemcamide, would not be well suited to a foam party application because of the presence of the irritant DEA.

IV. ANALYSIS OF THE EVIDENCE AT TRIAL RELATING TO CREDIBILITY ON KEY POINTS

[101] Prior to making an assessment with respect to liability, it is necessary to resolve a number of the key factual disputes arising out of the evidence at trial.

[102] At trial, much was made of the credibility of the witnesses. By and large, I am satisfied that none of the witnesses were deliberately dishonest in recounting their recollections of the

events at the time, though there are internal inconsistencies, in particular in the evidence of Carmen East, that give me some concern. For the most part, in my view, the many contradictions surrounding, in particular, the flow of information between the Johnsons, Tanshaw and Debro, arise out of occasionally poor recollections of the conversations at the time and the mistaken belief that something had been said or done when in fact this was not the case. It is clear to me that the parties did not always adequately convey their knowledge and concerns to one another.

[103] The only contemporaneous records of the dealings between Tanshaw and Debro, aside from invoices, are the contact notes made by Carmen East and Paul Ruffo. Debro was brought into this litigation later than the other parties, and only after it was named as a defendant did Debro attempt to reconstruct the events surrounding the development and sale of Lakeside Bubbles. Carmen East has admitted that she had to rely upon the contact notes to assist in her recollection of events. Because the contact notes provide only a partial outline of the events, this may have led to some confusion regarding the timing and details of the course of events. It is also worth noting that Carmen East had a large number of customers to whom she was selling chemical products and providing formulations, and her ability to recall the exact course of events may have been affected as a result.

[104] There is a discrepancy between the evidence of the Johnsons and Tanshaw with respect to the information that was given to Tanshaw concerning foam parties, and Tanshaw's degree of understanding of the proposed application. I am satisfied that the Johnsons explained the nature of a foam party to Doug Lostracco, such that he (and therefore Tanshaw) was fully aware or should have been fully aware of the nature of the risk. Doug Lostracco's evidence was that he believed a foam party would involve a quantity of foam, rising up to knee or hip height, in which bar patrons would dance and with which bar patrons would come in contact. In my opinion, the term "foam party" itself suggests something other than free floating bubbles above a dance floor; it suggests the presence of foam which would clearly come into contact with a person's body.

[105] I do not, however, accept the Johnsons' evidence that they provided Tanshaw with an MSDS for the Texas product. Jay Johnson apparently believed that he could preserve his "exclusivity" in the product by withholding information from Tanshaw. He says that he attempted to do so by blacking out the name of his supplier on the MSDS. I accept the evidence of Doug Lostracco that no MSDS was provided to Tanshaw. I am satisfied that the Johnsons are mistaken in their belief that they delivered an MSDS sheet for the Texas product to Tanshaw. It is more likely that the Johnsons provided the MSDS sheet to one of the other prospective chemical suppliers, such as Crown Chemical, which they had earlier contacted. This is consistent with the subsequent course of dealings, and the fact that Tanshaw advised Debro that it did not have an MSDS when it gave the product to Debro for testing. I accept Tanshaw's submission that had it been in possession of an MSDS, it would have provided the MSDS to Debro in the interest of facilitating the analysis of the product. It follows that Debro did not have access to the MSDS for the Texas product which Tanshaw had given to it to analyze.

[106] It is worth noting that the MSDS for the Texas product, vaguely written as it was, would likely not have assisted the attempt to duplicate or offset the Texas product in any meaningful

way. Representatives of Debro acknowledged this and more particularly Ms. East on direct examination stated: “This is very general, so I wouldn’t think that it will give me any information.”

[107] There is a discrepancy between the Johnson and Tanshaw evidence as to whether Tanshaw represented that it could supply an exact duplicate of the Texas product. In that regard, I do not accept the Johnsons’ proposition that Tanshaw represented to them that it could, nor do I accept that the Johnsons believed that Tanshaw said that it had supplied them with an exact duplicate of the Texas product. I accept that the Johnsons made it clear to Tanshaw that they were looking for a product that would effectively perform the same function. I am satisfied that the Johnsons advised Tanshaw that the product would come into contact with clothing, skin and eyes. I also find that Tanshaw held itself out as both a distributor and manufacturer of chemicals and the Johnsons assumed that Tanshaw possessed a degree of expertise in the manufacture of chemicals. I do not, however, believe that the Johnsons had a reasonable expectation that Tanshaw could duplicate the Texas product with chemical certainty. I find it significant that, prior to contacting Tanshaw, the Johnsons spoke with a number of chemical distributors who were apparently unwilling or unable to duplicate the Texas product, and that the one prior attempt at replacing the product using the Crown Chemical sample failed. By that point, it should have been clear to the Johnsons that the best a chemical distributor or manufacturer could do without costly testing was to attempt to provide what Debro referred to as an “offset”, not an exact duplicate of the Texas product. I do not believe that Doug Lostracco would have told the Johnsons that Tanshaw could “make anything”, and, to the extent that the Johnsons believed that it could, they were unreasonable in their expectations.

[108] There is a discrepancy between the Tanshaw and Debro evidence with respect to the information provided by Tanshaw to Debro regarding the proposed application for the product. I accept the evidence of Doug Lostracco that he told Carmen East that the product for which the Johnsons were seeking a substitute yielded heavy foam for use in dance parties. It should have been sufficiently clear to Debro from the outset that the product was intended to yield large quantities of heavy foam which had the potential to come into contact with skin and eyes and was not intended to produce just free-floating bubbles. I do not believe that Carmen East was shown pictures of a foam party by Ron Hubert on October 4, 2000. I find it significant that no reference is made in Ms. East’s contact note for October 4, 2000 to a viewing of foam party photographs, or anything else giving rise to a sudden concern about her earlier recommendation. It is more probable that she saw those photographs only after the incident, on Tanshaw’s computer, when she attended at Tanshaw’s premises on April 16, 2001.

[109] It follows that I do not accept that the alleged viewing of foam party pictures on October 4, 2000 motivated a decision on Debro’s part to rescind its recommendation of Colomid-C or Alkamide DC 212/S, because I do not accept that a viewing took place at that time. It is possible that Carmen East has come to believe, in her own mind, that the viewing took place on October 4, 2000 on the basis of her later review of the contact note dated that day. It is clear, however, that at some point Paul Ruffo turned his mind to the issue of potential liability. It is apparent from Ms. East’s contact note and Mr. Ruffo’s evidence that Mr. Ruffo, shortly after October 4,

2000, expressed concern about potential liabilities arising out of the use of the products he had recommended for foam parties. The step he took was to tell Carmen East to advise Tanshaw to obtain a waiver from its customer.

[110] There is a significant discrepancy between Tanshaw and Debro with respect to the course of dealings immediately after the October 4, 2000 meeting and the manner in which both Colamid-C and Alkamide DC 212/S first came to recommended by Debro to Tanshaw. I do not accept that the recommendation of Alkamide DC 212/S instead of Colamid-C proceeded in the manner described by Carmen East. I accept the evidence of Paul Ruffo that he initially recommended Colamid-C to Carmen East and that, "on the heels" of that recommendation told her that Alkamide DC 212/S would be acceptable as well. Ms. East took a sample of Colamid-C to Tanshaw on the basis of Mr. Ruffo's recommendation. Thereafter, I prefer Tanshaw's account. Specifically, I accept that Carmen East recommended Alkamide DC212/S as an alternative to Colamid-C to Mr. Lostracco only after he advised Debro that the 16-ounce Colamid-C sample was too small, and Debro declined to provide a 45-gallon drum of Colamid-C at no cost to Tanshaw. Ms. East says that she recommended both products at the same time and that Mr. Lostracco called to request a 20-litre sample of Alkamide DC 212/S. I do not believe that Mr. Lostracco would have requested a sample of Alkamide DC 212/S from Debro when Tanshaw already had the product in stock.

[111] Debro is adamant that a further meeting took place shortly after October 4, 2000, at Tanshaw's premises, at which Carmen East told Mr. Lostracco that the CDO products she had recommended were highly aggressive, could irritate skin and eyes, and should not be used for the foam party application. Mr. Lostracco denies that any such meeting took place. I accept Tanshaw's account. There is no contact note for this meeting, and it is clear from a review of the contact notes, notwithstanding any of Debro's evidence to the contrary, that the contact notes were not solely used for contacts leading to sales. On that, I note Ms. East agreed on cross-examination that the notes were also used as a means of communication between herself and the marketing managers, such as Mr. Ruffo. When asked why she didn't write down a note or anything about this meeting in a memo she prepared at the request of Debro's counsel two years later for purposes of the litigation, Ms. East responded: "I don't know."

[112] Moreover, the warning Ms. East claims to have made is entirely inconsistent with what subsequently occurred, namely the sale by Debro of Alkamide DC 212/S to Tanshaw for the foam party application. I do not accept the proposition that Tanshaw would have proceeded to formulate and sell the product to Jay Johnson and thereby put its 20 year business at risk, in the wake of so clear a warning. In short, I find that Debro did not rescind its recommendation of Colamid-C and Alkamide DC 212/S as it claims. The clear and unequivocal rescission of its recommendation is entirely inconsistent with its actions, including the subsequent sale of the product to Tanshaw.

[113] I am satisfied, however, that Carmen East indicated, in the course of her conversations with Tanshaw, and pursuant to Mr. Ruffo's instructions, that Tanshaw protect itself and obtain a waiver, and that it was her recommendation that motivated the drafting of the waiver signed by

Jay Johnson on April 4, 2001. I reject Mr. Hubert's evidence that the waiver was drafted because the MSDS provided to the Johnsons did not contain a waiver as per Tanshaw's usual practice. No waivers in respect of Tanshaw's other products were introduced in evidence. Moreover, it was apparent from the numerous other MSDS sheets in evidence that they typically contain disclaimers, but these bear no resemblance to the Tanshaw waiver.

[114] There is a serious discrepancy in the evidence with respect to when and how Tanshaw and Debro came to the mistaken conclusion that the Lakeside Bubbles product had been tested or "tried". Carmen East's contact note of December 13, 2000 indicates that Tanshaw advised her that the product had been successfully "tried". This is in clear contradiction to the evidence of Doug Lostracco, who says that it was not until April, 2001 that he was told by Jim Johnson that the product had been successfully tested, and that he passed this information to Carmen East at that time, not in December, 2000. For their part, the Johnsons deny ever having told Tanshaw that the product had been tested and, in fact, say that it never actually was.

[115] How Carmen East came to believe, on December 13, 2000, that the product had been tried is not clear. I have no reason to doubt that the December 13, 2000 contact note was an accurate reflection of her belief at the time, such as it was. But I am also satisfied that Tanshaw had not heard from the Johnsons since providing the sample to them in November, 2000. The Johnsons had no reason to contact Tanshaw because no foam parties were scheduled at that time, and the product had not yet been tested. I believe the interpretation of the December 13, 2000 contact note most consistent with the events to that date is that Tanshaw, on the recommendation of Carmen East, having provided the 20-litre sample of Alkamide DC 212/S to the Johnsons, and hearing nothing from them, assumed that some form of testing had been done by the Johnsons. I am supported in this conclusion by Jay Johnson's evidence to the effect that he visually examined the contents of the 20-litre sample. He looked at the thickness and the colour, assessed the scent of the product and came to the conclusion that everything appeared to be the same as the Texas product. It is likely that he passed this information along to Tanshaw and this in turn was passed onto Ms. East in December, 2000. Mr. Lostracco, believing on the advice of Carmen East that the Texas product was CDO, having provided CDO to his customer and having received feedback from his customer to the effect that the product appeared to be the same, drew a similar conclusion to that of Ms. East, as set out in her December 13, 2000 contact note, that the product "works very well". In short, the Lakeside Bubbles product had "been tried" and proved to be an acceptable replacement for the Texas product. The reference in the December 13, 2000 contact note to needing 9 barrels of the product per month was simply a repetition of what was already known and written in an earlier contact note. No order for the product had been made, but Carmen East was recording what the order would likely be when it came in. In December, 2000 the Johnsons had no need to place an order because Jay Johnson still had the Texas product on hand, which he used at the February, 2001 foam party.

[116] There is also a discrepancy in the evidence of Tanshaw and Carmen East with respect to the discussion of a rinse aid. Carmen East says that Tanshaw sought the rinse aid for use in conjunction with foam parties in that Mr. Lostracco indicated he was interested in a rinse agent to rinse off the CDO. Ms. East assumed the rinse agent was to be used to rinse off the CDO from

the dance floor. Concerned with the foam party application in general, she declined to provide a product. Tanshaw says that the rinse aid was sought in conjunction with its development of a line of products for use in industrial dishwashers. I prefer Tanshaw's account. There is no reason why Tanshaw or Jay Johnson would have been interested in obtaining a rinse agent in association with foam parties. Jay Johnson had never used a rinse agent before and would have had no interest in one. Moreover, it is not clear to me what Ms. East could have been hoping to achieve by declining to sell the rinse aid to Tanshaw because of her concerns about foam parties while continuing to supply Alkamide DC 212/S for precisely that purpose. Her alleged refusal to sell the rinse agent is inconsistent with her own account of Debro's policy to the effect that the company should not decline to sell a product specifically requested by a customer. To the extent that Carmen East believed that Tanshaw was seeking a rinse agent to use in association with foam party cleanup, I believe that this is reflective of the same degree of misunderstanding and confusion that surrounded the issue of whether the product had been tested. I am satisfied that there was no need for a rinse aid for foam parties and that Ms. East was confused. To the extent that Mr. Lostracco ever sought a rinse agent from Debro, I find that it was in association with dishwashers, not foam parties.

V. LIABILITY ANALYSIS

A. Personal Liability of Jay Johnson vs. Corporate Liability

[117] Tanshaw and the Back Alley submit that, if there is a finding that Jay Johnson bears responsibility for losses arising out of the April 12, 2001 foam party, liability should be borne by him personally, not by 1434381 Ontario Inc. and 1198810 Ontario Inc., the corporations of which he was sole shareholder.

[118] Jay Johnson purchased the foam party equipment with funds from 1198810 Ontario Inc., operating as the Lakeside Bar. He used the equipment for foam parties both at the Lakeside Bar and at Brock University. He was paid in his personal capacity for these parties and did not compensate 1198810 Ontario Inc. for the use of the equipment. After he ceased operating out of the Lakeside Bar, Jay Johnson continued to use the foam generating equipment. It was never sold by 1198810 to Jay Johnson. He paid for the November 2, 2000 sample pail of Lakeside Bubbles out of his own money. Jay Johnson's parents purchased the Lakeside Bubbles product on April 4, 2001, and he admitted neither he nor the numbered companies repaid them. The April 12, 2001 Lakeside Bubbles product was purchased by Jim Johnson, who was not repaid. Jay Johnson provided his Lakeside business card to Tanshaw, which contained his name and the name of the Lakeside Bar but not the name of any corporate entity. He never made Tanshaw or the Back Alley aware that they were conducting business with a corporate entity.

[119] The mere existence of corporations controlled by Jay Johnson does not establish the proposition that he was carrying on business under those corporations, or either of them. There is no evidence to establish that the corporations were engaged in the dealings with Tanshaw and the Back Alley. At all times the parties believed that they were conducting business with Jay Johnson personally and Jay Johnson did nothing to suggest otherwise. In *Tri-Con Concrete Finishing Co.*

v. Caravaggio, [2002] O.S. No. 2771 (S.C.); 21 C.L.R. (3d) 178, Wilkins J. set out the applicable principle as follows (at para. 48):

> It is an essential principle of the concept of limited liability in company law that a person doing business with a limited corporation must have this fact brought to their attention in order that they be bound by the law related to the limitations of liability of companies. On the facts of the case at bar, I am satisfied that the plaintiff was at no time notified that it was dealing with any specific company or business entity and that at all times the three individual defendants held themselves out as carrying on business directly with the plaintiff without reference to any one of their corporate or business entities as might exist.

[120] Jay Johnson did not bring the existence of the corporations to the attention of the Back Alley or Tanshaw. The Back Alley and Tanshaw were conducting business with Jay Johnson personally, not 1434381 Ontario Inc. and 1198810 Ontario Inc. Under the circumstances, I am satisfied that, to the extent that Jay Johnson's negligence contributed to losses arising out of the April 12, 2001 foam party, the liability is to be borne by him personally.

B. Liability of the Back Alley

(a) Liability to Personal Injury Plaintiffs under the *Occupiers' Liability Act*

[121] The Back Alley acknowledges that, pursuant to the provisions of the *Occupiers' Liability Act*, R.S.A. 2000 c.O-4, it owed a duty of care to its patrons. The Back Alley relies upon s.11(1) of the Act, which provides:

> 11(1) An occupier is not liable under this Act when the damage is due to the negligence of an independent contractor engaged by the occupier if
>
> > (a) the occupier exercised reasonable care in the selection and supervision of the independent contractor, and
> >
> > (b) it was reasonable in all the circumstances that the work that the independent contractor was engaged to do should have been undertaken.

[122] I am satisfied that Jay Johnson was an independent contractor and, accordingly, s.11(1) of the Act applies. Jay Johnson confirmed that he did not consider himself an employee, and it would not have been reasonable for him, or the Back Alley, to believe that he was.

[123] The first step of the analysis under s.11(1) is to determine whether the Back Alley exercised reasonable care in the selection and supervision of the independent contractor, Jay Johnson.

[124] Debro points out that Mr. Rasberry was absent from any dealings with Jay Johnson leading up to the party, and that the Back Alley in general made insufficient efforts to investigate Mr. Johnson and the materials he was using to generate the foam. Debro notes that, aside from some initial concerns about slipperiness and damage to clothing, Mr. Raspberry expressed little concern about the proposed foam party. No attempt was made to check Jay Johnson's references in Ontario, and neither Mr. Rasberry nor Mr. Johnston made specific inquiries about the chemical nature of the substance that was used to generate the foam, nor did they ask Jay Johnson, prior to the April 12, 2001 foam party, if he intended to use the same chemical, or if anything would be different from the February test party. Debro submits that Jay Johnson's description of the chemical as akin to baby shampoo should have raised concerns, as any type of shampoo can be irritating if exposed to eyes. Debro further asserts that the Back Alley is not entitled to "take credit" for the February foam party as a test, because the Back Alley made insufficient inquiries before the February party and, as such, exposed its clientele on that date to risk.

[125] While I agree with Debro's assertion that Mr. Rasberry was a highly hands-on manager of the business, I do not believe that his delegation of the dealings with Jay Johnson to Chuck Johnston suggests an absence of care or a failure on his part. His managers were experienced in the industry, and he was entitled to delegate responsibilities to them. While it was clear that Mr. Rasberry took a very active interest in his business, I do not find that his delegation of the arrangements to Chuck Johnston was inconsistent with that description or with his duty as the owner and operator of the Back Alley.

[126] Prior to both foam parties, principals of the Back Alley had a general awareness of the foam party concept. They were aware that foam parties had been going on in other bars in various parts of the world. Chuck Johnston had personal knowledge of the Lakeside Inn. Mr. Pintwala, a Back Alley employee, had personal knowledge of Jay Johnson's foam parties, which he shared with Chuck Johnston. Nevertheless, Mr. Rasberry had concerns. I accept that those concerns encompassed the risk of slip and fall, damage to clothing and irritability to skin and eyes. Specific inquiries were made of Jay Johnson. He said that he had hosted numerous parties, with no significant ill effects. From Jay Johnson's evidence at trial, this appears to have been true. While the Back Alley did not check the references provided by Jay Johnson, it is apparent, given the success of his prior parties, that those references would not have disclosed any problems or given cause for additional concern. The Back Alley had the videotape provided by Jay Johnson, which showed successful foam party events at the Lakeside Inn. The Back Alley specifically inquired if the event Jay Johnson proposed for the Back Alley would be the same as those at the Lakeside Inn. He said that it would be. Despite all of this knowledge and the assurances given by Jay Johnson, the Back Alley insisted on hosting a foam party in February to observe the event (and possible repercussions) for themselves.

[127] The February foam party was a test party in the sense that the Back Alley scheduled the event on a day when attendance was not likely to be as heavy as it otherwise might have been. With fewer people in the bar, it was believed that the event would be easier to control, should it go awry. I agree, to a point, with Debro's proposition that the February party exposed the Back Alley's clientele to substantially the same risk as the April party. But what is at issue is whether,

given the knowledge that the Back Alley possessed prior to the April party, the Back Alley failed to take reasonable and appropriate steps to protect its clientele at the April 12, 2001 foam party. That knowledge was that Jay Johnson had considerable experience with foam parties and that those parties had been successful. By April 12, 2001, the Back Alley had direct experience with Jay Johnson and foam parties. Jay Johnson's claims regarding the safety of the event had been validated through the holding of a successful foam party in February. The issue is not whether the Back Alley is entitled to "take credit" for the test event. The issue is whether, given the Back Alley's knowledge at the time, the decision to host the April event without further inquiries was reasonable. In this sense, of course, the problem-free February test party is highly significant, because it served to confirm to the Back Alley that the hosting of a second foam party was the next reasonable step to take.

[128] The second stage of the analysis under s.11(1) is to determine whether the work that the independent contractor was engaged to do should have been undertaken. Section 11(1)(b) anticipates that some activities may be so inherently risky that, notwithstanding the care taken in the selection and supervision of the independent contractor, the work should not have proceeded at all.

[129] I do not believe that foam parties are so inherently dangerous as to fall within the scope of s.11(1)(b). There was a significant amount of evidence at trial to the effect that the foam party concept had worked very well for Jay Johnson in Ontario, both at the Lakeside Bar and at York University. The concept had attracted sufficient media attention that Chuck Johnston and Doug Rasberry had become aware of it from television. There was no evidence to suggest that a foam party, properly run, is an inherently dangerous activity.

[130] In view of the foregoing, I am satisfied that the Back Alley has met the test set out in s.11(1) of the *Occupiers' Liability Act*.

(b) Liability in Negligence to the Personal Injury Plaintiffs

[131] In respect of any allegations of negligence that fall outside the provisions of the *Occupiers' Liability Act*, I am satisfied that the Back Alley is not liable for the injuries that occurred as a result of the April 12, 2001 foam party.

[132] A key element in determining whether the Back Alley owed a duty of care to the patrons on its premises is foreseeability. The court is required to determine whether the event resulting in injury was reasonably foreseeable by a reasonable person. In *Barnfield v. Westfair Foods Ltd.*, [2000] A.J. No.108 (QB), this Court held (at para.11):

> In applying the test of foreseeability one must consider both whether the event could be reasonably foreseen, and whether a reasonable person could foresee that injury is likely to follow. The test to be applied is reasonableness and not one of perfection... the occupier must take reasonable care to avoid injury to a customer but is not held to a standard of perfection.

[133] I do not believe that it was reasonably foreseeable by the Back Alley that, in the wake of the very successful February foam party, Jay Johnson would change, without notice, to a chemical that neither he, nor anyone else, had tested for the foam party application. The Back Alley was entitled to rely upon Jay Johnson's successful record to date and its own experience with the February test party.

[134] I am also satisfied that the steps taken by the Back Alley, as noted above, satisfy the standard of care imposed upon it in the context of the negligence claim, as well as the *Occupiers' Liability Act* claim. The Back Alley took the steps necessary to satisfy itself that it was providing safe entertainment for its patrons.

[135] It is worth considering what information additional inquiries on the part of the Back Alley would have yielded. Jay Johnson's references would, in my view, have confirmed that his foam parties were safe events. Jay Johnson's concern regarding the sharing of information, as evidenced by his removal of the Lakeside Bubbles labels, suggests that he would not have been forthcoming regarding the source of the chemical product used on April 12, 2001 or its precise formulation. Of course, a refusal on the part of Jay Johnson to provide better information might have raised concerns, but it was Jay Johnson's belief, though one unreasonably held, that the chemical product he used on April 12, 2001 was essentially the same as the Texas product. I do not believe that further inquiries made of Jay Johnson would have yielded results giving rise to concern. The Back Alley had no reason to suspect that Jay Johnson would change the chemical product he used at the foam parties between February and April 12, 2001. Nor, in my view, had further inquiry been made, would the Back Alley have learned that the chemical product used in the foam parties had been changed.

[136] In the result, I am satisfied that the Back Alley exercised reasonable care in staging the April 12, 2001 foam party, and it is not liable in negligence to the personal injury plaintiffs.

(c) Contributory Negligence

[137] In the context of the Back Alley claim for economic losses, Debro contends that the Back Alley was contributorily negligent. It relies upon the alleged failure of the Back Alley to adequately investigate the foam party concept, Jay Johnson, and the nature of the chemical that would be used at the foam party. Debro further alleges that the steps taken by the Back Alley to address the situation after April 12, 2001 were inadequate and may have made matters worse.

[138] I have addressed the adequacy of the Back Alley's investigation of Jay Johnson and the foam party concept above. I do not believe the analysis varies in the context of Debro's allegation of contributory negligence in the Back Alley economic loss action. The Back Alley was not negligent in its investigation of Jay Johnson or the foam party concept. It could not have reasonably anticipated that Jay Johnson would change the foam chemical in between foam parties. Any additional inquiries it could have made would not, in all likelihood, have yielded results that would have made the Back Alley aware of a potential danger.

[139] While I agree the Back Alley's public relations efforts that were made in the wake of the April 12, 2001 foam party may have had an impact upon the assessment of damages, I am satisfied they did not contribute to the April 12, 2001 incident itself. In my view, Debro's claim that the steps taken by the Back Alley to address the situation in the wake of the April 12, 2001 foam party may have made matters worse is more adequately addressed in the context of mitigation, and I will return to it below.

[140] In the result, I find that the Back Alley was not contributorily negligent in respect of any economic losses it suffered as a result of the April 12, 2001 foam party.

C. Liability of Jay Johnson, Tanshaw and Debro

(a) Duty of Care

[141] It is important to note that neither Jay Johnson, nor the corporations he controlled, were represented at trial, and Jay Johnson did not make any representations with respect to the issues of liability or damages in respect of either the personal injury action or the Back Alley claim for economic losses. Tanshaw together with the Back Alley, has already contributed to the personal injury settlement and appeared at trial, in essence, to advance its claim for contribution and indemnity against Debro and Jay Johnson. Consequently, Tanshaw does not take issue with the Back Alley claim for economic losses and does not dispute the existence of a duty of care owed by Tanshaw to either the personal injury plaintiffs or the Back Alley. Its submissions were effectively directed at the liability of Jay Johnson and Debro for the injuries suffered by the personal injury plaintiffs.

[142] Debro concedes that the injured Back Alley patrons were reasonably foreseeable plaintiffs and no policy reasons exist to negate a duty of care owed to them. With respect to the Back Alley's economic loss claim, however, Debro contends that the nature and scope of the loss was not reasonably foreseeable, and that this is a factor in the duty of care analysis. Debro further contends that no duty arose in respect of any of the plaintiffs by virtue of the principle of intermediate examination.

The Duty of Care and the Foreseeability of the Back Alley Economic Loss

[143] The first step in determining whether a defendant is liable for damages in negligence is to determine whether the defendant owed a duty of care to the plaintiff or plaintiffs. In recent years, the Supreme Court of Canada and the Alberta Court of Appeal have clarified the tests required for establishing a duty of care.

[144] In *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.*, 2004 ABCA 309, 357 A.R. 139 (C.A.) the Alberta Court of Appeal reaffirmed the importance of the appropriate application of the test established in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), and adopted and enriched by the Supreme Court of Canada in *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2, *Cooper v. Hobart*, [2001] 3 S.C.R. 537 and *Edwards v. Law Society of Upper Canada*,

[2001] 3 S.C.R. 562. The *Anns* test as discussed in *Cooper* requires the court to ask first if there is a sufficiently close relationship between the parties so that, in the reasonable contemplation of the party alleged to owe the duty, carelessness on its part might cause damage to the other party or parties. If the answer to that question is yes, the court must then determine whether there are any considerations which ought to negative or limit the scope of the duty, the class of persons to whom it is owed or the damages to which a breach might give rise.

[145] Before embarking on this analysis, it is important to consider whether these circumstances warrant consideration under the *Anns* test. The Supreme Court of Canada in *Cooper* listed several established categories of cases, such as acts of physical harm, nervous shock, and negligent misstatement, to name a few, where a relationship of proximity had already been recognized. The Supreme Court of Canada in *Cooper* held (at para. 36):

> When a case falls within one of these situations or an analogous one and reasonable foreseeability is established, a *prima facie* duty of care may be posited.

[146] Although products liability cases were not identified in *Cooper* as an established category, where physical harm is involved, as is the case here in this products liability lawsuit, a full analysis as elaborated on in *Cooper* may not have to be undertaken. Although this analysis may be unnecessary, I have decided to proceed with it out of an abundance of caution, just as Feldman, J.A. of the Ontario Court of Appeal did in *Hasket v. Equifax Canada* (2003), 63 O.R. (3d) 577 (C.A.) where she recognized that a full *Cooper* analysis was "unnecessary" in a negligent statement case, an established category, but went on to do it in any event.

[147] Now proceeding with the analysis, the first stage of the *Anns* test requires that the court consider both the proximity between plaintiff and defendant and any policy considerations, *as between those parties*, that might apply so as to moderate or negative the scope of the duty: *Plas-Tex*, *supra*; *Cooper*, *supra*. In *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, the Court defined "proximity" in the context of the *Anns* test (at para.24):

> The label "proximity", as it was used by Lord Wilberforce in *Anns*, *supra* was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs.

See also *Odhavhji Estate v. Woodhouse*, [2003] 3 S.C.R. 263.

[148] It is well established that the relationship between the manufacturer or distributor of a product that is defective or unfit for its intended use and the end user of the product is a relationship of sufficient proximity to found a duty of care. This has been clear at least since *Donaghue v. Stevenson*, **[1932] A.C. 562**. I am satisfied that the "circumstances of the relationship inhering" between Debro, Tanshaw, Jay Johnson on the one hand and the Back Alley

and its patrons on the other were of such a nature that Debro, Tanshaw and Jay Johnson were under an obligation to be mindful of the interests of the Back Alley and its patrons. Debro, Tanshaw, and Jay Johnson, therefore, stood in sufficient proximity to both the Back Alley and its patrons to ground a duty of care. I am also satisfied that there are no policy considerations, as between these parties, that would operate to negative or reduce the scope of the duty. This was, by all accounts, a conventional commercial arrangement whereby the chemical distributors and suppliers made recommendations and sold an unsuitable chemical product that was ultimately used to ill effect. The first stage of the *Anns* test has been met and I find that Debro, Tanshaw and Jay Johnson owed a *prima facie* duty of care to the Back Alley and its patrons.

[149] The second stage of the *Anns* test requires a consideration of any residual policy concerns that arise *outside of the relationship between the parties* which may affect the duty of care: *Plas-Tex*, *supra*; *Cooper*, *supra*. In *Cooper*, McLachlin C.J. and Major J., for the Court, held (at para. 39):

> The second step of *Anns* generally arises only in cases where the duty of care asserted does not fall within a recognized category of recovery. Where it does, we may be satisfied that there are no overriding policy considerations that would negative the duty of care.

[150] McLachlin C.J. and Major J. noted that the duty to warn of the risk of danger has been recognized as a category of recovery, as has the situation where the defendant's act foreseeably causes physical harm to the plaintiff or the plaintiff's property. The sale and distribution of a hazardous product without warning clearly falls within the scope of the traditional categories of recovery. On this basis, it may not be strictly necessary to consider the second stage of the *Anns* test. However, in *Plas-Tex*, the Court of Appeal held (at para. 119-120):

> In a new situation where the loss is pure economic loss, a policy analysis is especially critical. A policy analysis must be done to establish a duty of care (using the *Anns* test), and also to determine the extent to which a Defendant should have to compensate the Plaintiff. This analysis is easier to describe than to carry out. That there is overlap is not surprising. For example, it is necessary in both to determine foreseeability of harm. But there is also a basis for distinction with a difference.
>
> In deciding whether there is a duty of care, the focus is on the relationship, proximity and foreseeability of some harm and on relevant policy considerations. In determining scope of liability of damages for pure economic loss, the focus is on the nature of the negligent action and relevant policy considerations.

[151] In view of the foregoing, it appears that it would be appropriate to consider the second stage of the *Anns* test, which requires the Court to consider whether there are any residual policy considerations, extraneous to the relationship between the parties, that would serve to negative or

reduce the scope of the duty. In *Cooper*, McLachlin C.J. and Major J. set out the approach to be taken under the second stage (at para.37):

> ...[R]esidual policy considerations fall to be considered here. These are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized?

[152] I do not believe that there are any residual policy considerations that would serve to reduce or negative the scope of the duty owed by Debro or Tanshaw or Jay Johnson to the Back Alley. Tanshaw and Debro sold a product, which Jay Johnson used and thereby exposed Back Alley patrons to, with knowledge of the use to which it would be put. It cannot be said that the recognition of a duty of care owed to the Back Alley would create the spectre of unlimited liability to an unlimited class. The class of plaintiffs that would be affected were only those bars or clubs who had the misfortune to use the chemical supplied by the defendants and, of course, the patrons of those bars or clubs. Ultimately, there was only one establishment and one group of patrons in that position. Further, both the period of loss and damages are limited, in that the Back Alley has claimed an amount for damages for loss of profits for 4 ½ years after the incident. In the result, the damages will not "go on forever" and are determinable.

[153] Nor do I consider that economic losses in the nature of those claimed by the Back Alley were not clearly foreseeable. Tanshaw, Debro and Jay Johnson were all aware that the product would be used in bars and had the potential to harm patrons if it was not suitable nor fit for its intended purpose. To the extent that there are policy considerations, they weigh in favour of confirming a duty on the part of distributors and suppliers to the users of their product to ensure that the product is suitable and fit for its purpose and, to the extent that it carries hazards, adequate warnings are conveyed.

[154] In short, there are no policy considerations, either internal or external to the relationship between these parties that would negate a duty of care. I therefore conclude, under the *Anns* analysis, that Debro, Tanshaw and Jay Johnson all owed a duty of care to both the Back Alley and its patrons.

The Effect of the Principle of Intermediate Examination on Debro's Duty of Care

[155] Debro contends that no duty arises, in respect of any of the plaintiffs, by virtue of the principle of intermediate examination. In Theall, *Product Liability: Canadian Law and Practice*, the proposition is framed this way (at L7-19):

> If the manufacturer foresees the reasonable probability of examination, a duty of care should not arise.

[156] Further, Theall states (at L7-19):

> Where the manufacturer anticipates that the product will be tested by another party before use, *it may be entirely reasonable for the manufacturer not to conduct tests*, recognizing that the duty of care is based on whether a manufacturer intends products "to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination." [emphasis added].

[157] In *Viridian Inc. v. Dresser Canada Inc. et. al.*, [2002] A.J. No. 937 (C.A.); 2002 ABCA 173; Conrad J.A. held that the principle of intermediate examination is a component of the duty of care (at para. 44):

> In my view, the authorities establish that the reasonable probability of a defect being discovered by intermediate examination at the time the product is released, is a pivotal factor in determining whether a duty of care is owed to an ultimate user. Was an effective intermediate examination reasonably probable at the time the product was released by the manufacturer? That is the critical question.

[158] The principle of intermediate examination is subject to the notion of reasonableness. In this regard, the question is whether it was reasonable for a manufacturer or distributor to assume that the product would not only be tested, but would be adequately tested, prior to use. In *Viridian*, Conrad J.A. held (at para. 48):

> The critical time at which to ascertain whether a duty of care is owed to an ultimate user is the point of distribution. Was there a reasonable probability of an examination that would reveal a defect prior to its use or its incorporation into another product? In essence the question goes to foreseeability of harm that a product would be used, or incorporated into another product for use, once a defect was determined. While blind adherence to the principle of intermediate examination may not be appropriate in a case where, notwithstanding the discovery of a defect, a manufacturer would still reasonably foresee its use, that is not this case.

[159] The test is whether it was reasonable that the intermediate party will examine or test the product, and whether the reasonably foreseeable testing would be of a nature that would reveal the defect: *Viridian*.

[160] The question of whether an intermediate examination by Tanshaw was reasonably foreseeable must be carefully considered in the context of the peculiar facts of this case. Tanshaw sought advice from Debro with respect to the nature of the Texas product and possible offset products. The advice it received, notwithstanding the very general warning from Debro to obtain a waiver, was that the Texas product was CDO and that there were two CDO products that could be used as offsets: Colamid-C and Alkamide DC 212/S. Debro, which Tanshaw understood to

possess a high degree of expertise in the chemical industry, and indeed holds itself out as such, made a specific recommendation to Tanshaw. Debro did not couple that recommendation with a clear caution regarding irritability, nor, significantly, did Debro suggest that it would be either necessary or advisable for Tanshaw to conduct irritation tests. The lack of a specific recommendation by Debro in this regard must be viewed in the context of what Debro knew about Tanshaw. It was readily apparent that Tanshaw possessed a lesser degree of expertise in chemical formulations than Debro. Indeed, part of Debro's business was to make recommendations concerning formulations to its customers. It was key to the nature of the relationship between Debro and Tanshaw, and well understood by both parties, that Debro possessed expertise and that its recommendations could be relied upon.

[161] Debro says that both Ms. East and Mr. Ruffo understood and assumed that Tanshaw would use Alkamide DC 212/S to make a product, test a sample and find the appropriate levels of dilution and neutralization required to make the product safe for use by Tanshaw's customer. Under the circumstances, and in view of the clear foreseeability of very considerable harm arising out of the use of a hazardous product for this application, I do not think it was reasonable for Debro to assume that Tanshaw would conduct, or had the necessary expertise to conduct, the appropriate tests on the product Debro recommended and sold to Tanshaw prior to its use at the April 12, 2001 foam party.

[162] Debro submits that it provided a component part of a final foam product to be made by Tanshaw, and that the product recommended and provided by Debro was never intended to reach the final customer in an undiluted final form.

[163] I do not accept the proposition that the product that was intended to reach the final customer was sufficiently different from what Debro marketed to Tanshaw, or that it was merely a component of the final product, so as to establish that Debro's duty did not extend to the ultimate users of the product. It is worth remembering that Carmen East told Doug Lostracco that the Texas sample "was CDO". In reliance upon this, and in accordance with Debro's advice, Tanshaw provided a product that was no more than Alkamide DC 212/S neutralized with citric acid and with fragrance added. It was, for the most part, the very product that Debro had recommended and sold, not merely a component. Debro contends that the product was never intended to reach the consumer in an undiluted form, but it made no recommendations with respect to dilution and, in any event, as will be more fully described later in these reasons, the product in fact did reach the patrons of the Back Alley in a highly diluted form. Jay Johnson, consistent with his prior practice with the Texas product, diluted the Lakeside Bubbles product with water by as much as 98% when it was used at the April 12, 2001 foam party. The short answer to Debro's submission is that it recommended Alkamide DC 212/S, neutralized with citric acid, as a replacement product. That is exactly what Tanshaw provided to Jay Johnson.

[164] Debro further contends that intermediate examination was not only foreseeable, it actually occurred, when Tanshaw mixed the Alkamide DC 212/S with citric acid and fragrance. In my view, this was not an examination of the product for the purpose of determining whether the product could be safely used for the proposed application. I will have more to say about Debro's

submissions regarding the alleged negligence of Ron Hubert in mixing the Lakeside Bubbles later in these reasons. At this point, I believe it is sufficient to point out that the expert evidence established that the injuries were caused not by a failure to adequately dilute the product, or to adequately neutralize it, but by the nature of the product that Debro recommended. CDO products, such as Alkamide DC 212/S and Colamid-C, were simply not appropriate for the application.

[165] In short, the essence of Debro's submission is that, notwithstanding the fact that it advised Tanshaw that the Texas product had been tested by Debro, notwithstanding that it recommended an entirely inappropriate product, and notwithstanding the fact that Debro's business is, in part, to make recommendations intended to be relied upon, it was Tanshaw's responsibility to determine whether Debro's recommendation was made in error. In view of the fact that Tanshaw was following Debro's recommendation, I do not believe that the principle of intermediate examination operates to negate a duty of care in the present circumstances.

[166] Given the foregoing, I conclude that Debro, Tanshaw and Jay Johnson owed a duty of care to the patrons of the Back Alley and to the Back Alley itself.

(b) Standard of Care, and Breach of the Standard of Care

[167] In Edgell, *Product Liability Law in Canada*, the learned author states (at pg. 13):

> Negligence is conduct falling below the standard demanded for the protection of others against unreasonable risk of harm. This standard of conduct is ordinarily measured by what the reasonable person of ordinary prudence would do in the circumstances.

[168] The classic formulation of the standard of care can be found in *Donoghue v. Stevenson*:

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.

[169] In *Alie v. Bertrand & Frere Construction Co.*, [2000] O.S. No. 1360; (2000), 30 C.C.L.I (3d) 166 (Ont. S.C.J.), var'd: 30 C.C.L.I. (3d) 159 (C.A.), the Court noted (at para. 133):

> One would expect in the latter part of this century that it would be obvious, basic common sense that a product would not be marketed without adequate testing to ensure its intended use and the protection of the ultimate consumer.

Jay Johnson

[170] On April 12, 2001, Jay Johnson used Lakeside Bubbles to produce foam, knowing that he had never tested the product, despite having purchased a sample to test from Tanshaw. He knew, or clearly ought to have known, that the suppliers that he and his father had contacted in

Ontario had attempted to formulate a product that would be used to duplicate the effect of the Texas product, but that it was not an exact duplicate. As noted above, I do not believe, nor do I find, that Tanshaw told him that Lakeside Bubbles was an exact duplicate of the Texas product.

[171] It is clear that Jay Johnson did not take adequate steps to inform himself with respect to the nature of the testing of the Texas product and the nature of the replacement. He did not take the step of comparing, in any detail, the MSDS provided by Tanshaw in respect of Lakeside Bubbles against the MSDS for the Texas product. A review would have quickly made it evident that Lakeside Bubbles was not an exact duplicate. It was not sufficient for him to have noted that the Lakeside Bubbles MSDS contained a symbol indicating potential toxicity and to have assumed that Tanshaw's MSDS was simply more "in depth" than the one provided by Off the Wall. It was not reasonable for him to use the Lakeside Bubbles product on April 12, 2001 without having made any specific inquiries with respect to whether it had been tested for possible irritation. Of all of the parties in these actions, Jay Johnson had the clearest understanding of the nature of the risk. Aside from forming the unreasonable belief that Lakeside Bubbles was an exact duplicate of the Texas product, Jay Johnson did nothing to satisfy himself that the product that would be effectively poured over hundreds of people at the Back Alley was safe. It is not an excuse to say that he assumed the product was safe on the basis of the faith he placed in Tanshaw and his disclosure to Tanshaw of the nature of the risk.

[172] Jay Johnson took no steps to inform himself of the nature of the testing that had previously been done and the true nature of the product he used on April 12, 2001. He made no inquiries with respect to whether the testing of the product had been adequate and he took no steps to test it himself, to ensure that it would not be injurious to skin and eyes before he used it at the April 12, 2001 foam party. Finally, Jay Johnson failed to advise anyone at the Back Alley that he was using a different chemical product at the April 12, 2001 foam party from the one he had used at the test party in February 2001. In short, he did not meet the standard of care imposed upon him to ensure the protection of the Back Alley and its patrons.

Tanshaw

[173] The standard of care imposed upon manufacturers and distributors of products extends beyond the "reasonable person" test. Manufacturers and distributors are held to the standard of the reasonable manufacturer or distributor, with a view to the fact that they hold themselves out as possessing a higher degree of skill, and the fact that failure to meet a high standard has the potential to cause great harm. In *Hollis v. Dow Corning Corp*., [1995] 4 S.C.R. 634, the Supreme Court of Canada held (at 655):

> The 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.

[174] In *Lem v. Barotto Sports*, [1976] A.J. No. 442; [1976] 6 W.W.R. 430 (C.A.), the Alberta Court of Appeal held (at para. 22):

> The duty of care of which the duty to give warning is an aspect, grows more exacting with the degree of danger of injury or damage arising from a product's misuse, and accordingly the reach of foreseeability is extended further as the circumstances may reasonably require.

[175] I am satisfied that Tanshaw was aware of the use to which the product it supplied to Jay Johnson would be put; that is, for foam parties. As such, the standard imposed upon it is a high one. I do not believe that it is necessary to distinguish between Tanshaw's role as distributor and manufacturer, or formulator, of the Lakeside Bubbles product in this regard. What is significant is that Tanshaw was aware that Jay Johnson was placing some reliance upon it to test the Texas product and to recommend and provide a suitable alternative.

[176] The standard imposed upon Tanshaw was, at a minimum, to make adequate inquiries with respect to the testing undertaken by Debro and Jay Johnson and to have adequate regard to the information at its own disposal to the effect that Alkamide DC 212/S was a product that could cause irritation. It had a duty not to market a product that would come into contact with human skin and eyes without adequate testing.

[177] Unlike Jay Johnson, Tanshaw was clearly aware that the product it supplied to him was not an exact duplicate of the Texas product. However, like Jay Johnson, Tanshaw took no steps to inform itself with respect to the nature of any testing that had been done. No inquiries were made of Debro with respect to the manner by which Debro determined that Colamid-C and Alkamide DC 212/S were suitable offset products. No inquiries were made to determine whether Debro's "testing" included a safety or irritation aspect. No inquiries were made of the Johnsons to determine whether the Lakeside Bubbles sample had been tested at all. When Tanshaw did arrive at the conclusion that the sample had been tested, it is clear that no specific inquiries were made with respect to safety. Nor, aside from providing a modified MSDS for Jemcamide, a different chemical, albeit with similar properties, did Tanshaw make any effort to direct Jay Johnson or Jim Johnson's attention to the potential for severe eye and skin irritation that Alkamide DC-212/S presented. To return to the formulation of the standard of care in *Alie, supra*, Tanshaw did not meet the standard of care imposed upon it in that it marketed the Lakeside Bubbles product without adequate, or indeed, any testing to ensure its intended use and the safety of the ultimate customer.

Debro

[178] Debro, as a chemical distributor with considerable expertise, must be held to a similarly high standard. Like Tanshaw, the standard imposed upon Debro was to not market a product to which human skin and eyes would be exposed without adequate testing. It owed a duty not to recommend an offset product with virtually no actual knowledge of the chemical composition of

the Texas product. It owed a duty to have regard to the information at its own disposal with respect to the irritability of the product it recommended.

[179] I am satisfied that Debro knew or ought to have known enough about the proposed application of the product it recommended and supplied to have been obligated to carefully consider the risk of injury. Regardless of whether Carmen East and Paul Ruffo knew that the product would produce foam or free-floating bubbles, it was readily apparent that the product had the potential to come into contact with skin and eyes.

[180] Debro recommended two products, Colamid-C and Alkamide DC 212/S, which were unsuited to the application. It did so without conducting a thorough analysis of the sample of the Texas product that was provided. Paul Ruffo, who does not possess formal training in chemistry and whose function at Debro was primarily in respect of chemicals for industrial application, did not possess sufficient expertise and did not conduct a sufficient analysis to allow him to make an appropriately informed recommendation. He acknowledged Debro and its employees did not have the ability to analyze products or to make the exact duplicates of products. Clearly, his analysis was cursory and insufficient, and the recommendation plainly wrong. The presence of DEA in both Colamid-C and Alkamide DC 212/S should have precluded Debro from recommending these formulations for this application.

[181] Debro submits that it met the standard imposed upon it by providing adequate warnings and/or rescinded its recommendation to Tanshaw. Debro also relies upon its belief that the product had been tested in some manner, and submits that Tanshaw and Jay Johnson's intervening negligence has an effect upon the scope of its liability.

[182] Debro takes the position that it clearly advised Tanshaw that Alkamide DC 212/S should not be used for the foam party application, once it became clear to Debro what a foam party actually entailed. It relies upon Carmen East's assertion that she told Doug Lostracco that the product should not be used for foam parties.

[183] As noted above, there is no indication in the contact notes written by Ms. East, which are the only contemporaneous records of the dealings between Debro and Tanshaw, that such an unequivocal revocation of Debro's initial recommendations was made. I do not find Ms. East's evidence in this regard convincing, particularly in view of Debro's subsequent sale of Alkamide DC 212/S to Tanshaw with full knowledge of the purpose to which it would be put. Moreover, while I have found that Tanshaw was negligent in providing Lakeside Bubbles to Jay Johnson, I do not believe that Tanshaw would have been so careless as to do so in the face of so clear a disavowal by Debro of its initial recommendation. To the extent that a warning was given by Debro to Tanshaw, I find that the warning was to the effect that Tanshaw would be well advised to protect itself and obtain a waiver from its customer. I accept Debro's evidence that it made this recommendation, and I find that this recommendation is what prompted Tanshaw to draft and obtain the waiver from Jay Johnson.

[184] The issue with respect to Debro's warning to Tanshaw, therefore, is whether the recommendation that Tanshaw obtain a waiver is sufficient to absolve Debro or reduce the scope of its liability.

[185] To the extent that the recommendation that Tanshaw obtain a waiver can be construed as a warning, it is, at best, only a very general one. There were a number of risks associated with the foam party application, among them the risk of irritation arising out of contact with skin and eyes, but also the potential for damage to clothing and slipperiness. Debro may have been specifically concerned with skin and eye irritation, but in simply suggesting a waiver it did nothing to advise Tanshaw of the specific nature of its concerns. Moreover, the waiver recommendation appears to have been clearly directed at avoiding legal liability, not injury.

[186] In *Lambert v. Lastoplex Chemicals Co.*, [1972] S.C.R. 569, Laskin J.A. held (at p.574-575):

> The applicable principle of law according to which the positions of the parties in this case should be assessed may be stated as follows. Where manufactured products are put on the market for ultimate purchase and use by the general public and carry danger (in this case, by reason of high inflammability), although put to the use for which they are intended, the manufacturer, knowing of their hazardous nature, has a duty to specify the attendant dangers, which it must be taken to appreciate in a detail not known to the ordinary consumer or user. A general warning, as for example, that the product is inflammable, will not suffice where the likelihood of fire may be increased according to the surroundings in which it may reasonably be expected that the product will be used. The required explicitness of the warning will, of course, vary with the danger likely to be encountered in the ordinary use of the product.

[187] I do not believe that, in the present circumstances, the fact that Debro is a distributor of Alkamide DC 212/S, and not a manufacturer, is sufficient to bring Debro outside of the principle of law set out in *Lambert*. Debro holds itself out as possessing expertise in the chemical industry. Like a manufacturer, it must be taken to appreciate the attendant dangers associated with the use of Alkamide DC 212/S in a detail not known to the ordinary consumer or user. A recommendation from Debro to its customer that it obtain a waiver from the end user is not sufficient to specify the attendant dangers. In view of the danger likely to be encountered from the exposure of skin and eyes to Alkamide DC 212/S, it was incumbent upon Debro to provide an explicit warning. Debro failed to meet the standard imposed upon it to provide a product that was safe for the proposed application and, to the extent that there were dangers associated with the use of the product, Debro failed to provide a clear and adequate warning.

[188] Debro further relies upon its understanding, as evidenced in the December 4, 2000 contact note, that the product had been tested by the time of sale to Tanshaw. The only basis upon which Debro could have come to this conclusion at that time was through the cursory inspection of the product made by Jay Johnson. There is no evidence to suggest that Debro made

any inquiries of Tanshaw with respect to the nature of the testing done by Jay Johnson. In view of the potential hazards associated with the foam party application, I do not believe that Debro's failure to make specific inquiries prior to selling the product was reasonable.

[189] Paul Ruffo and Carmen East said that they believed that they had no choice but to sell the product to Tanshaw, that it would be illegal or inappropriate to decline to sell a product to a customer asking for it. This is a puzzling assertion in view of Carmen East's evidence that she declined to sell a rinse aid to Tanshaw because she was concerned about the foam party application. In any event, they were clearly wrong, and Debro cannot rely upon this belief to relieve it of liability. To the extent that the supplier of a product is aware that the product may be put to a dangerous use, it is open and in certain circumstances incumbent upon the supplier to decline to make the sale: *Good-Wear Treaders Ltd. v. D & B Holdings Ltd. et al.* (1979), 98 D.L.R. (3d) 59 (N.S.C.A.).

(c) Causation

[190] The evidence of both Dr. Swyngedouw and Dr. Birkholz was very helpful, largely in accord on the significant points and not seriously challenged by any of the parties. That evidence was that the injuries to the Back Alley patrons arising out of the April 12, 2001 foam party were caused by the application of a chemical product that contained DEA and was therefore unsuitable for the purpose to which it was put.

[191] Debro contends that any alleged wrongdoing on its part in recommending and providing the chemical that was used at the April 12, 2001 foam party was not a cause of the loss. It relies upon what it characterizes as the egregious intervening negligence of Tanshaw as an intervening act, and further argues that Jay Johnson was the "root cause" of the April 12, 2001 foam party. Debro further argues that the Back Alley has failed to prove a causal link between the alleged loss of sales in the wake of the April 12, 2001 foam party and the incident itself.

[192] I will address the issue of a link between the economic losses alleged to have been suffered by the Back Alley and the April 12, 2001 foam party in the course of my discussion regarding damages, below. I note that all of the industry experts who gave evidence at trial effectively acknowledged that the April 12, 2001 foam party was a public relations incident with potentially adverse consequences to the Back Alley. In that sense, there is a causal link between the April 12, 2001 foam party and a loss to the Back Alley. The question of whether that public relations incident translated into a loss of sales is one that can be more adequately addressed in the context of the assessment of damages.

[193] With respect to the intervening negligence of Tanshaw, Debro's argument is: (a) Tanshaw disregarded clear warnings from Debro; (b) even if a more adequate warning had been given by Debro, Tanshaw would have disregarded that, too, because it was determined to sell a foam party product to Jay Johnson; and (c) Tanshaw's actions in mixing the product and providing it to Jay Johnson were so egregiously negligent as to have been unforeseeable by Debro and constitute a novus actus interveniens.

[194] With respect to the alleged failure of Tanshaw to heed Debro's warnings concerning the use of Alkamide DC 212/S for a foam party application, I have found that no such explicit warnings were given. What Debro actually did was suggest that Tanshaw obtain a waiver from its customer. This falls far short of the sort of warning that would have been sufficient to alert Tanshaw to the nature of the risk so as to absolve Debro of responsibility for recommending a hazardous product in the first place. Moreover, Tanshaw followed Debro's recommendation and obtained the waiver. This did not prevent injury to the Back Alley or its patrons and thus, I find there was no break in the chain of causation.

[195] Nor am I satisfied that, had Debro been more explicit in its warnings, Tanshaw would have in any event sold Alkamide DC-212/S to Jay Johnson for his foam party promotions. While both Debro and Tanshaw appear to have been careless in assessing the adequacy of Alkamide DC212/S for the foam party application, there was no evidence to suggest that, as Debro maintains, Tanshaw was so reckless and determined to make a sale as to risk the substantial liabilities that might arise out of a mistaken recommendation. The potential gains to Tanshaw were limited. I do not believe it is reasonable, and in any event it is purely speculative, to suggest that Tanshaw would have wilfully or recklessly undertaken so substantial a risk, with such minimal reward, in the face of a clear warning or a revocation of the recommendation by Debro.

[196] I accept that, in providing the Jemcamide MSDS for a product that was not made from Jemcamide but from Alkamide DC 212/S, Tanshaw clearly demonstrated a cavalier approach to formulating and providing a product that was, in effect, going to be applied directly to human skin. It is important to note, however, that Jemcamide is sufficiently similar to Alkamide DC 212/S such that the information contained in the MSDS ought to have raised the same concerns in Jay Johnson, had he taken the time to consider it. The warning was the same. I do not believe that the fact that Tanshaw provided a Jemcamide MSDS rather than one for Alkamide DC 212/S was in any way connected to the loss and therefore, I conclude that Debro cannot rely upon it as a break in the chain of causation in respect of its own potential liability.

[197] Debro further relies upon what it characterizes as the gross negligence of Tanshaw's employee, Ron Hubert to relieve it of liability. Debro contends that Mr. Hubert failed to take proper care in diluting and measuring the pH of the Lakeside Bubbles used at the April 12, 2001 foam party. Both the sample product and the initial shipment, which had gone missing en route, had been mixed by Doug Lostracco. Mr. Lostracco neutralized the pH of those formulations by dissolving citric acid in one litre of water, removing one litre of Alkamide DC 212/S and replacing it with the citric acid in solution. Mr. Hubert, on the other hand, and contrary to Doug Lostracco's instructions, simply added citric acid to the Alkamide DC 212/S without first dissolving it in water. Debro contends that Mr. Hubert thereby failed to adequately dilute the product. Debro further contends that because Mr. Hubert did not add water to the Alkamide DC 212/S, he could not have taken an accurate pH reading.

[198] It is important not to confuse the issue of dilution at the product formulation stage with dilution at the time of use. It is undoubtedly accurate that, as Dr. Birkholz indicated, the poison is

in the dose. Inadequately diluted product, where that product is inherently hazardous to skin and eyes, would materially increase the risk. But it was Jay Johnson's evidence that at the April 12, 2001 foam party he diluted the Lakeside Bubbles as he had always diluted the Texas product. That dilution was in the range of 2% - 4% Lakeside Bubbles to 98% - 96% water. In view of the substantial dilution of the product at the time of use, it is difficult to conceive that Ron Hubert's act of not replacing one litre of "pure" Lakeside Bubbles, in a 20 litre pail, with water, would result in a significant difference in the ratio of Lakeside Bubbles to water at the time of use.

[199] Moreover, I am not convinced that Mr. Hubert's failure to follow Doug Lostracco's instructions resulted in a failure to take an accurate pH measurement. I accept the expert evidence that a pH reading cannot be taken in the absence of water. However, no evidence was introduced to suggest that Alkamide DC 212/S does not itself contain sufficient water to allow Mr. Hubert to have taken a pH test.

[200] An additional issue arises with respect to the failure of both Tanshaw and Jay Johnson to have adequate regard for the information contained in the MSDS each was provided. Tanshaw had prior experience with CDO products in general and Alkamide DC 212/S in particular, and some prior knowledge of the irritability of CDO products. Jay Johnson clearly disregarded the information contained in the Lakeside Bubbles MSDS, which contained a symbol indicating toxicity.

[201] While I agree that neither Jay Johnson nor Tanshaw had sufficient regard for what should have constituted cautionary information, their respective failures must be viewed in the context of the recommendations that had been made. Jay Johnson relied upon Tanshaw, and Tanshaw upon Debro, to recommend a product suitable for the foam party application. Jay Johnson had reason to believe that Tanshaw possessed a certain degree of expertise in making its recommendation, and Tanshaw had similar reason to believe that Debro possessed the requisite expertise. Tanshaw asked Debro to undertake an analysis, and Debro responded with the assertion that the product was CDO and recommended Alkamide DC 212/S. To suggest that Debro should be absolved of liability on the basis of the information contained in the MSDS is to suggest that Tanshaw had a duty to ignore Debro's own recommendation.

[202] In short, Debro recommended Alkamide DC 212/S for the foam party application to Tanshaw. Debro suggested that Tanshaw obtain a waiver, but gave no specific warning with respect to the possible risks associated with using Alkamide DC 212/S for foam parties. Both Tanshaw and Jay Johnson were similarly careless in the approach they took to the use of Alkamide DC 212/S and to MSDS information. They were careless, however, in the context of Debro's specific recommendation. Ron Hubert may have mixed the product in a manner different from that of Mr. Lostracco, but there was no evidence that this difference was a factor contributing to the loss; in fact, it appears that Alkamide DC 212/S would have been a hazardous product for the foam party application, no matter how Mr. Hubert or Mr. Lostracco had gone about neutralizing it. Debro cannot rely upon Tanshaw's and Jay Johnson's careless and negligent actions with respect to this product as constituting intervening acts, breaking the chain of causation, when Tanshaw was, in effect, relying upon Debro's own specific recommendation.

(d) The Debro Limitation of Liability and the TanshawWaiver

[203] Debro relies upon the terms of the limitation of liability clause on the back of Debro's invoice, under "Terms and Conditions of Sale". It contends that the clause functions to absolve it of all liability. Tanshaw, while not arguing the point aggressively, also provided Jay Johnson with a waiver, the terms of which are set out above, purporting to relieve it of liability.

[204] The short answer to the reliance upon the limitation of liability clause and the Tanshaw waiver is that neither the Back Alley nor the personal injury plaintiffs were parties to those contracts. In *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85, structural defects in the masonry work in a condominium building resulted in an action brought by the subsequent purchasers of the building against the building contractor. The Supreme Court held that the contractor's duty to take reasonable care to construct a building without dangerous defects arose independently of contractual stipulations. This duty, in the view of the Court, was not parasitic upon any contractual duties between the contractor and the original owner.

[205] In my view, neither Debro nor Tanshaw can rely upon the terms of the limitation of liability clause or the waiver to relieve them of liability in respect of the independently arising duty to the Back Alley and its patrons to recommend, formulate and sell a safe product. To hold otherwise would be to bind individuals further down the supply chain to provisions of agreements to which they were not parties and had no notice.

[206] I further note that the limitation of liability clause and the waiver were drafted by Debro and Tanshaw respectively and the principle of *contra proferentum* applies. In that regard, in respect of the Debro limitation of liability clause, I note that the claims advanced by both the Back Alley and its patrons are not claims in respect of injuries to "the buyer", which was Tanshaw, or "its customer", which was Jay Johnson.

[207] Moreover, even to be effective as against Tanshaw, it would be necessary for Debro to establish that Tanshaw's attention had been drawn to the limitation of liability clause. In *Eggen Seed Farms Ltd. v. Alberta Wheat Pool*, [1997] A.J. No. 702; 205 A.R. 77 (Q.B.), Gallant J. held (at para. 19):

> The evidence is that representatives of the plaintiff had not read and were not aware of the exclusionary clause in either the Interim Delivery Slip or the Sales Invoice. Because of that fact, because there was no satisfactory evidence that the exclusionary clause in the Sales Invoice was brought to the attention of any representative of plaintiff, and because no representative of the plaintiff signed the Sales Invoice, I hold that the exclusionary clause in the Sales Invoice is not effective against plaintiff.

Identical considerations apply to Debro's limitation of liability clause. There was no evidence that the provision was brought to the attention of Tanshaw.

[208] As for the Tanshaw waiver, it was signed by Jay Johnson on April 4, 2001 for an order of Lakeside Bubbles that got lost en route to Calgary. In fact, a waiver was never signed in respect of the replacement Lakeside Bubbles product that was purchased by Jim Johnson on April 11, 2001 and shipped to Calgary for use at the foam party held at the Back Alley on April 12, 2001. In the result, no waiver existed in respect of the product actually used at the April 12, 2001 foam party.

[209] For the foregoing reasons, I conclude that neither the Debro limitation of liability clause, nor the Tanshaw waiver, operate so as to relieve either Debro or Tanshaw of liability to the Back Alley or its patrons.

(e) Apportionment of Liability

[210] Section 2(1) of the *Contributory Negligence Act*, R.S.A. 2000, c.C-27, provides:

> 2 (1) When damage or loss has been caused by the fault of 2 or more persons, the court shall determine the degree in which each person was at fault.

[211] Given the foregoing and considering the totality of the evidence, I find on a balance of probabilities that Jay Johnson, Tanshaw and Debro failed in their responsibility to ensure that a product to which human skin and eyes would be directly exposed was safe for the proposed application and thus they are liable in negligence. Each of them bore a responsibility to ensure that the product was appropriately tested prior to use. Each of them was aware of the use to which the product would be put and should have made the necessary inquiries before selling and using the product. Both Debro and Tanshaw effectively recommended to Jay Johnson a product that was inappropriate, after making inadequate investigations of the Texas product. All of them ignored information in the MSDS that should have, at a minimum, raised questions about the suitability of Alkamide DC 212/S.

[212] Accordingly, I conclude that Jay Johnson, Tanshaw and Debro bear equal responsibility for the damages arising out of the April 12, 2001 foam party, to the Back Alley and to the personal injury plaintiffs. Fault is to be divided equally among them.

[213] The Back Alley, as noted above, took reasonable steps to ensure that the foam party of April 12, 2001 would be safe for its patrons. The Back Alley does not bear any liability for the losses arising out of the April 12, 2001 foam party.

VI. DAMAGES

A. Contribution and Indemnity in Respect of the Personal Injury Settlement

[214] The Back Alley and Tanshaw anticipate that Jay Johnson will declare personal bankruptcy in the event that any of the parties seek to collect on any judgment against him arising out of this action. Having already paid a settlement to the personal injury plaintiffs, the Back

Alley and Tanshaw contend that the portion of the loss in the personal injury action attributable to Jay Johnson should be distributed among the other tortfeasors in accordance with their *pro rata* share of liability. In view of my conclusion in respect of liability, this would entail apportioning Jay Johnson's one-third share of liability equally between Tanshaw and Debro in the event that Jay Johnson declares bankruptcy.

[215] The issue arises because the Back Alley and Tanshaw have already compensated the personal injury plaintiffs in the amount of $481,808.52 (including, it should be noted, a $30,000 contribution from Jim Johnson). Were Debro to be fixed only with its one-third share of liability, without further contribution, the Back Alley and Tanshaw would have no way to recover the excess share of damages that they have paid on behalf of Jay Johnson.

[216] Section 8 of the *Judicature Act*, R.S.A. 2000, c.J-2 provides:

> 8 The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

[217] Section 2 of the *Contributory Negligence Act*, R.S.A. 2000, c.C-27, provides:

> 2 (1) When damage or loss has been caused by the fault of 2 or more persons, the court shall determine the degree in which each person was at fault.
>
> (2) When 2 or more persons are found at fault, they are jointly and severally liable to the person suffering the damage or loss, but as between themselves, in the absence of a contract express or implied, they are liable to make contribution to and indemnify each other in the degree in which they are respectively found to have been at fault.

[218] It is clear that a plaintiff is entitled to recover the full amount of his or her damages from any tortfeasors who are found liable. It is also clear that, in the event that one defendant is insolvent, the solvent defendants will bear the additional burden of that portion of the judgment that cannot be recovered from the insolvent defendant: *Campbell v. Calgary Power Ltd.*, [1988] A.J. No.855 (C.A.). However, there is no authority for the proposition that the Court, upon giving judgment, may order that an insolvent defendant's share of the damages be distributed *pro rata* among the other defendants. The Back Alley points out that in 1979 the Alberta Institute of Law Research and Reform recommended that, on application at the time judgment is rendered, the court may make such further orders as necessary to distribute the share of an insolvent wrongdoer. The recommendation may have some merit, and in the present circumstances it

would operate so as to reduce the hardship imposed upon the Back Alley and Tanshaw by their decision to settle the personal injury claims. However, the relevant legislation has not been amended to accommodate this recommendation.

[219] The Back Alley further points out that this Court has discretion, pursuant to both its inherent jurisdiction and s.8 of the *Judicature Act*, to grant the remedy it seeks. I do not believe that the inherent jurisdiction of this Court, or the discretion extended to this Court pursuant to s.8 of the *Judicature Act*, is sufficiently broad to allow me to ignore the clear language of s.2(2) of the *Contributory Negligence Act*. That provision clearly stipulates that, in the absence of a contract express or implied, defendants are liable to make contribution to one another only to the degree in which they are respectively found to have been at fault. Here there does not exist a contract express or implied as amongst these Defendants to support the pro rata distribution that the Back Alley and Tanshaw propose. This appears to be a direct answer to the Back Alley's proposal, which, it is important to note, is made in respect of the Back Alley's position as defendant in the personal injury action. Accordingly, Debro is liable to contribute to the settlement only to the extent of its degree of fault.

B. Entitlement to Interest in Respect of the Personal Injury Settlement

[220] Tanshaw and the Back Alley submit that they are entitled to interest on those amounts that were paid to the personal injury plaintiffs in advance of this trial.

[221] The manner in which the personal injury actions were settled was effectively piecemeal, with the Back Alley and Tanshaw taking the initiative and paying the settlement monies. In exchange for compensation, the personal injury plaintiffs executed releases. Though not all of the Defendants were engaged in the settlement process, all, including Debro and Jay Johnson, were named releasees. The total sum paid was $481,808.52.

[222] To forestall the argument that the Back Alley and Tanshaw had settled for an improper amount, or overcompensated the personal injury plaintiffs in the event that other defendants were found liable, the Back Alley and Tanshaw filed a Notice to Admit Facts. The Notice to Admit Facts indicates that all claims for bodily injury damages in respect of the matters subject to Case Management, including claims brought in the Provincial Court of Alberta, total $481,808.52, and that the sum of $481,808.52 represents a fair and appropriate settlement of those claims. Debro, not having taken issue with the facts plead in the Notice to Admit Facts, is deemed to have accepted the sum of $481,808.52 as a fair and appropriate settlement.

[223] Debro was not a party to any agreement among the Defendants in respect of the settlement of the personal injury claims. At trial, counsel for Tanshaw quantified the amount of pre-judgment interest, at that time, to be in the range of $17,000.00. Debro objects to the claim on the basis that it never agreed to a further sum in respect of pre-judgment interest and, pursuant to the Notice to Admit Facts, was entitled to assume that in the event liability was assessed against it, it would only be required to contribute its portion of the $481,808.52 paid to the personal injury plaintiffs. Debro did not forcefully press the point and suggested that the matter

of interest falls within my discretion, subject to the consideration that it was not something to which Debro agreed.

[224] It is worth noting that the settlement of the personal injury claims dramatically reduced the potential complexity of what was, even in the absence of those claims, a long and complex trial. The parties and the Court benefited from the initiative taken by Tanshaw and the Back Alley to settle the personal injury claims. The increased expense that would have been incurred by all parties in the form of discoveries and trial time would have been significant. In these circumstances, and in view of the fact that the Notice to Admit Facts is silent with respect to the issue of pre-judgment interest, I conclude that it is appropriate to fix Debro with liability for pre-judgment interest in respect of its pro rata share of the settlement made with the personal injury plaintiffs.

C. The Back Alley Economic Loss Claim

[225] A substantial portion of the time spent at trial was dedicated to the issue of the Back Alley's damages. At its most fundamental, this claim is about lost drink sales, expenses associated with maintaining drink sales, and the loss of the opportunity to raise drink prices.

[226] The Back Alley claims for: loss of profits resulting from a decrease in the number of drinks sold and lower prices than its competitors for drinks; out of pocket expenses, including the increased cost of gift certificates, increases in advertising and entertainment expenses, a rent increase and legal fees; and prejudgment interest and costs. The total claim, by the time of trial, for damages and pre-judgment interest was $2,972,000. During the trial, the Back Alley withdrew its claim for damages in respect of higher insurance premiums. Experts in the nightclub industry and business loss calculations were called by the Back Alley and Debro. There is little to no common ground with respect to the effect of the April 12, 2001 incident on the Back Alley, the method of quantifying the loss, and the reasonableness of the Back Alley's attempts at mitigation. What follows is a summary of the more significant aspects of the evidence with respect to the Back Alley's damages and my conclusions with respect to same.

(a) Industry Experts and the Effect of the Foam Party Incident on the Back Alley

Ward Morrison

[227] Mr. Morrison was called as an expert by the Back Alley, qualified to offer opinions with respect to valuation, operating income and economic losses in the hospitality industry. He is a chartered accountant and a member of the Institute of Management Consultants of British Columbia. He has been a management consultant since 1971, specializing in the hospitality industry. He did not conduct an economic analysis of the Back Alley; in general, his evidence was directed to the issue of the potential impact upon a nightclub of a catastrophic event.

[228] Mr. Morrison began with an assessment of Calgary demographics. Considering the city's population, and the fact that a significant proportion of nightclub patrons can be fairly classified

as “twenty-somethings”, Mr. Morrison concluded that the resident potential market in Calgary, in the age range 18-29, was approximately 173,090 people at the time of the foam party incident. While the total available occupancy in Calgary nightclubs has remained relatively static since 1996, and therefore the Back Alley’s approximate 11% share of the licensed club space has likewise remained stable, the population cohort of 18-29 years increased at an average of nearly 4% annually, based on Statistics Canada data. On this basis, Mr. Morrison concluded that the volume of product sold at the Back Alley could reasonably be expected to rise. On the other hand, the cost per bottle of domestic beer, by far the most important product at the Back Alley, has increased at approximately 5% per annum since 2001.

[229] The most subjective element of Mr. Morrison’s review was his determination of the appropriate period of time for the Back Alley to have fully recovered from the damage to its reputation as a result of the April 12, 2001 foam party. He listed a number of factors that would have some degree of impact on a hospitality business effected by an incident such as this. These include the size and nature of the market, publicity surrounding the incident, the personal impact on the individuals involved, the cumulative effect of repeat events and the public perception of the operator’s degree of fault.

[230] Taking these factors in turn, Mr. Morrison said that Calgary’s population of regular nightclub patrons, on the basis of the city’s demographics, would number over 4000, but almost certainly less than 10,000. He stated that virtually everyone in the crowd at the Back Alley on a given night would have at least one friend or acquaintance in common with virtually every other patron in the club. On this basis, he concluded that the word of mouth impact of the foam party incident would have been “enormous.” Mr. Morrison did not review the news coverage of the event, but noted that, as late as July, 2004, at least one Calgary resident posted on the internet, in response to an advertised foam party, a comment to the effect that there was an incident in Calgary involving eye injury and “a few even went blind in one eye”; an indication of the ongoing negative impact of the publicity surrounding the event, as well as a tendency to distort or exaggerate the injuries sustained. Mr. Morrison noted that the number of patrons who engaged a lawyer, to the point that they came to the attention of the Back Alley, was about 60. He speculated that as many as twice this number would likely have been injured or affected and did not pursue any action. Of this group, he noted in his report of July 20, 2004, it was likely that they and their immediate families and many of their friends and acquaintances “would avoid patronizing the Back Alley, for some length of time, ranging from six months to forever.” There were, of course, no repeat events. With respect to the public perception of the operator’s degree of fault, Mr. Morrison indicated that this carries a surprisingly low weight in the list of factors which would impact the business. He did not speculate as to what the public perception of the Back Alley’s handling of the foam party incident was in the present case.

[231] Mr. Morrison included with his report a list, entitled “Catastrophic Events Affecting Hospitality Operations.” To a certain extent, it illustrates the unique nature of what occurred at the Back Alley. Mr. Morrison’s list included events in which restaurant patrons were murdered, or restaurant workers were found to have infected patrons with hepatitis, or restaurants were found to have been the site of a Norwalk virus contagion. The examples cited by Mr. Morrison

suggest that there is an extremely broad range of possible outcomes. The restaurant with the hepatitis outbreak fully recovered, due to a very successful public relations campaign, while the restaurant that was a victim of the Norwalk virus ultimately failed. Every example cited, however, was one in which the nature of the event carried a particular kind of stigma for the establishment. The examples cited by Mr. Morrison also suggest that even where the catastrophic event is one in which there is a significant impact on patrons' health, it is possible for an establishment to recover within a year, if the incident is properly managed.

[232] Based on his assessment of these factors, and his review of a number of other incidents, Mr. Morrison concluded that the Back Alley's losses would extend through 2006. In respect of future losses, he submitted that a reasonable basis for calculation would be that the 2004 losses would amount to approximately 70% of the losses assessed for 2003, the 2005 losses would amount to approximately 35% of the 2003 losses, by 2006 the loss would amount to 10% of the 2003 losses. He said that losses could be expected to continue past 2006, but ceased his assessment there on the basis that the duration of the claim "has to end some time".

Vance Campbell

[233] Vance Campbell is the principal of Campbell Corporate Management Inc., a consultant to the hospitality industry. He has owned and operated a number of restaurants and nightclubs in Calgary and Vancouver and has been a consultant for many others. Mr. Campbell has been employed in the hospitality industry for 41 years. He was called by Debro and qualified as an expert to offer opinions with respect to the impact of catastrophic events upon businesses in the hospitality industry and the appropriate response to same.

[234] Mr. Campbell testified that most bars and nightclubs engage in special promotions as a means of maintaining customer interest and loyalty, and as a tool to attract new customers. The purpose of promotional events is to enhance the image of the operation and to drive business to it. Some promotions are successful, and some are not. Occasionally, a single catastrophic event of a "life safety" nature, such as a shooting resulting in death on the premises, will precipitate the closing of a nightclub, usually accompanied by the intervention of the authorities. Mr. Campbell stated that, though he has seen established nightclubs open and close over the years, he has never heard of a single instance of a promotion that impacted an established, well-operated nightclub business in the manner suggested in this action.

[235] Mr. Campbell said that his "reading of the situation" was that the media coverage of the foam party incident, though intense, was not long sustained. He characterized the foam party incident as a "one-off" event, creating a "temporary setback". He believed the incident should have had no lasting negative repercussions and cited the Back Alley logbook, and entries from the period of April 13, 2001 onward, in support of the proposition that the business was holding its own and remained competitive with other Calgary nightclubs.

[236] Mr. Campbell was of the view that, to the extent that the Back Alley has suffered a loss, that loss is largely attributable to its failure to undertake damage control in the wake of the April

12, 2001 foam party. He noted that the Back Alley's response to the incident was to not comment, other than to assure the local health authority that the foam party promotion would not be repeated. In Mr. Campbell's opinion, "an immediate, clear and convincing effort should have been undertaken by management to mitigate the damages caused as a result of the foam party." In that regard, Mr. Campbell believed that it would have been more appropriate to take steps to show the Back Alley's concern for its patrons by attending at hospitals and issuing public statements that might serve to convince the public that the well-being and safety of its patrons was of the utmost importance to the Back Alley. By not doing so, Mr. Campbell was of the opinion the Back Alley "lost an entire generation" of customers because of the poor manner in which it handled the events arising from the foam party, not because of the foam party itself.

[237] Mr. Campbell also pointed to a number of other factors that, in his view, explained a decrease in sales at the Back Alley. He said that in recent years the hospitality industry in general has suffered from the repercussions of the terrorist attacks of September 11, 2001, resultant cross-border issues restricting travel, SARS, mad-cow disease, the Iraq war, a soft economy, weather-related disasters and an aging demographic. He cited a KPMG survey indicating that losses in the hospitality industry in Canada since March, 2003 alone have totaled $1.1 billion. He found that it was inconceivable that the Back Alley was not affected in a similar manner to that affecting other businesses in the hospitality industry.

[238] Mr. Campbell also stated that there is a direct relationship between patrons' perceptions of "life safety" incidents at nightclubs and the ongoing success of those nightclubs, noting "People are generally dissuaded from patronizing unsafe premises." He pointed to a number of entries in the Back Alley logbooks recording fights, some involving weapons, at the bar. He was also "not surprised to read that the plaintiff had a problem obtaining liability insurance at any price and was in fact practically self-insured."

[239] The Back Alley increased both drink prices and cover charges over the period of the loss claimed. Mr. Campbell noted that the price increases were sudden and drastic. In his experience, drink prices should be increased gradually and any increase in cover charges must be reflective of an increased perceived value to the regular clientele.

[240] Mr. Campbell's conclusions were set out in his report. I quote as follows:

> It is evident that a number of different issues either precipitated or sustained a reversal in the popularity of the Back Alley. They can best be summarized as arising from the following perceptions:
>
> 1. The actual promotion of April 12, 2001 was an unfortunate incident that affected roughly 60 patrons over the period of a few weeks. Some promotions work, some don't. This one didn't. It was not the actual incident but rather the lack of damage control that created the greatest negative impact;

2. As indicated above, the Foam Party can best be characterized as a "one-off" event that created a "temporary setback", and should have had no lasting negative repercussions;

3. A general economic reversal that pervaded an entire industry;

4. An increase in operating costs throughout the industry, particularly with respect to insurance liability coverage costs. These increased costs resulted in lower profit margins;

5. Sudden and unexplainable cost increases being passed onto the regular customer base eroded customer confidence further in the establishment; and

6. Although it is noted that there were life safety incidents before the Foam Party, these continued following the Foam Party and in my view, would have not have [sic] a positive factor in the circumstances.

(b) Drink Price Increases in Calgary

[241] A key component of the Back Alley's claim relates to drink price increases over the period of the loss claimed. Mr. Rasberry contends that, in the wake of the foam party incident, he was justifiably cautious about raising his prices and lost the opportunity to do so in a timely manner. The Back Alley claims for the increased profits it would have earned had it been able to raise drink prices in conjunction with its competitors.

[242] Trevor Tomaniuk is the owner of Outlaws Restaurant, as well as the Metropolitan Grill, a Calgary restaurant and nightclub. He appeared as a witness for the Back Alley. His evidence was that Calgary nightclubs monitored competition by doing checks of their competitors on a weekly basis. Based upon his observations with respect to these "club checks" and his personal observations of his own business, Mr. Tomaniuk said that business in the nightclub industry from 2000 to 2004 was strong. It was his recollection that in 1999 the drink price at Outlaws and its competitors was initially in the $3.25 to $3.75 range, but moved to $4.75 over the period between 1999 to 2003, in a number of increments. Mr. Tomaniuk could not recall exactly when each stage of the price increase occurred, but from his evidence it appears that Outlaws tended to raise prices in 25-cent increments. By the time of trial, the drink price at Outlaws was $5.25.

[243] Omar Polyniak has been engaged in the restaurant, nightclub and bar business for more than 20 years and gave evidence for the Back Alley. From July 2000 to March 2002 Mr. Polyniak was the owner of Desperadoes, a Back Alley competitor. Since March 2002 he has been an industry consultant. Mr. Polyniak said that when Desperadoes opened in July 2000, drink prices there were $4.25. He said that competitors raised prices in July 2001 to $4.75 but Desperadoes did not follow suit.

[244] Douglas Campbell, another Back Alley witness, is a former employee of Bacardi Canada. In that capacity he was a liquor representative responsible for selling liquor to various Back Alley competitors in the 2003 to 2004 period. He did not service or sell to the Back Alley, though he was aware of the Back Alley and the nature of its business because he did service the Back Alley in 1998, when he worked for Smirnoff.

[245] Mr. Campbell's primary function in his capacity as a liquor representative was to monitor sales in the industry. He gave evidence that the nightclub business in Calgary for the period of 1999 to 2004 was strong, and that liquor sales and prices were increasing. It was his evidence that nightclubs in Calgary attempted to keep pace with one another with respect to pricing. When one nightclub raised its prices, others would generally follow suit. In June, 2001, drink prices rose from $3.75 for liquor and bottled beer to $4.75. Some establishments implemented the one-dollar increase at once, others proceeded in two 50-cent increments. In 2002, prices increased again to $5.25 for both liquor and bottled beer.

[246] The Back Alley contends that its drink price increases lagged behind that of its competitors in the wake of and as a result of the foam party incident. According to the Back Alley, maintaining low drink prices was part of an aggressive strategy to minimize the consequences of the foam party incident. While the majority of the Back Alley's competitors were in a position to increase drink prices from $3.75 to $4.75 per drink in July 2001, the Back Alley was only able to increase its prices to $4.25 per drink. The drink price at the Back Alley remained at $4.25 in July, 2002, when the Back Alley's competitors raised their prices to $5.25. The Back Alley caught up, somewhat, when it increased prices to $4.50 in November, 2002, and then to $4.75 in September, 2003. As of September, 2004, the drinks at the Back Alley remained at prices 50 cents lower than those of its competitors.

(c) Cover Charge Increases at the Back Alley

[247] Mr. Rasberry said that historically over 10 years, and prior to April 12, 2001, the Back Alley's basic cover charge, leaving aside nights in which bands were performing, was $2.00. The charge applied to patrons coming to the bar between the hours of 10:00 p.m.and 1:00 a.m. After the foam party incident, and within the period of one year, the Back Alley's cover charge more than doubled. In keeping with its competitors and in an effort to create a new stream of revenue, the Back Alley raised the cover charge to $3.00 in September, 2001. In February or March, 2002 the cover charge went up to $4.00 and in September 2002, it was raised to $5.00.

[248] The cover charge imposed by the Back Alley's competitors, according to Mr. Rasberry, was $5.00 at the time of the April 12, 2001 foam party.

[249] The Back Alley's treatment of cover charge revenues has changed in the years since the foam party, reflecting the more substantial financial rewards the Back Alley reaps from the increased prices. Cover charges did not appear as a line item on the Back Alley's financial records until 2002. Prior to that time, the revenues generated by cover charges were largely distributed among the Back Alley staff in the form of a "tip pool". With the rise in prices, cover

charge revenue has become a significant factor in the Back Alley's bottom line and now contributes to the revenues of the bar. The Back Alley's revenues from cover charges in 2002 were $312,864. In 2004 they rose to $322,730. These figures reflect revenue from cover charges over and above what is distributed to the Back Alley staff by way of a tip pool.

(d) Damages Evidence of Doug Rasberry

[250] Doug Rasberry is the principal of the Back Alley. He is an astute businessman, and has thrived in a difficult industry that he knows and understands very well. However, Mr. Rasberry has an obvious interest in the outcome of this case, and his evidence should be approached with caution. In general, that evidence is that the Back Alley suffered an immediate and severe financial impact as a result of the foam party incident, that the foam party incident translated almost immediately into a decrease in the number of patrons at the bar and a corresponding and profound decline in drink sales. The Back Alley submits that decline is measured by comparing the number of drinks sold per fiscal year prior to the incident to the number of drinks sold in the subsequent years. The Back Alley further contends that, in its weakened state, it was unable to match and keep in lockstep with its competitors' price increases and therefore, lost further profits. In response to the foam party incident, Mr. Rasberry testified, the Back Alley has attempted to bring patrons back to its bar by aggressively distributing free drinks and spending more on promotions and live bands, all of which comes at an expense to the Back Alley.

[251] Mr. Rasberry believes that the April 12, 2001 foam party had a significant impact on the Back Alley's revenues. He estimated attendance at the Back Alley on April 12, 2001 to be in the range of 800 - 1000 people. In his view, the event drove away a substantial portion of the Back Alley's 8,000 - 10,000 person customer base. Because the Back Alley was less busy in the wake of the April 12, 2001 foam party, and because a busy nightclub tends to attract more customers, it is Mr. Rasberry's view that the Back Alley experienced ongoing difficulties bringing customers through the door. This resulted in a significant decrease in the number of drinks sold and a corresponding loss of profit. Consequently, the Back Alley also incurred significant additional expenses in order to lure patrons to the bar.

[252] According to Mr. Rasberry, the Back Alley had been performing well and growing consistently since 1991. A number of other large nightclubs competed with the Back Alley in Calgary, but from 1999 to 2004 overall nightclub capacity in the city remained constant. In 1991, drink prices at the Back Alley were $2.75 for beer and liquor. In fiscal 1998 prices increased to $3.75. The Back Alley implemented this price increase at the same time as other nightclubs in Calgary, over a 60 to 90 day period. The Back Alley's financial statements for 1998 indicate that the price increase may have had a significant impact on gross revenues; in that year they rose from a small loss in 1997 to $392,158.

[253] To Mr. Rasberry, a successful nightclub business is one that is growing. A busy nightclub attracts more people. In his view nightclubs are perpetually in the process of losing persons from their customer base and replacing them with new ones. Promotions are essential in this regard.

Loss of a significant portion of the customer base as a result of an incident like the foam party is disastrous, because, in addition to the initial loss of patrons, the problem is compounded by the inability to attract more patrons, because the bar is less busy and therefore less attractive.

[254] The 2001 fiscal year for the Back Alley ended in March, 2001, very shortly before the April 12, 2001 foam party. Mr. Rasberry says that 2001 was a very successful year. Income for the 2001 fiscal year was the second highest in the Back Alley's history, second only to 1998, the year of the last price increase. He anticipated that the 2002 fiscal year would be equally successful.

[255] In Mr. Rasberry's view, the April 12, 2001 foam party had an immediate impact on the Back Alley. Within a week or two of the event, he perceived an immediate, dramatic decline in the number of drinks sold. He felt that the business, which had been consistent for many years, "started to fall like a stone." In Mr. Rasberry's view, the loss was persistent and the Back Alley did not begin to recover until two years after the April 12, 2001 foam party.

[256] Mr. Rasberry said that he initially responded to this decline by taking a "wait and see" attitude for the first 30 days, but then reacted by putting together an aggressive marketing and advertising strategy. The Back Alley increased its advertising budget significantly. It became more aggressive in booking live entertainment and thereby incurred additional expenses. The Back Alley also became much more aggressive in its distribution of what Mr. Rasberry called "gift certificates," which are, in effect, coupons for free drinks.

[257] Gift certificates had formed a part of the Back Alley's marketing strategy prior to the April 12, 2001 foam party. Free drinks were distributed by the Back Alley either in the form of gift certificates generally given out to the public at large or as "management promotion", the latter being the label the Back Alley employs to describe drinks given free to patrons already in the bar. In the wake of the April 12, 2001 foam party, the Back Alley gave away significantly more drinks than in years prior. These free drinks complicate the damages analysis because when the gift certificates are redeemed, they are recorded by the Back Alley as sales, though the Back Alley does not receive cash for these sales. By Mr. Rasberry's count, the Back Alley redeemed approximately twice as many gift certificates in the year following the April 12, 2001 foam party as in the year prior. A thorough analysis of the effect of gift certificates on the Back Alley's revenues was undertaken by the Back Alley's expert, Brian Clark. In addition, Mr. Rasberry provided his own illustration, by way of several graphs, of the effect of gift certificates on the Back Alley's claim.

[258] In order to illustrate the number of drinks sold for cash by the Back Alley, Mr. Rasberry produced a chart, marked as Exhibit 14, comparing actual sales figures, per fiscal period, for the 2001 and 2002 fiscal years. The figures used to generate the chart were sales figures after "backing out" gift certificates. This was necessary because, according to Mr. Rasberry, the post-foam party sales figures are inflated because of the substantially greater number of drinks acquired by Back Alley patrons by way of gift certificates. Once gift certificate drinks are taken out of the equation, Mr. Rasberry's analysis indicated that, while the fiscal-period pattern of sales

was largely consistent from 2001 to 2002, illustrating the seasonal trends of drink sales at the Back Alley, actual cash sales in 2002 were significantly lower than in 2001. Put summarily, to the extent that the Back Alley sales figures as reflected in the financial statements are not significantly less after the foam incident party than before it, the difference can be accounted for in substantial measure by the fact that patrons were using gift certificates to acquire the drinks, and in the result, the Back Alley was not receiving cash for them.

[259] Mr. Rasberry also provided his own assessment of gift certificate expenses in Exhibit 15, in a sense a picture of the reverse side of the cash sales coin. The chart prepared by Mr. Rasberry indicates that, in the immediate wake of the foam party, and for the 2002 fiscal year at a minimum, the Back Alley's gift certificate expenses were markedly higher than those for the prior year.

[260] Mr. Rasberry said that the Back Alley incurred significant additional expenses in respect of entertainment at the Back Alley. Like gift certificates, the effect of entertainment on the Back Alley's revenues extends beyond a simple consideration of the cost of the expense, which was set out in Mr. Clark's report and evidence. In Mr. Rasberry's view, live entertainment pre-booked for the period immediately following the foam party incident meant that the Back Alley's revenues did not decline, when compared to prior years, as much as they otherwise might have.

[261] Mr. Rasberry's charts were put to Mr. Copeland, Debro's expert in respect of the assessment of economic losses. I will return to Mr. Copeland's evidence at length later in these reasons. Mr. Copeland acknowledged that Mr. Rasberry's graphs provide one way of looking at the loss, but said that they can be misleading. Exhibit 14 illustrates cash sales absent the redemption of gift certificates for drinks. Mr. Copeland noted that the concern he had with "backing out" gift certificates and assessing the value of the loss by comparing pre-foam party incident sales against post-foam party incident sales is that the cost of redeemed gift certificates is, to a certain extent, accounted for in determining the cost to the Back Alley of the drinks actually sold. To the extent that additional gift certificates were redeemed in the wake of the foam party, this additional expense to the Back Alley in respect of drinks sold is already reflected in the calculation of Back Alley drink costs by virtue of the mathematics used to calculate the Back Alley's costs and ultimately its revenue from drinks sold. Mr. Copeland says that what appears to be an initial downward trend in cash sales, as reflected in Mr. Rasberry's chart, is, in part, actually reflective of the additional cost to the Back Alley of redeemed gift certificates, as opposed to a decline in sales. More particularly, Mr. Copeland stated Rasberry's chart shows "the impact of the gift certificates" and that this expense (i.e. loss) has already been accounted for in the mitigation expenses incurred by the Back Alley following the foam party incident.

[262] The difficulties associated with interpreting Mr. Rasberry's charts illustrates the difficulty of assessing this loss in general, and the need for expert evidence in this regard. I do not entirely discount the value of Mr. Rasberry's charts, but they must be considered very carefully, in light of Mr. Copeland's evidence. It is worth noting that both Mr. Copeland and Mr. Clark, the expert for the Back Alley, preferred an approach whereby total sales were measured, without "backing

out" gift certificates, and then added the increased costs associated with gift certificates as a separate element of the loss. I prefer this approach.

(e) Economic Loss Experts

Brian Clark

[263] The Back Alley retained Brian Clark to prepare a financial analysis that examined the Back Alley's economic performance prior to and after the April 12, 2001 foam party. Mr. Clark was qualified at trial as an expert in business valuations and the calculation of economic losses. He attempted to calculate what the Back Alley's financial performance would have been, had drink volumes remained at pre-incident levels, and had the Back Alley been able to raise its drink prices in step with its competitors. He was not qualified, and did not speak, to the issue of whether the April 12, 2001 foam party was the actual cause of the alleged reduced financial performance of the Back Alley following the incident.

[264] Mr. Clark's report indicates that he calculated the number of drinks actually sold by the Back Alley in each fiscal year from 1998 to 2004. In fact, he arrived at his calculation by sampling the Back Alley's bottled beer and liquor purchases from 1998 to 2004. For each year, ten invoices were selected from different periods throughout the year, five representing bottled beer purchases and five representing liquor purchases. The cost of the purchases sampled represented between 8% and 10% of the total drink purchases each year. From these samples, Mr. Clark said that it was possible to determine the average cost of a bottle of beer and an ounce of liquor in each fiscal year. By dividing the total annual cost, to the Back Alley, of bottled beer and liquor by the average of the cost per bottle and ounce, respectively, it is possible to estimate the number of bottles of beer and ounces of liquor sold by the Back Alley in each fiscal year.

[265] On this basis, Mr. Clark concluded that from 1998 through 2001, the Back Alley annually sold in the range of 1,100,000 drinks. He used this number as the expected number of drinks the Back Alley could have sold annually in 2002 through 2004, but for the incident. It was Mr. Clark's evidence at trial that this constituted a very conservative estimate, because it did not account for growth in sales. Moreover, the Back Alley sold draft beer in 1998 and 1999 but ceased selling it thereafter. This would also suggest that Mr. Clark's estimate of expected drink sales, but for the foam party incident, is a conservative one.

[266] Mr. Clark's damages calculation was based upon the premise of expected sales of 1,100,000 units of beer and liquor annually at prices approximately equal to that of the Back Alley's competitors. To the extent that the Back Alley charged less than its competitors after the foam party incident, it is, therefore, accounted for in Mr. Clark's damages calculation in the form of "price adjustments". The rationale for the price adjustments is that the Back Alley did not increase drink prices in conjunction with its competitors, as it had traditionally done, because of the negative impact of the foam party. As a result of charging less for drinks than it should have been able to, the Back Alley suffered additional loss of profits.

[267] In 2002, according to Mr. Clark's assessment, actual sales revenue for liquor and beer at the Back Alley was $2,875,291, indicating an average drink revenue of approximately $2.81 per drink, irrespective of whether the drink was sold at the posted price or during happy hour or at a promotional price. The Back Alley sold approximately 1,022,797 drinks in 2002, 77,203 drinks short of the 1,100,000 that, in his view, the Back Alley could reasonably have expected to sell. Applying the revenue calculation to the expected sales, Mr. Clark stated that, leaving aside price increases, the Back Alley's drink revenue should have been $3,092,323. Mr. Clark, however, noted that there was a price increase at the Back Alley's competitors in July, 2001 that the Back Alley said it could not match, due to the effects of the April 12, 2001 foam party. The failure to be able to match competitors' price increases resulted in an additional loss of revenue. For 2002, this price adjustment amounts to $280,733, increasing the Back Alley's expected revenues from drink sales to $3,373,056. From this, Mr. Clark subtracted the estimated cost to the Back Alley of the expected 1,100,000 units of beer and liquor, for an expected profit of $2,542,626. Actual profit, based upon revenues arising from and cost of the 1,022,797 units "actually" sold, was $2,103,144, resulting in a loss of $439,482 from drink sales in fiscal 2002.

[268] Mr. Clark's estimate of expected liquor and beer revenue for fiscal 2003 began with the estimated revenue for 2002. He took the $3,373,056 figure from 2002, and assumed this to be the expected gross drink revenue for 2003. He noted that a further price increase in the industry, which the Back Alley did not match, was instituted in 2003. He calculated the price adjustment to be an additional $449,173. Total expected drink revenues for 2003, therefore, were $3,822,230. Expected profit from drink sales for 2003 he calculated to be $2,928,812, after deducting from the expected revenue, the estimated costs of 1,100,000 units of beer and liquor for 2003. According to Mr. Clark, however, the actual number of drinks sold fell even more precipitously in 2003. Based again upon his calculation of the average cost of drinks and the Back Alley's actual expenditures, he estimated that the Back Alley actually sold 879,337 drinks in 2003. Actual profit, based upon revenues arising from and cost of the 879,337 drinks sold, was $2,133,162. The loss of profits to the Back Alley from drink sales and the failure to match competitors prices in 2003, therefore, was $795,650.

[269] For 2004, Mr. Clark began with expected revenues, on the basis of the 2003 figure, at $3,822,230.There were no additional drink prices in the industry that the Back Alley failed to match in 2004, but for the first three periods of that year the Back Alley continued to lag behind its competitors in drink prices, resulting in a need to make a drink price adjustment of $84,220 for 2004. Total expected drink revenues, therefore, were $3,906,450. After deducting estimated costs for 1,100,000 drinks from the expected revenues, Mr. Clark arrived at an expected profit of $3,003,273. The actual number of drinks sold, according to Mr. Clark, was 923,177. This resulted in an actual profit from drink sales, based upon revenues arising from and cost of the 923,177 units sold, of $2,243,522. Mr. Clark therefore, calculated loss of profits for 2004 at $759,751.00.

[270] Mr. Clark also calculated losses in respect of a six-month stub period between the end of fiscal 2004 to shortly before trial. There were no price increases over this period. Applying the same analysis, he calculated a loss of profit from drink sales for that period in the amount of

$277,778. Adding all of the loss of profit figures from drink sales for 2002, 2003, 2004 and 2005, Mr. Clark arrived at a total loss of profits of $2,272,663, as shown on Exhibit 31.

[271] In addition to the loss of profits, Mr. Clark incorporated into his calculation of damages the Back Alley claim that it had incurred significant extra expenses as a result of the April 12, 2001 foam party. These expenses included an increase in the cost of gift certificates distributed to patrons and potential patrons and redeemable for free drinks, increases in advertising and promotion expenses, a rent increase, increased insurance premiums and legal fees.

[272] The Back Alley did not immediately increase gift certificate distribution in the wake of the April 12, 2001 foam party. Mr. Rasberry said this was because he had two popular bands booked for the bar and felt this would be a sufficient draw. Later, however, according to Mr. Rasberry and Mr. Clark, gift certificate distribution was significantly increased to draw patrons to the bar.

[273] Mr. Clark calculated the cost of gift certificates by taking the value of redeemed certificates, which was recorded by the Back Alley, and then determining the ratio of gift certificate expenditures as a proportion of liquor and beer revenue. The cost to the Back Alley of a gift certificate is lost revenue that would otherwise occur in the event of a sale. Based upon the number of gift certificates redeemed in 1999, 2000, and 2001 (the years prior to the foam party incident), Mr. Clark calculated that on average the Back Alley's gift certificate expense, as a percentage of drink revenue, was 3.53% for those years. His calculation of losses in the 2002, 2003 and 2004 years was based upon a comparison of an expected cost to the Back Alley of 3.53% of its drink revenues as compared to the actual cost for those years. Mr. Clark indicated he gave no consideration to applying any other percentage figure other than the 3.53% nor applying any discount to the 3.53% when doing his calculations. Mr. Clark calculated the cost to the Back Alley of gift certificates in 2002, 2003 and 2004 to be 6.92%, 5.30% and 4.46% of drink revenues respectively. On this basis, he arrived at a total figure of $184,294 for increased gift certificate expenses for those years.

[274] Mr Clark pointed out that the Back Alley increased its expenditures for advertising, promotion and entertainment to mitigate against the adverse effects of the foam party incident. More specifically, the Back Alley entertainment expenses increased after the foam party incident as the Back Alley wanted to obtain the best possible entertainment for its customers, so as to maintain its existing customer base and attract new customers. With respect to these advertising, promotion and entertainment expenses, Mr. Clark took the Back Alley's actual expenditures for 1999, 2000 and 2001 and averaged them, for an average annual expense of $552,783. Actual expenses in 2002 were $653,011, in 2003 the expenses were $599,025, and in 2004 the figure was $698,050. Mr. Clark then corrected for the expected inflationary increase by applying figures for the consumer price index for Alberta for those years. He arrived at a total additional expense of $175,964 for advertising, promotion and entertainment.

[275] The Back Alley claim included additional rent expenses. On December 15, 2001, the Back Alley's rent increased from $12 to $15 per square foot. Assuming that rent would have

increased to $13 per square foot, but for the April 12, 2001 foam party, Mr. Clark arrived at a loss in the amount of $71,470. The Back Alley claim also included $56,869 in legal fees, which the Back Alley claims it incurred in defending the punitive damages aspects of the personal injuries claims.

[276] Compiling the claims for lost profits and extra expenses together, Mr. Clark arrived at a total loss due to "unit losses" or fewer drinks sold, in the amount of $1,230,607; a price adjustment loss, due to the inability of the Back Alley to raise prices in step with its competitors, in the amount of $1,042,056; and total extra expenses including gift certificates, promotions and entertainment, rent and legal fees in the amount of $488,598. Adding all of these figures together, this amounts to a loss of $2,761,261. Mr. Clark calculated pre-judgment interest on this sum to October 31, 2004 to be an additional $210,902. He rounded the sum of these figures to $2,972.000. This is the Back Alley claim.

[277] Mr. Clark's report and additional summaries were reviewed by Kevin Copeland, a forensic accountant retained by Debro. Mr. Copeland took issue with a number of aspects of Mr. Clark's opinion. Mr. Clark offered no explanation as to why the foam party incident appeared to impact only liquor sales volumes and not beer sales volumes. Mr. Copeland questioned the lack of a period-by-period analysis of the Back Alley's revenues before and after the foam party. He questioned the calculation of losses due to the alleged inability to increase drink prices. Perhaps most significantly, Mr. Copeland noted that the Clark report did not acknowledge that the Back Alley's sales volumes might have been impacted by factors other than the foam party, such as price increases, cover charge increases, and other industry and economic factors. In effect, Mr. Copeland challenged the assumption that the Back Alley would, in the face of these other factors, continue to sell 1.1 million drinks annually.

Kevin Copeland

[278] Kevin Copeland was retained by Debro, and also attempted to assess the financial impact, if any, of the April 12, 2001 foam party on the Back Alley. Mr. Copeland is a forensic accountant and currently the partner in charge of the Calgary office of LBC International Investigative Accounting Inc. He was qualified to give opinion evidence in the area of investigative accounting, with respect to the economic impact of the foam party incident upon the Back Alley. Mr. Copeland's assessment is profoundly different from Mr. Clark's. In short, he is of the view that the foam party incident had no apparent impact on the Back Alley's sales revenues. Although Mr. Copeland acknowledges there has been a decline in drink sales over the period claimed by the Back Alley, Mr. Copeland does not characterize this as an economic loss to the Back Alley for he seriously questions whether the decline in drink sales is attributable to the foam party incident.

[279] Mr. Copeland's methodology for assessing both the pre-incident and post-incident financial performance of the Back Alley is very different from the methodology employed by Mr. Clark. The Back Alley accounts for its operations over 13, 28-day fiscal periods each year. As a result, while the fiscal year ends in approximately mid-March, it fluctuates slightly, and the fiscal

periods do not match up precisely from year to year. Rather than apply an average of the number of drinks sold in the years immediately prior to the foam party incident, Mr. Copeland distinguished beer from liquor sales and compared sales of each, per fiscal period, in the years after the incident, to sales in fiscal 2001, the year prior to the foam party incident. He noted that beer sales were an important part of the Back Alley's business.

[280] As a result of the mid-March fiscal year and 28-day fiscal periods, the April 12, 2001 foam party took place at the end of the first fiscal period in the 2002 fiscal year. While sales of beer at the Back Alley appeared to have dropped off in the fiscal period following the foam party incident (period 2 of fiscal 2002), Mr. Copeland says that the total volume of sales was actually 38% higher than the equivalent fiscal period in the prior year. Sales volumes in the equivalent fiscal period of 2003 also appeared to be higher than in 2001. While, over the course of the 13 fiscal periods in each of fiscal 2002 and 2003 there was some variation on the plus and negative side from sales volumes in fiscal 2001, Mr. Copeland observed that in general there was no downward trend in beer sales. To him, what appears to be happening here is, "we have beer sales remaining very consistent from 1999 through 'til 2004."

[281] Mr. Copeland also compared the post-foam party incident fiscal period beer sales volume to the 1999 - 2001 average for each fiscal period. His comparison on this basis appears to support the same conclusion as the fiscal period to fiscal period comparison. Mr. Copeland opined that, while there were some fluctuations from period to period in beer sales volumes, the fluctuations were both positive and negative and did not support the conclusion that there was a general downward trend in beer sales after the foam party incident. In respect of beer sales, which Mr. Copeland said constituted 36% of the Back Alley's revenue in fiscal 2001, the foam party had no apparent effect.

[282] In contrast, Mr. Copeland pointed out that the Back Alley had, on the whole, sold significantly less liquor since 2001. However, after comparing liquor sales volumes in the same manner as beer, Mr. Copeland highlighted a number of points. First, in fiscal period one of 2002, which was immediately prior to the April 12, 2001 foam party, liquor sales volumes at the Back Alley were down 16% from the same fiscal period for the prior year. In other words, sales volumes for liquor may have commenced a general decline prior to the foam party. The fiscal periods immediately after the foam party showed only minor declines from the prior year, then were followed by a brief recovery, and then substantial declines in liquor sales following fiscal period 8 of 2002, or November, 2001. Mr. Copeland pointed out that this was more than six months after the foam party and that he was having trouble understanding why that would relate back to the foam party incident. He also pointed out that the decline in liquor sales occurred during a period when the Back Alley increased prices from $3.75 to $4.50 and cover charges from $2.00 to $5.00, which may have had some negative effect on sales volumes. So too, he opined that the sales volume decrease may have also related to other economic and business factors such as the effect of the events of September 11, 2001 and the activities of the Back Alley's competition. He noted that, on the whole, the decline in liquor sales was greater in 2003 than in 2002. To Mr. Copeland, this suggested that the declines were unrelated to the foam party

incident, as one would expect the losses to have been greater in the weeks and months immediately following the foam party, not some two years later.

[283] Mr. Copeland was puzzled by this discrepancy between the lack of a decline in beer sales volumes and the clear decline in sales volumes of liquor following the foam party incident. In his initial report, he speculated that there were a range of possibilities for the decline in sales volumes, including a change in the type of clientele, changes in clientele drinking habits, changes in promotional efforts or emphasis by alcohol suppliers and/or the Back Alley itself and the impacts of competitor activities. Prior to writing his rebuttal report, he located research articles suggesting that liquor consumption is more susceptible to price increases than beer consumption: see Chaloupa, Grossman and Saffer: The Effects of Price on Alcohol Consumption and Alcohol Related Problems, *Alcohol Research and Health*, Vol. 26, No.1 (2002) and Johnson, Oksanen, Veall and Fretz: Short-Run and Long-Run Elasticities for Canadian Consumption of Alcoholic Beverages: an Error-Correction Mechanism/Cointegration Approach, *The Review of Economics and Statistics*, Vol.74, No.1 (Feb.1992). He noted, in his report, that the statistics in the studies track, somewhat, to the Back Alley's rates of liquor consumption.

[284] In addition to his analysis of units of beer and liquor sold, Mr. Copeland compared sales revenue in 2002 and 2003 to the average of each fiscal period in the years 2000 and 2001. He did not include cover charges, VLT or sundry revenue from the Back Alley in the analysis. His assessment on the basis of sales revenue was that beer and liquor sales in the period immediately following the foam party incident (period 2 of fiscal 2002) did not decline, and in fact were higher than the average in 2000 and 2001. In general, sales patterns after the foam party followed the same seasonal trends as in 2000 and 2001, suggesting that the fundamental business had not changed. Mr. Copeland noted that sales by period in both 2002 and 2003 were at similar levels to the average of the years 2000 and 2001.

[285] Mr. Copeland also reviewed the Back Alley claim for increased costs, including gift certificates, promotions, concert band expenses and other advertising. He observed that the use of gift certificates increased after the foam party incident. It was Mr. Copeland's understanding that Mr. Rasberry increased the use of gift certificates, although that was delayed a period, in direct response to the foam party incident. As a result of that, Mr. Copeland did an analysis of the gift certificates to determine to what extent those gift certificates had increased over the prior year.

[286] In conducting this analysis, Mr. Copeland analyzed gift certificates as a percentage of beer and liquor revenue. He noted that, to the extent that the ratio of gift certificate costs compared to revenue was higher in 2002 and 2003, versus the average of 2000 and 2001, there was an increased cost to the Back Alley. Costs were highest in fiscal periods 3, 4 and 5 of fiscal 2002, beginning, therefore, one month after the foam party incident. Interestingly, the most prominent increase in gift certificate costs, in period 4 of fiscal 2002, also occurred in the same month as a 50-cent increase in drink prices. It is Mr. Copeland's view that some portion, perhaps 25%, of increased gift certificate expenses should be apportioned to the need to offset the potential negative sales effects of an increase in drink prices and cover charges and the other

factors he noted, because as he concluded in paragraph 42 of his report ". . . some of the advertising and the promotion costs must relate to supporting the other factors."

[287] In addition, Mr. Copeland calculated what he believed to be the increased costs the Back Alley incurred for bands and other advertising and promotion expenses following the foam party incident. These calculations are set out in Schedules 5 and 7 of his original report and they take account of the 25% earlier noted.

[288] Mr. Copeland also noted that there was an increase in the Back Alley's average annual net income from 2002 to 2004 as compared to prior years, and that management fees paid to Doug Rasberry and his wife, which are essentially a discretionary distribution of profit, increased over the period. He indicated that when there are increased management fees being taken out of a business that is generally reflective of a business doing well and being profitable. Mr. Copeland observed that between 1999 and 2001, average net income plus management fees and taxes ("NIBMFT") for the Back Alley were $233,000. Average NIBMFT for the three years after the foam party incident increased by 71% to $399,000. Profitability, after the foam party incident, increased to levels not previously attained since 1997. Management fees increased from an average of $117,561 per year for 1999 to 2001 to an average of $221,688 per year for 2002 to 2004. Mr. Copeland attributed a part of the increase in revenues and profitability to cover charge revenues. He noted that Mr. Rasberry denied a connection between cover charge revenues and the volume of drink sales. However, in Mr. Copeland's view, cover charges constituted money taken from the same customers who purchase the drinks, and it would be unrealistic not to account for this in considering the volume of drink sales.

[289] It is worth noting that, notwithstanding Mr. Copeland's conclusion that the foam party incident did not have an impact on the number of drinks sold at the Back Alley after April 12, 2001, he did express the opinion that, to a certain extent, the Back Alley did incur additional expenses, both in the form of gift certificates and additional advertising and promotion costs, to mitigate reduced sales following the incident. After applying a 25% discount to account for that portion of these additional expenses that, in his opinion, were more properly attributed to mitigating the effect of other factors, including price increases, Mr. Copeland concluded, in his report, that an appropriate figure for these additional costs attributable to the foam party incident was $96,763. He stated at paragraph 43 of his report that: "This increase in expenses impacted net profit by decreasing it in the same amount."

[290] Mr. Copeland's approach to the assessment of the loss was submitted to Mr. Clark for review. Mr. Clark took issue with a number of aspects of Mr. Copeland's assessment. Mr. Clark criticized the period-by-period approach taken by Mr. Copeland on the basis that it failed to recognize significant factors that could affect the financial performance of the Back Alley in a given period. Mr. Clark submitted that, whether the Back Alley had prominent bands booked in a certain period, the weather, and the variable dates of fiscal periods (meaning that a long weekend falling within a given fiscal period in one year might fall within a different period the following year) would all impact upon the bar's performance in a given period. In effect, Mr. Clark contended that a period-by-period analysis is too narrow to adequately account for these

contingencies. He noted that Mr. Copeland did not dispute what he perceived to be the more significant statistic, the total number of drinks sold by the Back Alley from fiscal 2002 to fiscal 2004. Mr. Clark said that Mr. Copeland's analysis did not sufficiently account for the Back Alley's mitigation strategies, including an aggressive approach to advertising and increased entertainment costs, but more significantly the Back Alley's very aggressive use of free drinks and competitive pricing.

[291] Mr. Clark also took issue with Mr. Copeland's focus upon bottom-line revenues, profitability and management fees in the years since the foam party incident. In his view, this focus on the part of Mr. Copeland had nothing to do with calculating the Back Alley's losses. The real issue, in Mr. Clark's view, was not bottom-line revenues but loss of sales volumes following the foam party incident.

[292] Another issue, which occasioned considerable debate among Mr. Clark, Mr. Copeland, and counsel for the Back Alley and Debro, was Mr. Copeland's comments concerning SOCAN costs and the manner in which the Back Alley accounted for them. SOCAN is the Society of Composers, Authors and Music Publishers of Canada. SOCAN charges royalties or tariffs on the performance of works registered with SOCAN. Not all of the artists who play (or played) at the Back Alley are registered with SOCAN. Consequently, while SOCAN costs appear to form part of the Back Alley's financial records, they do not reflect, as the Back Alley made abundantly clear, amounts paid to non-Canadian artists, and therefore do not provide a complete reflection of the Back Alley's costs in respect of live musical entertainment. I do not propose to explore the SOCAN issue at any further length, beyond pointing out that Mr. Copeland's comments with respect to these costs were primarily directed at his concern that the accounting records appeared to be incomplete, or indicated that, at some point, the Back Alley's method of accounting for SOCAN expenses, in particular with respect to the means by which the Back Alley "netted off" cover charges, appeared to have changed. My assessment of damages does not rely upon Mr. Copeland's opinion with respect to entertainment expenses, and therefore his use of SOCAN figures in his calculation of expenses is not a factor in my analysis. It was repeatedly suggested by the Back Alley that Mr. Copeland's use of SOCAN figures reflected a fundamentally flawed analysis and a misunderstanding of the nature of the nightclub industry and seriously undermined his opinion in general. I do not believe that Mr. Copeland's use of SOCAN figures significantly impacted upon the usefulness of his opinion in general and therefore it does not affect the weight that I give to that opinion.

(f) Findings in Respect of Damages for Economic Loss

[293] As noted earlier, I am satisfied on a balance of probabilities that there is a causal link between the April 12, 2001 foam party and some of the economic loss suffered by the Back Alley. Debro, however, points to Mr. Rasberry's testimony, wherein he admitted that he has no way of telling how many people are in his bar on any given night. Furthermore, he has provided no evidence as to whether a decrease in the number of drinks sold is the result of more people drinking less, the same number of people drinking less, fewer people drinking the same number of drinks or fewer people drinking less drinks. Also, Debro contends that the Back Alley has

never presented any evidence as to whether its patrons ceased attending at the Back Alley because of the foam party incident. In the result, Debro concludes there is no evidence before the Court that fewer people attended at the Back Alley and therefore fewer drinks were sold as a result of the foam party incident. Because in Debro's view this casual link has not been established, it may be that the number of people frequenting the Back Alley never did change after the foam party incident.

[294] Mr. Rasberry responded to this argument with his own personal observations of attendance at the Back Alley following the foam party incident. Further, he argued that common sense should lead one to the conclusion that fewer people would attend and therefore less drinks would be sold after such a disastrous promotion as the April 12, 2001 foam party and the attendant publicity surrounding it.

[295] The evidence clearly established that there was substantial media interest in the foam party incident, resulting in very negative publicity for the Back Alley. Both Mr. Morrison for the Back Alley and Mr. Campbell for Debro gave evidence that indicated that an event such as this one, in which there was an adverse health impact upon the clientele of a business in the hospitality industry, can be expected to yield negative economic consequences. Subject to my concerns, set out below, with respect to the quality of the evidence provided by the Back Alley concerning the number of patrons at the bar in the wake of the foam party incident, I find, on a balance of probabilities that a number of those injured, and a certain number of patrons who might otherwise have returned to the Back Alley after April 12, 2001, would have been reluctant to do so because of the foam party incident. Moreover, I am satisfied that Mr. Rasberry had a legitimate concern with respect to the negative impact of the foam party incident on his business and as a result undertook a program whereby the Back Alley incurred additional expenses.

[296] I am also satisfied that the nature of the loss would have been reasonably foreseeable to Debro, Tanshaw, and Jay Johnson, all of whom were aware that the product they were marketing, producing and/or distributing would be used at a promotional event at a nightclub. Under the circumstances, I reject the contention that claims for loss of profits, or opportunity to earn profits, on the part of a nightclub using Lakeside Bubbles are forms of damages that could not reasonably have been foreseen.

[297] Mr. Clark and Mr. Copeland came to significantly different conclusions with respect to the extent of the Back Alley's losses in the wake of the April 12, 2001 foam party. Both Mr. Copeland and Mr. Clark were well qualified experts. Though the assessment of the Back Alley's losses was necessarily complex, both Mr. Clark and Mr. Copeland provided helpful evidence. The essential nature of their disagreement is in the weight to be given to the Back Alley's bottom-line financial performance and the reasonableness of the assumption that the Back Alley could expect to continue to sell 1.1 million drinks on an annual basis in the face of a variety of circumstances, both external and of the Back Alley's own making, following the April 12, 2001 foam party.

[298] The Back Alley suggests that Mr. Copeland, in stating the conclusion that the April 12, 2001 foam party caused no demonstrable losses, has strayed from his field of expertise and has provided an opinion with respect to causation. In my view, this is a misconstruction of Mr. Copeland's evidence. What Mr. Copeland has done is to provide, by way of his analysis, possible alternative explanations for some or all of the decline in drink sales. It was not Mr. Copeland's task to prove that any of these alternatives were solely or in part responsible for a decline in drink sales; it was his task to assist the Court in assessing the Back Alley's claim. Mr. Copeland provided a helpful, larger picture of the Back Alley's financial performance in the wake of the April 12, 2001 foam party. I am aware of the flaws inherent in Mr. Copeland's period-by-period analysis. It fails to account for a variety of contingencies, such as unique promotional events and varying fiscal period dates, that may impact the Back Alley's financial performance within a given period and renders comparisons of periods from year to year problematic. I note, however, that both Mr. Copeland's and Mr. Rasberry's period-by-period analysis show a relatively consistent pattern, when comparing periods over different years. Mr. Copeland's methodology is not so flawed as to fail to show the seasonal patterns of drink consumption at the Back Alley to which Mr. Rasberry alluded in his evidence.

[299] I appreciate that Mr. Clark was instructed to carefully limit his assessment to the scope of his expertise, and to avoid drawing conclusions with respect to causation. Mr. Clark relied upon the crucial assumption that the Back Alley could expect to continue to sell 1.1 million drinks in the years following the foam party. He was forthright about the assumptions that brought him to his conclusions, and his evidence clearly established that the Back Alley has not sold 1.1 million drinks per year, in the years following the April 12, 2001 foam party. I accept Mr. Clark's proposal that the difference between expected and actual results is the appropriate approach to measuring a loss, with the qualification that Mr. Clark did not take account of any contingencies following the incident that could have affected the feasibility of the 1.1 million drink target.

[300] I also accept, subject to my findings with respect to the duration of the loss and the effect of drink and cover charge increases in the years following the foam party incident, that the 1.1 million benchmark for expected drink sales used by Mr. Clark in his analysis is a reasonable target for the number of drinks the Back Alley could have expected to sell. The 1.1 million drink target takes account of fluctuations above and below that number in the years prior to the foam party incident. It remains reasonable, however, only to the extent that other factors, including drink price increases, rising cover charges, and external factors affecting the industry in general, would not have had an impact on the number of drinks sold. The point at which these other factors impact on the number of drinks sold is the point at which the 1.1 million drink target is no longer sustainable.

[301] Counsel for the Back Alley, if not Mr. Rasberry, acknowledged that contingencies since April 12, 2001 may have had some impact on the number of drinks sold at the Back Alley. To the extent that these contingencies are not accounted for in Mr. Clark's evidence, it was suggested that I apply a contingency deduction, following *Plas-Tex*. In that case, Justice McIntyre, faced with a particularly difficult problem of damages assessment, determined that the only reasonable

means to take account of the various contingencies in respect of a loss of profit claim was to apply a 50% deduction to the assessment provided by the expert at trial.

[302] I do not believe that the approach taken in *Plas-Tex* is appropriate in the present case. I note that in *Plas-Tex*, only one expert, Mr. Clark, gave evidence with respect to the valuation of loss of profit. In the present case, there was sufficient evidence with respect to the cause, extent, and potential duration of the Back Alley's losses to allow me to draw a conclusion, on the balance of probabilities, with respect to those losses, without the necessity of applying what would, in essence, be a largely arbitrary contingency deduction.

[303] In that regard, a number of factors are worth noting. I find it significant that the April 12, 2001 foam party was marketed as a special promotion to students at the University of Calgary, who were not, by all accounts, the largest portion of the Back Alley's customer base. The Back Alley, Mr. Rasberry conceded, ordinarily caters to a substantially blue-collar clientele. In my view, it is likely that a significant number of the patrons present at the Back Alley on April 12, 2001 were not part of the regular client base that the Back Alley claims was adversely affected by the foam party incident. I have some doubt, therefore, as to whether the Back Alley's blue-collar customer base was eroded to the extent Mr. Rasberry contends.

[304] It is and was common ground that nightclub patrons are notoriously fickle. The only constant in the nightclub industry, Mr. Morrison said, was change. The Back Alley contends that this means its customer base would be easily convinced, by an incident such as this, to transfer its loyalty elsewhere. But this fickleness cuts both ways. It also suggests that the Back Alley's clientele could easily be swayed away from the Back Alley, or in the number of drinks they consumed, by other factors as well, including price increases, nightclub promotions and other trends within the industry.

[305] While it is apparent that the media coverage of the foam party incident was somewhat sensationalistic and cast the Back Alley in an unfortunate light, it does not appear, from the evidence at trial, that there was a significant amount of media coverage beyond the first week after the incident. I am not persuaded that the public recollection is such that the Back Alley continued to operate under the stigma of the April 12, 2001 foam party for a period of four years following the incident. In this regard, I note that the incident itself was somewhat unique. It was, in the words of Mr. Campbell, a one-off promotion that went badly awry. Foam parties were never repeated at the Back Alley. It was not in the serious nature of food poisoning, or persistent notorious violence, which would be expected to permanently attach to a nightclub's reputation. The foam party failed disastrously, but it was a single incident, more suggestive of the potential perils of foam parties than a chronic problem at the Back Alley. Furthermore, as Mr. Campbell stated on page 3 of his rebuttal report of September 8, 2004: "The fact that the Back Alley continues to hold regularly featured promotions bears evidence to the fact that the operation of the business which creates the revenues stream survived the event of April, 2001...".

[306] While I am prepared to accept that the foam party had an adverse consequence on the number of patrons attending the Back Alley and, therefore, upon the number of drinks sold

following it, I am not prepared to accept that the foam party is responsible to the extent that the Back Alley alleges.

[307] Aside from Mr. Rasberry's assessment of the number of patrons in the Back Alley after the incident, there was no independent evidence upon which it could be determined that there actually have been fewer people in the Back Alley. It was apparent that the Back Alley has never conducted head counts, either before or after April 12, 2001. While Mr. Rasberry's assessment is worthy of consideration, I do not believe that I can put significant weight upon it without some support, at least, by the observations of the Back Alley's general manager, Dennis O'Neill, who spent considerably more time than Mr. Rasberry at the Back Alley over the relevant period but who, for whatever reason, was not called to give evidence.

[308] It was Mr. Rasberry's evidence that he attended at the Back Alley, during evening hours, about once every two weeks. The Back Alley is open four nights per week. Mr. Rasberry was there, to make an assessment of activity at the bar during its evening hours, on about 15% of the days that the bar was open. Moreover, Mr. Rasberry's account of a dramatic and precipitous decline does not accord well with the information recorded by Mr. Rasberry's managerial staff in the Back Alley's own logbooks. Mr. Rasberry suggested that the logbooks were not particularly reliable. He said that he did not fully trust his management to make accurate assessments of "busyness", either at the Back Alley or at the competing nightclubs to which he occasionally sent them. He said that his managers lacked his experience and, to cast themselves in a better light, were likely to play up attendance at the bar in the logbook. I was not convinced by his evidence in this regard. Mr. Rasberry entrusted his staff with significant managerial responsibilities. I do not believe that only he had the requisite expertise to assess how busy the Back Alley or other nightclubs were. The logbooks do not attest to a precipitous decline in the number of people at the Back Alley. They frequently compare the number of patrons inside the Back Alley very favourably against its competitors. For example, there are numerous notations throughout the 2001 - 2004 period that suggest that the Back Alley was matching or beating its competitors in attendance at its bar.

[309] This lack of evidence, and contradictory evidence, with respect to the number of patrons inside the Back Alley must be contrasted with what by all accounts is a demonstrable decline in drink sales. This is the point at which the validity of Mr. Clark's assumption with respect to ongoing drink sales must be considered in the light of Mr. Copeland's assessment of the potential impact of other factors on drink sales.

[310] I do not believe it is reasonable to conclude that the number of drinks sold within the Back Alley would not be sensitive to a series of price increases, in respect of both drink prices and cover charges. The Back Alley contends that, prior to the foam party incident, it was always well positioned to match its competitors' prices without risk of declining sales. It brought evidence to the effect that its competitors increased drink prices after April 12, 2001 and continued to do very well and remained very busy. Like the evidence in respect of the Back Alley, however, the evidence in respect of its competitors was not entirely clear in terms of the number of drinks sold as opposed to revenue generated. The witnesses who were in a position to

give evidence with respect to the Back Alley's competitors all said that they continued to do very well in the wake of price increases. (It is important to note, however, that the Court did not have the benefit of reviewing those competitors' financial statements.) With a view to bottom-line financial performance, and the logbooks, it could also be said that the Back Alley performed very well over the same period. At some point, however, price increases are likely to result in a reduction of the number of units sold, though the effect of the price increase may be to preserve or even increase bottom-line revenues.

[311] I further note that, notwithstanding the Back Alley's assertions that prior to the foam party incident the Back Alley was always able to match its competitors' prices, the Back Alley was, in fact, charging less for cover charge. At the time of the foam party incident, the Back Alley's cover charge was $2 to its competitors $5. Since the foam party incident, the Back Alley has increased its cover charge and now matches its competitors. To the extent that the lower charge gave the Back Alley a competitive advantage, that advantage no longer exists.

[312] It is worth considering, in view of what appears to be the very strong bottom-line financial performance of the Back Alley in the years since the foam party incident, what the Back Alley's revenues would have been if Mr. Clark's assumption of sales volumes had prevailed. By Mr. Clark's assessment, bottom line revenues, which were $392,158 in fiscal 1998, $187,564 in 1999, $188,865 in 2000 and $415,744 in 2001, should have increased to $829,289 in fiscal 2002, $1,461,116 in 2003 and $1,368,536 in 2004 as per his Schedule 7 of Exhibit 31A. Mr. Clark defended his opinion that the Back Alley could have reasonably expected this striking increase in revenues on the basis that the 1998 drink price increase had a similar effect, raising revenues from a small loss in 1997 to $392,158 in 1998.

[313] I accept the proposition that the appropriate measure of damages is the actual performance of the Back Alley against expected results. In certain circumstances, a business may continue to perform well, and continue to grow, and nevertheless have suffered a loss compensable in damages. In that sense, the continued prosperity of the Back Alley, at least as demonstrated by its financial statements, is not determinative of the issue of whether the Back Alley has suffered a loss. Nevertheless, the suggestion that the Back Alley could reasonably have expected such a profound increase in revenues bears very close scrutiny and, to a certain extent, must call into question the reasonableness of Mr. Clark's assumptions.

[314] The Back Alley conceded that the decline in drink sales in the years since the foam party incident is essentially a decline in liquor and not beer sales. A decline in the sales of one product, and not the other, is difficult to reconcile with the proposition that the Back Alley had lost a substantial portion of its customer base, resulting in fewer patrons inside the bar. Mr. Rasberry said that a number of factors may be at play, including a shift in patrons' preferences and increased and creative marketing by the nation's brewers. Equally compelling is Mr. Copeland's suggestion that liquor consumption is more sensitive to price increases than beer consumption.

[315] It is also worth noting that Mr. Copeland's period-by-period analysis reveals that beer sales in the four weeks after the foam party incident were up 38% over the equivalent period in

the prior year, and liquor sales in the 12 weeks following the incident were only slightly below those of the prior year. It is, as Debro points out, somewhat counterintuitive to suggest that the Back Alley's losses would start small in the immediate wake of the foam party incident and grow more pronounced with time.

[316] I appreciate that for the weeks immediately following the foam party incident, the Back Alley had pre-booked a number of prominent recording artists to play at the bar, and pre-sold tickets, thereby potentially increasing sales for the period. But the Back Alley's financial performance immediately after the foam party incident suggests that it was not suffering the immediate and severe impact that Mr. Rasberry said he observed. Taking the broader view, the fact that the losses claimed for 2003 are more substantial than those for 2002 is problematic, and more consistent with the proposition that factors other than the foam party incident were having an impact on unit sales at the Back Alley.

[317] I am satisfied that the Back Alley did incur some additional expenses in the wake of the foam party incident. It was apparent that Mr. Rasberry considered the April 12, 2001 foam party to be a disaster for his business and felt compelled to address the situation. I am satisfied that, to a certain extent, additional expenses can be attributed to the need to preserve or rehabilitate the Back Alley's reputation with nightclub goers in Calgary. Like the loss of profit claim, however, I have serious doubts with respect to whether all of the Back Alley's claim for increased expenses, can be attributed to the foam party incident. I note that over the period of loss claimed by the Back Alley, the bar continued to distribute a substantial number of free "promotions management" drinks, essentially free drinks to patrons who were already in the bar. This is a form of promotion that Mr. Rasberry himself conceded together with Mr. Clark was of very limited value. In fiscal 2002, immediately following the foam party incident, the cost to the Back Alley of these free drinks was greater than the cost of gift certificates, the latter of which were acknowledged to be a much more effective means of promoting the bar.

[318] In my view, the Back Alley has not established that the loss attributable to the foam party extends over the four-year period claimed. In coming to this conclusion, I rely upon the factors discussed, above. I do not accept that the Back Alley could be wholly insulated from the range of factors that have had an impact on the hospitality industry in the period since the foam party incident. I do not accept the proposition that the Back Alley could reasonably have expected to continue to sell 1.1 million drinks annually, in view of its substantial drink price and cover charge increases. I do not believe it is reasonable to assume that the Back Alley could have increased its prices, resulting in the very significant increase in the revenues projected by Mr. Clark, without suffering some loss in unit sales. In my opinion, there is a connection between the number of units sold and the price patrons are required to pay for them. I am mindful of the evidence of the industry witnesses who said that their respective establishments remained busy in the wake of price increases, but it is to be remembered that the Court did not have the benefit of examining these establishments' financial records, which may well have told a different story.

[319] I find that the most appropriate approach to the assessment of the Back Alley's damages is to take all of the foregoing factors into account and determine a reasonable period over which

the loss could have been expected to persist, all the while being mindful of the potential effect of drink price and cover charge increases on the volume of drink sales. Debro suggests that, if there has been a loss, it was of very short duration, as short as a month. I am not convinced that this is the case. The foam party incident occasioned significant media scrutiny. Through no fault of the Back Alley's ownership or management, the Back Alley was cast in a bad light.

[320] The foam party incident occurred in April, 2001, and the event itself was primarily directed at university students. According to Mr. Rasberry, the Back Alley raised drink prices by 50 cents, from $3.75 to $4.25, shortly prior to July 8, 2001. Cover charges were increased from $2.00 to $3.00 in September, 2001. Significant events occurred in September, 2001, which had an impact on the hospitality industry in general. Bottom-line financial results for the Back Alley for the 2002 fiscal year show profits of $175,233, as opposed to $321,368 for the prior year, and appear to reflect a decline in the Back Alley's financial circumstances at that time. I find that the appropriate period over which to assess the Back Alley's losses and extra expenses is from the foam party incident to the end of September, 2001. By that time, the fall/winter term for the university students who were the primary target of the foam party promotion had ended, and a new fall/winter term had begun. The media focus upon the Back Alley had long since passed.

[321] At my request, Mr. Clark calculated the Back Alley's loss of profit and extra gift certificate and promotions and entertainment expenses from the date of the foam party incident to the end of September, 2001. From the entertainment expenses he deducted the costs associated with bands that had been booked prior to April 12, 2001. As I directed, Mr. Clark used his assumption of 1.1 million drinks in expected sales per annum as the basis for comparison with actual sales. Mr. Clark took issue with using the 1.1 million drink target in assessing the loss over this period. Mr. Clark arrived at the 1.1 million benchmark because he had previously been asked by the Back Alley to assess a multi-year loss, and felt, therefore, an average of three years prior to the loss would be the most appropriate figure to apply. He said that, assuming a loss of several months, he might be inclined to consider different factors and use a different benchmark, possibly sales for the one year prior to the incident, or comparable fiscal periods in prior years. Notwithstanding Mr. Clark's concerns, I see no reason, in principle, why the 1.1 million benchmark, based upon a 3-year average, if it is suitable for assessing a multi-year loss, is not similarly suitable for assessing the loss for the months immediately following the incident. Consequently, I accept that the Back Alley's expected sales, over the period of April 12 to the end of September 2001, are appropriately determined by applying the annual expected sales figure of 1.1 million drinks.

[322] It is important to note that, for the purpose of calculating the loss in respect of the price adjustment over this period, I find it reasonable and probable that, in addition to the drink price increase from $3.75 to $4.25 that occurred at the time, the Back Alley would have raised its drink price to match its competitors' price of $4.75 in July, 2001, but for the foam party incident. The Back Alley had not raised it drink price since fiscal 1998 and therefore, was attempting to keep pace with its competitors when it raised its drink price in July, 2001. The Back Alley did reach the $4.75 drink price eventually, but not until over 2 years later when it raised prices again in September, 2003.

[323] The April 12 to end-of-September 2001 analysis covers seven fiscal periods. Using the 1.1 million drink benchmark, Mr. Clark calculated a unit loss in the amount of $88,224, and a loss due to the delayed ability to raise prices in conjunction with the Back Alley's competitors over this period in the amount of $112,292, for a total loss of profits from the sale of drinks of $222,516. For additional promotional and entertainment expenses, Mr. Clark arrived at a figure of zero. This is the result of deducting bands booked prior to April 12, 2001 and comparing band costs over the remainder of the period against band costs for the prior year. In short, after deducting for the pre-booked bands, the Back Alley spent no more over the relevant period than it did for the prior year when the figures are converted to averages. The additional gift certificate expense amounted to $70,379. Mr. Clark included $4590 for additional rent for the relevant period. He also included the entirety of the Back Alley's legal fees of $56,869 for the Back Alley's independent counsel in the personal injury action. Adding these figures together shows a total loss of $332,354, without prejudgment interest, to the Back Alley for the period immediately following the foam party incident to the end of September, 2001.

[324] There are, however, some items in Mr. Clark's calculation that in my view do not relate to the foam party incident. In particular, I do not believe that the Back Alley's additional rent expenses can be attributed to the April 12, 2001 foam party. Mr. Rasberry admitted that he failed to exercise his option to renew his lease on time. The result was that he was required to negotiate with his landlord. The landlord, at that point, was entitled to seek from Mr. Rasberry what it believed the rental rate of the property to be worth and what Mr. Rasberry was prepared to pay. Aside from the suggestion by Mr. Rasberry that his landlord, Landex, was annoyed with him for having been named as a party in this action, there is no evidence to support the claim that the increased rent expense is causally linked to the April 12, 2001 foam party.

[325] It is worth noting, moreover, that the Back Alley had, by virtue of the terms of its lease with Landex, recourse to arbitration in the event that it was unable to agree with Landex upon the basic rent for any renewal term. The Back Alley did not avail itself of the right to arbitration. Consequently, I do not include the $4590 in respect of rent in my award of damages.

[326] The Back Alley also claimed special damages for legal fees associated with defending the punitive damages claims in the personal injury actions. While the Back Alley's insurer retained counsel and undertook to defend the claim, the scope of the Back Alley's insurance coverage did not extend to claims by the personal injury plaintiffs for punitive damages and, consequently, the Back Alley elected to retain independent counsel.

[327] I do not take issue with the entitlement of the Back Alley to damages in respect of the legal fees incurred in dealing with the issue of punitive damages, and Debro does not object to that claim in principle. I note, however, that the amount claimed is substantial, in that it totals $56,869. On this, I have reviewed the invoices provided by the Back Alley, and they raise a number of concerns. I am not satisfied that all of the services for which the Back Alley was invoiced are strictly related to the punitive damages claims. To the extent, for example, that services were rendered in respect of preparing for and bringing the Back Alley's claim for

economic losses, the more appropriate means of compensating the Back Alley is by way of costs. Moreover, a number of the steps taken by the Back Alley's counsel appear duplicative of work done by counsel retained by the Back Alley's insurer.

[328] On the basis of the information contained in the invoices, I am not prepared to make an assessment of the appropriate measure of damages in respect of legal fees. I direct that counsel review with their respective clients the invoices that pertain to this matter so as to more properly identify those services strictly relating to the punitive damages claims. If the parties are unable to reach an agreement within 30 days, counsel may then make further submissions to me on the appropriate measure of damages in respect of legal fees at a time mutually convenient to all.

(g) Mitigation

[329] Debro placed significant emphasis on what it contended was a failure on the part of the Back Alley to mitigate its loss. Debro's position may be adequately summarized by quoting from the report of its expert, Mr. Campbell:

> In my opinion, an immediate, clear, and convincing effort should have been undertaken by management to mitigate the damages caused as a result of the foam party. As part of the mitigation process, representatives of management should have attended at emergency rooms and medical clinics the moment they became aware of a problem, and to gather as much information as possible relating to the injured parties and to assist them and their families. Public statements reflecting management's deep concern for the well-being of their cherished patrons should have been issued to the press, and senior management should have made themselves available to the press at every occasion to try and convince the public that the health and well being of the customers affected in the incident was of the utmost importance to the Back Alley and its employees.
>
> However, there are references in the articles provided to the fact that management had not commented other than to assure the local health authority that it would not repeat the incident. There doesn't seem to be any attempt on the operator's part to appease the afflicted parties. I got the impression that many of the "victims" seemed to have been angered by the operator's lack of communication with them.

[330] Mr. Rasberry said that he avoided public comment in an effort to minimize the negative publicity surrounding the foam party incident.

[331] In contrast to Mr. Campbell's opinion, it was Mr. Morrison's view that "the degree to which management might be faulted for any particular incident has a surprisingly low weight in the list of factors which impact the business." Mr. Morrison cited two contrasting instances involving hepatitis outbreaks in Vancouver; one in which an extremely proactive marketing campaign was undertaken, and another in which management chose to remain silent. In both cases, the respective strategies were adjudged by Mr. Morrison to have been successful.

[332] The onus of establishing a failure to mitigate is on the defendant: *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324. The plaintiff must take reasonable steps to mitigate the loss, but should not be judged against a standard of perfection with the benefit of hindsight. The fact that different measures might have proved more effective at mitigating the loss is not a bar to recovery, so long as the steps taken by the plaintiff were reasonable: Klar, *Remedies in Tort*, vol.4 at 27-162.91; *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.

[333] There were a number of steps the Back Alley could have taken in the wake of the foam party incident. It could have taken the approach recommended by Mr. Campbell and been more actively engaged with the victims and the media. It could have retained a public relations consultant to provide it with advice. Or it could have offered no comment, out of a concern that any statements or apologies offered might have been held against it by the personal injury Plaintiffs or its insurer, and in the belief that by offering comment, it would have increased the scope of the publicity and therefore the potential for economic losses. Mr. Rasberry opted for the latter course, providing no public comment, together with an aggressive strategy involving the distribution of gift certificates, spending more monies on bands and keeping the Back Alley's drink prices below the price of his competitors. Having heard Mr. Rasberry's evidence, I am convinced that he did not take this approach out of callous indifference. Mr. Morrison cited an example in which the "silent" approach proved to be an adequate strategy in the wake of a hepatitis outbreak at a prominent restaurant. There was, therefore, evidence to suggest that such a strategy was not unreasonable in the circumstances. In my view, Debro has not established a failure on the part of the Back Alley to mitigate its economic losses.

V. CONCLUSION

[334] Debro, Tanshaw and Jay Johnson breached duties of care to the Back Alley and its patrons by failing to meet their respective standards of care. They are equally liable for damages resulting from the April 12, 2001 foam party incident. The Back Alley is not responsible for the injuries suffered by its patrons on April 12, 2001, and it is entitled to damages in respect of the economic losses that can be causally linked to the foam party incident.

[335] Tanshaw and the Back Alley paid $481,808.52 to the personal injury plaintiffs, although it is to be noted that I have found the Back Alley is not liable in the personal injury action and need not have contributed anything. This $481,808.52 included a $30,000 contribution made by Jim Johnson, which, by agreement of the parties, reduces the net amount outstanding to $451,808.52. Tanshaw and the Back Alley are entitled to contribution from Debro and Jay Johnson in accordance with those parties' share of liability for the loss. In other words, Debro and Jay Johnson are each liable in the amount of $150,602.84. Pursuant to s.2(2) of the *Contributory Negligence Act*, Debro's contribution, notwithstanding the risk of bankruptcy on the part of Jay Johnson, is limited to its share of the damages to the extent of its degree of fault. Tanshaw and the Back Alley are entitled to pre-judgment interest in respect of Debro and Jay Johnson's respective shares of the loss.

[336] The Back Alley suffered an economic loss in the wake of the April 12, 2001 foam party. In my view, however, the loss does not extend for the period claimed. An appropriate assessment, taking account of all of the evidence, in particular that of the industry and economic experts, is that the period of loss extended no further than the end of September, 2001. Responsibility for this loss, as in the case of responsibility for the injuries suffered by the personal injury Plaintiffs, falls equally upon Debro, Tanshaw and Jay Johnson. The Back Alley is a plaintiff in the economic loss action and as a result, s.2(2) of the *Contributory Negligence Act* does not apply. Debro, Tanshaw and Jay Johnson are jointly and severally liable and the Back Alley may seek the entirety of its damages against any or all of these defendants, who may then pursue contribution amongst themselves. The Back Alley will have damages as against Debro, Tanshaw and Jay Johnson in the following amounts:

Loss of Profit (unit sales):	$ 88,224
Loss of Profit (price adjustment):	$112,292
Additional Gift Certificate Expenses:	$ 70,379
Special Damages (legal fees):	To be determined.
Pre-Judgment Interest:	To be determined.

[337] In the event that parties are unable to come to an agreement with respect to the special damages, pre-judgment interest and/or costs within 30 days, the matter may be brought before me at a mutually convenient time for a final determination.

Dated at the City of Calgary, Alberta this 3rd day of June, 2005.

C.S. Phillips
J.C.Q.B.A.

Appearances:

David M. Pick of Brownlee Fryett LLP
for the Defendant 376599 Alberta Inc. (“Back Alley”)

Nancy M. Carruthers of Parlee McLaws LLP
for the Third Party Tanshaw Products Inc. (“Tanshaw”)

Donald J. Chernichen, Q.C. and Melissa Moulton Tennison of Burnet Duckworth & Palmer LLP
for the Fourth Party Premetalco Inc. operating as Debro Chemicals and Pharmaceuticals (“Debro”)

No other appearances for Action No: 0101 10806

James G. Hanley
for the Plaintiff 376599 Alberta Inc. (“Back Alley”)

Donald J. Chernichen, Q.C. and Melissa Moulton Tennison of Burnet Duckworth & Palmer LLP
for Premetalco Inc. operating as Debro Chemicals and Pharmaceuticals (“Debro”)

No other appearances for Action No: 0301 05693

Corrigendum of the Reasons for Judgment
of
The Honourable Madam Justice C. S. Phillips

In written reasons of June 3, 2005, I indicated that a settlement contribution of $30,000 was made by Jim Johnson in respect of the personal injury claims, and that contribution was made for the benefit of his son, Jay Johnson.

On June 30, 2005, I was advised by Ms. Moulton Tennison, Counsel for Debro Chemicals and Pharmaceuticals Inc., that the issue of how the $30,000 was to be distributed was not adequately explained to me at trial. Ms. Moulton Tennison appeared before me in chambers with the consent of Mr. Pick, counsel for the Back Alley in respect of the personal injury claims, Ms. Remmer, counsel for Tanshaw Chemicals Inc., and Mr. Dear, who was counsel fo Jim Johnson at the time the settlement was made. Ms. Moulton Tennison explained that the $30,000 contribution was not made for the benefit of Jay Johnson. It was intended, instead, to be applied to the net settlement amount in respect of the personal injuries claims, bringing the net amount down from $481,808.52 to $451,808.52, the resulting figure to be divided equally among the parties found liable for damages to the personal injury plaintiffs.

The corrected text is at paragraph 335 of the foregoing reasons.