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**THE ENIGMA OF STIGMA:  
A NEW ENVIRONMENTAL CONTAMINATION  
CHALLENGE FACING CANADA'S JUDICIARY**

JODIE HIERLMEIER<sup>1</sup>

**ABSTRACT**

Would you buy previously contaminated property? The average citizen, given the choice between property with no history of contamination and one with prior environmental problems (even if they have been remediated), will instinctively choose the former over the latter. This is the phenomenon known as stigma. The recent case, *Tridan Developments Ltd. v. Shell Canada Products Ltd.*<sup>1</sup> marks the first time that Canadian courts have squarely addressed the issue of stigma with the trial judge awarding damages for the diminution in property value over and above the costs of remediation for a contaminated property on the basis of stigma. The concept of stigma introduces a unique twist to the determination of damages because it is the product of market forces; it involves the subjective feelings of neither the plaintiff nor the defendant but is predicated on the perceptions of potential third party purchasers and contingent on the sale of “stigmatized” property.

**I. INTRODUCTION**

Would you buy previously contaminated property? The average citizen, given the choice between property with no history of contamination and one with prior environmental problems (even if they have been remediated), will instinctively choose the former over the latter. This is the phenomenon known as stigma. The recent case, *Tridan Develop-*

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<sup>1</sup> (2000), 35 R.P.R. (3d) 141 (Ont. S.C.J.) [hereinafter *Tridan* cited to Ont. S.C.J], rev'd [2002] O.J. No. 1 (Ont. C.A.) online: QL (O.J.) [hereinafter *Tridan* cited to Ont. C.A.], the award of stigma damages was rejected on the evidence by the Ontario Court of Appeal.

*ments Ltd. v. Shell Canada Products Ltd.*<sup>2</sup> marks the first time that Canadian courts have squarely addressed the issue of stigma with the trial judge awarding damages for the diminution in property value over and above the costs of remediation for a contaminated property on the basis of stigma. The concept of stigma introduces a unique twist to the determination of damages because it is the product of market forces; it involves the subjective feelings of neither the plaintiff nor the defendant but is predicated on the perceptions of potential third party purchasers and contingent on the sale of “stigmatized” property.

This note will examine the nature of stigma, the recent case of *Tridan*, and the legal issues and arguments surrounding stigma damages. Policy considerations and possible solutions to the award of stigma damages will also be discussed. Like it or not, our society has personalized its fear of the real or apprehended danger posed by environmental contamination and, as a result, has created a new form of economic stigma which now must be dealt with by the courts.

## II. WHAT IS STIGMA?

Stigma is defined as “a mark or label indicating deviation from a norm.”<sup>3</sup> In the environmental context, stigma constitutes a mark or label that attaches to contaminated property, which results in a diminution in property value.<sup>4</sup> This mark may stem from the perceptions that the property poses health or safety risks, the fear of hidden cleanup costs if standards for cleanup change in the future, or the reluctance of banks to make loans on property associated with contamination.<sup>5</sup> In this sense, stigma is based on anticipatory fears or the possibility of future harm. However, even more pervasive than these fears – which may have a somewhat rational basis – is the innate aversion to these sites embodied

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<sup>2</sup> *Ibid.*

<sup>3</sup> *Webster’s Third New International Dictionary*, 3<sup>rd</sup> ed., s.v. “stigma”.

<sup>4</sup> E. S. Schlichter, “Stigma Damages in Environmental Contamination Cases: A Possible Windfall for Plaintiffs?” (1997) 34 *Houston L. R.* 1125; see also A. Geisinger, “Nothing But Fear Itself: A Social Psychological Model of Stigma Harm and Its Legal Implications” (1997) 76 *Neb. L. R.* 452.

<sup>5</sup> Schlichter, *ibid.*; see also A. Vale, & J. Cline, “Stigma and Property Contamination – *Damnum Absque Injuria* (1998) 33 *Tort & Ins. L. J.* 835.

in the public image. In this case, stigma is not based on the fears of the plaintiff or any actual risk associated with the property, but rather it is based on the fears of third party purchasers and their perceptions of the property. Even if there is no risk associated with the land, the perceived unattractiveness of the property will dictate lower market values. This is especially true if uncontaminated alternatives are readily available.

The problem facing courts, appraisers, and potential buyers in dealing with the notion of stigma is the expectation that there should be a rational or logical cause for the loss in value. In relation to stigma, whether the public's perception is reasonable is irrelevant because both rational and irrational beliefs affect property values. This is because the value of real property is "extrinsic to the commodity..."<sup>6</sup> in that it is created in the minds of the people who constitute a given real estate market. In other words, the market determines the market value.<sup>7</sup>

Stigma damages also pose a problem for the courts because they are fundamentally different from actual damages. The devaluation of property due to stigma is tied to perceived outcomes, not actual ones and often there will be a significant variance between the actual risks associated with contaminated land the public perception of the potential danger. Public reaction will be determined by whether the outcome of the event is voluntary or involuntary, whether the source of the risk stems from a catastrophic accident, and the level of familiarity with type of contamination.<sup>8</sup> The occurrence of "risk amplification" may also influence public perception.<sup>9</sup> Amplification traits are often related to the level of media coverage surrounding an incident, the blameworthiness

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<sup>6</sup> American Journal of Real Estate Appraisers, *The Appraisal of Real Estate*, 8<sup>th</sup> ed., quoted in Gibson, *infra* note 7 at 389.

<sup>7</sup> D. M. Gibson, "Stigma Damages – The Recovery of Diminished Property Values As A Result of Environmental Contamination" (1995) 15 J. Energy, Nat. Res. & Env't'l. L. 385.

<sup>8</sup> Geisinger gives the example that people generally fear nuclear incidents because of the involuntary, catastrophic nature of the event and the public's unfamiliarity with nuclear energy even though the actual risks associated with nuclear energy are low. Whereas with smoking, the perceived risk of harm is lower due to the voluntary, long-term nature of the event and the familiarity with the substance even though the actual risks associated with the activity are higher, see Geisinger, *supra* note 4 at 480. For a review of the factors affecting the market value of property see B. Mundy, "Stigma and Value" (1992) 60 App. J. 7; see also E.E. Jones, *Social Stigma: The Psychology of Marked Relationships*, (New York: W.H. Freeman, 1984) at 24 – 79.

<sup>9</sup> Geisinger, *supra* note 4.

of the party that caused the contamination, and the innocence of the victim.<sup>10</sup> As a result of these contextual factors, the harm caused by these processes bears little relation to the harm based on the actual impacts of contamination. It is this divergence between reality and perception that makes stigma particularly problematic for courts to quantify.

### III. THE CANADIAN POSITION:

#### *TRIDAN DEVELOPMENTS LTD. v. SHELL CANADA PRODUCTS LTD.*

The recent case of *Tridan* evidences a trend occurring in Canadian law that may result in new pressure for parties to remediate third party lands that they have contaminated. Although on appeal the award of stigma damages was reversed,<sup>11</sup> *Tridan* marks the introduction of a new head of damage in environmental contamination cases that will likely have significant influence on the scale of damages available for contaminated property.

In *Tridan*, the plaintiff brought an action seeking extensive damages as a result of contamination to its property, which neighbored a gas station owned by Shell. A significant gasoline leak from a faulty underground pipe released nine thousand litres of gasoline onto Shell's property, which Shell remediated upon detection. Shell accepted that the contamination to *Tridan*'s property originated from their land, and the main issue was the proper measure of damages. *Tridan*'s claim was based on a common law duty owed by Shell to *Tridan* under the rule in *Rylands v. Fletcher*,<sup>12</sup> and sought damages in excess of \$1.6 million for remediation, removal of contaminated soil, business interruption, increased mortgage payments, and diminution in property value. With regards to the diminution in property value, *Tridan* claimed that a stigma attached to properties that had been contaminated even after contamination was removed, and therefore, it was entitled to damages over the

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<sup>10</sup> Geisinger, *supra* note 3.

<sup>11</sup> *Tridan* cited to Ont. C.A., *supra* note 1.

<sup>12</sup> (1866), [1861-73] All E.R. Rep. 1 (H.L.), this case enunciates the principle that a person who keeps a potentially dangerous substance on his or her land is responsible for damages arising from its escape.

remediation award for such residual deficiency.<sup>13</sup> In support of its position, Tridan presented a number of experts to speak to the issue of stigma. A real estate broker and appraiser both gave evidence that stigma attaches to contaminated property and quantified a 17-18% reduction of the fair market value of the property as a result of such stigma.<sup>14</sup> As well, a banking consultant testified to the difficulties of financing a contaminated property, characterizing Tridan's site as "an extremely high risk, 'red flag' site and, even if...remediated, it would remain a high-risk site from a credit risk assessment viewpoint."<sup>15</sup>

Shell's position was that any cleanup damages should be limited to the cost of an actual cleanup under the Ministry of Environment guidelines since the underground petroleum contamination did not affect the current use of the property and would only have an effect if a change in property use was contemplated. Furthermore, the contamination was at a depth of three to five metres and posed no risk to the health or safety of the occupants, or even the plant life on the property. A real estate appraiser, testifying on Shell's behalf, refuted arguments that stigma exists and specifically stated that no such concept was recognized in the Ottawa real estate market.

Justice Binks accepted the plaintiff's evidence that the concept of stigma was recognized and accepted in the real estate community, including the Ottawa market. As such, the court awarded damages for diminution in value on the basis that, even after remediation, stigma attached to the contaminated property adversely affecting its mortgageability and marketability.<sup>16</sup> The amount was fixed at \$350,000 based on the diminution in property value in the range of 12-15% of the \$2.7 million property value. This amount was awarded in addition to the \$550,000 that the court awarded to cover the costs of remediation.

The legal basis of the decision stemmed from the basic principles of property damages. Traditionally, Canadian courts have looked to either the cost of restoration or the cost of diminution in property value as the basis for assessing damages. However, in a situation where the repairs

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<sup>13</sup> *Tridan* cited to Ont. S.C.J., *supra* note 1 at para. 61.

<sup>14</sup> *Tridan* cited to Ont. S.C.J., *supra* note 1 at para. 61-62.

<sup>15</sup> *Tridan* cited to Ont. S.C.J., *supra* note 1 at para. 59.

<sup>16</sup> In rendering his judgment Binks, J. stated that "the value of this stigma on the property is the difference in the value of the Tridan property before the spill occurred and its worth after reparation," see *Tridan* cited to Ont. S.C.J., *supra* note 1 at para. 71.

fail to restore the property to its original value, the plaintiff is entitled to the cost of repair and to an additional sum to compensate for the residual deficiency.<sup>17</sup> In *Payton v. Brooks*,<sup>18</sup> this principle was approved by the English Court of Appeal in respect of damage to an automobile. Though the plaintiff failed to prove any residual loss after repair, the court accepted that he would, on appropriate facts, be entitled to recover. Roskill L.J. stated:

There are many cases ... where the cost of repairs is a *prima facie* method of ascertaining the diminution in value. It is not, however, the only method of measuring the loss. In a case where the evidence justifies a finding that there has been, on top of the cost of repairs, some diminution in market value – or ... justifies the conclusion that the loss to the plaintiff has not been fully compensated by the receipt of the cost of complete and adequate repairs, because of a resultant diminution in market value – I can see no reason why the plaintiff should be deprived of recovery under that head of damage also.<sup>19</sup>

This same rule has been applied in Canadian cases,<sup>20</sup> and likewise formed the basis of the *Tridan* decision. The court also definitively stated that the speculative nature of stigma damages alone would not bar the plaintiff's recovery.<sup>21</sup>

Notwithstanding this reasoning, the decision was considered surprising in a number of respects. First, up to this point, courts had been reluctant to award damages for diminution of property value unless the plaintiff had sold, or at least tried to sell the property.<sup>22</sup> Here, no effort to sell was made. Second, just two months before *Tridan* was decided another Ontario Superior Court rejected the suggestion that the value of property should take into account the stigma associated with its con-

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<sup>17</sup> L.N. Klar et al., *Remedies in Tort*, vol. 4 (Aurora: Carswell, 1999) at 27-162.33; S.M. Waddams, *The Law of Damages*, 3<sup>rd</sup> ed. (Toronto: Canada Law Book Inc., 1997) at 111.

<sup>18</sup> [1974] R.T.R. 169.

<sup>19</sup> *Ibid.* at 176.

<sup>20</sup> *Chotem v. Porteous* (1920), 51 D.L.R. 507 (Sask. C.A.); *Walter v. Seibel*, (1927) 2 D.L.R. 1005 (Sask. C.A.); *Nesbitt v. Carney*, (1931) 1 D.L.R. 106 (Sask. C.A.); *Green v. White* (1975), 10 N.B.R. (2d) 299 (S.C.); *Burthwick v. Lucas*, (1940) 4 D.L.R. 288 (Sask. C.A.).

<sup>21</sup> See *Chaplin v. Hicks*, [1911] 2 K.B. 786 (Eng. C.A.).

<sup>22</sup> For instance, in another Ontario case the judge refused to award the neighbours of a mushroom farm compensation for the impact the odours had on their property values on the basis that they had not shown that the property had been sold or that attempts to sell had been unsuccessful, see *Pyke v. Tri Gro Enterprises Ltd.* 1999 CarswellOnt 4253, aff'g 2001 CarswellOnt 2697 (Ont. C.A.) online: eCarswell <<http://www.ecarswell.com>>.

tamination.<sup>23</sup> Lastly, the award for stigma damage appeared to be high for a downtown commercial property (in contrast with residential property), when no evidence was presented that *Tridan* contemplated a change in use for the site in the foreseeable future and the fact that, despite the contamination, *Tridan* continued its current business on the property without interruption.<sup>24</sup>

In allowing the appeal, the Ontario Court of Appeal found no evidence to support Justice Bink's finding of stigma damages. The testimony of the real estate broker and appraiser were based on stigma attaching to property cleaned up in accordance with the Ministry of Environment guidelines and not pristine cleanup levels.<sup>25</sup> In this case, the Court of Appeal upheld that the property be cleaned to pristine standard at an additional cleanup cost of \$250,000 in place of the \$350,000 award for stigma damages. Although the Court expressly stated that "there [was] no stigma loss at the pristine cleanup level,"<sup>26</sup> at no point in the judgement did the Court of Appeal expressly reject the notion of stigma damages being awarded if proper evidence was presented.

#### IV. A LEGAL BASIS FOR STIGMA: POLICY CONSIDERATIONS

##### 1. The Speculative Nature of Stigma Damages

Tort damages are governed by twin guiding principles, the principle that damages must be established with reasonable certainty and the principle of *restitutio in integrum* which seeks to make the plaintiff whole again.<sup>27</sup> With respect to the concept of stigma, these principles

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<sup>23</sup> The court held, *inter alia*, that the value of the contaminated site was the value if uncontaminated minus reasonable cleanup costs, and that stigma would be unlikely if the cleanup were completed to the satisfaction of the Ministry of the Environment, see *862590 Ontario Ltd. v. Petro Canada Inc.*, [2000] O.J. No. 984, online: OL (O.J.), (Ontario Superior Court of Justice) at para. 404.

<sup>24</sup> "Court Awards Neighbour 'Pristine' Clean-up Damages for Stigma, online: see Willms & Shier Environmental Lawyers <<http://www.willmsshier.com/newsletters/000.2htm#THE%20COURTS3>> (date accessed: 20 October 2001).

<sup>25</sup> *Tridan* cited to Ont. C.A., *supra* note 1 at para. 14-15.

<sup>26</sup> *Tridan* cited to Ont. C.A., *supra* note 1 at para. 17.



come into conflict. Proponents of stigma damages argue that stigma reflects the reality that the effects of contamination on property often go beyond remediation. As such, the failure to consider stigma in determining damage awards undercompensates the plaintiff property owners for losses created by another's actions.<sup>28</sup> On the other hand, critics argue that it is difficult – if not impossible – to determine whether property values have decreased, how long they may stay depressed, and if plaintiffs will sell their property during the time period of depressed return with any degree of certainty.<sup>29</sup>

Critics generally point to the shortcomings in appraisal techniques for calculating stigma damage as justification for its abandonment. Real estate appraisers typically use any of the following three methods for determining the fair market value of property:

- (1) the sales comparison approach;
- (2) the cost approach; or
- (3) the income approach.<sup>30</sup>

In calculating the market value of contaminated or stigmatized property, each of these methods of calculation has some limitations. Firstly, given that the sales comparison approach functions by comparing data on the recent sale of similar properties, it is questionable whether there is a “comparable market” in remediated or stigmatized sites on which to base an assessment.<sup>31</sup> The cost approach functions in a similar way as the sales comparison approach but may have limited use to valuing contaminated property because it focuses either on improvements to the value of buildings or the property, which may not be affected by contamination.<sup>32</sup> Lastly, the income approach, which is generally used for valuating income-generating properties such as office buildings or apartment blocks, is limited in its application because it will not apply to

<sup>27</sup> A.M. Linden & L.N. Klar, *Canadian Tort Law: Cases, Notes and Materials*, 11<sup>th</sup> ed. (Toronto: Butterworths, 1999) at 679-680.

<sup>28</sup> Gibson, *supra* note 7.

<sup>29</sup> Vale & Cline, *supra* note 4; see also *Tridan* cited to Ont. S.C.J., *supra* note 1, as an argument made by the defendant, Shell, in *Tridan*.

<sup>30</sup> R.D. Cox, Jr. & B.A. Bachrach, “Damages for Contaminated Property” (1993) Boston B.J. 19; see also Schlichter, *supra* note 4.

<sup>31</sup> *Ibid.* at 21.

<sup>32</sup> *Ibid.*

properties that currently have no present use or do not generate income.<sup>33</sup>

Aside from the shortcomings in appraisal techniques, the contextual nature of stigma damage poses an additional obstacle to its quantification. Since the value of real estate depends on the consideration of all the qualities of the site, the public's perception, and the economic fluctuations in property values, stigma will not be an issue in every case. Not every contaminated site will suffer from lower property values. For instance, if the land is to be used for commercial or industrial purposes, the fact that the property was previously contaminated or located near a hazardous waste site may not affect the marketability as substantially as if the property were intended for residential purposes.<sup>34</sup>

In addition to these factors, courts are also confronted with competing expert testimony regarding appraisal value, health and environmental effects, and problems with financing and mortgageability. In particular, it is argued that real estate appraisers will "become another in a long list of experts required . . . to testify in . . . already complicated cases."<sup>35</sup> The increased use of expert testimony in stigma damage cases is likely a major factor in the expected rise in litigation costs associated with these types of cases.<sup>36</sup>

As outlined above, there are some persuasive arguments against the recovery of stigma damages. In response to these criticisms, it is not contested that the acceptance of stigma will present problems for adjudicators who must set standards of liability. However, the anticipatory and difficult nature of stigma damages alone is not convincing to justify abandoning the recovery of stigma altogether. Courts are not completely unfamiliar with contingencies. In fact, they are often placed in the position of guestimating quantum, or of quantifying the unquantifiable. As stated by Devlin J. in *Biggin & Co. v. Permanite*,<sup>37</sup> "[w]here precise evidence is obtainable, the court naturally expects to have it . . . [w]here

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<sup>33</sup> *Ibid.* Alternatively, if property is an income property, its income may be affected by contamination and the effects of stigma.

<sup>34</sup> P. Patchin, "Contaminated Properties – Stigma Revised" (1991) App. J. 167 at 170-171; see generally Gibson, *supra* note 7; see *Tridan* cited to Ont. S.C.J., *supra* note 1, as an argument made by the defendant.

<sup>35</sup> C. L. Stott, Comment, "Stigma Damages: The Case for Recovery in Condominium Construction Defect Litigation" (1989) 25 Cal. W.L. Rev. 367 at 370.

<sup>36</sup> Schlichter, *supra* note 4.

<sup>37</sup> (1950), [1951] 1 K.B. 422 (Eng. K.B.) at 438 [hereinafter *Biggin*].

it is not, the court must do the best it can.” Our society places price tags on the loss of species and body parts, for the future loss of income and future business losses, so why not on the public perception of property values? As stated in *Chaplin v. Hicks*,<sup>38</sup> the leading case on certainty, “[t]he fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages.”

In following both *Biggin* and *Chaplin*, Justice Binks in *Tridan* refused to use the speculative nature of stigma as bar to recovery. Instead, he considered a number of contextual factors such the magnitude of the spill, the extent of the proposed cleanup, the measures taken to prevent further contamination, the present use of the property, and any reasonably foreseeable changes by the owners to measure stigma damages.<sup>39</sup> Thus, the decision by the Ontario Supreme Court in *Tridan* reflects the reality that the acceptance of stigma damages will necessarily involve a subjective weighing of factors, but that this alone will not preclude the recovery of such damages.

## 2. The Prospect of ‘Double Recovery’

Aside from the difficulties in quantifying stigma damages, the courts face a more difficult policy decision of whether the law should provide compensation for future damages that may never be realized if claimants chose not to sell their property.<sup>40</sup>

Public fear, or stigma, is unlikely to continue indefinitely and will likely subside over time. As such, plaintiffs who must sell their properties during the phase of heightened concern may experience damage from stigma.<sup>41</sup> The problem is that property value diminution itself has little direct effect on plaintiffs who do not intend to sell their property or who, in fact, never sell. The fear is that in allowing plaintiffs to prevail in such claims might encourage property owners to introduce fraudulent evidence of sales attempts or rush to sell merely to take advantage of the potential windfalls.<sup>42</sup>

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<sup>38</sup> *Supra* note 21 at 792.

<sup>39</sup> *Tridan* cited to Ont. S.C.J., *supra* note 1 at para. 74.

<sup>40</sup> T. J. Muldowney & K. W. Harrison, “Stigma Damages: Property Damage and the Fear of Risk” (1995) 62 *Def. Council J.* 525.

<sup>41</sup> *Ibid.* at 536.

<sup>42</sup> Although this scenario may seem unlikely, it is a ‘floodgates’ argument that has been forwarded by virtually every academic writer addressing stigma damages in the U.S. As of yet,

However, every new cause of action, new remedy, or new frontier in tort law encounters the omnipresent floodgates argument. It is a warning that subsists in order to curb the over-expansion of litigation and the financial and emotional repercussions associated with it. U.S. law has sought to curb the problem of fraudulent or unsubstantiated claims by injecting a standard of reasonableness or rationality into the claimed fears. Thus, courts will not impose liability where fears are not within a proper range of reason.<sup>43</sup> Aside from this, another more innovative proposal to curb the windfall concern has also been proposed. Schlichter suggests that defendants who are found liable for environmental contamination could be required to establish a trust fund for future stigma damage claims.<sup>44</sup> If plaintiffs do sell their property and can prove they would have been able to sell it at a higher price but for the contamination, the plaintiffs could recover the diminution in property value from the proposed trust fund. However, the fund would prevent those plaintiffs who never sell their property, or do not sell their property at the height of public concern over the contamination, from recovering additional stigma damages. Of course this suggestion still presents difficulties in quantifying the amount to be held in trust. Moreover, such guidelines would have to address which plaintiffs would have the opportunity to recover stigma damages,<sup>45</sup> and an applicable statute of limitations for stigma damage claims would have to be determined where defendants could recover any money remaining in the trust fund.<sup>46</sup>

### 3. Who Should Bear the Burden of Stigma Damages?

The crux of the policy considerations boils down to a dispute of the equities as to who should bear the burden of property value loss. In the

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the validity of this argument has not been considered by American courts.

<sup>43</sup> For instance, plaintiffs have been required to prove their fears were not unreasonable or provide proof that the public fear be scientifically founded, see *DeSario v. Industrial Excess Landfill, Inc.*, 587 N.C.2d 454 (Ohio Ct. App. 1991) [hereinafter *DeSario*]; see also *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715 (Mich. 1992) [hereinafter *Adkins*].

<sup>44</sup> Schlichter, *supra* note 4.

<sup>45</sup> For example, up to what distance from the contaminated property is it reasonable to assume the stigma affected the plaintiff's property value, and if it applies to residential and commercial property owners.

<sup>46</sup> It will have to be determined whether the limitation period for stigma claims runs from the date the cause of action arose or from the date of discoverability of the damage. Using the "discoverability rule" for stigma could allow plaintiffs to recover from the fund at any time they decide to sell the property and still receive a reduced price.

environmental context, proponents of stigma damages argue that the award of damages should be based on the polluter-pays principle. In fact, a basic policy factor driving U.S. law<sup>47</sup> is that polluters should pay for the problems their contamination causes. The innocent owners of property affected directly or indirectly by contamination should not be required to shoulder the economic loss resulting from another's actions. Rather, those polluters who derived a benefit from the use and sale of those dangerous substances should bear the economic losses associated with property devaluation.<sup>48</sup> Furthermore, it is argued that the polluters should bear the burden because they are in a better position to identify and indemnify the risks associated with contamination.<sup>49</sup> Thus, this burden should fall on the defendants not necessarily because they are morally blameworthy, but because they represent a conduit for internalizing the accident cost to the risk creating activity and can distribute this cost among beneficiaries through higher prices or liability insurance.<sup>50</sup> This position obviously influenced Justice Binks in *Tridan*, who quoted with approval from Lord Loreburn L.C. in *Lodge Holes Colliery Co. V. Wednesbury Corp.*: “[i]n judging whether [the plaintiffs] have acted reasonably, I think a court should be very indulgent and always bear in mind who was to blame.”<sup>51</sup>

In response, critics of stigma damages argue that the process of refuting stigma claims may be difficult and unfairly expensive for a defendant. It would carry the burden of disproving the effect of an intangible entity, namely the public perception, over which it has no control.<sup>52</sup> They argue that it would also be difficult to limit the class of people who could recover stigma damages and that, considering the impending bankruptcy of the polluter, it would be unjust to allow the company's limited resources to go to those who may suffer from stigma at the expense of those who suffer direct harm.

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<sup>47</sup> See especially *Bixby Ranch Co. v. Spectrol Electronics Corp.*, No. BC052566 (Sup. Ct. L.A. County 1993) [hereinafter *Bixby*]; *re Paoli Railroad Yard PCB Litigation*, 35F.3d 717 (3d. Cir. 1994) [hereinafter *re Paoli*]; see also the dissent in *Adkins*, *supra* note 43.

<sup>48</sup> In cases where the polluter did not derive a direct benefit, such as a carrier or transporter of substances, perhaps environmental insurance may be needed to fill this caveat.

<sup>49</sup> Gibson, *supra* note 7.

<sup>50</sup> J.A. Fleming, *The Law of Torts*, 9<sup>th</sup> ed. (Sydney, Law Book Company: 1998).

<sup>51</sup> [1908] A.C. 323 (H.L.) at 326.

<sup>52</sup> Vale & Cline, *supra* note 5.

Although these are valid concerns, this reasoning overlooks one imperative principle. In tandem with compensation, deterrence is one of the convention twin aims of tort law.<sup>53</sup> The reasoning follows that by making the potential polluters responsible for all damages following from their conduct, they will be more prudent in carrying out their activities and in allocating risk appropriately. By internalizing the cost to the activity that caused it damages will either stimulate remedial managerial response or a reduction of consumer demand. In contrast, externalizing the costs of accidents means that the cost of pollution would be borne by the public instead of the defendant whose products or services will appear cheaper than they should.<sup>54</sup> In light of this reasoning, it is in the public interest for the polluter to pay for all damages proven to flow from their activities.

#### 4. Stigma Claims and the Doctrine of *Caveat Emptor*

Traditionally, the doctrine of *caveat emptor* served to protect sellers from a buyer's damage claims.<sup>55</sup> Apart from cases of fraudulent misrepresentation, the doctrine of *caveat emptor* will not apply in cases where the vendor is aware of latent defects which he or she does not disclose.<sup>56</sup> Moreover, it has also been suggested that a vendor of real property may have a duty to warn a purchaser of dangers in or on the property which pose a risk of physical harm to persons or property.<sup>57</sup> Although not every contaminate will constitute a defect in the property,<sup>58</sup> if the contamination is considered a latent defect it will have to be disclosed.

Aside from the case law, specific disclosure obligations may also be imposed by statute or regulation. For instance, in Ontario, under the *Real Estate and Business Brokers Act*<sup>59</sup> a property owner, real estate

<sup>53</sup> Linden & Klar, *supra* note 27.

<sup>54</sup> Fleming, *supra* note 50.

<sup>55</sup> For examples of such laws in the U.S.A., see Muldowney & Harrison, *supra* note 40.

<sup>56</sup> *McCluskie v. Reynolds*, [1998] B.C.J. No. 1662 (B.C.S.C.)

<sup>57</sup> F. Coburn & G. Manning, *Toxic Real Estate Manual*, looseleaf (Aurora, Ont.: Canada Law Book, 1996) at II-v to II-xiv.

<sup>58</sup> For instance, in one case the court held that the presence of a defect in the property must be considered in context, in particular, by examining the use for which the property is intended. In this case, the court found that an industrial property contaminated with varsol constituted neither a patent or latent defect since its presence did not impair the use of the property for industrial purposes, see *Tony's Broadloom & Floor Covering Ltd. v. NMC Canada Inc.*, [1996] O.J. No. 4372 (Ont. C.A.), online: QL (OJ).

<sup>59</sup> R.S.O. 1990, c. R.4.

agent or broker is obliged to disclose the existence of contamination on a site, even after it has been cleaned. In British Columbia, vendors of real estate used for industrial and commercial purposes are required to provide a “site profile” to both a prospective purchaser and a manager in the Ministry of Environment, Lands and Parks.<sup>60</sup> All site profiles and site investigations received by a manager will be placed on a site registry to which the public is given access. The advent of these types of laws – along with specific caveats in the doctrine of *caveat emptor* – signal a trend of increased public awareness and concern over environmental contamination, making the climate for stigma damage claims more favourable.

## V. THE FUTURE: CANADIAN COURTS AND STIGMA DAMAGES

Until *Tridan*, Canadian courts had never squarely addressed the issue of recovery of stigma damages; however, as the preceding sections and the following public policy arguments suggest, recovery of stigma damages is a new reality Canadian courts will inevitably have to face and quantify. At a minimum, the legal and practical considerations suggest that courts should award stigma damages for “incomplete repair stigma,” consistent with U.S. jurisprudence.<sup>61</sup>

First, it must be recognized that the concept of stigma is not new. In Canada, stigma has been addressed in both the civil and criminal context. Stigma damages are in many respects comparable to damages associated with a common law cause of action for defamation. Whereas stigma concerns damage to the reputation of real property, defamation concerns damage to an individual’s reputation.<sup>62</sup> It is a relational interest, as it involves the opinions that others in the community have, or may

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<sup>60</sup> *Waste Management Act*, S.B.C. 1982, c. 41, subs. 20.11(7) [en. 1993, c. 25, s. 2], these amendments have not been proclaimed in force.

<sup>61</sup> “Incomplete repair stigma” refers to the situation where contamination spreads from one parcel to a neighbouring property. After the neighbouring property is remediated to the satisfaction of all regulatory standards, it still cannot recover its former value due to negative public perceptions that attach to the property, see *Bixby* and *re Paoli*, *supra* note 46. For a general review and critique of the concept of stigma in American law, see Muldowney & Harrison, *supra* note 39; see also Gibson, *supra* note 7; Schlichter, *supra* note 4.

<sup>62</sup> Linden & Klar, *supra* note 27 at 621.

have, about a particular individual. Likewise, the concept of stigma has been recognized by Canadian criminal courts to articulate negative public perceptions associated with the most severe crimes.<sup>63</sup> In the U.S., stigma damages have also been analogized to medical monitoring damages due to the latent nature of environmental contamination and because damages are based upon fear of the unknown.<sup>64</sup>

Aside from the recognition of stigma in other legal contexts, stigma damages should be awarded in order to fully compensate the plaintiff when the costs of remediation alone are not sufficient to do so. In awarding stigma damages, it is suggested that a property owner will have to provide proof that:

- (1) a stigma exists;
- (2) the diminution in property value is not speculative;
- (3) cleanup costs are inadequate to fully compensate the owner; and
- (4) the fear or stigma is not unreasonable.<sup>65</sup>

Requiring the plaintiff to prove these elements will keep the remedy sufficiently narrow to avoid the floodgates argument, and at the same time will inject some certainty into the recovery of stigma damages.

Proof that the fear is not unreasonable could be adduced even by showing that the fear is prevalent. Such evidence may include public opinion polls, real estate appraisers, tax assessments, real estate sales, or media coverage.<sup>66</sup> Requiring the fear to be reasonable may require extensive scientific evidence to establish that a risk exists to human health or the environment. This has the potential not only to place an onerous burden on the plaintiff, but also would exacerbate the expense and time needed for trial. Regardless of the standard, there must be some tangible proof to establish that a property has diminished in value. Such proof may include evidence of limited marketability by showing that offers to sell have been withdrawn, that prospective buyers are reluctant

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<sup>63</sup> See *R. v. Martineau* (1990), 58 C.C.C. (3d) 353 (S.C.C.), the court stated that the stigma and punishment attaching to a murder conviction must be reserved for those who either intend to cause death or who intend to cause bodily harm that they know will likely cause death.

<sup>64</sup> See *Ayers v. Jackson*, TP 525 A.2d 287 (N.J.1987); see also J. Johnson, "Environmental Stigma Damages: Speculative Damages in Environmental Tort Cases" (1997) 15(2) U.C.L.A. J. Env. L. & Pol'y 185.

<sup>65</sup> Gibson, *supra* note 7.

<sup>66</sup> Gibson, *supra* note 7.



to purchase without some form of indemnity<sup>67</sup> or that lenders are hesitant to provide financing. At a minimum, a landowner's case will depend on expert testimony from appraisers, but the cogency of this evidence will increase with corroborated evidence of offers to sell. In addition to the criteria mentioned above, the courts and legislatures may also consider more innovative methods for dealing with stigma damages such as the creation of trust funds to compensate anticipatory damage claims at the point when the property is sold.

## VI. CONCLUSION

The plaintiff in *Tridan* fulfilled some of the requirements listed above by providing expert testimony on the existence and acceptance of stigma in the real estate community and problems associated with financing a previously contaminated site. However, the plaintiff did not provide any definitive evidence that the property value had dropped or that its value would be affected if it were cleaned up to pristine levels. Also, the fact that the property at issue was commercial real estate and the contamination did not seem to impact the present use or profitability of the property weakened the plaintiff's position. Although the Court of Appeal rejected the notion of stigma damages in this instance, this decision should not stand as precedent for the general rejection of stigma in Canadian law. In *Tridan*, the Court of Appeal found that an additional \$250,000 award in place of stigma damages (for \$350,000) served as sufficient remediation costs in this situation. Notwithstanding these changes, the trial court decision is still important because it embodies the general contextual approach to be taken by the courts in quantifying stigma and acknowledges that increasing public concerns over environmental contamination may have real effects on the Canadian real estate market. In fact, there will be cases with facts more favourable to the award of stigma damages than those presented in *Tridan* that may serve as precedent as awarding such damages. Despite its limited application, *Tridan* still serves as a starting point for Canadian courts and legal

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<sup>67</sup> An indemnity, in the case of contaminated properties, is a financial guarantee against future claims and costs arising from the contamination, see P. Patchin, "Valuation of Contaminated Properties" (1988) App. J. 7.

commentators to begin analyzing this issue in relation to environmental contamination. As more plaintiffs continue to seek stigma damages, courts will be called on to develop a legal standard that properly disposes of these claims. As in the case of *Tridan*, Canadian courts may be called on to determine this legal standard sooner than they think.