August 31, 2016

I. INSURANCE ISSUES

A. In a commercial lease, the covenant of the tenant to insure the landlord along with itself fixes the tenant with the risk of loss. Failure to add the landlord to the policy, as required by the lease, does not allow the tenant to escape liability

***Deslaurier Custom Cabinets Inc. v. 1728106 Ontario Inc.*, 2016 ONCA 246, per Cronk J.A. [4195]**

I. FACTS AND ISSUES

The plaintiff tenant, Deslaurier, carried on business in leased premises from the defendant landlord. The tenant carried insurance coverage against risks of loss or damage to its property, but failed to include the landlord as additionally insured as required by the lease. The lease also contained cross-indemnity covenants with respect to damage or loss arising from each party's act, default or negligence.

A fire occurred which destroyed the leased premises and caused significant damage to the tenant's property. The tenant brought an action against the landlord for the loss, including the amount not covered by the insurance policy.

The tenant's application for Summary Judgment was granted on the basis that the landlord's indemnity covenant modified the landlord's protection from liability. The landlord appealed.

II. HELD: Appeal allowed, tenant's action dismissed

1. The motions judge was held to have erred by failing to hold that the tenant had contractually assumed the risk of any damage to its property and business arising from the fire.

(a) The Court held that determination of liability of one party to the other for such damage is to be determined on the basis of the lease in issue, rather than to insurance policy considerations on the basis of a trilogy of Supreme Court cases (***Smith v. T. Eaton Co.*** [1978] 2 S.C.R. 749, ***Cummer-Yonge Investments Ltd. v. Agnew Surpass Shoe Stores Ltd.*** [1976] 2 S.C.R. 221, ***Pyrotech Products Ltd. v. Ross Southward Tire Ltd.*** [1976] 2 S.C.R. 35) and ***Madison Developments Ltd. v. Plan Electric Co.***, 1997 CarswellOnt 3797 (Ont.C.A.).

(i) In the Trilogy the SCC held that the contractual covenant to insure, by the landlord, ran to the benefit of the tenant which therefore

relieved the tenant of risk for liability for a fire even if the fire was caused by that party's negligence and this was followed in ***Madison Developments.***

(i) It was noted that subsequent cases from Ontario and British Columbia have held that the principles from the Trilogy apply where the obligation to insure is that of the tenant rather than the landlord.

(b) The motions judge was held to have failed to apply the principles of the Trilogy.

(i) Based on the Trilogy and subsequent case law, the motions judge was bound to presumptively fix the tenant, rather than the Landlord, with responsibility for the tenant's claimed losses due to the insurance covenants.

(ii) Only after the presumptive allocation of risk was done, would the issue of whether this presumption was rebutted by other provisions in the lease come about.

2. The motions judge was held to have erred by failing to hold that the tenant's claim was barred as a result of its failure to add the landlord as an additional insured on its property damage insurance policy.

(a) While the lease contains no express waiver of subrogation against the landlord, the parties agreed that the landlord was to be added as an additional insurer under the tenant's insurance policies.

(b) Had the landlord been added to the policies, that would have operated as a bar to subrogated claims by the tenant's insurer for the tenant's fire loss.

(c) The insurer cannot be put in a better position than that of the tenant itself.

III. COMMENTARY: While this is an Ontario case, and one of the cases cited repeatedly throughout, *Madison Developments*, is also an Ontario case, the SCC Trilogy would be binding in Alberta, meaning that the principles from this case would apply to a lease in Alberta.

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August 31, 2016

II. LIABILITY ISSUES

A. Reverse Onus Provisions of the *Traffic Safety Act*: Section 186 of the *Traffic Safety Act* applies over Section 185 in accidents involving a motorist and a non-motorist (such as a pedestrian or cyclist). Section 185 applies to accidents between motorists

***Bradford v. Snyder*, 2016 ABCA 94 [4190]**

I. FACTS AND ISSUES

Appeal was of a decision involving a collision between a motor vehicle and a cyclist. The cyclist was facing a stop sign at an intersection and came to a "rolling stop" before proceeding through. The driver of the van did not see the cyclist before the collision as she was looking down at her speedometer to check her speed while driving through a playground zone.

At the trial, Justice Macleod found that in accidents involving a motorist and non-motorist, s.186 of the *Traffic Safety Act* (the *Act*) imposed a reverse onus on the defendant driver of a vehicle in motion to prove that the accident did not arise out of negligent operation of a motor vehicle. (S.186 provides that "if a person sustains loss or damage by reason of a motor vehicle being in motion, the onus of proof in any civil proceeding that the loss or damage did not entirely or solely arise through the negligence or improper conduct of the owner or driver of the motor vehicle is on that owner or driver" It is expressly applicable only to accidents between a motorist and a non-motorist.)

The Court found that the defendant driver had not discharged this onus due to taking her eyes off the road before entering the intersection, and therefore did not take reasonable care to avoid a collision. The Court found contributory negligence on the part of the cyclist, apportioning one-third of the fault to the driver, an two-thirds to the cyclist.

The defendant driver appealed, arguing that s.185 and the common law displaced the s.186 onus. S.185 provides that where "a person sustains loss or damage arising out of the operation of a motor vehicle on a highway" and "that motor vehicle is operated by a person who is in contravention of or fails to comply with" the *Act,* the onus of proof regarding civil liability is imposed on the driver. The Defendant argued that she had the statutory right of way, a cyclist was a motorist and, in this case, had contravened the *Act* by rolling the stop sign such that the burden of proof should be imposed on the Plaintiff.

The defendant driver also argued that the trial judge did not take into account three categories of evidence in apportioning the fault.

II. HELD: Trial judge did not err in holding that s.186 applied in this case, and did not err in apportioning fault

1. S.186 applies, not s.185.

(a) S.186 creates a rebuttable presumption that the loss or damage from the accident arose from the driver's negligence.

(i) This presumption remains until the end of the case and does not shift back to the plaintiff.

(ii) If the driver is able to prove the accident occurred through no fault of his/her own, then the presumption will have been rebutted and the driver will be found not liable.

(iii) If the evidence shows that the driver was at fault or the evidence is too meager or evenly balanced for a court to determine the driver's negligence, the presumption will not have been rebutted and the claim will succeed.

(iv) Contributory negligence on the plaintiff's part is not, in itself, sufficient to discharge the onus on the driver to rebut the presumption.

(v) The presumption can be rebutted in whole or in part, allowing apportionment of liability.

(vi) The Court found that had the defendant driver acted lawfully and without negligence, the defendant would have discharged the reverse onus under s.186. However, the trial judge found that the driver's conduct fell below the standard of care of a reasonable motorist under the circumstances.

(b) S.185 does not apply in this case.

(i) This is another statutory onus that places the burden on the party who contravenes the *Traffic Safety Act* and sustains loss or damage to prove that the loss did not arise of the contravention.

(ii) The onus of proof under this section is not based on the blameworthiness of the parties, but rather on a statutory framework. Imposing the onus of proof on the operator is not the same as a finding of negligence on the part of the operator.

(iii) S.185 and s.186 deal with two completely different situations – s.185 involved collisions between two motor vehicles while s.186 involves only one. Just because a cyclist with obligations under the *Traffic Safety Act* contravenes a provision, this does not void s.186's operation.

(c) Servient driver/dominant driver does not apply.

(i) Defendant driver argued that this case is analogous to a situation where an accident occurs because the servient driver fails to yield the statutory right of way. The common law places the onus on the servient driver to demonstrate the dominant driver was or should have been aware of the impending accident and could have taken evasive action.

(ii) The common law case cited was an Ontario case involving a collision between two motor vehicles – therefore it does not apply here.

2. The trial apportionment of fault did not involve a palpable and overriding error as trial judge did consider the evidence.

(a) Testimony of reconstruction experts was taken into account.

(i) Both experts testified that the collision could have been avoided if the cyclist stopped at the stop sign. The trial judge did take this into account.

(ii) The Court found that the apportionment assessment is not based on the extent to which each party's conduct caused the damage. If the driver fails to rebut the onus of negligence under s.186, the driver was a contributory cause of the accident.

(b) Testimony of eye-witness was taken into account.

(i) The trial judge did not err in assigning little weight or relevance to witness' evidence, as the witness was not paying full attention at the time of the collision.

(c) The cyclist's acts of fault were taken into account.

(i) The trial judge was correct in finding that the *Contributory Negligence Act* and the "comparative blameworthiness" approach applied to the issue of apportionment in this case.

(ii) The trial judge found that the cyclist must bear the greater responsibility for the collision.

III. COMMENTARY: Where a collision involves only one motor vehicle and non-motor vehicle, s.186 applies to place a rebuttable presumption that the loss or damage from the accident arose from the driver's negligence. Regardless of the actions of the non-motor vehicle, the motorist must still rebut the presumption, or else they will be liable due to the statutory framework. These provisions do not impose liability, but only the burden of proof.

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August 31, 2016

B. There is no vicarious liability for an occupier of land for the negligence of an independent contractor on the basis of agency

***Heikkila v. Apex Land Corporation*, 2016 ABCA 126 [4191]**

I. FACTS, LOWER COURT DECISION AND ISSUES

Facts

The Appellant, Kevin Heikkila, 19 years old at the time, was working at the construction site of the respondent developer, Apex Land Corporation ("Apex") in March 1994. While working on the rooftop of the site, the Appellant slipped on the icy roof and fell through an unmarked piece of plywood covering a hole cut for a skylight. As a result of the fall, the Appellant suffered injuries that rendered him a paraplegic. On September 26, 1995, the Appellant commenced a lawsuit against several defendants. However, through appeals to the Workers Compensation Board, Appeals Commission for Alberta Workers Compensation and the Alberta Court of Appeal, it was determined the Appellant's suit against all the defendants except Apex was barred by Part 3 of the *Workers Compensation Act*.

The Appellant argued that Apex's liability could be established via two different channels of reasoning:

> 1. Vicarious liability of Apex for the company providing supervisory management services, Summa Management Ltd. ("Summa") as its agent, or
>
> 2. Vicariously liability of Apex even if Summa was an independent contractor.

Alternatively, the Appellant argued that vicarious liability arises under the *Occupiers' Liability Act* (*OLA*). This argument raised s.11 of the *OLA*, which states:

> **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.

Issue

> 1. Was Summa acting for Apex to the degree necessary to make Apex vicariously liable at

common law for the conduct of Summa in negligently failing to have a safe workplace, including Summa's own acts or omissions as well as those of the site supervisor?

II. HELD: Appeal was dismissed. A unanimous Court found that the Appellant was unable to establish a basis for the vicarious liability of Apex for the negligence of the site supervisor via Summa. The Appellant was also unable to establish a basis for the liability of Apex under the *OLA* or any other basis.

1. The Court refused to recognize a new standard of care beyond the *OLA* specifically for a developer.

2. Vicarious liability applies where the law holds one party, who is free of personal fault, responsible of the misconduct of another.

3. The Appellant built his contention of vicarious liability via agency based on the language contained in the Agreement for Project Management Services between Apex and Summa (the Agreement).

(a) However, the Court upheld the trial judge's finding that the Agreement displayed the overall intention of the parties to hire Summa as an independent contractor. Although Summa hired the sub-trades, it was Apex who ultimately signed the contract.

4. While Apex had some obligations as an occupier under s.11 of the *OLA*, the nature of the contractual relationship between Apex and Summa was not by itself dispositive of the policy question of finding vicarious liability on the part of Apex.

(b) In fact, the relationship between employer and independent contractor does not typically give rise to a claim for vicarious liability. Where the control or direction of the activity of the front-line actor by the principal is hands on and extensive, the situation may be different.

5. Ultimately, the Court stated that the existence of other ways of looking at the facts does not amount an error in the trial judge's assessment. Furthermore, the Court also found "force" in Apex's argument that by virtue of s.11 of the *OLA*, the legislature has suggested that it is *not* justified to impose liability on a developer employing an independent contractor if the circumstances set out in s.11 are met.

6. The Appellant also submitted that the work was inherently dangerous and as such, liability was non-delegable to Summa. Apex ordered the skylights to be cut into the roof and therefore had the obligation to make sure this was done in a way that did not create an inherent danger. The Court rejected this argument as the line of analysis was not clearly set out in the pleadings.

(a) The Court exercised its discretion to refuse to entertain new grounds on appeal where the Court is not satisfied that doing so can be done fairly, or that a proper adjudication cannot be done on the existing record. This was not a situation where the issue had been effectively raised prior to the appeal.

(b) However, the Court offered a few statements regarding this argument in the case that it was incorrect in this conclusion. The Court did not find any similarity between the case law offered by the Appellant, which involved the use of a bull riding machine, use of a propane torch close to combustibles and in a case dealing with a roof situation, exposed electrical wire that was, in effect, a trap.

(c) The Court highlighted the danger of the Appellant's argument. To accept the Appellant's argument, it would be included within the concept of inherent danger comprehensive of virtually all activities done on a worksite that could be done negligently with dangerous implications. This reasoning would make the defendant developer/occupier liable almost to the level of an insurer of all significant physical work being performed by general or sub-contractors on a construction site.

(i) This approach would effectively erase the limitation on liability recognized by the Supreme Court of Canada that an employer is "never responsible for what is termed casual or collateral negligence of such a contractor or his workmen in carrying out the contract" (***St. John (City) v. Donald***, [1926] SCR 371 at p. 383).

(d) Furthermore, the trial judge had evidence before her and she did not make a finding of inherent danger in the initial activity. Instead, her reasons addressed the negligent execution of the lack of safety steps take *after* the initial activity.

Occupiers Liability

7. The Court highlighted that the extent to which an occupier might be able to foresee harm and the extent to which there is proximity by the occupier to persons on the property to render the occupier liable for harm, is set out by the legislature in the *OLA.*

8. Ultimately, the Trial Judge found that the elements of s.11 of the *OLA* were met:

(a) Apex exercised reasonable care in its selection of its independent contractor, Summa

(b) Apex exercised reasonable care in its supervision of Summa, and

(c) Apex satisfied the court that it had no knowledge of the safety standards and relied on Summa to carry out all aspects of the construction.

9. The Court of Appeal found the Trial Judge's fact findings valid and accorded it deference. Thus, Apex as an occupier was not liable under the *OLA* for damage due to the negligence of an independent contractor.

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C. In cases involving injuries caused by one player to another during a sporting event, there must be a deliberate intent to cause injury or reckless disregard for liability to be found

***Henderson v. Canadian Hockey Assn Inc*, 2016 MBQB 51, per McCawley J.**

I. FACTS AND ISSUES

The Plaintiff was injured when, while refereeing a hockey game, he was involved in a collision with an unidentified 13-year-old player. The Plaintiff sued the hockey coach of that player in negligence.

The Plaintiff had filed a Hockey Canada Injury Report stating that the player had clipped his skate with a stick, which is what he pleaded in his original Statement of Claim. That was later amended to allege that the player had collided with him.

At trial, all the Plaintiff could say was that he was watching the play in front of him when there was a collision, and that his next memory was lying in the dressing room. He could not recall signing the Injury Report, although he acknowledged his signature. He said he sent the Report to Fleming (who had taken over refereeing the game after the Plaintiff's injury) to sign it before submission to Hockey Canada without discussing its contents with Fleming. Four years after the event he had deposed an affidavit saying that he had received information from Fleming causing him to "see things differently" which led to the Statement of Claim being amended. At trial, he testified to a "collision" based on information he had from Fleming. The Plaintiff "acknowledged that hockey was a fast-paced, emotionally charged sport and that he was aware accidents could happen anywhere, anytime to anyone" (paragraph 17).

Fleming testified that while the Plaintiff was skating towards the play, an official opened the gate to the Defendant coach's bench and that a player skated out onto the ice and collided with the Plaintiff. In cross-examination Fleming admitted that "there was no basis to suggest that the unidentified player was doing anything more than trying to get onto the ice to join the game" and that he knew of no facts to suggest that the player had deliberately collided with the Plaintiff. The Court was "troubled" by the fact that in cross-examination on an affidavit prior to trial Fleming had said that he knew no further details beyond what was set out in his affidavit, but then added a number of details that were not in the affidavit. The Court found it "more troubling" that in speaking with the Hockey Canada investigator a year after the incident that he had not witnessed the event as he had been on his way to the arena. Although Fleming was adamant at trial that he had seen the

event, "he could give no plausible explanation as to why he told [the investigator] otherwise."

The issue was whether a hockey coach could be liable for damages arising from the unintentional contact by a player on his team.

II. HELD: For the Defendant, Plaintiff's claim was dismissed.

1. The Court gave little weight to the evidence of Fleming, given the contradictions in his evidence over time.

2. The Court held that the Plaintiff's evidence had been honest and straightforward, and that "[c]ommon sense would suggest that Mr. Henderson's earlier recollection, as frail as it might have been due to his injury and how quickly the incident happened, would probably be more accurate" given that no witness came forward to testify to how the incident might otherwise have occurred. The Court held that one reason for the lack of evidence about the event "may be that, but for the resulting injury, the incident itself was unremarkable" (paragraph 34).

3. The Court rejected the Plaintiff's submission that in the circumstances the onus of proof should be reversed to require the Defendant to disprove negligence or an intent to harm. This was held to be "an ordinary civil case and it is therefore up to the plaintiff to establish liability on a balance of probabilities that the defendant is liable on the basis of his acts or omissions" (paragraph 39).

4. The Court held that there was no evidence of negligence, carelessness or intent to injure on the part of the unidentified player or the hockey coach.

(a) The Court rejected the Plaintiff's submissions (based on ***Zapf v. Muckalt*** (1996) 84 B.C.A.C. 195 (B.C. C.A.)) that the standard was one of "carelessness." McCawley J. held that ordinary carelessness or negligence is not a basis for recovery in cases involving injuries caused by one player to another during a sporting event. Only where there is a deliberate intent to cause injury or reckless disregard for the consequences of one's action, will a finding of negligence result.

(b) It was held that all participants in a physical contact sport like hockey, including a referee, are presumed in law to assume willingly the risk of harm attendant on the regular and expected conduct of the game. The player making injurious contact with another player can only be held liable for the results of that physical contact if there is a deliberate intent to injure or conduct so outside the normal scope of play.

4. Further, the Court held that it is difficult to see how a coach could be held responsible for the conduct of a player in the absence of any evidence that the player's conduct was wrongful.

5. Finally, the Court held that it is difficult to see how a coach could be held responsible for conduct that he would not be able to anticipate or prevent.

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D. Canadian court recognizes new tort of public disclosure of embarrassing private facts and awards damages totaling $100,000 and issues an injunction against the Defendant

***Jane Doe 464533 v. D.(N.)*, 2016 ONSC 541, per Stinson, J.**

I. FACTS AND ISSUES

The female Plaintiff and male Defendant began dating in grade 12. After the school year ended, they broke off their formal relationship but continued to see each other romantically in the summer and fall of 2011. By that fall, they were both 18 years old.

The Plaintiff went to attend university in another city. Notwithstanding that they were no longer "boyfriend and girlfriend," the parties continued to communicate regularly online, with texting and by telephone. They would physically see each other when she returned to her parents' home.

In August, 2011, the Defendant began repeatedly asking the Plaintiff to make a sexual explicit video of herself and to send it to him. She ultimately recorded an intimate video in November, 2011. Before she sent it to the Defendant, she texted him, advising she was unsure about sending it to him. However, he talked her into it, reassuring her that nobody else would see the video. Accordingly, "she 'caved in' and sent the video to him.

In early December, 2011, the Plaintiff learned that the Defendant had posted her video on an Internet pornography site, the same day that she had sent it to him, under the title "College girl pleasures herself for ex-boyfriends [*sic*] delight." He also showed it to young men that they both knew from high school. It became known among her friends.

The Plaintiff was "devastated, humiliated and distraught." She got the Plaintiff's mother to speak to the Defendant, after which the video was removed from the website after having been online for approximately three weeks. There was "no way to know how many times it was viewed or downloaded and how many times it may have been copied."

The Plaintiff suffered significant consequences as a result of this. She had to defer her Christmas exams because she was physically and mentally distraught. She had sleep difficulty and skipped class. When she came home for Christmas break, her condition deteriorated to the point that her mother took her to a crisis intervention centre at a hospital. She ended up seeing a counselor for over a year and a half because of the "emotional fallout", and suffered "serious depression and emotional upset." She continued to suffer from panic attacks. Whenever she had eye

contact with the Defendant after the posting, he showed "an insolent look on his face, as if he was proud of himself." He had made no expressions of remorse.

The existence of the video became known to members of the Plaintiff's friends and social circle and harmed her reputation. She finished her undergraduate studies after four years and, at the time of the hearing was attending a graduate program to become a healthcare professional. However, she remained emotionally fragile and worried about the possibility that the video "may someday resurface and have an adverse impact on her employment, her career, or her future relationships."

The Defendant did not defend and was noted in default. When served with the notice of her application for assessment of damages, he continued to remain uninvolved in the case.

II. <u>HELD</u>: For the Plaintiff, damages of $100,000 awarded and permanent injunction issued requiring destruction of the images and prohibiting further dissemination and prohibiting further contact with the Plaintiff and her immediate family

1. The Court noted that "[i]n recent years, technology has enabled predators and bullies to victimize others by releasing their nude photos or intimate videos without consent." It was held that adults may also suffer great harm from such acts, to the extent that in 2014, Parliament amended the *Criminal Code* to create the new offence of publication of an intimate image without consent: *Criminal Code*, R.S.C. 1985, c.C-46, s.161.1. The province of Manitoba also enacted legislation to create the tort of "non-consensual distribution of intimate images": *The Intimate Image Protection Act*, C.C.S.N., c. 187, s.11. This case raised the question of availability of a common law remedy for victims of this kind of conduct.

(a) The Court held that common law had developed to the point where there were legal grounds to justify "the proposition that the courts can and should provide civil recourse for individuals who suffer harm arising from this misconduct and should intervene to prevent its repetition" (p.19).

2. The Court held that the Defendant was liable for the tort of breach of confidence.

(a) The Court summarized the elements of this tort:

21 In ***Grant v. Winnipeg Regional Health Authority***, [2015] M.J. No. 116 (Man. C.A.), the Manitoba Court of Appeal summarized the law in relation to claims for breach of confidence as follows (at paras.118-119):

Tort law has recognized that a breach of confidence in certain circumstances may create a cause of action (see ***Lac Minerals Ltd. v. International Corona Resources Ltd***., [1989] 2 S.C.R. 574; and ***Cadbury Schweppes Inc. v. FBI Foods Ltd***., [1999] 1 S.C.R. 142). Courts have recognized that

the unauthorized use of confidential information to the detriment of the party communicating it, and from which damages ensue, may lead to a cause of action. The elements required to make out the tort of breach of confidence are:

> a) That the information must have the necessary quality of confidence about it
>
> b) That the information must have been imparted in circumstances importing an obligation of confidence, and
>
> c) That there must be unauthorized use of that information to the detriment of the party communicating it (see ***H.R.G. v. M.S.L.,*** 2007 BCSC 930, 75 B.C.L.R. (4th) 141; ***Canada (Attorney General) v. Rundle (c.o.b. NEC Plus Ultr)***, 2013 ONSC 2747, 16 B.L.R. (5th) 269 (QL); and ***Sabre Inc. et al. v. International Air Transport Association et al.,*** 2011 ONCA 747 at p.14, 286 O.A.C. 246).

(b) The Court held that all three elements of the tort had been established. As to the first, the video was "private and personal to the plaintiff" and therefore had the "necessary quality of confidence about it." As to the second, it was held that the "circumstances that lead to the creation and communication of the video clearly demonstrate that it was communicated to the Defendant on the express basis that he would treat it as confidential." As to the third, the Court held that although prior cases held that the necessary injury was established by economic damage in commercial circumstances, there was no reason not to find that the psychological harm suffered by the Plaintiff qualified:

> 24 The third element of the tort, use of the information to the detriment of the party communicating it, is ordinarily considered in commercial circumstances, where the recipient has misused the confidential information for commercial advantage, at the expense or to the detriment of the other party. An essential element in any tort is harm to the plaintiff. I see no rational basis to distinguish between economic harm and psychological, emotional and physical harm, such as was experienced by the plaintiff in the present case. In any event, the possible future adverse impact on the plaintiff's career and employment prospects arising from the possibility that the video may someday resurface, also demonstrates actionable harm.

3. The Court also held that the Plaintiff had established the tort of intentional infliction of mental distress.

(a) The Court summarized the elements of that tort as follows:

> 26 In ***Prinzo v. Baycrest Centre for Geriatric Care*** (2002), 60 O.R. (3d) 474 (Ont. C.A.), Weiler J.A. adopted the test for intentional infliction of mental distress, as set out by McLachlin J. in ***Rahemtulla v. Vanfed Credit Union*** (1984), 51 B.C.L.R. 200 (B.C. S.C.). This test requires:
>
> (i) conduct that is flagrant and outrageous
>
> (ii) calculated to produce harm, and
>
> (iii) resulting in a visible and provable injury.

(b) The Court held that the Defendant's conduct was flagrant and outrageous. Although malice is not necessary to establish the tort, the Court held that malice on the part of the Defendant was established by the fact that he posted the video online as soon as he got it.

(c) Posting the video was also held to have been calculated to produce harm. The Court held that "although the extent of the harm need not be anticipated, the kind of harm must have been intended or known to be substantially certain to follow."

(d) The Plaintiff had suffered the necessary visible and provable injury in the sense of psychological harm. She had been diagnosed with depression. This was a "visible and provable illness."

4. The Court held that the Plaintiff had established one of the invasion of privacy torts.

(a) The Court cited with approval the four types of invasion of privacy torts recognized in the United States as summarized in an article by Professor Prosser:

> 36 The Court went on to recognize as authoritative a seminal American legal article on the subject by William L. Prosser, "Privacy" (1960), ***48 Cal. L. Rev.***, noting that "Prosser argued that what had emerged from the hundreds of cases he canvassed was not one tort, but four, tied together by a common theme and name, but comprising different elements and protecting different interests. Prosser delineated a four-tort catalogue, summarized as follows, at p.389:
>
> 1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs

2. Public disclosure of embarrassing private facts about the plaintiff

3. Publicity which places the plaintiff in a false light in the public eye

4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness."

(b) The Court held that privacy torts should be recognized because *Charter* cases have held that privacy is worthy of constitutional protection and should be considered a *Charter* value. Additionally, while the *Charter* does not apply to common law suits between private individuals, the common law is to develop in a manner consistent with *Charter* values and that with the advent of Internet and digital technology, common law evolve to respond to it: ***Jones v. Tsige***, 2012 ONCA 32, at paras.39 – 69.

(c) The Court held that the facts of this case fell into the category of the second type of privacy tort recognized by Professor Prosser, the public disclosure of embarrassing private facts. The Court felt that this tort should be recognized in Canada because "[t]o permit someone who has been confidentially entrusted with such details – in particular intimate images that to intentionally reveal them to the world by the Internet, without legal recourse, would be to leave a gap in our system of remedies" (p.45). The Court summarized the elements of this tort as they should be recognized in Canada and concluded that they had been established in this case:

> 46 I would essentially adopt as the elements of the cause of action for public disclosure of private facts the ***Restatement (Second) of Torts*** (2010) formulation, with one minor modification: One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of the other's privacy, if the matter publicized or the act of the publication (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public. [modification shown by underlining by the Court].
>
> 47 In the present case the defendant posted on the Internet a privately-shared and highly personal intimate video recording of the plaintiff. I find that in doing so he made public an aspect of the plaintiff's private life. I further find that a reasonable person would find such activity, involving unauthorized public disclosure of such a video, to be highly offensive. It is readily apparent that there was no legitimate public concern in him doing so.

5. The Court held that damages was a remedy available with respect to this tort. Given that there were no reported cases quantifying damages for this type of tort, the Court felt that cases awarding damages for physical sexual battery (with the attendant psychological injuries) are of assistance. Quoting from ***B.M.G. v. Nova Scotia*** (Attorney General), 2007 NSCA 120, the Court held that the interest at stake were intangible – the "dignity and personal autonomy" of the victim. Damage awards should take a functional approach in relation to those interests in addition to the more familiar ones of pain, suffering and loss of enjoyment of life." It was held that the damages in this type of tort should provide solace for the victim's suffering, vindicate the victim's dignity and personal autonomy, and recognize that the wrongful acts were humiliating and degrading (paras.53 – 56).

(a) The Court summarized the non-exhaustive list of factors that should be considered:

> 134 The Supreme Court in ***Blackwater v. Plint***, [2005] 3 S.C.R. 3 at p.89 approved the factors considered by the trial judge in that case: ***W.R.B. v. Plint***, [2001] B.C.J. No. 1446 (Q.L.) (S.C.) at p.398 ff. These include:
>
> . . .
>
> • the circumstances of the assaults including their number, frequency and how violent, invasive and degrading they were
>
> • the circumstances of the defendant, including age and whether he or she was in a position of trust, and
>
> • the consequences for the victim of the wrongful behaviour including ongoing psychological injuries.
>
> 135 Consideration of these factors, in my view, will assist in determining an appropriate amount of non-pecuniary damages to serve the functions of providing solace for the pain, suffering and loss of enjoyment of life flowing from the assaults, of demonstrating vindication of the victim's rights of personal dignity and individual autonomy and, with regard to aggravated damages, of appropriately recognizing the humiliating and undignified nature of the defendant's conduct.

(b) Considering these factors, the Court held that an award of $50,000 was appropriate for general damages. The "relatively modest" $10,000 award in ***Jones v. Tsige*** represented a "much different situation" where the "privacy right offended and the consequences to the Plaintiff were vastly less serious and offensive" (p.58).

(c) Aggravated damages were also warranted because "the posting of the video amounted to a breach of the trust reposed by the Plaintiff in the Defendant that he would not reveal it to anyone else" (p.59).

(d) Punitive damages were also warranted, in this case $25,000. This was taking into account proportionality and "the blameworthiness of the Defendant's conduct (high); the degree of vulnerability of the Plaintiff (significant); and the harm directed specifically at the Plaintiff (again, significant)." The Court also felt that this was a case that needed to consider deterrence (paras.60 – 62).

6. The Court felt it was appropriate to grant the injunctive relief sought by the Plaintiff.

(a) The required to destroy any images or recordings in his possession or under his control as may exist and he was permanently prohibited from "publishing, posting, sharing or otherwise disclosing in any fashion any intimate images or recordings of the Plaintiff."

(b) The Court also granted an injunction prohibiting the Defendant from having contact (direct or indirect) with the Plaintiff and her family).

III. COMMENTARY

This case recognizes a new invasion privacy tort in Canadian law, as has existed in the United States for some time. In the United States four types of invasion of privacy tort are recognized and they are now coming to be recognized in this country. In ***Jones v. Tsige*** (2012) 108 O.R. (3d) 241 the Ontario Court of Appeal recognized the tort of intrusion upon seclusion. In that case one bank employee accessed the records of another employee who had become involved with her husband. Both the prying employee and the bank were exposed to liability.

This case imports (with a minor modification or clarification) the American tort of public disclosure of private embarrassing facts. There may be liability exposure for the employee of individual tort-feasors who allow this kind of conduct to occur or who fail to take reasonable steps to detect or prevent such conduct on the part of employees or others for whom they may be vicariously liable. Also, as you can see, there is the potential for substantial awards for compensatory, aggravated and punitive damages in such cases.

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August 31, 2016

III. QUANTUM/DAMAGES ISSUES

A. Quantification of a loss of future income earning capacity on the capital asset approach must take into account negative contingencies, even where the loss cannot be calculated by a mathematical approach

***Dunbar v. Mendez*, 2016 BCCA 211, per Harris, J.A. [4193]**

I. FACTS AND ISSUES

This was an appeal by the defendants, Mendez and Hyland, from a personal injury damages award in favour of the plaintiff, Dunbar.

In 2011, the plaintiff, age 27, was injured in a motor vehicle accident. He suffered from a pre-existing degenerative hip condition exacerbated by the accident. He testified that he wanted to stay in his job for as long as he was physically able but was concerned about having to look at doing something else.

The plaintiff had a pre-existing hip problem and that there was a "real possibility" that his post-accident hip problems may have developed even if the accident had not occurred.

The plaintiff experienced ongoing back problems. He was able to continue full-time employment as a steel fabricator, albeit with considerable accommodation from his employer to cope with the limitations caused by his injuries. There was no dispute that the plaintiff was competitively unemployable as a steel fabricator. There was vocational evidence indicating he was able to retrain and work in other employment if necessary.

The trial judge concluded that the plaintiff demonstrated a real and substantial possibility of a loss of future earning capacity, but that the loss was not capable of mathematical calculation. She found that he would not be able to work as many hours as he could have if the accident had not occurred and that he might not be able to remain in his field indefinitely, even at reduced hours and with the employer's accommodations. The plaintiff's loss was quantified at $400,000 using the capital asset approach, which was equivalent to a loss of $20,000 per year until the plaintiff's intended retirement at age 55.

The defendants appealed on the basis the award was inordinately high.

II. HELD: Appeal allowed in part; loss of future earning capacity award reduced to $250,000

1. The court began by giving an overview of the law re: assessing future loss:

> (a) 21 The assessment of future loss requires a court to estimate a pecuniary loss by weighing (even if not assigning specific numeric values to) possibilities and probabilities of future events and relating evidence and findings of fact to the quantification of the loss: ***Schenker*** at paras.53, 69; ***Ostrikoff v. Oliveira***, 2015 BCCA 351 at p.29; ***Tsalamandris v. McLeod***, 2012 BCCA 239 at paras.53-55. The usefulness of economic and statistical evidence does not turn an assessment into a calculation. It does, however provide a useful tool to assist in determining what is fair and reasonable in the circumstances: ***Parypa v. Wickware***, 1999 BCCA 88 at p.70.

2. The Court also highlighted the importance of taking into account the contingencies (positive and negative) that arise on the evidence. In this case, the contingencies include:

> (a) That the plaintiff did not have a young family for most of the pre-accident period. However, by the time of trial he had two young sons. Hence, the amount of time spent at work was affected by the demands of having young children (p.26);
>
> (b) A steel fabricator does heavy work and demands considerable strength. Colloquially, it is a young man's game. Hence, as one ages the ability to sustain brutally long and physically demanding work weeks of 50 – 60 hours diminishes (p.27)
>
> (c) The availability of work as a steel fabricator is cyclical and dependent on the state of the economy (p.28), and
>
> (d) The plaintiff suffered a pre-existing degenerative hip condition (p.29).

3. The Court quantified the negative contingencies as follows:

> (a) 31 In my view, it would be reasonable, at least for the purposes of testing the reasonableness of the award, to assign a discount in the range of 25 – 50% to these, primarily negative, contingencies. If one allowed a 33% deduction for the relevant contingencies the starting point of the assessment, in order to arrive at a final award of $400,000 is an income loss of around $29,000 a year for 25 years. This amounts to an annual loss of 644 overtime hours or nearly 967 regular rate hours. In my opinion, these calculations indicate that the award is inordinately high. Indeed, it is difficult to imagine anyone reducing hours so dramatically and remaining employed in the field. Rather, such a reduction suggests the inevitable need to retrain, but the judge was not given the tools to compare Mr. Dunbar's likely earnings if he had to retrain with those he might reasonably have expected without the accident.

4. The evidence illustrated that the $400,000 award was only justifiable on two possible grounds:

(a) The first is if it is reasonable not to discount the award for any negative contingencies.

(b) Alternatively, if contingencies related to his pre-existing hip condition are factored in, the only way to justify an award of this amount is if Mr. Dunbar's income were to be reduced as a result of the accident by something approaching $28,000 to $40,000 a year over the period he would have worked before his hip problem significantly affected his earning capacity. However, this was not supported by the evidence.

5. In conclusion, the Court estimated the Plaintiff loss of earning capacity at $290,000. After factoring the negative contingencies, court awarded the plaintiff $250,000 for loss of earning capacity.

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IV. PRACTICE ISSUES

A. While the verdict of a criminal case can preclude the litigation of the issues involved in that criminal case in the related civil proceeding, issues that were not involved or decided in the criminal case (such as contributory negligence and the apportionment of civil liability) can still be litigated in the civil case

***Dalrymple v. McKay*, 2016 NSSC 95, per Wright, J. [4189]**

I. FACTS AND ISSUES

The Plaintiff Dalrymple sued the Defendant McKay in assault and battery, relating to a physical confrontation between them that took place in September 2014. This left the Plaintiff Dalrymple with serious personal injuries.

The Defendant McKay was charged and ultimately convicted after a trial of assault causing bodily harm contrary to section 267(b) of the *Criminal Code*, R.S.C. 1985, c. C-46. His record of conviction and the sentence imposed was admitted by the Defendant in the civil case.

The Plaintiff applied for summary judgment on the issue of liability, leaving quantum to be determined at a later date.

In his Amended Statement of Defence, the Defendant pleaded the defences of contributory negligence, self defence and provocation. In his response to the summary judgment application, he filed an Affidavit attesting to his version of the fight, which had been largely rejected by the criminal court judge in relation to the issue of self defence.

The Reasons of the criminal court judge indicated that the Defendant McKay was dating a woman named Tattrie, who had previously lived for eighteen years with the Plaintiff Dalrymple. Dalrymple was alleged to have sent derogatory messages to Tattrie, which had come to the attention of the Defendant/Accused McKay. When the two men encountered each other on the street, words were exchanged and a scuffle occurred. The criminal judge could not determine who swung first, or who hit whom how many times. However, he was satisfied that at one point the Plaintiff Dalrymple was not knocked down to one knee, after which the Defendant/Accused McKay kicked Dalrymple in the head while he was down, inflicting injury. The criminal judge disbelieved McKay's assertion that a knife had been involved. The criminal judge had doubt as to whether or not this was a consensual fight but found that there had been "some give and take by both men." He further found that Dalrymple had the opportunity to avoid some of what occurred. It was found that "the two of them were there and knew

what they were doing; they were there to mix it up." The criminal judge found that once the Plaintiff was dropped to one knee, the fight should have been over. McKay had to opportunity to retreat but instead kicked Dalrymple while he was down. The criminal judge found that the Crown had disproved self defence and convicted McKay.

II. HELD: For the Defendant; summary judgment application dismissed

1. The Court held that the Defendant was precluded from re-litigating the defence of self defence in the civil case:

> 11 It is difficult to see how the defence of self defence could properly be re-litigated in this civil case, given the clear findings made by the trial judge on this very issue. Unlike the case of ***Slaunwhite v. Walker***, a decision of Hall, J. of this court in 2000, we know very clearly in this case why the trial judge in Provincial Court rejected the defence of self defence.

2. However, material issues in the civil case had not been issues in play in the criminal court (including those relating to the defence of contributory negligence (paragraph 12).

(a) The Court noted the test for contributory negligence and how it could be properly pleaded in a case like this:

> 13 The test for contributory negligence was affirmed by the Supreme Court of Canada in ***Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd***., [1997] 3 S.C.R. 1210 (S.C.C.):
>
> > Although contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckoning he must take into account the possibility of others being careless.
>
> 14 Accordingly, the defendant has plead that the plaintiff's injuries were caused or contributed to by his own negligence by engaging in a physical confrontation when it was reasonably foreseeable that such behaviour could result in personal injury to himself. That defence was similarly pleaded in ***Slaunwhite*** but was not specifically dealt with in the confines of the summary judgment motion in that case.

(b) The Court concluded that there were issues of fact left to be decided in the civil case, including contributory negligence:

> 16 As previously recited, there were some questions of fact that Judge Gabriel was unable to make findings on, e.g., who swung first or who struck who how many times, or whether it began as a consensual fight because it appeared to him that there was some give and take by both parties.

17 While Judge Gabriel was satisfied beyond a reasonable doubt that the Crown had disproved self defence, it was entirely beyond the scope of the trial to consider whether the plaintiff was partly at fault for the injuries sustained by willingly engaging in a fight with the defendant.

18 I am satisfied that there still remains outstanding material and unanswered questions of fact which pertain to the defence of contributory negligence.

3. The Court declined to resolve the argument raised by the Plaintiff that contributory negligence cannot pertain to an intentional tort such as assault and battery. It was held that this is a question of law which should be left for trial (p.20).

III. <u>COMMENTARY</u>: The courts have long held that a criminal verdict (based on a finding of criminal responsibility beyond a reasonable doubt) can preclude the Accused/Defendant from re-litigating the issues that were involved in the criminal case in a related civil proceeding in some circumstances: ***Toronto (City) v. C.U.P.E., Local 79***, 2003 SCC 63; A.W. Bryant, S.N. Lederman and M.K. Fuerst, *Sopinka, Lederman & Bryant:* ***The Law of Evidence in Canada***, (3rd Ed. Online) section 19.162-19.175; ***Holt v. McMaster*** (1993) 140 AR 235 (Alta QB); ***F.(K.) v. White*** (2001) 198 D.L.R. (4th) 541 (Ont.C.A.); ***Cho v. Phimsarath***, 2003 ABQB 235; ***Caci v. MacArthur***, 2008 ONCA 750; aff'g [2007] O.J. No. 156 (Ont.S.C.); lv. to app dismissed [2009] S.C.C.A. No. 2; ***Plishka-Humphreys (Guardian ad litem of) v. Bolen***, 2012 BCSC 235.

The exception is where the Accused/Defendant pleads guilty in the criminal case for economic and practical reasons. For example, it is common for an individual (without legal advice) to plead guilty to a minor traffic or criminal matter rather than pay for legal counsel and attend court appearances, especially where the accused has language difficulties. This would be a situation of where the "stakes in the original proceeding were too minor to general a full and robust response, while the subsequent stakes were considerable" and the conviction will not preclude litigation of the issues in the civil case: ***Toronto (City) v. C.U.P.E.***, Local 79, 2003 SCC 63, at p.53; ***Becamon v. Wawanesa Mutual Insurance Co***., 2009 ONSC 113.

This case makes clear that even where the criminal verdict is found to be binding in the civil case, the Accused/Defendant can still litigate issues that were not dealt with in the criminal case, especially contributory negligence.

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