Blaney McMurtry LLP

PUBLICATION

The Most Important Cases For Personal Injury Lawyers

Date: May 03, 2021

Original Newsletter(s) this article was published in: Insurance Bulletin: May 2021

Blaneys' Partner, Stephen Moore, spoke at the 16th Annual Update: Personal Injury Law and Practice conference hosted by Osgoode Hall Law School Professional Development Program on April 29th, 2021. His session entitled "The Most Important Cases for Personal Injury Lawyers over the Preceding 12 Months", highlighted and reviewed the key cases decided in the last year and assessed their likely impact on personal injury law practice.

The content of Stephen's presentation is captured in the article below. For ease of reference, we have included a digital table of contents. The full article starts here.

TABLE OF CONTENTS

Introduction

The last year has been the most unusual one I have ever experienced. Notwithstanding the almost complete paralysis of the civil justice system in the months following the start of the pandemic, a number of important decisions were released by the Courts throughout the country in 2020 and the first few months of 2021. Frankly, there have not been as many decisions as usual and of those that have been published, only a small number address the bread and butter issues this audience is concerned with.

I have interpreted the phrase "personal injury" broadly and have included cases that have addressed less traditional personal injury claims. In particular, I have included two Supreme Court of Canada ("SCC") decisions which interpret the anti-SLAPP legislation in Ontario and a more recent decision of Mr. Justice Belobaba which dealt with a claim against Ontario's Premier, Doug Ford. I have also dealt briefly with Justice Corbett's seminal decision on the tort of harassment on the internet.

Generally, this paper is not intended to be comprehensive analysis of the cases but rather provides a brief precis of each case simply to ensure that you are aware of it. Those cases which are the most germane to personal claims cases arising from accidents and professional negligence are dealt with in more detail. I have also avoided discussions of cases on most topics that will be covered in more depth by speakers later in the day.

Although I am supposed to focus on decisions handed down in the last 12 months, I have expanded the scope of this paper to cover cases from January 1, 2020 to date.

SLAPP Suits

A number of provinces, including Ontario, have enacted anti-SLAPP legislation (Strategic Lawsuits Against Public Participation) and the SCC handed down two decisions on this subject in the fall of last year. Both decisions were delivered on the same day.[1] In addition, the Ontario Superior Court recently decided another very interesting case on the anti-SLAPP provisions involving Premier Ford.[2]

I have included a discussion of these decisions because anti-SLAPP claims usually sound in defamation where personal injury is the gist of the complaint. While the personal injury bar most often addresses claims arising from accidents and professional negligence, we are often approached by potential plaintiffs and defendants about defamation claims. Second, the anti-SLAPP legislation ushers in a completely new regime for dealing with lawsuits that arise from any expression on a matter of public interest. Members of the personal injury bar should be aware of this new regime which has the potential to impact lawsuits which are not fundamentally about defamation at all.

Before discussing either case, a word about anti-SLAPP legislation is in order. Côté J., speaking for a unanimous Court in the *Pointes* case, explained the purpose of such legislation as follows:

2 Strategic lawsuits against public participation ("SLAPPs") are a phenomenon used to describe exactly what the acronym refers to: lawsuits initiated against individuals or organizations that speak out or take a position on an issue of public interest. SLAPPs are generally initiated by plaintiffs who engage the court process and use litigation not as a direct tool to vindicate a bona fide claim, but as an indirect tool to limit the expression of others. In a SLAPP, the claim is merely a façade for the plaintiff, who is in fact manipulating the judicial system in order to limit the effectiveness of the opposing party's speech

3 In light of the increased proliferation of SLAPPs, provincial legislatures (in Ontario, British Columbia, and Quebec) have enacted laws to mitigate their harmful effects. These laws are occasionally referred to as "anti-SLAPP" legislation (2018 ONCA 685, 142 O.R. (3d) 161 (Ont. C.A.); Galloway v. A.B., 2019 BCCA 385, 30 B.C.L.R. (6th) 245 (B.C. C.A.); Klepper v. Lulham, 2017 QCCA 2069 (C.A. Que.) (CanLII); B. Sheldrick, Blocking Public Participation: The Use of Strategic Litigation to Silence Political Expression (2014)).[3]

Pointes contains a detailed analysis of Ontario's anti-SLAPP legislation. The result of this legislation was the enactment of sections 137.1. through 137.5 of the *Courts of Justice Act* ("*CJA*")[4]. Section 137.1 is a purpose clause which outlines the intent of the legislation. The SCC has indicated that this clause commands considerable interpretative authority. It provides:

137.1 (1) The purposes of this section and sections 137.2 to 137.5 are,

(a) to encourage individuals to express themselves on matters of public interest;

(b) to promote broad participation in debates on matters of public interest;

(c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and

(d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

Reviewing the legislative debates, Côté J. commented that the legislation will allow the court to quickly identify strategic lawsuits, minimizing the emotional and financial strain on defendants, as well as the waste of court resources. Her Honour went on to note that the legislation is about preventing strategic lawsuits and that anyone who has a legitimate claim of libel or slander should not be discouraged by this legislation.

The Court indicated that the legislative framework is engaged if the expression is causally related to the proceeding. Accordingly, not just lawsuits directly concerned with the impugned expression are caught by this framework. The *Pointes* case was a good example of a non-defamation suit that was caught by the legislation.

In this case, the plaintiff, a developer, obtained approval from a regional conservation authority for a development. The defendant, a not-for-profit association, applied for judicial review of the conservation authority's decision. That application was resolved, in part, by the defendant agreeing in minutes of settlement that it would not advance the position that the conservation authority's resolutions were contrary to relevant environmental legislation. The plaintiff's application to the city for an official plan amendment was denied and the plaintiff appealed. The president of the defendant testified before the OMB that development would result in significant environmental damage. The plaintiff's application for development approval was denied. In this action, the plaintiff sued the defendant for an alleged breach of contract and damages because of the defendant's testimony before the OMB. It alleged the president's testimony breached the minutes of settlement. This claim was not a defamation case but rather a breach of contract case which arose from an expression that relates to a public matter.

Just how far this legislation can extend is unclear. Suppose a constituent were to make evidence-supported public utterances about a politician's alleged misuse of public funds. And let us further suppose that this politician and constituent get into an argument about the merits of the constituent's allegations that leads to a fight where the constituent suffers minor personal injuries. If the constituent sued the politician for assault could the politician seek to use the anti-SLAPP provisions to end the assault lawsuit?

This paper will not set out a detailed analysis of these cases but, rather, provide only an overview. However, these three cases should be read by anyone who encounters a situation where someone is contemplating suing or has been sued and the suit arises from an expression on a public matter. If it does, then the plaintiff runs the risk of having the action dismissed very early on and potentially at great cost to the plaintiff. This legislation provides defendants with a mechanism that may allow them to stop the lawsuit in its tracks in advance of discoveries. Even the threat of motion under this legislation may be sufficient to convince the plaintiff to drop their action or never start it.

The Court concluded that the initial burden on the plaintiff to demonstrate that the expression relates to a matter of public interest is not an onerous one.

Once the Court has concluded that the lawsuit arises from the expression made by the moving party that relates to a public interest, the onus shifts to the plaintiff to satisfy the judge that there are grounds to believe that the plaintiff's proceeding has substantial merit -***and*** that the moving party has no valid defence to the proceeding ***and*** that the harm to the responding party is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression. A failure to demonstrate any one of these three requirements will result in the dismissal of the lawsuit.

The Court concluded that the "grounds to believe test" does not require a finding by the judge that the action has substantial merit and that the defendant has no valid defence on the balance of probabilities. Rather, the test requires the judge to have something more than suspicion but less than proof on the balance of probabilities. The test is a subjective test to be applied by the judge hearing the motion and not by some "reasonable trier".

The Court then provided an analysis of the balance of the requirements under the legislation, which I will not summarize here. In the end, the Court did not believe that he had a claim with merit because the testimony of the defendant before the OMB almost certainly did not violate the terms of the minutes of settlement. The plaintiff's action was dismissed.

As can readily be seen, this legislation has the potential to stop many types of lawsuits that are tied to a defendant's expression on a matter of public interest. The legislation is not only being used to defeat lawsuits based on such expressions but also to prevent such lawsuits from even being commenced. Before threatening a lawsuit, plaintiffs must seriously consider the counter-threat that they could face an anti-SLAPP application. The costs associated with losing such an application can be crippling and the costs threat alone may convince the plaintiff to desist.

That takes us to the second SCC decision in *Bent*. Ontario personal injury lawyers will already be familiar with this case. Unlike the decision in *Pointes*, the Court split 5:4 in this case. Maia Bent was the president-elect of the Ontario Trial Lawyers' Association and the plaintiff was a medical doctor who was retained by insurers to review other medical specialists' assessments. The action arose out of two reviews conducted by the plaintiff.

Without getting too deeply into the facts, Ms. Bent sent an email to some 670 OTLA members using the OTLA Listserv alleging that Dr. Platnick had acted improperly in preparing his reports in two matters including altering a report from another doctor involved in a CAT assessment. She also indicated that he had improperly influenced one assessing doctor to change her report. This email was leaked by an OTLA member and this resulted in an article about the matter being published in an insurance business magazine. Dr. Platnick sued the publication and when his requests for an apology from Ms. Bent went unanswered, he commenced his defamation action against Ms. Bent. Ms. Bent then brought her anti-SLAPP motion.

The court of first instance allowed the motion and dismissed Dr. Platnick's lawsuit. The Ontario Court of Appeal, in a unanimous decision, reversed the lower court. Both courts concluded that the anti-SLAPP provisions were engaged because Ms. Bent's comments were expressions

regarding a matter of public interest. However, unlike the lower court, the Court of Appeal found that Dr. Platnick had succeeded in demonstrating that Ms. Bent's defences of justification and qualified privilege were not valid defences. The Court of Appeal also concluded that the potential harm to Dr. Platnick outweighed the public interest in protecting Ms. Bent's expression. In this regard, the Court of Appeal indicated that this lawsuit bore none of the indicia of a SLAPP and that there was sufficient harm attributable to the initial publication by Ms. Bent (of the email) irrespective of the republication by the magazine.

The SCC, in dismissing the appeal, had no difficulty in finding that the lawsuit had substantial merit. The words uttered by Ms. Bent were published, referred to the plaintiff and were defamatory of the plaintiff in the sense that they would lower the plaintiff's reputation in the eyes of a reasonable person. The Court then addressed the defences raised by Ms. Bent and concluded that there were grounds to believe that the defences lack merit. Finally, the majority commented on the question of whether the pubic interest weighed in favour of allowing the suit to proceed or in the public interest in protecting the expression. In this part of the judgment, the majority specifically concluded that that the public interest could have been served without defaming Dr. Platnick. The Court also noted that in this case we were not dealing with an attempt by Dr. Platnick to vindictively or strategically silence another party but rather this was a case where one party is attempting to remedy seemingly legitimate harm suffered as a result of a defamatory communication.

The real difference between the majority and minority decisions is that the minority would have allowed the motion to succeed because it concluded that there were grounds to believe that Ms. Bent's defence of qualified privilege would succeed.

The majority was careful to point out that its considerations of the merits of the lawsuit and, in particular, the defences of justification and qualified privilege was limited in its application to the questions raised in the anti-SLAPP motion. However, we are left with a situation where the SCC has commented in a comprehensive manner about the factual and legal bases for both defences and found them wanting. This decision will be, at least, persuasive on the very issues that will be tried in this action. Ms. Bent has not only failed to have the action halted through the anti-SLAPP motion but is now left in a position where defending the action on its merits has probably been rendered more difficult because the motion was brought.

That takes us to Justice Belobaba's decision in December of last year in *Blair*. In this action, the plaintiff, the former interim Commissioner of the OPP, alleged that he had been defamed by statements made by Premier Ford to the effect that he had breached the *Police Services Act*. The plaintiff had complained to the provincial ombudsperson in a letter, which he later released to the media, that the appointment of a permanent Commissioner had been tainted by impropriety and political interference. Relying on a report form the Ministry of the Attorney General, Premier Ford, in commenting on that letter, noted that it contained information that breached the provisions of the *Police Services Act*. It was these statements that prompted the plaintiff's defamation action. Justice Belobaba noted that the plaintiff was not a powerful entity that was using litigation to intimidate a smaller and more vulnerable opponent and silence their

pubic expression. Nonetheless, because the impugned public statements related to a matter of public interest, the analysis in section 137.1 of the *CJA* was engaged. Justice Belobaba also noted that his decision to dismiss the suit under section 137.1 did not extinguish the plaintiff's core allegation that his reputation was damaged because of the impugned public statements. The decision to dismiss was based solely in the mandates of the anti-SLAPP provisions.

The Court found that the defendant had a real prospect of success on his fair comment defence. The court also found that the harm sustained by the plaintiff was not serious enough that the public interest in permitting the action to continue outweighed the public interest in protecting that expression. The Court noted that there was no evidence of emotional or psychological harm or resulting financial or economic harm. Additionally, the plaintiff had sued for wrongful termination, which occurred after the Premier's statements were made and allegedly was not tied to the conduct the Premier complained of. The Court concluded that the wrongful dismissal lawsuit would ensure that the plaintiff received his day in court. Justice Belobaba concluded that the public had an interest in hearing the Premier's comments on the plaintiff's allegations that the process for the appointment of the Commissioner of the OPP was tainted by impropriety and political interference.

What these decisions demonstrate is that a plaintiff who contemplates bringing a lawsuit involving expressions relating to public interests must be prepared to adduce evidence about not only the merits of their action, including a demonstration of the harm they have suffered, but must also be ready to adduce evidence to undermine any defence the defendant may raise. The failure to adduce such evidence could prove fatal.

This section of this paper is only intended to make personal injury lawyers aware of this relatively new procedure for dealing with lawsuits arising out of expressions related to the pubic interest. It is clear that if one intends to pursue a defamation claim, in particular, which involves statements that are of public interest, one must be fully aware of the procedural framework contained in sections 137.1 through 137.5 of the *CJA* before they even commence an action. If they are not, then their clients run the risk of having potentially meritorious actions dismissed before discoveries. They must also warn their clients of the risks and costs associated with this type of motion.

Limitation Periods

In July of 2004 the plaintiff strangled his 11-year-old son during a psychotic episode which was a feature of his underlying depression. At that time, he was taking Paxil. In September of 2005 he was found not criminally responsible by reason of mental disorder. After treatment he was discharged in November of 2007 and received an absolute discharge in December of 2009. In October of 2011 he commenced an action against the manufacturer of Paxil. The defendant moved to dismiss the claim because the two-year limitation period had lapsed. The motions judge concluded that the plaintiff lacked capacity until his absolute discharge in 2009 and, accordingly, the action was not statute-barred. The Court of Appeal in its decision in *Carmichael v GlaxoSmithKline Inc.*[5] reversed this finding and dismissed the action.

Essentially, the plaintiff argued that while he had the cognitive ability to commence a lawsuit earlier than he did, he did not have the psychological strength to do so.

The Court concluded that subsection 7(1)(a) of the *Limitations Act, 2002*[6] requires the court to focus on the capacity to commence a lawsuit and must take into account not only physical and mental factors but also psychological factors in deciding if a person has the requisite capacity. In this regard, the new Act is more liberal in recognizing factors that may affect capacity. The Court accepted that if the plaintiff suffers from a psychological condition that would make the initiation of a lawsuit unacceptably risky to the plaintiff's psychological integrity that this could excuse the failure to start the suit.[7] However, this test is objective and by referring to the plaintiff's "psychological strength" there is a danger that the Court will focus only on the claimant's lack of personal fortitude. Accordingly, for this and other reasons the Court found this phrase unhelpful.

There is a presumption of capacity in subsection 7(2) of the Act and so the plaintiff will require persuasive medical or psychological evidence to prove they lacked capacity.

The Court concluded that the motions judge had misapprehended the evidence of the experts and set aside the lower court decision. The Court of Appeal decided to re-assess the evidence itself and dismissed the action on the grounds that the presumption of capacity at an earlier point in time had not been rebutted.

The second decision I want to refer to is the Ontario Court of Appeal decision in *Baig v Mississauga*[8].

This decision really says little new on the question of limitation periods but it does reiterate some points that personal injury lawyers should note. It also seems to be frequently cited by counsel.

The plaintiff, who was self-represented, fell off his bicycle and injured himself. He sued the City of Mississauga more than four years later, seeking damages. Mississauga successfully moved for summary judgment on the basis that the action was statute barred. The plaintiff appealed.

The plaintiff went to the hospital the day of the accident and put the City on notice eight days later. That notice, which was on a form created by the City, warned the plaintiff of the two-year limitation period. The City assigned an investigator who was unable to reach the plaintiff and after a written warning closed his file.

The plaintiff claimed that as he had discovered that his lip injury would not improve with surgery and that his broken finger was developing osteo-arthritis and he would not regain its full use. He had also developed carpel tunnel syndrome.

The Court, relying on its earlier decision in *Liu v Wong*,[9] noted that the law was well established that it is knowledge of the material facts necessary to support the cause of action

that triggers the commencement of the litigation period. Knowledge of the extent of the damages is not necessary.[10]

The plaintiff also contended that because of mental deficits he was a person under disability. Relying on the Court of Appeal decision in *Carmichael* (discussed above), the Court concluded that under subsection 7(2) of the *Limitations Act, 2002*,***[11]*** he was presumed to be capable of commencing an action unless the contrary was demonstrated on the balance of probabilities. The Court then agreed with the motions judge that the evidence led by the plaintiff on his lack of competence did not displace the presumption under this subsection.

As I mentioned at the outset, this case really does not say anything new but it does demonstrate that a revised more negative prognosis will not excuse a failure to commence an action within the *prima facie* two years provided for in the *Limitations Act, 2002*.

Spoliation

Early this year the Saskatchewan Court of Appeal handed down a decision that discussed the circumstances where a court can draw an adverse inference when evidence has been destroyed or lost prior to the commencement of litigation. In the case of *Casbohm v Winacott Spring Wester Star Trucks*,***[12]*** the plaintiff suffered personal injury when he fell from an eight-foot stepladder on premises occupied by one of the defendants. The ladder had been supplied by that defendant and appeared to be undamaged before the plaintiff used it. Photographs of the ladder after the fall showed the right leg of the ladder to have collapsed inwards. The ladder was later disposed of by the defendant and was never examined by an expert for either side. The ladder was allegedly disposed of because it was unsafe to use given that it now had a bent leg. The motions judge[13] refused to draw an adverse inference against the defendants for disposing of the ladder before the commencement of the lawsuit. He concluded that the disposal was not done with the prospect of litigation in mind. He also concluded that the defendants were not aware of the extent of the plaintiff's injuries at the time the ladder was discarded and this rebutted the presumption of spoliation.[14] The motions judge rejected the evidence of all three experts, in part, because they had not inspected the ladder and the pictures of it after the incident did not focus on the damage to its leg. He concluded that the plaintiff had not proven his case on liability on the balance of probabilities.

The Saskatchewan Court of Appeal opened by discussing the Alberta Court of Appeal decision in *McDougall v Black & Decker Canada Inc.****[15]*** where that Court stated that spoliation "refers to the intentional destruction of relevant evidence when litigation is existing or pending".

In discussing this case, the Saskatchewan Court of Appeal noted that spoliation, which refers to the destruction, mutilation, alteration or concealment of evidence, is historically associated with maxim *omnia praesumuntur contra spoliatorem* (all things are presumed against the wrongdoer or spoliator). When it occurs, spoliation interferes with two major policy goals of the legal system: the establishment and maintenance of a fair trial process and the quest for the truth. When spoliation occurs, a party may be entitled to one of several remedies. One of these is the imposition of a rebuttable presumption of fact that the loss or destroyed evidence would not

assist or would have been damaging to the party responsible for the fact the evidence is not available to the party opposite. The law of spoliation is actually rooted in an old SCC decision, *St. Louis v R.**[16]*** and the *McDougall* case. The Saskatchewan Court of Appeal decision explained it as follows:

[18] *St. Louis*, therefore, stands for the following proposition. Spoliation in law does not occur merely because evidence has been destroyed. Rather, it occurs where a party has intentionally destroyed evidence relevant to ongoing or contemplated litigation in circumstances where a reasonable inference can be drawn that the evidence was destroyed to affect the litigation. Once this is demonstrated, a presumption arises that the evidence would have been unfavourable to the party destroying it. This presumption is rebuttable by other evidence through which the alleged spoliator proves that his actions, although intentional, were not aimed at affecting the litigation, or through which the party either proves his case or repels the case against him.

The Court then went on to indicate that the *McDougall* decision provided a useful summary of the Canadian law of spoliation:

[29] In conclusion, therefore, I would summarize the Canadian law of spoliation in the following way:

1. Spoliation currently refers to the intentional destruction of relevant evidence when litigation is existing or pending.

2. The principal remedy for spoliation is the imposition of a rebuttable presumption of fact that the lost or destroyed evidence would not assist the spoliator. The presumption can be rebutted by evidence showing the spoliator did not intend, by destroying the evidence, to affect the litigation, or by other evidence to prove or repel the case.

3. Outside this general framework other remedies may be available — even where evidence has been unintentionally destroyed. Remedial authority for these remedies is found in the court's rules of procedure and its inherent ability to prevent abuse of process, and remedies may include such relief as the exclusion of expert reports and the denial of costs.

4. The courts have not yet found that the intentional destruction of evidence gives rise to an intentional tort, nor that there is a duty to preserve evidence for purposes of the law of negligence, although these issues, in most jurisdictions, remain open.

5. Generally, the issues of whether spoliation has occurred, and what remedy should be given if it has, are matters best left for trial where the trial judge can consider all of the facts and fashion the most appropriate response.

6. Pre-trial relief may be available in the exceptional case where a party is particularly disadvantaged by the destruction of evidence. But generally this is accomplished

through the applicable rules of court, or the court's general discretion with respect to costs and the control of abuse of process.

The Court concluded that the spoliation must result from intentional conduct, which the Court understood to mean with the knowledge that the evidence would be required for litigation purposes. The Court went on to rely on several Ontario decisions for the proposition that spoliation refers to "the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in a pending or *reasonably foreseeable* litigation".

The Court quoted with approval the following passage form the 2020 decision of the P.E.I. Court of Appeal in *CMT v Government of P.E.I.*[17]

[136] ... a finding of spoliation requires four elements to be established on a balance of probabilities, namely:

(1) the missing evidence must be relevant;

(2) the missing evidence must have been destroyed intentionally;

(3) at the time of destruction, litigation must have been ongoing or contemplated; and

(4) it must be reasonable to infer that the evidence was destroyed in order to affect the outcome of the litigation.

The Court concluded that the critical issue is what is in the mind of the spoliator and that it makes little difference if the litigation was ongoing or contemplated, existing or pending or reasonably foreseeable. The operative question is whether the circumstances justify the reasonable inference that the evidence was destroyed to affect the outcome of the litigation. Even where such an inference can be drawn, it is open to the spoliator to convince the trier of fact that there was an innocent explanation for the destruction of the evidence.

It is clear from this case that where the plaintiff has given notice of an intention to sue there is little difference in this and the destruction of evidence where an action has already been commenced. In such a case, the adverse inference will likely be drawn unless the spoliator provides an explanation that satisfies the court that the destruction was not done to affect the litigation.

The Court went on to uphold the motions court judge's finding that the defendant had provided an innocent explanation for the disposal of the ladder and the appeal was dismissed.

This decision provides a detailed analysis of the law of spoliation and provides references to a number of helpful cases across the country, including Ontario.

Damages for Improper Psychiatric Care to Involuntary Patients

Justice Morgan delivered a lengthy decision on damages (having previously determined liability) in February of this year in *Barker v Barker*[18] . These claims arose from treatments received

by the plaintiffs while they were involuntary patients at the Oak Ridge Division of the Penetanguishene Mental Health Centre from the mid-1960s through the early 1980s. The Court had already found liability at least, in part, due to breaches of fiduciary duty by the defendants. The doctors were also found liable for battery.

This is a lengthy decision and it references the leading cases on a number of issues. The Court concluded that the trilogy cap did not apply to these claims. Three of the plaintiffs received general damages awards in excess of the cap. These awards were of $2.1 million, $1 million and $500,000 respectively. The most useful discussion for this audience relates to the principles of calculating damages for income loss and, in particular, the deductibility of collateral benefits. This section contains a summary of the relevant cases.

Failure To Clear Snow on Adjoining Municipal Sidewalk

In the British Columbia Court of Appeal decision in *Der v Zhao*,[19] the question is posed again whether a property owner, who is under a duty imposed by a municipal by-law to clear the snow on an adjoining sidewalk, can be held liable to a plaintiff injured when they fall on snow and ice on the adjoining sidewalk. This issue has been dealt with authoritatively in Ontario in the Court of Appeal's decision in *Bongiardina v York (Regional Municipality)*[20]. However, in this case the plaintiff/appellant noted that this question had never been addressed by applying the *Anns/Cooper* analysis and requested that the Court reconsider the issue using *Anns.*[21] The Court of Appeal obliged but nevertheless concluded that the adjoining landowner owes no duty of care to a pedestrian to clear snow and ice on an adjoining sidewalk simply because there is a municipal by-law obliging the landowner to do so. This lengthy decision contains an exhaustive analysis of the cases on this issue and is a great resource. However, as it finds that the decision in *Bongiardina* is correct even when the *Anns/Cooper* analysis is applied, I do not propose to discuss the case further.

The Crown Liability and Proceedings Act, 2019

The Ontario Court of Appeal handed down its much-anticipated decision in *Francis v Ontario*[22] late last month. This was an appeal by the Province of Ontario from a summary judgment in favour of the class plaintiffs. The plaintiffs alleged and the motions judge concluded that administrative segregation (solitary confinement) breached the class members' section 7 and 12 *Charter* rights and awarded damages of $30 million. The motions judge also found the Province liable in negligence.

Although I will spend a little time on discussing the decision, after doing so I will focus on the Court's interpretation of the *Crown Liability and Proceedings Act, 2019* ("CLPA") which will be of more general interest to this audience.

The representative plaintiff, who suffered from mental illness, was held in remand for over two years waiting to be tried for a bank robbery. During this remand, he was placed in administrative segregation twice, once for eight days. Being placed in administrative segregation augmented the plaintiff's mental issues. He found the experience excruciating, his anxiety was out of control, he felt terrorized and was in a state of delirium and shock.

Under the Nelson Mandela Rules promulgated by the United Nations, no prisoner is supposed to be placed in segregation for more than 15 consecutive days.

The class consisted of two groups: prisoners who were seriously mentally ill and the second group consisted of individuals who may not be acutely unwell but had been left in segregation for 15 or more consecutive days. In two previous decisions, the Ontario Court of Appeal had found that segregation in the federal system, which is similar to the segregation in the provincial system, for extended periods of time constituted cruel and unusual treatment under section 12 of the *Charter*.

In this case both groups of prisoners were found to have had their section 7 and 12 *Charter* rights violated and the province was found to have acted negligently towards them. As mentioned earlier damages of $30 million were awarded to the class.

The Court of Appeal focused on the *Charter* breaches because the Court felt that the more appropriate foundation for the claims was in the *Charter* rather than in the law of negligence. After finding *Charter* breaches, the Court turned its attention to the question of the claims of negligence against the Province. It was during this discussion that the Court opined on the impact of subsections 11(4) and (5) to the *CLPA*. The Province argued that these provisions had essentially obliterated most of the distinctions between operational and policy decisions thus immunizing the Province from suit in respect of most decisions. I reproduce those subsections here:

113 Sections 11(4) and 11(5) of the CLPA are of particular relevance to the issue in this case. They read:

(4) No cause of action arises against the Crown or an officer, employee or agent of the Crown in respect of any negligence or failure to take reasonable care in the making of a decision in good faith respecting a policy matter, or any negligence in a purported failure to make a decision respecting a policy matter.

(5) For the purposes of subsection (4), a policy matter includes,

(a) the creation, design, establishment, redesign or modification of a program, project or other initiative, including,

(i) the terms, scope or features of the program, project or other initiative,

(ii) the eligibility or exclusion of any person or entity or class of persons or entities to participate in the program, project or other initiative, or the requirements or limits of such participation, or

(iii) limits on the duration of the program, project or other initiative, including any discretionary right to terminate or amend the operation of the program, project or other initiative;

(b) the funding of a program, project or other initiative, including,

(i) providing or ceasing to provide such funding,

(ii) increasing or reducing the amount of funding provided,

(iii) including, not including, amending or removing any terms or conditions in relation to such funding, or

(iv) reducing or cancelling any funding previously provided or committed in support of the program, project or other initiative;

(c) the manner in which a program, project or other initiative is carried out, including,

(i) the carrying out, on behalf of the Crown, of some or all of a program, project or other initiative by another person or entity, including a Crown agency, Crown corporation, transfer payment recipient or independent contractor,

(ii) the terms and conditions under which the person or entity will carry out such activities,

(iii) the Crown's degree of supervision or control over the person or entity in relation to such activities, or

(iv) the existence or content of any policies, management procedures or oversight mechanisms concerning the program, project or other initiative;

(d) the termination of a program, project or other initiative, including the amount of notice or other relief to be provided to affected members of the public as a result of the termination;

(e) the making of such regulatory decisions as may be prescribed; and

(f) any other policy matter that may be prescribed.

The Court's analysis began with subsections 11(7) and (8) which give these provisions immediate and retroactive effect. The motions judge concluded that the above quoted subsections really only codified the existing law and maintained the policy/operational dichotomy. He found the Crown's conduct operational in nature and imposed liability for negligence.

The Court of Appeal concluded that if subsection 11(5)(c) was interpreted in the manner suggested by the Province, the result would come perilously close to characterizing every government decision as a policy decision which the government would not be liable for. The Court went on to indicate that there is a presumption that the common law remains unchanged absent a clear and unequivocal expression of legislative intent. Given that the Attorney General, when introducing the legislation, indicated that it codified existing case law set by the SCC, which states that good faith policy decisions by government are not judiciable, the Court of Appeal indicated that it should be presumed that the Attorney General correctly outlined the intent and the legislation retained the policy/operational dichotomy.

There is then a discussion, using examples, that attempts to outline the distinction between a policy and operational decision. In this case, it was a policy decision to adopt administrative segregation but how it was implemented was left to the individual institutions. Accordingly, the Court concluded that its implementation was operational in nature.

The Province also argued that under section 5(2) of the *Proceedings Against the Crown Act* the Crown could only be held liable for the negligence of named Crown servants. Both the motions judge and the Court of Appeal rejected this submission.

I think we are still left with questions about precisely what the *CLPA* changed. However, for the moment, it appears that it has not erased the policy/operational dichotomy that has been previously recognized by the Courts.

Hockey Injuries

In a decision[23] from early last year, Gomery J. awarded significant damages to a hockey player whom she found had been intentionally or recklessly hit from behind in a high speed, blindside collision in a non-contact recreational league hockey game. The case contains an analysis of the few cases where damages have been awarded for this type of injury.

Duty of One Joint Occupier to Another

In the Ontario Court of Appeal decision of *Nolet v Fischer*,***[24]*** the Court found that one joint occupier can owe a duty of care to another joint occupier of the same property. The plaintiff's relationship with the respondent had ended and the plaintiff tripped and fell while moving a freezer from the home because of an allegedly uneven sidewalk. The motions judge dismissed the action on two grounds. The first was that co-occupiers owe no duty of care to each other. The second was that the plaintiff did not prove that the sidewalk was uneven.

The Court noted that the terms "occupier" and "premises" were defined in the *Occupiers' Liability Act****[25]*** while the term "persons entering on the premises" was not. These "persons" were owed a duty of care by the occupier(s) and the Court noted that there was nothing in the Act which precluded an occupier from being such a person. After reviewing several rationales for why there were no previous cases on this issue, the Court concluded that an occupier owes a duty of care to another occupier. However, the Court dismissed the appeal because it agreed with the motion judge's second reason for dismissing the claim, that the plaintiff had not proved that the sidewalk was uneven.

Because of the dismissal of the appeal, a number of issues are left unresolved. For example, how do the doctrines of voluntary assumption of risk and contributory negligence factor into such claims. Another interesting question would have arisen if the defendant, who appears to have been the owner of the property, had been injured. Would a court hold the long-term guest liable for hazards that were not repaired by the owner? Does it even make sense to speak of a long-term guest as the occupier when they do not have the power or right to repair a hazard?

Liability for Injuries Caused by Domesticated Animals

We do not see reported cases about injuries caused by horses very often. Justice Nightingale of the Superior Court of Justice discussed the potential liability of the owner of a horse or other domesticated animal in detail in his decision in *Belton v Spencer*,**[26]** which was delivered late last month.

The plaintiff owned a stable and was stabling and caring for the defendant's horse. It was alleged that as he was leading the horse, it reared up on its hind legs and kicked him in the face. The suggestion was that the horse had a propensity to act in this manner. No one observed the incident and the plaintiff had no memory of it. The plaintiff alleged that the defendant was liable under the principles of *scienter* and/or negligence, including her failure to warn the plaintiff of the horse's dangerous behaviour and her negligent training of the horse. The plaintiff was unsuccessful and Justice Nightingale's decision provides a comprehensive discussion of the law in this area. After reviewing all of the evidence, His Honour concluded that the plaintiff had not established that he was struck in the face in the manner he suggested. This theory was mere speculation and he could have been injured in a number of other ways which do not implicate bad behaviour by the horse. Nevertheless, His Honour discussed the potential bases for liability notwithstanding his findings on the evidence.

His Honour began by discussing the doctrine of *scienter*. Where a domesticated animal has a mischievous propensity that is known to the keeper, the keeper is strictly liable for any injury that is caused by the dangerous or mischievous propensity. There is liability without proof of negligence, but the onus is on the plaintiff to prove the dangerous or mischievous nature. It will suffice if the defendant knew that the animal had previously committed or attempted to commit a dangerous or mischievous act. Liability only attaches if the animal was acting out of character, with viciousness or curiosity not natural to its species. In this case, even if the horse had reared and kicked the plaintiff, this behaviour was consistent with the horse having reared because it was spooked. Such behaviour would not be actionable. It was also noted that responsibility is on the keeper of the animal and the plaintiff would have been equally or more aware of any mischievous or dangerous nature of this horse.

The Court went on to discuss the defendant's potential liability in negligence and for failure to warn and rejected both of them. His Honour also found voluntary assumption of risk by the plaintiff.

Weighing the Evidence of Experts

The Ontario Court of Appeal commented on the need for trial judges to engage in a critical analysis of the evidence from experts on the issue of causation. This analysis must permit the appellate Court to effectively review the decision or a new trial will be ordered.

In the case of *Manos v Riotrin Properties (Flamborough) Inc.*,**[27]** the plaintiff sued for an alleged respiratory injury sustained when he was sprayed with a fire extinguisher by the defendant's employee. The plaintiff alleged that as a result of being sprayed, he suffered from reactive airways disorder syndrome. The appellant alleged that his alleged injury stemmed from a pre-existing condition, or, alternatively, that he was malingering.

The Court indicated that for reasons to be adequate they must explain the result, tell the losing party why he or she has lost, provide for informed consideration of the grounds for appeal and satisfy the public that justice has been done. It also noted that the overarching principle is whether the reasons permit meaningful and effective appellate review. In this case, there was no analysis of the evidence of the defence experts who testified that the respondent did not suffer from the alleged condition. Rather, the trial judge relied on an incorrect summary of their evidence given by a plaintiff's expert, who was not qualified on the topic and mistakenly stated that the majority of experts opined that the appellant suffered from the alleged condition. The Court noted that the trial judge was at liberty to reject the opinions of the appellant's experts but must say why they were rejected and that rejection had to be rooted in the evidence before him. Accordingly, a new trial was ordered.

The appellant had also complained that the plaintiff's treating respirologist gave opinion evidence on legal causation without complying with rule 53.03. The Court noted that he provided evidence of his observations and diagnosis which as a treating physician he was entitled to do. The fact that he had drafted letters, including one addressed to the claims adjuster acting on behalf of the plaintiff, did not result in his being required to comply with this rule.

Mitigation

This British Columbia Court of Appeal decision in *Pearson v Savage**[28]*** considered several questions arising out of a damages award made to a young woman who suffered debilitating injuries in a car accident when she was only 21 years of age.

The appeal, which was launched by the defendant, concerned several issues, such as the correct approach to contingencies for lost earning capacity, the alleged failure to apply an objective test to the issue of mitigation, the failure to apply the correct legal test for awarding management fees and misapprehending the evidence and engaging in speculation with respect to the award of management fees. The respondent cross-appealed, claiming that the financial management fee failed to account for legal fees and disbursements.

It is only the discussion on mitigation that I intend to refer to. In this case, the plaintiff discontinued medication for her depression and failed to follow-up on treatment recommendations. The appellant contended that had she done so, her loss of earning capacity claim would have been lowered. The Court noted that the onus is on the defendant on the question of mitigation. In deciding whether the plaintiff should have pursued treatment, one had to look at what a reasonable person in the circumstances of the plaintiff would have done considering the plaintiff's medical condition at the time. The Court concluded that the appellant's suggestion that the plaintiff had made a conscious and informed choice to discontinue anti-depressant medication was not correct. The Court noted that the trial judge accepted that her ongoing emotional struggles with depression, self-isolation, PTSD and feelings of worthlessness meant that it was unreasonable to expect her to have pursued those treatment recommendations that were made. The Court characterized this as a finding of fact

that she did not have the capacity to engage in the recommended treatment following the accident.

Liability for Stolen Vehicles

The British Columbia Court of Appeal considered the liability of a car dealership for an automobile accident that occurred when a car, owned by the defendant car dealership, was left unattended and running for 40 minutes with the keys in the ignition and was then stolen and involved in a serious accident during an ensuing police chase.[29]

The trial judge had found the car dealership liable. The trial judge had relied on the Ontario Court of Appeal decision in *J. (J.) (Litigation guardian of) v C. (C.)**[30]*. That decision was later overturned by the Supreme Court of Canada in the decision of *Rankin (Rankin's Garage & Sales) v J. J.**[31]*. The SCC decided that a garage that left a car unlocked with keys in the ashtray did not owe a duty of care to the plaintiff who was seriously injured by the negligent driving of a minor who stole the vehicle. That Court concluded that while the risk of theft was reasonably foreseeable, there was insufficient evidence presented to establish that it was foreseeable that someone could be injured by the negligent operation of a stolen automobile subsequent to the theft. It should be noted that the police chase started an hour after the theft and the vehicle was equipped with OnStar

The Court reviewed all of the evidence that might have given the dealership knowledge to indicate that there was a risk that a stolen vehicle would be involved in an accident. The Court concluded that the OnStar system could be expected to reduce this risk. In the end, the Court was not prepared to accept that a dealership could reasonably foresee injury in a police chase after a vehicle was stolen when it was equipped with OnStar. The Court also suggested that the evidence available might have put an owner on notice of some risk of such danger but this does not mean that is reasonably foreseeable.

It should again be noted that the trial pre-dated the decision of the SCC and it is possible that more persuasive evidence on foreseeability might have been led if that decision had been available. Having said that, the Courts, not surprisingly, appear to be reluctant to distinguish similar cases from this SCC decision.

The Court also found that the plaintiff lacked the necessary proximity to the dealership to impose a duty of care on the latter. It noted that unlike bars which may overserve, there is no commercial relationship between a dealership and a thief. A dealership has a much different expectation of how a thief leaving its premises will drive as opposed to the expectation of a bar that has served alcohol to the thief.

The Court allowed the appeal against the dealership and dismissed the claims against it.

Appointment of an Expert by the Pre-Trial Judge

This is a decision of the Ontario Divisional Court. In *Sosnov v J & H Freiberg*,**[32]** the pre-trial judge felt that it was necessary for the court to appoint an expert. This was opposed by the

defence. The defence filed a supplementary pre-trial conference memorandum and book of authorities in support of its position. The plaintiffs did not object but did not want to pay for the associated costs. The pre-trial judge made the order without issuing any reasons.

The Divisional Court recognized that a pre-trial judge has the power under rule 52.03(1) to appoint one or more experts to inquire and report on any question of fact or opinion relevant to an issue in the action. Where a party opposes such appointment, it is an error not to provide reasons for appellate review.

The Court went on to note that the role of a court appointed expert is to assist the court in understanding the evidence but not to investigate, advance possible theories or state, as conclusions of fact, opinions based on matters not advanced in evidence. This order requires the expert to investigate, weigh evidence and explore any other scenario which in his view would be relevant to the understanding of liability. In doing so, the order usurps the role of the trier of fact and the parties' right to present the case as they see fit. The order was reversed.

Re-litigating Criminal Convictions and Apologies

I only intend to spend a moment discussing this Alberta Court of Appeal decision.[33] In this case, the appellant had sexually assaulted his daughter. He had pled guilty to one of seven charges laid against him. At the sentencing hearing he had agreed to the facts read in by the Crown and had apologized for his conduct. He denied committing the assault in his statement of defence for the civil matter. The plaintiff successfully moved for summary judgment based on the conviction and the apology. The defendant appealed.

He argued that this was not the same as a conviction after trial and therefore the cases dealing with abuse of process did not apply. He further argued that he was not really guilty but pleaded guilty because the deal offered was very favourable compared to what would have been sentenced to following a conviction at trial.

The Alberta Court of Appeal rejected all of his arguments. However, the interesting argument he raised is that under Alberta law, as is the case in many provinces, an apology is not admissible in any court as evidence of fault or liability. The Court concluded that this referred to extra-judicial apologies and not to apologies made in open court in mitigation of sentence. In doing so the Court followed an Ontario Divisional Court decision from 2019.[34]

Defective Motion for Summary Judgment

In this somewhat unusual case, the New Brunswick Court of Appeal pointed out the dangers of bringing a summary judgment motion which does not address the issues correctly.

In this motor vehicle crash claim, the defendant had originally denied liability and claimed that the plaintiff was contributorily negligent. Following discoveries on how the accident occurred, the plaintiff brought a motion for summary judgment on the issue of liability. The defendant amended his defence to admit that his negligence caused the accident but denied that the

damages were caused by the accident. Defence counsel objected to the summary judgment motion given that he had admitted responsibility for the accident.

The Court pointed out that, at law, the term liability encompasses not just responsibility for the accident but a finding that the accident caused the plaintiff's injury. As the affidavit filed in support of the motion by the plaintiff did not address causation, the Court concluded that the summary judgment for liability was properly denied by the motions judge.

The New Tort of Harassment

Justice Corbett, in his decision in *Caplan v Atas*,***[35]*** recognized a tort of internet harassment in Ontario for the first time. The facts of this case outline one of the most egregious examples of persistent harassment of an individual based on pernicious lies that had been published in various media. The several cases which have involved harassing conduct by the defendant have a tortured history which is detailed in the decision. I will not go through it because this case, like the cases on anti-SLAPP suits, does not deal with one of the bread and butter issues this audience is concerned with. However, I felt that the audience should be aware of this important and seminal case.

His Honour concluded that the tort of internet harassment needed to be recognized because the defendant's online conduct and publications sought not to so much defame the victim but to harass them. His Honour concluded that the tort of intentional infliction of mental suffering was simply inadequate in these circumstances. In this case, there was no evidence of actual visible and provable illnesses because of the defendant's conduct. His Honour noted that one would hope the Courts could stop the harassing behaviour before this occurred. However, without such harm, the tort of intentional infliction of mental suffering is of no real assistance to a plaintiff. His Honour also did not think the tort of "intrusion upon seclusion" applied as the defendant had not invaded the plaintiff's private affairs but, rather, persistently published false statements about a broad range of people to cause harm to her primary victims. Accordingly, his Honour found it necessary to recognize the new tort of harassment over the internet.

His Honour adopted an American test for determining whether the tort had been committed:

171 The plaintiffs propose, drawn from American case law[63] the following test for the tort of harassment in internet communications: where the defendant maliciously or recklessly engages in communications conduct so outrageous in character, duration, and extreme in degree, so as to go beyond all possible bounds of decency and tolerance, with the intent to cause fear, anxiety, emotional upset or to impugn the dignity of the plaintiff, and the plaintiff suffers such harm.[36]

His Honour concluded that the facts of these cases clearly met that stringent test.

---

[1] *1704604 Ontario Ltd. v Pointes Protection,* 2020 SCC 22, 2020 (*"Pointes")* and *Bent v Platnick*, 2020 SCC 23 ("*Bent*").

[2] *B.W. (Brad) Blair v Premier Doug Ford,* 2020 ONSC 7100 per Belobaba J. ("*Blair*")

[3] *Pointes, supra,* at note 1, paragraphs 2 and 3

[4] R.S.O. 1990, c. C.43

[5] 2020 ONCA 447

[6] S.O. 2002, c.24, Sched. B.

[7] *Supra,* paragraph 102

[8] 2020 ONCA 697

[9] 2016 ONCA 366

[10] This is not exactly true for motor vehicle accidents in Ontario where the plaintiff must know that their claim exceeds the verbal threshold before the limitation period begins to run. See for example, *Peixeiro v Haberman*, [1997] S.C.R. 549.

[11] *Supra*

[12] 2021 SKCA 21

[13] Liability was determined on consent on a motion for summary judgment using affidavit evidence including affidavits from 3 experts.

[14] The evidence was that the plaintiff appeared to have a cut on his head and went on to complete the task using another ladder.

[15] 2008 ABCA 353

[16] (1896), 25 S.C.R. 649

[17] 2020 PECA 12

[18] 2021 ONSC 158.

[19] 2021 BCCA 82

[20] 49 O.R. (3d) 641

[21] The decision in *Cooper* post-dated the decision in *Bongiardina*.

[22] 2021 ONCA 197

[23] *Casterton v MacIsaac,* 2020 ONSC 190

[24] 2020 ONCA 155

[25] R.S.O. 1990, c. O.2

[26] 2021 ONSC 2029

[27] 2020 ONCA 211

[28] 2020 BCCA 133

[29] *Provost v Dueck Downtown Chevrolet Buick GMS Limited*, 2020 BCCA 86. I will not be discussing the appeal brought by the Minister on behalf of the police which was dismissed. However, this is a case worth reviewing if you are dealing with a police chase situation.

[30] 2016 ONCA 718

[31] 2018 SCC 19

[32] 2021 ONSC 1081

[33] *SP v AP,* 2020 ABCA 235

[34] *Pollard Windows Inc. v 1736106 Ontario Inc.,* 2019 ONSC 4859 at paragraph 57.

[35] 2021 ONSC 670

[36] *Ibid,* at paragraph 171.

The information contained in this article is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific legal advice, please contact us.