TORTS

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A. Introduction

As in previous years, in 2008 the Supreme Court of Canada released several tort cases of note. *Holland v. Saskatchewan*, 2008 SCC 42, set out the potential tortious implications for government for failure to implement a judicial decision. *Design Services Ltd. v. Canada*, 2008 SCC 22, resolved an issue left open by the court in 2000: the tortious liability of an owner to subcontractors in a tendering process. *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, confirmed that claims for mental injury must be approached from the perspective of a person of ordinary fortitude, and that no compensation is available for loss that is too remote. *British Columbia v. Zastowny*, 2008 SCC 4, definitively established that the *ex turpi* principle precludes a plaintiff from recovering damages for wage loss during time spent in prison, an issue that had split the British Columbia Court of Appeal. *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, greatly expanded the scope of the defamation defence of fair comment.

The House of Lords, too, had an active year generating torts jurisprudence. *Total Network SL v. Her Majesty's Revenue and Customs*, [2008] UKHL 19, sought to clarify the tort of unlawful means conspiracy. *Smith v. Chief Constable of Sussex Police*, [2008] UKHL 50, re-examined police liability at common law for failure to take preventative measures and protect an individual known to be at risk of harm.

B. Duty of Care

As in recent years, proximity and policy considerations and the determination of a duty of care under the test in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), reiterated in *Childs v. Desormeaux*, 2006 SCC 18, and other cases, resulted in several decisions of note. Many of these were in the context of negligence claims commenced against the government. On balance, the courts appear to be using the proximity branch of the *Anns* test to bar novel claims.

1. Government, for Implementation of a Judicial Decision

Government failure to implement a judicial decision is an "operational" act that may give rise to a private law duty of care: *Holland v. Saskatchewan*, 2008 SCC 42. Here, on judicial review the government was found to have wrongly altered the certification status of approximately 200 farmers under a provincial regulatory regime, causing the farmers financial loss. The government failed to recertify the farmers consequent upon the court's declaration on judicial review, and the farmers commenced an action in tort. The government moved to strike the farmers' claims in negligence and were successful in the Saskatchewan Court of Appeal. The Supreme Court of Canada confirmed that the law has not to date recognized an action for negligent breach of statutory duty, nor should it recognize such a duty in light of policy considerations such as the chilling effect and spectre of indeterminate liability. The law does, however, impose a duty on government for operational decisions and acts. Public authorities are expected to implement judicial decisions, and such implementations are "operational" acts in respect of which the government may be held liable. Accordingly, taking a generous view, the claim for failure to implement the judicial decree should not have been struck.

2. Contractor Liability in Tendering Process

An owner in a tendering process does not owe a duty of care in tort to subcontractors: *Design Services Ltd. v. Canada*, 2008 SCC 22. In this case, the owner in a design-build tendering process awarded the contract to a non-compliant bidder. An unsuccessful contractor (and its subcontractors) sued the owner. The owner settled the contractor's claim but the subcontractors, lacking privity of contract with the owner, pursued a claim in tort for economic loss against the owner. *Martel Building Ltd. v. Canada*, 2000 SCC 60, had left unresolved the legal basis for a subcontractor's claim in tort. In *Design Services*, the subcontractors' loss did not qualify as relational economic loss because none of the contractor's property was damaged. The claim did not fall within an established category in which a duty had been recognized. Nor was it appropriate to recognize a new duty. The fact that the subcontractors had the opportunity to form a joint venture with the contractor, and thus protect themselves by contract from the risk of economic loss, was an overriding policy consideration not to recognize a duty in these circumstances. Recognizing a duty of care in tort where commercial parties have deliberately arranged their affairs in contract would be an unjustifiable encroachment of tort law into the realm of contract. Tort law should not be used as an after-the-fact insurer. Finally, even if a *prima facie* duty of care was established, the spectre of indeterminate liability weighed against imposing a duty.

3. Doctor, to a Future Child

A doctor does not owe a duty of care to a potential future child when prescribing a drug dangerous to the fetus: *Paxton v. Ramji*, 2008 ONCA 697, leave to appeal filed [2008] S.C.C.A. No. 508 (QL). The issue of whether a child born with birth defects may bring a negligence claim against a doctor has challenged courts in Canada and around the world. In *Paxton*, the doctor prescribed Accutane, a drug carrying the risk of fetal malformation, to the mother after confirming that the father had a vasectomy. The vasectomy failed and the infant plaintiff was born with considerable damage. The proposed duty in this case was novel and therefore required the court to proceed with the *Anns* test: (1) is there a reasonable foreseeability of harm? (2) is there sufficient proximity between the parties? and (3) is there any policy consideration negativing the imposition of a duty? Here, foreseeability of harm was established: the child could be harmed by the prescription. Both proximity and policy considerations, however, weighed against recognizing a duty of care. *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38 (discussed in last year's *Annual Review*) also considered the potentially conflicting duties as between doctor and patient and doctor and future child. The *Paxton* court found that such conflicting duties would have an undesirable chilling effect on doctors. Further, the doctor's relationship with the future child is necessarily indirect, not close and direct as required. Finally, recognizing such a duty would have implications for society as a whole for several reasons: the doctor is required to act in the mother's best interests, and our medico-legal system gives the patient the right, in consultation with her doctor, to abort a fetus. Accordingly, notwithstanding the potentially undesirable consequences of not recognizing the existence of a duty, no duty of care existed and the claim was dismissed.

Hergott v. Bovington, 2008 ONCA 2, leave to appeal refused [2008] S.C.C.A. No. 92 (QL), also considered a claim by a child against the

mother's doctor. In that case, the trial jury had found a doctor liable to premature twins who suffered damage in connection with a fertility drug prescribed to their mother. The Court of Appeal held that the children had no valid cause of action against the doctor. It declined to adopt the two-category approach set out for such cases in *Lacroix (Litigation Guardian of) v. Dominique*, 2001 MBCA 122, leave to appeal refused [2001] S.C.C.A. No. 477 (QL), in which the Manitoba Court of Appeal divided cases between those in which the child's abnormalities had been caused by the wrongful act or omission of another and those in which, but for the wrongful act or omission, the child would not have been born at all. The Manitoba Court of Appeal held that liability may arise only in cases falling within the former category. In *Hergott*, the doctor had no duty not to cause the twins harm when prescribing medication to their mother. The doctor owed a duty only to their mother to inform her of the risks associated with the medication in question.

4. Police, for Preventative Measures to Protect Individual at Risk

Where the police become aware that an individual may kill or injure another, and take no steps to prevent it, are the police civilly liable to the injured individual (or, if deceased, his or her relatives) if such violence occurs? In *Smith v. Chief Constable of Sussex Police*, [2008] UKHL 50, the House of Lords examined the question from the perspective of a claim brought at common law. The favoured test in England for determining liability in such circumstances is set out in *Capro Industries plc v. Dickman*, [1990] 2 A.C. 605: (1) was the harm reasonably foreseeable? (2) was the relationship sufficiently proximate? and (3) in all the circumstances, is it fair, just, and reasonable to impose a duty of care? A four to one majority held that no private duty arose where, as here, the police had not assumed any particular responsibility towards the eventual victim and were engaged in discharging their more general duty of combating and investigating crime. In so holding, the House affirmed the "core principle" set out in *Hill v. Chief Constable of West Yorkshire*, [1989] A.C. 53, and *Brooks v. Commissioner of Police of the Metropolis*, [2005] UKHL 24, primarily on the basis that imposing such a duty could inhibit the police's robust approach to protecting the public. The majority also rejected the minority's proposed "liability principle", namely, that the police may owe a duty of care where a member of the public furnishes a police officer with apparently credible evidence that a third party whose identity and whereabouts are known presents a specific and imminent threat to his life or physical safety. But see *Mooney v. British Columbia (Attorney General) (sub nom. B.M. v. British Columbia (Attorney General))*, 2001 BCSC 419, affirmed 2004 BCCA 402 (see the 2005 *Annual Review*). In that case, under the *Anns* test, the police were found to owe a private law duty of care.

5. Liability for Intentional Tort of Another

In *Fullowka v. Royal Oak Ventures Inc.*, 2008 NWTCA 4, leave to appeal granted [2008] S.C.C.A. No. 325 (QL), the court underscored the difficulties associated with bringing a negligence claim against a party for the intentional tort of another party. These civil proceedings arose in connection with the 1992 bombing at the Giant Mine in Yellowknife where a striking miner had deliberately set off a bomb in the mine, killing nine miners. The relatives of the nine dead miners and a tenth miner who had witnessed the bomb's aftermath sued. The court held that the proper approach in dealing with responsibility for the tort of another concerned the duty of care, rather than the application of other principles. Two themes emerge from cases finding an ancillary tortfeasor liable for the torts of another: a special relationship with the plaintiff, or an element of control over the immediate tortfeasor. The court allowed the appeal by the mine, Crown, and security firm on the basis that they did not owe a duty of care. Applying the relevant authorities, the court held that no special relationship sufficient to create liability arose between the security company and the replacement workers who were killed. The security company's contract did not necessarily create a duty in tort, especially in respect of an intentional tortfeasor. Further, the security company had a limited degree of control over the premises and its degree of occupation was limited. As far as the Crown was concerned, the Crown did not owe a duty of care because the regulatory regime requiring it to provide for safety of the mine did not, without more, create a private duty. With respect to the mine owner's liability, there was insufficient proximity between the owners and the tortfeasor. Further, the chance of bombing was improbable and the type of harm was not foreseeable.

6. Federal Crown, for Delegated Duties

As a result of its delegation of exclusive control over educational responsibilities for Aboriginal children to a provincial government, the federal government owed no duty of care in tort to plaintiffs sexually assaulted by a teacher at a school covered by the delegated responsibilities: *Aksidan v. Canada (Attorney General)*, 2008 BCCA 43. Under an agreement with British Columbia, the federal government comprehensively delegated exclusive jurisdiction to educate those Aboriginal children within the jurisdiction of Canada under the *Indian Act*, R.S.C. 1985, c. I-5. The plaintiffs were sexually assaulted by a teacher at a

school. Following *Blackwater v. Plint*, 2005 SCC 58, a duty of care depends on the degree of control. Here, in the absence of any control exerted by Canada, no duty arose.

7. Parole Officer (and Crown), for Sexual Tort by Parolee

A parole officer (and, vicariously, the provincial Crown) owes a duty of care to an individual sexually assaulted by an offender on parole: *H. (D.) (Guardian ad litem of) v. British Columbia*, 2008 BCCA 222. In this case, the infant plaintiff had been sexually assaulted by the offender parolee both before and after a probation officer gave the offender permission, in the face of a probation order precluding him from having unsupervised contact with children, to reside in a suite in the same residence as the infant plaintiff. The infant's mother told the probation officer that the offender had no unsupervised contact with her children although this statement was not true. Although subsequent probation officers told the mother not to let the offender have contact with her children, they declined to elaborate about the nature of his past offences. Regarding the duty of care, the court noted that *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, confirms a restrictive approach to the second branch of the *Anns* test. Mere exercise of discretion was not sufficient to negate a duty of care; the discretion must engage policy issues that would be negatively affected by finding a duty of care. The plaintiff's claim was sufficiently novel that it did not fit within any recognized duties of care. It was, however, appropriate to recognize a new duty of care as there was no doubt that a relationship of sufficient proximity existed between the plaintiff and the probation officer, and there were no policy issues negating the imposition of a duty. Any discretion exercised by the probation officer was properly considered under the standard of care.

8. Federal Housing Regulator, for Leaky Condominiums

The Canadian Mortgage and Housing Corporation (CMHC) does not owe a duty of care to architects in respect of defective (leaky) houses, but does owe a duty of care to the plaintiff British Columbia Housing Management Commission (BCHMC): *Strata Plan VR 2275 v. Davidson*, 2008 BCSC 77. The architect defendants in leaky condominium litigation commenced third party proceedings against the CMHC. As in *McMillan v. Canada Mortgage and Housing Corp.*, 2007 BCSC 1475, the court found that, based on the legislative scheme and relevant authorities, insufficient proximity existed between the defendant architects and the CMHC to found a duty of care. However, unlike *McMillan*, here the CMHC had a contractual relationship with the plaintiff BCHMC. That contractual relationship was close and direct; consequently there was proximity between CMHC and BCHMC sufficient to permit the defendants' third-party claims to proceed, regardless of whether the plaintiffs were proceeding against the CMHC.

9. Government, for Regulatory Acts or Omissions

In two cases, the Ontario Court of Appeal held that, on the facts of the cases, it was plain and obvious that the government regulator does not owe a private law duty to the plaintiff recipients of medical devices: *Drady v. Canada (Minister of Health)*, 2008 ONCA 659, leave to appeal filed [2008] S.C.C.A. No. 492 (QL) (temporomandibular joint (TMJ) implants); and *Attis v. Canada (Minister of Health)*, 2008 ONCA 660, leave to appeal filed [2008] S.C.C.A. No. 491 (QL) (breast implants). The plaintiffs alleged that the government failed to regulate the respective industries and that they sustained damage or loss as a result of defective implants. In *Taylor v. Canada (Minister of Health)* (2007), 285 D.L.R. (4th) 296 (Ont. S.C.J.), leave to appeal refused (2007), 289 D.L.R. (4th) 567, (Ont. S.C.J. Div. Ct.) (summarized in last year's *Annual Review*), the motions judge held on similar facts that a relationship of proximity existed sufficient to ground a duty of care. However, in applying the *Anns* test the court held that there was insufficient proximity between the plaintiffs and the government. The relevant legislative scheme was entirely discretionary and envisioned no relationship between the government and consumers of TMJ devices: *Cooper v. Hobart*, 2000 SCC 791. Nor did sufficient proximity to establish a private duty arise on the specific, pleaded facts: *Finney v. Barreau du Québec*, 2004 SCC 36. Finally, even if a *prima facie* duty could be established, policy considerations such as the spectre of indeterminate liability, the chilling effect on public health, and the distinction between operational and policy conduct, would negative it.

10. Police Board to Public, for Supply of Police Equipment

The Vancouver Police Board may owe a private law duty of care in connection with supplying tasers to police officers without ensuring they were independently tested and properly maintained: *Bagnell v. Taser International Inc.*, 2008 BCCA 171. Here, an individual died in police custody. His relatives commenced action claiming that he died as a result of a taser used by the police. In Supreme Court chambers, the Board successfully applied to strike the plaintiffs' claim as disclosing no reasonable cause of action. The Court of Appeal held, however, that the relevant provisions in the *Police Act*, R.S.B.C. 1996, c. 367,

could provide the necessary relationship of proximity. Accordingly, it was not plain and obvious that the plaintiffs' claim would fail and the appeal was allowed.

11. Employee Liability to Employer, for Ordinary Negligence

The law will not impose a duty of care on an unskilled employee for the employee's ordinary negligence: *Douglas v. Kinger*, 2008 ONCA 452, leave to appeal refused [2008] S.C.C.A. No. 363 (QL). In this case, a cottage owner hired a 13-year-old boy to do unskilled work on the cottage and yard. The boy was not permitted to use power equipment unless an adult was present, but he accidentally destroyed the owner's boathouse and contents when refueling the gas-powered lawn mower. The court dismissed the insurer's subrogated claim. Liability depended on the degree of the employee's negligence in the context of the specific employment relationship. There was no established category defined by whether the employee was skilled or unskilled. As the claim did not fall within categories of recognized duties of care, it was necessary to apply the *Anns* test. Under that test, the foreseeability of harm was readily established because the boy knew about the dangers associated with his actions. In considering whether it would be fair and just to impose the employer's loss on the employee based on the parties' expectations, representations, and reliance, the court found that it was not just or fair to impose liability on the boy given the terms of the employment relationship. In any event, policy considerations relating to the employment relationship and other social considerations negatived imposition of a duty in these circumstances. A different result might follow if the loss was occasioned, not by ordinary negligence, but by an intentional tort or negligence outside the parties' reasonable expectations.

12. Inherently Obvious Risks

Where there are inherent and obvious risks in an activity, like indoor rock climbing, voluntarily undertaken by an adult, the law may not require the defendant (in this case, the owner of an indoor climbing gym) to prevent the adult from engaging in such an activity or to provide training or supervision: *Trustees of the Portsmouth Youth Activities Committee (a charity) v. Poppleton*, [2008] EWCA Civ 646. Since no amount of matting could avoid absolutely the risk of possibly severe injury from a fall, and the possibility of a fall was an obvious and inherent risk of this kind of climbing, the defendant did not owe the plaintiff a duty of care to prevent the plaintiff from undertaking the activity, or a duty to train or supervise him when he did it. If the law were to require such steps of a defendant, it would equally require it

for a multitude of other commonplace leisure activities which nevertheless carry with them a degree of obvious inherent risk.

The principle set out in *Poppleton* is consistent with the principles governing duties to warn in other areas of tort, for example in product liability where no duty is imposed to warn of a danger which is so obvious and apparent that anyone would be aware of it: see, *e.g.*, *Tudor Inn Reception Hall (1992) Ltd. v. Merzat Industries Ltd.*, [2006] O.J. No. 3629 (QL) (S.C.J.).

C. Standard of Care

1. Hospitals, for Patients and their Guests

A hospital may meet the standard of care to those assaulted on its premises where it has implemented reasonable security protocols: *Prosko v. Regina Qu'Appelle Regional Health Authority*, 2008 SKQB 144. Here, the plaintiff had accompanied her injured husband to the hospital one evening. She was assaulted by a male in the women's washroom. The court had little difficulty in concluding that the hospital, as occupier, owed a duty of care but emphasized that it was not required to protect all users of its facilities from any criminal offence committed on its premises by a member of the public. The court concluded that the hospital's evening security protocols, including two trained security guards and seven video cameras, were reasonable given the unlikelihood that an individual would come to the hospital to commit a criminal offence against another innocent person.

2. Parole Officers, for Those Injured by Parolees

In addition to finding that the parole officer owed a duty of care to the infant plaintiff in *H. (D.) (Guardian ad litem of) v. British Columbia* in connection with sexual assaults committed by an offender on parole, the court held that the parole officer had breached the standard of care. Like the standard of care set out in *Hill v. Hamilton-Wentworth Regional Police Services Board*, the court considered the standard to be that of a reasonable parole officer in similar circumstances. By this standard, the parole officer breached the standard of care in giving the offender permission to reside in a suite above the infant plaintiff.

D. Foreseeability

1. Claims for Mental Injury

The question of causation in respect of claims for mental injury must be approached from the perspective of a person of ordinary fortitude; loss that is too remote to have been reasonably foreseeable does not qualify as being caused in law by the defendant's breach: *Mustapha v. Culligan of Canada*, 2008 SCC 27. Evoking comparisons to the factual matrix of *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.), the plaintiff in *Mustapha* purchased bottled water manufactured by the defendant for use in a dispenser provided by the defendant. He and his wife saw a dead fly and part of another dead fly in the fresh, unopened, replacement bottle. Neither the plaintiff nor any member of his family drank from the bottle. The plaintiff claimed, however, to have become obsessed with thoughts about the dead fly and about the potential family health implications resulting from drinking unpurified water bought from the defendant. The defendant was not made aware of the plaintiff's particular sensibilities. The Supreme Court of Canada upheld the dismissal of the plaintiff's claim. The plaintiff's loss was too remote to have been reasonably foreseeable. The question of causation in respect of mental injury claims must be approached from the perspective of a person of ordinary fortitude. While unusual or extreme reactions to events caused by negligence are imaginable, they are not necessarily reasonably foreseeable. The court noted that an exception may exist in cases where it is proven that the defendant had actual knowledge of the plaintiff's particular sensibilities.

2. Acts of Third Parties

A party cannot be held responsible for the intervening acts of a third party unless the intervening act is reasonably foreseeable: *Orillia Power Distribution Corp. v. Garratt*, 2008 ONCA 422, leave to appeal refused [2008] S.C.C.A. No. 344 (QL). Here, an act of mischief by an unknown vandal occurred in broad daylight, immediately beside a public roadway, on a highway overpass frequently travelled by vehicles but rarely by pedestrians. The project, ongoing for several months, had not been subject to prior acts of vandalism. The court held that the plaintiffs' damage caused by the mischief was not reasonably foreseeable. The court did not discuss the doctrine of *novus actus interveniens*, and bundled its discussion of forseeability in with its discussion of the standard of care.

E. Causation

1. Proof of Causation where Several Possible Causes

The Court of Appeal for England and Wales has clarified the interpretation and application of *The Popi M* principle for establishing proof of causation in the face of several possible causes of damage or loss. *The Popi M (sub nom. Rhesa Shipping Co SA v. Edmunds)*, [1985] 1 W.L.R. 948 (H.L.), established that where there are several highly improbable explanations of the cause of loss, the judge should not select the least improbable cause but rather should decide the case on the basis that the claimant has not proved his loss. Unlikely or uncommon, but not impossible, explanations for damage or loss—for example, a mountain bike's handlebar shearing off in normal use or a car spontaneously catching fire when it had been parked in a garage for several hours—do not fall afoul of the *Popi M* principle: *Ide v. ATB Sales Ltd; Lexus Financial Services v. Russell*, [2008] EWCA Civ 424. As neither explanation was impossible, the respective trial judges were entitled to conclude that these explanations were the probable cause of the damage or loss in each case.

2. Proof of Causation in Medical Negligence

In 2007, following *Resurfice Corp. v. Hanke*, 2007 SCC 7, several medical negligence cases addressed causation issues. In contrast to past years when courts grappled with and corrected misapplications of *Athey v. Leonati*, [1996] 3 S.C.R. 458, few cases of note appeared in this area in 2008.

In *Bohun v. Segal*, 2008 BCCA 23, the plaintiff sued the defendant, a general surgeon specializing in breast cancer, for delayed diagnosis in connection with a cancerous lump in her breast. The defendant had not followed his standard practice of recommending a biopsy, and the trial judge found that in failing to do so the defendant had breached the standard of care. The judge applied the "material contribution" test for causation and found that the defendant's breach had caused the plaintiff's loss by delaying diagnosis and treatment, thus decreasing the plaintiff's chance of survival. The trial judge concluded that the defendant's breach caused a 20% increase in the risk of harm to the plaintiff. The plaintiff died after judgment, but before the appeal. The Court of Appeal allowed the defendant's appeal on causation. The medical evidence was unique in that it provided highly accurate predictions of the increased likelihood of death. The evidence established that the delay in diagnosis and treatment increased the plaintiff's risk of death from breast cancer from 21% to 25%. This increase represented a causation probability of 20% and

provided a sufficient and appropriate basis for applying the "but for" test for causation. For the plaintiff to succeed on causation, she had to prove that it was more probable than not that proper and timely diagnosis and treatment would have prevented her loss and that she would have lived longer but for the defendant's negligence: *Hotson v. East Berkshire Area Health Authority*, [1987] A.C. 750 (H.L.). It was not enough to show that the defendant's conduct increased the likelihood of damage and may have caused it: *Barker v. Corus UK plc*, [2006] UKHL 20. It was not impossible to prove causation on the "but for" test and accordingly it was not open to the trial judge to apply the material contribution test: *Resurfice Corp. v. Hanke*, *supra.* Through the expert evidence accepted by the trial judge, the defendant had, though not required to do so, disproved causation. The appeal was allowed.

3. Proof of Causation and Common Sense Inference

The decision in *Snell v. Farrell*, [1990] 2 S.C.R. 311, does not stand for the proposition that the plaintiff need only prove a sequence of events to prove causation; nor does it relieve the plaintiff of the need to provide medical opinion evidence on the issue when such an opinion is clearly needed to establish possible causes of an injury: *Deo v. Wong*, 2008 BCCA 110, leave to appeal refused [2008] S.C.C.A. No. 229 (QL). In this personal injury case, the plaintiff developed a knee problem following an accident, and several months later developed a more serious problem with the same knee which required surgery. The trial judge held that the first knee problem was causally connected to the accident. The Court of Appeal reversed the decision, holding that there was no medical evidence to support a causal connection between the accident and the first knee injury.

F. Vicarious Liability

In *McVea (Guardian ad litem of) v. B.(T.)* (*sub nom. British Columbia (Attorney General) v. Insurance Corp. of British Columbia*), 2008 SCC 3, the Supreme Court of Canada upheld the conclusion of the Court of Appeal (2005 BCCA 104) that the Attorney General of British Columbia was vicariously liable for all damages resulting from the death of a driver in an accident during the police chase of a stolen car. Although the *Police Act* exempts police officers from liability for damages resulting from their acts of ordinary negligence, under that statute the Attorney General of British Columbia itself remains jointly and severally liable for torts committed by a police officer. As such, full

responsibility for all damages was transferred onto the Attorney General. (For further discussion of the case, see the 2006 *Annual Review*.)

G. Damages

1. Pure Economic Loss

Does a defective product that theoretically endangers persons or property but does not create an imminent risk constitute a "real and substantial danger" so as to permit a recovery for pure economic loss, such as the cost of preventative repairs? In *Brett-Young Seeds Ltd. v. KBA Consultants Inc.*, 2008 MBCA 36, the court rejected an application for summary judgment to strike the plaintiff's claim for pure economic loss. The allegedly defective products were hopper cones. The plaintiffs recognized the limitations of the cones and sought to limit the risk by filling them only two-thirds full. There was no imminent risk of collapse. In *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85, the court had allowed damages for pure economic loss for defects that pose "a substantial danger to the health and safety of the occupants"; in such circumstances the defendant was liable for the reasonable cost of repairing the defects to render the building or equipment non-dangerous. In contrast, a plaintiff could not recover pure economic loss damages for merely shoddy or substandard defects that are not dangerous. In *Brett*, the court concluded the jurisprudence was inconsistent on the necessary degree of danger posed by the defective goods, and allowed the claim to proceed. Similarly, the court declined to strike a claim for damages measured by the profits lost due to the under-loaded hoppers. While earlier pure economic loss cases generally awarded damages solely for the costs of repairing the building or equipment to a safe state, it might be possible that other forms of pure economic loss damage could be claimed.

2. Assessment where Multiple Successive Tortfeasors

Where two causes of action were not separate but rather linked by an indivisible injury, damages were properly assessed globally for both accidents but double-recovery was not permitted: *Ashcroft v. Dhaliwal*, 2008 BCCA 352, leave to appeal refused [2008] S.C.C.A. No. 488 (QL). Here, the trial judge found indivisible injuries caused by two separate accidents and assessed damages globally at $400,000 for both. The plaintiff had settled the claim against the second tortfeasor, but the indivisible nature of the plaintiff's injuries brought into play joint and several liability. Although the settlement amount was likely privileged,

the court held that public interest, served by that privilege in encouraging settlements, was outweighed by the concern of preventing double recovery. Accordingly, it was appropriate to apportion damages between the two accidents and to require the settlement proceeds to be deducted from the global assessment made against the first tortfeasor.

3. Damages for Past Pecuniary Loss

In *British Columbia v. Zastowny*, 2008 SCC 4, reversing 2006 BCCA 221, the Supreme Court of Canada applied the doctrine of *ex turpi causa non oritur actio* to prevent a plaintiff from recovering damages for past pecuniary loss, here claimed as wage losses for periods while incarcerated. This case is discussed in detail in the next section.

H. Torts Defences

1. Ex Turpi Causa

The principle of *ex turpi causa non oritur actio* bars the plaintiff from recovering damages for wage loss during time spent in prison: *British Columbia v. Zastowny*, *supra*. In *Zastowny*, the plaintiff was sexually assaulted by the personal defendant, for whose wrongs the province was vicariously liable. After those assaults, but before trial, the plaintiff was incarcerated for a time. The trial judge expressly connected certain elements of the plaintiff's time in jail to the assaults. The trial judge considered that compensation for loss of earnings during a period when one is incarcerated did not contradict the notion of criminal responsibility. He awarded the plaintiff (*inter alia*) damages of $150,000 for loss of past income-earning capacity, but without reduction on account of incarceration. A majority of the Court of Appeal reduced the plaintiff's pecuniary awards on appeal, but still awarded him pecuniary damages for the "extra time" spent in prison that was causally connected to the tort.

The Supreme Court of Canada unanimously allowed the Province's appeal. Citing *Hall v. Herbert*, [1993] 2 S.C.R. 159, the court identified as applicable the following principles of the *ex turpi* doctrine:

(1) Application of the *ex turpi* doctrine in tort invalidates otherwise valid and enforceable tort actions.

(2) The *ex turpi* doctrine must be subject to clear limits and should occur only in very limited circumstances.

(3) The only justification for application of the doctrine is the preservation of the integrity of the legal system.

(4) The doctrine generally does not preclude an award of damages in tort because such awards tend to compensate the plaintiff rather than amount to "profit".

(5) The doctrine is a defence in a tort action. Responsibility for the defendant's wrong is suspended only because concern for the integrity of the legal system trumps the concern that the defendant be responsible.

(6) Treating the doctrine as a defence places the onus on the defendant to prove the illegal or immoral conduct precluding the plaintiff's action. As a defence, it allows for segregation between claims for personal injury and claims that would constitute profit from illegal or immoral conduct.

A pecuniary award for time spent in prison would introduce an inconsistency in the fabric of the law; it would "give with one hand what it takes away with the other". The consequences of imprisonment include wage loss; an award for wages lost during incarceration would constitute a rebate of the natural consequence of the penalty provided by the criminal law. *H.L. v. Canada (Attorney General)*, 2005 SCC 25, is authority for the proposition that the judicial policy underlying the *ex turpi* doctrine precludes evasion or a rebate of the consequences of the criminal penalty, both direct and indirect. To award damages for any period of time creates conflict between the criminal and civil law and is precluded by the *ex turpi* doctrine. The *novus actus interveniens* doctrine does not apply to this case. Despite the causal connection between the tort and the plaintiff's criminal activity, the judicial policy underlying the *ex turpi* doctrine precludes recovery for the period of incarceration. Only in "exceptional circumstances", such as where an individual was wrongly convicted, would an award for wage loss during a period of incarceration be appropriate.

For further discussion of the doctrine see *Moore Stephens v. Stone & Rolls Ltd.*, [2008] EWCA Civ 644, where the Civil Division of the Court of Appeal applied the *ex turpi* doctrine to bar a company from suing its accountants in negligence where the company sought to have the accountants indemnify it for liabilities incurred through the company's own fraud.

2. Volenti Non Fit Injuria

In *Joe v. Paradis*, 2008 BCCA 57, the court discussed the applicability of the doctrine of voluntary assumption of risk (*"volenti non fit injuria"*). *Volenti*, in the court's opinion, should not be invoked unless there is evidence that the parties put their minds to the question of

legal liability and expressly or tacitly made an agreement to waive liability, which agreement could be supported on basic contract law principles. To do otherwise would run the risk of inviting the jury to use the doctrine to assign all responsibility for the accident to another on a theoretical basis, unsupported by evidence.

3. Self-defence

a. Factual Issues

Where a trial judge finds that a person has no fear of personal injury to himself and that the blow then struck by that person against another is not a reasonable use of force, the defence of self-defence is unavailable: *Minet v. Kossler*, 2008 YKCA 12. Absent a palpable and overriding error in such findings, the Court of Appeal will not interfere with a trial judge's conclusion that the defence is unavailable.

b. Criminal and Civil Tests

The House of Lords recently affirmed that there is a difference between the criminal and civil tests for self-defence. An acquittal in a criminal trial does not automatically lead to dismissal of a civil claim: *Ashley v. Chief Constable of Sussex Police*, [2008] UKHL 25.

I. Contributory Negligence

1. Suicide

A majority of the House of Lords held that where an employee's suicide results from foreseeable depression caused by an employer's breach of duty, the employee's estate's damages may be appropriately reduced where the employee was not acting as an automaton when he killed himself: *Corr v. IBC Vehicles Ltd.*, [2008] UKHL 13. The House divided on how to ultimately deal with the issue of contributory negligence. Lord Mance and Lord Neuberger found that the issue was not fully argued below and consequently should not be dealt with by the House (and returned the issue to the trial court); Lord Scott held that the House should deal with the issue, and contributory negligence of the employee should be set at 20%; and Lord Bingham and Lord Walker found, on what they perceived to be the facts, that there was no contributory negligence by the employee.

2. Dominant Drivers

A dominant driver (that is, the driver with the right of way) is entitled to proceed generally upon the assumption that drivers of other vehicles will observe traffic rules: *Bedwell v. McGill*, 2008 BCCA 6. It was thus an error for the trial judge to find that the plaintiff, who had the right of way, proceeded "without proper care for others who might be crossing her path *as this defendant was entitled to*" (at para. 58). The defendant, lacking the right of way, was not entitled to cross the plaintiff's path without taking care to ensure that the way was clear. Accordingly, although the court is generally reluctant to interfere with a trial judge's finding as to contributory negligence, the court reduced the plaintiff's share of liability from 50% to 25%.

3. Last Chance Doctrine

The British Columbia Court of Appeal has again reaffirmed that the doctrine of "clear line" or "last chance" is "extinct" and "occupies no place in the law of torts": *Dyke v. British Columbia Amateur Softball Assn.*, 2008 BCCA 3, at para. 27. The "last chance doctrine" provided that if: (1) the defendant had negligently created a situation of risk that could cause an accident; (2) the plaintiff knew (or ought to have known) of that risk; and (3) by the exercise of reasonable care the plaintiff could have avoided the accident but failed to do so; then (4) in law the plaintiff's negligence would be the sole cause of the accident. In *Dyke*, Hall J.A. opined that the appropriate image of causation created by the *Negligence Act*, R.S.B.C. 1996, c. 333, is that of a "web" of causal factors, rather than a chain where a linkage can be broken by the plaintiff's own negligence. See also Esson J.A., dissenting, in *Lawrence v. Prince Rupert (City)*, 2005 BCCA 567, to similar effect (see the 2006 *Annual Review*).

J. Defamation

In 2008 there were several significant decisions developing the law of Internet defamation.

1. Internet Defamation: Publication and Jurisdiction

There is no presumption that a given Internet posting has been read in British Columbia, especially where the website has restricted access: *Crookes v. Holloway (sub nom. Crookes v. Yahoo)*, 2008 BCCA 165. In *Crookes*, the plaintiff sued Yahoo!, the California-based Internet service provider, which had no presence in British Columbia. As such, absent

a specific pleading that the offending statements were read in British Columbia, the plaintiff will not establish that British Columbia has jurisdiction over an extra-jurisdictional defendant.

2. Hyperlinks to Defamatory Publication

Merely providing a hyperlink to a website containing defamatory material does not make the party creating the hyperlink liable: *Crookes v. Wikimedia Foundation Inc.*, 2008 BCSC 1424. A reference via a hyperlink, like a reference via a footnote, does not constitute publication or endorsement of the website to which it is linked. If the hyperlinking website expressly endorses the content of the hyperlinked website, however, the publisher of that linking website may be liable.

3. Social Network Site Defamation

Last year saw the first defamation claim arising from the Facebook social networking site: *Applause Store Productions Ltd. v. Grant Raphael*, [2008] EWHC 1781 (Q.B.). An English businessman was awarded £22,000 in damages after a former friend created a fake profile disparaging, *inter alia*, his honesty and credit rating, and alleging that he was a homosexual.

4. Fair Comment Defence

In an important decision for freedom of expression, the Supreme Court of Canada greatly expanded the scope of the defamation defence of fair comment: *WIC Radio Ltd. v. Simpson*, 2008 SCC 40. Prior to this decision, a defendant had to prove that he himself honestly believed what he said in order to invoke the defence successfully: *Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067. Following *Cherneskey*, the British Columbia Court of Appeal denied the use of the defence in its *WIC Radio* decision as the defendant had advanced no evidence that he possessed an honest belief that the plaintiff would condone violence against homosexuals.

On further appeal the Supreme Court changed the "honest belief" portion of the test from an actual subjective belief on the part of the defendant to an objective hypothetical test: "could any person honestly express that opinion on the facts proved?" The objective person in question need not be reasonable; indeed, "any person" would include a prejudiced, exaggerated, or obstinate speaker. As stated by Binnie J., "[w]e live in a free country where people have as much right to express

outrageous and ridiculous opinions as moderate ones". It could thus be argued that the defence of "fair comment' could now simply be described as the defence of "comment".

The test for fair comment is thus now:

(1) the comment must be on a matter of public interest;

(2) the comment must be based on fact;

(3) the comment, although it can include inferences of fact, must be recognizable as comment;

(4) the comment must satisfy the following objective test: could any man honestly express that opinion on the proved facts?

Even if the comment satisfies the objective test, the defence can nonetheless be defeated if the plaintiff proves that the defendant was motivated by express malice: that is, the defendant made the comment for an indirect or improper motive not connected with the expressive purpose for which the defence exists.

In many cases, the distinction between subjective and objective belief will be academic. As Binnie J. observed, a simple means of proving that any person could honestly believe the impugned statement is to have the defaming defendant confirm in testimony his own honest belief in his statement.

5. Fair Comment Defence: Comment vs. Fact

The limits of the defence of fair comment, even as reformulated, were highlighted in *567893 B.C. Ltd. v. Aasen*, 2008 BCCA 303. In *Aasen*, the court reversed the trial court's application of the defence of fair comment to the defendant's allegation that a Vernon developer had a corrupt relationship with the mayor. The court found the utterances not to be comments, but rather allegations of fact; as such, the defence of fair comment did not apply.

6. Responsible Journalism Defence

A "public interest defence of responsible journalism" protects responsible media defendants against defamation actions: *Cusson v. Quan*, 2007 ONCA 771, leave to appeal granted [2008] S.C.C.A. No. 11 (QL). The *Cusson* defence, based on *Reynolds v. Times Newspapers Ltd.*, [2001] 2 AC 127, and *Jameel v. Wall Street Journal Europe Sprl*, [2006] UKHL 44, departs from the conventional interest-and-duty qualified privilege test with respect to publications to the world, and examines whether the publication was made fairly and responsibly. (For a more complete

discussion of the defence, see the 2002, 2007, and 2008 *Annual Reviews*.) The *Cusson* appeal, heard on February 17, 2009, will be the most significant defamation decision of the year.

The Supreme Court of Canada also recently granted leave to appeal in a case raising similar issues as *Cusson*: *Grant v. Torstar Corp.*, 2008 ONCA 796, leave to appeal granted [2008] S.C.C.A. No. 530 (QL).

In *Reaburn v. Langen*, 2008 BCSC 1342, Grauer J. found that the defence did not assist the defendant editor. The editor's failure to check facts provided to him by a person "with an axe to grind", coupled with the inflammatory tone of the article, betrayed a lack of responsible journalism.

K. Breach of Privacy

In the facts leading to *Nitsopoulos v. Wong* (2008), 298 D.L.R. (4th) 265 (Ont. S.C.J.), the defendant journalist posed as a maid and published a series of articles on her experiences. One of the families whose toilets Jan Wong had scrubbed sued for breach of privacy, even though that family was not named in the articles. The defendant applied to strike the claim, alleging that the essence of the claim was not breach of privacy but rather harm to reputation, and that, as a "dressed-up" claim in defamation, the claim should be statute-barred. The court concluded that there may exist a common law claim for breach of privacy which should not be struck out at a preliminary stage. In British Columbia, the *Privacy Act*, R.S.B.C. 1996, c.373, s.1, establishes such a claim.

L. Occupier's Liability

1. General Considerations

Generally speaking, absent some element of control, some special relationship between the occupier and the plaintiff, or some exceptional factor, the duty of the occupier does not extend to preventing the intentional criminal acts of persons on the premises. The liability for an occupier, however, may turn upon the wording of the various provincial occupiers' liability legislation or upon the specific facts of a given case: *Fullowka v. Royal Oak Ventures Inc.* (see above for a full discussion of facts of this case).

2. Standard of Care

Under the common law, persons who enter another's premises are classified as trespassers, licensees, invitees, or contractual entrants, with a different standard of care applying to each. Where the next of kin of a hospital patient accompanies the patient to the hospital, the standard of care applying to the patient should extend to his or her next of kin: *Prosko v. Regina Qu'Appelle Regional Health Authority* (see above for a full discussion of facts of this case).

Under the *Occupiers Liability Act*, R.S.B.C. 1996, c. 337, s. 3(1), an occupier owes "a duty to take that care that in all the circumstances of the case is reasonable to see that a person... on the premises... will be reasonably safe in using the premises". Where such a safe place is provided, but is not necessarily the most convenient place, the occupier has nonetheless satisfied the requirements under the Act: *Dyke v. British Columbia Amateur Softball Assn.*, *supra*.

Under s. 3(3.2), the Act creates a standard of care lower than that set out in s. 3(1): s. 3(3.2) deems that certain persons who enter certain categories of premises, like utility rights-of-way, willingly assume all risks. The subsection thus provides that the occupier may be subject to the diminished standard of care in respect of such entrants: *Skopnik v. BC Rail Ltd.*, 2008 BCCA 331 at para. 13, leave to appeal refused [2008] S.C.C.A. No. 452 (QL). Amendments made to the Act in 1998 were intended to extend the lower standard of care, in the circumstances described, to persons who were trespassers at common law: *Skopnik*, at para. 72 (per Bauman J.A.). The majority of the Court of Appeal held that a railway is a utility for the purposes of s. 3(3.3)(d), thereby invoking the application of the diminished standard of care in s. 3(3.2) for entrants upon that land (per Bauman and Tysoe JJ.A.; Saunders J.A. dissenting).

M. Gross Negligence

In *Hildebrand v. Fox*, 2008 BCCA 434, leave to appeal filed [2009] S.C.C.A. No. 1 (QL), the court held that in the absence of a legislative definition of gross negligence, the term will be given its meaning under the common law: quoting from *McCullough v. Murray*, [1942] S.C.R. 141, "a very marked departure from the standards by which responsible and competent people ... habitually govern themselves". For gross negligence to exist, quoting from *Ogilvie v. Donkin*, [1949] 1 W.W.R. 439 (B.C.C.A.), "it must be plain [that] the magnitude of the risks involved are such that, if more than ordinary care is not taken, a mishap is likely to occur in which loss of life, serious injury or grave

damage is almost inevitable". The court considered the nature of gross negligence, which it confirmed to be an independent tort, in the context of a Rule 19(24) application to strike.

N. Nuisance

1. Connection to Land

It has long been established that the tort of nuisance is rooted in land interests. Where a dock has been ripped off its moorings as a result of nuisance (in this case, the release of water upstream by Parks Canada), both in the Crown-owned riverbed and on privately-held land the damage to the privately-held land attachment is sufficient to give the landowner standing to sue in nuisance: *Henderson v. Canada* (2008), 292 D.L.R. (4th) 114 (Ont. S.C.J. Div. Ct.). The Divisional Court upheld the trial judgment awarding the landowner damages.

2. Nuisance Remedies

Remedies for nuisance must balance competing interests. An outright ban on the landing of golf balls on property adjacent to a golf course is overly broad, as the occasional incursion of golf balls into such property is an expected inconvenience of living beside a golf course: *White City (Town) v. Cattell*, 2008 SKCA 71. The court modified the full prohibition contained in the impugned injunction by allowing for the landing of a "modest few" golf balls in numbers which "would constitute the common experience of other occupiers in the vicinity".

O. Conspiracy

Just as its 2007 decision in *OBG Limited v. Allan*, [2007] UKHL 21, set out definitive tests for the complicated economic torts of inducing breach of contract and unlawful interference with economic interests, the House of Lords in 2008 sought to clarify the tort of unlawful means conspiracy: *Total Network SL v. Her Majesty's Revenue and Customs*, [2008] UKHL 19.

Total Network arose from a complicated "carousel fraud" in which the conspirators coordinated a series of otherwise legal trades between merchants in EU states. Through exemptions and state reimbursements of VAT, the Total Network scheme cost the state nearly £2 million.

In this case, the issue might seem academic: surely cheating the state revenue commission is a direct tort? It appears that the complexities of the EU and domestic legislation were such that while the carousel scheme constituted a clear crime, none of the actions committed by any of the individual conspirators constituted a tort actionable by the state. It was only the combined effect of their concerted scheme that resulted in the deprivation of tax revenue to the state.

The tort of conspiracy has two forms:

(1) "lawful means" conspiracy: the defendants join together with the predominant purpose of injuring another person through an otherwise lawful act; and

(2) "unlawful means" conspiracy: the defendants use unlawful means to achieve an objective, and that objective had the effect of injuring the plaintiff. It is not necessary for the plaintiff to prove that the predominant purpose of the defendant's conduct was to injure to the plaintiff, although it is necessary to prove that the unlawful means were directed towards the plaintiff.

Total Network involved the second species of conspiracy: "unlawful means".

Prior to *Total Network*, the law required the unlawful act relied upon to be an independent tort actionable by the plaintiff. It was not sufficient to rely on an act that was unlawful in the ordinary sense of the word (such as a crime or a breach of contract with a third party): the unlawful act had to arise from a breach of a duty by one of the defendant conspirators to the plaintiff. Under this formulation, the tort was superfluous: the claimant could sue directly in any case. Further, even where the defendant's unlawful means constituted a criminal act, the defendant could escape liability if there was no means to sue for that crime in tort.

In *Total Network* the House of Lords concluded that it is not necessary for the unlawful means to constitute a separate tort actionable against at least one of the conspirators; the tort is made out if the conspirators intended to harm the plaintiff through unlawful means, even if those means had not in themselves been tortious. The Lords set down a flexible test: "unlawful means" supporting a claim must be sufficiently reprehensible to justify imposing on the defendants liability for the resulting harm. Thus even if the claimant were not able to bring an independent tort claim against the defendant for the unlawful act (that is, the claimant was merely a consequential victim of a criminal act), the claimant might still succeed in the tort.

The Lords acknowledged that generally courts should not create torts to address crime, thereby assuming a legislative role and over-expanding the cumbersome tort of conspiracy. The Lords thus issued cautions with respect to the tort. First, the Lords emphasized that there must be a clear link between the unlawful or criminal conduct and the means of intentionally inflicting harm on the plaintiff; it is not sufficient for the plaintiff to prove that a crime was committed, if that crime was not the primary means by which the plaintiff was injured. Second, not every criminal act committed in order to injure can or should constitute an "unlawful means" supporting a claim of conspiracy. As an example of a criminal act not giving rise to tort liability, Lord Mance cited the instruction by a pizza delivery business to its drivers to break the speed limit in order to wrest a greater market share from its competitors.

It is important not to confuse the tort of unlawful means conspiracy with the tort of unlawful interference with economic interests, the subject of *OBG Ltd.*, last year's most important tort decision from the House of Lords (see the 2008 *Annual Review*). In contrast to conspiracy, a claim in unlawful interference with economic interests consists of intentionally damaging another person's business through unlawful means. With respect to this tort, "unlawful means" are not broadly defined but rather are limited to those acts that interfere with the freedom of a third party to deal with the plaintiff and which would be actionable by the third party against the defendant (assuming that the third party suffered damages as a result). One rationale given for the differing approach between the two torts is the odiousness of the concerted effort represented by a conspiracy.