TORTS

David A. Crerar

David Crerar is a partner in the corporate and commercial litigation group at Borden Ladner Gervais LLP, and serves as an adjunct professor at the University of British Columbia, Faculty of Law. He practises and has published in the areas of banking and pension litigation, injunctions, defamation, media and internet law, and protection of trade secrets. He has chaired and presented in CLEBC conferences on torts, internet law, civil procedure, and electronic discovery. Mr. Crerar is a graduate of the University of Toronto, Faculty of Law.

Lori H. Leung

Lori Leung is a lawyer at Borden Ladner Gervais LLP. Her practice focuses on commercial litigation. Ms. Leung is a graduate of the University of Ottawa Faculty of Law, and served as a law clerk to seven justices of the British Columbia Supreme Court in 2010 to 2011.

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A. Introduction

2011 was a particularly active year for the law of negligent misrepresentation.

First, in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, the court clarified the scope of duty of care owed by public authorities by further delineating between core policy decisions and operational decisions, proceeding to strike the allegation that the government

negligently represented to consumers and tobacco companies that mild/low-tar cigarettes were less harmful.

Second, in *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, the court held that real estate developers are only obliged to disclose material information. It also confirmed the availability of a negligent misrepresentation claim as an alternative to the statutory cause of action created under the *Real Estate Development Marketing Act*.

Third, the common-law world waits to see whether the U.K. Supreme Court will opt to further restrict the availability of negligent misrepresentation claims on the basis of there being a distinction between sophisticated commercial parties and non-commercial parties (*Scullion v. Bank of Scotland Plc*, [2011] EWCA Civ 693, leave to appeal to UKSC granted 23 November 2011).

Another noteworthy development in 2011 occurred in the law of fiduciary duty. The court in *Sharbern*, *supra*, found that the developer, who contractually took on a management role, owed but (in this case) met its fiduciary obligations, including its duty to disclose and to avoid conflicts of interest, to the purchasers/owners. And in *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, the court ruled that the provincial government did not owe residents of long-term care facilities a fiduciary duty when they were allegedly subjected to artificially inflated accommodation charges. In so ruling, the court confirmed that fiduciary duties would be imposed on public authorities only in narrow circumstances.

Finally, the Supreme Court of Canada issued a further decision in its recent series of important cases on defamation law. *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, provided a non-exhaustive list of criteria guiding claims in group defamation, and *Crookes v. Newton*, 2011 SCC 47, held that hyperlinking to a defamatory webpage does not alone constitute publication and will not attract liability.

B. Duty of Care

The first step of the analysis is to determine whether the plaintiff and defendant were in a relationship that gave rise to a *prima facie* duty of care based on foreseeability and proximity. If a *prima facie* duty exists, the second step is to ask whether the duty is nonetheless negated by policy considerations.

1. Expert Witness Owes Duty to Client

Expert witnesses owe a duty in both contract and tort to act with reasonable care and skill in carrying out their roles in litigation to the party who retained them. In a landmark decision, the U.K. Supreme Court (5:2) ruled in *Jones v. Kaney*, [2011] UKSC 13, that expert witnesses are no longer absolutely immune from civil lawsuits for professional negligence.

In the case, two experts were ordered to hold discussions and prepare a joint statement to assist the court at trial. Without reviewing the other party's reports, the plaintiff's expert witness signed the joint statement, which was drafted by the opposing side, and inconsistent with her earlier assessments of the plaintiff's injuries arising from a motor vehicle collision. The plaintiff alleged he was forced to settle for significantly less than what would have been achieved had his expert not signed the joint statement.

While expert witnesses remain immune to defamation claims, the court held that they are now exposed to liability for breaches of their duties in relation to their involvement in legal proceedings. The basis of imposing liability is reliance: the litigant relied on the expert's opinion to determine whether to take action, defend, or settle, and for how much. Where the witness behaves in an egregious manner or causes his or her client loss by adopting or adhering to an opinion outside the permissible range of reasonable expert opinions, the wronged client is entitled to a proper remedy.

The majority characterized this ruling as reinforcement of the expert's overriding duty to the court as well as to his or her profession, and dismissed the argument that a finding of liability would contribute to the phenomenon of the "hired-gun" expert. There was no empirical evidence showing that removal of the immunity would have a chilling effect on experts' willingness to participate in court proceedings. In any event, findings of liability would be rare given the extreme degree of delinquency required. Further, judges are obliged to protect expert witnesses against specious claims by disappointed litigants and to vigorously quash any attempt to pressure experts to adopt or alter opinions other than those genuinely held.

2. No Duty When Government Acts to Protect Consumers

Government agencies tasked with regulatory authority over safety of consumer products owe no private law duties to those who suffered economic loss as a result of the execution of those regulatory duties

(*Los Angeles Salad Co. v. Canadian Food Inspection Agency*, 2011 BCSC 779). In that case, the government agency advised the public not to eat baby carrots distributed by the company after four cases of Shigella prompted an investigation and a voluntary recall. The company sued, alleging breach of duty of care and negligent inspection.

The court found proximity wanting, as the applicable statutory scheme imposed duties owing only to the public at large and did not disclose an intention that the regulator had to protect a member of the public, including the commercial interests of regulated entities who might be affected by the discharge of legislative authority. Policy reasons (namely, indeterminate liability) also militated against imposing a duty on the government agency.

3. No Duty When Government Makes Policy Decisions

The government owes no duties in negligence with respect to "core policy decisions" that are made rationally and in good faith. It must be free to make decisions grounded in economic, political, and social considerations without fear of attracting indeterminate tort liability. In *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, the court rejected the tobacco companies' attempt to add the federal government as third party for allegedly being responsible for damages that might be found against the tobacco companies due to decades of Canada's active participation in the industry. Specifically, the companies argued that Canada breached its duty of care to them and consumers for (among other things) negligent misrepresentation of the "light" and "mild" strains of tobacco.

Similar to the analysis in *Los Angeles Salad*, *supra*, the court held that no statutory basis exists for imposing a duty as between Canada and consumers, given that the relevant legislation created broad duties to the general public, not private law duties. It did find a sufficiently proximate relationship between the government and the companies, since Canada played a role in developing low-tar tobacco and advised the companies of its potential to mitigate health risks. Further, the government's regulatory powers over the tobacco companies, coupled with its advice, support a conclusion that Canada ought reasonably to have foreseen that the companies would rely on the representations made. However, this *prima facie* duty should be nixed on the second leg of the *Anns/Cooper* test. Although the government may have been wrong in its assessment of the light/mild strain, it acted in the interest of public health and such a core policy decision is thus shielded from liability.

4. No Duty When City Failed to Enforce Its Animal Control Bylaw

A township, having failed to enforce its own bylaw on animal control, is not liable for injuries suffered by a victim of a dog attack, where the attack occurred on private property, where the victim did not rely on the township to protect her, and where the township lacked authority to reduce the number of dogs at a residence (*Kent v. Laverdiere*, 2011 ONSC 5411). An 11-year-old girl was attacked by her grandmother's French Mastiff when she disobediently entered into the dog pen without adult supervision. The girl's litigation guardian sued the township, which had in place a bylaw prohibiting ownership of more than three dogs. The grandmother, a breeder, had nine French Mastiffs at the time.

At the first stage of the *Anns/Cooper* test, the court found: (1) the relationship between the girl and the township was neither close nor direct; (2) the girl expected her grandmother (not the township) to protect her from dangers created by the presence of the several dogs; (3) the fact that the township enacted a bylaw restricting the number of dogs on a property did not make it liable for damages suffered by a third party; (4) even if the township sought to enforce its bylaw it had no authority to remove dogs or impose conditions; and (5) even if the grandmother had complied, it was unclear whether the risk posed by multiple dogs would have been foreseeable and whether the attack would not have occurred.

5. SIU Investigators Owe No Duty to Victim and Family

Special investigations units do not owe victims and their families a private law duty of care in the allegedly negligent conduct of their investigation of a crime (*Wellington v. Ontario*, 2011 ONCA 274, leave to appeal refused [2011] S.C.C.A. No. 258 (QL)). On policy grounds, recognition of such a duty risks privatizing criminal investigations, which are for the public's benefit. Consistent with *dicta* in *Los Angeles Salad*, *supra*, the Ontario Court of Appeal held that government authorities charged with making decisions in the interest of the general public should be free to make those decisions without fear of attracting (without more) a private law duty of care to a member of the public.

6. No Duty When Police and City Knew Bar Infamously Rowdy

Law enforcement agencies and municipalities are not obliged to alert future patrons of possible dangers posed by private establishments known for disorderly behaviour (*Burnett v. Moir*, 2011 BCSC 1469).

Here, the plaintiff suffered a brain injury after being hit with a bar stool thrown when a group of unruly patrons were being ejected from a pub. Evidence showed that over the span of nine years, police received many service calls regarding assaults at the pub.

The court dismissed the allegation that the police and city failed to properly identify the pub as a public nuisance and "trap for the unwary" and to take steps to abate the danger it presented. The relationship between the plaintiff and the defendants before the assault was neither close nor direct—the plaintiff had never attended the pub before and was not known to the defendants as more likely than others to be a patron or to be caught up in an assault. The plaintiff was a member of a large indeterminate pool of potential victims who faced a non-specific threat, not unique to establishments such as pubs. Further, the plaintiff did not have any particular expectation of the defendants, as he had attended other drinking premises where fights broke out. His past experience with nightclubs made it objectively improbable that he would have heeded any warning from the defendants about the pub. The plaintiff's consumption of alcohol, cocaine, and steroids, the combination of which causes aggression and decreases inhibitions, also belied any logical inference that he attended the pub anticipating or relying on police protection.

7. Employer Owes Duty to Employee During Firm Events

Employers who host corporate team-building activities outside work hours have a duty to conduct proper risk assessments of those activities beforehand to ensure safe participation and are liable for damages as a result of any breach of that duty (*Reynolds v. Strutt & Parker LLP*, [2011] EWHC 2263 (QB)). In that case, the firm was found liable for serious brain injuries suffered by an employee who, while not wearing a helmet, collided into another rider during a cycling race. The judge found that staff members were not encouraged to wear helmets; indeed, 11 of the 12 participants raced without one. The firm's liability was reduced because of the plaintiff's contributory negligence with respect to the dangerous manner in which he cycled that brought about the collision, and his own decision not to wear a helmet.

8. Designer/Manufacturer Owes Duty to Meet Minimum Standards

Product designers and manufacturers are required to meet minimum safety standards (*More v. Bauer Nike Hockey Inc.*, 2011 BCCA 419, affirming 2010 BCSC 1395). During an organized game of hockey, the

plaintiff was wearing a helmet certified by the Canadian Standards Association that met and exceeded its then-existing standards. He was hip-checked, fell into the boards, and suffered a subdural haematoma, causing severe disability. The Court of Appeal affirmed that the helmet was not defectively designed or manufactured and rejected the argument that there was any failure to warn of the limitations of protection afforded by the helmet.

9. No Duty Owed by Standards Development Association to End-Users of Products That Must Meet Standards Set by the Association

The plaintiff in *More*, *supra*, sued the Canadian Standards Association alleging that it was negligent in failing to adopt proper standards for helmet certification sufficient to prevent risks of serious head injury. The Court of Appeal affirmed that the standards set by the Association were appropriate.

At trial, the Association argued that even if their standards were unreasonably low, it did not owe the plaintiff a duty of care. The trial judge disagreed, holding that agencies responsible for setting certification standards for safety equipment can be successfully sued in negligence if those standards are set unreasonably low and evidence establishes that injury was avoidable had the product met a higher standard that ought to have been adopted. However, the Court of Appeal concluded that for policy reasons, the Association does not owe a duty of care to hockey players who are injured while wearing certified helmets.

10. No Duty Owed to Buyer Who Suffered Loss from Negligent Valuation

Commercial parties should not rely solely on the professional advice of third parties, but should (out of prudence) seek their own advice. For example, a surveyor engaged by a lender to provide a valuation of an investment property is not liable to the commercial borrower and investor for the negligent misrepresentations made by the surveyor (*Scullion v. Bank of Scotland Plc*, [2011] EWCA Civ 693, leave to appeal to UKSC granted 23 November 2011). The plaintiff (commercial investor and borrower) applied for a mortgage with the defendant bank. That application required an estimated value of the property in question. A valuation was provided by a firm of surveyors retained by the bank at the plaintiff's expense. The plaintiff relied on the surveyors' report in agreeing to purchase the apartment which he intended to rent out to others. Following completion, it became apparent that the valuation and projection of expected rental income were significantly inflated. The plaintiff was forced to sell the apartment at a discount. He sued the bank for his losses caused by the shortfall in the letting value on grounds that its surveyor negligently provided the valuation.

The trial judge found for the plaintiff. The Court of Appeal overturned this outcome on the basis that while the valuation was negligently prepared, the defendant did not owe the plaintiff a duty of care. Specifically, the plaintiff's reliance on the report was not clearly foreseeable and he, as a commercial purchaser and investor (as opposed to a residential buyer), should have sought his own independent valuation, particularly on the complicated question of future rental value. The court found that commercial purchasers can be regarded as less deserving of protection by the common law against the risk of negligence than those buying to occupy as their residence.

11. Notice to Broker of Insured's Changed Living Arrangements Triggers Duty

An insurance broker is liable for failing to anticipate the needs of an insured even where notice of those needs arose indirectly. The broker has a duty to provide relevant information about the availability of the types of coverage and to meet the insured's changing needs, which the broker is aware of or should have been aware of, and to address any possible gaps in coverage.

In *Beck Estate v. Johnston, Meier Insurance Agencies Ltd.*, 2011 BCCA 250, affirming 2010 BCSC 719, the husband and wife (co-insureds) separated. She moved out of the home that they co-owned, but continued to make premium home insurance payments. After separation, he murdered her, set fire to the house, and committed suicide. The wife's estate was denied coverage on the basis of the policy exclusion of damage or loss caused by the insureds' intentional or criminal acts. The trial judge found and the Court of Appeal affirmed that the broker, knowing the wife no longer lived in the house, was liable for failing to ascertain her home insurance needs and to advise of the availability of alternative coverage without the intentional/criminal acts exclusion.

The Court of Appeal rejected the argument that damage that the husband caused to the home was not foreseeable, reasoning that the issue was not whether the wife foresaw that the husband represented a real or an actual risk of intentionally damaging the home, but whether the change in risk and thus the gap in coverage was occasioned by the broker's failure to give proper advice. Further, the fact that this exclusion

appears in most homeowner's policies suggests that the risk of an intentional/criminal act by a co-insured is readily foreseeable.

The court also dismissed the insurance company's argument concerning causation. It upheld the trial judge's finding that but for the broker's negligent advice the wife would have purchased alternate insurance that addressed the gap in her coverage. The court drew inferences from the wife's past conduct in coming to the conclusion that she would have chosen a more costly policy without the exclusion had she been properly advised of her options.

12. Golfer Owes Duty to Fellow Golfer

Players on a golf course owe each other a duty of care (*Phee v. Gordon*, [2011] CSOH 181). Golfers must not overestimate the likelihood of their shots following their desired paths to their intended targets, but must properly assess the degree of risk their drives would place on others. Specifically, a golfer breaches his or her duty of care if he or she takes a shot when fellow golfers are within 200 yards and in a 30-degree cone from the tee pointing to the line of target.

Expert opinion established that most golfers hit within 15 degrees of either side of the desired target line. The plaintiff was 12 degrees to the left of the defendant at the time he was hit. The court found that the defendant should have appreciated that: (1) every golfer, no matter the level of competence, will make bad shots; (2) the lower the degree of skill of a golfer, the more likely there is to be a bad shot; and (3) he was a golfer of moderate skill and thus was more likely than a more skilled golfer to make a bad shot.

The golf club, in turn, owes a duty of care to its patrons. Specifically, owners and/or management must establish physical precautions (such as fencing, foliage, signs) as necessary to decrease unacceptable risks to players. The court allocated 30% of the responsibility to the club for failing to post signs warning users of the path about the risk of balls being driven from the tee in question.

13. Restaurant and Server Owe Duty to Patron

A restaurant and a server owe a duty of care to a hyper-allergic customer who inquires whether an item on the menu contains nuts, is incorrectly told "no", and suffers anaphylactic shock (*Martin v. Interbooks Ltd.*, 2011 SKQB 251). The restaurant's duty extends to ensuring its employees understand that they must know the ingredients of menu items so as to give an accurate answer to the customer

and avoid serving food that may cause harm. The defendants were also found liable for negligent misrepresentation, as well as breach of warranty for fitness of purpose under the *Sale of Goods Act*.

14. Social Host Owes No Duty to Guest Assaulted After Party

A social host is not obligated to ensure their inebriated guests do not engage in fights after exiting the host's property (*Desanti v. Gray*, 2011 ABCA 226, leave to appeal filed [2011] S.C.C.A. No. 437 (QL)). It is not reasonably foreseeable to a social host that a guest who has left a party would be the victim of a criminal act at some place outside the control of the social host simply because the guest consumed alcohol at the party. This is so even if the social host hears something suggesting that the guest might behave foolishly after he leaves. To conclude otherwise would unreasonably extend social host liability beyond that presently envisioned by the law.

15. Real Estate Agent Owes Duty to Vendor and Purchaser

A purchaser's real estate agent has a duty to verify material facts about a property, even where there are not necessarily "red flags" highlighting potential problems (*Krawchuk v. Scherbak*, 2011 ONCA 352, leave to appeal refused [2011] S.C.C.A. No. 319 (QL)). Further, the agent has a duty to provide a certain level of guidance when the client is filling out or receiving a property disclosure statement. Thus, where the defendant was acting as joint real estate agent to both the purchaser and vendor of a property with obvious structural defects, the defendant had an obligation to ask the vendor further questions about potential settlement issues. Her failure to do so made her liable to her vendor-client as well.

16. Financial Advisor Owes Duty to Client Who Retires Prematurely

A financial advisor owes a duty to a client who retires, as a result of misleading representations, on the belief that his or her investments and retirement plan will generate sufficient income. This is so even if the client did not consult the advisor when the decision to retire was made and that decision was not brought to the advisor's attention until several months later (*Giesbrecht v. Canada Life Assurance Co.*, 2011 MBQB 244). The investment counsellors were found negligent in their preparation of the plan. They failed to obtain important information from the plaintiffs to ensure the investments were suitable for unsophisticated investors such as the plaintiffs, to warn the plaintiffs of the

associated risks, to ensure the plaintiffs understood the plan, and to implement the plan properly. The damages award of some $400,000 for lost income due to premature retirement was reduced by 40% (along with the interest awarded) to account for the fact that the plaintiffs failed to read the plan and failed to fully fund the plan.

C. Standard of Care

1. Defining Standard of Care Without Expert Evidence on Industry Standards

The trial judge is entitled to define and apply the standard of care required of the alleged tortfeasor, without expert testimony on the issue or evidence to establish relevant industry standards (*Moreau v. Roman Catholic Bishop of Edmundston*, 2011 NBCA 26, affirming 2010 NBQB 239). The lower court found that the church ought to have provided reasonably safe premises for the purposes contemplated, that failing to install an extended handrail breached this standard of care, and that the church was liable for the foreseeable injuries sustained by an obese volunteer choir director who lost her balance and fell down a flight of stairs. The appellate court affirmed those conclusions, ruling that expert testimony on accepted norms (here, equipping the 27 concrete steps with a full-length handrail) is essential only where "the context is so esoteric that a person with ordinary judgment and experience could not form a valid opinion on the reasonableness of the conduct in issue" and that because the context in the present case "is as commonplace as can be", the trial judge "had the necessary wherewithal" to assess the reasonableness of the church's conduct (at para. 17).

2. Social Benefit of Impugned Activity Must Be Weighed Against Risk

The standard of care assessment must include consideration of relevant social values. In *The Scout Association v. Barnes*, [2010] EWCA Civ 1476, the plaintiff sustained injuries during a boy scouts game played in the dark. The trial judge ruled in favour of the plaintiff, having found that turning off the lights added an unreasonable degree of risk to the game.

The majority decision found that while scouting is valuable to society and will often properly include some risk, that level of risk must be acceptable. The trial judge's reasons indicated that he thought that the

added excitement of playing the game in the dark, which might well encourage boys to attend scouts (a desirable objective), did not justify the increased foreseeable risk of injury. In other words, introducing darkness did not add any social or educative value to the game other than giving it more spice, but it significantly increased the risk of injury. Thus, the trial judge had clearly in mind (though not explicitly stated) the established principle that social values of an activity are relevant in assessing the standard of care and so his finding was entitled to appellate deference.

3. Standard for Municipal Road Authority Limited to Reasonable User

Municipalities are obliged to maintain roads in such a reasonable state of repair that those requiring to use them may, exercising ordinary care, travel on them safely (*Morsi v. Fermar Paving Ltd.*, 2011 ONCA 577, leave to appeal filed [2011] S.C.C.A. No. 487 (QL)). Municipalities need not conform to a standard for their roads that ensures safety of a reckless driver. In this case, the plaintiff (killed in the car crash) was held entirely at fault due to his excessive speed, even though the accident might have been avoided had the city and the paving company it retained maintained better road conditions.

4. Standard Met If Reasonable Inspection Would Not Have Revealed Risk

In *Sutton v. Syston Rugby Football Club Ltd.*, [2011] EWCA Civ 1182, during a rugby practice, the plaintiff fell, gashing his knee on a broken stake used as a marker for an earlier cricket game. The trial judge concluded that the rugby club owed the plaintiff a duty of care that included inspecting with "a slightly more careful degree of attention" the field (in particular the touch down ends) in between matches to ensure safety for play. Because the club failed to conduct such an inspection, it was liable for damages.

On appeal, the court held that the trial judge went too far. While the club had, under occupiers' liability legislation, a duty to inspect the field for obvious unsafe conditions, it could not be required to conduct the kind of detailed scrutiny that would have revealed the marker below the surface of the grass. The court said that the trial judge erred in imposing a higher standard of inspection in relation to the touch-down ends than for the rest of the field. Reasonable inspection would not have revealed the marker, so the club's breach of duty was not the cause of the plaintiff's personal injuries.

5. Private Contractor Held to Standard Under Contract and Private Law

Where the government delegates responsibility to a private contractor, the contractor inherits the same Crown immunity for policy decisions, but continues to be liable under private law for negligence arising out of operational decisions. Where negligence arises out of an operational decision and is not based on a standard of care established as a matter of policy under the government contract, a contractor must meet the private law standard (*Billabong Road & Bridge Maintenance Inc. v. Brook*, 2011 BCSC 297).

In this case, the private contractor's actions were based on both policy and operational decisions. The Province established a policy that slippery roads must be remedied by applying sand within time frames set out in the contract. While the contract required the company to deploy trucks at least 60 minutes before the forecasted weather event, it was not required to restore traction to all affected roads immediately. The contract provided that as soon as a deficiency was detected or brought to the contractor's attention, traction restoration had to be completed within the specified time. Those time limits were a matter of policy and not reviewable by the court. However, the manner in which the company went about restoring traction was an operational decision subject to the private law standard of care.

The requisite private law standard expected with regard to slippery conditions that are noted while on a patrol is to respond immediately, to give all locations the same priority, and to complete sanding within a reasonable period. Because the contractor failed to sand the road in a timely manner, it was found liable for injuries the plaintiff sustained in a single vehicle collision. The plaintiff was 50% at fault for not taking reasonable evasive action.

6. Higher Standard on Drivers in Areas Frequented by Jaywalkers

Drivers will be held to an elevated degree of care when driving in areas known to be frequented by jaywalkers. In such circumstances, jaywalkers are reasonably foreseeable (*Walter v. Plummer*, 2011 BCCA 335, affirming 2010 BCSC 1017).

In this case, a 16-year-old pedestrian was jaywalking when he was struck by the defendant's motorcycle. The defendant was found 40% at fault for proceeding pass a stationary tractor trailer, which had entirely obstructed her view, at 40 kilometres per hour without an alert state of mind. She was held to a higher standard as she was aware that students often jaywalked in the area shortly after the end of the day (as she worked at one of the nearby schools). The fact that foreseeable pedestrians would be students is significant because young people may take less care for their own safety than adults.

7. Standard of Care—Physician—Informed Consent

A patient must authorize or consent to medical treatment; he or she must be fully informed of and must understand the nature of the proposed treatment and its alternatives, and be aware of any associated material risks and benefits.

A physician breaches his/her duty of care if the physician fails to properly inform the patient about the percentage of risk of injury in proceeding with a procedure. Liability will not be imposed where the patient would have agreed to the operation even if fully informed of its risks (*Gilberds v. Sobey*, 2011 ABQB 491). Statistical information on risks associated with the procedure in question should (if available) be given to patients to help them determine whether to undergo or forego treatment. In *Gilberds*, the court ruled that physicians are obliged to communicate effectively to the patient the degree of probability of a risk, as this information is relevant to reasonable patients considering whether or not they want to have the operation. The degree of probability is a factor that qualifies a risk as material.

In this case, although the physician explained the risk of a biopsy, his omission of the fact that there was a 5% risk of nerve damage impaired the plaintiff's ability to weigh her options. The court held that the seriousness of this omission was exacerbated by the fact that statistical probabilities were assigned to less likely and less serious risks, such that the plaintiff not only lacked significant information but may have also been misled into thinking the risk of nerve damage was substantially less than was actually the case. However, lack of informed consent does not mean causation is established. The court found that the plaintiff would have opted for the procedure even if she knew of the 5% risk of nerve damage; therefore, the doctor did not cause the injury sustained.

8. Standard of Care—Solicitor

a. Non-retainer Letter Important but Not Conclusive

Issuing a non-retainer letter goes a long way towards limiting the standard of care and avoiding liability (*Broesky v. Lüst*, 2011 ONSC 167).

While lawyers are not negligent for forgoing a written non-retainer, it is prudent to issue such a letter to the client. A non-retainer letter outlines what specific matters the client had not retained the lawyer to do. This is different from a limited retainer which is counsel's undertaking of a lesser standard than a reasonably competent solicitor would meet in the circumstances. The court provided two examples of limited retainers: closing a real estate transaction without a title search; and providing advice on a separation agreement without first obtaining financial disclosure.

b. Standard Same in Non-litigation Context

Lawyers practising collaborative family law ("CFL") are held to the same standard of care as family law litigators (*Webb v. Birkett*, 2011 ABCA 13, affirming 2009 ABQB 239, reconsideration denied 2011 ABCA 179). While clients may forfeit legal entitlements in order to access CFL benefits not available in litigation, including the hope of better maintaining ongoing parental harmony, CFL (an interest-based bargaining process) does not excuse its practitioners from first obtaining disclosure of information required to give advice on legal rights and risks—information needed by the client to make informed settlement decisions that are in his or her best interests.

c. Non-lawyer Attempting Solicitor Work Held to Same Standard

Those who undertake legal work (notwithstanding their lack of legal training and qualification) will be held to a standard of a reasonably capable lawyer (*Rowsell v. MacKinnon*, 2011 NLTD(G) 36). In this case, the testator asked his accountant to change his will to leave his friend $100,000. The accountant was reluctant to do so and suggested he see a lawyer, but eventually relented and prepared a new will as instructed. The new will and the gift were rendered invalid because the accountant arranged for one witness rather than two as required under legislation. The court held the accountant to a standard expected of an ordinarily competent solicitor. The accountant was professionally trained, he understood that he was qualified to provide accounting not legal services, and knew it would be wise to decline work he was not qualified to do. In failing to execute the new will properly, the accountant breached the standard of care.

D. Causation

1. The "But For" Test Generally Applies

The default analysis of causation remains the "but for" test (*Ediger v. Johnston*, 2011 BCCA 253, leave to appeal filed [2011] S.C.C.A. No. 371 (QL)). Under the "but for" test, the plaintiff must establish that (1) the injuries are substantially connected to the negligent act (factual causation); and (2) injuries caused by the negligent act fall within the range of that for which it is just to make the defendant responsible (legal causation).

The trial judge found (2009 BCSC 386) that the obstetrician breached the standard of care in failing to have a back-up surgical team "immediately available" and to obtain the mother's informed consent to a mid-level forceps delivery. Specifically, the trial judge held that before attempting this high-risk procedure, the obstetrician should have advised the mother of its benefits and risks along with those associated with any alternative procedures, including a Caesarean section. The trial judge concluded that the attempted forceps delivery caused compression of the umbilical cord with its attendant fetal bradycardia, which in turn resulted in brain injuries.

The Court of Appeal disagreed and dismissed the claim on the issue of causation. It stated that the material contribution test did not apply because it was not impossible for the mother to prove that the obstetrician's negligence caused brain damage. Absent evidence to support a finding of fact that but for the obstetrician's breaches of the standard of care, the baby would have been delivered earlier than she was and all or part of her injuries would have been prevented or diminished, factual causation was not established.

There was no causal connection between the attempted forceps delivery and the cord compression, since the bradycardia began "within at most one and two minutes" after the obstetrician abandoned the procedure and left to schedule a non-emergency C-section. No evidence was led nor findings made on whether delay could have been avoided if the obstetrician had had a surgical team "immediately available" or whether obtaining the mother's informed consent would have led the mother to elect a C-section over the attempted forceps procedure.

2. Causation Not an Either/Or Analysis

The "but for" test is met where there is "substantial connection" between the injury and the defendant's conduct (*Resurfice Corp. v. Hanke*, 2007 SCC 7). Even where the plaintiff's ongoing debilitating pain and whiplash sustained in a car crash are divisible injuries, causation is established where there is sufficient evidence of a substantial connection between the accident and the persisting symptoms (*Farrant v. Laktin*, 2011 BCCA 336, reversing 2008 BCSC 234).

The Court of Appeal identified two problems with the trial decision. First, the experts agreed that the plaintiff's spinal degeneration made him more vulnerable to injuries sustained in the accident, which demonstrated some inter-relationship between the two potential causes of the disabling pain, and thus should have led the judge to consider whether the accident triggered, accelerated, and aggravated the spinal degeneration, causing the disabling pain to develop earlier than it would have had the accident not occurred. The question was were the whiplash and spinal degeneration both a necessary cause of a single and indivisible disability?

Second, the trial judge's finding that the plaintiff never returned to his pre-accident state established that the accident continued to contribute to the pain to some degree. The trial judge was obliged to assess the extent of its contribution and determine if it was substantially connected to the disabling pain beyond the *de minimis* range. The plaintiff only had to establish a "substantial connection" between the whiplash suffered in the car accident and the ongoing pain; he did not have to prove that the whiplash was the only cause of the ongoing pain.

E. Remoteness of Damage and Reasonable Foreseeability Rule

Foreseeability is assessed on an objective standard; the question is whether a reasonable person in the position of the defendant could reasonably have foreseen that his or her negligence would give rise to a real risk that a person of ordinary fortitude would not brush aside as far-fetched, but would suffer a compensable psychiatric or psychological injury (*Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, discussed in the 2009 edition of the *Annual Review of Law & Practice*).

1. Psychiatric Injury Consequential to Physical Injury Compensable

Where psychiatric injury is consequential to the physical injury for which the defendant is responsible, the defendant is also liable for the psychiatric injury even if it was unforeseeable (*Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258, varying 2009 BCSC 852). In this case, the student, after having been hit in the face during a physical education class, suffered a concussion and developed a serious somatoform disorder.

The trial judge found that the teacher breached his duty by permitting the student to participate without having progressively attained the necessary skills, as the student had not attended any of the previous classes. The trial judge also found that in spite of contributing factors (the father's over-protective parenting) the accident was the cause, in fact and law, of the psychiatric illness. The $125,000 non-pecuniary damages award was upheld, but the Court of Appeal reduced the past wage loss and future income-earning capacity awards to account for the specific contingency that the student's pre-accident position (his absenteeism from school) meant he might not have been able to hold a job regardless of the accident.

2. Post-accident Alcoholism Related to Chronic Pain Compensable

Alcoholism related to chronic pain due to a traffic accident is compensable (*Zawadzki v. Calimoso*, 2011 BCSC 45). Here, the plaintiff pedestrian was struck by the defendant's truck. The defendant was found fully at fault. The plaintiff sustained physical injuries (including a permanently partially disabled elbow), became depressed, and began drinking excessively. The court rejected the defendant's argument that damages for later alcoholism were too remote. The plaintiff had a genetic predisposition to alcohol abuse, and such genetic vulnerability to alcohol addiction is the very type of pre-existing susceptibility the thin skull rule addresses.

3. Only Recognizable Psychiatric Injuries Compensable Absent Physical Injury

Mustapha, *supra*, did not open the door to new forms of psychiatric injuries compensable at law (*Healey v. Lakeridge Health Corp.*, 2011 ONCA 55, affirming 2010 ONSC 725). In *Healey*, a proposed class sought compensation when the defendant health corporation notified them that they might be infected with tuberculosis (in the end, they

were not). The defendant moved for summary judgment on the ground that the class had not suffered damages for nervous shock on the legal threshold, namely absent physical injury, they failed to establish a "recognizable psychiatric illness".

The class argued *Mustapha* lowered the threshold and an aggregate award could be made by statistical analysis. The court rejected this argument, noting that there are strong policy reasons for imposing a threshold on psychiatric injuries. Claims for psychological insult must be screened on an objective basis. The law appropriately declines monetary compensation for the upset caused by unfortunate but inevitable everyday stresses of life. In *obiter*, the court stated that the claims at issue require individual proof of harm suffered by individual class members and therefore cannot be addressed through an aggregate damages award.

Deros v. McCauley, 2011 BCSC 195, found the psychiatric injury (post-traumatic stress disorder) alleged as a result of witnessing a car accident involving a co-worker too remote and not compensable. The plaintiff found out within minutes that a rod had not skewered his co-worker, and that his co-worker had sustained no significant physical injuries. The court held that recovery for nervous shock arising from seeing a vehicle collision is limited to circumstances where someone died or was seriously hurt.

Consistent with these authorities, yet reaching an opposite conclusion, is *Lodge v. Fitzgibbon*, 2011 NBQB 226, in which the trial judge found it reasonably foreseeable to a doctor that a patient, having previously received inaccurate optimistic diagnoses, would endure psychological harm on learning the correct and grave diagnosis.

4. Special Remoteness Issue—Defence of *Novus Actus Interveniens*

The defence of *novus actus interveniens* concerns reasonable foreseeability of subsequent conduct rather than unreasonableness of that new act (*Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258, varying 2009 BCSC 852). The trial judge found that the father's over-protective conduct was foreseeable and did not represent a new intervening act that broke the chain of causation. The court dismissed the appeal, rejecting the school board's argument that unreasonableness was the appropriate test. The court affirmed reasonable foreseeability as the appropriate test and deferred to the trial judge's conclusion that the father's conduct did not represent a new intervening act.

The inquiry is whether the new intervening act of a third party was a reasonably foreseeable result of the defendant's allegedly negligent conduct. For example, a landlord was liable for injuries sustained by a guest who falls from a balcony that the tenant had tried but failed to fix properly (*Jack v. Tekavec*, 2011 BCCA 464, affirming 2010 BCSC 1773). The plaintiff was visiting friends when he fell three stories after leaning against the rotted, inadequately repaired balcony railing. The trial judge found and the Court of Appeal upheld that the landlord was: (1) aware of the railing's frailty, (2) obliged to fix it, (3) asked to repair it but failed to do so, and (4) the cause of the accident. His knowledge of the dangerous state of the balcony was sufficient to ground liability. The tenant's intervening act—the futile attempt to repair the balcony—was not only reasonably foreseeable, but indeed likely.

F. Vicarious Liability

1. Close Connection Test

The boundaries of vicarious liability were extended in *JGE v. The English Province of Our Lady of Charity & Anor*, [2011] EWHC 2871 (QB), by adopting the "sufficiently close connection test" established in *Doe v. Bennett*, 2004 SCC 17, and by concluding that a diocesan bishop could be vicariously liable for torts of a priest of his diocese. Both cases involved allegations of sexual assault by a priest.

The court in *JGE* held that the two prongs of the test (whether the relationship between 'A' and 'B' gives rise to vicarious liability and whether B's act or omission falls within the scope of that relationship) are often synthesised to accommodate for a fact-specific analysis. A non-exhaustive list of factors includes: the nature and purpose of the relationship; whether tools, equipment, uniform or premises are provided to assist 'B' in executing his or her mandate; the extent to which 'B' is authorized to act on behalf of 'A'; and the extent to which 'B' may be perceived to be an agent of 'A'. The court recognized the need to adopt the "close connection test" in light of the jurisprudence's almost exclusive focus on the employment context. Vicarious liability may attach to other relationships that lack indicia of an employee-employer relationship.

In this case, there was no formal contract—no terms and conditions other than those derived from canon law. The bishop had an advisory role and no powers of dismissal or effective control over the priest.

The bishop did not pay the priest wages. However, the bishop ordained and appointed the priest, gave him training, full authority, the premises, pulpit, and clerical robes to fulfill the role of priest, and directed him into the community with free rein to act as a representative of the church. In so doing, the bishop created a risk of harm to others that introduced the risk that the priest could abuse or misuse his immense powers. Accordingly, the bishop could be vicariously liable for the torts of the priest.

2. Focus on Nature of Relationship

A financial dealer is vicariously liable for failing to train its advisor for the purpose of committing him to compliance standards, such as knowing that promoting off-book investment products is unlawful (*Straus Estate v. Decaire*, 2011 ONSC 1157). The plaintiffs sought damages for losses sustained from the off-book investment the financial advisor improperly recommended. The court found the dealers vicariously liable, notwithstanding that the contract between the advisor and plaintiffs was limited to sale of the dealers' mutual funds and that the plaintiffs knew the investment was not a mutual fund and beyond the advisor's authority. The dealers failed to maintain proper compliance practices; even a superficial inquiry by the governance officer would have revealed that the advisor was actively engaged in off-book activity. The dealers were vicariously liable for the advisor's tortious conduct under either the employment or agency classifications, on application of the policy rationale.

3. Employer Not Vicariously Liable for Sexual Abuse by One Worker Against Another

Employers are not vicariously liable for the sexual abuse that an employee in a supervisory role perpetrated against another employee: "[i]ncidental connections to the employment enterprise, like time and place (without more), will not suffice" (*Corfield v. Shaw*, 2011 BCSC 1529 at para. 76). The test for vicarious liability for an employee's sexual abuse of another should focus on whether the employer's business and empowerment of the employee materially increased the risk of the sexual assault and thus the resulting harm.

G. Contributory Negligence

1. Test for Contributory Negligence—Children

A plaintiff must take reasonable care for his or her safety; the failure to do so will result in a finding of contributory negligence. When considering children's reasonable conduct, the question is whether the child exercised the care to be expected from a child of like age, intelligence, and experience. In *Vedan v. Stevens*, 2011 BCCA 386, the court set aside the part of the trial judgment (2010 BCSC 1735) that found the child 25% contributorily negligent for injuries suffered as a result of having been thrown out of the open bed of the truck the defendant was driving.

2. Standard of Care and Causation Applicable in Contributory Negligence Analysis

Under the contributory negligence analysis, the trial judge erred in determining the standard of care and in failing to consider causation (*McLaren v. McLaren Estate*, 2011 ABCA 299, reversing 2010 ABQB 471). The plaintiff mother was supervising her daughter's driving practice when an accident occurred, killing the daughter. The court held that the trial judge set too high a standard for supervision in its finding that the mother failed to recognize the peril of the snowdrifts. The duty to supervise a driver with a learner's licence does not demand a higher standard of supervision simply because the person with the operator's licence is a parent. The trial judge's failure to determine whether there was sufficient time and opportunity for the plaintiff to have taken steps to avoid the collision was indicative of the judge's failure to consider the necessary element of causation. Even if there was time and opportunity to take evasive steps, the evidence suggested that any instruction the mother could reasonably have given her daughter prior to hitting the snowdrift might very well have been ignored. The appeal of the finding of 25% contributory negligence on the part of the mother was allowed.

3. Too Young to Be Contributorily Negligent

After having found that the infant plaintiff was too young to be contributorily negligent for running into the path of a school bus, the trial judge erred in instructing the jury to consider the infant plaintiff's responsibility to comply with the *Motor Vehicle Act* as though the infant plaintiff were an adult (*Marshall v. Annapolis County District School Board*, 2011 NSCA 13, leave to appeal granted [2011] S.C.C.A. No. 151 (QL)).

4. Not Contributorily Negligent If Accept Ride from Impaired Driver

The plaintiff is under no obligation to make inquiries into the level of sobriety of the person from whom the plaintiff accepts a ride in circumstances where the driver did not display obvious signs of alcohol intoxication (*Gilbert v. Bottle*, 2011 BCSC 1389). This is so even if the plaintiff drank with the driver for a brief period of time at a party house where heavy drinking was known to have occurred.

5. Not Contributorily Negligent If Car Not Properly Equipped with Seat Belt

Only plaintiffs who knowingly ride in a vehicle not equipped with seatbelts will be found contributory negligent. In *Gilbert v. Bottle*, *supra*, the plaintiff was unaware until after she got in the car that the backseat was not equipped with accessible seatbelts. By the time the plaintiff realized this deficiency the driver had pulled away and refused to stop.

6. Inexperienced Golfer Failing to Duck and Cover on Hearing "Fore"

A novice golf player who did not know how to react properly to shouted warnings and who was put in a position of having to react very quickly was not found contributorily negligent for injuries suffered caused by an erratic flying golf ball (*Phee v. Gordon*, [2011] CSOH 181). The plaintiff should have ducked and covered his head with his arms, instead of standing and trying to sight a ball. However, the instincts of a beginner player in emergency situations will not be judged too finely.

H. Damages

1. High-water Mark for General Damages in Chronic Pain Cases

Ontario reached a high-water mark for general damages in the chronic pain case of *Degennaro v. Oakville Trafalgar Memorial Hospital*, 2011 ONCA 319. In this case, the plaintiff was diagnosed with a cracked sacrum after falling from a collapsed hospital bed and landing on her tailbone. Pain persisted even with treatments and she subsequently stopped working. The plaintiff was then in a motor vehicle collision.

More than a year after the car crash (and four years after the incident at the hospital), she was diagnosed with fibromyalgia.

The trial judge found the plaintiff's chronic pain was caused by the fall from the hospital bed and awarded about $3 million in damages, including $175,000 for general damages and $1.68 million for future care costs. The Court of Appeal substantially upheld the $3 million award, deducting only $374,641 from the future care costs award. The trial judge had ample basis for preferring the plaintiff's treating physicians over the hospital's experts. The court rejected the hospital's argument that the trial judge ought to have applied *Mustapha*, *supra*, which would have led to denial of recovery due to remoteness. The trial judge correctly concluded that on the thin-skull principle it was foreseeable that chronic pain, such as fibromyalgia, could result from a physical injury, notwithstanding an intervening car accident.

2. Stoicism

Stoicism may assist the court in making positive findings of credibility and may be considered in terms of assessing damages (*Burdett v. Eidse*, 2011 BCCA 191, reversing 2010 BCSC 219 on another point). Lay witnesses—friends, family members, co-workers—may play a vital role in advancing the plaintiff's claim for damages for brain injury, as their evidence can help establish the impact the harm caused had on the plaintiff's personality and functionality.

In this case, the plaintiff was in two serious motor vehicle accidents about six months apart. The defendant in the first collision was found 100% liable; the defendant in the second admitted fault. The plaintiff suffered from a mild traumatic brain injury as a result of the first crash but did not realize its significant impact on his level of functioning. The plaintiff had a "bulldog attitude", did not take much time off work, and complained little. However, those close to him observed noticeable changes. The trial judge referred to the evidence of the plaintiff's family and colleagues in finding that the plaintiff suffered cognitive impairment immediately after the first accident from which he is unlikely to ever recover. That finding was upheld on appeal.

3. Discount from Award for Loss of Future Earning Capacity—Pre-existing Ailments

An award for loss of future earning capacity must take into account the relative likelihood that due to the plaintiff's pre-existing medical conditions the plaintiff would have been unable to continue to work to a certain age had the motor vehicle collisions not occurred.

In *Burdett v. Eidse*, *supra*, the Court of Appeal found that the trial judge's failure to apply a negative discount to take into account the effect of the plaintiff's pre-existing cerebrovascular disease, hypertension, diabetes, and high cholesterol effectively placed him in a better position than he would have been in "but for" the first accident.

4. Sex of Infant Injured at Birth Affects Award for Loss of Future Capacity

While the trial judge was entitled to take judicial notice that there will be some increase in female earnings in the female plaintiff's category relative to male earnings, he erred in concluding that the present 40% gap between male earnings and female earnings will be almost entirely eliminated and that female earnings will rise to currently projected male earnings (*Steinebach v. O'Brien*, 2011 BCCA 302, leave to appeal filed [2011] S.C.C.A. No. 411 (QL)). Specifically, to reach the award for loss of future capacity, the trial judge took the appropriate estimate of normal life expectancy male earning capacity, determined the equivalent female earning capacity, and then discounted only 7% of the differential to the male earnings. The Court of Appeal accepted the mid-range of 20% as the evidentiary differential between average male earnings and average female earnings.

5. Concept of Indivisible Injury Applicable in Sexual Abuse Claim

Injuries the plaintiff suffered in having been abused by a co-worker were indivisible from those injuries she suffered as a child at the hands of her stepfather (*Corfield v. Shaw*, 2011 BCSC 1529). The defendant co-worker was liable for damages on an indivisible basis even though the plaintiff was still experiencing difficulties from the egregious and prolonged childhood abuse at the time the workplace assaults occurred. Subject to the crumbling skull principle, the defendant co-worker was jointly and severally liable for the injuries the plaintiff sustained since the assaults he perpetrated, in accordance with s. 4 of the *Negligence Act*, R.S.B.C. 1996, c. 333.

I. Tort Defences

1. Limitation Periods

There were three notable decisions in 2011 on limitation periods.

Depression and lack of knowledge of the English language which do not sufficiently render the plaintiff incapable or under a disability within the meaning under s. 7 of the *Limitation Act*, R.S.B.C. 1996 c. 266 will not postpone the running of an otherwise applicable limitation period (*Sandhu v. Insurance Corp. of British Columbia*, 2011 BCSC 793). Mr. Sandhu sued his lawyer (and ICBC) in relation to advice received on a settlement agreement with ICBC. The defendants sought dismissal on grounds that this action commenced after the six-year limitation period had expired. Mr. Sandhu unsuccessfully claimed that his depressed state and inability to understand English well effectively postponed the running of time.

Discovery of a new fact that might help the plaintiff's case does not restart the limitation period (*Investment Administration Solution Inc. v. Silver Gold Glatt & Grosman LLP*, 2011 ONCA 658, leave to appeal filed [2011] S.C.C.A. No. 543 (QL)). The test is whether the potential plaintiff has sufficient knowledge to initiate an action, not whether the plaintiff possesses all information. In this case, the plaintiff's discovery of the Institute of Chartered Accountants' determination that the defendant accountants might have breached the rules of professional conduct was a helpful but non-material new fact on which the claim in interference with economic relations was based, and thus did not restart the limitation period.

An expert's reluctance to provide an opinion regarding the negligence of the defendant does not warrant postponement if at an earlier point in time the plaintiff had knowledge of the material facts on which his or her claim was based (*Lawless v. Anderson*, 2011 ONCA 102, affirming 2010 ONSC 2723).

In this case, the plaintiff, having experienced problems after a breast augmentation operation, sought advice of expert 1, who informed her that she had been the victim of malpractice. On expert 1's advice, the plaintiff retained counsel, but counsel suggested that she not initiate action until she had a written opinion from someone who had seen her medical records. After overcoming significant difficulty, counsel obtained those records. Expert 1 reviewed them, and sent an e-mail confirming his earlier opinion. Counsel still felt this e-mail was insufficient to begin an action. Expert 1 declined to write a report. The plaintiff did not initiate action until obtaining a full report from expert 2, some 20 months after her first consultation with expert 1.

The trial judge and the Court of Appeal dismissed the action. They reiterated the discoverability rule: a prospective plaintiff discovers harm, thereby triggering the limitation period, when he or she knows

enough facts on which to base an action against the defendant. The court acknowledged that while laypersons will often not know they have been harmed until experts formally explain the harm to them, here, on meeting with expert 1 the plaintiff knew enough: (1) her breasts were deformed, (2) errors on the part of the surgeon led to disfigurement, (3) she would need corrective surgery, and (4) expert 1 felt she should complain to the College of Physicians and Surgeons and seek legal advice about a possible action. The later opinions offered no new information that would have changed a decision to sue. Additional information, in the form of an admissible written medical opinion, will support the claim and help to assess the risk of proceeding but is not needed to discover the claim.

2. Standard-form Waivers and Releases

Standard-form waivers and releases are available defences to a tort claim. Whether a waiver and release succeeds will depend on: (1) the contractual language used; (2) the knowledge of the plaintiff leading up to and at the time of signing; and (3) the circumstances under which the waiver or release was purportedly given with consent. Explicit words will carry great weight towards effectiveness. With respect to the second factor, knowledge may be informed by the individual's personal circumstances; his or her life situation will be taken into account. And on the third, the defendant need not bring implications of the waiver and release to the signatory's attention, so long as it is apparent to the signatory that it is a legal document and he or she had a reasonable opportunity to review it. Only if (given the context) a reasonable person would have known that the plaintiff did not intend to agree to a waiver and release, would the party subsequently seeking to rely on its terms have been obliged to take those reasonable steps.

In *Loychuk v. Cougar Mountain Adventures Ltd.*, 2011 BCSC 193, the court confirmed the long line of authorities establishing that liability exclusions are not *prima facie* unconscionable. The court found the zipline operator's waiver and release to be binding because (1) it was clear and unequivocal on its face; (2) the plaintiffs were given sufficient time to review it; and (3) one of the plaintiffs had recently graduated from law school, the other was an owner of a fitness business that used similar agreements.

Reaching an opposite conclusion, the court in *Arndt v. Ruskin Slo Pitch Association*, 2011 BCSC 1530, declined to enforce the waiver and release in question, because (1) the impugned clauses were "hidden" in a larger document, which also functioned as a player roster; (2) language therein required players to assume full responsibility for damages

incurred but did not actually require them to personally waive the Association's liability; and (3) despite the unequivocal language and lack of explicitness, nobody brought the onerous terms to the plaintiff's attention.

J. Defamation

1. Group Defamation

Even if members of a group are indirectly the subject of defamatory comments that mention that group, each individual member must prove that he or she personally suffered damage to reputation as a result of the defamatory statement (*Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9). The defendant radio host, well-known for his provocative remarks, accused Montreal taxi drivers whose mother tongue is Arabic or Creole, of being arrogant, rude, incompetent, ignorant, and dirty, and claimed that they obtained their taxi licences through corrupt means. The plaintiff applied to certify a class proceeding on behalf of every native speaker of Arabic or Creole who had a taxi driver's licence in the Montreal region at the time of the statements. The Supreme Court confirmed that a class proceeding is merely a procedural vehicle that did not displace the essence of an action in defamation: individual harm. It may be possible for the members in a class proceeding based in defamation to succeed; it will, however, be difficult.

The court provided factors to assist in determining whether one, some, or all members of the group sustained actionable personal injury as a result of the impugned communication:

(1) the size of the group: the larger the group, the more difficult it is to prove that personal injury has been sustained by every member;

(2) the nature of the group: the more strictly organized and homogeneous the group, the easier it will be to establish that the injury is personal to each member of the group;

(3) the plaintiff's relationship with the group: if the impugned statement specifically attacks the leadership of the given group, the leaders are more likely to have suffered personal injury;

(4) the real target of the defamation: vague and imprecise comments will make it more difficult for any member of the group to sue, while targeted and precise comments may make

it easier for specific members of a group to succeed in a defamation claim;

(5) seriousness or extravagance of the allegation: an inflammatory allegation may objectively be taken as gross exaggeration, and thus not taken seriously by listeners or readers;

(6) plausibility of the comments and tendency to be accepted: the reputations of individual members of a group are less likely to suffer where the impugned statements are implausible;

(7) extrinsic factors: the credibility or public personality of the maker of the statements may make it more likely that individual members of a group have indeed suffered harm: the words of a public buffoon are less likely to cause such harm.

Applied to the case, the plaintiffs were required to establish that an ordinary person would have believed that the comments harmed the individual reputation of each member of that group, with the result that each member of the group sustained personal injury. The evidentiary record at trial indicated that an ordinary person might have been annoyed by the defendant's comments but would not have believed the abusive comments to be true of each taxi driver personally, such that each driver personally suffered harm. While the case was decided under the Quebec *Civil Code*, and thus the framework for defamation differs considerably from that of the common law, the approach should equally apply in the context of a common law defamation claim.

2. Hyperlinks Are Not Publications

Merely providing a hyperlink to another website on which alleged defamatory material is posted does not constitute publication resulting in potential liability in defamation (*Crookes v. Newton*, 2011 SCC 47). If the website owner, in providing a hyperlink, repeats the defamatory material, publication and potential liability may be found. The majority decision, written by Abella J., presents a very bright line: no liability for merely providing a hyperlink. The minority decision, by McLachlin C.J. and Fish J., substantially agrees with the majority, but holds that "a hyperlink should constitute publication if, read contextually, the text that includes the hyperlink constitutes adoption or endorsement of the specific content it links to". It will be interesting to see whether trial courts adopt and endorse the minority decision, to curb abuses of the Abella J. judgment, which defendant website owners might exploit.

3. Who Can Sue for Defamation?

An Indian band council, democratically elected with powers under the *Indian Act* and thus with similar legislative powers as those possessed by a municipality, cannot sue in defamation (*Wilson v. Switlo*, 2011 BCSC 1287). Generally, municipal corporations, that is, cities, districts, townships, cannot sue for damage to their reputation because of the risk that lawsuits in defamation would limit citizens' freedom to criticize their local governments concerning its governing functions (see the discussion of *Dixon v. Powell River (City)*, 2009 BCSC 406, in last year's *Annual Review of Law & Practice*).

4. Context of Internet Debate Renders Statement Not Defamatory?

A statement that might be defamatory in another context, if advanced in the context of an active Internet-based debate in which a robust reply would be expected may not be capable of a defamatory meaning (*Baglow v. Smith*, 2011 ONSC 5131). The defendants on their website accused the plaintiff, who ran his own polemicist website, of being a vocal supporter of the Taliban. The statement was made in the course of an ongoing debate between the website owners. The trial court, in dismissing the claim on a summary judgment, found that as the statement came about mid-debate, where a rejoinder might be expected, and where the dialogue was not yet complete, the statement could have no effect on the reputation of the plaintiff. If the statement is made outside the scope of the debate or otherwise so outrageous as to prevent meaningful argument from continuing, then the statement may be defamatory. In other words, the context of the statements—in a blogging dialogue or debate, in which hyperbole is normal and a reply is expected—the impugned statement is likely not defamatory. This decision represents a significant potential development in the law of defamation.

5. Defence of Qualified Privilege Could Apply in Public Space

The defence of qualified privilege attaches to protect non-public communications even if they were distributed in a public space (*Rodrigues v. Toop*, 2011 ONSC 794). The defendant union steward in this case handed out flyers in a public parking lot to union members; those flyers allegedly contained defamatory statements about the plaintiff union local executive members. The court found that no flyers were given to the general public thereby rendering the message "private", and that qualified privilege served as a defence notwithstanding the impugned message's distribution in a public space.

6. Assessment of Damages for Online Defamation of Corporation

Farallon Mining Ltd. v. Arnold, 2011 BCSC 1532 provides the most complete overview of principles for the assessment of general damages for an attack on a company's trading reputation. The defendant, an investor using the pseudonym "Stonecut", posted defamatory statements on the Stockhouse "bull board" that the plaintiff mining company had manipulated the courts and deceived shareholders.

The court considered the ten most significant factors that prompted a larger award for general damages, including the malicious motive of the defendant, the Internet publication, and the fact that the readers of the bull board were generally potential investors of Farallon. Attenuating factors included: (l) any postings on an Internet chat room named "bull board" would likely be taken with a grain of salt by reasonable readers; and (2) the plaintiff's failure to prove any specific loss to business reputation. In the circumstances, the court awarded general damages of $40,000 but declined to award punitive damages as the defendant's dismal finances indicated that the general damages awarded would prove a sufficient deterrent.

7. Negligent Communication

A former employer owes a duty of care to its former employee in its communications concerning that employee's past employment (*McKie v. Swindon College*, [2011] EWHC 469 (QB)). *McKie* was a claim in negligent communication, similar to the cause of action recognized by the Supreme Court of Canada in *Young v Bella*, 2006 SCC 3 (see the 2007 edition of the *Annual Review of Law & Practice*). Six years after the plaintiff left his teaching post at Swindon College, an administrator at his former employer wrote a letter to his then-employer that there were "serious staff relationship problems with Mr. McKie". The court found that this claim was untrue, sloppy, and unfair. It recognized that had the action been framed in defamation it would likely be defeated by the defence of qualified privilege. Nonetheless, the plaintiff could claim in negligence: a duty of care was founded, and it was clear that negligence on the part of Swindon College in communicating about the plaintiff would harm the plaintiff.

K. Misrepresentation

1. Negligent Misrepresentation

A *prima facie* duty of care arises where the facts disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff (*R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42). This requirement is met if the parties were in a "special relationship", whereby (1) the defendant ought reasonably to foresee the plaintiff will rely on his or her representation; and (2) the plaintiff's reliance is reasonable in the circumstances. The court must then consider whether this *prima facie* duty should not be recognized due to policy reasons.

2. Materiality and Non-Disclosure in Statutory Misrepresentation Claim

In *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, affirming 2009 BCCA 224 (see the 2010 edition of *Annual Review of Law & Practice*), the Supreme Court of Canada set down important guidelines to determine whether erroneous disclosure or non-disclosure of certain facts was material in an investment decision, and thus could provide grounds for liability in misrepresentation.

Securities legislation and similar statues such as the now repealed *Real Estate Act*, R.S.B.C. 1996, c. 397, supplant the rule of *caveat emptor* with a duty of disclosure. A disgruntled purchaser may not point to any trivial undisclosed fact in seeking to make the issuer liable for the investor's losses. In determining what is material, the Legislature and the courts must balance between too much and too little disclosure. Whether a given fact is material and must be disclosed is determined by what the reasonable investor would consider as significantly altering the total mix of information made available. This determination is an objective one from the perspective of a reasonable investor; the subjective views of the issuer do not come into play when assessing materiality (although they may be relevant to a statutory good faith defence). Further, the plaintiff investor need not prove that but for the omitted fact the reasonable investor would not have made the investment. What is required is proof of a substantial likelihood that the omitted fact would have assumed actual significance in the deliberations of a reasonable investor.

Whether omitted disclosure was material is a fact-specific inquiry to be determined on a case-by-case basis in light of all relevant considerations

and from the surrounding circumstances forming the total mix of information made available to the investors. The materiality of a fact, statement, or omission must be proven through evidence by the party alleging materiality, except in those cases where common sense inferences are sufficient. The court must first look at the disclosed information and the omitted information. The court may also consider contextual evidence, which helps to explain, interpret, or place the omitted information in a broader factual setting, provided it is viewed in the context of the disclosed information. Further, evidence of concurrent or subsequent conduct or events that would illuminate potential or actual behaviour of persons in the same or similar situations is relevant to the materiality assessment. The predominant focus, however, must be on the contextual consideration of what information was disclosed and what facts or information were omitted from the disclosure documents the issuer provided.

In *Sharbern*, *supra*, the plaintiffs complained that the defendant developer had not disclosed the superior management fee that it received from an adjacent hotel development. The more advantageous fee might have prompted the defendant developer to favour the other hotel. The Supreme Court of Canada concluded that there was no evidentiary record to support a finding that the differences in management fees between the two hotels would have been material, such that there was a substantial likelihood that disclosures of those differences would have assumed actual significance in a reasonable investor's investment decision.

3. Damages for Negligent Misrepresentation

Where funds are advanced based on negligent misrepresentation, damages can be assessed for lost opportunity to use those funds elsewhere, even if the evidence suggests such use would never have occurred (*Smith v. Landstar Properties Inc.*, 2011 BCCA 44, affirming 2010 BCSC 843).

The plaintiff loaned the defendant $100,000, on the understanding that this investment would be secured by a charge on the defendant's property. The defendant failed to provide the required security—a fact the plaintiff later discovered. The plaintiff sued on the bases of negligent misrepresentation and breach of contract for the return of her money, contractual interest, and additional interest representing the amount that would have been given in the open market for an unsecured loan.

At trial, the defendant admitted the breach of contract but denied the negligent misrepresentation claim on the grounds that the plaintiff suffered no loss as she had obtained a court order requiring the defendant to repay the loan with interest up to the date of the notice of default. The evidence indicated that the plaintiff would never have made an unsecured loan at such a rate, even if offered the chance.

The trial judge awarded the plaintiff damages for breach of contract based on the value of the defendant's use of the plaintiff's capital, whether the plaintiff suffered loss or not, and damages for negligent misrepresentation equal to the difference between the interest actually paid and the price a reasonable person would have paid for an unsecured loan.

The Court of Appeal upheld the awards. Tort damages are normally measured according to reliance, whereas contract damages are usually concerned with expectation. The court thought that the broader guiding principle that damages are compensatory could apply to the unique facts of this case, which does not fit neatly within either category.

L. Intentional Interference with Contractual Relations

In order to establish the tort of intentional interference with contractual relations, the plaintiff must prove: (1) an intention by the defendant to injure the plaintiff; (2) interference by the defendant, by unlawful means, with the plaintiff's business; and (3) that the plaintiff suffered economic loss as a result of the defendant's wrongful interference. The first requirement is not made out when the wrongful conduct was not deliberately targeted against the plaintiff but was simply an incidental or foreseeable result of the defendant's wrongful conduct (*Print N'Promotion v. Kovachis*, 2011 ONCA 23). In *Print N'Promotion*, the plaintiff had an agreement with the tenant restaurant to use a wall for advertising. The defendant landlord knew of this agreement. When the tenant failed to pay rent, the landlord changed the locks. The tenant was successful in obtaining relief from forfeiture. Although the landlord defendant was aware of the advertising agreement and the likely harm that would befall the plaintiff if the lease were to be terminated, this knowledge fell short of the requirement of intentional targeted harm.

M. Breach of Fiduciary Duty

1. Government Fiduciary Duty

The general principles that identify fiduciary duty in a private relationship also apply to cases where it is alleged that the government owes a fiduciary duty to an individual or a group of individuals. However, the Crown plays many roles and represents many interests, some of which are in conflict. The special characteristics of governmental responsibilities and functions mean that governments owe fiduciary duties only in limited and special circumstances, such as in discharging the Crown's special responsibilities towards Aboriginal peoples and where the Crown is acting in a private capacity, as in its role as the Public Guardian and Trustee (*Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24).

In *Elder Advocates*, the Supreme Court of Canada upheld the decision to strike out a claim of breach of fiduciary duty against the Province of Alberta for an alleged failure to ensure that money paid by residents of long-term care facilities for an "accommodation charge" was used solely for accommodation and meals. The plaintiff society claimed that the elderly persons had been overcharged. The governing statute imposes an obligation on the Province to provide medical care, but imposes no requirement to act in the best interests of residents of Alberta generally, or in the best interests of residents of long-term care facilities in particular. While a trust relationship may exist between operators of facilities and residents with respect to the residents' property, there is no similar trust relationship established between the Province and residents.

2. Real Estate Investments

In *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, the court took pains to distinguish between the period when the defendant developer issued the disclosure statement (when it was acting as a developer/issuer and not as an agent owing fiduciary duties to the plaintiff) and the period when the defendant acted as the plaintiff's agent under the hotel management agreement, at which time a fiduciary relationship arose. Although the underlying factual basis of the issuer-investor misrepresentation issue and the principal-agent fiduciary duty issue were largely the same, the two issues constituted distinct causes of action arising at different times. It is important not to blur the two claims or to retroactively impose fiduciary duties that arose under the later relationship on the previous relationship of

issuer-investor where the parties dealt with each other in an arm's-length commercial relationship characterized by self-interest.

3. Actuaries

Actuaries owe a fiduciary duty to persons to whom they hold themselves out as experts in pension matters, and from whom they receive personal and confidential information, especially where the actuaries know that the persons are vulnerable and reliant on their advice (*Ault v. Canada (Attorney General)*, 2011 ONCA 147, leave to appeal refused [2011] S.C.C.A. No. 206 (QL)).

In *Ault*, the federal government gave certain government employees the option of transferring their funds from the public service fund to a plan sponsored by the actuary defendants. The scheme required them to leave federal employment and give up entitlements under the federal pension plan. The new plan was later disallowed by the CRA. The plaintiffs sued for the difference between the benefits they would have received had they stayed in the public service and what they did receive under the failed scheme. The actuaries were found to owe a fiduciary duty both before and after the employees switched pension plans; they breached that fiduciary duty by not providing full disclosure of the risks and their conflict of interest.

N. Occupiers' Liability

The conclusion that the defendant's ice-prevention maintenance program was inadequate to address the known danger of isolated patches of ice created by the defendant's car wash was sufficient to end the inquiry under s. 3 of the *Occupiers Liability Act*, R.S.B.C. 1996, c. 337, as to whether the occupier of premises took care to see that a visitor would be reasonably safe in using the premises (*Foley v. Imperial Oil Ltd.*, 2011 BCCA 262, affirming 2010 BCSC 797). In *Foley*, the Court of Appeal confirmed the trial judge's finding that the defendant occupier's scattering of salt would not likely provide sufficient safety, and that warning signs or cones should also have been used. While the burden of proof rests with the plaintiff to establish liability by demonstrating a breach of the standard of care under s. 3, certain obvious hazards may create an evidentiary presumption similar to *res ipsa loquitur*, prompting the prudent defendant to advance evidence to demonstrate that it had reasonably implemented its system of maintenance and prevention on the day in question.

O. Nuisance

To make out a claim in nuisance, one must prove the annoyance or discomfort is substantial and unreasonable. The threshold inquiry involves determining whether the interference is substantial. Only where the harm is sufficiently material to justify recognition by the court will the analysis proceed to an assessment of whether the interference is unreasonable in the circumstances (*Antrim Truck Centre Ltd. v. Ontario (Minister of Transportation)*, 2011 ONCA 419, leave to appeal filed [2011] S.C.C.A. No. 378 (QL)). To assess unreasonableness, the court will consider (1) its severity; (2) the character of the neighbourhood; (3) the utility of the defendant's conduct; and (4) the plaintiff's sensitivity. Embedded throughout this test is the need to strike a balance among competing property interests, as well as the principles of tolerance and accommodation.

1. Defence of Statutory Authority

Where the Legislature authorized construction to be carried out in a specific place, it is a defence to an action in nuisance caused by the construction if that nuisance is the inevitable result of the authorized construction (*Susan Heyes Inc. v. South Coast B.C. Transportation Authority*, 2011 BCCA 77, leave to appeal refused [2011] S.C.C.A. No. 175 (QL); the overturned trial decision was noted in the 2010 *Annual Review of Law Practice*). The Court of Appeal confirmed that the defence of statutory authority is difficult to establish and one that is to be narrowly applied. The Legislature is not to be deemed to have taken away the legal remedies of private persons and the right to compensation for injury to their legally recognized interests, unless a contrary intention is clearly manifested by the legislation.

Susan Heyes arose from the construction of the Canada Line skytrain under Cambie Street. The plaintiff was advised that construction would disrupt traffic for three months; in the end, her business was significantly harmed for three years. With respect to the first part of the test, the court found that the statute authorized the construction. On the second consideration—whether nuisance was an inevitable result—the plaintiff argued that because construction could have been carried out through the more expensive but less disruptive method of a bored tunnel, rather than the cut-and-cover method, the defendant could not claim that nuisance was an inevitable result. The Court of Appeal held that a common sense approach is necessary. At some point, an alternative is too expensive to be feasible. In this case, the court reviewed trial evidence that the bored tunnel would have cost

over a half billion dollars more than the cut-and-cover option, and that it would have significantly disrupted other parts of the city. As such, the cut-and-cover method was the only practicably feasible method, such that nuisance was inevitable, and the defence established.

2. Government Liability for Acts of Trustees on Right-of-way

Where the behaviour of invitees amounts to nuisance, a duty is cast on the landowner to control the behaviour or to put an end to it (*Mynott v. British Columbia (Ministry of Transportation)*, 2011 BCSC 258). In *Mynott*, the plaintiffs were homeowners whose property overlooked a recreation site on the Goat River to which the government defendant retained a right-of-way. To the plaintiffs' chagrin, over the preceding decade, the riverbank, the right-of-way, and their property itself had been inundated by a bacchanalian parade of drinking, copulating, defecating, and littering by itinerant fruit pickers. The government defendant claimed that it had discharged its duty to take reasonable steps to prevent the nuisance, and that its election not to close the right-of-way, but rather maintain it to ensure public access to the river, was a non-judiciable policy decision. The court rejected this argument, doubting that the defendant government's permissive approach to rights-of-way was an exercise of government power at all.

3. Trivial Nuisance Not Actionable

Liability for nuisance will only follow if the degree of harm caused by the defendant's actions amounts to (from a reasonable person's perspective, living in similar circumstances) unreasonable interference with their use and enjoyment of property. Thus, the defendant's staring into the plaintiff's condominium window in a crowded urban setting could not constitute nuisance (*Martin v. Lavigne*, 2011 BCCA 104, leave to appeal refused [2011] S.C.C.A. No. 228 (QL)). The Court of Appeal upheld the trial judge's finding that the staring (alleged to be a tactic in an ongoing strata council dispute) was a trivial annoyance falling far short of the degree of interference required to ground a claim in nuisance.

P. Rylands v. Fletcher Strict Liability

A claim based exclusively on the "extra hazardous" nature of the defendant's conduct will not (by itself) successfully ground a finding of strict liability pursuant to the rule in *Rylands v. Fletcher* (*Smith v. Inco Ltd.*, 2011 ONCA 628, reversing 2010 ONSC 3790, leave to appeal filed [2011] S.C.C.A. No. 539 (QL)). The court held that even if "extra

hazardous" conduct is a freestanding basis for the imposition of strict liability, there was no evidentiary basis on which the defendant Inco's refinery operations or its emissions of nickel, which complied with the applicable regulatory regimes, could be described properly as "extra hazardous" or "fraught with danger" or posing an abnormal risk of harm to its neighbours. Even accepting that Inco's industrial activities caused diminution in appreciation of the value of the plaintiffs' properties over 10 years, it could not warrant application of *Rylands v. Fletcher*.

The Ontario Court of Appeal fleshed out the meaning of the "non-natural use" requirement in *Rylands v. Fletcher*, which has long mystified the common-law world. To decide whether or not a particular use is non-natural, the court must have regard to "the place where the use is made", "the time when the use is made", and "the manner of the use". The court stated that compliance with planning legislation and other government regulations controlling where, when, and how activities can be carried out will be relevant, but not conclusive, considerations in assessing whether the use at issue is non-natural in the sense that it is not ordinary or usual. As to the broader purpose of this analysis, the court opined that "the non-natural user inquiry seeks to distinguish between those uses of property that the community as a whole should accept and tolerate and those uses where the burden associated with accidental and unintended consequences of the use should fall on the user" (at para. 98).

Q. Intimidation

An English Court of Appeal considered the rare tort of intimidation in *Berezovsky v. Abramovich*, [2011] EWCA Civ 153, a dispute between two Russian oligarchs. The court confirmed that the essential ingredients of the tort of intimidation are: (1) a threat by the defendant to do something unlawful or "illegitimate"; (2) the threat must be intended to coerce the plaintiff to take or refrain from taking some course of action; (3) the threat must in fact coerce the plaintiff to take or refrain from taking such action; and (4) the plaintiff must suffer loss or damage as a result. The court confirmed that a threat need not be express but may be implied, and that this will depend on the context in which it is uttered: "If you want to stay healthy, get out of London" would be likely considered as a threat if uttered by a gangster, while not so construed if uttered by a doctor to a patient (at para. 81). Nor is it necessary to plead or prove that the threatened event would actually occur; it would be a pointless threat if it did not carry with it the implication that the defendant would do all in his power to ensure that the threatened action would materialize.

R. Negligent Investigation

Although the tort of negligent investigation exists in Canada (for discussion of *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, see the 2008 edition of *Annual Review of Law & Practice*), and could apply to tax investigators carrying out a search, it did not apply on the facts in *Neumann v. Canada (Attorney General)*, 2011 BCCA 313, leave to appeal filed [2011] S.C.C.A. No. 422 (QL). The Canada Revenue Agency executed a warrant to search the plaintiff's home office in relation to a tax evasion investigation of a person to whom the plaintiff's company had paid sales commission. At trial, a jury awarded $1.3 million for emotional stress the search caused. That award was set aside on appeal.

The Court of Appeal first noted that the Supreme Court of Canada, in *Hill v. Hamilton-Wentworth*, was careful to limit its conclusions to the duty owed by an investigating police officer to the suspect, and cautioned that application of the principles governing negligent investigation to other relationships would require thorough analysis. The Court of Appeal thus left it an open issue as to whether the CRA could itself owe duties to an investigated party. Even if the CRA did owe such hypothetical duties, the CRA investigators did not breach their standard of care on the present facts. The court concluded that it would have been open to a reasonable investigator, knowing what the investigator in question knew, to conclude that a search warrant was necessary.

See also the discussion of *Wellington v. Ontario*, *supra*, confirming that public investigators owe no duty of care to victims or their families.

S. Malicious Prosecution

The high standard required in establishing malice on the part of the Crown in a malicious prosecution does not apply where the action is against a private individual (*Pate v. Galway-Cavendish Township*, 2011 ONCA 329, leave to appeal filed [2011] S.C.C.A. No. 293 (QL)). The defendant township had dismissed the plaintiff from his job as chief building inspector for the township. The plaintiff was told that the township had evidence that he had kept building fees for himself, and that if he resigned, the township would not report him to the police. The plaintiff did not resign and the matter was reported. The trial court allowed the plaintiff's action for wrongful dismissal but dismissed his claim in malicious prosecution on the basis that the plaintiff had failed to establish that the township had initiated the prosecution,

and that he had failed to establish malice, namely that the township intended to subvert or abuse the justice system through the prosecution. The Ontario Court of Appeal found that the trial court had incorrectly imported the very high standard for proving malicious prosecution against a Crown attorney into the private context.

As set out by the Supreme Court of Canada in *Miazga v. Kvello Estate*, 2009 SCC 51 (see the 2010 edition of *Annual Review of Law & Practice*) the standard for proving malicious prosecution against a Crown attorney is set deliberately very high to ensure that courts do not second-guess the prosecutorial discretion that rests, constitutionally, with Crown attorneys, and to ensure that an action for malicious prosecution only lies against a Crown attorney where that attorney steps outside his or her proper role as delegated minister of justice. The same considerations do not apply where the action is against a private individual. Thus, the only malice that needs to be proven in such an action is that the defendant was motivated by malice, or by a primary purpose other than that of carrying the law into effect. With respect to the second element of the test—that the defendant initiated the proceedings against the plaintiff—the court noted that a defendant may be found to have initiated a prosecution even though the defendant itself did not actually lay the information that commenced the prosecution. Where, for example, the defendant knowingly withheld exculpatory information from the police that the police could not have expected to find, and on which the prosecution of the plaintiff was based, the defendant may be deemed to have initiated the proceedings. The Court of Appeal ordered a new trial on these two issues.

Expect some clarification from the British Columbia Court of Appeal in 2012 on the form of the pleadings and evidence necessary to meet the test for malicious prosecution (*Gamble v. Canada (Attorney General)*, 2011 BCSC 1698, application for leave to appeal allowed in part 2011 BCCA 488).

T. Misfeasance

Under the *Federal Court Rules*, to succeed in a claim of misfeasance in public office against a government entity, the plaintiff must provide sufficient proof that a particular public officer associated with that entity committed the impugned acts or had a particular mental state (namely, "wilful default", "malice", or "fraudulent intent"). Pleadings that simply name a public authority, agency, or government (generally) will be struck.

In *St. John's Port Authority v. Adventure Tours Inc.*, 2011 FCA 198, reversing 2009 FC 746, the court followed *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184, ruling that the pleadings requirement imposed in *Merchant* does not place too great a burden on plaintiffs, since names are not necessarily required. Rather, pleading a particular group of individuals who dealt with the matter; job positions; an organizational branch; or an office or building in which those dealing with the matter worked; may suffice. The court also pointed to a competing policy consideration in its endorsement of *Merchant*: parties should not be permitted to make broad, sweeping allegations without evidentiary foundation and embark on a fishing expedition in hopes that something will turn up. Some sort of identifying marker, therefore, constitutes a "material fact", which must be pleaded in a claim of misfeasance in public office.

In *St. John's Port Authority*, the court held that Adventure Tours failed to plead all elements of the tort as set out by the Supreme Court of Canada in *Odhavji Estate v. Woodhouse*, 2003 SCC 69. Specifically, the company identified only a few allegedly improper decisions made by the Port Authority without specifically setting out all damages resulting from those decisions; it pleaded the Port Authority's mental state in respect of only some of the decisions it took issue with; and the vast majority of the allegations of misconduct were directed at the Port Authority as opposed to certain persons. Accordingly, the statement of claim was struck with leave to amend.

U. Civil Conspiracy

1. All Conspirators Must Engage in Unlawful Conduct

To succeed on a claim of unlawful conduct conspiracy, the alleged tortious acts of all defendants must be criminal or actionable in law. This holding is in line with *Bank of Montreal v. Tortora*, 2010 BCCA 139, discussed in the 2011 edition of *Annual Review of Law & Practice*.

In *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, Ren's Feed and Supplies Ltd. was a dealer of Purina livestock feed and pet food. When their dealership agreement terminated, two brothers saw an opportunity to set up Raywalt Feed Sales as a Purina dealership to take over Ren's territory. However, despite giving Raywalt territorial exclusivity, Purina continued to supply feed to Ren's, thereby enabling Ren's to sell to its former customers in what was now Raywalt's territory. When Purina finally ended this practice, Ren's got Edward McGrath (a Purina dealer in a neighbouring territory) to supply Ren's

with Purina feed at dealer prices, thereby allowing Ren's to continue to sell Purina feed in Raywalt's territory. Purina knew of and approved of this arrangement. Raywalt's business was not nearly as profitable as projected and ceased its business; the brothers sued Purina, Ren's, and McGrath.

The appellate court held that while Purina's breach of its contract with Raywalt sufficiently qualified as unlawful conduct, unlawful conduct by each conspirator was absent in this case. Neither Ren's nor McGrath did anything amounting to unlawful conduct. Specifically, Ren's did not have a contract with Purina or Raywalt and was free to purchase Purina feed from McGrath at the best price it could obtain, and McGrath did not breach his dealership contract with Purina by selling feed to Ren's, rather Purina knew and approved of what he was doing. Liability does not attach if the conduct of a party to the conspiracy is lawful or that party is the only one in the conspiracy who acted unlawfully. Accordingly, the trial judge's finding of unlawful conduct conspiracy and the award of damages was set aside. The appellate court, however, went on to assess damages flowing from the contract and upheld the trial judge's award of punitive damages (the latter of which is discussed below).

2. Punitive Damages in Civil Conspiracy Cases

A party to a dealership agreement who surreptitiously proceeds to do indirectly what it could not do directly, for example, supplying a product to a dealer through a third party in a territory exclusively assigned to the other contracting party, may constitute reprehensible conduct deserving sanction by punitive damages (*Agribrands Purina, supra*). While Raywalt's (the wronged party) claim of conspiracy did not succeed on appeal, the court upheld the trial judge's award of $30,000 in punitive damages against Purina (the wrongdoer).

The following facts sufficiently met the high threshold for punitive damages: (1) Purina knew sales volume was critical to success of the new dealership, but nonetheless put Raywalt at risk by eroding that volume; (2) Purina was aware of the financial risks and vulnerability of Raywalt: one of its principals mortgaged his home to Purina and Raywalt's credit line was secured by personal guarantees of its principals and their spouses; (3) Purina stopped supplying to Ren's directly when challenged by Raywalt, but began supplying to a third party so he in turn could continue to supply Ren's, so Purina did what it told Raywalt it would not do; and (4) Purina continued this indirect practice repeatedly over a lengthy period of time without regard for the detrimental consequences to Raywalt.

While punitive damages are possible in conspiracy claims, even if unsuccessful (as in *Agribrands Purina, supra*), they are to be awarded rarely especially in commercial cases (*Le Soleil Hospitality Inc. v. Louie*, 2011 BCCA 305, affirming 2010 BCSC 1183, leave to appeal filed [2011] S.C.C.A. No. 442 (QL)). In this battle for effective control of strata lots and leases concerning a downtown hotel, the trial judge granted (and the Court of Appeal affirmed) the punitive damages award of $100,000 against each of the defendants for inducing breach of contract and civil conspiracy. The award was found to be warranted in this case, but the trial judge opined that punitive damages are exceptionally rare in commercial contracts cases, even where there is fraud. The Court of Appeal rejected the defendants' argument that the plaintiff Hospitality did not suffer actual damage. It also dismissed the contention that the unlawful acts giving rise to the conspiracy were the same as the acts constituting the breach of contract, rather the unlawful acts for the claim in conspiracy occurred after the fraud, perjury, and court order violations were committed, thereby ousting the possibility of merger.