TORTS

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A. Introduction

It was a relatively quiet year in torts jurisprudence, although several cases offer useful applications of important tort principles. The recurring spectre of infinite liability to infinite persons was seen in many decisions. *Gobin (Guardian ad Litem of) v. British Columbia*, 2002 BCCA 373, was the latest decision in a series of jurisprudence starting with *Just v. British Columbia*, [1989] 2 S.C.R. 1228, whereby governmental liability was shielded where its actions or inaction were governed by a good faith policy decision. Relatively novel claims were limited: courts rejected or questioned whether a duty of care extends to victims of a drunken party guest, to those who injure themselves protecting their own interests following an accident, or to future purchasers or investors. There were several important decisions in defamation: the High Court of Australia mollified fears of the potentially infinite liability attached to Internet publications, while

other courts offered guidance on how the defence of qualified privilege may protect inaccurate yet responsible publications to the world at large. In the realm of damages, appellate courts clarified uncertainties concerning the deduction of double-recovered benefits, the review of jury damage awards, and the apportionment of concurrent claims in tort and contract.

B. Duty of Care

1. Social Host Liability

The issue of social host liability continues to challenge Canadian courts, and last year, three courts expressed concerns about imposing a duty on non-commercial social hosts for injuries caused by their inebriated guests.

In the facts leading to *Prevost (Committee of) v. Vetter*, 2002 BCCA 202, the plaintiffs were injured when their car was struck by a drunk driver. The driver had just come from a party at the defendant's home. The issues were bifurcated: the Supreme Court Rule 18A summary trial was to determine whether the defendants in this case owed the plaintiff a duty of care and whether they breached the standard of care. The issue of causation was to be left to a full trial. The summary trial judge determined that the defendant owed a duty of care and that they had breached this duty.

The ratio of the case is primarily procedural (although in a manner particularly important in torts actions): the Court of Appeal directed a new conventional trial of all issues together, setting aside the summary trial decision. The court expressed concern that the summary trial conclusions were based on assumptions of fact which should be left to the trial judge who would later be required to determine causation (at para. 8):

> In my view, it was not possible in this case for the summary trial judge to determine the existence of a duty of care, the appropriate standard of care, or a breach of the standard of care without also determining facts that the plaintiff must establish in order to succeed on the issue of causation. The summary trial judge made such findings of fact and those findings will be embarrassing to the subsequent trial judge, who will be asked by the appellants to make contrary findings on the basis of further and full evidence.

The court also expressed doubt as to whether a duty of care should be found in this case (at para. 27):

> ... whether social hosts ought to be held liable for the negligent actions off their property of persons who became intoxicated while on their property is a controversial and unsettled question that might well engage the attention of the Supreme Court of Canada in this case.

Ontario courts have gone even further in questioning the duty of care owed by social hosts, holding that such a duty is contrary to public policy, and thus would fail the second half of the *Anns v. Merton London Borough Council* test. In *Childs v. Desormeaux* (2002), 217 D.L.R. (4th) 217 (Ont. S.C.), notice to appeal filed C38836 (Ont. C.A.), an intoxicated driver negligently collided with the plaintiff's vehicle causing serious injury. The plaintiffs sued the hosts of the party that the intoxicated driver had just left. The trial judge found that the social hosts knew of the driver's alcohol problem but that they took no steps to monitor his consumption of alcohol at the party. They took no steps to prevent the driver, who was obviously impaired, from driving off from the party. Finally, the trial judge held that there was a relationship of sufficient proximity to the plaintiffs such that the social hosts could reasonably have foreseen the harm which did in fact occur. In the end, however, the trial judge rejected a duty of care based on policy considerations. The judge held that imposing liability in these circumstances would place "an inordinate burden on all social hosts" (para. 112). This burden would require social hosts, who may well themselves be intoxicated, to monitor the alcohol consumption of all of their guests and evaluate their ability to operate a motor vehicle. It would also require them to take steps to prevent their guests from driving in the event that they felt their guests were a danger.

Liability was also denied in *Calliou Estate (Public Trustee of) v. Calliou Estate*, 2002 ABQB 68, where the court found that the defendant members of a host hockey team owed no duty of care to members of a visiting hockey team when they provided the visitors with beer in the morning. After a day of drinking, an inebriated member of the visiting team drove three others team members to their deaths. The court did not undertake the same policy analysis as that in *Childs*, but rather concluded that there was no duty owed, and that in any case the accident eight hours later was interrupted by too many intervening events of drinking to be foreseeable.

2. Volunteers Owe Duty of Care Not to Act Negligently

In *Wiens v. Serene Lea Farms Ltd.*, 2001 BCCA 739, the Court of Appeal unanimously upheld the trial finding that a duty of care existed based on an implied promise. The plaintiff and the defendant had both volunteered to help construct a barn roof. The plaintiff was up a ladder secured by the defendant. The defendant released the ladder. Some time later, the ladder skidded on the manure-laden concrete floor. The plaintiff was seriously injured in the fall. The trial judge found the plaintiff 30 per cent liable for his own injuries, and apportioned 40 per cent of the liability to the owner of the farm for the unsafe conditions, and 30 per cent to the ladder-holding defendant. The defendant appealed, saying that while he initially held the ladder there was no promise to continue holding the ladder for as long as the plaintiff remained on it.

The Court of Appeal disagreed. The court applied venerable law, resembling the policy/operation dichotomy applied to governmental liability, that "if a person undertakes to perform a voluntary act, he is liable if he performs it improperly, but not if he neglects to perform it" (at para. 7). Further, the lack of a continued promise was immaterial (at para. 13):

> Although there was no evidence as to any verbal understanding as to how long he was to hold the ladder, as a matter of common sense in the particular circumstances of the case, it must have been implicit that he was to secure it during the time Mr. Wiens was on it. There need not have been two or more promises in order to establish negligence.

3. No Duty to Rescuer of Own Economic Interests

Danger invites rescue. Injury to a rescuer is foreseeable. Accordingly, a defendant who negligently causes a car accident owes a duty of care to bystanders who might come to the aid of someone injured in the accident. In *Saccone v. Fandrakis*, 2002 BCSC 73, the court refused to extend the duty of care to people who harm themselves while attempting to protect their own economic interests following a car accident. In *Saccone* the plaintiff saw that his parked vehicle had been hit by another car. Fearing that it had been a hit-and-run accident, he ran towards the vehicle to stop the driver. He slipped, fell, and injured his knee. In fact the driver, the defendant, had remained on the scene. The court found that the plaintiff was not acting as a rescuer, whose potential injury was foreseeable and to whom a duty of care existed. Instead, the plaintiff was acting to protect his own economic interests, a role to which no duty of care extends.

4. No Duty to Subsequent Purchasers

In *M. Hasegawa & Co. v. Pepsi Bottling Group (Canada) Co.*, 2002 BCCA 324, the plaintiff Japanese corporation suffered an economic loss when it purchased bottled water contaminated by mould. Although the water was safe for human consumption it raised concerns among consumers and the Japanese government prohibited its sale. In an effort to avoid the pitfalls of maintaining a claim for a pure economic loss (this issue is discussed below), the plaintiff claimed that the defendant bottler, Pepsi, negligently harmed the plaintiff's property when it bottled the water with mouldy caps. The court found that the defendant owed no duty of care to the plaintiff, which did not yet hold title to the water when it was bottled (para. 28).

In a similar decision, the plaintiff in *Border Enterprises Ltd. v. Beazer East, Inc.*, 2002 BCCA 449, had its claim of negligent misrepresentation struck under Supreme Court Rule 19(24). KICL was the lessee of a contaminated site. KICL cleaned the site up as per the instructions of the federal and provincial Crowns. Both the federal and provincial Crowns represented that the site was clean. In fact, creosol contamination remained. KICL was subsequently sold to the plaintiff Border Enterprises. Border brought a claim for negligent misrepresentation against the Crown. The Court of Appeal upheld Tysoe J.'s ruling that the claim should be struck because the plaintiff did not own KICL at the time of the misrepresentation, and thus there was no special relationship between the defendant Crowns and the plaintiff such as to give rise to a duty of care. The Court of Appeal expressed concern about imposing a duty of care that would "effectively create an insurance scheme" (para. 43) for an unidentifiable class of all future investors.

5. Duty of Bank to Customers

In *Desharnais v. Toronto-Dominion Bank*, 2002 BCCA 640, the plaintiff had acted under a power of attorney for her mentally incompetent common-law spouse to transfer his RSP from an account held by the defendant TD Bank to an account at the TD Bank's investment arm, Evergreen. The bank failed to highlight to the plaintiff the necessity of filling out the name of a beneficiary. As a result, when the common-law spouse died, the assets passed to the estate, and the plaintiff received nothing. The Court of Appeal upheld the findings below of negligence on the part of the defendants. It reversed, however, a finding of negligence against the TD Bank. The trial court had found that the power of attorney would not have permitted the plaintiff to have

changed the identity of the beneficiary from herself to the estate. As this was the effective result of the failure to designate a beneficiary, the court found the TD Bank negligent in facilitating an illegal transfer. The Court of Appeal expressed concern about imposing such a wide duty, and concluded that the plaintiff had failed to establish that such a duty should be applied (at para. 35):

> The trial judge's finding that a bank has a duty to ensure that its customers do not engage in what he found to be "illegal" transfers of money, and a corresponding duty to refuse to facilitate such transfers has significant ramifications for the banking industry. While there is legislation dealing with transactions involving banks which engage the criminal law (such as money laundering), here we are speaking of a transaction found to be contrary to the common law and a provincial statute. In the absence of evidence or authority to support such a broad duty of care, I would not be prepared to endorse it.

C. Pets and Children

1. Duty and Standard of Care of Parents

Parents owe a duty of care to supervise and control the activities of their children. Liability for damage caused by their children is not based on vicarious liability by dint of the parent-child relationship, but rather on personal negligence in failing to uphold this standard of care. In *Newton v. Newton*, 2002 BCSC 789, leave to appeal granted, 2002 BCCA 504, the court imposed a high standard of care on parents in the supervision of their children. The plaintiff in *Newton* was injured when her two-year-old grandson, Matthew, jumped into her arms causing her to fall down the stairs. The defendant, Matthew's mother, had told him to "go see Nannan" and then left him to navigate the stairs on his own while she went to the bathroom. Rather than climbing down the stairs, Matthew leapt for his grandmother, injuring her. Burnyeat J. said at para. 31 of the judgment:

> At the time of the accident Matthew was two years and three and a half months old. The duty imposed upon his parents to supervise his activities is heavy as the unpredictable and impulsive acts of a child that age pose a danger to others.

The court noted that Matthew's mother failed to follow her usual safety procedures involving her child on stairs. The cost of such procedures was minimal, but the risk of neglect was great. She did not live

up to the standard of care when she left him to negotiate the stairs alone, and thus bore full liability for the accident.

2. Duty and Standard of Care of Domestic Animal Owners

Lewis v. Robinson, 2002 BCCA 280, was a dog-bites-propane-delivery-man case. When the plaintiff visited the premises of the defendant to enquire about propane delivery, he entered the property through a hedge, as he had done so with the past owner. The defendant was startled, as was her tethered dog, Zeus. Zeus bit the plaintiff's hand. The plaintiff sued in scienter, in negligence, and under the *Occupier Liability Act*. The court confirmed that the Roman law doctrine of scienter (imposing liability if a domestic animal causing injury was known to have aggressive tendencies) continued to ground a claim, in tandem with that of negligence. In the end, the Court of Appeal upheld the dismissal of the plaintiff's case below. There was little evidence of past aggressive behaviour by the dog, so scienter was not established. As for the other claims, the fact that the dog was tethered indicated that the bite was caused by understandable misapprehension in the circumstances, and not negligence on the part of the defendant.

D. Negligence Issues Generally

1. No Negligence Claim for Pure Economic Loss for Perceived Threat

The Court of Appeal had the opportunity to review the issue of pure economic loss in *M. Hasegawa & Co. v. Pepsi Bottling Group (Canada) Co.*, 2002 BCCA 324 (also discussed above). The plaintiff corporation purchased from Pepsi bottled water contaminated by mould. Although the water did not pose a threat to human health, the government of Japan, where it was to have been sold, banned its sale. It is well-established law that if the plaintiff could demonstrate that the contaminated water represented a real and substantial threat to health they could recover their economic loss. The Court of Appeal upheld the trial judgment and refused to allow recovery for a pure economic loss where a negligently manufactured good merely raised concerns about safety. The test of perceived threat would be too difficult to apply. Writing for the court, Chief Justice Finch said at para. 56:

> ... a test of perceived as opposed to actual danger is, in my view vague, overbroad, and impractical. The plaintiff does not suggest whose perception should govern, or how a trier of fact could, on

> any reasonable basis, chose between evidence of differing perceptions of risk. ... Perception is not a matter susceptible to proof, or disproof, by evidence.

The decision is also useful in indicating that the since-overruled Court of Appeal decision of *Junior Books v. Veitchi*, [1982] 3 All E.R. 201, allowing recovery for pure economic loss, is no longer good law in Canada. Some, such as the *M. Hasegawa* appellants and Justice Linden in his leading torts text, have argued that *Junior Books* survives, based on comments made in a dissenting opinion by Madam Justice Wilson. The British Court of Appeal noted that Wilson J.'s comments were obiter dicta and probably do not represent the current law.

2. Negligent Misrepresentation

The Court of Appeal had the opportunity in 2002 to clarify some points regarding the law of negligent misrepresentation. In order to qualify as a negligent misrepresentation, a statement need not be known to be false by the party making it. This standard is the same even where those being misrepresented to are sophisticated parties. In *347671 B.C. Ltd. v. Blaikie*, 2002 BCCA 126, a partner of the defendant law firm prepared a term sheet to provide information for potential investors in the ill-fated Three Tenors concert. The sheet contained representations by the law firm's client that investors would get first charge on revenues and profits. The lawyer personally assured the information. Contrary to the reassurance, there was a registered charge under the *Personal Property Security Act* which took priority. The defendant argued that its lawyer did not make the representation but merely passed on the information provided by his client. The court rejected this defence (at para. 30):

> It seems to me that this argument comes close to suggesting that in order to prove negligence, it was necessary for the respondents to prove actual knowledge that the representation was inaccurate.

The defendant firm also argued that the standard in this case should be altered because of the sophistication of the plaintiffs; the principals of two of the corporate investors were lawyers, and they knew of the availability of registration in the Personal Property Registry to assure first position. The court disagreed (at para. 37):

> I do not agree that this makes it unreasonable for them to rely on the assurance given ... All the investors were sophisticated in business matters. That fact alone does not make it unreasonable for them to rely on assurances coming from a legal specialist known to be experienced and reliable.

E. Governmental Negligence

1. Policy/Operation Dichotomy

In *Gobin (Guardian ad Litem of) v. British Columbia*, 2002 BCCA 373, leave to appeal dismissed (9 January 2003), 29282 (S.C.C.), the Court of Appeal overturned the finding of liability at trial. The plaintiff was hit by a rock which fell through the windshield of the car in which he was a passenger. A few months earlier an independent worker for the province's rockfall mitigation program had recommended that mesh be installed to prevent rock fall in the area. The report indicated that the mesh was not an immediate concern but that it should be installed before the heavy rain began. Initially, the government planned to install the mesh in the summer but this was delayed by budget concerns. Later the project could not go ahead because the government agreed not to engage in non-emergency roadwork over the summer months to facilitate traffic flow.

The trial judge held that the project was not delayed for policy reasons, and that liability could flow. The Court of Appeal disagreed, noting that budgetary concerns represent a classic policy decision for which liability does not arise. After its budget was reduced, the Ministry had to make policy decisions about which projects to continue funding. The trial judge also held that once the Ministry had started the improvement project, it was obliged to complete the work. Here, too, the Court of Appeal rejected the lower court's analysis. The trial judge focused excessively on the specific meshing project, and not on the long-term highway improvement for the entire, inherently dangerous highway (at para. 50):

> Loose material is part of the ongoing problem throughout the whole of the Canyon. This time, instead of animals or rain causing the problem, some workmen caused it; the problem, however, is inherent in the general type of area that this road goes through. It was not a question of leaving the job "incomplete", as the job can always be said to be incomplete. Not until MoTH renders the entire area absolutely flat on both sides of the Canyon road will the job actually be complete, if one carries the trial judge's analogy forward. The job that was done was simply one further step in the Province's role in mitigation, rather than elimination, of rock fall.

Southin J.A. in a concurring judgment suggested at para. 69 that the Legislature compensate the unlucky victims of rockfalls and other random mishaps on our province's highways.

2. Governmental Negligence: Standard of Care Owed to Motorists

In a 5 to 4 split, the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33, found the defendant rural municipality 35 per cent liable for an accident that rendered the appellant passenger a paraplegic. The driver, who had been drinking for many hours before the accident, was found 50 per cent liable, while the passenger was held to be 15 per cent liable for accepting a ride from a driver in that state. All liability was joint and several.

The municipality was charged with the maintenance of the road by Saskatchewan statute; the decision rests on a statutory breach of standard of care rather than a common law breach and must be applied cautiously in this province. The municipality had not posted any signs on the curve, hidden by overgrown brush. The municipality was aware of earlier accidents in the area, and the stretch of road was inherently difficult to negotiate. Such factors allowed the court to impute knowledge of the hazards to the municipality. The majority held that the municipality was obliged to uphold a standard of care by maintaining the road so that a driver exercising ordinary care could travel safely. In failing to maintain the road to preserve the safety of the ordinary driver, the municipality failed in its standard of care. Had the municipality erected a warning sign before the hidden curve, the plaintiff might have reacted and averted the accident.

More important than the tort findings on governmental liability was the court's discussion of the standard of review of appellate courts for findings of fact, inferences of fact, questions of law, and questions of mixed fact and law; the court criticized the Saskatchewan Court of Appeal's reinterpretation of the facts at trial despite the absence of a "palpable and overriding error" in the findings below.

F. Causation

In *Hosak v. Hirst*, 2003 BCCA 42, the Court of Appeal applied the principles of *Athey v. Leonati*, [1996] 3 S.C.R. 458, in a case involving soft-tissue injuries resulting from a motor vehicle accident. In allowing the appeal, the Court of Appeal emphasized the need to keep issues of causation and assessment of damages separate. With regard to causation, a defendant who materially contributes to the plaintiff's injury is liable, even where his act alone is not sufficient to create the injury. The defendant takes the plaintiff as found, regardless of pre-existing conditions making the plaintiff more susceptible to injury. With regard

to damages, the defendant is only obliged to restore the plaintiff to his condition before the accident; a plaintiff suffering a pre-existing condition cannot expect to be restored to the monetary equivalent of perfect health. In other words, the defendant must compensate the plaintiff for the additional damage but not the pre-existing damage.

In *Hosak*, the issue was whether the accident had aggravated or activated a pre-existing degenerative condition of the plaintiff's spine. The Court of Appeal found that the trial court misapprehended evidence that the plaintiff's condition had existed in an asymptomatic state before the accident, and became symptomatic afterwards. The observations above flow less out of the trial judge's reasons than out of the appellate court's rejection of the respondent's explanation for the trial judge's findings (para. 70).

G. Defamation

As technology shrinks the world, courts continue to grapple with the difficulties of broad-scale publishing of defamatory materials to the public at large: in press conferences, in newspapers, and over the World Wide Web.

1. Jurisdiction: Internet Publication

The most important decision affecting British Columbia defamation jurisprudence comes not from this country, but from the High Court of Australia: *Gutnick v. Dow Jones & Co.*, [2002] HCA 56. *Barrons*, a business magazine owned by the defendant Dow Jones, published an article alleging that the plaintiff was a money-launderer. The issue sold 305,563 copies, of which a very small number were sold in the Australian State of Victoria, where the plaintiff filed suit. *Barrons* also placed the article online on the defendant's subscription website. Approximately 1,700 subscribers were Australian.

The issue for the court was whether the case should be heard in Victoria or New Jersey, the site of the six Dow Jones web servers whence the article was web-cast. The defendant stressed that few Victorians saw the online article, that the article was written by Americans for Americans interested in American stock markets, and that the United States was the appropriate place for trial.

Ultimately, the issue turned on the plaintiff's strategic decision to limit his lawsuit to the monetary damages in Victoria caused by the limited

Victorian publication of the article to 314 Victorian readers (see para. 48). The court identified the essential element of defamation as damage to reputation: it noted that Mr. Gutnick was a citizen and resident of Victoria, with his business headquarters and family in Victoria, and that he properly sued in Victoria to redress the local harm to his reputation (para. 44).

The court also dismissed the spectre of infinite international liability raised by the defendant. It noted that a party who publishes a possibly defamatory article on the Internet does so fully cognizant that it may be read by anyone, without geographic or jurisdiction limitation (para. 39). The residence of the potential victims of a defamatory publication makes clear the likely jurisdictions in which defamation suits might reasonably be brought. Finally, a geographically distant party is unlikely to hale a foreign publisher before local courts unless a local judgment would be of value, and unless enforcement against that foreign publisher is a realistic prospect.

The result in *Gutnick* is not inconsistent with the widest Canadian discussion on the subject of Internet defamation, the 1999 British Columbia Court of Appeal decision in *Braintech v. Kostiuk* (1999), 171 D.L.R. (4th) 46, leave to appeal refused, (9 March 2000), 27296 (S.C.C.), although in that case, the court considered the issue defensively, in rejecting jurisdiction. In *Braintech*, the British Columbia court refused to recognize the default judgment of a Texas court in an action for defamation, because there was no "real and substantial connection" between the defamatory Internet postings and Texas. The mere fact that a Texan Internet user could in theory read the allegedly defamatory bulletin board posting was not a sufficiently strong link to that territory to give its courts the right to decide the action. In reaching its practical conclusion, the Court of Appeal noted (at para 63):

> It would create a crippling effect on freedom of expression if, in every jurisdiction the world over in which access to [the] Internet could be achieved, a person who posts fair comment on a bulletin board could be haled before the courts of each of those countries where access to this bulletin could be obtained.

The court held that more was needed, such as intent to publish within a certain region, or to target the plaintiff, to prove publication in a specific jurisdiction through the Internet.

2. Jurisdiction: Labour Arbitration

In *Haight-Smith v. Neden*, 2002 BCCA 132, leave to appeal dismissed without reasons (21 November 2002), 29172 (S.C.C.), the Court of Appeal upheld the decision below (2000 BCSC 1233). The plaintiff, a former teacher in the Kamloops/Thompson School District, brought a defamation suit against other employees of the school district. Some employees were subject to the workplace collective agreement directing disagreements to arbitration; others were not members of the same union as the plaintiff. On a summary trial brought by the defendants, the trial court stayed the case against the union members on the jurisdiction clause, and dismissed the case against the others based on a defence of qualified privilege. In concluding that the essential character of the dispute concerned the workplace relationship, thereby ousting the primary jurisdiction of the courts, the court (at para. 43) endorsed the test laid out by the Manitoba Court of Appeal in *Phillips v. Harrison* (2000), 196 D.L.R. (4th) 69:

(1) the comments concerned the employee's character, history, or capacity as an employee;

(2) the comments were made by someone whose job it was to communicate a workplace problem; and

(3) the comments were made to persons who would be expected to be informed of workplace problems.

Interestingly, the court suggested that even claims by or against those employees not subject to the governing collective agreement may be barred from the courts if the comments and dispute primarily concern the workplace (para. 47). For a fuller review of these issues and antecedent cases, please see the 2002 *Annual Review of Law and Practice*, pp. 582-85.

3. Privilege: Responsibility of Journalists

Two decisions of note focused on whether the defendant journalists reported their subjects fairly, and were protected by a defence of privilege. These decisions are especially notable given the likely increasing influence in British Columbia of the House of Lords decision in *Reynolds v. Times Newspapers*, [1999] 3 W.L.R. 1010, which focuses less on the traditional duty-interest test and more on the fairness and responsibility of the publication. For a more detailed discussion of *Reynolds* and British Columbia citations thereof, please see the 2002 *Annual Review* at pp. 579-80.

Qualified privilege protects reports of the contents of documents filed in court (*Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130). Such reports must, however, be fair; unproven allegations in affidavits, for example, must be so described (*Taylor-Wright v. CHBC-TV*, 2001 BCCA 298). In *M.D. Mineralsearch Inc. v. East Kootenay Newspapers Ltd.*, 2002 BCCA 42, the plaintiff sued the defendant over a report that the plaintiff had been found to have committed a deceptive act or practice under the *Trade Practice Act*, and had been fined $200. Although the conviction had occurred, the trial court held that the newspaper should have gone further, explaining that the breach was a technical and not a dishonest breach, as reflected in the low fine. The court recognized that journalists bore a heavy responsibility to report judicial proceedings fairly, but found that the defendant in this case had reported fairly. The defendant had essentially paraphrased the wide description of liability under the Act, and was not obliged to explain that the Act prohibited both intentional and inadvertent deception (para. 40).

In *Bonnick v. Morris*, [2002] UKPC 31, the plaintiff, the managing director of a state-owned company, sued the defendants over a report of his dismissal juxtaposed with a source's comments on a suspicious contract entered into by the company. The Privy Council applied *Reynolds*, and examined whether the defence of qualified privilege applied. While finding the case to be borderline, the court concluded that it did. The court urged a practical and flexible approach to determining whether the journalist had acted fairly. Readers of the publication are not naïve, yet would not fix on the defamatory meaning where other plausible meanings were available. Further, a journalist should not be punished for making a wrong decision about how the average reader would perceive words with defamatory as well as licit meanings. Ultimately the determination will be a matter of degree, in light of all of the circumstances: particularly, the more serious the allegation, the less forgiving the court will be with regard to ambiguity among defamatory and non-defamatory meanings.

4. Privilege: Responsibility of Lawyers

In *Campbell v. Jones*, 2002 NSCA 128, a much publicized decision of importance to lawyers, the Nova Scotia Court of Appeal overturned a trial decision awarding $240,000 against two lawyers for statements made during a press conference. The lawyers' clients were black

adolescents who had been strip-searched at school by the plaintiff police officer. In the press conference the lawyer defendant alleged systemic racism in the Halifax Police Department.

At trial by jury, the judge rejected the defence of qualified privilege. The Court of Appeal found the defence to apply. The court identified and corrected three errors in the trial judge's rejection of that defence. First, citing *Reynolds*, qualified privilege offers wide protection even where the impugned statement is broadly published, as in the press conference. Second, the lawyer defendants had a duty to make the comments based on their ethical obligation to seek to improve the administration of justice. Third, the fact that the press conference occurred soon after the strip search, and not after a fuller investigation, should not have been given undue weight: timing is only one factor to consider, and the public's interest in receiving criticism of the means of law enforcement was immediately engaged.

5. Damages for Defamation

The decision of *Langille v. McGrath*, 2001 NBCA 106, addresses the practical problem of the lack of proportion between the costs of litigating a slur to reputation, and compensatory damages. In that case, the trial court awarded the successful plaintiffs $500 total in general damages based on the defamatory claim that the plaintiffs had threatened the defendant with serious bodily harm. There was no suggestion that the amount awarded represented nominal or contemptuous damages. The court noted that such a low award financially penalizes the plaintiffs for successfully defending their reputations, and for the defendant, could be considered a licence fee to defame. The court raised damages to $6,000 for each of the individual plaintiffs (paras. 27 and 30).

H. Occupier's Liability

An occupier of land may be liable for damage caused to his neighbour's land by a trespasser. The test of foreseeability is modified in these cases. Not only must the damage be reasonably foreseeable but also the defendant must in some way be alerted to the risk. In *Okanagan Exteriors Inc. v. Perth Developments Inc.*, 2002 BCCA 45, a fire on the defendant's land caused by vagrants resulted in damage to a neighbouring property. Both properties were uninhabited and under construction. There was evidence that vagrants regularly gathered on

the defendant's property and started fires. Furthermore, there was evidence that the defendant knew of the unauthorized activity. Hall J.A. stated (at para. 18):

> ... in this class of case it has to be brought home to a defendant that there is a real risk that harm may occur as a result of the unauthorized activity of a third party. This is a test that is perhaps somewhat more rigorous than the usual test of foreseeability in cases of negligence.

Where occupiers attempt to put an end to the potentially destructive activity that is "brought home" to them they can avoid liability. This was the result in *Kennedy v. Coquitlam (City)*, 2002 BCSC 1057. The plaintiff, Lisa Kennedy, engaged in a game with other teenagers at the defendant City of Coquitlam's recreation facility: One of the teenagers would drive their car slowly while the others gave chase. The first to catch the car got a ride. Mr. Miller, a city employee, was aware of the game and gave an informal warning to some of the teenagers. When the game persisted, Mr. Miller issued a formal warning. The plaintiff was present when the formal warning was given. As a result, the city was not liable, even in part, when the plaintiff fell while chasing a car, which ran over her foot.

I. Nuisance

In *Sutherland v. Canada (Attorney General)*, 2002 BCCA 416, the Court of Appeal overturned the finding of liability at trial. The Court of Appeal agreed with the trial judge that the same nuisance could found a claim as either a public or a private nuisance. The plaintiffs had established the elements of private nuisance: the airplanes constituted unreasonable and substantial interference with the use and enjoyment of their lands (para. 34). This did not end the inquiry for the court, however. The noise was an inevitable consequence of the statutory scheme. The trial judge rejected the defence of statutory authority because the operations of the airport were managed by a private company. The Court of Appeal rejected this distinction (para. 86):

> It cannot be disputed that private parties can rely on the defence of statutory authority, if the work in question was authorized by statute...

J. Damages

1. Restorative Damages

In *Prince George (City) v. Rahn Bros. Logging Ltd.*, 2003 BCCA 31, a negligent misrepresentation case, the court applied the principle for damages in tort that the plaintiff is to be restored to the position it would have been in had the misrepresentation never been made. In this case, the defendant city had negligently misadvised the plaintiff that certain lands were zoned so as to permit the construction of certain buildings. In fact they were not, as the plaintiff discovered when it faced the city's injunction restraining its use of the property. The trial judge limited damages to $125,541.87, representing the capital cost of the plaintiff's having built the now-unusable buildings. He rejected the plaintiff's desired measure of damage: the present cost of obtaining properly zoned land on which to reconstruct the buildings. The trial judge noted that with the downturn in the forest industry and the possible retirement of the plaintiff's principal, "on a balance of probabilities" the plaintiff would likely not have need of the buildings in future. The Court of Appeal found this analysis to be in error. The evidence indicated that notwithstanding current economic conditions, had the plaintiff been properly informed of the true, restricted zoning of the lands, it would have simply obtained and built on appropriate lands. Damages should not be limited to the out-of-pocket expenses of past construction; applying the principle of *restitutio in integrum*, the plaintiff was awarded the cost of replacing the buildings on properly zoned land. With deductions for depreciation and contingencies, damages were assessed at $475,000.

2. No Deduction of Social Assistance Benefits

Recent jurisprudence across Canada has debated whether insurance or other third-party indemnities for tortious harm should be deducted from a damages award. A five-member panel of the British Columbia Court of Appeal provided guidance in this issue in *M.B. v. British Columbia*, 2002 BCCA 142, concluding that the social assistance benefits received by the plaintiff should not be deducted from an award for loss of income. The social assistance benefits did not result in double recovery because they were not a wage replacement.

The plaintiff in *M.B.* had been sexually assaulted by her foster father while she was a ward of the Superintendent of Child Welfare. At trial the Crown was held liable and ordered to pay damages of $172,726

including an award of $10,000 for lost income. This number was arrived at by deducting the $122,000 the plaintiff had received in social assistance benefits from $132,000 she had lost in income. The award was varied on appeal: 2001 BCCA 227, leave to appeal granted, [2001] S.C.C.A. No. 333 (QL). The liability of the Crown was upheld but the amount of past income loss was varied to $50,000 with no deduction made for social assistance benefits. See the 2001 *Annual Review of Law and Practice* for a discussion of this decision. The appeal decision appeared to contradict the previous Court of Appeal decision in *M. (M.) v. F. (R.)* (1997), 52 B.C.L.R. (3rd) 127 (C.A.), where the court viewed social assistance benefits as an income replacement which must be deducted from a tort award compensating for lost income. The Court of Appeal was asked to clarify its position.

In the leading judgment, Prowse J.A. reviewed the fundamental principles underlying a damage award to a tort victim (at para. 15):

> They include the principle that an injured person should be compensated for the full amount of his or her loss, but no more; that damages should put the injured person in the same position he or she would have been but for the injury, insofar as that is possible; that the award is to be fair to both the plaintiff and to the defendant; and that the emphasis underlying an award of damages should focus on compensation to the victim, rather than on punishment of the wrongdoer. As a general rule, double recovery is not permitted, subject to recognized exceptions...

The majority agreed that benefits paid under the *GAIN Act* and the *B.C. Benefits (Income Assistance) Act*, "do not give rise to double recovery for loss of income, because those benefits are not in the nature of wage or income replacement" (para. 122, Finch C.J.B.C.). Prowse J.A. said (at para. 66):

> When one looks at the nature and purpose of these statutes, it is apparent that the benefits paid pursuant to them constitute income assistance, but not wage replacement. They were paid to her for the same reason they are paid to any recipient, "for the purpose of relieving poverty, neglect or suffering". They were payable as a matter of statutory entitlement independent of ay right she may have had to recover damages for loss of income earning capacity arising from tort.

Prowse J.A. and Finch C.J.B.C., now speaking in the minority, went further and said that even if the social assistance benefits amounted to a double recovery, they would have allowed the plaintiff to recover

the full amount of lost wages from the tortfeasor by holding that the income assistance was a charitable gift from the government.

Smith and Hall JJ.A. dissented, holding that the income benefits were a form of income replacement. Smith J.A. reviewed the purpose of the two statutes (at para. 166):

> Both statutes exhibit a direct relationship between the income assistance payments provided and income from employment. For example, under the *GAIN Act*, ss. 10 and 11 speak of encouraging recipients of income assistance to work and to obtain work-related skills and of providing incentives to recipients to obtain employment and to achieve financial independence. As well, s. 18 provides for the termination or reduction of income assistance payments to a recipient who refuses employment, is terminated from employment for misconduct or who leaves voluntarily for other than medical reasons, or who does not make reasonable efforts to obtain employment.

3. No Lifetime Damages Under Family Relations Act

In *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, the Supreme Court of Canada overturned the British Columbia Court of Appeal's interpretation of amendments to the *Family Relations Act*, R.S.B.C. 1996, c. 128, as they relate to costs of care of a mentally disabled youth once he becomes an adult. The Krangles' child was born with Down syndrome. The doctor negligently failed to advise the parents about amniocentesis which would have alerted them to the unborn child's condition and allowed them to terminate the pregnancy. At trial the doctor was found liable and was ordered to pay support costs of the child until the age of 19. It was agreed that at 19 the child would leave home and be taken care of in a state-funded group home. The award included a five per cent contingency that at some point in the future the state would not cover these costs. After the trial decision, amendments to the *Family Relations Act* made the Krangles concerned that they would be required to cover their child's care costs forever. The British Columbia Court of Appeal agreed with these concerns and awarded damages for lifelong care. Chief Justice McEachern dissented on two points:

(1) He disagreed on the effects of the new legislation. The definition of "child" in the *Family Relations Act* excludes adult disabled children no longer in the "charge" of their parents. Thus, the Krangles would not be required to care for their child.

(2) The amendments to the *Family Relations Act* were made after the proceedings commenced. Thus, McEachern C.J.B.C. held that the change should not affect the trial judgment.

McLachlin C.J.C. agreed with McEachern C.J.B.C. on the first point and allowed the appeal. The *Family Relations Act*, as amended, does not impose on parents of disabled children a lifelong legal requirement for their support. A moral obligation to support such children is not sufficient to ground an award of lifetime support, as society does not expect parents to bear this burden without state assistance. Accordingly, the order that the defendant doctor support the child for life was set aside.

4. Damage for Loss of Non-Commercial Goods

British Columbia v. Canadian Forest Products Ltd., 2002 BCCA 217, raised several interesting issues relating to damages. A fire in the summer of 1992 burned out of control and destroyed a considerable amount of timber on Crown land. The fire began on the defendant Canfor's property. Canfor was found liable for the fire. It was also found that the province was contributorily negligent in not extinguishing the fire more quickly.

The first issue on appeal was the proper apportionment of liability between the province and Canfor. The trial judge was unable to reach a conclusion on the relative responsibility of the parties and ordered Canfor to pay half of the province's damages. The Court of Appeal varied this order because it believed the trial judge had not properly applied *Cempel v. Harrison Hot Springs Hotel Ltd.* (1997), 43 B.C.L.R. (3d) 219 (C.A.). "As the court pointed out in that case, in apportioning liability, it is not a question of assessing degrees of causation but rather degrees of fault, or blameworthiness" (para. 25). After reviewing the facts the Court of Appeal concluded that Canfor was 70 per cent responsible for the damage from the fire while the province was 30 per cent responsible.

The second issue of note was the proper compensation to the government for the loss of trees with no commercial value. A number of trees destroyed by the fire were located within environmentally sensitive areas. These trees were planted to protect the environment and were not scheduled to be harvested. In *Prince Rupert (City) v. Pederson* (1994), 98 B.C.L.R. (2nd) 84 (C.A.), the plaintiff was unable to recover for the loss of pleasure suffered by the residents of Prince Rupert resulting from the loss of some trees. The Court of Appeal rejected

that approach because the loss in this case was "tangible and real" (para. 75). The loss of trees in the environmentally sensitive areas caused ecological damage affecting fish habitat and the water supply. Nonetheless the Court of Appeal refused to grant the British Columbia government the full commercial value of the trees because the trees were not scheduled to be harvested. The final award was for one-third of the value of the trees in the environmentally sensitive areas.

5. Review of Jury and Trial Damages Awards

In *Vaillancourt v. Molnar Estate*, 2002 BCCA 685, the Court of Appeal varied the jury's award of damages for non-pecuniary losses, diminished earning capacity, and future cost of care. The jury had initially assessed non-pecuniary damages far beyond the upper limit imposed by the Supreme Court of Canada. The trial judge concluded that she could not assess damages, so limited her adjustment to reducing the non-pecuniary award to the Supreme Court cap.

The Court of Appeal determined that it had jurisdiction to vary a jury award upward or downward. Such variance is not to be exercised lightly, but only where the award is out of all proportion to all of the circumstances of the case, and the amounts awarded in similar cases. The court concluded that the present award so suffered. As the plaintiff's jaw, the most significant injury, was likely to make a successful recovery, non-pecuniary damages were reduced to $125,000—slightly under halfway to the Supreme Court of Canada cap. For costs of care, the court concluded that there was no evidentiary basis to support the amount presented in an expert report, and accepted by the jury, that was based on the worst-case scenario. As for future income loss, the court noted that the plaintiff's change in employment arose largely from her husband's circumstances, and not that of the accident, and also noted her limited past earnings. The court noted that while a review of similar jurisprudence indicated lower amounts, the fact that the jury was obviously impressed with the plaintiff in awarding such high amounts must also be considered, prompting restraint in varying the amounts downward.

For a similar issue and analysis, see also *Schellak v. Barr and Duplessis*, 2003 BCCA 5.

In *Reilly v. Lynn*, 2003 BCCA 49, the Court of Appeal reviewed an award by the trial judge of $2.3 million for loss of earning capacity to the plaintiff, a young lawyer who suffered traumatic head injury from

an automobile collision soon after being called to the Bar. The majority and dissent differed predominately on the powers of the appellate court to review the findings of fact of the trial judge. The majority applied the dominant recent case law for review of damages awards: the court may vary the award if the trial judge applied the wrong principle of law, or the amount awarded is inordinately high or low.

The majority found that the award for lost future earnings should be adjusted down to $1.65 million to reflect the uncertain future of a young lawyer, even one with promising talent and prospects. Reduction was based on two adjustments: first, the actuarial estimate of a Vancouver lawyer's career earnings was considered excessive; second, although the actuarial calculations included general contingencies, they took inadequate account of specific contingencies relating only to the plaintiff that might indicate he would, through choice or otherwise, not earn as much over his career as anticipated. This necessitated a personalized analysis of the plaintiff's pre-accident health and employment performance.

6. Apportionment for Concurrent Claims in Tort and Contract

In the facts leading to *Crown West Steel Fabricators v. Capri Insurance Services Ltd.*, 2002 BCCA 417, the plaintiff's building burned down. The plaintiff discovered itself to be underinsured, and sued its insurance broker in negligence and in contract. The trial court granted judgment, but reduced the award by 35 per cent due to the plaintiff's contributory negligence. On appeal, the plaintiff argued that the apportionment provisions of the *Negligence Act* should not apply to its concurrent claim, which was not only founded in negligence but also in breach of contract. The court confirmed the trend in British Columbia trial courts that, notwithstanding the parallel contract claim, the contributory negligence provisions of the Act applied. The defendant's breach and the plaintiff's contributory fault were essentially identical under both the tort and the contract claim, and the result should stand.