

# TORTS

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### A. Introduction

The most important 2005 tort case to Canadians will not be released until next year: *Childs v. Desormeaux*, [2004] S.C.C.A. No. 361 (QL), was heard on January 18, 2006, and examines whether social hosts will be liable for harm caused by their inebriated guests. For a discussion of the appeal decision, see last year's *Annual Review* at p. 623. Courts continued to provide guidance on the boundaries of vicarious liability, particularly in the difficult context of institutional child abuse. The recent decisions confirm that the Supreme Court of Canada authorities on vicarious liability provide a workable, if fact-specific, framework for adjudicating such cases. Decisions of great importance to solicitors, *3464920 Canada Inc. v. Strother*, 2005 BCCA 35 and 2005 BCCA 385, leave to appeal granted [2005] S.C.C.A. 148 (QL), and *Hilton v. Barker Booth and Eastwood (a firm)*, [2005] UKHL 8, confirmed that lawyers owe a duty of the utmost undivided loyalty to their clients; even if others in the firm are ignorant of their colleague's breach of that duty, they will be obliged to disgorge any profits resulting from the breach. Another House of Lords decision, *Moy v. Pettman Smith (a firm)*, [2005] UKHL 7 offers solace to litigators sued over litigation advice, particularly for that provided in the heat of trial.

### B. Duty of Care

In four decisions, courts found that defendants may owe a duty of care to claimants in novel situations, and allowed those claims to proceed.

In *James v. British Columbia*, 2005 BCCA 136, the defendant province appealed the certification of a class proceeding. The plaintiff forestry worker was a former employee of a Youbou sawmill that had closed. He claimed that the province was vicariously liable for the negligence of the Minister of Forests who inadvertently removed from a licence a clause that would have prevented the mill from being closed without the minister's approval. The Court of Appeal confirmed that the minister had the power to require that the clause be a term of the licence,

and the power to require that it remain there for the benefit of mill employees. With respect to the first part of the *Anns* test, the alleged facts demonstrated a high degree of "closeness of relationship", such that it was not "plain and obvious" that the plaintiff could not establish that the minister owed a duty of care to maintain the clause. With respect to the second part of the test, the recognition of a duty of care would not give rise to a concern of indeterminate liability. The court dismissed the province's appeal.

In *Abarquez v. Ontario* (2005), 257 D.L.R. (4th) 745, the Ontario Superior Court of Justice stated that the provincial Crown might owe a duty of care to the plaintiff nurses, who had contracted SARS during the outbreak in Toronto, for its alleged failure to ensure their health and safety in the hospitals during the outbreak. The court, however, found that it was premature to decide the issue of proximity on the basis of the pleadings.

In *Lowe v. Guarantee Company of North America* (2005), 256 D.L.R. (4th) 518, the Ontario Court of Appeal partly allowed an appeal from an order striking the plaintiff's claim against their insurer and the insurer's designated assessment centre. Two employees of the assessment centre had determined, allegedly erroneously, that the recommended rehabilitative devices for the plaintiffs were neither reasonable nor necessary. The court accepted that it was reasonably foreseeable that a biased or careless assessment could harm the assessed person. The court applied the two-stage test for whether a duty of care exists, as set out in *Cooper v. Hobart*, [2001] 3 S.C.R. 537. First, although the relationship between the assessors and the plaintiffs did not fall within one of the previously recognized categories of proximate relationships, it was at least arguable that there existed a relationship of sufficient proximity such that the claim could be analogized to a recognized claim, in negligent misrepresentation. Second, the court concluded that it would offend policy concerns to impose a duty of competence on dispute resolution decision-makers such as the assessors. But it would not offend public policy to impose a duty of neutrality on such decision-makers. The court allowed the claim to proceed on that limited basis.

In *J.D. (F.C.) v. East Berkshire Community Health NHS Trust*, [2005] UKHL 23, the House of Lords considered a trio of cases that had been struck as bound to fail. The facts of the cases were unhappy: the defendant health authorities and doctors had reported, erroneously, that the plaintiff parents may have abused their children. The parents sued for infliction of nervous shock. The majority found that the law

should not extend a duty of care beyond the child as patient, to the parents themselves. The decision turned largely on the policy grounds that nothing should discourage doctors from their vital role in detecting and combating child abuse. Further, to impose on health officials duties to both the parents and the patient children would create an inherent conflict of interest. The law thus requires good faith, and nothing more; a report issued in bad faith will be remedied through an action in malicious falsehood.

In interesting *obiter dicta*, Lord Nicholls of Birkenhead raises and then rejects the possibility of navigating this difficult area of emerging negligence by shifting the analytic focus from whether a duty of care exists to whether the public authority exhibited an appropriate standard of care in assessing the child's condition.

## C. Standard of Care

### 1. Standard of Care for Insignificant Risks

The Court of Appeal returned to first principles of negligence in *Lawrence v. Prince Rupert (City)*, 2005 BCCA 567. Not every act that creates a risk constitutes negligence when injury occurs; conduct is only negligent if it creates an objectively unreasonable risk of harm. On the facts of *Lawrence*, the pole over which the plaintiff tripped was plain to see and occupied only a small portion of the sidewalk. Its abandonment did not pose an unreasonable risk. The court found the trial court to have applied a standard of perfection, effectively saying that any risk would be unacceptable and unreasonable.

### 2. Standard of Care to Trespassers

*North King Lodge Ltd. v. Gowlland Towing Ltd.*, 2005 BCCA 557 upheld a decision by the trial judge that a towing company had met the requisite standard of care. The court found that the plaintiff had committed a trespass to the defendant's chattels in mooring his ship without authorization. Traditionally, the standard of care owed to the trespasser is lessened: the occupier is only obliged not to harm the trespasser through deliberate or reckless acts. Certain cases impose a higher standard of care, based on the "duty of common humanity" to take proactive steps to avoid personal injury to trespassers, particularly children. The same policy concerns did not apply to trespassers to chattels with no attendant risk of personal injury: in such circumstances, the occupier need only avoid damage caused by intentional or reckless conduct.

### 3. Standard of Care to Prisoners

In two cases the Court of Appeal reversed trial decisions, and held that authorities had not fallen short of the standard of care to persons in their custody.

In the facts leading to *Pete v. Axworthy*, 2005 BCCA 449, leave to appeal filed [2005] S.C.C.A. No. 498 (QL), the plaintiff was injured by another inmate, Axworthy, who had been transferred to Pete's facility from a more secure facility despite a record indicating he was not a good candidate for the transfer. The trial judge found the province negligently failed to classify Axworthy, to give appropriate notice to staff of the risk he posed to other inmates, and to adjust supervision levels to reflect this risk. The majority on the Court of Appeal noted that the staff was properly informed to watch Axworthy closely, and that there was no indication that he would act in the way he did. Every inmate poses a risk—that is why they are inmates—but not every incident will indicate that the authorities failed in their duty. The court held that the trial judge had imposed on authorities a standard akin to perfection rather than reasonable care.

In *Roy v. British Columbia (Attorney General)*, 2005 BCCA 88, leave to appeal dismissed [2005] S.C.C.A. No. 188 (QL), a five-member panel of the court considered the standard of care owed by a peace officer to his prisoner. Mr. Roy died of blood alcohol poisoning while in the custody of two police officers. He exhibited no sign of physical injury. The majority held that a peace officer owes a duty to take reasonable care for a prisoner's safety. But peace officers are not insurers. Nor are they medical emergency services personnel, and should not be held to a standard of such persons.

## D. Causation

### I. "But For" and "Material Contribution" Tests for Causation

Courts continue to grapple with plaintiffs' attempts to broadly apply *Snell v. Farrell*, [1990] 2 S.C.R. 311 and *Athey v. Leonati*, [1996] 3 S.C.R. 458 in cases where causation proves difficult.

In *Seattle v. Purvis*, 2005 BCSC 1567, the infant plaintiff suffered from cerebral palsy caused by asphyxia, caused in turn by the infant's shoulder being trapped against the mother's pubic bone. The plaintiffs claimed that the physician attending the birth should have consulted the on-call obstetrician. The court found that the outcome might have been better had the obstetrician attended, and not that it *probably*

would have been better. Whether one applies a strict “but for” test or a more broad “material contribution” test to determine causation, the plaintiff failed to establish that the physician’s breach of duty caused the plaintiff’s condition. The case provides a useful review of current theories of causation:

- (1) The plaintiff must prove that “but for” the negligence of the defendant no injury would have occurred. This test should not be applied too rigidly, which means that an inference of causation may be drawn even in the absence of conclusive, precise, scientific evidence (*Snell*).
- (2) Where there are multiple possible causes of an injury, but the plaintiff can prove the defendant’s negligence materially contributed to the injury even though it was not the sole cause, liability for the whole loss, subject to claims of contribution, will attach to the defendant (*Athey*).
- (3) If the plaintiff can establish that the defendant materially increased the risk of a specific injury and that specific injury occurs, the court may infer on a sufficient evidentiary basis that the material increase in risk was a contributing factor of the injuries such that causation is established (*Levitt v. Carr* (1992), 66 B.C.L.R. (2d) 58 (C.A.) and *Webster v. Chapman* (1997), 155 D.L.R. (4th) 82 (Man. C.A.), leave to appeal dismissed [1998] S.C.C.A. No. 45 (QL)). The evidence is to be applied according to the proof which was in the power of one side to have produced and the other to have contradicted (*Snell*).
- (4) There may be a reversal in the burden of proof for causation such that if a plaintiff establishes that the defendant created an area of risk and an injury occurred in that area, the defendant must show that the injury had some other cause in order to escape liability (*McGhee v. National Coal Board*, [1973] 1 W.L.R. 1 (H.L.)). *Snell* rejected this approach in Canada and it seems to have been restricted in England to toxic exposure cases.

## 2. Snell Inference of Causation

In two cases, the Court of Appeal rejected attempts by plaintiffs to apply *Snell* broadly for an inference of causation. The court’s decision last year in *Mooney v. British Columbia (Attorney General)*, 2004 BCCA 402 (see last year’s *Annual Review* at pp. 629-30), reigning in such attempts, foreshadows this trend.

In the facts leading to *Trinetti v. Hunter*, 2005 BCCA 549, Trinetti had fallen on Hunter's premises. Trinetti alleged the defendant occupier had been negligent in failing to provide any warning of a step, and in failing to correct what she argued were dangerous conditions on the premises when the occupiers knew or ought to have known of them. The plaintiff asked the court to apply *Snell* and draw an inference that the defendant's negligence caused the accident. The court rejected this argument, and found that the defendant had not failed to make the premises reasonably safe for use. The court cited *Mooney, supra*, noting that inference principle of causation is restricted to those "rare cases where it is clear that a defendant controlled all possible physical agents of harm and it is impossible to identify scientifically the pathogenesis of the harm, and, therefore, to attribute precise responsibility for the harm as between the tortious acts of several defendants, or as between one defendant's tortious and non-tortious acts". The court noted that these rare circumstances did not arise in that case: as a primary matter, the plaintiff had failed to prove a tortious act, that is, the failure to take reasonable care.

In *Hall v. Cooper Industries, Inc.*, 2005 BCCA 290, leave to appeal dismissed [2005] S.C.C.A. No. 351 (QL), the plaintiff suffered a severe leg injury after being pinned under a steel plate. The Court of Appeal concluded that the plaintiff had failed to establish a *prima facie* case that the defendant's negligence caused the accident. As such, the *Snell* inference of causation, placing an expectation on the defendant to produce evidence to the contrary, did not arise.

### 3. Causation and Insignificant Risks

In *Lawrence, supra*, the Court of Appeal found that as soon as the plaintiff observed the misplaced pole on the sidewalk and saw that she had to step around it, the defendant's conduct in leaving the pole ceased to be a proximate cause of the accident. The plaintiff's momentary lapse of attention, and not the obvious pole, was the cause of the accident.

### 4. Failure to Warn and Causation

*Sabourin Estate v. Watterodt Estate*, 2005 BCCA 348, leave to appeal dismissed [2005] S.C.C.A. No. 417 (QL), arose from a mid-air collision between two planes. The trial judge found that a flight service specialist employed by Nav Canada failed in his duty to warn the pilot of one plane that the other was in the process of taking off. The trial court found, however, that on a balance of probabilities this failure

was not a contributing cause of the collision. As all aboard were killed, the evidence on this issue was speculative.

The majority concluded that the evidence at trial supported the trial judge's conclusion that there was no causal link between the accident and the flight service specialist's failure. It was open to the trial judge to conclude that one pilot probably did hear the other pilot's communications that his plane was taking off, yet nonetheless did not alter his course; it would be speculative to consider whether or not a second communication from the flight service specialist would have changed the outcome. In a strong dissent, Justice Lambert noted that failure to warn cases always present causation difficulties, and that causation must always be speculative, particularly so with deceased victims. His Lordship noted that the Supreme Court of Canada has employed both subjective and objective tests for causation in failure to warn cases. In, for example, *Arndt v. Smith*, [1997] 2 S.C.R. 539, the court asked what a reasonable person in the plaintiffs' circumstances, but without any of the plaintiff's particular idiosyncrasies, would have done if the warning had been given. Justice Lambert concluded that he had no doubt that a reasonable person in the position and circumstances of the deceased pilot, if directly given timely information about the other plane taking off, would have avoided the collision. There was nothing in the evidence to suggest that the pilot was not a reasonable person and an experienced pilot, or that he would have done anything different from what a reasonable person would have done. Thus in His Lordship's conclusion, causation was established.

## E. Vicarious Liability

### I. Introduction

The Supreme Court of Canada considered vicarious liability in two British Columbia residential school cases. In both, the court returned to the two-part test from *Bazley v. Curry*, [1999] 2 S.C.R. 534:

- (1) Is the relationship between the tortfeasor and the person against whom liability is sought sufficiently close?
- (2) Is the wrongful act sufficiently connected to the conduct authorized by the employer so that the tort can be considered a materialization of the risks created by the enterprise?

For a review of recent changes in the law of vicarious liability, see pp. 597-600 of the 2004 *Annual Review* and pp. 625-627 of last year's *Annual Review*.

## 2. Mere Creation of Opportunity Insufficient to Ground Vicarious Liability

In *E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*, 2005 SCC 60, the plaintiff brought an action against the Oblates and the Attorneys General of Canada and British Columbia. While attending a residential school for First Nations children run by the Oblates, the plaintiff was sexually assaulted by the defendant Saxey. Saxey, a lay employee, worked as a baker, boat driver, and odd-job man and lived upstairs in a building located on the school grounds. The Supreme Court declined to impose vicarious liability on the Oblates. The law requires a strong connection between what the employer asked the employee to do and the wrongful conduct that had occurred. The court agreed that the trial judge had over-emphasized the operational characteristics of the school and the potential risk it created for its students. The primary focus should be the employment relationship between the employer and the wrongdoing employee. Under the trial judge's approach, the employer would be liable for all tortious acts of its employees, no matter how remote the wrongdoing from the job-created power or status was, or how distanced the employee was from any position of authority over, or intimacy with, the students. A "mere opportunity" will not ground a finding of vicarious liability against an employer.

The British Columbia Supreme Court similarly declined to impose vicarious liability on a church in *Wilson v. United Church of Canada*, 2005 BCSC 564. The victim was sexually assaulted by a lay minister of the local church. The minister was convicted, but then died. The court held that here there was no strong, close connection between the minister's assigned role with the church and risk of harm to the victim. The minister had no assigned duties or capacity that would bring him in contact with individual children and would place them at greater risk. With respect to the alternative claim in direct negligence, as the plaintiff had provided no evidence that the church was negligent in hiring the minister, it was impossible to demonstrate that the church had breached its duty to safeguard the victim.

The Ontario Court of Appeal applied the above principles in a novel context in *Weingerl v. Seo* (2005), 256 D.L.R. (4th) 1. The court confirmed that a medical clinic was vicariously liable for the actions of a technician who sexually assaulted the plaintiff during her visit to the clinic. The clinic's enterprise and placement of the employee in his role materially increased the risk of sexual assault. There was an obvious and strong connection between what the employer was asking the employee to do and the wrongful act. Further, vicarious liability would

meet the policy objectives of compensation for the wrong and deterrence of future harm.

### 3. Apportionment of Fault

In *Blackwater v. Plint*, 2005 SCC 58, 27 former residents of a residential school on Vancouver Island sued defendants including the Government of Canada and the United Church of Canada for damages for sexual abuse inflicted by the defendant Plint.

The trial judge held that Canada was liable for the assaults on the basis of non-delegable statutory duty, and that Canada and the church were jointly and vicariously liable for the assaults. The trial judge apportioned fault 75% to Canada and 25% to the church. The Court of Appeal found Canada 100% vicariously liable and exempted the church from liability on the basis of the doctrine of charitable immunity. It also held that, since Canada was more responsible than the church, and was in a better position to compensate the victims for damages, vicarious liability should not be imposed on the church.

The Supreme Court of Canada restored the trial judge's decision on vicarious liability. Applying the test from *Bazley*, it held that the Church was vicariously liable for Plint's sexual assaults because it employed Plint in furtherance of its interest in providing residential education to Aboriginal children, and had given him the control and opportunity to prey on vulnerable victims.

In finding Canada 100% liable, the Court of Appeal had relied on Canada's degree of control over the school, the church's limited mandate to support Christian education, and the difficulty in holding two defendants liable for the same wrong. The Supreme Court of Canada held that none of these reasons negated the imposition of vicarious liability on the church. First, the church played a significant role in running the residential school. Second, Plint's employment fell within the church's authority. Third, joint vicarious liability is acceptable where there is a partnership; the trial judge had specifically found a partnership between Canada and the church in running the school. There was no compelling reason to justify limiting vicarious liability to only one employer where an employee is employed by a partnership.

The Supreme Court rejected the doctrine of charitable immunity. Such a status-based exemption for non-profit organizations would mean that if the organization were not at fault, or less at fault, and the government could not be held liable, then no liability would be

imposed. Such a class-based exemption found support in neither principle nor jurisprudence. It would also undermine the policy goals of *Bazley* to motivate such organizations towards responsible screening and supervision.

#### 4. Punitive Damages and Vicarious Liability

*Blackwater* also confirms that vicarious liability cannot ground an award of punitive damages, even where such damages were awarded against the offending employee. A party must itself exhibit high-handed, malicious, arbitrary, or highly reprehensible behaviour to attract punitive damages.

#### 5. Vicarious Liability of the Crown Despite Statutory Immunity

The British Columbia Court of Appeal considered vicarious liability under the *Police Act* in *McVea (Guardian ad litem of) v. British Columbia (Attorney General)*, 2005 BCCA 104. The victim (whose family sued for compensation) was killed when her car was struck by a stolen vehicle that was being pursued by an RCMP constable. At the summary trial, the judge found that the driver of the stolen vehicle was 90% at fault, and the constable was 10% at fault. The constable was immune from liability under the *Police Act*, but the court held that the Attorney General was vicariously liable for the tort committed by the constable. The Court of Appeal dismissed the appeal, holding that vicarious liability is imposed without any finding of blameworthiness on the part of the person who is made vicariously liable. The effect of the *Police Act* is to attribute the victim's remedy against the police officer, who cannot be sued, to the Attorney General. Further, the Attorney General was jointly and severally liable with the driver for damages by virtue of s. 4(2)(a) of the *Negligence Act*.

The British Columbia Supreme Court reached a similar conclusion in *N. (D.) v. Oak Bay (District)*, 2005 BCSC 1412. Aavik was a parole officer in charge of supervising a convicted sex offender, Hall. While on release and supervised by Aavik, Hall began to coach hockey at the Oak Bay Recreation Centre, where he committed two sexual assaults against minor league hockey players. The court found that Aavik had failed to advise the Centre that Hall was a sex offender. Aavik owed a duty of care to the public generally and to the individual hockey players who had been assaulted. Although Aavik was given statutory immunity the Crown was vicariously liable.

## F. Contributory Negligence

### I. Contributory Negligence for Failure to Wear Seatbelt

The plaintiff in *Snushall v. Fulsang*, [2005] O.J. No. 4069 (QL) (C.A.), leave to appeal filed [2005] S.C.C.A. No. 519 (QL), suffered injuries in a motor vehicle accident on Old Scugog Road in Hampton, Ontario. The jury found the plaintiff 35% contributorily negligent for failing to wear a seatbelt. The Ontario Court of Appeal noted that the failure to wear a seatbelt differs from typical contributory negligence in a motor vehicle case, because the accident would have occurred whether or not the seatbelt was worn. The failure to wear the seatbelt does not cause the accident. The court endorsed the holding of Lord Denning in *Froom v. Butcher*, [1975] 3 All E.R. 520, that contributory negligence should be assessed at a maximum of 25% for failure to wear a seatbelt, and then only where wearing a seatbelt would have prevented the plaintiff's injuries altogether. Applied to the immediate case, the court noted that the seatbelt would have had only limited prophylactic effect even had the plaintiff correctly worn the seatbelt, and reduced the plaintiff's contributory negligence to 5%.

### 2. "Last Clear Chance" and the Negligence Act

In his dissent in *Lawrence, supra*, Justice Esson pointed to s. 8 of the *Negligence Act*, which apportions fault between parties each of whom contribute to the accident, "even if [the other] person had the opportunity of avoiding the consequences of that act and negligently or carelessly failed to do so". His Lordship observed that this provision abolished the doctrine of "last clear chance" that formerly denied recovery to a party able to avoid the injury. Thus where the defendant carelessly leaves a pole over which the plaintiff trips through her own inadvertence, s. 8 would oblige the trial judge to apportion the relative fault of the parties. His Lordship would have apportioned liability 75% against the defendant B.C. Hydro and 25% against the plaintiff.

### 3. Joint and Several Tortfeasors

The British Columbia Court of Appeal also had opportunity to consider contributory negligence specifically as between joint and independent tortfeasors in *Horvath v. Thring*, 2005 BCCA 127. The action arose out of an accident that occurred when Constable Horvath, a member of the RCMP, was injured when the motorcycle he was riding collided with a motor vehicle driven by Thring. The court found that the fact that one of the parties at fault for damage or

loss was immune from liability did not alter the effect of s. 4(2)(a) of the *Negligence Act*, which makes each person at fault jointly and severally liable for 100% of damage or loss, subject to the right of contribution or indemnity under s. 4(2)(b) of the Act. The fact that a person at fault may not be able to obtain contribution or indemnity pursuant to s. 4(2)(b) of the Act, did not absolve him or her from liability for the full amount of the damages payable under s. 4(2)(a) of the Act.

#### **4. Defendant So Reckless as to Negate Plaintiffs' Contributory Negligence**

In the facts leading to *Laface v. McWilliams*, 2005 BCSC 291, the personal defendant drank to gross inebriation at a hotel. He later drove into a large group of people standing between a truck and the roadway. The defendant hotel asserted that the plaintiffs were contributorily negligent by standing in the road and by drinking. The court rejected this argument. The defendant driver had engaged in conduct so reckless that it was unforeseeable in any case that the plaintiffs would face a risk of injury from their failure to take care under the circumstances.

### **G. Damages**

#### **1. Introduction**

*Blackwater v. Plint*, *supra*, contains a useful exegesis distinguishing between causation as the source of loss, and the rules of damage assessment in tort, confirming *Athey*, *supra*, as the governing precedent.

#### **2. Loss of Chance**

*Seattle*, *supra*, cited the recent House of Lords decision in *Gregg v. Scott*, [2005] UKHL 2, noting that the law in Canada and the United Kingdom does not attach liability to a defendant based only on proof of the loss of a chance of a better outcome. In *Gregg*, the defendant doctor had failed to diagnosis a lump under the plaintiff patient's arm as cancer of a lymph gland. The proper diagnosis was not reached until a year later. The medical evidence indicated, however, that the one-year delay had not robbed the plaintiff of a likely cure, but had merely reduced the chance of the patient's recovery from bad to worse: his chance of survival for another ten years fell from 42% to 25%. The House of Lords confirmed the trial judge's conclusion that the delay

had not deprived the plaintiff of the prospect of a cure because he probably would not have been cured in any case.

In a strong dissent, Lord Nicholls of Birkenhead criticized the arbitrariness of the current rule that allows recovery where the chance of a cure exceeds 50% but denies recovery if the chance of a cure is less than 50%. Lord Nicholls proposed that the law move away from the "all-or-nothing" balance of probability approach to hold that the diminution of a chance of recovery constitutes actionable damage, whether or not the patient's prospects immediately before the negligence exceeded or fell short of 50%.

### **3. Deductions from Award for Loss of Earnings**

In *L. (H.) v. Canada (Attorney General)*, 2005 SCC 25, the plaintiff sued the Attorney General of Canada for sexual assault suffered in a residential school. The Supreme Court of Canada reduced the trial judge's award of damages for loss of earnings on two bases. First, the court reduced the award to reflect time that the plaintiff spent in prison; the plaintiff's intervening criminal conduct interrupted the chain of causation from his sexual abuse to his loss of income while incarcerated. Second, the court deducted the social assistance payments received by the plaintiff during the relevant period.

### **4. Contingent Future Damages**

The New Brunswick Court of Appeal confirmed that despite the difficulty of assessing damages for potential future losses, such losses must be assessed once and for all at trial. In *PMM Assurance & Services Inc. v. Michaud*, 2005 NBCA 66, the small claims court judge had ordered the defendant to pay an amount into court, leaving it to be determined at a later date what the actual damages would be if and when those losses manifested in the future. The Court of Queen's Bench ordered the defendant to pay funds into court, where they would remain for 10 years until the court could establish the actual loss the plaintiff had sustained. The Court of Appeal rejected these wait-and-see approaches to future losses, and held that in loss of chance cases, the court must adjust damages in the trial decision, to take account of contingencies.

### **5. Compensation for Personal Loss of Income Through Corporation**

In *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141, the plaintiff operated a guest ranch in the name of his company. He received annual payments from the company as a repayment of his equity in the company

converted to debt. The plaintiff was injured in a motor vehicle accident, and withdrew from involvement in the ranch. At the time, the plaintiff was not formally employed by the company. The company started to suffer losses and was unable to continue to make debt repayments to the plaintiff. On appeal, the defendants argued that the trial judge erred in allowing damages for past loss of income because the loss was that of the company, not the plaintiff. The appeal was dismissed. The court found that the plaintiff suffered a real loss of income, regardless of how the pre-injury payments were characterized for accounting purposes.

## 6. Andrews Upper Limit for Non-Pecuniary Damages

The British Columbia Court of Appeal considered in several cases the difficulties that arise in forcing jury awards to comply with the upper limit for non-pecuniary damages established in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229.

In *Dilello v. Montgomery*, 2005 BCCA 56, the jury had assessed \$362,000 in non-pecuniary damages. The trial judge reduced this amount to \$281,000 in order to conform with the upper limit. On appeal, the award was reduced to \$200,000. The Court of Appeal held that there was no basis for reducing the amount further. The assessment for damages had been based on the jury's best judgment as to the appropriate amount of compensation for Dilello's injuries. Considering the injuries and loss suffered, the jury award was not inordinately high. Chief Justice Finch noted the difficulty that courts have had in applying the upper limit, particularly in cases involving jury assessments of non-pecuniary loss. The Chief Justice opined that the upper limit had no logical foundation when it was chosen in 1978, that the limit has been described as the upper limit only for "cases of this nature", and that the *Andrews* trilogy cases all concerned non-pecuniary awards made by trial judges, not juries. His Lordship concluded in *obiter dicta* that appellate courts' imposition of an upper limit "is an unjustified interference with the functioning of the jury as finders of fact, and a fettering of the proper principles of appellate review". Nonetheless, the Chief Justice concluded that the court was bound by *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674, to reduce non-pecuniary awards in excess of the upper limit.

In *Coulter v. Ball*, 2005 BCCA 199, leave to appeal dismissed [2005] S.C.C.A. No. 289 (QL), the court considered various aspects of a damages award arising from a serious motor vehicle injury. At trial the plaintiff was awarded damages of \$6.2 million. With respect to non-pecuniary damages, the trial judge's award of \$284,000, at the rough

upper limit, was upheld. Although the negative traits of the plaintiff's personality and lifestyle existed before the accident, the trial judge was found to have reasonably concluded that these traits were accentuated by the accident. The court set aside the other heads of damages. The award for past income lost was more than 30 times the plaintiff's earnings in the year preceding the accident. The award for future earning capacity was distorted by an erroneous finding that the plaintiff had good work experience and a good work ethic, which findings were refuted by the actual evidence. The cost of future care was similarly unsupported by the evidence.

In 2006 the Court of Appeal will release reasons in *Lee v. Dawson*, in which the upper limit on non-pecuniary damages, established by *Andrews, supra*, is challenged as inconsistent with Charter equality values. The Chief Justice's comments in *Dilello* may foreshadow a change in the law. Raising or eliminating the upper limit would clearly have significant implications for personal injury litigation.

#### **7. Notional Licence Fee**

The facts of *Douglas v. Hello! Ltd.*, [2005] EWCA Civ. 595, are set out below. The Douglases were awarded nominal damages of some £10,750 for mental distress and additional expenses. On appeal, the Douglases sought more substantial damages, namely a sum equal to the notional licence that they would have charged the defendant Hello! to permit them to publish the unauthorized photographs. The House of Lords rejected the notional licence fee on the basis that the Douglases had already provided an exclusive licence to OK!, and to award them a second licence fee would leave them unjustly enriched. The Lords also noted the unreality of such a licence where the Douglases had already sworn that they would never have permitted Hello! to publish the photographs in the first place.

#### **8. Reduction of Damages Due to Pre-Existing Condition**

In *Zacharias v. Leys*, 2005 BCCA 560, the court considered *Athey v. Leonati, supra*, at length. The trial judge found that there was a "measurable risk" that the plaintiff's pre-existing knee problems would have worsened regardless of the accident. Nonetheless, the trial judge had concluded on a balance of probabilities that surgery would not have been required, and declined to lower the damages award. The Court of Appeal noted that while the balance of probabilities standard should be applied for past events, future hypothetical contingencies should simply be given weight according to the probability of their

occurrence. Instead of remitting the matter back to trial on this sole issue, the court reduced the award by 25%, reflecting the approximate risk that the plaintiff's knee would have worsened regardless of the accident.

## H. Professional Liability

### I. Strother: Breach of Fiduciary Duty

All readers of this work will be familiar with the British Columbia Court of Appeal's reasons in *3464920 Canada Inc. v. Strother, supra*, a decision of international importance for solicitors.

The plaintiff Monarch carried on business in tax financing for the film industry. It retained Strother, a partner at Firm D, to act as a tax shelter advisor. In 1998, the Ministry for National Revenue amended the *Income Tax Act* to end Tax Assisted Production Services Financing ("TAPSF") tax shelters. Throughout 1998, Monarch on several occasions asked Strother whether there was a possibility of carrying on the TAPSF business. Strother repeatedly advised Monarch that tax sheltered financing was at an end in Canada and that "nothing could be done". Monarch then ceased its TAPSF business. Strother did not advise Monarch that in January 1998 he had been retained by Darc, a former employee of Monarch. Darc had a "new idea" for a "technical fix" that would allow a new form of TAPSF loophole; at that stage it was deemed to be a "long shot".

In 1998, after the Monarch retainer agreements expired, but while Strother and Firm D were still performing legal work for Monarch, Strother and Darc sought an advance tax ruling on Darc's new idea. Strother did not advise Monarch of his relationship with Darc, or that they would be applying for the advance tax ruling. Nor did he reveal that he was in business with Darc, and would receive shares in Darc's company Sentinel Hill. The tax ruling was favourable. Through Sentinel Hill, Darc and Strother proceeded to exploit the *Income Tax Act* exception and generate substantial revenues. Monarch eventually discovered the new "loophole", but was unable to organize in time to benefit from it.

Monarch brought an action for damages, accounting and disgorgement of profits for breach of Strother's fiduciary duty and duty of confidentiality.

The Court of Appeal held that a solicitor's fiduciary duty to a client is not restricted to the precise terms of any contractual retainer, but includes an ongoing obligation to disclose any conflict of interest and to obtain the client's consent prior to taking any actions in potential conflict. Strother's ongoing obligations to Monarch required him to disclose his personal conflict, and to cease to act for both Monarch and Darc. The obligations were particularly clear in light of Monarch's request for advice as to its ability to continue in the TAPSF business. The court held that Strother had breached his fiduciary duty to Monarch and was obliged to account for and disgorge profits that he had obtained from the breach.

## 2. Strother: Remedies

The court noted that the accounting remedy sought by Monarch was one of the most important remedies for correcting breach of fiduciary duty. Strother was required to account for and disgorge to Monarch all benefits, profits, interests, and advantages he received or which he might thereafter be entitled to receive, either directly or indirectly. Because of Strother's easy access to offshore corporations and accounts, the court further imposed a constructive trust to ensure that Strother "remained faithful to [his] duties".

## 3. Strother: Claims Against Law Firm

Monarch also claimed that Firm D was jointly and severally liable with Strother for his breach of fiduciary duty, as well as vicariously liable. The decision on this point was rendered in *3464920 Canada Inc v. Strother*, 2005 BCCA 385, leave to appeal granted [2005] S.C.C.A. 148 (QL). The court declined to find Firm D jointly and severally liable for breach of trust or knowing receipt of trust funds. Strother and Firm D were not engaged in a true "joint enterprise" in the breach of trust. Nor did Strother use Firm D as his agent or vehicle for receiving such profits. The court found that Firm D lacked the requisite mental element for knowing assistance: the firm lacked knowledge of Strother's breaches; nor was it reckless or willfully blind to those breaches.

In considering whether Firm D was vicariously liable to account for Mr. Strother's secret profits, the court noted the *Partnership Act*, codifying the equitable rule that the firm is liable for any loss caused by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm or with the authority of his or her partners. These provisions also make a partner jointly and severally

liable with his or her partners for everything for which the firm, while he or she is a partner, becomes liable. The court applied the *Bazley* test to Strother's secret arrangement with Sentinel Hill: did the practice of law as carried out by Firm D materially increase the risk of Strother taking a personal interest, or were there only "incidental" connections such as time and place, between Strother's unfaithful acts and the law practice? The court concluded that Strother's actions did not take place in the ordinary course of the business of the firm or with the authority of his partners under the *Partnership Act*, but constituted a "frolic of his own". The court accordingly dismissed Monarch's claim that Firm D be required to account for the profits received or receivable by Strother from Sentinel Hill.

That being said, Firm D was ordered to disgorge the substantial transactional profits it earned from Strother's breach. The firm acted for both Monarch and Sentinel Hill in the ordinary course of its business and with the authorization of its partners. Whether or not the disgorgement of these profits fell under the *Partnership Act*, fiduciary liability required the firm not to retain profits even if the partners other than Strother were personally innocent.

#### **4. Hilton v. Barker Booth and Eastwood**

The House of Lords reached a similar conclusion, less than two weeks after the release of Strother, in *Hilton v. Barker Booth and Eastwood (a firm)*, *supra*. The defendant firm of solicitors acted for both the plaintiff and a rogue property developer in the same transaction. The firm knew but did not disclose to the plaintiff that the developer was an undischarged bankrupt with several fraudulent offences to his name. Nor did the firm tell the plaintiff that they were advancing a substantial deposit to the fraudster developer "so as to clothe him with the appearance of being a man of substance". The transaction failed and the plaintiff was driven to bankruptcy. He sued the firm. The Lords concluded that where a firm serves two clients the firm may not prefer its duty to one client over the other. As in *Strother*, the Lords rejected the duty of confidentiality as an excuse for the solicitor's actions. The fact that the firm has placed itself in an impossible conflict does not exonerate it from liability.

#### **5. Negligence of Barristers and Solicitors**

In the facts leading to *Shiokawa v. Tohyama*, 2005 BCCA 95, solicitors prepared a power of attorney under a joint retainer on behalf of a credit union lender and a borrower Tohyama, who fraudulently

claimed to be the authorized representative of Shiokawa. The lender instructed the solicitors to ensure that the power of attorney was satisfactory to authorize the transaction. Tohyama's claimed power of attorney turned out to be a fraud. Shiokawa was successful in having registration of the mortgage cancelled. The credit union sued the solicitors for its lost loan. The Court of Appeal held that the solicitors did not breach their duty to the lender and that the lender did not prove that the solicitors were responsible for the loss. The circumstances surrounding the execution of the power of attorney were not so suspicious so as to put the solicitors on inquiry and require them to report their suspicions to the lender. The lender was sophisticated and was not vulnerable to or reliant upon the solicitors outside the scope of the retainer. The court noted that the retainer defines the extent of the lawyer's duties. Any implied duty of care must be related to what the lawyer is instructed to do. The duty to inquire further will arise only in unusual circumstances.

Courts should not stifle advocates' independence of mind and action by too readily finding a lawyer negligent for litigation advice, particularly where that advice concerns a settlement offer on the courthouse steps: *Moy v. Pettman Smith (a firm)*, *supra*. Advocates are paid for their opinions, not the reasons for those opinions; in the circumstances the lawyer was not required to spell out her reasoning as to why the offer ought to be rejected.

## 6. Brokers

In a decision of importance to the securities industry, the Ontario Court of Appeal upheld the trial decision in *Blackburn v. Midland Walwyn Capital Inc.* (2005), 2 B.L.R. (4th) 201, leave to appeal dismissed [2005] S.C.C.A. No. 196 (QL). Georgiou had acted as the Blackburns' stockbroker while employed by the defendants Midland Walwyn and then by Levesque Securities before being dismissed by both of these firms for cause. At trial, the judge found that the requisite degree of vulnerability did not exist to establish a fiduciary relationship between Georgiou and the Blackburns. He found, however, that all of the defendants owed a duty of care to the Blackburns, and that they had not discharged that duty. Georgiou was negligent, *inter alia*, by making inappropriate discretionary trades, disregarding client instructions, and engaging in market manipulation. Midland and Levesque were negligent in failing to properly supervise and control Georgiou, and in failing to warn the Blackburns of Georgiou's known history of breaking industry and internal rules, and engaging in questionable and overly aggressive trading.

## I. Specific Torts: Defamation

### I. Jurisdiction

In an important jurisdictional case, the Ontario Court of Appeal allowed the appeal of a decision permitting a recent resident of Ontario to sue the *Washington Post*: *Bangoura v. Washington Post* (2005), 258 D.L.R. (4th) 341 (Ont. C.A.), leave to appeal filed [2005] S.C.C.A. No. 497 (QL). At the time of the publication, the plaintiff lived in Kenya; he did not move to Ontario until three years later. The court noted that only seven copies of the offending publication were delivered to subscribers in Ontario, and that only one person, counsel for the plaintiff, had sought access to the offending article through the *Washington Post* paid internet archive. The court concluded that there was no real and substantial connection between the action and Ontario, and that it would be inappropriate for an Ontario court to take jurisdiction. This decision signals that courts will take a practical approach to jurisdiction and not be swayed by the theoretically limitless jurisdiction of an internet publication.

In *Burke v. NYP Holdings, Inc.*, 2005 BCSC 1287, the court found that the plaintiff, the former general manager of the Vancouver Canucks, was entitled to sue the defendant *New York Post* for comments that were republished on the defendant's website and thereby accessible to a British Columbia reader. In reasons released the same day as the Ontario Court of Appeal reversed *Bangoura*, the court relied on the trial court decision in *Bangoura*; *Burke* may thus be of limited precedential value.

### 2. Limitation Periods

The British Columbia Court of Appeal confirmed that on the Internet, as with other media, each publication of a libel gives a fresh cause of action, and restarts a fresh limitation period: *Carter v. B.C. Federation of Foster Parents Assn.*, 2005 BCCA 398. The plaintiff thus is not necessarily required to start a lawsuit within two years of first learning of a defamatory Internet posting that remains accessible on a website. In so concluding, the Court of Appeal preferred the general Commonwealth principle to the American "single publication rule" that would have left the plaintiff statute-barred for certain of the comments. Note that the mere passive existence of the offending passages on the Internet is insufficient to prove publication; the plaintiff bears the onus of showing that third party actually visited the site and read the article in question.

### 3. Defamation by Banks

In the bizarre facts leading to the decision in *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, 2005 BCSC 1091, the defendant bank froze the plaintiff's funds after discovery that a \$776,650 cheque was fraudulent. The bank advised various people within the bank about the counterfeit cheque, and initiated a grid warning to other banks about the counterfeit cheque. The bank also contacted other banks to which the plaintiffs had issued cheques, including Citibank.

The court confirmed that financial institutions must take care not to defame individuals under investigation for fraudulent cheques and other schemes. They must also ensure that only appropriately qualified officers communicate and receive personal account information about the suspected perpetrators of fraud. Failure to do so will expose the financial institution to damages for defamation, breach of privacy, and breach of provincial and federal privacy laws.

The court found not to be defamatory those communications that did not identify the plaintiffs as being under investigation for fraud or as being the perpetrators of a fraud. These communications were phrased neutrally, to indicate merely that an investigation into the counterfeit cheque was being carried out. The bank was found liable for communications that supported the innuendo that the plaintiffs were active participants in cheque frauds. The case is under appeal, but not with respect to the defamation issues.

### 4. Meaning: Publication as a Whole

*P.G. Restaurant Ltd. v. Cariboo Press (1969) Ltd.*, 2005 BCCA 210, supplementary reasons 2005 BCCA 288, leave to appeal dismissed [2005] S.C.C.A. No. 270 (QL), provides a strong precedent for the principle that a court must consider the overall effect of an allegedly defamatory article: a court is not to dissect an article minutely and view individual passages in isolation. The court referred to the venerable defamation principle of "bane and antidote": if something disreputable is said about the plaintiff in one part of a publication, but is qualified or corrected in another part of the same publication, both passages must be considered in determining whether the overall article defames the plaintiff. The article in question, "Vomit Serves Up Virus at Buffet" created in some parts the impression that a queasy customer had vomited on the plaintiff's restaurant buffet table, rather than simply spraying microscopic particles of the Norwalk Virus. The article also featured, however, a prominent "pull-out" quotation from a health

officer that “it may not have been the food that was involved”; this quotation served as an antidote to the article’s earlier suggestion that restaurant patrons ate vomit-laden food.

## 5. Meaning: Specific Examples

In this modern age it is not defamatory to allege that the plaintiff “stole” a man’s wife: *Robbins v. Pacific Newspaper Group Inc.*, 2005 BCSC 1634. It is, however, defamatory to call the plaintiff a hypocrite.

## 6. Alternative Claims in Negligence and Defamation

*Dinyer-Fraser v. Laurentian Bank*, 2005 BCSC 225, confirms that one may sue concurrently for defamation and “negligent publication” out of the same facts. Some might call such a claim an end-run around the time-honoured and carefully-tuned defences in defamation, leaving free speech concerns in the dustbin. In *Dinyer-Fraser* the defendants had accidentally distributed a warning to clients about a temporary order issued by the BC Securities Commission to the plaintiff’s clients; the warning erroneously indicated that their investments (and by extension, the plaintiff) were the subject to the order.

In allowing the action for negligence publication, the court relied upon a House of Lords decision, *Spring v. Guardian Assurance Plc.*, [1995] 2 A.C. 296 (H.L.). The court held that there must exist a sufficient duty of care between the plaintiff and defendant, and the harm suffered must exceed merely reputational harm. The court noted that where the harmful publication was unintended, those policy concerns of suppressing free speech are artificial.

Note that the 2004 trial decision in *P.G. Restaurant*, *supra* (since overturned on other grounds), expressly questioned *Spring* and stated its preference for the *Spring* dissent, which would have negated an *Anns* duty of care on the policy grounds that the claim, if framed conventionally in defamation, would have been defeated by the defence of qualified privilege. *Dinyer-Fraser* noted that the *P.G. Restaurant* comments were *obiter dicta* and did not follow them.

## 7. Defences: Absolute Privilege

*Hamouth v. Edwards & Angell*, 2005 BCCA 172 extended the defence of absolute privilege to a letter written by a law firm in response to a securities exchange commission investigation of its client. Even though the letter did not refer to the investigation, it was made with respect to that quasi-judicial proceeding. The court noted that the commission

was a public body exercising quasi-judicial functions and thus communications made with reference to its proceedings were protected by absolute privilege. The court also noted that lawyers should not fear defamation actions for communications made fulfilling their obligations to their clients. The plaintiff's claim was accordingly struck.

### 8. Defamation Defences: Reynolds Qualified Privilege

The 2001 House of Lords decision in *Reynolds v. Times Newspapers*, [2001] 2 A.C. 127 set down an alternative test for qualified privilege which looked less at the relationship between the communicator of the defamation and the recipient, and more at the circumstances of the publication, particularly the level of responsibility exhibited by the defendant. The defence arises with wide-scale publications, as in newspapers or broadcasts, and has been applied in about 18 Canadian decisions. In 2005, the *Reynolds* defence was raised and rejected in a series of English cases, including *Jameel v. Wall Street Journal Europe SPRL (No. 2)*, [2005] EWCA Civ. 74, and *McKeith v. Newsgroup*, [2005] EWHC 1162 (Q.B.). *Jameel* will be soon considered by the House of Lords.

In *Armstrong v. Times Newspapers Ltd.*, [2005] EWCA Civ. 1007, brought by the famous cyclist over doping allegations, the Court of Appeal held that the overall behaviour of a journalist defendant must be considered; the court must not elevate one *Reynolds* factor (in this case whether the allegation was put to the plaintiff before publication) above all others.

### 9. Defamation Damages

In *Ager v. Canjex Publishing Ltd.*, 2005 BCCA 467 the court quashed an earlier award of \$100,000 aggravated damages made by the trial court to a defamed engineer; absent a clear finding of malice on the part of the defendant, it was inappropriate to award aggravated damages.

Where the plaintiff declines to defend his reputation by testifying at his defamation trial, damages will likely be modest: *Robbins v. Pacific Newspaper Group Inc.*, *supra*. In *Robbins*, damages totalled only \$20,500 despite judicial criticism of the acts and omissions of the media defendants.

### J. Specific Torts: Passing Off

*Kirkbi AG v. Ritvik Holdings Inc.*, 2005 SCC 65, provides the latest Supreme Court of Canada pronouncement on the tort of passing off. The court confirmed that a plaintiff under Canadian law must prove

three elements: (1) the existence of goodwill; (2) deception of the public due to a misrepresentation; and (3) actual or potential damage to the plaintiff. The court concluded that the plaintiff, the maker of Lego, could not establish the first requirement: it could not show the existence of goodwill in respect of the distinctiveness of the Lego interlocking bricks. Such goodwill lay in the distinctiveness of the product, which distinctiveness consisted of the utilitarian process and techniques that had been protected by now-expired patents. The plaintiff could not rely upon the common law tort of passing off to perpetuate a monopoly which for sound public policy reasons ended with the expiry of the patents. For further discussion of *Kirkbi*, please see the Trade-marks chapter of this volume.

## **K. Specific Torts: Breach of Confidence**

### **1. Breach of Confidence: Spousal Confidences**

In *L. (M.S.) v. G. (H.R.)*, 2005 BCSC 488, a family relations action, the ex-wife sued the ex-husband for breach of confidence after he disclosed that she had worked as an escort during the marriage and that she suffered from sexually transmitted disease. The court found that it was understood between the parties that these matters would not be disclosed. As no direct damages could be shown, damages were nominal: \$5,000. An injunction was issued against future publication. The first day of trial was Valentine's Day.

### **2. Breach of Confidence: Public-Domain Commercial Confidences**

In *Douglas v. Hello! Ltd.*, *supra*, the English Court of Appeal issued lengthy and scholarly reasons illuminating the merging and amorphous torts of breach of confidence and unlawful interference with business relations. The legal exposition arises from glittering celebrity. Michael Douglas and Catherine Zeta-Jones had provided exclusive rights to photograph their wedding to OK! magazine for £1,000,000. The happy nuptials were marred by an incognito paparazzo who sold surreptitious photographs to OK!'s competitor Hello! (exclamation marks in original). The trial court found that the exclusive right to photograph the wedding was a commercial secret for which both the Douglases and OK! could sue in breach of confidence for Hello!'s unauthorized publication. With respect to the Douglases' alternative claim based on breach of privacy, the trial judge had held that the law of confidence provided them with an adequate remedy, and that it

would be up to Parliament and not the court to create a statutory right of action.

The English Court of Appeal confirmed that the Douglasses were entitled to damages for Hello!'s breach of confidence, but that OK! had no such right of action. With respect to the Douglasses, the court applied the decision of the House of Lords in *Campbell v. MGN Ltd.*, [2004] UKHL 22 (for discussion of which, see last year's *Annual Review* at pp. 642-43). The photographs of the wedding clearly portrayed aspects of the Douglasses' private life that fell within the sphere of confidentiality that one would expect to be preserved by others. Hello! also argued that the OK! contract removed any expectation of privacy, as it placed the photographs in the public domain. The court found that the photographed intrusion into the Douglasses' private domain was inherently objectionable. While the dissemination of those photographs into the public domain through other means may lessen damages, it is not fatal to a claim for breach of confidence.

#### **L. Specific Torts: Interference with Economic Relations**

The Court of Appeal in *Douglas v. Hello! Ltd.* also dismissed OK!'s alternative claims based on the economic torts of unlawful interference with business, conspiracy to injure by unlawful means, and conspiracy to injure with predominate purpose of doing so. The court considered at length the jurisprudence and rationale for these obscure but important torts, specifically the mental element required. The court noted that the law has always shown a reluctance to impose liability in tort for causing purely economic loss. The court identified the gist of all of the economic torts to be the intentional infliction of economic harm on the plaintiff. It is not enough that the defendant knew that economic harm would occur as a result of the defendant's conduct. It must be shown that the object or purpose of the defendant is to inflict harm on the plaintiff, either as an end in itself, or as a means to another end. Foresight of harm, or recklessness as to harm, is insufficient. Accordingly, the court concluded that while Hello! knew that OK! may be harmed by Hello!'s scoop of OK!'s exclusive, the publication of the unauthorized photographs was not done to intentionally inflict economic harm on OK!

For a discussion of the differing Canadian tests of the tort of interference with economic relations, see last year's *Annual Review*, pp. 638-640.

### **M. Specific Torts: False Arrest and Imprisonment**

In *Mullins v. Levy*, 2005 BCSC 1217, the plaintiff attended the emergency ward of the Vancouver General Hospital after awakening with body tremors and feelings of distress. It was arranged that the plaintiff would see a doctor in the Psychiatric Assessment Unit. A resident working at the hospital who had not completed her residency concluded that the plaintiff was suffering a manic episode and required immediate treatment. One doctor signed a certificate under the *Mental Health Act* to involuntarily commit the plaintiff, and security guards were assembled outside the plaintiff's room. After detention, a second doctor signed the requisite second certificate. The plaintiff was detained for five days and medicated throughout that period against his express wishes.

The court concluded that the defendants had not complied with the requirements of the Act. Contrary to the Act, the plaintiff was involuntarily detained prior to the signing of two medical certificates attaching opinions that the person was mentally disordered and required detention. The doctors failed to adequately examine the plaintiff and review the circumstances of his treatment prior to signing the certificates and taking the extreme step of involuntary admission. Their actions constituted the torts of negligence as well as false arrest and false imprisonment of the plaintiff. The court awarded general and aggravated damages totalling \$15,000.

### **N. Specific Torts: Misfeasance of Public Office**

The British Columbia Court of Appeal allowed the appeal in *E. (D.) (Guardian ad litem of) v. British Columbia*, 2005 BCCA 134, supplementary reasons 2005 BCCA 289, from a decision of the trial judge that three superintendents of a provincial mental hospital did not abuse their public office when they recommended the sterilization of the appellant mental patients pursuant to the *Sexual Sterilization Act*. On appeal, Justice Donald condemned the Act as bad law, poorly crafted, and based on uncertain genetics. That said, it was not enough for the plaintiffs to show that the superintendents had administered a bad law. To succeed in a claim for misfeasance of public office, the appellants had to prove the existence of deliberate unlawful conduct in the exercise of public functions, and awareness that the conduct was unlawful and likely to injure the plaintiff. New trials were ordered for the claims where the evidence indicated that the superintendents disregarded their legislative mandate, that is, to prevent the patients' procreation upon their returned to the community.

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### O. Specific Torts: Occupiers' Liability

In *Leweke v. Saanich School District No. 63*, 2005 BCCA 304, the plaintiff slipped and injured herself on bleachers at a school while attending a parent-teacher night. The court dismissed the plaintiff's action in negligence and under the *Occupiers Liability Act* against the school board. An occupier need only ensure that its premises are reasonably safe; it need not serve as an insurer to all visitors. The school board had not departed from the required standard of care. The plaintiff's inappropriate footwear was the sole cause of the accident.