CASE SUMMARY

GOOD FAITH IN PERFORMING CONTRACTS IS NOW THE LAW

Bhasin v. Hrynew

The legal community from coast to coast was immediately abuzz when the Supreme Court of Canada released its unanimous decision in Bhasin v. Hrynew last November. Some lawyers hailed the decision as the most important case in Canada in 20 years. Others said the matter of good faith was still in limbo and that a huge tsunami of new good faith cases would soon be sweeping ashore.

The Facts

The defendant, Can-Am, marketed educational plans to investors and used retail dealers who were called enrolment directors. Both Bhasin and the defendant, Hrynew, were enrolment directors for Can-Am. Hrynew was a competitor of Bhasin.

There was constant animosity between Bhasin and Hrynew. Hrynew pressed Can-Am not to renew its agreement with Bhasin. Can-Am is alleged to have dealt dishonestly with the plaintiff, Bhasin, and ultimately gave in to the pressure of Hrynew, likely influenced by the fact that Hrynew had the largest agency in Alberta and a good working relationship with the Alberta Securities Commission, which regulated Cam-Am’s business.

Continued on Page 2
Hrynew proposed a merger with Bhasin on numerous occasions, which Bhasin refused. Hrynew encouraged Cam-Am to force the merger. The trial judge considered the proposed merger to be, in effect, a hostile takeover of Bhasin’s agency.

The Alberta Securities Commission raised concerns about issues of compliance among Can-Am’s enrolment directors and, in 1999, required Cam-Am to appoint a provincial trading officer to review compliance. Can-Am appointed Hrynew to that position.

The new role required Hrynew to audit Bhasin and the other employment directors. Bhasin objected to Hrynew reviewing his confidential business records. Can-Am approached the commission many times with a plan that Bhasin work for Hrynew. None of this was known to Bhasin. Can-Am repeatedly told Bhasin that all the information received about him would be treated as confidential and that the commission had rejected a proposal to appoint an outside provincial training officer (“PTO”). Apparently neither statement was true.

Bhasin continued to refuse to allow Hrynew to audit his records, and Can-Am finally gave notice of non-renewal of their contract. Bhasin lost the value of his business, $87,000.

Bhasin sued Can-Am and Hrynew. The trial judge found that it was an implied term of the contract that decisions about whether to renew the contract would be made in good faith. The trial judge found that Can-Am acted dishonestly with Bhasin throughout the events leading up to the non-renewal: it misled him about its intentions with respect to the merger and about the fact that it had already proposed the new structure to the Commission; it did not communicate to him that the decision was already made and final, even though he asked; and it did not communicate with him that it was working closely with Hrynew to bring about a new corporate structure with Hrynew’s being the main agency in Alberta. The trial judge also found that had Can-Am acted honestly, Bhasin could have “governed himself accordingly so as to retain the value in his agency”.

Note: Readers should not rely solely on the interpretation of a court decision summarised in this publication, but should consult their own solicitors as to the interpretation of the written reasons rendered by the court. The publishers and editors disclaim any liability which may arise as a result of a reader relying upon contents of this publication. The opinions expressed in the articles are those of the authors, and not necessarily those of the publisher and editors of the Construction Law Letter.
Bhasin’s contract with Can-Am contained an “entire agreement clause” stating that there were no “agreements, express, implied or statutory, other than expressly set out” in it. The trial judge held that this clause did not preclude the implication of a duty of good faith and allowed Bhasin’s bad faith claim.

The Alberta Court of Appeal allowed the respondents’ appeal and dismissed Bhasin’s lawsuit. The court found his pleadings to be insufficient and held that the lower court erred by implying a term of good faith in the context of an unambiguous contract containing an entire agreement clause.

The Supreme Court of Canada reversed the Court of Appeal and held that the trial judge was right. The court enacted a new and clear common law duty that applies to all contracts:

1. Good faith during contractual performance is now a general organizing principle of the law.

2. From the over-arching new duty of good faith in all contracts flows a further common law duty to act honestly in the performance of the contract and reasonably, not capriciously.

The court stated “that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract”.

The court set out its reasons for the new duty, its objectives, and some guidance for future cases as follows:

Anglo-Canadian common law’s resistance to acknowledge a generalized and independent doctrine of good faith performance of contracts has led to an unsettled and incoherent body of law that has developed piecemeal and that is difficult to analyze. The court found that approach to be out of step with the civil law of Quebec and most jurisdictions in the United States and produced results that were inconsistent with the reasonable expectations of commercial parties. Justice Cromwell, writing for the unanimous court, put forward the following two-step approach:

33 In my view, it is time to take two incremental steps in order to make the common law less unsettled and piecemeal, more coherent and more just. The first step is to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract, which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second is to recognize, as a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations.

34 In my view, taking these two steps is perfectly consistent with the Court’s responsibility to make incremental changes in the common law when appropriate. Doing so will put in place a duty that is just, that accords with the reasonable expectations of commercial parties and that is sufficiently precise that it will enhance rather than detract from commercial certainty”.

The court cautioned that the new development should not lead to a form of ad-hoc judicial moralism or “palm tree” justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.

The precise content of honest performance will vary with context, and the court made clear that the parties should be free in some contexts to relax the requirements of the doctrine so long as they respect its minimum core requirements.

Unfortunately for anyone hoping for the further guidelines on what the new duty will entail, the court found it unnecessary in this case to define in general terms the limits of the implications of the organizing principle of good faith.

Conclusion

The two incremental steps the court took to make the commercial law more coherent and just, in my view, are giant steps made to this part of Canadian law. It may very well be one of the most important cases, if not the most important, decided in Canada in the last 20 years.
I predict that there will be further incremental steps as the subject of good faith unfolds, whenever it is appropriate, and that more specific legal doctrines will be forthcoming from the good faith umbrella. Only time will tell.

In the meantime, all parties to a contract, before it is entered into, should be aware that good faith and honesty are now part of the law.

**Supreme Court of Canada**
McLachlin C.J.C., LeBel, Abella, Rothstein, Cromwell, Karakatsanis, Wagner JJ.
November 13, 2014

**CASE SUMMARY**

Soizic Reynal de St. Michel
Construction Lawyer

**ANTICIPATING THE EFFECTS OF BHASIN v. HRYNEW THROUGH THE EVOLUTION OF GOOD FAITH IN QUEBEC**

*Bhasin v. Hrynew*

The recent Supreme Court of Canada decision in *Bhasin v. Hrynew* clarifies Canadian common law with respect to the doctrine of good faith in contractual relationships. The court held that good faith is a general organizing principle of the law of contracts and gives rise to a duty to act honestly in the performance of contractual obligations and in the exercise of contractual rights. How will this decision affect the day-to-day performance of construction contracts throughout common law provinces?

Justice Cromwell wrote the unanimous decision and explained that the duty to perform honestly accords with the reasonable expectations of commercial parties. In other words, the moral obligation to perform contractual obligations honestly has always existed, but it is now recognized as an enforceable duty in Canadian common law jurisdictions. The failure to act honestly in the performance of contractual obligations or in the exercise of contractual rights now amounts to a breach of contract. This duty will most likely take an increasing part in the litigation and the resolution of contractual disputes. Until the Supreme Court released the *Bhasin* decision, when a party suspected dishonest conduct on the part of their contracting party, they could allege fraud, misrepresentation, or malice but ran the risk of very serious adverse cost consequences if they were unable to prove the stand-alone causes of action at trial. In the future, we can expect a number of court decisions applying the “new” duty to a growing range of fact situations and identifying specific types of behaviours from which bad faith and failure to perform honestly can be inferred.

This article briefly reviews the principle of good faith in Quebec, its application, and resulting duties in recent Quebec Court of Appeal decisions involving construction disputes. This review may provide a few clues on possible developments resulting from *Bhasin* and may also raise a few cautionary flags for the construction industry.

The obligation to act in good faith was expressly codified in Quebec for the first time in articles 6, 7, and 1375 of the *Civil Code of Quebec*, which read as follows:

**ENJOYMENT AND EXERCISE OF CIVIL RIGHTS**

6. Every person is bound to exercise his civil rights in good faith.

7. No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner, and therefore contrary to the requirements of good faith.

**OBLIGATIONS IN GENERAL**

1375. The parties shall conduct themselves in good faith both at the time the obligation arises and at the time it is performed or extinguished.

Justice LeBel has identified a fundamental difference in contract law between Quebec and common
law provinces in a conference he gave in 2011 at McGill University. In Quebec, contract law does not just flow from the pure meeting of the minds and contractual freedom as it does at common law. Instead, it is founded on the principle of contractual justice, because a free and equitable society requires a legal system that does not condone a “law of the strongest” but instead supports the principle that no one should benefit from their own wrongdoing. On this point, Justice LeBel quoted an article by late former Justice Gonthier:

In the execution of contractual obligations, the requirements of good faith protect against an abusive exercise of individualistic rights, however lawful the exercise of those rights may be in themselves. […] Bad faith violates these values that form the basis of harmonious and mutually beneficial relationships in our society and runs counter to the spirit and core values of fraternity.

The current version of the Civil Code of Quebec was enacted in 1991 and came into force in 1994, but starting in the late 1970s, the Civil Code Revision Office and the courts were already considering the idea of an overarching principle of good faith in Quebec. In 1990, the Supreme Court of Canada rendered a decision of critical importance, 

_Houle c. Canadian National Bank_, which recognized the doctrine of abuse of contractual rights and held that proof of malice is not necessary to establish abuse of rights. Instead, the parties’ conduct is measured against the standard of the prudent and reasonable individual. The Supreme Court took the next incremental step in the application of good faith in contracts in Quebec, with the 

_Bank of Montréal v. Bail ltée_ decision in 1992, when it held that a duty to inform arises from the obligation of good faith in the performance of contracts. This duty includes both the duty to inform and the duty not to give false information. The court held that there are three unique factors to construction contracts with high risks and high stakes, which affect the implied duty to inform:

- the allocation of risks (The party assuming the risk (e.g., during tenders) must inform itself, but the other party must not mislead it by its action or inaction.)
- the relative expertise of the parties (The party who designed the plans and specifications (or obtained them from their own designer) is more informed and has more expertise; its obligation to inform increases accordingly.)
- continuous disclosure of information (The continuing contract formation during the lengthy performance of most construction contracts, with often numerous changes and extras, requires continuous disclosure of information to ensure continued meeting of the minds.)

Twenty years later, the implied obligations imposed on contracting parties in Quebec go as far as a positive obligation to cooperate. In the last two years, the Quebec Court of Appeal rendered three important decisions for the construction industry. In all three cases, 

_Birdair inc. c. Danny’s Construction Company Inc., Hydro-Québec c. Construction Kiewit Cie., and Dawco Electric inc. c. Hydro-Québec_, the dispute arose from a familiar succession of events: the plaintiff contractor or subcontractor had to perform substantial changes in the contract or subcontract for additional work or unforeseen work and as a result incurred escalating costs, delays, and damages for which it claimed against the owner or general contractor. In a recent presentation at the 25th Construction Superconference in Montreal, Quebec, counsel John Murphy concluded from his review of these decisions that the obligation to cooperate includes, among others, the following:

- acknowledgment of the facts specific to the project (delays and changes)
- the diligent exchange of information before and throughout the project
- cooperation between the parties before the start of the project or the start of work on any change in scope
the protection of the parties’ reasonable expectations

the intensification of the obligation relative to the project size (in scope, time and price) and to any inequalities between the parties.

In *Bhasin*, the court clearly set the general duty to perform honestly in common law provinces apart from the duty to cooperate in Quebec:

This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract.

I am at this point concerned only with a new duty of honest performance and, as I see it, this should not be thought of as an implied term, but a general doctrine of contract law that imposes as a contractual duty a minimum standard of honest contractual performance.

This distinction between a positive “duty of disclosure” and the duty “not to knowingly mislead” may not remain as clear, depending on the fact situations brought before the courts in the future. As the Supreme Court noted in *Houle*, both withholding relevant information and providing false or misleading information generally represent two sides of the same coin.

The distinction between a duty to act honestly and the Quebec duty of loyalty may be a difference only in semantics. For example, in *Kiewit*, the contractor relied on the owner’s representations regarding additional compensation for changes in the scope of work. Kiewit relied on these representations and continued to perform the additional work. The court held that Hydro-Québec could not, in good faith, rely on the four corners of the contract to avoid paying Kiewit, as doing so would represent a breach of its duty of loyalty.

Let us consider a similar situation in Ontario: unexpected conditions surface in the course of the project, an error in the initial design causes substantial changes in the scope of work, or the project is delayed for reasons outside of the control of the plaintiff contractor. The contractor can prove that the owner acknowledged that it would satisfy a claim for additional compensation but then refused to pay (disputing quantum or hourly rates, for example). A court would not find that the owner breached its duty of loyalty, because there is no such duty in Ontario. The court’s reasoning, however, will likely be that there was a meeting of the minds between owner and contractor at the time, because the owner’s only alternative was to watch the project come to a grinding halt, that the owner misled the contractor so the contractor would complete and finance the work. The court would then probably conclude that the contractor is entitled to just compensation and that the owner cannot benefit from its own wrongdoing.

Justice Cromwell carefully acknowledged that good faith contractual performance is a general organizing principle of the common law of contracts and merely imposes a new duty to perform honestly. He also repeatedly qualified this change as an “incremental change”, suggesting that further applications of the principle of good faith may come in time and must be incremental. The evolution of the obligation of good faith and resulting duties in Quebec was also an incremental one, from the 1991 enactment of the *Civil Code of Quebec* until now. It would be prudent for owners, contractors, and subcontractors (or their lawyers) to consider some of the features of the duty to cooperate that John Murphy identified and start adjusting their contractual practices. For example, once an owner acknowledges legitimate delays and scope changes, that owner should make regular payments for those changes and delay costs rather than force the contractor to finance them in the expectation that “there may be back-charges” for deficiencies, contractor delays, or billing disputes. A practical and conservative approach would dictate that any act or omission that has the effect of giving party A to the contract an unfair advantage over party B and/or preventing party B from meeting its reasonable contractual
expectations will be closely examined against the new duty to act honestly.

Supreme Court of Canada

McLachlin C.J.C., LeBel, Abella, Rothstein, Cromwell, Karakatsanis, Wagner JJ.

November 13, 2014

CASE SUMMARY

COURT OF APPEAL PROTECTS ABILITY OF LAWYERS AND EXPERTS TO CONFER

Moore v. Getahun

In a recent decision that will have important consequences for litigants in construction disputes, the Ontario Court of Appeal has protected the right of lawyers and experts to communicate when that communication is for the purpose of ensuring that experts’ reports are clear and responsive to the questions in issue in a trial. In rendering its decision in Moore v. Getahun, the Court of Appeal disagreed with comments made by the trial judge—comments that had been widely criticized in the legal community and that if taken to be law would have made it much more difficult for parties in construction disputes to present their evidence clearly and cost-effectively to a court.

Background

While the case reverberated through the world of construction litigation, it was in fact a medical malpractice suit. The plaintiff, Blake Moore, was 21 years old when he seriously injured his wrist in a motorcycle accident. With the fractured bones partially reset, his wrist was wrapped in a full cast. Shortly thereafter, Moore developed compartment syndrome, a dangerous build-up in pressure within the muscles and nerves. Compartment syndrome is common following high-impact injuries. Moore suffered permanent muscle damage in his forearm. The trial judge found that Moore’s injuries were made worse as a result of improper use of a full cast, which did not allow for any pressure relief in the affected tissues. The defendant doctor was found liable.

Trial Judge’s Findings on Expert Evidence

What took this case out of the realm of medical malpractice and made it relevant to civil litigation in general were the trial judge’s comments on expert evidence. The defendant called several experts. One of them, Dr. Ronald Taylor, filed two reports. He acknowledged that he had spent an hour and a half on the phone, discussing his second report with lawyers for the defendant. The trial judge held that this telephone conversation was improper. In her reasons, the trial judge wrote, “The practice of discussing draft reports with counsel is improper and undermines both the purpose of [the Rules of Civil Procedure] as well as the expert’s credibility and neutrality”.

In the trial judge’s view, the role of an expert changed when amendments to Ontario’s Rules were introduced in 2010. These changes imposed new obligations on experts, including a duty to sign an explicit acknowledgement of their duty to the court rather than to the party retaining them. In the view of the trial judge, the amendments to the Rules mean that an expert’s “primary duty is to assist the court”. Accordingly, she concluded that “counsel’s [prior] practice of reviewing draft reports should stop. Discussions or meetings between counsel and an expert to review and shape a draft expert report are no longer acceptable”.

The trial judge also imposed significant disclosure obligations on communications between lawyers
and experts, finding that there should be “full disclosure in writing of any changes to an expert’s final report as a result of counsel’s corrections, suggestions, or clarifications, to ensure transparency in the process and to ensure that the expert witness is neutral”.

**Reaction in the Legal Community**

The trial judge’s comments attracted criticism from a broad spectrum of the legal community. The Advocates’ Society, a non-profit organization representing over 5,000 litigators across Canada, produced a position paper arguing that the trial judge went “too far” in categorically rejecting communication between lawyers and experts to revise expert reports. Criticism of the trial decision came from across the legal spectrum as well as from organizations whose members often give expert evidence in court. Six organizations were granted intervener status on the appeal; all argued that the trial judge had erred in her comments on the proper relationship between lawyers and experts.

**Appeal**

The Court of Appeal disagreed with the trial judge’s comments on expert evidence. Writing for a unanimous three-person panel, Justice Sharpe found there is nothing improper with lawyers and experts discussing an expert’s draft report. In the Court of Appeal’s view,

> it would be bad policy to disturb the well-established practice of counsel meeting with expert witnesses to review draft reports. Just as lawyers and judges need the input of experts, so too do expert witnesses need the assistance of lawyers in framing their reports in a way that is comprehensible and responsive to the pertinent legal issues in a case.

This, of course, does not mean that lawyers are free to shape the experts’ opinions or conclusions—those are for the experts alone. But “consultation and collaboration” are entirely appropriate to ensure a report “addresses and is restricted to the relevant issues and […] is written in a manner and style that is accessible and comprehensible”.

The Court of Appeal also disagreed with the trial judge’s view that the law had been changed in 2010 by the amendments to the *Rules*. The Court of Appeal found that those changes did not create any new duties but simply reinforced those that already existed in the common law—namely, the duty of the expert to be independent and the duty of the expert to assist the court rather than his or her client.

The Court of Appeal also clarified when drafts of expert reports need to be produced. In so doing, the court actually approved the standard that is less onerous than the one many litigators have been following in recent years. The recent practice, following a number of lower-court decisions, has been to produce all drafts of expert reports. This practice will likely now come to an end, as the Court of Appeal found that draft reports will only need to be produced when a party can show that a lawyer and an expert communicated in a way likely to interfere with the expert’s duty to be independent and objective. The Court of Appeal cited, as an example, a recent case in which an expert admitted under cross-examination that he did not actually draft the report containing his expert opinion.

Absent this sort of factual foundation, however, draft reports and communications between a lawyer and a witness will attract litigation privilege and will not routinely need to be disclosed. The Court of Appeal found that on the facts of this case, there was no evidence that the changes made by Dr. Taylor were anything more than “minor editorial and stylistic modifications” made to improve the clarity of the reports.

**Conclusion**

The Court of Appeal’s decision will be welcome news to many litigants in construction disputes. As industry participants well know, construction litigation frequently turns on complex technical issues that judges are not equipped to understand without
the assistance of expert witnesses. Those who have been involved in litigation involving expert witnesses will also know that the first drafts of experts’ reports do not always address all of the necessary issues or do so in sufficiently clear language. Lawyers are hired to present a case clearly to a court, and one of the areas in which they can be most valuable is in ensuring that expert evidence is presented concisely and intelligibly. While expert evidence must always be that of the expert—never of the lawyer—the Court of Appeal’s decision has affirmed the common-sense proposition that changes to the style rather than the substance of expert evidence are proper and should not attract the disapproval of a court.

Ontario Court of Appeal
Laskin, Sharpe and Simmons J.J.A.
January 29, 2015

ARTICLE

GROSS NEGLIGENCE—Pronounced Dead 100 Years Ago, But Alive and Well

The concept of gross negligence has been much criticized. One of Canada’s leading texts on the law of torts cites a former United States judge to the effect that the difference between negligence, gross negligence, and recklessness is akin to the difference between a fool, a damned fool, and a God-damned fool. As early as the 1920s, the concept of gross negligence was said to serve no purpose at law.

Yet, almost 100 years later, Canadian courts continue to draw a distinction between the two levels of negligence. Today, the concept of gross negligence is most commonly raised in an attempt to circumvent limitation of liability clauses. A typical such clause will provide that the parties will not be liable for consequential damages except to the extent that the damages result from gross negligence. Courts have had difficulty defining the concept. In Adeco Exploration Company Ltd. v. Hunt Oil Company of Canada Inc., Hunt Oil was the co-owner and operator of an oil and gas lease. Hunt was responsible for renewing the lease but failed to do so because of a wholly inadequate renewal application. The Alberta Court of Appeal looked for definitions in the case law and found references to “very great negligence”, “conscious wrongdoing”, and “a very marked departure” from the standard of care required. In Holland v. City of Toronto, the Supreme Court of Canada described “the character and the duration of the neglect to fulfill [the] duty, including the comparative ease or difficulty of discharging it” as “important, if not vital, factors in determining whether the fault (if any) ... is so much more than merely ordinary neglect that it should be held to be a very great, or gross, negligence”. “Conscious indifference” has also been held to equate to gross negligence.

In Adeco, the court found Hunt grossly negligent because while Hunt had a system for renewal in place, that system involved a great deal of ad hoc response to crises by personnel lacking requisite knowledge and skills, and quality control was conducted, if at all, by equally uninformed staff. In effect, it was a system where the blind were leading the blind. The court concluded that Hunt Oil was grossly negligent by failing to continue the lease.

In Ontario, gross negligence is almost exclusively discussed in the context of municipal liability, since municipalities are statutorily liable for
certain damages only in case of gross negligence. The Ontario Court of Appeal, in *Crinson v. Toronto (City)*, reviewed the jurisprudence and could find nothing more definitive than this: “it is clear that there must be more than a breach of a duty of care; the breach must rise to a level that can properly be described as gross negligence”.

Although a precise definition may be elusive, courts are nonetheless equipped to decide the issue of gross negligence. The court held that “to a great extent, the determination of gross negligence depends on the facts of each case. It depends on the application of a less than precise definition of gross negligence, interpreted through the prism of common sense”.

United States courts have also struggled with the issue. In September 2014, the District Court for the Eastern District of Louisiana in *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico on April 20, 2010* reviewed the U.S. law on gross negligence in finding that BP was “grossly negligent” leading up to the 2010 Deepwater Horizon oil spill in the Gulf of Mexico. The court accepted the following definition of gross negligence:

Gross negligence is a nebulous term that is defined in a multitude of ways, depending on the legal context and the jurisdiction. However, when the “cluster of ideas” surrounding “gross negligence” is considered, the prevailing notion is that gross negligence differs from ordinary negligence in terms of degree, and both are different in kind from reckless, wanton, and willful misconduct.

[...]

Gross negligence, like ordinary negligence, requires only objective, not subjective, proof. While ordinary negligence is a failure to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstances, gross negligence is an extreme departure from the care required under the circumstances or a failure to exercise even slight care. Thus, the United States contends that gross negligence differs from ordinary negligence only in degree, not in kind.

Based on that definition, BP’s decision not to re-run a crucial failed pressure test was held to constitute gross negligence in and of itself. However, the court did not stop there. It held that a number of cumulative breaches viewed together also amounted to gross negligence:

517. However, a series of negligent acts may also constitute gross negligence or willful misconduct under the CWA.

518. Accordingly, the Court further finds and concludes that BPXP committed a series of negligent acts or omissions that resulted in the discharge of oil, which together amount to gross negligence and willful misconduct under the CWA. This is an additional and alternative grounds for finding BPXP’s conduct amounted to gross negligence and willful misconduct.

519. BPXP’s negligent acts that caused the blowout, explosion, and oil spill include: drilling the final 100 feet of the well with little or no margin, running the production casing with the float collar in unconverted mode and without a shoe filter, failing to verify whether the float collar converted by reverse circulating the well, not conducting a CBL, using LCM as a spacer for the displacement and negative pressure test, misinterpreting the negative pressure test, allowing simultaneous operations to occur during displacement, and failing to provide a displacement schedule to the Transocean drill crew. Notably, the decisions regarding drilling the final 100 feet, the CBL, and LCM-spacer were profit-driven decisions.

520. These instances of negligence, taken together, evince an extreme deviation from the standard of care and a conscious disregard of known risks.

In summary, while the concept is far from crystal clear, the decisions in *Adeco* and *Deepwater Horizon* offer some guidance on what courts will be looking for. Courts will investigate whether systems were in place to avoid the damage, whether those systems were followed, and if not, why not. They will consider whether the negligent act was a momentary lapse or whether it was indicative of a pattern of negligent behaviour. They will judge all this against minimum industry standards. They will also not hesitate to find gross negligence based not on one outrageous act but on the cumulative effect of a number of seemingly minor infractions.

Finally, the decisions in *Adeco* and *Deepwater Horizon* indicate that the relative ease and low cost of the proper conduct is a relevant factor in determining whether negligence is elevated to the level of gross negligence. In *Adeco*, the court held that what Hunt ought to have done was both easy and cheap:

53 It is clear that continuation in this case was a simple matter. What was missing was available to Hunt Oil or could have been produced by it with minimal effort. When Hunt Oil’s land agent responded to the request for more information, either she was clearly wrong or the technical person who informed her was clearly wrong. Moreover,
the process of renewal had been in place for many years. What was required for renewal was readily available to Hunt Oil on a guide provided by Alberta Energy and on its website, referred to in that guide. Most importantly, although Hunt Oil says that it had a system in place for continuing leases, that system was dreadfully deficient. No alarm bells rang when the rejection letters were received by it. The employee who filed the initial application clearly did not know what was required to ensure continuation of the leases, nor did the employee who received and dealt with the rejection notices. It would have been an easy matter to have in place an employee who knew and understood the continuation process, or to arrange oversight by such a person. It would also have been an easy matter to require that all rejections be referred to someone up the management chain.

[...]

61 The trial judge found that it was not unreasonable for Adeco and Shaman to assume that Hunt Oil, as a good operator, would do what the operation agreement required it to do. In the words of the trial judge “[Hunt Oil] was obligated to do it and [was] paid to do it. There was no cost to [Hunt Oil] to do it and it was a slam dunk”.

[Emphasis added]

Similarly, in Deepwater Horizon, the court held that the proper interpretation of a test result, which would have avoided the disaster, was not a complex matter:

504. Furthermore, interpreting the negative pressure test is relatively straightforward. It is a “pass-or-fail” test; inconclusive or contradictory results mean the test has failed. This reduces the likelihood that a misinterpretation is an “honest mistake” or “mere inadvertence”.

All BP had to do was to re-run a test it had already done. It did not, and in not doing so, was grossly negligent and caused a massive environmental disaster.

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**CITATIONS**


In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico on April 20, 2010, 2014 WL 4375933 (E.D.La.).


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