TORTS

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A. Introduction

The Supreme Court of Canada had an active year in generating torts jurisprudence. *Resurfice Corp. v. Hanke*, 2007 SCC 7, confirms that except in rare cases, causation is to be determined on the strict "but for" test. *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, becomes the leading authority on actions against solicitors for breach of fiduciary duties, and sets out important principles to remedy such breaches. *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, recognizes a claim in negligent police investigation. *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, establishes that social workers treating a child in care do not owe a duty of care to parents of the child. Of general interest in *Hill* and *Syl Apps* is the court's attempt to address the role of potential or actual conflicting public or private duties within the context of the proximity and policy branches of the *Anns* test.

Arguably, the most important torts decision of 2007 was *OBG Limited v. Allan*; *Douglas v. Hello! Limited*; *Mainstream Properties Limited v. Young*, [2007] UKHL 21, in which the House of Lords sets out the definitive tests for the distinct economic torts of inducing breach of contract, and unlawful interference with economic interests

B. Duty of Care

As in recent years, the foreseeability branch of the test in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), reiterated in *Childs v. Desormeaux*, 2006 SCC 18 (discussed in the 2007 *Annual Review*), posed little difficulty for the courts; they, however, continued to grapple with the difficult issue of whether there exists sufficient proximity between parties to create a duty of care.

1. Social Worker Liability to Parents of a Patient Under Care

A treatment centre and its employees do not owe a duty of care to family members of children in care (*Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, overturning the Ontario Court of Appeal's decision profiled in the 2007 *Annual Review*).

The child had been made a permanent ward of the Crown. The child's family members sought damages for, among other things, nervous shock, emotional distress, and mental illness. The defendants applied to strike the claim. The Court of Appeal allowed the claim to proceed on the basis that the defendants may owe a duty of care to the family.

Foreseeability of harm, the first stage of the *Anns* test, was undisputed. The Supreme Court of Canada found that the claim stalled at the proximity stage of the test, primarily because of the potential for conflicting duties: imposing a duty of care on the relationship between the family of a child in care and that child's treatment team created a genuine potential for "serious and significant" conflict with the treatment team's duty to protect the child and promote the child's well-being. Any occasional alignment of the parents' and child's interests is outweighed by the fact that in many (if not most) cases conflict is inevitable. To recognize a duty of care to the family in such a context would create conflicting duties in the provision of medical treatment, thereby frustrating effective coordination of medical treatment by the child's treatment team. Finally, policy considerations related to the remedy and statutory immunities contained in the relevant legislation show insufficient proximity to ground a duty of care. The family's claim was thus struck as disclosing no cause of action.

2. Contractor Liability in Tendering Process

The Supreme Court of Canada heard and reserved reasons for judgment on November 9, 2007 ([2000] S.C.C.A. No. 350 (QL)) in an appeal from *Design Services Ltd. v. Canada*, 2006 FCA 260. In this case, unsuccessful subcontractors in a two-stage tendering process sought damages in tort from the owner. The issue whether the owner could owe a subcontractor a duty of care in tort was left open in *Martel Building Ltd. v. Canada*, 2000 SCC 60, at para. 108.

3. Governmental Liability for Operational Acts or Omissions

The government *may* owe a private law duty of care where, in a purported or attempted exercise of statutory powers, its employees do not duly exercise their discretion and thereby create, enhance, or contribute to a risk of harm to a discrete group of individuals (*Taylor v. Canada (Minister of Health)* (2007), 285 D.L.R. (4th) 296 (Ont. S.C.J.), leave to appeal dismissed [2007] O.J. No. 4947 (QL) (S.C.J. Div.)). In *Taylor*, the plaintiff applied to certify a class proceeding action for damages and declaratory relief against Canada, among others. The claims related to the conduct of Canada's employees regarding the importation and distribution of temporomandibular joint implants. The plaintiff claimed that she suffered serious injuries as a result of the implants and alleged that Canada's employees were negligent in the exercise of their powers and responsibilities under the *Food and Drugs Act*, S.C. 1952-53, c. 38. On the facts, a court could find at trial a relationship of proximity between the plaintiff and Canada, if Canada's course of conduct increased the risk to the health of the plaintiff and other potential recipients of the implants. Accordingly, the court dismissed Canada's motion to strike the claim as disclosing no reasonable cause of action.

4. Commercial Host Liability

A commercial host may avoid liability for torts that intoxicated patrons commit where the host can establish an absence of actual or constructive knowledge that the patron was intoxicated and posed a reasonably foreseeable risk of harm to others (*Donaldson v. John Doe*, 2007 BCSC 557). The defendants hosted an Oktoberfest. Following the event, a patron injured the plaintiff outside the defendants' venue. The court found that the nature of the Oktoberfest did not lend itself to monitoring patrons' liquor consumption, and the defendants had no knowledge of the tortfeasor's actual consumption. Further, because the defendants had adequately monitored patrons' behaviour, the court found no basis to impute to the host knowledge of the tortfeasor's consumption. As the harm to the plaintiff was not reasonably foreseeable, the action was dismissed.

5. Employer Liability for Job Postings

The dismissal in *Roback v. University of British Columbia*, 2007 BCSC 334, of a novel claim by a job applicant against an employer for negligent misrepresentation explored the factual and policy problems such claims raise. The defendant university posted an advertisement inviting applications for an academic position. When the plaintiff was not selected for the position, he sued the university for negligent misrepresentation. The court found that the job advertisement contained no misrepresentation. Further, the court held that a duty of care should generally not be recognized in the pre-employment hiring process because such an extension of liability would open the floodgates to litigation by disappointed job applicants and would result in the court's

improper intrusion into a highly subjective hiring process between employer and job applicants.

6. Rescuers

Negligent individuals do not owe a duty of care to injured rescuers where their conduct does not create some hazard, danger, or situation of imminent peril (*Smith v. Tucker*, 2007 BCSC 489). After the defendant ran out of gas, the plaintiff attempted to push the defendant's vehicle to the side of the road. In so doing, the plaintiff injured his leg. He sued the defendant claiming that she was liable to him as a rescuer. The court dismissed the claim on the basis that the defendant's negligence did not create a situation of imminent peril that would warrant treating the plaintiff's actions as being those of a rescuer, rather than those of a voluntary actor.

7. Highway Maintenance Contractors

The (in)actions of a highway maintenance contractor are capable of establishing a duty of care owed to members of the public injured on highways outside the contractor's jurisdiction (*Goodwin v. Mainroad North Island Contracting Ltd.*, 2007 BCCA 81).

The plaintiff was injured when her vehicle skidded on black ice and slid off the road. The defendant Mainroad, a highway maintenance contractor, was not obliged to maintain the road near the accident but, following a call from police as to ice in that area, advised that it would take care of the black ice. It did not do so. The court held that Mainroad owed the plaintiff a duty of care. The relationship between the parties did not fit within, or was not reasonably analogous to, any of the established categories referred to in *Cooper v. Hobart*, 2001 SCC 79. Applying the first stage of the *Anns* test, the reasonable foreseeability test was met in this case. Mainroad's conduct was properly characterized as "nonfeasance" rather than "misfeasance" and, in such cases, foreseeability alone is not usually sufficient to establish a duty of care. Here, however, Mainroad assumed a positive duty to act outside its contractual obligations and, in so doing, made the plaintiff its neighbour in law.

C. Standard of Care

1. Police and High-speed Chases

In two cases heard and decided together, the British Columbia Court of Appeal considered the standard of care of police officers involved in high-speed pursuits, and offered useful, general guidance on the principles governing the role of evidence, including expert evidence, in proving the standard of care in negligence cases.

In *Burbank v. B. (R.T.)*, 2007 BCCA 215, leave to appeal dismissed [2007] S.C.C.A. No. 316 (QL), and *Radke v. S. (M.) (Litigation guardian of)*, 2007 BCCA 216, a police officer attempted to stop a driver suspected of impaired driving (*Burbank*), and a driver of a stolen vehicle (*Radke*). High-speed chases ensued; both ended with the suspect drivers colliding with and injuring the plaintiffs. At trial the police officers were found partly liable for the plaintiff's injuries. On appeal, the officers argued that the trial judges erred on the standard of care: evidence was required, but was not adduced, on whether a reasonably competent police officer would have conducted herself differently than the officers in these cases.

Lowry J.A. wrote for the majority in *Burbank*. He emphasized that it is not usually necessary in a negligence case to adduce evidence, much less expert evidence, to prove the standard of care. The court generally determines the issue based on common experience having regard to any applicable legislation or policies governing the conduct in question. Only where the subject matter is beyond the common understanding of a judge or jury should expert evidence be adduced to assist the court in determining the standard of care. In this case, legislation governing the police activity provided some evidence of the standard of care. Further, evidence of the standard of care was not required because the inquiry into the officer's conduct was not beyond common understanding. The majority held that the trial judge's decision contained no reversible error. Newbury J.A., dissenting, would have allowed the appeal in *Burbank*, primarily on the basis that the trial judge erred in imposing a standard of perfection on the officer. Based largely on Lowry J.A.'s analysis of the issues in *Burbank*, the court unanimously dismissed the appeal in *Radke*.

2. Municipal Maintenance of Roadways

In *Rimmer (Guardian ad litem of) v. Langley (Township)*, 2007 BCCA 350, after encountering water flowing over a roadway, the plaintiff sustained serious injuries when he lost control of his car and collided with logs on the side of the road. The defendant municipality was required to make the roadway reasonably safe for the purposes of travel (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452). This duty included taking reasonable steps to prevent injury to users of the roads by reason of hazardous conditions (*Just v. British Columbia*, [1989] 2 S.C.R. 1228). The municipality ought to have known about the potential flooding of its roadway at the accident site and, appropriately, it was held partly liable due to its failure to keep the road reasonably safe.

3. Duty to Warn of Risks Inherent in Product

In *Walford (Litigation guardian of) v. Jacuzzi Canada Ltd.*, 2007 ONCA 729, leave to appeal filed (*sub nom. Pioneer Family Pools (Hamilton) Inc. v. Walford*), [2007] S.C.C.A. No. 599 (QL), a pool parts supply store was found partly liable for the plaintiff's catastrophic injuries. The plaintiff had broken her neck when she slid face first down a pool slide into her family's above-ground pool and she was awarded over $5 million at trial. The court confirmed that the pool store breached its duty to warn the plaintiff's mother of the hidden danger of catastrophic injury associated with slides on above-ground pools. The court also concluded, based on the plaintiff mother's evidence that she would not have erected the slide if she had been informed of the risks associated with it, that the store's breach caused the plaintiff's loss.

4. Amusement Ride Operators Not "Common Carriers"

An amusement ride is not a "common carrier" and does not attract the higher standard of care and reverse onus set out in *Day v. Toronto Transportation Commission*, [1940] S.C.R. 433 (*Mallais v. D.A. Campbell Amusements Ltd.*, 2007 ONCA 82). The plaintiff claimed that the operators of an amusement ride did not properly restrain her and that she was injured as a consequence. The Court of Appeal noted that there was no Canadian case law considering whether an amusement ride operator was a "common carrier". In determining that the operator was not a "common carrier", the court held that the primary focus should be on the natural and ordinary meaning of the well-known and simple term "common carrier". It found that the use of the words "transport" and "on regular routes", in the definitions of "common carrier", and of "from one place to another", among others, in "transport", strongly suggests movement from one geographic location to another. Because the ride did not involve such activity, it did not constitute a "common carrier".

D. Causation

The year saw a resurgence of causation as a determinative issue in negligence cases. The Supreme Court of Canada provided guidance on the appropriate test for determining causation, and appellate courts continued to reign in attempts to apply broadly the common sense inference of causation from *Snell v. Farrell*, [1990] 2 S.C.R. 311, or the "material contribution" test for causation (or both).

1. "But For" and "Material Contribution" Tests for Causation

Cricket mishaps create English nuisance law; Canadian causation cases come from hockey accidents.

In *Resurfice Corp. v. Hanke*, 2007 SCC 7, a products liability case, the plaintiff was burned badly in an explosion and fire when he prepared an ice resurfacing machine for routine operation. The Court of Appeal for Alberta applied the "material contribution" test for causation and allowed the plaintiff's appeal from the dismissal of his action.

The Supreme Court of Canada allowed the appeal and reaffirmed that the basic and primary test for determining causation remains the "but for" test, which applies whether there is one or more than one potential cause of injury. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. The "material contribution" test for causation remains an exception to the "but for" test and, broadly speaking, should not be applied to determine causation unless two requirements are met. First, it must be impossible for the plaintiff to prove causation against the defendant using the "but for" test and the impossibility must be due to factors outside the plaintiff's control, e.g., the current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach.

2. Proof of Causation in Medical Negligence Claims

In 2007, appellate courts provided guidance in several medical negligence cases as to the role of evidence, including expert evidence, under the "but for" test for causation.

In *Seatle (Guardian ad litem of) v. Purvis*, 2007 BCCA 349, leave to appeal dismissed [2007] S.C.C.A. No. 453 (QL), the defendant general practitioner delivered the infant plaintiff after a lengthy labour. The infant was injured through delays during the birth. The court held that causation was not supported by the evidence. Noting that the judge was not satisfied that a common sense inference of negligence could be drawn without the assistance of expert evidence that an obstetrician *would* (not *might*) have made a difference in the delivery, the court found no basis to draw such an inference on the evidence. Nor did the judge err in refusing to apply the "material contribution" exception to the "but for" test. As discussed in *Resurfice Corp. v. Hanke*, *supra*, it was not impossible for the plaintiffs to prove that the obstetrician's presence at the delivery would have materially altered the outcome of the infant's delivery.

In *Barker v. Montfort Hospital*, 2007 ONCA 282, leave to appeal dismissed [2007] S.C.C.A. No. 299 (QL), the plaintiff was admitted, released, and then readmitted to a hospital's emergency department in connection with abdominal pain and vomiting. She was eventually sent to surgery where an abnormal twisting of her small intestine was discovered. By this time, the plaintiff's bowel was irreparably damaged. The majority allowed the doctor's appeal on the causation issue, holding that the judge erred in inferring, in the absence of any medical or other evidentiary basis, that the defendant's delays in diagnosis and treatment caused the plaintiff's loss. The "material contribution" test had no application to the case because it was not impossible for the plaintiff to prove causation, through direct or indirect evidence, under the "but for" test.

In *Sam v. Wilson*, 2007 BCCA 622, the plaintiff suffered injuries when side effects associated with his tuberculosis medication materialized. A majority of the court allowed the doctor's appeal, holding that it was incumbent on the plaintiff to prove that the doctor's breach of the standard of care made a substantial or material causal contribution to the plaintiff's injuries. There was no support in the medical evidence to conclude that the doctor's failure to follow the relevant testing protocol was a cause of the plaintiff's injuries. Further, an inference of causation could not be drawn because such an inference was not a matter of common sense; it required expert evidence and where, as here, both parties have led expert medical evidence of causation, it is not open for a judge to draw a common-sense inference of the cause of a medical condition (*Moore v. Castlegar & District Hospital* (1998), 49 B.C.L.R. (3d) 100 (C.A.)).

Finally, in *Jackson v. Kelowna General Hospital*, 2007 BCCA 129, leave to appeal dismissed [2007] S.C.C.A. No. 212 (QL), the plaintiff had surgery following a fight. Although doctors prescribed formal assessments of his post-operative condition, the nurses only performed informal assessments. The plaintiff suffered hypoxia and respiratory distress. The court dismissed the appeal, holding that causation was not established. *Snell v. Farrell* does not stand for the proposition that an inference of negligence can be drawn where there is an absence of evidence that the negligence caused the injury. The burden remains on the plaintiff to prove a "substantial connection between the injury and the defendant's conduct" (*Resurfice Corp.*, *supra*). There must be some evidence that the negligence caused, or could have caused, the injury to justify drawing the inference. Finally, the "special circumstances" where the "material contribution" test may be applied did not exist. This was an ordinary medical negligence case where the required causation evidence was absent because the experts had not been asked the relevant hypothetical question.

3. Proof of Causation in Solicitor Negligence Claim

In *B.S.A. Investors Ltd. v. Douglas, Symes & Brissenden*, 2007 BCCA 94, leave to appeal dismissed [2007] S.C.C.A. No. 357 (QL), the defendant law firm appealed from an order finding it negligent for improperly executed mortgage documents and the plaintiffs' consequent loss. An employee of B.S.A., Mr. Mosly, obtained defrauded funds through a mortgage transaction. The defendant firm admitted that, in assisting with the mortgage transaction, its lawyer had been negligent. The court allowed the appeal, holding that there was no basis for the judge to draw an inference of the causation. Absent such an inference, the plaintiffs did not meet the burden of proof on causation, and the action against the law firm should be dismissed. The court cautioned that resort to the "inference principle" emanating from *McGhee v. National Coal Board*, [1973] 1 W.L.R. 1 (H.L.), for proving factual causation is justified only in unusual situations where it is impossible to establish causation on the evidence. Although it may have been difficult to do so, this was not one of the rare cases in which it was impossible for the plaintiffs to lead evidence establishing causation. For example, the plaintiffs could have called Mr. Mosly as an adverse witness under Rules 40(17.2) and 40(20) of the Rules of Court. In the circumstances, the judge was required to use the available circumstantial evidence to

determine causation on the "but for" test (*M. (B.) v. British Columbia (Attorney General)*, 2004 BCCA 402, at para. 177 (leave to appeal dismissed [2004] S.C.C.A. No. 428 (QL)).

4. Apportionment of Fault

Notwithstanding the existence of well-established general principles, courts continued to grapple with issues relating to the apportionment of fault. The issue is encountered regularly but is, as is evident from a comparison of the courts' analyses in *Hutchings*, *Ashcroft*, and *Misko*, one that causes confusion and uncertainty for the bar and the courts, particularly in the case of multiple, successive, tortious causes of damage where one of the parties at fault is not a party to the action.

The Supreme Court of Canada heard and reserved reasons on 12 December 2007 (S.C.C. File No. 31515) in an appeal from *McVea (Guardian ad litem of) v. B. (T.)*, 2005 BCCA 104, supplementary reasons 2006 BCCA 199. The case raises interesting issues relating to the government's vicarious liability for police negligence and the liability and contribution provisions in s. 4 of the *Negligence Act*, R.S.B.C. 1996, c. 333. (Note, just as this book went to press, the Supreme Court of Canada's reasons were released: 2008 SCC 3.)

In *Hutchings v. Dow*, 2007 BCCA 148, leave to appeal dismissed [2007] S.C.C.A. No. 244 (QL), a plaintiff sustained injuries in a motor vehicle accident and in an unrelated assault approximately two years later. The judge declined to allow the plaintiff's accident and assault actions to be heard together. Although the plaintiff had many of the symptoms of depression before the assault, the judge concluded that the depression was "a 100% non-divisible injury" contributed to in a material way by both the accident and the assault. Consequently, he held the tortfeasors in the accident and the assault jointly and severally liable. The court dismissed the defendants' appeal, holding that the evidence did not support the proposition that the plaintiff would likely have suffered from depression if the accident had never occurred. The accident and the subsequent assault were necessary causes that merged together to produce the depression, damage that was "of a piece". It was not possible (or logical) on the evidence to determine the plaintiff's original position with respect to his depression in the absence of the accident. The liability finding was appropriate under s. 4 of the *Negligence Act*.

In *Ashcroft v. Dhaliwal*, 2007 BCSC 533, appeal and cross-appeal pending, the plaintiff was involved in two motor vehicle accidents approximately one year apart. The trial judge was required to assess only the damages for the first accident, the claim in the second accident having settled before trial. The plaintiff's injuries in the first accident were similar to and were aggravated by the second accident. The trial judge questioned the compatibility of two longstanding approaches to assessing the damages for the first accident. First, he considered that under *Athey v. Leonati*, [1996] 3 S.C.R. 458, the defendants in the first accident would be fully liable for the injuries suffered in both accidents; in contrast, he considered that under *Long v. Thiessen* (1968), 65 W.W.R. 577 (B.C.C.A.), the assessment of damages would be confined to those injuries suffered in the first accident only and would not include those suffered in the second accident. The judge preferred the approach in *Athey* and found that the plaintiff's injuries were "indivisible". The defendants in the first accident were thus liable for all of the plaintiff's loss; however, because the plaintiff had already received settlement funds for the second accident, the judge concluded that the common-law rule against double recovery was engaged. To prevent double recovery, the judge required the plaintiff to account for any settlement funds (excluding costs) she received for the second accident. That amount was to be deducted from the full amount of damages assessed against the first accident defendants and judgment was to be entered for the net amount after deduction.

Finally, in *Misko v. John Doe*, 2007 ONCA 660, the court dealt with issues similar to those raised in *Hutchings* and *Ashcroft*. The plaintiff was involved in two motor vehicle accidents eleven months apart and allegedly suffered overlapping, indivisible injuries. He settled his claim against the first tortfeasor before trial and signed a release of that claim. Because the second tortfeasor was an unidentified motorist, the plaintiff sued his own insurer under the terms of his policy. His insurer brought a third-party claim against the first tortfeasor. The court upheld a chambers judge's order striking out the third-party claim. Of crucial importance to the outcome of the appeal, on the third-party claim the plaintiff took the position that his claim for damages sought against the insurer was limited to those injuries sustained in the second accident. The insurer argued that the plaintiff's injuries were indivisible and that the third-party claim was required to seek indemnity from the first tortfeasor under s. 1 of Ontario's *Negligence Act* (analogous to s. 4 of the British Columbia *Negligence Act*). In the circumstances, as a result of the plaintiff's position on the limited damages sought, the court held that, even assuming the plaintiff's injuries are indivisible, thus rendering the insurer fully liable for the plaintiff's indivisible injuries under *Athey v. Leonati*, judgment would go against the insurer only for damages for which the unidentified motorist is responsible. Although the court recognized that it may be difficult at trial to assess responsibility for such indivisible injuries, the determination must be made (*Blackwater v.*

Plint, 2005 SCC 58, at para. 82, and *O'Neil v. Van Horne* (2002), 59 O.R. (3d) 384 (C.A.), at para. 14). The court noted that the principles and formula set out in *Long v. Thiessen*, adopted in *Hicks v. Cooper* (1973), 1 O.R. (2d) 221 (C.A.), applied and could be used to determine the damages for which the insurer is responsible. Finally, the court cited a "formidable policy question" in support of its conclusion. The plaintiff settled the first claim and provided a release. If the insurer were permitted to third party the first tortfeasor, the plaintiff's claim against the insurer would have to be struck out in light of the release. The court concluded that such a result would undermine the public interest in encouraging settlement.

E. Proof of Actionable Damage

As in recent years, an employee's negligent exposure to asbestos provided the House of Lords with another opportunity to consider the nature and limits of one of the essential elements in a negligence claim, this time the concept of actionable damage or loss.

Through their negligent exposure to asbestos, the claimants in *Johnston v. NEI International Combustion Limited*, [2007] UKHL 39, had developed pleural plaques, areas of fibrous thickening in the lungs. The plaques are asymptomatic; they cause no impairment or disablement and are not causative of asbestos-related disease. Their presence, size, and number do, however, indicate the extent of an individual's asbestos exposure and risk of developing some such disease in the future. A diagnosis of pleural plaques may, in consequence, cause an individual to develop anxiety or even clinical depression.

The House of Lords held as follows on the three issues on appeal. First, the presence of pleural plaques, without more, does not entitle the claimants to bring an action in tort for damages. A claim in negligence is incomplete without proof of damage. Actionable damage is damage that crosses the minimal threshold stipulated by the maxim *de minimis non curat lex*; it causes an individual to be worse off, physically or economically, so that compensation is an appropriate remedy. Pleural plaques do not constitute actionable damage because they do not, save in exceptional cases, cause symptoms, increase susceptibility to other diseases, or have any adverse effect on the claimants' health. Second, the presence of pleural plaques coupled with the anxiety caused by the knowledge of the risk of future asbestos disease does not suffice to create a cause of action in tort for damages. This "aggregation theory" must be rejected where, as here, the risk and anxiety the claimants experienced was predicated on damage that was itself not

actionable: nought plus nought plus nought equals nought. Finally, the claimant who had developed clinical depression as a result of being informed, years after his asbestos exposure, about his pleural plaques and associated risks, could not bring an action because such psychiatric illness was not in law foreseeable and there was no basis to extend the principle in *Page v. Smith*, [1996] A.C. 155, under which it is sufficient to claim for psychiatric injury if the defendant should have foreseen that his negligence might cause some physical injury.

F. Vicarious Liability

1. By Crown for Sexual Torts of Employee

On the principles and approach set out in *Bazley v. Curry*, [1999] 2 S.C.R. 534, it was appropriate to hold the Crown vicariously liable for the sexual assaults committed on a 13-year-old boy on probation by a probation officer employed by the Crown (*G. (B.M.) v. Nova Scotia (Attorney General)*, 2007 NSCA 120). The facts of the case did not, however, support a finding that the Crown was directly liable in negligence or for breach of fiduciary duty.

2. Lessor Under Motor Vehicle Act

The Supreme Court of Canada confirmed in brief, oral reasons that under British Columbia law finance companies may be vicariously liable for motor vehicle accidents when they finance a consumer's acquisition of a motor vehicle through a "lease with an option to purchase" instead of a "contract of conditional sale" (*Transportaction Lease Systems Inc. v. Yeung (Litigation guardian)*, 2007 SCC 45). In *Yeung*, the plaintiff argued that the defendant vehicle lease company was vicariously liable for the plaintiff's injuries as an "owner" under s. 86(1) of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318. As noted in last year's chapter, a five-member panel of the Court of Appeal found the agreement between the driver and the lease company to be a lease, and as the vehicle was not a "contract of conditional sale", the lessor could not enjoy that express exemption from vicarious liability under s. 86(3) of the *Motor Vehicle Act*.

Note that the Legislature has responded to *Yeung* by adding several provisions relating to leased vehicles to the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231. Most notably, although the lessors remain vicariously liable under s. 86 of the *Motor Vehicle Act*, the Legislature has placed limits on their vicarious liability by operation of s. 86. Under s. 82.1 of the *Insurance (Vehicle) Act* (in force November 8, 2007), the maximum

recoverable from a lessor of a motor vehicle in an action for loss or damage arising out of the use or operation of a motor vehicle on a highway in British Columbia for one incident is the greater of: (a) $1,000,000; (b) the amount prescribed by regulation; or (c) the amount of third-party liability insurance required by law to be carried on the motor vehicle. The limit on lessor liability does not, however, apply to amounts payable by a lessor other than by reason of vicarious liability imposed under s. 86 of the Act. Finally, the limit applies only to loss or damage sustained on or after s. 82.1 comes into force.

G. Damages

1. Sexual Battery Cases

In *G. (B.M.) v. Nova Scotia (Attorney General), supra*, the Crown appealed a judge's award of $125,000 for non-pecuniary loss and $500,000 for past and future loss of income in a sexual assault case. On the non-pecuniary award, the court concluded that the general principles on the nature of general damages and the functional approach to non-pecuniary loss, as contained in *Lindal v. Lindal*, [1981] 2 S.C.R. 629, and *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, are relevant to the assessment of such loss in the context of sexual battery cases. The court noted that the functional approach to general damages in sexual battery cases should take into account solace for the victim's pain and suffering and loss of enjoyment of life, the victim's dignity and personal autonomy, and the humiliating and degrading nature of the wrongful acts. The non-exhaustive list of factors in *Blackwater v. Plint, supra* (at para. 89) assists in fashioning the award. The court dismissed the Crown's appeal from the $125,000 award for non-pecuniary loss on the basis that this award was at the low end of the appropriate range of damages awarded in similar cases.

On the Crown's appeal against the pecuniary awards, the court concluded that the judge carefully considered the "thin skull" and "crumbling skull" rules and did not err in finding a causal link between the defendants' tort and the plaintiff's loss. As to the amount of pecuniary damages, the court emphasized that an award for pecuniary loss is fundamentally different from an award for non-pecuniary loss. Unlike non-pecuniary awards, there is no appropriate range against which the reasonableness of damages for pecuniary loss is assessed; decided cases do not provide a benchmark for such awards. The amount of the award is determined by the extent of the financial loss as disclosed in the evidence in each case. Here, although the pecuniary award was unquestionably substantial, it was supported by the evidence.

2. Consistency Requirements for Non-pecuniary Awards

To be a wholly erroneous estimate of damage, a jury's assessment of non-pecuniary loss must be inconsistent *both* with the facts of the case *and* in comparison to awards made in comparable cases (*Toor v. Toor*, 2007 BCCA 354). In *Toor*, the jury assessed the plaintiff's non-pecuniary loss at $10,000, her costs of future care at $33,000, and her costs of past care at $2,000. The court allowed the plaintiff's appeal, holding that the assessment of non-pecuniary loss was so inordinately low that it constituted a wholly erroneous estimate of the plaintiff's damage (*Nance v. British Columbia Electric Railway*, [1951] 3 D.L.R. 705 at 713 (J.C.P.C.)). The court reiterated that it will show considerable deference to jury assessments and will interfere only where the assessment is significantly outside the range found in comparable cases (*Dilello v. Montgomery*, 2005 BCCA 56). Here, the jury's assessment of the plaintiff's loss was inconsistent with the facts of the case and with awards made in comparable cases. It was apparent from its assessment of the costs of future care that the jury concluded that the plaintiff had suffered ongoing injuries. In light of the jury's assessment of the plaintiff's future care needs, the assessment of non-pecuniary loss was inordinately low. Comparable cases suggest $30,000 as a low end for the range of non-pecuniary awards. The assessment of $10,000 for non-pecuniary loss was inordinately low and a new trial was required.

3. Principles Governing Awards for Loss of Future Income-earning Capacity

In three cases rendered within just over a month of each other, the Court of Appeal for British Columbia examined the principles governing an award for loss of future income-earning capacity in personal injury cases.

In *Steward v. Berezan*, 2007 BCCA 150, the trial judge awarded the plaintiff $50,000 for loss of future earning capacity. The defendants argued on appeal that the judge erroneously predicated this award on a theoretical basis rather than on an actual basis. The court allowed the appeal, holding that there was no basis in the evidence that the plaintiff had any intention to go into a career in which his injuries would be an impediment. The test in *Palmer v. Goodall* (1991), 53 B.C.L.R. (2d) 44 at 59 (C.A.), could not be transposed to an original analysis of a claim at the trial level. The plaintiff bears the onus to prove at trial a substantial possibility of a future event leading to an income loss, and the court must then award compensation on an estimation of the chance that the event will occur (*Parypa v. Wickware*, 1999 BCCA 88, at para. 65).

In *Djukic v. Hahn*, 2007 BCCA 203, the defendants, relying heavily on the court's reasoning in *Steward v. Berezan*, appealed the trial judge's awards for future income-earning capacity. The court dismissed the defendants' appeals, noting that the comments in *Steward v. Berezan* were of no assistance to the defendants because that case turned on its facts and did not establish any new principle of law.

Similarly, the court dismissed the defendant's appeal from an award for loss of income earning capacity to a 16-year-old plaintiff in *Sinnott v. Boggs*, 2007 BCCA 267. In *Sinnott*, although the plaintiff was "theoretically capable of taking any job, she would be able to do some of them only with pain and taking frequent breaks" (at para. 5). The court noted that the factors in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.), were not intended to be exclusive. Neither logic nor the authorities support a limitation on awards for loss of income-earning capacity based on, among other things, the lack of a foreclosed occupation or altered future plans. Three of the four factors identified in *Brown* are broad enough to support an award in circumstances where a plaintiff is able to continue in an occupation but the plaintiff's ability to perform and earning capacity are impaired by the injury. There is no reason why an injury that permits a plaintiff to continue in a particular occupation but at a reduced level of performance and income should not be compensated through damages for loss of earning capacity.

4. Damages for Tortious Breach of the Charter

In *Ward v. Vancouver (City)*, 2007 BCSC 3, the plaintiff, a barrister, was arrested, detained, and strip-searched by police on their mistaken belief that he planned to throw a pie at Prime Minister Chrétien. The plaintiff sought a declaration that his ss. 7, 8, and 9 *Charter* rights had been infringed. He also sued the City for the torts of assault, battery, and false imprisonment. The court dismissed the three tort claims.

The court noted that damages have been awarded for violations of the *Charter* even where there was no malice or bad faith. That being said, the court did not find the police officers' conduct to be malicious, high-handed, or oppressive. Nor did the plaintiff suffer significant physical or psychological harm. The court awarded nominal damages of $10,100 for the *Charter* breach.

In contrast to the conclusion in *Ward*, Ontario would appear to require proof of willfulness or bad faith as a precondition for damages for a breach of the *Charter*; simple negligence will not suffice (*Mammoliti v. Niagara Regional Police Service*, 2007 ONCA 79, leave to appeal dismissed [2007] S.C.C.A. No. 175 (QL) (discussed below)).

H. Professional Liability

1. Strother: Breach of Fiduciary Duty

The Supreme Court of Canada's decision in *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, becomes the leading authority on legal conflicts as well as fiduciary claims against solicitors.

The plaintiff Monarch carried on business in tax financing for the film industry. It retained Strother, a partner at Davis & Company, to act as a tax shelter advisor. In 1996, the Ministry for National Revenue amended the *Income Tax Act* to end Tax Assisted Production Services Financing ("TAPSF") tax shelters. Throughout 1997, Monarch asked Strother whether there was a possibility that it could carry on its TAPSF business. Strother repeatedly advised Monarch that tax sheltered financing was at an end in Canada and that "nothing could be done". In late 1997 Monarch ceased its TAPSF business.

In January 1998 Strother was retained by Darc, a former Monarch employee. Darc had a "new idea" for a "technical fix" that might permit a new form of TAPSF loophole.

In March 1998, after the Monarch retainer agreements expired, but while Strother and the law firm were still performing legal work for Monarch, Strother and Darc applied for an advance tax ruling on Darc's new idea. In October 1998, they received a favourable tax ruling. Strother did not advise Monarch of the positive advance tax ruling. Nor did he advise Monarch of the Darc retainer, nor the fact that he himself would receive shares in Darc's company Sentinel Hill. Strother advised the Davis management committee of the potential conflict of interest. The Davis managing partner prohibited Strother's personal participation in Sentinel. In March 1999 Strother resigned from Davis and became a shareholder of Sentinel. Strother, with Darc and through Sentinel, then proceeded to exploit the *Income Tax Act* exception and to generate substantial revenues. Monarch eventually discovered the new tax loophole, but was unable to organize in time to benefit.

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

The Supreme Court majority agreed with the conclusions of the Court of Appeal. A solicitor's fiduciary duty to a client is not restricted to the precise terms of any contractual retainer, but includes an ongoing fiduciary obligation to disclose any conflict of interest, and to obtain the client's consent before taking any actions in potential conflict. Strother's ongoing obligations to Monarch required him to disclose his

personal conflict, and to cease acting for both Monarch and Darc. These obligations were particularly clear in light of Monarch's request for advice on its ability to continue in the TAPSF business. Although generally a lawyer has no obligation to revise past legal opinions in light of changed circumstances, the ongoing retainer between Monarch and Davis obliged Strother to be wholly candid to Monarch of his relationship with Sentinel, and of the fact that he was profiting in a manner that he had previously advised his client Monarch was impossible. Strother knew that Monarch would have wanted to know of the tax exception. Further, he had an impermissible interest in keeping that information away from Monarch, a potential competitor to Sentinel.

2. Strother: Remedies

The court allowed, in part, the appeal on remedy. It noted that accounting and disgorgement are equitable remedies, designed to condemn selfish behaviour by fiduciaries and to restore profits that ought to belong to the beneficiary. At the same time, these remedies must not be disproportionately punitive.

Strother was thus required to account for and disgorge to Monarch all of his personal profit gained directly from the Sentinel group, and indirectly from his earnings as a Davis partner on account of billings to Monarch, from the date when Strother agreed to participate in the Sentinel venture to the date when Strother left Davis and ceased to have a solicitor-client relationship with Monarch: approximately 14 months. This remedy contrasts with the much broader remedy imposed by the Court of Appeal, requiring disgorgement of all profits received by Strother related to Sentinel. It has been conjectured that this narrowed remedy reduced the award from some $32 million to $1 million.

3. Strother: Claims Against Law Firm

Monarch also claimed that Davis was jointly and severally liable with Strother for his breach of fiduciary duty, as well as vicariously liable.

The court concluded that Davis was not directly liable for breach of fiduciary duty, as the Davis partners were ignorant of Strother's breaches.

On the claim of vicarious liability, the Supreme Court was guided in its interpretation of the liability provisions in the British Columbia *Partnership Act*, R.S.B.C. 1996, c. 348, by the test for vicarious liability set out in *Bazley v. Curry*, *supra*: did the practice of law as carried out by Davis create the risk of Strother's breach, or were there only

"incidental" connections, such as time and place, between Strother's unfaithful acts and the Davis law practice? The Supreme Court reached a different conclusion from the Court of Appeal and found Davis vicariously liable. Strother's secret profits were not part of a "frolic of his own", but were wholly entangled with and enabled by the ordinary business Davis conducted.

I. Torts Defences: Ex Turpi Causa

In *Watts v. Klaemt*, 2007 BCSC 662, the defendant was engaged in a long-term feud with his neighbour, the plaintiff's daughter. The defendant used a scanner to record all of the daughter's cordless telephone conversations, including one with the plaintiff who was an employee of the Ministry of Social Services. In that conversation, the plaintiff breached confidentiality by telling her daughter that she was under investigation for welfare fraud by the Ministry. The plaintiff counselled her daughter on how to evade the investigation. The defendant sent the tape to the Ministry. The plaintiff was dismissed for breach of trust.

The court found the taping breached the plaintiff's statutory privacy rights. The defendant argued *ex turpi causa*; he claimed that the court should deny the plaintiff compensation, as the breach of privacy—the taping of her telephone conversations—unveiled her immoral, if not illegal acts. The court concluded that the facts fell short of the rare circumstances in which *ex turpi causa* will deny the plaintiff recovery. Although there was a clear, causal connection between the loss of the plaintiff's employment and her immoral conduct, and although her actions warranted condemnation by the court, an award of damages to the plaintiff would not have the repugnant result of the plaintiff profiting from her own wrongdoing. Any damages would be compensatory, to correct the defendant's serious and protracted invasion of her privacy.

That being said, the immoral acts of the plaintiff resonated soundly in damages. Although the defendant's breach of privacy led to the discovery of the evidence required to justify the plaintiff's dismissal from work, the plaintiff's own misconduct was the underlying cause of her dismissal. The court denied her any damages associated with her lost employment: the bulk of her damages claim. Damages were limited to nominal general and punitive damages of $35,000, as well as $1,000 for out-of-pocket expenses related to the emotional depression caused by the breach of privacy.

J. Economic Torts: Inducing Breach of Contract and Unlawful Interference with Economic Interests

The murky and related torts of inducing breach of contract and unlawful interference with economic interests continued to crystallize. In a capitalist society that encourages economic competition these economic torts are of great potential importance, as well as great potential overbreadth. For a discussion of the varied Canadian approach to these torts, see the 2005 and 2006 *Annual Review*.

The House of Lords, in a single set of reasons addressing three appeals, put forward a comprehensive, albeit divided, exegesis on these two economic torts of inducing breach of contract and unlawful interference with economic interests (*OBG Ltd. v. Allan*; *Douglas v. Hello! Ltd.*; *Mainstream Properties Ltd. v. Young*, [2007] UKHL 21). The decision will likely become the leading authority on these two difficult, intertwined, and emerging torts.

1. Separate Torts

The Lords held that the two torts were distinct creatures, unravelling earlier case law conceptualizing the two torts as variants of the same wrong. The essential difference between the torts is that the defendant inducing a breach of contract is an accessory to a wrong committed by another party breaching the contract, while the defendant unlawfully interfering with economic interests is the primary tortfeasor.

Canadian authorities have generally held the two to be distinct in any case, although some authorities have equated or blurred the two torts.

2. Inducing Breach of Contract

Inducing breach of contract consists of the defendant inducing another party to breach a specific existing contract. The person accused of inducing the breach must have actual knowledge of the contract and must intend to procure a breach of the contract. It is insufficient to say that the defendant ought to have been aware that a contract existed, or that the defendant ought to have foreseen that his actions would cause a breach: negligent interference (even based on gross negligence) is not actionable. Thus, genuine belief that no contract would be breached is a defence to the claim. For a finding of liability, the defendant must target a specific contract, and must attempt to bring about the breach of the contract. This targeted breach may occur either as an end or as a means to an end, usually for the profit of the tortfeasor.

Finally, for a finding of liability, the inducement must result in a clear contractual breach; the Lords rejected earlier decisions in which mere hindrance with the performance of a contract (as opposed to outright breach) was sufficient to establish the tort.

3. Unlawful Interference

Unlawful interference, or causing loss by unlawful means, consists of intentionally damaging another person's business through unlawful means.

"Unlawful means" is a notoriously elusive concept. Must the act be criminally wrong? Tortiously wrong? Is breach of contract "unlawful"? Will a lesser degree of turpitude suffice? This difficulty is evidenced by the divided opinions of the Lords on this issue.

Lord Hoffman, writing for the majority, advocated a more narrow definition of "unlawful means", limiting it to acts that: (a) interfere with the freedom of a third party to deal with the plaintiff; and (b) would be actionable by the third party against the defendant (assuming that the third party suffered damages).

Lord Nicholls, in the minority, advocated a wider definition of "unlawful means". He found "unlawful means" to include any conduct that is unlawful, whether civilly or criminally, and whether directed at a third party or the plaintiff.

The Lords were generally unified on the mental element of the tort: the definition of "intent". The defendant must intend to cause loss to the plaintiff. Lesser states of mind will not suffice; mere foreseeability of harm is insufficient for the tort. At the same time, harming the plaintiff need not be the dominant objective; liability may lie where the intent to injure is the end to another means (again, usually the profit of the defendant). In this, the concept of intent matches that in the tort of inducing breach of contract.

4. Principles Applied to Facts

As the narrower test for economic torts set out by Lord Hoffman prevailed, in none of the three cases were the defendants found liable for inducing breach of contract or for unlawful interference.

In *OBG*, the defendant receivers were privately appointed to take control of the plaintiff's assets. The receivers sold land and chattels, and terminated and settled contracts. It turned out that the receivers' appointment was invalid. The receivers admitted liability for trespass

to chattels and land, both strict liability offences. But as they were acting in good faith in terminating the contracts, and did not intend to cause loss to the plaintiff, they were not liable for inducing breach of contract or unlawful interference.

In *Douglas*, OK! Magazine had entered into a contract for the exclusive photographic rights to the wedding of Michael Douglas and Catherine Zeta-Jones. Hello! Magazine obtained photographs from a freelance photographer who infiltrated the wedding, denying OK! its scoop. The economic tort failed as Hello! had not interfered by illegal means with the Douglas' ability to perform their obligations under their contract with OK!. Lord Hoffman did note, however, that Hello! had exhibited sufficient intent, in that it intended to cause loss to OK! by depriving it of its scoop and the attendant profits.

In *Mainstream*, the corporate plaintiff's employees diverted a business opportunity to a joint venture run by themselves and a financier. The tort of inducing breach of contract failed against the financier as he had genuinely believed that the opportunity could be pursued by the joint venture without causing a breach of contract with the employees.

5. Canadian Decision: Drouillard

In *Drouillard v. Cogeco Cable Inc.*, 2007 ONCA 322, the defendant engineered the dismissal of the plaintiff, its ex-employee, from his employment with Mastec, a cable contractor working on a project for the defendant.

The court reiterated the test for unlawful interference with economic relations: (1) intent to injure the plaintiff; (2) interference with the plaintiff's business by an illegal or unlawful means; and (3) economic loss suffered by the plaintiff.

Of these, the second—legal or unlawful means—remains the most elusive element. The Court of Appeal concluded that Cogeco's apparent breach of its own internal policy would not constitute an unlawful act. Cogeco was not bound to follow its own policy. As such, Cogeco was not liable in unlawful interference with economic relations.

Cogeco was, however, liable for interference with contractual relations. The Court of Appeal, like the House of Lords in *OBG*, drew a distinction between the two torts. The Court of Appeal set out a test for interference with contractual relations consistent with that set out by the House of Lords: (1) the plaintiff had a valid and enforceable contract; (2) the defendant was aware of the existence of the contract; (3) the defendant intended to and did procure the breach of the contract; and (4) as a result of the breach, the plaintiff suffered damages.

In *Drouillard*, elements (1), (2) and (4) were clear on the facts. As for element (3), the Court of Appeal, in contrast to the House of Lords, concluded that the defendant's reckless indifference procuring the breach of contract could ground liability. Cogeco acted with substantial certainty that its conduct would result in a breach of contract—dismissal without reasonable notice—thus satisfying the third element.

The Court of Appeal declined to rule on whether the breach of contract had to be complete, or could be partial. The House of Lords would only find liability where the contract was wholly breached.

K. Conversion

In *OBG*, *supra*, the House of Lords was divided on a possible expansion of the tort of conversion. The tort of conversion consists in the defendant's use of the plaintiff's personal property in a manner inconsistent with the owner's rights. It is a strict liability tort; it is no defence that the conversion occurred in error or in good faith. The tort is derived from the medieval tort of trover which was based on the legal fiction that the plaintiff had lost a chattel, that the defendant had found the chattel, and that the defendant then had converted the chattel to his own use.

Importantly, and, as noted in Lord Nicholls's minority opinion, somewhat inconsistently in our digital age, the tort only applies to chattels and real property. One cannot be found liable in conversion for misuse or retention of another's intangible property, such as contractual rights.

Lord Nicholls advocated that the tort of conversion apply to contractual rights whether or not they are recorded in writing. He observed an inconsistency in the facts underlying the case. In *OBG*, the defendant receivers had acted in good faith, although their appointment turned out to be invalid. They sold the plaintiff's land, plant, and equipment, and were liable for the conversion of those tangible assets. But the receivers could not be found liable in conversion for their unauthorized dealings with the plaintiff's debts and other intangible rights.

Lord Hoffman, for the majority, stated that only Parliament could effect such an expansion of the traditional tort, an expansion that would impose strict liability for pure economic loss, an expansion of which the law has traditionally and correctly been wary.

L. Defamation

1. Public Interest Defence for Responsible Journalism

A "public interest defence of responsible journalism" protects responsible media defendants against defamation actions (*Cusson v. Quan*, 2007 ONCA 771, leave to appeal filed [2008] S.C.C.A. No. 11 (QL)). In this case, the Court of Appeal endorsed the House of Lords decisions in *Reynolds v. Times Newspapers Ltd.*, [2001] 2 AC 127, and *Jameel v. Wall Street Journal Europe SPRL*, [2006] UKHL 44 (for a more full review of those cases, see the 2002 and 2007 *Annual Review*). The defence essentially measures the defendant's actions against standards of "responsible journalism". The majority *Jameel* decision, endorsed by the Ontario court, sets out a three-step approach:

1. Was the subject matter of the article a matter of public interest? In answering this question the court must consider the article as a whole, and not isolate the defamatory statement.
2. Was the inclusion of the defamatory statement in the article justifiable? Does the inclusion in the article of the statement that turns out to be false and harmful actually contribute the article, or is it unnecessary or gratuitous?
3. Was the defendant journalistically responsible? If the publication, including the defamatory statement, is of public interest, the question then arises as to whether the steps taken by the media defendant to gather and publish the information were responsible and fair. The media defendant must show that it met the expected standard of "care that a responsible publisher would take to verify the information published".

Reynolds sets out ten considerations for assessing whether the defendant acted journalistically and responsibly such that the public interest defence should apply. These include the seriousness of the allegation; the extent to which the subject matter is a matter of public concern; the reliability of the source; the steps taken to verify the information; the urgency of the matter; the tone of the article; and whether both sides of the story were presented.

Like the House of Lords in *Jameel*, the Ontario Court of Appeal emphasized that the *Reynolds* factors are not a list of hurdles, such that a media defendant's failure to prove any of them should prove fatal; instead, they are indicia of whether the media defendant was truly acting in the public interest in making the publication in question.

2. Defamation Damages

A corporation, like an individual, may claim damages for harm to its reputation. But a corporate plaintiff will traditionally receive only nominal damages unless it can show clear financial injury arising from the statement.

The House of Lords decision in *Jameel* indicates a possible movement away from this traditional reticence to award an aggrieved corporation significant damages for defamation. The majority decision concluded that "... the good name of a company, is that of an individual, as a thing of value. A damaging libel may lower its standing in the eyes of the public and even its own staff, make people less ready to deal with it, less willing or less proud to work for it", while still confirming that damages should be kept modest unless specific harm can be shown.

WeGo Kayaking Ltd. v. Sewid, 2007 BCSC 49, may also provide evidence of an incremental movement to more substantive general damages, even where the plaintiff corporation is unable to prove special damages in actual loss to the company's bottom-line. In *WeGo*, the court rejected the corporate plaintiffs' valuations for its claimed loss of customers and revenue due to the defendant kayak competitor's defamatory website. Nonetheless, the court awarded substantial general damages of $100,000 to one plaintiff and $150,000 to the other.

3. Criminal Defamation Defences Do Not Apply to Civil Defamation Claims

Criminal Code defences to criminal prosecutions for publishing defamatory liable do not apply to civil proceedings in defamation (*Strudwick v. Lee*, 2007 SKCA 11, leave to appeal dismissed [2007] S.C.C.A. No. 141 (QL)).

M. Breach of Privacy

Watts v. Klaemt, 2007 BCSC 662, which is discussed in the *ex turpi causa* section above, likely becomes the leading British Columbia authority on the tort of breach of privacy. The court found that the defendant had intentionally acted in a manner which the defendant knew or ought to have known would violate the privacy of the plaintiff, thus satisfying s. 1 of the *Privacy Act*, R.S.B.C. 1996, c. 373.

The court rejected the defendant's claim to a statutory defence of acting "incidental to the exercise of lawful right of defence of person or property"; as unpleasant as the defendant's feud with the plaintiff's daughter was, recording telephone conversations over a one-year period exceeded conduct that could be protected under that defence. Further, the plaintiff was not involved in the feud, but was a non-party whose rights were violated.

N. Harassment

Although British Columbia jurisprudence weighs against an independent tort of "harassment", the *Debt Collection Act*, R.S.B.C. 1996, c. 92, s. 14, and the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, ss. 114, 115 and 116, create a statutory tort of harassment (*Total Credit Recovery (B.C. Ltd.) v. Roach*, 2007 BCSC 530). The defendant's repeated calls to the plaintiff's employer, among other aggressive actions, was sufficient to breach the *Debt Collection Act*, leading to an award of $2,000 for the stress, anxiety, and humiliation associated with the harassment.

O. Misfeasance in Public Office

The Court of Appeal reiterated that in a claim for misfeasance in public office the plaintiff must provide clear proof commensurate with the seriousness of the alleged wrong that the public official acted in bad faith or dishonestly (*Windset Greenhouses (Ladner) Ltd. v. Delta (Corp.)*, 2007 BCCA 126). Even though the defendant municipality exercised a power that it did not have (specifically, in requiring the plaintiff to execute restrictive covenants as a condition for obtaining building permits), the evidence fell short of showing that the municipality exercised that *ultra vires* power knowingly, or with reckless indifference or willful blindness.

P. Malicious Prosecution

The leading case on malicious prosecution, *Nelles v. Ontario*, [1989] 2 S.C.R. 170, sets out a four-part test: (1) the impugned prosecution must have been initiated or continued by the defendants; (2) the proceedings must have terminated in favour of the plaintiff; (3) the proceedings must have been instituted without reasonable and probable grounds; and (4) the defendant must have acted out of malice for a primary purpose other than of carrying the law into effect.

In *Mammoliti v. Niagara Regional Police Service*, 2007 ONCA 79, leave to appeal dismissed [2007] S.C.C.A. No. 175 (QL), a plaintiff owned a building leased by the TD Bank. The plaintiffs removed from the premises 2000 boxes containing confidential documents. The bank demanded their return and advised the police of the removal. The police charged the plaintiffs with theft, extortion, and possession of property obtained by a crime.

The plaintiffs entered into a settlement with the police whereby the charges were withdrawn in exchange for, among other things, the plaintiff surrendering the boxes. The plaintiffs brought a claim for malicious prosecution against the police and the Crown, claiming that those defendants ought to have known that the matter was primarily civil.

On the second part of the *Nelles* test, due to the settlement agreement, there was no opportunity for the criminal proceedings to "terminate in favour of the plaintiff", in the form of a trial. The court nonetheless concluded that such an agreement was not fatal to the claim. The court looked to the underlying policy of the tort of malicious prosecution and noted that the Crown or police could avoid the tort's scrutiny of their actions by simply entering into a settlement agreement with an aggrieved accused. The accused would be put in the unfair position of having to choose between a possible criminal conviction and the abandonment of a possible claim in malicious prosecution.

On the fourth element, malice, the court must consider "the totality of all of the circumstances" of the case. While there was evidence vitiating a finding of malice, there was also some evidence of improper motive in the prosecution. Although proceeding with a prosecution in which there is no reasonable and probable cause may not of itself constitute malice, it may sometimes lead to an inference of malice. Given these comments, it will be very difficult to successfully strike a claim in malicious prosecution based on the fourth element in the test.

Q. False Imprisonment

In assessing whether the police may detain a citizen for investigative purposes, the court must ask itself if the detention was reasonably necessary based on an objective use of the totality of the circumstances. In *Webster v. Edmonton (City) Police Service*, 2007 ABCA 23, the police removed the plaintiff from his home on suspicion that he possessed illegal firearms. The court considered it reasonable not to allow the plaintiff to remain in his home whilst the search was taking place, and that it was reasonable to detain the plaintiff at the police station rather

than outside given the cold weather and the presence of media. Further, the trial judge erred in basing his finding of false imprisonment in part on the presence of a television film crew, a factor over which the police had no control. As there was a clear nexus between the plaintiff's detention and the officer's reasonable belief that the respondent was implicated in the criminal activity under investigation, and as the police acted reasonably, the tort failed.

R. Police Liability for Negligent Investigation

The tort of negligent police investigation exists in Canada (*Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41).

The police investigated the plaintiff for 10 robberies. The plaintiff was arrested, tried, wrongfully convicted, and acquitted after a second trial. The plaintiff's civil claims were dismissed at trial and on appeal. In dismissing his appeal, however, the majority confirmed that an investigating police officer owes a duty of care to a suspect in the course of investigation. The forseeability requirement was clearly established, and the relationship between an investigating officer and a suspect was sufficiently proximate to establish a *prima facie* duty of care. Further, the personal and public interests at stake support a finding of a proximate relationship in the investigatory context. Finally, recognizing a duty of care in these circumstances is consistent with the liberty and fair process values in the *Charter*.

On the policy considerations against recognizing a duty of care, the majority emphasized that to negate a *prima facie* duty of care, policy concerns must be more than speculative; a real potential for negative consequences resulting from recognition of the duty must be apparent. In light of this standard, none of the policy considerations the defendants advanced, such as potentially conflicting duties imposed on police officers, provided a basis for negating the *prima facie* duty of care. Having found that a duty of care existed, the majority held that the appropriate standard of care was that of the reasonable police officer in like circumstances, circumstances that may include urgency and deficiencies of information. In this case, although aspects of the investigation are not good practices by today's standards, the evidence did not establish that a reasonable officer similarly placed would not have followed similar practices to those in this case. Accordingly, the plaintiff's claim was properly dismissed.

S. Abuse of Process

The unnecessary filing and registration of consent judgments against several properties owned wholly or in part by the plaintiffs-by-counterclaim, where the defendant-by-counterclaim already had sufficient security, constituted the tort of abuse of process: *Western Surety Co. v. Hancon Holdings Ltd.*, 2007 BCSC 180. The consent judgments were filed and registered not to realize on security for debt but to extort payment from the plaintiffs in priority to other creditors. As such, the defendants had used the process of the court for an improper purpose collateral to the ostensible purpose of the judicial proceeding. The registration also constituted slander of title.

T. Occupiers' Liability

An important case for hospitals and health-care professionals, *Downey v. St. Paul's Hospital*, 2007 BCSC 478, confirms that a hospital that did not suspect a patient to be contagious, based on reasonable medical judgment, owed no duty to warn visitors that the patient may be contagious. The plaintiff had visited the patient, who suffered from HIV. He also suffered from tuberculosis, a condition not initially revealed by reasonable medical tests the hospital performed. The plaintiff, who was also HIV-positive, later contracted tuberculosis. The court noted that the *Occupiers Liability Act*, R.S.B.C. 1996, c. 337, only requires the hospital to make its site reasonably safe for visitors; the hospital does not serve as an insurer of the health of its visitors. Indeed, visitors to hospitals know that hospitals contain sick people and that a risk of infection is always possible.