TORTS

David A. Crerar

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

Colin T. Davidson

Colin T. Davidson is an associate in the insurance and tort liability group at Borden Ladner Gervais LLP. A graduate of the University of British Columbia Faculty of Law, Mr. Davidson practises in the areas of insurance and tort liability, personal injury, product liability, and property damage litigation.

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A. Introduction

2010 was a generally calm year for tort law.

The predominant feature in recent Canadian tort law is the judicial struggle with the issue of causation, largely flowing from decisions such as *Athey v. Leonati*, [1996] 3 SCR 458. The decision in *Resurfice Corp. v. Hanke*, 2007 SCC 7 (discussed in the 2008 *Annual Review*) has largely abated lower court confusion with respect to the limited and exceptional areas in which the lowered "material contribution" standard may displace the general "but for" test for causation. And in 2010,

the British Columbia Court of Appeal in *Clements (Litigation Guardian of) v. Clements*, 2010 BCCA 581 and the Supreme of Canada in *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, provided further clarification of the very narrow exceptions where the lesser "material contribution" test for causation may be applied.

B. Duty of Care

1. Duty of Care of Security Firm and Government Inspectors For Physical Harm Caused by Third Party

A provincial or territorial government, whose mine inspectors bear a statutory duty to inspect a mine for safety, owes a duty of care to miners who could be harmed as a result of a failure by a co-defendant security company to take adequate care to maintain safe working conditions during an acrimonious strike. That security company also owes a duty of care to the miners to take reasonable precautions to reduce the risk of physical harm (*Fullowka v. Pinkerton's of Canada Ltd.*). For discussion of the trial and Court of Appeal reasons, see the *2009 Annual Review* but note that the reasons below were broadly overruled by the Supreme Court of Canada.

In *Fullowka*, the Supreme of Canada made important pronouncements on the issues of duty of care, standard of care, causation, and vicarious liability. The latter topics will be further discussed within this chapter under their respective headings.

The unhappy facts of *Fullowka* arose from a bitter and protracted labour dispute at the Giant Mine, a gold-producing facility near Yellowknife in the Northwest Territories. Many illegal and violent acts occurred during the dispute, including various death threats. A dismissed employee illegally entered the mine and set a bomb which exploded and killed nine miners. The primary claim was brought by the families of the murdered miners against the territorial government and its mine inspectors, the security firm Pinkerton's, and the local and national organizations of the CAW Union. (Claims against the company that owned the mine had been settled earlier and were not considered by the court.)

With respect to the duty of care, the court confirmed the two-part approach set down in cases such as *Cooper v. Hobart*, 2001 SCC 79; *Childs v. Desormeaux*, 2006 SCC 18; and *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41: (1) does the relationship between the parties disclose sufficient foreseeability and proximity to establish a *prima facie* duty of care; and, if so, (2) are there any residual policy considerations which ought to negate or limit that duty of care?

With respect to whether the government and its mine inspectors owed a duty of care, the court analogized to the duty found to be owed by building inspectors in cases such as *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2. The government mine inspectors, like the government building inspectors, owed a statutory duty of care to adequately inspect and detect hazards that posed a risk to those who would foreseeably occupy the premises. Although potential harm by murder is not a typical risk for which mine inspectors inspect, and although the inspectors' statutory duties do not expressly extend to the detection and prevention of crime, unsafe conditions that mine inspectors are obliged to search for and detect may arise from the conduct of co-workers, managers, or third parties, and are not limited to conventional mining risks such as unsafe shafts or falling rocks. The inspectors themselves had noted that the lack of security during the labour dispute endangered the health and safety of employees. They thus had a statutory duty to inspect the mine and order the cessation of work if they considered the mine unsafe, regardless of the origin of the hazard.

With respect to the duty of care owed by the security company, the company undertook management of the risk and assumed responsibility to protect the miners from intimidation and injury by the strikers. The security company assured miners and other employees that they would be safe if they continued to work during the strike, and it must have understood that the employees reasonably relied on the company to provide a safe environment.

The court declined to displace any of these *prima facie* duties of care based on residual policy concerns. It rejected the argument that no duty should be found as the government and security company should not be held responsible for the murderer's actions: the failures alleged arose from the omissions of the defendants themselves, not the intervening murder. Although the defendants did not have direct control over the murderer, they could have exercised control over the workplace and lessened the risk that his action would kill the miners. Further, the security company surrendered much of its autonomy when it contractually agreed to provide security. Similarly, the government's autonomy was limited by its statutory responsibility for mine safety.

Ultimately, the court found that while both the security company and the government owed a duty of care, neither could be found to have failed in its standard of care owed to the plaintiffs: see further discussion below.

2. No Governmental Duty of Care Based on *parens patriae*

The power of the court to make orders in the best interests of a child under the *parens patriae* doctrine does not support the existence of a private law of duty of care on the part of a province towards children in the care of third parties, and the doctrine does not impose a positive duty on a province to seek out and address cases of potential child abuse (*Reference Re Broome v. Prince Edward Island*, 2010 SCC 11).

Broome arose from a reference to the Prince Edward Island Supreme Court Appeal Division with respect to whether the provincial government, between 1928 and 1976, owed certain duties towards children who allegedly had been physically and sexually abused while residing in a privately-operated children's home. (For a discussion of the Prince Edward Island Supreme Court Appeal Division's decision, which was largely endorsed by the Supreme Court of Canada, see the *2010 Annual Review*.) The Supreme Court of Canada decision focuses on the specific legislative scheme, as applied to assumed facts. The court, however, provided some potentially general pronouncements on the duty of care owed by the provincial government to children directly and indirectly under its care. In this, the court rejected the proposition that, based on the provincial government's funding of the orphanages, there was sufficient proximity between the government and the allegedly abused children. The court noted that the provincial government gave the grants with no restrictions and no accountability requirements, and that the use of the funds was solely at the discretion at the Board of Trustees of the orphanage.

3. Negligent Police Investigation

Two Canadian appellate courts issued reasons with respect to alleged claims of negligence, specifically negligent investigation, against police defendants, and reached different conclusions on the facts before them. Both cases were decided on applications to strike pleadings for failure to disclose a cause of action.

In *Thompson v. Webber*, 2010 BCCA 308, leave to appeal refused [2010] S.C.C.A. No. 329 (QL), the plaintiff complained to the defendant police department that his ex-wife had struck their two daughters with a spatula. He sued the department and officers in negligence, alleging that the defendants caused him injury by failing to adequately investigate and by failing to recommend prosecution of his ex-wife. The Court of Appeal dismissed the claim because the plaintiff was one step removed from the alleged victims. The relationship was thus not sufficiently proximate to

ground a duty of care between the father-plaintiff and the defendant police.

In the facts leading to *Wellington v. Ontario*, 2010 ONSC 2043, two police officers had stopped a vehicle driven by the 15-year-old son of the plaintiff. The driver attempted to escape, and was shot and killed by the police. A special investigations unit concluded that the police had acted lawfully and that no charges should be laid. The mother of the deceased driver sued the special investigations unit, in the name of the Crown, for negligent investigation of her son's death.

Reviewing an order dismissing an application to strike the statement of claim, the Ontario Divisional Court allowed the action to proceed. The court applied the two-step *Anns/Cooper* test. The court first considered whether there already existed case law that settled the issue of whether a police officer or investigator owed a duty of care to the relative of a victim of an alleged crime, such that a failure to conduct a reasonable and competent investigation would give rise to an action in negligence against the police. The court noted that the Supreme Court of Canada decision in *Odhavji Estate v. Woodhouse*, 2003 SCC 69, while not directly addressing the present circumstances, made it clear that the family of a victim could potentially claim against the police. As jurisprudence had not yet addressed the issue, the court proceeded to apply the *Anns/Cooper* test. The court noted that the special investigations unit dealt directly with one of the plaintiffs, and that the plaintiffs' claims of psychological and financial damage were potentially foreseeable as the result of negligence on the part of the investigative unit. With respect to the second stage of the *Anns/Cooper* analysis—whether any residual policy considerations ought to negate or limit the duty of care—the court concluded that it would be more appropriate to deal with this issue on a full evidentiary record.

4. No Duty of Care Owed by Child Welfare Ministry to Parents of Apprehended Child

In a pair of decisions (*C. (L.) v. Alberta*, 2010 ABCA 14 and *S. (C.H.) v. Alberta (Director of Child Welfare)*, 2010 ABCA 15), the Alberta Court of Appeal confirmed that family members of children apprehended by the Crown could not maintain a claim in negligence against the Crown. Imposing such a duty of care on the Crown would undermine the Crown's obligations to make any and all decisions in the best interests of a child in need of assistance. The interests of the child and the parents are often directly in conflict, and the relevant legislation recognizes that inherent conflict by giving the Crown broad authority to act in the best interests of the child. In *S. (C.H.)*, the court noted (at

para. 27) that "[i]mporting a duty of care in favour of the child's family members into this [hard and difficult] mix is both unwarranted and undesirable, as the potential for conflict will place additional undue strain on child welfare authorities and creates unnecessary policy consequences". The court also found that the parents' claims in fiduciary duty were bound to fail: the Crown did not owe a fiduciary duty to the parent or guardian of a child under the Director's care, as that relationship lacked vulnerability and dependence, the hallmark of a fiduciary relationship.

5. No Duty of Care Owed by Government Social Worker to Dismissed Employee

The plaintiff in *Harrison v. British Columbia (Children and Family Development)*, 2010 BCCA 220, leave to appeal refused [2010] S.C.C.A. No. 293 (QL), had been recently hired to provide one-to-one care for a youth with severe behavioural difficulties. The defendant resource worker for the Ministry of Children and Family Development had disclosed to the plaintiff's employer, an agency under contract with the Ministry, her concerns about a 1996 complaint that the plaintiff might have abused his infant daughter. As a result, the plaintiff was dismissed from employment. He claimed $520,000,000 against the Ministry and the resource worker for improper disclosure of personal information, in claims formulated under negligence, defamation, and misfeasance in public office. The court looked to the Supreme Court of Canada decision in *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38 (see the *2008 Annual Review*), in which the court had found that the defendants owed no duty of care to the plaintiff-parents of children under care. The Court of Appeal concluded that there was no basis to distinguish *Syl Apps*, and that, indeed, a person in Mr. Harrison's position had a far weaker argument for proximity than had the family members in *Syl Apps*. The court also noted the difficult and important work carried out by government social workers, and remarked that they must be free to carry out investigations and make recommendations in the best interests of the children under their care.

6. No Duty of Care Owed by Lender to Limited Partners Investing in Development

Where the lender only deals with the general partner, and reasonably assumes that the general partner will forward all communications to the limited partners investing in a project, the lender owes no duty of care to those limited partners (*Empire Life Insurance Co. v. Krystal Holdings Inc.*, 2010 ONCA 3, leave to appeal refused [2010] S.C.C.A.

No. 113 (QL)). In *Empire Life*, the plaintiff limited partners invested in a condominium complex. The defendant-by-counterclaim lender provided the plaintiff limited partners with loans through a fractured mortgage arrangement. When the arrangement was renewed, the lender and general partner were aware of significant tax arrears for the property; the limited partners were not. The limited partners claimed damages for negligent misrepresentation and breach of fiduciary duty. The court noted that the relationship between the limited partners was one based in contract, which, while not obviating a duty of care, is an important consideration. The lender made it clear in its communications that it would deal only with the general partner, and would not deal directly with the limited partners, in relation to the mortgage debt. The lender's relationship of proximity was limited to the general partner and it had provided the general partner with full facts. Had those facts been passed on to the limited partners, as the lender reasonably might have expected them to be, there would have been no miscommunication on which the limited partners could base a claim.

7. No Duty of Care on Financial Institution to Ensure Customer Not Committing Fraud

A bank does not owe a duty to a non-customer to make inquiries into the activities of its customer, with whom the non-customer has had dealings, in order to ensure that its customer is not using the bank to further fraudulent activities (*Dynasty Furniture Manufacturing Ltd. v. Toronto-Dominion Bank*, 2010 ONCA 514. Generally, the bank has a duty to a non-customer only where it has actual knowledge (including willful blindness or recklessness) of its customer's fraudulent conduct. Given the failure of the plaintiff to plead that the bank harboured suspicions about the customer's activities, the trial court was correct in striking the claim; the Court of Appeal expressly declined to decide whether a bank may ever be found to have a duty to a non-customer in circumstances where it does not have actual or constructive knowledge of the fraudulent activities.

8. No Duty of Care: Canada Revenue Agency

The Canada Revenue Agency does not owe a duty of care to a taxpayer with respect to its ruling that another taxpayer could deduct certain advertising expenses (*783783 Alberta Ltd. v. Canada (Attorney General)*, 2010 ABCA 226). The plaintiff published a weekly newspaper called Vue Weekly; its primary competitor was SEE Magazine, published by Lord Conrad Black. The plaintiff alleged that when Lord Black renounced his Canadian citizenship, his SEE should no longer have been

considered a Canadian newspaper under the *Income Tax Act*, and that the CRA was negligent in permitting SEE to continue to deduct advertising expenses. Vue contended that the CRA's favourable treatment of SEE helped SEE and harmed Vue competitively.

The Alberta Court of Appeal recognized that this result could be foreseeable, but held that the proximity necessary to find a duty of care did not exist. No precedent supported a claim of liability on the part of tax collectors to one group of taxpayers based on the taxes imposed upon another group of taxpayers. Further, policy considerations precluded any private law duty in tort owed by the CRA in these circumstances. The relationship between a given taxpayer and the CRA is personal and private, and imposing a duty on the CRA to account to one taxpayer for the way it assesses another taxpayer would impede this relationship in an unacceptable manner. Further, recognizing a duty of care would expose Canada, via the CRA, to liability to an unidentifiable group for an indeterminate amount, diverting significant resources from the ordinary administration of the taxation regime. The court confirmed that the claim was thus properly struck out on a summary basis.

9. No Duty of Care on Adult Children to Supervise Elderly Parent Living Independently

Adult children have no duty to supervise elderly parents who are living independently (*Morrison v. Hooper*, 2010 ONSC 4394). The elderly plaintiff sued the defendant driver after she was struck at a crosswalk; the defendant counterclaimed against the children of the plaintiff, alleging that they caused or contributed directly to the accident by failing to properly supervise and monitor their mother's activities. The court dismissed the claim summarily, concluding that there is no legal duty on a child to take proactive steps to force an unwilling elderly parent into a geriatric assessment. Further, even if there were a *prima facie* duty to act, public policy should negate it, as such a duty would have a chilling effect against children assisting their elderly parents. The acts of children, responsibly seeking advice from a geriatric psychiatrist or other professional to assist their parent, should not impose upon them a legal responsibility for the actions of the parent.

10. Duty of Care: Solicitor's Negligence

It was too remote and unforeseeable, at the time of the execution of a power of attorney, that the defendant solicitor's failure to follow the grantor's wishes would cause the designated attorney (the client's son) to incur legal expenses in appealing a decision of the Consent and Capacity Board (*Barbulov v. Huston*, 2010 ONSC 3088).

In *Barbulov*, the plaintiff's father retained the defendant solicitor to draft his wills; the plaintiff's father also executed a power of attorney for personal care and for property. Thirteen years later the father suffered brain damage. The plaintiff believed that the power of attorney did not reflect his father's wishes, and misinformed the father's physicians that there was no power of attorney. The physicians started an application to the Consent and Capacity Board to determine the father's best interests. The plaintiff then produced the power of attorney, and the Board concluded the power of attorney did in fact reflect the father's wishes. The plaintiff appealed the Board's decision. The reviewing judge concluded that there was no evidence that the father was aware of the terms of the power of attorney that he had signed, due to his limited command of English. Nonetheless, the reviewing judge concluded that the decision of the Board was reasonably supportable and that the plaintiff should adhere to it. The plaintiff sued the solicitor for the legal expenses he had incurred in prosecuting the Board appeal.

The Ontario Superior Court dismissed the claim summarily. It rejected an analogy to claims in which a beneficiary to a will successfully sued a negligent solicitor who had drafted the will; in contrast to a will, there is no benefit or interest accorded to an attorney in a power of attorney. Further, the solicitor did not undertake to look after the plaintiff's interests. His only concern was the interests of the plaintiff's father.

11. Duty of Care to Advise of Tainted Waste

A customer contracting with a waste disposal company owes a duty of care to advise that the waste is hazardous and requires special handling (*Enviro West Inc. v. Copper Mountain Mining Corp.*, 2010 BCSC 1443). There was a sufficiently close relationship between the generator of the waste and the waste disposal company plaintiff that the defendants should have reasonably contemplated that carelessness on their part with respect to the creation of, or advice concerning, the waste composition might harm the plaintiff. Although not all of the defendants knew the precise identity of the plaintiff waste disposal company, all of the defendants knew that the waste in question contained PCB-laden oil and that someone would have to collect, transport, and dispose of that tainted waste. As a result of the defendants' negligence, the plaintiff's waste disposal facility was contaminated with PCB waste oil. Damages for disposal of the PCB oil, flushing, cleaning, testing, and other special costs totalled some $776,033.75.

C. Standard of Care

1. Standard of Care: Tainted Waste Warning

With respect to the standard of care required of a generator of waste, the court in *Enviro West Inc.* (discussed above) endorsed and applied the Alberta decision in *Wainwright (Town of) v. G-M Pearson Environmental Management Ltd*, 2007 ABQB 576, affirmed 2009 ABCA 18, leave to appeal refused [2009] S.C.C.A. No. 36 (QL), which requires a waste generator:

(1) to fully understand the physical and chemical properties of the waste;

(2) to characterize and summarize the risks arising from those properties;

(3) to describe the nature of the levels; and

(4) to advise through a variety of means the difficulty of handling the waste and the risks related to the handling of that waste.

2. *Fullowka:* Standard of Care is Reasonable, not Absolute

With respect to the standard of care to which the security company was to be held in *Fullowka*, *supra*, the Supreme Court of Canada found that the trial judge had incorrectly imposed a standard of absolute care, not (as appropriate) a duty of reasonable care, in requiring the security company to ensure that there was no clandestine access to the mine.

3. *Fullowka:* Standard of Care Met by Good Faith Reliance on Legal Counsel's Opinion

The good faith reliance on a legal opinion, where there is no reason to doubt the accuracy of the opinion, acquits the standard of care even where the opinion turns out to be wrong and the party in question is a government regulator seeking advice about its own powers (*Fullowka, supra*). In *Fullowka*, the government had declined to order the mine closed in the face of the labour dispute, based in part on a legal opinion that it did not have the statutory ability to do so.

4. Standard of Care: Physician

a. Treatment

A medical practitioner is only required to possess the knowledge of the average practitioner in the same specialty; the standard of care does not change with respect to any particular course of treatment (*Nattrass v. Weber*, 2010 ABCA 64, leave to appeal refused [2010] S.C.C.A. No. 159 (QL)). The plaintiff fell off a ladder while attempting to rescue a bird. An unusual adverse reaction to a blood thinner administered after orthopaedic surgery required the amputation of both legs. It was accepted that the blood thinner was a standard medication in the treatment. When the plaintiff suffered throbbing pain, the dose of the blood thinner was increased; again, this was a standard medical treatment. At the time, it was not routine to monitor the platelet count of patients receiving the blood thinner, although such monitoring is standard medical practice today.

The Court of Appeal reversed the trial decision in favour of the plaintiff. The court confirmed that in prescribing drugs, the standard of care does not require the medical practitioner to know everything about the medication being prescribed, but only to have the knowledge of the average competent practitioner in the same specialty area. Thus the defendant orthopaedic surgeons were not required to have the same knowledge of the blood thinner medication as would a haematologist. The standard of care does not change with respect to any particular course of treatment when or because the doctor selects it. The standard of care is to be measured at the time of the incident in question (in the present case, the surgery); it is erroneous to rely on later standards of care and expert medical publications issued afterwards to anachronistically attack the earlier treatment. In the words of the court (at para. 29), "[m]edicine is a rapidly evolving science, and knowledge and standards of practice can change over a relatively short time". The defendant doctors could not have been expected to know of, much less change, their standards of practice as a result of publications occurring after or even just before the surgery; a reasonable time would have to pass before such publications could affect the standard of care.

Although ultimately the court, rather than the profession or trade, determines the legally required standard of care, the court will generally defer to the accepted standards of the profession or trade, and compliance with those standards will generally negate negligence. Specifically, the standard of care expected of a doctor is that he or she have and apply the level of care, skill, and knowledge of the average practitioner in his or her specialty. There are certain situations in which the standard practice itself may be found to be negligent, but this extreme finding will only be made where the standard practice is "fraught with obvious risks", such that any ordinary person would find it to be negligent without requiring diagnostic or clinical expertise to form that evaluation.

b. Post-operative Care

The essence of a physician's post-operative duty is to ensure that the patient is adequately equipped to obtain after-care or, in other words, to ensure they are placed into "capable hands". In some cases, this will require the doctor to arrange for such care directly, but in others it is sufficient to give the patient adequate advice and direction and leave their future care to them. The "capable hands" can sometimes be the patient's own (*Rollin v. Baker*, 2010 ONCA 569).

In *Rollin*, the court found that the physician's failure to warn of the risk of displacement following an operation on a fractured wrist, and the urgent need for care should displacement occur, breached the standard of care. The patient was not provided with adequate information to seek proper medical attention.

5. Standard of Care: Solicitor

The conduct necessary to meet the standard of care in preparing a chambers motion is full preparation, with full marshalling of both the law and facts (*Adeshina v. Litwiniuk & Co.*, 2010 ABQB 80). Although an expert would usually be called to provide evidence of a professional standard of care, the court was able to draw its own conclusions on the standard of care.

D. Causation

1. Use of "Material Contribution" Test in Lieu of "But For" Test

In *Clements (Litigation Guardian of) v. Clements*, 2010 BCCA 581, the court provided guidance on the rare instances in which a court may employ a relaxed causation test of "material contribution" rather than the presumptive "but for" test.

In *Clements*, the plaintiff suffered severe head injuries after the motorcycle on which she and her defendant husband were riding began to wobble, then collapsed on the highway. The trial court found that, due to the inadequacy of accident reconstruction modelling, it would be impossible for the plaintiff to prove that "but for" the defendant husband's alleged breaches of care (overloading the motorcycle and driving at excessive speeds), she would not have been injured. The trial court found causation on the "material contribution" standard.

The Court of Appeal reversed the finding below, admonishing that it is important to keep in mind that the material contribution test is not

a test for determining factual causation. Rather, it provides a basis for finding legal causation after it has already been proven in fact that the defendant's negligence may have caused the accident. The court emphasized that *Resurfice Corp. v. Hanke*, 2007 SCC 7, does not stand for the proposition that the material contribution test may be applied whenever a defendant's negligence has materially increased a plaintiff's risk of injury and it is impossible for the plaintiff to prove that negligence was a factual cause of the injury. "Material contribution" does not displace the "but for" test and is only to be applied in two exceptional circumstances.

The first circumstance, referred to as "circular causation", is illustrated by the classic case of *Cook v. Lewis*, [1951] S.C.R. 830, in which the plaintiff hunter had definitely been shot by one of the two defendant hunters but it was unknown which hunter's bullet had caused the injury. In a rare and bizarre example such as this, the question is not of "how much" each defendant caused the injury, but rather of "which one" caused the injury: circular logic makes the application of "but for" test unanswerable.

The second exceptional scenario where the material contribution test may be applied is in the case of "dependency causation", where proof of factual causation depends on establishing what one party would have done had another party not acted in a negligent manner, a hypothetical that may be impossible to prove. *Walker Estate v. York Finch General Hospital*, 2001 SCC 23, provides such an example: it was impossible to prove that the donor, whose tainted blood infected the plaintiff, would not have given blood had the defendant properly warned him against donating blood, given his lifestyle risks. The causal link between the at-fault defendant and the injured plaintiff is thus mediated by the hypothetical actions of an uncontrollable third party.

Thus the "material contribution" test is not meant to assist the plaintiff with evidentiary challenges. It is only be to invoked in cases of logical impossibilities. The Court of Appeal noted that there is generally nothing unfair about requiring a plaintiff to prove that the negligence of a particular defendant caused his or her injuries. A person who acts without reasonable care commits no wrong in law; the defendant only commits a tort if the lack of care actually causes injury to the plaintiff.

The Supreme Court of Canada in *Fullowka*, *supra*, also rejected the trial court's use of the "material contribution" test in lieu of the *Resurfice* "but for" test (and, to be fair, the court noted that *Resurfice* was decided a year after the *Fullowka* trial decision). The material contribution test is reserved for special situations that generally have two characteristics:

first, proof is impossible under the "but for" test; and second, it is clear that the defendant did in fact breach the standard of care to the plaintiff and thereby exposed the plaintiff to an unreasonable risk of injury of the type the plaintiff ultimately suffered. The *Fullowka* facts featured neither of these two characteristics.

2. Causation: Concept of "Proximate Cause"

As confirmed in *Resurfice*, the plaintiff always bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned as permitted by statute (*Skinner v. Guo*, 2010 BCCA 321, leave to appeal submitted [2010] S.C.C.A. No. 373 (QL)).

It is an error for the trial judge to ask himself or herself whether the defendant's acts and omissions were the "proximate cause" of the accident, as the phrase implies that the law recognizes only a single cause of any given accident (see *Chambers v. Goertz*, 2009 BCCA 358, discussed in the *2010 Annual Review*). Once the court finds that the accident would not have occurred but for the defendant's acts or omissions, the court may then turn to the issue of apportionment.

In *Skinner v. Guo*, the defendant had parked his car in the middle of a highway after striking a coyote. The plaintiff vehicle collided with the rear of the defendant's vehicle. The court found that the defendant's act of remaining stationary in the dark, on a well-travelled highway with a 90 kilometre per hour speed limit, and without activating emergency flashers or brake lights, did create an unreasonable risk of harm. But for the defendant's ill-advised actions, no accident would have occurred.

The court emphasized, however, that *Skinner* did not change the generally-accepted rule that the driver behind is liable for causing a rear-end collision, even when the driver in front brakes suddenly (*Ayers v. Singh* (1997), 85 B.C.A.C. 307).

3. Causation: Psychiatric Damage for Physician's Failure to Fully Advise of Injury

A doctor's failure to advise the patient plaintiff of the true seriousness of his injuries could foreseeably cause a person of reasonable fortitude to suffer psychiatric damage (*Haukioja v. Fraser*, 2010 ONCA 249). The court reiterated that causation requires the application of the "but for" test, including in claims of psychiatric illness, despite the difficulty

of proving causation in such cases. It was sufficient to find that, but for the physician's failure to fully disclose the seriousness of the injury, the plaintiff would not have formed the paranoiac belief that the doctor had deliberately caused him harm by the non-disclosure. The plaintiff in that case had no particular sensitivities, emotional or otherwise, in contrast to the unsuccessful hypersensitive hairdresser plaintiff in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 (for which, see the *2009 Annual Review*). Further, given the relationship of trust and authority between the defendant doctor and the plaintiff patient, it ought to have been foreseeable that a breach of that trust through a failure to properly advise of the extent of the plaintiff's injuries could have severe ramifications on the plaintiff's mental health.

4. Causation: Breach of Fiduciary Duty

Where the defendant realtor breaches his fiduciary duty by withholding information from his plaintiff client but the plaintiff could not have benefited from that information, a claim in negligence will fail as it lacks the requisite causation (*Crescent Restaurants Ltd. v. ICR Brokerage Inc.*, 2010 SKCA 92). In *Crescent Restaurants*, the defendant brokered a sale of a property by the plaintiff to a purchaser, leading to a binding agreement of sale. The defendant then learned that the purchaser was in negotiations to flip the property to a steakhouse chain. The defendant asked for an extension for subjects from the purchaser. Although the defendant broker had a fiduciary duty to disclose the reasons for seeking the extension (the contemplated flip of the property by the purchaser), the plaintiff could not have benefitted from that information even if disclosed: it had already agreed to sell the property, and there was no evidence that the purchaser would have abandoned the contract in the event that the extension was refused.

5. Causation and Negligent Legal Advice

In a claim for professional negligence based on inappropriate legal advice, there is a rebuttable presumption that, had the client received proper legal advice, they would have acted in accordance with that advice. Therefore, when giving advice on the merits of a claim, counsel should be careful not to overstate the strength of the case and should be especially wary of giving unqualified advice early in the process without the opportunity to fully review the case or assess all aspects of the matter (*Levicom International Holdings BV v. Linklaters (a firm)*, [2010] EWCA Civ 494). Jacob L.J. (the other Lords concurring) held that:

> When a solicitor gives advice that his client has a strong case to start litigation rather than settle and the client then does just

that, the normal inference is that the advice is causative. Of course the inference is rebuttable—it may be possible to show that the client would have gone ahead willy-nilly. But that was certainly not shown on the evidence here. The Judge should have approached the case on the basis that the evidential burden had shifted to Linklaters to prove that its advice was not causative. Such an approach would surely have led him to a different result.

E. Vicarious Liability

1. Vicarious Liability of Union for Acts of Its Members

In *Fullowka*, *supra*, the Supreme Court of Canada declined to hold the CAW national union organization vicariously liable for the acts of the union member who murdered nine miners. The plaintiffs alleged vicarious liability on two bases: first, that the CAW national organization controlled the local CAW branch; and second, that unions are generally vicariously liable for the acts of their striking members.

The Supreme Court of Canada confirmed the three-step consideration of whether vicarious liability should be imposed (see *Bazley v. Curry*, [1999] 2 S.C.R. 534, discussed with other vicarious liability cases in the *2004 Annual Review*). First, the court determines whether the issue is unambiguously determined by precedents. If not, a further two-part analysis is used to determine whether vicarious liability should be imposed as a matter of policy.

The court concluded that legal precedent did not generally support the proposition that unions are vicariously liable for the acts of their members. Further, with respect to whether vicarious liability should be imposed for policy reasons, the court noted that union members do not fall into any of the traditional categories of vicarious liability, and unlike employers, unions do not choose who will be a member of their organization. The court noted that the CAW local branch had significant autonomy from the national organization, and that the CAW local had in fact distanced itself from the CAW national.

These findings followed from an earlier conclusion that the CAW national organization and the CAW local branch were separate legal entities. Whether a given union local is indeed a separate entity from the national union organizations depends on the relevant statutory framework, the union's constitutional documents, and the provisions of collective agreements. The fact that the CAW local, as opposed to

the CAW national, was the certified and exclusive bargaining agent for all employees covered by the agreement made it clear that the CAW local branch was a legal entity separate from the national organization, and a legal entity capable of being sued in its own right.

F. Contributory Negligence and Apportionment

1. Test for Contributory Negligence

A plaintiff injured in an accident is contributorily negligent if he or she fails to take reasonable care for his or her own safety and this failure is a cause of the accident. Where a cyclist rides on the sidewalk, contrary to the *Motor Vehicle Act*, and is struck by a motor vehicle, the cyclist is not relieved of liability for failing to keep a proper lookout or failing to stop in time simply because a pedestrian might also have been struck in similar circumstances (*Bradley v. Bath*, 2010 BCCA 10).

2. Subcontractor Following Orders Known to be Risky

A subcontractor is not relieved of liability for negligent acts merely because those acts were directed by the general contractor after being informed of the risks (*Jelco Construction Ltd. v. Vasco (Euca Welding)*, 2010 ONCA 444). However, the general contractor was held 75% at fault after it ordered a subcontractor to perform welding when it was likely to (and did) cause a fire. The subcontractor had explicitly warned of the risk, but was told that the work had to continue.

G. Damages

1. Future Income Earning Capacity

A plaintiff must always prove that there is a real and substantial possibility of a future event leading to an income loss. If, and only if, that burden is met will the plaintiff's loss be assessed and damages awarded. Damages may be assessed in two ways. The first, the *Steenblok* [(1990), 46 B.C.L.R. (2d) 133 (C.A.)] or earnings approach, is based on assessing the actual lost wages and is most useful where the plaintiff has an established earnings history. The second, the *Pallos* [(1995), 100 B.C.L.R. (2d) 260 (C.A.)] or capital asset approach, is more useful in cases where there is no easy quantification of earnings, as with a child or plaintiff who has not substantially entered the workforce (*Perren v. Lalari*, 2010 BCCA 140).

While the court's language in this case is framed as a reaffirmation of existing principles, its effect in practice may be to reduce the availability of awards under this head of damages.

In *Perren*, the plaintiff suffered injuries in a motor vehicle accident. By trial, it was evident that she would experience chronic pain indefinitely and that she was not competitively employable in a job requiring heavy or repetitive work. However, her ability to perform her pre-accident job (which had no such requirements) was unaffected, and there was no substantial possibility that she would turn to employment involving heavy or repetitive work. There was thus no substantial possibility that she would suffer a loss of income. The Court of Appeal set aside the damage award for this head.

2. In-trust Awards

In-trust claims must be specifically pleaded and supported by the evidence. They require evidence that a third party performed some household tasks, but also that the plaintiff was incapable of performing them. Where there is no evidence of a diminution of ability to perform household tasks, there is no basis for an award (*Bradley v. Bath*, *supra*).

In-trust awards do not require that the injuries suffered reach a threshold of severity. Instead, where family members perform services for the plaintiff, the plaintiff must prove that: (1) the services were "above and beyond"that which is part of the usual "give and take" between family members; (2) the services must have been necessitated by the injury and would not have been required otherwise; and (3) any compensation granted must be commensurate with the plaintiff's loss. In addition, the services need not relate only to household services, but can cover work done in a family enterprise. However, such claims must be carefully scrutinized (*Dykeman v. Porohowski*, 2010 BCCA 36).

In *Dykeman*, the plaintiff had suffered soft tissue injuries preventing or limiting her involvement with her equestrian business. She advanced claims on behalf of her parents, who provided assistance to her. As a result, the plaintiff's mother was unable to return to her practice as a psychologist and was required to care for her grandchildren (for 12 to 14 hours at a time), as well as giving tours and helping with the business. The plaintiff's father, while working full time, assisted several hours a night with the physical aspects of the business. This evidence was sufficient for the question to be put to the jury.

3. Speculative Future Events

There is a difference between "speculation" in the narrow, slightly pejorative sense (being conjecture without a basis in evidence) and "projection" based on sound analysis and a history of success. In this *Family Compensation Act* claim, it was held that insufficient weight had been given to projected future earnings of the deceased's business and that the evidence established a real likelihood of increased income. The awards to the surviving spouse and children were therefore substantially increased (*Stegemann v. Pasemko*, 2010 BCCA 151).

4. Indivisible Injury: Apportionment Between Multiple Tortious Causes

Since *Athey v. Leonati*, [1996] 3 S.C.R. 458, tortfeasors have been liable for the full extent of an injury, including any aggravation, if the injury is indivisible. This is a question of fact. *Athey* overruled the decision in *Long v. Thiessen* (1968), 65 W.W.R. 577 (B.C.C.A.) as it relates to indivisible injuries (*Bradley v. Groves*, 2010 BCCA 361, leave to appeal filed [2010] S.C.C.A. No. 337 (QL)).

In *Bradley*, the Court of Appeal confirmed its ruling in *Ashcroft v. Dhaliwal*, 2008 BCCA 352 (see the *2009 Annual Review*) and continued its expansive view of the liability of tortfeasors for indivisible injuries. The plaintiff was injured in two car accidents. The first caused soft tissue injuries to the neck and back and, before she was fully recovered, the second accident aggravated those injuries. The plaintiff sued the first driver (commencing the action before the second accident) who was the only defendant before the court. The court held that the second accident had aggravated the initial injuries and held the first driver liable for the entirety of the plaintiff's damages. The first driver's remedy was to seek contribution and indemnity from the second.

For a different factual finding, see *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111, where a subsequent tortfeasor was not liable for the entire injury as the harm caused was divisible. There, the plaintiff was initially injured at a dance club when a co-worker fell on her, causing a concussion. She was subsequently involved in a car accident. The trial judge found that there were no overall or global symptoms that could not be separated between the two injuries and was satisfied that the plaintiff would not have fully recovered, regardless of the second accident. The first tortfeasor was assessed damages of nearly $6 million, while the subsequent tortfeasor was found liable for merely $10,000 due to the minor nature of the injuries sustained in the car accident.

5. Damages for Negligent Misrepresentation

Where funds are advanced based on a negligent misrepresentation, damages can be assessed for a lost opportunity to use those funds elsewhere, even if the evidence suggests such use would never have occurred. The plaintiff, having loaned money on the understanding that the investment would be secured, later discovered that no security had been granted and sued for the return of her money, contractual interest, and additional interest representing the amount that would have been given in the open market for an unsecured loan. The evidence indicated that the plaintiff would never have made an unsecured loan at such a rate, even if offered the chance. However, the trial judge noted that in cases of wrongful use, a defendant will be required to pay a plaintiff for the loss of use of the property even in a situation where the plaintiff would never have used it during the relevant period. Applying similar principles, the trial judge awarded the plaintiff the interest differential between what she had already received and what she would have received had she made the unsecured loan (*Smith v. Landstar Properties Inc.*, 2010 BCSC 843).

H. Tort Defences

1. Limitation Periods

Where an injured party applies for WCB benefits, the limitation period for a tort claim for the injury may not start to run until the WCB elects not to bring a tort claim itself and informs the injured party of that decision (*Yaremy v. Insurance Corp. of British Columbia*, 2010 BCCA 418).

Upon consideration of s. 6(4) of the *Limitation Act* and ss. 9 and 10 of the *Workers Compensation Act*, the majority held that the running of the limitation period had been postponed. Emphasizing that s. 6(4) requires that a person "ought" in their own interests be able bring an action, they held that as the *Workers Compensation Act* provisions gave the WCB exclusive jurisdiction to determine whether to maintain or compromise a tort action, the plaintiff's ability to bring an action was impaired. Given the plaintiff's financial need for the WCB benefits and the likelihood that those benefits would have ceased if he tried to bring an action personally, it was not in his interests to bring a tort action. Therefore the limitation period did not begun to run until the WCB informed the plaintiff that it would not be seeking to advance a tort claim.

I. Defamation

1. Identification

Defamation requires that the impugned words be capable of being interpreted to refer to the plaintiff: the requirement of "colloquium". The question is not whether the defendant intended to refer to the plaintiff, but whether the words would be reasonably understood to refer to the plaintiff by those to whom they were published. Further, even where the defendant intends to refer only to certain persons within a category of persons, all of the persons in that category may have a claim of defamation if the target person represents a significant proportion of the entire class (*Monument Mining Ltd. v. Balendran Chong & Bodi*, 2010 BCCA 373).

2. Defence of Responsible Communication on Matters of Public Interest

As discussed at length in the *2010 Annual Review*, in *Grant v. Torstar Corp.*, 2009 SCC 61, and *Quan v. Cusson*, 2009 SCC 62, the Supreme Court of Canada confirmed a new defence of responsible communication on matters of public interest. The new defence protects journalists, editors, and publishers, as well as non-traditional commentators such as citizen-journalists, bloggers, and members of the public, from a defamation claim if the defendant can show that it acted responsibly in reporting on a matter of public interest, even if the facts turn out to be incorrect and harmful. The Supreme Court of Canada broadened the scope of a similar defence set out by English courts in *Reynolds v. Times Newspapers Ltd.*, [1999] 4 All E.R. 609 and *Jameel v. Wall Street Journal Europe Sprl*, 2006 UKHL 44, which was limited to media defendants.

The defence is now being applied by lower courts across the country. Although it largely constitutes a review of the trial decision, *Hansen v. Harder*, 2010 BCCA 482, represents a useful appellate application of the new defence. The court noted that while the *Grant* defence finds its roots in the *Reynolds* defence, the Canadian test is slightly different. The court accordingly reviewed the findings below in light of the *Grant v. Torstar* reiteration of the test.

3. The Defence of Responsible Journalism and Archived Content

Failure to correct or withdraw an archived story published on the website of a newspaper or other online publisher may defeat the defence of

responsible communication (*Flood v. Times Newspapers Ltd.*, [2010] EWCA Civ 804). It may well be that, in the circumstances in which the story was originally published, it would have been protected by the defence of responsible journalism (or, in Canada, the defence of responsible communication on matters of public interest). But as time goes by and urgency abates, the defendant journalist, journal, or website operator will have trouble proving responsible behaviour if it fails to update, correct, or withdraw a story that turns out to be false.

4. Internet Hyperlinks to Defamatory Websites

The Supreme Court of Canada heard the appeal of *Crookes v. Newton*, 2009 BCCA 392, in December 2010 (for a discussion of which see the *2010 Annual Review*). The judgment will presumably clarify the liability of a person who hyperlinks from a website to another website containing allegedly defamatory statements, as well as issues of internet defamation generally.

5. Jurisdiction

In *Black v. Breeden*, 2010 ONCA 547, leave to appeal granted [2010] S.C.C.A. No. 387 (QL), the Ontario Court of Appeal confirmed the trial court decision ((2009), 309 D.L.R. (4th) 708 (Ont. S.C.J.)) indicating a greater willingness to hear defamation actions in domestic courts, even where arguably the majority of underlying facts and witnesses were outside the jurisdiction. In *Black*, the defendants would have known that the allegedly defamatory press releases posted on the company's New York website could and would be downloaded in Ontario, and that the reputation of the plaintiff, Lord Black, was predominantly established in Ontario. The court appeared to adopt a U.S. doctrine that allows a court to assume jurisdiction where the defendant appears to be targeting and directing the statements to readers in that jurisdiction. The appeal to the Supreme Court of Canada is scheduled to be heard on March 21 to 22, 2011.

6. U.S. Developments

Statutory developments in U.S. defamation law may impact Canadian defamation cases with cross-border components, a feature frequently arising in Internet-based claims. On August 10, 2010, the *Speech Act* 28 U.S.C. §§ 4101–4105 was signed, barring U.S. recognition and enforcement of foreign defamation judgments that fail to comply with the U.S. First Amendment.

J. Breach of Privacy

An unhappy and acrimonious family law dispute led to an award of $40,000 for breach of privacy and defamation (*Nesbitt v. Neufeld*, 2010 BCSC 1605). The ex-husband defendant-by-counterclaim launched a multi-pronged attack on his ex-wife, including the erection of a dedicated website accusing her of, *inter alia*, dating an Egyptian male prostitute and also a divorced Christian marriage counsellor, befriending paedophiles, being mean, weird, sneaky, and, perhaps most controversially, being "very Dutch". The husband published her private correspondence from her personal home computer and the court found that the use of the private correspondence was a deliberate act that violated the ex-wife's privacy, thus completing the tort. The court rejected the defence that the correspondence was found on the computer that the ex-wife had given to him. A brief scan of the correspondence found on that computer would have revealed the personal nature and made clear the obligation to return it to the owner. The court found that the ex-wife had a reasonable expectation that her private correspondence would not be e-mailed or faxed to third parties or publicly posted on the Internet without her knowledge or consent.

K. Malicious Falsehood

The "single meaning rule" in defamation has no place in the tort of malicious falsehood (*Ajinomoto Sweeteners Europe SAS v. ASDA Stores Ltd.*, [2010] EWCA Civ 609). The single meaning rule states that if words are capable of two meanings, one defamatory and one not, they must be taken as innocent, not defamatory. To apply this rule in the context of malicious falsehood would deny the claimant any remedy for business harm, on the illogical ground that it was only harmed in the eyes of some consumers and not others.

L. Harassment

Prince George (City) v. Riemer, 2010 BCSC 118, a municipal zoning dispute concerning the storage of rubbish, includes a discussion of the potential and novel tort of "harassment" flowing from the defendant's counterclaim against the municipality. The court noted that at last pronouncement (*Total Credit Recovery v. Roach*, 2007 BCSC 530), most authorities in British Columbia weighed against the recognition of a tort of harassment. In another recent case (*Mainland Sawmills Ltd. v. IWA-Canada*, 2006 BCSC 1195), the court considered the possible elements of such a tort, should it exist: outrageous conduct by the defendant; the

defendant's intention of causing, or reckless disregard of causing, emotional distress; the plaintiff's suffering of severe or extreme emotional distress; and an actual and proximate causation of that emotional distress by the defendant's outrageous conduct. In the end, the court concluded that Mr. Riemer had not established any of the indicia required to support a prospective claim in harassment.

M. Misrepresentation

1. Negligent Misrepresentation

There is a special relationship between the seller and purchaser of real property giving rise to a duty of care in regard to the information provided about the state of the property; a breach of this duty gives rise to liability (assuming the other requirements for negligent misrepresentation are met) for reasonably foreseeable loss and damage that results (*Aldred v. Colbeck*, 2010 BCSC 57). Where the seller ought to have been aware that a fuel tank was not properly decommissioned, representing that it was constituted a breach of the duty. The seller was responsible for the reasonable costs of remediating the property, as well for as the loss incurred by the purchaser in selling her previous property quickly in order to purchase the seller's property (which she was induced to do by the seller's representation). However, delay in selling the contaminated property, and the cost of debt financing for another property in the interim, was too remote to be compensable.

2. Fraudulent Misrepresentation and Concealment

Fraudulent misrepresentation requires a false or inaccurate statement made by a defendant who either knew it to be false or was reckless as to its truth. The tort of concealment, in the context of vendor and purchaser, requires a positive step by the vendor to hide a defect, coupled with the intention to withhold that information from the purchaser. Mere non-disclosure is insufficient. When the vendor places a clause in the sale agreement specifically disclaiming warranties as to the condition of soil, and both parties are aware that there is a landfill somewhere in the area but do not know exactly where, no concealment is shown. In fact, such a clause flags a potential issue and is the opposite of concealment (*Motkoski Holdings Ltd. v. Yellowhead (County)*, 2010 ABCA 72).

N. Occupiers' Liability

1. Liability to a Tradesman Performing Work on the Property

An occupier's duty to a tradesman on his property is to ensure that the premises are reasonably safe, not to monitor how the work is done or provide suggestions as to safety measures (*Mahe v. Bouilanne*, 2010 ABCA 32). The plaintiff was hired to transfer wiring from an older pole to one that had been recently installed. The defendant failed to inform the plaintiff that the old pole was rotten. It shattered during the work, throwing the plaintiff to the ground. The plaintiff should have used more care to protect against the risks of falling, but the defendant was 40% at fault for failing to warn of the risk posed by the rotting pole.

2. Liability to a Tenant Who Maintains the Property

A tenant may successfully sue the landlord for injuries caused by a failure to properly clear snow from steps, even where the tenant has assumed responsibility for clearing the snow in exchange for a reduction in rent. Despite the tenant undertaking the activity, the landlord has a duty to inspect the premises to ensure the snow has been properly removed. However, the plaintiff will likely be found contributory negligent (here, in the amount of 25%) (*Hunter v. Anderson*, 2010 BCSC 1037).

O. Conversion

Money paid by a developer to its general contractor as contractual advances to assist in financing the construction does not give the general contractor a proprietary interest in those funds. Any disbursement of those funds, save in the advancement of the project or as contemplated in the contract, constitutes a conversion for which the company, and those directing the disbursement, will be liable (*Columere Park Developments Ltd. v. Enviro Custom Homes Inc.*, 2010 BCSC 1248).

In *Columere*, the defendant directors of the general contractor diverted funds intended for subtrades to a company in which they held a controlling interest and which was a stranger to the contract. They argued that this did not constitute conversion as they were merely transferring their own company's funds, and that the plaintiff's remedy was in breach of contract against the general contractor. The court held that these arguments ignored the nature of the funds: to assert a proprietary right in these funds by fully dispersing them to a company that was a

stranger to the contract and did not assist with the construction was essentially theft. The directors were found personally liable in conversion for amounts of nearly $3 million.

P. Conspiracy

In order to make out a claim for unlawful act conspiracy, a plaintiff must plead an unlawful act by each conspirator; knowledge that the conduct of others is unlawful is not sufficient to render an otherwise lawful act unlawful. Where A and B have agreed to split the commissions A receives from their employer, contrary to their employment contract, and A transfers B's share to C, who has no such employment contract, C cannot be found liable for conspiracy as C receiving money from A was not unlawful. That C has no legal entitlement to the money is not sufficient and he is not precluded from accepting it if given (*Bank of Montreal v. Tortora*, 2010 BCCA 139).

The Court of Appeal further held that where a claim in unlawful act conspiracy is based on a breach of contract (or fiduciary duty) and the conspiracy claim will add nothing if the claim in breach succeeds, and fail if the claim in breach fails, the doctrine of merger applies and the claim in conspiracy should be struck.

Q. Misfeasance

In *Harrison v. British Columbia (Children and Family Development)*, 2010 BCCA 220, leave to appeal refused [2010] S.C.C.A. No. 293 (QL)) (discussed above), the court dismissed a claim for misfeasance in public office as there was nothing in the record before the court that could provide the necessary evidence of targeted malice by the defendant against the plaintiff. The court confirmed the authority of *Powder Mountain Resorts Ltd. v. British Columbia*, 2001 BCCA 619 at para. 8: "where bad faith on the part of a public official is alleged, clear proof commensurate with the seriousness of the wrong should be provided".

R. Economic Torts: Unlawful Interference with Economic Interests

The confusing area of economic torts in Canada gained a new chapter in 2010, courtesy of the Ontario Court of Appeal (for a discussion of this tort, see the *2008 Annual Review*). Unlawful interference with economic interests is made out when one party intentionally damages the other's business through "unlawful means". However, what

constitutes "unlawful means" remains unclear. Two positions have been advocated: a narrow interpretation requiring interference with the freedom of a third party to deal with the plaintiff which would be actionable by the third party; and a broad interpretation that includes any conduct that is unlawful, whether civil or criminal, and whether directed at the third party or the plaintiff.

In *Alleslev-Krofchak v. Valcom Ltd.*, 2010 ONCA 557, leave to appeal filed [2010] S.C.C.A. No. 403 (QL), the Ontario Court of Appeal adopted the narrow view of "unlawful means" and held (at para. 60) that:

> [T]o qualify as "unlawful means", the defendant's actions (i) cannot be actionable directly by the plaintiff and (ii) must be directed at a third party, which then becomes the vehicle through which harm is caused to the plaintiff.

The court then held that defamation of the plaintiff and the conspiracy to harm her did not meet the requirements for "unlawful means" as they were not directed at a third party. However, the defendants' conspiracy to harm her employer (by defaming her) and their breach of a contract with her employer were directed at her employer, a third party, and therefore constituted unlawful means actionable by the plaintiff.

Any clarity imparted by this decision, however, was short-lived as the Ontario Court of Appeal soon released *Barber v. Molson Sport & Entertainment Inc.*, 2010 ONCA 570. In that decision the court held that "unlawful means" are simply acts that the defendant is "not at liberty to commit," a phrase that should be interpreted broadly. No mention was made of the requirement that the conduct affect a third party (although, on the facts of the case, this stricter requirement would have been met), and the law remains uncertain.

S. Alienation of Affection

Alienation of affection is not a tort in Canada. Nor can parents deprived of access to their children bring a claim on this basis by alleging a breach of contract. Disputes of this nature should be handled by the appropriate family law legislation (*Knutson v. Knutson*, 2010 NWTSC 1).

T. Contribution and Indemnity

Whether a party who is immune to a suit by the plaintiff will be protected against a claim for contribution and indemnity brought by a concurrent tortfeasor is a question of timing. If the party is immune from the moment the plaintiff is harmed (due, for example, to contractual limitation on liability) they will be correspondingly immune to any claim for contribution and indemnity based on that incident. However, if the immunity arises after the incident, it cannot serve as a bar to a claim for contribution and indemnity. In particular, neither the release of liability by the plaintiff nor the running of a limitation period affect the ability to claim contribution and indemnity; that right is dependent only on the party having been liable to the plaintiff at some point following the incident (*Strata Plan LMS 1751 v. Scott Management Ltd.*, 2010 BCCA 192, leave to appeal refused [2010] S.C.C.A. No. 215 (QL)).