TORTS

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A. Introduction

2012 was a year of calm expansion of basic tort principles, and a year of exciting and useful jurisprudence with respect to emerging and novel torts.

In *Clements (Litigation Guardian of) v. Clements*, 2012 SCC 32, the Supreme Court of Canada confirmed that the "but for" test governs causation in negligence, and is not to be displaced by a "material contribution test" except in exceptional cases of necessity. In this, the court confirms the strict principles of *Resurfice Corp. v. Hanke*, 2007 SCC 7, but gives life to its exceptions.

The English Court of Appeal found that parent corporations may be vicariously liable for the acts of subsidiaries, without recourse to piercing the corporate veil (*Chandler v. Cape Plc*, [2012] EWCA Civ 525).

In *Hamilton (City) v. Metcalfe & Mansfield Capital Corp.*, 2012 ONCA 156, and *Weldon v. Teck Metals Ltd.*, 2012 BCCA 53, appellate courts provided useful guidance as to when a claim in misrepresentation crystallizes, thereby starting the limitation period, specifically in the financial context in which the conceptually distinct issues of "damage" and "damages" are frequently confused.

Proceeding on to brave new worlds, 2012 saw two potentially significant defamation trial decisions that will almost certainly lead to further appellate statements. An Australian case (*Trkulja v. Google Inc. LLC*, [2012] VSC 533) opened the door to potential defamation claims against search engines such as Google for unflattering search results. A British Columbia case (*Mainstream Canada v. Staniford*, 2012 BCSC 1433) widened the defence of fair comment to protect ostensibly factual assertions made with respect to a topic of scientific controversy.

Finally, in three cases, appellate courts usefully surveyed, considered, and clarified emerging, unsettled, and confusing torts. *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2012 NBCA 33, expansively considered the economic tort of interference with contractual relations by unlawful means. *Koubi v. Mazda Canada Inc.*, 2012 BCCA 310, clarified and narrowed the applicability of waiver of tort. *Jones v. Tsige*, 2012 ONCA 32, recognized a common law tort of invasion of privacy.

B. Negligence: Duty of Care

The first step of the negligence analysis is to determine whether the plaintiff and defendant were in a relationship that gave rise to a *prima facie* duty of care based on foreseeability and proximity. If a *prima facie* duty exists, the second step is to ask whether the duty is nonetheless negated by policy considerations.

1. No Duty to Patients of Other Doctors in the Same Hospital Department

In *Friend v. Watters*, 2012 ONSC 435, the Ontario Supreme Court determined that medical doctors do not owe a duty of care to patients of other doctors in the same hospital department. The plaintiff had undergone surgery to remove a suspected cancerous lesion. After the surgery, the plaintiff was seen by members of the Acute Pain Service of the Ottawa Hospital Civic Campus (the "APS"). The plaintiff later developed a skin abscess and alleged that she had been left with disabling chronic pain. One of the defendants, Dr. Penning, had at all material times been the Director of the APS. Dr. Penning did not attend to the plaintiff, nor was he scheduled to do so, until after her abscess had been diagnosed and treatment had begun. As part of a settlement with the hospital, the plaintiff had released Dr. Penning in his administrative capacity from further liability. However, the action was maintained against him in his personal capacity. The plaintiff claimed that Dr. Penning had a duty to assist in her care and to inform other members of the APS of her need for daily assessment and supervision. The court held that the plaintiff's pleading failed to establish a duty of care. Applying the test established in *Anns v. Merton*, [1977] 2 All ER 492, the court found that it was not reasonably foreseeable that harm would arise from Dr. Penning's alleged failure to impart information to his colleagues, and that the relationship between Dr. Penning and the plaintiff lacked the necessary proximity.

2. Health Canada May Owe a Private Law Duty of Care to Medical Device Users

The decision in *Taylor v. Canada (Attorney General)*, 2012 ONCA 479 leaves open the possibility that Health Canada could owe a private law duty of care to medical device users. The court held that it is "not plain and obvious" that Health Canada does *not* owe a private law duty of care to medical device users. As part of a class action proceeding, the parties brought a stated case to determine what was required in a statement of claim for regulatory negligence to establish a relationship of proximity between the plaintiff and Health Canada. The class consisted of persons who had been injured as a result of the implantation of joint implants manufactured by an American company and sold in Canada. The plaintiff alleged that Health Canada had failed to protect the class members from unsafe medical devices and had misrepresented the safety of the implants by wrongly indicating that a notice of compliance had been issued for the implants. The court held requirement of proximity between the parties in establishing a duty of care cannot

be reduced to a list of factors or circumstances. Rather, it depends on the facts of each particular case. Following *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, the court affirmed that in the regulatory context the proximity analysis focuses first on the applicable legislative scheme and secondly on the interactions, if any, between the plaintiff and the regulator. Applying this framework to the facts before it, the court concluded that the plaintiff's claim was not bound to fail for want of a private law duty of care.

3. Construction Lender Owes No Duty to Condominium Corporation or Purchasers of Units

The case of *Condominium Corporation No. 0321365 v. 970365 Alberta Ltd.*, 2012 ABCA 26, leave to appeal refused [2012] S.C.C.A. No. 129 (QL), established that a construction lender does not owe a duty of care to the purchasers of units in a condominium project or to the condominium corporation. The plaintiffs, the condominium corporation and a representative of the condominium unit holders, commenced an action against, *inter alia*, MCAP Financial Corporation ("MCAP") for damages caused by the allegedly faulty design and construction of the condominium complex. MCAP had provided interim financing to the developer in accordance with a commitment letter. The plaintiffs alleged that MCAP owed a duty to them to take reasonable steps to ensure that the developer complied with and satisfied the terms of the commitment letter, which they claimed would have prevented their losses.

The court held that the proposed duty of care failed both stages of the *Anns* test. The fundamental flaw in the plaintiffs' argument was that it relied on the terms of the commitment letter, a private contract between MCAP and the developer. No rights accrued to third parties under that contract. Further, there were several intractable practical problems with the proposed duty of care. First, the scope of the class to whom lenders would owe a duty of care was indeterminate, as was the duration of time for which the duty would exist. Second, there was "no reasonable answer" to the question of how far the lender would have to go in enforcing the terms of a lending agreement. Third, the proposed duty would "fundamentally alter the economic and commercial realities of construction financing and significantly undermine the continued viability of the commercial lending industry" by effectively making lenders the guarantors of performance by developers (at para. 61).

4. No Private Law Duty of Care when a Municipality Fails to Ensure Procedural Fairness

In *P.S.D. Enterprises Ltd. v. New Westminster (City)*, 2012 BCCA 319, the court held that no private law duty of care arises when a municipality fails to ensure procedural fairness in the bylaw approval process. The plaintiff had sold its hotel so that the city could redevelop the area in which it was located. However, the plaintiff had retained its liquor licences, which it intended to use in a new location. The plaintiff leased new premises that required rezoning in order to be used as a pub. At a council meeting after the public hearing regarding the rezoning application had been held, the plaintiff's principal made substantive further submissions in support of the rezoning application. This was contrary to a procedural bylaw. The city had a long-standing practice of stopping proponents before they began speaking in such circumstances, but this practice was not followed at the council meeting in question. As a result, it was necessary to hold an additional public hearing, the rezoning application was not completed in time, and the plaintiff's liquor retail licence was cancelled.

The plaintiff alleged that the city and its senior officials negligently failed to warn it of the potential consequences of speaking to council. The court acknowledged that the procedural fairness of the process had been placed in doubt, but held that the city's duty to ensure procedural fairness was owed only to the public at large. The failure to implement it did not give rise to a private law duty of care. The court went on to state that the finding of a private law duty of care could have compromised the council's ability to control its own process and that the city's quasi-judicial function of maintaining judicial fairness should not be "unduly encumbered by the threat of private tort liability".

5. No Duty of Care to a Purchaser of a Non-Dangerous Product

It is plain and obvious that a manufacturer does not owe a duty of care to a purchaser of a defective product that is not a source of danger directly or indirectly (*Arora v. Whirlpool Canada LP*, 2012 ONSC 4642). Purchasers of Whirlpool front-loading washing machines sought to bring a class action against Whirlpool based on a design defect that allegedly caused a build-up of smelly mold, mildew, and bacteria. For the purposes of the analysis, the court assumed that a *prima facie* duty of care existed. However, the court found that the proposed duty of care was negated by the long-held policy against negligence law providing compensation for pure economic losses in the absence of

countervailing policy reasons to justify tort law regulating an economic activity.

6. Duty of Care: Physicians: Genetic Risks

A physician does not have a duty to warn relatives of his or her patient of the risks associated with an inherited disease (*Liss v. Watters*, 2012 QCCA 257, leave to appeal refused [2012] S.C.C.A. No. 150 (QL)). In 1971, the defendant doctor diagnosed an infant patient with a serious genetic disease inherited from a gene carried by the infant's mother. The defendant did not inform anyone other than the infant's father of the diagnosis. The infant's father did not pass the information on to the infant's mother or any of her relatives. In 2002, a relative of the infant's mother gave birth to a child with the same disease.

The Court of Appeal held that the reasonable physician standard is no less applicable when a doctor is interacting, as a physician, with a person who is not his or her patient, and that the trial judge erred in law by applying the reasonable person standard without reference to the norms and practices of the medical profession. By imposing a general obligation owed by the doctor to all potentially affected relatives, the trial judge also wrongly ignored consideration of the duty of confidentiality that is the "cornerstone" of the doctor-patient relationship. The court stressed that the exceptions to the duty of confidentiality must not be overstated. Finally, the court held that the doctor's "failure to encourage" the infant's father to inform the infant's mother and her relatives of the diagnosis, on its own and in the absence of a plain standard of medical practice, could not be a basis for civil liability.

C. Negligence: Standard of Care

1. Statutory Right-of-Way Provisions Inform the Standard of Care even when the Victim is a Child

In *Annapolis County District School Board v. Marshall*, 2012 SCC 27, the Supreme Court of Canada held that statutory right-of-way provisions inform the standard of care even when the victim is a child. A four-year-old ran onto the road in front of his home and was struck by an empty school bus, suffering catastrophic injuries. At trial, the judge's charge to the jury included reference to provisions of the Nova Scotia *Motor Vehicle Act*, RSNS 1989, c. 293, concerning the duty of pedestrians to yield the right of way to vehicles. The Court of Appeal found that the trial judge had misdirected the jury by referring to these

provisions, on the basis that it invited the jury to treat the infant plaintiff "like an adult". The Supreme Court of Canada disagreed. The court held that statutory right-of-way provisions have a dual function; they inform both the assessment of whether a pedestrian was contributorily negligent (which did not apply, given that the infant could not be found contributorily negligent), as well as whether a driver breached the applicable standard of care owed to all pedestrians in the circumstances. Absent special circumstances (such as where a driver should expect children to be present), where the driver has the right of way, he or she can reasonably proceed on the assumption that others will follow the rules of the road. This applies equally when the pedestrian is a child.

2. Standard of Care: Section 158 of the Motor Vehicle Act

The British Columbia Court of Appeal in 2012 considered two cases dealing with the obligation under s. 158 of the *Motor Vehicle Act*, RSBC 1996, c. 318, not to pass a vehicle on the right unless it is safe to do so.

In *Nerval v. Khehra*, 2012 BCCA 436, a driver turning left across an oncoming wide single lane was struck by a driver going through the intersection. The through driver was speeding. Just before the accident, the through driver had also passed on the right a van in the same lane waiting to turn left. Nevertheless, the trial judge found the turning driver to be 60 per cent at fault for the accident. The court dismissed the turning driver's appeal. The court held that the trial judge had correctly concluded that the obligation under s. 174 of the *Motor Vehicle Act* not to start a turn if there is an immediate hazard has priority over the s. 158 obligation. The through driver remained the dominant driver. The court also reaffirmed that the correct analytical approach to such issues is to address breaches of common law or statutory obligations when apportioning fault, not by reclassifying which driver was dominant and which servient.

In *Smeltzer v. Merrison*, 2012 BCCA 13, a driver waiting to make a left turn into a parkade was motioned to proceed by a truck driver travelling in the opposite direction. The defendant driver passed several vehicles stopped behind the truck on the outside of a widened lane that led into a separate turning lane and struck the plaintiff's vehicle. With reference to *MacLaren v. Kucharek*, 2010 BCCA 206, the trial judge had found that the defendant had not violated s. 158, because the outside of the widened lane at the point of the collision was a *de facto* second lane.

The Court of Appeal, however, ruled that *MacLaren* was distinguishable and did not create any further exception beyond the three already provided in s. 158(1). The court held that these exceptions apply only to marked lanes; otherwise, drivers would be entitled to pass on the right wherever the road is wide enough for two vehicles. As the plaintiff was also at fault for failing to make her turn in a prudent manner, liability was apportioned equally.

3. Challenges in Assessing the Duty and Standard of Care Over a Long Class Period do not Preclude Certification

Challenges in assessing the duty and standard of care over a long class period do not preclude certification as a class action (*Stanway v. Wyeth Canada Inc.*, 2012 BCCA 260). The claim concerned hormone replacement therapy drugs that allegedly caused breast cancer. On appeal, the defendants argued that the 27-year class period was unmanageable given changing scientific knowledge over that period regarding the risks of hormone therapy. The court held that such concerns did not prevent certification of the action, and that if problems arose, they could be addressed through the creation of sub-classes or, if necessary, by decertifying the action.

4. Pets: Owners Must Take Preventative Measures to Protect Trespassing Children

Owners must take preventative measures to protect children, even trespassing children, from injuries that could be inflicted by pets (*Ross v. Vidnes*, 2012 SKQB 317). A St. Bernard owned by the defendant bit the seven-year-old plaintiff after lunging through the defendant's door, which was missing a window. The plaintiff had a history of entering the defendant's yard to play with the defendant's son and of provoking the dog. The defendant had previously told the plaintiff's parents that the plaintiff was no longer welcome at her home, but this stricture had not been enforced. The court held that the defendant was liable for the plaintiff's injuries under the doctrines of both *scienter* and negligence. The court found that the plaintiff was not a trespasser in the defendant's yard, but went on to hold that even if the plaintiff was a trespasser, the defendant knew or ought to have known that the dog posed a potential danger to unsupervised children and that her failure to take preventative measures breached her occupier's duty of "common humanity".

5. Excavators Must Call Before They Dig

Excavators must make a reasonable inquiry, including a telephone call to the responsible authority, to ascertain the location of any pipelines on a work site (*Enbridge Gas Distribution Inc. v. Froese*, 2012 ONSC 6437). The defendant severed a natural gas pipeline with a backhoe. Like British Columbia, Ontario requires persons planning to dig or excavate ground to first ascertain the location of any pipeline that may be interfered with. A "One Call" service has been set up for this purpose. The defendant had asked the property owner and a neighbour about the location of any pipelines, but did not make any further inquiries. The court held that by failing to telephone for the location of any pipelines the defendant breached the standard of care he owed to the utility.

6. Drivers Entering an Intersection on a Green Left-Turn Signal can Reasonably Assume a Red Light for Oncoming Traffic

In *Shapiro v. Dailey*, 2012 BCCA 128, the plaintiff was injured when her vehicle was struck by that of the defendant, who was impaired at the time, as she was straightening out of a left turn. The left-turn signal was green when the plaintiff entered the intersection. The defendant argued that the plaintiff was contributorily negligent because she should have stopped before entering the intersection. The court held that the plaintiff was the dominant driver with the right-of-way, and that it was reasonable for her to assume a red light for oncoming traffic and focus on making her turn.

7. Juries Entitled to Consider Whether or Not to Infer Negligence from Evidence

Juries are entitled to consider whether or not to infer negligence from the evidence surrounding the defect in a product liability claim (*Johansson v. General Motors of Canada Ltd.*, 2012 NSCA 120). The plaintiff was seriously injured when her vehicle swerved off the road. The defendant later issued a recall notice regarding a defective steering mechanism for the make and model of the plaintiff's vehicle. The trial judge granted the defendant's motion for a non-suit, holding that there was no *prima facie* case to define the relevant standard of care. The Court of Appeal found that the trial judge erred in his application of the Supreme Court of Canada's remarks in *Fontaine v. British Columbia (Official Administrator)*, [1998] 1 S.C.R. 424, regarding the doctrine of *res ipsa loquitur*. The court held that any inferences that a

jury could reasonably draw before *Fontaine* were no less reasonable after that decision. The court also held that the trial judge erred by confusing inferences of negligence with strict liability and by stating that evidence of a regulatory benchmark or expert evidence is a mandatory prerequisite for a *prima facie* case of negligence.

D. Negligence: Causation

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

In *Clements v. Clements*, 2012 SCC 32, the Supreme Court of Canada reversed the decision of the British Columbia Court of Appeal (2010 BCCA 581: see *Annual Review of Law & Practice* (CLEBC, 2011)). This decision clarifies when the "material contribution" test is to be used in lieu of the "but for" test, and expands upon the discussion of the issue in *Resurfice Corp. v. Hanke*, 2007 SCC 7.

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 judge found that, due to the inherent inadequacies of accident reconstruction modelling, it would have been 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 judge went on to find causation on the "material contribution" standard.

The Court of Appeal set aside the judgment against the husband on the basis that "but for" causation had not been proved and the material contribution test did not apply.

The Supreme Court of Canada reaffirmed that as a general rule a plaintiff cannot succeed in an action for negligence unless he or she establishes as a matter of fact that the loss would not have been suffered "but for" the negligent act or acts of the defendant. The "but for" test is to be applied in a "robust common sense fashion". Scientific proof of causation is not required. Exceptionally, however, a plaintiff may also be able to recover on the basis of the "material contribution" test, but this is a "radical step" that is justified only where it is required by fairness and conforms to the principles that ground recovery in tort.

In *Resurfice*, the Supreme Court had held that the material contribution approach could be used in place of the "but for" test where it was clear that the defendant had acted negligently and that it was "impossible" to prove causation on the "but for" test. The Supreme Court clarified and expanded upon these ideas in *Clements*, and held that the material contribution test can only be used where: (1) the plaintiff has established that his or her loss would not have occurred "but for" the negligence of two or more tortfeasors, each possibly responsible for the loss; and (2) the plaintiff, through no fault of his or her own, is unable to satisfy the "but for" test because each possible tortfeasor can point to the other(s) as the possible "but for" cause of the injury, defeating a finding of causation on the balance of probabilities against every defendant.

Further discussion of these principles can be expected when reasons are released in the appeal from *Ediger (Guardian ad litem of) v. Johnston*, 2011 BCCA 253 (discussed in last year's *Annual Review*), which also concerns the circumstances in which the "material contribution" test should be applied instead of the "but for" test. The Supreme Court of Canada heard oral arguments in December 2012.

2. "General Causation" Issues can be Certified as Part of a Class Action

Issues of "general causation" alone can be certified as part of a class action (*Stanway*, *supra*). Citing its earlier decision in *Harrington v. Dow Corning Corp.*, 2000 BCCA 605, the court noted that plaintiffs in product liability class actions must establish both general and specific causation. The court held that, as the finding of general causation was a substantial element of each class member's claim, an answer to the question would "obviously" move the litigation forward, even though individual class members may still face formidable challenges in establishing causation specific to themselves. The court also held that, at the certification stage of proceedings, the plaintiff did not have to establish the methodology by which the court could determine that the product in question had caused the injury.

E. Professional Liability

1. Even Extraordinary Market Fluctuations are a Foreseeable Risk

Market fluctuations, even on the scale of those in 2008, are an established risk of investing that financial advisers must take into account (*Rubenstein v. HSBC Bank Plc*, [2012] EWCA Civ 1184). The plaintiff had approached HSBC in 2005 explicitly seeking a risk-free investment. An adviser at HSBC recommended a premier access bond issued by AIG. The adviser told the plaintiff that the bond was the same as cash deposited in a bank. The fund the bond was invested in collapsed in 2008. The trial judge held that HSBC was negligent in its advice and in breach of a statutory duty. However, the judge awarded only nominal damages because he considered that plaintiff's losses were caused by the turmoil in the financial markets after the collapse of Lehman Brothers, which was not reasonably foreseeable when the advice was given. The Court of Appeal, however, held that the plaintiff had made it plain to HSBC that he wanted an investment that was without any risk to the capital; it was therefore HSBC's duty to protect him from exposure to market forces. Once the plaintiff was exposed to market forces, the risk of loss was foreseeable.

2. A Psychiatrist and Patient Engaging in a Financial Transaction Does not Necessarily Constitute a Breach of the Psychiatrist's Fiduciary Duty

The plaintiff and the defendant in *Grewal v. Sandhu*, 2012 BCCA 26, leave to appeal refused [2012] S.C.C.A. No. 120 (QL), were friends. The defendant also treated the plaintiff for depression from 2002 to 2004. During that period they cooperated in two real estate transactions, which ended badly. The trial judge found, *inter alia*, that the defendant had breached his fiduciary duty to his patient by misusing their therapeutic relationship. The defendant appealed. The Court of Appeal held that there was no misuse of the relationship that caused any loss. The transactions had been entered into between friends and were clearly financially beneficial to the plaintiff, who did not place any greater reliance on his friend because he was also his doctor. Citing the decision in *Freeman v. Pearlman*, 1999 BCCA 40, the court reaffirmed that a financial transaction between a doctor and a patient during the course of their professional relationship does not necessarily constitute a breach of the doctor's fiduciary duty. The duties owed by a doctor to his or her patients do not extend to the provision of financial advice.

F. Vicarious Liability

1. Corporations can be Liable for the Acts of Subsidiaries Without Piercing the Corporate Veil

Corporations can be held liable for the acts of their subsidiaries without employing the legal concept of piercing the corporate veil.

In *Chandler v. Cape Plc*, [2012] EWCA Civ 525, the Court of Appeal Civil Division held that liability for a subsidiary's employees may be imposed on a parent corporation where: (1) the business of the parent and the subsidiary are in relevant respects the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the industry; (3) the parent knew, or ought to have known, that the subsidiary's system of work is unsafe; and (4) the parent knew, or ought to have foreseen, that the subsidiary or its employees would rely on the parent using its superior knowledge for the employees' protection.

The plaintiff in *Chandler* was employed by the subsidiary in the late 1950s and early 1960s. In the course of his employment he was exposed to asbestos. The working conditions at the subsidiary were acknowledged to have been unsafe. The subsidiary had been dissolved by the time the suit was brought. The court's analysis relied heavily on the facts. The parent and the subsidiary had some directors in common, but the parent did not exert more than usual operational control over the subsidiary. The parent did, however, have actual knowledge of conditions at the subsidiary and assumed responsibility for health and safety policy at its affiliates. The parents company's doctor, who in many respects acted as an adviser to the parent's subsidiaries, was also engaged in research about the link between asbestos and asbestosis. Given these circumstances, the court held that the parent owed a duty of care to the employees of the subsidiary. The court emphasized that the basis for this duty was the parent's implied assumption of responsibility for the employees of its subsidiary; it did not rely on piercing the corporate veil.

2. Employment-Like Relationships can Result in Vicarious Liability

Vicarious liability can extend to employment-like relationships (*Van Hartevelt v. Grewal*, 2012 BCSC 658). The plaintiff alleged that he had been assaulted by the primary defendants, Grewal and his wife. The plaintiff was a tenant in an apartment building allegedly owned by the

secondary defendants, Grewal's parents. Grewal and his wife lived in the building rent-free, and in return were expected occasionally perform various services at the apartment building, such as collecting rent cheques, responding to noise complaints, and giving out keys. As Grewal's parents were aware, he had a history of violence and had previously had run-ins with the plaintiff. The plaintiff alleged that Grewal's parents were vicariously liable for his actions.

The court found that Grewal was "more of a point of contact agent than an employee in any conventional sense" (at para. 54). Nevertheless, relying on the decisions in *Bazley v. Curry*, [1999] 2 S.C.R. 534, and *K.L.B. v. British Columbia*, [2003] 2 S.C.R. 403, the court held that employer/employee relationships are not the only ones that can attract vicarious liability. The main considerations on the facts were: (1) whether the relationship was sufficiently close to justify the imposition of liability; (2) whether the tort was sufficiently connected to the assigned tasks of the tortfeasor to be regarded as the materialization of the risks created by the tortfeasor; and (3) whether the imposition of liability would satisfy the policy goals outlined in *Bazley*. The court held that these questions were answered in the affirmative. Grewal's father had created the risk, was aware or should have been aware of the risk, and was in the best position to mitigate the risk. Grewal's mother was held not to be liable, because the court found that she did not actually have an interest in the apartment building.

G. Contributory Negligence

All parties dealing with hazardous waste must act with reasonable care (*Enviro West Inc. v. Copper Mountain Mining Corporation*, 2012 BCCA 23, allowing the appeal of the decision discussed in last year's *Annual Review*). The plaintiff had been hired by the defendants to remove waste oil containing a high level of polychlorinated biphenyls ("PCBs") from a mine site. The plaintiff had been informed by the defendants that the oil was contaminated with PCBs, but was not told the level of contamination. The trial judge found that the defendants had been negligent, and awarded $766,033.75 to the plaintiff. The trial judge rejected the defendants' argument that the plaintiff had been contributorily negligent. The Court of Appeal agreed with the trial judge that the regulatory scheme places a significant burden upon the waste generator. However, the court held that while greater responsibility will normally be assigned to the waste generator than to others involved in hazardous waste removal, the failure of the waste generator to fulfill its

obligations "does not inoculate the waste collector from the requirements that it, too, act with reasonable care" (at para. 48). The matter of the plaintiff's contributory negligence was therefore remitted to the trial court for determination.

H. Damages

1. The Evidence of an Injured Party's Own Capabilities is More Relevant than the Average Performance of Others in Similar Jobs

The evidence of an injured party's own capabilities and potential is more relevant in the assessment of damages for loss of income than the average performance of others in similar jobs (*Shapiro*, *supra*). The plaintiff was injured in a car accident caused by the defendant. At trial, the plaintiff was awarded, *inter alia*, $900,000 for loss of future income and $32,115 for nanny costs. The defendant argued that the award for loss of future income was too high, because since the accident the respondent's earning had matched or exceeded the average annual earnings for "non-technical sales representatives". The court noted that the objective of damages is to restore injured parties to the position they would have been in but for their injuries. Thus, it held that evidence of the respondent's own capabilities was more relevant in assessing damages than the performance of others in similar jobs. The evidence that was available clearly indicated that the respondent was capable of performing more successfully than her statistical cohorts. The court agreed, however, that the award for nanny services was not justified, since the plaintiff would have required these services anyway due to the demands of her career.

2. Damages Cannot be Awarded for the Appreciation of an Interest with which the Plaintiff has Agreed to Part

Damages cannot be awarded for the appreciation of an interest with which the plaintiff has agreed to part (*Grewal*, *supra*). The plaintiff and the defendant cooperated in two real estate transactions together. The relationship between the parties soured and the properties were sold. The plaintiff alleged that one of the properties had been sold for less than market value. The trial judge agreed, and awarded the plaintiff $162,500, based on the value of the property at the time of sale. The plaintiff appealed, arguing that the damages should have been assessed based on the value of the property at the time of judgment. The Court of Appeal affirmed the decision of the trial judge in this respect. The

plaintiff had wanted the property sold. The defendant's breach of trust was not in selling the property when he did, but in failing to obtain the amount he should have for it. The defendant was only entitled to be compensated for the loss he suffered as a consequence of the breach.

3. Damages for Invasion of Privacy Should be Modest but Sufficient to Mark the Wrong that has been Done

Damages for the tort of invasion of privacy should be modest but sufficient to mark the wrong that has been done (*Jones v. Tsige*, 2012 ONCA 32; see "P. Recognition of Tort of Invasion of Privacy", below, for a full discussion of this emerging tort). The Court of Appeal fixed the range for damages at up to $20,000. Awards of aggravated and punitive damages are neither excluded nor encouraged.

Factors that can assist in determining where in the range a case falls include: (1) the nature, incidence, and occasion of the defendant's wrongful act; (2) the effect of the wrong on the plaintiff's health, welfare, social, business, or financial position; (3) the relationship between the parties; (4) any distress, annoyance, or embarrassment suffered by the plaintiff arising from the wrong; and (5) the conduct of the parties, both before and after the wrong, including any apology or offer of amends made by the defendant.

4. Damages not Contemplated at the Time of the Tort are not Reasonably Foreseeable at Law

Damages not contemplated at the time of the tort are not reasonably foreseeable at law (*Milliken v. Rowe*, 2012 BCCA 490). In 2007, the plaintiff was seriously injured in a motor vehicle accident. In 2010, she became the sole income earner in her household after rheumatoid disease rendered her husband unable to work. The trial judge awarded the plaintiff $30,000 for costs of future care related to the needs of her husband. The Court of Appeal faulted the trial judge for making an award "based merely on the fact that...the respondent and her husband were married with a possibility that at some future date the husband might require care of some kind" (at para. 31). As decided in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, compensation in tort is determined on the basis of reasonable foresight, not insurance, and reasonable foreseeability is determined at the time of the tort. The court held that, while the husband's need for care was foreseeable as a theoretical, factual outcome in hindsight, it was not a "real risk" in the mind of a reasonable man in the position of the defendant.

I. Tort Defences

1. Limitation Periods

A claim in misrepresentation will not crystallize, and a limitation period for such a claim will not start to run, until the plaintiff suffers damage. In some misrepresentation cases, particularly with respect to financial advice, it may appear that no damage is suffered until long after the initial negligent advice was given or misrepresentation made: it is not until the investment yields weak returns or tax authorities reject schemes, for example, that loss is clear and quantification of damages possible. Two 2012 appellate court decisions usefully distinguish between "damage" (that is, loss or deprivation suffered by the plaintiff) with "damages" (that is, the ability to quantify loss by means of financial compensation). The practical effect of these decisions is to require plaintiffs in financial misrepresentation claims to be more vigilant in investigating whether the advice they received was negligent, and in suing within a limitation period.

In *Hamilton (City) v. Metcalfe & Mansfield Capital Corp.*, 2012 ONCA 156, the plaintiff city had purchased $10 million in asset-backed commercial paper, the value of which plummeted in the 2008 financial crisis. The city sued for misrepresentation, claiming that the defendants negligently or falsely represented or failed to disclose material facts that made it highly unlikely that the city would be able to redeem the notes. The city had entered into a standstill agreement under a provisional arrangement (for the repayment of the notes on maturity). When the provisional agreement fell apart because the notes matured and the city was not repaid, the city faced a limitation defence.

The Superior Court and Court of Appeal both found the city's claims to be statute-barred. All of the elements of negligent misrepresentation accrued at the time the city purchased the notes, not when the notes matured and the city was not paid. "Damage" must be distinguished from "damages". Broadly described, "damage" is any measurable detriment, liability, or loss caused by the wrong. The general principle underlying damages for negligent misrepresentation is that the plaintiff is entitled to be put in the position that he or she would have been in had the misrepresentation not been made. The "damage" required to complete the cause of action occurs when the plaintiff detrimentally changes its position. In order to determine when a plaintiff first sustains relevant and measurable damage for deciding when a cause of action in a misrepresentation arises, courts are to compare: (1) the plaintiff's position had the defendant not made the misrepresentation;

and (2) the plaintiff's actual position. That comparison will indicate whether the plaintiff is worse off on balance than it would have been had the defendant not made the misrepresentation.

Applied to the facts of *Hamilton (City)*, the city was immediately worse off the moment that it purchased the notes because they were inherently worth less than the city had expected. The city was allegedly induced to believe that it was buying safe, secure, and liquid notes, when the notes never in fact had those properties. The city's worsened condition was therefore entirely attributable to the misrepresentation because it claimed that it would not have entered into the transaction had it been properly advised. While the city may not have been able to quantify its loss until the notes matured and it was not repaid, it suffered loss sufficient to give rise to its cause of action in misrepresentation when it entered into the transaction to purchase the notes.

The court further confirmed that it is not necessary for the plaintiff in a misrepresentation case to be aware of the full extent of the damage or damages before the cause of action crystallizes and the limitation period starts running. Once the plaintiff knows that some damage has occurred and the defendant caused the damage, the cause of action has accrued. Neither the extent nor the type of damage need be known.

Note that none of the above principles override the discoverability principle, either under the present *Limitation Act*, RSBC 1996, c. 266, or the new *Limitation Act*, SBC 2012, c. 13. The limitation period will start to run from the date on which the plaintiff knew, or with reasonable diligence ought to have known, that damage had occurred and that the damage was caused by the defendant.

In *Weldon v. Teck Metals Ltd.*, 2012 BCCA 53, a pension misrepresentation claim proposed as a class proceeding, the court made similar distinctions between "damage" and "damages". The court emphasized that damage for the purpose of crystallizing the cause of action of misrepresentation, and for tolling a limitation period, occurs upon change of position as a result of the misrepresentation, and is different from the quantification of loss or damages flowing from the damage itself.

2. Standard-form Waivers and Releases

Two negligence cases brought against separate Whistler zip-line operators in 2012 confirmed and clarified the enforceability of standard-form waivers of liability signed by participants. In both cases, the waivers were upheld and the plaintiffs received zip in damages.

A standard-form release signed by a zip-line participant barred a claim brought after the participant collided with another participant due to the operator's own negligence in *Loychuk v. Cougar Mountain Adventures Ltd.*, 2012 BCCA 122, leave to appeal refused [2012] S.C.C.A. No. 225 (QL). The court confirmed the three-part approach set out in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, in examining exclusion or limitation of liability releases and waivers. First, the court examines whether the exclusion of liability clause even applies to the facts of the case. If it does, the second issue is whether the exclusion clause was unconscionable at the time the contract is made. Even if the exclusion clause survives scrutiny for unconscionability, the court may nonetheless decline to enforce the clause based on overriding public policy grounds. Striking an exclusion clause on public policy grounds, however, should only be done in extreme cases of serious criminality or egregious fraud, as where a food supplier knowingly or recklessly sells toxic products.

On the specific facts, the trial court found the defendant zip-line operator's waiver and release to be binding because: (1) it was clear and unequivocal on its face; (2) the plaintiffs were given sufficient time to review it; and (3) one plaintiff had recently graduated from law school and the other plaintiff was an owner of a fitness business that used similar agreements. The trial court also confirmed the long line of Canadian authority that releases relating to recreational sports activities are not unconscionable. (See last year's *Annual Review* for a more detailed review.)

On appeal, the plaintiffs argued that this line of authority did not apply where the operator defendant, as is the case with zip-lining, has total control of the risk, in contrast to skiing or driving, where the participant has control over routes and techniques. The Court of Appeal rejected this argument. It is not unconscionable for an operator to insist that a would-be participant sign a waiver; if a person does not want to participate on that basis, he or she may simply choose not to engage in the activity. Similarly, such waivers do not offend public policy. Releases for inherently risky activities have been used and upheld for many decades: the legislature, not the courts, should change the law if warranted.

In *Niedermeyer v. Charlton*, 2012 BCSC 1668, the plaintiff was injured not on the zip-line itself, but in an accident involving the defendant's bus transporting her from the defendant's ticket kiosk to the zip-line site. The signed "Waiver of Claim" made express reference among the

covered activities to "travel to and from the tour area". The defendant was not obliged to draw the plaintiff's attention to that particular clause in the single-page document highlighted with warnings that it was an important legal document.

J. Defamation

1. Defamatory Meaning: Context of Internet Debate Renders Statement Not Defamatory?

Baglow v. Smith, 2011 ONSC 5131 (reviewed in last year's *Annual Review*), held that an otherwise defamatory statement may not be capable of having a defamatory meaning if advanced in the context of an active Internet-based debate, in which a robust reply would be expected. Such a conclusion would represent a significant development in the law of defamation. In granting the appeal of the 2011 trial decision, the Court of Appeal expressly declined to endorse the proposition that different rules apply to excuse otherwise defamatory statements in the context of online debates (2012 ONCA 407).

2. Defamatory Meaning: Homosexuality

While in olden days an allegation of homosexuality was defamatory, society has moved on, and a statement that someone is homosexual cannot lower their reputation in the eyes of right-thinking members of society, and therefore cannot be defamatory. A bigot is not a right-thinking member of society (*Cowan v. Bennett* (5 November 2012) Dunfermline, Case No. A218/11 (Sheriff Court)).

3. Publication: to Agent of Company

Where a letter defamatory of a company is sent to that company's designated agents, no publication occurs, and thus an action in defamation cannot stand (*Monument Mining Ltd. v. Balendran Chong & Bodi*, 2012 BCSC 1769). Where the plaintiff is a natural person, publication (and thus a potential claim in defamation) is established where the defamatory communication is made to an agent or employee of the plaintiff. The same does not apply to a corporation, which can only act through designated employees and agents. Thus, where otherwise defamatory letters were sent to the law firm and directors of the plaintiff corporation, the communication was in effect made to the corporation itself, and no publication occurred.

4. Publication and Defamation through Internet Search Results

At least in Australia, automatically generated search results juxtaposing the name or image of the plaintiff with unsavoury images or phrases may constitute publication and attract liability in defamation (*Trkulja v. Google Inc. LLC*, [2012] VSC 533). The defendant had been a victim of an attempted assassination. Searches of Google Images produced many results linking the plaintiff with "Melbourne crime". The plaintiff claimed that the search results created the innuendo that the plaintiff was a significant figure in the Melbourne criminal underworld. The jury found Google liable for publication and for defamation with respect to the Google Images search. Google applied to set aside the jury verdict. Google first argued that as the search systems and algorithms producing the search results were "fully automated" it was not, as a matter of law, a publisher of the images. The court rejected this argument, noting that while the systems were automated, the systems were the consequence of computer programmes written by human beings, and the programmes were doing exactly what Google intended them to do. The Google Image search result page juxtaposing the words "Melbourne crime" with the plaintiff's face was a sophisticated "cut and paste" creation that existed only on the Google website, and only because of Google's actions. The court distinguished UK authorities such as *Bunt v. Tilley*, [2007] 1 WLR 1243, which indicate that an Internet service provider or website will not generally be considered a publisher where it does not play an editorial or selecting role, but is merely a passive conduit for information on the Internet. The court assessed damages at AUS $200,000 (approximately CAD $185,420).

5. Defence of Fair Comment and Scientific Controversies

So long as there is some evidence of the facts underlying a seemingly defamatory statement on a matter of scientific controversy, that statement may be protected under the defence of fair comment (*Mainstream Canada v. Staniford*, 2012 BCSC 1433). The plaintiff Mainstream is the second largest producer of farmed salmon in British Columbia. The defendant Staniford is a zealous activist against farmed salmon. The defendant issued mock advertisements based upon the packaging for cigarettes, including the following statements: "Salmon Farming Kills", "Salmon Farming is Poison", "Salmon Farming is Toxic", and "Salmon Farming Seriously Damages Health". The plaintiff claimed that such statements could not be protected by the defence of fair comment as they were stark statements of fact. While expressing its distaste for Staniford's statements, strategies, and litigation conduct,

and finding the statements to be defamatory, the court nonetheless dismissed the claim based on the defence of fair comment.

The court applied the important English Court of Appeal decision in *British Chiropractic Association v. Singh*, [2011] 1 WLR 133, in which the British Chiropractic Association sued a doctor for writing an article that was published in *The Guardian*, alleging that certain chiropractic treatments were "bogus". The English Court of Appeal concluded that the defendant had reviewed the literature generated by the debate over chiropractics, and had interpreted that literature to form an opinion about that debate. Similarly, Staniford's statements—"as prejudiced, exaggerated and obstinate as they are"—were based upon the literature generated by the debate over farmed salmon. The court held that the statements, although resembling statements of fact, were in fact statements of opinion. The tacit premise was that those statements were based upon the scientific evidence reviewed by Staniford. Where scientific controversy exists on a given issue, conclusions drawn from the literature generated by the controversy will be found to be opinions, even if presented as facts. To quote *Singh*, "scientific controversies must be settled by the methods of science rather than by the methods of litigation" (at para. 162). This important case is under appeal.

6. Defence of Absolute Immunity for News Release Concerning Litigation

A defamation claim based on a news release setting out the defendant company's response to an earlier lawsuit filed by the plaintiff is protected by qualified privilege as well as by the absolute immunity afforded to reports on court proceedings, and may be dismissed on a summary trial (*Merit Consultants International Ltd. v. Chandler*, 2012 BCSC 1868). The defendants were directors in a company that had issued a press release stating that it considered the plaintiff's claim in breach of contract to be an "inappropriate" one that would be vigorously defended by the company, which would also bring a counterclaim in negligence and breach of contract against Merit. The news release was published via the Internet "to the world". The counterclaim was not filed until four weeks later. The parties agreed that the company had an obligation to report the fact of the lawsuit to its shareholders, but the plaintiff contended that general publication exceeded the limits of that occasion of qualified privilege. The court accepted that the press release was protected by the absolute privilege or immunity attaching to communications that take place during, incidental to, and in the processing and furtherance of judicial and quasi-judicial proceedings. It was reasonable for the company and its directors to respond to the lawsuit, and it was not inappropriate to state an intention to defend and file a counterclaim at the same time. The court dismissed the plaintiff's claim on a summary basis, concluding that "[i]t would, in my view, be utterly contrary to common sense and public policy for communication about litigation to be as hazardous as the plaintiff contends it to be. A tolerable amount of give and take is to be expected within the institutions of democracy, including the courts" (at para. 47).

7. Order to Disclose Journalist's Confidential Source

While it would be expedient at the discovery phase to order a journalist to reveal the identity of a confidential source who provided allegedly defamatory material about the plaintiff, held that requiring a journalist to breach a confidential undertaking with a source should only be done as a last resort (*Canwest Publishing Inc. v. Wilson*, 2012 BCCA 181). Blair Wilson, a former Liberal Member of Parliament, sued certain Liberal party operatives who were quoted in an article in *The Province* (owned by the appellant Canwest) that alleged financial incompetence and corruption in Mr. Wilson's successful 2006 electoral campaign. A portion of the article was based upon information provided by three confidential sources. The chambers judge ordered the defendant journalist who wrote the article to disclose the identity of her anonymous sources, primarily on the basis that their identities were critical to determining the issues between the parties, including whether the anonymous sources acted with malice. The Court of Appeal overturned the chambers decision, confirming the journalist-source privilege test set out by the Supreme Court of Canada in *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41. First, the court must determine whether the identity of the source is relevant. If it is, the court must go on to consider the four Wigmore factors to determine whether the journalist-source privilege should be recognized on the facts before the court. Most such inquiries will be determined on the fourth Wigmore factor: does the public interest served by protecting the identity of the informant outweigh the public interest in getting at the truth? In this case, the court concluded that Wilson ought to exhaust his discovery options with the personal Liberal operative defendants before attempting to force the media to provide such sensitive information.

8. Jurisdiction and Applicable Law

In *Breeden v. Black*, 2012 SCC 19, the Supreme Court of Canada confirmed the two decisions below allowing Lord Conrad Black to sue for defamation in Ontario, even though the original publication, and the majority of the parties (nine of eleven) were located outside that jurisdiction. The court recognized that the comparative convenience and expense for the parties and their witnesses favoured a trial in Illinois, the location of the plaintiff's former company, Hollinger. At the same time, his reputation was established mainly in Ontario. Further, 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 (although the court took pains to state that it was not adopting the U.S.' "targeting" doctrine, in which jurisdiction is established in the jurisdiction of the readers to whom the defendant appears to be directing the statements). The court's conclusion was made easier by the fact that the plaintiff agreed not to bring any libel action in any other jurisdiction, and limited his claim to damages to his reputation in Ontario. (This agreement was similar to that made by the plaintiff in *Gutnick v. Dow Jones & Co Inc.*, [2001] VSC 305, allowing for a seemingly "long arm" assertion of jurisdiction by the State of Victoria over the U.S. publication, as discussed in the 2002 *Annual Review of Law & Practice*). The result may have differed had the plaintiff sought to prosecute a claim for damage caused by the publication outside of Ontario as well.

In the companion case of *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18, also involving a multi-jurisdictional defamation claim, the court recognized that there are valid arguments in favour of abandoning the existing *lex loci delicti* rule, according to which the applicable law is that of the place where the tort occurred, in favour of applying of the law of the place where the *most* harm to reputation occurred. Such an approach may curb forum shopping. "Libel tourism" is not uncommon given the significant differences in defamation law and damages in Canada, the U.S., and the U.K. The court declined to resolve that issue on the facts before it because it held that Ontario law would apply on either analysis.

K. Misrepresentation

1. Fraudulent Misrepresentation does not Extend to Personal Relationships

The tort of fraudulent misrepresentation does not extend to personal relationships (*Bonhomme v. St. James*, 2012 IL 112393 (S.C.)). The facts of this case are somewhat unusual. The plaintiff met "Jesse", a male alter ego of the defendant, in an online chatroom. The defendant also corresponded with the plaintiff under her own name and under the names of fictional friends and relatives of Jesse. The relationship between the plaintiff and Jesse lasted for almost two years and eventually became romantic. Just before the plaintiff was due to fly to Colorado to visit Jesse, the defendant informed the plaintiff (in the guise of Jesse's "sister") that Jesse had died. The plaintiff was distraught. Sometime later, the defendant came to visit the plaintiff and the ruse was uncovered by some of the plaintiff's friends. The plaintiff then sued the defendant for, *inter alia*, fraudulent misrepresentation.

The fraudulent misrepresentation claim was dismissed at trial, but allowed on appeal. Affirming the decision of the trial court, the Illinois Supreme Court recognized that in rare instances fraudulent misrepresentation claims have been recognized in settings that are not, strictly speaking, commercial or financial, but held that the tort cannot extend into the "purely personal sphere".

2. Not Reasonable to Rely on an Off-Hand Comment

A reasonably prudent person would not rely on an off-hand comment (*P.S.D.*, *supra*). The plaintiff sought rezoning of leased premises it hoped to use for a pub. Contrary to a city bylaw, the plaintiff's principal, Mr. Walia, made substantive submissions to city council after the public hearing on the rezoning application had been held. A second public hearing had to be called, and the plaintiff's retail liquor licence was cancelled due to the delay. Mr. Walia alleged that in deciding to speak to council he had relied on a statement made by Mr. Hurst, a city employee. The statement by Mr. Hurst was that if Mr. Walia wanted to speak to council, "be my guest". The trial judge found that Mr. Hurst had only limited involvement with the file and that it was unreasonable for Mr. Walia to rely on his off-hand comment. The Court of Appeal affirmed that the remark in the circumstances could not reasonably be relied upon by Mr. Walia.

3. Case Law Should Not be Used to Interpret Phrases Clearly Defined in the Relevant Legislation

Case law should not be used to interpret phrases clearly defined in the relevant legislation (*299 Burrard Residential Ltd. Partnership v. Essalat*, 2012 BCCA 271, leave to appeal refused [2012] S.C.C.A. No. 372 (QL)). The appellant purchaser signed an agreement to pay $1,136,000 as security for her obligation to buy a unit in the respondent's development. The filed disclosure statement stated that construction would be finished in September 2009. Development was not completed until April 2010. Drawing on the reasoning in *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23 (see last years *Annual Review*), the trial judge found that because the purchaser had received informal notice that completion would be later than originally anticipated, the representation in the disclosure statement was not "false or misleading" within the meaning of the *Real Estate Development Marketing Act*, SBC 2004, c. 41 ("*REDMA*"). The Court of Appeal, however, held that the trial judge erred in using *Sharbern* to interpret the phrase "false or misleading" when it was clearly defined in the *REDMA*. Applying its decision in *Chameleon Talent Inc. v. Sandcastle Holdings Ltd.*, 2010 BCCA 300, the court held that a formal amendment to the disclosure statement was required in order for the purchase agreement to be enforceable.

L. Interference with Contractual Relations by Unlawful Means

Establishing the tort of interference with contractual relations by unlawful means generally requires an independent plea of an actionable wrong on the part of the defendant. However, courts allow exceptions where justice demands (*A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2012 NBCA 33). In *A.I. Enterprises*, the New Brunswick Court of Appeal provided a useful overview of this confusing and unsettled tort, surveying and reconciling Ontario and U.K. jurisprudence (see the *Annual Review of Law & Practice* (CLEBC, 2011 and 2008, respectively)). The court crafted a general model that it acknowledged may need refinement over time. In order to make out the tort, the claimant must establish the following:

(1) the existence of a valid business relationship between the claimant and the third party;

(2) that the defendant knew or ought to have known of the relationship;

(3) that the defendant's interference prevented the formation of a contract or its performance in circumstances where there is no breach of an existing contract;

(4) that the defendant's impugned conduct qualifies as unlawful means or warrants exceptional treatment;

(5) that the unlawful means are not directly actionable by the claimant;

(6) that the defendant intended to cause the claimant harm; and

(7) that the defendant's conduct was the proximate cause of the claimant's loss.

With respect to (4), the court endorsed the narrow definition of "unlawful means", in which the unlawful means complained of must be independently actionable by the third party (that is, the other party to the contract). It is not sufficient for the defendant's behaviour to be merely "unfair" or "not authorized by law". Nonetheless, future courts are entitled to make an exception to this narrow definition and to allow a claim where justice requires even if, technically speaking, the third party would have no independently actionable claim. This would allow, for example, a finding of "unlawful means" where the defendant had engaged in criminal behaviour or statutory breach that were nonetheless not privately actionable by the third party. The court emphasized that any exception allowed by a future court must not stifle or unduly impede the ability of others to engage in fair competition in the marketplace.

Justification is a defence to a claim in interference with contractual relations by unlawful means. A defendant is entitled to pursue his or her self-interests, such as in enforcing his or her own contractual rights. For example, if a landlord changes the locks on its defaulting tenant, resulting in the tenant breaching its contract with the claimant, the tort will fail even if the defendant fully appreciated that its actions would result in the breach of contract (see *Print N' Promotion (Canada) Ltd. v. Kovachis*, 2011 ONCA 23, discussed in last year's *Annual Review*, and cited in *A.I. Enterprises*).

The court also noted that a claim of interference with contractual relations by unlawful means, like the other intentional economic torts of conspiracy and inducing breach of contract, is only necessary where the claimant cannot sue directly to remedy the effects of the defendant's otherwise unlawful behaviour. For example, if the claimant can sue can directly in contract, or on the basis of breach of fiduciary duty

or good faith, there is no need to hike into the thicket of the economic torts, and such torts will be unavailable to the claimant.

The Supreme Court of Canada granted leave to appeal in October 2012, [2012] S.C.C.A. No. 263 (QL), and may in the next year or two provide a Canadian Rosetta Stone for the confusing world of economic torts.

M. Conspiracy

A claim in conspiracy requires an agreement between two or more persons. A court will not imply the existence of an agreement based upon the fact that one defendant "ought to have known" the effect of the parties' action. The defendant must intend to be a party to an agreement to do an unlawful act (*Mraiche Investment Corp. v. McLennan Ross LLP*, 2012 ABCA 95). In *Mraiche*, the plaintiff claimed that the defendant's solicitor tortiously conspired with his client to defraud the claimant through fraudulent conveyances. The plaintiff claimed that the solicitor knew or ought to have known that his client was a debtor to the plaintiff and that the conveyance of the properties to a new numbered company incorporated by the solicitor would directly harm the plaintiff. The chambers court and the Court of Appeal agreed that the claim should be struck on the basis that there was no triable issue.

N. Occupiers' Liability

1. "Premises" is Not Restricted to Leased Premises

The definition of "premises" under s. 1 of the *Occupiers Liability Act*, R.S.B.C. 1996, c. 337 ("*OLA*"), is not restricted to leased premises (*Chamberlain v. Jodoin*, 2012 BCCA 108). The plaintiff slipped and fell on a patch of sidewalk outside the defendant Donna Jodoin's hair salon. Ms. Jodoin leased space in the building from the defendant landlord, who also owned the section of sidewalk where the plaintiff fell. By the terms of the lease, full responsibility for the maintenance of the sidewalk had been assigned to Ms. Jodoin. The salon was closed on the day of the plaintiff's fall and the sidewalk had not been cleared of snow or salted. On days when the salon was closed, Ms. Jodoin only shovelled and salted the sidewalk when the snowfall was sufficiently heavy to require city snowploughs to clear the streets. The trial judge dismissed the action against both parties, finding that the landlord was not an occupier of the sidewalk and that while Ms. Jodoin was an occupier of the sidewalk, she had not breached the standard of care under the *OLA*.

The Court of Appeal confirmed that the requirements under s. 1(b) of the *OLA* are conjunctive and that a plaintiff must demonstrate that the alleged occupier has both responsibility for and control over the condition of the premises, the activities carried on at the premises, and the conduct of third parties invited to enter onto the premises.

The Court of Appeal agreed with the trial judge that the landlord was not an occupier of the sidewalk. It had assigned full responsibility for the maintenance of the sidewalk to its tenants and it had no control over the activities of individuals invited by tenants to access their premises.

As part of her defence, Ms. Jodoin submitted that the trial judge had misapprehended the evidence in finding her to be an occupier of the sidewalk, because the sidewalk was not part of the premises designated in her lease agreement with the landlord. The Court of Appeal rejected this defence, holding that the fact that Ms. Jodoin did not specifically lease the sidewalk did not preclude her from meeting the definition of "occupier" under the *OLA*. The Court of Appeal found, however, that the trial judge's conclusion that Ms. Jodoin met the requisite standard of care was open to him on the evidence and dismissed the appeal.

2. The Risk of an Assault by a Person with a History of Violence is Reasonably Foreseeable

In *Van Hartevelt*, *supra*, the plaintiff, a tenant in the building, was assaulted by the property owner's son, who acted as the property owner's "contact agent". As discussed in "F. Vicarious Liability", above, liability was determined on the basis of vicarious liability. The court also held that had liability not been found on the basis of vicarious liability, the property owner would still have been found liable under s. 3 of the *OLA*. He was aware of his son's violent history and a previous confrontation between his son and the plaintiff; the assault was therefore reasonably foreseeable.

O. Waiver of Tort

Waiver of tort is a restitutionary doctrine that permits a plaintiff to recover the benefits that the defendant has obtained through its wrongdoing, instead of the usual remedy of damages measured by the plaintiff's loss. Its status and effect remain controversial. It is

frequently pleaded by would-be class proceeding plaintiffs in order to avoid the usual difficulty of proving and quantifying individual damages in a class action. Instead, a plaintiff will claim "restitutionary damages": in other words, a disgorgement of the profits earned by the defendant. Because claims based on novel causes of action should not generally be decided summarily at a certification hearing, but should be decided after a consideration of the full facts, the pleadings have usually been allowed to stand.

Two cases decided last year may pour cool water on the strategy and effectiveness of pleading waiver of tort, in two ways. First, where a plaintiff claims under a statute that represents a complete code, there may be no room for alternative remedies such as waiver of tort. Second, the two cases endorse the idea of striking such claims summarily where appropriate.

In *Koubi v. Mazda Canada Inc.*, 2012 BCCA 310, leave to appeal dismissed (17 January 2013), S.C.C. No. 35017, the Court of Appeal clarified and limited the applicability of the emerging action for "waiver of tort" where relevant legislation already provides exhaustive and comprehensive remedies. The plaintiff had successfully applied for certification of a claim against Mazda, based on the allegation that its vehicles were defectively vulnerable to keyless break-ins.

The Court of Appeal provided an expansive review of Canadian jurisprudence on this controversial doctrine. One major issue is whether waiver of tort constitutes an independent cause of action, or whether it is merely an alternative remedy once the plaintiff has established an independent actionable wrong. If it is the latter, the plaintiff must first prove all elements of the underlying wrong, including loss, before waiver of tort will apply. If it is the former, however, the plaintiff need only prove that the defendant has wrongfully acquired a benefit. The court reviewed Canadian jurisprudence on this debate and concluded that the issue remained unsettled. Thus, it would have been inappropriate to deny certification on this ground alone.

That being said, as the plaintiff grounded her claim in alleged breaches of the *Sale of Goods Act*, R.S.B.C. 1996, c. 410 ("*SGA*"), and the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("*BPCPA*"), the plaintiff's claim was also governed by the statutory remedies provided in each of those Acts. The *BPCPA* provides an exhaustive code of remedies. While the *SGA* is not an exhaustive code, s. 56 of that statute limits the remedies for breach of warranty by the seller to the loss the plaintiff has suffered from the breach or damages representing the difference in value. Neither statute authorized the court to supplement

those statutory remedies with the remedy of waiver of tort, or otherwise. Accordingly, the certification was set aside as bound to fail (at para. 80): "[w]here the legal wrong allegedly grounding waiver of tort is limited to a statutory breach, and the legislation from which it emanates provides exhaustive or exclusive statutory remedies for that breach, longstanding principles of statutory interpretation militate against certification".

Koubi may deter plaintiff class action counsel from mechanistically pleading waiver of tort as a claim in itself. *Koubi* may also cause future claims to face greater scrutiny and rejection at an early stage: the court endorsed the recent comments by Madam Justice Lax in *Andersen v. St. Jude Medical Inc.*, 2012 ONSC 3660, that waiver to tort claims do not necessarily require a full trial, and that their validity and triability may be considered and struck at the certification stage.

Similar ambiguity over the tort prevailed in Ontario, where the issue was raised in at least two cases. In *Andersen*, *supra*, the court found that it was unnecessary to address the issue because it concluded that the defendant manufacturer was not negligent. In *Arora*, *supra*, the court held that it did not have to resolve the issue because it was plain and obvious that there was no predicate wrongdoing on which any cause of action could be based.

P. Recognition of a Common Law Tort of Invasion of Privacy

In *Jones*, *supra*, the Ontario Court of Appeal recognized a common law tort of invasion of privacy (the trial decision was discussed in *Annual Review of Law & Practice* (CLEBC, 2011)). The key features of this new cause of action are: (1) that the defendant's conduct must be intentional or reckless; (2) that the defendant must have invaded, without lawful justification, the defendant's private affairs or concerns; and (3) that a reasonable person would regard the invasion as highly offensive causing distress, humiliation, or anguish. Proof of harm to a recognized economic interest is expressly not an element of the cause of action.

The plaintiff and the defendant worked at different branches of the Bank of Montreal, where the plaintiff also maintained her primary bank account. The defendant became involved in a relationship with the plaintiff's ex-husband. Over the course of four years, the defendant used her workplace computer to access the plaintiff's personal bank account information at least 174 times.

The court discussed three factors supporting recognition of the tort of invasion of privacy. First, privacy has long been recognized as an important underlying value of several traditional causes of action to protect personal and territorial privacy. *Charter* jurisprudence has also recognized privacy as a fundamental value in Canadian law and has specifically identified a right to informational privacy distinct from personal territorial privacy. Second, technological change poses a "novel threat" to the right to privacy and there is a need for the law to evolve in response to this threat. Third, there is an evident need for a remedy for acts like those of the defendant.

The court also recognized (at para. 73) that "no right to privacy can be absolute and many claims for the protection of privacy will have to be reconciled with, and even yield to," competing claims for the protection of other rights, such as freedom of expression and freedom of the press.

In the present case, the court found that the defendant had violated the plaintiff's right to privacy through her "deliberate, prolonged and shocking" actions and awarded the plaintiff $10,000.