# TORTS

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## A. Introduction

The year 2015 proved to be fertile ground for an expansion of the private law duties of care owed by the Crown and government agents, ranging from duties owed to users of roadways during (or immediately before) police pursuits to the commercial interests of fish habitat developers during the environmental licensing process. In one decision, the importance of police maintaining a confidential informant's anonymity was emphasized. Particularly noteworthy for practitioners working on behalf of, or against, public bodies is *Paradis Honey Ltd. v. Canada (Minster of Agriculture and Agri-Food),* 2015 FCA 89 (leave to

appeal refused [2015] S.C.C.A. No. 227), in which a majority of the Federal Court of Appeal created a new analytical framework for establishing a public body's duty of care to the public for certain types of statutory and regulatory decisions.

Duties of care between private parties also received new and interesting judicial treatment in 2015. The courts established duties of care for captains of recreational soccer teams and party-goers facing taunts from a stranger.

This year's chapter also includes interesting cases considering the defences available to defendants faced with defamation claims.

Following the Supreme Court of Canada's decision in *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, which was prominently featured in last year's chapter, the courts began to apply the newly re-formulated "unlawful means" tort; however, it seems as though litigants and courts alike are still grappling with the scope and application of the tort.

## B. Negligence: Duty of Care

To determine whether the defendant owes a duty of care to the plaintiff, the court first asks whether the relationship between the parties gives rise to a duty of care already recognized in the case authorities: if so, a *prima facie* duty of care is presumed. If the relationship does not fall within traditional categories, the analysis proceeds to the second step: given the relationship between the parties, is it reasonably foreseeable that the defendant's carelessness could harm the plaintiff, and is there sufficient proximity between the parties to make it just and fair to impose a *prima facie* duty of care? Finally, if a *prima facie* duty of care arises under either of the first two steps, are there residual policy considerations outside the relationship between the parties that ought to negate or limit the *prima facie* duty? (*Cooper v. Hobart*, 2001 SCC 79).

### 1. Duty of Care Owed by a Team Captain to Opposing Recreational Sports Players

In *Forestieri v. Urban Recreation Ltd.*, 2015 BCSC 249, the court held that a team captain in an adult recreational sports league owes a duty of care to opposing players to inform everyone playing for the team of the league's safety rules.

In a recreational soccer league, the plaintiff was injured after being slide tackled by an opposing player. The plaintiff brought claims against the league, the university that entered the offending player's team into the league, and the university employee who captained the team. The offending player was not formally registered on the university's team; he was a substitute on the night of the incident. The league rules prohibited slide tackling and also emphasized that team captains were responsible for ensuring that their players knew the rules. While the evidence demonstrated that registered players likely knew the rules and code of conduct, there was no reason to believe that the unregistered offending player knew that slide tackles were prohibited. The defendant captain was responsible for ensuring that those who played for the team knew the rules, either by making sure that unregistered players did not participate or that unregistered players knew the rules of the league beforehand.

Faced with a novel duty of care, the court applied the *Anns* test and established that the team captain and opposing players were in a foreseeable and proximate relationship. The court noted that it ought to have been foreseeable to the team captain that a failure to fulfill her responsibility to inform all participants on her team of the league rules could put an opposing player at risk of harm. No policy considerations negated that duty. The court observed that while athletes in recreational sports leagues implicitly consent to reasonable contact from an opponent, in light of the express prohibition on slide tackling, the offending player's contact was unreasonable in the circumstances. The captain breached her duty by failing to register the offending player or inform him of the rules.

### 2. Duty of Care Owed by a Friend in a Confrontation

In *Robinson (Litigation guardian of) v. Bud's Bar Inc.*, 2015 BCSC 1767, the court held that the brother of a groom during a bachelor party did not create an inherently dangerous situation when he attached a "ball and chain" to his brother's leg following a night at the pub. A bystander teased the groom about his appearance, following which the groom shoved the bystander to the ground and caused injury. The court held that the brother did not create an inherently dangerous situation by putting the ball and chain on his brother's leg, and as a consequence, the brother did not owe a duty of care to the bystander.

In this unfortunate case, the defendant groom was leaving a bar with his brother and some friends at the end of a bachelor party. The groom was dressed "exotically", and in particular, he was wearing a ball and chain around his leg, which his brother had earlier attached. The group

encountered an intoxicated bystander, who teased the groom about his appearance and his upcoming nuptials. The brother walked away, but the groom pushed the plaintiff, who fell backwards and hit his head, suffering a significant brain injury.

The bystander commenced an action against, among others, the groom and his brother. The bystander argued that the groom's brother owed a duty of care to third parties who might come into contact with the groom, as it was reasonably foreseeable that the groom, "exotically" dressed and intoxicated, created a dangerous situation. The court held that it was not reasonably foreseeable that the brother's failure to intervene or supervise the groom's behaviour would cause harm to the plaintiff. As a finding of fact, while the groom was intoxicated, he did not appear to his brother to be "grossly intoxicated", nor was the groom known to be aggressive when drunk. Further, the ball and chain was affixed to the groom with the groom's consent. As a result, the brother did not cause a dangerous situation by attaching the ball and chain to the groom's leg and the brother had no positive duty to protect the plaintiff.

Interestingly, the plaintiff pleaded his claim against the groom in negligence rather than battery. The court held that the groom owed the plaintiff a duty to use reasonable care if he moved the plaintiff away from him to avoid the confrontation. Instead, the groom's push was abrupt and careless. The court commented that a person who touches or moves another person without that person's consent has an obligation to use reasonable care. The groom did not do so, and as a consequence, he was negligent. Self-defence was not available to the groom because, while the plaintiff was annoying, persistent, and aggressively rude, the plaintiff presented no immediate threat and the push was excessive in relation to the threat. Likewise, *volenti non fit injuria* was not an applicable defence, since the plaintiff did not assume the physical and legal risk of a physical confrontation with the groom. However, the court determined that the bystander had provoked the assault and that he was contributorily negligent, so his damages were reduced by 30%.

### 3. Private Law Duty of Care Owed by Police to Class of Potential Victims

The police may owe a private law duty of care to protect a narrow and well-defined class of potential victims from a known and imminent criminal threat: *Patrong v. Banks,* 2015 ONSC 3078, leave to appeal granted 2015 ONSC 6167 (Div. Ct.).

The plaintiff was shot in a drive-by shooting in Scarborough, Ontario. The shooter was a violent criminal who was well known to police and under surveillance in connection with a series of prior drive-by shootings in the community. The police expected that the shooter would be armed and police officers in the area had been ordered to arrest him, in a high risk takedown if necessary, if he entered Scarborough. However, on the day of the shooting, the police watched the shooter drive into the area but failed to arrest him because those orders had not been communicated to the surveillance officers on duty.

The plaintiff brought a claim in negligence against the police force. The defendant responded by bringing an application to strike the plaintiff's claim on the basis that the police do not owe a general duty of care to victims of violence and that the law does not require police to pay compensation to victims of crime arising from police negligence. The court disagreed and commented that a plaintiff may bring an action in negligence where it is "just and fair" to hold the police accountable in the circumstances.

Although government actors are often immune for breaches of their public duties, the court noted that in some cases, the police may owe a private law duty of care to a victim where the victim is reasonably foreseeable and proximate and no compelling policy reasons exist to negate a duty. The court observed that the foreseeability requirement does not mean that the victim must be personally and absolutely identifiable to the police. Rather, foreseeability and proximity are established where the plaintiff is a member of a class of potential victims who are known to the police. The plaintiff's pleadings alleged that the police knew that the shooter presented a threat to young black men in the community that may also be (or appear to be) gang members. The plaintiff argued that he fit this narrow, well-defined class of potential victims.

In the circumstances, accepting the allegations in the pleadings as true, the police had an enhanced duty to protect the plaintiff from violence. Policy reasons militated in favour of the recognition of the duty of care, since such a duty of care in this case would promote careful policing in the public interest and compliance with arrest and takedown orders for high-risk offenders. The court noted that there was no risk of indeterminate liability in this case, because the plaintiff and other potential victims were from a small and identifiable class of individuals in a known location. This class of individuals had an expectation that the police would protect them by following orders to arrest and takedown the suspect. In the circumstances, the recognition of a duty of care between the plaintiff and the police was just and fair,

and consistent with the policy goals of effective community policing and compensation to those suffering loss due to police negligence.

### 4. Crown Duty of Care to Protect the Legal Interests of Its Wards

The Crown may owe a duty of care to its wards to advise, gather evidence, take steps toward, and, if necessary, commence litigation related to abuse suffered by its wards while in the care of the Crown: *Papassay v. Ontario,* 2015 ONSC 3438.

A representative plaintiff commenced a proposed class action on behalf of Ontario Crown wards who had suffered abuse while in the care of the Crown. Upon discovering the abuse, the plaintiff alleged that the Crown was negligent by failing to advise the victims that they were potentially entitled to damages, by failing to gather evidence, by failing to retain counsel and by failing to properly consider whether it was in the victims' best interests to advance a claim on their behalf during their wardship. The representative plaintiff alleged that the Crown failed to take all reasonable steps to protect and preserve the victims' rights to recover compensation prior to the expiry of limitation periods.

The law is clear that a parent or a legal guardian owes a duty of care to his or her child. The plaintiff argued that in the context of wardship, the Crown was analogous to a parent. The Crown argued that, if a duty existed at all, it had been delegated to children's aid societies. Noting that previous case law suggested that the Crown may owe a duty of care to protect the legal rights of its wards, the court held that the applicable legislation grants primary responsibility for wards to the Crown, while aid societies are secondary care providers. Furthermore, the legislation explicitly provides that the Crown may take legal action on its wards' behalf. As a result, a private law duty of care analogous to that of a parent and child existed between the victims and the Crown, which includes the duty to preserve the child's legal rights, if necessary. The court held that it was not plain and obvious that the class claim would fail.

### 5. Private Law Duty of Care Owed by the Crown to Environmental Permit Applicants

In *Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General),* 2015 BCCA 163, the court held that the Crown may owe a duty of care to an applicant for an environmental permit where the Crown unreasonably delays its decision on the issuance of the permit.

The plaintiff alleged that the Crown was liable in negligence and misfeasance for its delay in its determination of the plaintiff's applications under the *Fisheries Act* to develop potential fish habitat areas. The plaintiff alleged that the application and notification process took substantially longer than mandated under the *Fisheries Act* regulations, and therefore, the Crown breached its duty of care and the plaintiff suffered a loss. The Crown responded by bringing an application to strike the plaintiff's claim. The chambers judge dismissed the Crown's application and the Crown appealed.

The Court of Appeal dismissed the appeal, and in the process, provided some helpful commentary on the scope of duties of care owed by the Crown to members of the public during the fulfilment of the Crown's statutory duties. The Crown conceded that its relationship with the plaintiff was foreseeable, but it argued that the relationship suffered from a want of proximity. The court commented that policy concerns may be relevant to the proximity analysis, especially where the enabling statute establishes proximity between the Crown and the plaintiff. In contrast, the court observed that where two parties are in a direct transactional relationship, policy has a more limited role because the only remaining proximity question is whether the statute prohibits a consideration of the interests of the plaintiff.

The court commented that the subject legislative scheme militated in favour of a private law duty of care toward the plaintiffs. The direct interaction between the Crown and the plaintiff and the specific timelines in the statutory scheme must be appropriately balanced with the legislative requirements to protect the fisheries, environment, and economic development (although the last category includes a consideration of the interests of the proponent as well). The court observed that this statutory balancing act is not irreconcilable with a private duty of care in negligence.

The court held that no policy considerations negate this *prima facie* duty of care. The Crown argued that a duty of care would interfere with "true policy decisions" of the Crown (as opposed to mere operational decisions, which may attract a duty of care). However, the Crown's pleadings were unclear whether the Crown's delay was a result of a true policy decision or the result of operational negligence, so the court declined to negate the *prima facie* duty of care at this stage in the proceedings.

## 6. Crown Duty of Care to Maintain Informer Privilege

In *Nissen v. Durham (Regional) Police Services Board*, 2015 ONSC 1268 (notice of appeal filed with the Ontario Court of Appeal), the court held that the police owe a duty of care to confidential informants to ensure those informants' identities remain confidential. If the police fail to protect an informant's confidentiality, they may be liable to the informant for damages.

The plaintiffs, a married couple, lived in a residential neighbourhood with their children in a house that they had invested considerable time and money toward improving. The wife learned that the neighbours' son had broken into a house in the neighbourhood, stolen guns, and took those guns to school to threaten other students. The wife provided information leading to the arrest of the neighbours' son on the condition that her anonymity would be guaranteed and that her identity be protected by the police. During its investigation, however, the police disclosed the wife's identity to the neighbouring family. After the neighbours' son was arrested, his family began to act in a threatening, intimidating, and dangerous manner towards the plaintiffs. The situation became so bad that the plaintiffs were forced to sell their house and the wife suffered from post-traumatic stress disorder as a result.

Informer privilege arises when information is provided to the police in exchange for a promise of confidentiality. On the facts, the wife was entitled to informer privilege. The court held that there is no principled reason that this privilege cannot give rise to a private law duty between the informant and the police. Otherwise, the informer would have a right to confidentiality without a remedy if the privilege is breached by the police. The court observed that there are no residual policy reasons to negate this *prima facie* duty because the privilege is almost absolute, requiring little consideration of the public interest as a consequence. Given the limited class of potential informants, there is no spectre of indeterminate liability. Furthermore, a recognition of the duty of care promotes careful police practices and facilitates the courts' supervisory role with regard to breaches of the privilege. Noting that recent Supreme Court of Canada jurisprudence confirmed that damages for severe psychological injury are not capped, the court awarded $345,000 for the plaintiff wife's psychological damages.

## 7. A New Analytical Framework for Public Authority Liability?

In *Paradis Honey Ltd. v. Canada (Minster of Agriculture and Agri-Food)*, 2015 FCA 89, leave to appeal refused [2015] S.C.C.A. No. 277 (QL), a group of commercial beekeepers who relied upon the importation of honeybees for their business operations proposed a class action to challenge a ban on the importation of new "packages", or colonies, of bees. Prior to 2007, the regulations allowed packages to be imported on a case-by-case basis, but in 2007, the Crown implemented a blanket prohibition on importation, which prevented beekeepers from applying for relief pursuant to the Health of Animals Regulation. The beekeepers sought to commence a class action on the basis that the new Regulation was negligent. The Crown applied to have the action struck for disclosing no reasonable cause of action.

Although administrative law remedies were likely available to the beekeepers, a majority of the Federal Court of Appeal held that the beekeepers could bring an action in negligence in the first instance. The court commented that the beekeepers' prior ability to apply for importation under the Health of Animals Regulation suggested that public policy favoured importation in appropriate circumstances. Therefore, a private law duty of care was not inconsistent with the Minister's public duty under the enabling statute. The Crown argued that the establishment of a duty of care to the beekeepers would have a general "chilling effect" on the Crown's performance of its statutory duties. The majority held that this was an insufficient policy ground upon which to negate a duty of care. There was no spectre of indeterminate liability since the class of potential claimants was limited to commercial beekeepers.

In *obiter*, Stratas J.A., for the majority, commented that courts should cease using private law principles to determine the liability of a public authority. Instead, courts ought to apply a public law analysis. In *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, the court held that if a duty of care would conflict with the general public duty established by statute, the court "may" not find one. However, Stratas J.A. observed that this principle does not establish a rule that decisions made under a general public duty or policy are protected from negligence. While *Imperial Tobacco* protects "core policy" matters from negligence claims, the definition of "core policy" is vague and does not clearly bar the beekeepers claim. Instead, Stratas J.A. suggested that public bodies should be held accountable when acting "unacceptably" or "indefensibly" in the court's view. Monetary relief should only be awarded to Plaintiffs where "additional circumstances" exist to fulfill a clear duty, redress significant maladministration or vindicate public

law values. In the case at bar, the motion to strike was dismissed and the beekeepers' claim allowed to proceed. Stay tuned to future editions of this chapter to see if this analysis receives subsequent judicial treatment.

## 8. Duty of Care Owed by the RCMP to Users of the Road before a Pursuit

Last year's *Annual Review* discussed *Bergen v. Guliker Estate*, 2014 BCSC 5, in which the court held that the police owe a private law duty of care to other users of the road immediately before deciding to pursue a suspect. This year, the appeal of that decision was released, indexed at 2015 BCCA 283.

On the facts at trial, the RCMP were aware that the suspect was suicidal and a flight risk. Once they made contact, a high speed pursuit ensued, which ended with the suspect crossing over the centre line and colliding with the plaintiff's vehicle. The Court of Appeal agreed with the trial judge that police owe a private law duty of care to other motorists during a pursuit, but held that this duty does not extend to the time immediately preceding a pursuit. The trial judge held that the police owe a duty of care as soon as it is reasonably foreseeable that a pursuit will occur. The Court of Appeal clarified that the precise sequence of events in the pursuit does not have to be foreseeable, but instead, it must only be foreseeable that a victim may be in a position where the offender's conduct could reasonably cause harm.

The Court of Appeal commented that proximity and foreseeability must be established separately, with proximity dealing with the quality of the relationship that makes the imposition of a duty of care "fair and just". Where the police act pursuant to a statute, that statute is relevant to the assessment of proximity, by either creating or negating a relationship of proximity or by the statute being neutral. At the proximity stage of the duty of care analysis, policy reasons can negate a duty of care where there is a conflict between public duties (in the statute) and private duties (at common law). The residual policy stage of the analysis deals with policy concerns outside of the parties' relationship. The Court of Appeal held that the lower court erred in its holding that prior jurisprudence had imposed a duty of care on the police immediately before the commencement of a pursuit where the suspect is known to be a flight risk. Consequently, a full *Anns* analysis should have been conducted by the trial judge, and the appeal was allowed on that basis.

The Court of Appeal commented that it was not clear how the plaintiffs' vehicle was foreseeable, especially since the location of the suspect was constantly changing. The trial judge did not conduct a full proximity analysis, but rather, erroneously subsumed it into the foreseeability analysis without proper consideration of conflicting policy considerations. The defendant's breach of the standard of care was not sustainable at law because the duty of care analysis was incomplete. Furthermore, such a breach required expert evidence as to the reasonable actions of a police officer in the circumstances, because the situation was one outside the knowledge and everyday experience of the ordinary person and the relevant statutory and policy provisions do not provide sufficient guidance on the issue. The Court of Appeal ordered a new trial so as to allow a full *Anns* analysis to be conducted, which will determine whether the police owe users of a roadway a duty of care prior to commencing a police pursuit.

## C. Negligence: Standard of Care

### 1. Professional Negligence: Standard of Care

*Malton v. Attia*, 2015 ABQB 135, provides practitioners with a helpful overview of a lawyer's standard of care with regard to various steps in the conduct of civil litigation. In this case, the court held that the defendant lawyer's litigation practices fell below the standard of care in numerous respects.

In the underlying litigation, the plaintiffs retained the defendant lawyer with regard to a deficient home inspection that failed to identify numerous structural defects. In reliance upon the home inspection, the plaintiffs purchased the home with a significant portion of their retirement savings (which was part of their retirement plan). The plaintiffs discovered the structural defects after moving into the home and they sought to recover their damages from the home inspector.

Unfortunately, the defendant lawyer's conduct of the litigation fell below the standard of care of a "reasonably competent solicitor" in numerous respects, which resulted in the plaintiffs recovering only $38,000 at trial, which was significantly less than the actual damages suffered by the plaintiffs. Examples of the defendant's litigation practices that fell below the standard of care include:

- A failure to reduce the terms of the retainer to writing or keeping notes on the file that would assist in determining the purpose and scope of the retainer.

- Advising the plaintiffs that their only avenue to mitigate their damages was to fully repair the structural deficiencies to the home. Had the defendant properly researched the law on this point, he would have discovered that other (and less onerous) mitigation options (such as selling the house at a loss) were available to the plaintiffs. This failure led to the plaintiffs expending almost all of their life savings to repair the house.
- The defendant's misapprehension of the law of damages led him to advise the plaintiffs that they were only entitled to damages for the cost to repair the defects to the house. In fact, had the defendant properly researched the law, he ought to have advised the plaintiffs to pursue damages for the purchase price of the house, less the actual value of the house at the time of purchase, plus mitigation costs. This would have resulted in better litigation prospects (and a higher potential damages award) for the plaintiffs than the strategy employed by the defendant lawyer.
- At the time that the plaintiffs purchased the house, their retirement plan was to purchase two additional properties with their savings, from which they would generate rental income. The defendant wrongly advised the plaintiffs that they would not be able to recover their losses that flowed from not being able to execute this investment plan because they had to use those funds to repair the house. In fact, the plaintiffs had a viable claim for damages related to this loss of investment opportunity, but the defendant failed to pursue it (despite the plaintiffs specifically asking the defendant about this possibility).
- The defendant's conduct of the litigation delayed the proceedings, which amplified the plaintiffs' economic loss and exacerbated their stress.
- The defendant failed to keep a record of the time that he worked on the plaintiffs' file.
- The defendant failed to advise the plaintiffs how to organize their documents and to take notes and proper photographic evidence regarding the damage to the house.
- The defendant was disorganized and not prepared for the examinations for discovery in the action.
- Despite the home inspector's clear indication that it was not willing to settle the matter, the defendant advised the plaintiffs to bring a judicial settlement conference in order to conduct a "dry run" of the case before a judge. Predictably, the settlement

conference was unsuccessful and it resulted in wasted effort for both parties.

- The defendant left the bulk of his trial preparation until the eve of trial.
- The defendant failed to marshal evidence of the plaintiffs' damages.
- Following trial, the defendant failed to advise the plaintiffs of the deadline to file an appeal.

At the underlying trial, the judge held that the home inspector was liable; however, since the defendant misapprehended the law of damages, the plaintiffs failed to pursue damages related to the value of the house or the resulting loss to their investment portfolio. At trial in the professional negligence action, the judge held that the defendant lawyer's litigation conduct fell below the standard of care. The plaintiffs were awarded damages related to the value of the house and their resulting loss to their investment portfolio in the amount of $359,000. The plaintiffs were also awarded general damages for pain and suffering in the amount of $150,000 in addition to $10,000 for punitive damages.

### 2. Occupiers' Liability: Standard of Care

In *Winters v. Haldimand (County)*, 2015 ONCA 98, a municipal defendant met its duty pursuant to Ontario's *Occupiers' Liability Act* (which is substantially similar to the statutory duty in B.C.'s *Occupiers' Liability Act*, R.S.B.C. 1996, c. 337) in relation to an inherently dangerous tree in the municipality's park. The infant plaintiff, who regularly climbed the subject tree with his friends without prior incident, fell out of the tree and suffered a spinal cord injury. Prior to this event, the municipality had not received any complaints about the tree, park personnel had never seen anyone climb the tree in the past, and indeed, the infant plaintiff's mother was unaware that her son regularly climbed the tree. The municipality had a regular maintenance and monitoring program in place for the park; however, the municipality took no steps to warn users of the park about the danger posed by the tree. The Court of Appeal endorsed the trial judge's finding that the danger posed by the tree was "an obvious one". In the circumstances of an "obvious and self-evident danger", the municipality had no duty to warn and it met its statutory duty in relation to the tree by monitoring and maintaining the totality of the park on a regular basis.

## D. The Unlawful Means Tort

As discussed in last year's *Annual Review*, in *A.I. Enterprises v. Bram Enterprises Ltd.*, 2014 SCC 12, the Supreme Court of Canada clarified the Canadian position on the sometime inconsistent (and often confusing) "unlawful means tort". The elements of the tort are: (1) the defendant intended to injure the plaintiff's economic interests; (2) the interference was by illegal or unlawful means; and (3) the plaintiff suffered economic loss or harm as a result. Liability to the plaintiff is based upon the defendant's unlawful act against a third party. The Supreme Court of Canada commented that the core of the tort "captures the intentional infliction of economic injury on C (the plaintiff) by A (the defendant)'s use of unlawful means against B (the third party)" (at para. 23).

A handful of reported decisions in 2015 considered the scope and application of the unlawful means tort. While it is beyond the scope (and purpose) of this chapter to offer any critical commentary on the handful of decisions subsequent to *Bram Enterprises*, it appears as though the unlawful means tort may remain confusing and elusive to litigants and courts alike.

In *Canadian Hedge Watch Inc. v. Street*, 2015 ONSC 454, the defendant made false statements to sponsors of a conference hosted by the plaintiff in an effort to kill the conference. Indeed, the defendant's false statements to third parties caused the plaintiff to lose at least six sponsorships. The plaintiff commenced an action and brought an application for an interlocutory injunction to restrain the defendant from interfering with the plaintiff's business. Without any additional analysis, the court commented that "[f]alse statements made with intent to injure a plaintiff form the basis for the tort of unlawful interference" which gave rise to a "strong *prima facie* case" for the purpose of the injunction application (at para. 38).

In *Fundraising Initiatives Inc. v. Globalfaces Direct Inc.*, 2015 ONSC 1334, the plaintiff and the defendant entered into an agreement whereby the defendant would utilize its field agents to recruit potential donors for certain charity clients of the plaintiff. The plaintiff terminated the agreement four years later. Approximately one month later, a new business began competing with the plaintiff in B.C. and the defendant provided services to the new competitor that were substantially similar to the services that it had provided to the plaintiff prior to termination. The plaintiff alleged that the defendant disclosed confidential information (including client information) to the new competitor (who was also a defendant to the action), who in turn

exploited that information to interfere with the plaintiff's economic interests.

The second defendant brought a motion to strike the plaintiff's claim on the basis that the pleadings failed to disclose an unlawful act against a third party, which would make the unlawful means tort unavailable to the plaintiff. The court held that the plaintiff's pleadings were sustainable because the confidential information belonged to third party clients as well as the plaintiff itself. In this sense, the third party clients would have a potential cause of action against the second defendant (and indeed, the first defendant) for the tort of intrusion upon seclusion, thereby meeting the "parasitic" requirement of the unlawful means tort.

In *Gaur v. Datta*, 2015 ONCA 151, the plaintiff alleged that the defendants sent various emails to third parties that had the effect of disparaging the plaintiff's professional reputation, which in turn interfered with the plaintiff's ability to maintain existing contracts, secure additional contracts and develop business opportunities. The defendants brought a motion to strike on the basis that the plaintiff did not plead the parasitic element of the tort (i.e., that the third party recipients would have a cause of action against the defendants in relation to the allegedly disparaging emails). The particulars provided by the plaintiff alleged that in one of the emails, the defendant threatened to not repay a debt to a third party unless that third party stopped doing business with the plaintiff. The Court of Appeal held that "on a generous reading of the pleading together with the particulars", the plaintiff's allegation in this regard was sufficient to establish the parasitic element of the unlawful means tort.

## E. Defamation

### 1. Initial Complaint to Police Not Protected by Absolute Privilege

The defence of absolute privilege does not apply to an initial complaint made by a complainant to the police regarding the commission of an alleged offence (*Caron v. A. (Litigation guardian of)*, 2015 BCCA 47). The plaintiff alleged that the defendant falsely accused the plaintiff of sexual assault and filed a complaint with the RCMP to this effect. At a subsequent criminal trial, the plaintiff was proven innocent because the plaintiff was working 1,500 kilometres away on the date of the alleged offence. The plaintiff then brought a defamation action against the accuser.

The defendant brought a summary trial application and sought dismissal of the action on the basis that the statements made to the police were protected by absolute privilege, and as a consequence, the defendant argued that it was plain and obvious that the defamation action could not succeed. The chambers judge dismissed the defendant's application. The Court of Appeal dismissed the defendant's subsequent appeal, holding that the defence of absolute privilege in defamation actions does not apply to an initial complaint made to police.

Qualified privilege applies "where there is a public or shared interest in support of the statement both being made and received" (at para. 15). This circumstance creates a defence to a defamation claim unless the plaintiff can show that the defendant made the publication for a malicious purpose. Absolute privilege, on the other hand, provides a complete defence to a defamation claim, even if the defendant made the publication with malice. Traditionally, absolute privilege attaches to any "communications which take place during, incidental to, and the processing and furtherance of, judicial or quasi-judicial proceedings" (at para. 16). The Court of Appeal canvassed the jurisprudence in Canada and summarized that "only a qualified, and not an absolute, privilege applies to initial complaints made to the police before the commencement of judicial proceedings" (at para. 37).

The defendant argued that, for public policy reasons, the defence of absolute privilege ought to be extended to include initial complaints made to police. The defendant argued that the law, as it stands, may impose a "chilling effect" for sexual assault complainants, since victims could be deterred from reporting sexual assaults (and other crimes) through the threat of possible defamation litigation if the criminal trial is unsuccessful. In order to incrementally change the law in this regard, the defendant would have to demonstrate that an expansion is "necessary in order to protect the proper administration of justice" (at para. 52). The Court of Appeal held that it "would not be appropriate ... to make such a determination ... without the benefit of an evidentiary record" (at para. 53). Stay tuned to future editions of this chapter to see if this issue is considered on the basis of a full evidentiary record at trial.

### 2. Broadcaster Liable for Defamation of Anti-Homosexual Activist

The Canadian Broadcasting Corporation was liable for defamation of a notorious anti-homosexual "activist" when the broadcaster featured selective text appearing on a homophobic flyer distributed by the plaintiff but the CBC did not bring the viewer's attention to the

"disclaimer" that the plaintiff included on the flyer (*Whatcott v. Canadian Broadcasting Corp.*, 2015 SKQB 7).

The plaintiff is a self-described "pro-life and pro-family advocate" who is opposed to homosexuality. The plaintiff is notoriously known for distributing flyers (which he often creates himself) that promote his anti-homosexual views. One of the flyers published a parody of a controversial song by a group known as "Decide" called "Kill the Christian" (which was the subject of its own human rights case in 2003). The title of the plaintiff's parody was "Kill the Homosexual". The plaintiff's lyrics in the flyer repeated that refrain numerous times. At the end of the flyer, the plaintiff included a paragraph stating that the plaintiff "does not want homosexuals to be killed" and that the flyer "should not be interpreted as an incitement to violence".

When the plaintiff's human rights appeal was being heard at the Supreme Court of Canada, the defendant broadcast a news story about the plaintiff and the human rights case. The defendant's news story contained a camera shot that lasted for four seconds, which depicted the lyrics printed on the plaintiff's "Kill the Homosexual" flyer. The defendant did not broadcast the "disclaimer" paragraph at the end of the flyer.

The plaintiff brought a defamation claim against the broadcaster on the basis that the broadcaster's failure to include the "disclaimer" paragraph in the flyer during the news story had a tendency to diminish the reputation of the plaintiff in the view of reasonable people.

The court held that the "selective use of the plaintiff's comments" in the news story "created a defamatory impression" (at para. 56). The sting of this impression was that "the plaintiff's words from the ... flyer, conveyed the impression that the plaintiff's views extended to inciting violence against homosexuals", which would tend to lower the plaintiff's reputation in the eyes of a reasonable person (at para. 57). The court awarded general damages in the amount of $20,000 and aggravated damages in the amount of $10,000 to the plaintiff.

### 3. Defence of Fair Comment Not Available when Journalists Are Reckless or Indifferent to the Veracity of the Underpinning Facts

The defence of fair comment was not available to journalists who published commentary about a University of Victoria professor and climate-change scientist when the journalists were careless or indifferent to the underlying "facts" in the articles (*Weaver v. Corcoran*, 2015

BCSC 165, notice of appeal filed with the Court of Appeal for British Columbia).

The plaintiff is a well-known scientist in the field of climate dynamics and is a controversial figure among those who dispute the notion that climate change exists or that such change is caused by human activity. The defendant journalists wrote articles suggesting that the plaintiff was biased, had fabricated stories about break-ins at his office, and had participated in a global conspiracy with other like-minded scientists to support the proposition that climate change has been caused by human activity. The sting of the statements imply that the plaintiff is untrustworthy, unscientific, incompetent, that is engaged in the willful manipulation and concealment of scientific data, and that he has fabricated stories about the involvement of the fossil-fuel industry with respect to break-ins at his office.

The court held that the publications were defamatory and that the defence of fair comment was not available to the defendant journalists in the circumstances. The test for establishing the defence of fair comment was set out in *WIC Radio Ltd. v. Simpson*, 2008 SCC 40:

- The comment must be on a matter of public interest.
- The comment must be based on fact.
- The comment, though it can include inferences of fact, must be recognizable as comment.
- The comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts?
- Even though the comment satisfies the objective test, the defence can be defeated if the plaintiff proves that the defendant was subjectively actuated by express malice.

The defence of fair comment was not available to the defendant journalists since "the defendants altered the complexion of the facts and omitted facts sufficiently fundamental that they undermine the accuracy of the facts expressed in the commentary to the extent the facts cannot be properly regarded as a true statement of the facts" (at para. 235). The defendant journalists heavily relied upon "facts" reported in an earlier article about the plaintiff, which was authored by a non-party to the claim. However, the journalists failed to independently verify the veracity of the "facts" reported in the earlier article. In doing so, the defendants took the risk that the "facts" in that article were not accurate. In this sense, the journalists were reckless or indifferent as to the veracity of the "facts" underpinning their commentary regarding the plaintiff. Since the underpinning statements were found

to be untrue (or distorted) at trial, the defence of fair comment was not available to the journalists.

## F. Statutory Tort of Invasion of Privacy

### 1. Employer May Be Vicariously Liable under the Privacy Act

An employer may be vicariously liable for a violation of the *Privacy Act*, R.S.B.C. 1996, c. 373 committed by one of its employees in relation to personal information belonging to the employer's customers or clients: *Ari v. Insurance Corp. of British Columbia*, 2015 BCCA 468. In 2013, the defendant's employee improperly accessed the personal information of approximately 65 of the defendant's customers. One of the affected customers commenced a class proceeding in relation to the breach. The defendant employer responded by bringing an application to strike the class plaintiff's *Privacy Act* pleading on the basis of a 1983 decision that stands for the proposition that vicarious liability cannot be imposed where the underlying wrong was (1) created by statute; and (2) is expressed in terms of intentional conduct.

The chambers judge dismissed this ground of the defendant's application to strike, which decision was subsequently upheld by the Court of Appeal. The Court of Appeal held that the language of the *Privacy Act* is broader than the statutory language at issue in the 1983 case since the *Privacy Act* does not "clearly" limit a plaintiff's recovery to damages from the person who committed tortious act. While vicarious liability for intentional and deliberate wrongdoing has been generally rejected in Canadian jurisprudence, the Court of Appeal noted that "it is not unheard of". On this basis, the court held that "to the extent that s. 1(1) of the *Privacy Act* requires deliberate wrongdoing, it is not *per se* incompatible with vicarious liability" (at para. 25).