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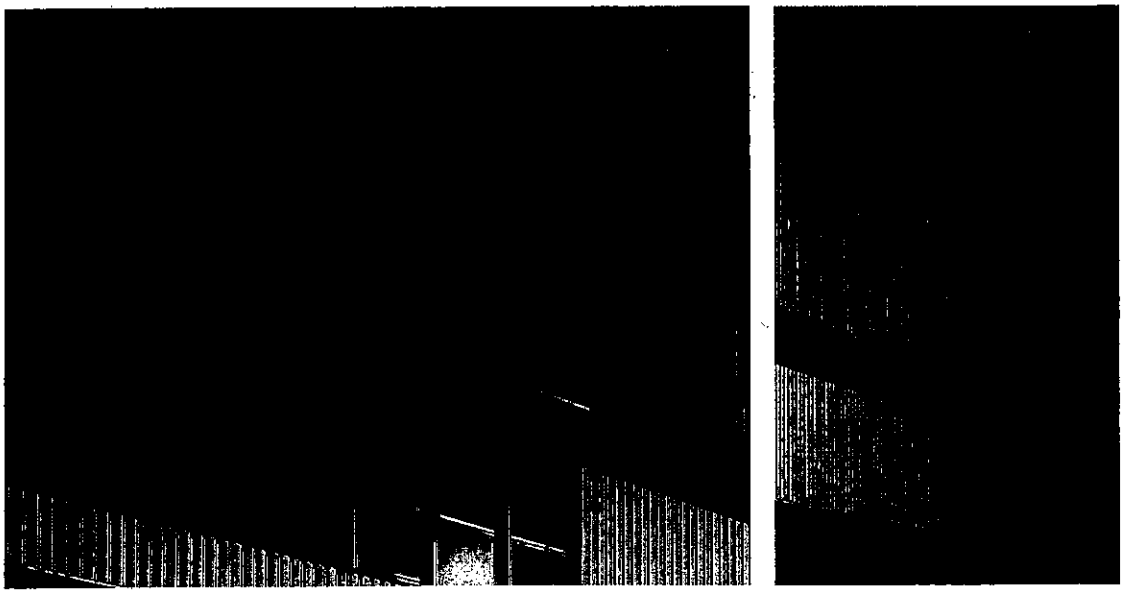

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TORTS

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A. Introduction

The year 2016 was an exciting one for the body of tort law. Ontario courts introduced the new tort of "public disclosure of private facts" (*Jane Doe 464533 v. D. (N.)*, 2016 ONSC 541) and a new defence to a false imprisonment claim (*Mann v. Canadian Tire Corp.*, 2016 ONSC 1926). Stay tuned to see if courts in our province follow suit.

Perhaps the most important (or at least, publicized) torts decision from the Supreme Court of British Columbia involved the scope of liability for a defamatory post made on one's Facebook page (*Pritchard v. Van Ves*, 2016 BCSC 686). In a year that will be remembered for the divisive presidential campaign in the United States and President Trump's unabated Twitter tirades, our court sent a clear message to

social media users in our province: angry social media posters may be liable for their own defamatory posts, and importantly, for their friends' consequential defamatory posts on their social media accounts.

This year also produced important developments in municipal duties of care in relation to general licensing bylaws (*Vlanich v. Typhair*, 2016 ONCA 517); the duty of care of a land surveyor to third party property owners (*Burke v. Watson & Barnard (A Firm)*, 2016 BCCA 439); and the Crown's liability for public nuisance (*George v. Newfoundland and Labrador*, 2016 NLCA 24).

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 of the relationship between the parties that ought to negate or limit the *prima facie* duty? (*Cooper v. Hobart*, 2001 SCC 79)

1. Township Does Not Owe a General Duty of Care to Enforce Its Taxi Licensing Bylaw

A township (and perhaps, a municipality or a city) does not owe a duty of care to the public to enforce its taxi licensing bylaw (*Vlanich v. Typhair*, 2016 ONCA 517).

The township enacted a bylaw that required taxis to carry at least $1,000,000 of liability insurance. The defendant taxi company had the requisite $1,000,000 of coverage at the time it applied for its taxi licence, but had only $200,000 of coverage at the time of the accident. The taxi company signed annual declarations in connection with the renewal of its licence, which represented to the township that it was compliant with the applicable licensing bylaws, when in fact, it was not.

The plaintiffs, who carried an underinsured motorist policy with State Farm, were injured in a collision with a taxi owned by the defendant

licensee. State Farm added the township as a third party to the claim, alleging that the township's negligent enforcement of the bylaw caused the plaintiffs' injuries and, by reason of the underinsured policy, its own economic loss.

The court held that licensing bodies do not owe a "general" private duty of care to the public for an improperly granted (or in this case, renewed) licence.

The concept of proximity from *Cooper* requires (at para. 37) an "immediate and direct nexus" between the licensing body's act or omission and the injury or loss suffered by the plaintiff. In this case, State Farm's pure economic loss was not sufficiently proximate to the township's failure to enforce its bylaw.

Even if the relationship between State Farm and the township was sufficiently proximate, the court identified a number of policy reasons to negate such a duty. Primarily, the law already provides a remedy in the form of underinsured motorist coverage. The court commented (at para. 47) that it would not be a "sound policy to afford State Farm a remedy to recoup the loss it agreed to cover". Further, the burden that such a duty would impose on "small municipalities" could be significant, which further militated against a duty of care.

2. A Land Surveyor Does Not Owe a Duty of Care to a Neighbouring Property Owner

A land surveyor that provides an opinion to a homeowner does not owe a duty of care to third party owners of neighbouring properties (*Burke v. Watson & Barnard (A Firm)*, 2016 BCCA 439).

The defendant surveyor provided a survey opinion to a homeowner in 1990, and again in 2007 after the homeowner and their neighbour got into a property line dispute. On the basis of the surveyor's 2007 opinion, the homeowner tore down the neighbour's fence under the cover of night, which resulted in the neighbour commencing a trespass claim against the homeowner. The neighbour was awarded damages and costs in that action, which were insufficient to cover the neighbour's actual legal fees incurred in the prosecution of the claim.

The neighbour then commenced an action against the surveyor to seek recovery of the shortfall between her actual legal fees and her damages and costs award in the first action (which shortfall was approximately $80,000). The defendant surveyor brought an application to strike, which was dismissed by the chambers judge on the basis that there were two lower court decisions in other provinces which held that

surveyors in those cases owed a duty of care to neighbouring property owners. Applying the *Cooper/Ann's* test, the chambers judge found that there was an existing duty of care between surveyors and neighbouring property owners, and on that basis, held that it was not plain and obvious that the neighbour's claim would fail.

The Court of Appeal held that the chambers judge incorrectly applied the first part of the *Cooper/Ann's* test, which asks whether the duty relationship has been previously recognized. The Court of Appeal clarified (at para. 43) that "previously recognized" means that the "duty of care must be well-established in the jurisprudence in order to negate the need for a full duty of care analysis". The existing jurisprudence was unsettled and not binding in British Columbia, so a full duty of care analysis ought to have been performed by the chambers judge.

The plaintiff neighbour argued that her status as an adjoining landowner created a sufficiently proximate relationship with the surveyor to establish a duty of care. The Court of Appeal disagreed, since surveyors are not the ultimate arbiters of boundary disputes between landowners; they merely provide an opinion to one of the homeowners involved in the dispute. The mere fact that the surveyor's opinion adversely affected the neighbour is not a sufficient basis to establish a duty of care. The neighbour did not rely upon the surveyor's opinion, the surveyor did not inferentially assume responsibility for the neighbour's interests, and indeed, the 2007 opinion was provided in the context of an adversarial dispute between the homeowner and the neighbour (which strongly militated against proximity in this case).

C. Negligence: Standard of Care

1. Standard of Care for a 10-year-old Child in Contributory Negligence Claim

In *Saumur v. Antoniak*, 2016 ONCA 851, the court upheld a lower court decision which held that a 10-year-old's failure to look both ways before crossing a busy intersection did not fall below the standard of care for a child of "like age, intelligence and experience" and that the child was not contributorily negligent for his injuries.

The court below found that the child plaintiff was "not equipped at his age to judge distance and speed", that the child was "confused because he arrived at the crosswalk and there was no crossing guard to help him", and on this basis, held that the child was not contributorily negligent for his injuries. The defendant, City of Hamilton (which

employed the crossing guard who ought to have been on duty at the time of the child's injury), appealed on the basis that the trial judge's findings that the child was forgetful, distracted, or confused at the time of the collision was "not an excuse for negligence but rather an *indicia* of it".

The Court of Appeal dismissed the appeal and indicated that, on the facts, the trial judge's finding regarding contributory negligence could have gone either way. The trial judge applied the correct legal test and there was no reversible error of fact or mixed fact and law in the trial judge's application of the legal test.

2. Professional Negligence: Standard of Care

In 2016 ABCA 130, the court allowed an appeal of a decision that was summarized in last year's chapter (*Malton v. Attia*, 2015 ABQB 135). The court held that the trial judge's assistance of the self-represented plaintiffs (specifically, the trial judge's introduction of a new theory of liability in her reasons, which carried the day) was a reversible error.

D. Negligence: Causation

1. Snell v. Farrell Inference of Causation Is Permissive, Not Mandatory

A trier of fact is not required to draw an adverse inference of causation when the defendant's negligence has undermined the plaintiff's ability to prove causation, even when the plaintiff was able to lead some evidence of causation (*Benhaim v. St-Germain*, 2016 SCC 48).

The plaintiff alleged that the defendant doctors negligently delayed in diagnosing her husband's lung cancer. The plaintiff argued that, but for the delay, her husband would have received life-saving treatment. The doctors argued that the cancer would have taken the husband's life even if it had been promptly diagnosed.

At trial, three expert witnesses formed opinions on the basis of incomplete information and each opinion involved speculation as to the stage of the husband's cancer at the time of the initial missed diagnosis. The trial judge recognized that she could draw an adverse inference of causation against the doctors on the basis of *Snell v. Farrell*, 1990 CanLII 70 (SCC), but did not do so.

The Quebec Court of Appeal held that the trial judge erred by not drawing an adverse inference of causation.

In a 4–3 decision, the Supreme Court of Canada held that the trial judge made no palpable and overriding error in finding that the plaintiff failed to establish causation on a balance of probabilities. Justice Wagner, writing for the majority, commented that drawing an inference is inherent to the fact-finding process and the decision whether to draw an inference falls within the discretion of the trial judge, with reference to all of the evidence. The trial judge was not required to apply an adverse inference of causation against the doctors simply because: (1) it was impossible to prove causation on the "but for" standard as a result of the doctors' fault; and (2) the plaintiffs adduced some affirmative evidence that the doctors' fault was linked to the loss. The majority held that the Quebec Court of Appeal erred by failing to give proper effect to the discretionary nature of the adverse inference.

Justice Côté, writing for the minority, held that the trial judge erred by misconstruing certain expert evidence, omitting other evidence, and in the inference-drawing process itself. Had the trial judge disregarded the speculative facts on which the experts' opinions were based, and properly taken into account evidence regarding the survival period for the husband, she would have drawn an adverse inference of causation against the doctors.

E. Nuisance

1. Crown Not Liable in Nuisance for Moose-Vehicle Collisions

The Newfoundland Court of Appeal dismissed the plaintiffs' appeal of a decision summarized in the 2014 edition of this chapter (*George v. Newfoundland and Labrador*, 2014 NLTD(G) 106, affirmed 2016 NLCA 24).

This proceeding was commenced as a class action on behalf of Newfoundland residents who were killed or injured in moose-vehicle collisions ("MVCs") during April 2001 to November 2011. The plaintiffs alleged that the government continued a nuisance by failing to prevent or limit MVCs and negligently failed to mitigate the associated risks. The Court of Appeal upheld the order of the court below, and in the process, provided some helpful analysis on the tort of nuisance.

The court below framed the threshold question for the tort as follows: "has a public nuisance been caused by an activity of the Defendant?" In doing so, the lower court held that the Crown did not engage in "active conduct" with regard to MVCs, so it could not be liable in

nuisance. The Court of Appeal held that this was wrong: liability for a nuisance may be caused by omission, as well as positive conduct. The evidence established that the Crown had previously adopted a policy that led to an increase in the moose population and failed to adopt policies that could have resulted in a significant reduction of the moose population (and a corresponding reduction in MVCs), thereby meeting the proper threshold analysis.

Since the court below framed the threshold question incorrectly, it did not perform the rest of the nuisance analysis. The Court of Appeal took the opportunity to do so and held that the Crown's interference with the public's right of access to the highways was not unreasonable. The Crown's interference was not unreasonable when balanced against the high cost of adopting a more strenuous MVC-prevention policy in the context of the "dire financial position" of the province during the relevant period.

The Court of Appeal held that the *Rylands v. Fletcher* analysis (which imposes strict liability on landowners that keep something "inherently dangerous" on their property, which escapes and causes loss or damage as a result of the escape) did not apply since moose are not "inherently dangerous" and permitting moose to roam freely is not an unreasonable use of the land.

F. Novel Torts in the Social Media Age

1. Posting an "Intimate" Video without Consent May Give Rise to Liability for a Number of Torts

Posting an "intimate" video on the Internet without the consent of the person depicted on the video may give rise to liability for the torts of breach of confidence, intentional infliction of mental distress, and the new tort of "public disclosure of private facts" (*Jane Doe 464533 v. D. (N.)*, 2016 ONSC 541).

The parties had previously dated. After repeated requests and pressure from the defendant, the plaintiff sent the defendant an "intimate" video on the basis of an express assurance from the defendant that no one else would see the video. Later that day, the defendant posted the video to a pornography website without the plaintiff's knowledge or consent. The video was removed after three weeks, but not before the existence of the video was viewed indeterminately and had become known to some of the plaintiff's friends.

The consequences of the publication of the video were significant for the plaintiff: she was physically and mentally distraught, she had to defer Christmas exams, and she had to receive crisis intervention counselling. The episode left the plaintiff with serious depression and she suffered from periodic panic attacks.

The defendant did not defend the action and the plaintiff obtained default judgment. However, the court took the opportunity to consider the important socio-legal issues raised by the claim and the common law remedies available to victims of similar acts.

The court held that the defendant's act met the requirements for the tort of breach of confidence: (1) the video had a necessary quality of confidence about it; (2) the plaintiff provided the video to the defendant on the express basis that he would treat it as confidential; and (3) while the tort is ordinarily applicable in commercial circumstances, the court saw (at para. 24) "no rational basis to distinguish between economic harm and psychological, emotional and physical harm, such as was experienced by the plaintiff in the present case".

The court also held that the defendant's act met the three elements of the tort of intentional infliction of mental distress. First, the defendant's conduct was flagrant and outrageous since he knew that the plaintiff was reluctant to make the video at all, but pressured her to make and send the video on the express assurance that he alone would view it. The very same day that he received it, the defendant posted it on the Internet, which was a clear violation of the promise that he made to the plaintiff. Second, the defendant's conduct was calculated to produce harm on the basis that he "must have either desired to produce the mental distress suffered by the plaintiff, or known that this type of harm was substantially certain to follow" (at para. 30). Third, the plaintiff suffered a "visible and provable injury" in the form of significant psychological harm.

Finally, the court introduced a new tort to Canadian law to deal with this unfortunate and growing problem. The tort of "public disclosure of private facts" is available to such victims and is met where the defendant "gives publicity to a matter concerning the private life of another" (at para. 46). The defendant will be liable to the plaintiff "for invasion of the other's privacy, if the matter publicized or the act of publication: (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public" (at para. 46). The defendant's act met the elements of the tort since he made a highly personal video of the plaintiff public and a reasonable person would find such public disclosure to be highly offensive.

The plaintiff commenced the claim under Ontario's "Simplified Procedure", which limited her claim to $100,000. The court awarded $50,000 in general damages, $25,000 in aggravated damages, and $25,000 in punitive damages.

G. False Imprisonment and Shopkeeper Privilege

1. Shopkeeper Privilege Is Recognized as a Defence to False Imprisonment

A shopkeeper has a limited defence to a claim of false imprisonment by an individual detained for suspected shoplifting (*Mann v. Canadian Tire Corp.*, 2016 ONSC 4926).

The plaintiff brought a claim against Canadian Tire arising from an incident where he set off an alarm and the store's staff asked to check his merchandise. The plaintiff reacted by filming the store's staff on his phone. The staff detained the plaintiff for the purpose of investigating the lawfulness of the plaintiff's video and encouraging him to delete the video. While the court found that the plaintiff's version of events was "vastly exaggerated" and that the store's staff treated the plaintiff in a courteous and professional manner, Canadian Tire was unable to establish the defence since the primary purpose of the detention was not to investigate the suspected shoplifting, but rather, to investigate the plaintiff's video recording.

The court introduced the defence of shopkeeper privilege into Ontario law on the policy basis that store owners ought to have a limited right to protect themselves from economic loss caused by shoplifting. The following conditions must be met in order to establish the defence:

(1) there must be reasonable and probable grounds to believe that property is being or has been stolen;

(2) the sole purpose of the detention must be to investigate whether any item is being or has been stolen from the store;

(3) the detention must be reasonable and involves inviting the suspect to participate in a search but does not empower the store to conduct a search without consent;

(4) the period of detention should be as brief as possible and reasonable attempts to determine whether property is or has been stolen should proceed expeditiously; and

(5) if the detainee refuses cooperation, the owner is entitled to detain him or her using reasonable force while summoning police and until they arrive.

The court found that the beeping sound of the security alarm gave rise to reasonable and probable grounds to believe that property was being stolen from the store. The length of the detention (13 minutes) was "not particularly onerous" and the store's staff did not search the plaintiff or use force to detain the plaintiff. However, the store was not able to establish the second condition of the privilege, since the detention ended up focusing on the plaintiff's video recording and encouraging the plaintiff to delete the video. On this basis, Canadian Tire was liable for false imprisonment. However, in light of the brief period of detention and the manner in which the staff treated the plaintiff, the imprisonment was of a "minimal nature". The court invited the parties to make submissions as to the quantum of damages in a future hearing.

H. Defamation

1. Facebook Poster Liable for Third Party Defamatory Publication on Her Facebook Page

A Facebook user who angrily vented to her Facebook friends about a dispute with her neighbor was liable in defamation for the publication of her own posts on her Facebook page, the re-publication of her posts by her friends on Facebook and through a consequential email, and for the publication of defamatory remarks made by her friends on her Facebook page in reaction to her original posts (*Pritchard v. Van Nes*, 2016 BCSC 686).

The plaintiff and defendant were long-feuding neighbours. Their dispute arose from a fountain installed by the defendant near the plaintiff's property line, the defendant's defecating dog, parking grievances, and other issues. The plaintiff recorded videos of the offending activities. The defendant took to her Facebook page to complain about the plaintiff's video recordings, posting, among other things that "we have friends living with us with their 4 kids including young daughters we think it's borderline obsessive and not normal adult behavior ... Not to mention a red flag because [the plaintiff] works for the Abbotsford school district on top of it all!!!!". The defendant's post prompted 57 other posts, mostly by the defendant's friends, in which the plaintiff was referred to as a "pedo", "creeper", "nutter", "freak", "scumbag", "peeper", and a "douchebag". The posts remained on the defendant's Facebook page for just under 28 hours.

The defendant's post spurred one of her friends to write an email to the principal of the school at which the plaintiff taught, in which the allegations from the defendant's Facebook page were republished.

The plaintiff found out about the defendant's Facebook post, which caused him to feel as though he lost the trust of parents and students at the school. He lost his love of teaching. He felt frightened for his personal safety since some of the responding posts suggested that he should be confronted or threatened.

Prior to trial, the defendant did not apologize to the plaintiff or otherwise retract the statements she made on her Facebook page. The defendant did not file a defence to the claim and the plaintiff took default judgment. The defendant did, however, attend the damages trial and she was cross-examined by the plaintiff's counsel and was given the opportunity to make submissions.

The court held that, "without question", the defendant's post was defamatory in meaning that the plaintiff was a paedophile and was unfit to teach. The defendant was also liable for republication of her post on her friends' Facebook pages and for the email sent to the school principal. The court observed that, given the nature of social media platforms, a person making a defamatory post must know or ought to know that some degree of dissemination of that post will occur. Republication of a Facebook post is a "natural and probable result" and the defendant was liable for all republication that resulted from her posts. Regarding the email, on the facts, the defendant had knowledge or constructive knowledge that her friend was going to send the email, but did nothing to prevent it from being sent. In the circumstances, the plaintiff provided her friend with implied authorization to send the email, which made the defendant a deemed publisher of the email.

Perhaps most importantly, the court held that the defendant was also liable for the defamatory comments made by her friends on her Facebook page in response to her posts. The court reviewed the Canadian law on liability for defamatory comments made by third parties and summarized the test as follows: (1) actual knowledge of the defamatory material posted by the third party; (2) a deliberate act that can include inaction in the face of actual knowledge; and (3) power and control over the defamatory content. If the three elements are met, then the defendant is taken to have adopted the defamatory material as his or her own.

In this case, the defendant was constantly replying to posts made by her friends in response to the original post, so she had knowledge of

the defamatory third party material on her Facebook page. The defendant undoubtedly had control of her Facebook page. She failed to delete the offending comments within a reasonable time (which, the court noted, would be "immediately" in the circumstances). On that basis, the defendant was liable to the plaintiff for the defamatory material posted by third parties.

Taking into account the seriousness of the sting and the obvious impact that it had on the plaintiff's career, the court awarded $50,000 in general damages and $15,000 in punitive damages.

2. Defamation Damages of a Notorious "Activist" Are Reduced on Appeal

In last year's chapter, we summarized *Whatcott v. Canadian Broadcasting Corp.*, 2015 SKQB 7, in which the CBC was liable for defamation of a notorious anti-homosexual "activist" for failing to reproduce the plaintiff's "disclaimer" contained in his pamphlets when reporting on his "protest" activities. On appeal, the court set aside the award of general damages and aggravated damages, instead awarding a nominal amount (2016 SKCA 17).

I. Fraudulent Misrepresentation

1. Fraudulent Misrepresentation Not Available for Emotional Harm Caused by Unplanned Parenthood

In *P.P. v. D.D.*, 2016 ONSC 258, the court struck the plaintiff's fraudulent misrepresentation claim arising from his allegation of "non-pathological emotional harm" caused by unplanned parenthood.

The plaintiff's claim arose from a brief sexual relationship with the defendant, who allegedly advised the plaintiff that she was using birth control, and on that basis, the plaintiff decided (and allegedly was encouraged by the defendant) not to use other prophylactic devices. Shortly after the conclusion of their relationship, the defendant notified the plaintiff that she was pregnant. The plaintiff did not allege that unplanned parenthood caused him any economic or physical loss or damage. Rather, he pleaded his claim in fraudulent misrepresentation, alleging: (1) that the defendant made a false statement; (2) that the defendant knew (or ought to have known) the statement was false; (3) that the defendant had intent to deceive the plaintiff; (4) that the false statement was material to the plaintiff's decision to act; and (5) that the plaintiff suffered damages.

Fraudulent misrepresentation is typically classified as an economic or pecuniary loss tort, for which compensatory damages are designed to restore the plaintiff to its financial position prior to the fraudulent misrepresentation. The court refused to extend the scope of the tort in this case, holding that it was "plain and obvious ... that fraudulent misrepresentation does not encompass a claim for the non-pathological emotional harm occasioned by unplanned parenthood" (at para. 59).