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"Any negative polls are fake news, just like CNN, ABC, NBC polls in the election. Sorry, people want border security and extreme vetting.
~ Donald Trump

IMPEACHMENT PROCESS: PLAINTIFF REAR-ENDS CAR IN FRONT, SUES AND LOSES

In *Chernet v. RBC General Insurance Company*, 2017 ONCA 337, the Ontario Court of Appeal upheld the motion judge's decision to dismiss a Plaintiff's case by way of summary judgment. The Plaintiff's allegations in the case seemed at odds, from the start, with the generally accepted rules about rear-end accidents. The law overwhelmingly favours the forward-most vehicle, and places a heavy onus on the rear-most driver to prove the accident was unavoidable. Otherwise, the rear driver is expected to keep enough distance from the car in front to be able to stop in time, even if that car stops abruptly.

In this case, the Plaintiff hit the Defendant from behind. As such, he had a steep hill to overcome. The motion judge assessed that no evidence existed which could allow for a conclusion that the Defendant's car suddenly cut in front of the Plaintiff's, such that the rear-end impact was unavoidable. Examples of such evidence could have been skid marks on the road or even evidence showing an off-center impact to the rear of the Defendant's vehicle. There was none.

The Plaintiff appealed on the basis that the motion judge made "geometrical" findings of fact, without the assistance of expert evidence. The Court of Appeal rejected this submission, and found the motion judge's inferences to be reasonable. The findings were not just reasonable by virtue of the lack of evidence, but also reasonable when considering (a) the Defendant's evidence that he was stopped at a red light when he was hit from behind and (b) the Plaintiff's entirely equivocal evidence when comparing his discovery testimony and his sworn affidavit in response to the motion (he told two obviously different stories).

The motion judge's finding of facts were entitled to a high degree of deference, in accordance with Supreme Court's decisions in *Hryniak* and earlier in, seeing as his decision was one of mixed fact and law.

One can argue that the Court of Appeal is effectively saying that the threshold where expert evidence would be required was simply not met, given the fact that the Plaintiff's own evidence was wholly insufficient, especially considering the high burden against him and the need to put his best foot forward in defending the summary judgment motion. This is yet another example of the growing tendency of the courts to find fact and weigh evidence on a summary judgment motion.

Jordan Black's diverse background in law, business ownership and commodity trading allows him both a commercial and entrepreneurial perspective. His principle focus is on insurance defence matters. Jordan Black is not to be confused with Orphan Black. If you know what this reference is made to, email your answer to dlauder@duttonbrock.com

Trumped Up Diagnosis Not a Precondition for Recovery of Damages for Mental Injury

In an explicit repudiation of the widespread societal suspicion of psychiatry and mental illness, in *Saadati v. Moorhead*, 2017 SCC 28, the Supreme Court of Canada has refused to impose a requirement for a claimant to prove that he or she has a recognizable psychiatric illness in order to recover damages for mental injury.

- RUSSIAN HACKERS GOING TO THE DOGS
- JUST LIKE TRUMP WAS THIS DECISION PLAGIARIZED FROM "LEGALLY BLONDE"?

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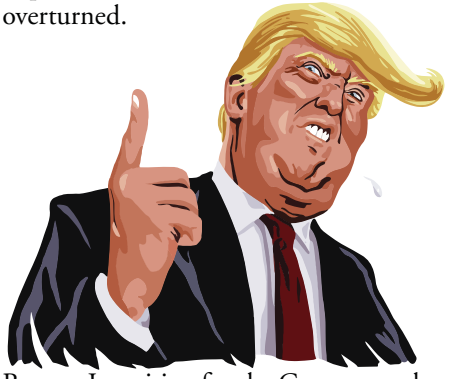
Whereas *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, spoke to the issue of causation in claims for mental injury, the Court's recent decision *Saadati* speaks to the issue of proof of damage in such claims. Specifically, the Court clarified whether it is necessary for a claimant to call expert evidence or other proof of a recognized psychiatric illness, in order to support a finding of legally compensable mental injury.

At trial, the plaintiff successfully established that his personality had changed after an accident, based solely on the testimony of lay witnesses. The court did not rely upon a psychiatric expert to find that the plaintiff had proven his claim. The British Columbia Court of Appeal reversed the trial judge's decision, finding that the plaintiff was required to prove a recognizable psychiatric illness, and that expert medical opinion evidence was required. That decision has been overturned.



Brown, J., writing for the Court, stated that there was no requirement for a claimant to demonstrate a recognizable psychiatric illness as a precondition to recovering damages for mental injury. The requirements for proving liability in negligence, namely proximity leading to a duty of care; breach of the standard of care; existence of "damage" which qualifies as mental injury; and causation (in fact and law), combined with the "serious and prolonged" threshold outlined in *Mustapha,* provide sufficient protection against unworthy claims. Where a trier of fact is genuinely uncertain about the worthiness of a claim for mental injury, those concerns should be addressed via a "robust application" of these elements.

His Honour stated that imposing a requirement on a claimant to demonstrate that a mental injury has been recognized and diagnosed by a psychiatric expert places the decision on recovery of damages into the hands of psychiatry, and its established classification system. This was felt not to be a sound means of establishing a fact in law.

The trier of fact is supposed to be concerned with the harm that a claimant has sustained, with symptoms and their effects, not with the ability of an expert to affix a label to those symptoms and those effects. Moreover, imposing such a requirement would result in less protection to victims of mental injury than to victims of physical injury.

Experts are not entirely out of the picture, however. While rejecting an explicit requirement for expert evidence, the Court acknowledged that expert evidence would often be helpful in determining whether or not a mental injury has been shown. The seriousness and duration of the claimant's impairment, and the effect of treatment (if any), must be considered. The trier of fact may be best informed about these issues by an expert. Furthermore, a defendant may rebut an allegation of mental injury by calling evidence from an expert who can establish that the accident could not have caused any mental injury. Any lack of diagnosis may then be weighed by the trier of fact in determining whether or not mental injury has been established

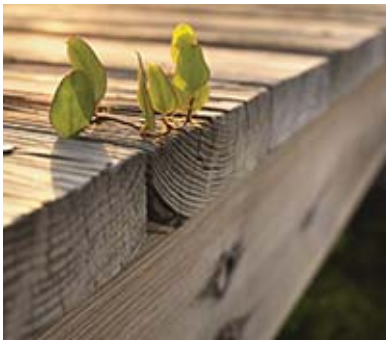
Donna Polgar is an associate at Dutton Brock. Her practice encompasses a wide range of property and casualty matters.

Russian Hackers Going to the Dogs

The Divisional Court in *Seipt v. Irvine*, claim No: (4)25121539, heard an appeal regarding a personal injury case going back to the summer of 2007. The defendants held a backyard birthday party and invited the 57 year old plaintiff. The defendants had two dogs, one being Tazzie, a pitbull. The plaintiff was aware that the defendants had these dogs. It was accepted during the trial that the plaintiff had a fear of dogs. She nonetheless attended the party.

At the party, the dogs were playing fetch. Once the dogs were finished playing, they started to walk towards the patio but were still some distance away. The plaintiff became nervous and quickly moved away from the dogs to return back to the house. In her attempt to step up onto the patio, she fell back and fractured her wrist.

The trial judge found that both dogs were friendly and well-trained. However, it was found that the defendants breached their statutory duty under the Dog Owners Liability Act by failing to muzzle and leash Tazzie, while not in a private, fenced area. Apparently, the backyard was missing the back fence. The trial judge did not discuss how this breach may have caused the plaintiff's injury, since the dogs were always some distance from the Plaintiff. The court stopped short of requiring the defendants to build and pay for a wall.



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The trial judge found that the party was held during the day, the plaintiff was wearing flats, she had not consumed alcohol, there were no visibility issues, and the deck was plainly and obviously there to be seen. That said, the trial judge still found that the 13.5 inch step rise created a risk. The trial judge again did not analyze how the step height may have caused the plaintiff's fall. The court in the end found the defendants 65% liable for the plaintiff's injury.

The defendants appealed, alleging that the trial judge set the standard of care too high, effectively rendering defendants insurers of their premises. The defendants also argued that the trial judge failed to explain how the alleged breach (the 13.5 inch step rise) caused the fall when the deck was plainly and obviously visible.

The Divisional Court agreed with the defendants and allowed the appeal, confirming that the standard under the Occupiers' Liability Act is one of reasonableness and not perfection. Occupiers are not insurers liable for any damage suffered by persons entering the premises.

The Court held that the trial judge erred in finding that the defendants were liable by simply installing a deck that was 13.5 inches from the ground, by failing to find an objectively unreasonable risk of harm, and by failing to make a finding that the defendants' actions caused the plaintiff's fall. The Divisional Court set aside the trial order, finding no liability against the defendants.

Melissa Miles articled with Dutton Brock and joined the firm as an associate following her 2015 call to the Ontario Bar. Melissa is developing a broad insurance defence practice. Melissa is not involved in any overseas hacking schemes (that we know of).

Just Like Trump Was This Decision Plagiarized from "Legally Blonde"?

The main takeaway from the recent Court of Appeal case, *Gardiner v MacDonald*, 2016 ONCA 968, was that professional drivers have a higher standard of care compared with other drivers. In this case the Court of Appeal affirmed the trial judge's decision to hold the applicant bus driver (and City of Ottawa) 20% liable for injuries sustained by the respondents in a motor vehicle accident whereby a car, driven by a drunk driver and containing four other passengers, drove through a red light and collided with the city bus that had entered the intersection at its green light.

The result seemingly creates a precarious precedent for similar outcomes in the future. It is important to recognize, however, that it was not the higher standard of care itself that led to the bus driver's resulting liability; but the content of the standard of care. As the trial judge stated in her decision, "the general standard of care of a professional… is a question of law, but the content of the standard of care in a particular case is a question of fact".

It is apparent upon reading the decision that the Court of Appeal's decision here was largely contextual and fact based. The bus driver, Mr. Richer, was a professional driver with 27 years of experience prior to the date of the accident. He had a class "C" license with which he operated OC Transpo buses, weighing in excess of 12,000 kilograms.

During the course of the trial, evidence was put forward establishing that upon approaching the subject intersection Mr. Richer was driving above the posted speed limit. Mr. Richer did not immediately look ahead or in front of the bus when entering the subject intersection but instead looked first to his left, right and in the bus's rear mirrors. The only passenger on the bus at the time was an off-duty bus driver who had the time to move to a safe location on the bus and brace for the impact as he and Mr. Richer foresaw the impending collision with the respondent's vehicle. Finally, there was winter road and weather conditions present at the time of the accident.

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Mr. Richer conceded the relevance of his status as a professional driver and admitted that according to the training and experience he had received as part of his course of employment, as well as pursuant to the Ministry of Transportation and Official Bus Handbook policies, there was a duty upon him to respect the provisions of the Highway Traffic Act by observing the posted speed limit and drive defensively by giving up the right-of-way if by doing so he could avoid possible collision with other vehicles. He also conceded the need to make allowances for conditions of the road, by driving in such a way and at such a speed as to maintain vehicle control. Lastly, he was trained to manoeuvre at a distance and in such a way so as not to preclude safe stopping or averting a collision.

The combination of the evidentiary facts surrounding the collision, along with the relevant rules from the Handbook (which seems to have been given high deference in this case), led to the "much higher-than-normal" standard of care being imposed on the bus driver. This decision leaves a number of questions to be answered and likely will be fleshed out by the judiciary in cases to come.

For example, when referring to Mr. Richer's app rd of care the decision makes mention of both 'the standard of care of a professional' as well as 'the standard of care of a reasonably prudent driver in like circumstances'. The first term begs the question of what exactly constitutes 'a professional', whether it is a commercial driver or employed drivers or some other larger class. The second term on the other hand creates an opening whereby the standard of care could seemingly be raised for drivers of all kind.

At first glance it might seem that Mr. Richer's driving did not breach any of his duties. His actions, however, were scrutinized closely by the court. When applied to the "new" standard of care, which stemmed largely out of the policies and Handbook of the MOT, and the potential harm that comes from driving a city bus (or other large-sized professional vehicles), Mr. Richer ultimately failed to maintain that duty.

The question remaining is whether the same contextual circumstances will be required in future cases to impose this new standard of care on professional drivers. At the very least, professional drivers across Ontario should be made aware of this new potential standard of care in operating a large commercial vehicle.

Michael Duboff is a first year associate with Dutton Brock, having been called to the bar in June. Michael is not an authorized Kremlin computer hacker

Upcomimg speaking engagements

Paul Tushinski "Advocacy Masterclass – Opening and Closing Statements at Civil Trial, on November 1, 2017, at the TLA Lawyers Lounge

Donna Polgar - September 27 at Osgoode Conference Centre, at the 13th Annual Update on Personal Injury Law and Practice.

Jennifer Arduini -Toronto Lawyers Association event entitled "7th Annual Articling Students Head Start Program" on September 19, 2017 at the TLA Lawyers Lounge

Andrea Lim -The License Appeals Tribunal: A Year in Review , audioconference, on September 25

Philippa Samworth - Accident Benefits update at the CDL Joint Seminar on November 14 at the OBA at 20 Toronto Street.

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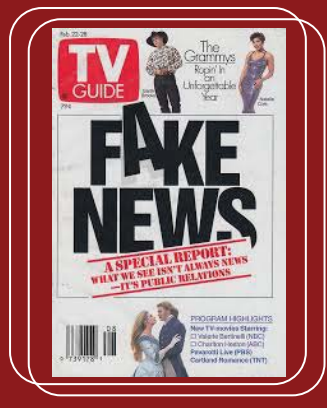
Wayne Morris – Litigating Sexual Assault claims, October 21 at OBA. Also, Ethics, Civility and Overzealous Advocacy on December 11 at the OBA.



WEB CONTEST

What is "Fake News"? Where did this concept originate? Did you know that a cover story titled "Fake News" which appeared in the February 1992 edition of TV Guide popularized the term? The story suggested that not only did the US government lie to pursue its Gulf War aims, but also did it with connivance of the media, making the lies seem honest. What was the name of the writer of the article that introduced the fake news catchphrase (hint – we share the same initials – Ed.)

Email your answers to dlauder@duttonbrock.com

Only one person correctly answered our last quiz on Murphy's Law so if you want to test yourself, go to our firm website (www.duttonbrock.com)

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