DUTTON BROCK LLP

A Quarterly Newsletter published by Dutton Brock LLP

Autumn 2012, Issue Number 42

"For me, the cinema is not a slice of life, but a piece of cake."
Alfred Hitchcock

INCEPTION 2
"Intrusion upon Seclusion"

In July 2009, Sandra Jones discovered that Winnie Tsige, an employee at the Bank of Montreal, had examined her banking records at least 174 times over a four year period without professional or other justification. The Defendant brought a cross-motion for summary judgment dismissing the action. This motion was granted and the action was dismissed on the basis that the common law tort of invasion of privacy did not exist in Ontario. The Plaintiff appealed this decision. The Court allowed the appeal and found that a cause of action for "intrusion upon seclusion is properly recognized in Ontario, formally recognizing the common law tort of invasion of privacy."

In *Jones v. Tsige* , 2012 ONCA 32, Ms. Jones and Ms. Tsige worked at different branches of the Bank of Montreal ("BMO"). Ms. Tsige eventually became involved in a relationship with Ms. Jones' former husband. Ms. Tsige accessed Ms. Jones' personal BMO accounts to determine whether her current boyfriend was making child support payments to Ms. Jones' account. Ms. Jones became suspicious and confronted Ms. Tsige, who admitted to this and understood it violated BMO's Code of Conduct. The information contained transaction details, as well as personal information such as date of birth, marital status and address. The information was not published, distributed or recorded in any way. Ms. Jones brought an action claiming damages for invasion of privacy, breach of fiduciary duty, plus punitive and exemplary damages.

Ms. Jones moved for a motion for summary judgment while Ms. Tsige brought a cross-motion to dismiss the action. The motion judge found that Ms. Tsige did not owe a fiduciary obligation and dismissed the claim. The motion Judge determined no right to privacy under the *Charter* or common law. In addition the existence of privacy legislation protecting rights meant any expansion should be dealt with under statute rather than the common law. The decision was appealed.

Sharpe, J.A., writing for the Court of Appeal ultimately rejected the conclusion reached by motion's judge. In guiding the Court to formally recognize a tort in common law for the breach of privacy, relevant jurisprudence from other jurisdictions was considered. In particular, Justice Sharpe focused on American jurisprudence that established the tort of an "intrusion upon seclusion." This recognized a tort where there was an intentional intrusion, physical or otherwise,

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upon the seclusion on another's private affairs or concerns that would be deemed highly offensive to a reasonable person.

Justice Sharpe also referred to the Superior Court decision of *Somwar v. McDonald's Restaurants of Canada Ltd.*, where Stinson, J., determined that while the courts in Ontario did not accept the existence of a privacy tort they did not go so far as to rule out the potential of such a tort, given the Supreme Court of Canada having recognized the protection of privacy under section 8 of the *Canadian Charter of Rights*. Moreover, it was found that advancements in technology might find the traditional torts of nuisance, trespass and harassment as inadequate protection.

Also considered by the Court of Appeal was whether the expansion of the law of privacy should be left to statute rather than the common law. Reference was made to *PIPEDA*, the federal legislation that protects the right of individuals from organizations using and disclosing personal information. BMO was of course subject to this legislation, but the Court indicated that a remedy need not be sought through this legislation since damages were not available and *PIPEDA* does not deal with the private rights of action between individuals.

In formally recognizing a common law tort of intrusion upon seclusion, the Court determined the key features of establishing a tort. First, did an intentional act by the defendant take place without lawful justification to the plaintiff's private affairs? Second, would that intrusion be viewed as highly offensive causing distress, humiliation or anguish by a reasonable person take place? Third, in calculating damages, the Court took guidance from the Manitoba *Privacy Act* that listed factors to consider when calculating damages. These factors included the nature, incidence and occasion of the defendant's wrong and the effect of the wrong on the plaintiff's health and welfare.

With respect to aggravated and punitive damages the Court neither excluded nor encouraged such awards, stating that exceptional cases would justify these awards. However, the Court stressed predictability and consistency should be the paramount concern for moral damages. On that note, the Court of Appeal granted summary judgment to Ms. Jones in the amount of $10,000. No order for costs was made. It appears that leave to appeal has not been sought to the Supreme Court of Canada.

Dilraj S. Sandhu is an associate at Dutton Brock LLP. Mr. Sandhu is developing a broad insurance defence practice with a focus on First Party Accident Benefit Claims.

Dude, Where's my Car?

One friend asks another to borrow a car to go to the movies. The car owner, having seen the friend drive countless times agrees. Unfortunately, the friend gets in an accident and as it turns out does not have a valid driver's license. Two years later, a process server shows up at the owner's door and serves the lawsuit. The Statement of Claim is provided to the owner's insurer. Should the insurer provide coverage?

Justice E. P. Belobaba discussed this issue in *Wawanesa v. S.C. Construction Ltd.*, 2012 ONSC 353. Jason was an employee of S.C. Construction. He drove his car to and from work almost every day. One day his car didn't work. Giuseppe, one of the principals of the company, let Jason drive a company van home. Jason did not have a valid license. There was an accident and eventually a lawsuit. S.C. Construction sent the lawsuit to its insurer.

Wawanesa brought an application seeking a declaration that S.C. Construction breached statutory condition 4(1) of the policy by permitting Jason to drive when he was unauthorized by law to do so. Wawanesa sought an additional declaration regarding statutory condition 1(1) that S.C. Construction failed to notify it of a material change in risk. If the insured was found in breach of either statutory condition Wawanesa's coverage would have dropped from the policy limits to the minimum $200,000 under section 258 of the *Insurance Act.*

Justice Belobaba summarized the applicable law regarding statutory condition 4(1) stating that an insured will not be in breach if the insured acted reasonably in the circumstances. Reference was made to a 2011 Court of Appeal decision, *Tut v. RBC General Insurance*, that explained that the word "permits" in 4(1) "connotes knowledge, willful blindness, or at least a failure to take reasonable steps to inform oneself of the relevant facts". The court concluded that the test to be applied is to examine whether the insured knew or ought to have known under all circumstances that it permitted someone to drive who was not authorized to do so.

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Prior case law provided an important distinction between employers that require its employees to drive and have a valid license, and employers that do not require its employees to have a valid license or drive. The former must have proper policies and procedures in place to ensure its employees have valid licenses, while the latter do not.

Justice Belobaba concluded that S.C. Construction acted reasonably in allowing Jason to take the company van home without first checking to see if he had a valid license. He noted that S.C. Construction was a small family run carpentry business, with typically only six to eight employees. None of its employees were hired to drive a company vehicle. None ever drove a company vehicle during work hours. There was no failure to take reasonable steps to verify Jason's driver's license because there was no need for him to have a driver's license in the scope of his employment.

Secondly, the principals of the company had worked with Jason for approximately 10 years. During that time, he drove to and from work almost every day; he was often observed driving with his wife and two children. In other words there was no reason to doubt that Jason had a valid driver's license. Justice Belobaba concluded that the employer acted reasonably in allowing Jason to drive the company vehicle and that Wawanesa failed to prove that S.C. Construction knew or ought to have known that Jason was not authorized to drive. The declaration regarding Statutory Condition 1(1) was dismissed as well.

The takeaway point from this case is that the owner of a vehicle will not be found to have violated statutory condition 4(1) simply by having lent a car to an individual who does not have a valid license. It is necessary to undertake an analysis of what the vehicle owner knew and ought to have known about the individual borrowing the car and in the employment context whether the employee is required to drive in the scope of his employment.

Elie Goldberg articled with Dutton Brock and joined the firm as an associate following his 2011 call to the Ontario Bar. Elie is developing a broad civil litigation practice which includes personal injury, product liability and occupiers' liability.

Godzilla vs. King Kong

For insurers who are seeing 'material contribution' causation arguments becoming ubiquitous in plaintiffs' mediation briefs, the Supreme Court of Canada's decision to unequivocally put the brakes on this line of argument in all but a small category of cases will be a welcome development. On the other hand, insurers should watch carefully to see if the SCC's reiteration of support for a "robust" and "common sense" approach to causation evidence will ease a plaintiff's burden on proof.

In *Clements v. Clements*, 2012 SCC 32, a personal injury claim arose from a motorcycling accident. The defendant husband was driving with his wife, the plaintiff, as a passenger. The couple was traveling from Prince George, B.C. to Kananaskis, Alberta when the bike lost control and the plaintiff fell and suffered a severe brain injury. There were several possible "causes" of the fall; some were negligent (the defendant was speeding in wet weather and had overloaded the bike); while another potential cause was non-negligent (a nail had lodged into the tire, causing it to deflate when the nail fell out).

At trial the defence called an expert who testified that the probable cause of the accident was the nail. He opined that because of the nail the accident would have happened even without the defendant's negligent acts. The trial judge rejected this conclusion on the basis of the expert's faulty assumptions on which his opinion was based, but at the same time found that the plaintiff was unable to meet the 'but for' test for proving causation.

The trial judge suggested that due to the assortment of negligent and non-negligent causes it was impossible for the plaintiff to meet the 'but for' test. He emphasized that it was not the plaintiff's fault that she was in this situation. The trial judge applied the 'material contribution' test and found the defendant liable on this basis.

At the Supreme Court of Canada, the ruling unequivocally disagreed with the trial judge's employment of the 'material contribution' test. The SCC found that this alternative approach to proving causation

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can be only used in the particular circumstance where there are multiple potential tortfeasors. The presence of non-negligent potential causes, called neutral factors, even if they make proof of causation impossible, will not get a plaintiff around the 'but-for' test.

For defendants, the decision restores confidence that a plaintiff will have to prove causation under the 'but-for' test in all be a small set of easily-identifiable cases. For plaintiffs, this represents a significant step back from recent decisions (i.e. *Resurfice Corp. v. Hanke*) in which the Supreme Court ruled that the 'material contribution' approach could be appropriate where:

(1) it was "impossible" for the plaintiff to prove causation on the 'but for' test;

(2) this impossibility was due to reasons outside of her control, and

(3) there was a clear breach of duty on the part of the defendant that exposed a plaintiff to an unreasonable risk of injury.

In rejecting a broader applicability for the but-for test, the Court insisted that plaintiffs are equipped with a satisfactory weapon of proof in the form of the robust approach to evidence that should be applied in proving causation. The Court stated "the law of negligence has never required scientific proof of causation; […] common sense inference from facts may suffice." Since the trial judge in this case had found that "[o]rdinary common sense" supported a causal relationship between the injury and the excessive speed and weight, the Court majority sent the matter for a new trial.

For this reason insurers should be cautious in evaluating the strength of a potential causation defence. A plaintiff very well many not need to provide an expert opinion on causation and "common sense" may very well be enough.

George Gray joined Dutton Brock as an Associate in 2011 after being called to the bar in 2009. George has a broad litigation practice with an emphasis on defence work. He has represented clients at the College of Physicians and Surgeons of Ontario and the Health Professions Appeal and Review Board.

Judge Wins Award for Best Actor in a Drama or Comedy

When the decision of *Martin v. Fleming*, 2011 ONSC 5636 was released the first thought that came to mind was that the court has now made it clear that multiple deductibles apply to multiple accidents. The effect is to reduce a single, global, general damages assessment. However, as the matter is scheduled to be heard at the Court of Appeal on October 29, 2012 there remains a reason to press pause on this drama and hold our breath a little while longer.

The facts of this case are not uncommon. For quite some time both the defence and plaintiff bar have operated on an assumption that there is one deductible per accident. The Plaintiff was involved in motor vehicle accidents on May 2, 2006 and June 20, 2008. Both accidents fell under the Bill 198 regime and therefore a $30,000.00 deductible applied for both accidents as per 267.5(7) of

the *Insurance Act* R.S.O. 1990, c. I.8. Counsel for the Plaintiff argued that only one deductible should apply following a global assessment of damages. Counsel for the defendants argued that their clients were each entitled to apply the deductible to their respective exposure.

A review of the case law confirms that the Court of Appeal has never had to address this issue. That said, there are three cases in the decision of Madame Justice Herman that have addressed the issue of multiple deductibles: *Baillageron v. Murray* (2001), O.J. No. 148; *Gorman v. Falardeau* (2002), O.J. No.5492; and *Moore v. Wienecke* (2006), O.J. No. 202. All three cases essentially concluded that following a global assessment of damages the statutory deductible available to each defendant is to be applied. Accordingly, it has been more than a decade since this issue appeared and determined by the courts.

The argument advanced by Plaintiff's counsel in *Martin*, was that in accordance with the interpretation of the *Legislation Act*, S.O. 2006, c.1, "Words in the singular include the plural and words in the plural include the singular". It was argued that if one pluralizes the nouns in s. 267.5(7) so that they read "action or actions" and "protected defendant or protected defendants" then one deductible applies. Madame Justice Herman did not agree with this interpretation simply stating pluralizing the nouns does not address the issue. In

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issue. In reaching this conclusion an analysis of Bill 59 the predecessor to Bill 198 was undertaken in order to answer:

1.what is the meaning of the legislative text?

2.what did the legislature intend? and

3.what are the consequences of adopting the proposed interpretation?

Madame Justice Herman stated in her concluding remarks that "the application of individual deductibles to each accident or action is consistent both with the wording of the legislative provisions, when read in context of the legislation as a whole, and the approach taken in other decisions.

Plaintiff's counsel also argued that the *contra proferentum* rule should apply and as such any ambiguity should be construed against the insurance company. Madame Justice Herman pointed out that the provisions for deductibles were drafted by the legislature and that the Plaintiff and Defendant can equally argue a restriction of their rights, specifically the Plaintiff's right to sue and the Defendant's right to claim the statutory deductible.

It is anticipated that that the Court of Appeal will answer the issue of fairness associated with the possibility that an injured Plaintiff involved in multiple accidents faced with

multiple deductibles could recover nothing in the way of general damages; whereas a similarly injured Plaintiff facing one deductible could successfully obtain an award for general damages.

The Court of Appeal will also have to contemplate the issues that would arise if only one deductible were to apply where there are multiple accidents. One can anticipate that Defendants would argue against global assessments and would struggle to determine which Defendant would benefit from the deductible. One must query the fairness in multiple Defendants having to share a deductible where one injury is more serious than another. Sharing a deductible could make the difference between a Defendant not having to pay anything versus having to pay something towards general damages.

This drama is definitely on the radar of the Ontario Trial Lawyers Association and the Canadian Defence Lawyers Association as both parties have been granted intervenor status for the upcoming Appeal.

Christopher Martyr was called to the Ontario Bar in February of 2002. Christopher has a general insurance defence litigation practice and has acted on behalf of insurers on various personal injury, general liability, property and subrogation matters in addition to providing opinions on insurance coverage issues. His court experience also includes trial work with appearances before the Ontario Superior Court of Justice and various administrative tribunals.

What character does Steve Buscemi play in Quentin Tarantino's classic "Pulp Fiction"?

Editors' note

E-Counsel reports on legal issues and litigation related to our institutional, insured and self-insured retail clients. Dutton Brock LLP practices exclusively in the field of civil litigation. Any comments or suggestions on articles or E-Counsel generally can be directed to David Lauder or Paul Martin. You can find all our contact information and more at www.duttonbrock.com.

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