The Canadian Abridgment eDigests -- Torts

2010-36
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TOR.III.2.a

Subject Title: Torts

Classification Number: III.2.a

Conspiracy -- Practice and procedure -- Pleadings

Plaintiff political party brought action to recover damages it alleged to have suffered as consequence of defendant political party and trustees having conspired to cause it economic harm by restricting its access to funds it was entitled to receive from trust -- Defendant political party's application pursuant to R. 173(a) of Queen's Bench Rules for order striking plaintiff's action on ground that it failed to disclose reasonable cause of action was dismissed -- Chambers judge applied relevant test and concluded that it was not plain and obvious that statement of claim disclosed no reasonable cause of action or arguable case -- Defendant political party appealed -- Appeal dismissed -- Chambers judge made no reviewable error in his application of relevant test to plaintiff's statement of claim and related pleadings.

Progressive Conservative Party of Saskatchewan v. Emsley (2010), 2010 SKCA 93, 2010 CarswellSask 464, Jackson J.A., Klebuc C.J.S., Klebuc C.J.S. for Cameron J.A. (Sask. C.A.); affirming (2008), 67 C.P.C. (6th) 284, 2008 CarswellSask 398, 2008 SKQB 251, L.A. Kyle J. (Sask. Q.B.) [Saskatchewan]

TOR.VII.3.c.i

Subject Title: Torts

Classification Number: VII.3.c.i

Fraud and misrepresentation -- Negligent misrepresentation (Hedley Byrne principle) -- Particular relationships -- Sale of land

On April 18, 2006, plaintiffs purchased home from defendants -- Plaintiffs alleged that they had to make extensive and costly repairs for first six months in new home as result of numerous concealed electrical, plumbing and structural defects -- Plaintiffs brought action for cost of repairs, some future work to complete repairs and aggravated damages for mental distress caused to them and two children -- Action dismissed -- Plaintiffs have produced no authorities on mental distress damages to assist court regarding failed real estate transactions -- Usual course of failed transaction was suit for either damages or specific performance by aggrieved party -- Here purchasers elected to keep house and effect major repairs without even discussing issue with defendants -- It was extent and speed with which they elected to turn their house into total construction site that caused mental distress -- It was not objectively contemplated by either party that damages for mental distress would flow from breach of this contract.

Cotton v. Monahan (2010), 2010 CarswellOnt 2705, 2010 ONSC 1644, H.S. Arrell J. (Ont. S.C.J.); additional reasons at (2010), 2010 CarswellOnt 4304, 2010 ONSC 3412, H.S. Arrell J. (Ont. S.C.J.) [Ontario]

TOR.VII.3.e

Subject Title: Torts

Classification Number: VII.3.e

Fraud and misrepresentation -- Negligent misrepresentation (Hedley Byrne principle) -- Miscellaneous

Plaintiff alleged that defendant, in his capacity as president of A Inc., induced her to leave stable and lucrative job with C Inc. by entering into contract of employment with her and caused her financial injury either by breaching agreement or by misrepresenting intention to enter into agreement with her at all -- Plaintiff terminated employment as senior manager of accounting when she was 63 years old -- Plaintiff's position was that she was seeking and was assured employment by defendant for minimum of two years -- Plaintiff brought action for damages commensurate with loss of income for two years, either for negligent misrepresentation or for breach of her contract of employment -- Action dismissed -- Case rested on assessment of credibility -- While there were ongoing discussions between defendant and plaintiff respecting prospect of suitable position for plaintiff at A Inc., on balance of probabilities those discussions did not coalesce into either binding agreement for employment, nor amounted to representations as alleged that finalized employment agreement would be put in writing once plaintiff resigned.

Sadaruddin v. 0638771 B.C. Ltd. (2010), 2010 CarswellBC 666, 2010 BCSC 357, A.F. Cullen J. (B.C. S.C.) [British Columbia]

TOR.VII.7.c.i.A

Subject Title: Torts

Classification Number: VII.7.c.i.A

Fraud and misrepresentation -- Pleadings -- Pleading innocent or negligent misrepresentation -- Sufficiency -- Striking out statement of claim for absence of reasonable cause of action

Defendant BHF and plaintiff S, marketing and events planning company, entered into discussions regarding using Don Jail for fundraising events -- Defendant W, interim president of BHF when final consultant's report commissioned by BHF was received, advised S of its contents and was source of S's information as to permitted scope of S's use of premises -- BHF provided letter of intent to S regarding joint venture -- Both plaintiff DJE, incorporated to act as subcontractor to S and to contract with suppliers and venue users, and S marketed venue -- As problems arose, they communicated with W who assured them that problems threatening feasibility of venture were being addressed -- S entered into service agreement with respect to project -- After plaintiffs organized events and incurred expenses, they were advised by BHF that lessor was refusing to allow plaintiffs to use premises as planned -- Plaintiffs brought action for damages -- Defendants brought motion for order striking out portions of statement of claim -- Motion dismissed -- Facts as pleaded, if proven at trial, were sufficient to establish that W knew that plaintiffs were relying on her representations -- Pleading contained sufficient allegations of fact, if accepted, to support finding that plaintiffs were acting reasonably in relying on defendants' representations -- Forseeability was not factor in existence of "special relationship" in claims of negligent misrepresentation -- In addition to

words, representations may be made by conduct, by omission and by implication -- Allegations of negligent misrepresentation against W were not reliant on contract -- Claim against employee or officer or director of company based on tortious conduct can proceed even where individual was acting in course duties -- Defendants, relying on "entire agreement" clause contained in contract, submitted that claim for negligent misrepresentation, at least as it related to S, could not succeed as any claim based on pre-contractual misrepresentations was barred by contract -- No facts were alleged and no submissions were made regarding scope of clause -- It was not plain and obvious that tort of misrepresentation could not succeed in face of "entire agreement" clause or that clause applied to defeat claim.

Slingshot Inc. v. Bridgepoint Health (2010), 2010 CarswellOnt 2477, 2010 ONSC 2453, Eva Frank J. (Ont. S.C. J.) [Ontario]

TOR.XVI.2.b

Subject Title: Torts

Classification Number: XVI.2.b

Negligence -- Duty and standard of care -- Standard of care

Plaintiffs made offer to purchase property, subject to home inspection and home being insurable -- Plaintiffs retained defendant, registered home inspector, to conduct home inspection and signed property inspection contract -- Inspection report documented numerous deficiencies in home, but plaintiffs removed conditions to their offer and closed purchase -- When plaintiffs began renovation work they discovered that 80 percent of wiring in home consisted of ungrounded active knob and tube wiring, which had to be replaced for insurance purposes -- Plaintiffs brought action for damages against defendant, alleging that he negligently misrepresented actual state of home in his inspection report -- Action dismissed -- Special relationship existed such that defendant owed plaintiffs duty to take care as he conducted his home inspection -- Plaintiffs' reliance on defendant was reasonable -- Plaintiffs' failure to call expert evidence concerning standard of care of home inspector with defendant's experience was not determinative -- Standard of care, being that of reasonable visual inspection done in accordance with standards in Ontario, was evident on face of contract and attached Canadian Association of Home & Property Inspectors code of standards -- At minimum, defendant was required to report any visible knob and tube wiring to plaintiffs as part of his inspection report -- However, plaintiffs had not established on balance of probabilities that active knob and tube wiring was visible to defendant at time of his inspection -- Accordingly, they had not established that defendant negligently breached his duty of care.

Calder v. Jones (2010), 2010 CarswellBC 1556, 2010 BCPC 77, Mrozinski Prov. J. (B.C. Prov. Ct.) [British Columbia]

TOR.XVI.2.b

Subject Title: Torts

Classification Number: XVI.2.b

Negligence -- Duty and standard of care -- Standard of care

In January 2005, plaintiff arrived at emergency room in wheelchair, complaining of various symptoms -- Plaintiff explained he had been diagnosed with Still's disease 20 years earlier and thought this could be recurrence -- Family doctor resumed care and plaintiff was transferred to another hospital briefly, then returned -- As condition worsened, plaintiff was transferred to third and fourth hospital -- Plaintiff received treatment at fourth hospital in late February 2005 and condition improved -- Plaintiff brought action against physicians for medical negligence in regards to delayed diagnosis and for defamation -- Action dismissed -- In circumstances, physicians' consideration of plaintiff's reported medical history was not negligent -- Twenty years was unusually long time to go without having relapse -- Failure to obtain previous records and delay in ordering and receiving certain test results were not negligent -- Plaintiff failed to establish that physicians were negligent in referrals or lack thereof -- Plaintiff did not establish breach of applicable standard of care -- Plaintiff had misfortune to have suffered rare condition that had unusual presentation and diagnosis proceeded through exclusion.

Shannahan v. Johnson (2010), 2010 BCSC 700, 2010 CarswellBC 1274, Savage J. (B.C. S.C.) [British Columbia]

TOR.XVI.3.f

Subject Title: Torts

Classification Number: XVI.3.f

Negligence -- Causation -- Miscellaneous

Plaintiff wife, passenger in vehicle operated by her defendant husband, was injured when vehicle struck deer -- Defendant was driving 130 km/h in 110 km/h zone and vehicle was on cruise control -- Defendant was listening to music and drinking coffee when he saw shadow coming from right of vehicle -- This was followed by impact -- Defendant testified that he did not see deer before impact, only its shadow -- He was unable to take any evasive action -- Terrain to right of defendant's vehicle at scene of accident was open field with no trees or shrubs that would preclude individual from seeing animals next to travelled portion of highway -- There were no vehicles travelling westbound in front of defendant's vehicle that limited defendant's view -- There was vegetation on divider area between westbound and eastbound lanes of highway that could have impeded defendant's view of deer in that area -- Weather was sunny and bright -- Plaintiff brought action for damages -- Action allowed -- Evidence unequivocal that deer approached vehicle from its right -- Even if it had initially emerged from median of roadway, it must have crossed entirely over lane in which defendant was driving before turning and re-entering defendant's lane of travel -- Alternatively, deer emerged from open field to right of highway -- In either case, defendant's failure to see deer was negligent -- It was virtually unavoidable inference that there was some absence of look out on part of driver -- Defendant was not paying attention -- He did not see deer when he should have seen it -- He took no evasive action to avoid impact when he should have been able to do that.

Freidooni v. Freidooni (2010), 2010 CarswellBC 995, 2010 BCSC 553, S.J. Shabbits J. (B.C. S.C.) [British Columbia]

TOR.XVI.5.h.v

Subject Title: Torts

Classification Number: XVI.5.h.v

Negligence -- Contributory negligence -- Apportionment of liability -- Miscellaneous

Plaintiff was walking with his friend L in nightclub, when L bumped into another man -- Even though bumping was minor incident, man immediately pushed and yelled at L -- L responded by yelling and pushing back -- After 2 and 2 1/2 minutes, L was struck on head by bottle wielded by man from group with man he was fighting -- Plaintiff stepped in to assist L and was hit with bottle wielded by another unidentified person -- Plaintiff did not alert any of nightclub's staff before he stepped in to assist L -- As result of injury, plaintiff lost vision in his right eye -- Corporate defendants sought to have claims against them dismissed on summary trial application -- Plaintiff agreed that it was appropriate to determine issue of whether corporate defendants were at fault by summary trial and sought judgment against them -- Application dismissed -- Liability apportioned 50 per cent to unknown assailant, 35 per cent to corporate defendants and 15 per cent plaintiff -- Uncontradicted evidence of plaintiff and L was that altercation went on for 2 to 2 1/2 minutes before L was hit with bottle and plaintiff stepped into assist him -- Manager of nightclub had conceded that such behaviour, yelling and shoving and pushing, would not be tolerated for that length of time in nightclub -- There was more than adequate time for security to intervene before plaintiff felt it necessary to go to L's aid -- Their failure to do so was breach of their duty under s. 3 of Occupiers Liability Act -- Assailant's action was intentional assault, and as such he should bear most of responsibility -- While plaintiff must bear some responsibility for intervening rather than alerting nightclub's staff, corporate defendant's bear more of responsibility for failing to intervene in timely fashion.

Hartley v. RCM Management Ltd. (2010), 2010 BCSC 579, 2010 CarswellBC 1014, Gerow J. (B.C. S.C. [In Chambers]) [British Columbia]

TOR.XVI.8.b.vi

Subject Title: Torts

Classification Number: XVI.8.b.vi

Negligence -- Occupiers' liability -- Duties and obligations -- Statutory duty

Plaintiff was walking with his friend L in nightclub, when L bumped into another man -- Even though bumping was minor incident, man immediately pushed and yelled at L -- L responded by yelling and pushing back -- L's evidence was that pushing and yelling went on for at least two minutes -- According to plaintiff, L and man engage in pushing and shoving for between 2 and 2 1/2 minutes -- After 2 and 2 1/2 minutes, L was struck on head by bottle wielded by man from group with man he was fighting -- Plaintiff stepped in to assist L and was hit with bottle wielded by another unidentified person -- Plaintiff did not alert any of nightclub's staff before he stepped in to assist L -- As result of injury, plaintiff lost vision in his right eye -- Corporate defendants sought to have claims against them dismissed on summary trial application -- Plaintiff agreed that it was appropriate to determine issue of whether corporate defendants were at fault by summary trial and sought judgment against them -- Application dismissed -- Uncontradicted evidence of plaintiff and L was that altercation went on for 2 to 2 1/2 minutes before L was hit with bottle and plaintiff stepped into assist him -- Manager of nightclub had conceded that such behaviour, yelling and shoving and pushing, would not be tolerated for that length of time in nightclub -- There was more than adequate time for security to intervene before plaintiff felt it necessary to go to L's aid -- Their failure to do so was breach of their duty under s. 3 of Occupiers Liability Act.

Hartley v. RCM Management Ltd. (2010), 2010 BCSC 579, 2010 CarswellBC 1014, Gerow J. (B.C. S.C. [In Chambers]) [British Columbia]

TOR.XVI.8.c.iv

Subject Title: Torts

Classification Number: XVI.8.c.iv

Negligence -- Occupiers' liability -- Particular situations -- Hotels and taverns

Plaintiff was walking with his friend L in nightclub, when L bumped into another man -- Even though bumping was minor incident, man immediately pushed and yelled at L -- L responded by yelling and pushing back -- After 2 and 2 1/2 minutes, L was struck on head by bottle wielded by man from group with man he was fighting -- Plaintiff stepped in to assist L and was hit with bottle wielded by another unidentified person -- Plaintiff did not alert any of nightclub's staff before he stepped in to assist L -- As result of injury, plaintiff lost vision in his right eye -- Corporate defendants sought to have claims against them dismissed on summary trial application -- Plaintiff agreed that it was appropriate to determine issue of whether corporate defendants were at fault by summary trial and sought judgment against them -- Application dismissed -- Liability apportioned 50 per cent to unknown assailant, 35 per cent to corporate defendants and 15 per cent plaintiff -- Uncontradicted evidence of plaintiff and L was that altercation went on for 2 to 2 1/2 minutes before L was hit with bottle and plaintiff stepped into assist him -- Manager of nightclub had conceded that such behaviour, yelling and shoving and pushing, would not be tolerated for that length of time in nightclub -- There was more than adequate time for security to intervene before plaintiff felt it necessary to go to L's aid -- Their failure to do so was breach of their duty under s. 3 of Occupiers Liability Act -- Assailant's action was intentional assault, and as such he should bear most of responsibility -- While plaintiff must bear some responsibility for intervening rather than alerting nightclub's staff, corporate defendants bore more of responsibility for failing to intervene in timely fashion.

Hartley v. RCM Management Ltd. (2010), 2010 BCSC 579, 2010 CarswellBC 1014, Gerow J. (B.C. S.C. [In Chambers]) [British Columbia]

TOR.XVI.13.h

Subject Title: Torts

Classification Number: XVI.13.h

Negligence -- Defences -- Miscellaneous

Commission administrative des régimes de retraite et d'assurances sent false information to participants of pension plan regarding calculation of their pensions -- Some participants took decisions on basis of that information and were adversely affected by it -- Representative of participants successfully brought motion for leave to institute class action -- Court found that Commission had committed extra-contractual fault and should be held liable for prejudice suffered -- Representative brought motion seeking payment of damages for loss suffered by class members -- Motion granted -- Among its arguments, Commission argued that there was intrinsic advantage to retiring -- Court found that members' decision to retire was taken as result of fault committed by Commission, and latter could not benefit from its own turpitude -- Further, quantum with respect to this item was not assessed by Commission -- Therefore, defence put forward by Commission could not be accepted.

Myette c. Québec (Commission administrative des régimes de retraite & d'assurances) (2010), 2010

CarswellQue 7051, D.T.E. 2010T-499, Auclair J.C.S. (Que. S.C.) [Quebec]

TOR.XVI.14.g.ii.A

Subject Title: Torts

Classification Number: XVI.14.g.ii.A

Negligence -- Practice and procedure -- Costs -- Contributory negligence -- Proportionate to fault

In action for damages alleged to have been suffered in motor vehicle accident, liability was apportioned 75 per cent to plaintiff and 25 per cent to defendant -- Plaintiff was awarded $25,000 for non-pecuniary loss and claims under all remaining heads of damage were dismissed -- Defendants had made offer to settle before commencement of trial, in amount of $10,000 plus 50 per cent of disbursements -- Plaintiff sought order that he be awarded 65 per cent of his costs and disbursements for action, and defendant sought order that plaintiff recover 25 per cent of its costs and disbursements to date of defendants' offer to settle and defendants recover 75 per cent of their costs from date of defendants' offer to settle forward -- Pursuant to s. 3(1) of Negligence Act, plaintiff was awarded 25 per cent of his costs from defendants, commensurate with apportionment of liability, including application regarding costs -- Application of usual rule would not work injustice in circumstances -- This was not case of plaintiff who suffered substantial injuries or who was substantially successful at trial -- There was offer to settle, albeit belated, from defendants, and that offer exceeded what plaintiff was awarded at trial, after taking into account apportionment of liability -- It was appropriate and reasonable for defendants to defend both with respect to liability and damages -- This was not case of needlessly requiring plaintiff to prove case that was bound to succeed, in whole or in part -- In circumstances, considering factors identified in applicable rule in Rules of Court, 1990, offer to settle in relation to award of costs to defendant was not considered.

Parwani v. Sekhon (2010), 2010 BCSC 540, 2010 CarswellBC 975, Ross J. (B.C. S.C.) [British Columbia]

TOR.XIX

Subject Title: Torts

Classification Number: XIX

Spoliation

Plaintiff went to racecourse, bringing unchecked betting slips that he had accumulated throughout horse racing season -- Plaintiff claimed that he inserted 20 to 25 slips into machine, and that he received cash voucher in amount of $6,553,600 -- Plaintiff was told by personnel that voucher would not be honoured -- Defendants contended that voucher was issued in error -- Plaintiff brought application, by way of summary trial, for payment on voucher -- Plaintiff's alternative claim was that defendants had obligation to give him his winning betting slips and that they breached that obligation by refusing to do so and by subsequently destroying them -- Defendants and third party brought application to dismiss claim -- Application by plaintiff dismissed; application by defendants and third party granted -- Defendants checked terminal used by plaintiff and provided explanation to plaintiff -- While documents were destroyed within week following incident, defendants were not aware that litigation was being contemplated and there was no evidence

that plaintiff was contemplating litigation at that time -- While it may have been prudent to contact plaintiff before betting slips were destroyed, defendants did not have positive duty to do so -- If plaintiff was not satisfied with explanation he had been given, he should have advised defendants -- Slips were destroyed in ordinary course of business -- Defendants did not intentionally destroy winning betting slips in effort to suppress truth -- There was no basis to apply doctrine of spoliation -- As there was no common law duty to preserve property which may possibly be required for evidentiary purposes, and given present findings, plaintiff's claim based on defendants' destruction of betting slips had to fail -- There was no evidence that plaintiff had any winning wagers.

Patzer v. Hastings Entertainment Inc. (2010), 2010 BCSC 426, 2010 CarswellBC 766, Fisher J. (B.C. S.C.) [British Columbia]

TOR.XX.2.a

Subject Title: Torts

Classification Number: XX.2.a

Trespass -- Trespass to land -- Conduct constituting trespass

Plaintiffs brought action against defendant alleging that she trespassed on their land when building fence to contain her horses -- Defendant acknowledged cutting trees but claimed that she had either express or implied consent, and she brought counterclaim for one-half of cost of fence pursuant to Trespass Act -- Action allowed; damages awarded; counterclaim dismissed -- Evidence showed that defendant trespassed on plaintiffs' land since she lacked both express and implied consent to cut trees -- Defendant was careless in establishing proper boundary between her and plaintiffs' property since she did not use compass and simply tried to estimate line through 400 metres of forested land -- Defendant cut trees 20 to 30 feet inside plaintiffs' property line and did not know extent to which she crossed line until plaintiffs walked with her along it -- Plaintiffs were awarded damages totalling $8,000, which included $5,000 for replacement cost of replanting trees and $3,000 for loss of amenity.

Henderson v. Bakken (2010), 2010 CarswellBC 998, 2010 BCSC 559, Savage J. (B.C. S.C.) [British Columbia]

TOR.XX.2.e.i

Subject Title: Torts

Classification Number: XX.2.e.i

Trespass -- Trespass to land -- Defences -- Leave and licence

Consent -- Plaintiffs brought action against defendant alleging that she trespassed on their land when building fence to contain her horses -- Defendant acknowledged cutting trees but claimed that she had either express or implied consent, and she brought counterclaim for one-half of cost of fence pursuant to Trespass Act -- Action allowed; damages awarded; counterclaim dismissed -- Evidence showed that defendant trespassed on plaintiffs' land since she lacked both express and implied consent to cut trees -- Defendant was careless in establishing proper boundary between her and plaintiffs' property since she did

not use compass and simply tried to estimate line through 400 metres of forested land -- Defendant cut trees 20 to 30 feet inside plaintiffs' property line and did not know extent to which she crossed line until plaintiffs walked with her along it -- Plaintiffs were awarded damages totalling $8,000, which included $5,000 for replacement cost of replanting trees and $3,000 for loss of amenity.

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