Tricks of the Trade Conference: Tort Update 2015

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Introduction[1]

There have been several significant cases this past year which every civil litigator should be aware of. The Supreme Court of Canada has clarified the tort of "unlawful means" in *A.I. Enterprises Ltd. v. Bram Enterprises Ltd*. The Ontario Court of Appeal has released its first decision commenting on causation since the release of *Clements* in *Fowlow v. Southlake Regional Health Centre* in 2012 by the Supreme Court of Canada. It has confirmed that municipalities have a statutory duty to maintain the lower portions of driveways on boulevards to the standard required for vehicular traffic and not that required for pedestrian walkways in *Bondy v. London (City)*. On the other hand, the Ontario Court of Appeal held in *Fordham v. The Corporation of the Municipality of Dutton-Dunwich* that municipalities do not have a duty to make roads safe for negligent drivers. In *Miller Group Inc. v. James*, the Court considered the interpretation and application of a Pierringer agreement, and in *Mandeville v. The Manufacturers Life Insurance Company* the Court refused to recognize a novel of duty of care owed to stakeholders by a company in connection with a legitimate transaction that received regulatory approval. In *TMS Lighting Ltd. v. KJS Transport Inc.*, the Court revisited and confirmed the test for establishing private nuisance. The Court held that the tort of intentional infliction of mental suffering probably cannot be grounded on an alleged omission rather than an intentional act in *Raposo v. Dasilva*. *Hansen v. Strone Corporation* is an illustration of how the discoverability rules affect when limitation periods begin to toll. In *Upchurch v. Oshawa (City)*, the Court held that the standard of care applicable to city representatives requires that they exercise their duties reasonably, not that they interpret relevant law correctly. In the product liability case of *Stilwell v. World Kitchen Inc.*, the Court reiterates that for an award of aggravated damages to be upheld, evidence of reprehensible misconduct is required.

Elsewhere in Canada, the Alberta Court of Appeal in *Ernst v. EnCana Corp.*, decided that the Energy Resources Conservation Board does not owe a private duty of care to a landowner. And finally on a more entertaining note, the Newfoundland and Labrador decision in *George v.*

Newfoundland and Labrador dismissed a class action against the province where the plaintiffs could not establish a duty on the part of the Province to prevent moose from venturing onto provincial highways.

The Cases

A.I. ENTERPRISES LTD. V. BRAM ENTERPRISES LTD.[2] - TORT OF UNLAWFUL MEANS

In this unanimous Supreme Court decision, the Court revisited and clarified the economic tort of unlawful means, also referred to in the past as the tort of unlawful interference with economic relations.

THE FACTS

A mother and her four sons owned an apartment building through corporations. Most of the family wanted to sell the building, but one of the sons did not. The dissenting son took a series of actions to thwart the sale. The result was that the ultimate sale price was nearly $400,000 less than it otherwise might have been. When the majority sued to recover this loss, the issue was whether the son and his company were liable for the tort of causing loss by unlawful means.[3]

BACKGROUND TO THE "UNLAWFUL MEANS" TORT

In a decision which reviewed the law in this area extensively the Court called the state of the common law in relation to the unlawful means tort "unfortunate" in that there has been little consistency and much confusion in its application. There has not even been consensus on what to name the tort; the unlawful means tort has also been referred to as the "tort of unlawful interference with economic relations", "interference with a trade or business by unlawful means", "intentional interference with economic relations", or "causing loss by unlawful means". The Supreme Court of Canada noted that while this tort is far from new, its scope was unsettled and needed clarification. The Court acknowledged that there historically was a lot of uncertainty surrounding it, and in *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.* the court undertook to clarify its scope. While the elements of the tort have been described in a number of ways, its core captures the intentional infliction of economic injury on a plaintiff by the defendant's use of unlawful means against a third party.

THE SUPREME COURT OF CANADA DECISION

The unlawful means tort is now available only in situations where there are three parties, the defendant commits an intentional unlawful act against a third party and that act causes economic harm to the plaintiff. The Court held that the tort should be kept within these narrow bounds.

In order for conduct to be considered "unlawful" for the purposes of this tort, the conduct complained of must either be (a) civilly actionable by the third party, or (b) would have been

civilly actionable if it had caused harm to the third party. It is not sufficient for the conduct to have constituted a breach of a statute or regulation. The Court refused to "tortify" every breach of a statute or regulation.

The son who did not want to sell the building argued that the tort only applies where no other cause of action is available. The Court rejected his argument, holding that this suggested requirement was unnecessary to keep the tort within its proper bounds.

The Court rejected the availability of principled exceptions. The Court was concerned that recognizing exceptions would allow for too much judicial discretion, the result of which would be to undermine the certainty of the tort and broaden its scope.

The Court also commented on what conduct would be considered intentional for the purposes of this tort. It concluded that conduct that was intended to cause economic harm to the claimant by the defendant as an end in itself or conduct which was intended to cause economic harm to the claimant because it is a necessary means of achieving an end that serves some ulterior motive would qualify.

Ultimately, the Supreme Court found that the son was not liable for unlawful interference with economic relations. There was no wrong that would be actionable by the third party (the prospective purchasers of the building) against the dissenting son.[4]

This is an important decision which contains a lengthy discussion of a number of cases from several common law jurisdictions. It is must reading for every commercial litigation lawyer.

FOWLOW V. SOUTHLAKE REGIONAL HEALTH CENTRE[5] - CAUSATION IN NEGLIGENCE

This is the first decision of the Ontario Court of Appeal to cite and comment on the test for causation in negligence cases as outlined by the 2012 Supreme Court of Canada decision *Clements v. Clements*.

THE FACTS

A 70 year old patient died shortly after an axillary-femoral bypass operation. The defendant surgeon used a graft for the procedure without being aware that the graft was not recommended for this type of surgery. The estate and family of the deceased patient commenced a medical malpractice claim against both the surgeon and the hospital.

The trial judge (Stinon J.), in a decision released after the SCC decision in *Clements*, found that the surgeon had failed to meet the standard of care. However, a causal connection was not established between the doctor's failures and the death of the patient. Although the manufacturer had issued a warning against using this graft for axillary-femoral bypass, the plaintiffs failed to show that the patient's death was caused by the use of the graft as opposed to a weakness in the patient's artery or some other cause. The trial judge indicated that the result might have been different if the plaintiffs' had been able to (a) show that the graft had detached

in previous axillary femoral surgeries, or (b) present details as to why a warning was issued against using the graft for this type of surgery, or (c) produce other evidence or data indicating that using the graft would increase the risk of developing complications after surgery.

THE COURT OF APPEAL DECISION

The Court of Appeal (Jurianz, Pepall JJ.A and Strathy J.A., as he then was) upheld the trial decision and confirmed that this was not a case for the application of the "material contribution" test, but rather that the "but for" test was appropriate. The Court rejected the appellant's submission that the plaintiffs only needed to prove that the use of the unapproved graft materially contributed to the risk of detachment to succeed.

According to the court, the "material contribution" test, as described in *Clements*, may be employed only where it is truly impossible for a plaintiff to satisfy the "but for" test, and is particularly likely to be applicable in cases in which there are multiple tortfeasors. In *Fowlow*, there was only one tortfeasor, and the plaintiffs did not prove that it was truly impossible for them to establish "but for" causation.

Since the plaintiffs did not produce any evidence from the manufacturer of the graft or from a pathologist that performed or witnessed the post-mortem examination, the "impossibility" criterion could not be satisfied. The failure to call such evidence speaks to the fact that the plaintiffs were unable to demonstrate that it was factually impossible to demonstrate causation. This passage suggests that the Court of Appeal might be prepared to apply the "material contribution in risk" test where it was factually impossible to demonstrate causation. A close reading of the SCC decision in *Clements* suggests that this was not the view of the SCC. It remains to be seen whether this represents an attempt by the Court of Appeal to limit the *dicta* in *Clements*.

BONDY V. LONDON[6] - MUNICIPALITIES HAVE A STATUTORY DUTY TO MAINTAIN LOWER PORTIONS OF DRIVEWAYS ON BOULEVARDS

The Ontario Court of Appeal has upheld a trial decision which found no liability on a municipality when a person fell on a paved residential driveway that slopes down to meet the road. Although, the parties conceded that it was part of the "travelled portion of the highway" the Court nevertheless concluded that generally the municipality only has a duty to maintain such boulevards as highways for vehicles and not as a passageway for pedestrian traffic.

THE FACTS

After heavy freezing rain, the Plaintiff fell on an icy sloped driveway sidewalk that was part of a municipal boulevard, which connected to her neighbor's driveway. The boulevard was classified as a highway within the *Municipal Act*.

THE COURT OF APPEAL DECISION

The parties acknowledged that the boulevard is a highway , within the meaning of the *Municial Act*.

Neither the city nor the neighbour were liable to the Plaintiff. The Court decided that the fact that people cross at undesignated places on a road does not create or impose an obligation on the Municipality to maintain the boulevard at a higher level. .In this case the pavement had become slippery because of an ice storm and the City's response was considered adequate. The neighbour was not responsible for the Plaintiff's injuries. The neighbour was not an occupier under the *Occupiers' Liability Act* and nothing in the City of London's street by-laws imposed a duty on the property owner to remove snow and ice.

Some commenters find this precedent troubling because it would be too onerous for municipalities in Ontario to plow, sand, or salt the lower portion of each private driveway simply because they are technically part of the travelled portion of the highway.[7]

FORDHAM V. DUTTON-DUNWICH (MUNICIPALITY)[8] - MUNICIPALITIES DO NOT OWE A DUTY TO DRIVERS WHO DO NOT DRIVE WITH REASONABLE CARE

The Ontario Court of Appeal held that a municipality does not owe a duty to drivers who drive without reasonable care.

THE FACTS

The plaintiff, a newly minted G2 driver, ran a stop sign at 80 kph on a rural road and then was unable to negotiate a small S curve just beyond the stop sign, lost control of his vehicle and crashed into a concrete bridge. The trial judge noted that some local drivers did not always stop for stop signs. Although the expert evidence was to the effect that if he had stopped he would have been able to negotiate the curve, the trial judge found that the curve should have been signed and held the municipality 50% at fault for the plaintiff's serious injuries.

THE COURT OF APPEAL DECISION

Although the Court of Appeal found some modest support for the proposition that not all rural drivers in this area stopped for stop signs, Laskin J.A., speaking for the Court, noted that there was no credible evidence that local drivers went through stop signs at the speed limit.

More importantly, the Court held that even if there had been such evidence this was legally irrelevant. There is not one standard for city drivers and another standard for rural drivers. A municipality's duty does not extend to making its roads safe for negligent drivers. A municipality need only erect signs if failing to do so would expose an ordinary driver exercising reasonable care to an unreasonable risk of harm.

MILLER GROUP INC. V. JAMES[9] - PIERRINGER OR PROPORTIONATE SHARE SETTLEMENT AGREEMENT

This appeal involved the interpretation and application of a "Pierringer" or proportionate share settlement agreement.

THE FACTS

Jimmy and Brenda James (the “Jameses”) commenced this action in negligence and nuisance for property and personal injury damages caused by a fly rock incident following blasting at a quarry owned by the appellant Miller Group Inc. (“M”) and operated by the respondents Sernoskie Bros. (“S”). M cross-claimed against S for indemnity, alleging S had agreed to indemnify them for these types of claims and had agreed to add them as named insureds on their liability insurance.

After discoveries, the Jameses and S entered into a Pierringer Settlement Agreement. Following which, three motions were brought and heard together. At the conclusion of the motion, the judge (Timothy D. Ray J.):

1. Granted the Jameses’ motion to remove S from the action and amend the statement of claim.

2. Granted S’s motion for summary judgment dismissing M’s cross-claim.

3. Dismissed the M’s motion for summary judgement to dismiss the Jameses’ claim. M was entitled to amend its statement of defence to seek a declaration for contribution and indemnity notwithstanding the removal of S from the proceedings.

M appealed the dismissal of its cross-claim against S and the dismissal of its motion for summary judgment to dismiss the Jameses’ claim.

THE COURT OF APPEAL DECISION

The Court (Sharpe, Epstein and Pepall JJ.A.) allowed the appeal. The matter was remitted to the Superior Court for determination of whether M has a contractual right of indemnity against S.

The Court agreed with the motion judge’s finding that M’s right to seek a reduction of its liability and its right to a reduction of its exposure to the plaintiffs as against S by way of contribution or indemnity was preserved. However, the motion judge erred by failing to address the factual and substantive basis for the M’s claim for summary judgment dismissing the Jameses’ claim. The terms of the settlement agreement and the assertion of the indemnity agreement between M and S gave rise to a threshold question as to M's liability for the damages claimed by the plaintiffs. The motion judge failed to deal with the threshold issue on the summary judgment motion. The threshold issue of whether M can establish an implied oral agreement with S for indemnification is one that should have be determined at the summary judgment motion in accordance with the procedure outlined in Rule 20.04(2.2).

Normally, Pierringer Agreements contain a term that the settling defendant can apply for a bar order (dismissing the non-settling defendant’s crossclaim against the settling defendant). The

extracts from the agreement in the case do not refer to such a provision but it appears that the same result was to be achieved through the motion to dismiss M's crossclaim by way of a summary judgment. However, by allowing M to amend its defence to seek a declaration for contribution and indemnity S would have remained in the action. Therefore, much of the benefit of the Pierringer Agreement would have been frustrated from S's perspective.

This case confirms a concern about Pierringer Agreements that has existed for some time but has not been commented on judicially. This case essentially concludes that Pierringer Agreement can be used to remove a defendant whose only potential liability for contribution and indemnity arises under the *Negligence Act*. However, if the co-defendant's right to indemnity arises in contract or otherwise, then the non-settling defendant's crossclaim should not be dismissed unless or until the other claim for indemnity has been shown to have no merit.

If a defendant has a realistic claim for indemnity in contract it should be pleaded. Once pleaded, such a claim is likely to defeat any attempt by a co-defendant to enter into a settlement that will allow the settling defendant to extract themselves from the litigation by way of a bar order.

MANDEVILLE V. THE MANUFACTURERS LIFE INSURANCE COMPANY[10] - ANNS TEST AND PURE ECONOMIC LOSS

The issue in this appeal was whether a company owed a novel of duty of care to stakeholders in connection with a legitimate transaction that received regulatory approval.

THE FACTS

In 1999, The Manufacturers Life Insurance Company ("Manulife") demutualized and distributed $9 billion to its participating policyholders. Less than three years prior, Manulife had transferred a group of Barbados policies to another life insurance company (the "Transfer"). The group of Barbados policies did not receive anything from the $9 billion disbursement. The representative plaintiffs (the "appellants") brought a class action on behalf of the Barbados policyholders, in which they claimed against Manulife for negligence and breach of fiduciary duty. They alleged that Manulife knew it was likely going to demutualize when it made the Transfer, and ought to have made arrangements to protect their interest in the eventual demutualization. Despite finding a *prima facie* duty of care based on foreseeability of harm and proximity, the trial judge (Newbould J.) refused to recognize that Manulife owed the class members a duty of care on policy grounds. The fact that regulators in both Canada and Barbados had approved the Transfer was sufficient cause to relieve any duty on the part of Manulife.

THE COURT OF APPEAL DECISION

The Court of Appeal, in a decision written by Gillese J.A., considered the issue of whether the trial judge erred in refusing to recognize that Manulife owed the class members a duty of care at the time of the Transfer. The Appeal was ultimately dismissed.

Gillese J. A. reasoned that the nature of the claim was one for pure economic loss and was not for a loss in a proprietary right. Despite being "owners" of a mutual company (Manulife) at the time of the Transfer, the policyholders did not have a legally recognized right or interest in respect of a possible demutualization. The Transfer occurred before the right to demutualize came into existence. Therefore, no right to share in demutualization had been conferred by contract, legislation or regulation at the time of the Transfer. The appellants had a hope or a mere expectancy - not a legally enforceable right. The class members did not have a vested or even contingent interest in property.

Furthermore, while the Court agreed with the trial judge that harm arising to the class members from Manulife's decision to demutualize was reasonably foreseeable, the Court found that the relationship between the class members and Manulife was not sufficiently proximate such that a *prima facie* duty of care arose. This was the case for two reasons. First, the appellants could not have an interest in something that was not legally possible at the time of the Transfer, i.e. they could not have an interest in the demutualization. Second, the Transfer and subsequent extinguishment of the appellants' tenuous interest in Manulife was legal and occurred under a prescribed regulatory framework.

The Court confirmed that policy considerations play a role at both stages of the *Anns* test, and play an important role in the decision of whether to recognize a new duty of care. In *Mandeville*, policy considerations militated against the finding that Manulife was given the statutory right to end its relationship with the class members (via the Transfer) and yet legally obligated to protect their interest in some future transaction. There was therefore no *prima facie* duty of care found at stage 1 of the *Anns* test due to a lack of necessary proximity.

According to the Court, there are two further policy considerations militating against the finding of a duty of care in stage 2 of the *Anns* test: (1) the law's traditional reluctance to permit recovery for pure economic loss, and (2) the fact that the law of negligence seeks to remedy the destruction of value as opposed to grievances about the way in which value is distributed.

This important case contains a fulsome discussion of the various criteria provided in the *Anns* tests. Anyone who has a thorny "duty of care" case would be well advised to review this case carefully.

TMS LIGHTING LTD. V. KJS TRANSPORT INC.[11] - TEST FOR ESTABLISHING PRIVATE NUISANCE

The Court of Appeal revisited and confirmed the test for establishing private nuisance.

THE FACTS

KJS Transport operated a trucking business that generated airborne dust, which disrupted TMS Lighting's manufacturing business. This appeal arose from the trial judge's (Price J.'s) finding that the appellants ("KJS Transport") were liable to the respondents ("TMS Lighting") in both nuisance and trespass. While KJS Transport conceded that they interfered with TMS Lighting's

use and enjoyment of their lands, they argued that the interference was not unreasonable and that TMS Lighting did not provide sufficient evidence to calculate nuisance-based damages.

THE COURT OF APPEAL DECISION

In a judgment delivered by Cronk J.A., the Court considered whether the trial judge erred in his nuisance analysis by finding that KJS Transport's interference with TMS Lighting's use and enjoyment of their lands was unreasonable in the circumstances. The Court also examined the calculation of damages for nuisance and trespass based on the available evidence.

Cronk J. A. reached the conclusion that the trial judge did not err in his nuisance analysis, as he appropriately applied the two-part test for establishing private nuisance as set out in *Antrim Truck Centre Ltd. v. Ontario (Transportation)*. That test requires that the plaintiff establish that the interference with the plaintiff's use or enjoyment of the land is both substantial and unreasonable. The appellant conceded that the nuisance was substantial but argued that interference was not unreasonable. This question must be determined by balancing the gravity of the harm against the utility of the defendant's conduct in all of the circumstances. The appellant's main contention was that the respondent's manufacturing process was too sensitive to dust and when this factor was considered the interference was not unreasonable. The Court of Appeal concluded that all of the factors had been considered and the trial judge's findings and his weighing of the various factors were entitled to deference.

While the damages issue is somewhat beyond the scope of this paper, it is an additional interesting issue addressed by the Court in this case. The Court found that the damage awards were unsustainable. It is not open to a trial judge to postulate a method for the quantification of damages that is not supported by the evidence at trial. Furthermore, the approach taken by the trial judge did not provide the parties with the opportunity to be tested or challenged at trial. The trial judge failed to consider whether TMS Lighting established lost productivity damages at trial. TMS Lighting failed to lead both expert evidence to establish the extent of damage due to lost productivity, and business records to evidence relevant information like sales revenues or productivity hours before and after the dust-related problems. New assessment of plaintiffs' lost productivity damages arising from defendants' proven nuisance and trespass was required in interests of justice.

RAPOSO V. DASILVA[12] - NO REASONABLE CAUSE OF ACTION WHERE CLAIM FOR INTENTIONAL INFLICTION OF MENTAL SUFFERING BUT NOT ACTS ALLEGED, ONLY OMISSIONS

In this decision, the Court suggests that the tort of intentional infliction of mental suffering cannot be grounded on an alleged omission rather than an intentional act or statement.

THE FACTS

This was an unhappy dispute between two siblings evolving from the circumstances of their father's death and his subsequent funeral. A brother sued his sister for intentional infliction of

mental distress, based on, among other allegations, his claim that she failed to notify him of their father's rapidly deteriorating medical condition and robbed him of his chance to say his last goodbyes.

LOWER COURT DECISION[13]

The elements of the cause of action for the tort of intentional infliction of mental distress was originally articulated in *Wilkinson v. Downton*[14] as case that has been followed and applied for over a century. The tort of intentional infliction of mental suffering has 3 elements:

1. an act or statement by the defendant that is extreme, right flagrant or outrageous;
2. the act or statement is calculated to produce harm; and
3. the act or statements causes visible or provable harm.

No cases were cited by the plaintiff in which omission to act has been held to found a cause of action for intentional infliction of mental distress. In Stinson J.'s view, there is a good reason for this absence of authority. To accept this submission would be to ask the court to impose a duty to act in questionable circumstances. It is undesirable to force the court into the field of dictating mandatory positive acts that must be carried out so as to avoid causing offence or unhappiness to others. Imposing positive duties such as a duty to communicate information, such as the father's medical condition in this case, raises a host of other issues such as privacy concerns, limits on the scope of how far the duty may extend, questions as to who should be subject to the duty and so on. Stinson J. concluded that the imposition of such a duty was undesirable. The statement of claim failed to disclose a reasonable cause of action, and the plaintiff's action was dismissed.

THE COURT OF APPEAL DECISION

Raposo moved to set aside the chambers order of Rosenberg J.A., in which the judge declined to set aside the Deputy Registrar's dismissal of this appeal for delay and to extend the time for perfecting the appeal from the order of a judge of the Superior Court.

The motion to set aside the dismissal order was dismissed. The Court (E.A. Cronk J.A., S.E. Pepall J.A., M. Tulloch J.A) agreed with the chambers judge's assessment of the merits of the proposed appeal and his conclusion that the pleading failed to give rise to a reasonable cause of action.

Justice Rosenberg did not, as Raposo claimed, err in treating the merits of the appeal as the determinative factor. The reasons show that he balanced all the relevant factors and concluded that the interests of justice do not warrant the discretionary relief sought in this case. Raposo was unable to point to any judicial authority in support of his argument that the tort of intentional infliction of mental suffering can be grounded on an alleged omission, rather than an intentional

act or statement, nor did he identify any actionable wrong by the defendant to support his claim for mental distress damages.

HANSEN V. STRONE CORPORATION[15] - DISCOVERABILITY AND LIMITATION PERIODS

Limitation periods do not begin to run until the plaintiffs' have in their possession sufficient facts upon which they could allege negligence.

THE FACTS

A fire took place at the res