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BLG MONTHLY UPDATE

Borden Ladner Gervais

The BLG Monthly Update is a digest of recent developments in the law which Neil Guthrie, our National Director of Research, thinks you will find interesting or relevant – or both.

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CIVIL PROCEDURE

Proceedings with a legitimate purpose and an illegitimate collateral purpose: what is a court to do?

JSC BTA Bank (controlled, since entering receivership, by the government of Kazakhstan) sought to recover $1.8 billion in assets allegedly misappropriated by Mukhtar Ablyazov during his tenure as chairman of the bank. Ablyazov argued that this was an abuse of the English Commercial Court's process, on the grounds that the ulterior motive behind the bank's claim was an illegitimate attempt by the president of Kazakhstan, Nursultan Nazarbayev, to neutralise Ablyazov as a political opponent. Ablyazov tendered voluminous and chilling evidence of the rotten state of Kazakhstan, including accounts of his imprisonment, torture and near escapes from assassination.

Teare J reviewed the modern law on abuse of process, noting that a collateral or ulterior purpose underlying otherwise proper proceedings may – albeit rarely – be such an abuse. Abuse lies in seeking a remedy that 'lies outside the range of remedies that the law grants' – but not where a collateral advantage is reasonably related to the redress sought. If the defendant's financial ruin is a natural consequence of a legitimate claim, that is not abusive *per se.* The judge rejected a line of authority which requires the court to determine whether the illegitimate purpose is the predominant one, in favour of the view that a claimant is entitled to proceed if one of two purposes is legitimate, subject to the court's discretion to decide that the proceedings are abusive (for example if there is no good arguable case for the recovery of assets).

Ablyazov's evidence, while voluminous, offered no direct proof that the bank was acting as an instrumentality of the president of Kazakhstan in an attempt to strip Ablyazov of wealth and influence. The bank had a legitimate interest in recovering the $1.8 billion allegedly misappropriated, even if there was another, illegitimate purpose. The judge also thought, in any event, that Ablyazov's financial ruin would be a necessary consequence of a legitimate

action for recovery – and thus could not be an illegitimate collateral purpose.

JSC BTA Bank v Ablyazov (No 6), [2011] EWHC 1136 (Comm), leave to appeal refused [2011] EWCA Civ 1588.

[Links available **here** and **here**].

CONFLICT OF LAWS

If you're afraid of wolves, don't go into the forest

So says the Russian proverb. Or, as Batchelder J of the 6th Circuit explained it in *Conn v Zakharov,* 2012 US App LEXIS 607, 'if you're afraid of the Russian legal system, don't do business in Russia'.

Advice not heeded by Richard Conn, who moved to Russia in order to undertake a joint venture with Vladimir Zakharov that was governed by Russian or District of Columbia law. Zakharov repudiated the deal and Conn, who 'believed he would not prevail in a Russian court' (presumably for reasons not associated with the merits of his claim), sued his former business partner in Ohio. The defendant had some contacts with the state: he had attended university at Case Western Reserve, owned and maintained real property, had motor vehicle registrations and spent at least a couple of weeks a year in the jurisdiction under a tourist visa. For the US district court and, on appeal, the 6th Circuit, this was not enough either under Ohio's 'long arm' legislation or for the purposes of federal due process: Zakharov's contacts with the Buckeye State were not sufficiently 'continuous and systematic' for the Ohio courts to have jurisdiction over the dispute, and Conn's claim was unrelated to activities carried on there. Conn served the claim by delivering it to the housekeeper at Zakharov's Ohio property while he wasn't there, but this didn't constitute personal service sufficient to establish jurisdiction.

Not a surprising result, but we like the proverb.

Kidnapping isn't 'commercial activity' and the *State Immunity Act* is a complete code (mostly)

Steen and Jacobsen were among 18 US citizens in Beirut who were kidnapped and held for ransom by Hezbollah in the 1980s. They were treated brutally during their captivity. In 2003, the men and their families obtained judgment in Washington DC against the Islamic Republic of Iran (IRI) and two of its agencies (the Ministry of Information and the Revolutionary Guard), which had sponsored Hezbollah. *Steen v Islamic Republic of Iran,* 2011 ONSC 6464, was an attempt to enforce in Ontario the US$350 million in damages they were awarded by the DC court.

In the Ontario proceedings, IRI and its agencies pleaded state immunity as a complete defence. The plaintiffs made a creative argument: since Steen and Jacobsen had been kidnapped so that IRI could extort money and weapons in exchange for their release, the underlying motive of IRI and its agencies was profit and thus subject to the exception for commercial activity under the *State Immunity Act* (SIA). Sadly, there is authority in both Canada and the US establishing that kidnapping is not commercial activity for these purposes, so the argument had to be rejected. The plaintiffs also argued that it was open to the court to create a common-law exception to the SIA for acts of a foreign state not undertaken in a sovereign capacity (*e.g.,* more or less covert support of

third-party terrorism). No success on that one either: the SIA is, as IRI argued, a complete code. The plaintiffs were, however, awarded $70,000 in costs based on the pre-litigation conduct of the defendants, which triggered the Ontario proceedings. A higher (substantial indemnity) award was not warranted because IRI and its agencies had done nothing, in these proceedings at least, to warrant that.

Not sure how the court could make that costs award when the SIA meant it didn't even have jurisdiction over the defendants...

[Link available **here**].

CONTRACTS

Applying commercial good sense, implying a term or just rewriting the contract?

The application of commercial good sense to the interpretation of contracts seemed like a good idea in *Rainy Sky SA v Kookmin Bank,* [2011] UKSC 50 (see BLG Monthly Update, January 2012). The UKSC's approach to contract interpretation in a subsequent case – *Aberdeen City Council v Stewart Milne Group Ltd,* [2011] UKSC 56 – is perhaps open to question.

[Link available **here**].

Stewart Milne Group (SMG) purchased land for development from Aberdeen City Council (ACC), subject to a requirement to make a further 'uplift' payment (less allowable costs) on certain events, including a sale or lease of the land. SMG transferred title to an affiliate, and ACC took the position that this was a sale that triggered the uplift. SMG disputed that, and also the formula for calculating the uplift if it was.

Lord Hope (with whom three other justices concurred) noted that the drafting of the purchase agreement was 'not without its defects', crucially with respect to the uplift formula. As drafted, the formula required the deduction of one allowable cost twice over, which clearly made no sense. It also specified a calculation based on the open market value of the land when the triggering event was a lease, but was silent on the basis for calculating the uplift in the event of a sale. Lord Hope thought it 'straightforward' that the parties must have intended the sale calculation to be on the same basis as that for a lease: 'it can be assumed that this was what the parties would have said if they had been asked about it at the time when the [contract provisions] were entered into.'
His Lordship went on to say that 'the fact that this makes good commercial sense is simply a makeweight'. SMG's contention that gross sale proceeds (a lower figure) should be used as the baseline was rejected, which essentially rescued ACC from suffering 'the results of its own commercial fecklessness'. Lord Clarke and three other justices generally agreed, but on the grounds that open market value was an implied term of the contract.

It's a Scottish case, so its persuasiveness is limited – but it's a decision of the UK Supreme Court and the contracts wonks think it may have wider application.

Brief e-mail sufficient to create binding guarantee

In a brief endorsement, the Ontario Court of Appeal has confirmed the trial judge's finding that an enforceable obligation was formed in an e-mail exchange between Chris Hinn and Pintar

Manufacturing, which concluded with this message: 'I will personally guarantee the debt to Pintar. Signed Chris'.

The intention to contract was there, the amount of the debt was clear from previous e-mails in the exchange, the debt had crystallised, Hinn was aware of the terms of the contract giving rise to the debt and there was consideration in the form of Hinn's forbearance to collect on the debt: *Pintar Manufacturing Corp v Consolidated Wholesale Group Inc,* 2011 ONCA 805.

[Link available **here**].

Delaware court awards damages for breach of obligation to negotiate in good faith

SIGA wanted to develop a smallpox drug but needed money to do it. It decided to collaborate with PharmAthene (PA), a company it had previously considered merging with. The parties developed a non-binding termsheet for a licence agreement, but never signed it. PA suggested a merger, on the understanding that if that fell through the parties would revert to the licensing plan. SIGA agreed, on the condition that PA would advance bridge financing. PA agreed, and they signed a merger termsheet, a merger agreement and a loan agreement, each of which provided that if the merger did not occur the parties would negotiate in good faith to execute the licence agreement as set out in the earlier termsheet.

Time passed and the drug looked both increasingly more promising and more valuable. The merger talks failed, but when the parties returned to the licensing idea, SIGA proposed 'vastly different' economic terms than those set out in the original termsheet (asking for 200-600% increases in payments under the licence).

PA's action found favour with the Delaware Court of Chancery: *PharmAthene Inc. v SIGA Technologies Inc.* (Del Ch, 22 September 2011). While the licence termsheet was not a binding agreement, either on its own or as part of the other agreements because it did not contain all essential terms, SIGA had acted in bad faith in performing its obligations under the agreement to negotiate a licence agreement after the failure of the merger discussions. The original licence termsheet was intended to have significance in renewed licence negotiations; because SIGA's new terms bore no resemblance to the original terms, it had acted in bad faith.

Vice-Chancellor Parsons struggled a bit with the remedy. Traditional expectation damages were too speculative; specific performance wasn't appropriate. In the end, the judge awarded PA a share of future profits from the drug, on specific terms – a remedy described as being akin to a constructive trust or equitable lien.

E-mail boilerplate and hyperlinked terms not enforced as between sophisticated commercial parties

A New Jersey court has declined to enforce forum-selection clauses in the footers of e-mails or hyperlinked to a website.

Two syndicates of Lloyd's insurers entered into contracts with Walnut Advisory Corp., an insurance agent. The syndicates later alleged that Walnut had underwritten risks, without their knowledge, that were outside the terms of Walnut's engagement. Walnut sought contribution and indemnity from Miller Insurance Services,

which acted as the broker between Walnut and both syndicates. Miller sought to dismiss the claims against it, on the grounds that it had notified Walnut that dealings between them (not otherwise documented but subject to an implied-in-fact contract) were to be adjudicated by the English courts. These notifications were contained in boilerplate clauses in e-mail footers and through hyperlinks to Miller's client extranet.

The US District Court in New Jersey analogised the notifications to those in browsewrap agreements in online commerce. Sheridan J concluded that the notices were of the kind not typically found enforceable because they did not make the key terms 'immediately visible' to the recipient. The sending of the terms postdated Walnut's engagement by the syndicates, and the terms themselves were either buried in the fine print or accessible only in a non-obvious part of Miller's extranet. The forum-selection clauses were unenforceable.

Liberty Syndicates at Lloyd's v Walnut Advisory Corp (DNJ, 15 Nov. 2011); *Syndicate 1245 at Lloyd's v Walnut Advisory Corp* (DNJ, 15 Nov. 2011).

Interpreting 'subject to consent, such consent not to be unreasonably withheld'

The English Commercial Court has fleshed out the principles to be applied in interpreting this oft-used phrase in a commercial contract: *Porton Capital Technology Funds v 3M UK Holdings Ltd,* [2011] EWHC 2895 (Comm)

[Link available **here**].

3M bought all of the shares of Acolyte Biomedica. Under the deal, 3M agreed to make earn-out payments to a group of shareholders; it also agreed not to close down the business of Acolyte without the vendors' consent (not to be unreasonably withheld), as a means of protecting their rights to the earn-out. It turned out that 3M would have to incur significant costs to keep the business going, but the vendors refused to consent to 3M's request to shut it down. Was this refusal reasonable?

Hamblen J ultimately said yes, applying the principles from consent cases involving commercial leases. The onus was on 3M to show that the vendors were acting unreasonably. The vendors did not need to show that their refusal was right or justified, merely that it was reasonable. In determining what was reasonable in the circumstances, the vendors could consider their own interests (maximising the earn-out) and were not required to balance those interests against those of 3M (containing costs related to keeping the business afloat).

A Canadian judge would require discretion of this type to be exercised in good faith, but that has been defined as acting reasonably or honestly, so the result wouldn't be too different. The legitimate interests of the other party would need to be considered (which is different from that last point in 3M), but good faith in a commercial context does not require the sacrifice of self-interest, as long as one is not 'excessively' self-interested: see, for example, *Shelanu Inc v Print Three Franchising Corp* (2003) 64 OR (3d) 533 (CA).

[Link available **here**].

Read the fine print, especially when you consign your valuable wine collection for auction

The fine print in the consignment agreement between Christie's and Christen Sveaas, a prominent Norwegian businessman and wine collector, was a complete defence to claims that the auction house had failed to make adequate efforts to promote the sale of the wines which Sveaas had consigned to it for sale. Many of the lots failed to sell or sold 'significantly below market value', according to the complaint: *Sveaas v Christie's Inc* (2d Cir, 22 December 2011).

[Link available **here**].

Christie's (or, rather, its lawyers) had anticipated claims of this type; the fine print gave the auction house 'complete discretion' as to the manner of sale, the distribution of sale catalogues, other publicity associated with the sale and the conduct of the sale itself. While New York contract law imposes a duty of good faith in the exercise of contractual discretion, there was nothing to show that Christie's had acted arbitrarily or unreasonably. Any fiduciary duty Christie's owed as Sveaas's agent was excluded by the 'complete discretion' clause in the agreement. The fine print also provided that Christie's was not liable for the difference in the selling prices it had estimated and those realised at the actual sale; only Christie's gross negligence in providing estimates would defeat the exclusion clause.

Wine tip: be careful about buying at auction; you may get stuck with stuff that's been stored next to someone's furnace for the last 10 years.

The ever-quotable Posner J on letters of intent

BPI Energy Holdings and Drummond Co. decided to form an alliance under which BPI would sell options to Drummond in exchange for a right to extract gas from Drummond's coal beds. Their intentions were set out in a memorandum of understanding and, on its expiration, a letter of intent – both stated to be non-binding. Drummond subsequently had second thoughts and backed out of the venture. BPI, having lost out on a favourable arrangement, sued Drummond for breach of contract and fraudulent misrepresentation.

It failed on both counts at trial and on appeal to the 7th Circuit, where Posner J said this: 'A document can be a contract without calling itself a contract; many letters of intent create contractual rights. [...] But when a document says it isn't a contract, it isn't a contract.' No contract, no breach. As to fraud, merely saying that the other party never intended to fulfil its end of the bargain won't get you there: 'otherwise every victim of a breach of contract could sue for fraud.' In the end, 'neither a breach of contract nor an invocation of legal remedies in an effort to wiggle out of a disadvantageous commercial relationship is fraud.' BPI also failed to show that it had placed any detrimental reliance on Drummond's acts, which torpedoed an estoppel claim; BPI had, moreover, been reckless in ignoring a 'manifest danger' that Drummond would back out.

Drummond, for its part, engaged in 'ostrich tactics' in failing to mention unhelpful authorities: see Gonzalez-Servin v Ford Motor Co (7th Cir, 23 November 2011), also *per* Posner J (see BLG Monthly Update, January 2012).

'Law would sometimes be clearer if judges said what they meant. Well, sometimes they do...' – and Posner J is one of them.

BPI Energy Holdings Inc v IEC (Montgomery) LLC (7th Cir, 8 December 2011)

COURTS

Every day can be (relatively) casual day in the UK Supreme Court and Privy Council

The UKSC and the Judicial Committee of the Privy Council have announced that counsel on any given appeal before these two courts may, if they all agree, dispense with wigs and gowns. This has been the practice for some years in family cases, and the judges of the UKSC and PC themselves don't wear traditional judge gear. Full dress is still required in the courts below, however.

[Link available **here**].

Tweeting from English courts

Lord Judge (real name), Lord Chief Justice of England and Wales, has issued guidance stating that representatives of the media and 'legal commentators' may send live, text-based messages from court without having to seek permission (subject to the possibility that their blogging or tweeting might need to be restricted in some cases); but members of the public must ask first, although that can be done informally by talking to court staff. Photography by anyone in court remains strictly no go, mobile phones must not be used and sound recording is possible only with permission.

Is the distinction between a 'legal commentator' and a member of the tweeting public a workable one? Not sure: everyone's a blogger now?

[Link available **here**].

EVIDENCE

Documents prepared for 'simultaneous review' by lawyers and non-lawyers not protected by privilege

Master Short of the Ontario SCJ has followed US authority in holding that documents containing largely factual information that are sent by a party to non-lawyer personnel for their review, with a cc to the party's lawyers, are not protected by solicitor-client privilege: *Humberplex v TransCanada Pipelines,* 2011 ONSC 4815.

In the Master's view, 'an operational communication cannot be cloaked with privilege by copying it to a lawyer'; the communication must in pith and substance involve a request for the provision of legal advice.

[Link available **here**].

This one just didn't pass the smell test

Kitty litter is big business. So when Clorox suggested in television ads for its carbon-based Fresh Step product that carbon is more effective in absorbing litter-box odour than baking soda, Church & Dwight (C&D), the only major manufacturer of a litter made with baking soda, sought an injunction to restrain the ads.

Clorox claimed that it had conducted 44 trials involving eleven human testers who smelled jars containing cat urine and faeces, maintaining that in every test the jars that also contained carbon reduced bad odours to zero, whereas jars containing baking soda did not. C&D argued that the jar tests were not only unreliable but also false by implication, justifying injunctive relief.

Rakoff J of the District Court in Manhattan accepted this: 'the Court agrees with C&D's expert that it is highly implausible that eleven panelists would stick their noses in jars of excrement and report forty-four independent times that they smelled nothing unpleasant.' Injunction granted: *Church & Dwight Co v The Clorox Co,* 2012 US Dist LEXIS 268.

Which is more troubling, the fact there are people willing to sniff jars of cat excreta or the fact there are experts able to opine on the results?

HEALTH/FAMILY/EQUITY

Wife's failure to disclose she had AIDS does not render marriage a nullity

Divorces are usually messy, this one (*Rick v King,* [2011] FamCAFC 200) more than most. Ms King filed for divorce from Mr Rick (pseudonyms by virtue of a court order) after three years of marriage. Rick responded by seeking a declaration that King's failure to disclose that she had AIDS meant that the marriage had been procured by fraud and was therefore a nullity from the beginning. He was under the impression that a declaration of nullity would preclude a claim by her for a share of his property under Western Australia's *Family Law Act* (FLA).

The FLA does provide that fraud will nullify a purported marriage, but as the judge at first instance and later the Family Court of Australia pointed out, this means fraud as to the identity of the other party or the reality of the marriage ceremony, not deceit inducing consent to the marriage. And Rick was wrong about the effect of nullity on a property claim too, but he could still presumably initiate criminal proceedings against King or a private tort claim.

Tough for Rick, but the right result if you think of the implications.

[Link available **here**].

INTELLECTUAL PROPERTY

Coolest band of all time sues over IP rights in album cover

Iconic. Terribly over-used word, but an apt description of the famous LP sleeve (remember those?) designed by Andy Warhol for the Velvet Underground's *The Velvet Underground & Nico* (1967). You know it: the one with the banana on a white backdrop, with the artist's name to the bottom right. On early copies of the album, the words 'Peel slowly and see' appeared at the top of the banana, which could actually be peeled open. (Unpeeled specimens of the original pressing are worth good coin.)

A partnership which manages the VU's catalogue has filed suit on behalf of surviving band members Lou Reed, John Cale (both also general partners of the management firm), Maureen Tucker and Doug Yule, claiming that because the image was taken from an advertisement that was in the public

domain in 1967, the Andy Warhol Foundation for the Visual Arts Inc has no right to license it for purposes including iPad and iPhone covers (hmm, we want one of those). The partnership claims the banana image has been in exclusive, continuous and uninterrupted use by the band as a trade-mark for more than 25 years, and seeks a declaration that the Foundation has no rights in the image, an injunction against use by third parties, damages and a share of profits earned by the Foundation from licensing.

The Velvet Underground v The Andy Warhol Foundation for the Visual Arts Inc, SDNY, 12 Civ 0201, filed 11 January 2012.

Huge but probably unenforceable award of damages for trade-mark infringement

It's a bit of a shame that those e-mail requests for (financial) assistance from the widows of deposed third-world dictators seem to have dried up; at least to start with, they were rather entertaining. Yahoo! Inc. took a different view of them, however, and has now obtained default judgment against a group of Thai and Nigerian individuals, a Nigerian corporation and a Taiwanese corporation for trade-mark infringement arising from an e-mail scam: *Yahoo Inc v XYZ Companies* (SDNY, 5 December 2011).

The defendants sent fraudulent e-mails to at least 11,660,790 recipients between December 2006 and May 2009, informing them they had won a prize in a lottery (without having entered it) and asking for personal and banking information which was then used for 'a wide range of credit and identity scams'. The e-mails used the Yahoo! name and trade-marks, suggesting the company's endorsement or participation.

Since the defendants took absolutely no steps to defend Yahoo!'s action for trade-mark infringement, Swain J of the District Court in Manhattan entered default judgment against them. Yahoo! could not establish what it had lost in the way of revenue as a result of the scam or what the defendants had made (although it alleged that one of them had deposited $3 million into its bank account), but statutory damages were available. Yahoo! asked for a total of just under $7 billion (including punitives) but got just under $2 billion plus its costs, which is still pretty good. Just try collecting on it, though.

[Link available **here**].

LAWYERS

Law firm not liable for carefully worded third-party opinion

Remember Marc Dreier? He's the chap who was charged with impersonating a senior lawyer at the Ontario Teachers Pension Plan in 2008, and convicted of numerous counts of fraud in New York the following year.

Fortress Credit Corp v Dechert LLP (NY App Div, 29 November 2011) relates to one of Mr Dreier's schemes. At his suggestion, Fortress Credit invested in a short-term note programme to finance real estate acquisitions. The borrower was a client of Mr Dreier, Solow Realty; the guarantor Mr Dreier himself. Or that's what Fortress was told, anyway: Solow Realty had no idea of any of this, and Dreier had forged the signatures of its CEO on the loan documents.

Before all of that emerged, Fortress seems to have suspicions and sought an opinion on the

documents from Dechert LLP – which Fortress then sued when the house of cards collapsed (resulting in a $50 million loss for Fortress). Initially successful, Fortress was on appeal unable to establish that Dechert had agreed to do anything more than review the relevant documents, much less that it had undertaken to verify the underlying legitimacy of the transaction. The firm was careful to state that it had assumed that all signatures were genuine and all documents authentic, and that it had made no independent inquiry into the accuracy of any of the stated facts. Fortress's counsel had, moreover, reviewed the Dechert opinion. Claims against the firm for misrepresentation and breach of fiduciary duty had to fail. A claim for legal malpractice was also unsuccessful because there was no attorney-client relationship, not even a near one.

PRIVACY/POLICE

Reasonable expectation of privacy in personal IP address

The majority of the Saskatchewan Court of Appeal has concluded in *R v Trapp,* 2011 SKCA 143, that an individual has a reasonable expectation of privacy in the IP address assigned to him or her by an internet service provider (ISP), a point which appeared not to have been considered previously by an appellate court in Canada.

[Link available **here**].

The Saskatoon police tracked activity associated with certain keywords on peer-to-peer file-sharing networks. A user's IP address is revealed while files are being shared and it is also possible to browse a user's shared files. Through their keyword monitoring, the police found child pornography in the shared folder of user 207.47.225.82 and determined that SaskTel was the user's ISP. SaskTel identified the user as Brian Trapp, and also provided his address and telephone number. Trapp challenged the disclosure of that information as an unreasonable search under s. 8 of the *Charter* in his appeal from conviction on charges of possessing and distributing child pornography.

Cameron JA (Jackson JA concurring) accepted that Trapp enjoyed a reasonable expectation of privacy in the IP address assigned to him by SaskTel, even though it revealed only his name and location; 'information of this nature is potentially capable of revealing much about the individual, and the online activity of the individual inside the home'. Obtaining the information from SaskTel was a search under s. 8, but a reasonable one in that the police had asked the ISP to provide the information voluntarily and had no reason to think the ISP was not prohibited from complying with that request.

Ottenbreit JA reached the same result but through a different route: Trapp had no reasonable expectation of privacy in simple biographical information, there was no s. 8 search and no *Charter* violation.

See also *R v Spencer,* 2011 SKCA 144, where the majority (Ottenbreit JA again dissenting) agreed with the majority in *Trapp.*

[Link available **here**].

Meanwhile in Alberta, licence plate numbers are not personal information: *Leon's Furniture Ltd v Alberta (Information & Privacy Commissioner),* 2011 ABCA 94, leave to appeal refused 2011 CanLII 75277 (SCC).

[Links available **here** and **here**].

PRIVACY/TORTS

Ontario CA recognises tort of invasion of privacy

The law has been edging towards recognising invasion of privacy as a tort since about 1890. The Ontario Court of Appeal has finally taken the plunge in *Jones v Tsige,* 2012 ONCA 32.

Jones and Tsige worked at different branches of the same bank. Tsige was in a common-law relationship with Jones's former husband. Tsige accessed Jones's banking information on at least 147 separate occasions, ostensibly to verify whether her boyfriend was paying child support to Jones. Jones sued on a variety of grounds, including invasion of privacy, but the judge at first instance concluded that while there was considerable uncertainty the case law did not support the existence of such a tort.

Sharpe JA reviewed the academic arguments for the existence of an actionable tort, provided an overview of Canadian cases and privacy statutes, and glanced at the law in the US and the Commonwealth. In the end, he was prepared to accept that an action could be brought for invasion of privacy, in light of the heightened need to protect personal information in the digital age. He accepted what the *Restatement (Second) of Torts* sonorously calls 'intrusion upon seclusion' as grounds for a remedy where an invasion on private affairs or concerns would be 'highly offensive to a reasonable person'.

Where there is no provable pecuniary loss associated with the invasion, damages will be at the low end of the spectrum – $10,000 on the *Jones* facts, but potentially only nominal and in any case not more than $20,000 in order to keep the floodgates closed.

[Link available **here**].

REAL PROPERTY

Murder/suicide of previous owners of property could be a material defect that must be disclosed, says Pennsylvania court

When the Jaconos sold their house to Janet Milliken, they did not disclose the fact that the previous owner of the property was alleged to have killed his wife, and then himself, on the premises. Milliken sued the Jaconos for material non-disclosure.

The trial judge did not think that a murder/suicide qualified and granted summary judgment for the defendants. On appeal (*Milliken v Jacono,* 2011 PA Super 254), the majority of the Pennsylvania Superior Court thought it was at least a triable issue that it did qualify. The alleged murder/suicide could be 'a problem' with a residential property that would have 'a significant adverse impact on the value of the property' for the purposes of state real estate disclosure legislation, even though the death of a previous owner (in whatever circumstances) was not enumerated in the list of things required to be disclosed. The dissenting judge thought disclosure should be confined to the physical condition of the property, not to unquantifiable (and variable) psychological effects potentially associated with it. If the majority were correct, he asked, how far back would one have to go historically in terms of disclosing bad events that happened on property put up for sale, and would crimes other than murder need to be revealed as well? The dissenting judge thought *caveat emptor* protection enough. But he was in the minority on this, so it's over to a jury trial.

TORTS

Contributory negligence defence not applicable to intentional tort claim, says English Court of Appeal

A supermarket scuffle has led the English Court of Appeal to reject the argument that the plaintiff's contributory negligence could serve as a defence to a claim for assault and battery: *Pritchard v Co-operative Group* (GWS) Ltd, [2011] EWCA Civ 329.

[Link available **here**].

Debbie Pritchard, an employee at a Co-op supermarket near Bristol, wanted to take a day's holiday, as she was still feeling unwell after 2 weeks of illness. Her boss, Neville Wilkinson, said no over the phone and an angry discussion ensued. Pritchard, her sister and a friend went to the store and confronted Wilkinson. In trying to get her to leave the premises, Wilkinson grasped Pritchard's arms and held them; Pritchard's sister grabbed Wilkinson and Pritchard bit him. Pritchard and her companions then left. The Co-op fired Pritchard, who sued for assault and battery and wrongful imprisonment, alleging that her injuries caused a complete psychiatric breakdown resulting in agoraphobia. The Co-op denied Prichard had been assaulted, arguing in the alternative that her actions made her contributorily negligent for her injuries.

The main issue for the Court of Appeal was whether contributory negligence can be a defence to an intentional tort claim. Like Ontario's *Negligence Act,* English legislation permits the 'fault' of a plaintiff to be taken into account, but Aikens LJ concluded that it was not meant to apply to intentional torts like assault, consistent with the position at common law before the enactment of the legislation. Even if this conclusion proved incorrect, Pritchard's actions were not the effective cause of the ensuing injury. The Co-op did succeed on causation: the evidence showed that Pritchard suffered from mental illness before the altercation and would have developed agoraphobia in any event. Lady Justice Smith agreed with Lord Justice Aikens, although she thought that apportionment ought, all things being equal, to be available where the plaintiff has provoked an intentional tort.

High Court of Australia accepts 'cumulative effect' theory of causation

Australia's highest court has, in *Amaca Pty Ltd v Booth,* [2011] HCA 53, accepted that parties may be liable where they are likely to have been one of a number of the cumulative causes of injury.

[Link available **here**].

John Booth was exposed to asbestos on brief occasions as a child and, during a long career as a car mechanic, repeatedly in the course of replacing brake-linings made from asbestos. He contracted mesothelioma and sued the manufacturers of the brake-linings. The trial judge rejected the theory that exposure to a single fibre of asbestos would be sufficient, finding that Booth's exposure to asbestos as a child was trivial and that subsequent non-trivial exposure over time contributed materially to his contracting the disease. The manufacturers contended there was no evidence to support that conclusion, or the

contention that car mechanics were at increased risk of contracting asbestos-related conditions.

Both the NSW Court of Appeal and the majority of the High Court of Australia accepted the trial judge's conclusions on causation; on a balance of probabilities, his long exposure to asbestos in the brake-linings materially contributed to his condition. It was therefore unnecessary to deal with the trickier issue: whether, in cases involving multiple possible causes (none of which can be singled out as *the* cause), there should be a relaxation of the conventional 'but for' test for causation. Heydon J, dissenting, was of the view that 'but for' causation had not been established and that the majority were conflating an increase in the risk of contracting mesothelioma (in any event, by only 10 and 20 per cent in the case of each of the brake-lining manufacturers) with factual causation.

Natty dread

Does Posner J of the 7th Circuit get all the fun cases or does he just have fun with all the cases he gets? *Grayson v Schuler* (13 January 2012) concerns a prison inmate who belongs to the African Hebrew Israelites of Jerusalem (AHIJ), a religious sect with some similarities to Rastafarianism. Schuler, a guard at the Big Muddy Correctional Center in Illinois reasoned that because AHIJ members are not required by their faith to wear dreadlocks 'therefore, ... [that] the plaintiff was not entitled to wear them' for reasons of health and safety. As Justice Posner put it, it was Schuler's 'therefore' that was the central issue in Grayson's appeal of summary judgment for the defendant.

Posner discusses dreadlocks at some length and includes a photograph of the late Bob Marley by way of illustration. He observes that while a ban on prisoners' dreadlocks could pass muster on safety grounds, it was discriminatory to permit Rastafarian inmates to wear them but not Mr Grayson, who was not to be singled out for being 'more zealous in his religious observances than his religion requires him to be'. The judgment of the court below was reversed.

Train hits man, man's body hits woman, woman sues man's estate

And wins. Hiroyuki Joho crossed a Chicago-area commuter railway track using a designated crosswalk, but failed to heed the warning lights and whistles of an oncoming train, which hit him and sent 'a large part' of his body flying through the air onto a nearby platform, where it struck and injured Gayane Zokhrabov. Zokhrabov sued Joho's estate in negligence but was initially unsuccessful: the trial judge concluded that Joho owed her no actionable duty of care.

The Illinois state appeal court thought differently: *Zokhrabov v Park,* 2011 Ill App LEXIS 1298. It is obvious that crossing a railway track poses great danger and requires due care, and obvious that Joho failed to act with due regard for his own safety. Or for the safety of others; it was reasonably foreseeable that the oncoming train would hit him and send his body onto the nearby platform. The fact that there are only 'a few reported cases involving flying pedestrians' didn't matter – ordinary negligence principles dictated the result. The estate's separate claim that the train operators failed to warn Joho adequately was rejected.

[Link available **here**].

TORTS/INSURANCE

Unclean hands don't preclude recovery where the injury isn't a necessary consequence of the illegal act

Sean Delaney awoke from a nine-week coma to find himself severely injured as a result of a car accident, with 'bleak' prospects for future employment. He naturally decided to sue Shane Pickett, the driver of the car in which he had been the passenger. The fly in the ointment was that when Delaney was pulled out of the car wreck, he was found to have a 240-gram bag of cannabis (rather a lot) inside his jacket.

Pickett had a further 34 grams stuffed down his sock. Delaney had no recollection of even getting into the car with Pickett, who was 'more an acquaintance than a close friend'.

At trial, the judge held that Delaney could not recover from either Pickett or under uninsured motorist coverage on the grounds that Delaney, like Pickett, must have been in possession of the pot with intent to traffic in it. The quantities in question did not support Pickett's contention that it was for personal use. Delaney had no real explanation for the bag in his jacket, although the evidence suggested that that he knew about it once he got in the car.

The majority of the English Court of Appeal agreed that the claim against the insurer failed because the policy excluded coverage for acts in furtherance of a crime. The trial judge was incorrect, however, that the *ex turpi causa* defence precluded recovery from Pickett, who owed a duty of care to his passenger regardless of the purpose of their journey. Delaney's injury was not an essential consequence of his illegal act. Not much comfort to Delaney, however: Pickett's own insurance had been avoided for material non-disclosure, making reliance on uninsured coverage necessary – but, as we have seen, this was unavailable. Ward LJ, dissenting, thought the trial judge made unfair inferences from the facts and would have allowed recovery against both Pickett and the insurer.

Delaney v Pickett, [2011] EWCA Civ 1532

[Link available **here**].

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