S.C.C. Cases of Interest to the Personal Injury Bar – the last 18 months[1]

by

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for

Diversified Litigation Series Seminar

Will Davidson LLP

Ontario Bar Association Centre

Friday, September 22, 2017

Toronto

1. January 2016 - June 2017 inclusive*. All cases are hyperlinked.
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*See "late-breaking decisions" for July – Sept. 2017

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Appeal Judgments

1. Civil Procedure: Contempt

Morasse v. Nadeau-Dubois, 2016 SCC 44 (Judgment rendered: October 27, 2016)

Basically what happened

During the 2012 student protests in Québec, Laval student Jean-Francois Morasse obtained an injunction against two student unions, stopping these groups from blocking Morasse's class attendance. During a TV interview, Gabriel Nadeau-Dubois, a spokesperson for one of the student unions, allegedly encouraged students to continue their picket lines despite any court order. Morasse argues that these interview comments amount to contempt.

S.C.C. holding

The power to find an individual guilty of contempt is an exceptional one. The potential impact on an individual's liberty means the formalities of a contempt proceeding must be strictly complied with: the accused must receive clear, precise and unambiguous notice of the specific contempt offence for which he or she is being charged, and the elements required for a conviction must be proven beyond a reasonable doubt.

As he had neither actual or inferred knowledge of the injunction Nadeau-Dubois was not guilty of contempt. He was not personally served, and service to anyone other than Nadeau-Dubois, on its own, was insufficient to ground his actual knowledge. Moreover, Nadeau-Dubois's knowledge of the order could not be inferred by him mentioning other injunctions in an interview, as these injunctions dealt with CEGEP schools, not Laval or even any other universities.

Why important

Morasse is a leading case on contempt. Contempt is an exceptional remedy with procedural safeguards. The elements of contempt must be proven beyond a reasonable doubt, and actual or inferred knowledge of the specific court order is required.

Key quote

"In all cases of contempt, it is crucial that courts stay alert to the exceptional nature of their contempt powers, using it only as a measure of last resort. A conviction for contempt should only be entered where it is genuinely necessary to safeguard the administration of justice."[1]

[1] *Morasse v. Nadeau-Dubois*, 2016 SCC 44 at para. 21, *per* Abella and Gascon JJ.

2. Class Actions: Jurisdiction

Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP, 2016 SCC 30 (Judgment rendered: July 15, 2016)

Basically what happened

As a condition for being bailed out by the Canadian government, GM Canada entered into wind-down agreements with many individual GM dealership owners across Canada. The agreement required each owner to receive independent legal advice regarding the agreement's nature and effect. GM dealership owners now allege that they received negligent legal advice and are suing Cassels Brock & Blackwell. Cassels added 150 other law firms that also advised GM dealership owners as third party defendants. However, the 83 law firms that reside outside of Ontario challenge Ontario's jurisdiction.

S.C.C. holding

Ontario has jurisdiction over all third-party claims, including the Québec law firms. This case centers around the fourth factor mentioned in *Van Breda*,[2] which is whether a contract connected with the dispute was made in the province attempting to assume jurisdiction. A contractual connection does not require a tortfeasor to be party to a contract. If the defendant's conduct brings him/her within the scope of the contractual relationship, and the events giving rise to the claim flow from the contractual relationship, the fourth *Van Breda* factor is satisfied.

Here, the wind-down agreements were created in Ontario because the last act essential to contract formation occurred at GM Canada's office in Ontario. Although not parties to the contract, the wind-down agreement's provision for legal advice brought the added lawyers within the scope of the contractual relationship. Therefore, Ontario jurisdiction is assumed, and given the procedural efficiency of resolving all claims in the same jurisdiction, *forum non conveniens* arguments are generally unsuccessful.

Why important

Lapointe illustrates the *Van Breda* test, specifically holding that the fourth factor does not require a tortfeasor to be a party to a contract. The fourth factor will be met if the defendant's conduct brings him within the scope of the contractual relationship and that the events giving rise to the claim flow from the contractual relationship.

Key quote

"The fourth factor also promotes flexibility and commercial efficiency. As seen in *Van Breda*, all that is required is a connection between the claim and a contract that was made in the province where jurisdiction is sought to be assumed. A "connection" does not necessarily require that an alleged tortfeasor be a party to the contract."[3]

[2] *Club Resorts Ltd v Van Breda*, 2012 SCC 17 at para. 90.

[3] *Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP*, 2016 SCC 30 at para. 32, *per* Abella J.

3. Contracts/Insurance: Exclusion/Exception Clauses; Standard of Review

Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co., 2016 SCC 37 (Judgment rendered: September 15, 2016)

Basically what happened

This appeal concerns the interpretation of a standard form exclusion clause contained in a "builders' risk" insurance policy. Generally, this insurance covers physical damage that results from faulty workmanship, but, as an exception, does not cover the cost of making good faulty workmanship.

In this case, a contractor was hired to clean windows on a construction site but ended up scratching them. Ledcor claimed the windows' replacement cost under a builders' risk policy as physical damage resulting from faulty work. However, the insurer denied coverage, claiming the damage to the windows fell under the cost of making good faulty workmanship exception.

S.C.C. holding

Ledcor successfully recovered the windows' replacement cost. Although normally contractual interpretation is subject to appellate deference, the interpretation of a standard form contract is subject to a correctness standard of review because these contracts have little meaningful factual matrix and wide precedential value.

Applying the general rules of contract interpretation, only the cost of redoing faulty work should be excluded. This interpretation is consistent with the contract's purpose, which was to provide broad coverage for construction projects prone to accidents and errors. Moreover, denying coverage for damage resulting from a contract's faulty workmanship, simply because the damage results to part of the project the contractor was working on, does not conform to commercial reality.

Why important

Contractual interpretation is not always a question of mixed fact and law entitled to deference on appellate review. A standard form contract's standard of review is now correctness. Additionally, there may be other circumstances where a correctness standard is appropriate.

An appellate court will not likely show deference if the parties negotiated and modified what was initially a standard form contract, as this interpretation has little precedential value.

Key quote

"Where, like here, the appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix specific to the particular parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review."[4]

[4] *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at para. 46, *per* Wagner J.

4. Contracts/Tax: Rectification

Canada (Attorney General) v. Fairmont Hotels Inc., 2016 SCC 56 (Judgment rendered: December 9, 2016)

Basically what happened

Fairmont and Legacy Hotels entered a complex financing agreement that was intended to operate on a tax-neutral basis. As the financing agreement ended, Fairmont's directors passed a resolution to redeem shares in Fairmont's subsidiaries, intending this to result in tax neutrality. However, the resolution resulted in an unexpected tax liability. Fairmont now seeks to rectify the directors' resolution to ensure tax neutrality. Specifically, Fairmont seeks to change its share redemption into a loan from Fairmont's subsidiaries to Fairmont.

S.C.C. holding

Rectification is unavailable here because the parties cannot show any prior agreement with definite and ascertainable terms. Rectification is unavailable where the basis for seeking it is that one or both parties wish to amend not the instrument recording their agreement, but the agreement itself. Although Fairmont intended to unwind the financing agreement on a tax-free basis, and this intention was frustrated, more evidence is needed to support a claim for rectification.

Where parties subscribe to an instrument under the *common mistake* that it represents their agreement, rectification is available if the parties can show:

(1) there was a prior agreement whose terms are definite and ascertainable;
(2) that the agreement was still in effect at the time the instrument was executed;
(3) that the instrument fails to accurately record the agreement; and
(4) that the instrument, if rectified, would carry out the parties' prior agreement.

Although some cases have held that rectification has a standard of proof higher than a balance of probabilities, only two standards of proof exists. Proof of rectification is the normal civil standard.

Why important

Fairmont makes several key points about rectification. Rectification exists to modify legal instruments that fail to record the parties' true agreement, not to modify agreements where a faithful recording led to an undesirable outcome. Also, the same test for rectification exists in tax and non-tax environments. No separate standard of proof exists for rectification.

Key quote

"Rectification is not equity's version of a mulligan. Courts rectify instruments which do not correctly record agreements. Courts do not 'rectify' agreements where their faithful recording in an instrument has led to an undesirable or otherwise unexpected outcome."[5]

[5] *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56 at para. 39, *per* Brown J.

5. Professions/Insurance: Solicitor-Client/Litigation Privilege

Lizotte v. Aviva Insurance Company of Canada, 2016 SCC 52 (Judgment rendered: November 25, 2016)

Basically what happened

The assistant syndic of the Chambre de l'assurance de dommages ("Syndic") oversees various professionals in Québec's insurance field. Syndic asked Aviva, an insurance company, to produce a claim file. Aviva only handed over some documents, maintaining that the withheld documents were protected by solicitor-client privilege or litigation privilege. The *Act* empowering the Syndic creates an obligation to produce "any … document".[6] At issue is whether this language allows the Syndic to bypass litigation privilege.

S.C.C. holding

The *Act* does not empower the syndic to bypass litigation privilege. Like solicitor-client privilege, litigation privilege is fundamental to the proper functioning of Canada's legal system. Therefore, only legislation with clear, explicit and unequivocal language can abrogate litigation privilege. Given the legislation empowering the Syndic lacks such language, Aviva can assert litigation privilege against them.

Any exception to solicitor-client privilege is also an exception to litigation privilege. Other unique exceptions to litigation privilege may be identified in the future, but they will always be based on narrow classes that apply in specific circumstances, not a case-by-case balancing test.

Why important

Lizotte establishes several key points about litigation privilege: that it is a class privilege; fundamental to the proper functioning of our legal system; and only legislation with clear, explicit and unequivocal language can abrogate from it.

Key quote

"Although litigation privilege is distinguishable from solicitor-client privilege, the fact remains that (1) it is a class privilege, (2) it is subject to clearly defined exceptions, not to a case-by-case balancing test, and (3) it can be asserted against third parties, including third party investigators who have a duty of confidentiality."[7]

[6] Act respecting the distribution of financial products and services, CQLR c D-9.2

[7] *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52 at para. 31, *per* Gascon J.

6. Professions/Privacy: Solicitor-Client Privilege

Alberta (Information and Privacy Commissioner) v. University of Calgary, 2016 SCC 53 (Judgment rendered: November 25, 2016)

Basically what happened

A former employee brought a constructive dismissal claim against the University of Calgary ("U of C"). The employee made a request for records pursuant to the *Freedom of Information and Protection of Privacy Act*,[8] but the U of C only produced some records, claiming that certain documents were protected by solicitor-client privilege. The Information and Privacy Commissioner of Alberta ("Commissioner") ordered the U of C to produce the protected records, as the *Act* empowering the Commissioner allowed access to a public bodies' records "despite any privilege of the law of evidence".[9] At issue is whether this language is sufficient to abrogate solicitor-client privilege.

S.C.C. holding

This language is not sufficient to abrogate solicitor-client privilege. In its modern form, solicitor-client privilege is not merely a rule of evidence, it is "a rule of evidence, an important civil and legal right and a principle of fundamental justice in Canadian law". Moreover, another section of the *Act* empowering the Commissioner specifically refers to solicitor-client privilege. So following the rule of strict construction, if the legislative intent was to abrogate solicitor-client privilege, that phrase specifically should have been used, not "privilege of the law of evidence".

Why important

This case confirms solicitor-client privilege is a principle of fundamental justice, not merely a rule of evidence. Other statutes that give access to documents "despite any privilege of the law of evidence" will likely not bypass solicitor-client privilege.

Key quote

"Given that this Court has consistently and repeatedly described solicitor-client privilege as a substantive rule rather than merely an evidentiary rule, I am of the view that the expression 'privilege of the law of evidence' does not adequately identify the broader substantive interests protected by solicitor-client privilege. This expression is therefore not sufficiently clear, explicit and unequivocal to evince legislative intent to set aside solicitor-client privilege."[10]

[8] *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25

[9] *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25, s 56(3)

[10] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at para. 44, *per* Côté J.

7. Professions: Professional Secrecy in Québec

Canada (Attorney General) v. Chambre des notaires du Québec, 2016 SCC 20 (Judgment rendered: June 3, 2016)

Basically what happened

At issue is whether a scheme in the *Income Tax Act* ("*ITA*") constitutes unreasonable search and seizure, contrary to s. 8 of the *Charter*, insofar as the scheme applies to notaries and lawyers. The *ITA* provisions in question are ss. 231.2 and 231.7, which could require lawyers to give over information or documents protected by professional secrecy, and s. 232(1), which excludes a lawyer's accounting records from solicitor-client privilege.

S.C.C. holding

For ss. 231.2 and 231.7, several defects cause a requirement sent to a notary or lawyer concerning information that is protected by professional secrecy to be unreasonable and contrary to s. 8: the client is given no notice of the requirement, an inappropriate burden is placed solely on the notary or lawyer, compelling disclosure of the information being sought is not absolutely necessary to administer the *ITA*, and no measures have been taken to help mitigate the impairment of professional secrecy.

The accounting records exception in s. 232(1) is also unreasonable and contrary to s. 8. A legislative provision can only abrogate from professional secrecy when the abrogation is absolutely necessary to achieve the legislation's purpose. There is no evidence that such a broad and undefined exception is absolutely necessary to meet the *ITA's* objectives, and therefore s. 232(1) is contrary to s. 8.

Why important

Sections 231.2 and 231.7 of the *ITA* should be "read down" to exclude notaries and lawyers in Québec, and s. 232(1), which excludes a lawyer's accounting records from solicitor-client privilege, is unconstitutional and invalid. This case confirms a robust protection for solicitor-client privilege and professional secrecy.

Key quote

"The seizures made in this case are unreasonable and are contrary to [section 8] because the requirement scheme and the exception for accounting records do not provide adequate protection for the professional secrecy of notaries and lawyers. The procedure set out in the *ITA* does not require that the client, who is the holder of the privilege, be informed of the requirement or of any proceeding brought by the CRA to obtain an order to provide information or documents. The procedure also places the entire burden of protecting the privilege on the notary or lawyer. Finally, the AGC and the CRA have not established that it is absolutely necessary here to impair professional secrecy"[11]

[11] *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20 at para. 6, *per* Wagner and Gascon JJ.

8. Professions: Solicitor-Client Privilege

Canada (National Revenue) v. Thompson, 2016 SCC 21 (Judgment rendered: June 3, 2016)

Basically what happened

During an audit, the Canada Revenue Agency requested various financial documents from Thompson, a lawyer. Thompson alleged that some documents were protected by solicitor-client privilege, however s. 232(1) of the *Income Tax Act* ("*ITA"*) excludes a lawyer's accounting records from solicitor-client privilege. The sole issue in this appeal is the statutory interpretation of s. 232(1), specifically whether it represents a sufficiently clear intent from parliament to abrogate solicitor-client privilege.

S.C.C. holding

S. 232(1) shows a clear and unambiguous parliamentary intent to abrogate solicitor-client privilege. If s. 231.2(1) did not exempt a lawyer's accounting records from solicitor-client privilege, the provision would serve no purpose. Further, considering the express language in the definition of solicitor-client privilege in s. 232(1) together with the provision's legislative history, Parliament's intent to exempt a lawyer's accounting records from solicitor-client privilege could hardly be clearer.

Although the legislative intent is sufficiently clear, s. 232(1) it is, nevertheless, unconstitutional. The companion case *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20, establishes that s. 232(1) amounts to an unreasonable search contrary to s. 8 of the *Charter*.

Why important

Thompson provides example of a legislative provision that carries a sufficiently clear intent to abrogate solicitor-client privilege, and shows the interpretation process courts will use for such provisions in the future.

Key quote

"In short, in contrast to how the statutory provision at issue in *Blood Tribe* could be interpreted, the only interpretation of the definition of 'solicitor-client privilege' in s. 232(1) that takes account of the history of the provision and the purpose of the broader scheme into which it is incorporated is that the provision is intended to permit the Minister to have access to lawyers' accounting records even if they contain otherwise privileged information."[12]

[12] *Canada (National Revenue) v. Thompson*, 2016 SCC 21 at para. 34, *per* Wagner and Gascon JJ.

9. Torts/Medmal: Causation; Adverse Inferences

Benhaim v. St-Germain, 2016 SCC 48 (Judgment rendered: November 10, 2016)

Basically what happened

Emond, Benhaim's husband, died of lung cancer. Benhaim alleges that Emond's doctors were negligent in diagnosing the cancer, and without this negligence Emond would have survived. The trial hinged on causation, specifically whether Emond's cancer was Stage I/II or Stage III/IV when his initial x-rays were taken. The defendant's negligence made proving the cancer's stage difficult, but the plaintiff nevertheless adduced some expert evidence that the cancer was Stage I/II when the initial x-ray was taken. Applying *Snell*,[13] the Québec Court of Appeal held that these circumstances required the trial judge to draw an adverse inference of causation.

S.C.C. holding

The SCC overturned the Court of Appeal decision. In circumstances where the defendant's negligence undermines the plaintiff's ability to prove causation, and where the plaintiff brings at least some evidence of causation, *Snell* only establishes that a court *may* draw an adverse inference of causation, not that a court must draw one.

With all the evidence taken together, it was within the trial judge's discretion to not draw an adverse inference of causation. The Court of Appeal erred by not considering the weaknesses of the plaintiff's evidence, specifically the evidence of the defendant's medical expert who testified that lung cancer was rarely diagnosed in Stage I or II and that lung cancer could not progress from Stage I to Stage IV in 12 months, which was the time between Emond's x-rays.

Why important

An adverse inference of causation does not automatically apply if certain conditions are met. If the defendant's negligence undermines the plaintiff's ability to prove causation, and the plaintiff brings at least some evidence of causation, a court may draw an adverse inference of causation. Also, the principles in *Snell* cannot be interpreted to reverse the burden of proof.

Key quote

"The inference of causation Sopinka J. described in *Snell* is one that trial judges are *permitted* to draw even in the absence of positive or scientific proof. It is not one that they are required to draw once certain criteria are established."[14]

[13] *Snell v. Farrell*, [1990] 2 SCR 31.
[14] *Benhaim v. St Germain*, 2016 SCC 48 at para. 50, *per* Wagner J.

10. Civil Procedure/International Law: Forum Selection Clauses

Douez v. Facebook, Inc., 2017 SCC 33 (Judgment rendered: June 23, 2017)

Basically what happened

In 2011, Facebook created a new advertising product called "Sponsored Stories". This product used the name and pictures of Facebook members to advertise products, allegedly without their consent. Douez brought an action against Facebook when she noticed that her name and profile picture had been used in Sponsored Stories. She alleges that Facebook used her name and likeness without consent for the purposes of advertising, contrary to s. 3(2) of the B.C. *Privacy Act*.[15] At issue is whether British Columbia has jurisdiction to hear this dispute despite a California forum selection clause contained in Facebook's terms of service.

S.C.C. holding

British Columbia has jurisdiction despite the forum selection clause. In the absence of legislation to the contrary, the SCC applied the common law test for forum selection clauses established in *Pompey*.[16] In the consumer context, the strong cause factors for the second step of the *Pompey* test are modified. When considering whether enforcing a forum selection clause in a consumer contract is reasonable and just, courts should consider all the circumstances of the case, including public policy considerations relating to the gross inequality of bargaining power between the parties, and the nature of the rights at stake.

Douez established strong cause to not enforce the forum selection clause. First, a gross inequality of bargaining power exists between an individual Facebook user and Facebook, a multi-billion-dollar company. Second, Canadian courts have a greater interest in adjudicating cases concerning constitutional and quasi-constitutional rights, like privacy, because these rights play an essential role in a free and democratic society and embody key Canadian values.

Why important

Forum selection clauses in consumer contracts are unenforceable if there is a gross inequality of bargaining power between the parties and quasi-constitutional privacy rights are at stake. Other quasi-constitutional rights or other public policy considerations could also render forum selection clauses in consumer contracts unenforceable.

Key quote

"When considering whether it is reasonable and just to enforce an otherwise binding forum selection clause in a consumer contract, courts should take account of all the circumstances of the particular case, including public policy considerations relating to the gross inequality of bargaining power between the parties and the nature of the rights at stake."[17]

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[15] R.S.B.C. 1996, c. 373: (2) It is a tort, actionable without proof of damage, for a person to use the name or portrait of another for the purpose of advertising or promoting the sale of, or other trading in, property or services, unless that other, or a person entitled to consent on his or her behalf, consents to the use for that purpose.

[16] *ZI Pompey Industrie v ECU-Line NV*, 2003 SCC 27.

[17] *Douez v. Facebook, Inc.*, 2017 SCC 33 at para. 38, *per* Karakatsanis, Wagner and Gascon JJ.

11. Civil Procedure/Technology: Worldwide Interlocutory Injunctions

Google Inc. v. Equustek Solutions Inc., 2017 SCC 34 (Judgment Rendered: June 28, 2017)

Basically what happened

Equustek Solutions manufactures networking devices for complex industrial equipment. Datalink, a distributor for Equustek, allegedly began to relabel and sell Equustek's products. Equustek started proceedings against Datalink, however Datalink left Canada and continued to sell Equustek's products online. Because most of Datalink's sales were done online to consumers outside of Canada, Equustek sought an injunction to force Google to de-index Datalinks websites on any of its search results worldwide.

S.C.C. holding

The SCC upheld the injunction and Google is forced to de-index worldwide. When a court has *in personam* jurisdiction, and where worldwide scope is necessary to ensure an injunction's effectiveness, a court can grant an injunction enjoining a person's conduct anywhere in the world. Here, Google did not dispute that British Columbia had *in personam* jurisdiction, and because most of Datalinks sales were outside of Canada worldwide scope was necessary to ensure the injunction's effectiveness.

Why important

Equustek establishes that Canadian courts can issue injunctions with worldwide scope. Additionally, the party seeking worldwide de-indexing, or presumably another type of injunction, does not have an onus to show the order is legally permissible in other countries.

Key quote

"When a court has *in personam* jurisdiction, and where it is necessary to ensure the injunction's effectiveness, it can grant an injunction enjoining that person's conduct anywhere in the world."[18]

[18] *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34 at para. 38, *per* Abella J.

12. Insurance in Québec: Injury by Third Parties

Godbout v. Pagé, 2017 SCC 18 (Judgment rendered: March 24, 2017)

Basically what happened

Godbout and Gargantiel were both injured in car accidents and allege that they suffered additional injuries caused by a third parties' negligence. Godbout alleges hospital staff are at fault for her legs needing to be amputated after her accident. Gargantiel alleges that Sûreté du Québec ("SQ") officers who took 40 hours to find his crashed vehicle were responsible for additional damage. Both plaintiffs received full compensation under the Société de l'assurance automobile du Québec ("SAAQ") and under the *Automobile Insurance Act* ("Act"), but nevertheless are trying to claim additional damages from the hospital staff and SQ officers respectively.

S.C.C. holding

Damage is limited to the compensation received under the SAAQ as both injuries are so connected to an automobile accident that they are considered damage suffered in an accident.

If there is a plausible, logical, and sufficiently close link between, on the one hand, the automobile accident and the subsequent events (in the context of these appeals, the fault of a third party) and, on the other hand, the resulting injury, the SAAQ will cover the whole of the injury.

In this case, the third-party claims fail because both injuries originated from a series of events that have a plausible, logical, and sufficiently close link to one another and have, in each case, the automobile accident as their starting point. The fact that the injury in question has an "aggravated" or "separate" aspect that happened after the automobile accident is immaterial: those events will be deemed to be part of the accident, and, therefore, of the cause of the whole of the injury.

Why important

Someone eligible to receive compensation under the SAAQ is unable to make claims against third parties who aggravate their injuries, provided the aggravation is sufficiently connected to an automobile accident. Without exception, the *Act* confers civil immunity on everyone who aggravates injuries suffered in automobile accidents. Also, the causal link in the SAAQ is *sui generis* in nature and cannot be the same as or derived from the general law of civil liability.

Key quote

"[P]rovided that there is a plausible, logical and sufficiently close link between, on the one hand, the automobile accident and the subsequent events (in the context of these appeals, the fault of a third party) and, on the other hand, the resulting injury, the *Act* will cover the whole of the injury."[19]

[19] *Godbout v. Pagé*, 2017 SCC 18 at para. 49, *per* Wagner J.

13. Insurance: Underinsured Motorist Coverage

Sabean v. Portage La Prairie Mutual Insurance Co., 2017 SCC 7 (Judgment rendered: January 27, 2017)

Basically what happened

Sabean was injured in a car accident and recovered $465K. However, the tortfeasor's insurance only paid out $382K. Sabean claimed the shortfall under his insurance policy with Portage. This policy contained excess coverage provisions but also stated that "any policy of insurance providing disability benefits" was deductible. Portage argues that Sabean's CPP disability benefits qualify as a "policy of insurance" and should be deducted.

S.C.C. holding

CPP benefits do not qualify as a "policy of insurance". The ordinary meaning of "policy of insurance" is a private insurance policy that is purchased. Therefore, a mandatory public scheme like the CPP is distinguishable. Although the SCC in *Canada Pacific Ltd. v. Gill*, 1973 SCR 654 described CPP benefits as "so much of the same nature as contracts of insurance",[20] an insurer cannot rely on its specialized knowledge of jurisprudence to advance an interpretation that goes beyond the clear words of a policy.

Why important

Sabean highlights the steps for analyzing standard form insurance contracts, establishes that an insurer cannot rely on its specialized knowledge of jurisprudence to advance an interpretation that goes beyond the clear words of a policy, and creates precedent for CPP benefits to not be considered a "policy of insurance" in other insurance contracts.

Key quote

"An insurer cannot rely on its specialized knowledge of the jurisprudence to advance an interpretation that goes beyond the clear words of the policy. An average person applying for this additional insurance coverage would understand a 'policy of insurance' to mean an optional, private insurance contract and not a mandatory statutory scheme such as the CPP."[21]

[20] *Canadian Pacific Ltd v Gill*, [1973] SCR 654 at p. 671.
[21] *Sabean v. Portage La Prairie Mutual Insurance Co.*, 2017 SCC 7 at para. 4, *per* Karakatsanis J.

14. Professions: Costs Against Lawyers Personally

Québec (Criminal and Penal Prosecutions) v. Jodoin, 2017 SCC 26 (Judgment rendered: May 12, 2017)

Basically what happened

Before a disclosure hearing began, Jodoin, a criminal lawyer, prepared motions to challenge a judge's jurisdiction on the basis of bias. However, a new judge ended up presiding over that morning's hearing. Jodoin requested a postponement to check the resumé of the crown's expert witness, but during this postponement Jodoin instead prepared documents alleging the new judge was biased. The crown attorney suspected Jodoin alleged bias for the purpose of obtaining a postponement and informed Jodoin that he was seeking costs against him personally.

S.C.C. holding

In this case, a costs award of personal costs against Jodoin is justified. The high threshold for a personal cost award is met by unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer, or dishonest or malicious misconduct on his or her part, that is deliberate. Here, Jodoin's acts constituted abusive conduct that was designed to indirectly obtain a postponement. Jodine was motivated by a desire to have the hearing postponed rather than a sincere belief that the judges targeted by his motions were biased.

Although facts considered in a personal cost award should normally be limited to the facts of a single case, external evidence with high probative value and a strong similarity to the alleged facts can be admitted. In this case, the external evidence of Jodoin obtaining motions alleging bias against the first judge was admissible.

Why important

Jodoin establishes when a personal cost award is appropriate. Although generally facts considered in a personal cost award should be limited to the facts of the case, external evidence can sometimes be admitted. Procedural safeguards exist for a lawyer facing personal costs, but *Charter* safeguards are not engaged.

Key quote

"… an award of costs against a lawyer personally can be justified only on an exceptional basis where the lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice. This high threshold is met where a court has before it an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer, or dishonest or malicious misconduct on his or her part, that is deliberate."[22]

[22] *Québec (Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26 at para. 29, *per* Gascon J.

15. Professions in Québec: Legal Fees; Prescription

Pellerin Savitz LLP v. Guindon, 2017 SCC 29 (Judgment Rendered: June 9, 2017)

Basically what happened

At issue in this case is the precise time a three-year prescription period for a claim of lawyer's fees begins to run. The parties entered into a fee agreement providing, among other things, that "[e]very invoice shall be payable within thirty (30) days [and that] after that time, interest shall be computed and charged at an annual rate of 15%." Five invoices were sent and unpaid before March 1 2012. Guindon terminated the relationship on March 21, 2012, and on March 12, 2015, just under three years later, Pellerin Savitz started an action for the unpaid fees. If the three-year prescription period started when the relationship was terminated, the action for unpaid fees would be valid. If the prescription period started on or before March 1, 2012, however, the action would be prescribed.

S.C.C. holding

The action is prescribed, as the prescription period began to run on the 31st day after an individual invoice was sent. The beginning of the prescription period for the recovery of lawyers' professional fees is not uniform. Rather, it depends on the date when the right of action arose, which varies from case to case depending on the circumstances. The fee agreement in question stated that "[e]very invoice shall be payable within thirty (30) days". Because of that suspensive term, each payment did not become exigible, and the prescription period therefore did not begin until the 31st day after the invoice had been sent.

Why important

No special prescription period for a claim of lawyers' fees. The prescription period's beginning depends on the date when the right to action arose, which varies from case to case. Also, a lawyer's duty to his client does not amount to an impossibility in fact that suspends a prescription period.

Key quote

"[T]he determination of the beginning of the prescription period is a factual question the answer to which varies from case to case depending on the circumstances and that turns on, among other things, the agreement between the parties and the terms of the invoices sent by the lawyer to his or her client."[23]

[23] *Pellerin Savitz LLP v. Guindon*, 2017 SCC 29 at para. 30, *per* Gascon J.

16. Torts: Proving Mental Injury

Saadati v. Moorhead, 2017 SCC 28 (Judgment Rendered: June 2, 2017)

Basically what happened

Saadati and Moorhead were involved in a car accident. Moorhead admitted liability for the accident, but argued Saadati suffered no damage. The trial judge held that, while the accident did not cause physical damage, it did cause "psychological injuries, including personality change and cognitive difficulties". Proof of these psychological injuries was based on testimony from Saadati's friends and family, not expert evidence of a diagnosed mental illness. At issue is whether recovery for mental injury requires proof of a recognizable psychiatric illness.

S.C.C. holding

Recovery for mental injury does not require proof of a recognizable psychiatric illness. The elements of the cause of action of negligence, together with the "ordinary fortitude" threshold stated in *Mustapha* for proving mental injury,[24] furnish a sufficiently robust array of protections against unworthy claims. Downloading the task of assessing legally recoverable mental injury to the DSM and ICD imports an arbitrary control mechanism upon recovery for mental injury.

In assessing whether the claimant succeeded in establishing mental injury, it will often be important to consider, for example, how seriously the claimant's cognitive functions and participation in daily activities were impaired, the length of such impairment and the nature and effect of any treatment. Here, the trial judge correctly concluded that Saadati's psychological injuries, namely personality change and cognitive difficulties, lead to a deterioration of his close personal relationships with friends and family. This evidence showed a serious and prolonged disruption that transcends ordinary emotional upset, and, therefore, Saadati was entitled to recover.

Why important

Saadati makes important points relating to recovery for mental injury: recovery does not require a recognizable psychiatric illness, and the ordinary duty of care analysis applies to claims for negligently caused mental injury.

Key quote

"Where a psychiatric diagnosis is unavailable, it remains open to a trier of fact to find on other evidence adduced by the claimant that he or she has proven on a balance of probabilities the occurrence of mental injury. And, of course, it also remains open to the defendant, in rebutting a claim, to call expert evidence establishing that the accident cannot have caused any mental injury, or at least any mental injury known to psychiatry."[25]

[24] *Mustapha v. Culligan of Canada Ltd*, 2008 SCC 27 ("[T]he requirement that a mental injury would occur in a person of ordinary fortitude . . . is inherent in the notion of foreseeability" (at para 14).
[25] *Saadati v. Moorhead*, 2017 SCC 28 at para. 38, *per* Brown J.

Oral Judgments

1. Civil Procedure: Striking Out; Self-Reps

Pintea v. Johns, 2017 SCC 23 (Judgment rendered: April 21, 2017)

Basically what happened

Pintea was a self-represented litigant in a lawsuit arising from a car accident. Pintea changed addresses but failed to notify the court, and did not receive any subsequent court documents sent to him. The case management judge directed that Pintea would be found in contempt if he did not attend a meeting in a week's time. Pintea did not receive this contempt notice and did not attend the meeting. At issue is whether Pintea can be guilty of contempt despite not knowing of the court order.

S.C.C. holding

The trial judge's contempt ruling is overturned. The common law of civil contempt requires proof beyond a reasonable doubt that Pintea had actual knowledge of the Orders for the case management meetings he failed to attend. The trial judge failed to consider whether Pintea had actual knowledge of the orders, therefore the finding of contempt cannot stand.

Why important

Common law contempt requires actual knowledge of the orders in question. The SCC also endorsed the *Statement of Principles on Self-represented Litigants and Accused Persons* established by the Canadian Judicial Council.

Key quote

"The common law of civil contempt requires that the respondents prove beyond a reasonable doubt that Mr. Pintea had actual knowledge of the Orders for the case management meetings he failed to attend."[26]

[26] *Pintea v. Johns*, 2017 SCC 23, *per* Karakatsanis J.

2. Insurance in Québec: Criminal Exclusion Clauses

Desjardins Sécurité financière, compagnie d'assurance-vie v. Émond, 2017 SCC 19 (Judgment rendered: March 31, 2017)

Basically what happened

Sabrina Foisy accidentally died during a high-speed police chase. Mariette Émond was the beneficiary of Foisy's accident insurance policy, but this policy would pay out nothing if Foisy died while participating in an indictable offence. Had Foisy not died, he would have been charged with hybrid offences. Art. 2402 of the *Civil Code of Québec* provides that "any general clause whereby the insurer is released from his obligations if the law is violated is deemed not written, unless the violation is an indictable offence." At issue is whether "indictable offence" in Art. 2402 includes hybrid offences.

S.C.C. holding

Art. 2402 of the *Civil Code of Québec*, even in light of s. 34(1) of the federal *Interpretation Act*, R.S.C. 1985, c. I-21, should be interpreted having regard insurance law's interpretive principles, meaning they should favour precision and certainty. Therefore, Art. 2402 concerns only indictable offences, not hybrid offences, which was the case here, meaning the exclusion clause cannot be set up against Émond.

Why important

Criminal exclusion clauses in Québec can only exclude indictable offences, not hybrid offences. Art. 2402 of the *Civil Code of Québec*, and likely other statutes relating to insurance, should be interpreted having regard for insurance law's interpretive principles.

Key quote

"For the reasons given by the Court of Appeal, we are all of the opinion that the exclusion from the insurance policy based on art. 2402 of the *Civil Code of Québec* may not be set up against the heirs of the insured, as that article must, even in light of s. 34(1) of the federal *Interpretation Act*, R.S.C. 1985, c. I-21, be interpreted having regard to the principles of interpretation that apply in the area of insurance law so as to favour the precision and certainty of the grounds for exclusion in such matters."[27]

[27] *Desjardins Sécurité financière, compagnie d'assurance-vie v. Émond*, 2017 SCC 19, *per* Wagner J.

Leaves to Appeal Granted

1. **Civil Procedure: Document Retention/Preservation**
Canada (Attorney General) v. Fontaine et al., 2016 ONCA 241 (Leave granted: Oct. 27, 2016)

In the context of Indian residential schools litigation/process, what documents are to be kept, and for how long.

2. **Civil Procedure: Jurisdiction**
Haaretz.com et. al. v. Goldhar, 2016 ONCA 515 (Leave granted: Mar. 9, 2017)

The Applicant Haaretz, Israel's oldest daily newspaper, published an article criticizing the management style and business practices of the Respondent Mitchell Goldhar. Mr. Goldhar was a Canadian businessman who owned Maccabi Tel Aviv Football Club, a soccer team based in Tel Aviv. The article was available in print and on the newspaper's Hebrew and English-language websites. Mr. Goldhar commenced a defamation action in Ontario against the newspaper, its former sports editor and the author of the article. Haaretz moved to stay the action, arguing that Ontario courts lack jurisdiction simpliciter or, alternatively, that Israel is a more appropriate forum. Ontario Superior Court of Justice: motion to stay action for lack of jurisdiction simpliciter or, alternatively, based on forum non conveniens dismissed. C.A.: appeal dismissed.

3. **Insurance in Québec: "Care, Custody & Control" Exclusions**
3091-5177 Québec inc. f.a.s.r.s. Éconolodge Aéroport v. Compagnie canadienne d'assurances générales Lombard et autre, 2016 QCCA 1903 (Leave granted: May 18, 2017)

The Applicant Éconolodge Aéroport hotel offered a park and fly service that included accommodation, breakfast, parking for a car while out of the country and an airport shuttle service. A customer's vehicle was stolen from the hotel's parking lot, and filed a claim for the theft of his vehicle with his insurer, AXA Insurance Inc., which compensated him and, in return, brought an action in subrogation against the hotel. The hotel argued the claim was covered by its insurance policy, so it brought an action in warranty against the Respondent Lombard General Insurance Company. However, Lombard refused to defend Éconolodge, arguing the [translation] "custody, control or management" exclusion in the insurance policy applied. Court of Québec: action in warranty allowed. C.A.: appeal allowed.

4. **Insurance in Québec: "Care, Custody & Control" Exclusions**
Promutuel Portneuf-Champlain, société mutuelle d'assurance générale v. Compagnie canadienne d'assurances générales Lombard, 2016 QCCA 1903. (Leave granted: May 18, 2017)

Similar summary to that immediately above.

5. **Professions in Québec: Legal Documents by Non-Lawyers**
Québec (Procureure générale) v. E.D., 2016 QCCA 536 (Leave granted: Sept. 8, 2016)

Before the social affairs division of the Administrative Tribunal of Québec ("ATQ"), in proceedings between the Minister of Employment and Social Solidarity ("Minister") and individuals (the Respondents) dealing with the granting of social assistance, the Minister filed motions for review with the ATQ that had been prepared, drawn up, signed and filed by an official of the Ministère de l'Emploi et de

la Solidarité sociale. The Respondents concerned, who were represented by counsel, filed motions to dismiss those proceedings on the ground they had not been drawn up by a member of the Barreau du Québec. Administrative Tribunal of Québec (social affairs division): motions to dismiss dismissed. Québec Superior Court: judicial review allowed. C.A.: appeal allowed.

6. **Torts: MVA's**
J.C.R. v. J.J., 2016 ONCA 718 (Leave granted: Mar. 9, 2017)

There is a publication ban in this case, a publication ban on the named party, and the court file contains information not available for inspection by the public, in the context of a single catastrophic MVA involving minors.

7. **Workers Comp in Québec: Duty to Accommodate**
Commission de la santé et de la sécurité au travail v. Caron, 2015 QCCA 1048 (Leave granted: Mar. 17, 2016)

The Respondent, Alain Caron, developed a case of epicondylitis in the course of his work as an instructor at the Centre Miriam (the "employer"). He was given a temporary reassignment which the employer terminated three years later. The Respondent has not returned to work at the Centre Miriam since then. A year after the Respondent suffered his employment injury, the CSST declared this injury had consolidated with permanent impairment and functional disabilities, and the CSST then began a rehabilitation process to assess whether the Respondent could continue working for his employer. It eventually declared that the Respondent was fit to return to the position he had held before his injury, but the employer successfully challenged that decision before the CLP. The CSST, having been informed by the employer that it had no suitable employment to offer, then decided the rehabilitation process would continue and his occupational opportunities would be re-evaluated on the basis that the employer had no suitable employment to offer. The Respondent's union asked the CSST to reconsider that decision, arguing the functional limitations resulting from the employment injury at issue made the Respondent a person with a handicap within the meaning of section 10 of the Québec Charter, he could not be discriminated against because of this handicap and that, in looking for suitable employment, the employer had to make every effort to facilitate his return to work without, however, imposing undue hardship on him. The CSST concluded the principle of reasonable accommodation could not be applied to disputes under the A.I.A.O.D. because the provisions of that statute are accommodation measures specific to employment injuries. The Respondent challenged the CSST's decision before the CLP, which confirmed the CSST's decision and therefore dismissed the Respondent's application to subject the employer to a duty of accommodation under the Charter. Québec Superior Court: judicial review allowed. C.A.: appeal dismissed.

And late-breaking decisions

1. **Civil Procedure: Tobacco Litigation; Disclosure; Privacy**
HMTQ v. Philip Morris International, Inc. 2017 BCCA 69 (37524)

Issue: What has to be disclosed in tobacco litigation.

2. Criminal Law: (Alleged) Inappropriate Police Actions
R. et al. v. D.B. et al., 2017 BCCA 84 (37476)

Issue: Confidential informer privilege v. solicitor/client privilege.