Tort Law Update

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This paper catalogues some significant tort cases in the Supreme Court of Canada and the Alberta Court of Appeal since the last Tort Update (Klar) in May, 2009. It includes 29 cases, 10 in the Supreme Court and 19 in the Court of Appeal, and is organized under the following headings: Defamation, Negligence and the Duty of Care, Negligence and the Standard of Care, Negligence and Breach of Statute, Negligence and Causation, Negligent Misrepresentation, Malicious Prosecution, Tort Damages, Tort Procedure, Fatal Accidents, Occupiers' Liability, and Constitutional Actions Instead of Tort.

DEFAMATION

The tort of defamation is essentially a type of no-fault liability and making out a *prima facie* case is relatively straightforward. The plaintiff has to prove only these three things: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of reasonable people; (2) that the words referred to the plaintiff; and (3) that the words were published, meaning they were communicated to at least one person besides the plaintiff. At that point falsity and damage to reputation are presumed and the onus shifts to the defendant to establish an applicable defence.

1. The New Defence of Responsible Communication on Matters of Public Interest

With regard to statements of fact, the two main defences, historically, were justification (truth) and privilege (absolute or qualified). However, neither defence has ever provided much legal cover for members of the media, whether media workers who report the stories or media organizations which publish them. But now, in ***Grant v. Torstar Corp.,*** [2009] S.C.J. No. 61 (S.C.C.), and its companion case of ***Quan v. Cusson,*** [2009] S.C.J. No. 62 (S.C.C.), the Supreme Court of Canada has unanimously (9-0) established a new defence for those who publish libellous facts: the defence of responsible communication on matters of public interest.

For analysis of ***Grant*** and ***Quan***, see Iwan Saunders, "Developments in Tort Law: The 2009-2010 Term", (2010), 52 S.C.L.R. (2d) 311, at 311-19.

2. The Old Defence of Fair Comment

When it comes to statements of opinion, as opposed to fact, there are two main defences to a *prima facie* claim in defamation: privilege (absolute or qualified) and fair comment. Though available to defendants generally, the defence of fair comment is most frequently invoked by members of the media. As a result of the then leading case of ***Cherneskey v Armadale Publishers Ltd.***, [1978] S.C.J. No. 115 (S.C.C.), the essential elements of fair comment were typically set out as follows: (1) the comment must be on a matter of public interest; (2) the comment must be based on fact; (3) the comment, though it can include inferences of fact, must be recognizable as comment; and (4) the comment must have been honestly believed by its writer or publisher. But the defendant having established these elements, the plaintiff could still defeat them by proving defendant malice.

With respect to element (4), the ***Cherneskey*** test for honest belief was obviously subjective, which is why fair comment failed in the case itself: there was no evidence of anyone's honest belief in the defamatory language. Some 30 years later, in ***WIC Radio Ltd. v. Simpson***, [2008] S.C.J. No. 48 (S.C.C.), the Supreme Court again considered fair comment, for the first time since ***Cherneskey*** and, more important, for the first time since passage of the *Charter*. In ***WIC Radio*** the central question once more was whether the test for honest belief was subjective or objective. And the Supreme Court unanimously (9-0) decided to change the law: going forward, the test for honest belief should be objective, not subjective.

For analysis of ***WIC Radio***, see Iwan Saunders, "Developments in Tort Law: The 2009-2010 Term" (2010), 52 S.C.L.R. (2d) 311, at 319-24.

3. Class Actions for Defamation

In a class action case from Quebec, alleging defamation of a group, in this case Montreal taxi drivers whose mother tongue was Arabic or Creole, the Supreme Court of Canada held (6-1) that, absent proof that all members of the group sustained damage, the action should be dismissed: ***Bou Malhab v. Diffusion Metromedia CMR Inc.***, [2011] S.C.C. No. 9 (CanLII).