Litigation Update

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1. Threshold for Establishing Compensability

In the by now famous fly-in-the-water-bottle case (*Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27), the Supreme Court found in that:

> ...the law of tort imposes an obligation to compensate for any harm done on the basis of *reasonable* foresight, not as insurance. The law of negligence seeks to impose a result that is fair to both plaintiffs and defendants, and that is socially useful. In this quest, it draws the line for compensability of damages, not at perfection, but at reasonable foreseeability. Once a plaintiff establishes the foreseeability that a mental injury would occur in a person of ordinary fortitude, by contrast, the defendant must take the plaintiff as it finds him for purposes of damages. As stated in *White*, at p. 1512, focusing on the person of ordinary fortitude for the purposes of determining foreseeability "is not to be confused with the 'eggshell skull' situation, where as a result of a breach of duty the damage inflicted proves to be more serious than expected". Rather, it is a threshold test for establishing compensability of damages at law.
>
> I add this. In those cases where it is proved that the defendant had actual knowledge of the plaintiff's particular sensibilities, the ordinary fortitude requirement need not be applied strictly. If the evidence demonstrates that the defendant knew that the plaintiff was of less than ordinary fortitude, the plaintiff's injury may have been reasonably foreseeable to the defendant.

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2. Mitigation in Wrongful Dismissal

The Supreme Court, in *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20 considered the duty to mitigate in the context of a wrongful dismissal action and found that:

> Given that both wrongful dismissal and constructive dismissal are characterized by employer-imposed termination of the employment contract (without cause), there is no principled reason to distinguish between them when evaluating the need to mitigate. Although it may be true that in some instances the relationship between the employee and the employer will be less damaged where constructive rather than wrongful dismissal has occurred, it is impossible to say with certainty that this will always be the case. Accordingly, this relationship is best considered on a case-by-case basis when the reasonableness of the employee's mitigation efforts is being evaluated, and

not as a basis for creating a different approach for each type of dismissal.

The decision of the court is reviewed in some detail in the article *Top court says dismissed employee must return to work to mitigate* published in the May 9, 2008 issue of *The Lawyers Weekly*.

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3. Owners Owe No Duty to Subcontractors in Tendering

The existence of a duty of an owner in a tendering process to subcontractors was considered by the Supreme Court in *Design Services Ltd. v. Canada*, 2008 SCC 22. The court found that the claims of the subcontractors did not fall into any recognized, pre-existing categories of duty of care in claims of pure economic loss and that finding a new duty of care was not justified in the circumstances, holding that:

> ...the appellants' ability to foresee and protect themselves from the economic loss in question is an overriding policy reason why tort liability should not be recognized in these circumstances. The appellants had the opportunity to arrange their affairs in such a way as to be in privity of contract with PW relative to "Contract A", but they chose not to do so and they are now trying to claim through tort law for lack of a contractual relationship with PW. Tort law should not be used as an after-the-fact insurer.

A summary of the decision can be found in the article, *Supreme Court of Canada Rules Owner in Tendering Process Owes No Duty of Care to Subcontractors*, by Paul Ivanoff and Roger Gillot, published in the May 12, 2008 *Osler Update*.

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4. SCC Refuses Leave to Appeal in 3 Manitoba Cases

The Supreme Court recently refused leave to appeal in the following decisions originating in Manitoba:

- *Penner v. P. Quintaine & Son Ltd.*, 2007 MBCA 159 (CanLII) in which the court considered the application of the implied undertaking rule;
- *Danylchuk et al. v. Wolinsky et al*, 2007 MBCA 132 (CanLII) in which the court considered an application for oppression remedies under s. 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44;
- *Histed v. Law Society of Manitoba*, 2007 MBCA 150 (CanLII) in which the court considered the "...proper balance between the constitutional right to freedom of expression and the need to regulate the conduct of members of the legal profession."

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5. Proposed Amendments to *The Court of Appeal Act*

Bill 39, *The Court of Appeal Amendment Act*, was introduced in the Legislature on May 1, 2008 and received 2nd Reading on May 22, 2008. The Bill amends the Act to add one judge to the current panel of seven and also creates authority for the Court to make orders with respect to vexatious litigants.

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