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New Defamation Defence Protects Public Interest Communications: SCC

Media organizations welcomed the recent Supreme Court of Canada decision in [Grant v. Torstar Corp.](#), 2009 SCC 61 (and its companion case [Quan v. Cusson](#), 2009 SCC 62) creating a new defamation defence of responsible communication on issues of public importance. Finding the strict liability libel law protecting reputation to be "not justifiable," the court creates a new defence requiring the judge to decide whether the publication concerns a matter of public interest and the jury to consider whether its publication was responsible (i.e. was the publisher diligent in trying to verify the facts). The following articles summarize the decision and discuss the reaction to it by lawyers and media outlets:

[Grant v. Torstar Corp.: Responsible communication on matters of public interest](#) by Ahsan Mirza, posted January 11, 2010 on The Court;

[Fundamental shift Supreme Court ruling puts onus on plaintiffs in libel actions](#) Law Times article from December 29, 2009;

[Responsible communication defence Judges alone will decide if matters are of the public's interest](#) published December 29, 2009 in Law Times;

[Globe and Mail](#), [Montreal Gazette](#) and [Toronto Star](#) articles.

Defining the Term Accident: A "Philosophically Complex Simple Question"

The Supreme Court of Canada sheds new light on the definition of the term "accident" in an insurance policy in [*Co-operators Life Insurance Co. v. Gibbens*](#), 2009 SCC 59, decided December 18, 2009. Noting that "a century and a half of insurance litigation has failed to produce a bright line definition of the word" and that "insurers have consistently declined to attempt to define the term in their policies," the court goes on to find that the average person would not consider a disease arising in the natural and ordinary course of events to be an accident. The court found that the insured's loss (paralysis resulting from a rare STD complication) was not covered, as it was not caused by "external, violent and accidental means" within the meaning of the policy. The following articles discuss the decision:

[*Swimming in a Serbonian Bog: the SCC Revisits the Meaning of 'Accident'*](#), posted December 24, 2009 on the Clark Wilson website;

[*"Accident" Insurance and Injuries Resulting from Unprotected Sex*](#) by Daniel Del Gobbo, posted December 18, 2009 on The Court.

A "Good Hard Look" at Summary Judgment

Three recent Manitoba decisions have considered the legal test for summary judgment under Queen's Bench Rule 20. In each case the court found that the defendant met the initial test in support of the motion to dismiss and the plaintiff failed to establish a triable issue.

In [*Bridgwater v. Stanhope et al.*](#), 2009 MBCA 126 the court dismisses the plaintiff's appeal of a [summary judgment](#) dismissing his negligence claim against two defendants under Queen's Bench Rule 20. In concluding that the motions judge made no error in law in his articulation or application of the test on summary judgment the court comments that:

...Rule 20 should not be used as a means to avoid a trial on *viva voce* evidence simply because the plaintiff's case is weak. Since an order pursuant to this rule takes away a party's right to a full trial, it must be used with care, good sense and practicality. On the other hand, the objective of the summary judgment process is to screen out claims that in the opinion of the court, based on evidence furnished as directed by the rule, ought not to proceed to trial because they cannot survive the "good hard look." It is not sufficient for the responding party to say that more and better evidence will or may be available at trial. Parties should not have to be put through a trial unless a genuine issue arises as to their liability (para. 7).

In [*Beavis et al. v. PricewaterhouseCoopers Inc.*](#), 2009 MBQB 286, the court confirmed the master's order granting summary judgment to the defendants, who had established that the limitation period expired before the action commenced. The court found no factual basis and therefore no merit to the plaintiff's argument that the limitation period had not expired because damages were not suffered until a time within the limitation period.

The defendants successfully appealed the master's [decision](#) to refuse summary judgment in [*Arctic Foundations of Canada Inc. v. Mueller Canada Ltd.*](#), 2009 MBQB 309. The court's outline of the test for summary judgment and the relevant case law is worth reviewing (see paras.60 to 70 of the decision). Applying the test, the court finds that the plaintiffs' claim for economic loss has no realistic chance of success and should not proceed further. The court also finds no special circumstances to justify permitting the plaintiff to amend the statement of claim to include a new cause of action in negligent misrepresentation.

General Damage Claims Against Air Carriers Excluded: MBCA

In [*Lukács v. United Airlines Inc.*](#), 2009 MBCA 111 the Court of Appeal refused leave to appeal a small claims court decision (heard in the Court of Queen's Bench) denying the plaintiff

compensation for mental anguish and missed academic opportunity when he was unable to attend a conference because of a flight cancellation. The court agreed with the trial judge that general damages for inconvenience or mental anguish are not compensable under the Montreal Convention. The court also rejected the applicant's argument that a claim for missed opportunity is not a claim for general damages in the context of carriage by air. They found this to be a question of mixed law and fact and therefore not appealable. In addition, they found the claim lacked substance, likening it to attempting to recharacterize hard to quantify damages as a claim for special damages.

Proposed *Insurance Act* Changes

Manitoba Finance is considering amendments to *The Insurance Act* concerning privileged information (similar to s.816.1 and s.816.2 of the Alberta [Insurance Act](#)). The Civil Litigation section of the Manitoba Bar Association seeks input from members on this issue by February 26, 2010. They will summarize the results and send them to Manitoba Finance. The Canadian Council of Insurance Regulators' [Final Report on Privilege Model and Whistle Blower Protection](#) provides context on the issues.

Resources for Litigation Lawyers

In the article [Discrimination in Human Rights Law Twenty Years After Andrews](#), recently posted on BC CLE's [Practice Points](#), the authors review recent Canadian case law on the test for *prima facie* discrimination in human rights law.

Peacemakers Trust publishes an acclaimed online [bibliography](#) of conflict resolution and ADR materials edited by Catherine Morris, a good starting point for research in this area.

Upcoming Law Society CPD

The Law Society and Seminar Partners Inc. are co-sponsoring the program [Advanced Cross-examination Techniques](#), which takes place January 25, 2010 at the Delta Winnipeg. Acclaimed presenters Larry Pozner and Roger Dodd will cover leading questions, controlling witnesses, cross-examination sequences, loops and trilogies, and the chapter method of cross-examination in this intensive day long seminar. For a sneak preview of some of the program's content, check out Roger Dodd's newly released [article](#) on use of blackberries and other technological devices during cross-examination.

Human Rights Commission staff and experienced practitioners will review important developments in the area of human rights law and provide practical tips concerning all levels of the process in [Let Me Get This Right: A How-To Session for the Human Rights Commission Process](#). The noon hour program will be held February 4, 2010 at the Law Society classroom.

Mark your calendars now for [E-Discovery - A Primer](#), a half-day program designed to help you understand how e-discovery issues will affect your practice. Presenters include Sedona Conference Institute 2009 faculty members Susan Wortzman and James Swanson, who will provide an overview of the Sedona Canada Principles. The program takes place March 25, 2010 from 12:00 noon to 4:00 p.m. at the Law Society classroom.

Mid-Winter 2010

The Manitoba Bar Association's [2010 Mid-Winter Meeting](#) takes place January 21-23 at the Fort Garry Hotel. Programs that may be of interest to litigators include:

- **Making Sense of Statutory Interpretation** - a primer on the theoretical, practical and judicial perspectives on interpreting statutes;
- **Compensation for Impacts on Aboriginal & Treaty Rights** - an expert panel

on justifying compensation and quantifying impacts;

- **Damages** - up-to-date information on the law of damages;
- **French Language Advocacy in Manitoba** - a practical overview on invoking a client's language rights.

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