Keeping Tabs

Monthly News from The Young Advocates' Standing Committee

Chair Chat

Yashoda Ranganathan

Did you ever wonder why advocates celebrate the "End of Term"? Apparently, the advocates of yore took the whole summer off and the Courts were closed. Pretty sweet, huh?

And why not? Summer in Ontario is beautiful! Who wants to work when the warm weather you have been waiting for all year is finally at hand!

As much as I'd like to take a page out of the book of the advocates of yore, it's a new term and I've got work to do as the new Chair of the Young Advocates' Standing Committee ("YASC").

What is YASC? We are a standing committee of The Advocates' Society with a mandate to be a voice for young advocates (advocates who are ten years of call or fewer) within the Society and within the profession. We do this through net-working/mentoring events, by publishing articles by and for young advocates, and by raising issues of concern to young advocates as we work with the Society's board.

Our pledge this year is to keep you better informed of what we are doing and how you can get involved.

As a first step, Ben Kates, the Secretary of YASC, has set up a volunteer roster for those of you interested in getting involved in the work of the Society by writing (articles or blog posts); helping out at events/education programs; or providing legal research and writing support in relation to interventions and initiatives of the Society. If you are interested in volunteering in any of these ways drop Ben a line at BenK@Stockwoods.ca.

Yashoda

Upcoming Events

Trivia Challenge (Sudbury)
July 15, 2015

Young Advocates' Pub Night (Toronto)
September 9, 2015

Opening of the Courts/Catzman Award (Toronto)
September 24, 2015

Mentoring Dinner (Toronto)
October 22, 2015

Welcome to the new Young Advocates' Standing Committee for 2015-2016!

Thank you to outgoing Chair Brent Arnold, and welcome to the new YASC Chair Yashoda Ranganathan

The YASC Interview: Brent Arnold

By: Vanessa Voakes, *Stikeman Elliott LLP*

Brent Arnold, known on the street as "Brent", "Mr. Arnold" or sometimes, "Hey you", was called to the Bar in 2006. Outgoing Chair of the Young Advocates' Standing Committee, Brent is a Partner practising in Gowlings' Advocacy Department and specializing in commercial litigation and arbitration. Brent has appeared before all levels of court in Ontario, the Supreme Court of Canada and the Licence Appeal Tribunal, the Human Rights Tribunal of Ontario, the OMVIC Discipline Committee and the Ontario Municipal Board. Fun fact: Brent secretly wishes for a world in which no-one is judged for wearing a straw cowboy hat!

Which word do you prefer: litigator or advocate?

I'm supposed to say "advocate." I say "advocate" if I'm speaking to advocates. For others, I tell them I'm a trial lawyer, because they know what that means.

Why did you become an advocate (or, a trial lawyer)?

I fell in love with the job as a summer student at Gowlings. Going into the summer I didn't know what I wanted to do, but I got a lot of court time and got to see a lot of what the job was really like. I caught the bug.

What is the most exciting thing that has happened in your career so far?

The Supreme Court was hard to top, and I was there on a case with big political implications (*Reference re Securities Act*), which really spoke to my background. I suppose anyone sitting in the Supreme Court feels they're watching history in the making.

What is your idea of perfect lawyerly happiness?

I'm not sure "happiness" and "lawyer" fit together terribly well; any job where you take on the burdens of others means you live and die by the fortunes of others. The best days are the ones where you know you've done your best, and done well.

If you weren't a lawyer, what would you be?

An academic. I love teaching, and as a professor of mine once asked, where else but at university do you get to sit around talking about things you like?

If you could have one superpower, what would it be and why?

The ability to smell into the future, mostly because that one's not already taken. I'm deciding whether to sell the rights to Marvel or DC…

What is your preferred tipple on a hot summer day?

A good Belgian beer is my patio go-to.

Which words or phrases do you think other lawyers most overuse?

"Overwhelming evidence" and "author of his own misfortune" come to mind.

Which words or phrases do you most overuse?

I should probably retire "I'm in your hands" from my repertoire. I remember Justice Brown saying something to this effect: "You can put yourself in my hands if you like, but I can squeeze hard."

Who are your Judge crushes and why?

I've always been impressed with Chief Justice McLachlin. And I had the great good fortune to practice with Chief Justices Patrick Lesage and Roy McMurtry. Both were legendary judges but beyond gracious and generous with their time when they were at Gowlings.

What is your favourite case?

Whichever one I'm on…

Depends on my mood. Justice Quinn's judgments are always entertaining. And I have a soft spot for anything penned by Bora Laskin.

You were the Chair of YASC last year – what would you say was your biggest accomplishment?

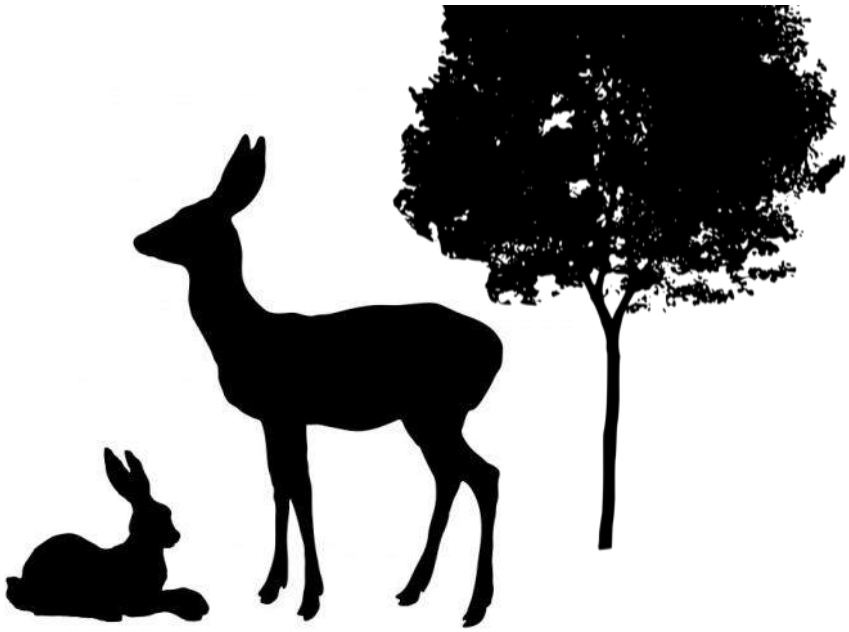
It's a big team, so the accomplishments are ours, not mine. We had a great year, making significant contributions to the Society's *Paperless Trials Manual* and the *Best Practices for Civil Trials*. I think our greatest accomplishment, though, was expanding YASC's programming throughout the province and making the Society more relevant for lawyers outside the GTA. I'm delighted to see the incoming Executive will be taking that trend even further.

If you could give one piece of advice to a new lawyer, what would it be?

I'd quote Kurt Vonnegut: "Keep your hat on. We could end up miles from here."

Universal Wisdom from *Bambi* and Why Litigants Should Heed It

Lionel Tupman, *Whaley Estate Litigation*



Bryant v. Best

In reviewing the Court's Endorsement on Costs in *Bryant v. Best*, 2015 ONSC 1853, released on March 23, 2015, I am reminded of the enduring wisdom which derives from Thumper, the cartoon bunny rabbit character in Walt Disney's classic movie, *Bambi*. Thumper's advice goes: "[i]f you can't say something nice, don't say anything at all." It appears, in communications between forest animals, and in litigation, this adage remains as true as ever.

Facts

On January 9, 2015, the Honourable Madam Justice Gauthier dismissed the moving party's motion. I'm not going to address the merits of the decision in this article. Rather, I'm going to focus on Justice Gauthier's decision on costs.

Justice Gauthier's Endorsement on Costs was released on March 23, 2015. The respondent, the Estate Trustee During Litigation ("Trustee"), was entirely successful in defeating the moving party's motion. Justice Gauthier referred to the Trustee's argument on costs, describing the evidence filed and the conduct of the parties during the motion:

> [4] Throughout the proceedings initiated by the August 5, 2014, Notice of Motion, the Trustee was repeatedly accused of dishonesty, and incompetence. The language used in Steven's material was intemperate and disrespectful. The complaints made against the Trustee in the execution of his duties were unfounded and unjustified. Sarah supported Steven's Motion, and herself made unfounded and unjustified accusations against the Trustee.
>
> [5] The positions advanced by both Steven and Sarah were ill-considered from the outset and completely unsupported by any cogent or coherent evidence.

Justice Gauthier ultimately held that the Trustee should be awarded his costs on a full indemnity basis, stating as follows:

> [34] The Trustee then is entitled to his costs relating to the motion. Insofar as the scale of costs is concerned:
>
> > It is a well-established principle of law that costs on a substantial indemnity basis are to be awarded only in rare and exceptional cases, where there has been reprehensible, scandalous or outrageous conduct in the course of the litigation.
> >
> > [...]
>
> [36] The jurisprudence also establishes that costs on the higher scale will be awarded where there are unfounded allegations of fraud and dishonesty. (*Twaits v. Monk*, 2000 CanLII 14725 (ON CA), [2000] O.J. No. 1699, 8 C.P.C. (5th) 230 (C.A.).

Discussion

The fact that unsubstantiated allegations of fraud or dishonesty may attract an award of costs on a substantial indemnity (or other elevated) scale should be familiar to most lawyers. Still, it bears repeating to all counsel and litigants, including self-represented litigants like the moving party in this case, that allegations of fraud and dishonesty must not be frivolously or arbitrarily pleaded. Proving fraud or breach of fiduciary duties as causes of action is not a task to be lightly undertaken. Without compelling, substantial proof – *real* evidence – of such causes of action, litigants will have difficulty satisfying a Court that it should make a finding going to the character, integrity, competence or professionalism of a defendant/responding party.

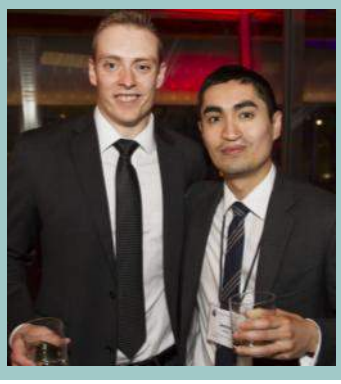
This is not to say, however, that litigants should not, in certain circumstances, plead fraud, dishonesty, or other related causes of action going to the "bad faith" of a party. When determining whether to plead such causes of action, the pros and cons must be weighed by litigants and counsel, and the strength of the evidence supporting the allegation must be viewed critically and pessimistically to assess the litigant's risk to an award of elevated costs.

This issue arises frequently in the context of estate litigation, where litigants often suspect that their opponents are dishonest thieves who are attempting to extort or swindle from an estate, a vulnerable person, or beneficiaries. What everyone (counsel and clients alike) should remember, however, is that allegations of dishonesty and fraud must not be made lightly and without compelling, cogent and convincing evidence to substantiate such claims.

Despite the wisdom of Thumper's advice, Thumper may not have been entirely correct. The more accurate adage to live by, at least in litigation, goes like this: "if you can't say anything nice, make sure you can prove whatever bad faith, dishonesty or fraud you are alleging."

Photo Gallery

Members of the Young Advocates' Standing Committee at the 2015 End of Term Dinner.



Intrusion Upon Seclusion—Three Years Later

Chloe Snider, *Dentons Canada LLP* and Brenna Nitkin (summer student), *Dentons Canada LLP*

January 18, 2015 marked the three year anniversary of the Court of Appeal for Ontario's landmark decision in *Jones v. Tsige* (2012 ONCA 32 (CanLII)), which established a new privacy tort – intrusion upon seclusion – in Ontario. This article looks back on that decision and highlights two recent appeal decisions relating to the development of that tort.

Jones v. Tsige concerned a dispute between two Bank of Montreal employees: Ms. Jones, the plaintiff, who had become romantically involved with the husband of the defendant, Ms. Tsige. Ms. Tsige accessed Ms. Jones' bank records more than 174 times[1], and Ms. Jones argued that Ms. Tsige had thereby unlawfully violated her right to privacy.

In determining whether Ms. Jones had a cause of action against Ms. Tsige based on a right to privacy, the Court of Appeal reviewed the four types of privacy torts recognized in American jurisprudence: (i) intrusion on the plaintiff's seclusion, (ii) public disclosure of embarrassing private facts about the plaintiff, (iii) publicity which falsely portrays the plaintiff in the public eye and (iv) appropriation of the plaintiff's name or likeness for the defendant's advantage.[2] In *Jones v. Tsige*, the Court of Appeal recognized the first type of privacy tort – intrusion upon seclusion – as being actionable in Ontario and awarded Ms. Jones $10,000 in damages.[3] In recognizing this tort, the Court of Appeal also relied on Charter values and emphasized that Charter jurisprudence "identifies privacy as being worthy of constitutional protection and integral to an individual's relationship with the rest of society and the state".[4]

The tort of intrusion upon seclusion recognized by the Court of Appeal requires an intentional (including reckless) intrusion on the plaintiff's private affairs or concerns in a way that a reasonable person would regard as highly offensive, resulting in distress, humiliation or anguish.[5] The Court held that these elements were intended to limit the cause of action so as not to "open the floodgates" except in circumstances where the invasion of privacy was both deliberate and significant.[6] The Court did not make any broader finding that would suggest that the other types of privacy torts recognized in American jurisprudence would be recognized in Ontario.

Although the Court of Appeal was cautious not to "open the floodgates" and did not go further than recognizing a cause of action for intrusion upon seclusion, two recent appeal decisions in Ontario and Manitoba on the issue of privacy suggest that the privacy tort recognized in *Jones v. Tsige* continues to expand incrementally as it is applied to different facts and circumstances. In February 2015, in *Hopkins v. Kay* (2015 ONCA 112 (CanLII)), the Court of Appeal for Ontario held that existing Ontario privacy legislation, the *Personal Health Information and Protection Act* ("*PHIPA*"), does not preclude a common law privacy cause of action where private medical records are improperly accessed. More recently, in May 2015, in *Grant v. Winnipeg Regional Health Authority* (2015 MBCA 44 (CanLII)), the Court of Appeal of Manitoba left open the possibility that a family member of an individual whose medical records had been publicly disclosed could rely on the privacy tort and that the Canadian privacy tort could expand beyond intrusion upon seclusion to include the third type of privacy tort recognized in American jurisprudence: publicity which falsely portrays the plaintiff in the public eye.

In *Hopkins v. Kay*, the plaintiff had commenced an action relying on the tort of intrusion upon seclusion after being notified by the Peterborough Regional Health Centre (the "Hospital") that the privacy of her personal health information had been breached.[7] The Hospital moved for an order striking the claim as disclosing no reasonable cause of action on the basis that *PHIPA* is an exhaustive code that ousts the jurisdiction of the Superior Court to entertain any common law claim for invasion of privacy rights in relation to patient records. The motion was dismissed and the Hospital appealed.

On appeal, the Court of Appeal concluded that the language of *PHIPA* does not imply a legislative intention to create an exhaustive code in relation to personal health information and that it contemplates other proceedings in relation to personal health information. The Court of Appeal also found that given the elements of the common law privacy action, allowing individuals to pursue common law claims does not conflict with or undermine the scheme established by *PHIPA*. Accordingly, there was "no basis to exclude the jurisdiction of the Superior Court from entertaining a common law claim for breach of privacy and, given the absence of an effective dispute resolution procedure, there is no merit to the suggestion that the court should decline to exercise its jurisdiction."[8] The Hospital has sought leave to appeal to the Supreme Court of Canada.

In *Grant v. Winnipeg Regional Health Authority,* the sister of the late Brian Lloyd Sinclair, a forty-five year old disabled man of Aboriginal ancestry, who died sitting in the emergency waiting room of the Health Sciences Centre ("HSC") in Winnipeg, commenced an action the HSC based on, among other causes of action, the developing privacy tort.[9] As the closed-circuit television ("CCTV") recording disclosed, Mr. Sinclair waited for thirty-four hours to be seen by medical personnel regarding a blocked catheter.[10] No medical staff at the HSC approached Mr. Sinclair in the waiting room until after he had already died of a treatable bladder infection.[11] HSC brought a motion to strike portions of the claim as disclosing no reasonable cause of action. The Master who heard the motion granted an order striking portions of the claim and the Manitoba Court of Queen's Bench affirmed that decision.

On appeal, Justice Mainella of the Court of Appeal of Manitoba allowed the appeal in favour of Mr. Sinclair's sister and held that the motion judge erred in denying her standing to advance a *Charter* claim on Mr. Sinclair's behalf.[12] In concurring reasons, Justice Monnin addressed the second issue before the court, namely, whether Mr. Sinclair's sister had standing to rely on the tort of intrusion upon seclusion based on the disclosure of Mr. Sinclair's confidential health information to the media after his death.[13] Mr. Sinclair's sister argued that the hospital disclosed that Mr. Sinclair had never approached the triage desk in the emergency room, information which could only have been obtained from the hospital's records.[14] Not only was Mr. Sinclair's confidential patient information leaked to the media, but this statement also turned out to be false (after the CCTV footage was released).[15] Justice Monnin found that had Mr. Sinclair not succumbed to his infection in the waiting room, he may have advanced a claim for either breach of confidence, intrusion upon seclusion, or publicity which falsely portrays the plaintiff in the public eye, and that it was a possibility that his sister may also have been able to rely on the tort.[16] Justice Monnin ordered that the privacy tort issue, along with the *Charter* issues, be referred back to the motion court, with leave to the plaintiff to amend the pleadings to reflect a cause of action based upon a breach of confidence, intrusion upon seclusion or publicity which falsely

portrays the plaintiff in the public eye, using the facts set out in the statement of claim.

Grant represents potentially significant developments to the privacy tort for two reasons. First, it suggests that the cause of action may be open not only to an individual whose privacy right has been breached, but also to family members. As Justice Monnin stated, this is still an open question.[17] Secondly, Justice Monnin's reasons suggest that the third type of privacy tort recognized in American jurisprudence – publicity which falsely portrays the plaintiff in the public eye – may also be recognized as part of the privacy tort in Canada (in addition to intrusion upon seclusion, which has already been recognized).

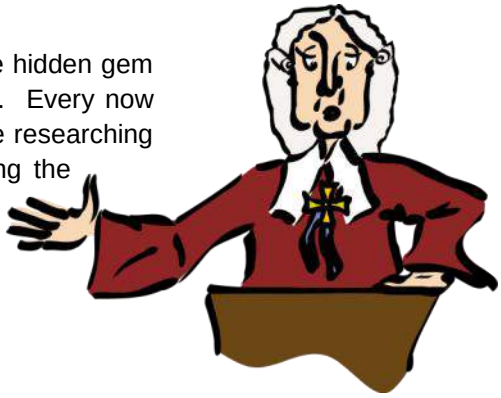
When *Hopkins* was heard at the Ontario Superior Court of Justice last year, Justice Edwards opened his judgment with the following observation, "With the click of a mouse, personal health records can be accessed by those who have a legitimate interest in properly treating a patient — or they can be accessed for an improper purpose".[18] As accessing confidential health information becomes as effortless as simply clicking a button, an individual's privacy rights become increasingly susceptible to violation. It will be interesting to follow the evolution of the privacy torts articulated in *Jones v. Tsige*, particularly in light of the ongoing litigation in *Grant*, which has been sent back to the motions judge, and *Hopkins*, which the Supreme Court of Canada now has the option to address.

Sources

[1] *Jones v Tsige*, 2012 ONCA 32 at para 2, 346 DLR (4th) 34 [*Jones*].
[2] *Ibid* at para 18.
[3] *Ibid* at para 92.
[4] *Ibid* at para 39.
[5] *Ibid* at para 71.
[6] *Ibid* at para 71-72.
[7] *Hopkins v Kay*, 2015 ONCA 112 at paras 5-6, 380 DLR (4th) 506 [*Hopkins*].
[8] *Ibid* at para 73.
[9] *Grant v Winnipeg Regional Health Authority*, 2015 MBCA 44 at paras 9 and 12, 230 ACWS (3d) 1028 [*Grant*].
[10] *Ibid* at paras 12-13.
[11] *Ibid.*
[12] *Ibid* at paras 4, 96-98.
[13] *Ibid* at para 5.
[14] *Ibid* at para 103.
[15] *Ibid*.
[16] *Ibid* at para 126.
[17] *Ibid* at para 127.
[18] *Hopkins v Kay*, 2014 ONSC 321 at para 1, 119 OR (3d) 251.

Poetic Justice

Erin Durant, *Dooley Lucenti LLP* and Chris Horkins, *Cassels Brock & Blackwell LLP*



Young advocates spend countless hours reviewing case law, searching for the hidden gem that will elevate our not-so-brilliant legal arguments in the minds of the court. Every now and then, we stumble upon a case that is completely irrelevant to what we are researching but which causes us to laugh and waste several non-billable minutes sharing the case with colleagues on Twitter. Below are some of our favourites.

Do you know the judge and case name for the classics below?

"I accept the plaintiff's evidence that it is more common, than not, for pedestrians, typically students, to cross Union Street, both north and southbound in the vicinity of whatever university facility they are attending, as opposed to walking to the crosswalk." [i]

"*From* there to here, *from* here to there, funny things are everywhere! [...] When you have to quote Dr. Seuss for a pithy opening, you know the legal cupboard is bare." [ii]

"After a busy day conducting illegal drug transactions, the plaintiff, the defendant and a mutual friend stopped at a corner store where the defendant purchased some 'scratch' lottery tickets. One of the tickets proved to be a $5-million winner. The parties dispute ownership of the winning ticket. If the ticket were a child and the parties vying for custody, I would find them both unfit and bring in Family and Children's Services." [iii]

Be featured in an issue of Keeping Tabs!
Tweet us your Poetic Justice @Advocates_Soc

i This may only be enjoyable to other graduates of Queen's Law School who understand the pedestrian and traffic patterns of Union Street in Kingston, Ontario. Justice Pedlar in *Holmes v. Kingston (City)*, 2009 CanLII 22556 (Ont. S.C.J.) at para. 10.

ii Justice F.L. Myers in *Rookie Blue Two Inc. v. Her Majesty the Queen*, 2015 ONSC 1618 at para. 1.

iii Justice Quinn in *Miller v. Carley*, 2009 CanLII 39065 (Ont. S.C.J.) at paras.1-2.