Keeping Tabs

Monthly News from The Young Advocates' Standing Committee

Liability of Theft Victims | Social Media on Trial | Barrie Wine & Cheese Trivia Challenge | Interview | Upcoming Events

The Young Advocates' Standing Committee ("YASC") is 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 networking/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 of Directors. The opinions expressed by individual authors are their own and do not necessarily reflect the policies of The Advocates' Society.

CHAIR CHAT

BY: DANIEL NAYMARK, *NAYMARK LAW*

The Advocates' Society and YASC do a few different kinds of things. There's the hallmark TAS advocacy skills training, and YASC's mentoring programs. There are the headline-worthy advocacy projects, like interventions at the Supreme Court. But for my money, the organization's most important role in the lives of young advocates is as a builder of community.

Entering the profession as a new lawyer, or moving to a new city where the faces at the bench and bar are unfamiliar, can be daunting experiences. I have been attending TAS programs since my call, and through them I've come to feel that I work day-to-day as a participant in a vibrant professional community with a shared history, traditions, and values. That sense of belonging, and the relationships that I've made in my professional community through YASC/TAS, make my work life that much more fulfilling.

Over the coming month, YASC is spreading its community-building efforts to new centres. On April 5th, we are hosting our first pub night in Halifax, at East of Grafton. On May 4th, we are hosting our first North Toronto pub night, at the Miller Tavern. Good first steps, I hope, in helping young advocates in both centres to find their own communities. And an established favourite returns April 6, with Wine & Cheese with the Bench in downtown Toronto.

Read on to learn about apportionment of fault from Meryl Rodrigues and about the use of Facebook in MVA trials from Jeremy Rubenstein, and to learn more about the hitherto mysterious Thomas Milne of Nahwegahbow Corbiere Genoodmagejig.

Daniel

Applications for the 2017-18 Young Advocates' Standing Committee are open until **March 31**.
More information & application HERE

Editor:
David Campbell, *Rogers Partners LLP*
Email: David.Campbell@rogerspartners.com
Assistant Editor:
Emily Pinckard, *Ross Barristers*
Email: EPinckard@rossbarristers.com

Contributors:
Daniel Naymark, *Naymark Law*
Meryl Rodrigues, *Rogers Partners LLP*

Contributors:
Jeremy Rubenstein, *Williams Litigation Lawyers*
Thomas Milne, *Nahwegahbow Corbiere Genoodmagejig Barristers & Solicitors*

Theft, Beer, and the Unlocked Car: *The Evolving Liability of Theft Victims*

BY: MERYL RODRIGUES, *ROGERS PARTNERS LLP*

Earlier this month, the Supreme Court of Canada granted leave to appeal in *J.J.* v. *C.C.* While hardly a flashy name, the case might be well on its way to making it into Canadian tort texts everywhere—and for good reason.

The underlying facts—involving wayward youth, alcohol, an unsuspecting garage and, ultimately, an unfortunate accident (all set in small town Ontario)—have given rise to not only an unusual jury verdict, but also a seemingly controversial appellate decision establishing a new duty of care. It is, it would seem, a controversy that the SCC would like to address, and there appear to be a number of issues that the Court might discuss in doing so.

Background

On a summer evening in 2006 in Paisley, Ontario, J.J. and C.C. (then 15 and 16, respectively) walked around town intending to steal from unlocked cars. C.C., at least, had been drinking alcohol, including beer his mother bought him. His mother, D.C., is also a defendant.

The two boys went to Rankin's Garage, a car and truck servicing and sales business (and a third defendant). The garage property was not secured, despite theft being an issue in the area. The two boys found an unlocked car with the keys in the ashtray. C.C. decided to steal the vehicle, though he was unlicensed and had no driving experience. The vehicle was subsequently involved in a crash while driven by C.C. His passenger, J.J., suffered a catastrophic brain injury.

C.C. pleaded guilty to several criminal charges relating to the theft and driving. His mother pleaded guilty to a charge of supplying alcohol to minors.

The Trial

J.J.'s suit against C.C., D.C. and the garage proceeded to a jury trial in 2014. The trial judge found that there was an established duty of care owed by the garage to the plaintiff, in part on the basis that people in possession of motor vehicles ought to ensure that youth "are not able to take possession of such dangerous objects."

The jury apportioned 37% liability on the garage, 30% on D.C., 23% on C.C., and 10% for J.J.'s contributory negligence. It is difficult to understand how, given the circumstances, the garage could be found *more* at fault than the other parties.

The Appeal

The Court of Appeal dismissed the garage's appeal on the question of whether the trial judge had erred in finding that the garage owed a duty of care to J.J.

The Court determined that the trial judge *had* erred in finding that a duty of care had already been established by case law, and accordingly undertook an *Anns-Cooper* analysis to conclude that a duty of care was nevertheless owed in the circumstances. The Court found that it was reasonably foreseeable that minors might steal an unlocked car from the garage, given that the garage was easily accessible, there were no security measures implemented, cars were unlocked with keys within, and there was a history of theft and mischief in the area. The Court further concluded that proximity was established such that the garage should have considered security measures to protect minors like J.J. from potential harm.

Finally, concerning the *Anns-Cooper* test, the Court found that there were no residual policy concerns to negate the *prima facie* duty of care.

On a further ground of appeal, the Court concluded that the jury verdict was not unsustainable and there was no basis to interfere with it.

What's next?

While perhaps the conclusion offends some sensibilities, the Court of Appeal's reasoning is arguably compelling on the specific facts of the case, where a commercial business failed to secure vehicles over which it had care and control in the face of a history of theft in the area.

That said, the Court's broad-strokes proximity analysis does not appear to address the "close and direct" relationship or "neighbourhood" required to underpin a duty of care, as outlined all the way back in *Donoghue* v. *Stevenson*. Rather, the Court appears

LIABILITY OF THEFT VICTIMS

to have relied on its finding that the garage should have contemplated minors—even minors with criminal intent—in its security considerations, and that it was fair and just to impose a duty of care in the circumstances to conclude that proximity was established.

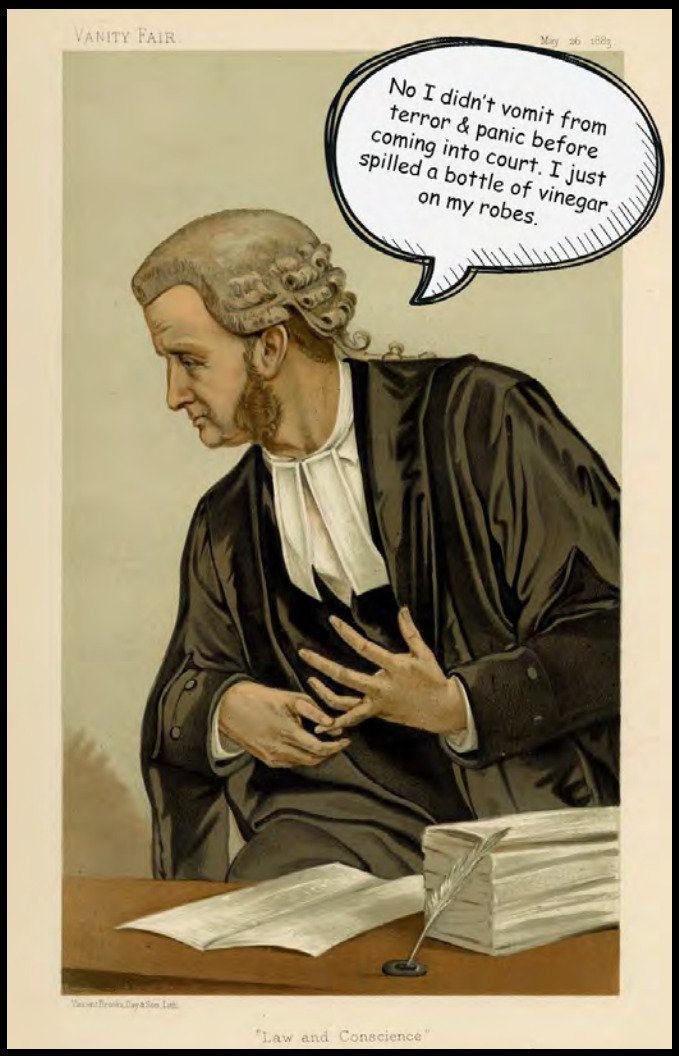
Arguably, there are factors that may be considered as part of the analysis that do not support the Court's proximity conclusion. For example, in *Odhavji Estate* v. *Woodhouse*, 2003 SCC 69, the SCC considered the direct causal link between the alleged misconduct and the resulting harm as one factor to support a proximity finding. Can such a close causal link between the garage's poor security measures and the plaintiff's injuries be established in all the circumstances of this case? Perhaps this is an issue that the SCC will seek to clarify.

There are other issues that might be addressed by the SCC. The case potentially provides an opportunity for the Court to revisit the implication of the *ex turpi causa* doctrine in a duty of care analysis (as opposed to as a defence), as discussed in *Hall* v. *Hebert*, [1993] 2 S.C.R. 159. While the facts of the case are unique in that there was a history of theft in the area, the Court of Appeal's decision seems poised to expose other victims of theft to civil liability.

Additionally, though not addressed by the Court of Appeal, the element of causation vis-à-vis the garage's negligence might be considered: "but for" the unsecured garage and vehicle, would the injury not have occurred? Or, is this an appropriate case to apply the "material contribution" test for causation? There may also be a whole slew of concerns to canvass relating to consent to drive issues. Or perhaps the SCC will consider this a case where the jury verdict is "plainly unreasonable and unjust", given that a seemingly innocent party was found more at fault than defendants engaged in criminal acts that contributed to the accident.

Ultimately, the SCC's decision looks to be one that will be eagerly anticipated and will hopefully ease any ruffled feathers one way or the other.

Courtroom Cartoon



Wine & Cheese with The Bench

April 6, 2017
Campbell House
Toronto, ON

Click here for registration

Halifax Pub Night

April 5, 2017
East of Grafton, 1580 Argyle St.
Halifax, NS

Click here for more information

Social Media on Trial: The Use of Facebook in MVA Trials

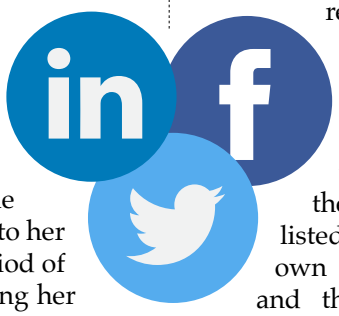
BY: JEREMY RUBENSTEIN, *WILLIAMS LITIGATION LAWYERS*

In personal injury litigation, a claimant's online footprint from social media may be one of the first stops for defence counsel when a new file arrives on his or her desk. Since social media profiles may be a source of photographs or posts of the claimant that are inconsistent with his/her stated injuries or restrictions, the introduction of these documents into evidence may affect a claimant's credibility. However, in motor vehicle accident litigation, online content becomes even more important because of the limitations and conditions to compensation imposed by the regulations to the *Insurance Act*.[1] For this reason, strict adherence to the *Rules of Civil Procedure* regarding the use and disclosure of social media content is an important practice point.

The regulations to the *Insurance Act* preclude claimants from recovering various types of damages unless they are able to establish, with corroborating independent evidence, that they suffered a "permanent and serious impairment of an important bodily or psychological function" (referred to as 'meeting the threshold'). These regulations also provide that a claimant's injuries can meet the threshold if they substantially interfere with most of the claimant's activities of daily living. It is, therefore, not surprising that the admissibility of activity on social media profiles has become a key consideration for both defence and plaintiff personal injury lawyers in motor vehicle accident litigation.

In 2015 the Ontario Court of Appeal released its decision in *Iannarella v. Corbett*,[2] which set out strict requirements and expectations of defence counsel with regard to the use and disclosure of surveillance. Although this case did not directly address social media, it laid the framework that will govern the admission or exclusion of evidence when it relates to online profiles. This is seen in the recent decision, *Nemchin v. Green*.[3]

In *Nemchin*, the Defendant sought to cross-examine the Plaintiff on certain Facebook posts, to which the Plaintiff objected. The basis for the objection, although touching on issues of relevance, related to a failure to comply with the *Rules of Civil Procedure*, namely, the posts were not contained in the Defendant's Affidavit of Documents.



Earlier in the litigation, there was an agreement between counsel regarding the Plaintiff's Facebook page. The Plaintiff agreed to allow the Defendant to have access to her Facebook profile for a period of 8 hours before de-activating her account. Therefore, it was no secret that the Defendant had viewed the Plaintiff's Facebook profile and was aware of its contents. However, and perhaps most importantly, the Plaintiff requested an updated Affidavit of Documents as part of this agreement, which was not received.

Considering the posts were authored or posted on the Plaintiff's own profile page, the Defendant argued that all the posts were already in the Plaintiff's possession, power and control, and should have been contained in her own Affidavit of Documents. Essentially, the use of the Facebook material should not have come as any surprise. That notwithstanding, the Defendant suggested a break be permitted to allow the Plaintiff to review the specific posts and prepare for them with her counsel, which would alleviate any perceived prejudice.

The Plaintiff, on the other hand, argued that the late disclosure and the Defendant's failure to include them in an Affidavit of Documents was overly prejudicial for three reasons. First, the Plaintiff should not be forced to interrupt her evidence at trial to engage in further 'preparation' of hundreds of pages of material. Second, one of the Plaintiff's medical experts had already given evidence and did not have the opportunity to consider the Facebook posts to determine whether it would change the expert's opinion. Lastly, the late disclosure failed to allow the Plaintiff to consider the evidence in the context of settlement negotiations prior to the trial.

The Defendant's position was that the nature and extent of the Plaintiff's activities contained online were relevant to the purported severity of the Plaintiff's psychological injuries and therefore could go to whether they meet the threshold. In that sense, the Plaintiff should have listed these documents in her own Affidavit of Documents and therefore the absence of the content from the Defendant's Affidavit of Documents was of no consequence.

Conversely, the Plaintiff asserted she predominantly suffered from post-traumatic stress disorder, which was argued to be 'invisible'. Therefore, according to the Plaintiff, the Facebook posts were always irrelevant and not included in her own Affidavit of Documents on that basis. For that reason, the fact that the documents were not included in the Defendant's Affidavit of Documents led the Plaintiff to the conclusion that the Defendant did not consider them relevant either and the reliance of these posts at trial took her by surprise.

The trial judge agreed with the Plaintiff's position and excluded the Facebook documentation. This was not because of a finding that the

SOCIAL MEDIA ON TRIAL

documents were irrelevant, but rather because the Defendant's Affidavit of Documents should have included them if they were believed to be relevant. To that end, the trial judge followed the sentiments of the Court of Appeal in *Iannarella* v. *Corbett*, in repeating the following passage: "Given the interests of fairness and the objectives of efficiency and settlement, the court expects the parties to comply fully and rigorously with the disclosure and production obligations under the *Rules*". In other words, if the Defendant took the position that the documents were relevant, those documents ought to have been included in an Affidavit of Documents, regardless of whether they were included in the Plaintiff's Affidavit of Documents.

It is therefore important for all counsel to consider why Facebook posts are or are not relevant and to take extra care to consistently update their Affidavits of Documents in the event online content is considered relevant. The slightest deviation from the strict framework set out since *Iannarella* can be unforgiving and may result in the exclusion of otherwise favourable evidence.

---

1. *Insurance Act*, R.S.O. 1990, c. I.8.
2. *Iannarella* v. *Corbett*, 2015 ONCA 110.
3. *Nemchin* v. *Green*, 2017 ONSC 1403.

Barrie Wine & Cheese with The Bench

Members of the bench & bar mixed and mingled at Michael & Marion's in Barrie, ON on March 1, 2017

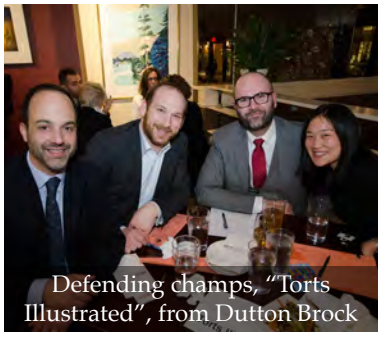
Michael Adams, Ashley McInnis, Madame Justice Eberhard, David Winnitoy

Sabrina Lucenti, Scott Fairley and David Thompson

Trivia Challenge For Charity - Toronto

The 6th Annual Trivia Challenge for Charity was held at The Hot House in Toronto, ON on March 23, 2017. A sold out crowd filled the room, and team "Conflict Cheques" from Cassels Brock & Blackwell LLP took home the trophy for 2017!

MC's for the evening, Emily Pinckard and Chris Horkins



Defending champs, "Torts Illustrated", from Dutton Brock

The Team from Torys LLP won Round 2

2017 Trivia Challenge Champions, "Conflict Cheques" from Cassels Brock & Blackwell LLP. Michael Mahoney, Alex Murphy, Derek Ronde, Jeremy Martin (missing from photo)

INTERVIEW

Interview with Thomas Milne,

Nahwegahbow Corbiere Genoodmagejig Barristers & Solicitors

BY: DAVID CAMPBELL, *ROGERS PARTNERS LLP*

1 **Q: Why did you become a litigator or advocate?**

A: I became an advocate to pursue truth and justice for First Nations people, which in some cases is long overdue for various reasons.

2 **Q: What do you like most about the practice of law?**

A: What I like most about the practice of law is that it is a profession where I can continue to learn new and interesting things, and meet interesting people who are doing extraordinary things.

3 **Q: Which living lawyer do you most admire?**

A: I admire living lawyers who are loyal to a particular cause and stick to it no matter what, and use their advocacy skills to advance the cause, whatever it may be.

4 **Q: What is your greatest fear in practice?**

A: Going to court with a dry cleaning tag stuck to my suit … oh wait! I've already done that! I suppose that I no longer fear. :)

5 **Q: What is your greatest extravagance in your everyday life?**

A: The lengths I'll go for excellent sound quality, excellent tea, and cigars.

6 **Q: How would your colleagues describe you?**

A: I think my colleagues would describe me as mysterious because I am an exceptional introvert.

7 **Q: What would you consider your greatest achievement?**

A: Biking and camping up and down Vancouver Island with a good friend of mine for several days without killing each other.

8 **Q: What is the latest non-legal book you've read?**

A: *Secret Path* by Gord Downie and Jeff Lemire.

9 **Q: Which talent would you most like to have?**

A: I would like to have the talent to shred a guitar with a well-placed face melter.

10 **Q: What is your favourite case?**

A: I don't really have a favourite case but I do appreciate decisions that are written using headings and sub-headings, and which clearly point out the legal analysis.

11 **Q: Who or what is the greatest love of your life?**

A: My wife, Bethany Scott, who is a fantastic ceramicist whose work can be found here: https://www.haroldferneshop.com/

12 **Q: If you weren't a lawyer, what would you be?**

A: My grandmother would have loved it if I turned out to be a Catholic Priest but I think she would have respected my choice to become a lawyer—the solemnity and robes are very similar!

13

Q: From whom have you learned the most about the practice of law?

A: I've learned the most about the practice of law from the partners of Nahwegahbow, Corbiere Genoodmagejig, David Nahwegahbow and Dianne Corbiere … and I'm not just saying that for brownie points!

14

Q: What is your most distinctive characteristic?

A: My good manners and dark, sarcastic humour (which runs in the family).

15

Q: What unique knowledge have you gleaned in your practice that you can share with other advocates?

A: The unique knowledge I have gathered from my practice includes knowing of the long, long struggle that First Nations people have endured in protecting their culture and way of life from encroachment, and the incredible tenacity, perseverance and strength that First Nations people continue to exhibit in protecting their rights against all odds.

Toronto Mentoring Dinner Series: Facing The Fear Factor

Thursday, May 25, 2017
Campbell House, Toronto, ON

Click here to register today

Upcoming Events

YASC Pub Night (Halifax)
April 5, 2017

Wine & Cheese with The Bench (Toronto)
April 6, 2017

John P. Nelligan Award for Excellence in Advocacy 2017 (Ottawa)
April 20, 2017

North of Bloor Pub Night (North York)
May 4, 2017

YASC Pub Night (Toronto)
May 10, 2017