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The Latest Tort Law Updates – 2013

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THE LATEST TORT LAW UPDATES - 2013

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The following is a sampling of cases released in 2013 that a litigator may find important in practice.

PIERRINGER AGREEMENTS

1. ***Sable Offshore Energy Inc. v. Ameron International Corp.*** **2013 CarswellNS 428, 2013 SCC 37, J.E. 2013-1134, 228 A.C.W.S. (3d) 78, 359 D.L.R. (4th) 381, 37 C.P.C. (7th) 225, 22 C.L.R. (4th) 1, 446 N.R. 35, 1025 A.P.R. 1, 332 N.B.R. (2d) 1.**

In this decision, the Supreme Court of Canada considered the issue of settlement privilege in the context of a Pierringer Agreement.

The plaintiff, Sable Offshore, sued several defendants. Prior to trial, it entered into Pierringer Agreements[1] with some of the defendants. The remaining defendants wanted to know the settlement amounts involved.

The Pierringer Agreements in this case required the plaintiff to amend its claim to pursue the non-settling defendants only for their share of the liability. They also required the settling defendants to produce all relevant evidence in their possession to the plaintiff, which would then be discoverable by the remaining defendants.

The terms of the agreements, except for the dollars changing hands, were disclosed to the remaining defendants and the agreements received court approval.

One of the remaining defendants brought a motion for disclosure of the amounts paid. Sable took the position this information was subject to litigation privilege.

Abella J.A., speaking for the Court, provides a thoughtful analysis regarding the practicalities of dispute resolution in the context of complex litigation and concludes:

[1] Named for the 1963 Wisconsin case of Pierringer v. Hoger, 124 N.W.2d.106 (U.S. Wis. S.C. 1963). A Pierringer Agreement allows one of more defendants in a multi-party proceeding to settle with the plaintiff and withdraw from the litigation, leaving the remaining defendants responsible only for the loss they actually caused. There is no joint liability with the settling defendants, but non-settling defendants may be jointly liable with each other [at para. 6]

> Since the negotiated amount is a key component of the "content of successful negotiations", reflecting the admissions, offers, and compromises made in the course of negotiations, it too is protected by the privilege. ...in my respectful view, it is better to adopt an approach that more robustly promotes settlement by including its content [at para. 18].

The Court was unmoved by the remaining defendants' argument that an exception to privilege should be made because knowledge of the amounts involved was necessary for them to conduct the litigation.

While the Court carefully leaves open the possibility of exceptions applying to privilege, including misrepresentation, fraud and undue influence, or to prevent a plaintiff from being overcompensated, it found that the arrangements made by the plaintiffs and settling defendants to disclose all the non-financial terms, the relevant documents and other evidence in the settling defendants' possession, and the assurance that the remaining defendants would not be liable for more than their share of damages, did not tip the scales in favour of disclosure. The Court further found that there was nothing argued that would materially affect the ability of the remaining defendants to know and present their case. It was also unfazed by the argument made that the remaining defendants might be more willing to settle if they knew the amounts settled by the other defendants.

LIABILITY OF SPONSORS FOR SPORTS INJURIES

2. *Boudreau v. Bank of Montreal,* 2013 ONCA 211, affirming 111 O.R. (3d) 544, 2012 ONSC 3965

In this case, the plaintiff was catastrophically injured while participating in a soccer game. He commenced legal proceedings against the Ontario Soccer Association (OSA), Soccerworld (where the event was being held), players, referees and, corporate sponsers of the OSA, including the Bank of Montreal, Rogers Communications and Umbro Inc. for $4.5 million.

The claim against the sponsors consisted of allegations that they knew or ought to have known that the OSA carried inadequate accident insurance (in this case $40,000.00[2]) and ensured that there was adequate insurance available in the event of serious injury.

The plaintiff argued it was foreseeable a player would get hurt and the sponsors were publically identified as corporate partners of the OSA.

[2] Para. 5 of 111 O.R. (3d) 544, 2012 ONSC 3965.

The sponsor defendants brought a motion to strike the statement of claim on the basis that it did not disclose a reasonable cause of action. The motion judge agreed, finding that that the facts pleaded did not establish a relationship of sufficient proximity between the plaintiff and sponsor defendants to ground a duty of care or to support the plaintiff's claim in negligence. The plaintiff appealed.

The Court of Appeal agreed with the lower court decision, stating:

> He [motion judge] correctly concluded that a duty of care as alleged had not been recognized before in Canadian law. Nor had an analogous duty been recognized. Furthermore, the motion judge found that the appellant had not pleaded the facts necessary to establish a relationship of sufficient proximity between the appellant and the respondents to ground a new duty of care [at para.6].
>
> We see no error in the motion judge's decision, The pleading is bald. It discloses no relationship between the appellant and the corporate sponsor respondents, apart from the one that normally exists between a commercial corporation and its target market [at para. 7].
>
> Indeed, the pleading discloses no organizational role played by the respondents in operating the league or the specific game in which the appellant was injured, apart from their status as sponsors [para 8].

The Court of Appeal's decision, however, does certainly leave open the possibility of allowing a claim against a sponsor to proceed in the future.

BANKRUPTCY AND JUDGMENTS FOR DAMAGES DUE TO INTENTIONAL TORTS

3. *Dickerson v. 1610396 Ontario Inc. (Carey's Pub & Grill)*, 2013 ONCA 653, reversing 2013 ONSC 403

This decision relates to the effect of a bankruptcy on an award of damages in civil proceedings for bodily harm intentionally inflicted.

The plaintiff was seriously injured when he was punched in the head by the defendant. He fell to the ground. He suffered a significant brain injury.

The defendant was charged and found guilty of aggravated assault.[3]

[3] As noted in paragraph 3 of the Court of Appeal decision, the motion judge's finding that the Defendant pleaded guilty was erroneous. It appears that the Defendant had pleaded "no contest" to the facts read in by the prosecutor.

The plaintiff brought civil proceedings against both the defendant and the pub where the parties had been drinking. A jury trial took place in March 2009 and there was no liability found against the pub. The defendant was held solely liable for damages exceeding $1 million.

The jury panel in the civil action was charged with answering the following question:

> State fully the deliberate or negligent act or acts that caused or contributed to the injuries of Daniel Dickerson.

The jury's answer was:

> David Radcliff deliberately punched Daniel Dickerson in the head directly causing the injury.

An appeal by the plaintiff regarding the dismissal of liability against the pub was unsuccessful, with the result that the plaintiff's only recourse was against the defendant's assets.

The defendant filed for bankruptcy and a motion was brought by the plaintiff to determine if the order of discharge released the defendant from his obligation to pay the judgment against the defendant..

Section 178 (1) of the *Bankruptcy and Insolvency Act*[4] *(BIA)* states as follows:

> An order of discharge does not release the bankrupt from
>
> (a.1) any award of damages by a court in civil proceedings in respect of
>
> (i) bodily harm intentionally inflicted....

At the motion, Morissette J., found that in order for s. 178(1) to apply there must be shown to be a concerted effort to inflict bodily harm. It appears from the decision that his concern lay more with the idea that only one punch was thrown and the consequences of Radcliff's actions were far more severe than he had intended or anticipated.

Morissette J. noted that the questions to and answers from the jury did not provide a judicial analytical framework to assess whether this was "intentional infliction of bodily harm."

He determined that the discharge did, in fact, apply to the award of damages.

[4] R.S.C., 1985, c. B-3.

On appeal, the Court of Appeal reviewed previous decisions and highlighted the need to weigh a bankrupt's need for a fresh start with a victim's right to obtain compensation from damages caused by intentional conduct. It also canvassed a number of decisions, similar to the one at hand, where Courts had declared that the judgment survived bankruptcy, and noted that decisions where Courts had found otherwise were not actions for damages for the tort of battery.

The Court of Appeal noted that the party seeking to protect the judgment from a discharge is required to show that the award of damages was made in respect of the intentional infliction of bodily harm. That requisite intention can be proved directly or it can be reasonably inferred from the facts [para. 32].

The Court of Appeal stated it did not matter whether one punch or ten punches were thrown. As well, it did not matter whether the plaintiff's brain injury resulted from the punch or from the impact of his head on the curb:

> When one person hits another with a closed fist with sufficient force to cause the unsuspecting recipient of the punch to lose consciousness and fall to the ground, it cannot be seriously doubted that the person intended to inflict bodily harm [paragraph 44].

As a result, the Court of Appeal granted the order sought by the plaintiff, allowing him to continue to seek compensation from the defendant.

MUNICIPAL LIABILITY

4. *Uggenti v. Hamilton (City)*, 2013 ONSC 6162

This was an appeal to the Superior Court of Justice from an arbitration decision involving an action for personal injury damages suffered by Bruno Uggenti when he was tobogganing at a reservoir property owned by the City of Hamilton. Retired Justice Eugene Fedak's decision found the City fully liable for the damages and assessed Mr. Uggenti's damages at just under $500,000 and his former spouse's damages under the *Family Law Act* at $100,000.00.

On appeal, R. A. Lococo, J., found no reason to interfere with the arbitration decision.

In particular, he determined that the plaintiffs had not willingly assumed the risk of injury as contemplated by s. 4(1) of the *Occupiers' Liability Act*[5] (*OLA).* Mr. Uggenti had been injured in a previous accident and the assumption was that he was aware of the risk of falling off a toboggan. Both the Arbitrator and Lococo J., however, determined that this

[5] R.S.O. 1990, c. O-2.

did not mean Mr. Uggenti knew of, or had assumed the risk of, hitting the edge of a snow covered ditch.

Of particular note were the findings of the Arbitrator that (1) the City knew about the ditch; and (2) it had failed to take reasonable steps to warn tobogganers of the danger. These findings were not disturbed on appeal.

Lococo J. determined as follows:

> ...In order for someone to voluntarily assume risk, that person must be aware of the existence of the risk. In this case, there was ample evidence before the Arbitrator to allow him to find that Mr. Uggenti was not aware of the risk he was assuming. There was also ample evidence to support the finding that Mr. Uggenti did not know that tobogganing was a prohibited activity [at paragraph 16].

An interesting aspect of this decision relates to the discussion of whether the property fell within the provisions of ss. 4(3)(c) and (4) (4)(c) of the *OLA*.

> **Risks willingly assumed**
> **4.** (1) The duty of care provided for in subsection 3 (1) does not apply in respect of risks willingly assumed by the person who enters on the premises, but in that case the occupier owes a duty to the person to not create a danger with the deliberate intent of doing harm or damage to the person or his or her property and to not act with reckless disregard of the presence of the person or his or her property.
>
> ….
>
> **Trespass and permitted recreational activity**
> (3) A person who enters premises described in subsection (4) shall be deemed to have willingly assumed all risks and is subject to the duty of care set out in subsection (1),
>
> (a) where the entry is prohibited under the *Trespass to Property Act*;
>
> (b) where the occupier has posted no notice in respect of entry and has not otherwise expressly permitted entry; or
>
> (c) where the entry is for the purpose of a recreational activity and,
>
> (i) no fee is paid for the entry or activity of the person, other than a benefit or payment received from a government or government agency or a non-profit recreation club or association, and
>
> (ii) the person is not being provided with living accommodation by the occupier.
>
> **Premises referred to in subs. (3)**
> (4) The premises referred to in subsection (3) are,
>
> (a) a rural premises that is,
>
> (i) used for agricultural purposes, including land under cultivation, orchards, pastures, woodlots and farm ponds,
>
> (ii) vacant or undeveloped premises,

(iii) forested or wilderness premises;

(b) golf courses when not open for playing;

(c) utility rights-of-way and corridors, excluding structures located thereon;

(d) unopened road allowances;

(e) private roads reasonably marked by notice as such; and

(f) recreational trails reasonably marked by notice as such.

With reference to this case, Mr. Uggenti would be deemed to have willingly assumed the risks if the reservoir property was considered a utility right-of-way or corridor. In those circumstances, the duty of care on the City would have been much less onerous – to ensure that it did not create a danger with the deliberate intent of doing harm or damage to the person or his or her property and to not act with reckless disregard of the presence of the person or his or her property.

The Arbitrator had considered a previous Court of Appeal decision[6] , and found it confirmed the intention of s. 4 of the *OLA* was to encourage occupiers to make their lands available to the public for recreational use.

The Arbitrator found that the City did not encourage the public to use the premises, and, in fact, prohibited tobogganing.

Lococo J. found that the *OLA* did not define “utility corridor” and he therefore looked to a policy document from the Ministry of Natural Resources for a definition:

> ...a narrow strip of land securing access between two points for the purpose of transporting and distributing gas or tele-communications [para. 20].

In the circumstances, despite the fact that the area had been designated by the City on its official plan as being “utility”, the Arbitrator found that the City-owned premises were not in fact a “utility corridor”. This finding was not disturbed in the appeal with the result that that Mr. Uggenti was successful in his claims.

[6] *Schneider v. St. Clair Region Conservation Authority*, 2009 ONCA 650, 97 O.R. (3d) 81 (C.A.).

WINTER ROAD MAINTENANCE

5. Mark v. Guelph (City), 2013 ONCA 536, affirming 2012 ONSC 3510

This appeal of a trial decision of Mossip J. involved winter maintenance in the City of Guelph and County of Wellington. The roadway in question was located in the City but was maintained by the County of Wellington. Nathan Mark suffered catastrophic injuries when his car crossed the centre line of the road and was struck by another vehicle.

The issue for Mossip J. was whether the City of Guelph and the County of Wellington had met their obligations under s. 44(1) of the *Municipal Act, 2001*[7]. In doing so, she was required to first consider whether the Minimum Maintenance Standards (MMS) applied in the circumstances; if they did not, the common law standard of reasonableness would apply.

The plaintiff called evidence of the first responders, including fire, ambulance and police. They confirmed the conditions to be very icy. A fire department vehicle had trouble stopping on the roadway, the ambulance attendants had difficulty attending to the injured parties and the police had difficulty mobilizing on the road to complete their investigation. One of the reconstructionists actually slipped and fell.

No charges were laid against either driver and the investigating officer did not think that either of the drivers was responsible for the accident.

The reconstruction report concluded that the road was extremely slippery and neither driver was driving in a dangerous manner. It further concluded that had the roadway, which was a main traffic artery within the City limits, been sanded the collision probably would not have occurred.

The plaintiff's experts testified that the Municipality was not keeping up with known, acceptable and widely used practices for winter maintenance. They concluded that given the weather and temperatures prevailing on the day of and the evening prior to the accident, sand alone should have been applied. By applying chemicals to the roadway, a brine was allowed to form which then refroze. The plough route took six hours to complete which provided time for the re-freezing to occur.

The defendants relied upon testimony of the operations manager for the County. He agreed that the roadway was a Class 2 roadway and must be treated for ice within four hours of becoming aware of the ice.

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[7] S.O. 2001, c. 25.

The defendants' expert testified that it appeared that sanding of the roadway (north and south) took place at 12:30 a.m., with further sanding going north at 6:15 a.m. The operator had been spot sanding with a mixture of sand with some salt mixed in, but he could not tell from the records what the ratio was or what the application rate was.

Of note was that there did not appear to be a supervisor of the snow plough operators during the night shift and no foreman appeared to be available to the operators if required. As well, there were no policies or procedures in place for the operators or their supervisors, other than the MMS and an "outdated" manual from 1972.

As is typical of cases against road authorities relating to winter maintenance activities, the trial appears to have concentrated on the documents – the employees, their activities in the day leading up and day of the accident, their hours worked, and the policies and procedures in place (or lack thereof).

The plaintiff's argument at trial was that, in fact, the actions and inactions of the municipality actually caused the icy conditions to form when treating the roadway at 12:30 a.m. and then failing to property treat the ice on the southbound lane at 6:15 a.m. on the morning of the accident. It was his submission, therefore, that the MMS did not apply in these circumstances.

The defendants argued that the plaintiff was contributorily negligent, and in particular noted the condition of the vehicle and the snow tires. They argued the plaintiff was 50% responsible for the accident.

Mossip J. found that the treatment of the roadway in question was the cause of the icy roadway at the time of the accident and that the icy road was the sole cause of the accident, with no contributory negligence on the part of the plaintiff.

She further found that the MMS either did not apply to the case, or if it did, the MMS was not met. She specifically agreed with the plaintiff's argument that the MMS did not apply because the municipality had caused a non-icy road to become icy by its own actions and then failed to treat that road properly.

She found that the roadway was not "treated" in a reasonable manner, and that, having created the icy conditions, the ice was not treated within a reasonable time. By going back six hours later and only spot sanding the northbound lanes, the road authorities failed to treat the ice created by the municipality in a reasonable manner in the circumstances.

Of note, the defendants did not apparently present an alternate explanation as to how the roadway came to be in the condition it was at the time of the accident.

With respect to the issue of contributory negligence, the judge accepted the evidence of the plaintiff and his experts that he was only travelling 23 km/hr at time of the collision.

She found that the plaintiff had rebutted the presumption of negligence which arises because he crossed the centre line prior to impact.

It is noteworthy that on appeal, the municipalities did not appeal the trial judge's finding of negligence against them. The only issue was regarding whether Mossip J. failed to apply the presumption of negligence which arises because the plaintiff crossed the centre line of the roadway.

The Court of Appeal, in a very short decision, confirmed that the trial judge had identified evidence capable of rebutting any presumption that arose: verification of the condition of the vehicle, verification by the plaintiff of the condition of the roadway, not travelling too fast, and evidence of the accident reconstruction expert (police expert) which saw no other cause of the accident other than icy road conditions.

In the result, the Court of Appeal saw no reason to disturb the lower court findings of fact regarding contributory negligence.

INTERFACE OF ONTARIO UNINSURED COMPENSATION WITH SAAQ

6. *Merino v. Klue*, 2013 ONCA 114

In this case, the Court of Appeal upheld a lower court decision that a non-pecuniary benefit paid under the SAAQ[8] was deductible from the uninsured limits available to a plaintiff in Ontario.

The plaintiff was a permanent resident in Quebec but attending school in Ontario. She was catastrophically injured as a pedestrian by an uninsured motorist. She claimed benefits from the SAAQ and also brought a claim in Ontario against her mother's insurer for uninsured coverage under the Ontario regime, limited to $200,000.

She recovered a total of $343,911.84 under the SAAQ, $181,107 of which was for non-pecuniary damage indemnity.

The insurer, Allianz, argued that the non-pecuniary damages award should be deducted from the limits available, which would effectively leave the Plaintiff with less than $20,000 being paid under the Ontario regime.

The motion court judge agreed.

[8] Société de l'assurance automobile du Québec (English: Quebec Automobile Insurance Corporation)

The Court of Appeal looked at the wording of the *Insurance Act*[9] and the Regulation[10] relating to uninsured coverage and found that the language was clear and the intention was to avoid double recovery on the part of an injured party.

Subsection 267.8(7) of the *Insurance Act* states:

> In an action for loss or damage from bodily injury or death arising directly or indirectly, from the use or operation of an automobile, the damages in respect of non-pecuniary loss to which a plaintiff is entitled shall not be reduced because of any payments or benefits that the plaintiff has received or is entitled to receive.

At the time of Ms. Merino's accident on September 12, 2002, s. 2(1)(b) of Ont. Reg. 676 – Uninsured Automobile Coverage – read as follows:

> 2.(1) The insurer shall not be liable to make any payment,
>
> (b) where a person insured under a contract is entitled to recover money under any valid policy of insurance other than money payable on death, except for the difference between such entitlement and the relevant minimum limits determined by the clause (a).

As a result, the plaintiff, who was catastrophically injured, was left with greatly reduced recovery of damages, assuming of course, that there was no ability to recover against the at-fault, uninsured driver personally.

This case is of limited application as s. 2(1)(b) of the regulation was revoked in 2003.[11]

[9] R.S.O. 1990, c. I-8.
[10] Ont. Reg, 676, R.R.O. 1990, as am. O. Reg. 778/93; 400/96.
[11] By O.Reg.276/03, s. 1.

ISSUE ESTOPPEL

7. *Penner v. Niagara Regional Police Services Board*, 2013 CarswellOnt 3743, 2013 SCC 19, EYB 2013-220248, J.E. 2013-639, 32 C.P.C. (7th) 233, 49 Admin. L.R. (5th) 1, 226 A.C.W.S. (3d) 139, 356 D.L.R. (4th) 595, 442 N.R. 140, 304 O.A.C. 106

In this 4-3 split decision, the Supreme Court of Canada reaffirmed that the doctrine of issue estoppel is about balancing judicial economy and finality and other considerations of fairness to the parties.

The doctrine of issue estoppel holds that a party may not re-litigate an issue that was finally decided in a prior judicial or tribunal proceeding between the same parties or those who stand in their place.

There are three preconditions for issue estoppel:

1. the same question has been decided;
2. the decision which is said to create the estoppel is final; and
3. the parties to the decision or their privies were the same in both proceedings.

In this matter, the lower courts had struck many of the claims in the plaintiff's civil action against the police on the basis that his complaint of police misconduct arising out of the same facts had been dismissed by a police disciplinary tribunal.

The complaints which were the subject of the police disciplinary tribunal arose out of the plaintiff's arrest while he was a spectator in traffic court. He suffered some minor injuries during his time with the police and required hospital treatment. He was charged but the charges against him were withdrawn by the Crown a few months later.

The plaintiff, Penner, filed formal complaints under the *Police Services Act* and, around the same time, commenced civil proceedings for damages.

At the disciplinary proceedings, the officers involved in the arrest were found not guilty of misconduct. Mr. Penner was a party to those disciplinary proceedings and the subsequent appeals.

The defendants in the civil suit then brought a motion to strike the claim on the basis of issue estoppel, arguing the disciplinary proceedings had fully and finally resolved the key issues underpinning the plaintiff's claims.

The defendants were successful up to and including the Court of Appeal.

The majority decision of the Supreme Court of Canada reiterated that while issue estoppel is an effective tool to balance judicial finality and economy and fairness to the

parties, the courts have discretion to refuse to apply issue estoppel if it will work injustice, even where the pre-conditions for issue estoppel have been met.

The majority found that the Court of Appeal had erred in its analysis of the differences in the purpose and scope of the two proceedings, and the reasonable expectations of the parties about the impact of the proceedings on their broader legal rights.

In reviewing its ability to exercise discretion, the majority agreed that each case would be reviewed on its facts to determine if the application of the doctrine was unfair or unjust.

It outlined two ways issue estoppel may be considered unfair. Unfairness may arise from the unfairness of the previous proceedings. If the prior proceedings were unfair to a party, it could compound the unfairness to hold that party to the results. Examples given by the Court of unfairness were lack of notice of allegations and lack of chance to respond to allegations. They also stated that the ability to appeal an unfair proceeding will have some bearing on this argument.

The Court also stated that it is sometimes unfair to use the results of a previous proceeding or process to preclude the subsequent claim. This argument requires the ability of the party to previous proceedings to raise all appropriate issues and is concerned with not permitting a party to have available multiple opportunities to obtain a favourable judicial determination. The Court gave the following example: where there is a significant difference between the purposes, processes or stakes involved in the two proceedings. The Court, however, cautioned that because there will always been differences between tribunal and court proceedings, the differences must be significant and assessed in light of the Court's recognition of the value of finality. The Court cautioned that it did not want issue estoppel to become the exception rather than the rule.

In order to answer the second branch of the Court's discretion, it is necessary to look to the reasonable expectations of the parties regarding the scope and effect of the proceedings and their effect on the parties' broader legal rights.

In applying the facts in this case to the framework it set out, the majority of the Supreme Court found the disciplinary process to be fair and that the plaintiff had participated in a meaningful way.

With respect to the second branch, however, the Court noted that there is nothing in the legislation, the *Police Services Act,*[12] which gives rise to a reasonable expectation that the disciplinary hearing would be conclusive of all Penner's legal rights against the

[12] R.S.O. 1990, c. P-15.

involved parties in a civil action. Factors examined by the Court were that the purpose of the hearing was to determine whether to impose employment related discipline; there were no remedies or costs available to a complainant.

The Court also found it noteworthy that Penner had filed civil action almost one year before the release of disciplinary decision.

In looking at the reasonable expectations of a party, the Court agreed that Penner might well think it unlikely that the disciplinary proceeding, in which he had no personal or financial stake, would preclude a claim for damages in civil action.

In a strongly worded dissent, LaBel and Abella JJ. reaffirmed the principle that litigation must come to an end to ensure the fairness and efficacy of the justice system. They point out that the majority decision is inconsistent with recent developments at the Supreme Court of Canada and raises potential difficulties, particularly as the decision relates to the procedural unfairness of a previous proceeding and the availability of judicial review. They pointed out the already existing problems experienced by parties in accessing civil and criminal justice.

The minority decision focuses on two principles of issue estoppel – (1) there should be an end to the litigation and (2) the same party should not be harassed twice for the same cause.

The minority decision cautions that applying issue estoppel in the context of administrative law will always lead to differences in the purposes, process or procedures used and this inquiry should not be used to override the principle of finality.

In this case, the critical factor for LaBel and Abella JJ. was that the plaintiff had an active role in both proceedings. At the tribunal, he was able to lead evidence, cross-examine witnesses, and make submissions. He had a statutory right of appeal and review of hearing officer's decision in the Divisional Court.

In countering the argument put forth in the majority decision, that Penner received no damages or costs, the minority examines that Penner had the opportunity to receive an indirect financial benefit in the disciplinary hearing. They state that had the finding been in Penner's favour, he would benefit from the tribunal decision in any subsequent civil action by being relieved of having to prove liability. The civil action would involve an assessment of damages only.

> In this case, a, hearings officer made unambiguous findings of fact against Penner to the effect that there was no evidence to support his claims. These findings of fact remained undisturbed on appeal and the plaintiff should not be permitted to re-litigate the same facts more than once.

INTERFACE OF OHSA AND TORT LAW

8. *Blue Mountain Resorts Limited v. Ontario (Ministry of Labour),* 114 O.R. (3d) 321, 2013 ONCA 75, reversing 2011 ONSC 3057 (Div. Ct.)

A guest of the Blue Mountain Resort died while swimming in an unattended pool in December 2007. An investigator with the Ministry of Labour learned of this in March 2008 and determined the Resort was required to report the death to the Ministry of Labour because it was a death or critical injury incurred by a person at a workplace as contemplated by s. 51(1) of the *Occupational Health and Safety Act*[13] (OSHA). An order was issued to that effect.

The Ontario Labour Relations Board upheld the inspector's order, essentially on the basis that employees of the resort would be present at the pool from time to time in order to maintain it.

The Divisional Court dismissed the Resort's application for judicial review, holding that the it was reasonable for the OLRB to determine that the pool was a workplace.

The resort appealed to the Court of Appeal.

The Court of Appeal held that the OLRB decision was unreasonable.

The focus of the decision appears to have centred on the financial consequences of the OLRB decision in the context of a recreational facility such as Blue Mountain Resorts. If, as required under the OHSA, a facility were required to block off and preserve the evidence in area in question each time a critical injury occurred, this could result in significant disruption of the facility's operations.

The Court of Appeal agreed that a report may be required even when the injury occurs to a non-worker. It held that it was unreasonable to require an employer, such as the Resort, to report all events at the workplace which result in death or critical injury, even where those events had no potential nexus with worker safety.

[13] R.S.O. 1990, c.O-1.

The Court held that the reporting requirements are triggered when:

1. a worker or non-worker is killed or critically injured;
2. the event occurs at a place where (i) a worker is carrying out his or her employment duties at the time the incident occurs, or (ii) a place where a worker might reasonably be expected to carry out such duties in the ordinary course of his or her work; and
3. there is some reasonable nexus between the hazard giving rise to the death or critical injury and a realistic risk to worker safety at the workplace.

Because, in this case, the guest's death was not (apparently) caused by any hazard that could affect the safety of a worker,[14] the Court determined it could find no reasonable nexus.

This decision has significant implications for employers. It may signal that critical injuries to patrons will increasingly need to be reported. Take for instance a slip and fall that occurs in the produce department of a grocery store. So long as the injury is critical, this is certainly the type of situation that would be caught by the reporting requirements.

This decision also has implications for personal injury lawyers. From the plaintiff perspective, where an injury occurs as the result of a defendant employees' actions, counsel should query whether or not the injury would have triggered the reporting requirements under the OHSA.

If the injury was reported, a number of documents would be generated internally by the employer to comply with its obligations under the legislation – photographs, statements, reports to the OSHA investigator, etc. that are arguably not privileged.

From the defence lawyer's perspective, you may deem it advisable to canvas long before your client's examination for discovery whether a report was made to the Ministry of Labour and determine what documents, if any, were generated as a result of that report.

[14] The Court accepted the conclusion of the lower court that it was "highly unlikely that a Blue Mountain employee is going to drown while swimming in the pool in the course of his or her employment duties" [at para. 61].

WSIB AND STATUTORY BARS TO CLAIMS

9. *Dicks, (Ontario) Workplace Safety and Insurance Appeals Tribunal v. Bellissimo,* 2013 ONSC 7866 (Div. Ct.)

This was an application for judicial review to Divisional Court from a decision of the Workplace Safety and Appeals Tribunal (WSIAT). It reinforces the importance of a good investigation where WSIB might arguably be a statutory bar to proceeding with a claim.

Ms. Dicks was injured as she was leaving work. She was struck by a vehicle doing snow removal.

Plaintiffs' counsel sued the registered sole proprietor of the contractor, Francesco Bellissimo, the operator of the vehicle, Giuseppe Bellissimo, and the lessor of the vehicle, Daimler Chrysler.

It appears that it was accepted that Ms. Dicks was Schedule 1 in course and scope of her employment when accident occurred. The issue was whether the tortfeasors were protected by the provisions of section s. 28 of the *Act*,[15] i.e. were Franceso Bellissimo and/or Bedrock Maintenance Schedule 1 employers and was Giuseppe Bellissimo a Schedule 1 worker?

Neither the contracting company, nor its owner Francesco Bellissimo, were registered with WSIB as a Schedule 1 employer. This was not dispositive because the Tribunal can find that if they were required to be registered, they are still protected by the provision. At the time of this incident, the company would have only be required to register with WSIB once it had hired its first worker.

The applicant, which in this case was Daimler (the leasing company), failed to call evidence at the WSIAT hearing to prove that the operator of the vehicle, Giuseppe Bellissimo, was a worker of Francesco Bellissimo or the company, Bedrock. There was conflicting evidence as to who owned the company. Although Francesco Bellissimo was the titled owner, Giuseppe held himself out as the owner and had actually signed the contract with Ms. Dick's employer as the owner.

As a result, the plaintiffs' action against all defendants was permitted to continue.

[15] *Workplace Safety and Insurance Act*, 1997, S.O. 1997, c. 16 Sch. A.

LIMITATION PERIODS – CONTRACTORS AND CROSSCLAIMS

10. *Welch v. Peel Standard Condominium Corp. No. 755,* 2013 ONSC 7611

In this case, the plaintiffs brought a claim against the defendant winter maintenance contractor more than two years after the slip and fall. The defendant contractor brought a motion for summary judgment to dismiss the claims of the plaintiffs and crossclaims of the co-defendant against it.

The Court was required to examine the doctrine of discoverability – both from the perspective of the plaintiffs bringing the claim and the co-defendants presenting crossclaims – in light of sections 5 and 18 of the *Limitations Act, 2002.*[16]

The plaintiffs' law firm gave notice to the condominium and the property manager. A couple of months later, a lawyer at the plaintiffs' firm had a telephone conversation with the claims examiner for the insurer. During that conversation, the lawyer asked the examiner if there were other maintenance contractors involved other than Downing and was told there were not.

Plaintiffs' counsel issued a claim against the condominium corporation and the property manager. Those defendants were represented by the same lawyer. The statement of defence made no reference to a maintenance contractor.

Shortly before discoveries, defence counsel learned from his clients that there was, in fact, a maintenance contractor hired at the time of the slip and fall. A motion to add the maintenance contractor, Forest, as a defendant occurred over one year later.

Taking into account the conversation between the plaintiffs' lawyer and insurer at an early stage, as well as the failure of Peel and Downing to make reference to the maintenance contractor in their pleading, the judge was reluctant to rule definitively without the benefit of a full record. In dismissing Forest's motion with respect to the plaintiffs' claims, Baltman J. impliedly found that the plaintiffs had acted with due diligence by making sufficient inquiries into the matter:

> Consequently, I reject the defendants' suggestion that the plaintiffs were obliged to make further inquiries. At the very least there is a material issue that requires a trial, where a decision about the reasonableness of their efforts can be made based on a full record and oral testimony before the trier of fact. This case is very different from *Higgins, supra,* where the court found that the plaintiff's motion materials failed to disclose "any" evidence of pre-discovery diligence, and plaintiff's counsel admitted he made "no inquiries" regarding the identity of other potential defendants prior to examination for discovery (para. 32) [para. 27].

[16] S.O. 2002, c. 24, Schedule B.

However, with respect to the crossclaims, the judge found that the Peel and Downings crossclaims against Forest were statute-barred because they had actual knowledge of Forest's existence from the outset. The limitation period began to run on September 22, 2009, the day they were served with the statement of claim and, as they did not serve the crossclaim until November 11, 2011, their crossclaim was out of time:

> I take a different view, however, with respect to the cross-claim. In cases involving a claim for contribution and indemnity, a defendant has two years from the date on which it was served with a statement of claim to issue the cross-claim or third party claim: *Boutz V. DTE Industries Limited,* 2013 ONSC 7085 (CanLII), 2013 ONSC 7085. I agree with Forest that as the defendants were parties to the contract with Forest, they had actual knowledge of Forest's involvement and therefore the two year limitation period for them runs from September 22, 2009, the day they were served with the statement of claim. It is no answer for them to say they were relying on the plaintiffs to add Forest as a defendant to the main action; from the moment they were served they should have realized, from their own records, that Forest was the contractor at the time, and added Forest as a third party. As the defendants instead waited to serve Forest with the cross-claim until November 11, 2011, their claim is out of time [para. 28].