

LITIGATION NOTES

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Accountant Liable to Third Party

The British Columbia Supreme Court decision in *Kumar v. Picco* released in late November serves as a warning for accountants about agreeing to meet with third party readers of a client's financial statements. Picco, a chartered accountant, was found liable to Kumar, a prospective purchaser of the client company, for negligent misrepresentation on the basis of meetings arranged by the client.

The case involved Picco's engagement to review the client's annual financial statements without audit. The financial statements indicated that the client, an auto dealership, paid approximately \$25,000 to the provincial taxing authorities for the prior year. That amount was far less than one might expect to have been paid based on the volume of car sales during the period. In fact, the client owed about \$750,000 in unpaid provincial sales tax for the current and prior years. The financial statements did not disclose the shortfall. Picco maintained that the misstatement was not the result of negligence because, on a review engagement, the accountant is only required to be satisfied that the statements are plausible, rather than having to verify figures reported for specific liabilities. The court rejected that defence, concluding that Picco should have done a quick mental calculation to determine whether \$25,000 was a reasonable amount for annual tax remittances. Had he done so, he would quickly have recognized that the correct amount was nearly ten times higher.

The question then became whether Picco could be liable to Kumar for his negligence. Under the common law an accountant generally does not owe a duty of care to readers of the client's financial statements, particularly in respect of losses resulting from an investment made on the strength of the statements. However, such a duty can arise in some circumstances, including situations where the accountant had direct involvement with the third party reader.

When Kumar began discussions with the client about a purchase, the client said that he was not good with numbers and that questions about finances should be put to Picco as the company's accountant. Picco later attended several meetings regarding the sale together with Kumar and answered questions arising from his review of the financial statements and Picco's review report. Kumar then decided to purchase the dealership and paid a \$250,000 deposit. However, rather than paying the deposit funds to his lawyer to hold in escrow pending closing, he paid the money directly to the client company. The client company and its principal both went bankrupt before the purchase was concluded. Kumar then sued Picco to recover the \$250,000.

The judge rejected Kumar's evidence that Picco told him that the deposit would be adequately secured. If he had done so, that statement would itself have been a negligent misrepresentation. The judge did find that Picco knew that Kumar

intended to pay the deposit directly to the client and thought it inadvisable to do so. However, Picco was quite rightly found not to be responsible for advising Kumar regarding whether and how to conclude the purchase transaction. Kumar had his own lawyer and accountant involved advising him about the transaction.

The judge then considered whether Picco owed Kumar a duty of care as a result of attending meetings and answering questions about the statements. The answer was yes. By having agreed to meet Kumar and provide information without in any way attempting to limit Kumar's use of the statements Picco was found liable for the loss of the deposit funds associated with the negligent misrepresentation in his review report on the financial statements.

The judge went on to find that Kumar was contributorily negligent for his own loss by not having acted on the advice of counsel to place the deposit funds under his care. Kumar had acknowledged at trial that his failure to do so was foolish. The judgement allocated 75% of the fault for the loss to Kumar for failing to protect his own interests. Picco was ordered to pay Kumar \$62,500 in damages – one quarter of the deposit amount.

Kumar v. Picco, [2007] B.C.J. No. 2463 (S.C.)

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Canadian Law of Libel Overhauled

The Ontario Court of Appeal recently developed the common law of libel by recognizing the defence of “responsible journalism”. The OCA’s landmark ruling permits journalists to avail themselves of the defence in libel suits where they can show that they followed standards of responsible journalism when reporting on a matter of public importance.

In *Cusson v. Quan*, the plaintiff was a police constable who, on his own initiative, travelled with his dog to New York City shortly after the September 11, 2001 attacks on the World Trade Center to assist in rescue efforts. He was initially cast as a hero in the media for his efforts. *The Ottawa Citizen* ran three articles that suggested that: a) Cusson had misrepresented himself to police as being a member of the RCMP; b) he had misrepresented that his dog was trained to undertake K-9 rescue; c) the New York police had asked him to leave the Ground Zero site; d) he faced disciplinary charges for his conduct. As a result of the publication of these stories, Cusson sued the newspaper, those involved in producing the articles and his OPP supervisor (who was a source) for defamation.

At trial, the jury found that much, but not all, of what was published was true. Accordingly, it awarded \$100,000.00 damages against the *Citizen* defendants and \$25,000.00 against Cusson’s supervisor. The jury found no actual malice on behalf of the defendants.

The newspaper defendants appealed the ruling. In so doing, they raised for the first time, whether a defence of “responsible journalism” applied to situations such as this. By raising the defence for the first time on appeal, the Court of Appeal upheld the jury award and held that the *Citizen* could not avail itself of the defence given that it failed to lead evidence on the defence at trial.

Nonetheless, the Court of Appeal recognized the defence of “responsible journalism”, thereby

forging new jurisprudence and paving the way for future litigation. Before *Cusson*, journalists who reported erroneous and defamatory information had only two major defences available to them: fair comment and justification or truth. Justification requires the journalist to prove that the allegations are true. Fair comment allows a journalist, absent malice, to publish a defamatory conclusion about a factual circumstance, provided the conclusion is founded on underlying facts contained in the article or that are notorious, that can be proven. Both defences are often difficult to establish, as there is often a significant amount of information available about a news story which is circumstantial in nature and cannot be formally proven in court, particularly in light of the rules of evidence and the reluctance of sources to come forward. Finally, there is another defence, the “duty and interest” defence, or the qualified privilege defence, which was often pled by media defendants but mostly rejected by the courts. This defence permits a person to publish erroneous, defamatory information about another so long as: a) the person disseminating the information has a moral, social and/or legal duty to distribute the information; b) the information is conveyed to a person who has a “real” interest in receiving it; c) the dissemination of the information is not motivated by malice. The defence often failed as the Canadian courts found that the second branch of the test is not met, given that media publications are conveyed to the world at large and not specific individuals.

In adopting the defence of “responsible journalism”, the Court of Appeal reviewed Canadian libel jurisprudence dating back to the 19th century. It also examined jurisprudence from the U.K., and the House of Lords’ decisions of *Reynolds v. Times Newspaper Ltd.* (2001) and *Jameel v. Wall Street Journal Europe SRL* (2007) which established the defence in England. The Court also reviewed libel jurisprudence in Australia, New Zealand, South Africa and the United States, all of which have concluded that “the traditional common law standard unduly burdens freedom of expression and have all made appropriate modifications to achieve a more appropriate balance between protecting reputation on the one hand and the public’s right to

know on the other.” In contrast, the Court of Appeal found that Canadian jurisprudence to this point had not evolved the defence of qualified privilege for journalists. In deciding that it was time for the law of libel in Canada to evolve, the Court noted that it agreed with the courts of all the various countries whose case law was overviewed and with the Canadian judges who have gradually expanded the defence of qualified privilege, “that the inhibiting effect of traditional defamation law is incompatible with the climate of free and robust debate to which a democratic society aspires.”

It would be wrong to conclude that journalists now have a free licence to publish defamatory stories. Although the shift in focus has gone from whether the journalist has published “true” statements to an analysis of whether the journalist has acted with due diligence in publishing those statements, the key word in the defence of “responsible journalism” is in fact, “responsible”. To that end, the Court of Appeal established that the media defendant must show that it took reasonable steps in the circumstances to ensure that the story was fair and its contents were true and accurate. The Court listed ten non-exhaustive indicia, as set out in the House of Lords’ judgments of *Reynolds-Jameel*, as useful considerations in determining whether journalists have behaved responsibly. Some of the noteworthy factors include: the steps taken to verify the defamatory information; the seriousness of the allegation; the nature of the information and the extent to which the subject-matter is “a matter of public concern”; whether the article contained the gist of the plaintiff’s side of the story and whether the plaintiff’s comment is sought; the tone of the article; the urgency of the matter.

This case is not just of interest to the law of libel. It is also a very good example of the flexible and evolving nature of the common law. The appellants and the media intervener urged the Ontario Court of Appeal to review international jurisprudence and to reformulate Cana-

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Go-Karts and Compulsory Auto Insurance

This case arises out of an accident at an amusement park. Denis Potvin and his father were driving go-karts on a track owned and operated by the defendant Pineland Amusements. The accident is said to have taken place after father and son collided and the son lost control of his machine. Legal action was commenced by the mother as the Litigation Guardian of her son. Both Pineland and the father were named as defendants.

The father was insured under an auto policy issued by Kingsway General. He issued third party proceedings against Kingsway, seeking a ruling that the insurer had a duty to defend and indemnify him in the main action. Kingsway responded by denying that the policy provided coverage in respect of the go-kart.

The issue to be resolved was whether the go-kart is an “automobile” for the

purposes of coverage. In accordance with the accepted test, this issue is to be resolved by asking three questions: Is the vehicle an “automobile” in ordinary parlance? If not, is it an “automobile” in the wording of the policy? If not, does the vehicle fall within the enlarged definition of any relevant statute?

The motions judge answered the first two questions in the negative, but did conclude that a go-kart comes within an enlarged statutory definition. Accordingly, he held that Kingsway was obliged to defend and indemnify. This decision was reversed by the Court of Appeal.

Part VI of the *Insurance Act* does provide a definition of “automobile”. That term includes every motor vehicle which is required to be insured under an auto policy. It also includes any vehicle which is designated as a automobile by regulation. It was common ground that the second part of the definition does not apply. Accord-

ingly, the whole question is whether the go-kart was required to be insured under an auto policy.

To answer that question, one must consider the *Compulsory Automobile Insurance Act* (“CAIA”) which provides that “motor vehicle” has the same definition as that given in the *Highway Traffic Act*. This definition is extremely broad, including any vehicle “propelled or driven otherwise than by muscular power”. However, the question is not whether the go-kart is a motor vehicle, but whether it must be insured. The CAIA deals with compulsory insurance by stipulating that no motor vehicle shall be driven on a highway unless it is insured by a contract of auto insurance.

A go-kart cannot be driven on a highway legally as such a machine does not conform to the requirements of the applicable legislation. On the other hand, it is clearly

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Owner’s Vicarious Liability for Auto Accidents

Section 192 of the Ontario *Highway Traffic Act* makes the owner of a motor vehicle liable for loss resulting from negligent operation, unless the vehicle was in the possession of another person without the consent of the owner. This provision has been often litigated and the general impact of the provision is well understood, although peculiar fact situations continue to cause some interpretive problems. Once such case, *Henwood v. Coburn*, was decided by the Ontario Court of Appeal on December 14.

Henwood was a travelling salesman. His own truck broke down and the supplier whose goods he sold leased another truck from Ontario Car and Truck Rentals for Henwood’s use. The supplier also asked Henwood to take one John Coburn on his rounds, for training purposes. Coburn was neither insured nor licensed to drive and the supplier specified that Coburn was not to be allowed to drive the truck.

After a day on the road, Henwood and Coburn stopped in at a local tavern and had some drinks. Coburn allegedly

became belligerent and demanded that Henwood drive him to a destination several hours distant. Henwood refused. Coburn assaulted Henwood, took the keys of the truck and started to drive off with it. Henwood managed to climb on board and occupied the passenger seat. According to Henwood’s evidence, Coburn was intoxicated. He knew that Henwood did not want him to be driving but refused to heed requests that he slow down and stop. About 20 minutes after the adventure began, Coburn crashed the truck into a field. Henwood was injured. Among others, he sued Ontario Car, the owner of the vehicle, relying on the statutory vicarious liability provisions of the *Highway Traffic Act*.

For the car owner, the question was whether the person in “possession” of the vehicle had its consent to possession. It was clear on the facts that Henwood had that consent and Coburn did not. The owner sought summary dismissal of the claim against it and in doing so attempted to revive an old argument which was rejected in Ontario some 80 years ago. According to this argument, the only “possession” which should count for the purpose of the vicarious liability analysis is the possession of the person

actually operating the vehicle. If this argument had been accepted the car owner would have been free of responsibility. The motions judge refused to accept it and found that it was Henwood who was in “possession”. He relied upon the fact that Henwood had managed to get on board the vehicle and continued to assert his claim to take control, although his assertion was ineffective in the circumstances.

The Ontario Court of Appeal disagreed both with the legal argument advanced by the car owner and with the factual determination made by the motions judge.

As to the legal argument of the car owner, the Court noted that the narrow view that only a driver can be in “possession” has been rejected consistently for many years. It was not willing to reconsider that question which was definitively settled by the case of *Thompson v. Bouchier*, decided in 1933. On the other hand, the Court was of the view that the motions judge did not have sufficient facts to justify the conclusion that Henwood remained in control. An assertion of the right to pos-

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33 Yonge Street, Suite 201
Toronto, Ontario
CANADA

Phone: 416-982-3800
Fax: 416-982-3801

www.lexcanada.com

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V.R.P. (Sas) Bersenas	416-982-3802	sas@lexcanada.com
Peter M. Jacobsen	416-982-3803	pjacobsen@lexcanada.com
Gerard A. Chouest	416-982-3804	chouest@lexcanada.com
James P. Thomson	416-982-3805	jthomson@lexcanada.com
Janice E. Blackburn	416-982-3806	jblackburn@lexcanada.com
James R. Lane	416-982-3807	jlane@lexcanada.com
Carlos P. Martins	416-982-3808	cmartins@lexcanada.com
Adrienne Lee	416-982-3809	alee@lexcanada.com
Tae Mee Park	416-982-3813	tpark@lexcanada.com
Ioana Bala	416-982-3810	ibala@lexcanada.com

Libel Law (continued)

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dian law in that fashion and the Court did just that, adopt-

ing a new defence that, in the words of the House of Lords, is “a different jurisprudential creature from the

traditional form of privilege from which it sprang”.

Cusson v. Quan, 2007 ONCA

Go-Karts (continued)

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physically possible to drive a go-kart on a highway. Each of the parties hung his hat on one of these propositions and, of course, argued for opposing results. The insurer argued that if the CAIA is read in context with the *Highway Traffic Act* the purpose of those pieces of legislation dictates the common sense result: there was no intention to suggest that a go-kart is a proper vehicle for driving on a

highway and no intention to require insurance. However, the motions judge thought that these were irrelevant considerations.

The Court of Appeal found for the insurer, but without accepting the insurer’s argument. It rather decided the case on a narrower point. Citing a recent precedent from its own jurisprudence, the Court found that the proper question was whether the go-

kart “required motor vehicle insurance at the time and in the circumstances of the accident”. As the go-kart was being driven on a track at an amusement park when the accident took place, insurance was not required and the claim for coverage was dismissed. Whether insurance might be required in the event of illegal use on a highway could be left as an open question.

Adams v. Pineland, 2007 ONCA 844

Vicarious Liability (continued)

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session is not the same thing as possession. Only a full

trial would allow a court to say who was in possession of the automobile at the time of the accident.

Henwood v. Coburn

2007 ONCA 882