MAY 2012

BLG MONTHLY UPDATE

BLG
Borden Ladner Gervais

The BLG Monthly Update is a digest of recent developments in the law which Neil Guthrie, our National Director of Research, thinks you will find interesting or relevant – or both.

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ACCESS-TO-INFORMATION/PRIVACY

Government minister's use of private e-mail still subject to FOI requests, says UK information commission

Michael Gove, the UK education secretary, used his private e-mail account to send messages to two members of his political staff and a civil servant. Further to guidance it published in December 2011, the UK Information Commissioner's Office (ICO) has ruled that the communications had to be disclosed under a FOI request because they related to public business; the same rule would apply to text messages or other electronic communications.

The ICO rejected the argument that the e-mails were for political rather than governmental purposes; the role of a political adviser isn't always purely political but may also (as here) have an 'official' character. Use of private channels for the conduct of public business was 'a matter of concern to the Commissioner for a number of reasons': good records management practices, data security, the integrity of the public record, effective compliance with access-to-information obligations.

[Links are available **here** and **here**].

ADMINISTRATIVE/SECURITIES

IIROC's authority is contractual not statutory; not amenable to judicial review

The Ontario Divisional Court has confirmed the nature of the authority of the Investment Industry Regulatory Organization of Canada (IIROC) in *Deeb v IIROC*, 2012 ONSC 1014.

Michael Deeb, the president of Hampton Securities, was investigated on the basis of three anonymous letters the regulator had received about the firm. Apparently the investigation initially indicated that everything was fine, but IIROC subsequently issued a notice of hearing which it posted on its website. Deeb and Hampton alleged that this caused their business to suffer and that IIROC was acting maliciously in instituting proceedings against them. They sought judicial review.

Pepall J agreed with IIROC that while IIROC is recognised under Part VIII of the *Securities Act*, its regulatory jurisdiction is not statutory; it is a matter of contract between the regulator and its members. As a result, IIROC does not exercise a public law power that can be the subject of judicial review. Even if it did, it would be premature to allow judicial review before IIROC's hearing panel had made an actual decision that could be reviewed. IIROC's motion to quash the application for judicial review was granted.

[Link available **here**].

ART LAW/ENVIRONMENTAL LAW/ TAXATION/VALUATION

What is the value of a work of art you can't sell?

It is illegal in the US to possess or traffic in live or dead specimens of the bald eagle, the national emblem. A stuffed one is part of 'Canyon', a 1959 work by Robert Rauschenberg, owned by art dealer Ileana Sonnabend until her death in 2007. After a visit from the US Fish & Wildlife Service, she obtained a permit both to own the work and to lend it to the Metropolitan Museum in New York. After Sonnabend's death, her heirs sold works from her collection in order to pay federal and New York estate taxes of $471 million.

The Internal Revenue Service says the Rauschenberg is worth $65 million, based on the $71.7-million price of Andy Warhol's 'Car Crash'. Sonnabend's estate has sued the IRS, arguing that the value is $0, there being

no legal market for the piece; selling it to pay the tax bill could put the executors in prison. The IRS takes the position that the valuation should be determined according to what the work would sell for on the black market, suggesting that a hypothetical Chinese billionaire might be willing to buy it secretly.

[Links are available **here**, **here** and **here**].

CIVIL PROCEDURE/TORTS

Limitation period for negligent misrep runs from when you know you have a claim, not necessarily from when loss actually occurred

With impeccably awful timing, the City of Hamilton bought asset-backed commercial paper (ABCP) in July 2007, three weeks before the ABCP market collapsed. The paper was to mature in September 2007. In mid to late August 2007, banks and investors hammered out a deal to restructure the ABCP market which included a 60-day standstill, subsequently extended to January 2008.

In September 2009, the city brought a claim for negligent misrepresentation against the seller of the ABCP, on the grounds that the latter had not accurately disclosed the nature of the investment. Out of time, said the judge. The claim arose when the city realised its investment would go south, which was some time before the ABCP restructuring was concluded; not knowing the extent of the losses did not prevent the claim from accruing. The claim was for misrepresentation, not for default in payment at maturity (when the city said the claim arose). The city had also issued an almost identical claim that was clearly within time, suggesting it was alert to a limitations issue. The standstill did not suspend the running of the limitation period because it did not involve third-party dispute resolution between the parties, and did not prevent the city from suing.

The Ontario Court of Appeal agreed with the judge below on all counts: *Hamilton (City) v Metcalfe & Mansfield Capital Corp,* 2012 ONCA 156. Note the distinction made between *damage* (loss giving rise to a claim) and *damages* (quantification of that loss): the city's claim arose when it became aware of damage (and not even the full extent of damage); the limitation period didn't wait to run from the point at which there were damages.

[Link available **here**].

UKSC on knowledge required to set limitation clock running

The nine claims in *Ministry of Defence v AB,* [2012] UKSC 9, related to nuclear tests carried out in the South Pacific by the UK government between 1952 and 1958. The claims were brought in 2004, but the UK Supreme Court has ruled (in a 4-3 decision) that they were out of time.

Applicable limitations legislation starts the running of the clock when there is actual or constructive knowledge that injury is attributable to an act or omission that allegedly constitutes negligence, nuisance or breach of duty. 'Attributable' here refers to causation, and to a real possibility of a causal link. Issuing a claim obviously displays the requisite level of knowledge. As does, for the majority of the UKSC, first having a reasonable belief there is a claim – belief that is more then mere suspicion but enough to justify investigation. One can know there is a claim without having the evidence necessary to prove it, but evidentiary obstacles to proving the claim don't somehow stop the clock. Consulting an expert does not always mean acquiring the requisite knowledge. On the facts, all nine claimants must have had a reasonable belief that their injuries could be attributed to the nuclear tests for longer than the applicable 3-year limitation period, especially in light of their public statements and campaigning on the subject before that time and general public awareness of the health consequences of nuclear fall-out.

The minority tried to differentiate between knowledge and belief, suggesting that while reasonable belief founded on known fact would start the limitation period, subjective belief alone would not. For the minority, because there were no known facts capable of supporting a belief that the injuries were attributable to radiation when the claims were issued, the claims were not time-barred.

[Link available **here**].

CONFLICT OF LAWS/BANKING/CARRYING ON BUSINESS

New York court on jurisdiction over claims of bank's foreign non-customers: not entirely clear-cut

The plaintiffs in the two related judgments in *Licci v Lebanese Canadian Bank SAL and American Express Bank Ltd* (2d Cir, 5 March 2012) were Israeli residents who had been the victims of Hezbollah rocket attacks in 2006. They alleged that Lebanese Canadian Bank (LCB) knowingly maintained bank accounts for a group allegedly affiliated with Hezbollah and that both LCB and Amex Bank had facilitated wire transfers for the affiliate. New York law does not impose a duty on a bank to protect non-customers from intentional torts committed by the bank's customers, but was it New York or Israeli law which governed the claims? New York, said the banks (for obvious reasons).

The trial judge failed to conduct choice-of-law review and thought there was no conflict between the laws of the two jurisdictions. On appeal, the 2d Circuit did consider which law governed.

Although any tort would have occurred in Israel, all of the conduct on the part of Amex Bank that might have given rise to liability occurred in New York, which therefore had the closer connection to the claim. This led to the same result the trial judge had reached: the claim against Amex Bank was dismissed because New York law didn't impose a duty to non-customers.

Things were less clear in respect of LCB. The 2d Circuit didn't think New York law provided sufficient guidance on whether a New York court had the jurisdiction to hear the claims being asserted. The trial judge thought that the mere fact that LCB maintained a corresponding bank account in New York and used it to wire funds to the Hezbollah affiliate wasn't a sufficient basis for jurisdiction, but the 2d Circuit thought the whole question 'insufficiently developed'. It therefore certified two questions to go up to the Court of Appeals: (1) is effecting wire transfers through a correspondent account in New York the transaction of business in the state, such that it would be captured by the state's 'long-arm' Civil Practice Law and Rules? and (2) if the answer to the previous question is 'yes', did the plaintiffs' claims actually arise from that transaction – or was the nexus between wire transfers and rocket attacks too attenuated?

CONFLICT OF LAWS/CIVIL PROCEDURE

Alberta court accedes to – but narrows scope of – Kansas court's letter of request to examine Canadian witness

The Kansas district court issued letters of request so that a representative of Shell Canada could be examined with respect to issues in Kansas class proceedings. Shell Canada objected to the request, saying that it was an overly broad fishing expedition. Wittmann CJQBA acceded to the request of the Kansas court, but also agreed that it was over-broad – some of the matters it covered were only remotely relevant. The judge narrowed the scope of inquiry to fit Alberta's conception of relevance and its rules of civil procedure and applied local rules with respect to refusals on examination – but he did say OK to videotaping the examination (which is not common in Alberta) if this was

acceptable under Kansas procedure: *Richardson v Shell Canada Ltd,* 2012 ABQB 170.

[Link available **here**].

CONTRACTS

The crucial comma

A tiny thing, the comma – but all-important in *Osmium Shipping Corp v Cargill International SA,* [2012] EWHC 571 (Comm).

[Link available **here**].

The ship *Captain Stefanos* was captured by pirates off the coast of Somalia, which gave rise to a dispute about who was to bear the costs associated with the suspension of the voyage. The charterparty provided that the owners of the vessel were on the hook in the event of 'capture/seizure, or detention or threatened detention by any authority including arrest...' The owners contended that 'by any authority' qualified 'capture/seizure' and that because the pirates did not constitute an 'authority', the owners were not responsible for costs incurred as a result of the ship's seizure. The charterers argued that the placement of the comma made it clear that 'by any authority' referred only to detention or threatened detention by a government authority, but that capture or seizure could be by anybody, including pirates. An arbitration panel agreed with the charterers' construction, and this was upheld by the English Commercial Court in a brief and sensible judgment.

See also *Herbert v JP Morgan Chase & Co* (EWHC (QB), March 2012; No HQ11X02595), where the bank successfully argued that the plaintiff was aware of a missing decimal point when he signed the bank's offer to relocate to South Africa (subsequently rescinded), and therefore couldn't claim lost earnings based on an annual salary he said would have been R24 million (US$3.1 million).

[Link available **here**].

Closer to home, see the case of the 'million-dollar comma': *AMJ Campbell Inc v Kord Products Inc* (2003) 63 OR (3d) 575 (SCJ).

[Link available **here**].

CONTRACTS/E-COMMERCE

Formation of guarantee through a series of e-mails 'entirely commonplace' for English Court of Appeal

Consistent with what the Ontario Court of Appeal recently said in *Pintar Manufacturing Corp v Consolidated Wholesale Group Inc,* 2011 ONCA 805 (see the BLG Monthly Update for February 2012), the English Court of Appeal has held that 'the conclusion of commercial contracts ... by an exchange of emails, once telexes or faxes, in which the terms agreed on are not repeated verbatim later in the exchanges, is entirely commonplace' and sufficient to meet the writing requirements for the formation of a guarantee under the *Statute of Frauds 1677*: see *Golden Ocean Group Ltd v Salgoacar Mining Industries PVT Ltd,* [2012] EWCA Civ 265.
The court rejected the 'forensic exaggeration' that this would require an 'educated trawl' through a huge binder of printed e-mail messages that was inimical to the intent of the writing requirement, which is instead to be construed 'in a manner which accommodates accepted business practice'. The e-mails at issue were also signed by a sender who knew that they were 'not simply an inconsequential communication' but one that would give rise to binding obligations.

[Links are available **here** and **here**].

DAMAGES

Value is what people will pay, and judges shouldn't second-guess that

Some law & economics from the 7th Circuit. Khan owned 40% of Falcon Holdings, a fast-food franchisor, and told his managers that he'd buy the remaining equity and allegedly told them he'd distribute half the company to them, as an incentive for their hard work. Khan did acquire the remaining equity but did not distribute any of it to the managers, denying he'd ever promised to do that. The managers sued, saying they had accepted lower salaries in reliance on the alleged promise.

The trial judge granted summary judgment in Khan's favour, in part because he thought the managers had failed to assess their damages adequately. They had taken the price paid by Khan for the remaining equity, divided it in half (to represent the portion they said they were promised) and then divided it by the number of managers. The judge thought this couldn't be sufficient, given that it was impossible to value the firm on the basis of what Khan had paid for the remaining equity stake.

Nonsense, said Easterbrook CJ on appeal: *Malik v Falcon Holdings* LLC (7th Cir, 14 March 2012). 'The value of a thing is what people will pay. The judiciary should not reject actual transactions prices when they are available.' Judge Easterbrook did do a bit of second-guessing, though: he thought it was unsound to assume that the value of Khan's 100% equity stake represented the entire value of the firm or that Khan would have offered managers a share without imposing terms (*e.g.* by making their share available in the form of options). In any event, he reversed the judgment below and remanded the case.

DAMAGES/TORTS

Damages awarded for wrongful use where no loss suffered

CHEP is the largest hirer of pallets in Australia. So large, in fact, that when Bunnings Group, an operator of retail hardware stores, appropriated a large number of pallets for its own use, CHEP never had a shortage of pallets to meet its own needs. Bunnings was found liable for conversion because it knew that CHEP did not consent to the use of the pallets (unless Bunnings paid for them) and at all times had an immediate right to repossess them.

The interesting thing is the award of damages: CHEP suffered no actual loss from the conversion, but the NSWCA held that it was entitled to damages to compensate it for the loss of use of otherwise profitable property (assuming there had also been some use of the property by the wrongdoer). Such an award was, in the court's view, a legitimate aspect of compensatory damages. No need to consider whether it was really a restitutionary award representing the wrongdoer's profit (although one of the judges on the panel preferred to frame it in those terms): *Bunnings Group Ltd v CHEP Australia Ltd,* [2011] NWSCA 342.

[Link available **here**].

EMPLOYMENT LAW/FIDUCIARIES

Non-compete clauses and departing fiduciaries

The clause at issue provided that Brulé, the founder of Veolia ES Industrial Services, would not compete with the business for 'two (2) years commencing on January 1, 2007 following termination'. Brulé left the company in 2004, taking with him a binder of information

about tenders Veolia had been involved in and a list of Veolia's employees. He incorporated a company called Clean Water Works, which in 2005 submitted a bid on a project, beating out Veolia. Veolia then sued for breach of the non-competition clause.

The trial judge concluded that the clause was badly drafted and could be made enforceable only by severing the words 'commencing on January 1, 2007', resulting in a non-compete period which ran from the date he left Veolia. This was reasonable, and had been breached. The Court of Appeal disagreed: the trial judge had been too ready to wield the proverbial blue pencil, which is to be used rarely and only where it crosses out trivial words not affecting the main purport of the covenant. Not so here, where the parties clearly did intend the language to have effect. Leaving the wording as it was, the clause was clearly unreasonable, in that it prevented competition for a period starting 2 years after the employee had left his old job. The trial judge was also wrong to say that Brulé had breached his fiduciary duty: it wasn't a breach of duty to take the binder of information because Brulé didn't actually use the information in putting his competing bid together, and it wasn't confidential anyway. There is no duty on the part of a departed fiduciary who is free to compete to inform his former employer of an intention to do just that.

Veolia ES Industrial Services Inc v Brulé,
2012 ONCA 173

[Link available **here**].

EVIDENCE/ADMINISTRATIVE LAW

Litigation privilege and administrative investigations

The UK's Office of Fair Trading (OFT) sought disclosure of notes of an internal investigation conducted by Tesco Stores, a major supermarket chain, in response to allegations that it had engaged in 'concerted practices' with suppliers of cheese, in order to hike prices. Tesco's external counsel submitted new witness evidence (which was favourable to Tesco) after the deadline for responding to the OFT allegations but before the OFT had made a finding of infringement of competition law. The OFT refused to admit the new evidence and demanded to see Tesco's notes of its interviews with potential witnesses. Tesco claimed litigation privilege over the records.

Lord Carlisle of Berriew, chairman of the Competition Appeal Tribunal, concluded that disclosure of the records was not necessary or proportionate, but went on to consider the (more interesting) question whether they were privileged: *Tesco Stores Ltd v Office of Fair Trading,* [2012] CAT 6. He noted that while it has been said that litigation privilege cannot be claimed where an internal document is prepared for use in non-adversarial or investigative proceedings, it isn't always clear (as in this case) whether the proceedings are adversarial or merely inquisitorial, or a bit of both. The OFT naturally contended that its process was simply investigative: no privilege, then. Lord Carlisle disagreed, on the grounds the proceedings were 'confrontational' and raised a serious prospect that Tesco would face penalties if found liable for infringement. This was 'not simply an investigation to get to the bottom of the facts'; it was as adversarial as civil litigation involving the same alleged infringements. Litigation privilege applied to the documents (and had not been waived by Tesco).

Compare *In the matter of an application by Canadian Distributed Antenna Systems Coalition* (OEB, 22 February 2012), reported in the BLG Monthly Update for April 2012.

FIDUCIARIES/M&A

Delaware decisions on conflicts of interest in M&A transactions

Two recent, one a bit older. The CEO of El Paso Corp. was the company's negotiator in a proposed sale of the business to Kinder Morgan Inc. No problem in that; it's what CEOs do. Where the problem lay was in the CEO's pre-closing discussions with Kinder Morgan about a side deal which would involve a buy-out by El Paso management (including the CEO) of a business unit that Kinder Morgan intended to sell off. Chancellor Strine took a very dim view of this obvious but undisclosed conflict of interest: it was clearly in the CEO's interest not to maximise the the value of El Paso – and by extension the object of the proposed management buy-out. Goldman Sachs, which advised El Paso but had a significant stake in Kinder Morgan, also takes a judicial drubbing. In the end, though, this didn't amount to grounds for the odd injunction requested, which would have allowed El Paso to shop itself in parts (in contravention of the merger agreement) but then require Kinder Morgan to close if no better deal emerged: *In re El Paso Corp Shareholder Litigation,* 2012 Del Ch LEXIS 46.

More CEO conflicts *in Re Delphi Financial Group Shareholder Litigation,* 2012 Del Ch LEXIS 45, where the chap in question failed to disclose to the board that he intended to seek a control premium for the class of shares he alone held. There were also allegations that he was negotiating side deals with the buyer with respect to businesses of his own that provided services to the company. In spite of 'troubling' breaches of duty, it was nevertheless likely that the CEO had an incentive to maximise the sale price of the company: the remedy would be damages for breach not an injunction preventing the deal.

See also *In re Del Monte Foods Co. Shareholders Litigation,* 25 A.3d 813 (Del Ch 2010), where a financial adviser in an M&A deal was criticised for having a significant equity investment in the purchaser.

LEGAL RESEARCH

How to cite a tweet (not even the new *McGill Guide* covers this)

In fact, the 7th edition (2011) already has a slightly dusty feel to it, with its coverage of things like CD-ROMs. Should you ever need to cite a tweet, the Modern Language Association of America (a major group of academics in the humanities) has published guidance in its style handbook: 'Last name, first name (user name). "The tweet in its entirety." Date, Time. Tweet.' To use one of our heaviest users of Twitter as an example, the citation would be (use your own date format, if you want):

Smith, Michael (MichaelSmithYYZ). "Important case from ONCA – joint and several #liability for #negligence & offers to settle in multiple defendant cases http://www.ontariocourts.on.ca/decisions/2012/2012ONCA0025.htm". 26 January 2012, 9.58 am. Tweet.

[Link available **here**].

PRIVACY/TORTS/DAMAGES/CLASS ACTIONS

Anxiety resulting from loss of personal data not compensable; proposed class action fails

TD Auto Finance Services (actually, its predecessor) sent a tape containing the personal information of its customers by courier. The tape was lost in transit, and customers were informed of this. Anna Mazzonna, one of the customers, alleged that this had caused her and others anxiety and fear about possible identity theft, as well as potential inconvenience in obtaining credit and having to monitor for fraud: *Mazzonna v Daimlerchrysler Financial Services Canada Inc,* 2012 QCCS 958.

[Link available **here**].

Lacoursière JSC refused to certify the proposed class action for the simple reason that Mazzonna failed to show that she or anyone else had suffered compensable damages; there was no evidence that her personal information had in fact been misused, and no cause of action for the stress caused by being informed of a possible risk of misuse of personal information. The judge relied in part on Ontario law: *Mustapha v Culligan of Canada Ltd,* 2008 SCC 27.

[Link available **here**].

Bob Charbonneau, Suzanne Courchesne and Anne Merminod of the Montreal office of BLG acted for the respondents.

SECURITIES

Drawing inferences from circumstantial evidence of insider trading

Some interesting points in *Re Suman* (OSC, 19 March 2012). OSC staff alleged that Suman had, in the course of his employment at MDS Sciex, communicated undisclosed material information to his wife about the proposed acquisition of Molecular Devices Corp. by MDS Sciex's parent. Suman and his wife bought a large number of securities in the company, which they subsequently sold for just under $1 million.

First interesting point: Molecular Devices was not a reporting issuer in Ontario, so there was no breach of s 76(1) of the *Securities Act,* which prohibits insider trading in securities of a reporting issuer (or a TSX Venture issuer with a real and substantial connection to Ontario). The allegations were therefore that Suman's trades were contrary to the public interest (which the Commission ultimately accepted). Second interesting point: the evidence of insider trading (and tipping) was largely circumstantial, although the Commission was prepared to infer from it that the offences had been made out. Suman had the opportunity to acquire the insider information from his job, the trades in question were completely atypical, he had googled media stories on Martha Stewart and insider trading on the day he began to make purchases, and he appeared to have used special software to erase data on his home and work computers.

Third interesting point: the Commission relied in part on *Re Shevlin* (FSA, 2008), where the UK regulator was willing to infer that an IT technician had obtained material non-public information in the course of his employment, which he used to trade – not in securities of the employer but in contracts for differences with the employer's securities as the underlying instrument. (OSA s 76(6) was amended in 2010 to extend the insider trading prohibition to derivatives based on securities of a reporting issuer, in response to the *Shevlin* scenario.)

[Link available **here**].

SECURITIES/CONSUMER PROTECTION/ CONTRACTS

Securities dealer's processing fees don't have to be reasonable, just disclosed

Morgan Stanley (MS) charged what was described as a handling, postage and insurance (HPI) fee in relation to each trade confirmation it mailed out to investors. Susan Appert initiated class proceedings to recover HPI fees charged since 1998, on the grounds the fees bore no relation to MS's actual charges: insurance may not have been applicable to all transactions, actual mailing costs were never disclosed, multiple confirmations may have been sent in a single mailing etc. She estimated that actual costs to MS were 42 cents per transaction; the fee in 2005 was $5.25.

The district court in Chicago dismissed her claim, a ruling upheld by the 7th Circuit: *Appert v Morgan Stanley Dean Witter Inc* (7th Cir,

8 March 2012). Disclosure of a fixed fee for something like shipping and handling does not necessarily mean that the stipulated amount is the actual cost of those services, and a court's focus will be on whether the amount was disclosed – not whether it is unreasonable or excessive. MS disclosed the amount of the HPI fee and noted that it was subject to change upon notice to the customer. The confirmation slips themselves said the fee represented HPI charges, 'if any'. There was therefore no breach of the MS customer agreement, and no claim in unjust enrichment either. If Appert didn't like the fee, she was free to take her business elsewhere.

TORTS

Permit to operate waste-disposal site does not preclude nuisance claim

Biffa Waste Services operated a dump for industrial and household waste, beginning in 2004, on land that had been zoned for the purpose since the 1980s. Biffa also had a permit for its operations from the environmental regulator, which specified that Biffa was to take appropriate measures to ensure that the site did not produce odours at levels likely to cause pollution, harm to human health or detriment to the environment. The site was located near a housing development, and complaints about bad smells were made from day 1 of Biffa's operations, resulting in acrimonious exchanges and eventually litigation.

The trial judge held that Biffa's permit had changed the character of the locality, which meant in this case that otherwise offensive activities ceased to constitute a nuisance. He also thought that the modern law of nuisance should be predicated on reasonable use: if the defendant has acted reasonably and not negligently, a nuisance claim should fail. The permit did not amount to statutory authority (and thus a defence to a nuisance claim), but informed the analysis of Biffa's activities and whether they were reasonable. The English Court of Appeal took a different view, noting that good old 19th-century principles of the law of nuisance for the most part remain valid and didn't need to be modified to accommodate modern statutory schemes. Statute and common co-exist, and the one does not displace the other. The residents' appeal was allowed: *Barr v Biffa Waste Services Ltd,* [2012] EWCA Civ 312.

[Link available **here**].

The case of the greasy chip: factual causation yet again

Kathryn Strong, an amputee on crutches, slipped just after noon on a greasy chip (french fry) on the floor of the sidewalk sales area outside her local Woolworths store, suffering severe spinal injuries from her fall. It was acknowledged that while Woolworths did clean the sidewalk sales area, it had no proper system in place for periodic inspection and cleaning, and the area had not been inspected in the 4.5 hours preceding the accident.

The NSW trial court found that Woolworths had been negligent: it should have seen the chip (which left a grease-mark 'as a big as a hand') but failed to do so. The Court of Appeal reversed, holding that it was not open to the judge (who didn't really address causation in fact) to infer that the chip had been lying on the ground for long enough to have been detected. It was *not* more likely than not that regular cleaning would have prevented Strong's injury.

The High Court of Australia reversed again (Heydon J dissenting): *Strong v Woolworths Ltd,* [2012] HCA 5. The general principle in slipping cases is that if more than one reasonable inspection period has passed, on a balance of probabilities failure to inspect has led to the

accident. Strong fell at lunchtime, when chips are likely to be dropped more frequently, but the court noted that in Australia chips are as likely to be eaten for breakfast or as a mid-morning snack as at lunchtime, so it was wrong for the Court of Appeal to conclude that the chip had not been there long enough to have been detected and cleaned up. The CA was also wrong to say that the usual 'but for' test for factual causation excludes consideration of factors making a material contribution to the plaintiff's harm. For the High Court, 'the determination of the question turns on consideration of the probabilities' – but whether a material increase in risk would be sufficient to prove causation was left as an open question.

For Heydon J, dissenting, material contribution was irrelevant: either Woolworths 'made no contribution at all [to the injury], or the only contribution'. He didn't think there was enough evidence one way or the other to establish when the chip fell or from which to draw inferences about causation.

[Link available **here**].

Zipline operator's waiver of liability enforceable

The British Columbia trial court held last year that releases signed by participants in ziplining were a complete defence to the negligence of the operator: *Loychuck v Cougar Mountain Adventures Ltd,* 2011 BCSC 193. The trial judge found that the operator's waiver was not unconscionable either at common law or under BC consumer protection legislation. The BC legislature had, furthermore, declined to act on a 1994 report which recommended limitations on waivers of liability for commercial recreational activities.

The BCCA has upheld the trial judgment: 2012 BCCA 122. The releases were discussed in the light of *Tercon Contractors Ltd v BC (Transportation and Highways),* 2010 SCC 4, and found not to be unconscionable. There was no inequality of bargaining power or substantial unfairness in requiring a release as condition of participating in a dangerous activity; this did not offend 'community standards of commercial morality'. The releases were also not offensive to public policy (and no amount of law reform commission reports recommending legislation to preclude waivers for recreational activities established a public policy against them). It would be against public policy to attempt to rely on a release where one had knowingly or recklessly endangered the public, but not in a situation where there had merely been negligence that caused injury to a participant with 'some measure of control' over the activities in question. The releases were not unconscionable under consumer protection legislation (assuming it applied) and arguments predicated on misleading advertising or lack of consideration also failed.

[Links are available **here** and **here**].

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