HANDLE WITH CARE

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A Risk Management Newsletter For the Health Care Protection Program Members

Health Team Contact Information has CHANGED

As part of a government wide communications initiative, Risk Management Branch received **NEW TELEPHONE NUMBERS** on September 26 -27, 2017. All previous phone numbers for staff were disconnected as of October 3, 2017. However, the following main telephone numbers remained **UNCHANGED**:

- the main RMB phone number (250-356-1794);
- the main RMB fax number (250-356-6222); and
- the Claims fax number (250-356-0661).

Refer to the About Us and Contact Information section (pg 35) for current contact information.

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Morality and Intentionality: The Impact of a Not Criminally Responsible Verdict on Intentional Tort Liability - by Laura Wilson, Guild Yule LLP. The implications of a prior not criminally responsible by reason of mental disorder verdict on subsequent civil proceedings involving the same offence. (pg 12-16)

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WHAT THEY WISH THEY KNEW BEFORE PUBLISHING

NEVER UNDERESTIMATE THE RISKS

I have defended various kinds of professionals who have found themselves on the wrong side of a defamation action. So often, my clients had a genuine need to voice criticisms of a person or company. Other times, it was just too darn easy for them to publish their own piece on social media, or to endorse and hyperlink to the defamatory words of others.

My clients often express to me that they wish they had known at the time of the publishing what would be involved in proving fair comment or truth, and the technicalities of these defences. Others wished that they had limited the scope of their publication so that they could better rely on the defence of qualified privilege, or even absolute privilege.

Often, my clients express to me that they wish they appreciated at the time of publishing how relentless the potential plaintiff would be in pursuing his or her claim. A tenacious plaintiff often believes that the publisher acted maliciously and ruined his or her life or business and believes, even where the objective facts suggest otherwise, that there is no truth to what has been said. This mindset can hamper resolution attempts and increase the likelihood of the matter going to trial.

Fortunately, this technical area of the law has an ever expanding set of cards to play to successfully defend or dismiss a defamation claim. For instance, in recent years the jurisprudence has opened the door to certain kinds of defamation claims being dismissed by way of summary trial. There are also strict pleadings rules which can greatly assist a defendant in striking part or all of a defamation claim.

However, why not stop for a moment and talk about how such claims can be avoided in the first place. Although I enjoy developing a relationship with my clients, advocating for their free speech, and defending them through the fight, I appreciate that all in all they would be happier if they had never required my litigation services. This discussion demonstrates that much can be gained by obtaining risk management legal advice, prior to publishing, regarding the words and appropriate forum to use. Such advice can save you from the time, expense and energy required to defend a defamation claim.

WHAT THEY WISH THEY KNEW: THE MEANING DEFENDED IS NOT THE MEANING INTENDED BY THE AUTHOR

A publisher rarely appreciates that the meanings and innuendoes which will have to be defended are not the meanings and innuendoes that he or she intended to convey or believed were being conveyed. If a defamation action is commenced, counsel will fight over the meanings of the words published. Plaintiff's counsel will plead and argue throughout that the most ghastly and horrendous meanings were conveyed, whilst defence counsel will seek to minimize or deny any defamatory meaning. Advocacy can be compelling in this regard given the subjectivity in determining meanings. This subjectivity is evident

by the fact that our trial court and appellate court often disagree on what the words conveyed in their context.

When considering meaning, the Court will not consider what you meant to say, but rather will look at the words conveyed, consider the context, and then arrive at a meaning which the Court believes a reasonable and ordinary reader or listener would take from the statement. Although you may testify on what you intended to convey to answer to allegations that you published with malice, the Court will not consider your own intended meaning when ruling on the meaning in fact conveyed.

The Court's determination of meaning and innuendoes will set the stage for the success or failure of the truth and fair comment defences.

WHAT THEY WISH THEY KNEW: THE LIMITS OF TRUTH

The defence of truth (formerly referred to as "justification") can provide a full defence to a claim in defamation. To succeed, the truth of every injurious imputation which the trier of fact finds to be conveyed by the publication must be proven on a balance of probabilities to be true. The Court will focus on the sting of the defamatory imputations, and whether the various stings are substantially true.

There are great risks in pleading truth where there is no evidence to support it. The failure to successfully prove facts pled to be true in a defamation action could encourage a finding of malice, which would defeat the fair comment and qualified privilege defences, and could result in aggravated and punitive damages being awarded to the plaintiff.

WHAT THEY WISH THEY KNEW: "FAIR COMMENT" IS NOT AS EASY AS IT SOUNDS

So often I hear my clients insist when first retaining me that what was said was "fair comment", without appreciating what is involved in successfully relying on this defence. To defend a statement as fair comment, one must meet the following stringent requirements: the comment must be on a matter of public interest; it must be a comment based on provable facts that are either stated with the publication or are otherwise known to the reader (such as being notorious); the comment, though it can include inferences of fact, must be recognizable as comment as opposed to a statement of fact; the comment must satisfy the following objective test: could any man honestly express that opinion on the proven facts; and, the defendant must not have acted with malice.[i]

Hence, the defamatory words must be recognizable to the ordinary reader as comment upon true facts, and not a bare declaration of facts. A comment contains an element of subjectivity and is capable of proof, whereas a statement of fact is capable of being determined to be accurate or not. An inference or deduction from facts may properly be regarded as comment, but an implication is regarded as a statement of facts.[ii] The difficulty is that the point at which criticism ends and accusation begins is not always easy to distinguish and the line between them can be, and frequently is, very tenuous.[iii] If the statement of fact and comment cannot be distinguished, the defence of fair comment is not available. The trial and appellate court often struggle and disagree with whether a statement is a statement of fact or a comment.

In most cases where the defence of fair comment is successful, the facts on which the comment is based are clearly stated in the publication, and the opinion is expressed in a way that makes it clear that the opinion is an inference or a deduction based on the stated facts.

There must be sufficient facts that were either stated with the publication or known to the reader, which can be proven as true to support the comment. A defendant only has to prove sufficient facts to convince the Court that anyone could have honestly expressed the defamatory comment, regardless of whether the inference or conclusion was fair and whether he or she had an honest belief in the comments.[iv] It at times is difficult to establish that the facts relied upon to support the comment were notorious or otherwise known to the reader.

One could write a whole paper on the various challenges to the fair comment defence, and as such I set out above the more common challenges.

WHAT THEY WISH THEY KNEW: LIMITATIONS OF QUALIFIED PRIVILEGE

As noted above, there is often a real need to share a concern. There are certain occasions in which a person can publish, in good faith, defamatory statements which turn out to be potentially untrue. Such an occasion of qualified privilege arises where: (i) persons of ordinary intelligence and moral principle would have felt a duty to communicate the information in the circumstances; and (ii) the information was conveyed only to the recipients who had an interest in receiving the communication. This reciprocity of interest is essential as this defence will fail where some of the recipients did not have an interest in receiving the communications.

A beautiful characteristic of this defence is that it protects all kinds of personalities. The Court is required to take the defendant as it finds them, "according to their temperament, their training, their intelligence," and to recognize that some people "rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognize the cogency of material which might cast doubt on the validity of conclusions that they reach."[v] If an occasion of qualified privilege arises "he will be protected, even though his language should be violent or excessively strong, if, having regards to all the circumstances of the case, [h]e might have honestly and on reasonable grounds believed that what [h]e wrote or said was true and necessary for the purpose of his vindication, though in fact it was not so."[vi]

This defence does not mix well with the Internet. When publishing on a website, you are publishing to the world.[vii] It does not matter if you believe that the website on which you publish would only attract readers who would have an interest in the matter. Unless you are publishing to a website which requires you to log in, and your post can only be seen by members who would have an interest in the matter, you should assume unless advised otherwise by a lawyer experienced in the area that an occasion of qualified privilege does not arise.

Before publishing on the assumption that you have an occasion of qualified privilege, you should also consider the potential need to demonstrate that you did not publish with malice. A finding of malice defeats the qualified privilege defence. Examples of circumstances where the Court will find that a publisher acted with malice include: where the publisher had a reckless indifference to whether what was being published was true or false; where the dominant purpose of publishing was to cause injury because

of spite or animosity; or where the dominant purpose in publishing was another improper motive. Allegations of malice lead to extensive discovery on all prior dealings with the plaintiff. Even dealings with the plaintiff that occurred subsequent to the publication can be offered into evidence and potentially relied upon as extrinsic evidence of malice. Often, organizations can choose who delivers the message. If such choices are available, it is beneficial to have the messenger be the one who had the least dealings with the potential plaintiff so as to avoid extensive discovery on the malice issue.

Qualified privilege can be a vital defence when one is responding to attack. Care must be taken to, among other things, ensure that you are responding to the same audience who heard the attack and that your response is limited to what is germane and appropriate to the occasion.[viii]

WHAT THEY WISH THEY KNEW: RESPONSIBLE COMMUNCATION

In 2009, the Supreme Court of Canada recognized that the threshold for meeting the qualified privilege defence when publishing to the general public remained very high and that the criteria for reciprocal duty and interest remained unclear.[ix] Rather than working within the constraints of the qualified privilege duty and interest analysis, Supreme Court of Canada instead formulated a new defence of responsible communication. This defence focuses on the concept of public interest and responsibility for mass media communications. Responsible communications is a type of privilege which involves close scrutiny of the facts of the particular case. With this defence, it is not so much an occasion that is privileged, but the publication itself.

The defence applies where a defamatory statement, first, relates to a subject of public interest, and second, meets various requirements concerning whether the defamatory statements have been responsibly verified before a publication. This defence is primarily available to journalists but can be used by bloggers and other publishers if they meet the requirements of responsible verification.

Whether the defence will succeed will depend upon the Court's analysis of several factors, including: the seriousness of the allegation; the public importance of the matter; the urgency in getting the message out; the status and reliability of the sources; whether the plaintiff's side of the story was sought and accurately reported; whether the inclusion of the defamatory statement was justifiable; and whether the defamatory statement's public interest lay in the fact that it was made rather than its truth.

Hence, to rely on this defence, one really needs to show that he or she diligently investigated the matter and if possible sought the plaintiff's side of the story before publishing.

WHAT THEY WISH THEY KNEW: ABSOLUTE PRIVILEGE WHEN REPORTING OTHERS

When someone makes a complaint to the police, or makes a complaint about a professional to a professional regulatory body, or files pleadings or provides testimony, he or she can do so within the sanctity of absolute privilege, provided that certain safeguards are taken.

The defence of absolute privilege exists to protect the functioning of the judicial and quasi-judicial process and to encourage individuals to participate in the judicial or quasi-judicial process without fear of exposing themselves to civil action.

An occasion of absolute privilege exists if the purpose of the communication is sufficiently related to, or necessary for, the judicial or quasi-judicial proceedings. Hence, a letter initiating a complaint, correspondence to and from, or testimony given in relation to the proceeding, would be protected. However, the protection of absolute privilege does not extend outside of the proceedings, and as such, discussing or republishing the complaint, submissions or evidence outside of the proceeding, will not be protected by this defence.

The privileged occasion of absolute privilege exists even if the complaint is found to be without merit and is dismissed at an early stage; this is because the purpose of the immunity would be undermined if absolute privilege only applied where the complaint leads to a successful proceeding.[x]

An occasion of absolute privilege only exists where the body or society to whom the complaint is made is quasi-judicial in nature as opposed to merely administrative. Hence, in *Sussman v. Ealesxi*, the Court found that the manager of a nursing home was protected by an occasion of absolute privilege when making a complaint about a dentist to the Royal College of Dental Surgeons, but was not protected by an occasion of absolute privilege when forwarding a copy of the complaint to the Waterloo-Wellington Dental Society.

Publications that are not necessary to further the judicial or quasi-judicial process may in some cases be protected by an alternative defence of qualified privilege.

It is therefore essential when making a complaint to the police or to a regulatory body, or providing evidence to further a complaint, that one ensures that the communication is made only to the appropriate judicial or quasi-judicial body, and that is not copied to disinterested parties. When in doubt, before bringing your complaint seek risk management legal advice to ensure that you can report within the protection provided by absolute privilege.

WHAT THEY WISH THEY KNEW RE: IT DOES NOT MATTER THAT THEWORDSWERE NOT YOUR OWN

There is a general rule that a publisher is not liable for their words being republished by a third party if the publisher did not authorize or intend for the republication to be made. There are exceptions to this general rule of which to be aware. Such exceptions include where the publisher implicitly or explicitly authorizes someone to communicate the defamatory remark to another, or where the republication was the natural and probable consequence. These exceptions only apply and result in liability for the republication of your words by another person where the substance of the defamatory statement is the same, or substantially similar to your original publication.

Most recognize that if they speak to a journalist, or send a message with an invitation that it can be shared with others, that they are liable for the resulting publication by the journalist or words republished in accordance with their invitation.

The Internet also opens up a whole new area of potential liability, namely the potential for Facebook page operators, website operators and Internet service providers to be liable for postings made by third parties on their Facebook page or website. Taking into account the basic principles of libel law in Canada, and recent decisions involving Internet defamation,[xii] one can be liable for defamatory statements posted by third parties if the provider knew of the publication or ought to have known of the publication by the third party but failed to remove it. At issue in such cases is whether the Facebook owner or website operator was an innocent disseminator.

Hence, if you have a website or a social media account, beware that you are also liable for the publications of others which appear on your site once you have knowledge of the defamatory publication but fail to remove it.

Be careful what you hyperlink to. While the simple act of hyperlinking to a website that contains defamatory material is insufficient for liability to arise for any defamatory publication at the hyperlink, liability will arise if the hyperlinking is done in a way that includes an adoption or endorsement of the defamatory content of the hyperlink. The Court will consider the words published with the hyperlink, as well as whether the hyperlink was to
a "deep link" directly to the defamatory words, or to a shallow link to the home page of the website hosting the defamatory statement deep within its site.[xiii]

MANAGING YOUR RISK

As evident above, the defences to defamation claims each have their own technicalities and limits.

Given the time and energy that goes into defending a defamation claim, and the potential steep financial and reputational risks that losing a defamation lawsuit can bring, we recommend consulting a lawyer before publishing potentially defamatory materials. With proper risk management legal advice, you can limit your risks by more carefully conveying your message, ensuring that only those who have an interest in the matter hear your
concerns and, depending on which defence you may be relying on, ensuring that the necessary factual foundation to support your statement is present.

Defending defamation claims can be very costly. Appropriate insurance coverage for your publications is vital.

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[i] *Simpson v. Mair*, 2008 SCC 40
[ii] *Kemsley v. Foot,* [1952] AC 345 (H.L.)
[iii] *Boland v. The Globe and Mail Ltd.,* [1961] 21 D.L.R. (2d) 401 (Ont. C.A.)
[iv] *Simpson v. Mair,* 2008 SCC 40
[v] *Horrocks v. Lowe*, [1974] 1 All E.R. 662 (H.L.)
[vi] *Adam v. Ward*, [1916-17] All E.R. 157 (H.L.)
[vii] See for example *Rubin v. Ross*, 2013 SKCA 21
[viii] See for example *Wooding v. Little*, (1982), 24 C.C.L.T. 37 (B.C.S.C.); *Ward v. Clark* 2001 BCCA 724; *Tucker*
[v] *Douglas*, [1952] 1 S.C.R. 275

[vi] *Adam v. Ward*, [1916-17] All E.R. 157 (H.L.)
[vii] See for example *Rubin v. Ross*, 2013 SKCA 21
[viii] See for example *Wooding v. Little*, (1982), 24 C.C.L.T. 37 (B.C.S.C.); *Ward v. Clark* 2001 BCCA 724; *Tucker v. Douglas*, [1952] 1 S.C.R. 275
[ix] *Grant v. Torstar Corp*., 2009 SCC 275; *Quan v. Cusson*, 2009 SCC 62
[x] *Hung v. Gardiner*, 2003 BCCA 257
[xi] *Sussman v. Eales*, (1985) 33 CCLT 156; rev'd in (1986) 25 CPC (2d) 7 (Ont. C.A.)
[xii] *Weaver v.* Corcoran, 2015 BCSC 165; *Pritchard v. Van Nes, 2016 BCSC 686; Carter v. B.C. Federation of Foster Parents Assn.* (2003), 27 B.C.L.R. (4th) 123 (B.C.C.A.); 42 B.C.L.R. (4th) 1 (B.C.C.A.). The latter case was the first Canadian case addressing this issue in the internet realm. Our firm was counsel for the Defendant, B.C. Federation of Foster Parents Association.
[xiii] *Crookes v. Newton*, 2011 SCC 47

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PREGNANCY LEAVE:
A Brief Explanation of Maternity and Parental Leave

Leaves from work are essential for pregnant women and families to ensure the health and well-being of biological mothers and newborn children. A clear understanding of the logistics of maternity and parental leave is critical to effectively planning one's leave. An issue that has been raised is gender discrimination in supplementary benefits plans based on the unavailability of maternity benefits for biological fathers. This article seeks to provide a general understanding of pregnancy leave and address potential gender discrimination.

In British Columbia, the *Employment Standards Act* gives pregnant employees the statutory right to request pregnancy leave, otherwise known as maternity leave. Maternity leave serves to protect the health and well-being of new mothers undergoing pregnancy, labour, childbirth, or recovering from child birth. Further, maternity leave facilitates a reasonable and safe return to the workplace. Pregnant employees are entitled to up to 17 weeks of unpaid leave. Employees may qualify for employment insurance benefits during this period under the *Employment Insurance Act*.[i] Leave can begin as early as 11 weeks before the expected birth date and end no later than 17 weeks after the actual birth date.[ii]

Employees are also entitled to parental leave. Parental leave entitles birth mothers an additional 35 weeks of unpaid leave beginning immediately after the end of their pregnancy leave. Further, birth fathers and adopting parents are entitled to 37 weeks of unpaid leave beginning after the child's birth and within 52 weeks of the child's birth.[iii] Employees may also qualify for employment insurance benefits during this time period to supplement their income.[iv]

Often times, organized bodies of employees, such as unions, come together to negotiate collective agreements with their employers which may give them additional benefits on top of their statutory entitlement. For example, a supplementary benefits plan may give employees partial wages while on maternity leave. These plans often act as "top-ups" to maternal and parental benefits received under the federal employment insurance scheme.[v]

Benefits plans set in collective agreements have the ability to extend maternity related financial benefits to biological mothers while excluding biological fathers and adopting parents. This has raised concerns of potential gender discrimination against biological fathers and concerns of family status discrimination to adoptive parents. However, the ineligibility of biological fathers for benefits related to maternity leave under a collective agreement has been found to be not in violation of the *B.C. Human Rights Code* ("the *Code*").[vi]

In a recent case, the plaintiff, a male nurse employed by a BC Health Care Agency, brought an action claiming discrimination contrary to section 13 of the *Code*. The action was based on discrimination in the plaintiff's employment because of apparent gender discrimination within a maternity benefits plan. The

plaintiff was a biological father who did not receive the supplementary maternity related financial benefits set out in the collective agreement negotiated by his bargaining association.

In holding that it was *not* a violation, the Court stated it is clear a biological father's ineligibility for pregnancy and maternity-related benefits under a collective agreement does not violate equality rights and is not a violation of the *Code*. The Court recognized that differential treatment in the availability of maternity leave benefits is necessary to ensure the equality of women, who have historically suffered disadvantage in the workplace due to pregnancy-related discrimination.

Collective agreements between employers and employees may provide additional benefits to employees on top of statutory allowances. However, a collective agreement that provides differential treatment in favor of pregnant women for the availability of maternity leave benefits does not constitute a human rights violation. The differential treatment is necessary to ensure equality in the workplace and the well-being of pregnant employees.

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[i] *Employment Insurance Act*, SC 1996, c 23 s. 22
[ii] *Employment Standards Act*, RSBC 1996, c 113 s. 50
[iii] *Ibid* s. 51
[iv] *Employment Insurance Act*, SC 1996, c 23 s. 23
[v] *Employment Insurance Act*, SC 1996, c 23
[vi] *Human Rights Code*, RSBC 1996, c 210

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Morality and Intentionality:
The Impact of a Not Criminally Responsible Verdict on Intentional Tort Liability

Introduction

When an individual is charged with a crime, the victim will often seek compensation for their injuries or losses by commencing civil proceedings once a criminal verdict has been entered. Most commonly, a plaintiff will sue in civil court once an accused is found guilty of a criminal offence. Section 71 of the British Columbia *Evidence Act* allows a plaintiff to use a prior guilty verdict from a criminal proceeding as proof "that the person committed the offence", which allows the plaintiff to bring their civil case without needing to prove the elements of the offence over again. Notably, this rule applies only where an accused is found guilty and not vice versa; thus, where a person is acquitted of a crime there is no assumption that they are also free from civil liability. The plaintiff will simply have to prove their case by meeting the usual civil standard of proof on the balance of probabilities.

There is a third possible verdict in criminal proceedings, however, which gives rise to much more complicated considerations: where the accused is found to be not criminally responsible by reason of mental disorder ("NCRMD"). This article will discuss the implications of a prior NCRMD verdict at criminal trial on subsequent civil proceedings involving the same offence.

Criminal Responsibility

Between approximately 2005 and 2012, Canadian courts issued almost 2,000 verdicts of NCRMD in criminal proceedings. The NCRMD verdict is codified in section 16 of the *Criminal Code:*

> *No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong*

The ability to give a NCRMD verdict is based on one of the fundamental principles of criminal law, which is that an accused must be capable of understanding that his or her action was wrong in order to be found guilty of that act. Criminal responsibility is appropriate only where the actor is a discerning moral agent, capable of making choices between right and wrong.[1]

If an accused can prove that they did not have the mental capacity to understand that their action was wrong at the time it was committed, a NCRMD verdict may be issued. Once a verdict of NCRMD is reached, a specialized Review Board will make one of three decisions: to discharge the accused, to discharge the accused with conditions, or to detain the accused in an appropriate institution.

Civil Liability for Torts

It may seem counter-intuitive that an individual could be found not criminally responsible for an act due to suffering from a mental disorder, but then held to be liable for damages at a civil trial arising out of the same act. This legal quirk arises out of the different fundamental purposes underlying criminal versus civil law, which leads to different standards of requisite intentionality.

Intentional tort liability, such as for assault or battery, requires a finding that the defendant acted voluntarily and intentionally. Intentionality does not turn on whether or not the person knew their act was wrong, but rather whether or not the person had the mental capacity to *form the intention to perform the act* and had an *understanding of what the consequence would be*.[2] This is a lower standard that that of criminal liability because a person can intend the physical motions comprising action and have an understanding of the physical consequences (civil standard) without recognizing that the action or consequence is morally wrong (criminal standard).

Take the example of an individual suffering from an active delusion, who believes that they needed to violently push someone onto the ground in order to save them from some sort of impending danger. That individual may recognize that pushing the victim will result in the victim falling onto the ground, but the individual believes that they have acted to save the victim and that their action is therefore morally upright. This event could theoretically give rise to a NCRMD verdict at criminal trial (because the accused did not appreciate the moral wrongness of their action), but still lead to the accused being civilly liable (because he or she did sufficiently intend to commit the act of pushing the victim with an understanding of its likely physical consequences, i.e. falling down). The defendant does not have to foresee the specific injury caused in order for the act to be considered intentional.

Civil Liability and Mental Illness

There are two ways that a defendant can avoid civil liability due to mental illness: if he or she can demonstrate either that the act was involuntary, or can demonstrate that the act was unintentional.

With respect to voluntariness, if a defendant can establish that their mind was "totally blank, by reason of mental illness, [such that they] conduct themselves like robots or automatons", no liability will attach.[3] A basic principle of tort law is that a person can only be liable for an action they voluntarily undertook. Lack of voluntariness usually applies only when a person is physically unable to control their own actions (e.g. someone who is suffering from a seizure) or is forced to take an action by someone else (e.g. someone grabs your arm and hits someone else with it; or someone pushes you unexpectedly causing you to bump into someone else).

The second argument that can be made is that the defendant's mental illness is "so extreme as to preclude any genuine intention to do the act complained of" (*Canadian Tort Law* at page 43). In other words, "the defendant was incapable, by reason of mental disability, of forming the requisite intention" (Robertson at page 249). What constitutes "requisite intention" is a fact-based analysis which has been interpreted differently in a variety of judgments, but the courts have been fairly consistent on the point that, "a defendant will not escape liability in tort merely by showing that he or she was incapable of knowing that the act was wrong" (at page 250). In other words, whereas criminal liability

requires an appreciation of the *moral wrongness* or *implications* of an act, civil liability for intentional torts requires only that the defendant understand the *physical consequences* of his or her actions (at page 250). This is a much lower standard.

Conceptual Differences

The underlying goals and purposes of criminal law differ significant from those of civil law. In criminal law, the basic goals include: the protection of society, rehabilitation, and punishment of wrongdoers. It makes little sense to find someone guilty who is not capable of understanding that their actions were wrong, as this does not meet the goals of punishment or rehabilitation. A NCRMD verdict still allows for the protection of society as the accused can be committed to an appropriate institution should they pose a continuing risk to the public.

By contrast, among the basic goals of civil proceedings are the provision of compensation to the victim, protection of the right to personal autonomy and physical inviolability, and deterrence of wrongful or negligent conduct. [4] Therefore, it makes sense that a defendant may be held civilly liable for damages he or she caused to another individual, even if the defendant did not realize that their actions were wrong. The victim still deserves compensation for the harm caused, and the violation of their personal autonomy, even if the damages will not serve a deterrence purpose. There is no NCRMD option: a defendant is either liable for the plaintiff's damages, or not.

A good example of the conceptual differences between criminal and civil liability in a different context is a case where a claims that a medical procedure was performed without consent. In many such cases, the doctor acted with the understanding that what he or she was doing was for the good of the patient, and did not intend to cause any harm. There would be no criminal liability for the action if the doctor was unaware of the moral wrongness of his or her actions. However, civil liability can be found in such cases because the doctor's actions were both voluntary and intentional, and the plaintiff deserves compensation for the violation of his or her bodily integrity without consent. The doctor's honest belief that he or she was acting in a morally upright way is irrelevant to civil liability.

Case Law Examples: Civil Standard of Intentionality

In ***Squittieri v De Santis,*** [1976] OJ No. 2400, the plaintiff died after being stabbed by the defendant. At the criminal trial, the evidence was clear that the defendant intended to kill the deceased and "appreciated the fact that he was killing a man with a knife". At the same time, however, the defendant's mental disability was sufficient to "deprive him of the ability of knowing that his act was wrong". Due to his inability to appreciate the moral wrongness of his act, the defendant was declared not guilty by "reason of insanity" (the former equivalent of a NCRMD verdict).

In the subsequent civil proceedings, the court held that regardless of the defendant's failure to recognize whether the act was right or wrong, it was sufficient for the purposes of civil liability that he "intended to kill and appreciated the nature and quality of his acts". The defendant was held to be liable at civil law based on the fact that the defendant: (a) intended to kill, (b) appreciated his conduct would result in death, and (c) knew, at the time of the act, that he was killing a man with a knife.

In ***Whaley v Cartusiano,*** [1990] OJ No. 246 (ONCA), the plaintiff was shot by his neighbor, the defendant, in a seemingly random attack after the defendant became enraged while arguing with his wife. The plaintiff was not involved in the argument and the attack appeared to be the result of a delusion or misapprehension on the part of the defendant. The defendant was acquitted at criminal trial "by reason of insanity". The defendant's insurance policy excluded liability for intentional bodily injury, so the issue was whether or not the defendant's assault constituted an "intentional" bodily injury for the purpose of coverage.

In their decision, the court reiterated the principle that intentional tort liability requires only basic intentionality, i.e. that "the defendant intended to shoot the plaintiff". The court found that the defendant's acts were intentional, based on the fact that he knew that by discharging his firearm he would injure or kill the plaintiff. The defendant had made statements such as "it's all your fault, I'll get you for this", as he discharged the weapon. Despite the fact that the accusations were apparently the result of delusions and did not make sense in the circumstances, it was sufficient to demonstrate that the defendant intended to cause injury using the firearm.

More recently, in ***Darch Estate v Farmers' Mutual Insurance Co.,*** [2011] OJ No. 2971, the court considered the definition of "willful, intentional, or criminal" conduct sufficient to deny coverage under an otherwise applicable insurance policy. The insured had been found not criminally responsible at his criminal trial for the act in question (see para 62).

In their reasons, the court stated that "the test for determining whether an individual suffering from a mental disorder is not responsible for his tortous [sic] act in a civil case is a different test from the s. 16 Criminal Code test for lack of criminal responsibility" (at para 69). The court concluded, based on authority, that the applicable test was "whether [the defendant] appreciated the nature and consequence of his act, in the sense that he knew the physical aspects of what he was doing and knew what would follow from them" (at para 79).

Despite suffering from delusions at the time, the insured had taken gasoline, poured it around the house, and lit it on fire, knowing that it would cause the house to burn down. For the purposes of the intentional act exclusion, this was sufficient to deny coverage to the insured (at paras 79 – 81). Again, here we see the court applying a very basic standard that does not excuse an action as lacking intention merely because it is being done for reasons or with an understanding of purpose that is clearly the result or disordered thinking.

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[1] *Winko v British Columbia (Forensic Psychiatric Institute),* [1999] 2 SCR 625 (SCC) at para 31.
[2] Gerald B. Robertson, *Mental Disability and the Law in Canada,* 2d ed. (Ontario: Carswell, 1994) at pages 249-250. Notably, the mental capacity required for liability in negligence further complicates the situation as it differs to some extent from either criminal or intentional tort liability. This will not be discussed in detail here.
[3] Allen Linden and Bruce Feldthusen, *Canadian Tort Law,* 10th ed, (LexisNexis, 2015), pg 42
[4] *T.O. v J.H.O.* [2006] BCJ No. 759 (BCSC) at para 26

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MARSH INSIGHTS:
Multi-Patient Incidents

"Hospital to pay $1.7M in class-action settlement after more than 400 people tested positive for tuberculosis"
"[Class action launched] against Hospital Monfort, Located in Ottawa, Ontario, to secure recovery of persons whose confidential personal health information was stored on a USB key which was lost by an employee of the hospital. The lawsuit claims $25 million in compensation."
"Class action lawsuit filed against hospital, former staff and Fleming College"

Similar headlines are becoming increasingly commonplace within the Canadian health care landscape as health care organizations are not only tasked with managing issues related to patient care, safety, and security, but also with the protection of their most important asset: their reputations.

As the health care environment continues to evolve, organizations are tasked with "doing more with less," resulting in the emergence of systemic issues that often result in adverse events. The landmark study To Err is Human published by the Institute of Medicine in 1999, highlighted these issues in the US specifically citing that a significant number of these adverse hospital events are preventable. Ross Baker's 2004 Canadian study revealed similarly startling statistics, including:

- 1 out of 13 patients experience adverse events in Canadian hospitals.
- 1 out of 9 adult patients will potentially be given the wrong medication of the wrong dose of a medication.
- 24% of preventable adverse events are related to medication errors. Others include surgery and infections.[1]

In addition, there are now also new and emerging risks that include cyber-attacks, privacy breaches, and exposures relating to infectious diseases and hazardous materials.

With this evolution comes the need to identify key tactics and mitigation strategies to ensure the protection of patients and their families, and of the organization as a whole. The ability to respond effectively and efficiently to a large scale event or multi patient incident is critical, because regardless of how low the risk is, patients and their families value early notification.[2]

LARGE-SCALE ADVERSE EVENTS OR MULTI-PAITENT EVENTS

An adverse event can be defined as "an unintended injury or complication that results in disability at the time of discharge, death or prolonged hospital stay, and that is caused by health care management rather than the patient's underlying disease process".[3] In such events, disclosure is often required.

However, attitudes on disclosure vary depending on the organization's culture and:

- Uncertainty about what patients and their families think should be disclosed.
- Health care providers' assumptions that focus will be on blaming the health care providers rather than understanding the root causes of the event.
- Uncertainty of potential reactions of patients and their families.
- Skills and knowledge regarding the disclosure process.
- Concerns of potential litigation and implications on insurers.[4]

A study conducted by Prouty, Foglia, and Gallagher (2014) found that recipients of disclosures in large scale adverse events favoured notification – even in low harm, low risk events. This notion was reaffirmed by a 2010 study conducted by Dudzinski et al. that suggested patients prefer being informed – even when it may cause increased anxiety. Failure to communicate adverse events can have detrimental consequences including:

- Transmission of inaccurate information.
- Potential to make uninformed decisions.
- Reputational risks and quality of care.
- Increased social media use can result in widespread news and risks of these incidents going viral.[5]

While the management of large scale adverse events are similar to that of a critical incident, there are inherent differences that need to be considered, such as:

- Impact is much larger, and therefore difficult to keep quiet.
- Reputational risks often mean a larger impact on the organization.
- Resource intensive – response requires a highly coordinated effort by the organization.
- Perception of severity of harm varies from patient to patient.[6]

TYPES OF EVENTS

There are several types of adverse events that have far reaching implications and potential for widespread involvement of multiple patients.

- **Diagnostic Errors —** In Newfoundland and Labrador, 383 women were misdiagnosed and potentially mistreated as a result of incorrect lab results for oestrogen and progesterone positive breast cancer positive results. In New Brunswick, the integrity and competence of a physician was called into question when an internal audit revealed a high degree of errors. In Ontario, a radiologist made significant errors in diagnostic testing reviews which have led to several deaths and "potentially significant clinical errors" in approximately 645 cases.

- **Instrument Reprocessing Failures —** In many hospitals across the country, hospitals have implemented stringent sterilization protocols for equipment used for multiple patients. In several cases, there has been a break down in the process resulting in potential exposure to infectious diseases. A Montreal area hospital had to notify 150 patients of a potential exposure due to a failure in the sterilization process in a bariatric surgery suite. It was unclear if the women treated between 2013 and 2014 were affected and the hospital has been testing patients.

- **Privacy Breaches —** as a new and emerging risk in health care, privacy breaches have created a unique challenge for health care organizations. While progress has been made with the integration of electronic health records and electronic medical records, implementation of new legislation regarding privacy (PHIPA), and tracking/monitoring breaches, the increased use of mobile technology (smartphones, laptops, thumb drives) and the risk of loss/theft of these devices creates new exposures. Recent examples include a lost thumb drive at the Montfort Hospital in Ottawa, and a privacy breach at Rouge Valley Health Centre that prompted a class action law suit after 8,000 records were breached by two rogue employees.

WHEN A LARGE SCALE ADVERSE EVENT OCCURS

When any adverse event occurs, the primary goal should always be to ensure the safety (immediate and ongoing) of the patients, staff, and members of the health care team. Then the clinical management of the patients becomes paramount. Once the needs of the patients are met, organizations should focus on ensuring that appropriate testing, follow up, and monitoring strategies are in place to safeguard optimal health outcomes. Only once that step is completed should the organization conduct an in depth analysis to determine correlations between health effects (infections) and the cause (exposure).

- **Exposure** is the proximity to or contact with the potential cause such as pathogen or environmental hazards such as radiation that have the potential to cause patient harm.

- **Look Back** is the process by which patients and or staff are identified who have incurred potential risk of exposure. There is an explicit intent for notification.

LARGE SCALE DISCLOSURE

Organizations are often tasked with managing the expectations of not only patients, but also families, lawyers, and insurance companies. And oftentimes, anxiety and emotions run high. In order ensure effective and efficient communication, health care organizations need to have a clear set of policies and procedures in place to manage a large-scale disclosure, including notification of patients, the public, coordination of potential follow ups and/ or diagnostic and laboratory testing, as well as regulatory and legislative requirements.

Disclosure policies should contain specific information regarding what is documented, who is responsible for the documentation, and who is leading the disclosure. In a large scale adverse event, disclosure should be made on a case by case basis. According to the CMPA, “the threshold for notifying patients should be the existence of a realistic possibility of harm, as opposed to a theoretical risk of harm”.[7] This analysis is complete, the CMPA suggests answering the following questions to aid in the decision making process around disclosure:

1. Has the review confirmed harm occurred to patients? If yes, disclosure and appropriate care and follow should occur.
2. Has the review confirmed there are patients that have possibly been harmed? If yes, then appropriate follow up and care should occur.
3. Does the review indicate what happened was a "near miss" (harm did not reach the patients) and therefor no harm has occurred? If so, disclosure to patients is generally not required.[8]

DOCUMENTING AND COMMUNICATION IN LARGE SCALE ADVERSE EVENTS

Each organization will have a unique process in the communication and documentation policies and procedures of large scale adverse events. It is imperative that the appropriate personnel, both internal and external, are notified in an efficient and timely manner. Depending on the circumstances or the event, the following persons should be notified:

- Most responsible provider (MRP).
- Legal counsel (internal and outside as needed).
- Insurance carrier.
- Regulatory bodies, as needed, including Public Health (in the event of infectious diseases exposure).
- Law enforcement, if required.[9, 10]

What information to provide, however, should be decided on a case-by-case basis. According to the CMPA, in the event of an adverse event, the following information should be considered for disclosure:

- Factual information regarding the event, clinical advice relating to the harm (or the potential for harm) resulting from the event.
- A care plan that includes follow up, diagnostic, and laboratory testing as required, treatment options, and follow up advice.
- Information regarding the potential involvement of outside agencies including Public Health in the event of a contagious or reportable infectious diseases exposure.
- Contact information.
- Information hotline or resources to help patients and their families manage anxiety and stress the result of this event.
- Recommended sources of information.

While apologies may be an effective way of managing adverse events, they must be well thought out and clearly articulated, conveying sincerity to the patient and their families. (Organizations should consider their own policies regarding apologies (as part of, or separate from, their disclosure policies) which should be created in collaboration with legal counsel. In the United States, as of 2012, 36 states have

implemented "I'm sorry" laws, and recent studies have revealed that apologies may have favourable impact on claims and litigation. One study conducted by Ho and Liu (2010) found that cases involving the most severe injuries "settle about 20% faster, in states with apology laws, and average claim payments are reduced by a range of $55,000 - $73,000.[11]

MANAGING THE MEDIA AND COORDINATING MEDIA RESPONSE

Legislation such as the Freedom of Information Act has increased the complexity of the health care environment. Organizations need to ensure that their media policy is sound, efficient and strategic. Whenever a multi-patient incident occurs, the organization should always assume there will be media involvement; a designated spokesperson can help the organization respond tactfully while protecting the privacy of their patients, families, and staff. With Rideout v. Labrador Corp [2007], a class action lawsuit was brought forward against a hospital after the plaintiff found that a media release was issued publicly prior to her own notification, leaving her "…distraught, horrified and in a state of nervous shock…[fearing] for her health and the health of her family."[para7][12]

All staff including physicians should receive guidance on managing the media and should familiarize themselves with the media relations policies of the organization. However, core should always remain the patient, their privacy, and the privacy of the health care providers. Regardless of the approach adopted by the organization, media relations should be tactful to minimize the negative implications on the careers and or reputation of the health care team and the organization. Legal advice should always be sought when developing the media relations strategy.

CONCLUSION

As health care organizations continue to struggle with meeting the needs of their communities, provision of quality and efficient care remains a paramount strategic initiative for Canadian hospitals. The challenge however, lies in the development and delivery of these services in a manner that is rooted in safety and patient-centred care.

Through greater transparency and accountability to the public, health care organizations are facing increasingly complex exposures and risks from large-scale adverse events and class action law suits. Marsh Risk Consulting, risk consulting division of Marsh Canada, has developed a checklist based on best practices from national and international safety organizations including the Canadian Patient Safety Institute (CPSI), Joint Commission: Accreditation, Health Care, Certification (JCAHCC), and Department of Veterans Affairs (VHA). Our checklist provides a blueprint for health care organizations manage large scale or multi patient adverse events and is designed based on evidence based best practices and can be modified to meet the individual needs of each organization.

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Checklist for Managing Large-Scale, Multi-Patient Adverse Events

COMPONENT	MEASUREMENTS	ACTION ITEMS TO CONSIDER	STARTED	COMPLETED
Culture of Safety -development of a 'just culture'	1. Are there prescribed accountabilities set out by the senior leadership team? 2. Are there established policies and procedures in place to guide the members of the healthcare team? 3. Has the organization created an environment that is transparent and committed to continuous risk and quality improvement?	1. Identify champions within the senior leadership team that will drive forward accountability and transparency 2. Ensure bi-directional flow of information between all levels within the organization 3. Create opportunities that encourage education regarding culture of safety and continuous quality		
Discovery of Large Scale Adverse Event	1. Does the organization have an internal notification system in place? 2. Have all appropriate personnel been notified? 3. Has a interdisciplinary team been created to begin review of the event?	1. Identify key stakeholders and initiate communication 2. Determine immediate actions to ensure the safety of patients, their families as well as staff 3. Develop and establish next steps including testing, treatment options, follow up		
Communication and Crisis Management Team	1. Is there a point of contact for patients and their families to contact for information and guidance? 2. Is there executive leadership involvement? 3. Have all internal and external stakeholders been appropriately notified?	1. Ensure appropriate communication channels are available to patients and their families 2. Communication with external stakeholders including insurer, outside legal counsel as needed, external regulatory bodies 3. Ensure and implement policies that will protect the privacy of patients and their families as well as staff and healthcare providers		
Analysis and Review of the Event	1. Has the organization identified what is currently known about the situation? 2. What type of review would be most appropriate for the situation? 3. Has a Root Cause Analysis or another form of review been conducted?	1. Determine and implement a review process ensuring appropriate representation from all areas 2. Develop a risk matrix to identify severity, frequency (number of potentially effected) and time to impact (urgency) 3. Create a succinct report highlighting key findings, documentation and communication		
Patient and Family Communication and Notification	1. Has the organization determined and planned the disclosure process for the patient(s)? 2. Has the review determined that harm has or can potentially occur for those effected? 3. Does the organization have an efficient disclosure process in place to ensure timely intervention or treatment options for patients?	1. Identify the most appropriate mode of communication to ensure timely delivery of information 2. Document notification process to eliminate potential missed opportunities and track communications 3. Ensure implementation of appropriate resources to manage follow up and address patients and families concerns		
Media and Communications	1. Have appropriate external stakeholders been notified including insurers, regulatory bodies, Public Health, external legal counsel? 2. Do law enforcement agencies need to be notified? 3. Has a press release been prepared in case one is required? Does the organization have a strategy to manage media including social media?	1. Ensure all relevant external and internal stakeholders have been notified 2. Tactfully develop a media strategy that will ensure optimal outcomes for all involved including patients, their families, staff and the organization 3. Identify a pointperson to manage media relationships to ensure consistent messaging		
Privacy Strategy	1. Does the organization have policies in place regarding the use of social media and its implications on patient and staff privacy? 2. Has the organization determined the involvement of the Privacy Commissioner? 3. Have there been external communications to the community at large?	1. Continuous monitoring and tracking of social media can help protect patients and their families' privacy as well as staff 2. Reputational risk management strategies including tactfully managing all communications external and internal to the organization 3. Develop and ensure a consistent method of updating patients, families and staff regarding any new developments while protecting their privacy		

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MIND THE GAP

Split Speed Bumps

A Health Care Agency was recently reminded by its property management company that it is possible to create a hidden hazard when trying to warn of a danger. Although the incident in question occurred in the parking lot of a shopping plaza, it is not difficult to imagine the same scenario playing out anywhere there are split speed bumps.

Photo by C. FitzSimons

While walking across the parking lot of the shopping plaza, the Plaintiff was injured when he stepped on what he thought was the top of a speed bump that was painted bright yellow. In fact, he stepped down into the gap between two speed bumps, which had been painted the same yellow as the speed bumps. Visually, with the gap painted to match the two bumps, it appeared to be a single contiguous speed bump. The Plaintiff sued the property owner alleging it had breached its statutory duty by not providing any warning regarding the change in elevation between the asphalt and the speed bump by painting them both the same colour.

The property owner countered that it had fulfilled its duty under the *Occupiers Liability Act* by ensuring the parking lot in question was reasonably safe, and had even gone so far as to paint the word 'step' in white in the hollow of the gap. It was acknowledged that the time of the incident that the white paint was faded and the underlying yellow paint made it appear that the gap and speed bumps were one.

In considering the case, the BC Supreme Court noted that the Plaintiff had been wearing appropriate footwear, had been walking with reasonable care and had deliberately stepped as to not trip over the speed bump. The Court concluded that the Plaintiff's actions had not contributed to his loss, and that the property owner had breached its duty by painting the gap the same colour as the rest of the speed bump, not withstanding the painted 'step' warning. By painting the gap and bumps the same colour, what was intended to be a warning of a danger, had the opposite effect and turned the warning into a trap. The Court went on to say, that had the gap been painted a contrasting colour (or remained the colour of the asphalt), the incident could have been avoided.

The decision was appealed and the ruling was upheld at the BC Court of Appeals.

It is reasonable to assume that if a loss occurred with similar circumstances, the Court would reference this particular case and reach the same conclusion: namely the premises owner is liable when the gap and speed bump are painted the same colour. Please update your parking lot maintenance plan to check that the intervening gap between speed bumps is a contrasting colour.

BC Supreme Court : https://www.canlii.org/en/bc/bcsc/doc/2009/2009bcsc1839/2009bcsc1839.html?resultIndex=1
BC Court of Appeals: https://www.canlii.org/en/bc/bcca/doc/2009/2009bcca558/2009bcca558.html?resultIndex=2

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UNAUTHORIZED ACCESS OF RECORDS
Nurse's Job Saved by Late Apology

The BC Labour Relations Board (LBR) recently upheld the reinstatement of a nurse who, on multiple occasions over an extended period, accessed private health authority records for personal reasons and without authority. The Board upheld the arbitration award that ordered her reinstatement based in part on the nurse's 11th hour apology. The decision illustrates the challenge for employers in alleging just cause even with strong facts.

The nurse has been employed with the health authority in a small community for 8 years and had a discipline free record. When she was confronted about the unauthorized access, she acknowledged that she had improperly accessed files including files of individuals connected to her co-workers. She even admitted that she had accessed files on occasions that the employer had not identified. She had no compelling reason for having looked at the files and explained that in some circumstances she had accessed files out of curiosity.

The health authority interviewed the nurse twice and during neither interview did the nurse apologize or show any remorse. Her employment was terminated as a result of this breach and her union grieved the termination.

In the arbitrator's award, the arbitrator acknowledged that the nurse's conduct was very serious. He noted that these incidents were not isolated incidents nor done on the spur of the moment.

However, he also considered that the nurse was employed in a small community in which her employer was the largest and perhaps the only stable health care employer in town. The nurse supported two children. The arbitrator concluded that these factors imposed a special economic hardship on her.

Interestingly, it was not until the arbitration hearing that the nurse, for the first time, expressed remorse for her conduct. Prior to the termination, there were two investigation meetings in which the employee did not express any remorse. Despite the natural response of skepticism that she was only apologizing to save her job, not because she was genuinely remorseful, the arbitrator accepted the nurse's demonstration of remorse as genuine and, in considering all the circumstances, ordered the health authority to reinstate her to employment. The arbitrator imposed a thirteen month suspension which meant that she would not receive any back pay on reinstatement.

The employer appealed the arbitration award to the LRB on the basis that it could not possibly have contemplated or factored into its decision making the possibility that the griever would demonstrate remorse after the fact and that just cause should be determined as of the time of termination.

However, the LRB ruled that it was appropriate for an arbitrator to consider the subsequent expression of remorse in determining whether the discipline was excessive.

The LRB decision was focused on the expression of remorse by the nurse and how that impacted whether the employment relationship was capable of restoration. The LRB decision did not focus on a consideration of the ability of her coworkers to trust her given her flagrant breach of privacy and whether this would impact her ability to function in the workplace. The media reported that some co-workers were not happy with this decision and their union's perceived failure to represent their interests.

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He Hit Me First!

The "Historic Compromise" in Action: Ending Civil Claims Using Section 257 of the *Workers Compensation Act*

In British Columbia, we have had legislation dealing with the compensation of injured workers since the passage of the *1902 Workmen's Compensation Act*, though the scheme of the *Act* was not brought into force until 1917 with the creation of the first Workmen's Compensation Board. Now, 100 years later, we have a robust administrative institution that deals with workplace safety and compensation for worker injuries by the thousands.

Workers compensation regimes such as ours have been described as a "historic compromise" permitting both workers and employers a semblance of security, consistency, and reliability when injuries inevitably happen. For workers, the availability of relatively immediate benefits and compensation without facing discipline or enmity from the employer is the obvious advantage. For employers, the advantage is the security of knowing that they will not be faced with protracted litigation (along with the attendant costs and disruptions) when injuries occur.

Where a worker sues for an injury sustained while at work, the *Workers Compensation Act* permits a party to the litigation to make an application to Worker's Compensation Appeal Tribunal (WCAT) in order to determine whether the injury is within the jurisdiction of the *Act*. For obvious reasons, this determination is sought by personal injury defendants who would rather the plaintiff receive their compensation from WorkSafe than be dragged through litigation and potentially pay damages to the plaintiff.

Section 10 of the *Act* serves as a bar to civil claims by workers against other workers or employers for injuries suffered in the course of employment. Section 257 permits a party to apply to WCAT for a determination of whether their litigation is subject to the section 10 bar. In essence, these two sections make the *Act* work as a mandatory public insurance program. Section 10(1) contains the prohibition on tort claims and it states:

> **Limitation of actions, election and subrogation**
>
> 10 (1) The provisions of this Part are in lieu of any right and rights of action, statutory or otherwise, founded on a breach of duty of care or any other cause of action, whether that duty or cause of action is imposed by or arises by reason of law or contract, express or implied, to which a worker, dependant or member of the family of the worker is or may be entitled against the employer of the worker, or against any employer within the scope of this Part, or against any worker, in respect of any personal injury, disablement or death arising out of and in the course of employment and no action in respect of it lies. This provision applies only when the action or conduct of the employer, the employer's servant or agent, or the worker, which caused the breach of duty arose out of and in the course of employment within the scope of this Part.

In order for the above to apply, the WCAT must make a ruling under section 257 of the *Act* to determine whether the constituent elements of section 10 are in place. The determinations are set out in section 257(2):

> (2) For the purposes of subsection (1), the appeal tribunal may determine any matter that is relevant to the action and within the Board's jurisdiction under this Act, including determining whether
>
> (a) a person was, at the time the cause of action arose, a worker,
>
> (b) the injury, disability or death of a worker arose out of, and in the course of, the worker's employment,
>
> (c) an employer or the employer's servant or agent was, at the time the cause of action arose, employed by another employer, or
>
> (d) an employer was, at the time the cause of action arose, engaged in an industry within the meaning of Part 1.

The definitions of the relevant terms are set out in section 2 of the *Act*:

> **"employer"** includes every person having in their service under a contract of hiring or apprenticeship, written or oral, express or implied, a person engaged in work in or about an industry;
>
> **"employment"**, when used in Part 1, means and refers to all or part of an establishment, undertaking, trade or business within the scope of that Part, and in the case of an industry not as a whole within the scope of Part 1 includes a department or part of that industry that would if carried on separately be within the scope of Part 1;
>
> **"industry"** includes establishment, undertaking, work, trade and business;

Usually, the primary issues to be determined are (1) whether one or more of the individuals involved were workers at the time of the incident, and (2) whether the injury arose out of the plaintiff's employment. The second determination is more often the disputed issue and can be the subject of very interesting application of policy. At the conclusion, I will set out a case study dealing with one of the interesting factual scenarios that can give rise to a determination of whether an alleged injury arose out of the plaintiff's employment.

The Process

Obtaining a section 257 certification from WCAT is a two-step process that requires both an application to WCAT and a subsequent application to the court. The WCAT *Manual of Rules, Practices and*

Procedures ("MRPP") sets out in some detail the requirements when making an application for a section 257 determination. The following is a general summary, with some issues to consider along the way:

1. If you suspect the subject matter of a civil action might fall under the jurisdiction of the *Workers Compensation Act*, it is good practice to include the following paragraph in Part 3 of the Response to Civil Claim:

   At the time of the alleged incident:

   i. [employee alleged to have caused the injury] was a worker within the scope of Part 1 of the *Workers Compensation Act*;

   ii. [employer] was an employer within the scope of Part 1 of the *Workers Compensation Act*; and

   iii. The plaintiff was a worker within the scope of Part 1 of the *Workers Compensation Act* or an independent operator or an employee deemed to be a worker within the meaning of the *Act* and the plaintiff's injury arose out of and in the course of her employment as a worker within the meaning or the *Act*,

   iv. and accordingly, pursuant to section 10 of the *Act*, the plaintiff has no cause of action against the defendants in respect of any personal injury sustained as a result of the alleged incident.

   Failure to include the above in the Response to Civil Claim is not determinative of a defendant's ability to make a section 257 application, but it is best practice to set out this defence in the pleading.

2. A section 257 application can be made by reference of the Court or, more commonly, by one of the parties. The applicant initiates the procedure by writing to the Workers' Compensation Appeal Tribunal, advising of the civil action and that a section 257 certification is sought. The applicant need only include basic information at this stage, including the plaintiff's birth date and social insurance number, and, if possible, the defendant employer's WorkSafe registration.

   If a trial date has been set, the tribunal must be advised. There is currently a significant backlog for section 257 determinations and, if a trial is imminent, you may be able to expedite the determination. If it is in your interest to have the determination made quickly, it is a good idea to set the matter down for the earliest possible trial before seeking the determination.

   The letter should then set out the determinations from section 257(2) that the applicant is seeking.

   The following documents must be included:

   i) All of the filed pleadings;
   ii) Relevant filed affidavits and Notices of Application;

iii) Notice of Trial; and
iv) Transcripts of any Examinations for Discovery.

3. Once WCAT receives the applicant's request, it will inform the other parties, set out a timeline for their participation, and advise them where to find the necessary resources. If the plaintiff's employer is not a party to the civil action, WCAT will also invite them to participate, as the claim may raise the employer's premiums.

4. The parties will be invited to provide written submissions, according to a schedule. The applicant goes first. Applicant submissions can be very extensive documents, depending on the determinations sought and the complexity of the claim. In many ways, the application materials resemble a summary trial application. When done properly, all relevant evidence is provided by affidavit or transcript of sworn testimony. The legal argument should cite the appropriate policy documents and prior decisions. As with any administrative tribunal, precedent is not binding in the same way it is on a Court, but it is very persuasive and is usually followed very closely.

   Citation to the following documents is appropriate:
   i) *Rehabilitation Services and Claims Manual [Vol. I & II*];
   ii) *Assessment Manual*;
   iii) *Prevention Manual*;
   iv) *Workers' Compensation Reporter*;
   v) Tribunal precedent panel decisions; and
   vi) Court decisions of WCAT appeals.

   Oral submissions are permitted in very limited circumstances, usually where credibility is in issue and the documentary evidence is insufficient to make a determination.

5. The applicant submits the application materials to all parties, who ordinarily have three weeks to respond. Following the responses, the applicant has three further weeks to provide a rebuttal. Any of these timelines may be extended by request to the tribunal, though the tribunal's appetite for extensions is limited. Once all of the submissions are complete, the tribunal must render its decision in ninety days. If the applicant is successful, the tribunal will issue a certificate which then must be entered in the civil proceeding by making an application to the Court in the original action. If the matter is not certified, the civil proceeding continues.

Worker/Worker Assault – A Case Study

A recent case arose out of an incident involving two employees of a health care agency. While dealing with a patient, two employees had an unpleasant interaction that may or may not have involved physical contact, depending on which account of the interaction is believed. The immediate dispute was handled through the internal processes of the health care agency, but one of the employees eventually brought an action in B.C. Supreme Court alleging, among other things, that he had been assaulted by the other employee and had suffered injuries as a result.

In this case, there was no dispute over whether the plaintiff was an employee of the health care agency. In submissions to WCAT, the plaintiff acknowledged his status as a worker. The primary determination required in our application to WCAT for a section 257 certification was, then, whether the alleged assaultive behaviour arose out of the employment of the workers.

The test for whether an injury arose in the course of employment was set out in *Gill v. Sidhu*, WCAT decision number 2005-00952, wherein Vice-Chair Riecken set out:

> RSCM I item #14.00 provides general guidance on when an injury is considered to have arisen out of and in the course of employment for compensation purposes. I find that it is also relevant in this case with respect to section 10 of the Act. It states the following:
>
> > No single criterion can be regarded as conclusive for deciding whether an injury should be classified as one arising out of and in the course of employment. Various indicators can be and are commonly used for guidance. These include:
> >
> > (a)whether the injury occurred on the premises of the employer;
> > (b) whether it occurred in the process of doing something for the benefit of the employer;
> > (c) whether it occurred in the course of action taken in response to instructions from the employer;
> > (d) whether it occurred in the course of using equipment or materials supplied by the employer;
> > (e) whether it occurred in the course of receiving payment or other consideration from the employer;
> > (f) whether the risk to which the employee was exposed was the same as the risk to which the employee is exposed in the normal course of production;
> > (g) whether the injury occurred during a time period for which the employee was being paid;
> > (h) whether the injury was caused by some activity of the employer or of a fellow employee.
>
> This list is by no means exhaustive. All of these factors can be considered in making a judgment, but no one of them can be used as an exclusive test.

The plaintiff alleged assault in his pleadings, which raised the concern that act of assault may take the injury outside of the jurisdiction of the *Act*. Thankfully, the very exhaustive WCAT policy manual did not disappoint, offering WCAT Policy Item C3-17.00, which deals with cases of alleged assault:

> In considering whether an injury or death arose out of and in the course of the employment, all relevant factors are taken into consideration including the causative significance of the worker's conduct in the occurrence of the injury or death and whether the worker's conduct was such a substantial deviation from the reasonable expectations of employment as to take the worker out of the course of the employment. An insubstantial

> deviation does not prevent an injury or death from being held to have arisen out of and in the course of the employment.
>
> [. . .]
>
> If a worker's injury or death is the result of an assault that arises out of and in the course of the employment, the worker may be entitled to compensation. However, if the worker's injury or death is the result of an assault that he or she initiated, this may constitute a substantial deviation from the course of the worker's employment.
>
> The Board considers the spontaneity of the assault, whether the worker's aggressive response is in proportion to a triggering incident or provocation, […] whether there is a connection between the employment and the subject matter of the dispute that led to the assault. Where the actions or response of a worker are extreme or are out of proportion to a triggering incident or provocation, this may be an indication that the assault is of a more personal nature. If the subject matter of the dispute that led to the assault is a personal matter, the injury or death is not considered to have arisen out of and in the course of the employment.
>
> Just as a worker's initiation of an assault may take the worker out of the course of the employment, an assailant's attack on a worker may bring the worker into the course of the employment, even though the assault does not occur at the workplace or during working hours.
>
> An assailant may be an employer, fellow worker or a non-worker (for example, a client or customer).
>
> In these cases, the facts of the situation as to whether the assault is clearly related to the employment are carefully considered to determine whether the employment was of causative significance. If the employment aspects of the assault are more than just an incidental intrusion into the personal life of the worker at the moment of the injury or death, the worker may be entitled to compensation.

We found an excellent precedent case in *Perry v. Allan, WCAT-2008-00847*, where the tribunal found that intentional contact between employees was within the course of duties and issued a section 257 certification. In *Perry v. Allan*, the defendant had allegedly punched the plaintiff in the back while the plaintiff was working as a log feeder in a mill. The plaintiff applied and was denied WorkSafe benefits, but also brought a claim in Provincial Court for personal injury. The defendant applied to WCAT for a section 257 certification and the tribunal stated at paras. 43-44:

> Having regard to the defendant's affidavit evidence, I find that the defendant did nudge or bump or hit the claimant's back with his elbow. There is a lack of evidence, however, to indicate that the defendant intended to cause harm to the claimant, or that this involved a personal dispute. I consider it likely that this involved an intentional act, rather than an inadvertent brushing of the defendant's back. I find persuasive the submission by counsel for the defendant, however, that

> this may reasonably be characterized as being analogous to a worker giving a co-worker a playful jab in the ribs. This may reasonably be characterized as being in the nature of horseplay. It did not, however, involve any substantial deviation from the defendant's employment. It was momentary in nature, and did not involve the dropping of active duties.
>
> I find that any action or conduct of the defendant, which caused the alleged breach of duty of care, arose out of and in the course of his employment within the scope of Part 1 of the *Act*.

In *Perry v. Allan*, the contact between workers was admitted, and there were two different but nonetheless believable accounts of the facts. In our case, the plaintiff's account of the facts had changed over time and contained serious inconsistencies. In view of *Perry v. All*an, though, even if the plaintiff's version was accepted, our client had a strong chance of winning the section 257 application.

Upon receipt of our submissions on behalf of the health care agency citing much of the above, and with some much-needed legal advice, the plaintiff agreed to dismiss his claim against the health care agency without the need for a full section 257 hearing.

Practical Considerations

When a new file arrives involving a claim for personal injury against a health authority or other entity that may be defined as an employer under the *Act*, the considerations should include the following:

1. Determine whether the plaintiff may have been a worker at the time of his/her injury. Remember, unlike the case study above, the plaintiff does not need to be an employee of the defendant, but rather, can be an employee of any employer and still fall under the jurisdiction of the *Act*. Obviously, the context will vary significantly, but plaintiffs who were at the time of the injury students, drivers, employees of contractors or repair companies, delivery personnel, or even customers could possibly fall under the definition of "worker".

2. Remember that the *Act* can apply to psychological injuries as well. If a dismissed worker files a claim for wrongful dismissal and includes mental health injuries arising from bullying or other oppressive conduct, the injuries may be within the jurisdiction of the *Act* and a civil claim would be barred by statute.

3. Investigate whether or not the plaintiff or an employer has reported the injury to WorkSafe. Some plaintiffs will not understand the statutory bar to claims for workplace injuries and will take both approaches simultaneously. Even where a WorkSafe claim has been made and denied, the statutory bar may still apply. In any event, any description of the injury given by the plaintiff to WorkSafe will be both relevant and useful in the litigation.

4. If you suspect the plaintiff may be a worker but remain unsure, include in your Response to Civil Claim reference to section 10 of the *Act* in any event. Failing to include the reference is not fatal, but it is helpful to have it in a pleading.

5. WorkSafe has a discretionary right of subrogation under the Act, but does not always exercise it. In particular, where the party alleged to be at fault is a government employer, it would make little sense for WorkSafe to initiate a proceeding against that employer to recover the amounts paid to the plaintiff.

Being public bodies with a high level of engagement with unrepresented individuals, both WorkSafe and WCAT have a good amount of helpful information available on their websites, including all of the forms that may be required. If you are interested in further reading or a particular issue arises, the *Rehabilitation Services & Claims Manual* is available on the WorkSafe website and the *Manual of Rules of Practice and Procedure* is available on the WCAT website. Both documents are very instructive regarding the policies and procedures that may apply to your issue.

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About Our Organization

We are the Client Services Team for the Health Care Protection Program (HCPP). HCPP is a self-insurance program which is funded by the Health Authorities of BC. The program is housed within the offices of the Risk Management Branch of the Ministry of Finance which also has responsibility for similar programs such as the Schools Protection Program, the University, College & Institute Protection Program and the Midwives Protection Program. As part of the services of our program, we provide risk management services including risk mitigation, risk financing, and claims and litigation management to HCPP member entities including all the Health Authorities and various other stand-alone health care agencies in the Province of BC. ***Handle with Care*** is published twice a year by HCPP.

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