KOSKIE MINSKY
JUSTICE MATTERS

Civil Litigation

This newsletter is intended to provide insight for our clients on relevant litigation issues.

Expert witness immune from negligence action brought by former client

In a recent summary judgement decision, the Ontario Superior Court upheld the principle that witnesses are immune from liability for their testimony given at trial. This particular case had an interesting twist in that the plaintiffs brought an action against their own expert witness when the trial at which he testified did not go their way.

The plaintiffs hired the defendant business valuation expert to prepare a report with respect to the value of the shares of a company in which they were shareholders. The value of the shares was a central issue in the plaintiffs' claim against the company and its majority shareholder.

During the trial, one of the plaintiffs gave opinion evidence as to the value of the shares. Although he was an experienced real estate broker with considerable knowledge about the type of property owned by the company, his evidence, as an interested party, was deemed worthless. Unfortunately, the consequences for the plaintiff did not end with his own testimony. The plaintiffs' expert made reference to various aspects of the plaintiffs' "findings" in the expert's technical report. As a result, the trial judge rejected the plaintiffs' expert's evidence in favour of the defendants' experts and awarded a far lower figure in damages than the plaintiffs were seeking.

As a result, the plaintiffs commenced a separate action against the expert and his appraisal company for negligence and breach of contract. They sought damages largely representing the difference between the share value found by the trial judge and the value ascribed to the shares by their expert.

It is well-established that witnesses and parties are entitled to absolute immunity from subsequent liability for their testimony in judicial proceedings so as to promote the full and free participation of witnesses unhindered by fear of retaliatory lawsuits. Although the principle has mainly been applied to witnesses adverse to the party suing, the Court in this case saw no reason why it should not apply equally

to a party's own expert witness. This protection promotes the policy that all experts must be objective and not become a "hired gun".

The Court was also concerned that allowing parties to sue their own experts meant allowing parties to relitigate their case when they are dissatisfied with the result. In granting the expert's motion for summary judgment, the court held the principle of finality strongly supported the application of the common law doctrine of witness immunity in this case.

This is not to say that a party has no recourse when they are dissatisfied with the performance of their expert. A party is free to dispute payment of the expert's fees as the plaintiffs did in this case as well. However, an expert's testimony cannot form the basis of a separate suit amounting to a*de facto* appeal of a negative trial decision.

Paul v. Sasso et al., 2016 ONSC 7488

Sanderson and Bullock Orders Explained

In complex litigation, the plaintiff often names numerous defendants before a clear understanding of the relative liabilities of those defendants has been determined. It is only throughout the course of the action that certain defendants are revealed to be more at fault than others. In certain instances, it is determined that some defendants had no liability whatsoever and in the ordinary course, such defendant(s) are entitled to claim their costs from the plaintiff after trial.

The above scenario may lead to an injustice where the plaintiff cannot really be faulted for naming a defendant initially, however, the plaintiff must nonetheless pay costs to that party. As a way of ameliorating this unfairness and when appropriate, the parties can ask the court to award a Sanderson Order or a Bullock Order, which Orders can be utilized to protect a successful plaintiff from an adverse cost award.

In effect, a Sanderson or Bullock Order permits a successful defendant to claim its costs from the unsuccessful defendant, as opposed to obtaining costs from the plaintiff. Both a Sanderson Order and a Bullock Order lead to the same result, but the mechanics of each are different. With a Bullock Order, the unsuccessful defendant reimburses the plaintiff for the successful defendant's costs. Accordingly, the Bullock Order provides compensation to the plaintiff, provided the unsuccessful defendant has an ability to pay.

On the other hand, a Sanderson Order provides more comfort for the plaintiff. Specifically, a Sanderson Order requires the unsuccessful defendant to pay the successful defendant directly. Generally the courts will order a Sanderson Order unless there is some reason to believe the unsuccessful defendant would not be able to pay.

In *Moore*, *(Litigation Guardian of V. Wienecke)*, 2008 ONCA 162, the Court of Appeal for Ontario articulated the test for awarding Sanderson and Bullock Orders. There is a two-step process, namely:

1. The threshold question is whether it was reasonable for the plaintiff to join the defendants in one action. If the answer to that threshold question is yes, then;
2. The court must exercise its discretion to determine whether a Sanderson or Bullock Order would be just and fair in the circumstances.

MacPherson J.A., writing for a unanimous panel, identified four factors that are relevant to the court's decision as to whether a Bullock or Sanderson Order should be awarded:

1. Whether the defendants tried to shift responsibility between each other, in contrast to concentrating on meeting the plaintiff's case (Justice MacPherson described this as the foremost consideration);
2. Whether the unsuccessful defendant caused the successful defendant to be added to the action;
3. Whether there was a joint cause of action against both defendants or a separate cause of action; and
4. Whether there is an issue with respect to the plaintiff's ability to pay costs.

It should be noted these factors are not to be applied mechanically in every case. Further, counsel should be mindful that the overarching determination is discretionary and that Bullock or Sanderson Orders are the exception to the general principle of having the plaintiff pay costs to the successful defendant.

New privacy tort penalizes sharing of intimate images

As a person reading a blog, you know the internet has changed the way we do so many things including a change to our conceptions of privacy and what constitutes an invasion of our privacy. In a recent decision, the Ontario Superior Court has recognised a new tort of public disclosure of private facts as a result of an egregious breach of privacy on the internet.

The 18-year-old plaintiff had been in a romantic relationship with the defendant, a young man from her hometown. When the plaintiff went away to university, their formal relationship ended but they continued to keep in touch. The defendant repeatedly insisted the plaintiff make an intimate video of herself to send him. Although she was resistant, the plaintiff eventually sent the video that was intended, and promised to be, for the defendant's eyes only. However, the defendant immediately shared the intimate video on a public pornography website and showed it to several of their common friends. The

video remained online for three weeks before the plaintiff heard about it and demanded the defendant to remove it. The plaintiff experienced significant and long-lasting psychological distress as a result of the incident, including depression and panic attacks. The Plaintiff issued a claim for damages.

In a motion for default judgment in which the defendant did not participate, the Court recognised three types of legal wrongdoing in the circumstances. Specifically, the defendant was found liable for the two established torts of breach of confidence and intentional infliction of mental distress. The Court went on to create a new tort of "public disclosure of private facts", expanding on the Ontario Court of Appeal's 2012 decision in *Jones v. Tsige* which created the privacy tort of "intrusion upon seclusion". The new tort applies where a person gives publicity to a matter concerning the private life of another if the matter publicized or the act of the publication:

a) would be highly offensive to a reasonable persons; and

b) is not of legitimate concern to the public.

The Court found the test was met in this case and awarded the plaintiff $50,000 in general damages, $25,000 in aggravated damages and $25,000 in punitive damages. The quantum of the award was largely based on awards in sexual assault cases where there was a similar harm to dignity, but was limited by the $100,000 cap on damages in the simplified procedure through which the plaintiff brought the action. The court also granted an injunction requiring the defendant to destroy the video and prohibiting him from communicating with the plaintiff.

In this case, the court recognised that although private information and activities have become somewhat rare in the internet age, they are still worthy of protection. As a result of this recognition, the right to privacy now has a new remedy.

Jane Doe 464533 v. N.D., 2016 ONSC 541 (Stinson J.)