

Take Five

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BRITISH COLUMBIA EDITION

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Welcome Spring.



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In Memory - Doug Morrison



It is with profound sadness that I share the news of the passing of our colleague and friend, Doug Morrison. Over the past five years that Doug worked with us, I enjoyed many discussions with him about challenging legal issues, sailing, art and baking. Doug was an inspiration to all of us at the firm. He was a brilliant man who loved the practice of law and was always willing to share the wisdom of his years of experience with our more junior lawyers. He was a compassionate family man who gave generously to his community. I will miss his keen wit and infectious enthusiasm. Our deepest condolences to Doug's family and friends.

- Sarah Picciotto

Who is OnPoint?

OnPoint is not a "temp" agency. We are a law firm of on-call lawyers actively involved in our clients' files, albeit on a fractional basis. We have two divisions: legal research and on-call associates.

Legal Research Division: For over 10 years, our research division has completed research and writing projects for lawyers in the private and public sectors, from case summaries to complex memoranda and facta. Many of our clients consider using our services as equivalent to relying upon work completed by in-house associates, and add a measure of profit accordingly when billing their own clients.

On-Call Associates Division: Our on-call associates division responds to the need to control costs while effectively managing workload variances. Our litigators are available for a range of services, from background assistance and file management to court appearances and locums. Whether we are engaged for a set period of time, a particular file or a specific project, our clients benefit from having access to temporary assistance from outstanding lawyers without the overhead associated with employing full-time associates.

The respondent plaintiff sued the defendant appellant after falling from a trailer on the appellant's blueberry farm and breaking two bones in his leg. The trial judge found that the appellant breached the standard of care set out in section 3(1) of the Occupier's Liability Act (the "Act"), and that the plaintiff's contributory negligence accounted for 30% of the damages sustained. The trailer's north door, from which the appellant fell, would not have complied with the applicable municipal occupancy permit standards unless it was double-bolted on both sides or a landing or stairway was installed. The trailer was used as both an office for the farm operation and as a temporary residence for one of the farm's employees. The appellant had been with the farm employee who lived at the trailer and the farm's de facto manager at the time of the accident, and all three had been drinking prior to, during, and after a wedding.

Gill v. A & P Fruit Growers Ltd., 2010 BCCA 107

Area of Law: Personal Injury

Under Appeal: Madam Justice Brown



Held: Appeal dismissed

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Two grounds of appeal were advanced by the appellant: first, that the trial judge applied the incorrect standard of care and second, that the plaintiff's actions gave rise to more than 30% culpability. On the issue of assessing the plaintiff's contributory negligence, the Court deferred to the determination of the trial judge, finding such an apportionment not to be "grossly disproportionate". The Court agreed with the trial judge's determination that section 3(1) of the Act set out the appropriate standard of care. Section 3(1) of the Act imposes on occupiers the duty to ensure that premises are reasonably safe for others. A lower standard, in section 3(3), applies to trespassers and recreational users of land, and only requires the occupier not to create dangers with the intent to harm others and not to act with reckless disregard for the safety of others. The Court agreed with the trial judge's assessment that the respondent was not a trespasser as he was invited into the trailer as a guest of either the farm's manager or the employee who lived there. The Court also rejected the argument that drinking alcohol in a trailer is akin to the recreational activity of having a picnic, foreclosing the option of the lower standard of care being applicable.

Reis v. Bucholtz, 2010 BCCA 115

Area of Law: Family

Under Appeal: Madam Justice Gropper



The appellant and respondent cohabited for approximately four years and have one daughter together. On their separation, the appellant voluntarily paid the respondent \$500 per month which they commonly understood to be child support. Shortly after, the appellant added \$500 per month to this amount, which the trial judge considered to be spousal support. The respondent brought an action for spousal support, child support, and full guardianship of their daughter. At trial, the judge gave the respondent primary parent status and awarded \$1,119 per month in child support and \$2,169 in spousal support for the period until the child commenced school. Retroactive child and spousal support were also granted. Among other grounds of appeal, the appellant argued that the trial judge erred in awarding retroactive child and spousal support.

Held: Appeal dismissed

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The Court reviewed the factors that ought to be considered in making a retroactive award. Based on jurisprudence from the Supreme Court of Canada (*D.B.S. v. S.R.G.*, 2006 SCC 37), these factors are: the reasons support was not sought earlier, the conduct of the payor parent, the circumstances of the child, and if hardship would be occasioned on the payor parent by ordering a retroactive award. The Court found that the trial judge properly considered these four factors. In particular, the Court agreed with the trial judge's characterization of the respondent's conduct as being blameworthy. Indicia of blameworthy conduct include the payor parent intimidating the recipient parent, misleading the recipient parent to think that child support obligations are being met when the payor knows or ought to know they are not, or inadequately disclosing his or her financial position to dissuade the recipient parent from commencing an action for child support. These factors also influence the date from which the retroactive support will be awarded, though only in exceptional cases will a retroactive award reach back more than three years. The Court was satisfied that the date of the respondent's informal notice to the appellant seeking spousal support was the appropriate date to commence retroactive spousal support, and the date of separation was the appropriate date to commence retroactive child support.

Susan Heyes Inc. v. South Coast B.C. Transportation Society, 2010 BCCA 113

Area of Law: Intervenor Status
Under Appeal: Mr. Justice Smith

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This was an application to vary a decision of the Court of Appeal declining a motion by the appellants (the "Proposed Intervenors") for intervenor status in an appeal (the "Main Appeal") between Susan Heyes Inc. ("Heyes") and numerous defendants. The Proposed Intervenors, the Cambie Village Business Association and a number of merchants from the Cambie Street area, were in the midst of having their class action certified in the Supreme Court. The aim of their class action

was to recover damages from South Coast B.C. Transportation Society and other defendants caused by the construction of the Canada Line, a rapid transit project that was under construction along Cambie Street in downtown Vancouver for several years. Heyes, the respondent in the Main Appeal, was successful at trial

in nuisance and other causes of action. She was awarded \$600,000 in damages incurred due to the business interruptions caused by the construction of the Canada Line. The chambers judge denied the application for intervenor status.



Held: Application to vary dismissed.

The application to vary was dismissed. The chambers judge correctly identified the two reasons for granting intervenor status: having a direct interest in the outcome of the case or representing a public interest in a public law issue, or bringing a different and useful perspective to the resolution of the issues. The Court agreed that any issues the Proposed Intervenors could raise could equally be raised by Heyes and no different perspective would be gained by allowing the application. The Proposed Intervenors argued that they had a direct interest in the outcome of the Main Appeal because the appellate decision will effectively determine the outcome of their class action and that once the Main Appeal is determined, the issue will effectively be res judicata. The Court disagreed, finding res judicata to be applicable only where the issue has previously been tried between the same parties.

Nazmdeh v. Spraggs, 2010 BCCA 131

Areas of Law: Personal Injury; Civil Practice and Procedure; Costs
Under Appeal: Madam Justice Humphries

In a personal injury lawsuit, the plaintiff's lawyer, the appellant, failed to respond in a timely way to requests by defendant's lawyer. In particular, the appellant lawyer failed to respond to interrogatories and gave inadequate responses to opposing counsel's demand for particulars. The applications judge heard four motions brought by the defendants, with a fifth having been heard by another judge. The matter settled, with the exception of costs awards in relation to the five motions. The defendants made an application pursuant to Rule 57(37) of the Supreme Court Rules for a costs award against the plaintiff's lawyer personally. The Rule provides the court with discretion to make such an award where the lawyer "caused costs to be incurred without reasonable cause, or has caused costs to be wasted through delay, neglect, or some other fault." The applications judge imposed costs against the appellant lawyer for half of the hearing and disbursements in relation to two of the motions.

Held: Appeal dismissed

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The appeal was dismissed. A five-member panel was convened to determine whether the Court's previous decision in *Kent v. Waldock* was correctly decided. The appellant argued that the decision in *Kent* required the applications judge to make a finding of "reprehensible conduct" on the part of the lawyer before making a discretionary award of party-party costs against the lawyer personally. The Court concluded that such a finding is only required where an award for special costs is made against a lawyer, as was the case in *Kent*. The applications judge correctly identified and applied the proper test: whether the lawyer's conduct caused costs to be incurred or wasted through delay or neglect, as specified in the wording of the Rule. The Court concluded that, "the trial judge exercised restraint in choosing to not order the lawyer to pay costs where the evidence was insufficient and where to obtain that information he would be required to infringe upon the privilege. In relation to the interrogatories and particulars, however, she was able to determine that the lawyer had failed to even meet his minimal obligations. This determination was available to her on the record."





Amezcuca v. Taylor, 2010 BCCA 128

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Areas of Law: Limitations

Under Appeal: Madam Justice Stromberg-Stein

The appellant and respondent were in a car accident in the fall of 1999. At the time of the accident, the respondent was acting in the course of her duties as an RCMP officer. Provincial legislation provides a statutory defense to provincial officers who are negligent in the course of their employment, and an agreement between the federal and provincial governments requires the federal government to indemnify the province

for any such claim, and is to assume conduct and carriage of any claim or action. Within a year of the accident, the appellant filed a statement of claim naming the respondent officer only. A statement of defence admitting negligence was filed. Attempts at settlement ensued, but no steps were taken in the action until February 2008 when the appellant delivered an application to the Department of Justice (the "DOJ") to amend the statement of claim and add the Minister of Public

Safety and Solicitor General of BC as a defendant. Prior correspondence from the DOJ to the appellant's counsel was not clear as to the identity of the appropriate defendant in the action or whether the DOJ was defending the action on behalf of a provincial entity. The master granted the application but the reviewing chambers judge overturned this decision on the basis that the master did not adequately consider the expired limitation period in his reasons.

Held: Appeal allowed

The appeal was allowed. The Court discussed the factors to consider on an application to amend pleadings following the expiry of a limitation period, and in particular, an application to add a defendant. The Court confirmed that there exists a discretion to permit amendments, but that such discretion must be exercised judicially and in accordance with guidelines, including: the extent of the delay and reasons for it, the explanation put forward to account for the delay, and the degree of prejudice caused by the delay. Courts must also consider the overriding question of what is just and convenient in the circumstances. The Court found that the Minister adduced no evidence indicating what prejudice might be experienced if he were added as a defendant, and the DOJ conceded that the Minister would be able to use all the information gathered by the DOJ on the case. The Court concluded that the loss of a limitation period is not a separate factor to consider in such applications. Rather, it is the potential for prejudice arising from such an expiration that is the relevant consideration.