- The Court of Appeal for British Columbia held that interference with Aboriginal fishing rights may ground an action in common-law nuisance but found that the defence of statutory authority applied under the circumstances (*Thomas v. Rio Tinto Alcan Inc.*, 2024 BCCA 62).
- On an appeal from the dismissal of a class action certification, the Court of Appeal for Ontario confirmed that an increased risk of physical harm on its own is not compensable in tort (*Palmer v. Teva Canada Ltd.*, 2024 ONCA 220).
- The Court of Appeal for British Columbia held that the engineers who negligently designed an apartment building had been in a sufficiently proximate relationship to a subsequent purchaser of the building to ground a duty of care, in the absence of a direct contractual relationship between the two parties *(Centurion Apartment Properties Limited Partnership v. Sorensen Trilogy Engineering Ltd.*, 2024 BCCA 25).
- The Alberta Court of King's Bench awarded $1.5 million in damages against an American defendant who reposted allegations of sexual assault against a musician on her social media page, offering a strong word of caution to social media users in the process (*Durand v. Higgins*, 2024 ABKB 108).
- In two separate cases, British Columbia courts considered the possibility that the new torts of harassment and intrusion upon seclusion may be recognized in the province but stopped short of actually doing so (*Sandher Fruit Packers Ltd. v. MacAskill*, 2024 BCSC 1855; *Situmorang v. Google*, LLC, 2024 BCCA 9).
- The British Columbia Civil Resolution Tribunal found that a company can be held liable for negligent misstatements made by an AI chatbot on its website (*Moffatt v. Air Canada*, 2024 BCCRT 149).

II. NEW TORTS [§36.2]

A. TORT OF HARASSMENT [§36.3]

In light of recent developments in other provinces, as well as prior British Columbia case law, the British Columbia Supreme Court acknowledged that there is an arguable case that the new tort of harassment may be recognized in the province (*Sandher Fruit Packers Ltd. v. MacAskill*, 2024 BCSC 1855).

The plaintiffs, a family who owned a fruit-packing business, applied for an injunction seeking to enjoin the defendant, a blogger, from

publishing allegedly defamatory material about them on his website, and requiring him to remove previous statements from the site. The plaintiffs grounded their application in the tort of defamation as well as the tort of harassment, which has not been recognized in British Columbia.

The Supreme Court acknowledged that the tort of harassment has recently been recognized by trial courts in Ontario and Alberta, including in *Alberta Health Services v. Johnston*, 2023 ABKB 209, a case summarized in last year's *Annual Review of Law and Practice* (CLEBC, 2024). The court also observed that in a previous British Columbia case, *Mainland Sawmills Ltd. v. IWA-Canada*, 2006 BCSC 1195, the court, in *obiter*, set out a hypothetical test for the tort of harassment if it were to be recognized in the province, whereby the plaintiff would need to establish:

(1) outrageous conduct by the defendant;

(2) the defendant intending to cause, or recklessly causing, emotional distress;

(3) the plaintiff suffering severe or extreme emotional distress; and

(4) actual and proximate causation of emotional distress by the defendant's outrageous conduct.

Based on commentary from *Mainland Sawmills Ltd. v. IWA-Canada* as well as pan-Canadian developments, the court noted that while it was prepared to accept that there was an arguable case that the tort of harassment would be recognized in British Columbia, it was not prepared to endorse the more lenient tests recently set out in Alberta and Ontario over the test set out in *Mainland Sawmills Ltd. v. IWA-Canada*. Accordingly, it found that the plaintiffs had not established an arguable case that they would be able to satisfy those requirements, including that they had suffered severe or extreme emotional distress. The court instead issued an injunction based on the tort of defamation.

B. COMMON-LAW TORT OF INTRUSION UPON SECLUSION [§36.4]

The Court of Appeal for British Columbia remanded the issue of whether the tort of common law intrusion upon seclusion exists in British Columbia to the British Columbia Supreme Court for further consideration in the context of a proposed class action (*Situmorang v. Google, LLC*, 2024 BCCA 9).

The plaintiff applied to certify a class action against Google for its use of facial recognition technology to collect and store facial biometric

data, pleading causes of action under the *Privacy Act*, R.S.B.C. 1996, c. 373 as well as under the common-law tort of intrusion upon seclusion, which has yet to be recognized in British Columbia. The chambers judge dismissed the application on the basis that the notice of civil claim did not disclose a cause of action.

The Court of Appeal allowed the appeal, holding that the notice of civil claim disclosed a cause of action for breach of privacy under the *Privacy Act*. The court also held that the plaintiff properly pleaded the elements of the tort of intrusion upon seclusion by alleging that the defendant's actions constitute an intentional intrusion upon class members' seclusion without lawful justification in a manner which would be regarded by a reasonable person as highly offensive. However, the court signaled that the existence of the tort in British Columbia remains an open question.

While noting that the tort of intrusion upon seclusion has been recognized in Ontario since 2012, the court observed that unlike British Columbia, Ontario does not have a statutory privacy tort. The Court of Appeal declined to address the question of whether the common law tort of intrusion upon seclusion exists in British Columbia, instead leaving the issue to be addressed by the Supreme Court upon remittal.

III. NEGLIGENCE [§36.5]

A. INCREASED RISK OF HARM NOT ACTIONABLE IN A CLAIM FOR DAMAGES [§36.6]

The Court of Appeal for Ontario reiterated that an increased risk of harm is not a compensable head of damages and cannot support an action in negligence (*Palmer v. Teva Canada Ltd.*, 2024 ONCA 220). This finding accords with a pair of trial-level decisions summarized in last year's *Annual Review of Law and Practice*, both of which cited the trial decision in *Palmer v. Canada Ltd.*

The plaintiffs applied to certify a class action against the defendant pharmaceutical company, seeking compensation for a potential increase in their cancer risk, which may have resulted from their use of a contaminated drug that had been recalled by the defendant, as well as psychological harm from the shock of the recall.

The motion judge dismissed the certification motion, holding that it was plain and obvious that the causes of action pleaded by the plaintiffs were bound to fail due to the non-compensability of the

harms alleged. Namely, no physical harm had yet manifested, and the psychological harm resulting from the recall was insufficiently serious to be compensable. The motion judge also held that the economic losses alleged by the plaintiffs, such as medical services and monitoring, were non-compensable in the absence of any meaningful physical or psychological injuries.

The Court of Appeal dismissed the appeal and upheld the findings of the motion judge as to the non-compensability of all three heads of damage. Although the court largely adopted the reasons of the motion judge, it did note that the motion judge erred in his analysis of the issue of present psychological harm related to the recall, as the motion judge appeared to find that there could be no cause of action for present psychological harm related to the risk of future physical harm.

The Court of Appeal noted that while such psychological harm could ground a cause of action in negligence, per the reasoning of the Supreme Court of Canada in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, the harm must meet a basic threshold of severity to merit recovery and must be assessed against the standard of a person of ordinary fortitude. The court found that even by applying the correct framework from *Mustapha v. Culligan of Canada Ltd.*, the result reached by the motion judge would have been the same.

B. DUTY OF CARE—ENGINEERS [§36.7]

Engineers who design a building with serious structural deficiencies are in a sufficiently close and direct relationship to a subsequent owner to establish sufficient proximity for a duty of care to arise, even in the absence of a direct contractual relationship between the parties (*Centurion Apartment Properties Limited Partnership v. Sorensen Trilogy Engineering Ltd.*, 2024 BCCA 25, leave to appeal refused 2024 CanLII 88323 (SCC)).

The defendant engineering company was retained as the structural engineer for an 11-storey residential apartment building project in Langford, which they were not qualified to design. Serious structural deficiencies were subsequently discovered in the building after its completion, leading to a revocation of its occupancy permit and a full evacuation of residents. By the time of the evacuation, the building had been sold to the plaintiff partnership, which sued the defendant in negligence. While the plaintiff and defendant were not in a direct contractual relationship, they each had contracts with third parties that contained risk allocation terms.

The chambers judge held that the relationship between the engineering company and the subsequent owner was insufficiently proximate to establish a duty of care. The chambers judge decided the proximity issue primarily on the basis of two recent leading cases on pure economic loss—*1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35 and *Tri-County Regional School Board v. 3021386 Nova Scotia Ltd.*, 2021 NSCA 4—finding that the particular contractual allocation of risk between the parties precluded a relationship of proximity. The chambers judge did not accept that proximity could be established with reference to *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, 1995 CanLII 146 (SCC), as there was no contractual allocation of risk in that case.

The Court of Appeal allowed the appeal and held that the relationship between the parties was sufficiently proximate as to establish a duty of care. The court concluded that proximity could be established with reference to *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, a case that the Supreme Court of Canada in *1688782 Ontario Inc. v. Maple Leaf Foods Inc.* identified as binding authority for duties of care in relation to negligent building design and construction. The Court of Appeal reached their conclusion notwithstanding any differences in the contractual arrangements in the case at bar and in *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*

The court also observed that even if a full "novel" proximity analysis were necessary, the result would remain unchanged. On this point, the court found that the chambers judge had placed too much emphasis on the contractual allocation of risk itself, as opposed to the nature of the risk contemplated by the parties. The court found that the parties had not contemplated the risk that a real and substantial danger would result from the engineers' inability to adequately design the building in the manner it had promised to.

C. DUTY OF CARE—RCMP COMMUNICATIONS CENTRE EMPLOYEES [§36.8]

The employees of an RCMP communications centre who failed to immediately alert the relevant authorities upon learning about an outage at a busy intersection were found to be 40 per cent liable for a serious accident that subsequently occurred at the intersection (*Emil Anderson Maintenance Co. Ltd. v. Taylor*, 2024 BCCA 156).

Several hours after the traffic lights had gone out at a highway intersection in Mission, a concerned driver called the non-emergency line of the local RCMP detachment to inform them of the issue.

Upon being connected to the RCMP's Operational Communications Centre ("OCC"), the driver specifically expressed concern that an accident would occur if the lights were not soon fixed. During the time that the lights were out, an employee of the highway maintenance contractor responsible for that section of the highway drove through the intersection twice. No immediate steps were taken either by the OCC or the contractor to warn drivers at the intersection, and a fatal accident occurred an hour and a half after the call had been placed.

The trial judge found that both drivers had been at fault, apportioning liability at 25 per cent to the driver who had been speeding and 10 per cent to the deceased driver. The trial judge applied an approach based on *Anns v. Merton London Borough Council*, [1978] A.C. 728 (U.K.H.L.) and *Cooper v. Hobart*, 2001 SCC 79 (the "*Anns/Cooper* analysis") to determine whether the OCC owed the victims of the accident a duty of care. The judge observed that while emergency dispatchers had been found to owe a duty of care to callers seeking emergency assistance, courts had not yet recognized a duty of care owed by dispatchers to a broader segment of the public. At the second stage of the test, the judge found that an accident was a reasonably foreseeable risk of a failure on the part of the OCC employees to take proper action. The trial judge found that the requirement of proximity was easily met, and that there were no policy considerations barring the establishment of a duty of care. The trial judge apportioned the remaining liability at 40 per cent to the OCC and 25 per cent to the contractor.

On appeal, the Attorney General of Canada, on behalf of the OCC, argued that the trial judge erred by holding that the OCC employees owed the plaintiff a duty of care, imposing an incorrect standard of care, drawing causal inferences, and disproportionately apportioning liability to the OCC. The contractor argued that the trial judge made several incorrect findings of fact and misapplied the law.

The Court of Appeal dismissed both appeals. The court found that the trial judge made no errors in applying the *Anns/Cooper* analysis to the relationship between the OCC and the drivers at the intersection. The court also found that the trial judge had not held the OCC employees to a standard of perfection but, rather, a standard of reasonable care under the circumstances. The court dispensed with the other grounds of appeal advanced by the OCC and the contractor, finding no reversible errors.