EMERGING TRENDS IN CANADIAN LAW

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Topics:

I. Costs recovery in litigation
II. Pure economic loss
III. Intentional interference with economic relations
IV. Discovery of electronic records
V. Reform of the law relating to apology
COST RECOVERY IN CANADIAN LITIGATION:

- Loser pays system
- Judicial discretion – ordinarily a conservative approach
- Tariff or schedule to assess fee portion of costs – based on active steps in the litigation
- Recovery – from 1/3 to full on fees – full on out of pocket expenses
- Formal settlement offer systems – to double or increase costs after date of service of offer
PURE ECONOMIC LOSS

- Introduction – financial loss without physical damage or personal injury
- *Hedley Byrne* and *Anns* followed in Canada – in *Kamloops*
- Later criticism of *Anns* by House of Lords in *Murphy* not followed in Canada
- Expansion of ability to claim continued until restricted by SCC in *Cooper* in 2002
PURE ECONOMIC LOSS

- After *Cooper* efforts to expand liability for pure economic loss have met with mixed success
- *Martel* – Negligent negotiation of lease - failed
- Sauer – BSE class action – upheld against the manufacturer of cattle feed (motions court)
INTENTIONAL INTERFERENCE WITH ECONOMIC RELATIONS:

- Elements of the Tort:
  1. Intent to injure the plaintiff;
  2. Interference with the plaintiff’s business or method of gaining his or her living by unlawful means;
  3. Economic loss caused thereby.
INTENTIONAL INTERFERENCE WITH ECONOMIC RELATIONS:

- Proof of intent – requires only
  - Existence of a valid business relationship or expectancy; and
  - Knowledge by the defendant of the relationship or expectancy.

- “Unlawful Means”
  - Breach of a statute, tortious acts, breach of contract, misrepresentation, and abuse of power
INTENTIONAL INTERFERENCE WITH ECONOMIC RELATIONS: Implications


- *Volkswagen v. Spicer*

- Broad scope of liability and damages – extends even to an expectation or expectancy
Canadian courts have embraced broad disclosure requirements in respect of electronic documents.

- Increased costs – forensic computer analysis, internal IT system capabilities to store and retrieve the information, legal and professional fees for examination and organization of the records.
Canadians are known for being overly apologetic – but apologies can have legal implications

- Apologies are admissible against a party
- Being Canadians, we want to preserve the beneficial effect of apologies – may help to keep us less litigious
- Several Provinces have passed or are in the process of passing “Apology Acts” to render an apology inadmissible
CONCLUSION

- Cost recovery – varies from 1/3 to full – conservative approach
- Pure economic loss – more conservative approach since SCC decision in *Cooper*
- Intentional interference with economic relations – broad imposition of liability and expanded damages to ‘expectancy’
- Broad disclosure of electronic records – with implications for claims expenses
- Preserve ability to apologize with impunity – may arguably reduce claims