CANADIAN LAW OF OBLIGATIONS

CONFERENCE PROGRAMME

THE CANADIAN LAW OF OBLIGATIONS 2017

INNOVATIONS, INNOVATORS, AND THE NEXT 20 YEARS

MAY 5, 8:15 AM – 5:00 PM, PETER A. ALLARD SCHOOL OF LAW, UBC

MAY 6, 8:15 AM – 5:00PM, ROBERT H. LEE ALUMNI CENTRE, UBC

THIS CONFERENCE IS APPROVED BY THE LAW SOCIETY OF BRITISH COLUMBIA FOR 13.5 CPD CREDITS

May 5

8:30-8:45 Welcome to Allard Hall, from Prof. Liz Edinger, Peter A. Allard School of Law

8:45-9:45 Opening Address: Justice Russell Brown, "Common Law Reasoning from a Recovering Tortaholic"

10:00-10:45 Bruce Feldthusen, University of Ottawa "Bungled Police Emergency Calls and the Problems with Unique Public Duties of Care"

In Michael v The Chief Constable of South Wales Police the UKSC struck out a fatal accidents claim brought by the family of a victim of domestic abuse. Two different police forces bungled Ms Michael's calls for help on the emergency line immediately before she was murdered. The claim failed because the court held that the law ought not to recognize unique public duties of care, that is duties not owed by similarly situated private defendants in ordinary negligence law. *Michael* has been described as one of the most important negligence decisions ever rendered in UK law. Yet the question of unique public duties is generally ignored in Canada.

This article explores first the complicated Canadian law of negligence governing duties to provide benefits to another. It concludes that Canadian courts would probably have permitted the *Michael* case to go to trial based on the ordinary principles that apply to private parties. Specifically, it bases this conclusion on an enriched notion of "assumption of responsibility" emerging from recent rights-based scholarship. The article concludes by considering the alternative argument that lies at the core of the *Michael* decision. Ought the courts to create a unique public duty that would have applied to the police in *Michael*? It concludes that unique public duties of care constitute an objectionable and unworkable intrusion by the courts on the prerogative of the legislatures. Fortunately, ordinary Canadian negligence law is sufficiently adaptive to deal with cases like *Michael* without needing to create a unique duty of care.

This Conference marks the retirement of Professor Joost Blom, in recognition of Prof. Blom' s contributions to legal education and to the Canadian law of Obligations. The organizing committee gratefully acknowledges the support of the Peter A. Allard School of Law and LexisNexis Canada.

10:45-12:15 Panel 1 The private law response to public wrongs: Public Authority Liability

Mayo Moran, Faculty of Law, University of Toronto, "The Problem of the Past"

How did historic wrongs go from being legally unthinkable to counting among law's most difficult cases? And given the new life of these old claims, how ought we to respond? This paper tells the story of how historic wrongs became legal problems and provides the beginnings of a more fulsome account of redress. To date, literature has tended to focus on the relatively novel terrain of truth commissions, acknowledgement and commemorative projects.

The survivor's quest for individual redress has, by contrast, garnered little serious academic attention. This project seeks to respond to that gap by using three illustrative cases to trace how historic wrongs came to be among law¹s most vexing problems of responsibility. The UK decisions on the Mau Mau uprising highlight how such reparative justice claims can possess a surprising force that is even capable of eroding the once-powerful procedural rules that used to protect the past from legal responsibility.

Canada's five billion dollar settlement of claims relating to the legacy of Indian residential schools not only reminds us of this force, it also provides insight into the challenges law faces when confronted by its own complicity in historic injustice. Finally North Carolina's efforts to respond to its troubled legacy of eugenics illuminates the tenacious quality of reparative justice claims—a quality that ensures that they often outlive defeat in the courtroom. Tracing the law¹s unlikely responsiveness to these claims for redress of historic wrongs sheds light on the reparative justice pressures exerted by these cases and helps to illuminate some of the key features of redress that have to date been all but ignored.

Efrat Arbel, Peter A. Allard School of Law, University of British Columbia, "False imprisonment in the administrative segregation context"

The use of solitary confinement in Canadian prisons is increasing at an alarming rate. Despite numerous calls for reform and restraint from national and international bodies, solitary confinement continues to be both misused and overused, and is an ongoing source of rights violations in Canadian prisons. The vast majority of scholarship and advocacy in this field has sought to address these problems by turning to public law, and more specifically, to the Charter of Rights and Freedoms. Notwithstanding its progressive potential, however, public law has offered prisoners very limited, and often inadequate forms of recourse. My paper outlines a novel approach through which to scrutinize the law and practice of solitary confinement. Rather than turning to the Charter, it turns instead to tort law, focusing on the tort of false imprisonment. It advances the substantive understanding of tort law's application to the law and practice of solitary confinement. Through an analysis of the law of false imprisonment, the paper charts a method through which to offer prisoners meaningful forms of recourse for damages suffered due to unlawful or excessive solitary confinement.

Margaret I. Hall & Aliya Chouinard, Faculty of Law, Thompson Rivers University, "Systemic wrongdoing and the liability of public authorities in tort law: two case studies"

The doctrines of tort law explain events in terms of wrongfulness in contrast to alternative "tragedy" narratives of inevitability or accident. This explanatory function of tort law creates social meaning while enabling the more traditional tort functions of compensation and deterrence. The explanation provided by each of the various tort doctrines is distinct, describing (and thereby deterring) a different kind and quality of wrong. Over-reliance on negligence as a theory of public authority wrongdoing has therefore weakened the ability of tort law to provide a coherent explanation of public wrongs and, therefore, the usefulness of tort as a means of effective response. This paper examines the potential application of two emerging theories of systemic tort liability (systemic negligence and systemic misfeasance in public office) to the events/harms under consideration in two public inquiry reports: The Public Inquiry into the Death of Edward Christopher Snowshoe and The Ashley Smith Report.

12:15-1:00 LUNCH

1:00- 2:30 Panel 2 Tort Law in the Internet Age

Emily Laidlaw, University of Calgary Faculty of Law & Hilary Young, University of New Brunswick Faculty of Law, "Primary Publishers and Internet Intermediary Liability"

The law of defamation has long been recognized as out of step with modern tort principles. For example, the publication element requires intentionally conveying defamatory content but no authorship or even knowledge of the content is required. Thus, some have referred to defamation as strict liability. Our paper re-examines the Canadian law of publication in defamation in the context of internet intermediary liability. Search engines and website hosts have been sued in defamation for content created by users. Courts have struggled with whether such intermediaries are publishers and if so, whether they have an innocent dissemination defence. The defence applies to those whose role in publication is secondary, and who have no knowledge of, and are not careless regarding the dissemination of, the defamatory contents. Instead of internet-intermediary-specific defences, which make a complicated area of the law more so, our paper proposes to modify the publication element of defamation so that it only ever applies to "primary publishers". "Primary publishers" include authors, editors and commercial publishers. They are more immediately involved in dissemination and have or should have knowledge of the contents. Some courts have suggested that the publication element should evolve to require knowledge of specific words. However, while knowledge is necessary, it is insufficient. If a newsagent were told a newspaper contained a libel and he continued to sell it, at common law he'd be liable. If Google were told that a search result is defamatory, it might be a defamer if it failed to remove it. We argue that this should not be the case. While there should be legal mechanisms for removing certain content from the internet, and penalizing a failure to remove it, a secondary publisher's failure to remove content should not make it liable in *defamation*. The proposed change will resolve many of the internet intermediary liability problems while

making defamation law fairer and reflecting modern tort law's emphasis on fault-based liability. This project is being carried out in conjunction with the Law Commission of Ontario's defamation reform project, and so proposed changes could result in legislative amendments.

Samuel Beswick, Faculty of Law, Harvard University (SJD Candidate), "Don't Tell Me What the Papers Say: Privacy Injunctions in the Internet Age"

In May 2016, a redacted decision of the Supreme Court of the United Kingdom roused privacy commentators and news outlets around the common law world. The decision, PJS v News Group Newspapers Ltd [2016] UKSC 26, [2016] FSR 33, enjoined the tabloid paper the Sun on Sunday from publishing in England the story of a celebrity's extramarital affair at a time when he was married (to a famous entertainer) with children. The decision overturned the Court of Appeal's earlier discharge of an interim injunction against the newspaper after the story had been published with impunity across the Atlantic. The Sun reacted with headlines branding the Supreme Court's judgment a "legal farce" and a "draconian gagging order". Was the Supreme Court's decision—conceding that the story may run overseas but protecting the applicants in their home environment—an innovative compromise between the applicants' and the newspapers' interests? Or did it just show that the judges were "out of touch with reality" and ignorant of the fundamental disruption that the internet age heralds for privacy law (as Lord Toulson alluded in dissent)? This paper uses the issues raised by the PJS case to critique privacy injunction jurisprudence across Canada and its close constitutional cousins, New Zealand and Australia. A comparative outlook is apt: courts of Commonwealth heritage still frame privacy interests primarily through the law of tort, and each country continues to draw upon and contribute to the law of the other in weighing shared common law principles and constitutional values.

The paper identifies three issues that are particularly problematic. First, are celebrities (and their families) "entitled to the same respect for their private lives as anyone else" (as the Court held in PJS), or should their public status warrant a lower expectation of privacy (as other Commonwealth courts have held)? Second, of what relevance is participant disclosure? The effect of PJS was to silence the participants to PJS's (admitted) extramarital affair from divulging their experience. That is a far more expansive curb than the established proscriptions of surreptitious "peeping" or publishing of "revenge pornography". Third, how do we rationalize privacy injunctions in the internet age? PJS held that widespread third-party publication did not vitiate injunctive relief. But as technological innovations erode our expectations of privacy, should the courts remain steadfast or heed the lesson of King Canute?

David Mangan, Faculty of Law, City University of London, "Reconsidering Defamation as a 21st Century Tort"

Innovations in information technology have prompted reconsideration of defamation (particularly libel); most notably because the internet has intensified the challenges posed to reputational concerns. With social media, as one example, it may be said that slander is converted into libel insofar as social media, as an online conversation, provide a transcript of a conversation. The more contemporary issues point up the

problems faced by this tort for some time. This contribution will explore libel as a nuanced tort that is developing in a new setting. The presentation will also consider the limitations of libel and how, as a result, it is being packaged with privacy claims in an effort to protect reputation. Historically, defamation has been viewed as a tort protecting reputation from the publication of false statements. While it is not (technically) within the remit of the tort, a cynical view has developed regarding how defamation is used to also capture legitimate criticisms. The definitional problems complicate its utility because the tort is supposed to represent a balancing of interests; those being free speech and reputation. The three-part criteria for establishing a *prima facie* claim in libel have been viewed as a low threshold. Consideration, though, must also include the robust (and developing) defences within this tort designed to protect a wider range of speech. The impact of these defences is that even speech that may satisfy the criteria for the tort will still be excused based on the imperative of free speech. Opinion stands out as one form of speech that demonstrates this limitation. Remarks made that draw inferences from, make value judgments of or analyse points in the public domain remain challenging when set within the parameters of a defamation action. Where the remarks made fall outside of the parameters of defamation, there will be a search for other tools the law may provide. Actions in privacy and data protection have emerged in response. This discussion will focus on privacy. This claim will be used where information is disclosed (i.e. published or passed on to others in some form) that may 'harm' reputation. For there to be an action, the information must have been obtained through some breach of privacy. This breach may be defined as either physical or informational (though there is overlap).

This presentation will be mindful of the long-standing ambiguity in the tort of defamation regarding reputation, coupled with efforts to protect reputational interests through other claims, notably privacy-based arguments.

2:30-2:45 Tea Break

2:45- 3:45 Panel 3 Emerging and Evolving Torts: Amatory Torts and the Tort of Deceit

Jason Neyers, Faculty of Law, Western University, "The Future of the Tort of Deceit"

In honour of Professor Blom's retirement, I propose to address the future of the tort of deceit. In *Bruno Appliance and Furniture Inc v Hryniak*, 2014 SCC 8, the Supreme Court of Canada unanimously held that deceit (or civil fraud as it styled it) consists of four elements:

(1) a false representation made by the defendant;

(2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness);

(3) the false representation caused the plaintiff to act; and

(4) the plaintiff's actions resulted in a loss.

Several commentators claimed that this decision radically changed and modernized the tort by removing a well-accepted fifth element—that the defendant intend that the plaintiff rely on the defendant's false representation. Is this correct? The analysis in the treatise by Blom and Burns (*Economic Torts in Canada*, 2nd ed (LexisNexis, 2016)) is ambiguous on this very important point. For example, in the introduction to their chapter on deceit, the authors invoke the test from *Hryniak* and advise readers that the chapter has been renamed "Civil Fraud" on account of the decision. This suggests that the authors consider the decision important and revolutionary. In subsequent sections, however, the authors devote an entire section to discussing the tort's intention to deceive element without any mention of *Hryniak*. This conversely suggests that the authors consider that *Hryniak* did not substantially change the law. Which of these two views is correct?

The paper will argue that, for the following four reasons, *Hryniak* did not remove the intention to deceive requirement from Canadian law. First, this element was not at issue in *Hryniak* and therefore this change could not be part of the decision's *ratio*. Second, many of the cases approvingly cited by the court in support of its four elements also confirm the traditional intention to deceive requirement. This would be odd if the aim of *Hryniak* was to fundamentally change the law. Third, the abandonment of the intention requirement would mean that many foundational fraud cases would now have to be regarded as wrongly decided. Fourth, the abandonment of this requirement would be inconsistent with the subsequent analysis of civil fraud by the unanimous court in *Bhasin v Hrynew*, 2014 SCC 71. The paper concludes that the Supreme Court of Canada needs to take greater care when summarizing complex bodies of law and that practicing lawyers need to stop treating the court's judgments as if they were statutory provisions to be applied independently of the prior jurisprudence of which they form a part.

Zoe Sinel, Faculty of Law, Western University, "Amatory Torts and the Limits of Tort Law"

Should conjugal infidelity attract tort liability? For almost 40 years, the answer in Canada has been no: enticement, harbouring, criminal conversation, and seduction have all been abolished through relevant provincial family law statutes. Amatory torts, on the dominant view, are wrongs of the heart, not of the law. Despite the present unavailability of amatory torts in Canadian law, the argument in favour of their continued desuetude is not moot. Their non-tort status bears on the more fundamental questions about the nature and limits of tort law. Most condemn adultery as wrongful. It threatens the valuable social institution of marriage and it can cause severe emotional distress in those betrayed. Given the role of torts in protecting both important social institutions (e.g., property and contract) from degradation and harm and private individuals from wrongfully-inflicted harm (both physical and psychological), why has it ceded ground when it comes to marital infidelity?

I propose to examine this question from the perspective of a rights-based paradigm which points to the conclusion that the explanation for these torts' abolition lies in the nature of the wrong that is conjugal infidelity. Simply put, romantic faithlessness is not a legal wrong on a rights-based or formalist understanding of private law. This argument, however, is susceptible to the criticism that the formalist

understanding of tort law is based on a flawed, outdated, and overly restrictive picture of the private law subject and his/her rights. In response, I propose an alternative but complementary explanation, namely, that the value or values served by intimate relationships could no longer be attained if amatory bonds were subject to legal enforcement. Through an analysis of the reasons against recognition of amatory torts, we are better able to understand tort law's nature and its limits. First, it reveals that the law of torts is not, as it is often said, primarily concerned with compensation for reasonably foreseeable loss; and, second, that there are limits to tort law's ability to redress emotional harms.

3:45-5:15 Panel 4 Issues in Causation and Empirical Research

Richard Lewis, School of Law and Politics, Cardiff University, "Tort Tactics: An Empirical Study of Personal Injury Litigation Strategies in England and Wales"

This paper reveals some of the tactics which lawyers may use when conducting personal injury litigation. The research is empirically based by being drawn from structured interviews with a cross section of practitioners. This qualitative evidence helps to place the rules of tort in a wider context and suggests that tactical considerations may affect the outcome of individual cases irrespective of their legal merits. A range of strategies are considered to illustrate how they may be used at different points during the litigation. In addition, the paper updates our understanding of the compensation system by considering the practitioners' responses in the light of the major changes made to this area of practice in recent years. It reveals how negotiation tactics have developed since research in this area was last carried out. Overall the article adds to a very limited literature dealing with negotiation and settlement of personal injury claims.

Lachlan Caunt, Peter A. Allard School of Law, University of British Columbia (PhD Candidate), "Material Contribution to Risk in Canada: The Most Exceptional Exception?"

When can the material contribution to risk test for causation apply in Canadian negligence law? After *Athey v Leonati* [1996] 3 SCR 438, it seemed like material contribution to risk could be a regularly invoked alternative test for causation in those hard cases where the but-for test was unworkable—a far from infrequent occurrence. From this high-water mark, the tide on material contribution to risk has receded. After *Clements v Clements* [2012] 2 SCR 181, the position is rather different. For now, *Clements* is the definitive test for when material contribution to risk can be used in lieu of but-for causation: and it is not promising reading for material contribution to risk.

This presentation will delve deeply on the jurisprudence, with special focus on *Clements*, and suggest that the Supreme Court of Canada has marginalised material contribution to risk so far that there is little promise that material contribution to risk will be more than the most exceptional of exceptions. In *Clements,* the Court cited the (oft-times confused and confusing) list of exceptions to the but-for rule; and made clear that material contribution to risk could only be applied after all of the exceptions to but-for were found unworkable. Given the breadth of the exceptions to but-for; and the malleability of but-for causation itself, the prospect for material contribution to risk applying in Canada are vanishingly small. This presentation will consider what hope this alternative test for causation has in Canada now, and in the future.

David Cheifetz, Faculty of Law, University of Oxford (MSt Legal Research Candidate) "Canadian Confusion Regarding Proof of Causation

Courts around the world continue to demonstrate great confusion with resulting unsound and inconsistent decisions when dealing with proof of causation as a required element for establishing legal responsibility. This is especially evident in the decisions of the Canadian courts. The confusion has three related sources: (1) a failure to distinguish causation in its universally required core "natural" or scientific sense from various limitations on legal responsibility for wrongfully caused harms, especially the "no worse off" limitation, (2) a failure to properly understand and specify the concept of causation in its core sense, and (3) a failure to properly understand and specify the nature of the evidence required to prove causation in its core sense. The first two sources of confusion have resulted in the Canadian Supreme Court's erroneously treating the but-for criterion as the exclusive test of causation and therefore either improperly denying causation or relying on unelaborated and unsound "robust" "common sense" inferences to support findings of causation not supported by that criterion, rather than recognizing that causation clearly exists under the more comprehensive NESS (necessary element of a sufficient set) criterion. The third source of confusion has led to the recent treatment of the standard of persuasion as a mere probability/odds standard rather than a minimum belief standard, with a resulting highly inconsistent and often paradoxical treatment of mere statistical frequency as sufficient proof of causation in some contexts but not in others.

May 6, 8:45-9:30

Joost Blom, Peter A. Allard School of Law, University of British Columbia, "Causation in Contract and Tort"

In comparison with tort, which — especially in recent years — has made very heavy weather of it, the question of causation of damage (meaning "causation in fact" as distinct from remoteness of damage, a.k.a. "causation in law") has not much troubled the law of contract. It is just as central to the definition of loss in contract as it is in tort, yet for some reason it has not posed nearly as much difficulty. The purpose of this paper will be to examine exactly what this reason is. An obvious starting-point for the inquiry is the difference between proving that physical damage was caused by the defendant's act or omission, which is typical of tort, and proving that financial loss was caused by it, which is typical of contract. (See, for instance, H. McGregor, *McGregor on Damages*, 14th ed. (2014) at para. 8-137.) Yet this cannot be a complete answer, because, even taking account of the difference in the type of damage, many of the problems that bedevil causation in tort — "loss of a chance", for example — have seemingly exact analogues in contract, which has been able to deal with them with less overt difficulty. In the course of the inquiry, the causation rules in tort and contract will be compared side by side, which is something that is done less often than one might expect. It is hoped that doing so will bring some aspects of the law of causation into clearer focus than when the context is restricted, as it usually is, to tort or contract alone.

9:30- 11:0 Panel 5 Issues in Contract: Mitigation and Good Faith

John Enman-Beech, Faculty of Law, University of Toronto (SJD candidate), "Canada's New Good Faith: Between Public and Private"

What is the new organizing principle of good faith in contract? In this article, I first hunt for an answer in existing conceptions of good faith. These good faiths often fall victim to a two-edged problem: their authors wish to keep them starkly on one side of a public/private line. I take as the criteria for the good faith we want a fit to known good-faith-based doctrine and an ability to guide future development—that is, good faith must serve as an organizing principle. The prime example of a good-faith-based doctrine is the new duty of honest performance, explicitly adopted by the Supreme Court as instantiating good faith. In order to example room for development, I take as a second datum the penalty doctrine, a poorly understood corner of the law. Thus I test public and private good faiths in terms of their ability to explain the duty of honest performance and their ability to help us understand and develop the penalty doctrine. Cabining good faith within a private ordering paradigm renders it an adjunct to party intention, and this makes it inapt to help us with doctrines like the two here that explicitly over-ride manifest disclaimers. More fundamentally, private good faiths turn to public conceptions whenever they seek generality. Public good faiths, on the other hand, see the principle as a corrective to unrestrained private ordering, instilling with trust and morality an otherwise barbarous market. But such correctives turn us back to party intention. Both doctrines I consider tie closely to the terms of the deal, and so cannot be understood purely as an intrusion of public policy. I find therefore that when authors attempt to publicize or to privatize good faith they render it conceptually vague and unable to serve as an organizing principle of contract. And so I ask what it would mean for an organizing principle of good faith to sit between public and private, to embrace a refusal of the dichotomy. Relational theory offers a way to situate this rejection within the contracting subject, and so I put forward a relational good faith as the best understanding of Canada's new organizing principle. Good faith is just this: respecting one's counterparty both as abstract subject and as embedded; it requires reasons that party and court, businessperson and citizen, can hold as their own.

Krish Maharaj, Peter A. Allard School of Law, University of British Columbia (PhD Candidate), "Cleaning The Slate: Debunking Misunderstandings About Mitigation"

Mitigation has played an essential role in the law of obligations in both contract and tort since at least Staniforth v. Lyall in 1830, yet it is perhaps one of the least fulsomely considered doctrines in either. That is to say by comparison with other decisions pertaining to the assessment of loss in the law of obligations, such as Hadley or The Wagonmound, which have been much celebrated and evaluated in depth, mitigation has been largely left alone, and is in some respects poorly understood. It is sometimes described for instance as being chiefly concerned with whether losses were avoidable, despite the fact that this is not at all the concern in issue in many of the leading cases. In my view, the above mentioned misunderstanding of mitigation leads to inevitable difficulties and inconsistency as courts around the common law world have struggled to apply mitigation to circumstances and issues not obviously countenanced by the orthodox understanding of the doctrine. This gives rise to a need for a revised theory that more accurately captures what it is mitigation does or appears to be doing in as much as said new theory is uncoupled from popular but at least arguably inaccurate ideas with respect to the same. As such, the proposed paper will consider the present state of the law on mitigation and will focus upon demonstrating the inaccuracy of

three key ideas that appear frequently in judicial decisions and the existing literature. These are, first, that mitigation is principally concerned with the avoidance of loss. Second, that the doctrine of mitigation is manifest in a duty resting on the plaintiff. And third, that the doctrine of mitigation is explicable as an aspect of causation, or as being the "other side of the coin" from remoteness. The ultimate purpose of this far reaching de-bunking is to clear the way for later work that will establish a new theory of mitigation that more accurately reflects both the realities of the doctrine's operation as reflected in the case law highlighting the inaccuracy of present theory, and the nature of mitigation as a species of legal concept. As such, the present paper will only trace the beginnings of this view, but the present proposal is without a doubt only the beginning of the larger project.

Daniele Bertolini, Law and Business Department, Ryerson University, "Decomposing *Bhasin v Hrynew*: Toward an Institutional Understanding of the General Organizing Principle of Good Faith in Contractual Performance"

In *Bhasin v Hrynew*, the Supreme Court of Canada recognizes good faith in contractual performance to be a "general organizing principle" of the common law of contract. The true impact of *Bhasin* on the future development of the Canadian contract law remains the subject of considerable debate among legal scholars and practitioners. This essay explores *Bhasin's* evolutionary impact on the Canadian common law of contract, by providing an institutional understanding of the general organizing principle of good faith in contractual performance. It is contended that *Bhasin's* contribution to the common law of contract is institutional rather than substantive: *Bhasin* fundamentally alters the organization of the sources of contract law by introducing a new lawmaking mechanism (i.e., "lawmaking through good faith") that is separate from and potentially supersedes the traditional doctrine of precedent. To support the central claim that *Bhasin's* contribution is institutional rather than substantive, I employ three different kinds of arguments that correspond to three distinct, but closely related dimensions of the principle of good faith in contractual performance: 1) semantic structure, 2) historical origins and 3) economic function. Although these three lines of inquiry rest on quite different methodological premises, they converge in supporting the central idea that good faith performance is best understood as an institutional mechanism to allocate lawmaking power rather than a substantive legal principle.

11:00-12:00 Panel 6 Issues in the Law of Trusts

Ying Khai Liew, Faculty of Law, University College London, "Sham Trusts and Intention: Lessons from Canada"

A 'sham trust' describes a declaration of trust intended to mislead third parties or the court, the true intention being to benefit someone other than he or she named in the trust declaration — viz the settlor, or a third party. Such a declaration of trust may be voided as a 'sham', with the result that the real beneficiary is recognised as the beneficiary of the trust despite the appearance of the declaration. Courts in Australia, England, and offshore jurisdictions are in agreement that subjective intention determines whether a trust is in fact a sham. This paper aims to demonstrate that this approach is fundamentally erroneous. First, it demonstrates the truth that objective intention determines whether a trust is *created*. It explains that the inquiry remains objective even when evidence other than writing is under consideration. Secondly, it explores what courts mean when they claim that subjective intention is relevant when dealing

with *sham* allegations. It concludes that the phrase 'subjective intention' refers to evidence outside the four corners of a trust instrument. Thirdly, it explains why this approach is misleading by drawing on Canadian jurisprudence, in particular the case of *Antle v R* [2010] FCA 280. Subjective intention refers to an assessment of what the settlor intended by standing in the position of the settlor. If subjective intention were truly relevant, then the settlor's and trustee's testimonies denying a shamming intention would be conclusive. However, this approach was comprehensively rejected in *Antle v R*. Instead, evidence outside the trust instrument was assessed *objectively* in order to determine the true intention of the parties. This is submitted to be the correct approach. Finally, this paper draws five important lessons from the renewed analysis. (1) The 'sham trust' doctrine provides a rule of evidence, not a rule of substance relating to intent; (2) the supposed rule against the admissibility of 'parol evidence' in the trusts context is in fact a rule of substance relating to intent, not a rule of evidence; (3) the perceived need for a 'common subjective intention' for a sham finding is no more than a shorthand for 'objective intention'; (4) the policy against giving effect to secret intentions explains why courts ought not to assess intention subjectively; and (5) the renewed analysis allows the 'sham trust' doctrine to be applied to cases involving self-declarations of trust without contravening the aforementioned policy.

Pablo Lerner, Ramat Gan School of Law, "Closing the gap between contract and property: Constructive trust in Israeli law"

This paper focuses on the relationship between contract and transfer of ownership and more precisely between vendor-purchaser relationship in a constructive trust (CTVP) — the principal instance in which Israeli law has, albeit with a unique twist, recognized this institution. CTVP is a recognized method to resolve conflicts that arise following the signing of a contract for the sale of land and before registration of the property by the buyer. In 1969 the Israeli Land Law was enacted and established a land transfer registration system — eliminating land equity rights. However, registration was often lengthy, and as such jeopardized buyer rights. Thus, Israel amended the law affording the buyer quick, unilateral, but temporary registration (a cautionary note) until full registration could became available. Yet, even the cautionary note provided insufficient, and Israeli courts developed "Israeli equity," a term that has the same meaning as CTVP. While a cautionary note can still protect buyer rights until final registration, even in its absence Israeli courts can recognize Israeli equity – protecting buyers from third parties. The existence of two tracks, Israeli equity and registration (through a cautionary note and full registration) raises questions about the essence of propriety rights. Some of which I address in this paper. I contend that to understand constructive trusts (and cautionary notes) in Israeli law, a contract to sell land must be understood as the legal basis of separation between the seller and the property. This fiction, i.e., separation of property (similar to a certain extent to the division between equity rights and legal rights, which exists in common law jurisdictions) protects the buyer's interests. Separation of the property may be achieved via registration but also via CTVP. Therefore, CTPV shifts property right protection from public notification (the essence of a cautionary note) to judicial discretion. As such, it relinquishes formalism in favor of a paternalistic approach to rights protection. Judicial discretion, via CTVP, also acts to prevent phony transactions aimed at deceiving third parties. Yet, broad judicial discretion allows legitimate as well as superfluous litigation (i.e., expensive) to clarify ownership claims. Therefore, the CTVP should not only

be on legal issues but also on economic efficiency. The issues discussed in this paper are true in other jurisdictions besides Israel. Consequently, this discussion may inform and assist in creating a common framework to unify ideas and standards ruling proprietary rights in different legal systems.

12:00-12:30 LUNCH

12:30-1:30 Panel 7 Rights/Tort Law: Examining the Interface

Bruce Pardy, Faculty of Law, Queen's University "Disabusing the Common Law of "Abuse of Rights"

Is the civil law doctrine of "abuse of rights" compatible with the common law of obligations? In this paper, I will argue that the answer is "no". I will challenge the enthusiasm found in the academic literature for the concept of abuse of rights, and in particular the ironic endorsements of rights-based torts scholars. Under the doctrine of abuse of rights, people may not exercise their rights for improper purposes such as defeating the objectives of others. For example, Weinrib states, "(I)f the freedom to perform an act merely to frustrate the purposes of another were legitimate, rights would be transformed from markers of mutual freedom to instruments of subordination". The reverse is true. If the freedom to act was dependent upon the motivation of the actor, rights would be transformed from markers of mutual freedom to instruments of social control. Within a system of rights, the law does not legitimize action. Instead, all action is legitimate except that which violates another's rights. The common law does not contain a general obligation of civility nor does the exercise of private rights require achievement of public good. The common law allows people to be nasty as long as they do not breach another's legal rights, which are specific and limited to their terms. Rights define the nature of the coexistence that the law requires. They do not vary relative to the motivations of those who exercise them. The autonomy of rights holders to pursue their own ends is not subject to the second-guessing of judges or state officials. The doctrine of abuse of rights reflects a paternalistic compulsion to supervise. If rights were dependent upon a case-by-case process of social justification then people would not be autonomous within the sphere of rights that they possess. Their rights would be more apparent than real.

Elizabeth Adjin -Tettey, Faculty of Law, University of Victoria "Rights and Tort Law: Respecting Children's Decisional Autonomy for Medical Interventions"

Tort law protects bodily integrity and personal autonomy including the right of competent individuals to make their own healthcare decisions regardless of the consequences. Children are viewed as lacking the necessary rationality to exercise their rights compared to adults. However, mature minors are considered competent to make their healthcare decisions consistent with their evolving intelligence and understanding reflecting the transition from childhood to adulthood. However, a minor's decisional capacity may be questioned where their decision, usually refusing "medically necessary" interventions, is contrary to the clinical judgment of healthcare professionals. A court may exercise its *parens patriae*

jurisdiction to override a child's treatment decision where this is perceived to be in the child's best interests and immunize the healthcare providers from tort liability.

The paper questions how seriously tort law respects and protects children's autonomy over their bodies and the implications of interfering with their bodies without their consent. The paper examines justifications for limits on a child's decisional autonomy, including "future-oriented" consent on the assumption that the child would make the same choice as a rational adult, and a caretaker philosophy with the state being the caretaker. The concepts of childhood and adulthood are both social constructions. Privileging adults' decisional capacity presupposes attainment of rationality on becoming an adult as part of the normal human development. This raises questions about how seriously tort law, and society in general, protects personal autonomy and inviolability, specifically the right to make one's own healthcare decisions.

1:30-2:30 Panel 8 Emerging and Evolving Tort Law: Privacy

Chris Hunt, Faculty of Law, Thompson Rivers University, "Canada's Statutory Privacy Torts in Commonwealth Perspective"

In the last decade common law privacy torts have emerged in Ontario, England and New Zealand, and three recent law reform commissions in Australia have issued reports recommending similar actions in that country. Four Canadian common law provinces have had statutory privacy torts for decades (British Columbia, Manitoba, Saskatchewan and Newfoundland). These statutes offer little guidance as to when a privacy interest will arise and the case law does little to illuminate. Despite dozens of decisions, few are at the appellate level, and none have engaged in a detailed assessment of the factors relevant to assessing privacy claims in the tort context. In this paper, the author undertakes a thorough analysis of the Canadian case law, uncovering the principles latent in the existing jurisprudence, and critically examine them in light of the dynamic developments occurring in other parts of the Commonwealth. After exploring the structure and scope of these statutory torts in Part One, the authors propose that courts employ a reasonable expectation of privacy test, turning on the existence of 10 contextual factors that are elucidated in Part Two. The authors recommend that these factors be analyzed from two perspectives—the extent to which they serve to identify a privacy interest, and the extent to which they suggest an intrusion was sufficiently objectionable to warrant recognition of a prima facie claim. While the recommendations in this paper are often directed at a Canadian audience, they are informed by the comparative experience abroad and hence could be of real interest to jurists throughout the Commonwealth concerned with the principled operation of privacy torts.

Jojo YC Mo, School of Law, City University of Hong Kong, "In search of a privacy action against physical intrusions in Hong Kong"

The focus of privacy laws in Hong Kong has always been on the use and dissemination of personal or confidential information but a person's privacy can also be intruded by unwanted watching or listening irrespective of whether information is collected or used. Despite an attempt to introduce two privacy torts by the Law Reform Commission of Hong Kong in 2004, there is no timetable as to when these two statutory torts be introduced. An analysis of cases in New Zealand suggests that the courts initially focused on the disclosure aspect as can be seen in Hosking but a separate tort of intrusion was ultimately recognised in Holland and a claimant can now pursue a claim for intrusion into his or her private sphere irrespective of whether information has been obtained or disseminated. Similarly in Canada, the Ontario Court of Appeal in Jones v. Tsige confirmed the existence of a right of action for intrusion upon seclusion. The English position, however, may be less clear-cut. The reasonable expectation of privacy test as laid down in Campbell suggested that the focus of the test is on the disclosure of private information and that no protection may be offered to the 'making of a photograph or other recording without subsequent publication. Subsequent decisions in Murray and Mosley recognised the intrusive nature of clandestine recording but the courts did not go so far to allow compensation based on the intrusive means of obtaining the private information alone. A clearer direction can perhaps be seen in the Gulati decision where Mann J granted damages based on the intrusive activity (i.e. hacking) alone, which gained the support of the Court of Appeal. This paper seeks to look at the inadequacies of existing laws in Hong Kong and explores the possibility of a common law action of privacy which focuses on breaches of physical privacy by drawing insights to the developments in New Zealand, Canada and the United Kingdom where these jurisdictions recognise breaches of physical privacy either through an intrusion tort or misuse of private information.

2:30-2:45 Tea Break

2:45-3:30 Lewis Klar, Faculty of Law (Emeritus), University of Alberta, "Establishing Proximity in the Context of Public Authority Liability"

Establishing proximity in negligence actions brought against public authorities has been a major hurdle for claimants to overcome since the Supreme Court of Canada's landmark decision in*Cooper v. Hobart*. Both lawyers and judges have had to reconcile a number of seemingly inconsistent messages from the Court. They were first told by Justice Dickson in a 1983 judgment, which still prevails in Canadian law, *R. v. Saskatchewan Wheat Pool,* that where a statute is silent about the creation of a private law duty the court should not interpret the statute's intent to create a private law remedy. In its 2001 judgment in *Cooper v. Hobart*, however, Chief Justice McLachlin and Justice Major asserted that if the defendant Registrar of Mortgage Brokers owed a private law duty, based on proximity, to the claimants, the only source of that duty was the statute. Any duty "must be in the statute". The jurisprudence which followed *Cooper*, however, opened up another avenue for establishing a duty, based on the real relationship and the interactions, if any, that existed between the claimants and the public authority. Thus, a new question arose, that of the required ingredients of this relationship. This article will examine interesting recent judgments which illustrate the differing approaches which courts are taking both to the question of whether statutes can, in and by themselves, establish proximity and

hence *prima facie* duties of care owed by public authorities to private individuals, and the types of interactions which might be sufficient to create proximate relationships.

3:30- 4:30 Panel 9 Affirmative Duties/Liability for Omission

Erika Chamberlain, Faculty of Law, University of Western Ontario, "Explaining Canada's Penchant for Affirmative Duties of Care"

Expansive duties of affirmative action are perhaps the most distinctly Canadian innovation in the common law of torts. Canada's recognition of a duty to rescue and a duty toward intoxicated persons, both in the early 1970s, reflected a conception of tort law based on mutual interdependence and care for the vulnerable. This was further developed to include duties to warn or protect potential crime victims and, more recently, a duty for police to prevent suspected impaired drivers from operating motor vehicles. The Canadian courts' approach to affirmative duties of care stands in sharp contrast to that of other Commonwealth jurisdictions. Those jurisdictions have adopted a more individualistic stance, indicating that injured plaintiffs should not expect others to protect them from being harmed by third parties or by themselves. This is even true when dealing with public bodies, like the police, who have a statutory obligation to prevent crime and protect the public. The rejection of affirmative duties is typically framed in the language of personal accountability and autonomy.

This paper will review the Canadian courts' innovative stance on affirmative duties over the last five decades, and will look to areas where it might continue to develop in the future. For example, in *Paton Estate v OLRG*, the Ontario Court of Appeal refused to rule out the possibility of a duty of care owed by casinos toward problem gamblers. This paper will also situate the law of affirmative duties within Canada's broader socio-political and legal frameworks, and will attempt to explain the distinctiveness of Canada's approach relative to other jurisdictions.

Alistair Price, Faculty of Law, University of Cape Town "Negligence Liability for Police Omissions in Canada: A Golden Mean?"

Aristotle suggested in the *Nicomachean Ethics* that excellences of character are destroyed by deficiency or excess. The virtuous path is a golden mean between extremes. A courageous act, say, lies somewhere between a cowardly and a reckless one. In this paper, I argue that Canadian common law's approach to the tort liability of the police for negligent omissions is a golden mean: it is a defensible middle-way between deficiency and excess represented, respectively, by English law and South African law. These contrasts may be observed in the different ways in which the three jurisdictions' courts have responded to a similar challenge arising from their shared Diceyan heritage. On the one hand, public authorities and officials are bound by the ordinary law of the land, including the private law of obligations. Police officers, just like private individuals, may commit the tort of negligence in Canada and England or be held

liable under the functionally-equivalent South African action in delict. On the other hand, police officers, like other state officials, owe moral and legal obligations to take positive steps to warn, protect, and rescue others, which are not owed by private individuals. These duties arise from the status, powers, and role of the police in modern societies. Yet English courts have been unwilling to adjust the private law duties and liabilities of the police to take account of their distinctive responsibilities. They are held to the same standards as ordinary citizens. In contrast, South African courts, like the Dutch, have drawn on the state's positive obligations in public law to protect fundamental rights in this context. In doing so, they have sought to justify expanding the scope of police liability to a degree that threatens to distort the private law of delict by undermining its foundations in corrective justice. The Canadian courts have thus far avoided both extremes. In litigation involving both victims of crime and suspected perpetrators, the tort of negligence has been developed with sufficient flexibility to accommodate positive duties of care that are a reflection of the distinctive status of police officers. At the same time, this has occurred in a manner that poses minimal risks to the bilateral structure and substance of Canadian tort law.

4:45 Closing Remarks, Professor Joost Blom