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This newsletter is prepared by Professors Robert Currie and Stephen Coughlan of the Law and Technology Institute of Dalhousie Law School, and David Fraser.

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Internet Defamation and Jurisdiction

Nazerali v. Mitchell was an application to dismiss a claim for defamation on the internet, on the basis that the pleadings did not disclose a cause of action against the defendants. The plaintiff was a businessman located in Vancouver and the defendants, who were located in the United States, ran a website which contained articles purporting to expose wrongdoing and unsavoury individuals in the stock and financial markets. The website contained a number of articles, some of which dealt with the plaintiff and made allegations against him: as the pleadings said, "[i]n their natural and ordinary meaning, the Defamatory Statements meant and were understood to mean that the plaintiff is a criminal, arms dealer, drug dealer, terrorist, fraud artist, gangster, mobster, member of the mafia, dishonest, dangerous and not to be trusted."

The defendants had applied to dismiss the proceedings because no jurisdiction over the plaintiffs was demonstrated in the cause of action. As the application judge noted, the *Libel and Slander Act* of British Columbia deems publication to have occurred in a number of cases, but no such presumption is made in the case of material on the internet. In such cases, it is necessary to allege that the allegedly defamatory posting was communicated to a third person in British Columbia. No such allegation had been made in the plaintiff's pleadings.

However, the plaintiff had subsequently filed affidavits from several business people in British Columbia, reporting that they had visited the website and had been "shocked", "amazed" and "dismayed" to see the allegations made there about the Plaintiff. The defendants argued that this was still not sufficient to demonstrate that the allegedly defamatory material had been communicated to anyone in British Columbia: the website contained twenty-one chapters, only portions of which were alleged to be defamatory, and none of the affidavits specifically asserted that they read the defamatory statements. Nonetheless the judge rejected the application to dismiss the claim. It was not necessary for the plaintiff to prove directly that the words complained of were brought to the actual knowledge of some third person: he only needed to prove facts from which it could reasonably be inferred that the words were brought to the knowledge of some third person. Here, the kinds of information the affidavits reported seeing – that the plaintiff was associated with terrorist groups, with organized crime, and with foreign dictators – reflected the derogatory meanings specified in the statement of claim. Accordingly an arguable case had been established and the statement of claim was not struck.

GPS Technology and Location of an Accused

In *R. v. Beaudet* the accused had been convicted of sexual exploitation and sexual assault and was seeking bail pending his appeal. To obtain it he needed to show that his grounds of appeal were not frivolous, but he was not successful in doing so. Only one of those grounds is relevant here. The accused (who was with the Ontario Provincial Police) maintained that GPS data showed that his boat had not reached the location of the alleged assault on the day in question. In reply, the Crown had led evidence from the Supervisor in charge of the unit which had trained the accused in the use of the GPS. That Supervisor testified that the accused was using older, less reliable technology, and that he had downloaded only one data point. The Supervisor also explained the program used for the GPS, the download points, and a higher definition map. On the bail hearing the

judge concluded that the trial judge had properly considered all of this evidence, and that the accused's argument had no merit.

Cell Phone Recordings and Leaving the Scene of an Accident

R. v. Skrinjar (no hyperlink available) is an Ontario Court of Justice case which demonstrates some of the implications of the pervasiveness of technology. The accused was charged with impaired driving and with leaving the scene of an accident. She had driven into another car, causing minor damage, and the two vehicles had then pulled into a nearby parking lot. The driver of the other car testified that he could smell alcohol and that she seemed wobbly on her feet, among other signs of impairment. She refused to give him her name, insisting (incorrectly) that he knew her, and stating that she wanted to leave. The witness took out his cell phone and surreptitiously videotaped his conversation with the accused. The witness tried to persuade the accused to give her name and not to drive because she was impaired, but eventually he moved his car (which was blocking hers) and she drove off. The witness then flagged down a police officer and reported the situation: he also sent the video to the officer. The officer asked the accused at the time whether he would be able to identify the accused, but he replied that he could not, but that he had videotaped her for that reason.

That officer forwarded the video by email to a second officer. The following day that second police officer searched records to determine the owner of the vehicle with the appropriate license plate and telephoned that number: as a result the accused attended at the police station for an interview three days later. She identified herself to him by showing her driver's license, and the officer noticed that she was wearing the same pink bra that she had been wearing in the video he had been sent. The video was also played at trial, where it verified many aspects of the witness' testimony, such as that he had repeatedly told her that she should not drive and that she had said she would pay for the damage to his vehicle.

The accused's argument at trial was that the Crown had not established impairment, and also that they had not shown that she had failed to identify herself to the witness. She also argued that the witness' in-court identification of her was not supported by his statement at the scene.

The trial judge rejected the claim that proof of identity rested only on the flimsy foundation of the witness' identification evidence at trial, primarily because of the videotape:

> 70 The defence has asserted that there was not sufficient evidence of identification in the Crown's case because it was essentially "in-court" only. I must disagree. Mr. Abbas took a video of Ms. Skrinjar at the scene, and identified her in court. Ms. Skrinjar's mother confirmed that the 97 Red GMC Yukon was a family vehicle, and that her daughter had driven the vehicle the night before. There was visible damage on the vehicle bumper, observed by Constable Strangways, consistent with Mr. Abbas description of the accident. When she attended the station to be interviewed the next day, according to Constable Strangways, she was wearing the same red brassiere she was wearing in the cell-phone video the night before. In my view, that is sufficient evidence of identification to meet the Crown onus.

The trial judge also held that the videotape showed that the accused was affected by an intoxication which was affecting her ability to make decisions about what to do at the scene.

Finally the accused argued that the Crown had not proven she left the scene without identifying herself, because the videotape ended before she had left. The trial judge also rejected this argument, holding that the evidence of the witness was that she left without identifying herself, and that this point was therefore proven even if the videotape had stopped.

Plaintiff sues cell phone provider for misuse of data

In *Connolly v. Telus Communications Co.*, [2012] O.J. No. 464 (QL), the plaintiff brought an action in Ontario's small claims court seeking rescission of his cell phone contract and other remedies related to alleged misuse of personal information.

The plaintiff inadvertently used his mother's social insurance number when opening his account with Telus Communications. When the phone company's audit of accounts showed a discrepancy between the customer's age and the sequence of the SIN number, it suspended his account. The account was restored when the plaintiff's lawyer contact the company and explained the problem. The customer was asked to fax copies of identification to confirm his identity and the customer refused, arguing that the fax was insecure and his information may be misused.

Other than the inconvenience of being without service for six days, the plaintiff offered no evidence of harm. The plaintiff claimed a novel tort of negligent endangerment , which was dismissed, as was a claim of breach of contract. On the claim that this amounted to an invasion of privacy, the court also dismissed the claim and cited the recent Ontario Court of Appeal decision in *Jones v. Tsige* in the following *obiter* observation:

> 43 The Plaintiff in the case at bar has failed to prove any of the elements of the tort: a) the invasion was authorized (the original SIN was given voluntarily believing it to his own number) and it was not an invasion per se; b) there was nothing nefarious about the use of the SIN in that it was kept confidential, not disseminated and expunged immediately upon request; c) there was no expectation of seclusion in that it was commercially reasonable to have the SIN for the protection of the both parties; and d) there was no evidence of anguish or suffering except some minor anxiety about the security of the fax machine, something hardly worthy of compensation especially since it was never used.

All of the plaintiff's claims were dismissed with costs.

Civilian sting leads to internet luring conviction

In *R. v. Cooke*, 2012 NSSC 6 [PDF], a father reported to the Sydney, Nova Scotia police what he thought was a case of internet luring. The complainant had set up an account on an internet dating site posing as a woman then engaged in communications with suitors and disclosed "her" age to be thirteen. Two of men continued to communicate with the "teen" and the father contacted the local police. Though the conversations carried out by the complainant were not well documented, the police took over the conversations for some time and subsequently arranged a meeting with the accused. The accused testified that he never thought the other person at the other end of the conversations was under eighteen, but this testimony was completely discounted by the Court. Though the court was concerned about the manner in which the investigation was begun, the Court was impressed with the evidence of the police and accused was convicted.

This newsletter is intended to keep members of IT.Can informed about Canadian legal developments as well as about international developments that may have an impact on Canada. It will also be a vehicle for the Executive and Board of Directors of the Association to keep you informed of Association news such as upcoming conferences.

If you have comments or suggestions about this newsletter, please contact Professor Robert Currie, Director of the Law & Technology Institute, at robert.currie@dal.ca.

Disclaimer: The IT.Can Newsletter is intended to provide readers with notice of certain new developments and issues of legal significance. It is not intended to be a complete statement of the law, nor is it intended to provide legal advice. No person should act or rely upon the information in the IT.Can Newsletter without seeking specific legal advice.

Le présent bulletin se veut un outil d'information à l'intention des membres d'IT.Can qui souhaitent être renseignés sur les développements du droit canadien et du droit international qui pourraient avoir une incidence sur le Canada. Le comité exécutif et le conseil d'administration de l'Association s'en serviront également pour vous tenir au courant des nouvelles concernant l'Association, telles que les conférences à venir.

Pour tous commentaires ou toutes suggestions concernant le présent bulletin, veuillez communiquer avec le professeur Robert Currie à l'adresse suivante : robert.currie@dal.ca

Avertissement : Le Bulletin IT.Can vise à informer les lecteurs au sujet de récents développements et de certaines questions à portée juridique. Il ne se veut pas un exposé complet de la loi et n'est pas destiné à donner des conseils juridiques. Nul ne devrait donner suite ou se fier aux renseignements figurant dans le Bulletin IT.Can sans avoir consulté au préalable un conseiller juridique.