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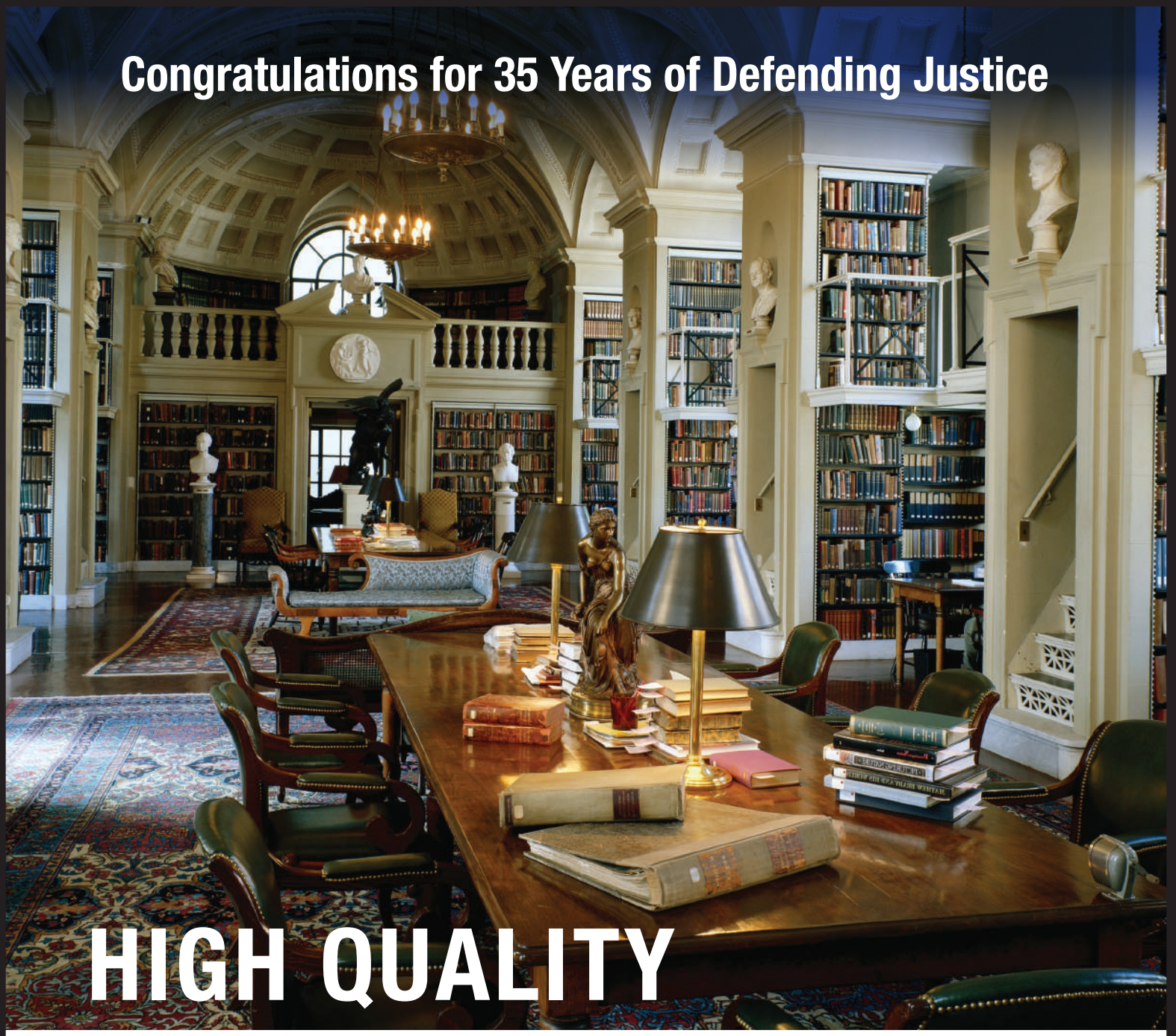

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Bottom Line

RESEARCH AND COMMUNICATIONS

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| CELEBRATING OUR ACTLA MEMBERS THROUGH THE ARC OF "COMPARATIVE BLAMEWORTHINESS" CASES |

By Barb Cotton of Bottom Line Research

How best to celebrate the 35th anniversary of ACTLA and the achievement of the Association and its members? I went back through the archives of *The Barrister*, and discovered that, on certain legal topics relevant to a plaintiff's personal injury practice, there was an arc of cases that illustrated the expertise of certain ACTLA members and contributed to an understanding of general legal principles. One of these arcs is the leading Alberta case law on "comparative blameworthiness" - ACTLA members have played a prominent role in the development of this jurisprudence.

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The seminal Alberta case on "comparative blameworthiness" is ***Heller v. Martens***, 2002 ABCA 122, 303 AR 84. Plaintiff's counsel in this case was the Lethbridge lawyer D.B. Stephenson, called to the bar in 1989 and now inactive. (It is not clear whether he was a member of ACTLA.) The plaintiff Heller was injured when the milk van he was driving was struck by Martens. Heller was not wearing a seatbelt and suffered serious shoulder injuries. At issue was whether liability in seatbelt cases was to be apportioned on the basis of the comparative blameworthiness approach or the causation approach. Heller argued for the comparative blameworthiness approach and that Martens' failure to stop at the stop sign was more blameworthy than his own failure to wear a seat belt.

As stated by the majority of the appellate court per Fruman J:

> **30** The comparative blameworthiness approach requires a court to examine all the circumstances of the parties' misconduct to determine their relative negligence. Ultimately, this requires "an assessment of relative misconduct from the perspective of departures from standards of reasonable care": Klar, supra at 374.
>
> **31** This approach is supported by the language of s. 1(1) of the CNA [Contributory Negligence Act, RSA 2000, c. C-27], which involves a two-step analysis. As a threshold, the cause of the loss or damage must be found to be the concurrent fault of both parties. It is only then, at the second step, that the process of apportionment of liability can occur such that the "[...] liability to make good the damage or loss is in proportion to the degree in which each person was at fault." In the context of the CNA,"fault" means "blameworthiness": Cempel v. Harrison Hot Springs Hotel Ltd. *(1997), 43 B.C.L.R. (3d) 219* at 228-29 (C.A.); Philip v. Hironka *(1997), 210 A.R. 1* at 24 (Q.B.). The section requires fault to be assessed based on all the circumstances of the case, because "if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally." Fault, therefore, requires an assessment of the amount that each causative negligent action fell short of the standard of care that was required in all the circumstances: Cempel at 229; Philip at 25.
>
> **32** Apportionment is affected by the weight of the fault that should be attributed to each of the parties, not the weight of causation: . . .
>
> .....

> **34** Apportionment of fault between a contributorily negligent plaintiff and a negligent defendant under the CAN requires an assessment of the parties' degree of departure from the standard of care. Although not an exhaustive list, in assessing comparative blameworthiness courts have considered such factors as:
>
> 1. The nature of the duty owed by the tortfeasor to the injured person . . .
> 2. The number of acts of fault or negligence committed by a person at fault . . .
> 3. The timing of the various negligent acts. For example, the party who first commits a negligent act will usually be more at fault than the party whose negligence comes as a result of the initial fault. . . .
> 4. The nature of the conduct held to amount to fault. For example, indifference to the results of the conduct may be more blameworthy: . . . Similarly, a deliberate departure from safety rules may be more blameworthy than an imperfect reaction to a crisis . . .
> 5. The extent to which the conduct breaches statutory requirements. For example, in a motor vehicle collision, the driver of the vehicle with the right of way may be less blameworthy . . .
>
> **35** Fault may vary from extremely careless conduct, by which a party shows a reckless indifference or disregard for the safety of persons or property, to a momentary or minor lapse of care in conduct which, nevertheless, carries with it the risk of foreseeable harm. Degrees of contributory negligence are assessed accordingly: . . .

In the result Heller was found to be 25% contributorily negligent and Martens 75% liable.

Robert G. McVey, Q.C. was plaintiff's counsel in the next leading Alberta case on "comparative blameworthiness", ***Rances v. Scaplen***, 2008 ABQB 708, 462 AR 1. Bob has a long history of valuable participation in ACTLA, having served as the ACTLA Judicial District Representative for Grande Prairie, a member of the Minor Injury Advisory Team, a presenter at several ACTLA seminars, most recently in 2020, and now as a sustaining member of ACTLA. Bob wrote two case comments on ***Rances v. Scaplen*** for *The Barrister*.

In ***Rances v. Scaplen***, a tractor-trailer driven by Arsenault, travelling on an unfamiliar highway from Edmonton to Grande Prairie, encountered a fog bank and slowed down to approximately eight to twelve kilometers per hour. The fog bank came on quickly and Arsenault stated that it was "like looking through a piece of paper". He was disoriented and traveled in both lanes, trying to find his bearings by the left lane yellow road markings. He did not pull over to the shoulder on the right as he was afraid the shoulder was too narrow and he would roll into the ditch. Arsenault was hit by a tractor-trailer driven by Bolton, who had been driving on cruise control, which he disengaged when he hit the fog bank. At the time of collision, as evidenced by tachograph readings, he was traveling at 67 kilometers per hour. Bolton then tried to leave the cab by climbing out the window. Shortly after, while Bolton was still in his cab window, there was a second collision. The tractor-trailers were struck by a Greyhound motorcoach driven by Scaplen, who was travelling at between 60 and 85 kilometers per hour. Bolton remained pinned partially outside of the cab until extracted approximately three hours later. Scaplen remained pinned in the motorcoach for several hours, and was severely injured.

The plaintiffs in the action were injured passengers on the Greyhound bus. The trial was limited to only the issues pertaining to liability. There was no issue of contributory negligence of the plaintiff passengers.

With the agreement of all parties, and citing case law that the comparative blameworthiness approach was applicable to joint tort-feasors in the absence of contributory negligence of the plaintiffs, K.G. Nielsen J assessed the comparative blameworthiness of the defendants. After applying the general principles of ***Heller v. Martens*****,** Nielsen J stated: "The court in Heller confirmed that the determination of the degree to which each person is at fault is a question of fact. It is a question of proportion, balance, relative emphasis and a weighing of different conclusions." (para 260)

Scaplen was held to be 40% at fault as he had a higher degree of care as the driver of a common carrier. Arsenault was found to be 30% at fault for driving too slow for the conditions, and Bolton was found to be 30% at fault for driving too fast. The corporate defendants, the owners of the tractor-trailers and Greyhound, were found to be vicariously liable.

In his first case comment (*The Barrister I*ssue no. 91 March 2009), Robert G. McVey, Q.C. gave an overview of the case. Despite the foggy conditions, the defence of inevitable accident was found not to be applicable. The court discussed the higher standard of care required of professional drivers. Each of the defendant drivers had failed to meet this standard and several violations of the *Transport Safety Act* were found. The Court accepted tachograph readings regarding the speed of the trucks.

In his second case comment (*The Barrister* Issue no. 93 September 2009) Bob reviewed the complexities of the Calderbank offers of settlement. The plaintiffs applied for double costs against the TRIMAC defendant and the court held that the fact that the plaintiff's offers to settle were conditional and global did not invalidate them. An application for enhanced costs with an inflation factor adjustment was dismissed.

Thus our ACTLA member Bob McVey was instrumental in this important building block in the arc of cases regarding comparative blameworthiness.

Walter Kubitz, Q.C. was counsel for the injured plaintiff Johnston in the next leading case, ***Johnston v. Day***, 2013 ABQB 512, 52 MVR (6th) 240. Walter is a past President of ACTLA for the 2006 - 2007 term, was a member of the Minor Injury Advisory Team, has presented at many ACTLA seminars, most recently in 2020, contributes articles and case comments to *The Barrister,* regularly mentors other lawyers and shares his precedents, and is a sustaining member of ACTLA.

Heather Donison and Kerry Gellrich represented one of the other plaintiffs. Heather Donison is a very active member on the ACTLA chat line, helping her colleagues through her contributions, and has been a Judicial District Representative and member of the Minor Injury Advisory Team. Kerry Gellrich is another active ACTLA member and a current editor of *The Barrister*.

In ***Johnston v. Day,*** Prien was the owner of the Crowsnest Taxi business in Southern Alberta, and sometimes drove the taxis, and Middleton was one of his drivers. Day was a frequent passenger of Prien and Middleton and was usually inebriated when riding in the taxi. The taxi drivers often stopped to run errands for Day while he was a passenger. Prien was always careful to take the keys with him when running errands. There were no company rules or policies in place about leaving the keys to the taxi in the vehicle when running errands for passengers, however.

The day of the injuries, Day was riding in the front of the taxi, with Middleton driving. He asked her to stop at a fruit stand to purchase some fruit for him and she did so, leaving the keys in the taxi when she exited. The inebriated Day then started the taxi, revved the engine, began driving and mowed down people in line at the fruit stand, including the plaintiff Johnston and others.

The liability trial was to apportion liability between the various defendants. N.C. Wittmann CJQB noted that the acts of Day were criminal and he had been convicted of theft and impaired driving. He was the most blameworthy, and 65% liability was apportioned to Day. Middleton may have been lulled into a false sense of community and "family" in her relationship with Day but her actions were foolhardy. She was apportioned 20% liability. Prien was at fault for setting no guidelines or policies for his taxi drivers, and he was 15% at fault.

Thus ACTLA members Walter Kubitz, Q.C., Heather Donison and Kerry Gellrich were instrumental as plaintiffs' counsel in this building block of leading Alberta cases on comparative blameworthiness.

In the next leading case, ***Bradford v. Snyder,*** 2016 ABCA 94, 616 AR 265, a decision of the Alberta Court of Appeal *per curiam*, Craig Gillespie was counsel for the plaintiff. Craig is a past President of ACTLA for the 2014-2015 term, a frequent presenter at seminars and a frequent contributor to The Barrister.

In ***Bradford v. Snyder*** the plaintiff Casey was riding a bicycle and came to a rolling stop at a stop sign in an intersection in a playground zone. She then proceeded through. She was struck by the defendant motorist Siobhan, who had glanced down at her speedometer for two seconds to ensure she was not speeding through the playground area. Neither party saw each other before the collision. Casey was seriously injured. She conceded that if she had come to a full stop the accident could have been avoided.

The trial judge apportioned liability one-third to the driver and two-thirds to the bicyclist. On appeal it was argued, among other things, that the trial judge had erred in his assessment of comparative blameworthiness as the driver had taken her eyes off the road for just two seconds – for a "brief but inopportune speedometer glance" - and the bicyclist could have avoided the accident if she had fully stopped at the stop sign. (The appeal largely turned on whether the trial judge had correctly applied the reverse onus provisions of the *Traffic Safety Act.*)

In discussing the comparative blameworthiness approach, the appellate court stated:

> **41** In light of these factors, fault can therefore vary from extremely careless conduct (a reckless indifference or disregard for the safety of persons or property) to a momentary or minor lapse of care in conduct: *Heller* at para 35. Liability is apportioned according to the parties' degrees of fault.
> **42** Apportionment is not a mathematical exercise. There is no prescribed formula or ratio for tallying and then mapping the parties' acts of fault to their respective liabilities. In other words, the law does not require that the Court apportion liability amongst the parties in proportion to their discrete acts of fault. For example, if a plaintiff allegedly committed five discrete acts of negligence, and the defendant allegedly committed ten acts, the trial judge does not then automatically impose one-third liability on the plaintiff and two-thirds liability on the defendant.

The appellate court noted that the trial judge had assigned the greater degree of responsibility to the bicyclist for failing to come to a complete stop at the stop sign, based on all of the evidence, and it could not be said there was palpable and overing error. The appeal was dismissed.

The most recent case in this arc is ***Baker Estate v. Poucette***, 2016 ABQB 557, 44 Alta LR (6th) 74, wherein Richard Edwards was plaintiff's counsel. Richard has presented at ACTLA seminars in the past and is an active participant in the ACTLA Plaintiff's list-serv, helping his colleagues through his contributions.

In ***Baker Estate v. Poucette***, the former teacher and then entrepreneur Baker borrowed his sister's motorcycle and went for a drive. He was speeding down the highway and had rounded a curve when the defendant Poucette made a slow, wide left hand turn, without signalling, from a stop on the shoulder of the road, into Baker's path. Baker struck the truck when it cut in front of him and he died. Poucette was charged under the *Highway Traffic Act* and ultimately pleaded guilty.

In terms of comparative blameworthiness, the trial judge R.A. Neufeld J stated:

> **87** [T]his approach includes consideration of factors such as the nature of the duty owed by the tortfeasor to the injured person; the number of acts of fault or negligence committed by a person at fault; the time of the various negligent acts; the nature of the conduct held to amount to fault; and the extent to which the conduct breaches statutory requirements: . . .

And concluded:

> **93** Taking all factors into consideration, it is my view that the primary blame for the accident belongs to Mr. Poucette, while a secondary proportion of blameworthiness belongs to Mr. Baker. In reaching that conclusion, I note that Mr. Poucette's conduct was in breach of the TSA by failing to use his indicator, thereby posing a danger to any following vehicle. Mr. Poucette's conduct fell below the standard of care of a reasonable motorist in the circumstances. Mr. Baker's speeding, also conduct in breach of the TSA, primarily endangered himself by making it more difficult to detect and respond to highway hazards. However, at the point of the collision itself, Mr. Baker's speed was within posted limits.

Baker was found to be 25% liable and Poucette 75% liable.

Thus it can be seen that ACTLA members have made a significant contribution to the development of personal injury jurisprudence over the years, and ACTLA has been a stalwart champion of justice.