

L'avvocato

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Vince A. Pileggi

With the advent of spring, the Canadian Italian Advocates Organization has also gone through a renewal of sorts.

Earlier this year, a new Board of Directors was elected. It is one of the largest and most diverse Boards in recent history. As President of this organization, I would first like to acknowledge the tireless efforts of my predecessors who have invested much time and effort in making this organization what it is today. The present Board shares my vision in building upon the many successes of the past, but also making C.I.A.O. even more accessible and relevant to law students and experienced counsel alike.

This newsletter is intended to serve not only as a communication tool for our members, but also as a platform for some of the excellent work they do within our profession. I am certain you will agree that their varied talents and expertise are impressive and are second to none.

Over the last few months, we have embarked upon an ambitious membership campaign focusing on securing members from every law school in Ontario. At present, we have student representatives from five law schools. They are determined to promote our organization and encourage new members not only to join, but to make meaningful contributions. Having personally met with them, I have no doubt that they will succeed. Their drive and passion for this organization is inspiring.

In keeping with its mission statement, C.I.A.O. has, over the years, accomplished a great deal to enhance access to justice and to promote public education.



Vince A. Pileggi

This year is no exception. As we have done in the past, C.I.A.O. hosted its annual Mock Trial. It is held each year to commemorate the entrenchment of the *Charter of Rights and Freedoms*. Given its ever-increasing popularity, the event took place at a local Toronto school. Over 800 students from 13 different schools had the unique opportunity to observe the criminal process unfold. From a mock bail hearing to the trial proper, students were treated to a very authentic and engaging exercise. As an extension to what students witnessed, C.I.A.O. saw fit to launch an essay-writing contest open to all students in attendance. The winner

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was recently announced. Each year, members of our organization - be they practising lawyers or members of the judiciary, give much time and energy to ensure the continued success of this important undertaking. We at C.I.A.O. appreciate their continuing efforts to public legal education.

Another first for our organization was the introduction of Continuing Professional Development (C.P.D.) for our members. C.I.A.O. is proud to have held its first C.P.D. session on Risk Management in partnership with LawPro. The event was well frequented and, by all accounts, well received. Preparations are already underway for subsequent educational initiatives. Summer and articling students should note that C.I.A.O. will be hosting its first educational seminar for students titled the "Art" of Articling - best practices for successful articles and beyond. Further C.P.D. sessions are scheduled for the summer and fall. Consult our website for details.

One other important initiative which this Board is committed to delivering to our members is our Member Affinity Program. We have been in negotiation with a number of service providers who have agreed to provide our members with considerable discounts on services such as auto/home insurance, office products, automobile purchases, etc. Details of member discounts will be made available on our website shortly.

Of course, our much anticipated Judges' Night and our annual Festa di Natale are two initiatives which we will continue to host. Check your inbox soon for particulars on these "must attend" events.

Finally, any organization is only as great as its members. If not already a member, do consider joining and getting involved. Please visit our website at www.ciaocanada.com for upcoming events and e-mail me with any ideas or initiatives you might have!

Concludo con due parole in italiano. Come avvocati italo-canadesi, rimaniamo sempre fieri della nostra italianità e sempre consapevoli dei sacrifici subiti da quelli che prima di noi, hanno gettato le basi. Questa nobile e pregiata professione è veramente un onore, dandoci l'opportunità di migliorare noi stessi e la nostra comunità. Teniamo sempre vive le nostre radici nello scopo di aiutarci l'un l'altro realizzando anche di più. Vi prego di iscrivervi alla nostra organizzazione.

Distinti Saluti,
Vince A. Pileggi
President

Law/Giurisprudenza

Intrusion Upon Seclusion: Common Law for the 21st Century

Marco P. Falco

In January of this year, the Ontario Court of Appeal resolved an important debate about the recognition of the right to privacy in tort law. In *Jones v. Tsige*, the Court imported the tort of "intru-

sion upon seclusion" to Ontario common law. In so doing, the Court established a new normative foundation for the protection of individual privacy. While most academic commentary has been devoted to exploring the tort of intrusion upon seclusion, short thrift has been given to the Court's methodology in *Jones v. Tsige*. In particular, the decision is a welcome example of how the common law evolves in a manner consistent with legislative and *Charter* values.

The facts in *Jones v. Tsige* were ripe for a remedy. The plaintiff and defendant worked for the same bank. The defendant, Tsige,



Marco P. Falco

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was in a common law relationship with the plaintiff's ex-husband. In a period of four years, the defendant used her computer at work to retrieve information about the plaintiff's banking information on at least one hundred and seventy-four occasions. Having learned of the defendant's conduct, the plaintiff commenced an action for invasion of privacy and moved for summary judgment. The motions judge held that there was no tort of "invasion of privacy" at common law and dismissed the plaintiff's action. The Court of Appeal allowed the plaintiff's appeal and awarded the plaintiff damages in the amount of \$10,000.00.

After reviewing American and Commonwealth jurisprudence, the

Court held that it was time to recognize the tort of intrusion upon seclusion in Ontario. The key features of the cause of action are: (i) the defendant's conduct must be intentional, which includes reckless conduct; (ii) the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and (iii) a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. Proof of harm to a recognized economic interest is not an element of the cause of action. Moreover, the Court set the range of damages for liability where there is no pecuniary loss at up to \$20,000.00.

The recognition of intrusion upon seclusion in Ontario is based largely on a right to individual privacy that underlies both tort, statutory and *Charter* law. As the Court of Appeal noted, the Supreme Court of Canada has consistently interpreted the *Charter's* section 8 protection against unreasonable search and seizure as protecting the underlying right to privacy. *Jones v. Tsige* follows a methodological pattern in Canada whereby the principles of tort law are animated by *Charter* values. While critics would argue that this approach conflates discrete constitutional concepts with the law of tort, the decision represents a recognition that all law shares an underlying normative end - in this case, the protection of individual privacy. The Court of Appeal confirmed that tort law does not develop in a vacuum.

Personal injury & disability law

Brad S. Moscato

Most lawyers have likely received a call from a distraught client who has sustained an injury as a result of another person's negligence. The caller is looking for legal representation to recover compensation for their injury and loss. In such instances, compensation may be available to the injured party and his or her family. The means of securing compensation varies, however, depending on the type and nature of the accident or event. To be sure, thousands of people are injured every day in a variety of unfortunate ways, ranging from car accidents to slip and falls. In car accident cases, for example, compensation is available for injured persons and their families from a number of different sources. A victim may be able to receive both accident benefits from their own insurer, and be able to sue for damages in tort. Compensation may be available through statutory accident benefits payable immediately by an injured person's own insurer, regardless of fault. The legislation governing this area of law, however, is ever-changing. In September 2010, the legislation underwent sweeping reform. Some of these changes have harmed innocent accident victims.

In addition to the benefits available through a person's own insurer, the at-fault driver's insurer may be responsible for compensating an injured person for pain and suffering, loss of income, housekeeping assistance, future medical and rehabilitation needs, and other potential losses.

As a lawyer, you may have also received a call from a client who suffers a psychological disability and has been in receipt of long-term disability benefits from their insurer. The insurer has advised the client that it will be terminating those benefits. The



client seeks legal advice and assistance. Long-term and short-term disability insurance is generally available either through an employer's benefit plan or directly through private purchase. By buying the insurance and paying the premiums, employees and private purchasers are owed disability benefits in the event of an

injury or disability that prevents them from working. Unfortunately, insurers do not always hold up their end of the contracts.

Disputes can arise from situations involving the nature and level of psychological disability, chronic pain, and a range of other issues.

The client does not have to accept the insurer's position and instead can sue the insurer for wrongful termination of benefits, breach of a peace-of-mind contract, aggravated and punitive damages.

These are just a few examples of the types of personal injury and disability dilemmas people face every day.



Brad S. Moscato

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Two for two to rectify

The *McPeake* Case

Salvatore Mirandola

Rectification has emerged as an important remedy for taxpayers faced with unintended tax consequences from transactions in which they participate. If certain conditions are met, the remedy allows taxpayers essentially to 'fix' the transaction documents, or even the transactions themselves, so that the intended tax consequences are achieved. The law in this area has expanded dramatically in recent years.

On January 26, 2012, the British Columbia Supreme Court released

the judgment of Justice Dorgan in *McPeake v. Canada (Attorney General)* ("McPeake"). In this article, I provide summary comments on the law of rectification and I discuss the McPeake case.

Rectification – What Is It?

Rectification is a remedy used by courts to restore parties to a transaction to their originally-intended bargain. In its traditional form, rectification was used mainly to correct documents containing transcription errors that gave rise to consequences that the parties did not intend. Courts were careful to assert that they were not correcting transactions, but correcting documents that did not accord with the intentions of the parties.

More recently, courts have appeared

willing to rectify transactions as well, especially in circumstances where the transactions achieve unintended tax consequences.

In order to obtain rectification, the party seeking it must show all of the following:

- the existence of a common intention by the parties prior to the making of a document or instrument that contains the alleged error;
- that the common intention remained unchanged at the time the document or instrument was made; and
- that the document or instrument does not conform to the common intention.

Typically, a person seeking rectification brings an application in the Superior Court of the relevant province. Often, these applications are made on notice

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to the Department of Justice, representing the Canada Revenue Agency ("CRA"), and to the equivalent counsel for any relevant provincial tax authorities.

The McPeake Decision – Facts And Decision

In McPeake, a family trust owned a significant portion of Mr. McPeake's software business. The business was sold for proceeds of \$4 million, a portion of which was distributed to beneficiaries of the trust. This structure was tax efficient in part because several individuals were entitled to claim a capital gains exemption in connection with the sale.

The taxpayers sought to rectify the relevant trust deed, the terms of which ran afoul of the so-called revocable trust attribution rule in subsection 75(2) of the *Income Tax Act* (Canada) ("Tax Act"). Subsection 75(2) applies in certain circumstances to attribute income and/or capital gains to a person who transfers property into a trust. In 2003, CRA issued reassessments to the trust and to Mr. McPeake on the basis that the trust in question was a revocable trust because property that Mr. McPeake had contributed to the trust could revert to him. In May 2009, the trustees brought a successful (and unopposed) application for rectification.

Later in 2009, CRA informed the trustees that the trust deed contained two other errors that had not been rectified. The trust was still a revocable trust (and subsection 75(2) of the Tax Act still applied) because trust property could pass to persons determined by Mr. McPeake and could not be disposed of but for the consent or direction of Mr. McPeake. As a result, the trustees brought a second rectification application (this time opposed), arguing again that the trust deed continued not to reflect their intention that income and capital gains from property transferred to the trust not be attributed to the transferor (Mr. McPeake).

In the result, Justice Dorgan was satisfied, based on the affidavit evidence in the application, that "the trust deed as it stands now does not reflect the true intentions of the petitioners in forming the trust". She was satisfied that the common specific intention of the creators of the trust was "to avoid tax payable on capital gains from the sale of shares [in the trust] by maximizing tax exemptions that could be multiplied across the

trust's many beneficiaries." She was also satisfied that this common specific tax intention existed before the formation of the trust deed and continued after the trust deed was created.

Significance Of Decision

The McPeake case is consistent with several prior cases in which rectification was granted where the taxpayers were able to show an intention to avoid tax but where the documents or transactions did not accord with the intention.

Also, Justice Dorgan arguably clarified the standard of proof in rectification cases. In other cases, courts have held that the person seeking rectification must show "convincing proof" or meet a "convincing standard", being something more than a simple balance of probabilities and something less than the criminal standard of "beyond reasonable doubt". In McPeake, Justice Dorgan pointed out that the Supreme Court of Canada has rejected any intermediate or higher standard of proof in civil cases than the balance of probabilities.

Moreover, McPeake serves as a reminder that rectification is an 'equitable' remedy. One of the factors a court will consider in a rectification application is what unfairness or harm would flow



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from a decision not to correct relevant documentation.

Finally, McPeake confirms that rectification remains an important tool in the arsenal of taxpayers confronted with unintended tax consequences arising from transactions or documents. It also confirms that it is wise for taxpayers and their advisors to document the specific tax avoidance intention clearly and unambiguously – that is, to document as clearly as possible that the avoidance of a particular kind (or particular kinds) of tax was a motivating or non-incidental feature of the transaction or document in question.

Events & News

Upcoming Events

- JULY 4TH** The Art of Articling (Student CPD)
- JULY 31ST** The New Criminal Rules (CPD)
- SEPT. 26TH** CPD details to follow: see www.ciaocanada.com for more information
- OCT. 24TH** Judges' Night
- NOV. 30TH** Festa Di Natale - at *Riviera Parque*

C.I.A.O.'s New Board of Directors

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5 Tips for your first meeting with a Family Law Client

Lorraine A. Bortolussi

The first meeting with a family law client who is facing the prospect of a divorce can be daunting. The following suggestions are intended to make that first meeting a more productive experience, for client and lawyer alike:



Lorraine A. Bortolussi

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with the family law client should be detailed and used to gather factual information from the client in order to understand their case. It is not helpful to have a cursory “meet and greet” with a new family law client.

2 Remember to address all of the client’s interests and not just their legal rights

The family law client is going through one of the most difficult times of their life. Family law clients are frequently fearful and confused. They seek comfort, protection and guidance. For this, they often turn to a lawyer. By and large, legal training is a rights-based practice and adversarial. It is not a system conducive to maintaining relationships between the parties. However, the maintenance of communication between the parties is often what is needed when children are involved. In fact, even if children are not involved, a rights-based approach to family law can quickly fuel litigation and escalate disputes.

3 Try to identify where your client fits in the emotional stages of separation, i.e: denial, anger, bargaining, despair/depression, acceptance

By identifying the emotional state of your client, you will be better able to assess whether the client is open to settlement. Even

when both parties agree that the separation is inevitable, there may be scepticism by one spouse about the goodwill of the other. This lack of trust makes the reorganization of the family and its finances very complicated. A dispute driven largely by emotion and irrational decisions, rather than common sense, can have a detrimental effect on the resolution of the issues.

4 Offer Alternatives

Alternatives to litigation may suit your client more than litigation. Explain some of the alternatives available to your client, including negotiation, mediation, collaborative family practice, and arbitration.

5 Provide a “To – Do” List To Your Client

The client must leave your office understanding the importance of providing full, frank and timely disclosure to the other spouse and the court. Disclosure is mandatory in family law even if your client insists that both parties are fully aware of all financial aspects of the relationship. Early and complete disclosure with appropriate documents will result in a sworn Family Law Financial Statement. If full disclosure is provided, the Statement will withstand questioning (i.e. discovery) and comply with the requirements of the Family Law Rules and case law. Proper supporting documentation is critical for the proper calculation of the equalization payment and support. The mis-characterization of an asset used in the equalization calculation can lead to an error in the hundreds of thousands of dollars and a report to LawPro.



Medical research tips and techniques: A Primer

Maria Damiano

In medical malpractice, knowledge of medicine is key to winning the case and/or proving damages. From the initial intake to trial, an understanding of the medical complexities of your case is critical. Indeed, a surgical error or a missed diagnosis does not mean your client will automatically have a successful case. Knowing where to obtain the medical knowledge is important. The following is a list of useful resources for the medical malpractice practitioner:



Maria Damiano

Maria Damiano is a lawyer at Paul Harte Professional Corporation who practises in plaintiff-side medical malpractice law. Maria is currently the Chair of the Medical Malpractice Section for the Ontario Trial Lawyers Association.

2 Association Websites

Specialists are often governed and / or represented by various medical societies. These societies frequently establish clinical practice guidelines that may assist you in determining the standards in a particular area. For example, the Clinical Practice Guidelines of the Society of Obstetricians and Gynaecologist of Canada (SOGC) (www.sogc.org) is my starting-point whenever I have a case involving gynaecological or obstetrical errors.

3 University Websites

Medical schools or subsites with “edu” endings often provide great online resources.

The Internet

The Internet can be a great source of information, though it must be used carefully. Some key websites that I find helpful in gathering preliminary information include:

1 College Websites

For the most part, health-care professionals in Ontario are governed by a College (i.e. the College of Physicians and Surgeons of Ontario governs all physicians in Ontario). The Colleges’ websites include useful information relating to the standard of practice and what can amount to professional misconduct.



4 YouTube

Though usually used for recreational viewing, YouTube can sometimes be a useful educational tool. Step-by-step “walk-throughs” of simple outpatient procedures can prove invaluable. However, one must always verify the source of the presentation.

5 Government Websites

The National Institute of Health (www.nih.gov) is a leading American-based medical research group which has an extensive catalogue of on-line books (many of which are available free of charge). Medline Plus (www.medlineplus.gov) has good health information from the National Library of Medicine and is free of charge. Medical Research Council of Canada (www.hc-sc.gc.ca) provides information and research conducted by Health Canada in areas like pharmaceutical regulation and disease tracking (it is also free).

6 WebMD

(www.webmd.com): General health information is provided on this website free of charge.

7 PubMed

(www.ncbi.nlm.nih.gov/pubmed): This is a premier journal database with over 18 million references from 5,500 journals across the globe. The service is provided free of charge for searching and obtaining abstracts. Charges then apply to obtain the complete article.

8 Medical Texts

Though medicine is a dynamic discipline, textbooks remain a very useful source of medical information, especially for determining the standard of care. Used copies of textbooks are readily available at online book retailers. In addition, a trip to a local medical school library can be an inexpensive way to see how a particular medical procedure has changed. Past editions of a textbook can demonstrate the evolution of a procedure over time, proving invaluable to establishing the standard of care at a particular moment.

Students' Corner: Surviving law school

Wesley Forgione

This article offers some insight into how I survived and excelled during law school and ultimately obtained an articling position.

How to Survive Law School Exams

– At the end of each semester, students will write an exam for each class worth 100% of their final grade. The idea of writing a “do or die” exam intimidated me at first, but students get used to this pressure fairly quickly.

Pre-Exam Preparation

It is important to prepare for exams through diligent study and preparation. Students must treat law school as a full time job. As a law student, it is important to ensure that you have read assigned materials and prepared concise and accurate notes.

Exam Preparation

Make sure to leave yourself at least one month before exams to put together a summary of each class. A summary is a condensed outline of the material covered over the semester.

Staying Sane

It is important for law students to try and lead a balanced life. Find an activity you love and do it as often as you can.

Obtaining an Articling Job Getting Involved

Employers will scrutinize your resume looking for your efforts within the law school community and the community at large. C.I.A.O. is one such organization that provides opportunities for law

students to “get involved”. C.I.A.O. hosts many events throughout the year that provide an excellent opportunity for networking. Moreover, C.I.A.O. also offers law students and lawyers the opportunity to get involved in many community initiatives such as an annual Mock Bail and Mock Criminal Trial. This type of community involvement is vital for two reasons. First, it allows lawyers to “give back” to their

Proverbi Legali

“La verita’ sta nel mezzo, diceva il diavolo seduto tra due avvocati.”

“Non esistono cause che non trovino un avvocato.”

“Con gli avvocati sono necessari tre sacchi: uno di quattrini, uno di ragione, e uno di pazienza”

community. Second, it provides yet another opportunity to meet and network with other colleagues. I have come to learn first hand that C.I.A.O. provides countless opportunities for lawyers regardless of their years of experience or area of practice.

The Articling Interview

During the interview, it is important to be yourself. Look for a firm culture in which you think you will fit in.

Wesley Forgione

Wesley Forgione is a recent graduate of Osgoode Hall Law School

C.I.A.O. Contest

Winner of C.I.A.O. Essay Writing Contest Announced



Joanne Bruno

This year, C.I.A.O. invited students to participate in an essay-writing contest. Students were invited to discuss the presumption of innocence and its application and importance to Canadian law. Ryan Ishmael, a grade 12 student at Father Henry Carr, was the winner of the \$250 prize.

We thank all those who participated in this important public information initiative including the Honourable Mr. Justice DiZio, Her Worship Mary Ross-Hendricks, Stefano Fortini, Rudi Covre, Derek Rowsell, Officer Sohal, John Spina, Rosanne Giulietti and Sue Bashford. Special thanks go to our President, Vince A. Pileggi, who organized the entire event and made sure that everything unfolded as it should. Please contact Vince or myself if you would like to get involved in this or other public education initiatives hosted by C.I.A.O.

Risk management CPD

Photo from C.I.A.O.'s first ever Continuing Professional Development Program held on May 23, 2012 at the Columbus Centre. The topic was Risk Management. Special thanks to our presenters Dan Pinnington and Dom Bellacicco from the Lawyers' Professional Indemnity Company who made for an informative and enjoyable learning session.



C.I.A.O. hosts annual mock trial for high school students

Joanne Bruno

On April 18th 2012, as an unsuspecting group of over 800 students from 13 G.T.A. high schools settled in to listen to Rosanne Giulietti's introduction to Law Day, they were startled by a scream from the audience. A disguised man had just grabbed the purse of one of their teachers and was making his getaway from the gymnasium. This is was the beginning of a demonstrative exercise that C.I.A.O. has put on for years.

At the Annual Mock Trial, C.I.A.O. provides students with an opportunity to watch experienced lawyers conduct a bail hearing before a Justice of the Peace and a trial before a real judge of the Ontario Court of Justice. Students were selected from the audience

to participate as witnesses and jury members.

The event was held in the gymnasium of Father Henry Carr Secondary School, formerly Marian Academy, in North Etobicoke, which, with the help of a sophisticated set, was transformed into an authentic-looking courtroom.

Both the accused, played by Derek Rowsell and his real life wife, Rosanne, testified at the mock bail hearing conducted by crown attorney Joanne Bruno and defence lawyer Stefano Fortini. Her Worship Justice of the Peace Mary Ross-Hendriks then gave her ruling, providing the

students with a thoughtful examination of how the plan proposed for release would sufficiently address any public safety concerns.

The Honourable Mr. Justice Antonio Di Zio presided over the trial conducted by Joanne Bruno and defence lawyer Rudi Covre. After very able jury instructions, the jury found the accused "not guilty". C.I.A.O. is proud to have hosted mock trials annually for the last 15 years.



The contents of l'avvocato are of a general nature, do not constitute legal advice, and are not intended to be a full and complete analysis of the topics herein. Before applying the concepts discussed in l'avvocato, it is imperative that you consult your legal advisor. To unsubscribe to this newsletter, please contact info@ciaocanada.com. C.I.A.O. welcomes articles and contributions to l'avvocato. Please contact the Editor, at info@ciaocanada.com to submit an article for consideration. Editor-in-Chief: Marco Falco. Layout: Anthony Naimo and Nadia Lucchese.