

No elevated civil standard for sex assault

CRISTIN SCHMITZ OTTAWA

The civil standard of “proof on a balance of probabilities” does not vary with the stigma of the alleged tort, nor with the seriousness of the potential consequences for alleged tortfeasor, the Supreme Court has ruled 7-0.

On Oct. 2 the top court applied the brakes to a recent trend among some lower courts, notably in B.C., requiring that a tort be proved to a higher degree of probability “commensurate with the occasion” (borrowing Lord Denning’s words) in cases involving allegations of serious moral turpitude, such as professional misconduct or criminal conduct, particularly sexual assault against minors.

“I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities,” Justice Marshall Rothstein held for the court.

Justice Rothstein elaborated “it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.”

He also ruled that “there is no



ALISTAIR EAGLE FOR THE LAWYERS WEEKLY

Karim Ramji, counsel for the successful appellant, said if the Supreme Court had not overturned the appeal court’s judgment, sexual abuse survivors would face insurmountable odds in civil cases.

requirement that a sexual assault victim must provide independent corroborating evidence” in civil cases which turn on the contradictory sworn testimony of the opposing parties.

The Supreme Court overturned a 2007 B.C. Court of Appeal majority judgment that was seen

as imposing a heavier-than-usual burden of proof on persons suing for childhood sexual abuse, including the requirement for corroboration if their word is pitted against the defendant’s.

“If the Supreme Court of Canada had not overturned the British Columbia Court of

Appeal’s judgment, the battle that [sexual abuse] survivors would face [in civil cases] would have been almost insurmountable,” said Karim Ramji of Vancouver’s Donovan and Company, counsel for the successful appellant/plaintiff F.H.

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A paperless world cuts both ways for real property practitioners

The practice of real estate is changing radically, but concerns remain about the risks of new software

CHRISTOPHER GULY OTTAWA

An ardent advocate for real property law during his three-decade long legal career, Alan Silverstein has more recently become an enthusiastic proponent of technology and its benefits for lawyers.

Two years ago, he left his pri-

vate practice to serve as director of national legal engagements for TELUS Corp.-owned Emergis Inc. and to promote Assyst Real Estate, a software program that automates the mortgage process between lawyers and lenders.

Instead of exchanging documents by fax or courier, information is shared securely online. Participating lenders (Royal

Bank, nationally, and three more banks in Quebec) send instructions for approved mortgage transactions directly to the computer of a subscribing lawyer or notary.

“The Law Society [of Upper Canada] says that you have 60 days to report a transaction to the lender. We tell people you can report in 60 seconds because there’s no paper,” boasts Silverstein, certified as a specialist in real estate law by the Law Society of Upper Canada

(LSUC).

Available in Ontario, Quebec and British Columbia, so far, Assyst works with other documentation-prep software, such as Do Process’ The Conveyancer (now owned by Teranet Enterprises Inc.) and OneMove Technologies Inc.’s econveyance, to help lawyers handle mortgage files “more efficiently and more quickly, and increase their bottom line without having to raise fees,” says Silverstein.

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'I can't hold them responsible for more than \$1M'

Software

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"Their disbursements will go down because less money is spent on faxes, couriers and postage."

He explains that automated processes, such as Assyst, could also help lawyers recover some of the refinancing business and the related millions of dollars of revenue lost to title insurance companies over the past few years.

"They can go after the [refinancing] business because they can now do deals faster than a title insurance company can and issue a report within minutes of closing," he says.

"The most important thing in a real estate transaction is not the paperwork but the report. It's the opinion that's paramount, and it can be delivered with a digital signature so the lender can verify the identity of the lawyer sending it."

Silverstein points out that only lawyers in good standing with their law societies can sign up for Assyst. And many have done so, according to him.

Over the past six years since its launch, the software program has supported over 632,000 transactions in an electronic format recognized by law (through provincial e-commerce legislation and the federal *Personal Information Protection and Electronic Documents Act*) and by law societies across the country.

There are also plenty of e-tools available, from web-based technology that enables title searches and registration to software platforms through which one can order title insurance and quickly receive confirmation of coverage.

But it's the conveyancing software that has the most potential to "revolutionize" the way that real estate law is practised, says lawyer Karen Decker, vice-president of underwriting and legal at Stewart Title Guaranty Co. in Toronto.

That's the software that can facilitate transaction management and generate documents from a template. Lawyers or notaries using the technology are charged a fee (anywhere from \$15 to \$25) per transaction and usually pass the costs on to the client.

"The platforms have created efficiencies for lawyers and have also reduced the possibility of errors once they fill in data fields in the software that are automatically merged into the various documents they need to generate in order to complete a transaction," says Decker, who notes that Stewart Title will soon be launching its own software platform, called LegalSTEPS, for Ontario lawyers to complete documents for a real estate transaction and order title insurance from one application.

She points out that the next major step will be the creation of hubs where the various parties to a real estate transaction — the lawyer, lender, title insurer, title registry — connect. By enabling lawyers to receive mortgage instructions from and send reporting back to lenders, Emergis' Assyst is one of the first examples of this move toward convergence.

"You will see companies creating connectivity software that give lawyers access to everything they need to conduct a real estate closing without having to switch programs," Decker explains.

Recently, that's also included the electronic transfer of funds, which Toronto-based Teranet Inc. has made possible through its Closure program. The web-based service enables lawyers to securely manage the transfer of real estate closing funds online to reduce the need for certified cheques, bank drafts, direct deposits and couriers, according to Teranet spokesperson Tanis Robinson.

Closure is the type of program that would fit nicely into the automated world of Ray Mikkola, a partner with Pallett Valo LLP in Mississauga, where he heads the firm's commercial real estate law group. Currently, he searches title, registers mortgages and completes real estate transactions from his desktop and would appreciate having access to a ubiquitous system for electronically transferring funds rather than sending a certified cheque by taxi. But after reading the terms and conditions of Closure,

he decided to opt out of the service.

"If they lose my money I can't hold them responsible for more than \$1 million of it," says Mikkola, who chairs the national real estate section of the Canadian Bar Association.

Specifically, his concern is in s. 6.3 (a) of the agreement that states Teranet's "maximum aggregate liability...for any and all claims arising from fraud or



Silverstein



Decker



Mikkola



Grenside

breach of trust by Teranet, or...of someone for whom Teranet is in law responsible, or failure to follow an account holder's or a user's directions through the Closure service, shall not exceed the lesser of \$1 million and the actual value of the deposit with Teranet related to the particular deal...that gave rise to the claims, losses, actions or damages."

Section 6.4 states that the limitations of liability set forth in the previous section "shall also apply where the liability results from negligence or breach of contract, including a breach of a fundamental term or condition or a fundamental breach of this agreement."

Mikkola points out that almost all of the commercial deals he's involved with are worth more than \$1 million.

However, Robinson says that Closure uses the nine-year-old Large Value Transfer System, operated by the Canadian Payments Association, and funds are backed by collateral pledged to the Bank of Canada by the participating banks. The LVTS is not mentioned in the terms and conditions "because it is not our system," she adds.

"There are so many checks and balances built into the system, and the payment is guaranteed by the Bank of Canada. It's virtually impossible for funds to be lost."

Law firms are using Closure. "We like it," says Rosemary Grenside, a real estate lawyer with Torkin Manes Cohen Arbus LLP in Toronto.

Rather than sending out certified cheques by courier or arranging for wire transfers, she can forward or receive funds with just a few clicks of a computer mouse and a \$20 fee, plus GST, per transaction. To comply with the LSUC's By-Law 9 on financial transactions and records, she and her colleagues at the firm fill out the prescribed requisition forms related to electronic transfers, which two partners sign as they would with trust cheques. Every transaction produces a confirmation, which is also stored as part of the record keeping.

"It takes 10 minutes from the time you hit the send button to when everybody is notified — whether it's a lender or a property tax department — and the money is in their accounts," says Grenside, who has used Closure on a deal worth about \$5.5 million.

"It would be extremely useful if more lawyers were prepared to do it this way."

Getting them completely on side, however, remains one of the greatest challenges.

For Mikkola, an electronic funds-transfer system would have to give him a "high degree of confidence" that when money leaves his trust account, it reaches its proper destination "and not end up where it's not supposed to be and I can't get it back."

As Decker points out, six years ago Toronto-based CLN Highlander Inc. was unsuccessful in creating a lender-to-lawyer software platform for residential real estate transactions, called LawOffice Max. The Internet-based software program was "too cumbersome to use" and most law firms already used some conveyancing software that essentially performed the same function. LawOffice Max still exists for mortgage instruction and document delivery.

But Ontario's real estate bar, particularly the County and District Law Presidents' Association, "objected strongly" to the lender outsourcing models that CLN Highlander and other companies were promoting at the time, explains Decker. The major

objections included concerns about undisclosed costs to the consumer, "authorized" practice of law and the fact that the processes didn't seem to create any "value add" to the transaction. Lawyers often had to reduce their fees because quotes provided to consumers didn't account for the additional CLN Highlander costs, she says.

"The key thing is that software companies have to listen to what lawyers are looking for."

For instance, Silverstein would like to see regulators establish certification authorities available for lawyers across Canada. Currently, only Quebec's *Chambre des Notaires* (for notaries) and British Columbia's Law Society have CAs that validate the identity of a person affixing a digital signature to an electronic document.

Yet in the electronic age, Mikkola is worried that there may be a "dumbing down" of the legal profession in which lawyers are "constrained from drafting documents that suit a client's particular requirements on occasion and are instead apt to accept the pre-printed forms."

On another matter, he says there's an important role for the continued use of sworn documents in electronic transactions.

For example, a vendor would more likely be motivated to disclose a claim that is adverse to his or her title if required to do so under oath.

"If I never had to meet with a client and never had to say 'You need to provide me with a sworn document and tell me the truth or you may go to jail,' I'm not sure I'd come up with the same safety checks that we have in the system now."

"If we're having more and more of these documents in non-paper form [electronically], we'll have to trust that the lawyers involved ensure their clients are behaving appropriately within the law. If lawyers lose direct contact with clients through the automation process — and there's no indication that's happening — there's a much higher risk that documents will not be prepared properly and the system that relies on truth and accuracy may suffer significantly."

Adds Mikkola: "The continuing involvement of lawyers is the best safeguard." ■

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