OTLA Ontario Trial Lawyers Association

The Litigator

Winter 2023

GREAT FACTS GREAT LAW

Publication Agreement No. 40037155

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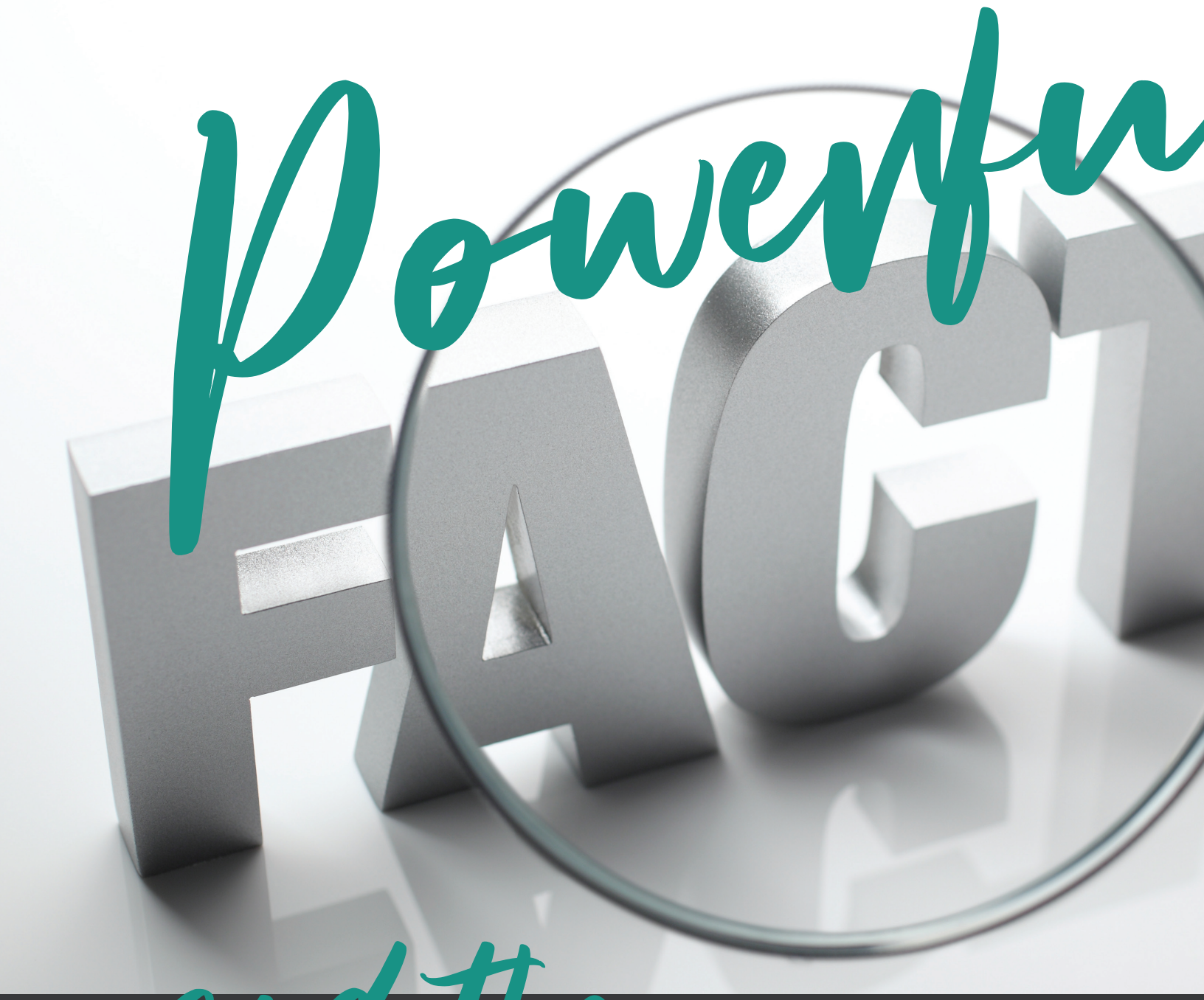

Powerful Facts and the Development of Tort

BY NEIL WILSON & MEAGHAN COKER

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We've all heard the expression "bad facts make bad law".

The original quip, often attributed to US Supreme Court Justice Oliver Wendell Holmes, is actually that "Great cases like hard cases make bad law." But if both hard cases and great cases make bad law, what is our common law system good for? The theme of this issue of the *Litigator,* "Great Facts: Great Law" is a more optimistic take on this well-worn phrase.

The tension between these different takes on the value of compelling facts is perhaps most apparent when courts grapple with recognizing, and sometimes with applying, a new duty of care or cause of action. From the landmark decisions of the past (*Donoghue v. Stevenson*) to more recent "what ifs" (*Childs v. Desormeaux* and social host liability), these cases challenge judges to balance just individual results with the broad consequences of creating new duties of care or applying a duty to a new fact situation. At the same time, these decisions help fulfill the promise of the common law: that it can deliver just results by making sure that the law remains adaptable to the twin challenges of changing times and unforeseen situations.

In Ontario, three cases decided this year showcase this ever-present evolution of tort law. In *Ahluwalia v. Ahluwalia,* 2022 ONSC 1303, Justice Mandhane recognized the tort of family violence. In *Aylmer Meat Packers Inc. v. Ontario,* 2022 ONCA 579, the Court of Appeal recognized the duty of care of a public authority to ensure its regulatory actions do not unreasonably harm a regulated company's business interests. And in *Desrochers v. McGinnis,* 2022 ONSC 5050, Justice Hurley recognized a duty of care owed by an ATV owner to not allow access to someone who does not have the skills needed to operate the vehicle safely.

These cases all needed the help of deserving clients, intrepid lawyers (or in one case a self-represented litigant) and open-minded judges. But beyond the players in the courtroom, the cases all rested on the essential foundation of great facts. This article looks at how the plaintiffs in these cases presented the great facts

necessary for success, and discusses what broader considerations made the facts compelling enough to influence the development of the law.

Ahluwalia v. Ahluwalia, 2022 ONSC 1303

In *Ahluwalia v. Ahluwalia* the parties were husband and wife. They had two children and had been married for 16 years when they separated and the father began divorce proceedings. The mother advanced claims that physical and mental abuse had occurred over the course of the marriage. Justice Mandhane recognized a new tort, the tort of family violence, and awarded $150,000 in damages. The damages were awarded not only as a result of specific incidents of assault, but based on the broader concept of family violence, which encompassed the entire relationship and recognized the insidious nature of spousal abuse.

The Tort of Family Violence

The recognition of the new tort was grounded in 2021 reforms to the *Divorce Act* which introduced a definition of "family violence" relevant to the determination of the best interests of the child, but which did not itself create a cause of action in tort. Justice Mandhane held that given the absence of a meaningful family law remedy, recognizing a tort of family violence, which could be brought as part of the family law proceeding, was necessary to provide claimants with meaningful access to justice.

Justice Mandhane relied on the *Divorce Act's* new definition of "family violence" as the test for liability under the tort of family violence – meaning that if conduct occurs meeting the definition of "family violence" under the *Act,* then liability is proven. Consequently, the Court found the father liable under two branches of the definition: (1) violent and threatening conduct and (2) a pattern of coercive and controlling conduct.

Justice Mandhane accepted that the tort of family violence overlaps with existing torts, such as the tort of spousal battery,[1] the inter-spousal tort of assault,[2] and the tort of battered women's syndrome recognized in several U.S. states.[3] However, Her Honour held that these existing torts do not account for the "cumulative harm" often present in family violence cases.[4] The decision noted that while existing torts may be effective for assessing damages for specific incidents, they are not well-suited to addressing harmful *patterns* of violence, such as prolonged psychological abuse and financial control.

The Facts That Mattered

The Court heard specific details of the father's physical assaults, including that the father slapped and punched the mother in their first year of marriage and slapped her again on at least two subsequent occasions. The Court also considered the father's psychological and emotional abuse, which included insulting the mother on her appearance and difficulty conceiving, threatening to leave the mother and children without any money, leaving the family home without any explanation for hours or days, and controlling the mother's finances.

Beyond these terrible incidents of abuse and control, the facts which led the Court to decide the case on the basis of a tort of family violence rather than existing torts were facts which related to the nature of sustained coercion in an abusive relationship. For example, Justice Mandhane found that the father used violence at the beginning of the marriage to condition the mother to obey him and that both the mother's and father's families encouraged her to remain in the marriage. These facts were important to the recognition of the tort of family violence because they underscored that understanding the true harm suffered required looking at the broader effects of violent and controlling behaviour as well as individual incidents.

Aylmer Meat Packers Inc. v. Ontario, 2022 ONCA 579

In *Aylmer Meat Packers* the Ontario Ministry of Agriculture took control of an abattoir following an investigation into Aylmer violating meat processing laws. The Ministry occupied and retained control of Aylmer's facilities for 19 months before the facility was returned. Aylmer claimed that the plant should have been returned much sooner.

The Court of Appeal agreed. The Court found that the Ministry owed a duty of care to the plaintiff and that the Ministry had breached the applicable standard of care by needlessly maintaining the occupation when the site could have been returned to the owners to allow it to be sold. As a result, the plaintiffs were awarded $3,520,000 in damages reflecting diminution in the value of the enterprise.

The Duty of Care

To assess if the Ministry owed a duty of care, the Court of Appeal applied the *Anns-Cooper* test (foreseeability, proximity, no residual policy reason for not imposing a duty). The Court concluded the Ministry's occupation

would cause reasonably foreseeable harm to Aylmer's economic interests. Likewise, the Court found sufficient proximity based on specific interactions between the Ministry and Aylmer, such as suspending Aylmer's abattoir license and failing to hold the hearing required by statute, taking control of the facility, and allowing the meat to spoil and then later destroying the meat.

Importantly, the Court noted similarities with the tort of negligent investigation by police recognized in *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, including that Aylmer was targeted as a "particularized suspect" in a regulatory investigation.

The Court went on to conclude that there were no residual policy reasons to decline to impose a duty under the second branch of the *Anns-Cooper* test and, in accordance with earlier case law, dismissed the argument that a duty of care should be rejected because of a purported "chilling effect" on government action. As a result, it was determined that the Ministry owed a duty of care to ensure that its actions did not unreasonably or unnecessarily harm Aylmer's business interests.

The Facts That Mattered

The Court of Appeal found that the Ministry had breached its obligation to ensure that its actions did not harm the plaintiff's business interests. While the initial decision to seize the plant was reasonable, the extended occupation of the plant was not. The finding of liability was made even though Aylmer and its owner had pleaded guilty to charges stemming from the initial investigation (including selling uninspected meat).

The consideration driving the Court of Appeal's analysis was that Ontario's occupation of the plant continued far beyond any period that was supported by common sense and with apparent indifference to the economic harm being caused to the plaintiff. This overarching conclusion was supported by the "great facts" that underpinned the Court's ultimate conclusion. In particular, the Court noted that Ontario's representatives:

- had no timelines, discussions, or informal or documented plans for detaining Aylmer's plant;
- waited ten months to attempt to fix a broken freezer, allowing Aylmer's meat to spoil, and then took another six months to destroy the meat and return the plant to Aylmer; and
- gave no thought and were unaware of the Ministry's power to store the

detained meat off-site, opting to incur $40,000 in security costs each month to maintain the occupation at Aylmer (while it had earlier delayed a freezer repair that cost only $20,000).

With these facts established, the Court did not pull any punches and described the Ministry's actions following the initial detention of the meat as a "litany of bureaucratic ineptitude" and the result of "decision-making paralysis" – not words any defendant wants to hear.[5]

Desrochers v. McGinnis, 2022 ONSC 5050

In *Desrochers,* the Court found a duty of care was owed by the owner of an ATV to a person who the owner allows to drive the ATV when that person has limited ATV-driving experience. The Court concluded that the standard of care had been breached. The plaintiff suffered a severe brain injury after crashing an ATV owned by her boyfriend's father into a tree on the side of a road at a sharp turn.

Duty of Care for Owners of ATVs

The Court found that the plaintiff had established a duty of care owed by both the plaintiff's boyfriend and his parents. Justice Hurley reasoned that because an ATV poses a foreseeable risk of injury, especially to persons with little or no experience, an owner or person who controls access to an ATV owes a duty of care to inexperienced users who they permit to use the vehicle. Furthermore, a duty of care is also owed when a person's known physical or mental condition would make the operation of the ATV unsafe.

On the standard of care, the claim against the plaintiff's boyfriend succeeded and the claim against his parents did not. Justice Hurley found that the accident should have been foreseeable to the boyfriend due to his awareness of the plaintiff's inexperience and because of the condition of the road in issue. Justice Hurley noted that the fact that the plaintiff allowed her boyfriend to manage her medication showed the trusting dynamic of their relationship and that she would have listened to him if he had directed her to wear a helmet, avoid the road, or not ride at all.

The Facts That Mattered

The plaintiff's injuries left her with no memory of the accident and incapable of giving evidence. The only witness to the accident was her boyfriend, who Justice Hurley found had little credibility and had an agenda to absolve himself and misrepresent the plaintiff's level of experience driving the ATV.

The facts presented supported three important conclusions which, once established, led to liability. First, ATVs are dangerous and require special skill and experience to operate safely, especially when navigating a sharp turn. The plaintiff called two expert witnesses who testified about the training needed to operate ATVs in these circumstances and the particular challenges posed by turns.

WHILE THE CASE-SPECIFIC NATURE OF GREAT FACTS CERTAINLY IMPEDES PRECISE DEFINITION, THERE ARE SOME *common threads* LINKING THE KINDS OF GREAT FACTS NEEDED IN CASES INVOLVING A SERIOUS DISPUTE OVER THE VIABILITY OF A CAUSE OF ACTION.

Second, the road itself was a challenging one to navigate given the sharp turn, lack of lighting and the time of night the plaintiff was riding – all of which the defendant knew about.

Finally, the plaintiff did not have the skill to operate the ATV safely on the road or knowledge of the layout of the road. Justice Hurley found that the defendant gave the plaintiff minimal instructions on driving an ATV and had only practiced with her in a field under his direct supervision. He gave her no warning or caution about driving the ATV on the road at issue or guidance on how to handle sharp turns. On top of all of this, the defendant knew that there was a safer route to her destination that went through a field, not a road with a sharp turn. Ultimately, the Court concluded that there were simple steps that the defendant could have taken to prevent the accident.

What Makes Great Facts?

So what makes great facts? To paraphrase another US Supreme Court judge, "I know it when I see it."[6] While the case-specific nature of great facts certainly impedes precise definition, there are some common threads linking the kinds of great facts needed in cases involving a serious dispute over the viability of a cause of action.

First, great facts build on both social and judicial trends. This can be seen in different ways in the decisions discussed above. In *Ahluwalia,* Justice Mandhane noted the "evolving social understanding about the true harms associated with family violence" and drew from cases decided in other contexts that have explained the systemic barriers to leaving abusive relationships. In *Aylmer Meat Packers,* the facts built on an increasing willingness to scrutinize governmental decision-making – and the justifications provided for poor decision-making when the justifications do not stack up against basic common sense.

Second, great facts are those that fit into a cohesive theme. In *Desrochers,* a dominant theme was the vulnerability and inexperience of the plaintiff relative to the knowledge of the defendant with respect to both ATVs in general and the road in particular. In *Ahluwalia,* the facts supported the underlying principle that the deep harm caused by family violence results from more than just specific instances of abuse and also flows from patterns of coercion that permeate the entire relationship.

Third, great facts must be compelling enough to outweigh the bad facts that are a part of every case. In *Desrochers,* the lack of a helmet and the plaintiff's own decision to ride the ATV despite her minimal experience are both bad facts that presumably played into the defence's theme of personal responsibility. In *Aylmer Meat Packers,* the fact of a guilty plea to the charges underlying the original seizure of the plant comes to mind as a less than ideal fact for the plaintiff.

Finally, and perhaps most importantly, great facts are facts that expose the gaps or shortcomings in the law as it currently exists. They are facts that are compelling enough to shape the development of the common law because they cry out for a certain result even if that result does not fit neatly within earlier precedents. And in the end, great facts are facts that make great law because they help ensure that the legal principles we have developed are able to produce results we recognize as just.

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NOTES

[1] *Schuetze v. Pyper,* 2021 BCSC 2209.

[2] *Montgomery v. Kenwell,* 2017 ONSC 3107.

[3] *Ahluwalia v. Ahluwalia,* 2022 ONSC 1303, at para. 51.

[4] *Ahluwalia v. Ahluwalia,* 2022 ONSC 1303, at para 54.

[5] *Aylmer Meat Packers Inc. v. Ontario,* 2022 ONCA 579, at paras. 71 and 80.

[6] Justice Potter Stewart's description of the test for obscenity in *Jacobellis v. Ohio,* 378 U.S. 184 (1964).