

## **CHAPTER 5**

### **MISCELLANEOUS TORTS AFFECTING BUSINESS**

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#### **TEACHING APPROACH**

This is the third of four chapters devoted to specific torts law. Chapter 3 provided a general introduction to the area. Chapter 4 provided a fairly detailed discussion of intentional torts. Chapter 6 provides an in-depth examination of negligence, which is the most important tort. The purpose of the present chapter is to draw students' attention to eight other torts that commonly affect business people:

- conspiracy
- intimidation
- interference with contractual relations
- unlawful interference with economic relations
- deceit
- occupiers' liability
- nuisance
- the rule in *Rylands v Fletcher*
- defamation

The primary challenge in the presentation of the current chapter lies in the need to strike an appropriate balance between breadth and depth. Too often, the discussion of tort in the business law context consists of an examination of professional negligence and perhaps some reference to the intentional torts. That sort of approach takes much too narrow a view of the topic.

- First, from a risk management perspective, it is critically important for business students to be aware that, in the normal course of operations, they may be exposed to liability for, say, interference with contractual relations (if they over-zealously pursue a competitor's employees), conspiracy (if they collaborate with another organization in undermining a competitor), deceit (if they intentionally mislead

- customers or investors), or defamation (if they make a false and unflattering statement about a competitor).
- Second, leaving aside specific torts, students should recognize the extent to which private law rules regulate business. They should also have an appreciation of the manner in which tort law mediates a compromise between the parties' competing values and interests. Depending upon the circumstances, the possibilities run the gamut from liability premised upon proof of carelessness on the one hand to strict liability, which is imposed regardless of fault, on the other. Those possibilities are illustrated in this chapter.

At the same time, there is a danger of overwhelming students with excessive information. Business people should certainly be aware of the tort of intimidation, for instance, but they do not need to know all of the details. The text therefore focuses on the most important features of each tort, from both a legal perspective and a risk management perspective.

The materials themselves should come alive quite easily. As generally is true with tort law, the cases and rules are both accessible and stimulating. Students can readily identify with the interests that are involved in the context of, say, deceit or defamation. We all have personal experience with lies. Nevertheless, it remains important to put the topics into context, so as to avoid the impression of a grab bag. For that reason, the eight torts have been grouped by themes.

- *Morality in the Marketplace* The torts of conspiracy, intimidation, interference with contractual relations, unlawful interference with economic relations, and deceit all deal directly with the idea of morality in the marketplace. They regulate, in various ways, the means by which a business person can gain an advantage over competitors or customers.
- *Torts Related to Land* Every business person is affected by the use and occupation of land. Consequently, it is important for students to appreciate the various bases upon which an owner or occupier can sue or be sued. The tort of trespass to land was examined in Chapter 4. This chapter includes a discussion of the torts of occupiers' liability, nuisance, and *Rylands v Fletcher*.
- *Defamation* As typically is true in tort law, defamation stands on its own. It is concerned with the need to strike an appropriate balance between protecting the plaintiff's reputation and respecting the defendant's freedom of speech.

## ADDITIONAL TEACHING SUGGESTIONS

### Fault and Strict Liability

As explained in the text, liability for the tort of *Rylands v Fletcher* is *strict*. The defendant may be held liable even though it did not carelessly or intentionally cause the plaintiff to suffer an injury. Indeed, the defendant may be held liable even if it took every reasonable precaution to avoid hurting the plaintiff. *Rylands v Fletcher* therefore presents an ideal opportunity to encourage students to reflect on the proper role of fault in tort law.

It is necessary to first define "strict liability." That term has at least two meanings.

- Chapter 12 briefly discussed the cause of action in unjust enrichment that leads to the remedy of restitution. Liability under the action in unjust enrichment is strict in the sense that it does not require proof that the defendant breached any obligation. The reason for restitution is almost always based entirely on the plaintiff's impaired intention. *Air Canada v Ontario (Liquor Control Board)* (1997) 148 DLR (4th) 193 (SCC) provides an excellent illustration. The plaintiff airline mistakenly paid fees to the defendant with respect to in-flight alcoholic drinks. Although neither party recognized that mistake for several years, the defendant eventually realized that such fees were not actually applicable in the circumstances. It nevertheless continued to collect payments from the plaintiff for five years. The lower courts granted restitutionary relief, but only with respect to money that the defendant received after it had become aware of the plaintiff's error. In the Supreme Court of Canada, however, Iacobucci J properly extended the scope of recovery to all mistaken payments on the basis that "Canadian law has never required a showing of bad faith as a precondition to the recovery of monies collected by the government under an inapplicable law." Given the defendant's receipt of an enrichment, the plaintiff's mistake alone is sufficient to justify the imposition of liability. A recipient's enrichment is "unjust" simply because the claimant did not truly intend a transfer of wealth.
- The term "strict liability" carries a different meaning in tort law. With some exceptions (such as vicarious liability, as discussed in Chapter 3), liability in tort is always premised upon the fact that the defendant did something that it was not supposed to do – that it breached an obligation. There are, however, variations within that broad explanation. Most torts require proof that the defendant broke its obligation either carelessly (as in the tort of negligence) or intentionally (as in the case of battery). Some torts, however, may be committed merely because the defendant committed the prohibited act, even if it took every reasonable precaution. *Rylands v Fletcher* is illustrative.

Students could be encouraged, as part of a class discussion or assignment, to consider the relative merits of imposing liability in tort on a fault basis and on a strict basis.

Considerations of fairness usually favour a fault-based form of liability. Tort law is almost always required to strike a balance between the parties' competing interests. Depending upon the circumstances, however, it may do so in different ways.

- The tort of negligence, which is the most common basis of liability today, strikes the most sensitive balance between the parties' interests because it requires proof that the defendant's conduct was, having regard to all of the circumstances, careless.
- The approach under the intentional torts is somewhat more harsh. Liability is imposed only if the defendant acted "intentionally." As discussed in Chapter 4, however, "intention" carries an unusual meaning. It is enough if the defendant knew that a particular act would have particular consequences. The plaintiff does *not* have to prove that the defendant intended to either cause harm or commit a tort. (For instance, I may commit the tort of trespass to land by walking on your lawn, even if I honestly believe that that land belongs to me.)

- The approach under strict liability torts like *Rylands v Fletcher* is harshest of all. The plaintiff is not required to prove that the defendant acted either carelessly or intentionally. It is enough to show that the defendant somehow breached its obligation.

There are, then, various ways in which tort law strikes a balance between the parties' interests. To a large extent, the precise explanation for the approach that is used in any particular case reflects historical considerations and the somewhat haphazard development of the common law. However, there also seems to be a fairly clear relationship between the purpose of a given tort and its elements of proof.

- The tort of negligence is aimed, in a very general way, at the prevention and reparation of preventable injuries. Such injuries may occur in a remarkable variety of ways. The law therefore uses the flexible standard of carelessness. Interestingly, there is a general trend toward bringing other torts under the negligence umbrella. That is clearly true with respect to the traditional torts of occupiers' liability and nuisance. The courts and legislatures increasingly want judges to have as much flexibility as prudently possible when trying to strike an appropriate balance between competing interests.
- In contrast, the interests protected by intentional torts are more specific and generally of a higher order. For instance, the tort of battery is aimed squarely at the protection of physical well-being and the tort of false imprisonment is aimed squarely at the prevention of unlawful detentions. The legal system readily recognizes the tremendous value that society places on personal safety and freedom of movement. It therefore is willing, in some respects, to impose liability more easily. Hence, it is sometimes said that intentional torts can be committed "innocently," in the sense that the defendant does not have to be aware that it is doing anything wrong. Again, I may be held liable for the tort of trespass to land even if I honestly and reasonably believe that I am walking on land that belongs to me, rather than to you.
- The same sort of analysis explains why liability under *Rylands v Fletcher* is strict. The legal system has decided that while the defendant may be entitled to bring a special and unusual danger on to its land, it must readily accept the consequences of doing so if the dangerous thing escapes and causes the plaintiff to suffer a loss or injury. Because the defendant's activity is ultra-hazardous in itself, the plaintiff is not required to prove that the defendant acted either carelessly or intentionally. In the circumstances, liability is available on a strict basis in order to further the goals of compensation and deterrence. If the plaintiff suffers a loss as a result of an ultra-hazardous activity, it should have relatively easy access to damages. Moreover, the threat of such liability discourages the defendant from using its land in a particularly dangerous manner.

## **DISCUSSION BOXES**

### **Ethical Perspective 5.1**

#### **Conspiracy to Injure Plaintiff by Lawful Means**

These questions, taken together, encourage students to reflect on the fact that the rules regarding conspiracy represent an attempt to resolve a tension between two competing sets of values.

- On the one hand, the law historically encouraged profit-making activities, even when those activities detrimentally affected other businesses. And it still remains true that, as between two parties, the law generally supports the belief that societal interests are best served by vigorous competition. In that sense, the rules of conspiracy reflect an ethos of “the survival of the fittest.” Perhaps not surprisingly, many of the leading cases date from an era of *laissez-faire* economics and Darwinian science: eg *Mogul Steamship Co v McGregor Gow & Co* [1892] AC 25 (HL).
- On the other hand, it has long been thought unfair if several organizations collaborate to inflict an injury upon another. The law is not tolerant of *any* competition – only *fair* competition. It is not difficult to see another classic English trait, that of individualism, at play in the legal rules.

The historical perspective, however, tends to break down in modern times. When the general rules regarding conspiracy were first formulated, companies tended to be smaller and more evenly balanced. In that context, it made some sense to permit vigorous competition between individual firms, while prohibiting collaborative efforts. Today, the situation is often much different. A single, multi-national corporation may have *far* more power than any collection of companies ever did. It therefore seems odd, for instance, that Microsoft or AOL Time Warner is allowed to exert pressure that would be considered tortious if applied by two much smaller outfits working together.

In that regard, these questions can be used to encourage students to consider the *purpose and underlying rationale* of legal rules. It is not enough to identify and explain a historical reason for a law. The goal in each instance should be to identify the social problem that a law is seeking to redress, and then to evaluate the extent to which the current rule sensitively and effectively cures that problem. If the social problem in question is unfair competition, then it might be better to develop a test that premises liability upon that problem itself. It arguably makes little sense to focus on another factor (*ie* collaboration between two or more organizations) that only fortuitously coincides with the existence of unfair competition.

Finally, students should be encouraged to reflect on the fact that Canadian law must increasingly operate within the context of a global economy. To the extent that restraints are placed on competition within Canada, Canadian companies may be at a competitive disadvantage *vis à vis* foreign companies who are not similarly fettered. That is not to say, of course, that competition should be entirely unregulated. It does, however, stress the need for a broad outlook.

## **Business Decision 5.1**

### **Common Law Categories of Occupiers’ Liability**

1. Lord Denning clearly was skeptical of the court's ability to consistently and accurately identify the moment at which a person turned from a trespasser into a licensee and then into an invitee.
2. The manner in which courts actually decide cases is also suggested by Lord Denning's quotation (and is, of course, entirely consistent with his general approach to judging). The boundaries between different categories of visitors are blurred. Moreover, the facts are often unclear. Consequently, in practice, judges tend to draw upon instincts developed over many years, and to decide such issues intuitively, having regard to both the circumstances of the case and the desirability of deciding the dispute one way rather than another.

### **Business Decision 5.2**

#### **Nuisance and the Defence of Statutory Authority**

1. The Town of Sepsis will be held liable. Its sewage system created an unreasonable interference with your property.
2. The town will not be able to rely on the defence of statutory authority. The nuisance was not the inevitable result of the legislation. If Sepsis had used 1.5 metre pipes, as it was permitted to do, your restaurant would not have been flooded with waste.

### **You Be the Judge 5.1**

#### **Secondary Pickets**

Although students would not be expected to know, secondary picketing had generally been considered illegal in Canada since *Hersees of Woodstock Ltd v Goldstein*.<sup>1</sup> In *Pepsi-Cola*, however, the Supreme Court of Canada held that the distinction between primary and secondary picketing should no longer prevail. Instead, all picketing *prima facie* is legal unless it creates *undue harm*. And that will be true only if the picketers' behaviour constitutes a crime or a tort.

Courts may intervene and preserve the interests of third parties or the struck employer where picketing activity crosses the line and becomes tortious or criminal in nature. It is in this sense that third parties will be protected from "undue" harm in a labour dispute. Torts such as trespass, intimidation, nuisance and inducing breach of contract will protect property interests and ensure free access to private premises. Rights arising out of contracts or business relationships will also receive basic protection. Torts, themselves the creatures of common law, may grow and be adapted to current needs.

The basis for the court's decision was the right to freedom of expression that appears in section 2(b) of the *Charter of Rights and Freedoms*.

Free expression is particularly critical in the labour context. ... Working conditions, like the duration and location of work, parental leave, health benefits, severance and retirement schemes, may impact on the personal lives of workers even outside their working hours. Expression on these issues contributes to self-understanding, as well as to the ability to influence one's working and non-

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<sup>1</sup> [1963] 2 OR 81 (CA).

working life. Moreover, the imbalance between the employer's economic power and the relative vulnerability of the individual worker informs virtually all aspects of the employment relationship.... Free expression in the labour context thus plays a significant role in redressing or alleviating this imbalance. It is through free expression that employees are able to define and articulate their common interests and, in the event of a labour dispute, elicit the support of the general public in the furtherance of their cause

(Because the case involved a private dispute, the *Charter* did not directly apply. The court nevertheless held that it was entitled to develop the common law in a manner that was consistent with *Charter* values.)

The Supreme Court of Canada recognized that, as a result of its decision, “[s]ome economic harm to third parties is to be anticipated as a necessary cost of resolving industrial conflicts. ... [T]otal protection is not the goal. ... [T]hird parties are to be protected from *undue* suffering, not insulated entirely from the repercussions of labour conflict.” The court did not, however, believe that the negative consequences of its judgment would be widespread.

[W]e may usefully review what is caught by the rule that all picketing is legal absent tortious or criminal conduct. The answer is, a great deal. Picketing which breaches the criminal law or one of the specific torts like trespass, nuisance, intimidation, defamation or misrepresentation will be impermissible, regardless of where it occurs. Specific torts known to the law will catch most of the situations which are liable to take place in a labour dispute. In particular, the breadth of the torts of nuisance and defamation should permit control of most coercive picketing. Known torts will also protect property interests. They will not allow for intimidation, they will protect free access to private premises and thereby protect the right to use one's property. Finally, rights arising out of contracts or business relationships also receive basic protection through the tort of inducing breach of contract.

The court further suggested that any remaining difficulties may be addressed either through developments in tort law or through legislative restrictions on the right to picket.

[T]o the extent that it may prove necessary to supplement the wrongful action approach, the courts and legislatures may do so. Doubtless issues will arise around the elaboration of the relevant torts and the tailoring of remedies to focus narrowly on the illegal activity at issue. Doubtless too, circumstances will present themselves where it will become difficult to separate the expressive from the tortious activity. In dealing with these issues, the courts may be expected to develop the common law sensitively, with a view to maintaining an appropriate balance between the need to preserve third-party interests and prevent labour strife from spreading unduly, and the need to respect the *Charter* rights of picketers. The legislatures too may play a role. Clarification of the status of picketing at common law should not be viewed as a restriction on legislative intervention. Rather it should be seen merely as a tool to assist the courts where federal and provincial laws remain silent. As mentioned earlier, different circumstances in different parts of the country may call for specially tailored

legislative regimes. Legislatures must respect the *Charter* value of free expression and be prepared to justify limiting it. But subject to this broad constraint, they remain free to develop their own policies governing secondary picketing and to substitute a different balance than the one struck in this case.

In fact, some provinces had already enacted legislation to restrict secondary picketing. That was true in Alberta and British Columbia.

While the preceding discussion provides a useful backdrop to You Be the Judge 5.1, students should be able to answer the questions simply on the basis of the materials that appear in the text.

1. The actual issue in *Pepsi-Cola* was whether the employees could be restrained from conducting their secondary pickets. The Supreme Court of Canada refused to issue injunctions with respect to the pickets that were set up outside of the stores that sold Pepsi-Cola and outside of the hotel where the replacement workers were living. There was nothing independently wrongful about those pickets. The court did, however, impose an injunction to restrain the pickets that had been set up outside of the managers' homes. The court held, without much analysis, that those pickets amounted to both intimidation and nuisance.

Students would be expected to consider a number of possible torts. They would also be expected to recognize that there may not be enough information to provide definitive answers in some instances.

- *Assault* — As we saw in the Chapter 4, an assault occurs when the defendant intentionally causes the plaintiff to reasonably believe that offensive bodily contact is imminent. Depending upon the facts, that may have been true when the pickets were shouting threats at the managers' homes.
- *Trespass to Land* — A trespass to land occurs when the defendant improperly interferes with the plaintiff's land. The picketers may have committed a trespass to land if, for instance, they walked on the managers' lawns. Not so, however, if they remained on public property (eg sidewalks).
- *Conspiracy* — A conspiracy requires proof that two or more people agreed to act together to hurt the plaintiff. There are two problems with that argument in this case. First, as mentioned in the footnotes to the text, some jurisdictions have statutorily abolished the tort of conspiracy in the context of trade unions. (That is true in Saskatchewan, where *Pepsi-Cola* actually occurred.) Second, the requirements for conspiracy depend upon whether or not the defendants' actions were *otherwise* illegal. If the defendants were otherwise committing a tort or a crime, then it would be enough that they *should have known* that their activities would hurt the plaintiffs. If, however, the picketers' conduct was *not* otherwise illegal, then a conspiracy would exist only if the picketers' *primary purpose* was to hurt the plaintiffs. That fact could not be proven. The picketers' primary purpose was to hurt the company for which they worked.
- *Intimidation* — Intimidation occurs when the plaintiff suffers a loss because the defendant successfully threatened to commit an *unlawful* act against either the plaintiff or a third party. The requirement of an *unlawful* act would be difficult to



satisfy with respect to the secondary pickets that were set up outside of the stores and the hotel. However, because of the threatening nature of the pickets that were set up outside of the managers' homes, the tort was committed in those instances.

- *Interference with Contractual Relations* — The tort of interference with contractual relations occurs when the defendant disrupts a contract between the plaintiff and a third party. That might appear to be true in the case of the secondary picket outside of the stores that sold Pepsi-Cola. The Supreme Court of Canada, however, held that the picketers were *not* liable because they did not have sufficient knowledge of the contracts that might have existed between the company and the stores. The picketers did not, for instance, know whether the company had an ongoing contract with the stores, or whether the stores bought each shipment of merchandise under a new contract. (The decision seems rather narrow on that point.)
- *Interference with Economic Relations* — An interference with economic relations occurs when the defendant intentionally commits an unlawful act that hurts the plaintiff. Again, it would be difficult to prove that the picketers' behaviour toward either the stores or the hotel was otherwise unlawful or unauthorized.
- *Nuisance* — A nuisance occurs when the defendant unreasonably interferes with the plaintiff's enjoyment of property. In each instance, the court has to balance the parties' competing interests. With respect to the pickets that were operated outside of the stores and the hotel, the Supreme Court of Canada held that the defendants' behaviour was not unreasonable. It came to a different conclusion, however, with respect to the pickets that were operated outside of the *private residences* belonging to the managers. The same activity may be reasonable or unreasonable depending upon the surrounding circumstances.
- *Defamation* — Defamation occurs when the defendant makes a false statement that could lead a reasonable person to have a lower opinion of the plaintiff. Depending upon what the picketers were shouting at the managers' homes, they may have committed the tort of defamation. The managers' neighbours may have heard derogatory comments from the picketers.

2. As previously explained, the basis of the right to carry out secondary picketing lies in an extension of section 2(b) of the *Charter*. Students may remember that section from Chapter 1. But even if they do not remember the earlier discussion of the *Charter*, they should recognize that secondary picketing is important: (i) in terms of freedom of speech, and (ii) as a means by which employees may bring pressure to bear on employers during labour conflicts. That is not to say, however, that students must necessarily agree with the Supreme Court of Canada's position. *Pepsi-Cola* is a controversial decision. Some students may reasonably believe that it is unfair for employees, in order to extract more favourable terms of employment, to inflict economic injuries upon innocent shopkeepers.

## REVIEW QUESTIONS

1. The "intentional torts," discussed in Chapter 4, include assault, battery, false imprisonment, trespass to land, conversion, and detainment. For those torts, "intention" carries an unusual definition. The defendant acts "intentionally" as long as he or she

intended to do the physical act in question. It is not necessary for the plaintiff to further prove that the defendant knew, or even should have known, that the relevant act would hurt the plaintiff or constitute a tort. A trespass to land is committed, for instance, if the defendant intended to walk on a particular piece of land even if the defendant believed that he or she owned that property.

In contrast, the concept of “intention” is usually defined much differently for the purposes of the torts that are discussed in Chapter 5. The plaintiff generally must prove that the defendant actually realizes, and perhaps desires, that certain acts will have certain consequences for the plaintiff.

The differing definitions of “intention” reflect the fact that different torts affect different interests. The intentional torts pertain to the most important personal interests—*eg* the right to be safe from physical harm, the right to move about freely, the right to control privately held property. For that reason, the concept of “intention” has a very broad definition so as to generously protect the affected interests. In contrast, the torts examined in Chapter 5 affect less important interests—usually business interests. For that reason, the concept of “intention” is defined more narrowly to provide the defendant with greater freedom of action.

2. The statement is incorrect in several respects. (1) Most obviously, the tort does not require proof that the plaintiff and the defendant agreed to commit a certain act together. Instead, the plaintiff complains that the defendant made an agreement with another person to act in a certain way. (2) The tort does not require proof of an agreement to commit a wrongful act in the nature of a *crime*. If the defendant and another person knew, or should have known, that their actions would hurt the plaintiff, then it is enough for the plaintiff to prove that the impugned agreement involved the commission of an *unlawful* act. Unlawful acts include crimes, but they also include other torts, labour relations legislation, and licensing regulations. (3) If the defendant and the third party agreed to act together with the *primary purpose* of hurting the plaintiff, then the plaintiff need not even prove that the impugned agreement involved the commission of unlawful acts. Otherwise *lawful* acts may trigger liability for conspiracy as long as the defendant had the requisite intention of hurting the claimant.

3. Two-party intimidation occurs when the defendant directly coerces the plaintiff into suffering a loss. In contrast, three-party intimidation occurs when the defendant coerces a third party into acting in a way that hurts the plaintiff.

- The courts sometimes say that the tort of intimidation cannot be based on a threat to commit a breach of contract in a two-party situation. In that situation, since the plaintiff is a party to the relevant contract, he or she should simply sue on the contract itself, rather than rely on the tort of intimidation.
- The same rule does not apply in a three-party situation. In that situation, the plaintiff is threatened by the prospect that the defendant may breach a contract that the defendant has with the third party. The plaintiff is not a party to that contract and therefore does not have the option of suing on it (for the reasons

discussed in Chapter 8). The plaintiff therefore must find protection in the tort of intimidation.

4. As a general definition, the tort of intimidation occurs when the plaintiff suffers a loss as a result of the defendant's threat to commit an unlawful act against either the plaintiff or a third party. Most unlawful acts, if threatened, will support a claim of intimidation whether the target of the threat is the plaintiff or a third party. That is true, for instance, of a threat to commit a crime or some tort other than intimidation. The governing rules probably are different, however, if the defendant threatens to commit a breach of contract.

It is clear that the plaintiff may be entitled to sue for intimidation if the defendant threatens to commit a breach of contract against a third party. That makes sense insofar as the plaintiff, as a stranger to the relevant contract, cannot take action to compel the defendant's performance of its undertakings. (Even in that situation, however, the defendant may not be liable to the plaintiff for intimidation if the defendant reasonably believed that it was justified in threatening to break its promise to the third party.)

The circumstances are different, however, in a two-party case, where the defendant merely threatens to breach a contract that it has with the plaintiff. Though not entirely settled, it appears that, instead of suing for the tort of intimidation, the plaintiff is expected to take action against the defendant *within* the contract.<sup>2</sup>

5. A company may be in danger of committing direct inducement to breach of contract if it hires a person away from a rival company. That is true, however, only to the extent that four requirements are satisfied.

- The defendant must have *known about the contract* that the third party shared with the plaintiff. The defendant does not, however, have to know all of the details of that contract.
- The defendant must have *intended to cause* the third party to breach that contract. In that regard, it is irrelevant whether the defendant was motivated by a desire to help itself or hurt the plaintiff.
- The defendant must have *actually caused* the third party to break its contract with the plaintiff. A difficult issue often arises, however, if the defendant merely presented the third party with information and allowed that party to decide for itself whether or not it would break its contract with the plaintiff.
- The plaintiff must have suffered a *loss* as a result of the fact that the defendant induced a breach of contract. That requirement is usually satisfied by the fact that the third party left the plaintiff's employment.

6. Although the two torts may often overlap, there are distinct and there are situations in which one tort will apply even though the other does not. The tort of interference with economic relations is committed only if the defendant did something that was (apart from the tort itself) illegal or unauthorized. In contrast, the tort of *direct*

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<sup>2</sup> *Central Canada Potash Co v Saskatchewan* (1978) 88 DLR (3d) 609 (SCC).

inducement to breach of contract may be based on an act that was otherwise perfectly lawful.

7. The tort of deceit occurs if the defendant: (i) makes a false statement, (ii) which it knows to be untrue, (iii) with which it intends to mislead the plaintiff, and (iv) with which it actually causes the plaintiff to suffer a loss. The final part of that definition is satisfied if the plaintiff suffers a loss by *reasonably relying* on the defendant's statement. A reasonable person, however, normally relies only upon statements of fact and not upon opinions, predictions, and puffs.

- A reasonable person usually does not rely on another person's opinion, but rather forms its own opinions on the basis of facts.
- Likewise, a reasonable person does not rely upon another person's prediction because a reasonable person realizes that a prediction, which invariably pertains to the future, may not come true.
- And finally, a reasonable person does not rely on a puff, which is mere "sales talk," because sales talk is typically overstated and somewhat misleading.

8. That statement pertains to the tort of deceit. It is not entirely accurate. The tort of deceit raises liability for false statements, which the defendant knows to be untrue, and that are intended to mislead the plaintiff. Assuming that such a statement has been made, however, damages are not available for *every* loss that the plaintiff suffers in reliance. Liability instead is limited to losses that arise from the plaintiff's *reasonable reliance* upon the defendant's deceitful statement. As in many other situations, tort law expects the claimant to act reasonably. That rule hurts some plaintiffs by protecting defendants from unreasonable reactions. The tort of deceit, for instance, does not apply if a consumer relies upon a salesperson's "puffery." Reasonable people know that such talk is not to be taken seriously.

9. There are a number of problems with the traditional common law approach to occupiers' liability. Most stem from the fact that different levels of care are owed toward different categories of visitors.

- First, the traditional common law tort insensitively lumps different types of people together. For example, because they both enter land without permission, both a burglar and a harmlessly wandering child are considered trespassers.
- Second, the line between the different categories of visitors is often blurred. That is especially true for licensees (who are on the premises with permission, but who do not further the occupier's economic interests) and invitees (who are on the premises with permission, and who do further the occupier's economic interests).
- Third, a visitor's status may change from one moment to the next as the basis for a visit shifts. For instance, a customer who refuses to leave the store is transformed from an invitee into a trespasser.
- And finally, it often is difficult to decide whether or not a danger is hidden or unusual. That determination may be important, however, because while a licensee must merely be protected from hidden dangers about which the occupier actually

knew, an invitee must be protected from unusual dangers about which the occupier should have known.

Because of those difficulties, the provinces that still retain the common law rules have modified them by increasing the occupiers' obligations and reducing the significance of the different categories of visitors.

- An occupier's duty to a trespasser is now based on a concept of "common humanity" that strikes a more sensitive balance between the parties' interests. Consequently, the content of the occupier's obligations reflects a variety of factors, including: the age of the trespasser, the reason for the trespass, the nature of the danger that caused the injury, the occupier's knowledge of that danger, and the occupier's cost of removing that danger.
- Licensees and invitees are now generally treated the same. An occupier's obligation to a licensee is no longer limited to hidden dangers. Like an invitee, a licensee is entitled to protection from unusual dangers, even if they are not hidden.
- Finally, the courts in Newfoundland have gone even further. They have held that a single standard of care applies for all lawful visitors. An occupier must use as much care as is reasonable in the circumstances.

10. Rather than modifying the common law rules, several provinces have enacted legislation to govern occupiers' liability. Generally speaking, the statutory rules substantially simplify and broaden the common law rules. There are several significant differences between the common law rules and the statutory rules.

- First, the legislation applies not only to dangers that are caused by the condition of the premises, but also to activities that occur on the premises.
- Second, the legislation generally requires an occupier to provide all visitors with as much protection as is reasonable in the circumstances. In any given case, the precise content of that obligation reflects: (i) the potential danger to the visitor, (ii) the occupier's cost of removing the danger, (iii) the purpose of the visit, and (iv) the nature of the premises.
- Third, the statutes generally allow an occupier to avoid liability by issuing a warning.
- Finally, the statutes modify the rules regarding the liability of a landlord for injuries that a person suffers while visiting a tenant. A visitor can sue a landlord if an injury is caused by the fact that the landlord breached its contract with the tenant by failing to keep the premises in good repair.

11. As the name indicates, the tort of occupiers' liability imposes liability upon an "occupier" of premises. The traditional common law rules held that since a landlord of rented premises has ownership, but not immediate control, over the property, that party is not an occupier. That rule generally has been modified, however, under occupiers' liability legislation. Under statute, a landlord generally may be held responsible if a visitor is injured as a result of the landlord's failure to keep the premises in good repair.

12. Generally speaking, a nuisance occurs when the defendant unreasonably interferes with the plaintiff's ability to use and enjoy its own land. A nuisance occurs only if the defendant's interference is unreasonable. In deciding that issue, the courts look at a number of factors, including:

- the nature of the interference
- the nature of the neighborhood
- the time and day of the interference
- the intensity and duration of the interference
- the social utility of the defendant's conduct
- the defendant's motivation

The most important factor is the nature of the interference. The defendant's conduct is almost always considered unreasonable if it causes substantial physical damage. In contrast, the courts are less likely to hold the defendant liable if it merely impairs the enjoyment of the plaintiff's property. That is especially true if the defendant's interference is non-intrusive (*ie* if the defendant does not cause anything to travel onto the plaintiff's property).

13. The main remedies for nuisance are compensatory damages and injunctions. A court is usually willing to grant an injunction in order to stop a nuisance. Occasionally, however, the court may exercise its discretion to refuse an injunction. That is clearly true if the nuisance causes relatively little damage to the plaintiff and if damages can provide an adequate remedy. It may also be true if an injunction would create an intolerable hardship for the defendant or, more importantly, for the community as a whole. Finally, the courts sometimes award both compensatory damages and an injunction. The damages will take care of past losses and the injunction will prevent future losses.

14. The definition of the phrase "non-natural use" is important because it determines the scope of the tort. "Non-natural use" has been interpreted in two different ways.

- Some courts have said that the requirement refers to any use of land that creates a special danger.
- Other courts, however, have said that the requirement refers only to a use of land that creates a special danger *and* that is unusual.

Judges have recently preferred the second interpretation. As a result, the defendant cannot be held liable simply because it creates a special danger while acting in the normal course of a business operation. For instance, the act of burning scrub grass on a farm creates a special danger, but it is not unusual. It therefore cannot form the basis for an action in *Rylands v Fletcher*. In contrast, storing fireworks in a basement not only creates a special danger, it is also unusual. Consequently, it may underlie a successful action in *Rylands v Fletcher*.

15. Most torts are based on some form of fault. The defendant is usually held liable only if it intentionally, or at least carelessly, caused the plaintiff's injury. The rule in *Rylands v Fletcher*, in contrast, is a strict liability tort. The defendant may be held liable even though it acted as carefully as possible.

Note: The nature and justification of strict liability was considered in greater detail under the heading of Additional Teaching Suggestions. Students would not be expected to provide that information in response to this question unless that material had previously been discussed in class.

16. Even though the rule in *Rylands v Fletcher* is a strict liability tort, liability is not imposed *every time* that there is a non-natural use, an escape, and a loss.

- Liability is denied if the plaintiff *consented* to the defendant's activities.
- Liability is denied if the escape was caused by the act of a third party or a natural occurrence that the defendant could not have guarded against.
- Liability is denied if the plaintiff's injury was the inevitable result of an activity that the defendant was statutorily authorized to perform.

Finally, it should be noted that those defences are very difficult to prove.

17. The tort of defamation is intended to protect reputations. It is therefore committed only if the defendant makes a false statement that could lead a reasonable person to have a lower opinion of the plaintiff. The critical point is that the tort is based on the manner in which *other people* perceive the plaintiff. Publication is therefore necessary. Publication occurs when the defendant conveys an unfavourable statement about the plaintiff to a third party. Without publication, there is no chance that anyone will think less of the plaintiff as a result of the defendant's opinion. For that reason, I would not commit the tort if I made unflattering comments about you in the course of a private conversation that no one else overheard.

18. A privilege is an immunity from liability. Absolute privilege provides a complete immunity. It applies even if the defendant knowingly made a false statement for a malicious purpose. That defence is only available, however, when the law needs to encourage people to communicate without any fear of being sued. It is therefore usually limited to statements made:

- during parliamentary proceedings
- between high government officials dealing with government business
- by a judge, lawyer, litigant, or witness in the context of legal proceedings
- between spouses

Qualified privilege is not limited to specific situations. It may apply any time that two elements are satisfied:

- The defendant had a legal, moral, or social obligation to make a statement.
- And the person to whom it is made had a corresponding duty or interest in receiving it.

Unlike the defence of absolute privilege, the defence of qualified privilege is limited to statements that the defendant made in good faith. It is not available if the defendant knew that its statement was untrue or if the defendant was motivated by some malicious purpose.

19. A fair comment is an honest expression of an opinion regarding a matter of public importance. The defence is intended to protect honestly held, informed opinions

concerning an issue of public interest. The defendant therefore has to prove that a reasonable person would have interpreted the statement as an opinion based on fact, rather than as a fact.

The defence is especially important to businesses like newspapers, magazines, and television programs because such organizations are primarily concerned with disseminating information on significant social issues. Moreover, those businesses often publish the opinions of readers and viewers that are potentially defamatory. In certain provinces, legislation allows the publisher to use the defence of fair comment as long as an honest person could have held the same opinion. In provinces without such legislation, the publisher can use the defence only if it shares the opinion contained in the editorial. In any event, the defence is not available if the defendant acted maliciously.

20. The tort of defamation protects the reputation of human beings. It does not protect the reputation of a person's belongings or business. Those interests, however, are protected by the tort of *injurious falsehood*. That tort occurs when the defendant makes a false statement about the plaintiff's business that causes the plaintiff to suffer a loss. It may take a variety of forms.

- **Slander of Title:** The defendant may falsely say that the plaintiff does not own a particular piece of land, therefore making it difficult for the plaintiff to sell that property for its full value.
- **Slander of Quality:** The defendant may falsely disparage the plaintiff's products in a way that causes potential customers to take their business elsewhere. The tort is not committed, however, if the defendant merely suggests that its products are better than the plaintiff's; nor if the defendant's statement about the plaintiff's business is true; nor if the defendant tries to gain an advantage by making a false statement about the high quality of its *own* products.
- **Other Situations:** Even if there is no slander of title or slander of quality, the defendant may be held liable for making some *other* type of false statement about the plaintiff's business. For example, in the bizarre case of *Manitoba Free Press v Nagy*, the defendant newspaper said that the plaintiff's house was haunted, and therefore made it difficult for the plaintiff to sell that property.

Regardless of the precise form of the injurious falsehood, the plaintiff must prove three elements.

- **False Statement:** The defendant must make a *false* statement about the plaintiff's business or property. Because the tort is concerned with reputations, that statement must be made to a third party.
- **Malice:** The defendant must have acted out of *malice*. The meaning of that requirement is, however, somewhat unclear. The defendant certainly may be held liable if it made the false statement for the purpose of hurting the plaintiff. However, it also appears to be enough if the defendant either knew that the statement was false or was reckless as to the truth of the assertion, and if the defendant either intended to hurt the plaintiff or knew that the plaintiff was likely to be injured.



- **Loss:** The defendant's false statement must have caused the plaintiff to suffer a loss. The plaintiff may prove, for example, that a customer broke a contract to purchase the plaintiff's goods, or that a customer took its business elsewhere, or that a customer was willing to pay only a reduced price. It is not enough, however, for the plaintiff to merely show that its profits began to decline *after* the defendant uttered the false statement. A business may fall on hard times for a variety of reasons. A court will therefore insist upon persuasive evidence that the defendant's injurious falsehood actually *caused* the plaintiff's loss.

### CASES AND PROBLEMS

1. The facts suggest that Cardinal may be the victim of the tort of two-party intimidation. (The relevant action is for two-party intimidation even though there were more than two parties involved. The defendants tried to directly intimidate the plaintiff. They did not threaten a third party in order to affect the plaintiff.) Liability would be premised upon four factors.

- First, the defendants' actions were clearly unlawful because they amounted to tortious and criminal conduct (*eg* trespass to land). If those acts were not unlawful, the tort of intimidation tort would not arise.
- Second, those acts were performed as part of an implicit threat to injure the plaintiff unless he complied with the defendants' demand to vacate the premises.
- Third, it is irrelevant that the defendants may have been motivated by a desire to earn money for themselves, rather than by a primary desire to hurt the plaintiff.
- Finally, however, the facts do not reveal whether or not the threat succeeded. The tort would arise only if the plaintiff complied with the defendants' threat by leaving.

[Based on *Mintuck v Valley River Band No 63A* (1977) 75 DLR (3d) 589 (Man CA).]

2. Peacock's action against Koln would fail for four reasons.

- First, Koln did not know that DeJohnette had already entered into a contract with Peacock – he was merely worried that those parties *might* enter into an agreement.
- Second, Koln did not intend to cause DeJohnette to breach its contract with Peacock.
- Third, Koln did not actually cause DeJohnette to breach its contract with Peacock. Although DeJohnette was tempted to buy from Koln instead, it ultimately decided to honour its agreement with Peacock.
- And finally, because DeJohnette ultimately decided to honour its original agreement, Peacock did not suffer any loss.

3. Roxel can successfully sue Ash and Izzy. The defendants agreed to act in a way that hurt the plaintiff. Significantly, because that agreement involved acts that were unlawful in themselves (because they violated the *Competition Act*), Roxel's claim will not fail simply because Ash and Izzy were motivated primarily by a desire to maintain their own profits, rather than by a desire to injure Rose. Because the conspiracy involved unlawful acts, Roxel would only have to prove that Ash and Izzy should have known that their agreement would cause her to suffer a loss. [based on *Canada Cement LaFarge Ltd*

*v BC Lightweight Aggregate Ltd* (1983) 145 DLR (3d) 385 (SCC) – as discussed below in a Case Brief]

4. The tort of deceit occurs if the defendant makes a false statement, which it knows to be untrue, with which it intends to mislead the plaintiff, and which causes the plaintiff to suffer a loss. The court must be satisfied that:

- the defendant made a *false statement*
- the defendant *knew*, at the time of making the statement, that it was false
- the defendant made the statement with the *intention of misleading* the plaintiff
- the plaintiff *suffered a loss* as a result of *reasonably relying* upon the statement

Although Arvid's sense of grievance against Miriam is understandable, it is far from clear that she committed the tort of deceit. The facts provided merely indicate that Miriam had inaccurately (and perhaps even unreasonably) predicted the outcome of her business venture. More specifically, the gist of her presentation to Arvid merely pertained to the *future*. As a general rule, liability will not be imposed if the defendant made an inaccurate prediction of the future. The plaintiff must prove instead that the defendant made a *false statement* of past or existing fact.

Arvid's best hope is to adduce additional evidence with respect to the document that he received from Miriam. That document predicted future sales, but it also purported to provide accurate information regarding Miriam's past business ventures. If that information actually was incorrect, then Arvid might have a good claim in deceit.

However, even if Miriam's past revenue figures were wrong, Arvid also would have to prove that she *knew* of that inaccuracy and that she *intended to mislead* him. Again, the claim would require additional evidence.

If Arvid was able to establish the first three elements of the tort of deceit, then there is no reason to suspect that he would not also be able to show that, in investing in Miriam's scheme, he had *reasonably relied* upon her information.

Finally, if Miriam was held liable for deceit, Arvid would be entitled to compensation for his loss. Tort law reckons that loss looking backward. Arvid would be entitled to be placed in the position that he would have enjoyed if the tort had not been committed. Miriam accordingly would be liable to pay \$5000 to Arvid.

Significantly, because Arvid's claim would lie in tort, rather than contract, Miriam would not be required to fulfill Arvid's expectation by paying to him the profit that he would have enjoyed if the contract had been fulfilled as promised.

5. It is unlikely that Alkabe would be held liable under the traditional common law rules. If Jyoti was classified as a trespasser, the company, as the occupier, would merely have been required to refrain from intentionally or recklessly injuring her. Even if she was classified as a licensee, on the basis that the corporation impliedly consented to her presence by not enforcing its prohibition against trespassing, Alkabe's only obligation

was to warn her of hidden dangers. As the ramp was large, and therefore presumably not hidden, there would not have been any breach.

Under the modified common law rules, the company would have owed a duty of common humanity to Jyoti if she was a trespasser. A judge would then have to determine whether or not, given all of the circumstances (including Alkabe's knowledge of the nature of the trespass and Jyoti's age), that standard had been met. If Jyoti was a licensee, Alkabe would have been required to protect her from unusual dangers. It probably did not do so because it allowed her to jump her bike over the ramp.

Finally, if the accident occurred in a jurisdiction that has legislation, Jyoti's classification would not be relevant and Alkabe would have been required to take as much care as was reasonable in the circumstances. That standard probably was not met.

[Based on *McErlean v Sarel* (1987) 42 DLR (4th) 577 (Ont CA).]

6. The case upon which this exercise is based succeeded on three grounds: (1) nuisance, (2) *Rylands v Fletcher*, and (3) negligence. Because that third option is not considered until the next chapter, this answer deals only with nuisance and *Rylands v Fletcher*.

**Nuisance** A nuisance occurs when the defendant unreasonably interferes with the plaintiff's use and enjoyment of its own land. As on the present facts, there is a tension between the way in which the defendant wants to use *his* property and the way in which the plaintiff wants to use *her* property. The courts have a great deal of flexibility in resolving a dispute between neighbours.

A nuisance occurs if the defendant *unreasonably interferes* with the plaintiff's use of its land. Interference can happen in a variety of ways. As on the current facts, the simplest situation occurs when the defendant causes physical damage to the plaintiff's property. As a result of the manner in which Aguiar has used his land, *Hamilton House* has been badly damaged and Barb Howlett has been without potable water for a year. Moreover, while liability requires proof of an *unreasonable* interference, a court would easily find that requirement to be satisfied in this instance.

In defence, Aguiar might argue that, since he had completed work on his property before Howlett purchased *Hamilton House*, she cannot complain about having moved to an existing nuisance. As a matter of precedent, however, that argument will not succeed. An unreasonable interference with land cannot be justified in that manner.

**Rylands v Fletcher** The rule in *Rylands v Fletcher* states that the defendant can be held strictly liable for its non-natural use of land if something escapes from its property and injures the plaintiff. That tort requires proof of two elements.

- **Non-natural Use of Land** The plaintiff must prove that the defendant made an *non-natural use* of his land. A court likely would interpret that to mean that Aguiar must have created a *special and unusual* danger. That requirement is

satisfied in this case because Aguiar changed the topography of his land and channeled a natural stream through PVC piping.

- *Escape* The plaintiff must prove that something associated with the non-natural use escaped from the defendant's land. In this case, a great deal of water escaped from Aguiar's land and flooded into *Hamilton House*.

Interestingly, because *Rylands v Fletcher* is a *strict liability* action, Howlett need not prove that Aguiar committed the tort either intentionally or negligently. Given the ultra-hazardous nature of Aguiar's non-natural use of his land, liability arises simply because he did, in fact, improperly cause Howlett to suffer a loss. As Harris J explained in the decision upon which this exercise is based:

The defendants have meddled with the forces of nature and were oblivious to its demands. They did so ... for their own convenience and casually to the profound detriment of their neighbours' safety, security and dignity.

[Based on *Ivall v Aguiar* [2007] OJ No 1962 (SCJ) (QL).]

7. Alonzo should rely upon the rule in *Rylands v Fletcher*. There are several reasons for that advice.

- First, although the meaning of "non-natural use" remains somewhat unsettled, it is strongly arguable that the company's use of the ravine satisfies that requirement, even if that requirement is interpreted to include a use that both creates a danger and is unusual or uncommon.
- Second, the methane gas was a dangerous substance that escaped from the defendant's property.
- Third, the plaintiff was injured by that substance.
- And fourth, liability under *Rylands v Fletcher* is strict in the sense that the defendant's reasonable attempt to prevent leakage of gas provides no defence.

It should also be noted that the action in nuisance would not apply because the gist of Alonzo's complaint does not pertain to an interference with the use and enjoyment of his land. He was standing on public property at the time of the accident. Likewise, the tort of occupiers' liability is inapplicable because Alonzo was not injured while he was on the company's premises.

[Based on *Gertsen v Metro Toronto* (1973) 41 DLR (3d) 646 (Ont HC).]

8. There are really three parts to this question: (i) has the tort of nuisance been committed?, (ii) does the defendant nevertheless have a defence?, and (iii) what remedy will likely be awarded if the defendant is held liable?

- *Nuisance* — The defendant has committed the tort of *private nuisance*. (Since the tort affects a large segment of the community as a whole, it may also have committed the tort of *public nuisance*, which is mentioned in a footnote in the text. It is possible for both forms of nuisance to exist in the same situation.) The noise associated with the new runway unreasonably interferes with the plaintiffs' enjoyment of their land. That is true even though the plaintiffs have not suffered

any physical damage to their property. Given the extent of the noise, it is enough that their enjoyment of their land has been substantially impaired.

- *Defence* — Although a tort has been committed, the defendant will not be held liable. It will be able to successfully plead the defence of *statutory authority*. This was not a case in which the nuisance was merely a *possible* result of a legislative scheme. The statutes and regulations in this instance dictated the location and the direction of the new runway. In the circumstances, it was *inevitable* that air traffic would pass directly over Bridgeport. That undoubtedly creates a real hardship for the plaintiffs. The tort of nuisance, however, is designed to strike a balance between the needs of the claimants and the needs of the community as a whole. And as part of that scheme, the defence of statutory authority allows the legislature to decide that a few people must suffer in the interests of the greater good.
- *Remedy* — The plaintiffs are not entitled to any remedy. An interesting question would have arisen, however, if the defence of statutory authority was not available (*eg* because the legislative scheme was not created in a way that made the nuisance *inevitable*). While a judge will often impose an injunction in order to stop a nuisance, that remedy would be more difficult to justify in this case. Given the tremendous expense involved in building the new runway, as well as the adverse consequences that its closure would have on the larger community, the plaintiff might be confined instead to compensatory damages.

[Based on *Sutherland v Canada* (2002) 215 DLR (4th) 1 (BC CA).]

9. Jiang has a strong case of defamation. A reasonable person's opinion of Jiang would certainly be diminished as a result of an allegation that Jiang misappropriated money from the Student Union.

Jiang may sue Dina, as the writer of the story that was published in the *Metro Squawker*. A statement cannot be defamatory unless it is *published* or communicated to a third person. For the same reason, the newspaper itself could be liable for defamation. Regardless of the theory of vicarious liability for an employee's torts, the newspaper literally published the allegations against Jiang. Carl also might be sued. He communicated his accusations to Dina, as well as the other members of the Union who were present in his dorm room.

Jiang will not win the case, however, if he actually is guilty as alleged. The defence of *justification* holds that a true statement cannot be considered defamatory even if it ruins a person's reputation. The court therefore would be interested to learn whether Jiang in fact misappropriated funds from the Union.

Even if the allegations are inaccurate, Carl might try to avoid liability under the defence of *qualified privilege*. As President of the Union, he has a duty to investigate allegations of the Treasurer's improprieties. That defence, however, presumes not only that Carl had a duty to speak, but that his audience had a duty to hear. The other members of the Union

have a duty to hear in appropriate circumstances (such as an official Union meeting), but the same does not apply to Dina, as a reporter, in Carl's dorm room.

Dina might argue the defence of *fair comment*. The facts, however, indicate that her allegation of impropriety constituted a statement of fact rather than an opinion based upon fact. The defence only applies to opinions made on matters of public importance.

Finally, Dina might try to find protection in the defence of *public interest responsible journalism*. That defence may apply if a reporter, despite making factual errors, acted in accordance with the standards of responsible journalism. The defence is guided by ten considerations. Looking at those factors, it is unlikely that the defence would apply in this instance. Some factors are especially important:

- The allegation against Jiang case is very *serious*.
- Carl was the only source of Dina's information. The *reliability* of Carl's investigation and conclusions was very low. He acted on incomplete information and he lacks the expertise required for a proper investigation.
- There is no evidence that Dina took *steps to verify* Carl's information.
- There was no *urgency* to the matter as Dina knew that the Union would probably take up the allegations during their next meeting.
- There is no evidence that Dina gave Jiang an *opportunity to provide input*.
- Nor is there evidence that Jiang enjoyed an opportunity to *tell his side of the story*.

10. The plaintiff's claim in defamation might succeed. Significantly, the tort may be committed even if the defendant did not intend to refer to the plaintiff, or indeed, was not even aware of the plaintiff's existence. The applicable test asks whether a reasonable person could identify the plaintiff as being the subject of the defendant's statement. If that requirement is satisfied, the other elements of the tort also appear to be met: (i) the statement would tend to lower the plaintiff's reputation in the opinion of reasonable people, and (ii) it was published through the sale of the comic book. None of the major defences are applicable. Specifically, the defendant's statement was not justified. Although Tony Twist was an enforcer in the NHL, he was not the morally depraved character that appeared in Spawn. In the real life case upon which this question is based, an American jury found for the plaintiff and awarded an astounding \$24 500 000 in damages. Although that verdict was set aside, a second jury awarded the plaintiff \$15 000 000. Canadian law undoubtedly would exercise greater restraint on the remedial issue.

[Based on "Ex-NHLer Nets \$24.5M in Comic-Book Lawsuit: Villainous Character Given Same Name," *National Post*, 7 July 2000; "Former Tough Guy Tony Twist Awarded \$15million in Case vs McFarlane," *Globe & Mail*, 13 July 2004; see also *E Hulton & Co v Jones* [1910] AC 20 (HL).]

11. The class action almost certainly will fail. The facts of this exercise are closely based on *Bou Malhab v Diffusion Métromédia CMR inc.* On that occasion, the Supreme Court of Canada denied liability on the ground that that because the class was large (approximately 1100 drivers a) and diverse, a reasonable listener would not ascribe the negative attributes to any particular person. The defendant's comments were on par with

a statement that “All lawyers are liars,” which the court was confident would not be taken seriously by a reasonable person. It is possible for a defendant to be held liable for defamation of a group of individuals. Liability is difficult to establish, however, because the plaintiff must prove that the reasonable person would ascribe the negative characteristics that are contained in the defendant’s statement to each member of the group.

[Based on *Bou Malhab v Diffusion Métromédia CMR inc* (2011) 328 DLR (4th) 385 (SCC)]

12. Canaural has five possible causes of action.

- *Breach of Contract* — Although the issue is not addressed in this chapter, Ballack and Heinz are clearly in breach of contract.
- *Intimidation* — DeutscheSonic might be held liable to Canaural for the tort of three-party intimidation. That would depend upon the interpretation of the president’s discussion with Ballack and Heinz. A court might conclude that Ballack and Heinz quit their jobs with Canaural as a result of threats that DeutscheSonic made against them (*ie* they left out of fear for their own well-being, rather than out of a desire to take up more lucrative and stable positions with DeutscheSonic), and that Canaural suffered a loss as a result. Significantly, however, intimidation would require proof that those threats were unlawful in themselves. And it is not clear that that requirement could be met. DeutscheSonic’s illegal activities arguably depended upon the willingness of Ballack and Heinz to accept the plan. If Ballack and Heinz had stood firm, it is not clear that DeutscheSonic was in a position to do anything to anyone.
- *Interference with Contractual Relations* — DeutscheSonic committed the tort of directly inducing breach of contract. The president did not merely outline the relative benefits of working for one company over the other. Instead, he intentionally persuaded Ballack and Heinz to break the employment contracts that he knew they had with Canaural. Canaural suffered a loss as a result.
- *Interference with Economic Relations* — In this situation, Canaural would also be able to establish the tort of interference with economic relations. DeutscheSonic’s actions were unlawful in themselves because (among other things) they constituted the tort of inducing breach of contract. DeutscheSonic knew that its actions would financially ruin Canaural.
- *Conspiracy* — Finally, DeutscheSonic, Ballack and Heinz would all be liable for the tort of conspiracy. Even if their primary purpose was to benefit themselves, rather than to hurt Canaural, they participated together in acts that were otherwise illegal (*eg* because they involved the tort of inducing breach of contract) and that they knew would destroy Canaural.

In each instance, Canaural would be entitled to compensatory damages equal to the value of the financial losses that it suffered. Given the deliberate and malicious nature of the defendants’ conduct, a court might also exercise its discretion to award punitive damages.

[Based on *HL Weiss Forwarding Ltd v Omnus* (1976) 63 DLR (3d) 654 (SCC).]

## CASE BRIEFS

***Allen v Flood*** [1898] AC 1 (HL)—note 2

A company hired the plaintiff to carry out woodwork on its ship. The defendant union objected to that arrangement because the plaintiff previously had done similar work for another ship without being a member of the union. The defendant therefore threatened to withdraw the services of all of its member by calling a *lawful* strike unless the company fired the plaintiff. The company followed the advice and terminated the plaintiff's employment in a *lawful* way that did not violate the employment contract. The plaintiff then sued the defendant. The jury found that the defendant had acted maliciously with the sole intention of punishing the plaintiff for his past actions. The court nevertheless dismissed the claim. It did so on the ground that the defendant had procured the termination of the plaintiff's employment with the company by using entirely *lawful* means. The case therefore stands for the general proposition that one individual is entitled to inflict economic harm upon another so long as lawful means are used. It is irrelevant that the defendant acted intentionally or even maliciously.

***Daishowa Inc v Friends of the Lubicon*** (1998) 158 DLR (4th) 699 (Ont Gen Div)—note 4

The defendant organization objected to the fact that the plaintiff company was conducting a logging business on land that was subject to a land claim by the Lubicon Cree. The defendant therefore organized a consumer boycott of the plaintiff's products. It approached companies that purchased products from the plaintiff. If such a business did not agree to cooperate with the boycott, the defendant applied pressure by establishing an informational picket outside of its premises. As a result of those efforts, the plaintiff lost a great deal of business and a great deal of money. It therefore sought an injunction, on the basis of the tort of conspiracy, to restrain the defendant from continuing on with its program. The court rejected that claim on the basis that the defendant had not acted for the primary purpose of hurting the plaintiff. (Furthermore, it was irrelevant that the defendant also had not acted for its own benefit, but rather for the promotion of a political cause.)

***Canada Cement LaFarge Ltd v BC Lightweight Aggregate Ltd*** (1983) 145 DLR (3d) 385 (SCC)—note 6

The plaintiff company produced materials that were used in the manufacture of concrete products. The defendant companies were in the business of manufacturing cement products. The parties all entered into a series of agreements under which the plaintiff promised that it would not compete with the defendants, and the defendants agreed to purchase materials from the plaintiff. After those agreements expired, the defendants began to buy their materials from another supplier. The plaintiff suffered a financial loss as a result. The plaintiff then claimed that it had been injured as a result of the defendants' commission of the tort of conspiracy.

In the Supreme Court of Canada, Estey J reviewed the rules regarding the tort of conspiracy. He distinguished between two situations. First, if the defendants' actions were *not* unlawful in themselves, then the tort is committed only if the defendants' primary purpose was to hurt the plaintiff. Second, if the defendants' actions *were*



unlawful in themselves, then the tort is committed as long as the defendants knew or should have known that the plaintiff would be injured. In that respect, Canadian law is different from English law. In England, the tort of conspiracy *always* requires proof that the defendants' primary purpose was to hurt the plaintiff: *Lonrho Ltd v Shell Petroleum Ltd (No 2)* [1982] AC 173 (HL).

On the facts, the court rejected the claim on the basis that there was no evidence that the plaintiff's loss was actually caused by the conspiracy between the defendants. Estey J also doubted the validity of the plaintiff's claim in light of the plaintiff's earlier participation in the conspiratorial scheme.

***Rookes v Barnard*** [1964] AC 1129 (HL)—note 7

The plaintiff was a member of the defendant union. He was also an employee of an airline named BOAC. The plaintiff became involved in a dispute with the union and therefore resigned his membership. The union then threatened to withdraw all of its services from BOAC unless BOAC terminated the plaintiff's employment. BOAC succumbed to the pressure and fired the plaintiff. The plaintiff then successfully sued the defendant union for the tort of intimidation. The defendant had coerced BOAC to act in a manner that injured the plaintiff. Moreover, the defendant's threat to BOAC was unlawful because it was made pursuant to a conspiracy between the various members of the union.

It is worth noting, as well, that the facts created a case of three-party intimidation. The plaintiff could not resist the defendant's pressure by suing the defendant for breach of contract for the simple reason that there was no contractual nexus between those two parties. Furthermore, the plaintiff could not sue BOAC because, while the employer had fired the plaintiff without cause, it had also provided payment in lieu of notice.

Aside from being a leading authority on the tort of intimidation, *Rookes v Barnard* also established the English rule that punitive damages are available only if: (i) they are statutorily authorized, (ii) government servants acted in an arbitrary, oppressive or unconstitutional way, or (iii) the defendant cynically committed a tort after determining that it could thereby earn a profit in excess of the plaintiff's compensable losses. As explained in the last chapter, Canadian law takes a broader view of the matter (but does not award punitive damages as often or as generously as American law).

***Central Canada Potash Co v Saskatchewan*** (1978) 88 DLR (3d) 609 (SCC)—note 8

The plaintiff company received a lease from the defendant province that allowed it to mine for potash. A term of that lease stated that the plaintiff's rights could be terminated if it failed to comply with the applicable legislation. The defendant enacted regulations that placed a quota on the amount of potash that the plaintiff could mine on an annual basis. The plaintiff insisted on exceeding that quota. The defendant therefore threatened to terminate the lease unless the plaintiff complied with the legislation. The plaintiff then claimed that the defendant had thereby committed the tort of intimidation.

The court rejected the plaintiff's claim. It drew a distinction between three-party intimidation, as in *Rookes v Barnard*, and two-party intimidation, as on the facts before it. In that latter situation, it said that the plaintiff should be restricted to its contractual remedies. It would be undesirable to allow a contractual party to capitulate to an allegedly improper contractual demand and then to sue for intimidation. The proper route in such circumstances is for the plaintiff to resist the defendant's pressure, if necessary, by suing on the contract itself.

The court also rejected the plaintiff's claim on the basis that the defendant's actions were entirely lawful when taken. In threatening to terminate the lease, the province did no more than threaten to enforce its rights under that contract. It was irrelevant that the regulation upon which the defendant relied in making that threat was subsequently struck down as being *ultra vires*. The legality of the defendant's threat was assessed at the time that the threat was made.

***Lumley v Wagner*** (1852) 42 ER 687 (Ch D)—note 9

The essential facts appear in Case Brief 5.1.

***DC Thompson & Co Ltd v Deakin*** [1952] Ch 646 (CA)—note 10

The plaintiff was a printing company. It prohibited its employees from joining a union and it fired one employee who had joined a particular trade union. That same union then organized a strike action against the plaintiff. As part of that campaign, it discouraged members of other unions from doing business with the plaintiff.

The plaintiff bought its paper supplies from a particular company. That company noticed that its employees were reluctant to make deliveries to the plaintiff. The company therefore informed the plaintiff that, in the circumstances, it was unable to fulfill its contractual obligations to supply paper.

The plaintiff sought an injunction to restrain the defendant union from procuring the company's breach of contract. The court refused that order because the plaintiff had not shown that the defendant, with knowledge of the contract and with an intention to induce breach, used unlawful means to cause the company to break the contract.

***Alleslev-Krofchak v Valcom Ltd*** (2010) 322 DLR (4th) 193 (Ont CA)—note 13

In *Reach MD Inc v Pharmaceutical Manufacturers Association of Canada*,<sup>3</sup> the Ontario Court of Appeal adopted a very broad test of "unlawfulness" for the purposes of the tort of unlawful interference with economic relations. That approach has been followed by some Canadian courts.<sup>4</sup> The Ontario Court, however, has not been consistent on that issue.

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<sup>3</sup> (2003) 227 DLR (4th) 458 (Ont CA).

<sup>4</sup> *UFCW Local 1252 v Cashin* (2002) 216 Nfld & PEIR 41 (Nfld CA); *Tran v Financial Debt Recovery Ltd* (2000) 193 DLR (4th) 168 (Ont SCJ) set aside on other grounds (2001) 40 CCLT (3d) 106 (Ont Div Ct); *A & B Sound Ltd v Future Shop Ltd* (1995) 25 CCLT (2d) 1 (BCSC). Many of the leading authorities are reviewed by Lambert JA in *No 1 Collision Repair & Painting (1982) Ltd v Insurance Corp of British Columbia* (2000) 80 BCLR (3d) 62 (CA).

A very different approach to the element of unlawfulness was employed in *Alleslev-Krofchak v Valcom Ltd.*<sup>5</sup> That case involved bad behaviour by a company that wanted to do business with the Department of National Defence. The Department issued a request for proposals that required a bidder to have experience with a certain method of contracting. The defendant, lacking such experience, retained the plaintiff, who had considerable experience. The plaintiff, in turn, brought the defendant together with an American company that was well-suited to the project. The proposal was arranged so that the American partner, as sub-contractor, was managed by the plaintiff, while the defendant, as main contractor, was managed by an individual named Lewis.

Soon enough, however, the defendant took steps to eliminate the plaintiff from the project. It circulated defamatory emails and it directed the American partner to terminate the plaintiff's position. When the American company refused, the defendant suspended the sub-contract, locked out the plaintiff, and installed Lewis as manager. The plaintiff responded with a variety of claims, including defamation, conspiracy, and intentional interference with economic relations by unlawful means. Liability was imposed at trial. On appeal, an issue arose with respect to the element of "unlawfulness" within the tort of intentional interference. Goudge JA, writing for a unanimous panel, held that the element of unlawfulness required proof that the defendant committed a civilly actionable wrong against a third party. The explanation for that view is found in an English case.

[A] person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him. If such interference is justifiable in point of law, he has no redress. Again, if such interference is wrongful, the only person who can sue in respect of it is, as a rule, the person immediately affected by it; another who suffers by it has usually no redress; the damage to him is too remote, and it would be obviously practically impossible and highly inconvenient to give legal redress to all who suffer from such wrongs. But if the interference is wrongful and is intended to damage a third person, and he is damaged in fact — in other words, if he is wrongfully and intentionally struck at through others, and is thereby damnified — the whole aspect of the case is changed: the wrong done to others reaches him, his rights are infringed although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done.<sup>6</sup>

On the facts of *Alleslev-Krofchak*, that meant that the unlawfulness of the defendant's actions could not be satisfied on the basis of its defamatory statements regarding the plaintiff. It could be established, however, by proof that, as against the *American company*, the defendant was subject to liability for breach of contract and the tort of conspiracy. Since those claims were not actionable by the plaintiff, they provided the means by which she could prove that the defendant had, through unlawful acts, intentionally interfered with her economic relations.<sup>7</sup>

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<sup>5</sup> (2010) 322 DLR (4th) 193 (Ont CA).

<sup>6</sup> *OBG Ltd v Allan; Douglas v Hello!; Mainstream Properties Ltd v Young*, [2008] 1 AC 1 (HL), quoting *Quinn v Leatham* [1901] AC 495 at 534-35 (HL).

<sup>7</sup> See also *Correia v Canac Kitchens* (2008) 91 OR (3d) 353 (CA).

***Barber v Vrozos*** (2010) 322 DLR (4th) 577 (Ont CA)—note 13

Ten days after *Alleslev-Krofchak* was released, the same court decided *Barber v Vrozos*.<sup>8</sup> Curiously, although LaForme JA both concurred in the earlier judgment and co-wrote the later one, *Barber* contains no reference to *Alleslev-Krofchak*. Nor does *Barber* mention the English test of “unlawfulness” that the Court of Appeal had endorsed in *Alleslev-Krofchak*. Instead, it adopts the elements of the tort as formulated in *Reach MD*. The case began with an attempt to alleviate the hardships experienced by Toronto’s tourism industry in the summer of 2003 as a result of a SARS outbreak. The solution, it was decided, was a concert by the Rolling Stones. The defendant Molson, acting as the event sponsor, held exclusive rights to sell food, drinks, and merchandise. Molson sold the exclusive right to sell water to Vrozos; Vrozos, in turn, sold that exclusive right to Stephen Barber; and Barber assigned that exclusive right to the plaintiff company. Unfortunately, notwithstanding those arrangements, Molson and Vrozos also allowed other parties to sell water at the concert. The event consequently was a disaster for the plaintiff. Despite supplying 3 000 000 bottles of water, it was undercut by the other suppliers and sold only 250 000. The plaintiff successfully sued Molson and Vrozos on a number of counts. On appeal, the Court of Appeal considered Molson’s liability for the tort of intentional interference with economic relations by unlawful means. The issue of unlawfulness was satisfied because Molson, in allowing other parties to supply water, breached its contractual undertaking to provide Vrozos with the exclusive right to distribute water. Moreover, it did so knowing that the plaintiff would be adversely affected as a result. In that sense, *Barber* is consistent with *Alleslev-Krofchak*. The underlying reasoning, however, is irreconcilable with that earlier decision. Rather than requiring some form of actionable wrong against a third party (*ie* Vrozos), the court in *Barber* endorsed the broad approach found in *Reach MD*. There is no need, wrote Gillese and LaForme JJA, for proof of an illegal or tortious act. It is sufficient that Molson committed an act that it was not at liberty to commit.

***Derry v Peek*** (1889) 14 App Cas 337 (HL)—note 15

The defendants were the directors of a company. They caused the company to issue a prospectus regarding a possible business venture. That prospectus contained a false statement to the effect that the company had received government authorization to use “steam or mechanical power instead of horses.” In fact, that authority had not yet been granted by the Board of Trade and, indeed, was eventually refused. In reliance on the prospectus, and in ignorance of the error, the plaintiff invested in the company. He later lost his investment when the company folded. He then sued the defendant directors for the tort of deceit. That claim failed because the defendants, while in error, had not acted with an intention to deceive, nor without any belief in the truth of the prospectus, nor with reckless disregard as to the truth or falsity of the prospectus.

***Nickell v City of Windsor*** (1926) 59 OLR 618 (CA)—note 18

While returning books to a public library, the plaintiff slipped on an ice-covered step. The librarian, who was in charge of the operation, knew about the ice patch for at least three hours, but did not take any steps to reduce the danger. The plaintiff sued for occupiers’ liability. The action was allowed. Without much analysis on point, the court classified the

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<sup>8</sup> (2010) 322 DLR (4th) 577 (Ont CA).

plaintiff as an invitee and held that the defendant failed to take appropriate steps for her safety.

***Coffyne v Silver Lake Regional Park Authority*** (1977) 75 DLR (3d) 300 (Sask QB)—note 18

The plaintiff visited a provincial park operated by the defendant. The park featured a swimming area with a diving board that was four feet high. The water was murky and the bottom could not be seen from the surface. The plaintiff dove off the board and was injured after he struck his head on the bottom of the lake, which was only about six or seven feet deep. He sued the defendant for occupiers' liability. The court allowed the claim. It classified the plaintiff as a licensee and held that the defendant consequently was required to warn the plaintiff regarding hidden dangers about which it actually knew. The defendant had failed to do so.

***Francis v IPCF Properties Inc*** (1993) 136 NBR (2d) 215 (QB)—note 19

The plaintiff, a 66 year old woman, was injured after she slipped and fell on a patch of ice in a supermarket parking lot. As an invitee under the traditional common law rules, she was entitled to succeed in her action for occupiers' liability only if the ice patch constituted an "unusual danger." The court held against her. "A series of decisions of the courts of this province have repeatedly held that ice in a parking lot in the winter in New Brunswick does not constitute an unusual danger. ... In my opinion the nature of parking lots in the winter in this climate is such that it is inevitable that there will be various patches of ice."

***Waldick v Malcolm*** (1991) 83 DLR (4th) 114 (SCC)—note 19

The plaintiff visited a farm occupied by his sister and her husband. The plaintiff was seriously injured when he slipped on what he knew to be an icy parking lot, fell, and fractured his skull. He sued the defendants for occupiers' liability. That action was governed by Ontario's *Occupiers' Liability Act*, which required the defendants to exercise "reasonable care in the circumstances." Unlike the plaintiff in *Francis*, the plaintiff in this case therefore did not have to prove, under the traditional common law, that the accident was caused by a hidden danger about which the occupier actually knew.

The plaintiff said that the defendants were in breach of the statutory standard of care because they had not salted or sanded the parking lot, despite knowing of its icy condition. In response, the defendants argued that they had satisfied that standard because they had complied with common practice in the area, which was *not* to sand or salt driveways.

The Supreme Court of Canada upheld the decision of the lower courts and imposed liability. It held that the defendants had failed to meet the statutory standard of using reasonable care to render the premises safe for visitors. The parking lot should have been salted or sanded. Furthermore, the court said that the defendants could not escape liability merely by proving that it was common practice in the community *not* to sand or salt. There was insufficient evidence to establish the existence of such a practice. Moreover,

even if such a practice had been established, it would not have protected the defendants. That practice itself would have been negligent.

***Dunster v Abbott*** [1953] 2 All ER 1572 (CA)—note 20

The plaintiff was a door-to-door salesman. He entered the defendant's property in the hope of making a sale to the defendant. The defendant indicated that he was not interested. While leaving the property, the plaintiff fell into a ditch and was injured. He sued the defendant for occupiers' liability. The court held that the plaintiff was a licensee, rather than an invitee because he entered the defendant's premises for his own purposes. The court also held that the defendant had not breached the standard of care because the ditch was not hidden or unusual. As quoted in the text, Lord Denning was sceptical as to the traditional common law approach of categorizing visitors.

***Veinot v Kerr-Addison Mines Ltd*** (1974) 51 DLR (3d) 533 (SCC)—note 22

The defendant occupied a piece of land. It knew that its land was used by snowmobilers, but it did not object. The plaintiff, who was unaware that the land was private property, was snowmobiling at night. He was injured when he struck a pole that formed part of a gate across the property. He sued the defendant for occupiers' liability. At the relevant time, Ontario had not yet enacted legislation. The case therefore was decided under the common law rules. The jury found that the plaintiff was a licensee, rather than a trespasser, because he had the defendant's implicit permission to snowmobile in the area. The jury imposed liability on that basis.

A majority in the Supreme Court of Canada upheld that decision. It further said that even if the defendant had not consented to the snowmobilers' presence, such that the plaintiff was a trespasser, the defendant would have owed a duty of common humanity. While flexible, that duty would have required the defendant to warn the plaintiff of the hidden danger posed by the gate. Since it failed to do so, it would have been held liable.

***Yelic v Gimli (Town)*** (1986) 33 DLR (4th) 248 (Man CA)—note 23

The defendant was the occupier of a cemetery. There was a decorative fence around the property. The plaintiff wished to visit a grave when the cemetery was not generally open to the public. When he tried to climb over the fence, a part of the fence that was in a state of disrepair gave way. The plaintiff fell and was injured. He sued the defendant under the common law rules for occupiers' liability.

The trial judge held that the defendant actually knew that the fence was in need of repair and had done nothing about it. He therefore found it unnecessary to determine whether the plaintiff was an invitee or a licensee because liability would arise even if the case fell within the lower category. A licensee must be protected from hidden dangers about which the occupier actually knew, while an invitee must be protected from unusual dangers about which the occupier knew or should have known.

The Court of Appeal reversed the trial decision. It agreed in *dicta* that licensees and invitees might be held to different standards, depending upon whether the defendant had actual or constructive knowledge of a danger. However, it also held that the plaintiff did

not fall into either one of those categories. Unlike the situation in *Veinot*, the plaintiff did not have implied permission to be on the property after hours. He was, therefore, a mere trespasser. Consequently, the defendant was simply required to satisfy the standard of common humanity. That standard did not require the repair of a decorative fence in the absence of evidence to the effect that the defendant knew that trespassers regularly climbed over the fence.

***Stacey v Anglican Church of Canada (Diocesan Synod of Eastern Newfoundland and Labrador)*** (1999) 182 Nfld & PEIR 1 (Nfld CA)—note 24

The defendant was the occupier of a cemetery. The plaintiff visited the cemetery during regular hours. There were a number of paths through the property. The plaintiff was injured when she chose instead to walk down an embankment. She had seen several other people doing so, despite a sign that said “do not walk” in the area. The plaintiff sued the defendant for occupiers’ liability. There is no statute in Newfoundland, so that claim was decided under common law rules.

The Newfoundland Court of Appeal rejected the traditional approach that separated visitors into categories and held each category to a different standard of care. It formulated a new test that applied to all visitors. “An occupier’s duty of care to a lawful visitor to his or her premises is to take such care as in all the circumstances is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he or she is invited or permitted by the occupier to be there or is permitted by law to be there.”

Having regard to all of the circumstances, the court refused to impose liability. The defendant acted reasonably in providing various paths through the cemetery. It was not responsible for the plaintiff’s decision to walk down an embankment despite a sign prohibiting her from doing so.

***McGinty v Cook*** (1991) 79 DLR (4th) 95 (Ont CA)—note 26

The plaintiff paid \$5 so that he and his family could camp overnight at a facility operated by the defendant. After the 11:00pm “quiet time” had gone into effect, the plaintiff was disturbed by a group of drunken youths at a nearby camp site. The group had been causing problems all day, but the camp staff did nothing to remedy that problem. The plaintiff eventually was attacked and injured by one of the drunks. The court imposed liability upon the defendant, as occupier of the premises, for failing to take reasonable steps to ensure the plaintiff’s safety.

***Coleiro v Premier Fitness Clubs (Erin Mills) Inc*** 2010 ONSC 4350 (Ont SCJ)—note 26

The plaintiff worked out at the defendant’s fitness facility. The defendant did not employ security staff. After the plaintiff finished his workout, he suffered an unprovoked attack at the hands of two of the defendant’s other patrons. The defendant’s employees did not help the plaintiff, but one of them did yell out that the police had been called. The plaintiff, who suffered cuts and bruises, sued the defendant on the theory of occupiers’ liability. The claim was rejected on the ground that the attack was not reasonably

foreseeable and hence the defendant was not expected to guard against it. The attack was instead an entirely independent act perpetrated by the assailants.

***Zavaglia v MAQ Holdings Ltd*** (1986) 6 BCLR (2d) 286 (CA)—note 28

The defendant rented a house to a man named Ruggles. While visiting Ruggles, the plaintiff was injured after he fell in a stairwell that did not have a handrail. The Court of Appeal said that the plaintiff could not have succeeded against the defendant under the common law tort of occupiers' liability. However, it also noted that the situation had changed by virtue of s 6(1) of the *British Columbia Occupiers' Liability Act*: "Where premises are occupied or used by virtue of a tenancy under which a landlord is responsible for the maintenance or repair of the premises, it is the duty of the landlord to show toward any person who, or whose property, may be on the premises the same care in respect of risks arising from failure on his part in carrying out his responsibility, as is required by this Act to be shown by an occupier of premises toward persons entering on or using them."

***Taylor v Allard*** (2010) 325 DLR (4th) 761 (Ont CA)—note 28

The defendant landlord built a fire pit in the backyard of a property. The property was then rented to the defendant tenants. The tenants invited the plaintiff to attend a party on the premises. While intoxicated, the plaintiff fell into the fire pit and was badly burned. The trial judge held the plaintiff and the defendant tenants equally responsible and accordingly reduced damages by half. The defendant landlord escaped liability at trial on the basis that he was not an "occupier." While generally upholding the decision below, the Ontario Court of Appeal held that the landlord was jointly and severally liable, alongside the tenants. Contrary to the trial judge's finding, the landlord admitted in pleadings that he was an occupier. Furthermore, although the rental agreement relieved the landlord of maintenance obligations, the *Landlord and Tenant Act*,<sup>9</sup> imposed a statutory duty upon residential landlords to maintain premises.

***Blount v H Corp Coiffures Ltd*** (Unreported, 17 September 2008, Ont SCJ)—note 28

A beauty salon operated on rented premises. The plaintiff visited the salon for the purpose of having his eyebrow pierced. In the course of the procedure, he fainted, fell to the floor, hit his head, and suffered brain damage. He sued the landlord under Ontario's occupiers' liability statute.

Although the statute extends the common law tort, so that liability may fall upon both a tenant occupant and a landlord, the latter's liability is premised upon proof of unreasonableness. On the facts, the landlord had done nothing wrong and therefore would not be held responsible.

***Ryan v Victoria (City)*** (1999) 168 DLR (4th) 513 (SCC)—note 29 and note 34

The plaintiff was riding his motorcycle down a main street in Victoria. He was thrown from his bike and injured when his front tire became caught in a "flangeway" gap that was running alongside a railway track that was located on the street. The plaintiff sued both the city and the railway company. The railway denied liability on the ground that its

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<sup>9</sup> RSO 1990, c L.7 (Ont).



tracks were authorized by statute. The trial judge found the city and the railway liable for negligence, and the railway also liable for nuisance. The Court of Appeal set aside the judgment on nuisance, but held that both defendants were liable in negligence for failure to issue a proper warning of the danger. The matter was appealed further to the Supreme Court of Canada.

The Supreme Court of Canada held that the railway tracks constituted a *public* nuisance (as distinguished, in note 26 in the text, from the more common tort of private nuisance). The flangeway gap created a danger to the public for precisely the reason revealed by the facts: it was wide enough to catch motorcycle tires. With respect to the defence of statutory authorization, the court held that the defendant bears the burden of showing that a nuisance was an *inevitable* result of performing a statutorily authorized activity. In doing so, it adopted the approach that Sopinka J suggested in *Tock*, but that did not command majority support on that occasion. On that approach, it is not enough for the defendant to show that it had exercised reasonable care. The defence therefore did not apply on the facts. The railway company could have used a narrower flangeway gap that would not have caught the plaintiff's tire.

***Hollywood Silver Fox Farm v Emmett* [1936] 2 KB 468 (QB)—note 32**

The plaintiff operated a fox breeding business on his property. He erected a sign advertising that fact. The defendant, who was a land developer of a neighbouring property, objected to the sign because he believed that it detrimentally affected the value of his own property. As part of a dispute between the parties, the defendant repeatedly discharged his shotgun near the plaintiff's property in order to interfere with the foxes breeding process. He knew that foxes are highly nervous and temperamental animals. The plaintiff sued for nuisance. The defendant argued that the discharge of a weapon is not normally considered a nuisance, and that the plaintiff's losses were attributable to the unusually sensitive nature of foxes. The court nevertheless imposed liability because the defendant knew of the plaintiff's susceptibility to harm and because of the defendant's malicious motivation.

***Tock v St John's (City) Metropolitan Area Board* (1989) 64 DLR (4th) 620 (SCC)—note 34 and note 37**

The plaintiff owned a house in St John's. That house was serviced by a sewer line that the defendant installed and operated under statutory authority. Following an unusually heavy rainfall, the defendant's sewer became clogged, and the plaintiff's basement became flooded. The plaintiff sued for nuisance. The defendant responded by arguing the defence of statutory authority. The trial judge imposed liability, but the Court of Appeal reversed that decision. The matter was appealed further to the Supreme Court of Canada.

The Court unanimously agreed that the defendant had committed the tort of nuisance and that the defence of statutory authority did not apply. It was badly split, however, on the reasons for the latter decision. There were three distinct approaches. First, Wilson J held that the defence applied only if the relevant statute gave the defendant no discretion as to when, how, or where to perform the authorized activity. Since the defendant in this case did enjoy some discretion, the defence was inapplicable. Second, LaForest J preferred a

policy approach that openly examined factors relevant to the determination as to who should bear the loss. That exercise would consider the nature and utility of the authorized activity, the extent to which private interests were violated, the availability and feasibility of loss prevention techniques, and so on. On the facts, and as a general rule, he held that the burden should fall upon the defendants. Finally, Sopinka J held that the defence should apply only if a nuisance was the inevitable result of performing the statutorily authorized act. On the facts, the defence did not apply because the defendant could have built a sewer with different specifications that would not have resulted in the plaintiff's basement being flooded.

***Ryan v Victoria (City)*** (1999) 168 DLR (4th) 513 (SCC)—note 29 and note 34

See above.

***Sturges v Bridgman*** (1879) 11 Ch D 852—note 35

For many years, the defendant operated a business on its premises that caused vibrations and noise. It had never received a complaint from its neighbours. The plaintiff physician then opened an office near the boundary of the defendant's premises. The noise and vibrations disrupted his consultations. He therefore sued for nuisance. The defendant argued that liability could not be imposed because the plaintiff had moved into a pre-existing situation. The court found in favour of the plaintiff. It is no defence for the defendant to simply prove that the plaintiff came to the nuisance.

***Rylands v Fletcher*** (1868) LR 3 HL 330 (HL)—note 36

The parties owned neighbouring properties. The defendant hired independent contractors to build a reservoir on his land. The contractors did so carelessly. As a result, water leaked into an unused mine shaft on the defendant's property. From there, it flooded the mine that was being worked beneath the plaintiff's property. The plaintiff did not sue the contractors, but he did sue the defendant. The defendant, however, had not personally acted carelessly. Furthermore, because the work was done by independent contractors, rather than employees, the defendant was not vicariously liable for the careless construction. The plaintiff therefore required some means of holding the defendant strictly liable for the damage.

The courts at the time were moving away from strict liability and toward notions of fault. The judges in *Rylands v Fletcher* nevertheless imposed liability on a strict basis, perhaps because they were influenced by a recent spate of similar incidents, in which people had been killed and substantial property damage had been inflicted. In doing so, they also drew upon a number of other areas of tort law in which liability may be imposed on a strict basis (eg dangerous animals, trespassing cattle).

***Tock v St John's (City) Metropolitan Area Board*** (1989) 64 DLR (4th) 620 (SCC)—note 34 and note 37

See above.

***Smith v Inco Inc*** 2010 ONSC 3790 (Ont SCJ), rev'd 2011 ONCA 628 (Ont CA)—note 38

For many years, the defendant operated a nickel refinery in Port Colborne, Ontario. The process emitted nickel particles, which drifted on the winds and settled onto neighbouring land. In 2000, the plaintiff commenced a class action representing the owners of approximately 7000 residential properties. The claim was framed in trespass, nuisance, and strict liability. The first theory was dismissed, but Henderson J imposed liability for both nuisance and the tort of *Rylands v Fletcher*. As to the latter, the court concluded that (1) the defendant brought nickel onto its property, (2) nickel was not a natural part of the atmosphere or the neighbouring land, (3) a nickel refinery was not an ordinary use of land and it constituted a special use that carried new dangers, and (4) although nickel was not dangerous *per se*, its escape adversely affected neighbouring land and caused property values to diminish substantially. Compensatory damages of \$36 000 000 were awarded against the defendant, but punitive damages were refused.

The Ontario Court of Appeal rejected the suggestion that liability could be imposed for a tort of “ultra-hazardous use.” It also held that *Rylands v Fletcher* did not apply because the defendant’s use of its land was not “non-natural.” (That finding seems rather narrow and somewhat inconsistent with a more generous approach frequently taken by Canadian courts.) Finally, the Court of Appeal denied liability in nuisance on the basis that while nickel dust may be dangerous, there was no evidence that the defendant had caused the plaintiffs to suffer any loss. The market value of the property itself was not noticeably lower than similarly situated lands elsewhere. No person had sustained any physical loss.

***Bou Malhab v Diffusion Métromédia CMR inc*** (2011) 328 DLR (4th) 385 (SCC)—note 40

André Arthur is a radio host at CKVL in Montreal. The station is owned by the defendant. Arthur, who is well known for his provocative comments, launched into the following diatribe (translated) during one broadcast.

Why is it that there are so many incompetent people and that the language of work is Creole or Arabic in a city that’s French and English? ... I’m not very good at speaking “nigger.” ... [T]axis have really become the Third World of public transportation in Montreal.... [M]y suspicion is that the exams, well, they can be bought. You can’t have such incompetent people driving taxis, people who know so little about the city, and think that they took actual exams.... Taxi drivers in Montreal are really arrogant, especially the Arabs. They’re often rude, you can’t be sure at all that they’re competent and their cars don’t look well maintained.

The plaintiff, a Montreal taxi driver of Arabic descent, launched a class action on behalf of himself and all of his Arabic or Creole colleagues.

The trial judge imposed liability and ordered that damages of \$220 000 be paid to a not-for-profit organization. Guibault J found that while not every member of the class sustained injury as a result of the comments, the nature of the remedy circumvented that problem. A majority in the Quebec Court of Appeal set aside the judgment on the ground that an ordinary person would not have believed the comments and on the ground that the effect of the comments was diluted by the large size of the class.

The Supreme Court of Canada agreed with the Court of Appeal. Deschamps J, writing for the majority, explained that because the class was large (approximately 1100 drivers) and diverse, a reasonable listener would not ascribe the negative attributes to any particular person. The defendant's comments were on par with a statement that "All lawyers are liars," which the court was confident would not be taken seriously by a reasonable person.

Although *Bou Malhab* originated in Quebec under the civil law, the same principles regarding groups applies in the common law tort of defamation.

***Crookes v Newton*** 2011 SCC 47 (SCC)—note 42

The plaintiff alleged that he was the victim of defamatory statements that a third party made online. The defendant, a blogger, wrote about the dispute and provided hyperlinks to the allegedly defamatory materials. The plaintiff asked the defendant to remove the hyperlinks, but the defendant refused. The plaintiff then sued the defendant on the theory that the defendant "published" the libelous statements by hyperlinking to them. That argument failed at trial and on appeal. The British Columbia Court of Appeal, however, did not say that hyperlinks cannot constitute publication. It merely held that there was no evidence that anyone had accessed the relevant statements by means of the hyperlinks.

On further appeal to the Supreme Court of Canada, the majority held that the defendant could not be held liable merely for hyperlinking to a page that contained a defamatory statement about the plaintiff. The requirement of publication would be satisfied only if the defendant repeated the statements that appear on the hyperlinked page. That rule was explained on the basis that the content of the hyperlinked page may change over time. It may have been entirely clean and lawful when the defendant first created a hyperlink to it. The defamatory material might be added only subsequently and without the defendant's knowledge.

A concurring opinion by the Chief Justice agreed on the result, but held that the defendant would be liable for "publishing" the hyperlinked defamation if the defendant adopted or endorsed the impugned words.

The court also indicated the need for proof that a third party actually read the defamatory statement. That burden is not discharged merely by proof of a hyperlink to the defamatory material.

***Pleau v Simpson-Sears Ltd*** (1977) 75 DLR (3d) 747 (Ont CA)—note 43

The plaintiff's wallet, which contained a number of blank cheques, was stolen. A short time later, someone began forging the plaintiff's signature on the cheques. One such cheque was used at the defendant's store. At the request of the police, the defendant attached a notice to each of its cash registers that contained the plaintiff's name and address, and that said "If Any Cheque is Presented, Detain Person and Call Security." Those notices were visible not only to the defendant's cashiers, but also to its customers. An acquaintance of the plaintiff saw one such notice while shopping and informed the plaintiff. The plaintiff was very upset because the notices were capable of conveying the

impression that he himself was a criminal. He therefore sued the defendant store for defamation. The defendant relied on the defence of qualified privilege.

The court held that the defendant was not liable. The impugned statement was made on an occasion of qualified privilege. The defendant store had a duty to communicate, and its cashiers an interest in receiving, concerns regarding suspicious cheques. Furthermore, even though the notices could be seen by customers, the defendant had acted reasonably in the circumstances. The situation would have been different, however, if, for instance, the defendant had posted the notices more publicly.

**Cusson v Quan** (2009) 314 DLR (4th) 55 (SCC)—note 44

Immediately after the terrorist attacks on 11 September 2001, Danno Cusson, an officer with the Ontario Provincial Police, decided that he wanted to go to New York to assist in rescue efforts. His employer refused him permission, believing that he should remain on duty. Cusson therefore quit his job with the OPP in order to fulfill his wish. The story received considerable attention in the media, which generally portrayed Cusson as a hero. The *Ottawa Citizen*, and several of its journalists, however, held a far less favourable opinion of Cusson. The *Citizen* accordingly published a number of stories that were critical of him. Those stories suggested, for instance, that Cusson (1) misrepresented himself to New York police as a trained RCMP K-9 officer, (2) had no search and rescue training, and (3) had compromised the rescue effort. Cusson sued for defamation.

A jury found that the *Citizen* had sustained some of its allegations, but not the allegations enumerated in the preceding paragraph. Cusson was awarded \$125 000 in damages and the court allowed him \$250 000 in costs.

On appeal, the *Citizen* raised the defence of *public interest responsible journalism*. The Ontario Court of Appeal canvassed the law of several jurisdictions before concluding that the defence does indeed exist in Canada. Nevertheless, the court also held that, since the defence had not been raised at trial, it could not be relied upon for the purposes of appeal.

On further appeal, the Supreme Court of Canada upheld recognition of the new defence. McLachlin CJC explained that liability for defamation will not arise if (1) a publication dealt with a matter of public importance, and (2) the publisher acted responsibly by diligently trying to verify the information upon the story is based. On the facts of *Cusson v Quan*, the court ordered a new trial so as to give the defendant a fair opportunity to avail itself of the defence of *public interest responsible journalism*.

The Supreme Court of Canada's decision was informed by American and English law. In each jurisdiction, it is necessary to strike a balance between the plaintiff's interest in a good reputation and the societal interest in open debate on public matters.

American law strongly favours the latter. In 1964, the United States Supreme Court decided, in *Sullivan v New York Times*,<sup>10</sup> that a public figure cannot succeed in an action for defamation unless the defendant is proven to have acted with "actual malice."

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<sup>10</sup> 376 US 254 (US SC, 1964).

In 1999, the House of Lords struck a more balanced position, in *Reynolds v Times Newspaper Ltd*,<sup>11</sup> by adopting the defence of public interest responsible journalism. A journalist or media outlet enjoys a form of the qualified privilege defence if, in the context of reporting on a public matter, it makes an error, despite adhering to professional standards of responsible journalism. Lord Nicholls offered the following guidance.<sup>12</sup>

Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only. (1) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. (2) The nature of the information, and the extent to which the subject matter is a matter of public concern. (3) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. (4) The steps taken to verify the information. (5) The status of the information. The allegation may have already been the subject of an investigation which commands respect. (6) The urgency of the matter. News is often a perishable commodity. (7) Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. (8) Whether the article contained the gist of the plaintiff's side of the story. (9) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. (10) The circumstances of the publication, including the timing.

*Cusson v Quan* largely endorsed the English view. The defence accordingly reflects the broad principle that a media defendant, having acted in accordance with the standards of responsible journalism in publishing a story that the public is entitled to hear, should not be held liable in defamation even if some of the facts are incorrect. That objective standard is applied with reference to the broader public interest. The defendant must show that it took reasonable steps to ensure both that the story was fair and that its contents were true and accurate.

***Grant v Torstar Corp*** (2009) 314 DLR (4th) 1 (SCC)—note 44

This is a companion case to *Cusson v Quan*, in which the Supreme Court of Canada recognized the new defamation defence of *public interest responsible journalism*. This case involved newspaper stories regarding a proposed private golf course development on the claimant's lakefront estate. In the course of the story, the reporter quoted neighbours, who suggested that permission for the development had been subject to improper political influence. The claimant won at trial, but the Ontario Court of Appeal held that the trial judge had erred in failing to consider the new defence of public interest responsible journalism. The Supreme Court of Canada agreed with the Court of Appeal and ordered a new trial.

***WIC Radio Ltd v Simpson*** (2008) 293 DLR (4th) 513 (SCC)—note 47

<sup>11</sup> [2001] 2 AC 127 (HL). See also *Jameel v Wall Street Journal Europe* [2007] 1 AC 359 (HL).

<sup>12</sup> [2001] 2 AC 127 at 205 (HL).

Kari Simpson is a well-known social activist, who holds strong views regarding homosexuals. She vigorously opposed a proposal to include materials dealing with homosexuality into public school curricula. Her comments on point included the following extract.

There is another group within the homosexual community though who is very much politically driven. These people want your children. ... [W]hen homosexuality takes on all the aspects of a political movement it too becomes a war. ... And the spoils turn out to be our children. An exaggeration? Well, what are we to think when militant homosexuals seek to lower the age of consensual sexual intercourse between homosexual men and young boys to the age of 14.

Rafe Mair is a well-known radio talk show host, who frequently adopts controversial positions. During a broadcast, he critically referred to Simpson's views by draw comparison to Hitler, the Klu Klux Klan, and skinheads.

Simpson sued Mair for defamation, alleging that his words conveyed damaging innuendo to the effect that:

(a) that she had advocated or was in favour of parents taking their children out of school because the children's teacher was gay; (b) that she advocated keeping gay people out of Surrey's public schools; (c) that she was hostile toward gay people to the point that she would condone violence toward gay people; (d) that she preaches hatred against gay people; (e) that she rants against gay people in a way that would influence someone to take the law into his own hands and do them harm; (f) that she would employ tactics against gay people similar to those used by Hitler and other bigots, such as former State Governor George Wallace, Governor Ross Barnett and Governor Orval Faubus; and (g) that she is a dangerous bigot apt to cause harm to gay people.

At trial, Mair denied any imputation that Simpson favoured violence against the homosexual community, and he insisted that he merely intended to convey his belief that she was an intolerant bigot.

I didn't say that Kari is—is a violent person or would want violence to happen. I don't think that—I think that would be the furthest thing from her mind. I think she's, in her own mind, at least, a gentle person. I'm not talking really about what Kari is. I'm talking about what the consequences of thinking that you're doing the right thing this way under these circumstances may well be.

The trial judge held that Mair's comments were defamatory, but dismissed the claim on the grounds of the fair comment defence. The British Columbia Court of Appeal overturned that decision on the basis, *inter alia*, that Mair had not provided evidence to the effect that he honestly believed that Simpson would condone violence.

On further appeal, the Supreme Court of Canada restored the trial decision. In doing so, it substantially revised the defence of fair comment. While that defence traditionally required proof that the defendant honestly believed the truth of the impugned opinion, it now merely requires proof that *some* person—however intolerant or biased—could reasonably hold the opinion in question. The majority reached that position after concluding that the traditionally formulated defence insufficiently protected the *Charter*

value of freedom of expression. The majority also feared that a narrowly confined defence would chill legitimate debate on matters of public importance because journalists and editors may “spike” stories, despite their belief in them, simply for fear of litigation and a potential inability to prove subjective belief at trial.

The fair comment defence accordingly was formulated as a five part test. (The key revision is highlighted.)<sup>13</sup>

- (a) the comment must be on a matter of public interest;
- (b) the comment must be based on fact;
- (c) the comment, though it can include inferences of fact, must be recognisable as comment;
- (d) the comment must satisfy the following *objective test: could any [person] honestly express that opinion on the proved facts?*
- (e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was [subjectively] actuated by express malice.

On the facts of the case, the majority of the court held that the new test was satisfied. On the crucial issue of belief, LeBel J explained:<sup>14</sup>

Mair testified as to his subjective honest belief in what he intended to say, but acknowledged that he did not honestly believe that Simpson would condone violence. Notwithstanding the absence of a subjective honest belief that Simpson would condone violence, Mair and WIC Radio, like the newspaper publisher in *Cherneskey*, were entitled to rely on the objective test, i.e. could any person honestly have expressed the innuendo that Simpson would condone violence toward gay people on the proven facts? As mentioned earlier, Simpson’s public speeches were full of references to “war ... [where] the spoils turn out to be our children”, “militant homosexuals”, “[w]ar, you shoot, they shoot” and so on. Simpson’s use of violent images could support an honest belief on the part of at least some of her listeners that she “would condone violence toward gay people”, even though Mair denied that he intended to impute any such meaning.

***Cherneskey v Armadale Publishers Ltd*** (1978) 90 DLR (3d) 321 (SCC)—note 48

The plaintiff was a lawyer and a city councillor. The defendant was the publisher of a newspaper. The defendant published a “letter to the editor” that accused the plaintiff of racism. It was unclear if the authors of the letter believed that accusation, but the evidence did establish that the defendant did not. The plaintiff sued the defendant for defamation. The defendant relied on the defence of fair comment. A majority in the Supreme Court of Canada rejected the application of the defence on the ground that the defendant did not actually believe the truth of the letter’s accusation. “Freedom to express an opinion on a matter of public interest is protected, but such protection is afforded only when the opinion represents the honest expression of the view of the person who expresses it.” The dissenting judges preferred a more generous approach that would allow the defence to apply as long as the impugned statement might have been held by an

<sup>13</sup> (2008) 293 DLR (4th) 513 at 530-531 (SCC).

<sup>14</sup> (2008) 293 DLR (4th) 513 at 540-541 (SCC).



honest person. As noted in the text, several provinces subsequently statutorily adopted the essence of the dissenting view.

***Hill v Church of Scientology of Toronto*** (1995) 126 DLR (4th) 129 (SCC)—note 50

Casey Hill, a Crown prosecutor in Toronto, was involved in lengthy proceedings against the Church of Scientology. The Church's lawyer, Morris Manning, filed a notice of motion alleging that Hill had breached a court order the required certain Church documents to remain sealed. Before filing that document, Manning appeared, in his barrister's robes, on the front steps of a court house and held a press conference. During that press conference, he read from the notice of motion and offered additional comments. The notice of motion was eventually dismissed when the judge found that its allegations were both untrue and unfounded. Hill then sued the Church and Manning for defamation. The trial judge held both defendants jointly liable for general damages of \$300 000. He also held the Church liable for aggravated damages of \$500 000 and punitive damages of \$800 000. The Court of Appeal affirmed that decision. The matter was further appealed to the Supreme Court of Canada.

The Supreme Court of Canada upheld the decisions below. In particular, it held that punitive damages may be awarded if the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. They are further confined to situations in which the combined award of general and aggravated damages is insufficient to punish and deter. All of those requirements were satisfied on the facts. In making the unfounded accusations against Hill, the Church was guilty of "insidious, pernicious and persistent malice."

***Manitoba Free Press v Nagy*** (1907) 39 DLR 340 (SCC)—note 54

The defendant recklessly published a story that the plaintiff's house was inhabited by ghosts. As a result, the plaintiff found it difficult to sell or rent the premises, and the value of the property declined. The court held that the defendant's recklessness raised a presumption of malice, and that the plaintiff was entitled to succeed in an action for slander of title.