Toronto Law Journal

Driverless Cars: Where Will the Liability Lie?

Joanna Reznick, Associate, Dutton Brock LLP

Last year, Google introduced a prototype of their new driverless car. What differentiates this from the traditional vehicle? Well, it's lacking both a steering wheel and pedals.

Google's robotic cars use a combination of lasers, cameras and sensors in an effort to scan their environment, such that they can effectively drive and react to traditional obstacles: stop signs, other vehicles, and pedestrians.

The plan for robot domination is in the works with automobile manufacturers entering the race in an effort to develop their own autonomous vehicles. Additionally, Nevada, Florida, California and Michigan have all passed laws permitting the use of autonomous cars. The UK government announced that driverless cars will be allowed on public roads as of January 2015.

The rise of autonomous vehicles has been a popular topic in various news sources recently, and all signs point towards a future without human drivers. Hundreds of thousands of Canadians are injured and killed every year in car accidents due to human error; proponents of driverless vehicles suggest the accident rate will reduce substantially once human error is taken out of the equation.

The driverless car may have a downside, however, as a number of industries will be impacted if drivers become obsolete. The insurance industry will see far less claims, medical clinics far less patients, and personal injury lawyers, far less files.

Before driverless vehicles hit the road, however, experts in motor vehicle legislation and insurance will need to 'legalize' and regulate this technology.

Autonomous cars will inevitably create an unforeseen shift in motor vehicle legislation. Current legislation, such as the *Highway Traffic Act*, R.S.O. 1990 C. H.8, revolves around the actions and omissions of people. New legislation will have to account for technological error. If implemented, motor vehicle legislation may shift away from regulating speed limits and careless driving, towards a focus on vehicle maintenance and repair, and implementing technological standards. For the time being, the U.S. states that have legalized the use of autonomous cars require a human driver be present in the vehicle; the Ontario Ministry of Transportation's proposed plan has recommended the same requirement.

The transition period (from driver to driverless vehicles) will pose difficulties as well, and will certainly be difficult to legislate. Autonomous cars are programmed to abide by the rules of the road and speed limits. Will they impede the flow of traffic, causing further congestion and accidents before eliminating both issues altogether? If so, governments may have to mandate that all citizens use driverless vehicles in certain

areas, and with Google vehicles containing approximately $150,000 in equipment, such goals may be unrealistic.

Interesting liability issues will also arise. Though collisions may occur with far less frequency, if they do occur, who will be the responsible party? Will it be the manufacturer of the technology or the owner of the vehicle? Even more obscure, will it be the autonomous "robot" that controls the vehicle or the human think tank behind the ideas? Is it possible that countless future motor vehicle lawsuits will be *Smith v. Google*? Or *Smith v. Robotic Vehicle #1323*?

Though driverless cars are indeed the future, it is clear that autonomous vehicles will complicate motor vehicle legislation and insurance before making things simpler.

Joanna Reznick is an Associate at Dutton Brock LLP whose practice revolves around litigation involving cars with incompetent drivers – we just won't say which side.

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Neighbourly Nuisance: Ontario Court of Appeal Confirms Nuisance Must Emanate from Another's Land

Daniel Kirby, Paul Morassutti, Jennifer Fairfax and Patrick Welsh[i]**,**
Osler Hoskin & Harcourt LLP

A landowner sought to change the law of nuisance by alleging that a prior owner's remediation of the property was insufficient and therefore interfered with the current owner's use and enjoyment of the property. The Ontario Court of Appeal disagreed, and instead confirmed that in order to form a tenable claim, the alleged nuisance must originate from somewhere other than on the claimant's own land.[ii]

Background

In *French v. Chrysler* (*French*),[iii] the plaintiffs, the Chippewas of the Thames Land Claim Trust, sued a number of parties, including Chrysler, regarding alleged petroleum hydrocarbon and asbestos contamination at a property in Sarnia, Ontario known as the Holmes Foundry. Chrysler had obtained the property in 1987 and decommissioned the Holmes Foundry in close consultation with the Ontario Ministry of the Environment prior to selling it to a developer in 1989. The plaintiffs purchased the property from this developer in 1999. In 2005, the plaintiffs commenced a claim against the developer and Chrysler, alleging, among other things, negligence relating to the decommissioning of the property. In July 2014, with the matter yet to proceed to trial, the plaintiffs sought leave to amend their statement of claim to add a claim of nuisance against Chrysler. In August 2014, the motions judge denied the plaintiffs' request on the basis that the proposed amendments did not raise a claim in nuisance that was tenable at law.

Essential Elements of Nuisance

In *French*, the plaintiffs argued, before the motions judge and the Court of Appeal, that Chrysler's alleged failure to properly decommission the Holmes Foundry resulted in a continuous and ongoing interference with their use and enjoyment of the property, to wit, a nuisance. In examining the caselaw on the essential elements of nuisance, the plaintiffs argued that there was no explicit requirement that the nuisance must emanate from another's property. Rather, the plaintiffs relied on the Supreme Court of Canada's decision in *Antrim Truck Centre v. Ontario (Transportation)*,[iv] arguing that to support a claim in private nuisance, there must only be a substantial and unreasonable (in all of the circumstances) interference with a plaintiff's property. Further, the plaintiffs pointed to the decision of *Morguard Real Estate Investment Trust v. ERM Canada Corp.*,[v] where the motions judge noted the following: courts have commented extensively on the difficulty in providing an exhaustive definition of the tort of nuisance; the categories of nuisance are not closed; and the principles of private nuisance are sufficiently elastic to deal with less typical cases of nuisance.

The motions judge hearing *French* did not agree with the Chippewas' characterization of nuisance, explaining that a basic principle which gives coherence to an otherwise confusing

body of caselaw is the maxim "use your own property so as not to injure that of your neighbours." While the motions judge agreed that there is no requirement that a defendant own or occupy adjoining lands in order to be liable in nuisance, the judge concluded that the nuisance itself must still originate outside the property occupied by the plaintiff.

The Ontario Court of Appeal agreed with the motions judge and rejected what the panel viewed as an attempt by the plaintiffs to fundamentally change the law of nuisance. Instead, the Court explained that nuisance has "certain defined, long-standing characteristics, which courts have considered to be essential to the tort. In particular, the alleged nuisance must originate somewhere other than on the plaintiff's land." Because the plaintiffs' purported claim lacked this "essential characteristic," it had no reasonable chance of success.

Discussion

The Ontario Court of Appeal's decision provides helpful clarity to an aspect of the tort of nuisance which, to-date, has received very little judicial consideration. Simply put, a nuisance must emanate from a source other than the claimant's property. As such, a current owner will be hard-pressed to succeed in a claim in nuisance brought against a former owner of the same property, for example, for a previous and allegedly insufficient remediation of contaminants. Had the Court of Appeal ruled otherwise, all former owners of property may have been exposed to a potentially significant avenue of liability if any previous act (or omission) by the former owner could be said to have caused a substantial and unreasonable interference with the current owner's use and enjoyment of its property - not to mention the significant threat such a ruling would have posed to the principle of caveat emptor. The Court's decision, when combined with the Nova Scotia Court of Appeal's decision in *W. Eric Whebby Limited*,[vi] effectively closes the door to the concept of a "neighbour in time" grounding a nuisance claim as between current and former owners of the same property.

Certain co-authors of this Osler Update act as counsel for the third-party defendant, NA Water Systems LLC.

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[i] Messrs. Kirby and Morassutti and Ms. Fairfax are partners of Osler, Hoskin & Harcourt LLP. Mr. Welch is an associate.

[ii] *1317424 Ontario Inc v. Chrysler Canada Inc.,* 2015 ONCA 0104.

[iii] *French v. Chrysler,* 2014 ONSC 4753 (decision of motions judge).

[iv] *Antrim Truck Centre Ltd v. Ontario (Transportation),* 2013 SCC 13.

[v] *Morguard Real Estate Investment Trust v. ERM Canada Corp et al.,* 2012 ONSC 4195.

[vi] *W. Eric Whebby Ltd. v. Doug Boehner Trucking & Excavating Ltd.,* 2007 NSCA 92.

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Prosecutorial *Charter* Disclosure and Good Governance: *Henry v. British Columbia (Attorney General)*

Jason MacLean, Assistant Professor,
Bora Laskin Faculty of Law, Lakehead University

As a first-year law student at McGill University some years ago I interviewed for a summer position with the Department of Justice in order to get some initial experience in the practice of criminal law. I approached the interview hoping that my experience in helping establish Innocence McGill, a law student clinic devoted to investigating wrongful conviction claims in the province of Quebec,[1] would recommend me to the job. Surely, I thought, my work with Innocence McGill would demonstrate my interest in criminal law and the criminal justice system.

Before I had a chance to trumpet Innocence McGill during the interview, one of the DOJ lawyers interviewing me beat me to it:

LAWYER: Aren't you playing for the wrong side with this innocence project thing?

ME: [longish pause] Well, I guess the way I see it is that we all have the same optimal outcome in mind—

LAWYER: How's that?

ME: Well, as Justice Rand explained in *Boucher v. The Queen*, the role of the prosecutor isn't to "win" but to ensure that justice is done.[2] So I don't really see any conflict. Defence counsel and prosecutors are equally interested in avoiding wrongful convictions, I would have thought….

Upon returning to Montreal, I told my mentor, Rod Macdonald, the DOJ lawyer's question and my response. "That's a home run answer!" Rod reassured me, though he needn't have bothered – I was already more than a little enamoured of my answer.

I didn't get the job.[3]

[1] For more information on Innocence McGill, see https://www.mcgill.ca/innocence/mcgill-innocence-project.
[2] That, roughly, was my off-the-cuff paraphrase. Justice Rand put it far more eloquently: "The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings." *Boucher v. The Queen,* [1955] S.C.R. 16, at p. 24.
[3] Nor, for the record, am I bitter about it.

I relate this story by way of introducing the Supreme Court of Canada's recent decision in *Henry v. British Columbia (Attorney General)*[4] because it illustrates, I suspect, a lingering misconception about the proper role of Crown Prosecutors in Canada.

It is a misconception, moreover, that is apparently held by a majority of the Supreme Court of Canada. In *Henry*, the question before the Court was what level of fault must a claimant establish to sustain a *Charter* claim against the government for a failure to meet its constitutional disclosure obligations in the context of a criminal proceeding. According to a majority of the Court, claimants must allege that the Crown, in breach of its constitutional obligations, caused the claimant harm by *intentionally* withholding information when the Crown knew, or ought to have known, that the information was material to the claimant's defence, and that the failure to disclose would *likely* impinge on the claimant's ability to make full answer and defence to a criminal charge.[5]

The Exceptional Background Facts in *Henry*

In March of 1983 Ivan Henry was convicted on 10 sexual offences; he was declared a dangerous offender and sentenced to an indefinite period of incarceration, where he remained for nearly 27 years. In October 2010 the British Columbia Court of Appeal quashed all 10 convictions, substituting acquittals for each, because of serious errors committed by the Crown during the conduct of Mr. Henry's trial.[6]

Between 1980 and 1982 a series of sexual assaults characterized by a similar *modus operandi* occurred in Vancouver. A single perpetrator appeared to be responsible.

Donald McRae lived in one of the Vancouver neighbourhoods in which the assaults took place, and in 1981 the Vancouver police placed him under surveillance as a suspect. He was not arrested, however, and in March 1982 Mr. Henry moved into a house located on the same city block as Mr. McRae's residence.

Mr. Henry soon became a suspect, and was arrested and subsequently released in connection with the assaults. Five days later, Mr. McRae was arrested and charged with trespass by night for "prowling" outside a residence several blocks away from the location of two of the previous 10 assaults. Two months later, Mr. McRae was once again arrested.

In July 1982, however, Mr. Henry was re-arrested after the victim of a June attack identified him from an array of photographs shown to her by the police. None of the other "foils" shown to the victim were photographed in manner similar as Mr. Henry, and all of the other foils differed significantly from him in terms of age, hair style, and facial hair.

Through his legal counsel, Mr. Henry made numerous pre-trial requests for disclosure of all victim statements as well as medical and forensic reports. The Crown did not disclose any of the requested materials before the commencement of trial. Mr. Henry proceeded at trial *pro se*. There was no reliable out-of-court identification of him as

[4] *Henry v. British Columbia (Attorney General),* 2015 SCC 24.
[5] *Id.,* at para. 99 [emphasis added].
[6] *R. v. Henry,* 2010 BCCA 462, at para. 154.

the perpetrator. Nor was there any physical evidence linking him to any of the victims. The Crown's case rested entirely on *in-court identifications* of Mr. Henry by the complainants.

At the beginning of the trial. Mr. Henry once again requested disclosure of all victim statements. The Crown disclosed 11 statements made by the 8 trial complainants, but failed to disclose 30 additional statements made by those complainants, including statements contained in the notes of the original crime scene investigators. These statements, it turns out, contained inconsistencies that could have been used to rebut the questionable identification evidence proffered by the Crown.

The Crown also failed to disclose key forensic evidence, including sperm from several of the crime scenes that could have been used to exclude a suspect based on blood type. The very existence of this evidence was not disclosed to Mr. Henry. Nor did the Crown disclose the fact that Mr. McRae had been considered a suspect and had twice been arrested in the vicinity of the assaults.

Following Mr. Henry's conviction, he continued to make disclosure requests and applications for appeal. Between 1982 and 1988, more than 25 sexual assaults bearing the same *modus operandi* occurred in the Vancouver vicinity of the assaults for which Mr. Henry had been tried and convicted. These assaults were not disclosed to Mr. Henry.

Eventually, in 2002, as part of an investigation into sexual assaults committed in Vancouver between 1982 and 1988 believed by police to be carried out by a single perpetrator, the police arrested Mr. McRae, having linked him to three such assaults. He pleaded guilty to these offences in 2005.

This investigation prompted the Crown to provide full disclosure to Mr. Henry, who then used the disclosure – including disclosure of the information that should have been disclosed at trial – to reopen his appeal.

In June 2011 Mr. Henry filed a civil action seeking damages against the City of Vancouver, the Attorney General of British Columbia, and the Attorney General of Canada. In the claim before the Supreme Court of Canada, Mr. Henry alleges that the Attorney General of British Columbia failed to make full disclosure of relevant information before, during, and after his trial as part of subsequent proceedings, resulting in a breach of his s. 7 *Charter* rights.

The Decisions Below

The British Columbia Supreme Court, relying on the Supreme Court of Canada's foundational decision on *Charter* damages in *Vancouver (City) v. Ward*,[7] held that a claimant need not allege malice in order to make out a *Charter* claim for prosecutorial misconduct.[8]

[7] *Vancouver (City) v. Ward,* [2010] 2 S.C.R. 28.
[8] 2013 BCSC 665, at para. 28, quoting *Ward*, at para. 18.

The British Columbia Court of Appeal unanimously allowed the Attorney General of British Columbia's appeal, holding that Mr. Henry was not entitled to seek *Charter* damages under s. 24(1) for the "non-malicious acts and omissions of Crown counsel."[9]

We can only hope, as the majority of the Supreme Court of Canada takes for granted as a matter of faith, that cases of prosecutorial misconduct like Mr. Henry's are in fact "exceptional."

The Majority's Decision: The *Intentional* Prosecutorial Misconduct Threshold for *Charter* Damages

The question on appeal before the Supreme Court of Canada in *Henry* was stated as follows:

> Does s. 24(1) of the *Canadian Charter of Rights and Freedoms* authorize a court of competent jurisdiction to award damages against the Crown for prosecutorial misconduct absent proof of malice?

A majority of the Court answered this question in the affirmative, subject, however, to an important qualification. According to the majority:

> a cause of action will lie where the Crown, in breach of its constitutional obligations, causes harm to the accused by *intentionally* withholding information when it knows, or would be reasonably be expected to know, that the information is material to the defence and that the failure to disclose will likely impinge on the accused's ability to make full answer and defence. This represents a high threshold for a successful *Charter* damages claim, albeit one that is lower than malice.[10]

The majority rejected the malice standard pressed by the Crown because that standard derives from, and is tied to, the tort of malicious prosecution, which has a distinctive history and purpose. Moreover, a malice standard would set the bar too high and fail to respond to the state conduct in issue. Nor is it well suited to obligatory – and not discretionary – Crown disclosure context. The majority concluded that a "threshold specifically tailored to the context is preferable."[11]

To establish a contextual threshold, the majority turned to the countervailing "good governance" prong of the test set out earlier in *Ward,* explaining that "the liability threshold must ensure that Crown counsel will not be diverted from their important public duties by having to defend against a *litany* of civil claims" and that "the liability threshold must avoid a widespread 'chilling effect' on the behaviour of prosecutors."[12]

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[9] 2014 BCCA 15, at paras. 20, 23, 29.
[10] *Henry v. British Columbia (Attorney General), supra,* at para. 31 [emphasis added].
[11] *Id.,* at para. 65.
[12] *Id.,* at para. 71 [emphasis added].

The majority's good governance concerns, however, are difficult to reconcile with two significant aspects of the Court's decision. The first is the majority's express article of faith that in "the disclosure process, mistakes are the *exception* rather than the rule."[13]

Notwithstanding this unfounded belief (no evidence is cited in support of it), the majority proceeds to invoke rather hyperbolic – if not hysterical – language in support of its high threshold for *Charter* damages claims for prosecutorial misconduct. The majority worries that, absent such a high threshold of intentional misconduct, prosecutors "would be *constantly enmeshed in an avalanche* of interlocutory civil proceedings and civil trials," an "avalanche" that would doubtless contain a few strong claims of serious wrongful non-disclosure but which would "invariably [inevitably?] bring with it *scores of meritless claims*."[14]

Moreover, absent an intentional misconduct threshold, Crown prosecutors might tend toward "defensive lawyering," whereby disclosure decisions would be motivated less by "legal principle than a calculated effort to *ward off the spectre of liability*" and an "*onslaught of litigation*" which will "*drive* prosecutors into civil court."[15] The majority neglects to define what it means by "defensive lawyering," but it would appear to map onto the misguided notion identified and rejected by Justice Rand in *Boucher v. The Queen* of winning versus losing. A narrow focus on prosecutions, in other words, rather than a broader focus on justice.

In response to the dissenting proposal advanced by the Chief Justice and Justice Karakatsanis (discussed below), namely the principled *Charter* breach approach set out in *Ward,* Justice Moldaver writes that "I fear that my colleagues' approach runs the risk of *opening the floodgates to scores of marginal claims*."[16] "A duty of care paradigm," argues Justice Moldaver, "risks opening up a Pandora's box of potential liability theories."[17]

Default Disclosure as *Ex Ante* Good Governance and *Charter* Compliance

According to the Chief Justice and Justice Karakatsanis, the test dispositive of the issue arising in *Henry* is straightforward: "It is sufficient for Mr. Henry to allege that the Crown breached its constitutional obligation to disclose relevant information and that *Charter* damages would be an appropriate and just remedy, serving one or more of the functions of compensation, vindication and deterrence."[18]

The dissenting opinion in *Henry* is compelling for a number of reasons. First, it comports with the purposive approach to s. 24(1) of the *Charter* and the generous interpretation it, like all other *Charter* provisions, is to be given.[19] Second, it comports with the principled approach to *Charter* damages claims set out by *Ward* and avoids "casting it in a strait-jacket of judicially prescribed conditions."[20] Third, it turns the

[13] *Id.*, at para. 72 [emphasis added].
[14] *Id.*, citations to other decisions omitted [emphasis added].
[15] *Id.*, at paras. 73, 94 [emphasis added].
[16] *Id.*, at para. 78 [emphasis added].
[17] *Id.*, at para. 93.
[18] *Id.*, at para. 138.
[19] See e.g. *R. v. Gamble,* [1988] 2 S.C.R. 595.
[20] *Ward, supra,* at para. 18.

majority's "good governance" concern on its head: "Good governance is strengthened, not undermined, by holding the state to account where it fails to meet its *Charter* obligations."[21] As Professor Kent Roach has argued, "routine arguments that *Charter* damage awards adversely affect good governance discount the fact that deterrence and compliance with the *Charter* 'is a foundation principle of good governance.""[22]

This is a strong argument, but there is an arguably even stronger corollary argument to be made – namely, that "defensive lawyering" and a near-default standard of Crown disclosure would not only conduce to good governance, but would also conduce to *ex ante Charter* compliance. As Dickson J. (as he then was) explained in the foundational case of *Hunter v. Southam* regarding the purpose of s. 8 of the *Charter*, "[t]hat purpose is, as I have said, to protect individuals from unjustified state intrusions upon their privacy. That purpose requires a means of preventing unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place. This, in my view, can only be accomplished by a system of prior authorization, not one of subsequent validation."[23]

This principle of *ax ante* constitutional protection is in no way particular or limited to s. 8 of the *Charter*. Arguably, it is *the* foundational principle of *Charter* interpretation, albeit one that is directly cited less and less. It runs directly counter to the majority's preference in *Henry* of resolving allegations of prosecutorial misconduct "in future cases as they arise".[24]

It is also a principle anticipated by and inherent in Justice Rand's pronouncement in *Boucher v. The Queen* of the paramount importance of the core public duty of the state – including its Crown prosecutors – to set aside notions of winning versus losing, of offensive versus defensive lawyering, and ensure that justice is done in the first instance, not long after the fact.

[21] *Henry v. British Columbia (Attorney General), supra*, at para. 129.
[22] Kent Roach, "A Promising Late Spring for Charter Damages: *Ward v. Vancouver,*" (2011) 29 N.J.C.L. 135, at p. 150, quoting *Ward, supra*, at para. 38 (quoted in *Henry, supra*, at para. 129).
[23] *Hunter v. Southam,* [1984] 2 S.C.R. 145, at p. 160 [emphasis original].
[24] *Henry v. British Columbia (Attorney General), supra*, at para. 33.

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A Comment on *Rea v Wilderboer*

Paul Le Vay, Stockwoods LLP

In *Rea v Wilderboer*,[1] the Ontario Court of Appeal has sought to bring clarity to the 'murky'[2] question of when a complainant may seek an oppression remedy for a violation of their reasonable expectations resulting solely from a wrong that is done to the corporation, thereby circumventing the statutory requirement to obtain leave of the court to bring a derivative action.

The issue is framed as follows: Corporate law is based upon the separate legal identity of the corporation and the corresponding limit on the liability of shareholders for the obligations of the corporation. From this, the common law rule in *Foss v Harbottle* evolved. As articulated by the Court of Appeal in *Meditrust*,[3] that rule provides that "a shareholder…does not have a personal cause of action for a wrong done to the corporation".[4] The basis for this rule is a *quid pro quo*: "A shareholder cannot be sued for the liabilities of the corporation and, equally, a shareholder cannot sue for the losses suffered by the corporation".[5] If it were not so, said the court in *Meditrust*, "a shareholder would always be able to sue for the harm to the corporation because any harm to the corporation indirectly harms the shareholders".[6] Thus the rule advances the sound policy interests of respecting legal personae and avoiding the chaos of multiple proceedings for the same wrong. However, a consequence of the rule was that minority shareholders were left with little protection where the actions of the majority negatively affected the corporation or the interests of the minority.[7] Two statutory reforms were enacted to address this problem: the derivative action,[8] pursuant to which a minority shareholder[9] might seek leave of the court to sue in the name of the corporation for wrongs done to the *corporation itself*, and the oppression remedy,[10] whereby a shareholder[11] could seek a remedy as of right where oppressive or prejudicial conduct by the company (or by others conducting the affairs of the corporation) unfairly disregards the interests of the *shareholder*.[12] In theory, the first is an action for corporate relief and the second involves a personal claim. In practice, given the broad language of the oppression remedy[13] and the liberal interpretation afforded it,[14] the line between the two became 'murky'.

1 2015 0NCA 373.

2 Markus Koehnen, *Oppression and Related Remedies* (Toronto: Thomson Carswell, 2004).

3 *Meditrust Health Care Inc. v Shoppers Drug Mart* (2002) 61 OR (3d) 786.

4 *Ibid*, at para 12.

5 *Ibid*.

6 *Ibid*, at para 13.

7 The indoor management rule, which provided that an alleged wrongful act that could be ratified by a majority was not actionable further compounded this problem (*Rea* para 16).

8 *Canada Business Corporations Act*, RSC 1985 c C-44 (the "Act") s. 239.

9 And certain other statutorily defined complainants, such as directors or officers.

10 Act, s. 241.

11 And certain others: see footnote 9 .

12 See footnote 9.

13 See for example, s. 241 of the Act provides for relief where the "affairs of the corporation…[are] carried on…in a manner…that unfairly disregards the interests of any security holder".

14 See for example *Jabalee v Abalmark Inc.* [1996] O.J. 2609 (OCA)

The Court of Appeal addressed the issue in 2008 in *Malata Group (HK) Ltd. v Jung*.[15] The plaintiff, who was one of three shareholders and also a creditor of the corporation (M Ltd.), sought relief under the oppression remedy alleging that the defendant director (J) had misappropriated corporate funds and thus failed to act honestly, in the best interests of M Ltd. J moved unsuccessfully to strike the claim on the basis that it ought to have been brought as a derivative action. The Court of Appeal dismissed J's appeal, holding that there was no 'bright line' between derivative actions and oppression claims. Owing to this overlap, a Court could not determine the matter through the application of the rule in *Foss v Harbottle* but must examine "the relevant statutory text and the facts of the claim at issue".[16] Noting that the statutory oppression provisions contemplated remedies benefitting the corporation, the Court held that one area of overlap was "where directors of *closely held* corporations engage in self-dealing to the detriment of the corporation and other shareholders *or* creditors".[17] The Court placed particular emphasis two things:

1. M Ltd. was closely held, lessening the rationale for leave since a smaller number of shareholders meant there was less risk of a frivolous lawsuit; and
2. The plaintiff was also a creditor who could seek recovery of debt under the oppression remedy.

However, murkiness remained.

Rea also involve an appeal from a motion to strike. As in *Malata*, the oppression claims involved allegations that insiders had breached fiduciary obligations to the corporation through the misappropriation of corporate assets. However, unlike in *Malata*, the corporation in *Rea* was a widely held public company. Further, there was no indication that the plaintiff had any interest at stake other than as a shareholder.[18] Justice Blair found that the case could not proceed as an oppression claim. While acknowledging the overlap between the remedies, he noted that in the cases where an oppression action had been permitted where wrongs had been done to the corporation "those same wrongs have, for the most part, also directly affected the complainant in a manner that was different from the indirect effect of the conduct on similarly placed complainants" and that most involved closely held corporations.[19] To be permitted to bring an oppression case, the complainant must show harm that impacts her interests personally, giving rise to a personal action and not simply her interests as part of the collectivity of stakeholders.[20] The Court carefully analyzes the *raison d'être* and requirements for each of the two remedies and emphasizes the importance of the leave requirement for derivative actions in the case of publicly held companies in order to avoid strike suits and a multiplicity of unwarranted actions.[21] It distinguished *Malata* on the basis that the company was closely held and that the plaintiff was also a creditor, which showed personal harm.[22] In contrast, where the substantive remedy claimed is the disgorgement of ill-gotten gains back to the company, a derivative action is required.[23]

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15 (2008), 89 OR (3d) 36.

16 *Ibid*, at para 27.

17 *Ibid*, at para 31 (emphasis added).

18 The plaintiff had been a founder of the company but had sold most of his interest and no longer had a role on the board or in management.

19 *Ibid*, at para 29.

20 The "reasonable expectation" of a shareholder that corporate fiduciaries will conduct themselves honestly cannot be used *simpliciter* to found the oppression action: *ibid*, para 44.

21 *Ibid*, at para 37.

22 *Ibid*, at para 40.

23 *Ibid*, at para 45.

Following *Rea*, the line between the remedies is clearer. Where the action involves conduct by insiders that harms the corporation, a shareholder complainant in an oppression case will have to show harm to personal interests that goes beyond the indirect harm to the collectivity flowing from the harm to the company. As well, it will be an easier road if the company is closely held. Whether this has an impact upon class actions in the public company space will be interesting, particularly where the holding in *Rea* intersects with the preferable procedure requirement. In that regard, it is worth noting the following door which was left open by the Court of Appeal:

> It may be that, in some circumstances, the failure to provide proper disclosure of material information to shareholders can constitute oppressive conduct and, similarly, that in some circumstances wrongfully withholding information from a director may be "oppressive" to the director's ability to carry out his or her role in that capacity. However, no such pleading is asserted here.[24]

24 *Ibid*, at para 44.