TORTS

David A. Crerar

David Crerar is a partner in the corporate and commercial litigation group at Borden Ladner Gervais LLP, and serves as an adjunct professor at the University of British Columbia, Faculty of Law. He practises and has published in the areas of banking and pension litigation, injunctions, defamation, media and Internet law, and protection of trade secrets. He has chaired and presented in CLEBC conferences on torts, Internet law, civil procedure, and electronic discovery. Mr. Crerar is a graduate of the University of Toronto, Faculty of Law.

Ryan W. Parsons

Ryan W. Parsons is an associate in the corporate and commercial litigation group at Borden Ladner Gervais LLP. A graduate of the University of British Columbia, Faculty of Law, Mr. Parsons practises in the areas of commercial, insurance, and personal injury litigation, with an emphasis on civil appeals.

Michelle T. Maniago

Michelle Maniago is an associate in the corporate and commercial litigation group at Borden Ladner Gervais LLP. She practises primarily in the areas of commercial, shareholder, and Aboriginal litigation. She also practises as a research lawyer, assisting both litigators and solicitors. A graduate of Osgoode Hall Law School, York University, Ms. Maniago clerked at the British Columbia Court of Appeal before being called to the Bar of British Columbia in 2008.

The authors would like to acknowledge and thank Alex Shandro, articled student, for his research assistance with this chapter.

A. Introduction

In contrast to recent years, Canadian courts were not active in generating noteworthy negligence cases in 2009. By and large, difficulties in the lower courts' application of principles governing the duty of care, the standard of care, and causation (the "material contribution" test in particular) appear to have waned.

The most noteworthy tort cases this year arose in the realm of defamation. The Supreme Court of Canada's twin decisions in *Grant v. Torstar Corp.*, 2009 SCC 61, and *Quan v. Cusson*, 2009 SCC 62, mark the most important advance for freedom of expression in recent years; the court confirmed that the defence of responsible communication on matters of public interest can protect from defamation claims about important and responsible public reports that nevertheless turn out to be wrong.

The year 2009 also saw several trial decisions to watch. Interesting applications of nuisance law (exploring the defence of statutory authority for construction of the rapid-transit "Canada Line" in Vancouver) and trespass law (exploring the University of British Columbia's remedy of distress damage feasant to tow vehicles improperly parked on the University's land) are currently subject to pending appeals that may be heard in 2010.

B. Duty of Care

As in 2007, many cases (especially in the context of government liability) determining whether a *prima facie* duty of care arises under the test in *Childs v. Desormeaux*, 2006 SCC 18, focused on the issue of the parties' proximity: was it sufficiently close and direct to found a duty of care? Also notable in several cases was the court's consideration of potentially conflicting duties as a policy consideration negating imposition of a duty of care.

1. Lawyers and Clients

In *Galambos v. Perez*, 2009 SCC 48, the court examined the nature and extent of the duty owed by lawyers to a client on unusual, if not unique, facts. Mrs. Perez was effectively the office manager of the defendant law firm. During her employment, the firm handled the preparation and execution of her own and her husband's wills as well as two mortgage transactions. Occasionally, when the firm experienced cash flow problems, Mrs. Perez voluntarily, and without the knowledge of the firm (until after the fact), made cash advances totalling approximately $200,000 to the firm. When the firm was placed in receivership, she sued the firm alleging that it had breached its duty of care toward her by (a) placing itself in a conflict of interest with her; (b) failing to advise her in connection with her cash advances; and (c) failing to require or suggest that she obtain independent legal advice before making the cash advances. Affirming the trial judge's factual findings, the Supreme Court of Canada held that, given the very limited nature of the firm's retainers with Mrs. Perez and the lack of any connection between those retainers and her unsolicited and voluntary cash advances, no conflict arose between the firm's duties to Mrs. Perez as its client. There was no duty on the firm under negligence principles to provide her with advice or to insist she obtain independent legal advice about her cash advances.

2. Website Owners and Uses of Website

A website owner may owe a duty of care to users of its website in relation to statements made on the website on which the user relies (*Patchett v. Swimming Pool & Allied Trades Association Ltd. (SPATA)*, [2009] EWCA Civ. 717). SPATA posted information on its website regarding the qualifications of its registered members, indicating that such members had been vetted for experience and financial status. The plaintiffs chose a contractor listed on SPATA's website. When that contractor became insolvent, they sued SPATA for their loss. A majority of the Court of Appeal held that SPATA owed no duty of care on the basis that the parties' relationship was more remote than that of advisor and advisee—but the court did not rule out the possible existence of such a duty. In assessing whether the duty arises in a particular case, the website must be considered as a whole. Of particular relevance would be the existence of any disclaimers or exclusion clauses, as well as any statements on the website urging users to make further, independent inquiries.

3. Government and Children in Facilities Operated by Third Parties

The government does not owe a general duty of care *per se* toward children or toward children resident in a care facility or orphanage operated by a third party not under the supervision or control of a government (*Broome v. Prince Edward Island*, 2009 PECA 1, appeal heard and reserved [2009] S.C.C.A. No. 72 (QL)). Fifty-seven residents of an orphanage between 1928 and 1976 commenced action against the government, among others, for physical and sexual abuse. The government was not involved in and had no control over the administration of the orphanage. Applying the approach set out in *Syl Apps Secure Treatment Centre v. B.D.*, [2007] 3 S.C.R. 83, among other cases, the court found no precedent or analogous case where a general duty of care had been imposed on government toward children resident in a care facility or orphanage operated by a third party not under the supervision or control of a government. On the facts, a *prima facie* duty of care did not arise as there was not a sufficiently close relationship between the plaintiffs and the government to form the basis for a duty of care. Nor was the harm alleged reasonably foreseeable.

4. Commercial Hosts and Third Parties Injured by Patrons

Under the duty of care analysis, foreseeability is a factor with respect to whether the relationship between the parties warrants imposing a duty.

If a duty is established, then foreseeability of the specific harm must be considered to determine whether the defendant breached the standard of care (*Donaldson v. John Doe*, 2009 BCCA 38). In *Donaldson*, the court found that commercial hosts do owe a duty of care to third parties to protect them from alcohol-related injuries caused by intoxicated patrons (including an assault to the plaintiff's face by another patron with a souvenir glass beer mug). The court dismissed the appeal, however, based on no proof of either a breach of the standard of care or of causation.

5. Government and Individuals Needing Healthcare Services

The government may owe a private law duty of care to an individual requiring its healthcare (air ambulance) services (*Heaslip Estate v. Ontario*, 2009 ONCA 594). The plaintiff was seriously injured in a tobogganing accident. Following his admission to hospital, the plaintiff's physician sought his transfer by air ambulance to another hospital but was advised that the air ambulance would not be available for two hours—it was in use not far from the plaintiff and was carrying a person with non-life threatening injuries. The plaintiff died of his injuries and his estate sued the government in negligence. The court held that on the specific allegations of negligence a private law duty of care arguably arose from the request for the air ambulance. The case fell within the established category of a public authority's negligent failure to act in accordance with an established policy where it is reasonably foreseeable that failure to do so will cause physical harm to the plaintiff (*Just v. British Columbia*, [1989] 2 S.C.R. 1228). Further, the court held that, even if the case did not fall within an established category, it would be appropriate to recognize the possible existence of a duty in this case on the basis that there was a sufficiently close and direct relationship between the plaintiff and the government such that the government had to be mindful of the plaintiff's legitimate interests. Finally, given the very specific nature of the claim, no policy concerns such as a fear of indeterminate liability negated the *prima facie* duty of care.

6. Government and Economic Harm Incurred by Egg Producers

Governmental inspection and testing agencies did not owe a private law duty of care to a poultry farm whose flock was destroyed pending verification of the presence of an infectious disease (*River Valley Poultry Farm Ltd. v. Canada (Attorney General)*, 2009 ONCA 326, leave to appeal refused [2009] S.C.C.A. No. 259). The plaintiff sued Health Canada and the Canadian Food Inspection Agency (CFIA), alleging that they were negligent in their investigation of whether the plaintiff's

flock was infected by salmonella. Testing revealed that only a portion of the plaintiff's flock was infected. The plaintiff alleged that the testing took too long and it was obliged to destroy its entire flock. The plaintiff alleged the government breached a duty of care to investigate promptly and competently in this regard, thus causing the plaintiff's economic losses. The court held that the alleged duty of care did not fall within an established category of cases. Accordingly, the existence of a duty must be determined through the three-part test set out in *Cooper v. Hobart*, [2001] 3 S.C.R. 537, and subsequent cases. The court held that there was no proximity between the plaintiff and Health Canada, and thus no private law duty of care arose, because Health Canada took on its testing role not because of a concern for the plaintiff's economic interests but because of its overriding public health mandate. In respect of CFIA's liability, although it agreed that the plaintiff had established reasonably foreseeable harm to its economic interests, the court held that the plaintiff could not establish sufficient proximity to CFIA. Mere "targeting" for investigation under a statutory regime is not enough to establish proximity. There was no similarity between this case and the principles emerging from *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129. Additionally, the *Health of Animals Act*, S.C. 1990, c. 21, discloses a legislative intention to exclude imposition of a private law duty of care. Finally, the potential conflict if CFIA were required to be mindful not only of the health of animals and the public but also the economic interests of farmers is an overriding policy consideration negating a private duty.

7. Government to Individuals Contracting SARS

The government did not owe a private law duty of care to individuals, including nurses, who contracted SARS in 2003 (*Laroza Estate v. Ontario*, 2009 ONCA 373; *Williams v. Canada (Attorney General)*, 2009 ONCA 378, leave to appeal refused [2009] S.C.C.A. No. 298; *Abarquez v. Ontario*, 2009 ONCA 374, leave to appeal refused [2009] S.C.C.A. No. 297; *Henry Estate v. The Scarborough Hospital*, 2009 ONCA 375; and *Jamal Estate v. TheScarborough Hospital*, 2009 ONCA 376, leave to appeal refused [2009] S.C.C.A. No. 308). Generally, the plaintiffs in these appeals alleged that the government was negligent in its implementation of policies and procedures intended to address the SARS outbreak. In each case, the Court of Appeal affirmed that the alleged private law duty did not fall within an established category. In applying the test set out in *Cooper v. Hobart*, 2001 SCC 79, the courts held that there was insufficient proximity between the plaintiffs and

the government. The mere fact that the plaintiffs contracted SARS while in a hospital did not establish a direct relationship with the government for purposes of the duty of care analysis. In each case, the government was required to address the interests of the public at large, not the particular interests of the plaintiffs. Absent sufficient proximity, no *prima facie* duty of care arose. Finally, to recognize a duty in these circumstances would raise the potential for conflict with the government's overarching duty to the public at large.

C. Standard of Care

1. Good Faith

Good faith is not a discrete aspect of the standard of care analysis in a claim in negligence about the actions of a social worker (*B.M. (Guardian ad litem of) v. British Columbia*, 2009 BCCA 413). The infant plaintiff's father injured him after a social worker lifted a requirement that the father not be left alone with the boy. The Crown did not dispute the existence of a duty of care but asserted that a social worker who acts in good faith is not liable for errors in judgment. In reconciling its earlier cases with the standard of care analysis in *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, the Court of Appeal held that, although not a discrete aspect of the analysis, the presence or absence of good faith may be an important consideration in determining whether the standard of care (namely, a reasonable social worker in similar circumstances) has been breached.

2. Logging Truckers

The standard of care applicable to a logging trucker was that of a prudent and diligent inspection before departure (*Michel v. Doe*, 2009 BCCA 225, leave to appeal refused [2009] S.C.C.A. No. 324 (QL)). The plaintiff was injured by an object that fell off a loaded logging truck. The trial judge dismissed the claim, finding no evidence that the standard of care had been breached. The plaintiff maintained that the trial judge erroneously applied the principles stated in *Fontaine v. British Columbia (Official Administrator)*, [1998] 1 S.C.R. 424. The Court of Appeal clarified that, although in *Fontaine* it had declared *res ipsa loquitor* to be an expired doctrine, the court had not modified the underlying principles governing the use of circumstantial evidence in determining liability for negligence. Here, on the trial judge's factual findings, the possibilities of non-negligence (a prudent and diligent inspection in which the fallen object nevertheless eluded detection) and

of negligence (no inspection or a negligent one) were equally consistent. In the circumstances, as in *Hall v. Cooper Industries, Inc.*, 2005 BCCA 290, the plaintiff had failed to establish a *prima facie* case of negligence, and the defendant was not required to produce evidence to the contrary to rebut an inference of negligence.

3. Medical Malpractice

A doctor performing a mid-forceps delivery breaches the standard of care in proceeding with the mid-forceps delivery without first checking on the availability of back-up anaesthetic and surgical support for Caesarean section delivery if necessary (*Ediger (Guardian ad litem of) v. Johnston*, 2009 BCSC 386). The infant plaintiff suffered serious brain injury during a forceps-assisted delivery by the doctor, when his heart stopped, depriving him of oxygen for 18 minutes. The court held that the doctor did not breach the standard of care in attempting a rotational "mid-level" forceps procedure to assist the plaintiff's delivery, but did breach it in so proceeding without first checking on the availability of surgical back-up.

4. Solicitor's Negligence

A lawyer will only be held to have breached the standard of care if any "reasonably competent" lawyer would have acted differently (*Pritchard Joyce & Hinds (A Firm) v. Batcup*, [2009] EWCA Civ. 369) (in Canada, see *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147). In *Pritchard* the plaintiffs sued their counsel (among others) for failing to advise them of certain time limits for bringing a claim against their former counsel. In overturning the trial judge's decision holding the defendant firm liable, the Court of Appeal held that the trial judge applied too high a standard of care. The law does not demand either omniscience or infallibility in lawyers any more than it does in doctors or architects.

5. Teachers

The standard of care to be exercised by school authorities is that of a careful or prudent teacher. A gym teacher may breach the standard of care when the teacher allows a student to play in a field hockey tournament, notwithstanding the student's absence from all of the previous classes in which the basic skills of the sport were taught (*Hussack v. School District No. 33 (Chilliwack)*, 2009 BCSC 852). The court found that, to play the sport safely, all students must learn how to check or tackle efficiently and safely. Learning how to avoid checking from behind would be a key component in the effort to

dispossess an opponent of the ball. Here, the student did not learn these skills, and compensable injury resulted.

D. Causation

In *Chambers v. Goertz*, 2009 BCCA 358, the Court of Appeal outlined and clarified the law in cases of multiple potential tortfeasors. The case involved a claim in negligence brought by pedestrians in a single-car motor vehicle accident. On appeal from the trial judge's liability finding, the court sought to clarify a possible misunderstanding arising from the use of the phrase "material contribution" by the Supreme Court of Canada. In cases where it is impossible for the plaintiff to prove a casual link between the breach of duty and the harm (for example, *Fairchild v. Glenhaven Funeral Services Ltd.*, [2002] UKHL 22; *Barker v. Corus (UK) Plc*, [2006] UKHL 20; and *Cook v. Lewis*, [1951] S.C.R. 830), the use of "material contribution" does not signify a test of causation at all; it is a policy-driven rule of law designed to permit plaintiffs to recover in such cases despite the evidentiary gap. In contrast, as used in the context of determining whether the defendant's negligence "materially contributed" to the occurrence of the plaintiff's injury, as in *Athey v. Leonati*, [1996] 3 S.C.R. 458, the test is used to identify for which of the multiple necessary "but for" factual causes of an injury the defendant should be held responsible. In law, a materially contributing cause, one for which it is appropriate to hold a defendant liable, is one that falls outside the *de minimus* range, or one where there is proof of a "substantial connection" between the injury and the defendant's conduct (*Athey*; *Snell v. Farrell*, [1990] 2 S.C.R. 311).

E. Contributory Negligence and Apportionment

When a pedestrian jaywalks across a highway, he or she must yield the right of way to a vehicle. In *Claydon v. Insurance Corp. of British Columbia*, 2009 BCSC 1077, the plaintiff was found to be 25% liable for her own injuries. However, in *Moses v. Kim*, 2009 BCCA 82, the Court of Appeal upheld a 65% finding of contributory negligence when the defendant driver was "there to be seen" by the plaintiff pedestrian.

In *Quade v. Schwartz*, 2009 BCCA 73, the Court of Appeal reduced the plaintiff cyclist's liability for an accident from 75% to 50%, holding that despite the plaintiff's speed and failure to wear a helmet, he was "there to be seen" by the defendant driver.

F. Damages

1. Apportionment Between Multiple Tortious Causes

The most important question to be determined in cases involving multiple tortious causes of action is whether the damage or loss is indivisible (*B. (P.B.) v. M.B (M.M.)*, 2009 BCCA 365). The plaintiff sued her father for damages stemming from years of physical, mental, and sexual abuse. The trial judge found the father 65% responsible for the plaintiff's non-pecuniary loss and 85% responsible for the plaintiff's pecuniary losses. On appeal on the issue of causation, the majority of the court noted that the most important question in these cases is whether the injury is divisible. If it is, a plaintiff can recover only the divisible loss caused by that defendant. If the injury is indivisible, a plaintiff can recover 100% of the damages from each defendant. The trial judge in this case failed to determine whether the injury was divisible and appears to have confused the finding of liability with the assessment of damages. Examining the evidence, the trial judge found that the father's conduct alone would have caused severe psychological injury. This was sufficient to have found the injury to have been indivisible. In assessing damages, the thin skull and crumbling skull principles must also be considered to determine how exactly the plaintiff is to be made whole again. In this case there was no evidence that the plaintiff's original position was in any way diminished amounting to a "crumbling skull". The father was therefore responsible for the entirety of the plaintiff's condition.

Mackenzie J.A., in dissent, noted that *Athey v. Leonati*, [1996] 3 S.C.R. 458 did not disturb existing principles of causation and assessment of damages as between separate, non-concurrent torts. If the crumbling skull principle allows for apportionment between tortious and non-tortious symptomatic conditions, then it would be illogical not to do the same for two separate and non-concurrent tortious symptomatic conditions. The difficulty in dividing the combination of original condition and tortious injury is no different if the original condition has a tortious cause as well. The sexual abuses by various parties in this case were divisible injuries that resulted in tangled global symptoms. There was no basis to interfere with the trial judge's decision in this regard.

In *Kearns v. Marples*, 2009 BCSC 802, the plaintiff sought damages for injuries sustained in an assault. Following the assault, though, the plaintiff was injured in two separate motor vehicle accidents. The motor vehicle defendants did not appear in the assault action. In respect of damages attributable to the assault, neither party sought to

have the court make a global assessment of damages for her assault and motor vehicle injuries. The court held that, although the injuries may be overlapping as between the various tortious causes, they were not truly indivisible in the legal and factual sense of the term. The case involved the very common fact pattern whereby injuries occasioned by one tortfeasor are exacerbated by another. Applying the approach set out in *Chartrand v. Grace Lutheran Church Society*, 2003 BCSC 1377, the court held it appropriate to assess only damages of the assault up to the time of the first motor vehicle accident.

2. Future Income-earning Capacity

A helpful framework for fixing the amount of future loss is to determine the general level of earnings thought to be realistically possible and then to project those earnings across the working life of the plaintiff, taking into account positive and negative contingencies (*Pett v. Pett*, 2009 BCCA 232). The trial judge had referred to the plaintiff's low level of education as something for which the defendant was not responsible. On appeal, the court held that the reference to the plaintiff's low level of education was problematic. Although the defendant is not responsible for the plaintiff's education level (and the corresponding dependence on physical labour that was hampered by the back injury sustained in the accident), the defendant must take the victim as found and will be responsible for the impact that the accident had on the plaintiff. More problematic was the fact that the trial judge did not afford much, if any, explanation for the way in which he arrived at his award of damages for loss of future earning capacity.

3. Charter Challenges to Legislated Limits on Damages for Non-pecuniary Loss

Charter challenges to legislated monetary limits on damages for non-pecuniary loss for minor injuries were rejected in both Alberta and Nova Scotia. In *Morrow v. Zhang*, 2009 ABCA 215, leave to appeal refused [2009] S.C.C.A. No. 341 (QL), the court held that a $4,000 limit on non-pecuniary damages for minor injuries did not infringe s. 7 or 15(1) of the *Charter* and in *Hartling v. Nova Scotia (Attorney General)*, 2009 NSSC 2, affirmed 2009 NSCA 130, the court held that a $2,500 limit on such damages did not infringe s. 15(1) of the *Charter*.

4. Reductions for Betterment

In *Laichkwiltach Enterprises Ltd. v. F/V Pacific Faith (Ship)*, 2009 BCCA 157, the court clarified the principles governing the reduction of damages for betterment. The defendant was found liable in negligence for damage to the plaintiff's fishing vessel. The general principle is that the plaintiff should have deducted from the award the amount by which his or her property is improved (betterment) but is compensated to the extent he or she has had to put out money prematurely to obtain that betterment. Betterment is a question of fact to be determined on the evidence and what is reasonable in the particular case. The starting point is the cost of repair. In some cases, that cost will also be the end point. In other cases, betterment will be proven and it will fall to the trier of fact to assess the extent of the betterment. That assessment must conclude with a determination of what is reasonable and fair to both parties.

G. Tort Defences

1. Volenti and Consent

Even when a protester voluntarily places himself or herself in a circumstance where he or she assumes some risk of injury from accident, or even negligence, by going onto a construction site, the onus remains on the defendant to show something in the protester's conduct which would allow the defendant to argue *volenti non fit injuria*. To find otherwise would tolerate the use or threatened use of violence to those engaged in non-violent protest activity (*Krawczyk v. Peter Kiewit Sons Co.*, 2009 BCSC 164). It makes no sense to treat mere unlawfulness as the basis for consent to an assault or battery, particularly where the unlawfulness involves neither violence nor the creation of an apprehension of violence.

Nor will such a trespass provide the basis for an inference of consent to an assault or battery. To hold otherwise would be to convert a trespass or the disobedience of a court order into acquiescence to the commission of an intentional tort. The onus of proof for consent still lies on the defendant.

2. Contractual Waiver and Negligence

To provide a defence to negligence, a contractual waiver must be clearly and broadly worded (*Gallant v. Fanshawe College of Applied Arts*

and Technology, [2009] O.J. No. 3977 (QL) (Ont. S.C.J.)). The plaintiff was injured during a motorcycle course exercise. The defendants sought to rely on a contractual waiver signed by the plaintiff before the course began. The court held that the waiver was not sufficiently broad or clear in its language to exonerate the defendants from their own negligence in failing to provide a safe teaching environment after promising to do so. Further, the court held that, in the circumstances, it would be unfair and unreasonable to give effect to the waiver as a defence to the defendants' negligence.

3. Ex Turpi Causa Non Oritur Actio

The *ex turpi causa non oritur actio* doctrine prevents a party from benefiting from illegal or immoral conduct. It is not necessary to plead it as it is a question of law. Rather, it is necessary to plead the material facts to support the application of the doctrine (*Randhawa v. 420413 B.C. Ltd.*, 2009 BCCA 602).

H. Defamation

1. Defence of Responsible Communication on Matters of Public Interest

Exactly 200 years after the death of Thomas Paine, and three days before Christmas, the Supreme Court of Canada issued a pair of decisions that mark the most important advance in freedom of expression, and in particular, freedom of the press, in recent Canadian law.

In *Grant v. Torstar Corp.*, 2009 SCC 61, and *Quan v. Cusson*, 2009 SCC 62, the Supreme Court of Canada confirmed a new defence of responsible communication on matters of public interest. This new defence will protect journalists, publishers, and, importantly, citizen-journalists and bloggers, from a defamation claim if the defendant can show that he or she acted responsibly in reporting on a matter of public interest even if the facts turn out to be wrong.

Further, the Supreme Court of Canada recognized the concept of "reportage": a journalist or publisher generally will not be liable for quoting defamatory statements made by a person if the defamatory statements are repeated in a fair manner, and in order to report on what was said in a given dispute.

a. The Test for the Defence of Responsible Communication on Matters of Public Interest

The defendant must prove two elements in order to establish the defence of responsible communication:

(i) the publication must be on a matter of public interest; and

(ii) the publication was responsible, in that the defendant was diligent in trying to verify the allegations, having regard to all of the circumstances.

(i) Was the Publication on a Matter of Public Interest?

To qualify as a matter of public interest, the public must have some substantial concern about the subject matter, because it affects the welfare of citizens, or because it has attracted considerable public notoriety or controversy. Some segment of the public must have a genuine stake in knowing about the matter; mere curiosity or prurient interest is not sufficient.

In Australia and New Zealand, where the responsible journalism defence was first developed, the defence is limited to government and political matters. The Supreme Court of Canada, however, confirmed that in Canada the defence is much broader. The public has a genuine stake in knowing about many matters, ranging from science and the arts, to the environment, religion, and morality, and the responsible communication defence extends to protect responsible but erroneous statements concerning all areas of social discourse in which the public has a vested interest. Further, the defence protects reports on persons who are not necessarily famous public figures, so long as the report concerns a matter of public interest.

Defamation trials are often heard by judge and jury. The issue of whether the publication was on a matter of public interest, however, is to be first determined by the judge alone as a matter of law. If the judge determines the matter to be one of public interest, the second part of the test, whether the publication was responsible, will be sent to the jury for determination.

(ii) Was Publication of the Defamatory Communication Nonetheless Responsible?

The Supreme Court of Canada provides a list of considerations that will guide the trial court as to whether the publication of the defamatory communication was nonetheless responsible:

(1) *The seriousness of the allegation*: If the allegation in the article is particularly serious, such as an allegation of corruption or criminality, the court will expect the defendant to show greater due diligence in researching the allegations.

(2) *The public importance of the matter*: Not all subjects are of equal public interest. Where the subject matter is of great public importance, the court may more readily conclude that it was responsible to publish the article on the basis of the facts then known.

(3) *The urgency of the matter*: Given the relative importance of the subject matter, did the public needed to know the information when it did, based on the amount of due diligence conducted by the defendant journalist? This factor is considered in light of what the defendant knew or ought to have known at the time of publication. If a reasonable delay could have helped the defendant to find out the truth and correct the defamatory falsehood, without compromising the story's timeliness, the defendant will have a harder time showing that he or she communicated responsibly.

(4) *The status and reliability of the source*: The less trustworthy the source, the greater the need to use other sources to verify the allegations. If the source has an axe to grind, or insists on confidentiality, the court will expect the defendant to undertake further investigations to back up the allegations.

(5) *Whether the plaintiff's side of the story was sought and accurately reported*: This factor has been recognized as the most important consideration, based on balance and fairness. In most cases, it is inherently unfair to publish defamatory allegation of fact without giving the target an opportunity to respond. That being said, if the target of the allegations has no special knowledge about those allegations (such as, for example, an allegation that the target is being investigated by the police), this factor may be of little importance.

(6) *Whether inclusion of the defamatory statement was justifiable*: Was it really necessary to include the defamatory statement in order to communicate on the matter of public interest? This consideration should not be applied strictly, and editorial discretion should be granted a generous scope.

(7) *Whether the defamatory statement's public interest lay in the fact that it was made rather than its truth ("reportage")*: It is generally no defence that one is merely repeating another person's libel: the person who repeats the defamatory statement is just as liable as the maker of the original false statement. This repetition rule does not apply, however, to fairly reported statements whose public interest lies in the fact that they were made, rather than in the truth or falsity of the reported statements. In other words, the defendant is entitled to report that certain persons made defamatory statements. This exception to the repetition rule is known as "reportage". In order to rely on the reportage exception, the defendant must:

   (a) attribute the statement to a person, preferably identified, thus ensuring some accountability;

   (b) confirm, expressly or implicitly, that the truth of the statement has not been verified;

   (c) set out both sides of the dispute fairly; and

   (d) provide the context in which the statements were made.

These seven considerations are the most important considerations, but they are not exhaustive; each defamatory statement and each set of facts of due diligence must be assed individually.

Another potentially relevant consideration is the "tone" of the article. But the court cautions not to put too much weight on this factor. While distortion or sensationalism may undermine the defendant's claim of responsible communication in the public interest, the Supreme Court concludes that "the defence of responsible communication ought not to hold writers to a standard of stylistic blandness" (*Grant v. Torstar Corp.*, at para. 123). Nor is the defence lost if the communicator takes a partisan or adversarial position in the article.

b. The Role of Malice

Under the traditional test for qualified privilege, even if the defendant can show a duty and interest in making the defamatory communication, if the defendant was motivated primarily by malice (rather than the public interest) in making the communication, the defence is lost. Consideration of the duty and interest relationship, and consideration of malice are two separate steps in the judicial consideration.

In *Grant* and *Cusson*, the Supreme Court of Canada confirmed that malice is not a separate consideration at the end of the inquiry, to defeat the defence even if the defendant has practiced due diligence. If the defendant is motivated by malice, then that fact will be rolled into the assessment of whether the defendant acted responsibly in making the communication.

c. Defence Extends Beyond Professional Journalists, and Includes Online Media

The defence of responsible communication on matters of public interest, as reflected in its name, is not limited to professional journalists and traditional paper-based publications. The Supreme Court confirms that the new defence is "available to anyone who publishes material of public interest in any medium". It extends to bloggers and other online media, even though such Internet-based communications are potentially much broader, more permanent, and more harmful than traditional print media.

For now, bloggers and citizen-journalists should expect to be held to the same standards of responsible journalism and the same legal considerations (set out in the factors above) as would be a professional print journalist. The test will be an objective one and will not be lowered or altered for non-professional journalists. The court, however, anticipates that "the applicable standards will necessarily evolve to keep pace with the norms of new communications media" (*Grant*, at para. 97).

d. The Defence of Responsible Communication Is a New, Separate Defence, and Not a Variation on the Defence of Qualified Privilege

The traditional test for qualified privilege protects communications that society wishes to encourage, even where those communications turn out to be incorrect. For example, if a doctor reports a concern that a child patient has been assaulted, that doctor is protected by the defence even if that report turns out to be incorrect and harms, for example, the parents. The test for qualified privilege asks whether there is a duty on the person making communication to make the communication, and a corresponding interest in receiving such a report. The majority of the Law Lords in *Reynolds v. Times Newspapers Ltd.*, [1999] 4 All E.R. 609 and *Jameel v. Wall Street Journal Europe SPRL*, [2006] UKHL 44 took the view that the responsible journalism defence was a logical extension of the qualified privilege defence. The Supreme Court, however, concluded that it was more appropriate to

treat it as a new defence, separate from the traditional duty-interest defence of qualified privilege. The court noted that the traditional qualified privilege test is not based on values of free expression, but rather on the social utility of encouraging particular communications without fear of civil liability.

2. Counsel and Witness Immunity

Counsel gathering information for a judicial or quasi-judicial proceeding and witnesses providing that information are immune from civil liability (*McDaniel v. McDaniel*, 2009 BCCA 53). It is irrelevant that the witness may be motivated by malice towards the plaintiff. It is the occasion that attracts the immunity, and not the intention of the person providing the information.

3. Fair Comment

Although the defendant relying on the defence of fair comment must show that the facts on which the comment is based are truly stated, the defendant is not required to set forth all facts, both pro and con, relevant to the matter on which he or she is commenting (*Creative Salmon Co. Ltd. v. Staniford*, 2009 BCCA 61, leave to appeal refused [2009] S.C.C.A. No. 154 (QL)). That said, the admission of relevant facts will be a factor to consider in determining whether or not malice motivated the comment.

4. Municipality May Not Sue in Defamation

A municipality may not sue for defamation (*Dixon v. Powell River (City)*, 2009 BCSC 406). The court applied two Ontario decisions examined in the 2006 edition of *Annual Review of Law & Practice* (*Halton Hills (Town) v. Kerouac* (2006), 270 D.L.R. (4th) 479 (Ont. S.C.J.) and *Montague (Township) v. Page* (2006), 79 O.R. (3d) 515 (S.C.J.)) to conclude that a municipality might have been able to sue in defamation just like any other corporate entity before the *Charter*; the s. 2(b) expression rights enshrined in the *Charter* made such litigation no longer feasible.

5. Internet Hyperlinks to Defamatory Websites

Providing a hyperlink to a website containing defamatory material will not implicate a website owner for republishing that material. If the website simply provides a hyperlink, or describes the hyperlinked contents in a neutral manner, then the hyperlink is serving as no more than a footnote in a book or a card in a library catalogue. The owner

or operator of the website may be liable if it endorses or adopts the defamatory content, or explicitly encourages the reader to link to the offending material (*Crookes v. Newton*, 2009 BCCA 392, application for leave to appeal [2009] S.C.C.A. No. 448). The court also confirmed that providing the website address of a defamatory website, without encouragement or endorsement, does not constitute publication.

6. Jurisdiction

In *Black v. Breeden* (2009), 309 D.L.R. (4th) 708 (Ont. S.C.J.), the court showed a greater willingness to hear defamation actions in the domestic courts even where the majority of underlying facts of witnesses were outside the jurisdiction. In *Black*, the defendants would have known that the allegedly defamatory press releases posted on the company's New York website could and would be downloaded in Ontario, and that the reputation of the plaintiff, Lord Black, was established predominantly in Ontario.

I. Breach of Privacy

Installation of security cameras on one's own property may result in an invasion of a neighbour's privacy. In *Wasserman v. Hall*, 2009 BCSC 1318, a neighbourly dispute over the position of a fence escalated into a series of unfortunate events, including the installation of security cameras. Cameras pointed towards the fence line, where there was no expectation of privacy, did not violate the *Privacy Act*, R.S.B.C. 1996, c. 373; cameras pointed in the general direction of the neighbour's house did violate the Act.

J. Occupiers' Liability

A person who enters recreational trails, reasonably marked by notice as such, for the purpose of a recreational activity and without payment of any fee, is deemed by the *Occupiers Liability Act*, R.S.O. 1990, c. O.2, to have willingly assumed the risks associated with the activity. The duty of the occupier (here, the Conservation Authority) to the person is: "to not create a danger with the deliberate intent of doing harm or damage to the person or his or her property and to not act with reckless disregard of the presence of the person or his or her property" (s. 4(4)). In *Schneider v. St. Clair Region Conservation Authority*, 2009 ONCA 640, application for leave to appeal [2009] S.C.C.A. No. 445, the Conservation Authority owned a park and encouraged the general public to use the park free of charge for recreational purposes. During the winter, the plaintiff was cross-country skiing in the

park and was injured when she left the trail and struck her ski on a concrete wall hidden under the snow. The Court of Appeal, reversing the trial decision, held that, despite the fact that the plaintiff left the trail, the entire park was a "recreational trail" and the Conservation Authority met its duty under the Act.

When a person jaywalks across the street and allegedly injures himself or herself by tripping over uneven pavement that is in a state of disrepair, the trial judge must consider whether the repair policy the City relies on is indeed a "policy", and, if so, whether it was made in a *bona fide* exercise of the City's discretion. If the policy meets these criteria, then the court is required to assess the policy in light of all the surrounding circumstances, including budgetary restraints. Once this analysis is complete, the court should then question whether the policy was carried out in a reasonable manner (*Plakholm v. Victoria (City)*, 2009 BCCA 466). In this case, a new trial was ordered because the trial judge had erred by applying the standard of care traditionally imposed on occupiers vis-à-vis licensees to a municipality, contrary to the *Occupiers Liability Act*, R.S.B.C. 1996, c. 337.

The law of occupier's liability does not require an occupier to guard against any possible foreseeable accident. Just because there was a foreseeable risk of falling off a roof while repairing it, the reasonable occupier does not necessarily have to install a railing or take other similar steps. A "reasonable" response is dictated by the circumstances (*Wood v. Ward*, 2009 ABCA 325).

K. Nuisance

1. Private Nuisance

A private nuisance is established where a neighbour unreasonably and substantially interferes with another neighbour's use and enjoyment of his or her own property. Substantial interference connotes more than mere inconvenience or minor discomfort. The test is objective and requires proof that the "interference is of a kind and extent that would not be tolerated by the ordinary occupier" (*Boggs v. Harrison*, 2009 BCSC 789 at para. 23, (reconsideration denied 2009 BCSC 1115); *Wasserman v. Hall*, 2009 BCSC 1318 at para. 85).

Yet, in *William L. Chafe & Son Ltd. v. Murphy*, 2009 NLTD 134, the court imported a subjective test and held that the tort of nuisance requires a realization or awareness on the part of the tortfeasor of his or her activities that give rise to the nuisance.

2. Public Nuisance

A public nuisance is an unreasonable interference with the use and enjoyment of a public right to use and enjoy public rights-of-way. It is well established that a public nuisance may also be a private nuisance (*Heyes v. City of Vancouver*, 2009 BCSC 651, appeal pending).

3. Novel Applications

A lengthy course of intimidation, harassment, and annoying behaviour by a neighbour can be such a substantial and unreasonable interference with one's enjoyment of property to be a compensable nuisance (*Boggs v. Harrison*, 2009 BCSC 789). The tort is sufficiently broad to encompass the video surveillance of a neighbour's property (*Wasserman v. Hall*, 2009 BCSC 1318).

Employing a method of construction, like cut and cover (or "open trench") where traffic is significantly disrupted, and causes economic loss to a business, may be a compensable nuisance (*Heyes v. Vancouver (City)*, 2009 BCSC 651, appeal pending). The court found that the construction adversely affected access to and revenue from the plaintiff's business. The mode of construction (when others were available) imposed an unreasonable burden on the plaintiff, outweighing the social or public utility associated with the construction of the new rapid transit "Canada Line" in Vancouver.

4. Defence of Statutory Authority

The defence of statutory authority evolved to accommodate the fact that the execution of various statutory mandates legislated with the intention of benefiting the general public could cause a nuisance. However the defence is limited in its scope and where the evidence supports the conclusion that there is an alternative plan that would not have created the nuisance, the defence must fail (*Heyes v. Vancouver (City)*, 2009 BCSC 651, appeal pending).

L. Trespass

Any encroachment on another's property, even minute, is a trespass (*Wasserman v. Hall*, 2009 BCSC 1318). It is not necessary to prove actual damages.

1. Distress Damage Feasant

The University of British Columbia may impound a car under the self-help doctrine of distress damage feasant when the car is parked improperly on the University's lands. However, the University may not impound a car for past offences (*Barbour v. University of British Columbia*, 2009 BCSC 425, appeal pending).

2. Nominal Damages

Taking it upon oneself to fix a road in disrepair can make a person liable in trespass. The damages payable will depend on the quality of the repair job. In *Peachland (District) v. 0748151 B.C. Ltd.*, 2009 BCSC 735, a landowner's contractor performed some maintenance on the street and removed loose rock and debris from the steep slope on one side of the street. The municipality sued in trespass, alleging that the slope was made unstable. The court found that the slope was not made unstable and that the trespass had actually put the municipality in a better position than it was before (through the contractor's repairs to the road). Under these unusual circumstances, the court held that the municipality was entitled to nominal damages only.

M. Assault and Battery

The tort of assault is the intentional creation of the apprehension of imminent harmful or offensive contact. Although the tort requires proof of an intention, the intent need not be to make actual physical contact. In the context of an assault, "apprehends" means "expects" rather than "is fearful of" (*Krawczyk v. Peter Kiewit Sons Co.*, 2009 BCSC 164). Here, the plaintiff breached an injunction by going onto the defendant's property to protest a work project. She alleged that one of the defendant's employees had backed up his truck in her direction with intent to injure or threaten her. The court found that the plaintiff did not prove the requisite intention for assault and dismissed her claim.

Battery is also an intentional tort, and, unless consent has been given, any person touched intentionally by another has suffered battery. In *Battrum v. British Columbia*, 2009 BCSC 1276, appeal pending, the plaintiff asserted that she was entitled to damages for battery because she did not consent to the paramedic's treatment of her at the accident scene. The court found that the plaintiff's consent could be implied from her conduct (especially in calling 9-1-1 for assistance).

N. Conversion

Where a trustee holds funds for beneficial owners and those funds are then transferred to another trustee, there can be no claim in conversion. In order to be actionable, a conversion must result from the defendant's positive act which denies or seriously interferes with a claimant's possessory rights (*Ethiopian Orthodox Church of Canada v. Hohite*, 2009 BCSC 1379). In this case, the funds were held by the trustee for the benefit of the Vancouver congregation. The plaintiff—an Ontario corporation, extraprovincially registered in British Columbia—did not have any possessory rights to the funds since it was merely a trustee. The court dismissed the action.

O. Conspiracy

Where individuals conspire, for example, to extend short-term credit at a cost to borrowers in excess of that permitted by the *Criminal Code*, R.S.C. 1985, c. C-46, and incorporate companies in order to carry out that conspiracy, the companies themselves are parties to the conspiracy. The fact that the illegal activity was conducted through and by the companies does not relieve the principals of personal liability. The court will not permit individuals to hide behind the corporate veil of a corporation primarily incorporated to engage in a wrongful act (*Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, 2009 BCCA 110, leave to appeal refused [2009] S.C.C.A. No. 194 (QL)). Note that this discussion on conspiracy is *obiter dicta*, as the court agreed with the primary claim based in unjust enrichment.

P. False Imprisonment

In *Miazga v. Kvello Estate*, 2009 SCC 51, the Supreme Court of Canada tightened the test for the tort of malicious prosecution. As a result, it will be a remarkable case in which the tort is successfully prosecuted against a Crown prosecutor.

In the criminal proceedings underlying the *Miazga* civil case, the plaintiffs were charged with some 75 counts of sexual assault against children in their care. The complainant children had detailed bizarre acts of sexual abuse involving satanic rituals. Just before trial, the defendant, the Crown attorney Miazga, entered a stay of proceedings after the child complainants, on whose testimony the prosecution was based, recanted their claims.

The Supreme Court of Canada confirmed the four-part test for malicious prosecution: the plaintiff must prove that the prosecution was: (1) initiated by the defendant; (2) terminated in favour of the plaintiff; (3) undertaken without reasonable and probable cause; and (4) motivated by malice or primary purpose other than that of carrying the law into effect. In *Miazga*, only the final two parts of the test were under consideration.

As to the third part of the test, whether the prosecution was undertaken without reasonable and probable cause, the focus is not whether the prosecutor personally viewed the accused as guilty, but whether the prosecutor believed, based on the circumstances, that proof beyond a reasonable doubt could have been made out in court. The traditional test, which focuses on the accuser's personal view of the defendant's probable liability, arises in the traditional context of the tort—a private lawsuit. In contrast, in a public prosecution, the Crown attorney is duty-bound to act solely in the public interest; the Crown's personal belief in the guilt or innocence of the accused is less important than the objective assessment of whether sufficient cause exists. If the court concludes on the basis of circumstances known to the prosecutor at the relevant time that reasonable and probable cause existed to start or continue a criminal prosecution, then the criminal process was employed properly and the tort is dismissed on the third step of the test. If, however, the court determines that there were no objective grounds for starting or continuing the prosecution at the relevant time, the court proceeds to the fourth step and asks whether the prosecution was motivated by malice or for a purpose other than carrying out the law.

The fourth part of the test, concerning malice, will be made out where the court is satisfied that the Crown prosecutor started or continued the prosecution for a purpose inconsistent with his or her role as a minister of justice, in other words, the prosecutor deliberately intended to subvert or abuse the office of the Crown or the process of criminal justice. If the prosecutor lacks a subjective belief in the reasonable and probable cause, it is relevant to the malice inquiry but does not equate with malice and does not relieve the plaintiff of proving that the prosecutor acted for an improper purpose. Again, this contrasts with the traditional private suit. As the tort of malicious prosecution arose from civil cases between private parties, courts are willing to infer malice from an initial finding that prosecution was initiated without reasonable and probable grounds, the improper motives are often clear from the pre-existing relationship between the parties, and there are obvious improper motivations for bringing the suit. The requirement of an improper purpose ensures that liability for malicious prosecution will

not arise where the prosecutor proceeds absent reasonable and probable grounds by reason of incompetence, inexperience, honest mistake, poor judgment, lack of professionalism, laziness, recklessness, negligence, or even gross negligence.

Q. Abuse of Process

It is arguably not necessary in British Columbia that a plaintiff bringing an action in abuse of process prove that the defendant made an overt act or threat in conjunction with the abusive litigation (*Smith v. Rusk*, 2009 BCCA 96). The Court of Appeal confirmed that, generally, commencing an action for an improper purpose may constitute the tort of abuse of process, and, specifically, the filing of a builder's lien for an improper purpose can constitute abuse of process. In both cases, the commencement of legal proceedings without legal foundation and for the unlawful purpose of, for example, settlement by means of legal blackmail, can constitute abuse of process.

R. Misrepresentation

1. Negligent Misrepresentation

The guiding test for misrepresentation remains as stated in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, and modified by *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165. For a claim in negligent misrepresentation to lie, there are five general requirements:

(1) there must be a duty of care based on a "special relationship" between the representor and representee;

(2) the representation in question must be untrue, inaccurate, or misleading;

(3) the representor must have acted negligently in making the misrepresentation;

(4) the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and

(5) the reliance must have been detrimental to the representee in the sense that damages resulted.

As a general rule, only misrepresentations of fact are actionable (*Manufacturers Life Insurance Co. v. Pitblado & Hoskin*, 2009 MBCA 83, application for leave to appeal [2009] S.C.C.A. No. 441).

a. Duty of Care

Novel claims in misrepresentation do not require the "*Anns/Kamloops* analysis", as a modified test for duty of care was imported into the misrepresentation analysis by *Hercules Managements Ltd. v. Ernst & Young* (*Manufacturers Life Insurance Co. v. Pitblado & Hoskin, supra*).

Where a market feasibility analyst assesses the feasibility of building a new hotel and projects the likely future financial performance of the hotel, the analysis involves a great deal of educated guesswork. A projection of future performance will be reasonable (and meet the "standard of care") if it falls within a "range of reasonableness" (*Strata Plan LMS 3851 v. Homer Street Development*, 2009 BCCA 395).

b. Negating Policy Reasons to Impose Duty of Care

In the duty of care analysis, policy reasons, like indeterminate liability, may negate the imposition of a duty of care. However, there is no question of indeterminacy where the defendant to a misrepresentation claim knows the identity of the plaintiff and the representations are used for the specific purposes for which they were made (*Manufacturers Life Insurance Co. v. Pitblado & Hoskin, supra*).

c. Duties Owed by Real Estate Brokers

A real estate broker may owe a duty of care to a third party potential purchaser (*Roman v. Bryant*, 2009 NSSM 39). However, the duty of a listing realtor who has no direct contract with purchaser is different and less than that of a selling realtor (*Walls v. Ross*, 2001 BCPC 187, cited in *Roman v. Bryant*).

d. Duties Owed by Dealerships to Lessees

In *Marigold Nursery Ltd. v. Victoria Ford Alliance Ltd.*, 2009 BCSC 1255, the plaintiff (car lessee) argued that the defendant dealership (lessor) owed it a duty of care not to misrepresent information about certain vehicle leases. The court rejected this argument, finding that the lessee had ignored documents sent by the lessor so that even if those documents contained a misrepresentation about the date of termination of the lease, the lessee could not prove reliance.

e. Reliance May Be Inferred or Deemed

Reliance is a question of fact as to the plaintiff's state of mind. At common law, it will be sufficient for the plaintiff to prove that the

misrepresentation was at least one fact that induced him or her to act to his detriment. Where a misrepresentation was calculated or would naturally tend to induce the plaintiff to act on it, reliance may be inferred. The onus of rebutting that inference lies with the representor (*Hub Excavating Ltd. v. Orca Estates Ltd.*, 2009 BCCA 167). See also *Manufacturers Life Insurance Co. v. Pitblado & Hoskin*, *supra*.

Some legislation has codified misrepresentation principles, including provisions that allow courts to deem reliance. However, the Court of Appeal has held that the reliance deemed in s. 75(2) of the *Real Estate Act*, R.S.B.C. 1996, 397, as replaced by the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41, is rebuttable (*Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2009 BCCA 224, leave to appeal granted [2009] S.C.C.A. No. 317 (QL)).

2. Fraudulent Misrepresentation

The tort of fraudulent misrepresentation consists of four elements:

(1) the wrongdoer must make a representation of fact to the victim;

(2) the representation must be false in fact;

(3) the party making the representation must have either known it was false or made it recklessly without knowing whether it was true or false; and

(4) the victim must have been induced by the representation to enter into the contract.

See G.H.L. Fridman, *Law of Contract in Canada*, 4th ed. (Scarborough: Carswell, 1999), pp. 309-310, as cited in *Catalyst Pulp and Paper Sales Inc. v. Universal Paper Export Co. Ltd.*, 2009 BCCA 307.

a. Inducement

Inducement may be shown by the resulting action of the plaintiff to his or her detriment (*Catalyst Pulp and Paper Sales Inc.*).

b. Buyer Beware

While the vendor's acts of concealment of damage to a house can constitute a fraudulent misrepresentation, the vendor may not be liable for merely undertaking cosmetic improvements when the purchasers have an obligation to inspect and to make inquiry. Failure to make inquiry will not transfer risk to the vendor. In *Fitzhenry v. Vaccaro*, 2009 MBQB 97, the vendor had purchased an old house and made repairs before listing it for sale. He repanelled one wall which showed water damage; his intent was to cover up water damage. He did not know that there was deterioration of the foundation and walls of the house. The purchasers (the plaintiffs) bought the house and sued in misrepresentation after discovering the defects. The court held that since the water seepage was not caused by panelling, the vendor did not hide the defect but merely prepared the house for sale. The failure of the purchasers to make inquiry did not transfer risk to the vendor. The court applied the principle of *caveat emptor*, or "buyer beware".

S. Deceit

To succeed in deceit, a plaintiff must prove that (1) a false representation or statement was made by the defendant which (2) was knowingly false, (3) was made with the intention to deceive the plaintiff, and (4) which materially induced the plaintiff to act, resulting in damage. Direct interaction between the plaintiff and defendant is not necessary; the interaction may take place through an agent. The fact that a principal has not specifically authorized a false statement by his or her agent does not detract from the principal's vicarious liability. The principal is liable for the fraud the agent committed in the course of the principal's business, even if committed for the agent's benefit (for example, to enable the agent to earn a commission) (*Re Village on the Park*, 2009 ABQB 497).

T. Passing Off

The tort of passing off occurs when the defendant tries to present his or her goods as the goods of the plaintiff, thereby injuring the plaintiff's right in the property—especially, the goodwill of the plaintiff's business. The principal head of damage is the loss of business profits caused by the diversion of the plaintiff's customers to the defendant as a result of the defendant's misrepresentation. Beyond this, damages may be awarded for any loss of business goodwill and reputation resulting from the passing off (*Stenner v. ScotiaMcLeod*, 2009 BCSC 1093, supplementary reasons 2009 BCSC 1348).