

## Case Comments

### *Commentaires d'arrêt*

Malicious Prosecution: Invasion of *Charter* interests: Remedies: *Nelles v. Ontario*; *R. v. Jedynack*; *R. v. Simpson*.

John Sopinka\*

Relatively recent, highly publicized cases of wrongful conviction and wrongful prosecution, of which Susan Nelles and Donald Marshall are among the most prominent, have brought to the fore the issue of compensation for innocent accused persons or wrongfully convicted persons, and accountability of the Crown and Crown prosecutors for abuse of their broad statutory powers. These are individuals for whom the criminal justice system has failed. The traditional view of the costs suffered by the accused is that it is merely an inevitable, albeit unfortunate, hazard of living in society and there is no reason to shield a citizen against the consequences of the risk of prosecution absent a showing of malice, incompetence, or serious neglect by the prosecutor. Individuals just have to bear their own loss as a cost of the criminal justice system, says the traditional view. Yet, a person wrongfully accused or convicted may have suffered the same social stigma, loss of liberty, loss of earnings, costs of defence, and possibly loss of family life that is suffered by the rightfully convicted accused who is responsible for his or her crime. These actual harms are exacerbated by the moral harm of the injustice of his or her situation. Fairness suggests that innocent private citizens should not be asked to bear the burden of systemic-based or individual prosecutor-based criminal justice failings.

In the wake of increased concern regarding wrongful prosecutions and convictions, however, one reaction has been to centre on the criteria for and availability of statutory payments to the wronged individuals. Another route has been the old tort of malicious prosecution to ameliorate the harms suffered. This tort presents some important modern issues for bringing claims against government officials, particularly given the advent of the *Charter*.<sup>1</sup> Clearly, civil tort litigation presents significant hurdles of expense, uncertainty, and difficulties of proof against the Crown when the latter has a strong need to vindicate itself, as well as the structural difficulty of resolving issues involving the relationship between the state and the individual. Yet, malicious prosecution is a significant potential avenue of redress.

I will first examine the elements and scope of malicious prosecution and then turn to the interesting, unresolved issues surrounding the tort, and its future

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<sup>1</sup> *Canadian Charter of Rights & Freedoms*, Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.

directions, one of which involves the suggestion of the creation of a constitutional tort for breach of *Charter* rights.

### 1. *Elements of the Tort of Malicious Prosecution*

The rationale of tort action for damages for malicious prosecution is that the court's process has been abused by wrongfully invoking the law on a criminal charge. The tort has been restricted, however, to ensure that criminals can be brought to justice without making prosecutors fear an action for damages if a prosecution fails. The aim has been to distinguish between:

- (1) the innocent, unconvicted accused, and
- (2) the innocent accused who has been put to the expense, trouble, and embarrassment of criminal proceedings because of the spite or ill-feeling of the prosecutor.

The requisite elements of establishing this tort have been well-settled for at least the past hundred years.

The centrepiece of malicious prosecution is the *Nelles* decision of the Supreme Court of Canada in 1989.<sup>2</sup> In conjunction with the mysterious deaths of babies at the Hospital for Sick Children, Susan Nelles had been charged with the murder of four infants, but was discharged on all counts at the end of the preliminary inquiry. Subsequent events revealed that the charges had been laid precipitously before a full and proper investigation had been concluded. Nelles commenced an action against the Crown in right of Ontario, the Attorney-General of Ontario, and several police officers, alleging that they had acted improperly and maliciously in laying the murder charges against her. Before trial, the Attorney General moved to dismiss the action on the grounds of absolute immunity from lawsuit for malicious prosecution. The Ontario Supreme Court and Court of Appeal allowed that motion.

In considering the appeal, Dickson C.J.C. writing for himself and Wilson and Lamer JJ. set out the necessary elements of the tort, each of which must be established by the plaintiff in order to succeed in a malicious prosecution action:

- (1) the proceedings must have been initiated by the defendant;
- (2) the proceedings must have terminated in favour of the plaintiff;
- (3) there must be an absence of reasonable and probable cause for the defendant's conduct;  
and
- (4) there must have been malice, or a primary purpose other than that of carrying the law into effect.

Although there is a degree of overlap between the elements, failure to establish any one of these is fatal to the action.

Turning to the first element, there are two aspects: (i) has a prosecution been commenced?; and (ii) who are the persons liable for its commencement? The

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<sup>2</sup> *Nelles v. Ontario*, [1989] 2 S.C.R. 170.

first aspect is determined by whether the defendant has caused everything to be done which could have been done in order to launch criminal proceedings against the plaintiff. This normally means an information has been laid or a charge proffered against the plaintiff. The point arose in the Supreme Court in *Casey v. Automobiles Renault Canada Ltd.*<sup>3</sup> In that case, the defendants had laid an information before a magistrate charging the plaintiff with theft. Nothing, however, had been done under the information, which simply remained in the magistrates' office until later withdrawn by the defendants. In the action for malicious prosecution, Martland J. writing for the majority, held that there was no difference between holding an inquiry in open court versus merely receiving a complaint and taking no further action provided the charge is one over which the court in which it is filed has jurisdiction and it is an offence with which the court can deal. The informant defendant had done all he could have done to launch criminal proceedings against the plaintiff. It did not matter whether the charge had gone beyond preliminary stages. Presumably this only goes to the amount of damage. There is also some question, however, as to the scope of what constitutes a "prosecution". In *Stoffman v. Ontario Veterinary Association*,<sup>4</sup> the Ontario High Court held that it encompassed quasi-criminal complaints, such as professional disciplinary proceedings. Quare whether the malicious institution of civil proceedings can ever be the subject of a civil action.

The other aspect of the first element of setting in motion a prosecution is the definition of who is liable for so doing. In other words, who is included as a 'prosecutor'? The classic definition in the English case of *Danby v. Beardsley*, is that a prosecutor is a person "actively instrumental in putting the law in force".<sup>5</sup> This test is not always easy to apply. It is helpful to consider a few examples. In a case where the defendant lays an information, an action for malicious prosecution will likely lie, as was held in *Watters v. Pacific Delivery Service Ltd.*<sup>6</sup> This encompasses both the police officer who lays the information and a private citizen who has given a deliberately false report to the officer.<sup>7</sup> That a defendant merely gives incriminating information to the police or to a judicial officer, however, would not necessarily make him or her liable as "prosecutor", unless the defendant *knowingly* gives false incriminating information. In addition to the police and their informants, a prosecutor includes agents of the Crown who continue a prosecution in circumstances that otherwise attract liability for malicious prosecution.

The second element is termination in the plaintiff's favour. The older cases appear to have had a more formalistic, higher standard and held that discharge by *nolle prosequi* absent a not guilty plea was insufficient to establish termination in the plaintiff's favour.<sup>8</sup> This threshold appears to have been relaxed in more

<sup>3</sup> [1965] S.C.R. 607.

<sup>4</sup> (1990), 73 O.R. (2d) 737 (H. Ct.).

<sup>5</sup> (1880), 43 L.T. 603.

<sup>6</sup> (1963), 42 D.L.R. (2d) 661 (B.C.S.C.).

<sup>7</sup> *Critchley v. Hill* (1968), 38 D.L.R. (2d) 492 (B.C.S.C.).

<sup>8</sup> *Morgan v. Hughes* (1788), 2 Term. 225.

modern cases, perhaps due to the difficulty of establishing the other elements of the tort. Successful termination of the proceedings will be established if:

- (a) the proceedings end in an acquittal;
- (b) the complainant abandons the prosecution if not the result of some compromise or arrangement by the accused;<sup>9</sup>
- (c) an information is found to be a nullity;<sup>10</sup>
- (d) the Crown enters a stay of proceedings;<sup>11</sup> or
- (e) the plaintiff is discharged at a preliminary hearing.<sup>12</sup>

If a conviction stands and is not reversed on appeal, this is a complete bar to an action for malicious prosecution. So too are compromises or arrangements between the complainant and accused. It would seem to follow that a discharge or conditional discharge predicated on a finding of guilt is also a bar.

The last two elements of the tort, absence of reasonable and probable cause and malice, are the most difficult to prove as Lamer J.,<sup>13</sup> as he then was, noted in *Nelles*:

Reasonable and probable cause refers to an honest belief in the guilt of the accused based upon a full conviction founded on reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious person, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.

This test requires an actual, *subjective* belief by the prosecutor which is *objectively* reasonable in the circumstances, the latter being a matter for determination by the judge rather than the jury. All hinges on the facts known to the defendant when the charge was laid.

To show the final element of "malice", the plaintiff must show an improper purpose, a deliberate improper use of the office of the Attorney General or Crown Attorney. "Improper purpose" includes spite, ill-will, or vengeance. It also encompasses matters such as gaining a private collateral advantage. In *Nelles*, this ingredient was described as "perpetrating a fraud on the process or criminal justice" and in doing so perverting or abusing an office and the process of criminal justice for ends it was not designed to serve. Sometimes this will amount to criminal conduct. This element of the tort of malicious prosecution is an onerous and strict burden, particularly given that prosecutorial discretion has a wide scope. Courts require substantial evidence from which a finding of malice can be derived and are reluctant to conclude that because a prosecution has been brought without reasonable and probable grounds, the defendant acted out of malice. This would seem to be *some* evidence, however, from which malice may be inferred, though it is not conclusive.

<sup>9</sup> *Baxter v. Gordon Ironsides & Fares Co.* (1907), 130 L.R. 598 (C.A.); *Casey v. Automobiles Renault Canada Ltd.*, *supra* footnote 3.

<sup>10</sup> *Romegialli v. Marceau*, [1964] 1 O.R. 407 (C.A.).

<sup>11</sup> *Boudreault v. Barrett* (1993) 140 A.R. 24 (Q.B.).

<sup>12</sup> *Supra* footnote 2.

<sup>13</sup> *Hicks v. Faulkner* (1878), 8 Q.B.D. 167 at 171.

In sum, then, proving malicious prosecution is an not easy task. The tort is, as Fleming has noted in his text, "held on a tighter rein than any other in the law of torts".<sup>14</sup> Plaintiffs have to establish a negative, that is, the absence of reasonable and probable cause, and there is also a very high standard of proof to avoid a non-suit or directed verdict. The elements of the tort of malicious prosecution work to deter civil suits.

Once the four elements have been established, the plaintiff must have incurred or suffered damage due to the malicious prosecution. The old, 1698 English decision of Holt C.J. in *Savill v. Roberts* established three heads of damage:<sup>15</sup>

- (1) damage to a person's "good name, fame, credit and esteem";
- (2) damage to the person which includes an emotional reaction to the prosecution and risk of imprisonment;
- (3) damage to property, which generally refers to financial loss due to mounting a defence or loss of earnings.

The most interesting of these three heads of damage is the first category which resembles defamation.

Often the very nature of the proceedings complained of will necessarily involve damage such as, for example, a charge of theft.<sup>16</sup> An analogy has been drawn between an action for malicious prosecution and an action for slander imputing commission of a crime, when the words spoken are actionable *per se* without proof of damage, which is presumed. In *Quartz Hill Consolidated Gold Mining Company v. Eyre*, for example, damages were presumed to a company's "reputation," its credit rating and financial standing, where a winding-up petition had been presented without reasonable and probable cause.<sup>17</sup>

If, however, the nature of the prosecution is not "necessarily and naturally" defamatory or conveying an imputation affecting the plaintiff's "fame", as the test was defined by Buckley L.J. in *Wiffen v. Bailey and Romford Urban Council*, the plaintiff must rely on the other two heads of damage.<sup>18</sup> In that case, a public health complaint did not necessarily and naturally involve damage to the plaintiff's reputation. Such was also the case in *Berry v. British Transport Commission* where the plaintiff had been charged with the minor regulatory offence of pulling the communication cord on a train.<sup>19</sup> It is not clear, however, whether the offence must be one entailing imprisonment or payment of a fine. Presumably, the existence of such contingencies would enhance the inference of damage to reputation.

<sup>14</sup> J.G. Fleming, *The Law of Torts*, 8th ed. (Sidney: Law Book Co., 1992).

<sup>15</sup> (1698), 1 Ld. Raym. 374 at 378; 91 E.R. 1147 at 1149.

<sup>16</sup> *Barker v. Simonds*, [1943] O.W.N. 363 at 367 (C.A.), Kellock, J.A.

<sup>17</sup> (1883), 11 Q.B.D. 674 at 692.

<sup>18</sup> [1915] 1 K.B. 600 at 608 (C.A.).

<sup>19</sup> [1961] Q.B. 149 at 166, Diplock J. (not disproved on appeal).

## 2. *Absolute or Qualified Crown Immunity*

Perhaps of greater interest, however, than the fairly non-contentious, actual elements of the tort of malicious prosecution is the decision in *Nelles* regarding Crown immunity. The Court was unanimous in holding that the *Crown itself* was protected statutorily from liability by the Ontario *Proceedings Against the Crown Act*, section 5(6),<sup>20</sup> although Lamer J. (Dickson C.J.C., and Wilson J. concurring) intimated that this section might be open to *Charter* attack. Nonetheless, the Supreme Court held, L'Heureux-Dubé J. dissenting, that absolute immunity for the Attorney-General and Crown Attorneys from malicious prosecution suits was not justified in the interests of public policy. Absolute immunity would threaten the rights of individual citizens wrongly and maliciously prosecuted. Lamer J. analyzed the competing interests and policies, openly rejecting the "floodgates" argument that the result would handicap or "chill" prosecutions. Such would be unlikely given the inherent difficulties of proving malicious prosecution, and, as Kerans J.A. writing for the Alberta Court of Appeal in *German v. Major* had noted, there are civil procedure mechanisms for striking-out unmeritorious claims before trial.<sup>21</sup> These appear, based on post-*Nelles* case law, to be satisfactorily and effectively operating in weeding-out frivolous claims. Alternatives to malicious prosecution claims would be inadequate in redressing the personal wrong done to the plaintiff. Criminal prosecution against the prosecutor, even if it could be established, would only vindicate the public wrong and a restitutionary order on conviction would only indirectly remedy the individual wrong done. Use of professional disciplinary proceedings similarly would not address the problem of compensating the victim.

## 3. *Crown Negligence as a Tort?*

Some suggest that the principles underlying malicious prosecution extend to acts of negligence by Crown agents as well. It is clear, as a general rule, that breach of a statutory duty may give rise to a civil action and that damages may be awarded for negligent government activity in the circumstances set out by the Supreme Court in *Kamloops v. Nielsen*.<sup>22</sup> But, what if the police or Crown attorney have performed a *flawed* investigation of an offence, resulting in a wrongful prosecution or conviction? The law has not been definitively resolved in this area and this is one question left open for future cases. Lamer J. in *Nelles* stated that "errors in the exercise of discretion and judgment" were not actionable, given that the tort requires a demonstration of improper motive or purpose, effectively creating a "qualified immunity" to protect Crown attorneys from civil suit based on errors in judgment or mistakes made in the course of

<sup>20</sup> R.S.O. 1990, c.P. 27.

<sup>21</sup> (1985), 62 A.R. 2 (C.A.).

<sup>22</sup> [1984] 2 S.C.R. 2.

official duties. “Errors in judgment” and “mistakes”, however, rank on the lowest end of the blameworthiness scale, and nothing was specifically said in *Nelles* excluding negligence in all its forms. Although the majority in *Nelles* did not seem concerned about the chilling effect on Crown agents if malicious prosecution could be brought against them, liability for mere negligence may be viewed in a different light.

It appears that the issue may not have been laid to rest in *Nelles*. In *McTaggart v. Ontario*, a decision by Corbett J. in the Ontario Court, General Division, a motion to strike a claim brought against the Crown, the Attorney General, and the police was dismissed.<sup>23</sup> Corbett J. accepted the proposition that Lamer J.’s reasons in *Nelles* which removed prosecutorial immunity from malicious prosecution actions did not necessarily extend to liability for negligent conduct short of malicious prosecution. An argument in favour of this approach is that a balancing of fairness to the victim against fairness to prosecutor suggests attaching less immunity to the position of a public official. In this way, there is greater accountability required of public officials, thus engendering greater public confidence in official positions.

In the absence of immunity, there is no valid theoretical reason why prosecutors would not be liable for negligence. Certainly the risk of harm is foreseeable and there would appear to be a “sufficient relationship of proximity or neighbourhood” such that, in the reasonable contemplation of the prosecutor, carelessness on his part might likely damage the accused, to paraphrase the *Anns*<sup>24</sup> principle adopted in *Kamloops*.<sup>25</sup> Notwithstanding, the English courts have refused to find a duty of care in such circumstances.<sup>26</sup> In Canada, perhaps in recognition that the theoretical principles of negligence law cannot be applied without a heavy infusion of policy, we have preferred to simply state quite plainly that the prosecutors are immune.

#### 4. Charter Implications

A related future direction for malicious prosecution lies in discerning *Charter* implications, specifically the potential of a new, so-called “constitutional tort” to remedy police and Crown prosecutorial misconduct through a damage award.

The possibility of monetary compensation under section 24(1) of the *Charter* has not yet been judicially developed, though there has been favourable *dicta* in *Nelles* by three of the justices taking part in that decision, though the other three did not deal with the question. L’Heureux-Dubé J. dissented, McIntyre J. held that the judicial uncertainty regarding immunity meant that the matter should be remitted to a trial judge, and La Forest J. preferred to rely on

<sup>23</sup> (1991), 6 O.R. (3d) 456 (Gen. Div).

<sup>24</sup> *Anns v. Merton London Borough Council*, [1978] A.C. 728.

<sup>25</sup> *Supra* footnote 20.

<sup>26</sup> See *Hill v. Chief Constable of West Yorkshire*, [1989] A.C. 53.

the common law, leaving consideration of *Charter* implications to another day. Lamer J. writing for himself, Dickson C.J.C. and Wilson J. noted, however, that:

...in many, if not all cases of malicious prosecution by an Attorney General or Crown Attorney, there will have been an infringement of an accused's rights as guaranteed by ss.7 and 11 of the *Canadian Charter of Rights and Freedoms*.

Availability of malicious prosecution was linked to ensuring protection of individual rights. The focus was on the public's confidence in public prosecutors when such persons abuse that process through a malicious prosecution. An absolute immunity would strike at the principle of equality under the law, and would be doubly problematic when committed by individuals who are held to the highest standards of conduct in exercising a position of public trust. Explicit reference was made to the availability of section 24(1) *Charter* remedies should the right to liberty and security of the person have been violated. Although not decided, doubt was cast on any common law or statutory rule that would exclude the courts from granting a just and appropriate remedy under the *Charter*.

Judicial remedial discretion under section 24(1) is broad and there has been suggestion, both academic and provincial appellate authority, of the possibility of awarding damages for violation of an individual's legal rights as set out in sections 7 to 15. There is a lively debate, however, as to the relation between a constitutional tort and traditional tort concepts, much of which is based on questions of the purpose of such a tort, namely a narrow compensation goal or a wider notion of Crown prosecutorial accountability.

Undeterred by this debate, courts have not hesitated to award damages for *Charter* breaches arising out of conduct that would have fallen short of malicious prosecution. In *R. v. Simpson*, an accused was not brought before a justice of the peace within the time required by the *Criminal Code*.<sup>27</sup> It was the practice of the St. John's constabulary on weekends to hold the accused over until Monday. The trial judge stayed the charges but the Newfoundland Court of Appeal set aside the stay in part on the basis that damages under section 24(1) of the *Charter* for wrongful detention would have been an appropriate remedy. We restored the stay but simply on the basis that it was not established that the trial judge erred in imposing a stay. It appears that damages may also be awarded for failure by the Crown to disclose which impairs the right of full answer and defence.<sup>28</sup>

This development means that few will wish to resort to the action of malicious prosecution with its rigorous standards when they have at hand a mechanism that is much more flexible. I agree with Lamer J. in *Nelles* that if one can establish malicious prosecution, there are probably several alternatives upon which a *Charter* breach can be founded based on the same conduct. But, often, conduct of the police or the prosecutor that does not constitute malicious

<sup>27</sup> [1995] S.C.J. No. 12 (Q.L.).

<sup>28</sup> See *R. v. Jedyneck*, (1994), 16 O.R. (3d) 612 (Gen. Div.); *R. v. Pawlowski* (1993), 12 O.R. (3d) 709 (C.A.).

prosecution may amount to a *Charter* breach and attract a remedy under section 24(1).

Finally, suggestions have been made that direct governmental liability might be more fair than that based on personal liability of a governmental official or public servant. The rationale for this would be an acknowledgement that harms caused to wrongfully accused, prosecuted or convicted persons are not done by malicious or negligent persons, but sometimes just a function of the overall criminal justice system and sometimes public pressure to find an accused. Suggestion has also been made that constitutional tort claims ought to be strict liability, although against this suggestion, section 24(1) does require a remedy that is “just and appropriate in the circumstances” and in *Reference Re Motor Vehicles*, the Supreme Court took a dim view of strict liability when measured against general *Charter* aims.<sup>29</sup>

### *Conclusion*

The malicious prosecution tort, though old, thus appears to present potential scope for, or at least be connected conceptually to the growth and development of claims by individuals wrongfully accused, prosecuted, or convicted. As part of the search in our society for a more perfect criminal justice system, one which maximizes prosecution of the guilty with protections for the innocent, at least for malicious prosecution and the considerations surrounding that tort, it does appear that old dogs *can* be taught new tricks to reflect changed modern concerns.

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<sup>29</sup> *Reference Re s. 94(2) of the Motor Vehicles Act (B.C.)*, [1985] 2 S.C.R. 486.

*Personal Property Security Act (Ont.): Trustees in Bankruptcy: Re Lambert: Re Haasen.*

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In two recent decisions — *Re Lambert*<sup>1</sup> and *Re Haasen*<sup>2</sup> the Ontario Court of Appeal has addressed the debate concerning the interpretation of the saving provision, section 46(4) of the *Personal Property Security Act*.<sup>3</sup>

In both cases the situation involved a sale of a motor vehicle under the terms of a conditional sales contract. The financing statements did not contain a proper description of the debtor's name, but did have a proper vehicle identification number. The purchasers subsequently went bankrupt and the trustee searched only under the name of the debtor. Since this did not turn up the financing statement, the trustee disallowed the security. At trial, Farley J. found that the security interest was ineffective as against the trustee in bankruptcy pursuant to section 20(1)(b) of the P.P.S.A. On Appeal to the Court of Appeal, Doherty J.A. speaking for the Court, concluded that the trustee in bankruptcy could have searched under the V.I.N. (Vehicle Identification Number) and discovered the existence of the financing statement. He also concluded that in those circumstances, it could not be said that a reasonable person would likely be misled materially by the error or omission since a reasonable person utilizing the system would make a vehicle specific search and would thereby discover the existence of the financing statement.

The relevant sections of the Act are as follows:

S. 20(1)(b) Except as provided in subsection 3, until perfected, a security interest in collateral is not effective against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy;

S. 46(4) A financing statement or financing change statement is not invalidated nor is its effect impaired by reason only of an error or omission therein or in its execution or registration unless a reasonable person is likely to be misled materially by the error or omission.

Although the Court has thoroughly reviewed numerous cases and many learned articles on the subject, these decisions have failed to come to grips with the underlying integrity of the legislation.

The clear intention of the legislature was that the security of a *bona fide* advancer of credit should not be defeated through a failure to comply with the

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<sup>1</sup> (1994), 20 O.R. (3d) 108 (C.A.); see R.J. Wood, "Registration Errors under the OPPSA: Lambert (Re)" (1995) 24 Can. Bus. L.J. 444.

<sup>2</sup> (1994), 20 O.R. (3d) 128 (C.A.).

<sup>3</sup> S.O. 1989, c. 16.

technical provisions of the *Act*.<sup>4</sup> The legislature has attempted to balance this by protecting the interests of *bona fide* users of the system to ensure that they will not be misled to advance credit to a debtor relying on the expectation that there are no outstanding securities against the debtor or the assets sought to be secured which would have priority.

The dilemma, however, arises in the interpretation of the statute in relation to what is meant by “users of the statute”.

To this point, two lines of thinking have developed in relation to what is meant by “a reasonable person likely to be misled”. One line is represented by the string of decisions, commencing with *Mercier J.*, *Chadwick J.*, *Killeen J.*, respectively in *Canamsucco Roadhouse Food Co. v. Lngas Ltd.*,<sup>5</sup> *Fritz v. Ford Credit Canada Ltd.*,<sup>6</sup> and *Re Millman*.<sup>7</sup> These are to the effect that the court, when examining the problem, must look to the individual user and determine exactly what is its role. In effect, the court has in these cases examined the individual to determine for what purpose it was using the system in order to define whether it would be reasonably misled. It is to be noted that in those cases, a trustee in bankruptcy, in fact, was aware of the financing statement but had simply not turned up the statement in the search it had made.

The other line of cases was to the effect that in interpreting the statute, the court was not concerned with the identity of the individual against whom the security interest is sought to be enforced nor the purpose for which the individual is using the system. In effect, these cases have held that a if reasonable person legitimately wanting to use the system would not have been able to discover the financing statement, then the security would not be valid.

In *Re Armstrong, Thompson & Tubman Leasing Ltd. and Deloitte Touche, Trustee in Bankruptcy of the Estate of the McGill Agency Inc.*,<sup>8</sup> Bell J. reviewed the above-noted cases and concluded that those cases should be restricted to their facts where the trustee in bankruptcy actually knew of the security interest before or at the time of the bankruptcy. She adopted the reasoning that the statute provides for a “reasonable person” test which does not address the actual identity of the persons conducting the P.P.S.A. search. In doing so, of course, she relied on the particular wording of section 46(4) which is written in the language of “a reasonable person likely to be misled” with no other specific qualifications. Bell J. referred to her own decision in *Re Weber*<sup>9</sup> where she had postulated that the test in section 46(4) is an objective one.

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<sup>4</sup> S. 9(2).

<sup>5</sup> (1991), 2 P.P.S.A.C. (2d) 203 (Ont. Gen. Div.).

<sup>6</sup> (1992), 4 P.P.S.A.C. (2d) 143 (Ont. Gen. Div.).

<sup>7</sup> (1994), 17 O.R. (3d) 654 (Gen. Div.).

<sup>8</sup> (1993), 15 O.R. (3d) 292 (Gen. Div.).

<sup>9</sup> (1990), 73 O.R. (2d) 238.

In *Re Lambert*, the Court of Appeal has reviewed these two lines of cases and has concluded that the test must be seen to be an objective one and that it is not appropriate to inquire into the identity of the person who is being misled.

In doing so, the Court of Appeal made a thorough review of the legislative history of the section and concluded as follows:<sup>10</sup>

Two competing approaches were put forward and their respective merits debated over several years. In the end, a standard determined by reference to the probability of a reasonable person being materially misled went out over the subjective actual prejudice test favoured by others...

The court was reinforced in this reasoning by reference to the decision in the Saskatchewan Court of Appeal in *Kelln (Trustee of) v. Strasbourg Credit Union Ltd.*<sup>11</sup>

In particular, the court referred to the judgment of Bayda C.J.S., speaking only for himself, who had concluded that the curative provision was to be determined by asking “[w]hether a reasonable person using the registration and search systems put in place by the Act is apt, by reason of the omission in the circumstances surrounding it to end up believing that something important is so when in fact it is not so...”. The Ontario court found this decision even more comforting in light of the fact that the Saskatchewan statute was not so precise in its language and in fact, was perhaps even ambiguous since it did not specifically refer to “a reasonable person”. The majority of the court in Saskatchewan, however, had in fact restricted the reasonable person to being that “reasonable person within the class of person for whose benefit registration or other methods of perfection are required...”<sup>12</sup>

The Court of Appeal in Ontario concluded that the prime objective in relation to the statute was to protect the integrity of the system.<sup>13</sup> In my view, the court correctly analyzed the function of section 46 as being designed to distribute the burden of errors appropriately between persons who have the right to know what securities exist against a particular asset and persons who wish to protect their security through registration. The court stated the following:<sup>14</sup>

The purpose underlying the search function of the registration system is particularly important to the interpretation of section 46(4). As professor MacLaren properly points out, the inquiry or search function exists to provide information to prospective buyers and lenders who are purchasing properly or taking property as exists to provide information to prospective buyers and lenders who are purchasing properly or taking property as collateral for a loan.

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<sup>10</sup> *Supra* footnote 1 at 116.

<sup>11</sup> (1992), 89 D.L.R. (4th) 427 (Sask. C.A.).

<sup>12</sup> *Ibid.*, Vancise J.A. at 442.

<sup>13</sup> *Ibid.* at 119.

<sup>14</sup> *Ibid.* at 120.

The putative purchaser or lender wants to know whether there are any prior claims on the property which could affect the decision to buy the property or accept it as collateral.

In my view, the "reasonable person" in section 46(4) is a person using the search facilities of the registry system for their intended purpose, that is, to find out whether personal property can be purchased or taken as collateral is subject to prior registered encumbrances.

I think it is relatively clear that a trustee in bankruptcy does not fall within the definition of "reasonable person" as described immediately preceding by the Court of Appeal. It is therefore difficult to understand how the trustee in bankruptcy could defeat a security.

The court seems to be adopting a two-step process for adjudication. The first step is to determine whether or not the security is in the abstract, invalidated. This is done by examining whether a prospective buyer or lender would be misled in the circumstances, whether or not such a prospective buyer or lender actually does exist in the circumstances of the case in question. If the conclusion of the court is that a prospective lender or buyer would have been misled, then the security is, for all purposes, invalid and it does not matter that a third party, such as a trustee in bankruptcy may gain a windfall benefit as a result.

This reasoning raises serious questions for its application. Firstly, it should be recognized that what is being addressed is not merely a "windfall benefit". A "windfall benefit" is a benefit which derives to and is, in effect, an unexpected profit deriving from an otherwise legitimate transaction for which there is no better claimant with a higher interest. In the contest between a trustee in bankruptcy and the security holder, the effect of the court's interpretation is not merely to provide a "windfall benefit" to the trustee but rather, to provide an unjust enrichment to the creditors of the bankrupt at the expense of the security holder. If the security is not defeated, the security holder will, in effect, recover the loss which it will otherwise suffer through the failure of the bankrupt to make the payments due on the security. The effect of this interpretation is to deprive that security holder of its asset. There is no juristic reason to justify such an interpretation.

Clearly, it was not the intention of the legislature to provide a bounty to the trustee in bankruptcy at the expense of a legitimate advancer of credit based on the security interest. The wording of the legislation does not require that interpretation.

This is the second concern in the reasoning given. It seems at odds with the court's own interpretation of the purpose of the statute and the section. The court has stated that the purpose of the section in the statute is to balance off the risk of loss between a legitimate advancer of credit and the interest of legitimate prospective purchasers or advancers of credit to be informed. By giving the bounty to the trustee in bankruptcy, it seems that the court has, in effect, overstepped the basic purpose of this statute *i.e.* to

protect the interests of the creditor, while at the same time protecting the interests of the prospective purchaser or prospective lender. There is another possible interpretation of the statute that will better achieve the intention as defined. A close review of section 46(3) contains the key words "...unless a reasonable person is likely to be misled...". The use of the words "likely to be misled" makes it clear that the legislature was talking, not in terms of the abstract, but of a real situation. In other words, there must be a situation where there is *likely* to be a misleading and not a mere possibility that there would be a *misleading* if one chose to use the system. Secondly, the word "misled" has the connotation that there will in fact be a *misleading*. A misleading can only take place in a real situation, *i.e.* where someone is led astray or caused to go wrong. The Court of Appeal has not considered this connotation of this phraseology.

It is generally a well recognized rule of interpretation that a statute should be interpreted so as to give effect to the overall general purview of the statute, and to avoid a meaning which will lead to an injustice.<sup>15</sup>

No grounds have been advanced to justify that a trustee in bankruptcy should receive preferential treatment. A trustee in bankruptcy should be seen as standing no higher than in the shoes of the bankrupt or the creditors he represents and should not derive any rights greater than those of the bankrupt vis-a-vis the security holder or the creditors. The ancient principle *nemo dat non quod habet* is classically applied in this circumstance. In other words, the trustee can have no greater interest than that of the source from which its interest derives.

The two-step process described above is not in accordance with the overall purpose of the statute as defined by the court itself. This interpretation simply leads to an unjust enrichment for the other creditors as represented by the trustee. Surely this could not have been the intention of the statute. An alternative approach would be for the court to determine in the first step whether or not there exists a "reasonable person" described in section 46(4). If, in fact, there is no such "reasonable person", then obviously, there is no reasonable person "likely to be misled materially". If the court finds that there is in fact such a person, then the court will go to the second step to determine whether that person, acting reasonably, would likely be misled.

The court itself recognizes that the search function has other uses in the commercial world such as to conduct inquiry into the credit worthiness of a potential borrower.<sup>16</sup> However, the court recognizes that such potential users are not persons who are intended to be protected under the registry system. When a trustee in bankruptcy searches a system in an attempt to gather information for the purpose of distribution of the estate, this is not the purpose for which the system was designed and that interest should not be protected.

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<sup>15</sup> *Craies on Statute Law* 7th ed. (London: Sweet & Maxwell, 1971) at 86ff.

<sup>16</sup> *Supra* footnote 11 at 121.

In summary, The Court of Appeal has failed to recognize and address the fact that an unjust enrichment will result from the interpretation of the statute which it has made. At least three other judges have found that the “reasonable person” to be considered in the interpretation of section 46(3) is a “reasonable person” who is a legitimate user (*i.e.* a prospective lender or buyer) of the statute using it to discover a pre-existing security and who will be misled by the failure to discover it by reason of the failure to properly comply with the registration provisions. In accordance with the general principles of interpretation, a statute should be interpreted to avoid a manifest injustice which will result from an unjust enrichment. The decisions in questions were, of course, on their facts, correctly decided but should be confined to those facts.