**CANs – Torts**

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# Nuisance

## Antrim Truck Centre Ltd v Ontario (Transportation)

* P owned a truck stop on a highway.
* Ontario rerouted the highway such that P lost all his business.
* P sought and was awarded damages.
* Demonstrates the maxim that interference must be both substantial and unreasonable to be classified legally as nuisance.
* Demonstrates that the test for unreasonableness is whether the plaintiff ought to be forced to suffer the interference without compensation, and not solely based on public utility or the reasonable necessity of the defendant’s conduct.
* Demonstrates that even if interfering conduct is for the public good, the plaintiff does not need to suffer a disproportionate amount of the burden.
* Establishes that whether the plaintiff should be compensated relies on a balancing act between the gravity of the interference to the plaintiff and the utility of the defendant’s actions.

## Appleby v Erie Tobacco Co

* D owned a tobacco plant which put off a mild odor.
* D changed the process resulting in the odor becoming much worse.
* P sought an injunction to stop this as the odor restricted her enjoyment of her nearby land.
* The judge granted a delayed injunction in order to give the tobacco company a chance to remove the odor.
* Demonstrates that the introduction of a new nuisance into an area with a relatively low standard of comfort can create a case for legal liability.

## Hollywood Silver Fox Farm Ltd v Emmett

* P owned a fox breeding farm (foxes are picky breeders and are easily disturbed).
* D out of anger at P intentionally fired loud guns on the nearest point of D’s property to the fox cages.
* The judge granted an injunction against D.
* Demonstrates that malice may contribute to the unreasonableness of the plaintiff being forced to endure the nuisance.

## Rogers v Elliot

* D owned a church with a loud bell.
* P became ill such that the sound of the bell was painful to him.
* P sought an injunction to stop D from ringing the bell.
* The judge denied the injunction on the grounds that nuisance ought to be measured based on the average person in a given area and not by the standards of one who is particularly sensitive or immune.

## Fontainebleau Hotel Corp v 4525 Inc

* P and D owned neighbouring hotels along a beach.
* D added additional stories to his hotel reducing the sunlight on the neighbouring beach.
* P sought an injunction against D.
* The judge denied the injunction on the grounds that sunlight is not a legally protected right.

## Prah v Meretti

* P owned a home which was powered partly by solar panels; D built a larger home beside P’s house limiting the access of light to the solar panels.
* P sued D for nuisance owing from his reduced ability to generate power.
* Judge upheld the claim on the grounds that reducing P’s access to sunlight constituted a substantial Nuisance.

## Laws v Florinplace

* D owned a porn shop in a conservative community with several young families.
* P sought an injunction against the porn shop on the grounds that it would bring about unsavory characters that may cause a nuisance to the local families.
* The judge granted the injunction on the grounds that their concern was reasonable and their apprehension legitimate.

## Sturges v Bridgeman

* P owned a doctor’s office next to a confectioner who used loud machinery.
* During remodeling the doctor put an examination room on the adjacent wall to D.
* The loud noises made P unable to use the examination room.
* The judge granted an injunction against D to stop making the noise.
* Demonstrates that coming to the nuisance is not a defense.
* Demonstrates that not complaining about a noise which due to circumstance does not bother you does not mean you consent to that noise regardless of circumstance.

## Miller v Jackson

* P built a house on the edge of a cricket field, which had been in constant use for decades.
* P sought an injunction against D to prevent the cricket league from using the field as the constant balls hitting his house and the noise of the games were reducing his enjoyment of his property.
* The judge denied the injunction but allowed damages for the damage caused to D’s home.
* The injunction was denied on the grounds that the public utility of the cricket field outweighed the defendant’s right to the enjoyment of his land.
* The dissenting justice believed that the injunction ought to be granted due to D’s legitimate concern about his safety.

## Shuttleworth v Vancouver General Hospital

* P owned a home across from a site on which a contagious disease wing was to be added to an existing hospital.
* P sought an injunction to stop it from being built out of fear that he could get ill and that the hospital would be loud and unpleasant.
* The judge denies the injunction on the grounds that P cannot demonstrate the increased risk to himself nor the likelihood of nuisance originating from the hospital.
* The type of injunction asked for in this case is known as “quia timet” (because he fears).
* Demonstrates that in order to get an injunction before the nuisance has occurred the plaintiff must overcome a high burden of proof as to the likelihood of the nuisance.

## Bamford v Turnley

* P alleged that D’s brick making operation was a nuisance.
* The judge denied the injunction on the grounds that the benefit to the community of the brick making outweighed the interference caused to the plaintiff.
* Demonstrates that a nuisance may be justified if it benefits the public at large.

## Bryant v Lefever

* P and D own adjacent houses.
* D builds an addition onto his house which causes it to be taller than the chimney of P’s house, as a result whenever P lights a fire some of the smoke remains in P’s house.
* The judge denies the injunction on the grounds that it would be much simpler for P to extend his chimney.

## Kenway v Thompson

* P owned a home on a lake, which was regularly used by a waterskiing club.
* The noise of the water-skiers annoyed P.
* The judge gave a “Creative Injunction” which specified the times and level of noise which the club could continue to use.
* Demonstrates the creative liberty allotted to judges in granting injunctions.
* Also demonstrates that the frequency and duration of a noise can make an otherwise benign occurrence into an actionable nuisance.

## Spur Industries v Del E Webb Development Co

* Del established a residential development near Spurs feedlot.
* The residents of Del’s development complained about the smell.
* Del sought an injunction to force Spur to move.
* The judge granted the injunction but forced Del to pay Spur damages for forcing him to move.
* Demonstrates that a judge may grant a compensated injunction where an injunction is granted against party A, but they must be compensated by party B as party B shares liability.

## Shelfer v City of London Electrical Lighting Co

* No facts given.
* Establishes the “Shelfer Rule” which states that:
  + An injunction may be replaced with financial damages only if the following four criteria are met;
    - The injury to the plaintiff’s legal rights is small,
    - The injury is capable of being estimated in terms of money,
    - The injury can be adequately compensated by a small payment, and
    - It would be oppressive to the defendant to grant an injunction.

# Battery

## General

**Battery is a direct, intentional and physical interference with the person of another that is harmful or offensive to the ordinary sense of dignity and honor of a reasonable person**

## Malette v Shulman (1990) (Ont. CA)

**Facts**

* P was rushed unconscious to hospital after a car accident
* D was the attending physician
* P carried a card forbidding blood transfusions which D was informed of
* P’s daughter signed a document forbidding blood transfusion
* D personally administered a blood transfusion

**Issue**

* Whether a doctor is liable for administering blood transfusions to an unconscious patient in a potentially life-threatening situation when the patient is carrying a card stating she rejects blood transfusions

**Analysis**

* In an emergency the law sets aside consent on the reason that a reasonable person would want the treatment were she capable of giving instructions
* A doctor is not free to disregard a patient’s advanced instructions
* A patient has the right to refuse treatment even if doing so would be harmful to said patient
* In absence of any evidence to the contrary advanced instructions written on a card can be taken as the actual beliefs and intentions of the patient and hence if said card revokes consent. Any attempt to contravene its instructions in relation to the owner’s person is battery

**Principles**

* Any intentional non-consensual touching which is harmful or offensive to a person’s reasonable sense of dignity is actionable
* A surgeon who performs an operation without his patient’s consent commits an assault for which he is liable
* In order for a physician to give emergency treatment without requiring the consent of the physician the patient must:  
  a) be unconscious and have no one legally authorized to act as an agent for them available  
  b) Time must be of the essence, waiting bares a risk of serious injury or death  
  c) Under the circumstances a reasonable person would consent and , on a balance of probabilities, the patient would consent
* Informed consent: No medical procedure may be undertaken without the patient’s consent obtained after the patient has been provided with sufficient information to evaluate the risks and benefits of the proposed treatment and other available options

## Nancy B v Hotel-die de Quebec

* A patient has the right to cease treatment even if doing so is likely to result in their death

## Bettel et al v Yim (1978) (ONSC)

**Facts**

* P is a father seeking damages on behalf of his young son
* D owned a variety store where P was playing with other boys
* D asked P to leave
* P threw a match into D’s store lighting a bag of charcoal
* D accused P but P denied
* D shook P, accidentally striking him with his head and breaking P’s nose

**Issue**

* Can someone who intentionally commits a battery be held responsible for harm which he did not intend?

**Analysis**

* D intended to shake P, constituting battery, the harm resulting from which D is liable for regardless of his intention to do so, or lack there of

**Principles**

* Being touched without your consent may constitute battery even if the harm is only trivial
* The least of touching in anger is battery
* In order to be liable for battery you only need to have intended the offensive contact, at that point you become liable for harm caused

Sexual Battery  
Non-Marine Underwriters, Lloyd’s of London v Scalera

**Facts**

* P: Appellant, Insurance company for bus company employing accused D: Alleged victim
* An employee of a company insured by P sexually assaulted D

**Issue**

* Whether the burden of proof for consent in sexual battery falls on the plaintiff or the defendant

**Principles**

* In battery cases the plaintiff only needs to prove that force was applied. If that is demonstrated, it is on the defendant to justify why it was applied
* Sexual battery creates a high “demoralization cost” on the part of the plaintiff
* any contact is assumed to be offensive unless it may be shown otherwise. Either by way of consent or of demonstrating the contact is a normal and expected part of life
* All the plaintiff needs to prove is that a force was intentionally applied to them, for sexual battery they must show that it was of a sexual nature

## Norberg v Wynrib (1992)

**Facts**

* P was addicted to prescription pain killers
* D was a doctor who knew of this addiction and insisted that he would give her a prescription in exchange for sex
* P asked for help with her addiction, but reluctantly acquiesced to the sex when help was refused
* P sued D for sexual battery

**Issue**

* Can an addict be said to have consented to sex had with their physician in exchange for prescription of the addict’s drug of choice?
* What amounts to valid consent as a defense of sexual battery?

**Principles**

* Consent cannot be given unless the consenting party is free from constraints which interfere with their ability to reasonably refuse
* In a situation where P is pressured to enter an unconscionable interaction by way of D having power in relation to them, P cannot be said to have given consent
* P must show a “power dependency” relationship to negate a consent defense
* Damages may be sought for Battery without proof of damage to the plaintiff, aggravated damages may be sought if the battery was humiliating or damaging to Ps dignity
* The point of punitive damages is to disincentivize D or anyone else from committing the same offence
* Failure to resist or protest is an indication of consent if a reasonable person who is aware of the consequences and capable of protest or resistance would voice his objection
* Consent must be genuine: Must be voluntary, cannot be obtained by force/ threat of force or be given under the influence of drugs or alcohol, or due to fraud/deceit as to the nature of Ds conduct
* Two-step process for determining legally ineffective consent in unequal power relations  
  1) Proof of power in equality  
  2) Proof of exploitation

## Hegarty v Shine (1878)

* P was a servant who contracted venereal disease from D, the master of the house
* D did not disclose his illness to P
* The judge ruled that fraud only vitiate consent to sexual activity if it is fraud related to the nature of the activity or the identity of the person
* This is the OLD rule of fraud vitiating consent

## R v Maboir (2012)

* M was HIV positive and had sex with someone without disclosing this
* M was found guilty of assault
* Formally confirmed that the interpretation of fraud in Hagerty v Shine is no longer good law
* Fraud vitiating consent now extends to failure to disclose known sexually transmittable conditions

## E v Eve (1986)

**Facts**

* P is the mother of D
* D is mentally retarded and cannot effectively communicate
* P wishes to sterilize D as D will likely never be able to raise a child though she is capable of becoming pregnant

**Issue**

* May the parens patriae power be used to consent to sterilization on the behalf of a mentally infirmed adult?

**Analysis**

* Giving peace of mind to P is not a valid reason for sterilization of D, the parens patriae power of the court is only to be used for the benefit of the individual and not for the benefit of another
* The parens patriae power should never be utilized to approve non-therapeutic sterilization as the harm to the rights of the handicapped individual is clear while the benefits of the procedure are not.

**Principles**

* The Crown may consent for mentally infirmed adults under the parens patriae power
* The court should avoid creating damage which it cannot repair

## In Re B (1987) (UK)

* The Sunderland Borough Council (SBC) sought leave to have B, over whom they were guardians, sterilized
* B is mentally retarded, prone to aggression and epileptic
* G is unlikely to be able to safely give birth
* The House of Lords rejects the idea that someone incapable of understanding reproduction in any sense has a right to choose whether to reproduce
* HOL allows B to be sterilized

# Informed Consent

## Reibl v Hughes (1980)

**Facts**

* P underwent surgery at the hands of D
* P was told the risks of the surgery but not the reasons for it being performed nor the likelihood of living a healthy life without the surgery
* P formally consented, but claims it was not informed consent

**Issue**

* What information must be given to the patient for consent to be informed consent?

**Analysis**

* Battery in a medical context should be saved for those circumstances in which consent was wholly absent or where what was done went beyond what was consented to
* In failing to disclose certain risks of the operation and valid alternatives D violated his duty to disclose

**Principles**

* The test for improper disclosure is whether a prudent person in the patients place properly informed would have chosen to act differently
* A failure to disclose the risks of treatment goes to negligence and not battery
* Doctors have a strict duty to explain the nature and character of the medical procedure on terms that the patient can understand but have broader discretion regarding what collateral risks to disclose

## White et al v Turner et al (1981)

* Material Risks are risks which pose a real threat to the patient’s life, health, or comfort. These must be disclosed
* Minor risk inherent in all surgeries do not need to be disclosed

## Wallace v Kam

* D failed to warn P about a minor risk of a surgery D was performing on P
* The court found that a reasonable person would have consented and dismissed the claim
* The goal of the disclosure rule is to protect patients from risks which, had they known of, they would not have undergone the procedure
* A doctor’s omission is only legally consequential if actual damage occurs

# Strict Liability

## Rylands v Fletcher (1865)

**Facts**

* F brought an action against R to recover damages caused by water flowing into Fs mine from a reservoir on Rs land

**Issues**

* Should the owner of an artificial reservoir be liable for damage caused by water escaping despite their best efforts to prevent it?

**Analysis**

* R must bear the burden of damages unless he can show that the damage was somehow caused by an act of F
* F did not knowingly take on risk, so he ought not to be subject to it

**Principles**

* Mine owners have a right to be free from foreign water being poured into their mines
* Strict liability torts do not take intention into account, if you caused the harm you are liable, full stop.
* The person who brings and keeps something capable of mischief on his land and fails to prevent its escape is responsible for all-natural causes of its escape.
* The only excuses to a strict liability tort are the fault of the plaintiff in causing it and an act of God causing the damage
* Taking every possible precaution cannot absolve you of liability for a strict liability tort
* Strict liability applies in cases where the plaintiff could not have known he was taking on any risk and could not prevent himself from doing so
* If Ds use their land for any purpose which is not natural by introducing into it something that was not naturally there naturally, and if it as a consequence escaped and caused damage to Ps land then Ds are responsible

**Powell v Fall**

* P is seeking damages from a fire caused by a spark coming off D train engine
* The train engine is inherently dangerous and as such its owner is liable for any damage it causes
* If an object is likely to cause harm its owner is liable for all harm so caused

**Losee v Buchanan**

* A boiler in D’s factory exploded and damaged P’s crops
* The court denied damages on the grounds that the explosion as an unavoidable accident and that P took some risk upon himself by living near Ds factory

# Vicarious Liability

## Jones v Hart (1698)

**Facts**

* D owned a pawnshop
* Ds servant took in, then lost Ps goods

**Issue**

* Is a master liable for the act of his servant?

**Principles**

* Whoever employs another, is answerable for him, and undertakes for his care to all that make use of him
* The act of the servant is the act of the master where the servant acts on the master’s authority
* Three elements of vicarious liability  
  1) The employee must have committed a tort  
  2) The person committing the tort must be an employee of D and not an ‘independent contractor’  
  3) the tort must be committed ‘in the course of employment’

## 671122 Ontario Ltd v Sagaz Industries Canada Inc

* In order to determine if the tortfeasor was an employee or independent contractor you must establish whether the person is performing the service as a person in business on his own account.  
  Factors to consider  
  1) Level of control of the employer, Who provides the equipment   
  3) Who hires helpers  
  4) Degree of financial risk  
  5) Degree of responsibility for investment   
  6) Opportunity for profit
* The employer of an independent contractor does not bare the burden of vicarious liability unless:

1. The employer is negligent in selecting, instructing, or supervising the contractor
2. The duties performed by the contractor are non-delegable owing to some relation between the employer and the public, or the employer and the plaintiff
3. The work is highly specialized, peculiar, or inherently dangerous

## Canadian Pacific Railway v Lockhart

* Employer had a provision against using uninsured vehicles
* The employee hurt someone with an uninsured vehicle in the course of employment
* Employer was held vicariously liable
* An employer is liable even for acts which he hasn’t authorized so long as they relate to acts that he has authorized so that they may rightly be regarded as modes of doing them

## London Drugs Ltd v Kuehne & Nagle International Ltd

* Employees of a warehouse were sued by the owner of the warehouse for damages which the warehouse had to pay for a transformer negligently damaged by the employees
* An employer found vicariously liable for damage caused by an employee has right to indemnity from the employee
* Justice La Forest wrote an influential dissent in which he outlined policy reasons why this should not be the case:

1. Allows P to obtain compensation from someone with “deep Pockets”
2. A person/ corporation who employs others to advance its own economic interest should be liable for losses incurred in the course of the enterprise
3. Promotes a wide distribution of tort losses since the employer usually has insurance
4. Deterrence

## Bazely v Curry

**Facts**

* D was a pedophile who worked for the Children’s foundation
* P was a child who D sexually abused
* P sought compensation from (CF)

**Issues**

* May the owners of care facility be held liable for sexual abuse committed by one of their employees?
* Should non-profit employers be exempted from vicarious liability?

**Analysis**

* In order for an employer to be found vicariously liable for sexual battery by an employee, they must have materially enhanced the risk of it occurring
* There is no special rule for not for profit organizations

**Principles**

* Salmon Test: Employers are vicariously liable for:

1) Employee acts authorized by the employer  
2) unauthorized acts so connected with authorized acts that they may be regarded as modes of doing an authorized act

* An employer may be vicariously liable if he creates a “situation of friction” out of which an intentional tort occurs
* Where the employee’s conduct is closely tied to a risk that the employer’s enterprise has placed in the community, the employer may justly be held vicariously liable
* The person who introduces a risk incurs a duty to those who may be injured by it
* When determining the relatedness between the risk created by the employer and the wrong done the following should be considered:   
  1) The opportunity that the enterprise afforded the employee t abuse his or her power  
  2) The extent to which the wrong may have furthered the employers aim   
  3) The extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employers enterprise  
  4) The power conferred on the wrong doer in relation to the victim  
  5) The vulnerability of potential victims   
  - Known as “Bazely Factors
* To determine vicarious liability, it must be determined whether the employee’s wrongful act was so closely connected to the employment relationship that the imposition of liability is justified.

## Jacobi v Griffiths

* D worked for a non-profit club which provided behavioral guidance to children and employed Griffiths, who was expected to develop a rapport with the club’s members
* P were two young children who were sexually abused at D’s home
* Court ruled that the club was not liable as the act was not sufficiently connected to D’s employment
* Uphold Bazely but reaches different result

## EB v Order of the Oblates of Mary Immaculate in the Province of British Columbia (2005)

**Facts**

* P attended a residential school run by D
* P was sexually abused by an employee of D (Saxey)

**Analysis**

* Saxey did not have any authority to insinuate himself in the intimate lives of the students
* The judge applies the “Bazely factors” and found  
  1) Saxey was not permitted to interact with the children except for under the supervision of other staff making the opportunity afforded to him by D minimal   
  2) Saxey’s conduct was antithetical to the aims of D  
  3) There was no intimacy inherent in Saxey’s duties as he was a baker and a boat driver   
  4) D did not confer any power onto Saxey in relation to the children  
  5) The children were vulnerable but not as a part of Saxey’s employment

**Principles**

* Being an employee is not enough to instantiate vicarious liability. There must be a strong connection between the wrong done and the employee’s position
* Mere opportunity is not enough to support vicarious liability for a intentional tort

**Justice Abella Dissenting**

* The nature of the residential school system made P especially vulnerable and the nebulas nature of Saxey’s employment gave him ample perceived authority in the eyes of P
* Applies the same Bazely factors as the majority but comes to a different result
* The Policy Concerns of Fair Compensation, Precedent and Deterrence weigh in favor of assigning vicarious liability to employers

# Defamation

## Elements of Defamation (Hay)

1. A defamatory statement: Any communication that reduces the esteem or respect in which P is held by others in the community  
   - On an objective test a right thinking member would think less of P   
   - Plaintiff does not need to show it was untrue   
   - Plaintiff does not need to prove intention or negligence on the part of D  
   - Court will consider ancillary facts which change the meaning of otherwise benign words
2. Reference to Plaintiff: The defamatory communication must be reasonably understood as referring to P as an individual   
   - Objectively would a reasonable person assume the statement refers to P
3. Publication: The communication must be published to a third person who understood it

## Defenses to Defamation

1. Justification: Proof that the statement is true  
   - On BOP
2. Privilege: Based on the public interest of promoting open communication about issues of interest

* Absolute Privilege: Provides complete immunity even if the statement was made with malice (Hay)
  + Arises between spouses, between lawyers and clients, while speaking before parliament, in court, and during quasi-judicial proceedings before administrative bodies
* Qualified privilege: Protects bona fide honest statements (Hay)
  + Must be a duty on the part of the speaker to say something and a corresponding duty on the receiver to receive such statements
  + Can be a legal or moral duty
  + Defense is lost with malice

1. Fair Comment on the Matter of Public Interest: Mostly applies to the press/ media

* Must be a comment or opinion
* Must be founded on fact which is understood by the audience
* Comment must be made on a matter of public interest
* The comment must be fair (Honest)

## Malice

* A statement made with malice is one made with knowledge of its false or recklessness to its truth value

## Remedies for Defamation

* Damages are ‘at large’ (presumed)
* Based on how widely disseminated the statement was
* The length of time for which the statement was propagated is considered
* Aggravated damages may be awarded if Ds conduct is oppressive, or humiliating to P
* Punitive damages may be awarded if the conduct is so egregious that D needs to be punished to establish deterrence
* Injunctions may be granted to stop publication of defamatory material

## Hay v Platinum Equities Inc (2012)

**Facts**

* D reported P to the ICAA for creating false RERs
* P never made the RERs, his name was affixed to another person’s work
* P sued D for defamation on the grounds that the report published to the ICAA lowered his esteem as an accountant

**Issues**

* Was P defamed by the report of his alleged conduct submitted to the ICAA?

**Analysis**

* The letter was also not found to be defamatory as it was accurate and appropriate given the knowledge D had at the time
* Additionally, the letter was protected under absolute privilege as it was a complaint to a quasi-judicial body with the power to discipline P
* The letter was also protected under qualified privilege as D had a moral duty to send it and the ICAA had a social duty to receive it

**Principles**

* Defines three elements of Defamation (above)
* A defamatory statement is one which tends to injure the reputation of the person to whom it refers which lowers him in the estimation of the right-thinking members of society, and which causes him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike or disesteem
* The test is: whether the words tend to lower P in the eyes of right-thinking people generally
* A statement is defamatory by inuendo if it refers to a fact likely to be known to the third party which in combination with the words are defamatory
* Defines absolute and qualified privilege (above)

## WIC Radio Ltd v Simpson (2008)

**Facts**

* P called D a bigot and stated that D would condone violence against homosexuals on his radio show
* D had spoken the previous night at a rally where she described her struggle against the normalization of homosexuality as “a war for our children”

**Issues**

* Were Ps statements defamatory?
* Is P protected by the fair comment defense?

**Analysis**

* The statements were found to be defamatory
* Because no malice was proven on the part of P, his opinions on this subject of public interest are protected by the law and his defense of fair comment stands.
* The statement can reasonably be assumed to be a comment by P and not an imputation of fact which a reasonable person is likely to believe as such
* Ps reputation as a “shock jock” reduces the likelihood that listeners will assume truth from what he says

**Principles**

* Under the present law, if a plaintiff shows the defendant published something harmful to his or her reputation, then both falsity and damage are presumed, and the onus shifts to the defendants to establish an applicable defense”
* Elements of the fair comment defense:

1. the comment must be on a matter of public interest;
2. the comment must be based on fact
3. the comment, though it can include inferences of fact, must be recognizable as comment
4. the comment must satisfy the following objective test: could any man honestly express that opinion on the proved facts?
5. even though the comment satisfies the objective test the defense can be defeated if the plaintiff proves that the defendant was actuated by express malice.

* “comment” includes a “deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof”.
* “[t]he comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made”
* If the factual foundation is unstated or unknown, or turns out to be false, the fair comment defense is not available
* The test is whether anyone could have honestly expressed the view on the proven facts
* The word “fair” refers to limits to what any honest person, however opinionated or prejudiced, would express upon the basis of the relevant facts.