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# FUNDRAISING FOR LITIGATION: A DISCUSSION OF THE TORTS OF MAINTENANCE AND CHAMPERTY

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## INTRODUCTION

Sometimes, clients wish to pursue litigation but are unable to pay for it. Third parties can support litigation, financially, under certain circumstances, but these third parties run the risk of liability arising from the tort of maintenance and champerty.

## THE DIFFERENCE BETWEEN MAINTENANCE AND CHAMPERTY?

Maintenance has been defined as "officious intermeddling with a suit, which no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend." [1]

Essentially, champerty is a refinement on the doctrine of maintenance. Champerty arises when the party and the maintainer agree to split the proceeds of any successful litigation.[2] In other words, champerty is maintenance plus an agreement to share in the spoils of litigation. Champerty is specifically prohibited by statute in Ontario and any champertous agreements are forbidden and invalid.[3]

## POLICY REASONS FOR THE RULES

The offences of maintenance and champerty are ancient.[4] The Ontario Law Reform Commission noted that the rules were adopted to prevent abusive interference by powerful royal officials and nobles. These rules are now justified by public policy

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[1] *Langtry* v. *Dumoulin* (1885), 7 O.R. 644 (Div. Ct.) at 661.

[2] See, for example, *Carr* v. *Tannahill* (1870), 30 U.C.Q.B. 217, where the defendants agreed to pay all the costs of the plaintiffs arising from the suit and, if the plaintiffs received good title to a certain mining property then the plaintiffs would received one-tenth of it.

[3] *An Act Respecting Champerty*, R.S.O. 1897, c. 327. Even if such a statute did not exist, Taschereau C.J. of the Supreme Court of Canada held: "Now it is undeniable, I take it, that every contract into which champerty enters as a consideration is null and void, *à nullité d'ordre public*, and that an action founded upon such a contract cannot be maintained. *Meloche* v. *Deguire*, 1903 CarswellQue 22 (S.C.C.) at para. 14.

[4] It dates back to at least 1219. See *Re Trepca Mines Ltd (No. 2),* [1963] Ch. 199 (C.A.).

considerations. Firstly, the rules against maintenance and champerty serve to prevent one party from inciting another to initiate or defend litigation that would never have been brought or defended. There is also a fear that litigation driven by non-parties could serve to increase lawsuits, harass defendants, and result in the suppression or manufacturing of evidence and the subornation of witnesses.[5] As Lord Denning observed, however, "These fears may be exaggerated; but, be that so or not, the law for centuries has declared champerty to be unlawful, and we cannot do otherwise than enforce the law…."[6]

## THE INGREDIENTS OF MAINTENANCE

The rule against maintenance seeks to prevent officious or malicious intermeddling. The non-party must seek to stir up litigation. Thus, the maintainer "must have intervened officiously or improperly"[7] and, without it, no breach of the rule against maintenance occurs. Where there is evidence that the party has already started the proceeding but later accepts help from a meddler, it is not maintenance. [8]

Not unlike the criminal law, there is an element of *mens rea*, which is not surprising given its common law criminal roots. Lord Coleridge C.J. put it powerfully: "that the acts of the maintainer must be immoral, and that the maintainer must have been actuated by a bad motive…"[9]

In *Wiegand* v. *Huberman*, the defendants borrowed money from the plaintiff in order to finance a lawsuit. The money was loaned and, in return, the plaintiff would receive ten per cent of the proceeds of the litigation plus a fixed amount of money as compensation. The defendants' defence of maintenance and champerty was dismissed because the plaintiff did nothing to stir up litigation. Rather, all the plaintiff did was finance the litigation for, without the assistance, the defendants would never have had the opportunity to recover lost property. The court analogised the case with the commonplace practice of lawyers to assist financially challenged clients in return for a share of the proceeds. [10]

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[5] The Ontario Law Reform Commission, *Report on Class Actions,* vol. 3 (Toronto: Ministry of the Attorney-General, 1992) at 717 and G. H. L. Friedman, *The Law of Torts in Canada*, vol. 2 (Toronto: Carswell, 1990) at 259-260.

[6] *Re Trepca Mines Ltd, supra*, note 4 at 219.

[7] *Goodman* v. *R.*, 1939 CarswellQue 41 (S.C.C.) at para. 19.

[8] *Ibid.,* at para. 20.

[9] *Bradlaugh* v. *Newdegate*, (1882-83) L.R. 11 Q.B.D. 1 at 9.

[10] 1979 CarswellBC 443 (S.C.).

In *Buday* v. *Locator of Missing Heirs Inc*., a joint venture was created to prove that Buday *et al*, were entitled to certain mining properties. Locator was in the business of establishing the ownership of such properties. While a champerty case, the elements of maintenance must also be found. In this case, Locator did nothing to stir up Buday *et al* into litigation but, instead, had entered into a *bona fide* business agreement to recover the mining interest.[11]

*Tacan* v. *Canada* is an example of an improper intermeddling. The plaintiffs, three members of a native band attempted to assign their lawsuit against the Crown to their Band. The action was dismissed because the Band had no legitimate interest in the litigation and, as such, amounted to maintenance because it was an improper intervention. That the plaintiffs were members of the Band was not sufficient to create an interest on the part of the Band in the litigation. An assignment of a bare right to litigate is also maintenance when the plaintiffs are no longer disposed to enforce their rights without the intervention of the Band.[12]

## THE EXCEPTIONS TO THE RULE AGAINST MAINTENANCE

Over the centuries, courts have begun to relax the rule against maintenance while brooking no such relaxation against champtery. Lord Denning noted the difference:

> Maintenance may, I think, nowadays be defined as improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse. At one time, the limits of "just cause or excuse" were very narrowly defined. But the law has broadened them very much of late …] and I hope they will never again be placed in a strait waistcoat. But there is one species of maintenance for which the common law rarely admits of any just cause or excuse, and that is champerty…[13]

There are many reasons to justify an outsider supporting a party to a suit including having an interest in the suit, having a common relationship, or because of charity.

### A. Charity

Charity is one such example where the rules against maintenance have relaxed:

> Maintenance is lawful under certain circumstances, but maintenance in consideration of an interest in the subject matter of the action to be maintained cannot receive the sanction of a court of justice. Any one for instance even not

[11] 1993 CarswellOnt 480 (C.A.)

[12] 2003 CarswellNat 2275 (F.C.).

[13] *Re Trepca Mines Ltd., supra* note 4 at 219.

> interested at all, may, if he acts only from philanthropic motives, lawfully give money to a poor man to enable him to carry on a suit…[14]

In *Newswander* v. *Giegerich*, the appellant brought an action for maintenance against the respondent for assisting another man, Briggs, who was poor and improvident, in bringing an action against the appellant. The Supreme Court of Canada held:

> It would indeed at the present day be a startling proposition to put forward that every one was guilty of the crime of maintenance who assisted another in bringing or maintaining an action, irrespective of the results or merits of such an action and whether the courts sustained it or not. Many grasping, rich men and soulless corporations would greedily welcome such a determination of the law, because it would enable them successfully to ignore and refuse the claims of ever poor man who had not sufficient means himself to prosecute his case in the courts…[15]

**B. Common Interest.**

The Supreme Court of Canada held that, "But the doctrine cannot be applied to a person having an interest or believing that he has an interest, in, in the subject in dispute, and *bona fide* acting in the suit."[16] Lord Coleridge C.J. also noted that: "if he [the maintainer] has, or believes himself to have, a common interest with the plaintiff in the result of the suit, his acts, which would otherwise be maintenance, cease to be so."[17]

*Tacan* v. *Canada, supra*, was an example of where there was no common interest between the Indian Band and certain aboriginal members of that Band.

Unfortunately, I was unable to find any test to determine what is a common or joint interest and what is not. When it is mentioned at all, the courts simply decide that the person has a common interest with little or no analysis. One case suggests that these interests must be actual valuable interests in the results of the suit arising either presently, contingently, or in the future. [18] Clearly, there is a interest held by many Canadians in seeing some accounting of missing public funds which is valuable and has arisen in the present.

This exception seems to be interwoven with the exception below.

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[14] *Meloche* v. *Deguire, supra,* note 3 at para. 15.

[15] *Newswander* v. *Giegerich*, 1907 CarswellBC 42 (S.C.C.) at para. 26.

[16] *Langtry* v. *Dumoulin, supra*, note 1 at 661.

[17] *Bradlaugh* v. *Newdegate*, (1882-83) L.R. 11 Q.B.D. 1 at 9.

[18] *Ibid.,* at 12.

### C. Common Relationship

Litigation support can also excused "in certain cases of blood relationship between the parties…and where there is a common or joint interest in the party to the record and those who assist him."[19] These common relationships can include "A master for a servant, or a servant for a master; an heir; a brother; a son-in-law; a brother-in-law; a fellow commoner defending rights of common; a landlord defending his tenant in a suit for tithes; a rich man giving money to a poor man out of charity to maintain a right which he would otherwise lose." [20]

### D. A More Liberal Approach

As Lord Denning observed some thirty years ago, it is now a modern reality that many court actions are supported by non-parties such as associations, such as trade unions or insurance companies, or the state: "This is perfectly justifiable and is accepted by everyone as lawful, provided always that the one who supports the litigation, if it fails, pays the costs of the other side."[21]

In 1993, the Supreme Court of Canada also looked at the issue of financial support as maintenance. One of the parties in this case was supported by a church, which had common issues regarding the ability of a father to instil religious values in his children after a divorce. The court noted that there was no evidence that the church induced the party to use his name in order to avoid liability for costs while advancing their own interests nor that the party would have given up pursing his interests in the absence of the church's help. The church did not fund the suit for uncharitable reasons nor controlled or directed the proceedings. [22]

## CONSEQUENCES OF MAINTENANCE AND CHAMPERTY

[19] *Langtry* v. *Dumoulin, supra*, note 1 at para 660.

[20] *Bradlaugh* v. *Newdegate*, *supra,* note 17 at 12.

[21] *Hill* v. *Archbold*, [1968] 1 Q.B. 686 (C.A.) at 694-695.

[22] *Young* v. *Young* [1993] 4 S.C.R. 3 (S.C.C.) at 257.

Both rules originally had criminal consequences at common law but this is no longer true as such offences have been abolished in Canada.[23] Likewise, in the UK, it is no longer a crime nor a tort.[24]

In Canada, the torts of maintenance and champerty have not been abolished. As such, an action for the tort for maintenance can be maintained but the plaintiff must have suffered some kind of damage because it is in respect of an offence that has caused damage. Without special damages, there is no remedy.[25]

It is important to note that the rules against maintenance and champerty are not defences to an action unless the action deals with the legitimacy of a champertous document.[26]

Friedman speculates that the torts of maintenance or champerty may not, in a practical sense, continue to survive given the realities of the modern world where many people involve themselves in litigation such as insurance companies, trade unions, legal aid organisations.[27]

## FUNDRAISING FOR LITIGATION

This is really a variation on the issue of maintenance: instead of one intermeddler, however, there are many. For the reasons enumerated above, this should pose no problem vis-à-vis the proposed litigation because the legal logic does not really change whether there is one intermeddler or a thousand.

In the context of abuse of process, the Alberta Court of Queen's Bench held that:

> In my judgment, <u>where the financing comes from for the purpose of pursuing a lawsuit is of no concern to the Court and does not create an abuse of process</u>. If I were to accede to the submissions made by Mr. Lutes that this is an abuse of

[23] See *Criminal Code*, R.S., 1985, c. C-46, s. 9 which reads in part: "Notwithstanding anything in this Act or any other Act, no person shall be convicted or discharged under section 730
(a) of an offence at common law,
(b) of an offence under an Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland…"

[24] Lord Mackay of Clashfern, ed., *Halsbury's Laws of England*, vol 9(1), 4th ed. (London: Butterworths, 1998) at para. 850.

[25] *Sheppard* v. *Frind*, [1941] S.C.R. 531. See also Law Society of Upper Canada, 42nd Bar Admission Course Materials: Civil Litigation Reference Materials (Toronto: Law Society of Upper Canada), 2000 at 2-3.

[26] *Kroeker* v. *Harkoma Express Lines Ltd*., (1974), 2 O.R. (2d) 210 (Ont. H.C.). *Gudmundsson* v. *Trinity Plastic Products Inc*., 1999 CarswellOnt 68 (Gen. Div.)

[27] G. H. L. Friedman, *The Law of Torts in Canada*, *supra* note 5 at 259-260.

> process then the funding which the governments of Canada and the provinces provide to interested parties for litigation and appearing on court challenges would cause a flurry of applications every time a lawsuit is commenced on the grounds that it was an abuse of process. In my judgment, a court should not be concerned with how an action is funded. This is not for the courts to know and in my judgment cannot be considered an abuse of process."[28]

In *Ilic* v. *Calgary Sun*, the plaintiff sued for defamation and raised funds for the litigation through a fundraising campaign within his church and the local Serbian community. The court rejected the argument that participants in meetings held at the church and within the community somehow coerced the plaintiff into launching the suit since the plaintiff was the person who was involved in organising these meetings. The evidence showed that the financial contributions furthered the plaintiff's interests and not the interests of the contributors. There was no proof that the contributors and induced the plaintiff to initiate the lawsuit: he was no "straw man or puppet for a hidden group."[29]

The third party must be no more than the charitable provider of money.

[28] *Jacobi* v. *Newell No. 4 (County),* 1992 CarswellAlta 560 at para. 19.

[29] 1998 CarswellAlta 513 (Q.B.) at para. 47.