

Dimensions of Private Law

Categories and Concepts
in Anglo-American
Legal Reasoning



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CAMBRIDGE
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge CB2 1RP, United Kingdom

CAMBRIDGE UNIVERSITY PRESS

The Edinburgh Building, Cambridge, CB2 2RU, UK
40 West 20th Street, New York, NY 10011-4211, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
Ruiz de Alarcón 13, 28014 Madrid, Spain
Dock House, The Waterfront, Cape Town 8001, South Africa

<http://www.cambridge.org>

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First published 2003

Printed in the United Kingdom at the University Press, Cambridge

Typeface Adobe Minion 10.5/13.5 pt. *System* L^AT_EX 2_ε [TB]

A catalogue record for this book is available from the British Library

ISBN 0 521 81643 2 hardback
ISBN 0 521 01669 X paperback

DIMENSIONS OF PRIVATE LAW

Categories and Concepts in Anglo-American Legal Reasoning

Anglo-American private law (the law governing mutual rights and obligations of individuals) has been a far more complex phenomenon than is usually recognized. Attempts to reduce it to a single explanatory principle, or to a precisely classified or categorized map, scheme, or diagram are likely to distort the past by omitting or marginalizing material inconsistent with proposed principles or schemes. Many legal issues cannot be allocated exclusively to one category. Often several concepts have worked concurrently and cumulatively, so that competing explanations and categories are not so much alternatives, of which only one can be correct, as different *dimensions* of a complex phenomenon, of which several may be simultaneously valid and necessary. This study will be of importance to those interested in property, tort, contract, unjust enrichment, legal reasoning, legal method, the history of the common law, and the relation between legal theory and legal history.

STEPHEN WADDAMS is Goodman/Schipper Professor of Law at the University of Toronto. His many publications include *Products Liability*, *Sexual Slander in Nineteenth-Century England: Defamation in the Ecclesiastical Courts, 1815–1855*, *The Law of Contracts*, *The Law of Damages*, *Introduction to the Study of Law*, and *Law, Politics and the Church of England: the Career of Stephen Lushington 1782–1873*.

PREFACE

Organization of ideas in Anglo-American private law has been beset with difficulties – linguistic, philosophical, jurisprudential, rhetorical, and historical. This study, though not a history of private law (by period or by topic), is historical in perspective: attention is directed to the past (from the eighteenth century to the recent past), and to the failure of any organizational scheme or of any single or simple explanation either to describe the law that preceded it, or to supply a workable guide for decisions thereafter. This failure suggests that the interrelation of legal concepts has involved a greater complexity than can be captured by organizational schemes, maps, or diagrams, or by any single explanatory principle.

Since the nineteenth century it has been common to make distinctions in respect of Anglo-American law between public and private law, and within private law between property and obligations, and within obligations among contracts, torts, and unjust enrichment. Legal issues and rules have been supposed to belong to one of these subcategories, and the rules applied to determine the result in particular cases. But this scheme has failed to account for many actual judicial decisions, a failure that led, in the twentieth century, to scepticism of formal explanations of law, to alternative explanations, and in turn to counter-reaction.

This study approaches these questions not by proposing any new all-embracing explanation, or by seeking to impose a single pattern on all of private law, but by proceeding from the particular towards the general. From this direction it will be seen that many important legal issues have not been resolved by being initially allocated exclusively to a particular subcategory, but by simultaneous application of several or all of the concepts mentioned in the last paragraph. The plan of the study is not schematic but progressive, considering first a particular dispute – that between the two principal opera houses in mid-nineteenth-century London for the services of Johanna Wagner – and then proceeding to a number of other legal issues

that have similarly resisted classification. In the light of these issues we turn to the interrelation of obligations, then to the distinction between obligations and property, and finally to that between private right and public policy. This progression from particular to general, like the method of legal thinking it describes, shows why it has been so difficult to reverse the process and to impose the general upon the particular.

I am grateful to the University of Toronto for research leave, to the Killam Program at the Canada Council for the Arts, and to the Social Sciences and Humanities Research Council of Canada for research funds. I am grateful also to many friends, colleagues, and students who read the drafts and made helpful comments, and to Stephanie Chong, Adam Taylor, Craig Lockwood, Megan Ferrier, and John Sawicki for valuable research assistance.

Stephen Waddams
Toronto, 2002

TABLE OF CASES

Addis v. Gramophone Co. Ltd [1909]	AC 488, HL	153
ADGA Systems Int. Ltd v. Velcom Ltd (1999)	168 DLR (4th)	351,
Ont. CA	155	
The <i>Africa</i> (1854)	1 Sp 299	217
The <i>Albazer</i> [1977]	AC 774, HL	45
Albert (Prince) v. Strange (1849)	2 De G & Sm 652, 1 H & Tw 9	75
The <i>Albion</i> (1861)	Lush 282	216
Alfred McAlpine Construction Ltd v. Panatown Ltd [2001]	1	
AC 518, HL	2, 44, 46	
Allen v. Flood [1898]	AC 1, HL	40
Allen v. Gulf Oil Refining, Ltd [1980]	QB 156, CA	94
Amalgamated Investment & Property Co. v. Texas Commerce International Bank [1982]	QB 84	65
The <i>Annapolis</i> (1861)	Lush 355	216
Anns v. Merton London Borough Council [1978]	AC 728, HL	47, 157,
	203	
Anon (1857)	Deane 295	194
The <i>Araminta</i> , (1854)	1 Sp Ad & Ecc 224, Adm. Ct	151–2
Argyll v. Argyll [1967]	1 Ch 302	77
Asamera Oil Corp. Ltd v. Sea Oil & General Corp. [1979]	SCR 633	114
Astley v. Reynolds (1731)	2 Str 915	166
Attica Sea Carriers Corp v. Ferrostaal Poseidon Bulk Reederei GmbH [1976]		
1 Lloyd's Rep 250, CA	115, 148	
Attorney General for Hong Kong v. Reid [1994]	1 AC 324, PC	183
Attorney General v. Blake [2001]	1 AC 268, HL	2, 35
Attorney General v. De Keyser's Royal Hotel [1920]	AC 508, HL	84
Attorney General v. Guardian Newspapers (No. 2) [1990]	1 AC 109,	
HL	124	

- B (KL) v. BC (2001) 197 DLR (4th) 431, BCCA 105
- Bagot v. Stevens Scanlon & Co. [1966] 1 QB 197 143
- Balfour v. Balfour [1919] 2 KB 571, CA 127
- Bamford v. Turnley (1860) 3 B & S 66 88, 93, 196
- Bank of America Canada v. Mutual Trust Co. (2002) 211 DLR (4th) 385,
SCC 120
- Banner Homes Group Plc v. Luff Developments Ltd [2000] Ch 372,
CA 78
- Banque Bruxelles Lambert SA v. Eagle Star Ins. Co. Ltd [1997] AC 191,
HL 70, 156
- Banque Financière de la Cité v. Parc (Battersea) Ltd [1999] 1 AC 221,
HL 166
- Barber v. Lesiter (1859) 7 CBNS 175, 185 30
- Barrett v. Enfield London Borough Council [2001] 2 AC 550, HL 94
- The *Bartley* (1857) Swab 198 216
- Baumgartner v. Baumgartner (1987) 164 CLR 137 133
- Bayliss v. Bishop of London [1913] 1 Ch 127 162
- Bazley v. Curry [1999] 2 SCR 534, 174 DLR (4th) 45 2, 102, 103, 192
- BC Checo Int. Ltd v. BC Hydro & Power Authority [1993] 1 SCR 12 143
- BC Power Corp Ltd v. A-G BC (1962) 34 DLR (2d) 25 84
- Beatty v. Guggenheim Exploration Co. 225 NY 380, 122 NE
378 (1919) 74, 184
- The *Beaverford* v. The *Kafiristan* [1938] AC 136 217
- Beddow v. Beddow (1878) 9 Ch D 89, 93 180
- Besant v. Wood (1879) 12 Ch D 605 200
- Beswick v. Beswick [1968] AC 58, HL 49, 51, 209
- Birmingham & District Land Co. v. North West Railway Co. (1888)
40 Ch D 268 64
- Blackwell v. Blackwell [1929] AC 318 63
- BMW of North America Inc. v. Gore 517 US 559 (1996) 220
- Board of Trade of the City of Chicago v. Christie Grain & Starch Co. 198
US 236 (1905) 175
- Boardman v. Phipps [1967] 2 AC 46, HL 112
- Boomer v. Atlantic Cement Co. Ltd 257 NE 2d 870 (NYCA, 1970) 179
- Boscawen v. Bajwa [1996] 1 WLR 328, CA 185
- Boston v. Boston [2001] 2 SCR 413, 201 DLR (4th) 1 140
- Botiuk v. Toronto Free Press Publications Ltd [1995] 3 SCR 3 220

- Bow Valley Husky (Bermuda) Ltd *v.* Saint John Shipbuilding Ltd [1997] 3 SCR 1210 40, 47, 209
- Bowen *v.* Hall (1881) 6 QBD 333, CA 30, 31
- Bowen *v.* Paramount Builders (Hamilton) Ltd [1977] 1 NZLR 394 158
- Bracewell *v.* Appleby [1975] Ch 408 108
- Bradford Corp. *v.* Pickles [1895] AC 587, HL 41, 212, 213, 214
- Brewer Street Investments Ltd *v.* Barclays Woollen Co. Ltd [1954] 1 QB 428 69
- British Columbia *v.* Mochinski [1997] 3 SCR 1176, 154 DLR (4th) 212 95
- British Motor Trade Association *v.* Gilbert [1951] 2 All ER 641 116
- Brown *v.* BC [1994] 1 SCR 420, 112 DLR (4th) 1 95
- Brown *v.* Edgington (1841) 2 Man & G 279 98
- Bryan *v.* Maloney (1995) 182 CLR 609 157, 158
- Bryant *v.* Herbert (1877) 3 CPD 389 9
- Bunn *v.* Lind, *The Times*, 23 Feb. 1848 24, 27, 28, 29, 30
- Burmah Oil *v.* Lord Advocate [1965] AC 75, HL 84
- Burn *v.* Morris (1834) 2 C & M 579 177
- Burnie Port Authority *v.* General Jones Pty Ltd (1994) 179 CLR 520 93
- Burton *v.* English [1883] 12 QBD 218 82
- Byrne & Co. *v.* Leon Van Tienhoven & Co. (1880) 5 CPD 344 8
- Cadbury Schweppes Inc. *v.* FBI Foods Ltd [1999] 1 SCR 142, 167 DLR (4th) 577 21, 75, 179, 217
- The Calypso* (1828) 2 Hagg 209 217
- Cambridge Water Co. *v.* Eastern Counties Leather Plc [1994] 2 AC 264, HL 93
- Campbell *v.* Mahler (1918) 47 DLR 722, Ont SC App Div 148
- Canada Trust Co. *v.* Ontario Human Rights Commission (1990) 69 DLR (4th) 321, Ont CA 200
- Canadian National Railway *v.* Norsk Pacific Steamship Co. [1992] 1 SCR 1021, 91 DLR (4th) 289 157
- Cargo ex *Capella* (1867) 1 A & E 356 217
- Cassell & Co. Ltd *v.* Broome [1972] AC 1027, HL 220
- Castrique *v.* Imrie (1870) 4 LR HL 414 172
- Cattle *v.* Stockton Waterworks Co. (1875) LR 10 QB 453 47
- Cehave NV *v.* Bremer Handelsgesellschaft mbH [1976] QB 44, CA 211
- Central Trust Co. *v.* Rafuse [1986] 2 SCR 147 21, 143
- Chadwick *v.* Manning [1896] AC 231 65

- Chase Manhattan Bank *v.* British Israel Bank (London) Ltd [1981]
Ch 105 74
- Chasemore *v.* Richards (1859) 7 HLC 349 214
- Charles Rickards Ltd *v.* Oppenheim [1950] 1 KB 616, CA 65
- Chattock *v.* Muller (1878) 8 Ch D 177 78
- Chesterfield (Earl) *v.* Janssen (1751) 2 Ves Sen 125 198
- The *Chieftain* (1846) 2 W Rob 450 216
- Chrispen *v.* Topham (1986) 28 DLR (4th) 754, affd 39 DLR (4th) 637,
Sask CA 201
- Citizens Bank of Louisiana *v.* First National Bank of New Orleans (1873)
LR 6 HL 352, 360 65
- City of Toronto *v.* J. F. Brown Co. (1917) 55 SCR 153 84
- Clark *v.* Kirby-Smith [1964] 1 Ch 506 143
- Clark *v.* Marsiglia 43 Am Dec 670, (NYSC, 1843) 148
- Clea Shipping Corp. *v.* Bulk Oil International Ltd (No 2) [1984] 1 All ER
129, QB 148
- Cleaver *v.* Mutual Reserve Fund Life Assurance [1992] 1 QB 147 124
- Commonwealth *v.* Pierce (1884) 138 Mass 165 81
- Cook *v.* Swinfen [1967] 1 WLR 457, CA 143
- Cooke *v.* Cooke (1812) 2 Phil 40 128, 130
- Cooper *v.* Hobart (2001) 206 DLR (4th) 193, SCC 203
- Cooper *v.* Shepherd (1846) 3 CB 266 177
- Cooperative Insurance Society Ltd *v.* Argyll Stores (Holdings) Ltd [1998]
AC 1, HL 34, 180
- The *Coromandel* (1857) Swab 205 216
- Cox *v.* Burbidge (1863) 13 CBNS 430 95
- Cox *v.* Troy (1822) 5 B & A 481 7
- C. R. Taylor (Wholesale) Ltd *v.* Hepworths Ltd [1977] 1 WLR 659,
QB 115
- Crabb *v.* Arun DC [1976] Ch 179, CA 59, 61
- Cream Silver Mines Ltd *v.* British Columbia (1991) 85 DLR (4th)
269 84
- Crippen, Re [1911] P 108 124
- Cunningham *v.* Harrison [1973] QB 942, CA 46
- D & F Estates Ltd *v.* Church Commissioners for England [1989] 1 AC 177,
HL 47, 157
- Daily Mirror *v.* Gardner [1968] 2 QB 762, CA 38
- Davies *v.* Davies (1886) 36 Ch D 359 200

- Davis *v.* James (1771) 5 Burr 2680–81 45
- De Crespigny *v.* Wellesley (1829) 5 Bing 392 176
- Degelman *v.* Guarantee Trust Co. of Canada [1954] SCR 725 168
- DeMattos *v.* Gibson (1858) 4 D & J 276 43
- Denmark Productions Ltd *v.* Boscobel Productions Ltd [1969]
1 QB 699 148
- Denny *v.* Ford Motor Co. 662 NE 2d 730 (NYCA) 100
- Detroit Football Co. *v.* Dublinski, (1956) 4 DLR (2d) 688, reversed on other
grounds 7 DLR (2d) 9 35, 120, 121
- Dies *v.* British & International Mining & Finance Corp. [1939]
1 KB 724 169, 170
- Dillwyn *v.* Llewelyn (1862) 4 D F & J 517, 6 LT 878 59
- Dobson *v.* Dobson [1999] 2 SCR 753, 174 DLR (4th) 1 2, 203, 205
- Domowicz *v.* Orsa Investments Ltd (1993) 15 OR (3d) 661 195
- Donoghue *v.* Stevenson [1932] AC 562, HL 97
- Donselaar *v.* Donselaar [1982] 1 NZLR 97 220
- Dunne *v.* Northwest Gas Board [1964] 2 QB 806 94
- Dutton *v.* Bognor Regis Urban District Council [1972] 1 QB 373,
CA 47, 158
- Dutton *v.* Poole (1678) 8 T Raym 302 49
- Dysart *v.* Dysart (1844) 3 Not Cas 324, revd 5 Not Cas 194, 1
Rob Ecc 105 194
- East Lancashire Railway Co. *v.* Hattersley (1849) 8 Hare 72 148
- East River SS Corp. *v.* Transamerica Delaval Inc. 476 US 858
(1986) 156
- Edwards *v.* Lee's Administrator 265 Ky 418, 96 SW 2d 1028 (1935) 107
- Egerton *v.* Brownlow (1853) 4 HLC 1 192, 198, 204, 211
- Elsom *v.* Elsom [1989] 1 SCR 1367 179
- Emerald Construction Co. *v.* Lowthian [1966] 1 WLR 691, CA 38
- Epstein *v.* Cressey Development Corp. (1992) 89 DLR (4th) 32,
BCCA 108
- Erven Warnink Besloten Vennootschap *v.* J. Townsend & Sons (Hull)
Ltd [1979] AC 731, HL 210
- Essex Real Estate Co. *v.* Holmes (1930) 37 OWN 392, affd 38 OWN 69,
Div Ct 200
- Esso Petroleum Co. Ltd *v.* Southport Corp. [1956] AC 218, HL 88
- Estok *v.* Heguy (1963) 40 DLR (2d) 88 69
- Evans *v.* Evans (1790) 1 Hagg Con 35 196

- Exchange Telegraph Co. v. Central News Ltd [1897] 2 Ch 48 175
- Exchange Telegraph Co. Ltd v. Howard (1906) 22 TLR 375 175
- Exchange Telegraph Co. Ltd v. Gregory & Co. [1896] 1 QB 147 175
- Fairchild v. Glenhaven Funeral Services, Ltd [2002] 3 WLR 89, HL 2,
202, 203
- Farrer v. Nelson (1885) 15 QBD 258 96
- Fender v. St John Mildmay [1938] AC 1, HL 199, 201
- Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943]
AC 32, HL 10, 168
- Finelli v. Dee (1969) 67 DLR (2d) 393, Ont CA 148
- Fitt v. Cassanet (1842) 4 Man & G 898 168
- Fletcher v. Rylands (1865) 3 H & C 774 89, 95
- Flint & Walling Manufacturing Co. v. Beckett 79 NE 503
(Indiana SC, 1906) 143
- Flood v. Kuhn, 407 US 258 (1972) 33, 120
- Foskett v. McKeown [2001] 1 AC 102, HL 184, 186, 189
- Francis v. Cockrell (1870) 5 QB 501 105
- Fraser River Pile & Dredge, Ltd v. Can-Dive Services Ltd [1999] 3
SCR 108
- Furlonger v. Furlonger (1847) 5 Not Cas 422 195
- The *Fusilier* (1865) Br & Lush 341 216, 217
- G (ED) v. Hammer (2001) 197 DLR (4th) 454, BCCA 105
- The *General Palmer* (1844) 5 Not Cas 159n 217
- George Whitchurch Ltd v. Cavanagh [1902] AC 117 65
- Gerrard v. O'Reilly (1843) 3 D & War 414 (Ir Ch) 60
- Gershman v. Manitoba Vegetable Producers Marketing Board (1976) 69
DLR (3d) 114 41
- Gillett v. Holt [2001] 1 Ch 210, CA 62
- Gillies v. Keogh [1989] 2 NZLR 327 133
- Giumelli v. Giumelli (1999) 161 ALR 473, Aust HC 66
- Glanzer v. Shepherd 233 NY 236 (1922) 70
- Goodson v. Richardson (1874) LR 9 Ch App 221 178, 211
- Gorham v. BT [2000] 1 WLR 2129, CA 54, 55, 56
- Gran Gelato Ltd v. Richcliff Group Ltd [1992] Ch 650 40
- Greasley v. Cooke [1980] 1 WLR 1306, CA 59
- Green v. Russell [1959] 2 QB 226, CA 50
- Greenhill v. Greenhill (1836) 1 Curt 462 131
- Greenwood Shopping Plaza Ltd v. Beatty [1980] 2 SCR 228 209

- Greville *v.* Da Costa (1797) Peake Add Cas 113 168
- Grimshaw *v.* Ford Motor Co. (1981) 174 Cal Rptr 348 220
- Groom *v.* Crocker [1939] 1 KB 194 143
- Groves *v.* John Wunder Co. 205 Minn 163, (1939) 115
- Gunton *v.* Richmond upon Thames Rural London Borough Council [1981] Ch 448 148
- GUS Property Management Ltd *v.* Littlewoods Mail Order Stores Ltd [1982] SC 157, HL (Sc) 44
- Hadley *v.* Baxendale (1854) 9 Exch 341 97
- Halifax Building Society *v.* Thomas [1996] Ch 217 124
- Hammersmith Railway *v.* Brand (1869) LR 4 HL 171 93, 94
- The *Harriet* (1853) 1 Sp 180 217
- The *Harriett* (1857) Swab 218 217
- Harris *v.* Beauchamp Bros [1894] 1 QB 801 180
- Harris *v.* Harris (1828) 1 Hagg Ecc 351 129
- Harrison *v.* Carswell [1976] 2 SCR 200 194
- Harry *v.* Kreutziger (1978) 95 DLR (3d) 231, BCCA 210
- Hedley Byrne & Co. Ltd *v.* Heller & Partners [1964] AC 465, HL 70, 156
- Heilbut, Symonds & Co. *v.* Buckleton [1913] AC 30, HL 97
- Henderson *v.* Merrett Syndicates Ltd [1995] 2 AC 145, HL 143
- Henningsen *v.* Bloomfield Motors 32 NJ 358, 121 A 2d 69 (SCNJ, 1960) 201
- The *Henry Ewbank*, 1 Sumn 400, 11 F Cas 1166, 1170 (CA, Mass., 1833) 216
- Henthorn *v.* Fraser [1892] 2 Ch 27, CA 201
- Hewitt *v.* Hewitt 394 NE 2d 1204, 1209–11 (Ill, 1979) 134
- Hill *v.* Church of Scientology of Toronto [1995] 2 SCR 1130 220
- Hill *v.* Van Erp (1997) 188 CLR 159, Aust HC 53
- Hodgkinson *v.* Simms (1994) 117 DLR (4th) 161 74, 218
- Holford, In re (1894) 3 Ch 40 19
- Hollebone *v.* Midhurst and Ferhurst Builders Ltd [1968] 1 Lloyds Rep 38 115
- Holman *v.* Johnson (1775) 1 Cowp 341 199
- Holt *v.* Markham [1923] 1 KB 504, CA 162
- Hongkong Fir Shipping Co. Ltd *v.* Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26 211
- Houghton *v.* Bankart (1861) 3 De G F & J 16 91

- Hounslow London Borough Council *v.* Twickenham Garden Developments Ltd [1971] 1 Ch 233 149
- Howell *v.* Young (1826) 5 B & C 259 143
- Hughes *v.* Metropolitan Railway Co. (1877) 2 App Cas 439, HL 64
- Hunt *v.* New York Cotton Exchange 205 US 322 (1907) 175
- Hunt *v.* Severs [1994] 2 AC 350, HL 46
- Hunter *v.* Canary Wharf Ltd [1997] AC 655, HL 41
- Hussey *v.* Palmer [1972] 1 WLR 1286, CA 184
- Hyde *v.* Hyde (1866) LR 1 PD 130 129
- Imperator Realty Co., Inc. *v.* Tull 127 NE 263 (NYCA, 1920) 65
- The *Inca* (1858) Swab 371 217
- The *India* (1842) 1 W Rob 406, 408 216
- International News Service *v.* Associated Press 248 US 215 (1918) 42, 173, 174, 175
- Inverugie Investments Ltd *v.* Hackett [1995] 1 WLR 713, PC 108
- Inwards *v.* Baker [1965] 2 QB 29, CA 59
- Ira S Bushey & Sons Inc. *v.* United States 398 F 2d 167, 171 (2d cir, 1968) 103
- Isenberg *v.* East India House Estate Co. Ltd (1863) 3 De G J & S 263 111, 178, 179
- J. Nunes Diamonds Ltd *v.* Dominion Electric Protection Co. [1972] SCR 769 21, 143
- Jacob & Youngs Inc. *v.* Kent 230 NY 239, 129 NE 889 (1921) 115
- Jacobi *v.* Griffiths [1999] 2 SCR 570, 174 DLR (4th) 71 2, 192
- Jaggard *v.* Sawyer [1995] 1 WLR 269, CA 108, 117
- Jegon *v.* Vivian (1871) LR 6 Ch App 742 218
- John Trenberth Ltd *v.* National Westminster Bank Ltd (1979) 39 P & CR 104, Ch 178, 179
- Johnson *v.* Agnew [1980] AC 167, HL 21
- Johnson *v.* Gore Wood & Co. [2002] 2 AC 1, HL 57
- Jones *v.* Festiniog Railway (1868) LR 3 QB 733 94
- Jorden *v.* Money (1854) 5 HLC 185 64, 65
- Joseph Watson and Sons Ltd *v.* Firemen's Fund Ins. Co. of San Francisco [1922] 2 KB 355 83
- Joyner *v.* Weeks [1891] 2 QB 31 115
- The *Juliana* (1822) 2 Dods 504 217
- Junior Books Ltd *v.* Veitchi Co. Ltd [1983] 1 AC 520, HL (Sc) 47, 157, 158

Just v. British Columbia [1989] 2 SCR 1228	95
Kamloops (City) v. Nielsen [1984] 2 SCR 2	203
Keeble v. Hickeringill (1705) 11 East 574n	30, 41
Keech v. Sandford (1726) Cas t. King 61	114
Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, HL	207
Krehl v. Burrell (1878) 7 Ch D 551	178
Kuddus v. Chief Constable of Leicestershire Constabulary [2002] 2 AC 122, HL	220
Kuwait Airways Corp. v. Iraqi Airways Co. (Nos 4 and 5) [2002] 2 WLR 1353, HL	111
LAC Minerals Ltd v. International Corona Resources Ltd [1989] 2 SCR 574, 61 DLR (4th) 14	75, 78, 181, 186
Lake v. Bayliss [1974] 1 WLR 1073	116
Lapierre v. A-G [1985] 1 SCR 241	85
Lawrence v. Fox 29 NY 268 (1859)	49
Leigh & Sullivan Ltd v. Aliakmon Shipping Co. Ltd [1986] AC 785, HL	157
Les Affreteurs etc. v. Walford [1919] AC 801, HL	50
Lewis v. British Columbia [1997] 3 SCR 1145, 153 DLR (4th) 594	95
Lewvest Ltd v. Scotia Towers Ltd (1981) 126 DLR (3d) 239, Nfld SC	179
Limpus v. London General Omnibus Co. (1862) 1 H & C 526	102
Linden Gardens Trust Ltd v. Lenesta Sludge Disposals Ltd [1994] 1 AC 85, HL	44, 45
Lister v. Hesley Hall Ltd [2002] 1 AC 215, HL	2, 102, 104, 203, 231
Lister v. Stubbs (1890) 45 Ch D 1, CA	172, 183
London Drugs Ltd v. Kuehne & Nagel International Ltd [1992] 3 SCR 299	51, 208
Lord Strathcona SS Co. v. Dominion Coal Co. [1926] AC 108, PC	43
Lumley v. Gye (1853) 2 El & Bl 216, 22 LJQB 463 (demurrer) and (1854) 18 Jur 468n., 23 LT 66, 157, 23 LJQB 116n. (verdict)	23, 29, 30, 31, 32, 34, 35, 36, 41, 56, 118
Lumley v. Wagner (1852) 1 De G M & G 604, 21 LJ Ch 898, 16 Jur 871, 19 LT 264	23, 28, 29, 30, 31, 34, 35, 41, 120
Lynch v. Knight (1861) 9 HLC 577	30
Macdonald v. Casein Ltd [1917] 35 DLR 443, BCCA	35
McDougall and Waddell (Re) [1945] 2 DLR 244	200
McFarlane v. Tayside Health Board [2000] 2 AC 59, HL (Sc)	203
McLaren Maycroft & Co. v. Fletcher Devt Co. [1973] 2 NZLR 100	143

- Macpherson v. Buick Motor Co. 217 NY 382, 111 NE 1050 (1916) 97
- Maddison v. Alderson (1883) 8 App Cas 467, HL 65
- Manitoba Fisheries Ltd v. R [1979] 1 SCR 101, 88 DLR (3d) 462 84
- Marcic v. Thames Water Utilities Ltd [2002] 2 WLR 932, CA 89
- Marigold Holding Ltd v. Norem Construction Ltd [1988] 5 WWR 710,
Alta QB 158
- Martel Building Ltd v. Canada [2000] 2 SCR 860, 193 DLR (4th) 1 40,
71
- Marvin v. Marvin 18 Cal 3d 660, 557 P 2d 106, 134 Cal Rptr
815 (1976) 133
- The *Mary Pleasants* (1857) Swab 224 217
- Maskell v. Horner [1915] 3 KB 106, CA 166
- Mayfield Holdings Ltd v. Moana Reef Ltd [1973] 1 NZLR 309 149
- M(B) v. BC (2001) 197 DLR (4th) 385, BCCA 104, 105
- Microsoft v. Plato, The Times, 17 Aug 1999 146
- Milburn v. Jamaica Fruit Importing Co. [1900] 2 QB 540 82
- Miles v. Marshall (1975) 55 DLR (3d) 664, Ont HC 115
- Millennium Productions Ltd v. Winter Garden Theatre (London)
Ltd [1948] AC 173, HL 178
- Miller v. Jackson [1977] QB 966, CA 179
- Morison v. Moat (1851) 9 Hare 241 77
- Morrison Steamship Co. v. Greystoke Castle [1947] AC 265, HL 46,
47, 48, 49
- Moses v. Macferlan (1760) 2 Burr 1005 10, 162, 163
- Moss v. Christchurch RDC [1925] 2 KB 750 115
- Mulholland v. Merriam (1872) 19 Gr 288 50
- Mullings v. Trinder (1870) LR 10 Eq 449 227
- Murdoch v. Murdoch [1975] 1 SCR 423 136
- Murphy v. Brentwood District Council [1991] 1 AC 398, HL 40, 46,
47, 48, 157, 158, 160, 203
- Muschinski v. Dodds (1985) 160 CLR 583 133
- Nagle v. Fielden [1966] 2 QB 633, CA 201
- National Provincial Bank v. Ainsworth [1965] AC 1175, HL 131
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