

A SPIRITED LOOK AT THE COMMON LAW OF GHOSTS

by Michael Shortt*

One of the remarkable features of the common law is its hyper-specificity. Any area of daily life that generates sufficient litigation soon acquires a distinct and freestanding body of common law. Thus there is a common law of roads,¹ a common law of water drainage,² and even a common law of rabbits.³

This raises an obvious question: is there a common law of ghosts?

After exhaustive⁴ research, it appears that there is indeed a common law of ghosts.⁵ The common law of ghosts is embodied in a small but not insubstantial body of case-law. To your author's surprise, most of it dates from the twentieth century, and all the major common-law jurisdictions are represented.

The balance of this article explores how the common law has dealt with the (non-)existence of ghosts, as well as the treatment of ghosts and hauntings in contract and tort.⁶

1. THE EXISTENCE OF GHOSTS AT COMMON LAW

The most fundamental question, of course, is whether ghosts exist at law. Surprisingly, the existence of the undead has been a live issue throughout legal history. At various times the courts have given very different answers to this most important of questions. Those answers fall into three categories: "Yes"; "No"; and "Estoppel." This section examines each category in turn.

A number of common-law judgments have proceeded on the assumption (implicit or explicit) that ghosts exist. For example, in *McClary v Stull*,⁷ the Nebraska Supreme Court was asked to invalidate a will because the testatrix had allegedly drafted her will based on advice she received

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¹ See e.g. the aptly and eponymously named *Russell on Roads*, 2nd ed (Carswell, 2008).

² See e.g. Douglas Cameron, "Common Law and Water Drainage in Ontario" (1979) 4 Can Water Resource J 34. Few subjects have given rise to more alliterative authorities than water law: *Woolrych on Water Courses*, *Wilcox on Waters*, *Wisdom's Law of Watercourses*, etc. Again, much like the case law, your author assures you that these doctrinal authorities are very real.

³ Anonymous, "The Rabbit and the Law" (1929) 41 Jurid Rev 154.

⁴ This research is current to July 2015. Search terms included: haunted, haunting, ghost, spectre, apparition, wraith, poltergeist, wright, banshee, phantom, ghoul, lich, phantasm, and shoggoth. Indeed, a working knowledge of *Dungeons and Dragons*® is virtually essential for conducting research in this field. Otherwise, one can hardly run a proper "Boolean" search.

⁵ The civil law of ghosts goes back to the Twelve Tables of Rome (VIII Tab 9). As to the law of ghosts in medieval civilian jurisdictions, see *Disputatio Juridica de Jure Spectrorum* (Juridical Disputations on the Law of Ghosts), a doctoral thesis submitted by Andreas Becker to the University of Jena in 1700.

⁶ Curiously, ghosts do not play an important role in the law of real property, despite the obvious possibility of treating them as a species of incorporeal hereditament.

⁷ (1895), 44 Neb 175 (Supr Ct).

from her dead husband via a planchette.⁸ The testatrix's children claimed that their father's ghost exerted undue influence over his wife to deny them a share under the will.

Rather than rejecting the possibility of a ghost exercising undue influence, the Nebraska Supreme Court approached the case as raising a question of fact: did the deceased husband actually exercise undue influence over his wife? The Court opined:

Law, it is said, is 'of the earth, earthy' and that spirit-wills are too celestial for cognizance by earthly tribunals, a proposition readily conceded; and yet the courts have not assumed to deny to spirits of the departed the privilege of holding communion with those of their friends who are still in the flesh so long as they do not interfere with vested rights or by the means of undue influence seek to prejudice the interests of persons still within our jurisdiction.⁹

Similarly, in the Australian case of *Descas v Descas*, the presiding Magistrate treated the question of whether the family home was haunted as a question of credibility, rather than science.¹⁰ The Magistrate in *Descas* seemed ready to accept that the family home was indeed possessed by a poltergeist, if only the wife had been a better witness. Finally, a 2013 Ontario case treated allegations of haunting as factual assertions subject to the rule against hearsay.¹¹ Presumably the outcome would have been different if the appropriate witnesses were called.

Cases denying the existence of ghosts are much harder to locate, being veritable phantoms unto themselves. In fact, your author could find only one case in which the non-existence of ghosts formed part of the *ratio decidendi*.¹² In *Manitoba Free Press v Nagy*, a Winnipeg newspaper was sued for injurious falsehood after it published a report that Mrs. Nagy's property was haunted.¹³ In order to succeed in her claim for injurious falsehood, Mrs. Nagy had to prove that the Free Press' report of the haunting was untrue. While the falseness of the report could have been demonstrated by showing that Nagy's property in particular was not haunted, both sides fought the case on the larger issue of whether ghosts existed at all.

The Free Press pled that Nagy had the burden of proving that ghosts did not exist, and that she had failed to discharge this burden. This argument met a chilly reception in the Manitoba Court of Appeal, which took judicial notice of the non-existence of ghosts:

It is, of course, impossible to prove such a matter by evidence in the ordinary way. The very nature of a ghost, as understood by superstitious people, is that of a phantom appearing at rare intervals. Unless, therefore, we hold that the Courts should take judicial cognizance of the fact that ghosts do not exist, the falsity of the statement could never be absolutely proved. I think that the members of the Court may, and as educated men should, assume that there are not such things as ghosts, and that therefore

⁸ A planchette is a small piece of wood with wheels attached to the bottom and that is intended to be used for automatic writing or selecting answers from a Ouija board.

⁹ *McClary v Stull*, *supra* note 7 at 189-190.

¹⁰ [2013] FMCAFAM 69 at paras 33, 67-69 (yes, that is a real neutral Australian neutral citation).

¹¹ *1784773 Ontario Inc v K-W Labour Association*, 2013 ONSC 5401 at para 17. However, the judge in *K-W Labour Association* does not seem to have had access to any of the cases cited in this article, which raises the spectre that the judgment was rendered *per incuriam*.

¹² While there are a handful of judgments that dismiss the existence of ghosts out of hand, the non-existence of ghosts was not crucial to the resolution of any of those cases, and thus all statements made therein about the non-existence of ghosts are merely intangible and ethereal *obiter*.

¹³ 16 Man R 619, 5 WLR 452, 1907 CarswellMan 37 (CA) [*Nagy* cited to Carswell].

the statement is necessarily false.¹⁴

On appeal, the Supreme Court of Canada's only comment on this issue was that "In the case at bar I think the evidence only admits of one conclusion and that is that the article complained of was false."¹⁵ This statement is ambiguous, since it is unclear whether the Supreme Court decided the case on the narrow ground that Nagy's house was not haunted, or the broader ground that ghosts do not exist. As is so often the case, the Supreme Court appears to have equivocated when faced with a really tough issue. Thus, in Manitoba, and perhaps Canada as a whole, the non-existence of ghosts has been judicially recognized.

Ultimately though, the existence or non-existence of ghosts at common law may be irrelevant in many cases, since the conduct of a litigant may estop that person from denying the existence of ghosts.

This rule of law is illustrated by the New York case of *Stambovsky v Ackely*.¹⁶ In that case, Mr. Stambovsky attempted to back out of his promise to purchase Mrs. Ackely's house. Mr. Stambovsky justified his refusal to complete the transaction by his discovery that the house was widely reputed to be haunted – a fact which was not disclosed to him by Mrs. Ackely, although she had previously reported that her house was haunted in local and national newspapers. Mrs. Ackely countered this argument by pleading that ghosts do not exist and thus a haunted house could not be a ground on which to grant rescission of a contract.

The Appellate Division of the New York Supreme Court was unimpressed by Mrs. Ackely's defense, replying that:

Whether the source of the spectral apparitions seen by defendant seller are parapsychic or psychogenic, having reported their presence in both a national publication (Readers' Digest) and the local press (in 1977 and 1982, respectively), defendant is estopped to deny their existence and, as a matter of law, the house is haunted.¹⁷

Thus, while the court hedged its bets over the factual existence of ghosts (allowing that their source could be either psychological or parapsychological), the legal doctrine¹⁸ of estoppel barred Mrs. Ackely from denying that her house was haunted. This estoppel would presumably apply in Canada, notwithstanding the effects of *Winnipeg Free Press v Nagy*. Estoppel is, after all, the preeminent legal fiction, and courts have estopped litigants from denying even the most self-evident truths.¹⁹

¹⁴ *Ibid* at para 18, Richards JA, with Phippen JA concurring. However, Perdue JA, who dissented on other grounds, seemed less certain of the non-existence of ghosts (see *ibid* at para 34).

¹⁵ *Manitoba Free Press Co v Nagy* (1907), 39 SCR 340 at 349.

¹⁶ 169 AD.2d 254; 572 NYS.2d 672 (NY Sup Ct (App Div) 1991) [*Stambovsky* cited to AD].

¹⁷ *Ibid* at 256.

¹⁸ A brief comment on the difference between a "rule" and a "doctrine" is in order. A rule at common-law is something to which there are exceptions (e.g. the rule against hearsay). A common-law doctrine is a rule whose exceptions have themselves acquired exceptions (e.g. the doctrine of consideration, to which promissory estoppels is an exception, which itself is subject to the sword/shield exception).

¹⁹ See e.g. *Clark v Adie (No 2)* (1877), 2 App Cas 432 (licensees are estopped from denying the validity of the licensed patent even if the patent is later struck down by a court); *Esten v Canada (AG)*, 2007 FC 538 (issue estoppel barred the Canadian Food Inspection Agency from re-litigating issues related to the same cow). Your

2. GHOSTS AND CONTRACT

Ghosts seem to play a relatively insubstantial role in the formation of contracts. In fact, your author found only one case dealing with the issue, namely *Cooper v Livingston*.²⁰ In that case, the Florida Supreme Court held that a promise to cure illness by conjuring spirits was not sufficient consideration to support a promissory note.²¹

Whether this case lays down a general rule about the insufficiency of ghostly consideration is unclear, since the Florida Supreme Court seems to have assumed that the spirits to be conjured were infernal or satanic in nature. A contract to conjure such spirits would of course involve committing the common-law crime of blasphemy,²² and a promise to commit a criminal act is never sufficient consideration.²³ Additionally, American judgments sometimes analyse whether ghostly consideration has “failed,” a question which presumes the possibility that such consideration is valid and might succeed in other cases.²⁴ Thus it remains an open question as to whether transactions involving ghosts can be sufficient consideration to support a contract.

Despite their near-invisibility in contract formation, ghosts have played a much more prominent role in invalidating contracts. We have already seen in *McClary v Stull* that ghosts can be the source of undue influence leading to the annulment of a legal document.²⁵ While *McClary v Stull* concerned a will, the principles of ghostly undue influence apply to contracts as well.²⁶ Indeed, British courts have set aside contracts procured by spiritual leaders who exercised undue influence on behalf of the Holy Ghost.²⁷

Finally, consider the issue of ghostly misrepresentations. Can a person obtain the rescission of a contract if that contract is based on a false representation concerning ghosts? A line of American cases holds that the answer to this question is a categorical “no.” This result based on the following line of reasoning: misrepresentations must concern facts; it is impossible to either prove or disprove the existence of ghosts; the existence of ghosts is thus a matter of faith and belief, rather than a fact; hence it is impossible to make a representation (fraudulent or otherwise) on the subject of ghosts.

author wonders whether there has ever been a case of “meta estoppel,” under which a litigant was estopped from asserting an estoppel.

²⁰ 19 Fla 684 (Sup Ct 1883).

²¹ *Ibid* at 693-694.

²² *Bowman v Secular Society Ltd*, [1917] AC 406 (HL). This offence is codified in Canada in *Criminal Code*, RSC 1985, c C-46, s 296(1).

²³ *Wild v Simpson*, [1919] 2 KB 544; *Brown v Brine (Executor)* (1875), 1 Ex D 5. It goes without saying that contracts to commit crimes are also against public policy: *Beresford v Royal Insurance Co*, [1936] 2 All ER 1052 (KB); *Continental Bank Leasing Corp v Canada*, [1998] 2 SCR 298.

²⁴ *Du Clos v Batcheller*, 49 P 438 (Wash Sup Ct, 1897) [*Du Clos*] (promissory notes made to medium in order to bring about a spiritual “materialization” held void for failure of consideration, as no “materialization” ever took place).

²⁵ *Supra* note 7.

²⁶ *Du Clos*, *supra* note 24.

²⁷ *Nottidge v Prince*, 19 LJ Ch 857, 8 WR 742. See also *Smith v Tebbitt* (1867), LR 1 P&D 398 (testatrix believed that *she* was the Holy Ghost).

While the logic of this argument may be seductive, if we allow ourselves to be spooked by this notion, then it leads to singularly ghastly jurisprudence. Consider the case of *Burchill v Hermameyer*,²⁸ in which Mr. Hermameyer sued to recover \$10,000 (a small fortune at the time) that he invested in Mrs. Burchill's corporation following Mrs. Burchill's representations that ghosts had told her there was oil under her land. When no oil was ever discovered, Hermameyer argued that this ghostly representation constituted fraud justifying the return of his investment. The Texas Court of Appeals rejected this argument, invoking the reasons given above to dismiss Hermameyer's claim for fraudulent misrepresentation:

[Spiritual] communications ... are of too unsubstantial a character to be received as representations of fact. We think, therefore, that the representations of the defendants, if any, to the effect that spirits had revealed, through a medium, the existence of oil in valuable quantities beneath the lands in question, must, under the circumstances of the case, be regarded as insufficient to form a basis for relief to the plaintiff.²⁹

Well-advised American defendants in fraud cases have also escaped criminal liability for fraudulent statements about ghosts by invoking this same argument.³⁰

Fortunately for Canadians who are the victims of ghostly contractual misrepresentations, the existence of ghosts in this country has been considered a question of fact since *Winnipeg Free Press v Nagy*; thus, false representations concerning ghosts can indeed be grounds to annul a contract in Canada. The choice-of-law clause implications of this should be chillingly obvious.

3. GHOSTS AND TORT

This section deals with ghosts both as a source of tortious liability and as a defense thereto. As will become clear, ghosts manifest themselves in the most unexpected areas of tort law.

First, as we have seen in *Winnipeg Free Press v Nagy*, someone who alleges that that a house is haunted commits the tort of injurious falsehood, and is liable to compensate the owner for any special damages that the owner can prove. This rule of law applies in both Canada and Britain, the UK case of *Barrett v Associated Newspapers* also having recognized that unfounded allegations of haunting could lead to liability in tort.³¹ Thus far there have been no cases involving false allegations of haunted chattels,³² but presumably the same principles would apply.

As a last observation on the law concerning haunted houses before turning to more serious matters, note that it is no defence to the tort of trespass to allege that a house is believed to be haunted. Trespassing in a haunted house or causing mischief thereto is punished just as harshly as torts committed against houses without such ectoplasmic encumbrances.³³

²⁸ 212 SW 767 (Tex Civ App 1919).

²⁹ *Ibid* at 771.

³⁰ *Nurse v State*, 128 SW 906 (Tex Crim App 1910).

³¹ *Barrett v Associated Newspapers* (1907), 23 TLR 666.

³² While cases of haunted chattels are thus far unreported, fictional examples abound. Consider Stephen King's novels *Christine* (a haunted 1958 Plymouth Fury) and *From a Buick 8* (a haunted 1953 Buick Roadmaster).

³³ *Simpson v McCaffrey*, 13 Ohio 509 at 512 (Ohio Sup Ct 1844); *Hayward v Carraway*, 180 So.2d 758 (La Ct App

Next, consider the ghost-related defamation of persons. At the time of writing, no reported case has considered the question of whether a person (or his estate) can recover in defamation against someone who alleges that that person is a ghost. But some guidance on this issue can be deduced from the authorities on whether similar conditions are defamatory. We know, on the one hand, that it is not defamatory merely to allege that someone is dead.³⁴ But, on the other hand, it is defamatory to allege that someone is possessed by a demon.³⁵ Assuming that alleging someone to be a ghost falls somewhere between these two extremes – which seems like a reasonable assumption – we can confidently posit that the law on this point is unsettled.

The rights of relatives of the alleged ghost are more clear. In *Loft v Fuller*, the family of deceased airline pilot Robert Loft sued a publisher who had released a book chronicling alleged sightings of Robert Loft's ghost.³⁶ The Florida Court of Appeal ruled that the book was neither defamatory, nor an invasion of privacy, nor an intentional infliction of emotional distress. In the Court's opinion, even though the book repeatedly alleged that Robert Loft's ghost haunted the aircraft of his former employer, these allegations caused no tortious damage to his living relatives. Thus while the legal remedies of the alleged ghost remain unsettled, it is now tolerably clear that the alleged ghost's relatives have no cause of action in tort.

CONCLUSION: THE PATH OF THE SPIRIT OF THE LAW

This article has surveyed the existence of ghosts at common law, and the role that ghosts play in the two major branches of the law, namely contract and tort. Due to space constraints, it was not possible to cover the important role played by ghosts in many other branches of the common law. These include family law, where it has been held that a parent's belief in ghosts is not a relevant factor in determining custody;³⁷ criminal law, where ghosts have been a key element in the offence of criminal conspiracy;³⁸ and criminal procedure, where ghost stories told by judges have been invoked (thus far unsuccessfully) as a breach of procedural fairness.³⁹ Further research in these areas is left as an exercise to the reader, who will doubtless delight in disinterring case law about the restless dead.

1st Cir 1965).

³⁴ See *O'Neil v Edmonds*, 157 F.Supp 649 (ED Va 1958); *Thomason v Times-Journal*, 190 Ga App 601 at 602 (Geo CA 1989) and the cases collected therein.

³⁵ *Glatzel v Brittel*, 2010 Conn Super LEXIS 2736.

³⁶ 408 So.2d 619 (Fla CA 4th Dist 1981). See also *Guay v Sun Publishing*, [1953] 2 SCR 216 (family of person mistakenly reported as deceased cannot recover for negligent publication of obituary).

³⁷ *Levinski v Levinski*, 78 NBR (2d) 156, [1987] NBJ No 1145 at para 10 (QB).

³⁸ *The King v Parsons* (1762), 1 Black 392 (KB) (family convicted of criminal conspiracy for attempting to frame a doctor for murder by faking communications from a ghost).

³⁹ *USA v Shuff*, 470 Fed.Appx 158 at 161 (4th Cir 2012) (Judge's recounting of the alleged haunting of the courthouse by the ghost of a Confederate soldier was not held to prejudice jurors trying a Black accused).