**TORTS CHECKLIST**

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| **Possible Torts** | **Possible indicators that tort should be at least be mentioned** |
| 1. **Trespass** | Entering into private land |
| 1. **Battery** | Some sort of force applied regardless of direct contact |
| 1. **Assault** | Yelling, threatening, emotional pain, distress |
| 1. **Harassment (potential tort)** | Yelling, threatening, bothering someone, loud noises, nuisance |
| 1. **IINS** | Yelling, threatening, bothering someone, loud noises, nuisance, emotional pain, distress |
| 1. **False Imprisonment** | Blocking a pathway with no reasonable alternative |
| 1. **Privacy Act** | Facts regarding recording, consent to show something, videotaping, pictures, reasonable expectations of privacy |
| 1. **Intrusion upon private seclusion (potential tort)** | Looking into private affairs of others, snooping for information |
| 1. **Defamation** | Anything that is said that may be offensive about someone |

**Basic principles of tort law:**

* **Volition** – conscious mind? Caused by actual force or violence?
* **Intention** – was there desire to bring about consequences of their act?
  + Imputed intent - certain or substantially certain to result from act (Bielitsi v Obodiak)
  + Transferred intent – intended to be tortious, but damage was done to someone else (Bici v Ministry of Defence)

**Mitigating defences (volition and intent are still there):**

* **Duress** – action done by “threat” or “force”? (Gilbert v Stone)
* **Provocation** – must lose self-control + must occur at or immediately after event
* **Mistake** – intended consequences of act + under belief action was justified (Hodgkinson v Martin)

**Full defences:**

* **Accident** – no intent to cause tort or consequence, complete accident
* **Children/Mentally ill** – can they appreciate nature and quality of actions?

**Trespass**

**Statutory trespass** (**Trespass Act [RSBC 1996])**

* S. 4 (1) Subject to s. 4.1, a person commits an offence if the person does any of the following:
  1. Enters premise that are **enclosed** land;
  2. Enters premises after person has had notice form an occupier of the premise or an authorized person that entry is prohibited
  3. Engages in activity on or in premises after the person has had notice from an occupier of the premises or an authorized person that the activity is prohibited
* S. 4.1 Defences to trespass – person may not be convicted
  1. The consent of an occupier of the premises or an authorized person,
  2. Other lawful authority, or colour of right
* Vancouver (City) v Wallstam – tent city, residents doing no harm on public land

**Common law trespass** (Turner v. Thorne)

1. Direct and intentional
   * Requires direct force (eg. Natural movement of seeds via wind wouldn’t suffice)
2. Physical intrusion
   * Not necessarily a person – dropping things, throwing things, etc.
   * Trespass may be committed by the continued presence on the land of something which actor has tortiously placed thereon, whether or not they have the ability to remove it (Turner v. Thorne)
3. Onto the land in the possession of another
   * Looking at implied license for entry in cases of land that clearly allows and encourages public entry – once implied license is revoked, lawful passage on land may suddenly become trespass

* Harrison v Carswell – picketing on sidewalk of mall, private property rights > right to protest, should asses on case by case basis

**Battery (**Bettel v Yim**)**

1. Direct and intentional
   1. It is direct if it is the immediate consequence of a force that D set in motion
   2. Intent read very broadly (Yim didn’t intend to harm, but intent still found)
2. Bringing about of a physically harmful or socially offensive physical contact
   1. No need for actual harm – physical contact usually suffices
   2. Socially offensive (Mallete v Shulman – life saving blood transfusion, against religion)
3. With the person of another
   1. Read broadly (spitting on someone’s face, hitting backpack, etc.)

P must prove all three elements 🡪 consent and defences place onus on D (Scalera)

In order for consent to be valid, person must be capable of appreciating the nature and consequences of the act to which it applies.

**Consent in battery**

* **Sporting context**
  + Consent “to the ordinary risks of the sport in which they engage” (Wright v Mclean – kids + mud balls)
  + Consent exceeded when “definite resolve to cause serious injury to another” (Agar v Canning – slashing face with hockey stick during game)
* **Sexual battery context** 
  + Consent vitiated or non-existent if there is a fundamental inequality between the parties and if this inequality is exploited (Norberg v Wynrib)
* **Consensual fight** 
  + Consent vitiated if they intentionally apply force causing serious hurt or non-trivial bodily harm to each other (R. v. Jobidon)
  + Jobidon principle narrowed 🡪 consent only negated if accused both intends and causes serious bodily harm (R. v. Paice)
  + First and only punch killed victim – despite considerable force, no necessary intent to cause bodily harm – not guilty of manslaughter (R. v. B(K))
  + Public policy argument – no consent in an obviously mismatched fight (Lane v Holloway)
* **(Factors that vitiate consent** 
  + **Fraud**
    1. D responsible for P’s misapprehension
    2. Fraud relates to nature and quality of the act
* R. v. Mabior – HIV non-disclosure – since low viral load + condom, no realistic possibility of HIV = no significant risk of serious bodily harm – no fraud
* R. v. Hutchinson – consensual sex but only with condom – holes poked 🡪 pregnancy – deception negated consent
  + **Mistake** 
    1. D aware of P’s misapprehension
    2. Mistake relates to the nature and potentially extent of the act
  + **Duress** 
    1. Decided on case to case basis, seems to function only on serious threats to person, not threats to property - Latter v Bradell

**Assault** (Holcombe v Whitaker)

1. The intentional creation in the mind of another of a
   1. No need for actual testimony from D showing intent to create fear; balance of probabilities; you acted in intentious manner that makes fear reasonable
2. Reasonable apprehension
   1. Strongly considers what P felt + consider reasonableness
   2. Conditional threats largely depends on immediacy
      1. Police v Greaves – verbal conditional threats capable of being immediately carried out constitutes assault (threatens police not to come closer with knife)
3. Of immediate physical contact
   1. Immediacy depends on facts of the case; no requirement necessary that intervening act needs to be sanctioned, but it is strongly suggested
   2. Banging on door (frightening action) + conditional threat = sufficiently immediate (Holcombe)

**Harassment (Potential tort –** Mainland Sawmills**)**

1. Outrageous conduct
   1. Savino – D called police over noise complaints and very minor things against P continuously; severe or extreme requirement not made out
2. Intention to cause emotional distress or acting in reckless disregard as to the possibility
3. Plaintiff suffered severe or extreme emotional distress as a result

* Emotional distress of such substantial quantity or enduring quality that no reasonable person in a civilized society should be expected to endure it (Girard v Ball)
* Mainland Sawmills - P described D’s conduct as causing them fear and anxiety, but despite their concerns, they still came to work + no physical injuries, stays away from work, medical treatment, visible and provable illness, property damage or economic loss – not made out

1. Actual and proximate causation of emotional distress by the defendant’s outrageous conduct

**Quantifying/Comparison Facts:**

* Lynch - failed to plead elements of harassment because she failed to plead elements of IINS

**Intentional infliction of nervous shock (IINS) (**Prinzo v Baycrest Medical Centre**)**

1. Flagrant or outrageous conduct

* Mere insult is not sufficient
* Rahemtulla – reckless disregard whether shock or mental suffering + foreseeability of inflicting shock and mental suffering

1. Calculated to produce harm

* Rahemtulla – reckless disregard whether shock or mental suffering + foreseeability of inflicting shock and mental suffering
* If defendant wishes to produce consequences that follow from the act or if consequences are known to be substantially certain to follow – Piresferriera v Ayotte

1. Resulting in visible and provable illness

* Rahemtulla – must be a recognized illness; absence of clinical diagnosis not fatal but as counsel, it would be due diligence to obtain one

**What Constitutes “Flagrant Conduct”**

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| --- | --- | --- |
| ***Rahemtulla*** | Flagrant | Lying about criminality/morality; allegations of theft; dismissed from employment |
| ***Prinzo*** | Flagrant | Letter from employer indicating imminent termination if she doesn’t return to work immediately from an injury; harassing phone calls; dismissed from employment |
| ***Boothman*** | Flagrant | Yelling profanities/insults in public by supervisor; control by threats of bodily harm; aware of fragile mental state |
| ***Clark*** | Flagrant | Sexual harassment |
| ***Lavinskas*** | Not Flagrant | Lying about allegations poor performance; perceived as a “joke”; belittled |
| ***Rinaldo*** | Not Flagrant | Senr. management told him they didn’t like him; made it difficult for him to perform |

**Quantifying/Comparison Facts:**

* Wilkinson v Downton – practical joke that husband badly injured in accident – vomiting, weeks of suffering and incapacity due to violent shock in nervous system 🡪 IINS claim successful
* Samms v Eccles – constantly calling including late night, going to residence and flashing her, tries to convince sexual relations; P feels deeply wounded, suffers great anxiety and fear for personal safety, severe emotional distress – P awarded damages

**False Imprisonment (**Bird v Jones**)**

1. Intentional
2. And total restraint of a person
3. Lawful justification is a complete defence (Beatty & Mackie v Kozak)
   1. No requirement of physical contact, particular duration or awareness/consciousness
   2. Peace officer/official role or title does not inherently preclude liability or provide inherent lawful justification (Can v Calgary Police Service)
   3. Assessed on a reasonableness standard, case by case basis

**Quantifying/Comparison Facts:**

* Bird v Jones – police blocked P from getting to place in particular pathway; not total restraint because he could still get to destination by going around blocked off area (had a reasonable means of escape)

Usually damages are very low, but tort is very easy to prove

**Privacy Act, RSBC 1996**

1. It is a tort actionable without proof of damage, for a person, willfully and without a claim of right, to violate the privacy of another
   * Wilfully – applies narrowly to an intention to do an act which they knew or should have known would violate the privacy of another person (Milner)
   * Claim of right – honest belief in a state of facts which, if it existed, would be a legal justification or excuse (Milner)
2. Nature and degree of privacy to which person is entitled is that which is reasonable in the circumstances, giving due regard to lawful interests of others

* Location of surveillance is key to determining reasonable expectation 🡪 expectation may be highest in one’s home (Milner)
* Conversely, no reasonable expectation of privacy for actions taking place in public
* Silber v BCTV– Even on private property, if in full view of passerby, no reasonable expectation (altercation between P and reporter on private parking lot of P)

1. In determining whether there is violation of privacy, looks at nature, incidence and occasion of the act and to any domestic or other relationship between parties
   * You can’t sue your partner for privacy breach if she enters your house if she has a key to your house; faculty and wifi
2. Privacy may be violated by eavesdropping or surveillance, even if no trespass

**Quantifying/Comparison Facts:**

* Hollinsworth v BCTV – BCTV did not wilfully or without claim of right breach privacy right because they had reasonable and honest belief to air videotape. However, some of the staff who purposely broke consent to receive video breached privacy.
* Milner v Manufacturers Life Insurance Company – surveillance with photos + videos
  + P - Expectation of privacy within house is higher, but blinds open, lights on, any passerby can see inside, ought to have reasonably known someone would investigate her insurance claim, they had lawful interest in conducting surveillance – NOT VIOLATED
  + P’s sons playing sports in front yard – NOT VIOLATED
  + Andrea – expectation highest in home, investigator had no lawful interest, continued to shoot even after P was out of sight, Andrea alone in state of undress – VIOLATED
* Milton – carelessness to undress in front of window may mitigate privacy expectations; however this decisions is highly criticized

**Intrusion upon seclusion (**Jones v Tsige**) – Common law tort for privacy**

1. One who intentionally intrudes (physically or otherwise)
   1. Includes recklessness
2. Upon the seclusion of another (or his private affairs or concerns)
3. Is subject to liability to the other for invasion of his privacy if the invasion would be highly offensive to the reasonable person
   1. Only intrusions into matters such as one's financial or health records, sexual practises and orientation, employment, diary or private correspondence that, viewed objectively on the reasonable person standard, can be described as highly offensive (Jones)

This is ON test, but BC will most likely be aligned with the ONCA position.

**Defamation** (Grant v Torstar)

1. Impugned statements were defamatory
   1. Are the statements capable of defamatory meaning? (Lawson v Baines):
      1. Defamatory in an ordinary sense
      2. True/Legal innuendo: requires additional fact to make prima-facie non-defamatory statement into a defamatory one
      3. Popular/False innuendo: statement is not obviously defamatory, but given ordinary/popular (albeit mistaken or false) innuendo, defamatory meaning can be reached
   2. Were the statements in fact defamatory?
      1. What is the sting of the remark? Would the sting “lower the plaintiff in the eyes of a reasonable person? (Sim v Stretch)
      2. If so, remark is defamatory 🡪 proceed to element 2
2. Was there reference made to the plaintiff?
   1. Can statement be regarded as referring to the plaintiff?
      1. If reference to an individual, look at whether statement in fact leads reasonable person to the conclusion that it refers to the plaintiff
      2. If reference to a group, look at factors (Bou Malhab and Knupper)
         1. Size of group, nature of group, connection to group, real target of defamatory statement, plausibility of statement
         2. Does combination of these five suggest that this can be referable to the plaintiff?
   2. If so, proceed to element 3
3. Was the statement published?
   1. No specific requirement; satisfied if communicated to at least one person other than the plaintiff
   2. Must be “readily available to a third party in a comprehensible form” (Crookes v Newton)
      1. Receipt of info by a third party must be in a way that it is understood
   3. Unclear whether hyperlinks make publication “readily available” – fact specific
   4. If so, publication satisfied

**Republications:**

1. If there is a republication, then we must determine whether person who made original remark will be liable for the subsequent republication (Lambert v Thompson). They will not be liable UNLESS they meet ONE of the following:
   * Did the original defendant provide the republisher express or implied authority to republish defamatory work?
   * Was the original defamatory remark made to someone who had a duty to disclose the remark?
   * Was the republication a natural and probable consequence of the original republication?
2. If any one these are answered in affirmative, original publisher liable for republication.
3. If non of these are answered, then only republished will be liable for republication

**Defence of justification:**

* What is true cannot be defamatory – D can be successful on this statement even if statements were made maliciously
* A defendant pleading justification must show that the “whole of the defamatory matter is substantially true” (Meier v. Klotz)
  + Finding the sting of the defamatory remark is essential – what is the precise implication of the statement?
  + Not sufficient for D to show they believed the statements to be true or relied on info provided by a third party
  + Defendant does not need to prove literal truth or truth of every single fact in the allegation
* A defamatory statement that is general in character may be justified by proving the truth of specific instances that support the general imputation (Williams v Reason)
  + However, a single instance will not suffice (Wakley v Cooke– statement that P was a “libellous journalist” was not justified by proving that the plaintiff had published one libellous story)

**Defence of fair comment (**WIC Radio v Simpson**):**

1. A comment (not an allegation of fact)
   1. Facts are statements that are susceptible to truth; useful to ask whether the remark is objectively verifiable
2. Which any person could honestly express
   1. Low threshold: could “ANY honest person, however opinionated or prejudiced… express that comment upon the basis of the relevant facts? (Channel Seven v Manock)
3. Based on facts that are true
   1. Sting of statements need to be true
   2. The comments must indicate, either explicitly or implicitly, what facts the comment is being made in reference to
   3. If the facts are notorious or well known, then element is easier to make out (Baltrop v CBC)
4. Pertaining to a matter of public interest
   1. Low threshold: Is the subject of the comment more properly described as private?
   2. Those who court public attention are given a prima facie assumption that comments relating to them are in the public interest (MacDonell v Robinson)
5. While not an element, having comment actuated by malice will deny the D the defence of fair comment
   1. There must be actual, genuine malice from the D and statement must have been made as a result of this malice 🡪 onus on P

**Defence of responsible communication on matters of public interest (**Grant v Torstar**):**

1. Publication must be on a matter of public interest
   1. Same factors as element 4 of fair comment
   2. Does it affect people at large, so that they may be legitimately concerned about what is going on (London Artists v Littler)
2. D must show that the publication was responsible
   1. List of factors that are relevant but NOT exhaustive, not all 8 or any one need be proven
   2. The seriousness of the allegation, public importance of the matter, urgency of the matter, status and reliability of the source, whether plaintiff’s side of story was sought and accurately reported, whether inclusion of defamatory statement was justifiable, whether public interest lay in the fact it was made rather than its truth, other considerations
   3. Publisher should not incur liability even if some statements may be defamatory + untrue if:
      1. The report attributes statement to a person, preferably identified
      2. Report indicates, expressly or implicitly, that its truth has not been verified
      3. Report sets out both sides of dispute fairly and
      4. The report provides context in which statements were made