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# INTENTIONAL TORTS

## Basic Principles

TORT LAW is always on the BALANCE OF PROBABILITIES

Direct interference with the person (actionable per se):

Battery, Assault, Trespass to Land, False Imprisonment/Arrest, Invasion of Privacy (Privacy Act)

Indirect interference (not actionable per se):

Intentional Infliction of Nervous Shock, Misfeasance, Defamation, Harassment, Malicious Prosecution

Defendant can only be held liable if conduct both **voluntary** and **intentional**

* **VOLITION**: was the act directed by their conscious mind? (extremely low threshold – rarely a problem)

**SMITH V STONE** (1647) – carried onto land against will thru force of others – not liable bc not voluntary

* **INTENT**: did the individual desire to bring about the consequences of the act? OR, could intent have be brought about through:
  + ***Imputed (constructive) intent***: if they didn't intend to bring consequences but these consequences were certain to arise from the act, intent “imputed” upon that person
  + ***Transferred intent***: if they intended to commit one intentional tort and then unintentionally commits another, intent is transferred to the second tort

**Motive, Mistake and Accident** – can help with assessing damages but not elements of establishing tort

* **MOTIVE**: why did defendant do an action?
* ***Duress***: compulsion by 3rd party to commit tort; not defence but may negate consent of wronged party

**GILBERT V STONE** (1648) – trespass/theft under threat of 12 armed men – still considered voluntary and intentional act, contrast with *Smith v Stone*

* ***Provocation***: conduct “must have been such as to cause the defendant to lose his power of self-control and must have occurred at the time of or shortly before the assault”; “sudden and uncontrolled passion” (defined in **MISKA v SIVEC** (1959)**)** – high standard.
* **MISTAKE**: defendant intends consequences of acts but they have a different factual OR legal significance than what was contemplated. Not *per se* considered defence.
  + ***Mistake of law***: eg **HODGKINSON** (1929) – mistakenly but sincerely believed he had auth to remove plaintiff from the premises to protect interests of the Crown
  + ***Mistake of fact***: eg **RANSON** (1889) – thought plaintiff’s dog was wolf and killed it
* **INEVITABLE ACCIDENT**: any situation in which defendant unintentionally and w/o negligence injured plaintiff. absence of intent distinguishes accident from mistake. Not liable in intentional torts or negligence!
* **CAPACITY ISSUES:** generally assume all adults have capacity to form above intent
  + *LIABILITY OF CHILDREN AND THOSE WITH A MENTAL ILLNESS*: rather than tests of volition/intent, was the defendant capable of "appreciating the nature and quality" of the act?
  + Parents/teachers, and health staff supervising patients w/ MIs not vicariously liable UNLESS they are a party to wrongful conduct or fail to control person (negligence)

# BATTERY

DEFINITION: “the direct and intentional bringing about of a physically harmful or socially offense physical contact with the person of another” (p61)

ELEMENTS:

1. **PHYSICAL INTERFERENCE** – direct and intentional physical contact or interaction; bodily contact is not required (p61: spitting in face, pouring water, cutting hair count)

**NON-MARINE UNDERWRITERS v SCALERA** (2000) – SA battery case, P says contact w/o consent   
Physical contact for battery must be of a nontrivial nature; contact does not need to be physically or psychologically injurious or morally offensive

1. **DIRECTNESS** – “interference is direct if it is the immediate consequence of a force set in motion by an act of the defendant …. the burden is then on the defendant to allege and prove his defence” (*Scalera*)
2. **INTENTION TO CONTACT** – onus on defendant to prove absence of intent once directness has been established

**BETTEL v YIM** (1978) – P playing in D’s store, told to leave; D saw P lighting matches and throwing into store; D grabbed P by arm and began shaking to get confession; head hit P’s nose “by accident”

If defendant had initial intent to make physical contact, subsequent injury falls within the initial battery due to the principle of directness; defendant’s lack of subjective intent to harm irrelevant

1. **HARM** – “the fundamental principle, plain and incontestable is that every person’s body is inviolate. The law of battery protects this inviolability and it is for those who violate the physical integrity of others to justify their actions” (*Scalera*)
   1. *ACTIONABLE PER SE***. [MALETTE V SHULMAN** (1990), doctor liable for battery for blood transfusions to JW patient who otherwise would have died, having seen their JW card. Liable bc clear neg consent**]**

# ASSAULT

DEFINITION: “the intentional creation in the mind of another of a reasonable apprehension of immediate physical contact” (p67)

ELEMENTS:

1. **OVERT ACT** – words alone are insufficient to constitute assault

***Conditional threats***: traditionally insufficient UNLESS words can give meaning to an overt act

**POLICE v GREAVES** (1975) – D brandishing knife, saying “come a step closer and you will get this straight through your guts”. Show of force + unlawful/unjustifiable demand = assault. Brandishing knife = “act”, given threat/immediacy = assault

**HOLCOMBE v WHITAKER** (1975) – P wanted annulment, D said “if you take me to court, I will kill you”. Suit filed and D went to P’s apartment, beating/trying to pry open door while reiterating threat.

Show of force + unlawful/unjustifiable demand = assault.

1. **REASONABLE APPREHENSION OF PHYSICAL CONTACT** – plaintiff must establish *apparent* intent (not necessarily *actual* intent) and capacity of defendant to make contact. Impression created in plaintiff’s mind is important (eg *Holcombe* – court considered evidence of effect on her resulting fear and actions)
   1. *ACTIONABLE PER SE*. “apprehension” broader than “fear”; physical contact doesn’t need to be injurious for battery to be made out.
2. **IMMEDIACY** – threat must be capable of being carried out immediately; future threats don’t constitute assault. (eg *Greaves* – immediacy of threat and possibility with knife noted) – *relaxed somewhat when courts began considering impact on plaintiff…*

NB: **WARMAN v GROSVENOR** (2008) – how might elements and scope of tort of assault evolve in new contexts?

D made internet threats over 2 years, called on public to assault/harass P, making inferences about bullets with “name on them”, posting home address and phone #. D made 14 online postings and over 60 emails.

Factors eg specificity of threats, detail of contact info, malevolence make threats serious. Previous threats to make people call P’s co-op and complain had been fulfilled. Wide publication through the internet 🡪 reasonable apprehension; “immediacy” in plaintiff’s uncertainty as to when or if attacks could occur. D liable for assault.

# FALSE IMPRISONMENT

DEFINITION: the direct and intentional restraint of another person’s movements (see p72)

ELEMENTS:

1. **DIRECTNESS** AND **INTENTIONALITY**
2. **TOTAL RESTRAINT** – must be total, even if only momentary: eg barriers, other physical means, impl/expl threat of force, or legal authority.

**BIRD v JONES** (1845) – P wanted to go one way on highway, D’s policemen made barrier, req toll. False imprisonment must be total. P could have gone other way, only a loss of freedom for one path.

* 1. *Where a* ***means of escape*** *exists, there is no false imprisonment* – assessment of feasibility of escape part of determining whether false imprisonment exists; not required to risk physical injury
  2. *ACTIONABLE PER SE*: proof of injury not needed to make out tort.

NB: **Lawful justification**, ie not false, can arise as defence but not element of tort itself – *eg shoplifter who brings false imprisonment action*: defendant might assert defence of legal authority depending on outcome of crim proceedings

NB: ordering another person to restrain may make you liable for false imprisonment – *eg manager yells “stop that man, he’s a thief” leading to police arrest* = both liable. Distinguish: merely “providing information” (p77)

## FALSE ARREST

DEFINITION: one category of false imprisonment where “a total restraint of movement is brought about by an implicity or explicit assertion of legal authority” (p75)

**SANGHA v HOME DEPOT** (2005) – **D’s subjective belief not relevant even if D mistaken to facts or legal auth. Delay in release can be false imprisonment.** P went to Home Depot to buy shelving brackets and light bulb. Upon leaving was stopped/arrested by store LPO for theft for “lightbulb concealed in pocket”. Total 45 min detained, waited 20 min after determining he wouldn’t be charged to release. 1) LPO didn’t have lawful auth on facts of case to arrest/detain (not a peace officer); 2) no lawful reason for waiting to release claimant, false imprisonment

**CAMPBELL v SS KRESGE CO** (1976) – **specific intent to arrest not required to find false arrest**

P at K-Mart couldn’t get help, left full trolley and left. Customer told D (Williamson, police officer working as security guard) P put sth in pocket. D followed and confronted with police badge, asking her to come back into store “to avoid embarrassment”. D let her go after saying he was trying to get facts and couldn’t see tipper.

Police badge induced fear in plaintiff, as did mention of “embarrassment” 🡪 felt that she had to comply. Circumstances led to belief despite D not considering an actual arrest, thus amounting to false imprisonment

**WARD v CITY OF VANCOUVER** (2007) – **lawful arrest/detention can become unlawful if change in facts/events, and/or there is no continuing lawful basis for detention.** Police get tip someone wants to pie PM. P identified as potential suspect, arrested for breach of peace and detained for investigation for pie-ing. P held for ~4.5 hrs, PM left area ~1 hr in. – 2 potential justifications for continued detention – 1) investigative, 2) under arrest for assault.

Ward’s breach of peace arrest not justifiable after PM left ceremony; also wasn’t arrested for assault and investigative detention is supposed to be short. Length of time = false imprisonment from time PM left until his release.

# MALICIOUS PROSECUTION

DEFINITION: “unjustified interference with individual freedom….that result from the improper initiation of criminal proceedings against an individual” (see p81)

ELEMENTS: (set out in **NELLES v ONTARIO**)

* + 1. **PROCEEDINGS INITIATED BY D** – defendant actively instrumental in bringing prosecution; providing info usually not enough
    2. **TERMINATION IN FAVOUR OF** **P** – eg crim trial, must resolve in favour of plaintiff, eg acquittal (bc conviction would establish reasonable/probably cause for proceedings)
    3. **LACK OF REASONABLE/PROBABLE CAUSE** – “an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.” (*Hicks v Faulkner* in *Nelles v Ontario*)
       - test = subjective [honest belief] + objective [reasonable man] *BUT* see *Miazga*, where subjective belief not necessary to consider bc inconsistent with role of Crown prosecutor
    4. **MALICE** – “improper purpose”, willful and intentional, wider than spite eg to gain private collateral advantage

**MIAZGA v KVELLO ESTATE** (2009) – SCC considers subjective requirement. Miazga prosecuted for SA on accusations of children. M doubted credibility but told to continue if believed essential elements. Parents convicted, SCC overturned, charges stayed; children recanted, parents sued for malicious prosecution

1. *reasonable/probable grounds has to do with professional assessment of legal strength*, not personal views on guilt – in public prosecution, Crown bound to act in PI and thus use objective reasonable grounds.

2. *prosecutor’s lack of subjective belief doesn’t necessarily equal malice*: inexperience, incompetence, negligence, gross negligence all actionable explanations. Malice = willful abuse of process of criminal justice, or commencement/continuation of process with a purpose inconsistent with role as MoJ

**++ DAMAGE** – *NOT ACTIONABLE PER SE* (eg prove loss of rep, liberty, $)

## ABUSE OF PROCESS

DEFINITION: “focuses on the misuse of civil proceedings for a collateral or illicit purpose other than the resolution of the claim” (p88)

*#3 is the difficult obstacle – not clear in BC if it is required*

ELEMENTS: (see p88) – plaintiff must prove that:

1. Defendant brought civil action (don’t have to resolve in P’s favour)
2. Defendant did so for extrinsic purpose
3. Defendant undertook or threatened to undertake an **overt act** to further their improper purpose
4. Plaintiff suffered loss as result

# MISFEASANCE OF PUBLIC OFFICE

DEFINITION: “abuse of power deliberately intended to injure a particular individual” (p824)

ELEMENTS:

1. **DELIBERATE AND UNLAWFUL** conduct of public officer in their capacity as public officer
   1. *Eg* breach of duty, exercise of power with improper purpose, acting in excess of authorized discretionary powers; also brought against intentionally providing misleading info re legality, etc
2. **INTENT** – public officer aware both that conduct was unlawful and that it was **likely to harm plaintiff**
   1. Subjective awareness, subjective recklessness or willful blindness OR specific intent, though objective foreseeability of harm not sufficient – “blameworthy state of mind” required (*Odhavji Estate*)

**++ DAMAGE** – *NOT ACTIONABLE PER SE*

**ODHAVJI ESTATE v WOODHOUSE** (2003) – **contemporary articulation – subjective awareness of harm reqd**

Ps allege that police who shot Odhavji after bank robbery didn’t fully cooperate with Spec Investigations Unit as required under their statutory obligation, causing mental distress, anxiety, etc. Any way that elements proven (together or separately), tort involves deliberate disregard of official duty + knowledge that misconduct likely to injure plaintiff. “Ought to have known” isn’t sufficient. Underlying purpose: protect each citizen’s reasonable expectation that public officer won’t intentionally injure member of public through deliberate unlawful conduct.

**RONCARELLI v DUPLESSIS** (1959) – **Historical use of tort:** D, A-G, told Liq Commissioner to refuse to renew liquor license of 34-yr restaurant proprietor P who provided bail for 380 arrested JWs – use of legal power for improper purpose (punishment of Roncarelli) for reason irrelevant to legal authority (helping JWs, not related to sale of liquor). Public officials must act in “good faith”, statutory discretion is not unfettered

# INTENTIONAL INFLICTION OF NERVOUS SHOCK

ELEMENTS: (first set out in **WILKINSON v DOWNTON**)

1. **OUTRAGEOUS CONDUCT –** conduct that is flagrant and outrageous eg threats of future violence, serious harassment, unwarranted accusations, circulation of false information
2. **CALCULATED TO PRODUCE HARM** – requires actual or constructive intent to cause a severe impact on the plaintiff’s psychological well-being

**RAHEMTULLA v VANFED CREDIT UNION** (1984) – woman accused of theft and fired, IINS found – intent can be imputed based on seriousness of conduct if (a) defendant acted in reckless disregard to possible harm, OR, (b) it was foreseeable that profound distress would ensue

1. **RESULTING IN A VISIBLE AND PROVABLE INJURY** – *NOT ACTIONABLE PER SE –* nervous shock, defined as recognizable psychiatric illness or physical harm.
   1. ***Mustapha v Culligan of Canada Ltd***– anguish, worry, emotional distress usually insufficient BUT
   2. ***Tran v Financial Debt Recovery Ltd*** – plaintiff entitled to recover for emotional harm falling short of psychiatric illness or condition

**WILKINSON v DOWNTON** (1897) – **first case to substantially address as tort.** – D told P that P’s husband injured with both legs broken (“practical joke”). Violent shock to nerv sys, vomiting, weeks of suffering afterward. – effect was likely outcome of conduct; more harm than anticipated not an excuse. Intent imputed bc grave effects would be produced in “all by an exceptionally indifferent person”. Malicious by nature even if no spite intended.

# HARASSMENT

**FITZPATRICK v ORWIN** (2012) – **extent of harm need not be anticipated if it is certain to follow** – F in campaign against Squires: insults, abusive lang, dead coyote on car – conduct clearly outrageous/flagrant; conduct esp coyote easily foreseeable to cause “upset and alarm”. Anxiety, depression, PTSD, medication clearly come w/in req for IINS

**YOUNG v BORZONI** (1897) –  **visible and provable illness required** – tenancy dispute; Ps sue D, counsel for landlord corp, for “pain and suffering”, “loss of enjoyment of life”, “emotional stress and mental anxiety” – court takes issue with 1) whether conduct was *calculated* to produce harm and 2) whether they met harm req. Recognizable psychiatric illnesses count, but emotional stress, anguish and despair don’t

DEFINITION: “if such a tort existed, the plaintiff would have to establish that: the defendant’s conduct was outrageous; the defendant intended to cause emotional distress or acted in reckless disregard as to this possibility; and the plaintiff suffered severe or extreme emotional distress as a result” (p101, referring to *Mainland Sawmills*)

Tort generally considered as tantamount to US tort of infliction of emotional distress; generally only considered in courts if there is a specific target who suffers prolonged distress

ELEMENTS:

**SAVINO v SHELESTOWSKY** (2013) –  **court notes state of flux, examine possible tort with known torts that have “factual nexus”** – neighbourly dispute re: noise complaints where Ds make application to dismiss claim like in *Mainland Sawmills.* Not proven here, but door not closed on tort.

**MAINLAND SAWMILLS LTD ET AL v IWA-CANADA ET AL** (2006) – Ps seek claims of harassment based on trespass, damage to property, assault, based on US tort of intentional infliction of emotional distress – **If tort existed, potential elements would be as follows.** Plaintiffs fail to prove #3, so don’t need to confirm tort exists

1. OUTRAGEOUS CONDUCT – by D
2. INTENTION – or reckless disregard of causing emotional distress
3. EMOTIONAL DISTRESS – severe/extreme, suffered by P
4. CAUSATION – actual or proximate causation of distress by D’s outrageous conduct

\*\* Harassment also governed by criminal offence of harassment under **s264 of *Criminal Code***. Under offence, accused must **engage in conduct that causes person to “fear for their safety”** including in case law emotional/psych security

# INVASION OF PRIVACY

#### Common Law tort (ontario)

4 privacy interests to be protected, where breaches may give rise to cause of action (*Heckert v 5470 Investments Ltd*, para 73, adopted from W Prosser):

1. Intrusion upon a person’s seclusion or solitude, or into his private affairs;
2. Public disclosure of embarrassing private facts about the person;
3. Publicity which places the plaintiff in a false light in the public eye;
4. Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness

#### statutory tort (BC *Privacy act*) – displaces common law in bc

**JONES v TSIGE** (2012) – P found D had been looking at banking records. Both worked for same bank and D was in common law relationship w/ P’s ex. D also looked at P' banking records ~174 times over 4 yrs.– **common law recognition of tort in ON as “intrusion upon seclusion”.** To make out claim for intrusion on seclusion, P must establish that**: 1.** Intrusion unauthorized; **2.** Intrusion highly offensive to reasonable person; **3.** Matter intruded upon was private; **4.** Intrusion caused anguish and suffering. In this case, deliberate/repeated and motivated actions = intrusion, J awards dmgs, but no public embarrassment so no agg damages.

**Privacy Act, RSBC 1996 c 373**

**1** (1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.

S1: def of tort

S 2: how to examine nature/entitlement to privacy – some exceptions eg legal auth

S 3 + 4: what kind of conduct gives rise to action

(2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.

(3) In determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.

(4) Without limiting subsections (1) to (3), privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass.

ELEMENTS:

1. Establish that plaintiff entitled to privacy in the circumstances (s1(2))
   1. At home, entitlement increases; in public, entitlement generally decreases
      1. ***Aubry v Éditions Vice-Versa***: in public, entitled if photog could have reasonably asked permission
      2. ***Milner v Manufacturers Life Insurance Co*:** D might have “claim of right”/lawful interest; surveillance ok if done within ordinary expectation of privacy eg from where any passer-by could see
2. Establish that defendant breached that privacy (s1(1), 1(3), 1(4))

**HOLLINSWORTH v BCTV** (1999) – P balding, got graft surgery, consented to filming for instructional purposes. BCTV did feature on baldness 7 yrs later and original filmer got video from doctor w/o P’s knowledge. P clearly shown on news for 3 secs– **“wilfully” in s1 applies narrowly to intention to do an act which person doing act know or should have known would violate privacy. “Claim of right” = honest belief that, if state of facts existed, would be legal excuse.** BCTV believed they had consent bc doctor told them so, so BCTV not liable for invasion of privacy though doctor/surgery company was.

# TRESPASS TO LAND

DEFINITION: “the direct and intentional physical intrusion onto the land in the possession of another” (p165)

Who can sue for trespass? – action generally only available to people in **legal possession** of land, eg those with legal title/right to entire area OR squatters with possession of amount of land they actually occupy/cultivate (p167-68).

* **Trespass by relation** available if nobody was in possession at time of trespass and they retake possession eg where D trespasses onto vacant land owned but not occupied at time of trespass. (p168)

ELEMENTS:

1. **DIRECT INTRUSION** – intrusion must be direct result of the actions of the defendant eg movements of nature aren’t actionable in trespass
   1. *continuing trespass*: successive actions for trespass apply as intrusion goes on; statute limitations may apply though (p167)

**ENTICK v CARRINGTON** (1765) – Ds claimed to have warrant, broke into house and took papers  
entering without permission is trespass; any invasion, no matter how small, is trespass

**TURNER v THORNE** (1959) – Ds delivery service, though P’s property same as old client; garage not locked so unloaded cartons in middle of their garage. P tripped over cartons and was injured  
placing objects on property is trespass. **Mistake is no defence**. Ds liable for P’s injuries

1. **INTENTION** – to bring about consequences of the conduct. BOP on D to prove lack of intention once direct intrusion is proven. (p168)
   1. *ACTIONABLE PER SE* – all that is required is intention to intrude onto land or interfere with it; no harm required to establish tort
2. **PHYSICAL INTRUSION** – smoke, noise, etc not sufficient (more likely to be dealt w/ through tort of nuisance)

#### PRIVATE/PUBLIC TRESPASS DISTINCTIONS – governed by statute

**VANCOUVER (CITY) v O’FLYNN-MAGEE** (2011) – Ds erected structures on Art Gallery lands as part of Occupy Vancouver. Ds received notice of violation of bylaws, did not comply with order to remove –**Trespass Act says if you continue to enter premises after getting notice you are liable for trespass; City within bounds to bring action due to bylaws**. City has right to use/lease lands, so according to Vancouver Charter has right to regulate and make bylaws. Essentially city has private ownership of the space such that it can bring action

**HARRISON v CARSWELL** (1976) – P charged under MB *Petty Trespasses Act* – **property rights accorded by statute – right to picket on private property open to public is not protected unless enacted in legislation.** Dickson J holds that mall essentially still private property. Laskin CJ, dissent, would rather have its character as by nature a public place considered. MB goes on to amend trespass legislation to include protection of picketers

# INTENTIONAL TORTS: DEFENCES

## Defence of Consent

### Basic Principles

**Basic rule in Canada**: consent is freestanding defence (*Non-Marine Underwriters v Scalera*).

BOP: D must plead and prove existence of consent, rather than req the P to prove absence of consent. Must prove that plaintiff consented to specific act that gave rise to tort action (p187)

* Once established, consent is a COMPLETE defence

Competency to consent (p194) – for consent to be valid, person must be **capable of appreciating the nature and consequences of the act** to which consent applies – ie, if can’t make such a determination due to age, illness, intoxication, other incapacitating factors, consent is invalid

If person deemed competent, court must uphold right to make decisions (even if they seem unreasonable to court or others)

#### Implied consent

Implied consent can include: certain participation, demeanour, or behaviour; failure to object, withdraw, or passivity

**WRIGHT v MCLEAN** (1956) – **leading case: in absence of malice, anger, or mutual ill will, court will assume that those participating in a sport or game are consenting to the ordinary risks of that activity**. – Boys engaged in mudball fight, McLean’s bike is hit, he joins fight, P is hit in head w rock and injured. D invited to join, no ill will.

NB: Application to **spectators**: was plaintiff aware of risks and usual protections? *Elliot and Elliot v Amphitheatre Ltd* – P hit by puck in stands; P was amateur hockey player so aware of risks; D not liable.

#### Exceeding consent

**AGAR v CANNING** (1965) – **leading case: someone who plays sport is assumed to be consenting to the ordinary risk of injury, but not anything beyond what could normally be expected**. – P & D opposing hockey players. D bodychecked P to get puck; P hit D on neck; D hit P with blade of stick in face in retaliation. P fell unconscious. Injuries are frequent in hockey games; BUT injuries inflicted showed definite resolve to cause serious injury. Doesn’t fall within scope of implied consent. Must limit immunity from liability by looking at facts of case. D liable though damages mitigated for provocation.

#### consent to fistfights

**ELLIS v FALLIOS-GUTHIERREZ** (2012) – **example of the principle of implied consent AND its limits** – P and D’s fight leads to NOSE BITING – P provoked D into fight, so initial fight consensual (implied consent) – but D exceeded P’s consent in biting him, which demonstrated intent to cause serious bodily harm (biting not expected in a fist fight; even if consensual, causing srs bodily harm exceeds consent)

**R v PAICE** (2005) – **SCC: consent only negated where accused intends to and does cause serious bodily harm**. – narrows *Jobidon* principle to incidents involving serious physical injuries. Intent issue resolved.

**R v JOBIDON** (1991) – **SCC: in “ordinary fights”, consent is exceeded/vitiated where accused intentionally applies force causing serious hurt or non-trivial bodily harm**. – accused charged w manslaughter following consensual fight leading to death.

### Vitiating Factors

Once defendant establishes that P consented to the act giving rise to the tort, P may raise factors that vitiate the consent. If consent vitiated, D will be held liable as if there had been no consent (p195)

#### Fraud/Deceit

*Eg*. D 1) knowingly makes false statement; 2) makes a statement in total disregard as to its truth; 3) knowingly creates a misleading impression by omitting relevant information

REQUIREMENTS (p195-96):

1. D was **aware of** (or responsible for) plaintiff’s misapprehension
2. Fraud was directly related to the **nature and quality of the act**, not a “collateral” matter
   1. *R v Mabior* – fraud re: potentially harmful consequences of act negates consent if the fraud physically harmed complainant, or exposed them to significan risk of serious bodily harm *eg lying about HIV status*
   2. *R v Hutchinson –* complainant consented to intercourse w condom, accused poked holes and she became pregnant – SCC maj upheld conviction for aggravated sexual assault bc though she had consent, deception had negated her consent. Min argued that she had not consented to unprotected intercourse 🡪 no consent at all

#### Mistake

Consent only vitiated by mistake if D responsible for creating P’s misapprehension and it went to the nature/quality of the act. (p197-98)

1. Plaintiff consents due to mistaken belief – where defendant knows, or ought to have known, that plaintiff consented on basis of mistaken belief, liability may be imposed  
   *DISTINGUISH FROM:*
2. Defendant mistakenly believes P has consented – provides no defence *eg Toews v Weisner* – school nurse thought parents had consented to child’s injection – still liable despite good faith belief

#### Duress

**LATTER v BRADDELL** (1880) – **consent procured through duress is not valid** – P, maid, accused of being pregnant by employer; told to go to room and forbade to speak; doctor called to examine P despite verbal protests – maj: P had own power physically to comply or not comply, not duress, consent not vitiated. Duress limited to physical force, threats of force, and maybe some economic threats/penalties. Dissent: abundant evidence of non-consent, belief she must obey employer shouldn’t be sufficient consent

#### Public Policy

Consent can be vitiated in some cases for public policy reasons eg can’t consent to being killed or seriously injured (*Jobidon, Paice*); can’t consent to someone exploiting position of authority/trust (p202)

**NELITZ v DYCK** test for when power imbalance vitiates consent:

1. **Proof of inequality** – eg “power dependency” relationship; AND
2. **Proof of exploitation** – consider type of relationship in light of community standards

**NORBERG v WYNRIB** (1992) – **unequal bargaining power and exploitative nature of relationship can make it impossible for P to meaningfully consent** – doctor offered prescription drugs in exch for sex; P did so after she couldn’t obtain drugs elsewhere – consent should be about freedom to consent or not, which is untenable in certain circumstances. Voluntariness issue is dealt with in contract law with unequal parties, so it should be able to address the issue in tort law as well – “unconscionable transactions” negate legal effectiveness of contract/consent

## Self-Defence and Defence of Third Parties

#### Basic principles

REQUIREMENTS (p227): D must prove on BOP that

1. Defendant **honestly and reasonably believed they were about to be struck**
   1. Right to invoke defence ends once danger has passed
2. Amount of force used to protect themselves was **reasonable in all circumstances**
   1. Generally should be proportional – courts use subjective/objective standard (p230)

**WACKETT v CALDER** (1965) – **defendant not required to weigh the niceties of the blow** – P drunk, invited D to fight outside hotel. “Futilely” tried to strike D and D’s brother; D hit him in face with fist, knocking him to ground. P “went for” D again, D hit again then left. D entitled to reject force with force, esp since P went to hit him a second time when first blow not sufficient. Second blow justified to end it

* 1. In determining whether force excessive, resultant injuries not necessarily considered as long as nature of force in circumstances is reasonable (p 230)
  2. D doesn’t have to wait for other party to strike first blow (p 230)

#### Defence of Third Parties

**Basic rule**: same as in self-defence; can be raised by anyone on the scene, not just relatives etc (p234)

**ELLIOS v FALLIOS-GUTHIERREZ** (2012) – **even if reasonable belief of danger, excessive force doesn’t allow for self-defence** – D argued self-defence/defence of family – test to establish self-defence wasn’t proven:

1. *Plaintiff armed* *or threatened use of weapon* – P’s credible testimony = not proven; no immediacy
2. *Violent force was for defending self/family* ---- D didn’t establish that he only bit lips after P reached for weapon
3. *Actions not excessive, but were reasonable and proportionate* ---- grabbing plaintiff’s wrists would be enough

**GAMBRIELL v CAPARELLI** (1974) – **even if intervener holds an honest (though mistaken) belief that the other person in imminent danger of injury, they are justified in using force as long as it’s reasonable** – D’s son and P got into fight; P eventually put both hands around D’s son’s neck. D saw P holding son by neck, yelled stop, got garden tool and hit P on the shoulder then head. – force was reasonable – she yelled stop, didn’t work; grabbed nearest implement and hit plaintiff; injuries as lacerations and not fracture indicate that force not excessive

## Defence of Legal Authority

*Most commonly associated with false imprisonment; may be raised for battery, trespass, other intentional torts*

ASSESSING DEFENCE (p259):

1. Did the defendant have legal authority to undertake the act that gave rise to the tort in issue?
2. Was the defendant legally privileged, ie, protected from civil and criminal liability in doing the tortious act?
3. Did the defendant meet all the other obligations imposed upon them in the process?

Scope & legal character set out in statute – **Criminal Code**

**S 494 –**  Citizens’ Arrest – narrower than allowed for peace officers

**R v CHEN** (2012) – **if grounds for making arrest satisfied, citizens can arrest immediately or within reasonable time after offence if they reasonably believe it’s not feasible for police to make arrest** – D arrested returning thief not currently committing off. – Parl enacted *Citizen’s Arrest and Self-Defence Act* SC 2010 c 9 to allow for this.

**S 25** **–** individuals protected from civil/crim liability if found to be acting w legal authority

**S 25(3) –** limits use of force to standard below that which “is intended or is likely to cause death or grievous bodily harm unless the person believes on reasonable grounds that it is necessary for the self-preservation of the person or the preservation of any one under that person’s protection from death or grievous bodily harm”

**S 495 –** peace officers can arrest without warrant if someone has committed offence or on reasonable grounds has or is about to commit offence

**MYLES PARLEE v PORT OF CALL HOLDINGS** (2000) – **private individuals who make arrest must satisfy on BOP that 1) someone committed indictable offence 2) person effecting arrest had reasonable grounds for belief that person arrested was the one who committed the offence**

**SMART v SEARS CANADA** (1987) – **commission of crime essential to establishing defence; otherwise, requires reasonable and probable grounds** – p detained by employees who thought he was helping 3rd party steal. Sears raised defence of legal auth against P’s false imprisonment claim– P was just in general area and made some meaningless head gestures, not sufficient to constitute reasonable/probable grounds

# INTENTIONAL TORTS: REMEDIES

**B(P) v B(W)** (1992) – **example of breakdown of damages** – P SA from 5-18 by father; raped at 20; other violence. D sentenced to 5.5 yrs on crim incest charge but rape charges stayed, so P sued for battery and assault.

*Non-pecuniary general damages*: $100,000 – total breach of trust/fear, most psych dmged of anyone doctor saw

*Aggravated damages*: $75,000 – gross breach of familial trust

*Punitive damages*: $50,000 – since D wasn’t convicted on rape charges, can award them despite crim charge. Usually tortious acts that are also criminal = shouldn’t award redundant damages in civil suit.

**INJUNCTION**: court order to do sth

Prohibitive injunction – person must stop

Mandatory injunction – person must do sth

*Equitable remedy: clean hands principle; not normally granted if damages adequate*

**ORDER OF SPECIFIC RESTITUTION**: aims to prevent someone from profiting from wrong where profit may exceed amt paid in damages. *Based on unjust enrichment.*

**DECLARATION**: formal statement re: legal status – rare in torts

|  |  |
| --- | --- |
| **DAMAGES** | |
| **NOMINAL DAMAGES** (p32) | **COMPENSATORY DAMAGES** (p33-35) |
| Small sum awarded to redress violation of legal right even in absence of harm or loss (*The Mediana*) – usually for torts that are actionable *per se* | Allow claimant to obtain financial redress for actual loss (backwards-looking). Pecuniary loss – consider loss of future earnings, med care; non-pecuniary loss – consider arbitrary “fairness” of award, since pain etc hard to count (*Andrews v Grand & Toy)* |
| **PUNITIVE DAMAGES** (p37-40) | **AGGRAVATED DAMAGES** (p36-37) |
| Comparatively rare, only when comp/agg dmgs insuff to adequately punish defendant. *Whiten v Pilot Insurance Co* principles: not limited to certain types of cases; very srs misconduct only; crim sanction doesn’t preclude aware of punitive dmgs; should be awarded with restraint; no cap but should be lowest sum that accomplishes goal; juries should be informed of function and factors; appellate courts can intervene | Compensatory damages awarded to compensate for additional (intangible) injuries to dignity arising from D’s conduct. Court must be satisfied that:   1. P suffered damaged to their feelings as result of tort 2. D’s conduct not just tortious but also highly offensive (often leads to inference of #1) |

# DEFAMATION

## Elements of Defamation

P must prove on the BOP that the impugned statements were (p1078-79):

1. **DEFAMATORY –** words,drawings, political cartoons etc
   1. **Literal meaning** – defamatory in plain and ordinary sense
   2. **Legal innuendo** – reference to extraneous circumstances which would give defamatory meaning in eyes of those receiving publication
   3. **False innuendo** – by establishing ordinary person would infer defamatory meaning even w/o special knowledge of P or circumstances

**SIM v STRETCH** (1936) – **TEST:** “would the words tend to lower the plaintiff in the estimation of right thinking members of society”?

1. Is there evidence of a tort (the material is ***capable*** of being defamatory)? – Low threshold
2. Is the material **in fact defamatory**? (contextual analysis)
3. **MADE REFERENCE TO P –** must show on BOP; simple if refers to P by name
   1. **Reference by inference** – can be satisfied in absence of express reference

**KNUPFER v LONDON EXPRESS NEWSPAPER LTD** (1944) – Ds published article re Young Russia saying they were pro-Hitler; P was leader of Brit branch but not named in article. 4 witnesses said they thought of him – **TEST:**

1. **Q of law**: can statement be regarded as **capable** of referring to plaintiff? (if no, not defam)
2. **Q of fact**: would statement lead a reasonable person who knows the plaintiff to conclude it does refer to them?
   1. **Group reference –** general rule is that individual members can’t succeed in defamation action unless there’s something in statement that identifies a particular member (p1086)  
      BUT *AUPE v Edmonton Sun* – group of 200 COs defamed by editorial, bc writer hadn’t restricted comments to certain ppl involved in a recent incident – so reasonable person who knew any COs would think comments referred to them

**BOU MALHAB v DIFFUSION** (2011) – Mtl taxi drivers sought class action for racist comments made by radio host about Mtl taxi drivers whose mother tongue is Arabic or Creole – **FACTORS to consider:**

* Size of group (larger = harder to prove each member sustained PI)
* Nature of group (homogeneity, history of stigmatization)
* P’s relationship with group
* “real target” of defamation (precision or generality of allegations)
* Seriousness or extravagance of the allegations
* Plausibility of the comments and tendency to be accepted
* Extrinsic factors (eg characteristics of maker/target, medium used, general context)

1. **WERE PUBLISHED OR DISSEMINATED –** not actionable unless remarks communicated to someone other than the plaintiff; any party who helped communicate defamatory statement (ie reproduction) may be liable as well in a new independent action (p1087)
   1. **Liable for repetitions only if:**
      1. Gave express or implied auth for remarks to be republished
      2. Made remarks to someone who had moral, legal, or social obligation to republish; OR
      3. Republication is natural and probable consequence of original publication

NB:*NOT ACTIONABLE PER SE* – but *no specific intent* is required at this stage. A malicious intent CAN factor into defeating some defences…

**CROOKES v NEWTON** (2011) – hyperlink to website that contains defamatory material is not publication itself; if D uses reference in a manner that in itself conveys defamatory meaning, may be liable

## Defence of Justification

**Basic rule**: defendant has complete defence of justification if they can prove that the statements were true (even though they were also defamatory). (p1090-91)

* Must show that “the whole of the defamatory matter is substantially true” (*Meier v Klotz* at 388)
* Not sufficient if they just believed it to be true
* Needs to prove truth of statements that comprise “sting” of defamation
* Single instance will not justify statements

**WILLIAMS v REASON** (1983) – accusation of rugby player’s “shamateurism” due to receiving book $; on appeal D sought to introduce new evidence of “boot money” – evidence of boot money is relevant to “sting” of defamation, ie taking money while claiming to be amateur. In line with accusation, so new evidence in appeal allowed

***Disincentive to plea of justification: defence considered republication of impugned statements –*** *if defence fails, defendant will be liable for separate instance of defamation*

## Defence of Qualified Privilege

**Basic rule:** defendant has complete defence of qualified privilege if they can show they had a moral, social, or legal duty to make the statement; applies even if statements untrue, but not if P establishes malicious intent. (p1104)

SCENARIOS: (p1104-1106)

* D made statements to protect own interests/defend reputation
* D made statements to protect interests of someone else (must have duty)
* D made statements for a common interest – duty to publish and reciprocal duty to receive info (eg employment medical exam in *McLoughlin v Kutasy*)
* D made statements in protection of public interest, eg, political speech, health/safety comm amongst public officials – duty to publish and reciprocal duty to receive info
  + **CAMPBELL v JONES** – violation of Charter rights in strip search of students; lawyers suggested searches wouldn’t have happened if students not black and poor – qualified privilege applied bc public interest in info about conduct > P’s right not to be defamed

“**Fair and Accurate Reporting**”: addtl form of qualified privilege; applies to proceedings open to public and available at CL if reporting is fair/accurate

**HILL v CHURCH OF SCIENTOLOGY** (1995) – **defence of qualified privilege fails if conduct exceeds legitimate purpose of occasion** – before court proceedings, CoS organized public press conference w lawyer reading out accusations against P and gave copies to reporters; P exonerated at proceedings – circumstances called for restraint; high-handed and careless conduct that wasn’t necessary/appropriate

*Publication to the world* 🡪 not generally covered by qualified privilege (p 1110-11)

Exceptions: politician’s duty to express matters of concern to public (*Shavluk v Green Party*); media defendant’s duty to publish an article (*Grant v Torstar*)

## Defence of Fair Comment

**Basic rule**: defendant will have complete defence of fair comment if can prove that material was (**WIC RADIO LTD v SIMPSON*,*** revising *Chernesky v Armadale Publishers Ltd* wrt #4):

1. **On a matter of public interest** – person/figure, event, or issue, but not personal life of public figure
2. **Recognizable as comment** – generally those statements that can’t be concretely proved/disproved – use reasonable viewer perspective
3. **Based on facts that are true** – not necessarily 100%, but *factual foundation*; if factual foundation unstated or unknown, defence will fail; must be sufficiently stated to audience/public so audience can make up own minds
4. **That any person could honestly express based on the same facts** – objective test; not a “reasonable person”, but any – even a bigoted or unreasonable – person, with the proved facts. Low threshold.  
   *If plaintiff can prove malice/improper motive, defence is defeated*

NB: no need to show that comments actually fair – can protect comments that are exaggerated. (p1111)

## Defence of Responsible Communication

*Developed in Grant v Torstar to address gap in defamation law where defendant publishes statements of fact on a matter of public interest.*

**JAMES v BLACK PRESS GROUP LTD** (2012) – **example of defence of responsible comm failure –** BP uses pic of James w/ headline accusing him of guilt of SA of minor, but person guilty actually father. BP claims defence of resp comm – use *Grant v Torstar* test. 1) *was publication on matter of PI?* – assess whole publication; yes!

2. *was publication of the defamatory communication responsible*? – allegation was v serious, so demanded high degree of diligence. Photo wasn’t essential/urgent part where lack of reasonable steps were justifiable. BP had lots of time to double check/confirm, and chose not to do so at these opportunities. = BP not covered under defence, did not establish that they acted responsibly

**GRANT v TORSTAR** (2009) – Grant sued *Toronto Star* based on critical article written about his private golf course dev. *Star* argues that they attempted to verify, shouldn’t be held liable just bc journalist can’t prove to court that all of story was true; CL modified to recognize new defence – **TEST FOR DEFENCE OF RESPONSIBLE COMM**:

1. **Was the publication on a matter of public interest**? – “must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached”
2. **Was publication of the defamatory communication responsible**? – depends on number of factors:

* Seriousness of allegation
* Public importance of matter
* Urgency of matter
* Status/reliability of source
* If P’s side was sought and accurately reported
* Whether inclusion was justifiable
* Whether defamatory statement’s public interest lay in the fact it was made rather than its truth *eg* if dispute itself is a matter of public interest; just have to indicate that truth hasn’t been verified
* Other considerations *eg* tone, meanings
* *Attempt to prove malice will not defeat defence*

# NUISANCE

### PRIVATE NUISANCE

**Private nuisance**: protection of P’s land from **unreasonable interference** with someone’s use and enjoyment of land

*Two situations that could give rise to claim*:

\*\*can include **intrusive** or **non-intrusive** interference (eg sewer system drains away water, p916)

1. Where conduct of D causes physical damage to P’s land

* More likely to find unreasonable interference if causes phys damage (p915)
* Damage must not be result of abnormal sensitivity of P’s land

**HOLLYWOOD SILVER FOX FARM v EMMETT** (1936) – D discharged guns near P’s pens to interfere with fox breeding season. Where D has knowledge of sensitivity and acts with malice, interference may be considered unreasonable.

1. Where conduct of D causes loss of use/enjoyment of P’s land

**ANTRIM TRUCK CENTRE LTD v ONTARIO (TRANSPORTATION)** (2013) – Prov opened new section of highway that bypassed P’s 30-yr restaurant and put it out of business – **SCC articulates two-part test for action in private nuisance**:

1. **Is interference w enjoyment SUBSTANTIAL**? – if not, don’t need to go to reasonableness stage and claim fails (*Strand Theatre Ltd v Prince Albert (City)* – *low toxicity contamination not harmful, so fails*)
2. **Is the interference UNREASONABLE**?

**340909 ONT LTD v HURON STEEL PRODUCTS** (1990) – factors for unreasonableness in enjoyment cases:

* *Severity of interference* (nature, duration, effect): must be of sufficient intensity to be intolerable to ordinary occupier; more than temporary or short-lived; damage caused to P
* *Character of neighbourhood*: look to “standard of comfort” expected of locale eg mixed use area might be subject to lower standard than rural or residential neighbourhood
* *Nature and utility of D’s conduct*: less likely to protect land use of D who acts unreasonably
  + *Antrim*: public utility may outweigh interferences w land – contextual approach
* *Sensitivity of P*: no liability if P is abnormally sensitive, standard is of reas and ord resident there
  + *Martin v Lavigne (2011)*: staring doesn’t meet test of intolerability to reasonable person

*\*\* in physical damage cases, look mostly to damage and sensitivity*

#### Defences to Private Nuisance

STATUTORY AUTHORITY:

Where conduct is being carried out according to statute, no liability for nuisance where the statute imposes a duty OR is specific about the manner and location of conduct (*Tock v St John’s Metropolitan Area Board*)

*High burden*: Applies only if D proves nuisance practically impossible to avoid (*Ryan v Victoria (City)*)

CONSENT: if D can est that P encouraged or clearly consented, liability precluded

PRESCRIPTION: after uninterrupted period of 20 yrs, D’s conduct may be retrospectively legalized

Only if 1) nature of nuisance remains same over period and 2) P aware of nuisance (p934)

*Remedies include*: injunctions (prohibitory, mandatory, interlocutory); damages; abatement

### PUBLIC NUISANCE

**ATTORNEY-GENERAL ONTARIO v ORANGE PRODUCTIONS LTD** (1971) – **public nuisance is one so widespread in range or indiscriminate in effect it should be taken as responsibility of comm at large**

**Public nuisance** arises in two situations (p 935):

1. **Common interests**: where D’s conduct unreasonably interferes with common rights, resources, or interests (eg operation of brothel in residential neighbourhood)
2. **Combined private interests**: multiple private properties impacted by D’s nuisance activity (eg factory emits fumes that damage all nearby houses. Homeowners can either sue individually or together

**HICKEY v ELECTRICITY REDUCTION CO** (1970) – **P in private action for public nuisance must have suffered special damage in kind, not just degree** – Ps may be more affected by D’s poisonous waste bc fishermen, but right to fish common to all so can’t maintain personal right of action

# NEGLIGENCE

1. DUTY OF CARE
2. STANDARD OF CARE

= Primary elements of negligence

+ Defences to negligence actions

1. CAUSATION
2. REMOTENESS OF DAMAGE
3. ACTUAL LOSS – Negligence not actionable *per se*

## DUTY OF CARE

**Was the defendant under any legal obligation to exercise care with respect to P’s interests in the type of case/conduct in question?**

**Duty of Care Framework** (*Cooper* is current test)

*Misfeasance or nonfeasance? (regular or affirmative duty)*

1. Was harm reasonably foreseeable and proximate? (*Anns,* *Kamloops*) BOP on P
   * Foreseeability? = *kind* of harm, not *specific injury* [broad, so this is p easy to meet]
   * Proximity [sufficient degree btwn P and D to justify imposition of DoC – mostly the issue]? Consider:
     + Is relationship already recognized?
     + Does P come within *class of persons* D ought to have had in mind? “foreseeable P”
     + If **affirmative duty**, does relationship fit within ‘special’ category, with suff proximity? (*Childs* factors: creation or control of risk; autonomy; reliance)

If there was foreseeable harm and a sufficient relationship of proximity, and for affirmative duties it supports criteria for finding special relationship, *prima facie* duty of care exists.

1. **Novel duties:** Is the situation one where new DoC should be recognized (or, are there residual policy considerations that might negate/limit scope of DoC)? BOP shifts to D (*Childs*)
   * Is an alternative legal remedy available?
   * Would recognizing DoC give rise to indeterminate liability?
   * Are there other policy concerns that argue against a duty? (Need evidence, *Hamilton-Wentworth Police*)
     + Policy considerations shouldn't determine matter if they are merely speculative

Classical approach to DoC reflecting particular assumptions about negligence law:

* Legal responsibility doesn’t flow from moral responsibility/culpability
* Courts have limited role in imposing liability outside confines of CL due to role of legislature
* Theory of legal obligations: acts more culpable, and thus more likely to attract liability, than omissions
* Assumptions about value of various interests: physical injuries > emotional/comm’l harm; deeds > words

**COOPER v HOBART** (2001) – **current test for determining DoC**  – registrar of brokers suspended licence of bad broker, P sued registrar claiming that if done so quicker wouldn’t have lost investment –

**1.** was the harm reasonably foreseeable and is there a sufficient degree of proximity between P and D to justify the imposition of a DoC? [focuses on facts of relationship between P and D]

**2.** is the situation in question one in which a new duty of care should be recognized? [focuses on policy considerations outside of the relationship]

**KAMLOOPS v NIELSEN** (1984) – **imports more flexible version of *Anns* test into Canada**  – **1.** Is there a sufficiently close relationship between the parties? **2.** If so, onus on D to show if there are any considerations which ought to limit/negative **a.** the scope of duty, **b.** the class of persons to whom it is owed, **c.** the dmgs to which a breach of it may rise?

**ANNS v MERTON LONDON BOROUGH COUNCIL** (1977) – UK – **rearticulates *Donoghue* criteria**  – 2 step framework for finding a DoC: **1.** There is a sufficient relationship of proximity based upon foreseeability; IF YES, **2.** There are no principled reasons why court shouldn’t recognize DoC

Clarification post-*Cooper* in ***Childs v Desormeaux*:** McLachlin clarifies that once P establishes DoC, policy burden shifts to D. Also suggests that proximity analysis doesn't apply to established categories, leading to combined effect of *Cooper* and *Childs* as indicating that **established categories won't be subject to either stage of the test**

**DONOGHUE v STEVENSON** (1932) – UK – **birth of modern negligence law & DoC** – 2 major DoC elements:

**1.** Must take reasonable care to avoid acts/omissions which D can reasonably foresee would be likely to injure neighbour; **2.** Neighbour is person closely and directly affected by the act such that D should have them in reasonable contemplation – relationship between parties is integral element

***Hill v Hamilton-Wentworth Regional Police Services Board*** (2007) – SCC maj rejected policy arguments that imposing a DoC on police would interfere with exercise of discretion during investigations; Court emphasized Ds need **tangible evidence** to support claims that imposing DoC would have deterious effects

### Reasonable Foreseeability

**Foreseeability of Risk of Injury**: was the injury the *kind* of harm that D should have reasonably foreseen would result from his conduct? Probability alone isn’t determinant of whether sth is foreseeable. Compare:

**MOULE v NB ELEC POWER COMM** (1960) 10.5y/o climbed tree, fell into wires at unusual height due to rotten branch, unlikely sequence of events – company owed duty only against “any foreseeable consequence of the presence of that danger which could be said to involve a reasonable probability of causing harm”.

**AMOS v NB ELEC POWER COMM** (1976) – 9y/o climbed tree, brushed against wires – distinguish from *Moule*. Children climbing trees is a foreseeable circumstance, accident here could have been foreseen as was what seemed to be normal tree in front of home that shouldn’t have been near uncut, concealed wires.

\*\* fact that an injury actually occurred doesn’t change resolution of issue, because reasonable foreseeability is framed as a hypothetical Q: *did D’s act create a foreseeable risk of injury?*

**Foreseeable Plaintiff**: P must come within a “class of persons” foreseeably at risk (ie, public at large too broad). See:

**PALS GRAF v LONG ISLAND RYE CO** (1928) – aspiring train-catcher’s package of fireworks fell on train rails, exploded, shock threw down scales at other end of platform which struck P – negligence is about breach of duty owing to P. Here, P so far away that no reasonable expectation that injury would befall her specifically

### special Duties of Care

Special duties of care can arise based on special relationships with the claimant – focus on status of claimant

#### Psychiatric harm

Central concern 🡪 harder to determine reasonable foreseeability of psychological harm than physical injury

Courts generally loathe to impose liability for careless infliction of psychiatric harm eg anger, grief; focuses on recognized psychiatric illnesses

**MUSTAPHA v CULLIGAN OF CANADA LTD** (2006) – D not liable for damages for psych harm where harm consists of extraordinary reaction by particularly sensitive person to relatively minor incident – to find DoC re psychiatric injury, P must establish that it is “reasonably foreseeable that a person of normal fortitude or sensibility is likely to suffer some type of psychiatric harm as a consequence of D’s careless conduct”.

Focus on *kind* of injury (psychiatric) rather than thin skull rule that allows for recovery despite *extent*

#### Duty owed to rescuers

**Rescuer:** someone who is “engaged in the process of attempting to save someone who is in danger at the time of the purported rescue” (*Joudrey v Swissair Transport Company*) – eg distinction btwn rescue and recovery of dead

* If D’s negligence induces rescuer to encounter danger, D can be held liable:

**HORSLEY v MACLAREN** (1972) – did captain have DoC to rescue passenger who died when attempting to rescue another passenger? – question is whether Horsley’s death was aggravated by MacLaren’s negligence re the original dude overboard. Any duty owing to Horsley stems from fact that MacLaren’s negligence created a *new situation of peril* that caused Horsley to act as he did. Court finds that MacLaren’s rescue attempts weren’t negligent enough to induce 3rd party to risk his life.

### Affirmative Action

|  |  |
| --- | --- |
| **Misfeasance** | **Nonfeasance** |
| * + Worsening P's position   + Creation of a dangerous situation   + Active contribution to harm | * + Failing to improve P's situation   + Failure to confer a benefit   + Failure to prevent harm |

Duties of AA recognized based on *nonfeasance*: if “special relationship” or if D had contractual or statutory obligation to intervene. Compare to basic principles of negligence based on acts of *misfeasance*

Duty to Rescue? – no general duty to help; may arise only from special relationship (*Childs v Desormeaux*)

**MATTHEWS v MACLAREN** (1969) – 3 possible ways for duty to rescue to arise here: **1.** Special relationship *analogous* to existing rel btwn carriers/passengers; **2.** Codified duty; **3.** Voluntary assumption of duty, since MacLaren undertook rescue efforts.

**OSTERLIND v HILL** (1928) – D rented canoe to P, heard P’s cries for help but ignored – No general duty to rescue; “innocent” bystander has no duty to assist and thus can’t be held civilly liable.

**Good Samaritan Act (RSBC 1996, c 172)** – (s 1) private individuals immunized from liability arising from rescues unless they are grossly negligent; (s 2) this doesn’t apply to emergency medical service personnel

#### Relationships of Economic Benefit

COMMERCIAL HOST – commercial vendors of alcohol have duty to take *reasonable steps* to prevent intoxicated patron from doing things that pose foreseeable risk of injury to themselves or 3rd parties, eg drunk driving

**JORDAN HOUSE v MENOW** (1974) – **DoC to patrons** – driver hit M after ejected from hotel bar for excess drinking; put out on dark/raining night in dark clothes; was known to hotel – Court looks to facts of case; notes factors supporting that relationship sufficient to generate a DoC protecting P from injury:

* Existing invitor/invitee relationship in law, and statutory legislation contravened
* D’s personal knowledge of P and of propensity to drink, as well as risk of harm outside (highway)
* Reasonable steps available to mitigate the risk (cab, spare rooms) w small burden on hotel to do so

**STEWART v PETTIE** (1995) – **DoC to 3rd parties** – dinner theatre, drunk husband drove them all home, passengers injured – Court finds DoC to third parties who might *reasonably be expected to come into contact with the patron* eg 3rd parties using the highways, passengers in patron’s own vehicle, though mere existence of special relationship doesn’t impose positive duty to act

Didn’t *breach* DoC in this specific case bc no foreseeability of harm – reasonable expectation of sober driver given facts

SOCIAL HOST – don’t owe general duty of care to injured members of the public

**CHILDS v DESORMEAUX** (2006) –D drank 12 beers at BYOB party, drove into oncoming traffic and killed 1 + srsly injured 3 incl paralyzed P – social host not sufficiently similar to comml host to find DoC: 1) comml hosts have greater capacity and expectation to monitor alcohol consumption; 2) they’re heavily regulated; 3) profit-based relationship v different from social relationship.

**Court finds that 3 situations can give rise to special relationship:**

1. Where D intentionally attracts P into situation of risk

2. Where there’s a relationship of supervision/control

3. Where D exercises public function/comml enterprise incl implied responsibilities to public at large

*Linked by 3 themes:* D’s involvement in creation/control of risk; autonomy of persons affected; reasonable expectations of people in P’s position. Private party w alcohol, w/o more facts, not sufficient to tall into any of these categories

#### Creation of Control or Risk

Where D materially implicated in creating/controlling the risk, D more likely to be found owing an affirmative duty.

**CROCKER v SUNDANCE** (1988) – **affirmative duty found** – Sundance holding promo tubing competition. P entered drunk, signed forms w/o reading; drunk at competition, drank between heats; owner asked if he was in condition to compete and later suggested he not continue, but took no further steps. P injured & became quadriplegic – *relationship analogous to comml host*: Sundance set up inherently dangerous competition; provided liquor, knew of intoxication and increased risk of injury which should have imposed greater duty to control conduct. Also had strong ability to control/mitigate risk of injury, eg disqualify P.

**KENNEDY v COE** (2014) – **affirmative duty not found** – P fell into tree well and suffocated, D “ski buddy” –Doesn’t fall into “volunteer” cases due to guided tour setup, so conduct *Anns* test for *pf* DoC. Foreseeability: yes, foreseeable risk of falling into tree well. Proximity: look to *Childs* factors, fails here:

* Risk: D not materially implicated in creation/control of risk (compare to guided situation)
* Autonomy: no spec rel, bc ski buddy system defined by guide’s instructions
* Reliance: evidence in emails that P well aware of risks/limitations of ski buddy systems

**FULLOWKA v PINKERTON’S** (2010) – **affirmative duty found** – D hired as security for violent strike at mine. Striker trespasses and set bomb killing 9 – *Anns* test for *pf* DoC. Foreseeability: yes, both reasonably foreseeable AND actually had prior info about bomb threat. Proximity: yes – reasonable reliance by P on D’s duty to control risks, since hired for that reason.

#### Relationships of Control or Supervision

* DoC imposed on those **supervising prisoners** to ensure that they don't injure themselves, each other or members of the public. Similar principles apply to **supervising institutionalized mental health patients**
  + *Hunter and New England Local Health District v McKenna* (AUS) - mentally ill man discharged into friend's care to drive him to mother's home; during journey, man killed friend and himself. Found that health authority didn't owe DoC to friend bc relevant legislation required that man be discharged
  + *Stuart v Kirkland-Veenstra* (AUS) - 2 police officers found man who looked to be contemplating suicide; questioned him and he said he changed mind. Police left, he committed suicide later that day. Found that officers didn't owe DoC bc weren't in position to exercise control over him; hadn't formed belief that he was mentally ill and at risk of suicide, which would have given them legislative power
  + *Irvine v Smith* - no DoC owed by practising physician to control adult son (P in truck struck and killed son, causing him to suffer nervous shock) - regardless of professional expertise, no duty to take son for mental eval + P's shock unforeseeable
* **Employers** may be held personally or vicariously liable if fail to prevent abuse or harassment in workplace
* **Coaches, instructors and supervisors** may be sued on several grounds
  + *Bradford-Smart v West Sussex County Council* - school may owe DoC to protect student from bullying on school property but also, in exceptional circumstances, outside school
  + *Cliché c Baie-James (Commission scolaire)* - municipality liable for failing to provide enough lifeguards to supervise class trip to pool for 36 kindergartners

## STANDARD OF CARE

**What standard of care would be exercised by a “reasonable person in all of the circumstances” of the case? Did D breach this standard of care?**

**Standard of Care Framework**

1. Who is the comparable “reasonable person”?
   1. *Arland v Taylor* – sn “of normal intelligence who does nothing a prudent man wouldn’t do” – objective test
   2. **Special cases** = heightened/relaxed standards? (Children, people with disabilities, professionals)
2. In asking what the “reasonable person” would have done at time of conduct:
   1. What was the *probability of harm*? (the greater, the more care expected) (*Bolton*)
   2. What was the *severity of foreseeable harm*? (the greater, the more care expected) (*Paris*)
   3. What was the *cost of risk avoidance*? (the lower, the greater expectation of taking steps) (*Vaughn*)
   4. Does D’s conduct have *social utility*? (If so, may weigh strongly against finding breach) (*Watt*)

1. PROBABILITY AND SEVERITY OF HARM

**BOLTON v STONE** (1951) –P walking on road adjacent to cricket ground, injured by ball hit out of ground – *clearly foreseeable but improbable harm*: Chance so small that reasonable man would think it OK to not take preventative steps. D met SoC bc probability of harm so low. (Can’t hold everyone liable just if a risk exists!)

**PARIS v STEPNEY BOROUGH COUNCIL** (1951) –one-eyed workman given job of knocking out bolts at eye level with steel tool; steel splinters hit his good eye – if probability of injury not necessarily high but severity of harm if injured severe, there exists an unreasonable risk and precautions should have been taken

2. COST OF RISK AVOIDANCE

**VAUGHN v HALIFAX-DARTMOUTH BRIDGE COMM** (1961) –D painted bridge, paint flecks blew onto car. D said took all proper measures to prevent, so not careless – further precautions could be done at lower expense eg signs at the parking lot or warning policy; reas person would have, so D should have done them

3. SOCIAL UTILITY (only really considered re conduct of public actors)

**WATT v HERTFORDSHIRE COUNTY COUNCIL** (1954) –P firefighter using spec jack only used once in past 15 yrs, put in non-spec truck; driver braked, it dislodged and hurt P – importance of fighting fires outweighed costs of D’s conduct; must balance risk against end to be achieved

### Special Cases

1. CHILDREN

Modified SoC: did the child exercise the care expected of a child of like age, intelligence, and experience?

**JOYAL v BARSBY** (1965) –6y/o aware of dangers ran onto busy highway, suffered grievous injuries. 6y/o appeared to be waiting, but ran into D’s rear door – considered context of circs, found reaction appropriate, reasonable for her age, int, exp. Not contributorily negligent bc didn’t breach SoC. *Dissent: training -> liable*.

* ***Tillander v Gosselin***: “tender age” threshold; can’t be held liable in torts where of age such that child not capable of appreciating the risk associated with her conduct. Not a hard & fast rule before using modified SoC
  + ***Heisler v Moke***: distinction ultimately goes to capacity, can D appreciate nature and quality of act?
* Distinctions made on activity – child involved in adult activity eg driving is required to meet SoC expected of a reasonable adult and thus no modified test (*Ryan v Hicksson*)
  + Supervisors of children can be vicariously liable if they carelessly failed to monitor/control child’s conduct, using “reasonable parent of ordinary prudence” SoC (*LaPlante v LaPlante*)

2. PERSONS WITH DISABILITIES

Physical disabilities: Modified SoC – reasonable person w that disability (*Carroll and Carroll v Chicken Palace Ltd*)

Also requires D to consider risks associated with their disability and re their capabilities/limits

Mental illness: specific modified SoC for particular sudden onset situations, not general test for all MIs:

**FIALA v CHECHMANEK** (2001) –M had severe manic episode, jumped on car, began choking D, D involuntarily accelerated into P’s car, M continued to threaten/yell at both – can relieve of liability IF P proves:

**1. sudden onset** of mental illness, w/o prior warning; **2.** As result of MI, can’t appreciate **nature/quality** of act; **3.** As result of MI, has **no meaningful control** over actions at the time of relevant conduct. Decided specifically on these facts, since MacDonald not aware of illness but not in control can be relieved of liability.

3. PROFESSIONALS

Modified SoC: “reasonable, ordinary and prudent person employed in that same profession”

**WHITE v TURNER** (1981 aff’d 1982) –D plastic surgeon did P’s breast reduction. P suffered post-op complications, breasts scarred and misshapen; P sued D for negl in operation – errors in judgment not by itself negligence, but P can prove on BOP that bad result brought about by negligent conduct, eg, not what reasonable same professional would have done in that circumstances. Here, doc did op too fast, didn’t do proper check on tissue 🡪 actionable negligence. Used expert evidence to help determine standard.

* Includes professionals knowing their limits – *Layden v Cope*: GP should have referred to specialist sooner

## Causation

**Was D’s breach the cause of P’s loss?**

**KAUFFMAN v TORONTO TRANSIT COMMISSION** (1959) –youth scuffled, fell on man, man fell on P, P has severe permanent injuries. Sues transit company – no evidence that lack of hand rail contributing cause of P’s accident, or that anyone grabbed for it – no causal rel btwn alleged negligence and P’s injury. Would have happened anyway.

**Causation: “factual causation”**

1. **“But for” test** – P must establish that D’s conduct *necessary cause* of resulting injury – if injury would have happened anyway, causation is NOT established (*Kauffman*, *Barnett*). If no clear answer, consider…
2. **Issues that may arise**: *may give rise to alterations/exceptions to but-for test:*
   1. Multiple negligent defendants? (*Cook v Lewis* starting point)
      1. independent – only liable for injuries caused; joint – liable for all injury
   2. Learned intermediaries? (*Dow*)
   3. Informed consent required? (subj/obj *Hopp* & *Keibl* test)

*Evolving modifications/exceptions to but-for test:*

* 1. Did D’s conduct cause a material *increase* in risk to injury? (*Snell*)
  2. Did D’s conduct cause a material *contribution* to injury? (*Clements*)

MULTIPLE CAUSES: Independent sufficient (*Lambton*) or insufficient (*Athey*) causes?

* 1. Crumbling skull doctrine (would P have expected effects anyway)? Thin skull rule (take as you find them)?

#### But-For test

**BARNETT v CHELSEA & KENSINGTON HOSPITAL MGMT COMMITTEE** (1969) –3 men went to hospital for vomiting after drinking tea. Nurse called med casualty officer, told her to tell them to go to bed and call own doctors. 5hrs later, 1 man dies of arsenic poisoning. – despite breach of SoC, arsenic wouldn’t have been detected and treated within timeframe to reasonably prevent death. P dying thus wasn’t causally connected to negligence of staff, would have died anyway.

**RICHARD v CNR** (1970) –“we’re here”, P thought was attendant, backed off ferry to land in water – D not negl in untying rope across end of ferry – “sole, direct, proximate and effective cause” was P backing off boat contrary to warning signs and crew’s attempts to stop him

#### OTHER ISSUES

MULTIPLE NEGLIGENT DEFENDANTS

**COOK v LEWIS** (1951) –P shot in face, 2 negligent hunters, BOP not satisfied for either – Court held that where there are 2 negligent defendants, BOP for causation will shift from P to D if P can prove that: **1)** BOTH Ds are negligent; **2)** one HAD to have caused P’s loss; **3)** it is impossible to prove which D caused P’s loss. Each D liable unless could disprove causation on the BOP.

* *Cook* principle not limited to only two defendants as used in *Clements*, but is framed differently there

LEARNED INTERMEDIARY

Manufacturers of products not directly avail to public eg prescription drugs can discharge duty to inform consumers by adequately disclosing info to learned intermediary like a doctor

**HOLLIS v DOW CORNING CORP** (1995) –P hurt by exploding breast implant, D didn’t inform P’s surgeon of risks of rupture but argued it was absolved of liability bc P couldn’t prove doc would have warned her even if info passed on to doc – didn’t accept arg. Assume that if LI had known, would have informed P

MODIFICATION FOR INFORMED CONSENT

* *Hopp v Lepp*, *Reibl v Hughes* (1980): med professionals have duty to ensure informed consent
  + Objective/subjective test of causation: **would reasonable person in P’s position have consented if they’d been adequately informed?** This avoids subjective test allowing Ps to just argue they wouldn’t have consented, such that patient’s testimony would be coloured by hindsight

MATERIAL INCREASE IN RISK OF INJURY

Eg where event/exposure to substances increased the longer-term risk of P suffering disease/injury; P must establish that increased risk to injury was more probably than not caused by D’s negligence

**SNELL v FARRELL** (1990) –D performed cataract operation. Discovered some discolouration, but no other signs of bleeding so continued. After surgery, blood in eye; 9mo later, optic nerve atrophied resulting in blindness. Couldn’t determine if injury result of negl surgery or natural causes – BOP stays with P to prove medical causal link, but Court may draw inference of causation if only *some* determinative proof. If D raises counter evidence, court will take “robust and pragmatic” approach to facts. Here, D negl in continuing operation because doing so **greatly increased** P’s risk of suffering the injury that befell her.

MATERIAL CONTRIBUTION TO INJURY

Alternate to but-for test in very limited circumstances: where it’s impossible to prove causation on but-for test, due to eg the limits of scientific knowledge (*Hanke*). Supposes that there are multiple sufficient causes/contributors (as distinguished from material increase to risk). Has never been applied!

**CLEMENTS v CLEMENTS** (2012) –P wife unable to prove but-for causation of D husband’s motorbike negligence, due to limits of crash reconstruction evidence – Material contrib to injury modification applies only where P has established**: 1)** loss wouldn’t have occurred but-for 2+ tortfeasors, each possibly in fact responsible **AND 2)** through no fault of her own, P unable to show that any one of them was necessary or but-for cause of injury. Only applies where it’s **impossible** to say each D’s act caused the injury. Doesn’t include P’s inability to meet BOP, scientific uncertainty here, etc. (Would apply in *Cook v Lewis* situation!)

### Multiple Causes

Divisible injuries – can be split into separate causes eg injury A caused by person A, injury B caused by person B

Indivisible injuries – can’t neatly separate eg impossible to ascertain which tortfeasor was but-for cause (or logical reason for joint liab)

|  |  |
| --- | --- |
| ***Joint tortfeasors*** | Tortfeasor liable for all torts and resulting injuries.  *Cook v Lewis*: three categories of joint tortfeasors –   1. Principal and agent 2. Master and servant 3. Joint ventures or concerted actions |
| ***Independent tortfeasors*** | Tortfeasor only liable for injuries they caused |

INDEPENDENT INSUFFICIENT CAUSES

* several factors combine and are necessary but no factor individually sufficient to cause loss on own.

**NOWLAN v BRUNSWICK CONSTRUCTION LTEE** (1975) –D negl in constructing P’s house, argued no damage but-for architect’s poor design – good design with poor workmanship would have prevented dmg but vice versa as well – both necessarily contributed to damage, indep insuff causes, so D fully liable (joint liability)

**ATHEY v LEONATI** (1996) –P had pre-existing back condition. Suffered back/neck injuries in 2 traffic crashes. Issue was whether later disc herniation after D-ordered exercise caused by injuries sustained in accidents or if attributable to appellant's pre-existing back problems – not necessary for P to est that D’s conduct *sole cause*. Single indivisible injury = apportionment of liability not appropriate. Disc herniation and consequences are one injury, so **any D found to have negligently caused/contributed to it** will be fully liable.

Thin skull rule: but-for accident, injury would not have occurred (D liable for “victim as you find them”)

Crumbling skull doctrine: where pre-existing condition inherent in P’s “original position”, can consider in determining liability (would P have experienced effects/consequences anyway?) Not used here bc herniation is a distinct injury, no evidence it would have happened w/o the accident.

If necessary to have both the accidents AND the pre-existing back condition for herniation, causation proven and both Ds fully liable.

INDEPENDENT SUFFICIENT CAUSES

**LAMBTON v MELLISH** (1894) –2 Ds each used organs which became subj of injunction, one D’s organ was smaller – each D “added his quantum” until whole constituted tort. Ds responsible for noise as a whole

* P can sue either or both – both were cause-in-fact of the injury.

PARALLEL OR OVERLAPPING INJURIES

* P’s subsequent fate has no impact on original TF’s liability eg D pays for 20 yrs future care and P dies 3 yrs later
* Quantum of damages may be reduced to reflect P’s pre-existing injuries or disabilities
* Where P suffers independent successive parallel injury prior to trial on first injury, court may take account

**PENNER v MITCHELL** (1978) –M got loss of income for 13 mo, wouldn’t have worked for 3/13 anyway due to heart condition – reduce, shouldn’t give dmgs for costs that would have been incurred even w/o tortious injury.

DEVALUING P’s LOSS

**DILLON v TWIN STATE GAS & ELEC CO** (1932) –P fell over bridge, electrocuted by wire on way down – only give damages for brief moment btwn touching wire (D’s negligence) and hitting ground (inevitable death)

## Remoteness

**Was the loss suffered reasonably foreseeable, or was it too remote to warrant recovery?**

**Remoteness: “legal causation”**

1. **Foreseeability test** – D only liable for reasonably foreseeable consequences of negligence (*Wagon Mound*)
   1. Based on type of injury, not extent (*Hughes, Smith*)
   2. If psychiatric harm, consider “ordinary fortitude”, not mental thin skull rule (*Mustapha*)
2. **Intervening acts?** *May find that subsequent act “severed” chain of causation:*
   1. Can original TFer reasonably foresee kind of intervening act? (*Bradford*) – if yes, may be liable (*Price*)

FORESEEABILITY TEST (replaced earlier *directness* test)

**WAGON MOUND No 1** (1961) –oil spilled into harbor, over day it carried over to wharf where welders working; molten metal fell, igniting rag, which either ignited oil or oil-soaked pilings of wharf, causing damage – court held that even though crew careless and breached DoC, resulting harm/conseq suffered by P was not foreseeable by a reasonable person and thus too remote to permit recovery. **D only liable for reasonably foreseeable consequences of their negligence.**

* Analysis considers *type or kind* of injury rather than *manner of the accident*

**HUGHES v LORD ADVOCATE** (1963) –D’s employees left paraffin lamp and open manhole unattended, boy knocked lamp into manhole, paraffin caused explosion, boy fell in and was burned – P’s burns foreseeable type of injury from lamp; exact manner of accident in which harm occurred doesn’t matter. D liable.

* Thin skull rule can apply: despite *extent* of injury, D still liable if *type of injury* foreseeable

**SMITH v LEECH BRAIN & CO** (1962) –P burned on doing galvanizing work; burn treated but later diag w cancer, had pre-malignant condition that burn promo’d cancer in, died – Ds liable anyway; could reasonably foresee type of injury, the burn, despite not being reasonably foreseeable that P would get cancer and die.

PROBABILITY v POSSIBILITY OF INJURY

**WAGON MOUND No 2** (1967) –same as #1 except Ps were owners of 2 boats dmged in fire – evidence that officers knew oil was difficult but not impossible to light on fire. Person is negligent if they don’t take steps to eliminate a risk that they know or ought to know is a real risk (one that would occur to mind of reasonable person in same circs and which he wouldn’t brush aside as far-fetched) and not a mere possibility. Ds liable.

FORESEEABILITY AND THE CAUSATION CHAIN

**ASSINIBOINE SOUTH SCHOOL DIVISION v GREATER WINNIPEG GAS CO** (1971) –toboggan > snowbank > gas-riser pipe > gas escaped > entered boiler room > reached expl mixture and ignited > expl and fire, dmg to school – court examined whether each step in causation chain reasonably foreseeable, not whether D could directly contemplate resulting damage from initial conduct. (Maybe going back to directness approach…)

FORESEEABILITY OF PSYCHIATRIC HARM

* *Mustapha* – in contemplating whether type of injury reasonably foreseeable, will have in mind a P of “ordinary fortitude”. If person suffers psychiatric injury due to “eggshell personality”, no liability bc injury is unforeseeable

### Intervening Causes

Historically, courts distinguished between 3 kinds:

1. Naturally occurring subsequent acts 🡪 provided intervening act not too unusual, wouldn’t break chain
2. Negligent 3rd party subsequent acts 🡪 may break chain of causation
3. Intentional, wrongful subsequent acts 🡪 generally will break chain bc shouldn’t foresee wrongful acts

Current test: **was the loss created by the intervening act within the scope of the risk created by the original TFer?**

**PRICE v MILAWSKI** (1977) –GP xrayed foot not ankle, told P ankle only sprained not broken > went to orthopaedic surgeon, didn’t check xrays so diagnosed as strained ligament > a month later new orthopaedic surgeon discovered fractured ankle. P suffered permanent disabilities – was reasonably foreseeable that xrays to be relied upon by subsequent drs; orthopaedic surgeon’s negligence didn’t sever but compounded GP’s negligence, so original TFer still liable

**BRADFORD v KANELLOS** (1973) –fire in grill at restaurant discharged CO2 to extinguish, no damage done to grill, but extinguisher made popping noise > patron shouted that gas escaping and explosion would happen > ppl ran from restaurant > appellant wife pushed/fell from seat and injured – negl was permitting grease to accumulate on grill; not fair to conclude that patron yelling that there was gas leak was reasonably foreseeable

*Dissent*: would find D liable on basis of foreseeability of each event in chain

* *Jolley v Sutton London BC*– P’s own carelessness (contrib negl) generally doesn’t sever causation chain
* Courts generally take broad approach to intervening causes, eg, if P sustains injuries during recovery D may be held liable for entire loss (*Block v Martin*, slight fracture caused by D > entire fracture when P slipped 6 mo later)

## ACTUAL LOSS

**Was the loss in question recognized by the courts as recoverable?**

# NEGLIGENCE: DEFENCES

**Is there a defence available to D?** – BOP on D; may be able to rely on more than one defence

### Contributory Negligence

**Basic rule**: P will be held to have contributory negligence if it can be shown their conduct carelessly contributed to the harm suffered as a result of D’s negligence. D must show:

1. P didn’t take **reasonable care** of himself (look to context – emergency? Customary practice/precautions?)

**HEENEY v BEST** (1999) –P’s chickens asphyxiated when D negl cut off power, P’s alarm system not plugged in, arg that custom is not to have alarm system anyway – found contrib negl. Suggests that if P takes precautionary measures, like installing alarm, may impact def of “reasonable care”; P careless wrt maintenance of those precautionary measures might be contributorily negligent.

**WALLS v MUSSENS LTD** (1969) –fire caused by negl of D. Attendants tried to smother fire w snow. P heard about fire, tried to tow away vehicle, all forgot about 5 fire extinguishers. Service station destroyed – “agony of the moment” rule relaxes SoC req of individuals faced with an emergency: **did P do something an ordinarily prudent man might have done under stress of emergency**? Here yes, didn’t reduce damages for finding P contributorily negligent

1. Lack of care **contributed to the injury**
   * not necessary to be only cause, but must have been proximate or effective cause

**GAGNON v BEAULIEU** (1977) –P believed seatbelts caused greater injury. In collision, thrown forward and struck windshield – expert evidence established that not wearing seatbelt would result in more severe injuries, particularly in type of injuries P sustained; shown by D, so contributory negligence made out.

#### Apportionment of Risk

Once D establishes defence, court must decide how to apportion damages. Question considered: **how significant was that conduct in creating or contributing to the loss suffered by P**? Deg of fault decided on facts of case

*Negligence Act*: s 1 – based on fault; where unsure, split liability evenly. S 2 – apport expressed as percentage. S 3 – liability for legal costs also apportioned. S 4 – where 2+ Ds found at fault, joint and severable liability possible, and indemnity between parties. S 8 – express abolition of “last chance” doctrine

**MORTIMER v CAMERON** (1994) –horseplay > tripped backwards over door, fell 10ft thru wall, quadriplegic – accident beyond scope of risk of horseplay, reasonable assumption that wall would hold. City 40% liable (noncompliance w Building Code), apt corp 60% liable (failed to conduct reasonable inspection)

### Other Defences

#### Voluntary Assumption of Risk

**Basic rule**: *volenti non fit injuria,* to one who is willing, no harm is done (can occur in event of express or implied consent)

D must prove that:

1. P **knew of and understood** the risk he was incurring, AND
2. P **voluntarily assumed** the risk

**DUBE v LABAR** (1986) –P and D drunk, got in car to go to bar, drank more, found women, drove 50-60miles more, at some point picked up hitchhikers, D veered car to right and P grabbed wheel to correct; car overturned on embankment causing injury to P – did P give express or implied consent to accept risk? Here, P contrib negl and vol assumed risk bc clear that knew legal and physical risk and in essence bargained away right to sue for injuries incurred as result of negl on D’s part.

*\*\*generally inapplicable in most drunken-passenger cases bc reqs kind of awareness rarely present on such facts.*

* + Generally limited to narrow scope of some sporting activities
    - *Hayter v Bezanson* – P didn’t consent to risks in D’s unusual way of hitting golf ball. Conduct can fall outside normal risks of sport as played properly.

#### Participation in Criminal or Immoral Act

**Basic rule**: *ex turpi causa non oritur actio*, from a dishonourable cause an action does not rise

D must prove that:

1. P **stands to profit** from his criminal behavior, OR
2. Compensation would amount to **avoidance of criminal sanction**
   * *Beljanski (Guardian ad litem of) v Smithwick* (2006) - dependent children of career criminal brought claim when father killed negligently. Court used *ex turpi causa* in refusing to base award on any illegal income deceased would have made thru illegal activities

**HALL v HEBERT** (1993) –P and D drunk, D stalled car, agreed to let P drive, P lost control and flipped car. P injured and sued D for letting him drive drunk – *ex turpi causa* frustrates complete cause of action. Responsibility for wrong suspended only because concern for the integrity of the legal system trumps the concern that D be responsible. Applies properly where P seeks to profit from illegal conduct (not wholly applicable here)

#### Inevitable Accident

**Basic rule:** if accident inevitable, D won’t be held liable

**RINTOUL v X-RAY AND RADIUM INDUST. LTD** (1956) –O driving car owned by respondent owner. Brakes worked properly at least 6 times before, but when tried to break after light change, didn’t work. Hand breaks reduced speed of car but still struck back of appellant’s car – P relying on defence of inevitable accident must show that something happened **over which he had no control** that could not have been prevented by the **exercise of reasonable care.** Here, didn’t prove w evidence that 1) failure couldn’t have been prevented, 2) that assuming failure occurred w/o negl, collision couldn’t have been avoided by exercise of reasonable care

* Court prefers “external” factors of inevitable accident (eg icy roads) over “internal” factors
  + *Barron v Barron* (2003) – D drinking coffee and had choking fit, crashed. Court rejected defence bc D should have refrained from drinking coffee while driving since had such choking fits before

# STRICT AND VICARIOUS LIABILITY

### Strict Liability

#### Strict Liability for Escape of Dangerous Substances

**Basic rule** from *Rylands v Fletcher*: “the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequences of its escape”

ELEMENTS

1. **Non-natural use of land**: P must show that use was DANGEROUS, EXTRAORDINARY, and of NO GENERAL BENEFIT to the community

**GERTSEN v MUNICIPALITY OF METRO TORONTO** (1973) –TO dumped organic waste into landfill in York, methane escaped into P’s garage and exploded when started car – consider: degree of danger of land use; utility/normality of land use; circumstances of time/space; purpose of D in non-natural use of land. Tho organic waste, in urban area ravine, landfill was selfish opp for TO to get rid of waste and York to level land

* *Smith v Inco Ltd* (2010): nickel refinery operating in heavily industrialized part of city not non-natural

1. **Escape of something likely to cause mischief**:

**READ v J LYONS & CO** (1947) –shell filling factory, explosion – “escape” = from a place which D has occupation of, or control over, to somewhere OUTSIDE his occupation or control (if P injured ON D’s land, can’t claim under rule in *Rylands*)

1. **Damage** (NOT ACTIONABLE PER SE)

#### Defences TO STRICT LIABILITY

DEFENCES TO THE RULE IN *RYLANDS* (Solomon 972-74)

1. **Consent**
   1. D who establishes that P implicitly or explicitly consented to the presence of the danger enjoys complete defence - court may imply consent from nature of legal or phys rel/circs.
2. **Common benefit**
   1. If source of danger maintained for common benefit of both P and D, liability not imposed. Eg *Carstairs v Taylor* (1871) - rain water collected in special box on roof, flowed through drains; rat made hole in box, water flowed into P's ground floor premises and damaged property. P's action dismissed bc water collected for mutual benefit of both
3. **Default of the Plaintiff**
   1. P can’t recover if: voluntarily and unreasonably encounters known danger; P's wanton, wilful, reckless misconduct materially increased probability of injury; abnormal sensitivity of P's property
4. **Act of God**
   1. Force of nature that arises w/o human intervention; must be so unexpected it couldn't have been reasonably foreseen and thus effects couldn't have been prevented
5. **Act of a stranger**
   1. If D proves escape was caused by stranger's deliberate and unforeseeable act (onus on D to show escape couldn't have been prevented through reasonable care)
6. **Statutory authority**
   1. Liability may be denied if D acted pursuant to statutory authority. If language *mandatory*, then in absence of negligence D won't be held liable for acts done pursuant; if language *permissive*, courts generally won't interpret it as authorizing D to violate rule

### Vicarious Liability

Three general categories: statutory vicarious liability; principal-agent; **employer-employee**

Several aspects of vicarious liability (Solomon 994-95):

* *Alternative liability*: vicarious liability doesn't relieve tortfeasor of responsibility
* *Right of indemnification*: if employer satisfies judgment under vicarious liability, generally has right to recover same amount from employee; primary burden falls on tortfeasor. BUT employment K or collective agreement may prevent employer from doing this, or may decide it would damage employee morale
* *Third party protection*: if exclusion clause that eliminated D's exposure to liability, protection of of clause may extend to D's employees - general rule is that this is limited to parties w privity (though employee exception in *LD v Kuehne*)
* *Vicarious and Personal Liability*: employer can be held personally liable for own tort as well, eg if employee was completely ill-suited to work environment and employer acted negligently in hiring this person

WHO IS AN EMPLOYEE?

**Basic rule**: someone under the **direct control and supervision** of the employer

*671122 Ontario Ltd v Sagaz Industries Canada Inc* (2001) - *Consider*: level of control employer has over activity; whether worker provides own equipment; whether worker hires own helpers; degree of financial risk assumed by worker; degree of responsibility for investment/management by worker; worker’s opportunity for profit in performance of activity

**BAZELEY v CURRY** (1999) – P sexually assaulted as child in residential care facility for emotionally troubled youths. Non-profit operator undertook BG check on perpetrator prior to hiring, and fired as soon as crim conduct discovered

**General test: employer can be held vicariously liable for tortious acts of employee but there must be a strong connection between the creation or enhancement of risk and the wrong that accrues from it**

Modified *Salmond* test – employers potentially vicariously liable for:

1. Employee acts authorized by the employer
2. Unauthorized acts so connected with authorized acts that they may be regarded as improper **modes** of doing an authorized act
   * Where employee acts in furtherance of employer’s aims (bc authority; doesn’t work for int torts)
   * Where employer creates situation of friction (recognizes that employer resp for creating risk)
   * Dishonest employees (based on fairness/policy considerations)

Consider subsidiary principles in determining where precedent inconclusive re whether vic liability should apply:

* Opportunity that enterprise afforded employee to abuse power
* Extent to which wrongful act may have furthered employer's aims
* Extent to which wrongful act related to friction, confrontation or intimacy inherent in employer's enterprise
* Extent of power conferred on employee re victim
* Vulnerability of potential victims to wrongful exercise of employee's power

# STRATEGIC LITIGATION AGAINST PUBLIC PARTICIPATION

#### 1. What are SLAPPs?

* Not meritorious – however, this is difficult to determine at the outset
* Aimed at ostensibly democratic actions eg circulating petitions, picketing, etc
* Usually the result doesn't really matter to the P
* Mostly brought by corps aiming to quiet protesters etc
  + Strategic use of legal arena to intimidate target and exhaust limited resources
  + Point is to deter defendants from their activities

**LUBICON LAKE NATION** – Daishowa continued logging on Lubicon Lake Cree Nation land despite saying they wouldn't; several NGOs took up the cause and contacted retailers regarding violation of agreement, as well as consumers, essentially encouraging a boycott of the paper company. All 50 stores contacted joined the boycott during the campaign. Daishowa filed a claim against 2 of these NGOs, incl number of torts:

* **Interference with contractual relations** – *Elements*: 1) D has knowledge of K; 2) D has intent to interfere w/ K by illegal means; 3) that interference causes economic harm to P
* **Intimidation** – *Elements*: 1) coercion; 2) by threats of unlawful action

Daishowa arguing that not free expression but economic message; TJ agrees that it has economic message but most effective part is picketing through speech - this is not illegal, so Daishowa can't succeed on first two torts

* **Conspiracy** – *Elements*: 1) two or more persons; 2) agree to act together in a planned, concerted fashion; 3) for a predominant purpose; 4) of causing economic harm to P; 5) harm in fact follows.

TJ finds that predominant purpose wasn't to cause economic harm but to inform members of public about the issue, so though this was stronger case than the above 2 it still failed.

* **Defamation** – *Elements*: 1) statement that is defamatory; 2) made reference to P; 3) was published or disseminated. Defences at time of case: 1) justification; 2) fair comment; 3) qualified privilege

TJ found this tort to succeed based on assertion that Daishowa's logging will "result in the cultural genocide of the Lubicon people" - but given that purpose was in public interest, NGOs found liable for only $1

Fact that only a dollar awarded, and an injunction only on using the word genocide, suggests that this is very much at borderline between SLAPP and meritorious tort case

Cost NGOs $400k in legal fees - for case that TJ is ultimately v sympathetic to

#### 2. How do you defend against them?

No way to defend against someone threatening lawsuit or actually suing you, but *BCSC Civil Rules of Procedure*:

9-6 (4) – can apply for judgment dismissing all or part of a claim

9-6 (5) – on hearing app, court can do so if satisfied there's no genuine issue for trial

But not always clear at outset whether there is a genuine issue for trial

* + - Judges will always err on side of precaution in preliminary hearing
    - SLAPPS generally worded very closely to legitimate torts claim

Even if you win at trial, costs awarded tend to only amount to half of reasonable legal costs

#### 3. Why are they a problem

Deep power imbalance between corporations and small NGOs/individuals; aimed at suppressing lawful public participation and robust democratic debate on matters of public interest; also a huge drain on our legal system -- collectively, these factors demonstrate that SLAPPs are a serious problem

#### 4. Possible legislative fixes

Effective anti-SLAPP mechanisms include:

* Making it easier for judges to identify SLAPPs
* Mitigate the costs of SLAPPs
* Disincentivizing companies from bringing SLAPPs in the first place
  + Communicates govt's disapproval of certain trends in litigation, inappropriate use of courts

Attempts to address SLAPPs in legislation:

* QC Civil Code protections
* ON legislation not yet in force
* BC’s late *Protection of Public Participation Act* – in force for less than a year but repealed:

4 (1) If a defendant against whom a proceeding is brought or maintained considers that the whole of the proceeding or any claim within the proceeding has been brought or is being maintained for **an improper purpose**, the defendant may, subject to subsection (2), bring an application for one or more of the following orders:

1 (2) A proceeding or claim is brought or maintained for **an improper purpose** if

(a) the plaintiff could have no reasonable expectation that the proceeding or claim will succeed at trial, and

(b) **a** principal purpose for bringing the proceeding or claim is

(i) to dissuade the defendant from engaging in public participation,

(ii) to dissuade other persons from engaging in public participation,

(iii) to divert the defendant's resources from public participation to the proceeding, or

(iv) to penalize the defendant for engaging in public participation.

(a) to dismiss the proceeding or claim, as the case may be;

(b) for reasonable costs and expenses;

(c) for punitive or exemplary damages against the plaintiff.

(2) If an application is brought under subsection (1),

(a) the applicant must set, as the date for the hearing of the application, a date that is

(i) not more than 60 days after the date on which the application is brought, and

(ii) not less than 120 days before the date scheduled for the trial of the proceeding, and

(b) all further applications, procedures or other steps in the proceeding are, unless the court otherwise orders, suspended until the application has been heard and decided.

(3) Nothing in subsection (2) (b) prevents the court from granting an injunction pending a determination of the rights under this Act of the parties to a proceeding.

🡪 allows D to bring application before court to dismiss SLAPP if brought for improper purpose; would result in dismissal of proceeding/claim, reasonable costs/expenses, and/or punitive/exemplary damages against P. Allows for three routes to dismissal or remedy:

1. If BOP met, case dismissed and J has discretion to award all costs paid + punitive damages
2. If realistic possibility, BOP shifts to P to prove at trial it wasn't an improper purpose at trial
   * J can make interim costs order, req P to put aside enough money for all expenses plus damages to cover if this is the case; possibility of all costs paid and punitive damages at end of trial
   * *Operates as financial disincentive for P to bring SLAPP or drag out the proceedings*
3. If P drops the case or D decides to settle, required court supervision of actions
   * *Addresses power imbalance between parties so that settlement is to be fair*

**TRANS MOUNTAIN PIPELINE** – NEB ordered access to Burnaby Mountain to make geological assessments. A number of protesters convened at 3 different borehole sites on Burnaby Mountain. Physically blocked worker access to sites; shouted slogans and threats; yelled with a bullhorn at one site. – TMX brought tort alleging trespass; nuisance; assault; intimidation; intentional interference with contractual relations; conspiracy. *All but one settled out of court – decision forthcoming*

*Trans Mountain Pipeline v Gold* motion for injunction – Ds tried to argue against there being a serious legal issue to be tried to stop award of injunction – Court finds that P has est strong *prima facie* case wrt at least some of the torts 1) because aggression, language, and physical blocking would lead to conclusion of assault and intimidation; 2) circumstances appear to show concerted effort to thwart P from performing duties. Also, P has lawful authority to access land, despite property interest being unclear. Court must perform duty of intervening to protect private interests when there’s strong *prima facie* case of liability for tortious behaviour

**TASEKO MINES LTD v WESTERN CANADA WILDERNESS COMMITTEE** (2016)– **strongest SLAPP ruling yet** – Taseko claims damages (punitive, injunctive relief, special costs) for defamation by Wilderness Committee arising from internet articles posted re: mine Taseko wishes to construct. Wilderness Committee argues defences of fair comment and justification, and seek special costs on basis that Taseko's claim is a SLAPP.

Taseko says WC’s articles conveyed "natural and ordinary inferential meanings" that they had callous disregard for environment, etc, from articles encouraging readers to be involved in public discourse and use WC's letter writing tool to respond to proposal still to be approved by fed govt. TJ scathing:

* Reasonable ordinary person reading the articles would understand Taseko to be submitting proposal for open pit mine which would be subject to environmental review and vigorous public debate -- articles don't suggest that Taseko not law-abiding or didn't have right to propose and seek approval from fed govt
* Reasonable and ordinary member of public “neither sheep nor parrot” - letter writing tool served to encourage engagement in public discourse but didn't prevent public from expressing own opinion
* Reasonable and ordinary person would view statements as comment as part of debate

**HOLDING**: none of the articles are defamatory, not in ref to P (rather to their project) and, in any case, defence of fair comment applies. Continuing to seek punitive dmgs and special costs attracts Court's rebuke; such allegations should be withdrawn where it's apparent a proper basis doesn't exist for the allegations. Seeking punitive damages an ec threat; may serve to silence critics. Court awards special costs to Ds.

# OBJECTIVES AND FUNCTIONS OF TORT LAW

#### FUNCTIONAL APPROACH

1. **COMPENSATION** – tort law should aim to restore P to position he would have been in if tort hadn’t been committed; as result, compensation tailored to particular loss P suffers
2. **PUNISHMENT** – tort law as way to express society’s disapproval of the conduct of wrongdoers who cause harm to other citizens; award of damages designed to compensate P but also acts as sanction on D
3. **DETERRENCE** – tort law should influence conduct of citizens with view to promoting certain social goals
   * **SPECIFIC** – law aims at changing behavior of D who is subject of tort action
   * **GENERAL** – law aims to change behavior of class of potential Ds, to prevent future harm
   * **MARKET** – law aims to allocate cost of accidents, eg, manufacturers incorporating potential liability costs within market price

* *Deterrence is forward-looking in comparison to punishment, which is backward-looking*

1. **JUSTICE** – corrective justice particularly, concerned with annulling “wrongful gains” and compensating for “wrongful losses”

#### RIGHTS-BASED APPROACH

Tends to be **normative**, ie focused on what tort law SHOULD do. Characteristics:

* **Non-instrumental** – tort law doesn’t exist just to promote external goals like compensation
* **Structuralist** – rights are integral and at foundation of tort law
* **Formalist** – existence/enforcement of rights (legal rules) should determine outcome