Tort Law Prof Arbel Fall 2016

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# Comparison of Criminal, Tort and Contract Law

|  |  |  |
| --- | --- | --- |
| **Criminal Law** | **Contract** | **Tort Law** |
| Crime | Contractual obligations | Wrongful Act - Harm |
| Public | Private individuals/entities | Private – 2 individuals |
| Crown v Accused | Plaintiff v Defendant | Plaintiff v Defendant |
| Punishment - fine prison | Damages – monetary/equity | Damages – general / special |
| Guilt | Liability | Liability |
| Beyond a reasonable doubt | Balance of probabilities | Balance of probabilities  |
| Statutes and common law | Common law | Common law |
| Duty owed to State | Duty of contract obligations owed to parties  | Duty of care owed to all in society |

# Underlying Values of Torts Solomon

Compensation – put wronged party in position they would have been in if harm had not occurred (compensatory damages)

Appeasement and Vindication – vindicate the P’s position and condemn the D’s conduct (nominal damages)

Punishment – for morally reprehensible actions, looks backwards at wrong that occured (punitive & aggravated damages)

Deterrence – looks forward, discourages reprehensible conduct (specific and general damages)

# Principles of Liability

There can’t be a claim in tort absent a legal wrong *Moreland-Jones v Taerk* 2014 ONSC 3061

Absolute Liability

* Proscribed behaviour causes loss
* No negligence / intent needed

Strict Liability

* Similar to absolute
* Cause of action does not require proof of breached obligation (ie defective product that caused harm – only harm needs to be proven)
* Defendant can raise defences

Negligence

* Failure to take reasonable care to prevent foreseeable harm to other person

No Liability

* Some harms not recognized by torts

# Intentional Torts

**Volition / voluntariness**

* Volition present if defendant exercised voluntary control over his/her physical actions, directed by conscious mind. Smith v Stone (1647) KB 🡪“because the defendant was not acting voluntarily he could not be found liable in trespass”

**Intent**

* Desire to do the act, rather than desire to bring about consequence of action
* Motive (reason for doing so) not considered – not element of a tort action. P must prove D’s intent only. *Gilbert v Stone* (1648) KB
* If P proves harm caused directly, D has burden to disprove intent Solomon
* Mistake is not relevant in establishing the elements of a cause of action in intentional tort. In tort, a mistake occurs when the defendant intends the consequences of their acts, but those consequences have a different factual or legal significance than contemplated.
	+ Eg: the defendants are out hunting for wolves. They mistakenly shoot the plaintiff’s dog, believing the dog to be a wolf. The defendants can still be held for the damage caused by their mistake (*Ranson v Kiter, 1889, QB)*

Imputed intent

* The concept of intent also encompasses situations in which the defendant did not desire the consequences to occur, but they were certain or substantially certain to result from his or her act.

Transferred intent

* Doctrine to impose liability where defendant intends to commit tort against one person but unintentionally commits tort against other party.
	+ No liability for pure accident *Bettel v Yim*
	+ Need capacity to prove intent
	+ Mistake not relevant for intent *Hodgkindon v Martin*

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| * **Burden of proof**
 | * **BATTERY**
 | * **ASSAULTrarely used**
 | * **FALSE IMPRISONMENT**
 | * **MALICIOUS PROSECUTION**
 | * **TRESPASS**
 |
|  | * Trespass on the Person
 | * Trespass on Case
 | * Trespass on Property
 |
| * P
 | * Direct
 | * Direct
 | * Direct
 | * Indirect interference
 | * Direct – personally done, not be natural cause
 |
| * P
 | * Interferences (physical or threat of)
 | * Immediate Apprehension
 | * Total restraint (against will, no reasonable route of escape)
* False arrest:
* Imprisonment occurs through deployment of legal authority
 | * Trial - initiated by D- terminates for P
 | * Physical Interference – presence of person or thing on your land
 |
| * P
 | * Harm / offence
 | * Harm / offence
 | * No reasonable or probable grounds – both subjective and objective
 | * Land in possession – no requirement of ownership for trespass
 |
| * D
 | * Intent
 | * Intent
 | * Intent
 | * Malice
 | * Intent
 |
|  | * Actionable per se
 | * Actionable per se
 | * Actionable per se
 | * NOT actionable per se
* Damage
 | * Actionable per se
 |
| * **Defences**
 | * Consent
* Self Defense
* Provocation
* Discipline
* Duress
* Necessity
* Legal Authority
 | * Consent
* Self Defense
* Provocation
* Discipline
* Duress
* Necessity
* Legal Authority
 | * Legal Authority
* Consent
 |  |

# Battery

1. **Concerned with protecting and preserving dignity / integrity of person**
2. Every person’s body is inviolate *Non Marine Underwriters*
3. **Threat to person’s autonomy**
4. **Actionable *per se* – does not require proof of harm for action** *Bettel v. Yim*
5. **Threshold for what is considered battery very low**
6. **Wide range of direct physical interferences prohibited - including what the person is wearing, carrying, riding on *Morgan v Loyacomo 1941 p 61***
7. **Does NOT require intent to harm – just intent of physical contact** *Bettel v. Yim*

**Elements of Battery – *Bettel v Yim***

1. Directness (poison is indirect)
2. Interference – physical contact, can be trivial or severe, need not produce harm
3. Harmful / Socially Offensive
* Harm (needs consequence) OR dignity offended
* Not harm required - Ex. Spitting (*Alcorn v Mitchell*)
* Cutting hair (*Forde v Skinner*) – bodily contact not required
* P need not be aware of harm when occurring (kissing sleeping girl)
1. Intent – desire to do actions that trigger consequences

**Defences to tort of battery – *Bettel v Yim***

* Consent
* Plaintiff NOT required to prove they did not consent
* Defendant can prove consent as affirmative defence
* Self-defence
* Defence of property
* Necessity
* Legal authority

**Foreseeability of Consequences - *Bettel v Yim***

* The doctrine of foreseeability as found in the law of negligence DOES NOT apply
* It doesn’t matter that the magnitude of the interference exceeds the intended offence
* You don’t have to be able to foresee harm or offensiveness, you just need to intend the physical contact

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| **Bettel v Yim (1978) Ont Co Court** |
| **Facts**: D shakes kid in store, unintentionally hits his head, breaking P’s nose. **Issue**: Can intentional wrongdoer be held liable for unintended consequence? YES**Ratio**: A person is responsible for all damage, foreseeable or not, that arises from their intentional, direct interference on a person.**Legal Principles**:* **Foreseeability**
	+ If physical contract was intended, the fact that its magnitude exceeded all reasonable or intended expectation should make no difference
	+ Foreseeability does not apply to intentional torts (only negligence)
* **Definition of battery**
	+ All 4 elements must be included – direct interference that causes harm or offence that was intentional
	+ Actionable *per se*
* **Burden of proof**
	+ P must prove direct intentional interference, D must prove **lack** of intent
	+ Legal injury is complete without actual physical harm – actionable per se
 |

# Assault

* **Intentional creation in the mind of another of a reasonable apprehension of immediate physical contact** *Solomon*
* **Any direct and intentional act that causes a person to apprehend immediate harmful or offensive bodily contact** *Osborne text*

* **Does not have to be actual contact, can be threat of physical contact *Police v Greaves***
* **Circumstances have to be such that reasonable belief the threat could actually be carried out *Police v Greaves***
* **Words + Something (violent history, holding a weapon) *Holcombe v Witaker***
* **Designed to preserve psychological integrity (battery- physical integrity)**
* **Trespass on the person - intent of physical contact**
* **Actionable *per se* – does not require proof of harm for action**
* **Similar to battery, lines are blurred *Bettel v Yim***
* Threat of immediate harm with ability to do so is enough to prove assault ***Police v Greaves***

## ****Elements of Assault****

* 1. Directness
	2. Immediate apprehension
	3. Harm/offence
	4. Intent

P must prove first 3 elements, D must disprove intent *Bettel v. Yim*

## ****Defences to tort of assault****

* Consent
	+ Plaintiff NOT required to prove they did not consent
	+ Defendant can prove consent as affirmative defence
* Self-defence
* Defence of property
* Necessity
* Legal authority

# False Imprisonment

**An individual’s movement is intentionally restrained with complete detention by physical barriers or threat of force** *St Jacques, Bird v Jones*

*“The gist of the action of false imprisonment is the mere imprisonment; the P need not prove that the imprisonment was unlawful or malicious, but establishes a prima facie case if he proves that he was imprisoned by the defendant.” Frey*

## ****Elements of False Imprisonment**** ***Bird v Jones***

* 1. Directness
	2. Intent
	3. Total restraint
* **No minimum time of restraint *Campbell v SS Kresge, Bird v. Jones***
* Requires a boundary, movable or fixed, that cannot be passed *Bird v. Jones*
* Must be **total** restraint, not partial *Bird v. Jones*
* **Individuals movement is intentionally restrained – by barrier or mental suasion – with complete detention**
* Must be **intentional** *Bird v. Jones*
* **Can be acted on by third party, person ordering restraint is liable**
* **Physical restraint by barriers or threat, or mental restraint by authority** *Bird*
* Doesn’t need force, can be threat of force *Campbell v SS Kresge*
* **Does not require awareness of imprisonment when it *occurred J(MI) v Grieve 1996* BCSC**
* **Must not have reasonable route of escape** *Bird v. Jones*

 Plaintiff must prove all 3 elements *Bird v. Jones*

**Actionable *per se* – does not require proof of harm for action**

## ****False Arrest****

* Requires all elements of FI
* False arrest is imprisonment by a peace officer s 2 of CC - anyone empowered under statute exerting legal authority falsely – mayor, warden, sherrif, JP, correctional officer, police officer, CBSA officer, pilot, Cdn Forces
* Falsely detained under implicit or explicit assertion of legal authority *Campbell*
* P going with is not consent, it is fear of consequences from authority if refuse to go *Campbell*
* If you consent to confinement through contract or otherwise you cannot claim false imprisonment or false arrest *Herd v Weardale*

## ****Defences to False Imprisonment****

* Legal Authority - D must prove *Frey v Fedoruk*
* Consent

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| Bird v Jones 1845 QB Definition of false imprisonment |
| **Facts**: P trying to pass through highway, obstructed, but at liberty to go in other directions**Ratio**: NOT FI b/c only partial obstruction – must have total restraint**Legal principles**:* Must be total restraint
* Must be a boundary of imprisonment (either physical or by threat of force or power)
* Can be “for however short a time”
 |
| Campbell v SS Kresge 1976 NSSC TD False Arrest  |
| **Facts**: **Off-duty police officer** working as security officer. P shopping in K-mart, left cart, stopped in parking lot by security officer who makes her return to store – felt she had no choice, D said didn’t want to cause embarrassment**Issue**: Did the security guard’s actions constitute false imprisonment? YES**Legal Principles:*** Total restraint not necessary, can be threat of legal authority
* Short period of time, doesn’t matter – still FI
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| Frey v Fedoruk 1950 SCCImprisonment must be legally justifiable  |
| * **Facts**:
	+ Peeping tom case - Mother saw someone looking in window, son chased P with knife and shouted, took back to his house and called police, police arrested him
	+ Trial judge dismissed action for false imprisonment and malicious prosecution. Convicted P for “said offence” (no actual offence under CC)
	+ CA quashed conviction, no offence under CC
	+ CA affirmed trial judge, found P guilty of offence *at common law*, D were justified in arresting without a warrant.
* **Issue**
	+ Can the Ps conduct constitute a criminal offence and if so, were Ds justified in arresting P without warrant
* **Ratio**
	+ **Nobody should be convicted of a crime unless it is an offence listed in the CC or another offence creating statute**
	+ **Imprisonment must be legally justifiable and proven by D.**
	+ **Action of false imprisonment is the mere imprisonment** – P doesn’t need to prove imprisonment was unlawful or malicious, but establishes prima facie case if proves he was imprisoned - onus lies on the defendant of proving a justification
 |

# False Imprisonment in Prisons (solitary confinement / administrative segregation)

## “[Solitary confinement is] the most individually destructive, psychologically crippling and socially alienating experience that could conceivably exist within the borders of the country” – Prof Michael Jackson, Allard Law

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| R v Hill (1997, BCCA) |
| * **Facts:** P placed in SC – but with another inmate not solitary - for 19 days per s 38.1 CCRR after riot b/c he had suasion in prison population (a ‘wheel’)
* **Trial** judge – P claims dismissed - found seg order was reasonable as per s 38.1 – placed in SC for security and order of institution, and released from once no evidence to link P to riot. Dismissed P claim of breach of s. 7 Charter rights. Dismissed P claim for false imprisonment, as already a prison therefore cannot sue for interference with his ‘residual liberty’.
* **Causes of action**: Charter rights breached, false imprisonment, cruel and unusual punishment
* **Issue**: Was the decision to place P in seg valid and reasonable pursuant to s. 38.1 of CCRR? NO
* **Ratio**: Breach of duty to review case establishes false imprisonment.
* Seg or SC places him in a ‘prison within a prison’ and deprives him of a legal residual liberty.
* **Reasons**: Terms of review not done properly - Warden had the authority to put him in segregation, however should hae reviewed the seg order within 7 days which was not done. Therefore for 11 days after 7 days the authorities were in breach of their duty to review P’s case. Tort of FI applies – direct intentional complete detention of prisoner.
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| Saint-Jacques v. Canada (TB case), New Brunswick trial division 1991 |
| * **Facts**: P had transferred from another facility, that facility had outbreak of TB. P refused to take TB test, put in SC for 80 days total for ‘medical quarantine’ although no evidence he was in contact with anyone with TB and no ‘quarantine’ order in effect.
* **Issue**:
	+ Was this false imprisonment? YES - direct intentional total restraint
	+ Did they have legal authority? Couldn’t conclusively show
	+ Said decision made by warden – arbitrary
* **Ratio**: “**The gist of the action of false imprisonment is the mere imprisonment; the P need not prove that the imprisonment was unlawful or malicious, but establishes a prima facie case if he proves that he was imprisoned by the defendant.”** *Frey v Fedoruk* 1950 SCR 517
* **Defense of legal authority required elements:**
	+ - Appropriate decision of authority YES
		- Legally privileged YES
		- Discharged duty correctly NO
 |

# **Malicious Prosecution**

**To protect from indirect interference resulting from improper initiation of criminal proceedings against an individual**

* **Not actionable per se** – P must prove harm
* **Purpose: not bring administration of justice into disrepute**
* Trespass on the case, improper purpose (malice) akin to fraud, **criminal** case
* Indirect interferences – wrongful criminal proceedings, wrongful conviction
* Injuries to person’s dignity or reputation as a result of proceedings
* **Abuse of process** – misuse of proceeding in **civil** case
	+ Defendant brought civil action for some other purpose
	+ Defendant undertook act other than litigation to further improper purpose
	+ Plaintiff suffered a loss

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| **4 Elements of Malicious Prosecution (*Nelles v Ontario*)** |
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| 1. Proceeding initiated by D
2. Proceeding terminates in favour of P
3. No reasonable and probable cause
* Subjective – actual belief of prosecutor
* Objective – reasonable to reasonable man
1. Malice on part of D
 | #1 and 2 easy to prove# 3 and 4 hard to prove, standard of proof very high |

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| Nelles v Ontario 1989 SCCElements of Malicious Prosecution |
| **Facts**: P nurse charged with 1st degree murder of 4 babies in hospital, charges dropped lack of evidence, reputation ruined**.****Legal Principles:** **Limits to immunity of Crown prosecutors** **– public policy** Absolute immunity would drop public confidence in legal system Charter rights violations need protection by Courts Built in deterrent to flood of cases – burden of proof very high**Reasonable and probable cause** Objective component – reasonable person wouldn’t think guilty Subjective component – defendant didn’t actually believe plaintiff guilty High threshold – don’t want to have chilling effect (public policy protect image of legal system) |

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| Miazga v Kvello Estate 2009 SCCObjective belief when against prosecutors |
| **Facts**: Prosecutor thought that the kids were lying re sexual abuse, but proceeded to pursue parents’ case, parents found not guilty**Legal Principles:*** Softened requirements of subjective belief– objective belief of reasonable cause more important *when against prosecutors*
* Gives additional level of protection to public prosecutors
 |

# Sexual Battery

* No independent tort of sexual battery
* Battery of sexual nature applies to regular context of battery, however consent is applied differently here because of the particular circumstances of sexual battery
* General everyday contact – is consent required?
* We cannot sue in battery for:
	+ **Implied consent** – ie walking into a crowd, you’d expect to be jostled so you’ve consented by walking in – but consent cannot be implied in sexual activity *Scalera*
	+ Physical contact generally acceptable in everyday life – and sexual activity is not one of these *Scalera*

## Should we apply an independent tort of sexual battery? (USE AS FORMAT FOR ANY NEW TORT)

**YES –**

* **Access to Justice -** Could lead to a new pool of tort claims, encourage more victims to bring cases. Currently underreported, systemic barriers from women’s claims for women’s claims being treated with respect (rape mythology, evidence lost, credibility challenges)
* **Access to Compensation -** More women get compensation and recognition of harms they experienced
* **New developments in case law** – To a state that it becomes easier to substantiate sexual violence claims
* **Better address deterrence** - By naming and conceptualizing the offence might cause a potential perpetrator to stop and think first and justice
* **Clear rules developed through specific tort -** Too many discordant forms of battery cause battery hard to define and pin down, gives defense too many outs, loses the impact of battery as a violation of personal integrity, physical autonomy, protection of the person’s body.
* **Different standard of consent applied** – sexual battery constructive consent is objective (*Scalera*) – battery general constructive consent is more subjective (what the D honestly believed in the circumstances).
* **Value in naming actual harm** - Naming sexual violence as sexual violence - different than other types of violence, wrong not to account for gender imbalance and fundamentally sexual in nature.

**NO –**

* **Labels victims unnecessarily -** Identifying sexual battery risks reinforcing paradigms of victimhood, labels victim, can cause trauma. Hard to bring claims forward - emotional, public discussion of intimate issues.
* **Not fair to accused who believed consent given** - Could put an undue burden on defendants who genuinely honestly and in good faith, believe that they had consent, despite a mistaken belief.
* **Covered by existing torts** – Victims have ways to access compensation for harms already, no need to create new systems to do the same thing
* **Easier for victims to use other torts** – No public testimony, don’t have to tell sexual parts through other torts

## Constructive consent objective not subjective in sexual battery *Non-Marine Underwriters*, *Scalera*

**The Supreme Court of Canada ruled that in cases involving sexual battery, the defence of constructed consent must be assessed on an objective basis, not a subjective basis. Do you agree? Why or why not?**

**Yes** –

* Objective standard moves away from he said she said, means victim doesn’t have to take stand and be revictimized, removes burden from victim, applies standards of reasonableness
* Moving away from subjective standards moves us away from conceptions of consent that might not be reflective of people’s actual experiences.

**No** –

* Reasonableness might be restrictive or not apply to the facts of the case “old white guy judge” might have a different standard of reasonable conduct
* Shame as a profound impact on person long term. Impacts extent of damages before court. Norberg

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| --- |
| Norberg v Wynrib [1992] 2 SCR 226 CONSENT - EXPLOITATION |
| **Facts**: * Woman sought Rx pain killers, doctor aware of her addiction. Did not refer her for treatment. She got meds from other doctors or on the street. Doctor offered trade of drugs and prescriptions for sex. She did not want to provide sexual favours – initially refused, left office, sought drugs elsewhere, initially drugs would be given prior to sex, then she acquiesced in order to get drugs.

**Legal history:*** BCSC – by submitting to advances she did consent
* BCCA – her actions were sufficient to imply consent in the circumstances
* SCC – Difference between **consent** and **acquiescence**. Majority found action in tort of battery (3 of 6), 1 strong dissent (L’Heureux Dube), 1 dissent that has not stood test of time

**Elements** – Intent – direct interference – intent to engage in sexual contact**Consent:*** Defendant must prove P consented
* Requires a presumption of individual autonomy and free will 🡪 **must be given freely** 🡪 **P must be in position to make a free choice,** **genuine, voluntary** 🡪 actions don’t determine consent
* Willingness requires not feeling constrained
* Contradicted by presence of exploitation \*\* Compliance is not consent
* In sexual battery, consent is factually specific

**Ratio**: * **Two part test to show ability to choose freely**:
	+ **Imbalance of power** was consent was truly given – consent as a defense can be mitigated.
	+ **Exploitation** from the imbalance of power, consent cannot be given.
* **Consent must be freely given, without exploitation, voluntarily, genuine, with capacity (limited capacity of vulnerable people means limited ability to give consent).**
* When there is a **power imbalance** consent and there is evidence of **exploitation**, consent can not have validly be given (can apply to any consent, not just sexual battery)
* If capacity is impeded, personal autonomy may be compromised and consent not truly given

**Medical provider duty**:* He had a fiduciary duty to care for his patient’s illness and he breached that duty.
* Reasonable practitioners would have taken steps to help heal her addiction.
* Hippocratic Oath forbids sexual contact - NO circumstances in which sexual activity physician-patient acceptable *Task Force on Sexual Abuse of Patients*
* Exploitation of drug addiction, wouldn’t have consented without addiction

**Issues with majority judgment*** No recognition of gendered violence
* Failure to recognize specific harms that occur in sexual battery
* But gives strength to sexual assault fitting in battery to allow for claims being more supported

**Dissent (McLachlin):*** Cannot properly address sexual violence in **contract** or **tort** because procedurally you can’t void consent the way you can void a contract.
* Core wrong was the violation of the highest fiduciary duty resulting in a profound loss
* Need to look at legal liability through law of fiduciary duty of physicians - utilize an “analytic model by which physicians can be held to the high standards which the trust accorded them requires”
* Broader social implications – “society has an abiding interest in ensuring that the power entrusted to physicians not be used in corrupt ways”
* Power imbalance – patient is vulnerable, physically or by trust, privacy and submission to expertise
* Gendered exploitation – public issue needs to be addressed – gender dynamic cannot be ignored – we don’t want to live in a society where people are exploited

**Issues with dissent*** Favored because it talked about gendered violence, tho some say it doesn’t go far enough
* Might force the law of fiduciary duty to too broad of extent of physician duties of care

**Damages**:* **Majority**: Compensation, deterrence, punitive? Deterrence – broad scope for abuse of power in relationships and inequality
* **Minority**: prolonged addiction, pain and suffering, sexual violation; punitive damages, deterrence for sexual assault in society, morally offensive, cold and calculating, arrogant and callous, without concern for consequences - **Focuses on general deterrence**
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| Non-Marine Underwriters v Scalera [2000] 1 SCR 551 |
| **Facts:** Bus driver sexually battered a youth over a period of time, she brought a claim.**Issue:** Should the bus driver’s insurance cover the intentional tort of battery in this claim? NO**Ratio**: * Defendant must prove consent in sexual battery (same as in other torts) (RIGHTS BASED APPROACH)
* In sexual setting, consent must be clearly given, cannot be implied. The facts should show whether consent was genuinely given or not. Where evidence fails, the court must construct consent. When constructing consent, focus on reasonableness - what an objective person would have believed.

**Majority**: * No recognition of independent tort of sexual battery but could be in future. Puts BOP on D to prove consent.
* Basing battery on the principle of fault would subordinate the P’s right to protection from invasions of her physical integrity to the defendant’s freedom to act, and medical battery (and any other form) does not require P to prove they did not consent so why should sexual battery? Para 23
* Forcing P to disprove intent wrongly puts focus on P character vs D actions

**Dissent**:* Tried to change traditional rule of D proving consent to FAULT BASED APPROACH – wherein P proves that D knew she did not consent or ought to have known she did not consent. PROBLEM: puts BOP on victim to prove non-consent.
* Dissent put it on P as he linked harm/offense to lack of consent, and P must show harm/offence

**Specific to sexual battery:*** **Every person’s body is held inviolate**
* Alleging sexual assault – must show evidence of force applied to her – simply refers to physical contact of sexual nature, neutral in whether or not consented.
* Defendant can dispute whether sexual contact took place. If not disputed, D must prove that plaintiff consented OR REASONABLE PERSON in his position would have thought that she consented.
* Does not require proof of causation (action caused harm – dissent any non-consensual touching is harmful)
* Too much burden on plaintiff- risk victim-blaming para 29 “to require P’s to prove that they did not consent and that a reasonable person in the circumstances would not have believed they consented, is to place a burden on p’s in actions for sexual battery that p’s in other types of battery do not bear.”
* Dangerous precedent to reference the plaintiff’s character (how they dress) para 30-31
* Public policy reasons
* Hard for victims to bring action forward if focus on victim’s character
* We are not switching BOP – we require the D to DISPROVE intent
* Makes it harder for defendant

**Constructed consent*** Some situations, there is not enough info for explicit consent
* Courts will sometimes jump in an construct intent – objective standard (standard of reasonableness)
* Subjective belief of defendant doesn’t matter
* Assume no consent unless it’s given
* Does evidence support finding of consent
* Sexual activity requires repeated consent

Discussion about the case: By applying the standard of objectivity as majority does, they are trying to avoid the positions that allow assaulters to get off the hook because of some rationale that infers consent where it wasn’t expressly given. Imposes a heavier burden on defendants to prove consent.  |

# Intentional Affliction of Nervous Shock

* Tort law reluctant to recognize psychological harm as actionable
* Courts will look for physical manifestations of loss to recognize a harm
* Likely to be found when there is a power imbalance, age differences, close relationships between P and rumor victim

## Elements of IINS *Wilkinson*

* 1. **Outrageous conduct**
	2. **Intent**
		1. **Imputed intent** - *Bielitski, Purdy, Tran*
		Intent may be imputed when damage long-term *Tran*
		2. **Construed broadly** *Tran*
	3. **Shock - Recognizable** psychiatric illness or physical harm
		1. Initially - must be provable *Radovskis 1957*
		2. More recent - No medical evidence needed *Rahemtulla & Tran 1984*

Actionable per se

* *Purdy* v Woznesensky 1937 Sask CA – D punched husband, in head in front of wife, deemed to be calculated to produce a response from her, wife suffered shock – should have foreseen harm to her nervous system)
* *Bielitski v Obadiak* 1922 Sask CA D claimed P’s son had killed himself, P suffered nervous shock – intent imputed as D could not explain his conduct
* *Radovskis v Tomm* 1957 Man QB No evidence of physical manifestation of nervous shock (although facts extreme)
* *Rahemtulla v Vanfed Credit Union* 1984 BCSC – changed the rule – **medical evidence not required for shock**
* *Tran v Financial Debt Recovery Ltd* 2000 Ont SCJ ***–*** courts allowed claim of IINS **“for emotional harm falling short of a psychiatric condition**

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| Wilkinson v Downton [1897] 2 QB 57First definition of IINS |
| **Facts**: practical joke that husband was dead – severe consequences from shock – side effects on her health**Outrageous or extreme conduct*** No clear authority
* Based on facts, relationship, pre-existing conditions

**Intentional*** **Intent may be imputed** – should have known would action would cause harm

**Shock** * **Must be visible and provable illness - measure**
* **Need physical manifestation, not necessarily medical evidence**
* Depends on relationship between parties
* More recognition of shock, how we understand it
 |

# Privacy

**“Willfully and without a claim of right violate the privacy of another”** *Privacy Act, Hollinsworth*

* **Privacy protected under Federal statutes include CC, underlies some *Charter* rights ss 2 and 7-15, FIPA, and provincial statutes Privacy Act, PIPPA**
* Actionable *per se*
* Common law principles of privacy evolving, *Jones v Tsige, Motherwell*
* No DISTINCT tort of privacy in BC, covered by nuisance *Ari v ICBC, Bracken v Vancouver Police Board*
* But there IS STATUTORY TORT OF PRIVACY INVASION/BREACH! Privacy Act BC
* Ontario: more likely to apply tort of privacy *Somwar v McDonalds Restaurants 2006 SCC*

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| PRIVACY ACT [RSBC 1996] CHAPTER 373 |
| * Creates **statutory provision of tort of violating privacy**
* Nature and degree must be reasonable, regard for lawful interests of others, regard for **nature, incident and occasion of the act** s 1
* Can include **surveillance and eavesdropping** whether or not trespass s 1(4)
* Not violation if consented, incidental to a lawful act, authorized by law s 2
* Actionable without damage if using identity of another s 3(2)
* Limits interpretation of court
* Limitation periods
* Can use defences of legal authority & consent
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| Hollinsworth v BCTV –1999 BCCA |
| **Facts**: Videographer of baldness surgery for company got a copy for BCTV to use for segment w/o consent of patient. Action for privacy invasion, P won $15,000, D’s appeal dismissed.**Ratio**: * **Claim for invasion of privacy must advance under statute**
* **Must fit within parameters of Privacy Act statute**
	+ Actionable without proof of damage if \* willful \* without claim of right (honest reasonable belief of right) \* violation of privacy
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| Motherwell v Motherwell 1976 AB CAPrivacy covered by Personal Nuisance |
| **Facts**: Family members continual harassment by telephone, nuisance or invasion of privacy?**Issue:** Is the intrusion of phone call harassment privacy infringement or nuisance?**Ratio:** Where there is an imposition in your personal life and as a result you are compelled to engage that interfere with the comfort of our daily living there is a harm, that is dealt with under the tort of personal nuisance**Legal Principles:*** **Common law recognizes invasion of privacy under the tort of personal nuisance**
* **Creates a new category of nuisance of invasion of privacy over the phone**
* Private nuisance – must be a real interference with the comfort or convenience of living according to the standards of the average man
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| Jones v Tsige 2012 ONCA New tort “intrusion on seclusion” in Ont – Not applicable in BC  |
| Tells us what Courts will look to in determine whether or not a new common law tort should be made |
| **Facts**: D looked at P’s personal banking info due to dispute with her boyfriend (P’s ex husband) over 4 years. Trial judge dismissed P’s claim for damages**Issue**: Is breach of privacy actionable in Ontario Law? YES under NEW TORT**Elements of tort of “intrusion on seclusion”:**Unauthorized \* intentional \* offensive to reasonable person \* private matter \* caused anguish and suffering**ADDING A NEW TORT – WOULD IT HELP US BETTER ADDRESS THE NATURE OF HARM?** **WHAT WOULD BETTER HELP US REACH THE UNDERLYING GOALS OF TORT LAW?****Justification for adding new tort*** Its time to recognize a new tort – statute doesn’t provide enough protection
* Common law can respond quicker than statutory law, and create new common laws quicker than legislature can create new/revise statutory law
* Privacy is a broad notion that is important to legal rights / Charter rights of person
* Privacy inconsistently applied in Canada, law offers minimal protection
* Tort - Ability to get more compensation for damages
* Can adapt to changing technology and its effects on privacy rights

**Reasons to NOT add a new tort:*** Statutory system may provide enough to address the nature of harm
* Invasion of privacy can be dealt with through existing torts – nuisance, trespass, IINS, defamation
* Floodgates of new cases
* Statute is sufficiently broad
* Not open up an uncertain area of new common law that could cause chaos and contradict one another – more likely to avoid that if we stick to statutory law
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# Discrimination

* Tort law could provide a supplementary remedy to Charter regimes *Osborne* text
* No independent tort of harassment *Bhadauria*

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| Bhadauria v Seneca College 1981 SCCNo tort of discrimination |
| **Facts**: P applied for job many times, more than qualified, never got interview**CA** tries to create an independent tort of discrimination – P had common law right to not be discriminated against**SCC** – **decides statutory scheme (Ont Human Rights Code) is comprehensive - no need for complementary tort remedy** **– no tort of discrimination****Discrimination (since case) protected by*** **s 15 of *Charter*** – explicit recognition that no piece of legislation can be discriminatory
* Also quasi-constitutional statutes (**Human Rights Code**)
* Better, more comprehensive remedies
* More accessible, less expensive
 |

# Stalking and Harassment

## Stalking – knowingly or recklessly harass another person, leads to fear

**Criminal** - Prohibited under s 264(1) of CC, can also infringe Privacy Act

**Tort** – no independent tort of stalking providing a civil remedy for stalking (Osborne). However may fall under other heads of torts (assault, battery, IINS etc)

## Harassment – conduct that is seriously annoying, frustrating, distressing, pestering

Ie. Sexual harassment, bullying, abusive or racist comments

**Criminal** - Prohibited under s 264(1) of CC, can also infringe Privacy Act

**Tort** – no independent tort of harassment providing a civil remedy (Osborne). However may fall under IINS.

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| Fowler v Canada  |
| * No independent tort of harassment
* Establishes elements of hypothetical tort
 |

# Trespass

**Definition – direct and intentional physical intrusion onto land in the possession of another**

**Purpose of tort: protection of fact of possession of property** (*Carrington*)

**Actionable per se** – no proof of harm (*Carrington, Evtick, Harrison dissent*)

## Elements of Tort of Trespass

**Direct** - Must be directly placed on land – not indirect by natural unintentional means *Hoffman v Monsanto Canada 2007 SKCA* seeds blew by wind

**Physical intrusion** – **1) enter into land, 2) place object, 3) fail to leave when asked**

* + Can be bringing something onto land and failing to remove it
	+ Entering another’s property and not leaving
	+ Unjustified invasion of another’s property *Harrison dissent*
	+ Continued trespass allows successive actions until object removed, damages assessed as at date of each action *Williams v Mulgrave, Turner*

**Land that is possessed** **by another**- ownership not necessary

* Even though we talk about trespass to land, it includes soil, structure, anything fixed to the land
* Possession = control of land *Harrison*
* Plaintiff must be in possession of land at time of intrusion *Townsview Properties v Sun Construction and Equip*
* Actual possession – even squatters – is good against all except those who can show a better right of possession *Penney v Gosse 1974 Nfld SC*

**Intentional**

* Unforeseeable or unintended consequences don’t matter – action is liable *Turner v Thorne*

**Defences** – storm, natural disaster, unanticipated PUBLIC NECESSITY, manmade is PRIVATE NECESSITY defense.

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| Evtick v Carrington 1765 DEFINES TRESPASS \* ACTIONABLE PER SE |
| * **The right to security of property is “preserved sacred and incommunicable in all instances”**
* **Every invasion into property, even minute, by mistake, or not deliberate, is trespass** (also in *Turner)*
* No damage required, entering another property without permission.
* Trespasser is liable for personal injuries resulting directly and indirectly
* Liability is caused by the continued presence on the land of thing which was tortuously put there
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| Turner v Thorne 1959 Ont HC Unintended Consequences |
| Driver left parcel in garage, P tripped over in dark, injured 🡪 D liable **Unforeseeable or unintended consequences don’t matter – action is liable**  |

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| Harrison v Carswell 1976POSSESSION \* RIGHT TO ENJOY PROPERTY |
| 1. D picketed in a mall, P asked her to leave 🡪 convicted, reversed CA, restored SCC Possession = Control of property – even when public invited in
2. **FUNDAMENTAL FREEDOM OF RIGHT TO ENJOY PROPERTY AND NOT TO BE DEPRIVED THEREIN – intrusion on property is prohibited in our legal system**
3. **Dissent definition** –
	1. **Unjustified invasion of another’s possession – even if no damage occurs – nominal damages if minor – can use force to remove if not willing to leave – trespass infers a significant element of protection of privacy**
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## **TRESPASS AND NUISANCE** –

**Substantial and unreasonable interference with a use and enjoyment of land in possession of another**

**Operates differently than trespass**

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| **Nuisance** | **Trespass** |
| Requires proof of loss | Actionable per se |
| Protects the **quality** of possession  | Protects **fact** of possession |
| Effect of interference on P | Nature of interference |
| Conduct doesn’t have to be intentional | Conduct is intentional |

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| Kerr v Revelstoke 1976 Alta SC ACTION IS LIABLE, CONSEQUENCES DON’T MATTER |
| P owned motel, bought for tranquility, lumber processor moved across street, created noise, sawdust, P sued in trespass negligence and nuisance 🡪 D liable Successful in trespass 🡪 ash and smoke invaded their premises* **Successful in nuisance** 🡪 sounds from sawmill interfered with use and enjoyment of property
* Not negligent
* Awarded $30K damages
 |

# Defences to Intentional Torts

* Consent
* Self defense – complete, absolves liability
* Provocation
* Discipline
* Legal authority – complete, absolves liability

Consent – freely given, capacity to consent, implicitly or explicitly given

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| **Legal Principles** | **Cases** |
| Must be freely given, voluntarily, of free will, autonomously, not forced |  |
| Capacity to consent* age
* mental disability
* alcohol/drug consumption
* physical disability
 | Solomon P 194 |
| Consent to specific act |  |
| **Explicit** – written verbal or by gesture, **Implicit** – through participation |  |
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| Consent to act infers consent to risks of act |  |
| Not a valid defense if accused intends and causes serious bodily harm | Ellis v Fallios |
| Exceeding consent  | Agar v Canning – limits on player’s immunity from liability when intending to cause harmReibl v HughesHopp v Lepp |
| Factually derived | Agar v Canning, Norberg v Wynrib |
| Implied consent All settings except medical or sexual as consent to one thing does not extend to consent of another in those settingsImplied through participation (hockey, mud slinging)Engaging in an activity means you consent to the “ordinary risks of the sport in which they engage… but only while play is fair and according to rules”  | *Wright v McLean* consent goes to “ordinary risks of the sport” where play is fair and according to rules |
| * + **Constructed Consent** - **Sexual battery**
* Objective standard in sexual battery – doesn’t matter what P believed (subjective), what matters is what was reasonable in circumstances (obj)
* Not enough evidence to determine whether consent occurred (he said/she said) – courts can manufacture consent out of evidence
 | Scalera |
| **Age of consent:*** 12-13 years + <2 yrs
* 14-15 + <5 yrs
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* **Implied consent** *Wright v Mclean* kids slinging mud 🡪 P gets hurt 🡪 battery established: direct, interference, harm, intent to throw rock 🡪 defense of consent – P said “want to fight?” = implied consent 🡪 D not liable - ordinary risks of activity, no ill will
* Plaintiff chose to engage in the act of throwing mud/clay, no intent to harm from the defendant, no ill will.
* Can’t imply consent in sexual or medical settings
* **Exceeding consent** *Agar v Canning, 1965* hockey players in game, P injured by D hooking him with stick 🡪 can consent be established by inherent risks of playing hockey
* EXCEEDED CONSENT – went beyond accidental harm or normal risks of hockey
* intent to cause harm – places limits on player’s immunity from liability
	+ Intention to cause harm - If there was intention to cause serious injury, even if provoked, it is beyond the scope of implied consent. P 191
	+ Principle: Consent is FACTUALLY derived – cite this case and Norberg v Wynrib
	+ exceeding consent Reibl v Hughes, Hopp v Lepp

Factors vitiating consent

* **Fraud**
* Defendant knowingly makes a false statement or knowingly misleads by omitting relevant information
* Usually verbal or written statements but can include conduct
* If consent was based on fraudulently induced belief it will only vitiate the consent if:
	+ The defendant is shown to have been aware of or caused the wrong belief
	+ If the shown fraud relates to the act itself, not a ‘collateral’ matter
* If the fraud is about the potentially harmful consequences of an act, it will vitiate the consent “IF the fraud physically harmed the complainant or exposed him or her to a significant risk of … harm” *R v Mabior* 2012 SCC
* **Mistake**
* Consent would be negated if the plaintiff’s consent was gained through mistaken belief caused by the defendant IF that mistaken belief led to harmful consequence or risk of serious physical harm *R v Mabior* 2012 SCC
* Mistakenly believing that they gave consent is NOT a defense against the defense of consent. *Solomon* P 198
* **Duress** (**Coercion**)
* If consent was procured with use of force or invocation of authority that takes away free will or autonomy then the defense of duress stands
* **Public Policy**
* Consideration can negate the defense of consent
* We want to consider how the imbalances of cases or examples of exploitation might negate the consent given as a means of protecting public policy.
* Fact specific – power relationships (ie student/teacher) are always imbalanced – parties may have other fiduciary obligations (to take care of student, to act professionally)

Self-Defense

**Must show on balance of probabilities**:

* Honest belief of danger, amount of force used reasonable
* No ability to walk away or escape without defending *Wackett v Calder 1965*
* Amount of force they used to protect themselves was reasonable, not excessive *Wackett v Calder 1965, Ellis v. Fallios-Guthierrez*
* If successful, no liability – it’s a complete defence
* Right to invoke ends when danger passed

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| Ellis v. Fallios-Guthierrez, 2012 ONSC 1670  |
| * Individual is **legally justified** in employing intentional force against another if such force is used as a **preventative mechanism**
* Available where **harm is threatened**, but also where the defendant **reasonably believes that an attack is imminent** (even if that honest belief turns out to be in reasonable error).
* Force used must be **reasonable and proportionate** to the harm that is threatened. It cannot be excessive.
* It must not be used as a vehicle for opportunistic revenge or disproportional counter-attack.
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Defense of Provocation – lose self-control, linked directly to provoking action

* Action must cause to lose power of self-control
* Provoking action must happen right before criminal action occurs
* When both parties provoke each other to such an extent the court may not apply the defense of provocation *Ellis*

Defence of 3rd parties – using force to rescue a 3rd party

* When a person holds an honest belief that another person is in danger, and intervenes to rescue them, he is justified in using force provided that such force is reasonable and necessary p 233 Gambriell v Caparelli 1974
* Defense of 3rd parties not limited to relatives, may be used by anyone arriving on the scene R v Duffy 1973 page 234

Defence of Discipline

* Teachers, parents and guardians can invoke re force with children
* S 43 criminal code – can use force as long as it does not exceed what is reasonable

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| Canadian Foundation for Children Youth and the Law v Canada (AG) 2004 SCC 4 page 239 |
| * S 43 limited to ‘minor corrective force of a transitory and trifling nature’
* Situation of parent and child is unique – personal autonomy of parents is protected when parents choose to discipline parents SO LONG as:
	+ Not under 2 years
	+ Not against teenagers
	+ Not out of anger or just to punish
	+ Force only used to restrain or control a child, not force reasonably expected to harm
	+ Does not apply to cruel or degrading force
	+ Child must be able to understand why force is being used – so not under two or if disabled
* Cannot be used against teenagers 🡪 challenged in R v Swan 2008 - CA held that **there is no age limit in s 43**
* Court’s analysis consistent with Canadian social standards and customs & statutory language of s 43
* **Problem** – if we protect parents’ autonomy – why don’t we protect the children’s autonomy in law???
	+ Impossible for courts to get inside that split second moment and figure out what was really happening then
	+ How can we be civilly liable to our children and pay them damages?
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Defense of Legal Authority

* Most commonly used in tort of false imprisonment
* Can be raised in battery, trespass to chattels, conversion, trespass to land and other intentional torts
* Complete defense – absolves of liability

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| Did D have **legal authority** to do the action? | **When and Who can arrest** S 494 S 495  | Private citizen *R v Chen*Reasonable grounds *R v Biron* |
| Was D **legally** **privileged** (protected) from both civil and criminal liability in doing the act?  | S 25  |  |
| Did D meet all of the other **obligations** **imposed** upon him or her in the process? (ie inform suspect of reasons for arrest or use appropriate force not excessive)  | **What to do when searching / arresting / entering****Charter rights** S 1-34 Const | Conduct when arresting: *Koechlin v Wagh*Authorized search criteria: *Caslake*Search incidental to arrest: *Caslake*Property entry w/o warrant: *Eccles v Bourque* |

## Charter application

* Charter rights apply to those used by govt, police, goal of protecting public from state – not private from private
* S 7 – 15 – legal rights, rights to associate, right to legal counsel upon detention, unreasonable search and seizure
* S 8 rights of accused during arrest
* S 24 can order damages but very rarely does Charter come up in tort law cases
* S 52 any law inconsistent with Charter has no effect
* S 92 of Const Act – Constitution reigns supreme

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| 2010 Vancouver v Ward **Charter Rights infringed 🡪 applies Charter damages under s 24**  |
| * Liability under s 24(1)- judges can grant aggrieved individual whatever remedy is appropriate and just
* Plaintiff must satisfy that a rights violation has taken place, govt must justify violation under s 1 “reasonable limits”

**4 criteria:*** + must establish charter rights violated
	+ award of damages must advance charter goals (rights protection)
	+ award of charter damages must be best award in circumstances
	+ amount of damage should reflect purpose of deterrence, compensation, vindication
 |

Common issues to defense of legal authority

**AUTHORITY AND PRIVILEGE TO ARREST W/O WARRANT**

* Individuals do not have to stop, identify themselves, answer questions, submit to a search, or otherwise cooperate with the police or others p 365
* Individuals can use force to resist unauthorized police conduct
* However if police conduct is legally authorized a person who defies or resists may incur criminal liability for obstructing or assaulting an officer page 265

**ARREST PROVISIONS – CC S 494 (anyone) and 495 (officer)**

* Must believe **on reasonable grounds** that the person committed the offence – not suspicion, actual objective reasonable belief
* Can arrest anyone **found committing or is about to commit** an indictable offence or any criminal offence *R v Biron*
* Or is escaping from arrest by someone with authority to arrest
* Must be right away or within reasonable time after offence *Chen*
* Private citizen – S 494 – citizens may arrest if reasonable grounds and reasonable time if the believe the police cannot make the arrest in the circumstances.

**PRIVILEGING PROVISIONS – CC S 25**

* Reasonable force – as much as necessary for that purpose unless causing death or grievous bodily harm unless absolutely required and flight cannot be prevented by any other reasonable means
* Acts on reasonable grounds, with or without warrant
* “justified in using force” protects against both civil and criminal liability

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| R v Chen Private Citizen Arrest  |
| **Facts** * + Chen owned grocery store, repeat shoplifter, came back into store
	+ Chen did a citizens arrest, P had not shoplifted when back into store

**Issue** * + Had Chen exercised his legal authority of private citizens power to arrest properly?

**Ratio*** + **Expansion of private citizens power to arrest within ‘reasonable time after offence is committed’ (previously only at the time of offence)**
	+ S 494 🡪 private citizens can arrest within reasonable time after offence is committed 🡪 amended after Chen (previously only at time of offence)

**Analysis** * + Court found it was an ongoing offence. Stole in the morning, came back but not stolen again
	+ Private citizens power to arrest
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| Koechlin v Wagh 1957 11 DLR (2d) 447 (Ont CA) Arrest provisions |
| * Officer conduct when arresting - can’t force to identify, must provide opportunity for phone call, inform why under arrest (Const right)

Did they have legal authority to execute arrest? YES 495Were they privileged? YES 495Did they meet their obligations? NO* No right to use force to identify themselves
* When affecting arrest must provide opportunity to make phone call
* When affecting arrest must inform of why they are under arrest
* Similar clothing of suspect doesn’t cut it
* Public policy - Pg 276 police officers should be able to do their job, courts should not impede cops, public need not comply but they probably should anyways
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| R v Caslake [1998] 1 SCR 51 Criteria for authorized search |
| **Criteria for authorized search** * police need not search unless necessary
* search must directly relate to the arrest
* search must be under objective valid under administration of justice
* search cant be abusive
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| Eccles v Bourque [1975] 2 SCR 739Criteria for entering property without warrant  |
| **Criteria for police to enter property without warrant pursuant to arrest:*** If it is reasonable and probable that the person sought for arrest is within the property
* Proper announcement before entering
* if NOT cannot use defense of legal authority – police may be liable for trespass and owe damages
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# Medical Battery

Consent to Treatment, Counseling and Care

#### ****CONSENT MUST BE:****

* **Voluntarily given *Battrum***
* **Not obtained by fraud or misrepresentation**
* **Conscious state of mind**
* **Obtained from pt with capacity to consent – factually derived depending on circumstances**
* **Understand the condition being treated, the nature of the tx as well as risks/benefits of proposed tx, and alternatives *Malette***
* **Must have had full and frank disclosure, opportunity to ask questions**
* **must be specific to specific tx**
* **explicit - expressly provided orally, in writing, or implicit - by conduct (showing up for doctors appointment or surgery).**
* **Silence is not consent *Marshall***
* **if consent can be obtained it must be obtained *Marshall***
* Implied or imputed - Patient has given general consent to course of treatment or operation – implicit consent to any subordinate tests or procedures necessary as part of the treatment UNLESS patient expressly objects ***Marshall***
* **can be removed at any time**
* **consent to exam extends only to actions reasonably part of exam *Marshall***
* BC Health Care (Consent) and Care Facility (Admission) Act [RSBC] 1996 c 181
* Statute defines consent – where there is ambiguity the statute governs *Cuthbertson v Rasouli 2013 SCC 53*
* In emergencies if meaningful consent CAN be found it must be found *Malette*
* If a patient expressly prohibits a treatment it CANNOT be overridden or ignored p 208 AND *Malette v Shulman 1987*

#### ****CONSENT NOT REQUIRED IF:****

* Unforeseen medical emergency – impossible to get consent *Murray v McMurchy, Malette*
* Pt is not conscious and not able to consent, treatment in progress was consented to, medically necessary to provide additional treatment *Marshall*
* Not obtained by fraud or misrepresentation
* Conscious state **of mind**

#### ****CAPACITY**:**

* If person doesn’t have requisite **capacity** then their personal autonomy is limited – core decision becomes the best interest of the patient (and best interest of the child in cases of minors) ***AC v Manitoba, Re K & Pub Trustee, E v E, C v Wren, C(L) v Pinhas, Marshall v Curry***
* 1 - Pt must understand information relevant to tx decision - requires cognitive ability to process retain and understand information
2 - Must be able to appreciate the reasonably foreseeable consequences of the decision or lack of decision *Starson v Swayze 2003*
* **C(L) v Pinhas 2002 Ontario SC** – patient severely ill with anorexia – did not have capacity to consent or refuse treatment because of her illness despite her age and otherwise being competent.

### **Forced sterilization – substitute consent**

* **E(Mrs) v Eve 1986 SCC** – substitute consent – non-therapeutic sterilization of mentally incompetent adult never justified in a patients best interest. Goes against fundamental rights, can’t be tolerated in our society.
* **K and public trustee 1985 BCCA** – apply for hysterectomy of mentally disabled girl traumatized by blood, caring and loving parents, don’t want her to get periods. BCCA – wasn’t for contraception, was to avoid trauma - agreed it is in child’s best interests and allowed it.

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| Marshall v Curry 1933 INFORMED CONSENT – IMPLIED CONSENT |
| **Facts**:* Patient consented to inguinal hernia repair. In surgery, surgeon found testicle irreparably damaged, threat to patient’s health, in way of complex repair. Surgeon removed testicle and completed surgery. Patient brought claims of assault and negligence by removing testicle without consent

**Issue**:* Is the unanticipated need to remove the testicle covered by implied consent as per the patients pre-operative general consent?

**Ratio**:* **Consent may be implied** from the pre-operation discussions or the antecedent circumstances so long as it has not been forbidden in cases of emergency, that are not anticipatable, and where saving life or preserving health of patient is required
* **If consent can be obtained, it MUST be obtained (capacity)**
* **Silence and compliance are not implied consent!**
* Medical professionals may have increased protection from liability as they have a higher ground of duty
* Consent to examination only extends to the reasonable activities of the patient but not entitle to a more intimate exam than patient consented to.
* A person’s body must be held inviolate and immune from a surgeons knife if an operation is not consented.
* If it CAN be expressly received, it MUST be (not implied if could have been express)
* **Analysis**:
* The surgeon’s actions were necessary and could not have been foreseen and unreasonable to postpone to another surgery. P 211
* Despite the absence of express and possibly implied consent, the removal of the testicle was necessary for the health of the patient. P 211
* **Conclusion**:
* Action dismissed
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| C v Wren 1986 - pre Morgentaler – pre Swayze |
| * **Morgentaler – decriminalized abortion is legal when done by regulated health provider**
* **Sufficient understanding and intelligence**
* **Age is no barrier to consent**
* **Parental rights diminish as child enters adolescence**
* **Consent is all you need**
 |
| Malette v Shulman 1987 ORInformed consent /= refusal  |
| * **Facts**:
* Patient was unconscious, medical emergency, needed blood transfusions.
* Nurse found card in patients wallet refusing blood transfusions on religious grounds and showed to DR.
* Doctor did not consider the card represented informed consent so gave the patient blood.
* Family member arrived later and confirmed refusal of blood.
* Patient sued on negligence and battery.
* **Issue:**
* Is a written card valid to expressly forbid a treatment on a patient without capacity to consent?
* **Ratio:**
* **The doctrine of informed consent does not extend to informed refusal**
* **The cards unqualified message to refuse blood products speaks on behalf of the patient expressly forbidding treatment**
* “its obvious purpose as a card is as protection to speak in circumstances where the card carrier cannot”
* **Analysis:**
* Consent must be informed - she couldn’t have been fully informed of risks at time she signed card so doctor didn’t follow it
* Consent must have capacity – how do we know she had capacity? How do we know it belongs to her?
* Liability of battery does not exist in not doing something, just in doing it and explaining the full risks of it (therefore only consent matters in battery)
* “The same liability considerations do not apply to a patients refusal to accept treatment… the doctor is not exposed to a claim of battery”
* **Conclusion:**
* Dr Shulman should not have given the patient blood (I disagree)
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| Re Dueck 1999 Sask QB Mature Minor \* Child’s best interests |
| 13 yr old boy refused chemo and surgery, could have treated cancer* No developmental impairment to stop competence
* But dependent on father and did not have independent thought, father controlled information to son and misled him that non-medical tx was better, child never questioned father.
* Child never arrived at his own decision, independent thought, didn’t show cognition of understanding what was at issue
* **Was not a mature minor, ordered the Minister to make medical decisions on the boys behalf**.
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| AC v Manitoba Child and Family Services 2009 2 SCR Defer to statute \* child’s best interests |
| Almost 15 years devout JW, has a signed medical directive refusing transfusions**Deferred to statute** - Child and Family Services Act allows hospital to intervene in best interest of the child* Childs best interest: mental, emotional and physical needs, mental emotional and physical stage of development; views and preferences; cultural linguistic racial and religious heritage
* Court found her competent BUT found it was in her best interest to give blood transfusions.

**Ratio** - SCC – Where statutory scheme is operative, courts will defer to it. If a child’s best interest standard takes into account the minors views in accordance with her maturity, it will not violate the Charter. **Dissent**: Binnie – Act infringed on charter rights – once she was found competent to make her own medical decisions, overriding the decision could not be justified. |

# DEFAMATION

## NOT AN INTENTIONAL TORT \* NO REQUIREMENT OF INTENT \* WORK IS DONE IN DEFENCES

* Context specific – changes regularly, online implications changing, constantly evolving nature of the tort
* Unique because will use civil juries (rare in other civil cases) to incorporate a reasonable man’s understanding of the remarks, an to prevent indirect censorship by the state
* Establishing tort is simple, bulk of work is in defences

Underlying objectives and goals

* **Deter** defamation to **protect** reputation and vindication (to put the person in the position they would have been in had it not occurred) and to balance the Charter rights with personal protection of reputation
* Difficult to compensate through damages, hard to get reputation back

Critical balancing act

**Application of tort of defamation must be consistent with Charter values – tries to strike balance between s 2(b) Charter freedom of expression against the underlying goal of protection of reputation**

**GUIDING CONSIDERATION – MUST BE DISCUSSED IN CONSIDERATION OF DEFAMATION**

* Interpreting the publication rule to exclude mere references not only accords with a more sophisticated appreciation of Charter values, but also with the dramatic transformation in the technology of communications
* **Freedom of expression is not absolute**. One limitation is law of defamation. Does not forbid people from expressing themselves, but provides a remedy for harm caused if defamed by another *Grant v Torstar Corp*
* **Guarantee of freedom of expression in 2(b) of Charter has 3 core rationale**s: 1) democratic discourse 2) truth-finding 3) self-fulfillment. Assist in determining what limits on free expression can be justified under s1 *Irwin Toy v QC*

## Elements of Defamation

**Defamatory statement**
 Lessens reputation of person defamed in mind of person who reads it *Sim v Stretch*

 Consider the publication as a whole, not just parts*Slim v Dialy Telegraph*

 If radio or TV, consider gestures, tone, facial expression*Vogel v Cdn Broadcasting*

**Made in reference to P**
 P has burden of showing on BOP that statement in ref to them

 Simple if by name, harder if no express reference *Knupper v London Express 1944*

 Members of a large group must be identified as individuals –

 IF statement is to entire group, each member might have claim *Knupper v London Express 1944*

 No requirement of intent to identify P – test is if a reasonable

 person would identify them *Clarke v Stewart 1916*

 Reference to P found despite general comment about many *AUPE v Edmonton Sun*

 Reference not found, comment too general *Bou Malhab v Diffusion Metromedia*

**Published or disseminated**

Has to be told to any other person, other than spouse *Huth v Huth 1915 3 KB 32 CA*

 Low threshold for determining publication, easy to satisfy

 Any subsequent repetition (statement, repeat, print, allow to

 be posted) would be re-publication *Lambert v Thomson 1937 OR CA*

Intent doesn’t matter – it’s the effects that count – liability attaches as soon as defamed, whether aware or intended

**Two types of statements**

* Statement that is defamatory in its **ordinary meaning**,
* Statement that is defamatory in the current **circumstances by innuendo** (legal innuendo – uses slang or technical terms that would be known to the audience, or **false/popular innuendo** – the ordinary person would infer something defamatory from the remarks *Sim v Stretch*

**Two-part test**:

* + Can the statement be regarded by a reasonable person as being capable of making reference to the P (trier of law answers), if Yes:
	+ Would the statement lead the reasonable person to believe it actually refers to the P in fact (trier of fact decides)?

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| Sim v Stretch – 1936 2 A11 1237 ER (HL) |
| **Facts**:* Telegram from new employer of maid asked old employer for money owing to the maid to be sent along with her belongings.
* Old employer sued in defamation for suggesting had borrowed money from maid.

**Ratio:** * **A defamatory statement must be found to lower the P’s reputation in the mind of ‘right-thinking’ members of society with regard to the circumstances.**
* **Requires plain ordinary meaning of words, or context of words by innuendo, which in this case do not lower P’s reputation**

**Reasons**: * No importance can be attached to words in a telegram, no right-thinking person would lower esteem of P for having borrowed money.
 |

* Lawyer insinuates police is racist, successful QP: *Campbell v Jones*
* **RCMPI** Recognize new defence: *Grant v Torstar Corp*
* Hyperlinks not necc. re-pub: *Crookes v Newton*

Defences to Defamation

## Justification

**If its true it cant be defamatory**. Complete defense. Necessitates proof that the statement was true *Williams v Reason*

**Malice** is **not** an issue – if its true it doesn’t matter if it was made in malice

**If you apply this defense, will it affect the balance of rights to freedom of expression with right to protect reputation?**

## Fair Comment

1. Comment
2. Based on fact
3. In public interest
4. Honestly held Honesty/good faith is objective test *WICO Radio v Simpson*

Malice can defeat the defence

## Absolute privilege

**Freedom of expression is protected in 1) executive officers re affairs of state, 2) parliament, 3) judicial/quasi-judicial**

**Executive officers** *Dowson v Queen* two protected occasions - communication privileged if:

* Between officers of state, in relation to state affairs, made in course of official duty (from *Chatterson* in *Dowson*)

**Parliament**

* Legislators encouraged to speak freely for public interest

**Judicial / Quasi-Judicial Proceedings** – *Stark v Auerbach*

* Priv applies even if malicious or not justified *Royal Aquarium and Summer and Winter Garden Society v Parkinson*
* Only applies if relevant to proceedings *Duke v Puts*
* Must have some connection to proceedings *Rybachuk v Dyrland*

**Professional Organization quasi-judicial** *Hung v Gardiner*

* Public interest should outweigh that of individual b/c prof activities governed by rules and immunity only conferred on a citizen complaining to a body created by statute
* Doctrine of immunity applies to statements made to disciplinary body
* Applies to bodies that are not merely administrative in nature

## Qualified privilege

* **Complete defense**
* **Defense applies to the occasion not the statement**
* Certain situations where we want people to be able to speak freely
* **Malice negates defense of QP**– *Hill* - ill will, indirect or ulterior motive, speaking recklessly, no consideration of truth
* Applies when speaker has duty to speak, and recipient has interest to receive statement *Toogood v Sprying*
* QP in courtroom steps press conference, successful raised QP even though court docs weren’t filed yet, but defence defeated by malice (exceeded purpose of occasion): *Hill v Scientology*
* QP attaches to the occasion on which statement is made, not the statement itself *Adam v Ward*
* Must rebut the inference that the statement was made with malice
* QP defeated when limits of the duty or interest are exceeded
* Public has a right to be informed about aspect of proceedings
* Lawyer insinuates police is racist, successful QP: public interest in receiving info about officers conduct outweighed students right not to be defamed Campbell v Jones

**4 Classifications for QP:**

* Statement is made **to protect their own interests**
	+ can utter statements to defend from attack unless irrelevant to original attack *Adam v Ward, Davies & Davies v Kott*
* Statement is made **to protect another person**
	+ D must have legal social or moral duty to communicate the info
* Statement is made in **furtherance of common interest**
	+ ie dr / patient report *Wang v BCMA, McLoughlin v Kutasy*
* Statement is something **about which the public has a right to know**
	+ you have a duty to share with the public - speaker has duty to publish info and receiver has interest to receive it; media statements not covered by public interest as no duty to report matters *Globe & Mail v Boland and Banks v Globe & Mail*

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| Hill v Scientology Republication, Malice |
| **Facts:** Lawyer held a press conference on steps of courthouse, handed out copies of motion he was about to file and read it out loud. **Ratio**: Documents pertaining to a lawsuit before it has been filed with the court does not fall under absolute privilege. **Issue**: Are they protected by qualified privilege? * **Did the statements made exceed the purpose of the occasion.**
* **Definition of malice ill will, indirect or ulterior motive, speaking recklessly with no consideration of the truth**

**Defined defamatory statement long term impacts –** [166] …A defamatory statement can seep into the crevasses of the subconscious and lurk there ever ready to spring forth and spread its cancerous evil. The unfortunate impression left by a libel may last a lifetime. Seldom does the defamed person have the opportunity of replying and correcting the record in a manner that will truly remedy the situation. |

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| Crookes v Newton 2011 SCC 47 Republication |
| **Facts**: Website linked to another site that contained a defamatory statement, party to defamatory statement **Issue**: **Is a hyperlink enough to constitute a re-publication? NO Since there was no repetition, there was no publication****Reasons**: * Hyperlinks operate like footnotes or references, they don’t show the content on the other side of the link\* they **could** constitute republication if they republish defamatory statement (thumbnail image of the pages content)
* Website author does not control the information that is contained on the hyperlink page, so we shouldn’t hold them accountable for the content
* **Need to find a balance between freedom of expression and right to protect personal reputation**
* **An act is deliberate if the D played more than a passive instrumental role in making the information available.**
* **To prove the publication element of defamation, a plaintiff must establish that the defendant has, by any act, conveyed defamatory meaning to a single 3rd party who has received it.**
* **Traditionally, the form the defendant's act takes and the manner in which it assists in causing the defamatory content to reach the 3rd party are irrelevant.**
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| Burke v John Doe 2013 BCSC 964 Defamation Online / Service |
| **Facts** - Brian Burke was accused of having an affair with a reporter. Defamed. 18 online bloggers with an excerpted defamatory statement, re-posted on their walls and some added comments. Must serve, other party has 30 days, if no response, default judgment can be awarded against them. **Issue** – How do you serve someone who operates under a pseudonym and operates a blog?**Ratio** – **To serve someone from an online site with defamation you can give notice online through the same means as the defamation was published and that constitutes service.*** **Anyone who re-publishes a statement can be named in a defamation suit**

**Reasons*** Ways to find them are time consuming, technical and expensive (“impracticable”)
 |

# Remedies in Intentional Torts

#### Tort claims are means to an end – to get a remedy for the wrong caused by D – to put the P in the position they would have been in had the tort not occurred

Damages

**General** (non-pecuniary)

* Loss of dignity, pain of suffering, disfigurement
* Any other losses as a result of the act
* Difficult to quantify – philosophical policy exercise more than legal or logical *Andrews v Grand & Toy* 1978 SCC

**Special** (pecuniary)

* Things that can be monetarily quantified (hospital bills, wage loss)
* Must be determined by precise evidence *The Mediana 1900 HL*

Injunction

**Discretionary remedy if damages insufficient**

* Prohibitive – don’t do
* Mandatory – must do
* If ignored can be held in contempt of court
* Not normally granted where damages sufficient
* Used more often in nuisance, trespass of property, defamation
* P must have “clean hands” and not be in the wrong

Declarations

**Formal statement of a person’s legal right, not frequently used**

Specific restitution

**Directs a party to restore a pre-existing condition or return an object or profits gained from a wrong.**

* *Kingsteet Investments Ltd 2007 SCC 🡪* restitution (disgorgement) is a tool of corrective justice, restores parties to pre-transfer position

Courts can order remedy under Charter s 24(1) if Charter rights infringed.

Classification of Damages

* **To determine $ amt courts consider:**
* Nature of P’s loss – pecuniary (monetary – lost wages, medical bills, etc) and non-pecuniary (pain and suffering)
* Way the loss is calculated and proven
* Purpose for which the award is made
* In intentional torts, damages are most frequently classified according to purpose for which they are awarded:
	+ - Punitive
		- Compensatory
		- Nominal (token)
		- Disgorgement (gains based)

### Nominal damages

*The Mediana* [1900] AC 113 HL 🡪 nominal damages affirm a legal right to a verdict or judgment because your legal rights have been infringed (not ‘small’ damages 🡪 token affirming legal rights)

* Small sum to redress a violation of a legal right that is worthy of protecting even in the absence of actual harm page 32
* Vindicates the P, without overly punitive to D
* **Only awarded for torts that are actionable per se** (actionable without proof of loss) ie battery and trespass NOT negligence or trespass on the case (mal pros or false imprisonment)

### Compensatory damages

* Awarded to bring financial redress to P for actual loss suffered.
* Very commonly awarded in torts cases
* Can be awarded for both general and special losses
* *Dodd Properties Ltd v Canterbury City Council* 1980 🡪 purpose underlying compensatory damages is to bring the P to the position he would have been in if the harm had not occurred.
* According to *Solomon* et al., compensation, in the sense of reparation for loss, is the most important function of tort law. However, Solomon et al further state that “it is generally accepted and clearly documented that tort law is an extremely inefficient mechanism for providing compensation”. Do you agree? Why or why not?
* Torts are expensive to pursue (Morland, Burke) only for wealthy people
* Damages might not match nature of extent of harms that are being addressed
* Damages for harms seem disproportionate between different torts
* Difficult to recover compensation

### Aggravated damages

* Subset of compensatory damages awarded to compensate for additional injuries from D’s reprehensible conduct.
* Usually for egregious conduct with malice
* **Augment non-pecuniary loss compensatory damages**
	+ - TWNA v Clark 2003 BCCA 🡪 awarded to compensate “intangible emotional injury” where injury is aggravated
		- Huff v Price 1990 BCCA 🡪 compensate for losses not fully compensated for in pecuniary losses, that are sufficiently significant in depth or duration that they significantly impact the P

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| *B(P) v B(W)* (1992) 11 OR (3d) 161 (Gen Div) Aggravated Damages |
| * **Facts**:
* Profound sexual assault by father since age 5, violent rapes, incest and assault charges, short period of imprisonment 5 years.
* P sued D for assault and battery.
* **Ratio:**
* **Aggravated damages awarded when Ds conduct increases damages.**
* **Aggravated are not punitive - would amount to double jeopardy when also criminal case, but in this case one episode of rape was not tried therefore he add punitive damages.**
 |

### Punitive damages

* Goals - both deterrence and punishment, make an example of someone, shows conduct not accepted
* Punishment – looks backward to condemn D’s actions
* Deterrence – looks forward to discourage such wrongs
* Rarely awarded, only when other damages are not sufficient to punish
* Limited to situations where the D conduct warrants punishment

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| 8 criteria for punitive damages per Binnie in *Whiten*1. Used to punish, deter, denounce conduct, strip D of profits
2. Misconduct must be very serious
3. Most likely intentional torts, but also in nuisance, negligence and other torts as well as contracts
4. Criminal punishment does not preclude punitive damages, just one consideration
5. Should be awarded with restraint and only if compensatory, aggravated is insufficient
6. No fixed ratios between compensatory and punitive, nor is there a cap
7. Juries should be instructed on punitive damages and factors to determine award and amount
8. Appellate courts can intervene if punitive damages are beyond acceptable rational measure amounts
9. Court may grant whatever remedy it deems appropriate for violation of charter rights under s 24(1) incl. compensatory, aggravated and punitive damages.
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| Whiten v Pilot Insurance Co 2002 SCC Punitive Damages |
| * **Facts**
* D insurer refused to pay P’s house fire claim, stating it was intentional but evidence showed it was accidental. Punitive damage of $1000000 awarded to P
* **Ratio**:
* Principles governing punitive damages were reviewed.
* Used to punish, deter, denounce conduct, strip D of profits
* Misconduct must be very serious
* Most likely intentional torts, but also in nuisance, negligence and other torts as well as contracts
* **Criminal punishment does not preclude punitive damages, just one consideration**
* **Should be awarded with restraint and only if compensatory, aggravated is insufficient**
* **No fixed ratios between compensatory and punitive, nor is there a cap**
* Juries should be instructed on punitive damages and factors to determine award and amount
* Appellate courts can intervene if punitive damages are beyond acceptable rational measure amounts
* **Court may grant whatever remedy it deems appropriate for violation of charter rights under s 24(1) incl compensatory, aggravated and punitive damages.**
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### Damages in Tort of Defamation

* Follow same guiding principles of other torts
* Injunctions can be issued (take a post down, stop retweeting, etc)
* Serious requirement to mitigate damages – take down posts, print a retraction, try to reach your audience in any way possible to remove the defamatory statement
* Provide an apology to harmed party
* Malice (done purposefully or should have known better) attracts more damages
* Difficult in making defamation suits but when they are made and are successful damages are large
* Aggravated damages decision in Hill – was there an apology, a retraction?
* Punitive damages decision in Hill - insidious persistent and
* In Hill, there is no threat to freedom of expression here…

### Disgorgement

* D must give up gains made from his wrong conduct *Edwards v Lee’s Administrators 1936 Ky CA*
	+ it is unjust to escape liability and profit from wrongdoing
	+ damages are based on profits received not damages sustained
* Unjust enrichment restitution:
	+ - Enrichment of D
		- Corresponding deprivation to P
		- Absence of a juristic reason for enrichment

# Flowchart

* What torts that might apply?
	+ P against D
	+ D against P
* Are all elements of the tort proven by the facts? (Actionable per se or need to be proven?)
* What defences could the other party claim? (Complete defense?)
* What arguments could be raised AGAINST those defences? (Defeated by malice?)
* Who has the burden of proof of each element or defense? Can they prove those on the facts?
* What underlying tort goals are being achieved?
	+ Deterrence, vindication, punishment, compensation
* What damages could be awarded? Would it be worth pursuing?
	+ General damages - Nominal, compensatory, punitive, aggravated
	+ Specific (what do they apply to)
	+ Do the defences lower the damages?
* Do any judicial remedies apply? (
	+ Declaration
	+ Specific Restitution
	+ Injunction (only usually in trespass or defamation, fact specific)
* Should the tort be applicable here from a public policy perspective? From a greater good perspective? From the person’s own best interests perspective?
* **Defamation** – is the Charter balance achieved?